



<u>Decision Ref:</u>	2021-0375
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Service
<u>Conduct(s) complained of:</u>	Claim handling delays or issues Poor wording/ambiguity of policy Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a café restaurant, held a 'Business Complete Insurance' policy with the Provider.

The complaint concerns a claim for business interruption losses arising from the outbreak of coronavirus (COVID-19).

The Complainant Company's Case

The Complainant Company notified the Provider in or around **23 March 2021** of a claim for business interruption losses as a result of the temporary closure of its business on **15 March 2020** due to the outbreak of COVID-19.

Following its assessment, the Provider wrote to the Complainant Company on **25 March 2021**, to advise that it was declining its claim, as follows:

"We have carefully considered your insurance policy to assess whether it provides cover in circumstances where your business had to close to assist nationwide measures introduced by the Government to slow the spread of the COVID 19 pandemic. The business interruption section of the policy is normally triggered following physical damage to the premises or stock caused by one of the insured events listed in the policy.

There is also an extension against business interruption resulting from a case or cases of specifically named notifiable diseases (listed in the policy) at the premises or

caused by food or drink supplied from the premises or any organism likely to cause one of the named listed notifiable diseases being discovered at the premises.

We have determined for the reasons outlined in detail below that your policy does not provide cover in these circumstances and unfortunately, we must decline your claim as a result.

The relevant wording of the policy in so far as relates to your claim, is as follows:

1. Section 2 of the Policy provides cover for business interruption. "Business Interruption" is defined as:- "Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**."¹

2. The Policy specifies a number of additional extensions that apply to section 2 business interruption cover, one of which at clause H ("the clause") provides:-

"This extension provides cover against **business interruption** resulting from the following.

1. A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.
2. Any organism likely to cause a notifiable disease (as listed below) being discovered at the premises.
3. Murder or suicide at the premises.

Notifiable diseases

Acute encephalitis	Diphtheria	Measles	Smallpox
Acute poliomyelitis	Dysentery	Meningitis	Tetanus
Anthrax	Legionellosis	Mumps	Tuberculosis
Bubonic or pneumonic plague	Legionnaires' disease	Paratyphoid fever	Typhoid fever
Chickenpox	Leprosy	Rabies	Viral hepatitis
Cholera	Leptospirosis	Rubella	Whooping cough
Conjunctivitis	Malaria	Scarlet fever	Yellow fever

3. [The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other.

3.1. The definition of notifiable diseases covered by the extension does not include COVID-19. Accordingly, it cannot be said on any view that business interruption has resulted from any of the matters specified at 1, 2 or 3.

3.2. *The extended business interruption cover is specifically limited by reference to the insured property. In particular, the relevant sub clauses which relate to notifiable diseases require that the notifiable disease should be at the premises or be caused by food or drink supplied from the premises or result from an organism likely to cause a notifiable disease "being discovered at the premises". None of these events occurred and accordingly, it cannot be said on any view that business interruption has resulted from any of the matters specified at 1, 2 or 3.*

3.3. *It is clear that the agreement to indemnify in respect of the risks at 1, 2 or 3 is provided only where the business interruption loss has been caused by the matters specified at 1, 2 or 3. It is quite clear having regard, inter alia, to social distancing practices (including now the restrictions on more than 4 people gathering together outdoors) and the widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices and public concerns and not by the matters at 1, 2 or 3."*

Following this, a complaint was received by this Office on **7 April 2021** from the Complainant Company regarding the Provider's decision to decline its claim.

A complaint was subsequently recorded by the Provider on **15 April 2021**. On **20 April 2021**, the Provider wrote to the Complainant Company to advise that it was upholding its decision to decline the claim, as follows:

"Section 2 of the Policy provides cover in respect of loss of Gross profit with a sum insured of €35,000 for a 12 month indemnity period as outlined on your policy schedule. The Policy will only respond to claims presented for loss of Gross profit following damage caused to the property used in connection with the Insured's business by any of the perils covered under Section 1(a): Buildings, Trade Contents, Stock of the policy. Business interruption policy cover for loss of gross profit becomes operative upon a payment made or liability admitted under the property damage section of the policy. [...]

The Policy specifies a number of additional extensions that apply to Section 2 Business Interruption cover, one of which at clause H of the Policy "Human notifiable diseases, murder or suicide" [...]

[The Provider] have carefully considered your claim and do not consider that the claim falls within cover under the Policy. In particular, [the Provider] is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other:

1. Cover for loss of gross profit only applies following damage caused to the property used in connection with the Insured's business by any of the perils insured under Section 1(a) Buildings, Trade Contents, Stock of the policy. Business interruption cover

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for loss of gross profit becomes operative upon a payment made or liability admitted under Section 1(a) of the policy. Cover for loss of gross profit only applies following damage caused to the property used in connection with the Insured's business by any of the perils insured under Section 1(a) Buildings, Trade Contents, Stock of the policy. Business interruption cover for loss of gross profit becomes operative upon a payment made or liability admitted under Section 1(a) of the policy.

2. The definition of notifiable diseases covered by the extension does not include Covid-19. The definition of notifiable diseases covered by the extension does not include Covid-19.

3. The extended business interruption cover is specifically limited by reference to the insured property. In particular, the relevant sub clauses which relate to notifiable diseases require that the notifiable disease should be at the premises or be caused by food or drink supplied from the premises or result from an organism likely to cause a notifiable disease "being discovered at the premises". None of these events occurred and accordingly it cannot be said that business interruption has resulted from any of the matters covered by the Policy in response to the claim notified by you. [...]."

The Complainant Company considers that its claim for business interruption losses as result of the temporary closure of its business due to the outbreak of COVID-19 is covered by the terms and conditions of its business insurance policy. In this regard, the Complainant Company states, in its Complaint Form, as follows:

"my business has been closed due to the covid 19 pandemic. [The Provider] have stated they do not cover for Covid-19."

As a result, the Complainant Company seeks for the Provider to admit and pay its claim, as follows:

"I am seeking financial loss for the period we were closed."

The Provider's Case

The Provider says that as notified by the Complainant Company on **23 March 2021**, since **15 March 2020**, the business had not been able to operate as normal as a result of the COVID-19 pandemic. The Provider says business interruption is only covered under the policy in certain defined circumstances – none of which include closure or interruption as a result of COVID-19. In broad terms, the Provider says, there are several distinct reasons why the claim was declined. These are as follows:

1. The claim did not come within the terms of the business interruption cover as set out in Section 2 of the policy;
2. COVID-19 is not a *notifiable disease* for the purpose of the infectious diseases extension in Section 2 of the policy;

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3. The infectious diseases extension only covers business interruption arising from the presence of a disease on the premises or caused by food and drink from the premises; and
4. The losses suffered by the business were caused by reason of social distancing practices, Government directions and public concern – none of which are matters covered by the policy.

The Provider says that each of these reasons are expanded upon and set out in greater detail below.

(i) Business Interruption Cover

The Provider says that business interruption is defined in section 2 of the policy at page 36, as follows:

“Business interruption

Interruption of or interference with the business carried on by the Insured at the premises in consequence of damage to property used by the Insured at the premises for the purpose of the business.”

The Provider says that as is apparent from this definition, the Provider contends that cover is only provided in circumstances where the business is interrupted as a result of damage to the property. The Provider says this is repeated at page 39 under the heading *cover* where the policy provides:

*“The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under ‘Basis of settlement’ below, following **damage** caused to property used in connection with the Insured’s business at the **premises** by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy.”*

The Provider says it is relevant to note that the highlighting in bold in the above passage appears in the original policy wording. The Provider says the purpose of this was to emphasise and highlight in as clear a way as possible the fact that a business interruption claim can only be made as a result of damage to the premises and not in any other circumstance. It also emphasises that the highlighted words have specific definitions under the policy and must be considered in light of this.

It is quite clear, the Provider says, that the interruption to the business in this case arose, not as a result of damage to the premises, but rather as a result of both the suite of public health measures including social distancing measures introduced in mid-**March 2020** and other Governmental restrictions which prohibited the making of unnecessary journeys by the public.

In summary, the Provider says the policy only responds to claims for loss of gross profit arising from damage caused to the premises. The Provider submits that the Complainant Company's claim is manifestly not such a claim and it follows that the Provider was correct to decline the claim.

(ii) Covid-19 not a notifiable disease

The Provider says there is an extension to the cover provided in respect of business interruption in section 2 in the following terms:

"H Human notifiable diseases, murder or suicide

*This extension provides cover against **business interruption** resulting from the following:*

- *A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises**.*
- *Murder or suicide at the **premises**."*

The Provider says, again it is relevant to note that the bold highlighting is present in the original policy document – this emphasises the requirement that the disease or organism must actually be present on the premises. Importantly, the Provider says, this extension is confined to a specified and finite list of diseases – described as *notifiable diseases*. The Provider has set out the list of these diseases in its Complaint Response.

The Provider says it is quite clear that COVID-19 is not a notifiable disease for the purpose of this extension. Indeed, the Provider submits that it could not have been listed in circumstances where the disease was not in existence or, at the very least, was entirely unknown at the time when the policy was inception.

The Provider advises that it has obtained an expert report on this issue, which is dated **19 July 2020**. In the course of this report, the Provider says the author discusses the origins of COVID-19 and concludes that it is an entirely new disease. The Provider says the report goes on to specifically consider the question of whether it can properly be regarded as coming within a 'sub family' of any of the notifiable diseases listed in the infectious disease extension. In this regard, the Provider says the report identifies the relevant virus families that cause the listed notifiable diseases – none of which are coronaviruses. The Provider says the report points out that the viruses which give rise to the listed diseases are actually taxonomically distinct from SARS-CoV-2 and the report concludes that:

"Considering both the disease agent itself and the symptoms it causes, my view is that Covid-19 cannot reasonably be described as a subset of the diseases listed in Table 1."

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The Provider says that in the event that the Complainant Company does in fact assert that COVID-19 falls within the list of notifiable diseases set out in the policy, it will be necessary for it to be furnished with the information relied on in that regard, and to be afforded an opportunity to respond to it. The Provider says it is clear that COVID-19, a disease of very recent origin, is one that post-dates the inception of the policy and does not come within the list of notifiable diseases listed.

(iii) No notifiable disease on the premises

The Provider says that quite apart from the fact that COVID-19 is not a notifiable disease for the purpose of the policy, it is quite clear that the Complainant Company is not asserting that the closure was caused by the disease or the organism causing it, SARS-CoV-2, either being present on the premises, or present in food or drink supplied by the business. Rather, the closure arose as a result of the public health measures referred to above. Having regard to the very clear policy wording, the Provider says the closure of the Complainant Company's business on **15 March 2020** does not come within the terms of the extension.

(iv) Loss caused by other factors

The Provider says that even if an insured event occurred (which it says is obviously not the case), it would be necessary to consider what loss has been caused by that event. The Provider says that an insurance contract is a contract of indemnity, and it is only the loss that has actually been caused by the insured event that is covered by the insurance contract. Furthermore, the Provider says that it is only where the insured event is the proximate (that is, the dominant, effective, or operative) cause of the loss that an indemnity can be provided. The Provider submits this is a fundamental principle of insurance law.

The Provider says that when assessing the issue of causation, it is a well-established principle that the appropriate approach is to utilise a "but-for" test – in other words, it is necessary to consider the counterfactual of what would have happened "but-for" the insured event occurring. In certain circumstances, the Provider says a loss may be caused by more than one proximate and concurrent cause, only one of which is insured. The Provider submits that as confirmed in *Orient-Express Hotels Ltd v Assicurazioni Generali* [2010] Lloyd's Rep IR 531, where there are multiple concurrent independent proximate causes of the loss so that any of the causes of loss would, on their own, have caused the loss, then there is no indemnity available.

The Provider says that the losses sustained by the Complainant Company in this case would have been caused irrespective of whether the insured event occurred (that is, the "*business interruption resulting from ... a case or cases of any of the notifiable diseases (as listed below) at the premises, or caused by food or drink supplied from the premises*"). Even if there had been no business interruption arising from a case of disease at the premises or caused by food or drink supplied from the premises (and it is denied that this insured event has occurred), the Provider says the same losses would have occurred because all of the other aspects of the COVID-19 pandemic, and the Government response to it, would still have occurred.

Since **8 March 2020**, the Provider says the Government has taken significant public health measures, both through the giving of guidance and advice, and the enactment of legally binding restrictions (together, the “*Public Health Measures*”). The Provider says the adverse impact of the response of the Government, businesses and individuals, and the adverse impact of such response on economic activity and public confidence, was immense. The Provider says the combined effect of the COVID-19 pandemic, the Public Health Measures (other than the imposed closure) introduced by the Government, social distancing practices, the widespread public concern regarding the risk of infection, and the economic slowdown would have resulted in the Complainant Company earning no gross profit during the period, and/or making a loss during the period such that it would not have been economically viable for it to open.

The Provider’s Conclusion

The Provider says the explanation of the reasons for the declination as set out above is essentially the same as the reasons given to the Complainant Company in the letter dated **20 April 2021**. The Provider contends that the terms of the policy are abundantly clear. The Provider says whilst it is very much alive to the very difficult situation the Complainant Company, along with many other businesses, found itself in, it is clear that the policy is not responsive to a business interruption claim arising from the closure of the business by reason of the COVID-19 pandemic.

In terms of Extension H of the additional business interruption extensions, the Provider says it does not consider that COVID-19 constitutes a notifiable disease within the meaning of this extension. The Provider says an indemnity is provided only in respect of the notifiable diseases within the meaning of, and listed in, the policy. In this regard, the Provider says that COVID-19 is not such a disease and thus, there is no indemnity available under the policy.

The Provider says it is satisfied that the claim was assessed correctly in accordance with the policy terms and conditions, and that the Complainant Company’s claim does not fall to be covered under its policy. The Provider further says it believes that its decision to decline the Complainant Company’s claim to be fair and reasonable.

The Complaint for Adjudication

The complaint is that the Provider wrongfully 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**, 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 Company was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

A Preliminary Decision was issued to the parties on **1 October 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.

By email dated **16 March 2020**, the Provider wrote to a director of the Complainant Company in respect of the cover provided under the Complainant Company's policy, as follows:

"The policy operates for loss of profits subject to €15,000 limit in the event of the company being closed by Government order as a result of specified notifiable infectious disease.

Corona virus is not specifically noted as an identified notifiable disease and therefore there is no cover in place in respect of such closures under the policy."

The Provider emailed a Complainant Company's director again on **16 April 2020**, advising that:

"[The Provider] do not provide cover for loss of income or profits as a result of Pandemics and

As a result we do not provide indemnity in respect of Corona Virus."

I note that in an email to a Complainant Company's director on **5 February 2021**, the Provider advised that the position on cover had not changed. It was also acknowledged in this email that the Complainant Company wished to register a claim under its policy. In this respect, the email advised that the matter would be forwarded to the Provider's Claims Department.

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I note that the Provider's records indicate that a claim, in respect of business interruption losses arising from the outbreak of COVID-19, was registered by the Provider on **23 March 2021**, with a date of loss as **15 March 2020**. Following this, the Provider's Loss Adjusters prepared a Preliminary Report dated **25 March 2021**. The Provider wrote to the Complainant Company on **25 March 2021**, declining the claim. On **29 March 2021**, a telephone conversation took place between the Provider's Loss Adjuster and the Complainant Company's director which discussed, in part, the cover under the Complainant Company's policy.

It appears that following contact by the Complainant Company with this Office, a complaint was logged by the Provider on **15 April 2021** regarding the declinature of the Complainant Company's claim. The Provider issued a Final Response letter on **20 April 2021**, upholding its decision to decline the claim.

In this respect, I note that the Complainant Company held a 'Business Complete Insurance' policy with the Provider with a period of insurance from **4 November 2019** to **3 November 2020**.

The Complainant Company's policy schedule indicates that the following policy sections were amongst the 'Operative Sections' that applied in respect of its policy:

- "1. Property Damage*
 - (a) Buildings, Trade Contents, Stock*
 - (b) Money*
- 2. Business Interruption".*

The second and third pages of the policy schedule contain tables outlining the sums insured under the previously mentioned Operative Sections of the Complainant Company's policy. In respect of '**Section 2: Business Interruption**', the relevant table states, as follows:

Item	Cover Description	Indemnity Period	Sum Insured
1.	<i>Estimated gross profit</i>	<i>12 Months</i>	<i>€350,000</i>
Total:			<i>€350,000</i>

It appears that as part of its Complaint Response, the Provider has supplied two versions of its 'Business Complete Insurance' policy document: 'BCI PD 2018 04 V1.0' and 'BCI PD 2015 01 V1.0'. In terms of the policy wording set out below, I note that both policy documents contain identical wording.

Section 1(a), '**Buildings, Trade Contents, Stock**', of the '**Business Complete Insurance**' policy document states at page 14, as follows:

"Cover

*The **insured property** is covered against **damage** caused by the following perils, except as otherwise shown in the schedule."*

The perils insured against under Section 1(a) are set out beneath the above clause under 12 numbered sections. While I do not propose to set out each of these perils in detail, I note, in summary, that these perils cover fire, lightning and earthquake; aircraft and aerial devices falling from the sky; explosion; riot, civil commotion, labour disturbances; certain physical impacts to the premises; storm and flood; escape of water; accidental escape of water; theft; subsidence, ground heave or landslip; and other forms of physical and accidental damage. As can be seen from the passage cited above, to invoke the cover provided by Section 1(a), damage must be caused by one of the stated perils.

Section 2 of the policy deals with business interruption and, at page 39, provides the following cover:

*“The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under ‘Basis of settlement’ below, following **damage** caused to property used in connection with the Insured’s **business** at the **premises** by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy.*

Provided that the following conditions are met:

- 1. Payment is made or liability admitted for the **damage** under an insurance covering the interest of the Insured in the property, or payment would have been made or liability admitted for the **damage** but for the operation of a policy excess.*
- 2. The total liability under this section is restricted to:*
 - the total sum insured shown in the schedule in respect of any item listed in the schedule; or*
 - the sum insured remaining after deducting any amount the Company has already paid under this section during the same **period of insurance**, unless the Company shall have agreed to reinstate such sum insured;*

whichever is less.”

‘Business interruption’ is defined on page 36 as:

*“Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**.”*

‘Damage’ is defined at page 3 of the policy document as: *“Accidental loss, damage or destruction.”*

In my opinion therefore, for business interruption cover to become operative pursuant to Section 2 of the policy, there must be *damage* to property at the premises *caused* by any of the perils insured against under Section 1(a). I have considered each of the insured perils at Section 1(a) and the circumstances giving rise to the Complainant Company’s claim.

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Having done so, I am not satisfied that the occurrence of a disease such as COVID-19 comes within any of these perils. Accordingly, I am satisfied that the provider was entitled to adopt the position that the business interruption cover provided by Section 2 of the policy was not triggered in this instance.

However, the Complainant Company's policy also contains a number of additional extensions in respect of business interruption at the '**Additional extensions that apply to section 2: Business interruption**' section of the policy document, beginning at page 43. For these extensions to apply, the policy document states, on page 43, as follows:

"Additional extensions that apply to section 2: Business interruption

The insurance provided by the extensions in this section shall only be applicable where gross profit or gross revenue (or estimated gross profit or estimated gross revenue) are insured."

As can be seen from the business interruption table in the Complainant Company's policy schedule, estimated gross profit was indeed insured. Accordingly, I am satisfied that the additional extensions applicable to business interruption were operative on the Complainant Company's policy, during the relevant period.

In this respect, Extension H provides, at page 45, as follows:

"H Human notifiable diseases, murder or suicide

*This extension provides cover against **business interruption** resulting from the following:*

- *A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises**.*
- *Murder or suicide at the **premises**.*

Notifiable diseases

<i>Acute encephalitis</i>	<i>Diphtheria</i>	<i>Measles</i>	<i>Smallpox</i>
<i>Acute poliomyelitis</i>	<i>Dysentery</i>	<i>Meningitis</i>	<i>Tetanus</i>
<i>Anthrax</i>	<i>Legionellosis</i>	<i>Mumps</i>	<i>Tuberculosis</i>
<i>Bubonic or pneumonic plague</i>	<i>Legionnaires' disease</i>	<i>Paratyphoid fever</i>	<i>Typhoid fever</i>
<i>Chickenpox</i>	<i>Leprosy</i>	<i>Rabies</i>	<i>Viral hepatitis</i>
<i>Cholera</i>	<i>Leptospirosis</i>	<i>Rubella</i>	<i>Whooping cough</i>
<i>Conjunctivitis</i>	<i>Malaria</i>	<i>Scarlet fever</i>	<i>Yellow fever</i>

This extension does not cover:

- *any amount over €15,000 or the limit shown against this extension in the schedule.”*

In determining whether the Provider was entitled to decline cover under Extension H, the question which must be addressed, in light of the particular wording of Extension H, is whether COVID-19 constitutes a notifiable disease within the meaning of Extension H of the policy.

The manner in which Extension H is drafted suggests that the cover provided for business interruption resulting from a notifiable disease or an organism likely to cause a notifiable disease is limited to those diseases specifically identified and “listed” in the ‘Notifiable diseases’ table. In this respect, I note that the first and second bullet points of Extension H specifically refer to the notifiable diseases/a notifiable disease “*as listed below*”. As a result, I accept that the references to notifiable disease(s) are quite clearly confined to the context of the diseases listed in the table.

Further to this, there does not appear to be anything in the wording of Extension H or the way in which it is drafted to suggest that the cover provided by this extension is capable of extending, or was intended to extend, cover to business disruption resulting from a disease which is not listed in this table. The absence of a definition of the term ‘notifiable disease’ in Extension H and the policy document, and the absence of any particular criteria to be satisfied before a particular disease would be considered a notifiable disease, suggests that the cover provided by Extension H does not, and was not, intended to extend to diseases which are not listed in the table.

Equally, and arising from the preceding analysis, I don’t accept that the cover provided by Extension H is capable of providing, and was not intended to provide, cover for business interruption resulting from a variant or a subset of the one of the diseases listed in the table.

In considering the cover provided by Extension H, I note the following passages from the High Court decision of McDonald J. in ***Brushfield Limited v. Arachas Corporate Brokers Limited and AXA Insurance DAC*** [2021] IEHC 263, where a similar clause to the one at issue in the present complaint was considered:

“115. [T]he clause in the [Insurer’s] policy is restricted to the specific diseases listed. Business interruption which arises as a consequence of the occurrence of a disease which is not on that list will not give rise to cover under para. 1 of the MSDE [Murder, Suicide or Disease] clause. This is a crucially important aspect of the MSDE clause in the [Insurer’s] policy. In terms of its specificity, the MSDE clause is different to a number of disease clauses to be found in other policies available on the Irish market at the time this policy was put in place in April 2019. [...]

118. [...] Critically, neither COVID-19 nor any variant thereof is included in the list of specified diseases contained in para. 1 of the MSDE clause. In those circumstances, it seems to me to follow that [...] para. 1 of the MSDE clause does not provide cover for business interruption losses caused by an occurrence of COVID-19 even where that occurs on the hotel premises or within a 25-mile radius of it. It cannot be disputed that the cover available under the first paragraph of the MSDE clause is limited to business interruption which arises as a consequence of the occurrence of one of the specific diseases expressly listed in the clause. In circumstances where COVID-19 is not listed, it must follow that there is no cover for business interruption losses which are attributable to cases of COVID-19 per se whether or not they manifested themselves either on the premises or within the relevant 25-mile radius.”

The Provider has supplied a report dated **19 July 2020** from an Honorary Professor working in a Department of Infection and Immunity at an English university. The views expressed in this report were that COVID-19 “*is a new disease of humans*” and “*cannot reasonably be described as a subset of the diseases listed in Table 1.*” I note that the ‘Table 1’ referred to in this report contains the same list of diseases as the ‘Notifiable diseases’ table in Extension H. Further to this, I note that the Complainant Company has not provided any expert evidence to contradict the conclusions of this report. Consequently, there is no evidence to suggest that COVID-19 constitutes one of the diseases listed in the ‘Notifiable diseases’ table.

Accordingly, I am satisfied that, on a reasonable interpretation of Extension H, cover is provided only in respect of the notifiable diseases listed in the ‘Notifiable diseases’ table. It is my opinion, therefore, that to trigger the cover provided by Extension H, business interruption must result from one of the notifiable diseases listed in this table. As COVID-19 is not listed in the ‘Notifiable diseases’ table, I am satisfied that the Provider was entitled to form the opinion that Extension H does not provide cover for business interruption resulting from COVID-19.

While I appreciate that the Complainant Company is likely to have suffered significant disruption to its business as a result of COVID-19 and that this decision will come as a disappointment, I am satisfied that the Provider was entitled to decline the Complainant Company’s claim for business interruption losses.

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

22 October 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.