



<u>Decision Ref:</u>	2021-0332
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Retail
<u>Conduct(s) complained of:</u>	Rejection of claim Failure to process instructions in a timely manner Failure to provide product/service information Failure to process instructions Refusal to insure - failure to renew policy
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is the owner of a business premises and held a property owners insurance policy with the Provider for the period **February 2020** to **February 2021**.

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

The Complainant's Case

The Complainant's Broker notified the Provider's Policy Administrator of a claim for loss of rent due to Covid-19 by email dated **25 March 2020**.

Following its assessment, the Provider's Claims Service Provider wrote to the Complainant's Broker on **30 July 2020**, declining the claim, as follows:

"We note that you have sought to recover loss of rental income due to the COVID-19 pandemic.

We understand that no specific cases of COVID-19 have been identified at the Property.

Your Insurer has given careful consideration to the facts and documents presented in support of your claim and we now write to confirm your Insurer's coverage position.

Unfortunately, your Insurer has concluded that the Policy does not respond to your claim. We set out the reasoning for this decision below.

Policy Response

The Policy is a Property Owners Policy (policy number [...]). We refer you to the below applicable Policy Wording (version [...]).

The Insuring Clause in the Policy states:

“In consideration of the Insured having agreed to pay the Premium, the Insurer will reimburse, pay or cover the Insured, on and subject to the terms, limits, conditions clauses and exceptions of this Policy, against the events set out in the Sections operative (specified herein) and occurring in connection with the Business during the Period of Insurance, or any subsequent period for which the Insurer agrees to accept payment of the Premium.”

The operative section in this instance is Section 2 – “Loss of Rent Receivable”. The Insuring Clause in Section 2 states as follows:

“The Cover

The Insurer will cover the Insured against Consequential Loss arising from an Incident occurring during the Period of Insurance.”

The covered loss in this instance, must arise from an “Incident” that is: “Damage from a Defined Insured Event to Building(s) or property situated at the Premises and used by the Insured for the purpose of the Business.”

In this regard:

1. “Damage” is defined as “physical loss, damage or destruction”. It is your Insurer’s opinion that no “Damage” (as defined) has occurred; the presence of the pathogen that can lead to COVID-19 is not “physical loss, damage or destruction” of the tangible property, therefore the definition of “Damage” is not met.
2. A “Defined Insured Event” means “fire, lightning, explosion, aircraft or other aerial devices or articles dropped therefrom, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious persons other than thieves, earthquake, storm, flood, escape of water from any tank, apparatus or pipe, water freezing in any tank, apparatus or pipe, or impact by any vehicle or animal as more fully detailed under Section 1 Property Damage, Operative Covers 1-7.”

Section 1 Property Damage Operative Covers 1 -7 includes fire, explosion, earthquake, riot, civil commotion, strikers, locked out workers etc, storm or flood,

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escape of water, water freezing, impact by any road vehicle but there is no reference to infectious diseases contained therein.

Considering the above, your Insurer does not believe that a covered loss has arisen under this Section.

Where cover is available under the Insuring Clause of Section 2 (which your Insurer does not believe to be the case), the cover available would be as follows:

“Item A - Loss of Rent Receivable

The insurance under this Item is limited to:

- (a) Loss of Rent Receivable; and*
- (b) Increase in Cost of Working.*

The amount payable by the Insurer as reimbursement in respect of this item shall be:

- (1) in respect of Loss of Rent Receivable, the amount by which the Rent Receivable during the Indemnity Period shall in consequence of the Incident fall short of the Standard Rent Receivable, and*
- (2) in respect of Increased Cost of Working the additional expenditure incurred by the Insured for the sole purpose of avoiding or diminishing the reduction in Rent Receivable which but for that expenditure, would have taken place during the Indemnity Period in consequence of the Incident but not exceeding the amount of the reduction in Rent Receivable avoided less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the business payable out of the Rent Receivable as may cease or be reduced in consequence of the incident.”*

The above is then varied by Extension 3 “Disease, Infestation and Defective Sanitation” which is applicable in respect of “Item A - Loss of Rent Receivable”:

“3. This Section shall extend to apply to Consequential Loss arising from the occurrence at the Premises of:

- (a) murder, suicide, or food or drink poisoning;*
- (b) a notifiable human, infectious or contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) that is required by law to be reported to government authorities;*

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which results in closure or causes restrictions on the use of the Premises by order of any person or authority holding the appropriate statutory power.

The maximum amount that would be paid by the Insurer under this Special Extension shall not exceed 10% of the total Sum Insured under this section or €60,000 whichever is the lesser unless otherwise stated in the Schedule."

Extension 3 applies to extend the cover afforded under Section 2 to cover "loss ... resulting from interruption of or interference with, the Business carried on by the Insured at the Premises" where there has been an occurrence "at the Premises" of a notifiable disease (our emphasis).

While COVID-19 may be a "notifiable human, infectious or contagious disease", in this instance, we are advised that there has not been an outbreak of COVID-19 at the Property and in order for the Extension to respond, the proximate cause of your losses suffered must be because of a specific occurrence of COVID-19 at the Property. In other words, the loss claimed must directly result from the manifestation of COVID-19 at the Property (and the extent of cover would then of course be subject to the terms and conditions of the Policy).

As there is no suggestion that your losses claimed are because of a specific case of COVID-19 at the Property, your Insurer is of the view that Extension 3 is not triggered (in addition to the fact that Section 2 "Loss of Rent Receivable" does not provide cover for the reasons stated above in any event). For the same reason, Extension 2 "Denial of Access" is also not triggered and does not provide cover (and the claim does not relate to "Damage" as defined either). Based on the information that you have provided, the view of your Insurer is that the proximate cause of your loss is the guidance and regulations issued by the Government, rather than a specific occurrence of COVID-19 at the Property.

In this regard, please note that the Policy is not intended to provide cover for a general loss of income caused by the negative effects of the global or national COVID-19 outbreak, for example, downturn in trade experienced by all businesses due to a reduction in customer footfall.

In the circumstances, and on the information provided to date, your Insurer has made the decision that the Policy does not respond to the claim presented and on behalf of Underwriters, we hereby decline the claim."

The Complainant considers that his claim for loss of rent receivable due to the outbreak of Covid-19 is covered by the terms and conditions of his insurance policy. In this regard, the Complainant sets out his complaint in his Complaint Form, as follows:

"I have a property at [address] rented to [a] tattoo studio. I have received no rent since March 2020 as Government closed all businesses due to Covid 19. My Insurance Co will not pay on policy as pandemic is not covered on policy. [...]."

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As a result, the Complainant seeks for the Provider to admit his claim for loss of rent receivable due to the outbreak of Covid-19.

The Provider's Case

The Provider explains that the Complainant purchased a Property Owners Insurance Policy for the period **14 February 2020** to **13 February 2021**. The Provider advises that the version of the policy wording applicable to this complaint is the ROI Property Owners wording version ending 019. The Provider says the policy provides cover for numerous incidents but is subject to the relevant exclusions, terms and conditions within the policy.

The Provider says the Complainant advised that he has owned the insured property for more than 20 years, with the premises leased on a long-term tenancy to a local tattoo business. On **12 March 2020**, the Provider says the Health Service Executive ("HSE") (social distancing) Guidelines were imposed which caused a significant downturn in trade. Later, on **24 March 2020**, the Provider says it was officially declared by the Department of Health that all non-essential businesses had to close (tattoo parlours included).

Following the presentation of the Complainant's claim, the Provider says it proceeded to appoint the Claims Service Provider/Loss Adjusters to review and investigate the loss in question. The Provider says the Claims Service Provider received notification of a potential "Covid-19" claim on **26 March 2020**. The Provider says the Claims Service Provider subsequently arranged a telephone call with the Complainant on **2 April 2020** to complete preliminary enquiries into the claim. The Provider says the preliminary discussion with the Complainant outlined the following:

"The policyholder leased his premises to the tenant on a fixed term from 2014 to March 2019. The tenant runs a tattoo business from the premises. [The Complainant] previously tried to contact the tenant prior to March 2019 to advise he wanted to increase the rent, but the tenant would not answer the phone. [The Complainant] asked the agents who look after the property to chase this up for him also, but it appears they got nowhere either, so things were left as was, and no new agreement was signed. [The Complainant] has not been paid any rent for March 2020, and the tenant will not answer his calls. When he went to the premises to discuss with the tenant, the place is closed up and there is a sign in the window saying they have closed. A search of the tenants business online reveals they have closed form 18th March 2020 due to "Covid-19 restrictions"

Policy Response

The Provider says the Insuring Clause in the policy states:

"In consideration of the Insured having agreed to pay the Premium, the Insurer will reimburse, pay or cover the Insured, on and subject to the terms, limits, conditions clauses and exceptions of this Policy, against the events set out in the Sections operative (specified herein) and occurring in connection with the Business during the

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Period of Insurance, or any subsequent period for which the Insurer agrees to accept payment of the Premium.”

The Provider says the operative section in this instance is ‘**Section 2 – Loss of Rent Receivable**’. The Insuring Clause in Section 2 states, as follows:

“The Cover, The Insurer will cover the Insured against Consequential Loss arising from an Incident occurring during the Period of Insurance.”*

The Provider says the cover must arise from an “Incident” that is defined as:

“Damage from a Defined Peril to Building(s) or property situated at the Premises and used by the Insured for the purpose of the Business.”

The Provider sets out the definition of “Damage” and “Defined Peril”. The Provider further refers to ‘Section 1 Property Damage Operative Covers 1-7’ and states that there is no reference to infectious diseases.

The Provider cites the Insuring Clause of Section 2. The Provider also cites Extension 3 of the ‘Section 2 Extensions’, as follows:

“3. This Section shall extend to apply to Consequential Loss arising from the occurrence at the Premises of:

(a) murder, suicide, or food or drink poisoning;

(b) a notifiable human, infectious or contagious disease (other than Acquired immune Deficiency Syndrome (AIDS) or an AIDS related condition) that is required by law to be reported to government authorities;

which results in closure or causes restrictions on the use of the Premises by order of any person or authority holding the appropriate statutory power. [...].”

The Provider says this is an “on premises” hybrid clause, which is different from and outside the scope of the recent High Court case of *Hyper Trust Limited trading as The Leopardstown Inn v. FBD Insurance plc* [2021] IEHC 78, dated **5 February 2021** and the UK FCA Test Case.

The Provider says the loss claimed must directly result from the authority’s closing of or restricting the use of the premises, as a result of the occurrence of Covid-19 at the premises. The Provider states it is of the view that the premises were closed as a result of the general Government order to close non-essential business, not the presence of Covid-19 at the premises. The Provider contends that the Complainant’s losses do not trigger the coverage provided by this extension.

The Provider says it agrees that Covid-19 is a notifiable human, infectious or contagious disease, and was classified as such in the Republic of Ireland on **20 February 2020**. The

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Provider says it further agrees that the appropriate authorities closed or caused restrictions on the use of the premises.

However, the Provider contends, in this instance, it has been advised by the Complainant that there has not been, to his knowledge, an outbreak or occurrence of Covid-19 at the insured premises and in order for Extension 3 to respond, the proximate cause of the losses suffered must be a specific occurrence of Covid-19 at the premises which results in closure or causes restrictions on the use of the premises.

In other words, the Provider says the loss claimed must directly result from the authorities closing or restricting the use of the premises as a result of the occurrence of Covid-19 at the premises.

In respect of an occurrence of Covid-19 at the insured premises, the Provider says that following a review of the outcome of the discussion held with the Complainant, it is of the view and understanding that there was not an outbreak or occurrence of Covid-19 on the insured premises which led to the closure of the business in **March 2020**.

The Provider says the Claims Service Provider also raised this question with the Complainant in preliminary discussions and the advice received was that because the tenant was not answering or returning calls, it was the Complainant's assumption at that time that the tenant had closed the premises due to the effect Covid-19 was having on businesses. The Provider says a search of the tenant's business online in **April 2020** revealed that the business closed to customers from **18 March 2020** due to Covid-19 restrictions. The Provider says the following message was issued by the tenant on social media on **18 March 2020**:

"As the situation with COVID-19 has progressed the past few days we have decided to temporarily close [...] until we have more information. Anyone with appointments in the near future have been messaged and we will reschedule, this won't affect your deposit/voucher. We will let everyone know when we are to reopen and keep you all updated. we thank you for all your continued support and will see you all again when we reopen after this blows over"

From reviewing the tenant's social media account, the Provider says it also transpired that following a brief reopening during the summer months of **2020**, the business has now closed as of **29 September 2020**:

*"It's with a heavy heart we sadly have to announce we are closing the doors of [...]. Thank you to all our loyal customers over the years. But not to worry about deposits and tattoo needs as our artists in the Dublin studio will be working hard around the clock to look after you guys!
Please contact our Dublin studio for any further information"*

The Provider says the closure of the tattoo parlour was as a direct result of social distancing guidelines imposed on **12 March 2020**, which caused a significant downturn in trade. The Provider says the premises was closed as a result of the general Government order to close non-essential business, not the presence of Covid-19 at the premises.

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The Provider says that if the Complainant had provided evidence of an occurrence of Covid-19 at the premises, cover would have been triggered under Extension 3(b) of the Section 2 Extensions. The Provider says its view is that this clause is capable of responding to a case of Covid-19 at the premises. The Provider advises that it is reviewing coverage on a case by case basis, to ascertain whether there was Covid-19 at the premises (as required by Extension 3(b)). In situations where an insured provides satisfactory evidence of Covid-19 occurring at the premises, the Provider says it accepts that this clause is triggered. The Provider says it does not require evidence of a positive Covid-19 test to establish the presence of the disease on the premises, as the Provider recognises that testing was very limited in the early months of the pandemic.

The Provider says its position is that where coverage under Extension 3(b) is triggered, its obligation is to indemnify an insured only for the loss caused by the occurrence of Covid-19 at the premises. Typically, the Provider says, it offers to indemnify for a two week period, which in the majority of cases is more than sufficient for the insured premises to close, undergo a deep clean to remove any trace of the virus, for staff to isolate consistent with Government advice, and re-open. Where individual circumstances indicate that a longer period is required, the Provider says it will indemnify on that basis.

In coming to a decision on cover under Extension 3(b), the Provider says it has considered the decision in *Hyper Trust Limited trading as The Leopardstown Inn v. FBD Insurance plc*. The Provider says the wording in Extension 3(b) ("at the premises" disease clause) is different from the clause considered by the Court in *Hyper Trust Limited* ("radius" disease clause), and it is the Provider's opinion that the Court's decision in that case is not determinative of coverage under Extension 3(b).

In respect of the measures introduced by the Government in **March** and **April 2020**, the Provider says Extension 3(b) does not provide cover in relation to loss caused by other consequences of Covid-19, such as the Government imposed closure or restriction measures on the use of the Complainant's premises, because they are not the reason of the said occurrence of Covid-19 at the Complainant's premises. As a result, the Provider says its view is that from **24 March 2020**, the Complainant's business would have been closed and suffered loss in any event, irrespective of Covid-19 occurring at the premises, because of the wider measures introduced by Government in response to the pandemic, which resulted in the closure/restrictions on the use of the Complainant's premises.

In line with the terms and conditions of the policy and the information presented by the Complainant for the loss in question, the Provider submits that the claim presented does not fall for consideration under the policy.

The Provider says Covid-19 was an unprecedented event for businesses and insurers alike. Where it was felt cover should be provided under the policy, the Provider says it proactively engaged with an insured in an effort to agree claims. In this instance, the Provider says it is not in agreement that the terms and conditions of the policy provide cover for the loss in question.

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The Provider says there is an “on premises” hybrid clause and the loss claimed must result from the authorities closing or restricting the use of the premises as a result of the occurrence of Covid-19 at the premises. The Provider says that in the interests of fairness to all policyholders, it must proceed to apply the terms and conditions as outlined in the policy document.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined the Complainant’s claim for loss of rent receivable from **March 2020**, due to the outbreak of Covid-19.

Decision

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

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

A Preliminary Decision was issued to the parties on **3 September 2021**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that on **24 March 2020**, the Government adopted certain NPHEt recommendations for the nationwide closure of non-essential businesses.

On **25 March 2020**, the Complainant’s Broker notified the Provider’s Policy Administrator of a claim for loss of rent due to Covid-19. In an email from the Policy Administrator to the Claims Service Provider of the same date, the details of the Complainant’s claim were recorded, as follows:

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“The Insured wants to make a claim for loss of rent due to Coronavirus/COVID19.”

By email dated **2 April 2020**, the Claims Service Provider wrote to the Complainant requesting certain information in respect of the claim. In particular, the Claims Service Provider requested copies of any correspondence received from the Complainant’s tenant to explain why they ceased paying rent.

The Complainant’s daughter responded to this information request on **6 April 2020**, in part, as follows:

“Please find attached a copy of his lease on [the insured premises]. My father asked me to confirm to you that he has received no government assistance and no correspondence from his tenant to explain why they have ceased paying rent. The last date on which rent was received was 6th March. [...]”

It appears that a telephone conversation took place between the Claims Service Provider and the Complainant on **2 April 2020**. An internal Claims Service Provider email dated **2 April 2020** which followed this conversation, states, in part, as follows:

“I understand that the policyholder has leased his premises to the tenant on a fixed term from 2014 to March 2019 (circa €10k per year). The tenant runs a tattoo business from the premises [...]. He tried to get in touch directly with the tenant prior to March 2019 to advise he wanted to increase the rent to €15k per year, but the tenant would not answer the phone. He asked the agents who look after the property to chase this up for him also, but it appears they got nowhere either, so things were left as was, and no new agreement was signed.

He has not been paid any rent for March, and the tenant will not answer his calls. When he went to discuss with the tenant, the place is closed up and there is a sign in the window saying they have closed. I have done a [social media] search of [the tattoo parlour], and they have closed from 18 March due to Covid-19. [...]”

In a Preliminary Report prepared by the Claims Service Provider dated **7 April 2020**, it is stated on page 3, as follows:

“4 Circumstances

4.1 *This claim relates to loss of rental income sustained by the Insured, which he has advised is due to the effect that Covid-19 is having on his tenant’s business, as they have closed the premises.*

4.2 *The Insured has advised that rental income is paid to him weekly by the tenant in advance, however, no payments have been received for the entire month of March 2020, and this has continued into April 2020. The Insured has also tried to call the tenant to discuss this with them, but the tenant has closed the premises due to the effect Covid-19 is having.*

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4.3 *We would however take this opportunity to advise insurers that, as the tenant is not answering or returning calls to the Insured, it is only the Insured's assumption at this stage that the tenant has closed the premises due to the effect of Covid-19 is having.*

4.4 *However, we can advise that we have completed a social media search of the tenant's business [...] and we note that they have announced that they are closing their business, which is located at the risk address, on a temporary basis, until such times that they have further information. This announcement was made on 18 March 2020.*

5 Cause

5.1 *The reported cause of the loss of rental income for the Insured is due to what he believes is the enforced closure of his tenant's business due to the Covid-19 pandemic, with the tenant now withholding rental payments which are due to the Insured. [...]."*

By letter dated **30 July 2020**, the Claims Service Provider wrote to the Complainant to advise that his claim was being declined as his policy did not respond to the circumstances of his claim.

In this respect, I note that the Complainant holds a **Property Owners' Insurance** policy with the Provider. In the Complainant's **Property Owners Insurance Schedule**, the period of insurance is stated as covering the period of **14 February 2020 to 13 February 2021**. In respect of loss of rent receivable, the following cover is identified on page 3 of the policy schedule:

"Section 2 – LOSS OF RENT RECEIVABLE

<i>Payable for a maximum indemnity period of 24 months</i>	<i>Loss of rent and auditors fees arising from an incident covered under an operative cover in Section 1"</i>	<i>€63000</i>
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I note that within the Complainant's policy schedule, it states that that the indemnity provided in respect of loss of rent receivable is loss of rent arising from an incident covered under an operative cover in section 1.

Section 1 of the Complainant's policy document sets out the '**Operative Covers**', beginning at page 12, under 11 headings. I summarise these as: fire, explosion, lightning, aircraft or aerial devices; earthquake; riot, civil commotion, strikers, locked out workers, labour disturbances or malicious persons; storm or flood; escape of water; water freezing; impact by any road vehicle or animal; accidental escape of water from any sprinkler installation; theft or attempted theft; subsidence, heave or landslip; and certain accidental damage.

In this respect, I note that disease or virus generally, and specifically Covid-19, does not form part of or come within the meaning of any of the Operative Covers under section 1.

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Section 2 of the policy document provides cover in respect of **loss of rent receivable** and states, at page 23, as follows:

“The Cover

The Insurer will cover the Insured against Consequential Loss arising from an Incident occurring during the Period of Insurance.”

In this respect, the term ‘Incident’ is defined on page 10 of the policy document, as follows:

“Incident

means Damage from a Defined Insured Event to Building(s) or property situate at the Premises and used by the Insured for the purpose of the Business.”

‘Damage’ is defined on page 8, as: *“physical loss, damage or destruction.”*

‘Defined Insured Event’ is defined on page 9, as:

“[...] fire, lightning, explosion, aircraft or other aerial devices or articles dropped therefrom, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious persons other than thieves, earthquake, storm, flood, escape of water from any tank, apparatus or pipe, water freezing in any tank, apparatus or pipe, or impact by any vehicle or animal as more fully detailed under Section 1 Property Damage, Operative Covers 1-7.”

Having considered the above policy provisions, it is my opinion that to trigger cover under section 2 of the Complainant’s policy there must be an ‘Incident’ during the period of **14 February 2020 to 13 February 2021**, being the period of insurance. This means that there must be damage (which means physical loss, damage or destruction) to the Complainant’s premises from a Defined Insured Event. As can be seen, the Complainant’s policy expressly identifies the events which come within the meaning of the term Defined Insured Event. Accordingly, to come within the cover provided by section 2, the damage to the Complainant’s premises must be caused by one of these specified events.

Having considered the cover provided under section 2 of the Complainant’s policy and the circumstances giving rise to the Complainant’s claim, it is my opinion that section 2 does not respond to, or provide cover in respect of, a claim where there is no physical loss, damage or destruction to the Complainant’s premises. It is also my opinion that section 2 does not respond or provide cover where the incident or event giving rise to the claim is a disease or virus such as Covid-19; the measures introduced by the Government in response to Covid-19; or the response of the Complainant’s tenant to the outbreak or spread of Covid-19 or their compliance with any public health measures.

Despite this, I note that a number of extensions to the cover provided under section 2 are also set out at the ‘Section 2 Extensions’ of the Complainant’s policy document.

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In the context of the present complaint, the policy document states, at page 27, as follows:

“Section 2 Extensions

Unless otherwise stated in the Schedule (or by Endorsement to the Policy), the following Section Extensions shall apply and are subject to all other terms, limits, conditions and exceptions of this Section and of the Policy, except where specifically varied by the terms of the Section Extension.

[...]

3 *Disease, Infestation and Defective Sanitation*

This Section shall extend to apply to Consequential Loss arising from the occurrence at the Premises of

- (a) murder, suicide, or food or drink poisoning;*
- (b) a notifiable human, infectious or contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) that is required by law to be reported to government authorities*
- (c) vermin or pests;*
- (d) an accident causing a defect in the drains or sanitary apparatus;*

which results in closure or causes restrictions on the use of the Premises by order of any person or authority holding the appropriate statutory power.

The maximum amount that will be paid by the Insurer under this Special Extension shall not exceed 10% of the total Sum Insured under this Section, or €60,000 whichever is the lesser, unless otherwise stated in the Schedule.”

While the term ‘occurrence’ has not been capitalised and italicised as it appears in the Section 2 Extensions insuring clause, I note that the term ‘Occurrence’ is defined at page 10 of the policy document, as follows:

“Occurrence

means any one event, or all events of a series consequent upon, or attributable to one source or original cause.”

For cover to be triggered under Extension 3(b), it is my opinion that there must be consequential loss arising from the occurrence, at the premises, of a notifiable human, infectious or contagious disease which results in the closure or causes restrictions on the use of the premises by order of any person or authority holding the appropriate statutory power. In this respect, I note it is not disputed that Covid-19 is a disease within the meaning of Extension 3(b).

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In the context of Extension 3(b), Extension 3 states that there must be an occurrence *at the Premises* of Covid-19. In addition to this, the occurrence of Covid-19 *at the Premises* must result in the closure of the premises or cause restrictions on the use *of the Premises*.

In determining the appropriate meaning of this *at the Premises/of the Premises* requirement, I note that the Complainant's policy document defines the term premises at page 11, as follows:

"Premises

means the Premises stated in the Schedule, or in any Endorsement(s), and used by the Insured for the purpose of the Business."

Leading on from this definition, I note that under the heading 'Details of your Property – Property 1' of the Complainant's policy schedule, the 'Risk Address' is identified as the property which is the subject of the Complainant's claim for loss of rent receivable.

Accordingly, it is my opinion that giving the words of Extension 3 their plain and ordinary meaning, reasonably interpreted, Extension 3(b) requires there to be an occurrence of Covid-19 actually and specifically at the Complainant's premises. Further to this, the occurrence of Covid-19 at the Complainant's premises must specifically result in the closure of the Complainant's premises or cause restrictions on the use of the Complainant's premises by a person or authority holding the appropriate statutory powers.

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 somewhat similar to Extension 3(d) of the Section 2 Extensions:

"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."

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In terms of whether there was an occurrence of Covid-19 at the Complainant's premises, I note that when submitting his claim for loss of rent receivable, during the claim assessment process and following the declination of his claim, the Complainant did not provide any evidence to suggest that there was an occurrence of Covid-19 at his premises nor has the Complainant provided evidence of any such occurrence as part of his complaint to this Office.

Further to this, I note in the Claims Service Provider's email of **2 April 2020**, it is indicated that the tenant's business closed on **18 March 2020**, but there is no evidence to suggest that this closure of the Complainant's premises was the result of an order by a person or authority holding the appropriate statutory power arising from the occurrence of Covid-19 at the premises. I also note, in his Complaint Form, the Complainant states "*I have received no rent since March 2020 as Government closed all businesses due to Covid 19.*" This would suggest that the loss of rent was not due to the closure/imposition of restrictions on the Complainant's premises arising from an occurrence of Covid-19 at the premises, but rather, due to Government restrictions being imposed on all businesses generally and not specifically the Complainant's premises or his tenant's business because of the specific occurrence of Covid-19 at this premises.

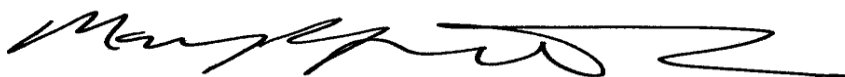
Although it appears likely that the Complainant's tenant closed their business (and this impacted the tenant's ability to pay rent) because of Covid-19, there is no evidence to suggest that this inability to pay rent was because of an occurrence of Covid-19 at the premises which resulted in the closure of, or imposition of restrictions on, the premises. Accordingly, in light of the cover under Extension 3 and the information provided in respect of the Complainant's claim, it is my opinion that the Provider was entitled to maintain the position that cover was not triggered under Extension 3(b) of the Section 2 Extensions.

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 for loss of rent receivable. 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

27 September 2021

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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.

