An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0285
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Failure to process instructions Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is the landlord of a commercial business premises and he held a commercial property insurance policy with the Provider.

The complaint concerns a claim for loss of rent arising from the outbreak of coronavirus (COVID-19).

The Complainant's Case

By email dated **14 April 2020**, the Complainant's Broker notified the Provider of a claim for loss of rent as a result of the closure of the Complainant's premises on **13 March 2020**.

Following its assessment, the Provider wrote to the Complainant's Broker on **5 June 2020**, outlining the reasons the policy did not respond to a claim for loss of rent, as follows:

> *"As you are aware, Section 2 of the Policy deals with Loss of Rent. The Policy Excess applies to this Section.*
>
> *Clause 3 of the Section Definitions provides the definition of DAMAGE is extended to include for this Section 2 only:-*

"(a) (i) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES."

NOTIFIABLE DISEASE is defined as
"Illness sustained by any person resulting from:-

(a) food or drink poisoning

(b) any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)] an outbreak of which the competent local authority has stipulated must be notified to them."

The loss of rent is set out under the heading WHAT IS INSURED. As it clear therefrom, for any loss to fall within cover, it must result from DAMAGE by an insured cause.

We have carefully considered the Policy and do not consider that the claim is covered. In particular, we are satisfied that the claim is not covered for the following reasons, each of which apply independently of each other:-

1. *The closure of the Premises was not "as a result" of an outbreak of any Notifiable Disease occurring at the Premises. The closure arose from preventative measures taken by the Government, arising from national considerations due to the global pandemic including in particular, social distancing measures.*

2. *Any loss which has occurred, has occurred as a result of the consequences of the pandemic and in particular the requirements of social distancing, including the restrictions on the gathering of persons, travel restrictions, requirements for remote working and the economic slowdown and has not occurred as a result of an outbreak of a Notifiable Disease occurring at the Premises.*

3. *It is clear that the agreement to indemnify in respect of the risk specified Section 2 Clause 3(a) (i) is provided only where the business interruption loss has been caused by the matters specified at Clause 3(a) (i). Having regard to the Government directions as regards social distancing, including restrictions on travel and the widespread public concern regarding the risks of infection and the economic slowdown, any business interruption loss has been caused by such social practices and public concerns and not by the matters specified at Clause 3(a) (i).* […]*."*

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Subsequently, the Complainant wrote to the Provider by email on **15 July 2020**, in respect of his claim, as follows:

> *"*[The Provider] *are using the English language in the policy under the sections stated however, I would argue a different meaning under these definitions of the policy. For example, the definition 'Business' section 4, 5 and 7. My business was closed by the Government which means I had a loss of rent and therefore that has caused financial damage. I understand that* [the Provider] *do not cover COVID19 and I am not claiming under this. I am claiming under loss of rent due to Government directions. If you take a look at section two under definition one, the word rent should mean periodic payments made to me for the lease of the building and this is what I am claiming under as I could not lease out or get my payments. I paid insurance to cover a risk that risk has been exposed and now the insurance don't want to pay this seems unfair to me.*
>
> *I would also like you to look at section 2 loss of rent 3 (iii) closure of premises by local authority for sanitary arrangements now look at* [the Provider] *letter about social distancing arrangements is that not what I was made close for."*

By letter dated **27 July 2020**, the Provider advised the Complainant that it was upholding its decision to decline the claim, as follows:

> *"In our initial correspondence of the 5th of June, we outlined our decision as to why, in the given circumstances, the policy would not respond to a claim for loss of rent. From the contents of your email of the 15th of July I note that you have accepted our rationale with regard to that decision, however you have asked us to consider a claim for loss of rent due to Government directions and directed our attention to the definition of the word Rent which is defined under Section 2 - Loss of Rent as: "The word RENT shall mean periodic payments made to YOU for the lease of BUILDINGS".*
>
> *Furthermore, you have also asked us to review Section 2 clause 3 (a) (iii) which states "closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements". We respectfully wish to inform you that in order for a claim to be successful under this section there must be an element of Damage, the definition of damage is extended under this Section 2 to include a notifiable disease occurring at the premises.*

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We note from the outcome of our investigations and from our Loss Adjuster's Report that your Tenants were unable to pay their rent after closing their respective businesses on the 13th of March as they were not in a position to continue with operations due to the nature of their businesses and the close proximity of Clients within the premises.

The Policy Wording is very specific with regard to outlining cover and for any loss to fall within cover, it must result from DAMAGE by an insured cause.

For the policy to respond to a loss of rent claim, the Insured must establish that they have suffered damage, which as noted above is extended to include a notifiable disease. Based on your presented claim there was no outbreak of a notifiable disease, in this instance Covid-19, occurring at the premises. The premises did not close due to an outbreak of a notifiable disease on the premises nor were your Tenants directed to close by a local authority as a result of an outbreak at the said premises.

By virtue of the above, we regret to advise you that there is no applicable cover in respect of your presented claim […]*."*

The Complainant considers that his claim for business interruption losses is a result of the disruption to his rental income due to the outbreak of Covid-19 and is covered by the terms and conditions of his insurance policy. In this regard, the Complainant sets out his complaint in the Complaint Form, as follows:

"I made a claim under the business interruption policy I had looking for loss of rent which was €40000 over a 12 month period. The government asked me to close down on the 13-3-2020 for sanitary arrangements (social distancing). The Insurers refused to pay out i have argued my case under Section 2 3 (a) (iii) but to no avail.

…

I have been closed for 4 months for far and by the look of things it will be 5 months before we can open so claim is for €13333 less access (sic) *on policy"*

As a result, the Complainant seeks for the Provider to admit his claim for business interruption losses as a result of the disruption to his rental income due to the outbreak of COVID-19.

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The Provider's Case

The Provider advises that the Complainant held a Commercial Property Owners' policy which includes a 'Loss of Rent' section covering the Complainant for loss of rent due to damage to the premises. The Provider says DAMAGE is defined within the policy as *"loss or damage or destruction"* to the premises, and PREMISES is defined as *"The BUILDINGS and the land within the boundaries belonging to them"*. Typically, the Provider says the loss of rent section would cover customers for loss of rent following an event such as a fire at the premise.

The Provider says the policy also extends the above definition of DAMAGE (through 3(a)(i)) to include a Loss of Rent Notifiable Disease Extension which provide for loss of rent where there is an outbreak of any Notifiable Disease occurring at the insured premises:

> *"(a) (i) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES."*

The Provider says the policy provides defined, specific and clear cover in respect of Notifiable Diseases. For cover to operate, there would need to have been an outbreak of any Notifiable Disease occurring at the Premises. In the case of the Complainant's claim, the Provider says no Notifiable Disease occurred at the insured premises.

The Provider says that section 2 of the policy, "LOSS OF RENT", defines a NOTIFIABLE DISEASE as:

> *"3. NOTIFIABLE DISEASE*
>
> *Illness sustained by any person resulting from:*
> *(a) food or drink poisoning*
> *(b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) an outbreak of which the competent local authority has stipulated must be notified to them."*

The Provider says the closure of the premises was not because of an outbreak of any Notifiable Disease occurring at the Premises. The closure of the premises was due to the Complainant's tenants being unable to carry out their respective businesses due to preventative measures taken by the Government arising from national considerations due to the Covid-19 pandemic including in particular, social distancing measures.

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The claimed losses, the Provider says, sustained by the Complainant occurred because of the consequences of the pandemic and the requirements of social distancing, including the restrictions on the gathering of persons, travel restrictions, requirements for remote working and the economic slowdown and did not occur as a result of an outbreak of any Notifiable Disease occurring at the Premises.

The Provider says that although it is sympathetic to the Complainant for the losses which he has sustained, it must apply the policy cover in a fair manner and, unfortunately, the claimed for losses are not covered by the policy.

Under the heading "WHAT IS INSURED" at section 2, the Provider explains the meaning of the term, *"DAMAGE by an insured cause under Section 1"*. The Provider refers to the definition of DAMAGE as outlined above. The Provider further says that section 2 of the policy provides covers for loss of rent, defining "RENT" as:

> *"The word RENT shall mean periodic payments made to YOU for the lease of the BUILDINGS"*

The Provider says the loss of rent section of the policy extends the above definition of damage to include the "**Loss of Rent Notifiable Disease Extension**" which provides cover for loss of rent where there is an outbreak of any Notifiable Disease occurring at the insured premises, as noted above.

In summary, the Provider says that for cover to operate, there needs to be an occurrence of damage to/at the premises covered by the policy – which does not arise in the case of the Complainant's claim.

The Provider says it accepts that COVID-19 is a Notifiable Disease within the meaning of section 2, clause 3 of the policy. The Provider says this is not in dispute and this issue did not apply to the declinature of the Complainant's claim.

In respect of there being an outbreak of a Notifiable Disease at the Complainant's premises, the Provider says it has comprehensive procedures in place to ensure that all claims related to COVID-19 are thoroughly investigated and reviewed, and policy cover considered in detail prior to any decision being made in respect of policy cover.

In this case, the Provider says the Complainant stated on his completed claim form that there was no outbreak of COVID-19 on the premises or nearby. The Provider says it appointed Loss Adjusters in respect of the claim on **14 April 2020**, and they made successful contact with the Complainant on **16 April 2020** and provided a report on **23 April 2020**.

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The Provider says the Loss Adjusters confirmed as part of their review that *"There was no outbreak of covid-19 on the premises"* insofar as the Complainant was aware. The Provider says the closure of the premises and loss of rent claim was attributed to the Government instructions to restrict mass gatherings and the issuing of guidelines for social distancing.

Therefore, the Provider says there was no indication or evidence that there was an outbreak of a Notifiable Disease on the Premises. As per the Loss Adjuster's report, the Provider says the Complainant advised that the premises was closed on **13 March 2020** as the tenants were concerned they were unable to carry out their respective businesses due to the close proximity of clients within the premises. The Provider says social distancing was not possible and therefore, they had to close on foot of the advice issued by the Government.

In respect of section 2, clause 3(a)(iii), the Provider says that the policy is very specific regarding cover, and for the loss to be covered, it must result from damage by an insured cause. The Provider says the closure of the premises was not due to the closure by an appropriate local authority because of defects in the drains or other sanitary arrangements. The closure arose from preventative measures taken by the Government, arising from national considerations due to the COVID-19 pandemic.

"Sanitary Arrangements", the Provider says, should be construed reasonably and in conjunction with the word *"drains"* and when interpreted in this way, it cannot be extended to cover the inability of a premises to suppress transmission of the COVID-19 virus to a level acceptable to the public authorities. The Provider says there has been no order of a public authority regarding any defect in the sanitary arrangements at the premises and, in the absence of a premises-specific order, the clause cannot apply.

In this respect, the Provider refers to the High Court decision in *Brushfield Limited t/a The Clarence Hotel) v. Arachas Corporates Brokers Limited and AXA Insurance DAC* [2021] IEHC 263, and the judgment of McDonald J. delivered on **19 April 2021**. Specifically, the Provider refers to paragraphs 164, 165 and 166 of this judgment.

The Provider says its aim is to deal with claims promptly, efficiently and fairly. The Provider says it diligently gathered and carefully reviewed all information provided by its appointed Loss Adjusters prior to the decision being made. The Provider says its handling and management of Covid-19 related claims are the subject of much governance and oversight, to ensure customers are treated fairly.

The Provider says it is acutely aware of, and fully empathises with, the enormous difficulties and financial loss the Complainant and many others, have faced because of COVID-19. However, for a claim to be paid under a contract of insurance, it must be a result of an event that the policy provides cover for.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined the Complainant's claim for business interruption losses due to the outbreak of COVID-19.

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Decision

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

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

A Preliminary Decision was issued to the parties on **29 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.

The Complainant is the owner and landlord of a commercial unit which, at all material times, appears to have been rented or leased as a dance studio. On **14 April 2020**, the Complainant's Broker notified the Provider of claim for loss of rent due to the closure of the Complainant's premises on **13 March 2020**. Following notification of the claim, the Provider appointed a firm of Loss Adjusters to investigate the Complainant's claim.

The Loss Adjusters prepared a Preliminary Report dated **23 April 2020** in respect of the Complainant's claim. On **5 June 2020**, the Provider wrote to the Complainant's Broker to advise that it had declined the Complainant's claim. By email dated **15 July 2020**, the Complainant made certain submissions regarding the interpretation of the policy and the nature of his claim.

I note that the Complainant also requested that the Provider consider a claim under section 2, clause 3(a)(iii) concerning the closure of his premises by an appropriate local authority because of defects in the drains or other sanitary arrangements. In response to this, the Provider wrote to the Complainant on **27 July 2020**, upholding its decision to decline the claim.

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In this respect, I note that the Complainant held a **Commercial Property Owner's Policy** with the Provider. According to the Complainant's **Property Owner Insurance Policy Schedule**, which covers the period **13 August 2019** to **12 August 2020**, the Complainant's policy included cover for loss of rent with a sum insured of €40,000.00 for a 12 month indemnity period.

Section 2 of the policy document provides cover for loss of rent in the following terms:

> ***"SECTION 2 – LOSS OF RENT (The POLICY EXCESS applies to this Section)***
>
> ***SECTION DEFINITIONS***
>
> ***1. RENT***
>
> *The word RENT shall mean periodic payments made to YOU for the lease of BUILDINGS*
>
> ***2. INDEMNITY PERIOD***
>
> *The period beginning with the occurrence of the DAMAGE and ending not later than 12, 24 or 36 months thereafter (as indicated in the Policy Schedule) during which the results of the BUSINESS shall be affected in consequence of the DAMAGE.*
>
> ***3. NOTIFIABLE DISEASE***
>
> *Illness sustained by any person resulting from:*
>
> *(a) food or drink poisoning*
>
> *(b) any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)] an outbreak of which the competent local authority has stipulated must be notified to them.*
>
> *The definition of DAMAGE is extended to include for this Section 2 only:*
>
> *(a) (i) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES.*
>
> *(ii) the discovery of vermin or pests at the PREMISES which causes a competent local authority to restrict the use of the PREMISES.*
>
> *(iii) closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements.*
>
> *(iv) murder or suicide occurring at the PREMISES.*
>
> *Provided that the beginning of the INDEMNITY PERIOD will be:*
>
> *(i) in the case of (a)(i) and (a)(iv) when the incident happens or is discovered*

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(ii) *in the case of (a)(ii) and (a)(iii) the date when the restrictions on the PREMISES are applied for the period specified in the INDEMNITY PERIOD.*

(b) […]

WHAT IS INSURED

1. *WE will pay for loss of RENT occurring during the INDEMNITY PERIOD resulting from DAMAGE by an insured cause under Section 1 to any of the following:*

(a) *the CONTENTS or glass insured under this section*

(b) *the BUILDINGS of the PREMISES shown in the Schedule.*

(c) *property in the vicinity of the PREMISES which prevents or hinders the use of the PREMISES or access to it.* […]

WHAT IS NOT INSURED

All Exclusions applicable to Section 1 apply to this Section […]*."*

Having considered the wording of section 2, it is my opinion that to trigger cover under the policy for a loss of rent claim, the loss of rent must result from DAMAGE by an insured cause. In the context of the present complaint, the definition of term DAMAGE is extended by clause 3(a), in particular, by clause 3(a)(i) in respect of notifiable diseases; and by clause 3(a)(iii) in respect of defects in drains or other sanitary arrangements.

Dealing first with clause 3(a)(i), the Complainant's policy stipulates that there must be *"an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES"*. I note it is not disputed that COVID-19 constitutes a notifiable disease within the meaning of section 2 of the policy.

In terms of the requirement for *"an outbreak"* of a notifiable disease, I note that this term is not defined in the Complainant's policy. However, in *Hyper Trust Limited v. FBD Insurance plc* [2021] IEHC 78, McDonald J. referred to the Health Protection Surveillance Centre's definition of outbreak, stating that:

> *"**179.*** […] *In my view, reasonable persons in the position of the parties to the* [Insurer's] *policy would consult the HPSC definition if they were in any doubt about the meaning of the word "outbreak" as used in the policy. None of the parties to the proceedings objected to the court availing of the HPSC definition in its interpretation of the policy."*

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In the following paragraph, McDonald J. took the view that a single instance of COVID-19 was sufficient to come within the meaning of the term outbreak, stating:

> *"**180.** [I]t is clear from the definition of "outbreak" that a single instance of a serious disease such as Covid-19 within the 25 mile radius would be sufficient to satisfy the definition* […]*."*

I note that clause 3(a)(i) also contains a requirement that the outbreak of the notifiable disease must occur *"at the PREMISES"*. In determining the correct meaning of this *at the premises* requirement, I note the definition of damage at clause 3(a) extends to include damage under four sub-clauses, (a)(i) to (a)(iv). For clause (a)(i), the outbreak of the notifiable disease must occur *at the premises* or be attributable to food or drink supplied *from the premises*.
For clause (a)(ii), the discovery of vermin or pests must be *at the premises*; clause (a)(iii) requires the closure of the premises; and clause (a)(iv) requires murder or suicide to occur *at the premises*. As can be seen, the language used in each of these sub-clauses is premises specific.

The Complainant's policy schedule identifies the 'Risk Address' as the premises the subject of this complaint, which was rented / leased by the Complainant as a dance studio. In this respect, I note that the language used in the policy document in defining the term 'PREMISES' (and related terms) is quite specific and confined to the buildings and grounds comprising the Risk Address.

I also note that, at the 'DEFINITIONS' section of the policy document, the term 'PREMISES' is defined as:

> *"The BUILDINGS and the land within the boundaries belonging to them."*

'BUILDINGS' is defined as:

> *"The word BUILDINGS shall mean the structure of the PREMISES including all outbuildings at the PREMISES and includes:*
>
> *(a) landlord's fixtures and fittings therein and thereon*
> *(b) walls gates and fences*
> *(c) car parks yards and pavements*
> *(d) telephone gas water and electric installations* […]
> *(e) foundations*
> *(f) drains sewers within the perimeter of the PREMISES* […]*."*

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Accordingly, it is my opinion that giving the words of the definition of DAMAGE at clause 3(a), their plain and ordinary meaning, reasonably interpreted, clause 3(a)(i) requires there to be an outbreak of a notifiable disease actually and specifically at the Complainant's premises in order to trigger cover under section 2 of the policy in respect of a loss of rent claim arising from COVID-19.

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company*, *Company* [2021] IEHC 263, delivered on **19 April 2021**. In his judgment, McDonald J. made certain remarks regarding an at the premises requirement contained in a clause similar to clause 3(a)(iii) of the Complainant's policy:

> *"167.* […] *Those words "at the premises" are also to be found in paras. 2 and 3 of the MSDE 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.*
>
> *168. For all of these reasons, I have come to the conclusion that para. 5 of the MSDE clause will only apply where there is a specific order of a public authority requiring closure of all or part of the premises as a result of a defect in the drains or other sanitary arrangements at the premises."*

Accordingly, to trigger cover under section 2, clause 3(a)(i) requires an outbreak (a single incident) of any notifiable disease (COVID-19) occurring at the Complainant's premises.

In terms of whether there was, on the balance of probabilities, an outbreak of COVID-19 at the Complainant's premises, I note from the evidence that the Complainant closed his premises around **13 March 2020**. In what appears to be a claim form completed by the Complainant (forwarded to the Provider by the Complainant's Broker on **16 April 2020**), the Complainant answered *"None"* to the following questions:

> *"**Does any of the following circumstances apply?***
> *Outbreak of Covid 19 on the premises or nearby*
> *Closure due to concern or fear for safety of staff and customer*
> *Closure due to employees self-isolating*
> *Closure or reduction in activity due to collapsed customer demand"*

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I also note that the Loss Adjuster's Preliminary Report dated **23 April 2020**, states, on page 2, as follows:

> *"**Circumstances of Claim:***
> [The Complainant] *advises that the premises was closed on 13/03/2020 as the tenants were concerned they were unable to carry out their respective businesses due to the close proximity of clients within the premises. Social distancing was not possible, therefore they had to close, on foot of the advice issued by the government. As a result your insured has lost rental income from the various tenants.*
> *There was no outbreak of covid-19 on the premises, insofar as your policyholder is aware."*

In the Complainant's letter of **15 July 2020**, the Complainant explains the reason for the closure of his premises, as follows:

> *"My business was closed by the Government which means I had a loss of rent and therefore that has caused financial damage. I understand that* [the Provider] *do not cover COVID19 and I am not claiming under this. I am claiming under loss of rent due to Government directions."*

In his **Complaint Form** to this Office, the Complainant states that:

> *"The government asked me to close down on the 13-3-2020 for sanitary arrangements (social distancing)."*

Following this, in an email to this Office dated **13 April 2021**, the Complainant advised that:

> *"Around about 6-3-20 I got a call from one of my dance teachers who informed me that one of the children who was at her class was a close contact to someone who tested positive for covid 19 (the child's mother) who was a healthcare worker and the child would have to be tested and she would not be returning to running her classes, I took the decision to close the* [premises] *completely to all dance teachers, a week or so later the government shut down the whole country and my* [premises] *remains shut to this day* […]*."*

In an email dated **14 May 2021**, the Complainant explained that:

> *"5 I closed the* [premises] *before the government closed the country down as I had a teacher who had a child that was a close contact in the class (her mother was a healthcare worker) I took the decision to close the premises yes I understand now it was the wrong decision for financial purposes If the virus ripped through the* [premises] *I would be paid according to the insurers"*.

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In an email dated **16 May 2021**, the Complainant explained that:

> *"We closed approximately 7 days before the government closed the country down. This was a commercial decision I made.* […]*."*

The Complainant also attached the following letter from a dance teacher who used the dance studio at the premises:

> *"You were asking me about the Irish dance classes that our school runs in the* [premises]*, from memory the last day we ran a class in the* [premises] *was 6/3/20. Just after the class we were contacted to say that one of the children that had attended the class that day, was a close contact to someone who was going for a test.*
>
> *The following day, the child's mother contacted me to say she tested positive and the child herself would have to be tested.* […]*."*

At the time the Complainant's claim was notified to the Provider in **April 2020** and during the Provider's assessment of claim, there does not appear to have been any evidence of, and the Complainant does not appear to have been making a claim based on, an outbreak of COVID-19 at his premises. Further to this, I note from the evidence that the Complainant's motivation for closing his premises was not based on an outbreak or occurrence of COVID-19 at the premises.

While there is evidence to suggest that a child who attended the premises seven days before its closure was considered a close contact of a confirmed case of COVID-19, there is no evidence to suggest that the child in question in fact tested positive for COVID-19 or that this child was on the premises while infected with the virus.

Therefore, having considered the evidence, I am not satisfied, on the balance of probabilities, that there was an outbreak of COVID-19 at the Complainant's premises.

Furthermore, for the purpose of clause 3(a)(i), I do not accept that policy cover will be triggered because of any Government directions in respect of public health measures such as social distancing or because of a Government imposed closure in response to COVID-19.

Turning to clause 3(a)(iii), I note that the Complainant's policy extends the definition of DAMAGE to cover loss of rent arising from the *"closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements"*.

In his letter to the Provider dated **15 July 2020**, the Complainant requested that the Provider consider a claim under clause 3(a)(iii), as follows:

> *"I would also like you to look at section 2 loss of rent 3 (iii) closure of premises by local authority for sanitary arrangements now look at* [the Provider] *letter about social distancing arrangements is that not what I was made close for."*

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In his **Complaint Form**, as noted above, the Complainant states that:

> *"The government asked me to close down on the 13-3-2020 for sanitary arrangements (social distancing)."*

In the Complainant's email dated **13 April 2021**, the Complainant stated that:

> *"My* [premises] *remains closed because of sanitary reasons (we need to keep apart from one another)* […]*."*

Thus, the basis for the Complainant's position that the circumstances of his claim come within clause 3(a)(iii) is that the closure of his premises was brought about by social distancing requirements, or an inability to maintain or adhere to social distancing guidelines.

In the recent case of *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company*, McDonald J. considered whether the following clause provided cover in the context of COVID-19:

> *"5. the closing of the whole or part of the **premises** by order of the public authority as a result of a defect in the drains or other sanitary arrangements at the **premises**."*

As can be seen, the wording of this clause is quite similar to clause 3(a)(iii) of the Complainant's policy.

Ultimately, McDonald J. took the view that such a clause would not apply in respect of claims associated with COVID-19 or Government measures introduced in response to COVID-19:

> *"164. It, therefore, seems to me that the question boils down to whether or not an inability to enforce social distancing could be said to constitute a defect in the sanitary arrangements at the premises.*
> […] *The question, accordingly, is whether a reasonable person, in the position of the parties at the time the contract was concluded, would understand that the reference to "a defect in the… other sanitary arrangements at the premises" was intended to capture an inability to ensure that appropriate social distancing was maintained between customers of the hotel or the hotel bar.*
>
> *165. It is important to keep in mind that the* [Insurer] *policy in issue was put in place in April, 2019. At that point, COVID-19 had not been heard of. However, the concept of social or physical distancing was not completely unprecedented. It was, for example, practised since ancient times in the case of leprosy. Nonetheless, the concept was not commonly known and had not been part of common experience in Ireland in living memory. In those circumstances, I have to question whether the practice of social distancing or physical distancing could be said to have been reasonably known to reasonable people in the position of the parties to the AXA policy at the time the policy was put in place in April, 2019.*

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166. Even if one were to take the view that social distancing was reasonably known as a concept in 2019, I find it difficult to accept that a reasonable person in April, 2019 would have characterised the practice of social distancing or physical distancing as a "sanitary arrangement". Again, it is important to consider the meaning of those words in context and to keep in mind that para. 5 is directed at defects in sanitary arrangements which could lead to the closure of premises by a public authority. I was not referred to any statutory or regulatory provision dealing with any aspect of sanitary conditions that would have permitted a public authority, at the time the policy was put in place in April 2019, to close premises by reason of an inability to enforce social distancing. In those circumstances, I find it very difficult to accept that a reasonable person, in April, 2019, would have considered that the phrase "a defect in … other sanitary arrangements" would cover such an eventuality. Even on the assumption that it could, no one has identified what is alleged to have been the defect in the relevant arrangements at the hotel. A defect inherently involves some element of deficiency or fault. One can see, for example, how a deficiency in hygiene standards could lead to a closure order being imposed for public health and safety reasons – especially where food preparation or service is concerned. However, no equivalent deficiency has been identified here in the context of social or physical distancing. Although the announcement of 15th March, 2020 refers to "reckless behaviour by some members of the public in certain pubs last night", there is no suggestion in the terms of the Taoiseach's announcement on that day that there was any deficiency on the part of the owners of bars generally. On the contrary, the statement expressly acknowledged that the majority of the public and the majority of pub owners were behaving responsibly.

The closure required by that announcement was plainly prompted not by any deficiency but by the fact that, as the advice of 15th March 2020 expressly recognises, public houses are "specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions". That can hardly be considered to be a defect since that is an inherent aspect of the concept of a public bar. The very fact that the measure applied to all bars reinforces the conclusion that there was no defect in the sanitary arrangements in any bar in particular. Likewise, when it came to enacting the 2020 Regulations, there is no suggestion that these regulations were designed to address defects in sanitary arrangements at hotels or bars. On the contrary, it is quite clear from the recitals to the 2020 Regulations that they were enacted solely for the purposes of addressing the "immediate, exceptional and manifest risk posed to human life and public health" by the spread of COVID-19. There is nothing to suggest that the 2020 Regulations were prompted by concerns about the existence of defects in any arrangements. They were designed, instead, to address the spread of COVID-19 and the need to close down all services other than essential services for that purpose. Accordingly, I cannot see any basis upon which it can be said that para. 5 of the MSDE clause can be said to apply in this case."

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Accordingly, in light of the above-cited passages from the judgment of McDonald J., I do not accept that an inability to maintain or adhere to social distancing requirements, as suggested by the Complainant, comes within the meaning of section 2, clause 3(a)(iii) of the Complainant's policy. Further to this, the Complainant has not provided any evidence to support the statement contained in his correspondence of **15 July 2020** or his Complaint Form, that his business was closed by the Government or that the Government asked him to close on **13 March 2020**.

While I appreciate that the Complainant has likely suffered significant disruption to his rental income as a result of COVID-19 and that this decision will come as a disappointment, I am satisfied that the Provider was entitled to decline his claim loss of rent, made pursuant to section 2 of his policy. Therefore, I do not consider it appropriate to uphold this complaint.

Conclusion

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

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

MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

23 August 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.