An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0262
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Failure to process instructions in a timely manner Failure to provide product/service information Failure to process instructions Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as an accommodation and restaurant business, hereinafter 'the Complainant Company', held an insurance policy with the Provider.

The Complainant Company's Case

On **30 March 2020**, the Complainant Company's Broker notified the Provider of a possible claim for business interruption losses due to the outbreak of coronavirus (Covid-19), as follows:

> *"Business interruption as a result of Coronavirus (Covid 19)*
>
> *Please note your file of a possible claim under the above policy for Business Interruption. We will request the specific dates of closure and loss from Insured and await your advices."*

Responding to this email on **6 April 2020**, the Provider advised the Complainant Company's Broker of the cover provided under the policy, as follows:

> *"Unfortunately, the Business Interruption section of the policy does not respond to closure as a result of COVID-19, and I am writing to explain why this is the case.*

Having reviewed you clients' policy … the cover available to them under the policy includes an extension to the Business Interruption section for losses due to the prevention of access to the insured premises, see Business Interruption – Extension 2 Prevention of Access – Non-damage.
However, despite this, the losses in this case are due to an excluded cause, that being the decision of Government to take certain measures to seek to control the spread of the pandemic. This is not an event which is insured under the policy.

Whilst, therefore, there is cover for prevention of access there is an express exclusion as follows:

Page 55, Extension 2 Prevention of Access – Non-damage, Exclusion (iii):

"… closure or restriction in the use of the ***premises*** *due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements"*

Therefore, our non-damage prevention of access extension excludes business interruption losses due to prevention of access caused by the occurrence of an infectious disease, where the closure is on the order or advice of the competent local authority. Unfortunately, subject to any further information or representations you may wish to provide us with on behalf of your client, for this reason it appears that your client's claim is not covered under the policy.

We do provide businesses with cover for established infectious diseases whose impact is assessable (known as Specified Disease Cover). These diseases are set out in the policy and only those listed are covered: COVID-19 is not included on the list of disease covered by this insurance. This is because, in common with most of the market, our insurance policies are not designed and priced to cover pandemics. A key principle of insurance is that the losses of the few are paid by the many. In a pandemic situation the losses are many and the market is not designed to cover such scenario."

By email dated **8 April 2020**, the Complainant Company's Broker wrote to the Provider, as follows:

"Please note our Insured's comments regarding the 'ambiguity of the wording'.

This is a disappointing attitude by [the Provider].
The 'Prevention of access – Non-damage' clause is as follows
Access to or use of the premises being prevented or hindered by ***any action of government the Gardaí emergency services or a local authority due to an emergency which could endanger human life*** *or neighbouring property*
If we take it that use of our premises has been prevented by an action of government due to an emergency that could endanger human life, I argue we should be covered.

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The exclusions to this clause are as follows
Excluding (i) any restrictions of use of less than 4 hours (ii) any period when access to the premises was not prevented or hindered (iii) ***closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements*** *(iv) closure or restriction in the use of the premises due to vermin*

The general clause is open to an action at the level of government due to an emergency that could endanger human life, while the exclusion is narrowed to the order or advice of a competent local authority as a result of an occurrence of an infectious disease and is very targeted to the premises (as evidence by inclusion of the reference to food poisoning, defective drains, etc.).
At minimum, this is ambiguous and open to interpretation and given the Central Bank view that, where policies are ambiguous or unclear, the insurer should find in favour of the insured, I would hope that [the Provider] *will accept a claim ….”*

The Provider responded to this email on **16 April 2020**, as follows:

“We note your client’s arguments. However, there is no ambiguity in the policy wording.

Under Prevention of access Non-Damage, it is abundantly clear that there is cover for (general) prevention/hindrance of access to the premises by action of Government and a range of state agencies, but no cover if this is due to disease, because such disease cover as we are willing to provide is dealt with in the Specified Disease Extension.

In this case we are dealing with a global pandemic which has closed every business and organisation in the country. The policy is not designed, intended or worded to cover such a situation. The customer’s business like all others was closed by order or advice of the Government which is the only competent local authority capable of dealing with such an event. …”

By email dated **4 May 2020**, the Complainant Company wrote to the Provider to express its dissatisfaction at the Provider’s decision to decline the claim, as follows:

“[We] *are not at all happy with your responses and, quite frankly, find them to be disingenuous.*

Let me start with your e-mail of April 6th where you say “the losses in this case are due to an excluded cause, that being the decision of Government to take certain measures to seek to control the spread of the pandemic. This action is not an event which insured under the policy”. I will point out that there is nowhere in the policy where this is specified or made clear.

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You go on to say that you provide "cover for established infectious disease whose impact is assessable (known as Specified Disease Cover)" and you say "This is because, in common with most of the market, our insurance policies are not designed and priced to cover pandemics. A key principle of insurance is that the losses of the few are paid by the many. In a pandemic situation the losses are many and the market is not designed to cover such scenarios." Thank you for the rather condescending tutorial however, again, there is nowhere in the policy where this is specified or clear. Indeed, the policy cites situations of mass impact, such as Radioactive Contamination, War, Terrorism, Pollution/Contamination and the like, under the ***'General exclusions'*** *clauses. Pandemics are at an actuarial risk level that is at least as great as war but, by not being listed, are not excluded.*

Further, in the ***'Prevention of Access – Non-damage'*** *extension, there is a claim limit of €20,000 and a maximum indemnity period of 3 months, so hardly outside the capability of the "market" to price or absorb and to assert this is the case is, as I have said, disingenuous.*

You state that there is no cover for disease under the ***'Prevention of Access – Non-damage'*** *extension because such cover as you are "willing to provide is dealt with in the Specified Disease Extension." In the context of a contract of insurance, "willing" is a strange term to use! The referenced* ***'Specified disease murder food poisoning defective sanitation vermin'*** *extension is focused on* ***"any occurrence of a specified disease being contracted at the premises"*** *and/or* ***"any discovery of an organism at the premises likely to result in the occurrence of a specified disease …"****. It goes on to specify the cover that will be provided in such situations and for any situation involving food poisoning, defective drains, vermin, etc., including special conditions. How then can you claim that the exclusion under the* ***'Prevention of Access – Non-damage'*** *extension, which uses the same terminology and language of the* ***'Specified disease murder food poisoning defective sanitation vermin'*** *extension, is broadened to exclude the situation we currently find ourselves in?*

The exclusion to the ***'Prevention of Access – Non-damage'*** *extension is* ***"closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism as a result of an occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements."*** *I have underlined the words that show this exclusion is narrowed in its focus to a specific set of circumstances at the insured property and as directed by the local authority.*

The wording of ***'Prevention of Access – Non-damage'*** *extension is:* ***"Access to or use of the premises being prevented or hindered by any action of government the Gardaí emergency services or a local authority due to an emergency which could endanger human life …"*** *This extension very clearly specifies* ***"any"*** *action of government, the Gardaí, emergency services or a local authority which prevents or hinders access to the insured premises. This is currently the situation we find ourselves in.*

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Access to our premises has been hindered and prevented by actions of the government, the Gardaí and the public health emergency team in order to limit the danger to human life. Cover for business interruption under this extension should therefore be extended to us. Our premises has not been closed due to the order or advice of a competent local authority as a result of an occurrence of an infectious disease at the premises. Indeed, there has been no occurrence in the local vicinity and [Location Redacted] remains one of the counties at the bottom of the table for occurrences of Covid 19.

In your e-mail you state: "In this case we are dealing with a global pandemic which has closed every business and organisation in the country. The policy is not designed, intended or worded to cover such a situation. The customer's business like all others was closed by order or advice of the Government which is the only competent local authority capable of dealing with such an event."

*For a start, not every business and organisation in the country has been closed. This is quite simply untrue. Further, to equate the current restrictions and advice from the government as the "only competent local authority capable of dealing with such an event." is a clear attempt to obfuscate between government and the local authority. In the **'Prevention of Access – Non-damage'** extension, there is distinction between the government, the Gardaí, the emergency services and the local authority. To try to insinuate that the 'government' is the 'local authority' in this situation is a clear attempt to undermine the intent of the exclusion.*

*As previously stated, it is not clear that the policy is not "designed, intended or worded" to cover the situation we are in. On the contrary, we have a very clearly worded **'Prevention of Access – Non-damage'** extension that covers any action of the government to prevent or hinder access to our premises. There is no exclusion under the **'General exclusions'** clause that applies. The infectious disease exclusion under the **'Prevention of Access – Non-damage'** extension is narrowed to the order/advice of a local authority as a result of an occurrence of an infectious disease, food poisoning, defective drains, etc. and to assert it extend to exclude the current preventative emergency situation is ludicrous!*

*It is clear you are trying to interpret the policy wording, after the fact, to suit the current situation and in your favour. I find this disappointing and disingenuous in the extreme, particularly given the **'Prevention of Access – Non-damage'** extension is limited to €20,000 and/or 3 months, and in light of the reminder form the Central Bank of the obligation on insurers to interpret clauses in favour of the consumer, or 'contra proferentum'.*

The recent direction from the Central Bank is that "the CEO of each insurance firm shall take responsibility for the oversight of how their firm is managing determination of whether claims are covered or not in the context of Covid 19". I would like assurance and confirmation that there has been this oversight of our submission. …."

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The Provider acknowledged receipt of the Complainant Company's email on **8 May 2020** and informed the Complainant Company on **15 May 2020** that it was treating the email as a formal complaint. Following its review of the complaint, the Provider wrote to the Complainant Company on **10 July 2020**, as follows:

> *"**Your complaint***
>
> *The emails from you and your broker state in summary that:*
> 1. *Your interpretation of the policy is that cover should apply because your business was interrupted as use of your premises has been prevented by actions of government, the Gardai and the public health emergency team due to an emergency which could endanger human life.*
>
> 2. *You do not consider that Exclusion (iii) applies because it is (a) limited to the order or advice of the competent local authority and is (b) targeted to the premises (as evidence by inclusion of the references to food poisoning, defective drains, etc.) You say your premises has not been closed due to an order or advice of a competent local authority as a result of an occurrence of an infectious disease at the premises, and you say there has been no occurrence in the local vicinity. You say that there is a distinction between the government, Gardai emergency services and the local authority in the Prevention of Access – non-damage extension. The "government" is not the "local authority".*
>
> 3. *There is no express exclusion for actions of the Government to control the spread of a pandemic. You note that mass impact situations such as radioactive contamination and war are listed in the General Exclusions.*
>
> 4. *The policy wording is ambiguous and should be applied contra proferentum given Central Bank guidance.*
>
> *We will respond to each of these points in turn below. However in the first instance it may be helpful to explain the business interruption cover provided as part of your policy.*
>
> ***Your Business Interruption cover***
>
> *The core Business Interruption cover provided by the … policy responds to physical property damage at the insured premises resulting in the business being interrupted or interfered with. We understand that there has been no damage to property in this instance.*
>
> *There are two extensions which can, in certain specified circumstances, provide cover for business interruption losses where there is no damage to property. These are the "Prevention of access – non-damage" (Extension 2) and "Specified Disease Murder Food Poisoning Defective Sanitation Vermin" (Extension 15). We have explained the cover available under these extensions in the "**Explanatory Note**" below.*

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Having set out what we hope is a clear explanation of the cover provided for financial losses for business interruption in cases where there is no material damage to your business premises we have addressed the specific points raised in your letter below.

(a) Cover should be triggered under the Prevention of Access – Non-Damage Extension

The "Prevention of access – non-damage" extension (Extension 2) covers loss resulting from an interruption or interference with the business at the insured premises as a result of "access to or use of the premises being prevented or hindered by an action of government, the Gardaí, emergency services or a local authority due to an emergency which could endanger human life or neighbouring property". This cover is subject to an exclusion where the "closure or restriction in the use of the premises [was] due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease)". Extension 2 does not therefore extend cover under the policy to Specified Diseases or to any other human infectious diseases. The only cover provided in respect of Specified Diseases is that provided by Extension 15, which does not cover COVID-19, as it is not included in the specified diseases listed in the policy. [The Provider's] *policies are not designed to cover losses arising from the occurrence of a general pandemic such as COVID-19.*

Even if the policy did in principle apply to COVID-19, cover would still only be available under Extension 2 where the loss ***results from*** *an interruption of or interference with your business and the interruption or interference* ***results from*** *access to/use of the premises being prevented or hindered by the defined action of government or other specified authority. Losses that you would have suffered in any event as a result of the downturn in economic activity and the general lockdown are therefore not covered.*

(b) Exclusion (iii) in Extension 2 does not apply as the restrictions were not advice of a competent local authority and there was no occurrence at the premises

As set out in the Explanatory Note, Extension 2 does not extend [the Provider's] *coverage to Specified Disease or to any other human infectious diseases. The only cover provided in respect of Specified Diseases is that provided by Extension 15, which as explained above does not cover COVID-19.*

In addition, the reference to "competent local authority" in the exclusion distinguishes the "local authority" referred to in the exclusion from the "local authority" referred to in the operative clause. In the context it is used, it means any of "government, the Gardaí, emergency services or a local authority" and it therefore would apply to exclude losses, if cover was triggered.

(c) Pandemics are not expressly excluded

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We have explained above the scope of the cover under Extension 2. [The Provider's] *policies do not provide cove for pandemics such as COVID-19 and therefore it was not necessary to expressly exclude such risks.*

(d) The policy wording is ambiguous and should be applied contra proferentum.

We note your reference to the statement from the Central Bank of Ireland in relation to its 'Expectations of Insurance Undertakings in Light of COVID-19' dated 27 March 2020. We have taken this statement into account in assessing your claim. It is clear from the statement that the Central Bank does not expect insurers to cover claims that are not covered under the policy terms and conditions.

We disagree that there is any ambiguity in the policy wording and the wording of Extension 2 is clear and unambiguous. The ordinary and natural wording of the words is clear from the insuring clause and when read in light of the policy as a whole. We do not believe that there can be any doubt as to the meaning of the insuring clause or that there is more than one possible interpretation.

Outcome of investigation

We are satisfied based on the information you have provided that you and your broker's interpretation of the policy is not correct. We appreciate that this decision will come as a disappointment and we wish to assure you that it is not a decision we have taken lightly. We hope this letter helps you to understand why we consider, based on the information you have provided, that the policy does not respond to your claim. …"

The Complainant Company wrote to the Provider by email on **17 July 2020**, as follows:

"As I stated in my original e-mail to you, I believe it is clear, under the wording of the 'Prevention of Access – Non-damage' extension … applies in this situation and cover should be extended to us. The infectious disease exclusion clause does not apply as there has been no occurrence of Covid-19 or any other infectious disease at the premises.

I continue to challenge your repeated view that [the Provider's] *policies are not designed or intended to cover losses arising from actions to address a pandemic. While you may assert this is the case, it is not made clear anywhere in your policy. Indeed, you provide no evidence that this is the case. On the contrary, you exclude other situations of mass impact quite clearly in the General Exclusions.*

Your view that the only cover provided for infectious diseases is as found in Extension 15 is, in any case, inapplicable in this situation as, to repeat myself, there has been no occurrence of Covid-19 or any other infectious disease at the premises.

Use of your premises was prevented by an action of the government to limit danger to human life. Indeed, you supported this yourself in your e-mail of April 16th where

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you stated "The customer's business like all others was closed by order or advice of the Government", yet you do not acknowledge this in your most recent letter. I refer you to your own explanatory note where you state that 'loss resulting from an interruption' results from "access to / use of the premises being prevented by the defined action of the government", which is exactly the situation we have found ourselves in. Your assertion that the losses appear to be as a result of our own/others response to Covid-19 is ludicrous and insulting.

Similarly, your assertion that there is an underlying business trend to be taken into account is nonsense, as is your attempt to imply a distinction between use of the term 'local authority' in two instances simply by the insertion of the word 'competent'. Frankly, you insult my intelligence and I will not deign to provide any further comment on those points.

On the other hand, I find it interesting that you have totally neglected to respond to my points regarding your view that it is outside your/the market capability to price or absorb claims under the current situation, given the claim limit of €20k. I await your response on this.

…

Therefore, I again refer you to the reminder of the Central Bank of the obligation on insurers to interpret clauses in favour of the consumer, or 'contra proferentum' where ambiguity in a contract is to be construed against whoever drafted the contract. While you may choose to disagree with my interpretation, you have already evidenced ambiguity in the policy and, by refusing to provide cover in the circumstances, are in breach of your obligations. …"

By letter dated **6 August 2020**, the Provider wrote to the Complainant Company, as follows:

"We have reviewed the information you have provided and it does not change our initial position on cover. We regret that we must inform you that unfortunately your policy does not respond to cover your claim and we must now formally decline your claim. Extension 2 does not extend cover in the circumstances which arise, as explained in our letter of 10 July 2020 and explanatory note. …

In the first instance we do not agree that the access to or use of the premises has been prevented or hindered by an action of government, the Gardai, Emergency services or a local authority due to an emergency which could endanger human life or neighbouring property, i.e. there has not been an insured event. …

However, we have also considered the cover that would be available under Extension 2 if there was an insured event. An insured event alone is not sufficient to trigger cover. Where the premises has closed, the losses suffered must ***result from*** *the prevention of access to the premises and not from some other reason.*

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This means that losses that would have been suffered in any event (i.e. had access or use of the premises not been prevented or hindered in the specific circumstances set out in Extension 2) are not recoverable under the policy.

You have indicated that the interruption to your business began on 24 March 2020 which is the date on which stay at home measures were introduced. The losses suffered during the period of the lockdown would have been suffered even if your business was permitted to remain open throughout the lockdown. The losses you suffered from this date were not therefore caused by a prevention of access, as required by Extension 2, rather they were caused by the situation brought about by the pandemic, social distancing requirements and the general lockdown.

Additional points raised in your email

It is clear from the wording of the policy that it is not designed or intended to cover losses arising from actions to address a pandemic. Extension 2 does not provide cover for all of the consequences of a pandemic, cover is only provided in the specific circumstances set out in the extension. Extension 2 must be read as a whole with reference to both what is covered and what is not covered and makes clear that the cover under this Extension does not apply to infectious diseases. The cover which is available in relation to infectious diseases is limited to the cover available under Extension 15 and it is clear that Extension 2 does not extend to provide cover for a pandemic.

We note that you have dismissed the trends clause as "nonsense" however the trends clauses are a standard provision in business interruption policies and the basis upon which claims are adjusted is clearly set out in your policy …. The trends clause only applied where there is cover. However, where there is cover, the losses are required to be adjusted in accordance with the trends clause. This requires the losses to be adjusted to provide for "the trend of the business and any other circumstances affecting the business had the damage not occurred so that the adjusted figures represent as near as possible the results which would have been obtained during the relative period after the damage had the damage not occurred." This applies to cover available under Extension 2. When the trends clause is applied, losses which would have been suffered in any event and in the absence of any prevention of access are not covered.

Finally, you have asked us to respond to a previous comment you have made regarding the ability of the market to price or absorb claims under the current situation given the claim limit of €20,000. You appear to be referring to a statement made in my email of 6 April 2020. This email has been reviewed following your request for a response and it is clear that the point which I was explaining was that cover is only available for specified diseases under the Specified Diseases cover and there is no general cover available under our policies for the consequences of a pandemic.

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> *We regret that you are dissatisfied with our decision on cover and we recognise that this is a difficult time for our customers. Unfortunately your policy does not respond to provide cover for this claim and we understand that this is disappointing to you. …"*

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

> *"We run an accommodation and restaurant business at[business type redacted]. We are insured by* [the Provider] *who cover both our home and the business we run on a part-time/seasonal basis. The business was shut as a result of government direction on March 24th. We believe the business interruption cover in our policy applies. However,* [the Provider] *are disputing this. Apart from this, their handling of the matter has, so far, been very poor. They put it in their complaint process, unrequested. They have been slow to respond, have obfuscated on the interpretation of the wording in the policy and denied ambiguity when there is no clarity or, indeed, a clear alternative interpretation. They have also, in their latest letter, implied that we closed the business voluntarily when they clearly said in an earlier e-mail that it was closed on the order of the government. It seems that are doing everything possible to avoid paying out, even though the amount is capped at €20k, or are trying to drag out communication in the hope we will give up. We would like them to honour the business interruption spirit of the policy and pay out on our claim. …."*

The Complainant Company seeks for the Provider to admit its claim for business interruption losses as a result of its temporary closure and, in this regard, states:

> *"Expected average turnover of €2,250 per week for 14 weeks of closure with gross profit margin of 75%: (€2,250 x 14) x .75 = €23,625 loss as a result of the business interruption."*

The Provider's Case

Background

The Provider says it declined the Complainant Company's claim for business interruption losses because it does not fall to be covered under the Complainant Company's policy. The Provider says the Complainant Company has claimed for business interruption losses under the prevention of access – non-damage extension ("POA-ND Extension") to its Provider policy; however, there is no cover for claims arising from Covid-19 under the POA-ND Extension.

On **30 March 2020**, the Provider says it was notified of a possible claim under the policy by the Complainant Company's Broker. By letter dated **6 April 2020**, the Provider says it responded explaining that there was no coverage under the policy for the loss, and in particular, there was no coverage under the POA-ND Extension. In response, the Complainant Company wrote to the Provider on **4 May 2020** setting out a number of grounds of complaint, including that there should be cover under the POA-ND Extension. Following further review of the complaint, the Provider says it issued a Final Response letter

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on **10 July 2020**, clearly setting out the reasons for declinature and explaining the cover in the explanatory note which accompanied the letter. The Provider says it continues to rely on the Final Response letter and Explanatory Note. The Provider says it stated that based on the information provided by the policyholder to date, the policy did not respond to the claim.

The Provider says it confirmed that it was prepared to review the Complainant Company's claim should it wish to submit additional information and the Provider attached a list of questions setting out the information needed in order to carry out the review. The Provider says the letter of **10 July 2020** confirmed that it could alternatively be treated as a final response letter if the Complainant Company wished to do so. The Provider says the Complainant Company responded to its information request on **17 July 2020** and that it considered this information carefully, and responded formally declining the claim on **6 August 2020**.

Cover

The Provider says the core business interruption cover provided by the policy responds to physical property damage at the insured premises resulting in the business being interrupted or interfered with. The Provider says there has been no damage to the property in this instance. The Provider says there are two extensions which can, in certain specified circumstances, provide cover for business interruption losses where there is no damage to property. These are the POA-ND Extension and the 'Specified Disease Murder Food Poisoning Defective Sanitation Vermin' extension ("Specified Disease Extension").

The Provider says the POA-ND Extension covers loss resulting from an interruption or interference with the business at the insured premises as a result of *"[a]ccess to or use of the premises being prevented or hindered by an action of government, the Gardai, emergency services or a local authority due to an emergency which could endanger human life or neighbouring property."* The Provider says this cover is subject to an exclusion where the *"closure or restriction in the use of the premises [was] due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease)"* ("Infectious Disease Exclusion"). The POA-ND Extension does not therefore extend cover under the policy to Specified Diseases or to any other human infectious diseases.

Furthermore, the Provider says, the Infectious Disease Exclusion does not contain any terms limiting the exclusion to an occurrence of an infectious disease "on the premises" (as has been suggested by the Complainant Company). The Provider submits that it is not possible to read words into the exclusion that are not there. In other sections of the policy, such as the Specified Disease Extension, there are express requirements that the occurrence of the specified disease is contracted by a person "at the premises", or discovery of any organism "at the premises". Such wording, the Provider says, is not present in the Infectious Disease Exclusion in the POA-ND Extension.

The Provider says the Infectious Disease Exclusion delineates and confirms the scope of cover, as set out in *Crowden*, discussed below. Viewing the provision as a whole, the Provider

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says it is clear that the objective* intention of the policy wording is to limit the cover for infectious diseases to the Specified Disease Extension and to the specified diseases listed in that extension. The Provider says the only cover provided in respect of infectious disease is that provided by the Specified Disease Extension, which does not cover Covid-19, as it is not included in the specified diseases listed in the policy.
The Provider says its policies are not designed to cover losses arising from the occurrence of a general pandemic, such as Covid-19.

[*In a submission dated **13 April 2021**, the Provider corrected and changed the word 'subjective' to 'objective']

"Competent local authority"

The Provider says the phrase "competent local authority" in the Infectious Disease Exclusion refers to any one of the authorities referred to in the operative clause (i.e. *"government, the Gardai, emergency services or a local authority"*) which is competent to act in the locality of the premises. In this way, the Provider says the reference to *"competent"* local authority in the Infectious Disease Exclusion distinguished the "local authority" referred to in the exclusion from the "local authority" referred to in the operative clause. Furthermore, the Provider says it has never been the case that the only authority competent to act in relation to public health protection (including in relation to infectious diseases) is a local government authority. The Provider says the government has always been an authority with competence to act in relation to local and public health matters.

The Provider says the Health Act 1947 (the "1947 Act") sets out the provisions relating to public health and provides for the Minister to make regulations to introduce certain changes. By definition, the Provider says, the "Minister" for the purposes of the 1947 Act is the Minister for Health. Section 31 of the 1947 Act permits the Minister for Health to make regulations providing for the prevention of the spread (including the spread outside the State) of an infectious disease. Regulations may also be made for their enforcement and execution by officers of the Minister for Health and by health authorities and their officers (and also, with the consent of specified ministers, enforcement and execution by officers of other authorities, for example sanitary authorities or Customs & Excise).

The Provider says that the Health (Prevention and Protection and other Emergency Measures in the Public Interest) Act 2020 was enacted by the Oireachtas on **20 March 2020** (although some of its measures came into effect on earlier dates, namely **9** or **13 March 2020**). This Act amended the 1947 Act and conferred certain powers on the Minister for Health. The Provider says section 31A of the 1947 Act (as amended) now provides that the Minister for Health may make Regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19, including: restrictions on travel within and outside the State; restrictions on persons requiring them to remain at home or at another location; the prohibition of events; safeguards required to be put in place by owners and occupiers of a premises or a class of premises (including the temporary closure of such premises). Further, under section 31B, the Minister for Health may make an "affected areas order" declaring an area or region of the State to be an area where there is known or thought to be sustained transmission of Covid-19. In addition, the Provider says closures effected in

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response to the various announcements made by An Taoiseach are clearly *"closure or restriction in the use of the premises … due to the order or advice of the competent local authority"*.

The Provider says restrictions began on **7 March 2020** when An Taoiseach announced that for a two week period until **21 April 2020** (subsequently extended) everybody must stay at home except in certain circumstances. To underpin these measures, the Minister for Health signed the Health Act 1947 (Section 31A – Temporary Restrictions)(Covid-19) Regulations 2020 (S.I. 121 of 2020) relating to section 31A of the 1947 Act (as amended) on **10 April 2020**. A further regulation was issued at this time, the Health Act 1947 (Affected Areas) Order 2020 (S.I. 120 of 2020), declaring that "the State (being every area or region thereof) is an area where there is known to be sustained human transmission of Covid-19" under section 31B of the 1947 Act.

The Provider says the Complainant Company has made clear that the *"business was shut as a result of government direction on March 24th."* The Provider says it understands that this *"government direction"* to be the post-cabinet statement of An Taoiseach on **24 March 2020**, in which he advised that, amongst other measures, all hotels were to limit occupancy to essential non-social and non-tourist reasons and all cafes and restaurants were to limit supply to take away food or delivery. This statement by An Taoiseach, the Provider says, was clearly an *"order or advice"* within the meaning of the Infectious Disease Exclusion, directed to the nation. In addition, it was confirmed by the High Court in the recent decision of *Ryanair DAC v An Taoiseach, Ireland and the Attorney General* [2020] IEHC 461, delivered on **2 October 2020** that the government advice to avoid non-essential travel and to restrict movements on entry to the State is properly characterised as "advice". Subsequently, and in any event, the Provider says once these measures were put on a mandatory statutory footing by regulations made by the Minister for Health (S.I. 121 of 2020), they fell within the term *"order or advice"* within the meaning of the Infectious Disease Exclusion.

If however, the Provider says, the meaning of "the competent local authority" in the Infectious Disease Exclusion was in any doubt, the restrictions imposed in Kildare, Laois and Offaly in **August 2020** clearly demonstrate that the government is a competent local authority. The legal basis for these lockdowns was the Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) (Relevant Counties) Regulations 2020 (S.I. 295 of 2020). The Provider says these regulations were made by the Minister for Health on **8 August 2020** pursuant to the powers conferred in the Minister by section 5 and section 31A (inserted by section 10 of the Health (Prevention and Protection and other Emergency Measures in the Public Interest) Act 2020) of the 1947 Act. Subsequently, specific local restrictions were introduced in Dublin and Donegal (S.I. 352 of 2020 and S.I. 375 of 2020). Again, the Provider says this demonstrates that the *competent* local authority is not confined to a local authority and may include any of the entities in the POA-ND Extension (i.e. *"government, the Gardai, emergency services or a local authority"*). The Provider says that in the English case of *Financial Conduct Authority v Arch* [2020] EWHC 2448 (Comm), (the "FCA Test Case"), the court found that "competent local authority" included the government.

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Contractual Interpretation

The Provider has set out a brief summary of the relevant principles of contractual interpretation and says that the test to be applied is an objective one, to be determined on the basis of what a reasonable person in the position of the parties would have believed.

Construction of exclusions

In December 2020, the Provider said that recent English case law had clarified the construction of exclusions in insurance policies. The Provider submitted that there is no reason why these authorities would not be considered persuasive before an Irish court. The Provider said that the use of the word "excluding" (such as in the POA-ND Extension) does not mean that the Infectious Disease Exclusion is to be construed in the same way as an exemption clause exempting liability, for example for negligence. Rather, it said that the provision is an example of delineation of cover, to be construed by reference to ordinary principle of construction. The Provider says this position is summarised in *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm), where, after considering the judgment of the UK Supreme Court in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57, the court found that *"insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford."*

The Provider says the court in *Impact Funding* held that:

> *"An exclusion must be read in the context of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly … But the general doctrine, to which counsel also referred, that exemption clauses should be construed narrowly, has no application to the relevant exclusion in this policy. An exemption clause, to which that doctrine applies, excludes or limits a legal liability which arises by operation of law, such as liability for negligence or liability in contract arising by implication of law"*.

That is, *"The fact that a provision in a contract is expressed as an exemption does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly"*.

Viewing this provision as a whole, the Provider says, it is clear that the Infectious Disease Exclusion in the policy delineates the scope of cover. The Provider says the Irish Supreme Court considered exclusions in insurance contracts in *Analog Devices v Zurich Insurance* [2005] IR 274, however, it did not consider whether exclusions could be said to delineate cover, which has since been considered and settled more recently by the English courts in *Impact Funding* and *Crowden*, and confirmed in relation to the Provider's particular exclusion in the FCA Test Case.

Contra proferentum

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The Provider says the general principles of contractual interpretation include the principle of contra proferentum. In *Analog Devices*, Geoghegan J. quoted Clark (4th edition of Contract Law in Ireland) which sets out the general principle:

> *"If the exempting provision is ambiguous and capable of more than one interpretation then the courts will read the clause against the party seeking to rely on it"*.

The Provider says that Geoghegan J. said that the words in an insurance contract must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principle object of the contract of insurance.

The Provider also refers to *Emo Oil v Sun Alliance* [2009] IESC 2, in which the Supreme Court cited Clark, The Law of Insurance Contracts (5th edition), as follows:

> *"In the past some courts were quick to find ambiguity in policies of insurance, in order to apply the canon of construction contra proferentum, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentum ought only to be applied for removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First there must be genuine ambiguity".*
>
> [Provider emphasis]

The Provider says there is no ambiguity in the policy wording and the principle of contra proferentum does not therefore apply. In addition, the Provider says recent English case law (which has yet to be considered by the Irish courts) has established that courts should not automatically apply a contra proferentum approach to construction, as in *Crowden*, cited with approval in the FCA Test Case:

> *"The Court should not adopt principles of construction which are appropriate to exemption clauses – i.e. provision which are designed to relieve a party otherwise liable for breach of contract or in tort of the liability – to the interpretation of insurance exclusions, because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford. To this end, the Court should not automatically apply a contra proferentum approach to construction. That said, there may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the Court would be entitled to opt for the narrower construction."*

The Provider says it has considered the Central Bank of Ireland's Business Interruption Insurance Supervisory Framework (the "CBI Framework") which sets out the Central Bank's

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expectations of insurance firms handling Covid-19 related business interruption insurance claims, which 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, the Provider says in a letter issued to the insurance industry on **27 March 2020**, known as the "Dear CEO Letter", the Central Bank of Ireland 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 doubt about the meaning of a term, the interpretation most favourable to their customer should prevail."*
>
> [Provider emphasis]

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

FCA Test Case

The Provider refers to the decision of the Divisional Court in England in a test case which was brought by the Financial Conduct Authority ("FCA") seeking the court's interpretation of various business interruption covers, the FCA Test Case. The Provider says that eight insurers participated in the test case, including the Provider. The Provider submits that this is an important judgment which is likely to be a persuasive authority in this jurisdiction. The Provider says applications were brought for a leapfrog appeal to the UK Supreme Court and appeals were heard on **16 November 2020**. The Provider says it is important to note that it did not appeal the divisional decision and the FCA did not appeal the findings as regards the Provider's policy wording.

The Provider says the key sections of the FCA Test Case decision regarding its cover and the operation of the Infectious Disease Exclusion is at paragraph 373 of the judgment, where the court stated:

> *"we agree with* [Counsel] *that the question of the construction of the infectious disease carve-out has to be approached on the basis that it is a provision delineating the scope of cover, not in any sense an exemption clause. The applicable principles are as summarised by the judge in Crowden and there is no place for the application of the principle of contra proferentum, to the extent that principle has any application in the modern law of construction of contracts."*

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The Provider says the court also found that:

> *"the phrase "competent local authority" must mean the same in the carve-out as it does in the specified disease clause … the phrase "competent local authority" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government."*

The Provider says that, as a result, the regulations issued by the Government fell within the meaning of the order or advice of a competent local authority, and *"Accordingly, the carve-out applies and there is no cover under either* [Provider] *wording in respect of the closure of or restriction in the use of the premises."*

The Provider says the court's decision that there was no cover in its policy wording is reflected in the declarations ordered by the court in paragraph 16.1, as follows:

> *"16.1 In relation to the provision in* [the Provider] *1.1-1.2 excluding "closure of restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious diseases" ("the infectious disease carve-out"):*
>
> *(a) "competent local authority" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government;*
>
> *(b) The actions of the government in response to COVID-19, including the 20 and 23 March government advice and the 21 and 26 March Regulations, were "the order or advice of the competent local authority as a result of an occurrence of an infectious disease"; and*
>
> *(c) Accordingly, the infectious disease carve-out applies and there is no cover in respect of the closure of or restriction in the use of the premises."*

The Provider says that these conclusions of the Divisional Court and the declarations in relation to the Provider's policy are not under appeal. The Provider says that accordingly, this reflects the coverage position in the current complaint.

<u>Causation</u>

The Provider says that because there is no coverage under the policy, there is no need to consider causation. However, should this Office find that there is cover under the policy, the Provider says its position is that cover would only be available under the POA-ND Extension where the loss **results from** an interruption of or interference with a business and the interruption or interference **results from** access to / use of the premises being prevented or hindered by the defined action of government or other specified authority.

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The Provider says an insured event alone is not sufficient to trigger cover. Where the premises has closed, the losses suffered must result from the prevention of access to the premises and not from some other reason. The Provider says this means that losses that would have been suffered in any event (i.e. had access or use of the premises not been prevented or hindered in the specific circumstances set out in the PAO-ND Extension) are not recoverable under the policy.

The Provider says the Complainant Company has stated that the interruption to its business began on **24 March 2020**. The Provider says the losses suffered during the period of the lockdown would have been suffered, even if the business was permitted to remain open throughout the lockdown. The losses suffered from this date were not therefore caused by a prevention of access, as required under the POA-ND Extension, rather they were caused by the situation brought about by the pandemic, social distancing requirements and the general lockdown. The Provider says that losses suffered by the Complainant Company would have been suffered in any event as a result of the downturn in economic activity and the general lockdown and are therefore not covered.

The Provider says the business trends clause in the policy provides that the losses are to be:

> *"adjusted as necessary to provide for the trend of the business and any other circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred so that the adjusted figures represent as near as possible the results which would have obtained during the relative period after the damage had the damage not occurred."*

The Provider says this is in similar terms to the trends clause in *Orient-Express Hotels v Assicurazoni General SpAv (UK)* [2010] EWHC 1186 (Comm), and the "but for" test must be applied in this case. The Provider says the loss would have occurred irrespective of any interruption of or interference with the premises as a result of the insured peril. In other words, the *"but for"* test is not satisfied and there is no cover.

<u>Quantum</u>

The Provider notes that the Complainant Company acknowledges that the limit of cover under the relevant section of the policy is €20,000 and it maintains that it has suffered loss of €23,625 based on the expected average turnover per week for 14 weeks of closure with a gross profit margin of 75%. The Provider says it further notes that the maximum indemnity period under the extension shall not exceed three months.

The Provider says that to the extent this Office determines that there is cover for the losses claimed under policy (which is denied), the Complainant Company will need to prove the quantification of it losses in accordance with the policy terms and conditions. In the event that this Office intends to deal with quantification of losses, the Provider says it would require to fully consider any relevant financial information and request additional information if required and provide expert evidence in relation to quantification.

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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 Basis of Settlement provisions in the Business Interruption section including the business trends adjustment, which would require the losses claimed to be reduced.

The Provider says it considers the decision of the English Divisional Court in the FCA Test Case to be clear and in December 2020, it noted that while there was an appeal of the decision to the English Supreme Court, the relevant aspects of the decision relating to cover under the Provider's policy wording were not under appeal. The Provider says that this would be a persuasive authority in Ireland which would likely be followed by an Irish court and it should therefore be followed by this Office.

The Provider says while it acknowledges that ***section 12(11)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** provides that the Ombudsman shall act in an informal manner and according to the equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form, the Provider submits that in circumstances where the issue for consideration is one of contractual interpretation and a purely legal question, this Office must have regard to the legal principles and that both parties should be given the opportunity to submit written legal submissions on these issues and the jurisdiction of this Office in relation to questions of legal interpretation.

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 the temporary closure of its business in March 2020, for a period, following the announcement by Government on 24 March 2020 regarding the closure of non-essential businesses 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.

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A Preliminary Decision was issued to the parties on **8 July 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

On **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential businesses. In the context of the present complaint, the Government recommended that all hotels were to limit occupancy to essential non-social and non-tourist reasons, and that all cafes and restaurants were to limit supply to takeaway food or delivery.

The Complainant Company operates an [type of business redacted] and it closed its business on **24 March 2020** in compliance with the Government's recommendation. Arising from this, the Complainant Company's Broker notified the Provider of a possible claim for business interruption losses on **30 March 2020**. The Provider responded to the Complainant Company's Broker on **6 April 2020** to advise that the business interruption cover provided under the policy did not respond to a closure brought about by Covid-19 and that the Complainant Company's losses were due to an excluded cause - the decision of the Government to take certain measures to seek to control the spread of Covid-19. This was followed by an exchange of comprehensive correspondence between the parties which culminated in the Provider formally declining the Complainant Company's claim on **6 August 2020**. The position maintained by the Provider throughout this process was that the circumstances of the claim did not come within the scope of cover provided by Extension 2, ('Prevention of access – Non-damage'), of the business interruption cover extensions by reason of an exclusion contained within Extension 2 relating to a closure of the insured premises arising from the order or advice of the Government.

In this respect, I note that in March 2020 the Complainant Company held a policy of insurance with the Provider. The Complainant Company's policy schedule shows that for the insured period, it had business interruption cover for "*Revenue, including donations and grants*" in the amount of €30,000 for a maximum indemnity period of 12 months. The terms of the business interruption cover provided by the Complainant Company's policy are set out at section 4, 'Business interruption', of the applicable policy document.

The cover provided under section 4 is set out at pg. 52 of the policy document, as follows:

> *"If any property used by **you** at the **premises** suffers **damage** during the **period of insurance** and as a result the **business** at the **premises** is interrupted or interfered with **we** will pay **you** for each item in the schedule the amount of loss as a result of the interruption or interference in accordance with the Basis of settlement. …".*

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In terms of the limit of lability for business interruption claims, the policy document states at pg. 53 that:

> *"**Limit of Liability***
>
> ***Our** liability shall not exceed the sum insured for each item or any other limit of liability stated in this section and in total **our** liability shall not exceed the total sum insured for all items unless expressly varied in this section."*

Extension 2 ("the POA-ND Extension") of the business interruption section of the policy document states at pgs. 54 and 55, as follows:

> *"**Extensions***
>
> *The insurance cover provided by this section is extended to cover loss resulting from interruption of or interference with the **business** carried on by **you** at the **premises** as a result of the following*
>
> *Unless specifically stated otherwise these extensions do not increase **our** liability as stated in the Limit of liability paragraph to this section*
>
> *…*
>
> ***2. Prevention of access – Non-damage***
>
> *Access to or use of the **premises** being prevented or hindered by any action of government, the Gardaí emergency services or a local authority due to an emergency which could endanger human life or neighbouring property*
>
> *Excluding*
> *(i) any restriction of use of less than 4 hours*
> *(ii) any period when access to the **premises** was not prevented or hindered*
> *(iii) closure or restriction in the use of the **premises** due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements*
> *(iv) closure or restriction in the use of the **premises** due to **vermin***
>
> *Limit*
> *€20,000 any one period of insurance*
>
> ***Special condition***
>
> *The maximum indemnity period under this extension will not exceed 3 months"*

/Cont'd…

I note that the POA-ND Extension provides cover where access to an insured premises is prevented or hindered arising from actions of certain authorities due to an emergency which could endanger human life or neighbouring property. However, the scope of this cover is subject to, and limited by, a number of exclusions. Of particular relevance to the Complainant Company's claim and this complaint is exclusion (iii) which excludes cover under the POA-ND Extension arising from the closure or restriction in the use of an insured premises due to an order or advice of the competent local authority as a result of an occurrence of an infectious disease or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease ("the Infectious Disease Exclusion").

In determining whether the Provider was required to admit the Complainant Company's claim under the POA-ND Extension, it is first necessary to determine whether the Infectious Disease Exclusion is triggered. If this is the case, then the Complainant Company is not entitled to an indemnity pursuant the POA-ND Extension.

I note that in the FCA Test Case, the English High Court considered the proper interpretation of a clause which was very similar to the DOA-ND Extension and an exclusion which is essentially identical to the Infectious Disease Exclusion in the Complainant Company's policy. In this respect, the Court in the FCA Test Case was of the view that the exclusion in question applied in the context of Government advice and Regulations introduced in response to Covid-19. I note that in considering the term 'competent local authority', the Court took the view that this term referred to whichever authority was competent to impose the relevant restrictions in the locality on the use of the premises. The Court's reasoning as to the proper interpretation of the exclusion clause was, as follows:

> *"374. We also agree with* [Counsel] *that the phrase "competent local authority" must mean the same in the carve-out as it does in the specified disease clause. In the latter, given the legislative background which can legitimately be taken into account in construing the phrase, we consider it inherently unlikely that the parties intended the scope of cover provided by the clause to be limited to local outbreaks of a specified disease for which only the local district council or other local authority … issues orders or advice. A number of the specified diseases are … on the list of notifiable diseases under the 2010 Regulations, no doubt at least in part because of their capacity to lead to more widespread infection or contagion than in a particular locality. Many of those diseases, at least historically, have been widespread, not just the plague or diphtheria or tuberculosis but in more recent times, measles, mumps and rubella.*
>
> *375. … The narrow meaning for which the FCA contends leads to an artificial and illogical result. In our judgment,* [Counsel] *is right that the phrase "competent local authority" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government.*

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> *376. Given that the phrase has that meaning in the specified disease clause, as we have said it must have the same meaning in the infectious disease carve-out. The order or advice contained in the 20 and 23 March government advice and in the 21 and 26 March Regulations was the order or advice of the competent local authority, and was as a result of an occurrence (in fact many occurrences) of an infectious disease. Accordingly, the carve-out applies and there is no cover under either* [Provider] *wording in respect of the closure of or restriction in the use of the premises."*

Further guidance as to the proper interpretation of the Infectious Disease Exclusion can be seen in the Irish High Court decision of McDonald J. in ***Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited & Or*** [2021] IEHC 263, delivered on **19 April 2021**. In particular, the Court dealt very briefly with the term 'other competent authority' and stated, in a manner consistent with the views expressed in passages from the FCA Test Case cited above, as follows:

> *"209. … It seems to me that there is a significant point of distinction between the language of the clause in the* [Insurer 1] *policy and the language of the* [Insurer 2] *clause which referred not only to the police but also to "other competent… authority". The use of the words "competent" is striking. It immediately suggests that the action taken would be competent (i.e. within the powers of the relevant body concerned). …"*

In light of the foregoing case law and having regard to the terms of the Infectious Disease Exclusion, it is my opinion that the Irish Government comes within the meaning of the term 'competent local authority' for the purposes of this exclusion. It is also my opinion that the Government's adoption of the NPHET recommendations and subsequent announcement on **24 March 2020** that all non-essential businesses close, constituted an 'order or advice' of the competent local authority. Furthermore, it is quite clear that the measures announced by the Government on **24 March 2020** were in response to an 'infectious disease' (i.e. Covid-19). In this respect, I note that on **20 February 2020**, the Infectious Diseases (Amendment) Regulations 2020, amended and provided for the inclusion of Covid-19 on the list of *"Diseases specified to be infectious diseases"* contained in the Infectious Disease Regulations 1981.

The Infectious Disease Exclusion requires the order or advice of the competent local authority to be *"as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease)"*. Looking at the language used in this exclusion and giving these words their plain and ordinary meaning, I am of the view that this exclusion does not seek to impose any requirement as to where the occurrence or discovery must take place. In such circumstances, I do not accept that the occurrence of the infectious disease or discovery of the organism must be at the insured premises or within a particular distance of the insured premises.

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Following the Government announcement on **24 March 2020**, the Complainant Company closed its business and the insured premises. In these circumstances, it is my opinion that the closure of the Complainant Company's insured premises falls squarely within the Infectious Disease Exclusion in the policy. Accordingly, cover under the POA-ND Extension was not triggered. 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 to it, I am satisfied that the Provider was entitled to decline its claim for business interruption losses.

In its Complaint Form, the Complainant Company states that:

> *"*[The Provider] *put* [the email of 4 May 2020] *in their complaint process, unrequested. They have been slow to respond, have obfuscated on the interpretation of the wording in the policy and denied ambiguity when there is no clarity or, indeed, a clear alternative interpretation."*

In respect of treating the Complainant Company's email of **4 May 2020** as a formal complaint, the Provider says that it was appropriate to deal with this correspondence as a complaint in accordance with its complaints handling process and the ***Consumer Protection Code 2012*** ("the Code"). The Provider says that by dealing with the Complainant Company's challenges as a complaint, the Complainant Company received responses within certain timeframes and could be satisfied that the Provider had complied with its obligations under the Code.

While the Provider treated the email of **4 May 2020** as a complaint, I do not accept that there was anything wrong or incorrect with the Provider's conduct in so doing. It was clear from this email, and previous correspondence, that the Complainant Company was dissatisfied with the Provider's declinature of its claim. In such circumstances, I consider it to have been entirely reasonable for the Provider to have treated this email as a complaint which, in turn and as noted by the Provider, attracted the complaint handling requirements of the Code. In doing this, I note that the Provider also facilitated the making of a complaint to this Office because, pursuant to ***section 54(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, before a complaint is made to this Office, the Provider must be given an opportunity to deal with a complaint through its internal dispute resolution procedure. A Final Response letter issued on **10 July 2020**, thus enabling the Complainant Company to make a complaint to this Office from that date.

The Complainant Company considers that the Provider was *slow to respond*. In this regard, I note that a claim was notified to the Provider on **30 March 2020**. This was responded to on **6 April 2020**. The Complainant Company's Broker wrote to the Provider again on **8 April 2020**. This was responded to on **16 April 2020**. The Complainant Company wrote to the Provider on **4 May 2020**. This email was acknowledged on **8 May 2020** and the Provider informed the Complainant Company on **15 May 2020** that it was treating its email as a formal complaint. A Final Response letter issued on **10 July 2020** and was responded to by the Complainant Company on **17 July 2020**. This was then responded to by the Provider on **6 August 2020**.

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While the Complainant Company considers that the Provider was slow to respond to its correspondence, on the basis of the available evidence, I do not accept that there was any unreasonable delay on the part of the Provider in responding to the Complainant Company's correspondence.

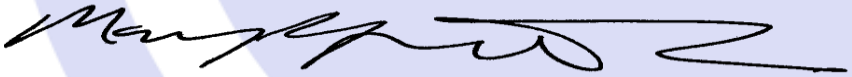
In respect of the substance of the Provider's response, neither do I accept that the Provider obfuscated regarding the interpretation of the policy, wrongly or unreasonably denied ambiguity or failed to offer a clear alternative interpretation of the policy. While the Complainant Company disagreed with the Provider's interpretation of the policy, the Provider was nonetheless entitled to come to its own conclusions as to what it considered to be the proper interpretation of the policy. Further to this, in light of the above considerations, I am satisfied that the Provider's position in terms of the proper operation of the POA-ND Extension and the Infectious Disease Exclusion, were reasonable and in line with the proper interpretation of the policy.

Therefore, although I accept that the Complainant Company may be frustrated by the limitations of the cover offered by the policy it put in place for the period at issue, I do not consider there to be any reasonable basis upon which it would be appropriate to uphold this complaint.

Conclusion

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

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



MARYROSE MCGOVERN
Deputy Financial Services and Pensions Ombudsman

30 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

ensures compliance with the Data Protection Regulation and the Data Protection