An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0376
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is a landlord renting his premises (which operates as a pub) for a weekly rent of €400 (€20,800 yearly). He held a property owner's insurance policy with the Provider, in respect of the policy period from 30 July 2019 to 29 July 2020.

The Complainant's Case

Following discussions with the Licensed Vintners Association and the Vintners Federation of Ireland, the Government, arising from the outbreak of coronavirus (COVID-19) and as part of measures introduced to curb the spread of COVID-19, called on all public houses and bars in the Republic of Ireland to temporarily close from 15 March 2020.

The Complainant's Representative notified a claim to the Provider on **31 March 2020** for the loss of rental income because his tenant, which trades as a public house, was unable to pay the Complainant the rent falling due, owing to the tenant's temporary closure arising from the outbreak of COVID-19.

In making such a claim, the Complainant relied upon the following wording of Section 2, 'Rental Income', at pg. 21 of the applicable Property Owners Insurance Policy Document:

> ***"Murder Suicide or Disease***
>
> *The **Underwriters** shall indemnify **You** under this section in respect of **Damage** resulting from interruption of or interference with the **Business** during the **Indemnity Period** following:*

a. *any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **Premises** or within a 25 miles radius of it …*

*The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the **Business** shall be affected in consequence of the **Damage**".*

Following its assessment, the Provider-appointed Loss Adjuster advised the Complainant's Representative by letter dated **7 May 2020** that it was declining indemnity, as follows:

"[The Complainant's] *policy does not provide cover in this instance as the loss they are claiming is not the result of a specific occurrence or outbreak of COVID-19.*

For [the Complainant's] *policy to respond, the interruption/interference with the business must have been caused by a specific occurrence of the disease at the premises or within a 25 mile radius, which does not appear to be the case here …*

… loss due to reduced economic activity or closure of the insured's premises, whether voluntarily or by order of the Government, as a result of the wider impact of COVID-19 is not a loss that is covered by this policy …

… [the Complainant] *is claiming for loss of rent in circumstances where a tenant has unilaterally decided not to pay rent, notwithstanding that the tenant remains contractually obliged to do so; the policy is not intended to cover losses of that nature".*

The Complainant's Representative emailed a complaint to the Provider on 27 May 2020 regarding its claim decision, as follows:

"It is my view that the decision of [the Provider] *to decline cover is wrong as my insurance policy provides cover for my rental income and the policy conditions include cover for human contagious disease in the premises or within a 25 miles radius of it, which has occurred in this case due to the Covid-19 outbreak"*.

Following its review, the Provider wrote to the Complainant's Representative on 5 August 2020 confirming that it was standing over its decision to decline indemnity.

The Complainant sets out his complaint in the Complaint Form he completed, as follows:

"I own a property…trading as [a public house]. *On 15/3/2020 the pub was closed as a result of a Government direction due to Covid-19 and the pub remains closed to date. My insurance policy provides cover for loss of rental income due to a pandemic within a 25 mile radius of my pub. The pub is closed as a direct result of the Covid-19 pandemic and the insurer is refusing cover in this case. Covid-19 has affected* [County] *and the local hospital* [redacted] *is approx. 11 kilometres (approx. 7 miles) from the pub property where there were numerous cases of Covid-19".*

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As a result, the Complainant seeks from the Provider *"payment of financial loss of €400 per week due to the loss of rental income due to Covid-19 for the closed period"*.

The Provider's Case

The Provider says that the Complainant, who holds a property owners insurance policy, submitted a claim on 31 March 2020, by way of his Representative, for the loss of rental income as his tenant, which trades as a public house, was unable to pay the Complainant rent, due to the tenant's temporary closure arising from the outbreak of COVID-19.

The Provider says that as part of its assessment, its Loss Adjuster contacted the Complainant's Representative on 15 April 2020 seeking further information. The Representative furnished the Complainant's responses on 21 April 2020, which advised that *"Pub closed as a result of Government restrictions on social distancing guidance in relation to Covid-19"* and that there was no *"specific case of Covid-19 – Closure due to Government restrictions"*.

The Provider says that following its assessment, its Loss Adjuster wrote to the Complainant's Representative on 7 May 2020 setting out the reasons why it did not consider there to be cover for the claim, under the terms and conditions of the property owner's insurance policy, as follows:

> *"Unfortunately* [the Complainant's] *policy does not provide cover in this instance as the loss they are claiming is not the result of a specific occurrence or outbreak of COVID-19.*
>
> *As you will be aware, our policy terms exclude cover for disease and epidemics generally. The policy does provide a limited degree of cover in respect of local occurrences or outbreaks of disease. However, the fact that an outbreak may have been reported within a 25 mile radius of* [the Complainant's] *premises does not automatically trigger cover. For* [the Complainant's] *policy to respond, the interruption/interference with the business must have been caused by a specific occurrence of the disease at the premises or within a 25 mile radius, which does not appear to be the case here.*
>
> *We should explain that loss due to reduced economic activity or closure of the insured's premises, whether voluntarily or by order of the Government, as a result of the wider impact of COVID-19 is not a loss that is covered by this policy.*
>
> *In any event, we also understand that* [the Complainant] *is claiming for loss of rent in circumstances where a tenant has unilaterally decided not to pay rent, notwithstanding that the tenant remains contractually obliged to do so; the policy is not intended to cover losses of that nature".*

The Provider says that the Complainant's Representative emailed on 27 May 2020 to make a complaint about the claim decision.

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The Provider says that following its review, it issued a final response letter to the Complainant's Representative on 5 August 2020 detailing how the rental losses he incurred fell outside the scope of policy cover, as follows:

> *"I understand that* [the Complainant]*…(the* ***Insured)*** *is the freeholder of…the* ***Insured Property*** *and that the Insured Property operates as a public house …*
>
> *On 31 March 2020,* [the Provider was] *notified a claim under the Policy for losses sustained as a result of COVID-19, following closure of the Insured Property by the occupiers who also stopped paying rent to the Insured. Following a request by* [the Loss Adjuster] *acting on behalf of* [the Provider]*, for additional information on 15 April 2020,* [the Complainant] *provided the Insured's responses on 21 April 2020 which advised "Pub closed as a result of Government restrictions on social distancing guidance in relation to Covid-19" and that there was no "specific case of Covid-19 - Closure due to Government restrictions".*
>
> [The Loss Adjuster] *provided a response…on 7 May 2020 which stated "the insured's policy does not provide cover in this instance as the loss they are claiming is not the result of a specific occurrence or outbreak of COVID-19".* [The Loss Adjuster] *explained that "For the insured's policy to respond, the interruption/interference with the business must have been caused by a specific occurrence of the disease at the premises or within a 25 mile radius, which does not appear to be the case here" and that "loss due to reduced economic activity or closure of the insured's premises, whether voluntarily or by order of the Government, as a result of the wider impact of COVID-19 is not a loss that is covered by this policy".* [The Loss Adjuster] *further explained that "the insured is claiming for loss of rent in circumstances where a tenant has unilaterally decided not to pay rent, notwithstanding that the tenant remains contractually obliged to do so; the policy is not intended to cover losses of that nature".*
>
> ***The Complaint***
>
> [The Provider] *received the complaint sent on behalf of the Insured on 10 June 2020. The basis of the complaint is that it is considered that the Insured's claim for loss of rental income, due to the impact of COVID-19, should be covered under the Policy. The Insured explained that "the decision of the insurers to decline cover is wrong as my insurance policy provides cover for my rental income and the policy conditions include cover for human contagious disease in the premises or within a 25 mile radius of it, which has occurred in this case due to the Covid-19 outbreak".*
>
> ***The Policy***
>
> *Having myself reviewed the Policy wording in light of the information which you have provided, I have noted the following relevant terms and conditions.*

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Certificate Exclusions

Contamination and Pollution Exclusion

1. *This Certificate shall not cover any liability, loss or Damage due to contamination, soot, deposit, impairment with dust, chemical precipitation, poisoning, epidemic and disease including but not limited to foot and mouth disease, pollution, adulteration or impurification or due to any limitation or prevention of the use of objects because of hazards to health. (underlining added)*

It is clear from this general exclusion that, as epidemic and disease is excluded, the Policy does not respond to any loss or damage due to a pandemic (an outbreak of a disease which equates to an epidemic and occurs over a wide geographic area and affects an exceptionally high proportion of the population) such as COVID-19.

There is limited cover that is then brought back into the Policy with the following clause (which I have redacted to include only the most pertinent sections).

Section 2** - **Rental Income

Murder Suicide or Disease

The Underwriters shall indemnify You under this section in respect of Damage resulting from interruption of or interference with the Business during the Indemnity Period following:

a) *any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the Premises or within a 25 miles radius of it*

The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the Business shall be affected in consequence of the Damage. (underlining added)

*There is no dispute that COVID-19 constitutes a human infectious disease under the Policy. However, in order for the cover to operate under the Policy, the Murder Suicide or Disease clause would require losses to follow and be in consequence of i.e. as a **direct** result of an occurrence of COVID-19. The Insured would therefore need to demonstrate that there had been a specific case of COVID-19 at the Insured Property or within a 25 mile radius, which **directly** led to the claimed losses.*

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Please note that the Policy does not respond to losses caused by governmental restrictions or orders requiring businesses to close and/or other steps taken as a precautionary measure to limit the spread of the virus. The closure of the Insured Property is in response to such government restrictions and this does not trigger cover under the Policy. Nor is the Policy a form of rent guarantee cover in circumstances where the occupiers of the Insured Property have not paid the rent due (notwithstanding the closure of the Insured Property) and the Insured has rights of recourse against the occupiers to recover the rent.

As the Insured has been unable to demonstrate how any specific occurrences of COVID-19, either at the Insured Property or within a 25 mile radius have directly led to losses, the conditions of the Murder Suicide or Disease clause have not been satisfied …

In the circumstances, I have not been persuaded that there is cover in force for this claim or that [the Provider] *has acted unreasonably in the application of the Policy terms and conditions".*

The Provider says that following both the UK Supreme Court decision of 15 January 2021 in *The Financial Conduct Authority v. Arch Insurance (UK) Ltd and others* ('the FCA Test Case') and the Irish High Court decision of 5 February 2021 on the scope of COVID-19-related business interruption in *Hyper Trust Ltd v. FBD Insurance plc* ('the FBD Test Case'), that the Provider reconsidered all claims affected by the test case.

Following its reconsideration, the Provider says that its decision to decline the Complainant's claim has not changed, though as it adjusted its position as to why it was declining the claim, the Provider wrote to the Complainant in **February 2021** to advise, as follows:

"We write further to prior correspondence in relation to both the UK court proceedings commenced by the UK Financial Conduct Authority (FCA) against certain insurers in respect of certain business interruption policies (FCA Test Case) and proceedings taken against FBD Insurance in the Irish High Court (FBD Proceedings).

As you may be aware, the UK Supreme Court handed down its judgment in the FCA Test Case on 15 January 2021 which means that the FCA Test Case has concluded. The Irish High Court also delivered its judgment in the FBD Proceedings on 5 February 2020. We have now considered the impact of the FCA Test Case and FBD Proceedings on your claim and following careful consideration of both judgments and your claim, unfortunately we are writing to advise that your claim as presented is not covered by your Policy …

The Outcome of the Test Case and FBD Proceedings

As set out in earlier letters to you, the purpose of the FCA Test Case was to resolve certain key contractual uncertainties and 'causation' issues in relation to certain business interruption policies.

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However, the FCA made clear at the outset that the FCA Test Case would not consider additional causation issues specific to loss of rent and similar claims under a property owners policy (for example, whether the non-payment of rent by a tenant due to the government shutdown triggers cover under the policy). Equally, the FBD Proceedings did not relate to or consider the cover offered by property owner policies.

The UK Supreme Court held that in principle the Notifiable Disease clauses at issue in the FCA Test Case provide cover for business interruption losses as a result of the COVID-19 pandemic (and the government and public response to it). However, it remains for each individual policyholder to establish that its claim falls within the specific wording of its policy. We have carefully reviewed and considered the UK Supreme Court judgment and have concluded that the judgment does not impact the overall analysis of our property owner policies.

Cover under your Policy

Your policy is not a rent guarantee policy of insurance. Although it contains a Notifiable Disease Extension that is substantively the same as certain of the wordings considered in the FCA Test Case, your Policy provides cover for loss of rent (as defined in the Policy) only where rent is no longer payable under the terms of the lease as a result of an insured peril (e. g. prevention of access to the premises or an occurrence of a Notifiable Disease as a specified in the Policy.

This is on the following basis:

- *Your policy provides an indemnity in circumstances where the "Gross Rentals" falls below the "Standard Gross Rentals".*
- *"Gross Rentals" are defined as "the money paid or payable to you…" by the tenants.*
- *"Standard Gross Rentals" are defined as the "Gross Rentals" (being the money paid or payable to you) during the period in the twelve months prior to the loss.*

In other words, for there to be an insured loss the "Gross Rentals" must fall below "Standard Gross Rentals" as a result of an event covered under the Policy.

As "Gross Rentals" include both money paid and payable, any shortfall between "Gross Rentals" and "Standard Gross Rentals" is limited to rent that would have been due but is not now due under the terms of the lease as a result of an event insured under the Policy. There is no insured loss as a result of the non-payment of rent that remains due under the terms of the lease in any circumstances, not only in relation to the Notifiable Disease extension.

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> *It is not sufficient for cover under your Policy simply to show that your tenant(s) have not paid the rent in circumstances where the rent is payable. You have not provided any evidence that the various government advice, restrictions or regulations arising out of the COVID-19 pandemic have the effect that rent ceased to be payable by your tenant to you and the recent judgments in the FCA Test Case and FBD Proceedings do not alter this policy requirement. In the absence of such evidence, unfortunately your Policy does not respond to your claim ….*"

The Provider says that as a result, it wrote to the FSPO on 6 April 2021 to set out its revised position in relation to the Complainant's claim. In that regard, the Provider says that the Complainant's policy does not cover non-payment of rent by a tenant which remains obliged to discharge the rent payable under the applicable lease agreement.

The Provider says that following the Supreme Court decision in the FCA Test Case in the UK and the FBD decision in Ireland, it has re-examined all claims received, including claims declined, and that it has adjusted its position in light of those decisions. This has resulted in the Provider accepting that cover applies under certain types of business interruption policies, in respect of which it had previously declined claims. However, the Provider says that this is not the case for the Complainant's policy. Those decisions did not affect the principal basis for declining this claim, which is that the Complainant's policy does not cover the non-payment of rent as a result of an infectious disease, when that rent remains payable to the Complainant under the lease.

The Provider notes the **Section 2, 'Rental Income'**, of the Complainant's Property Owner's Insurance Policy Document provides loss of rental cover to an insured against certain specified insured risks. The Provider says that typically, policyholders are concerned to protect themselves against reduction in rental oncome as a result of damage to the insured property. As a result, the Provider says that the insured risk in this regard under the policy is, at pg. 20 of the policy document, *"**Damage** to the **Property Insured** by an **Insured Event** under Section 1"*. However, like all insurance policies, this cover is subject to the terms, conditions, endorsements and exclusions set out in the policy document.

The Provider notes that **Section 2, 'Rental Income'**, at pg. 21 of the Policy Document also provides cover for:

> *"… interruption of or interference with the **Business** during the **Indemnity Period** following:*
>
> *a. any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **Premises** or within a 25 miles radius of it".*

The Provider says that the policy terms make clear that it is not sufficient for a policyholder to demonstrate that an insured risk has occurred, but that they must also demonstrate that an insured loss has been suffered.

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The Provider notes that Section 2, 'Rental Income', at pg. 20 of the Policy Document states that:

> *"The insurance is limited to loss due to:*
>
> *i. loss of **Gross Rentals***
>
> *ii. increase in cost of working*
>
> *and the amount payable as indemnity thereunder shall be;*
>
> *i. the amount by which the **Gross Rentals** during the **Indemnity Period** shall in consequence of the **Damage** fall short of the **Standard Gross Rentals**".*

The Provider says that in summary:

- The Complainant's policy provides an indemnity where the *"Gross Rentals"* fall below the *"Standard Gross Rentals"*.
- *"Gross Rentals"* are defined as *"the money paid or payable"* to the policyholder by the tenant.
- The *"Standard Gross Rentals"* are defined as the *"Gross Rentals"* (being the money paid or payable to the policyholder) in the twelve months prior to the loss.

The Provider says that in other words, for there to be an insured loss, the *"Gross Rentals"* must fall below *"Standard Gross Rentals"* as a result of an event covered under the Policy. As *"Gross Rentals"* captures money paid or payable, any shortfall between *"Gross Rentals"* and *"Standard Gross Rentals"* is limited to rent that would have been due but which is no longer due under the terms of lease, as a result of an event insured under the policy. In this case, the Provider says that there is no insured loss under the policy as a result of the non-payment of rent which remains due and payable by the tenant to the Complainant under the terms of the lease (not only in relation to the Notifiable Disease extension but in respect of all covered events).

The Provider concludes that the Complainant is in the unfortunate position of being unable to collect the contracted rent from the tenant, which it says appears to be due to the impact on the Complainant's tenant, of the Government directions in response to the COVID-19 pandemic. The Provider says, however, that such losses are not covered by the terms and conditions of the Complainant's policy. The Provider says that the cover offered by the Complainant's policy is clearly not triggered if a tenant remains obliged to discharge the rent due and owing under the terms of the lease, which it is satisfied is the case in the present matter.

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The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined the Complainant's claim in March 2020, in respect of a loss of rent received, as a result of his tenant's temporary closure, arising from the outbreak of coronavirus (COVID-19).

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant 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. 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, who held a property owner's insurance policy with the Provider, submitted a claim on 31 March 2020 for the loss of rental income because his tenant, which trades as a public house, was unable to pay the Complainant the rent falling due, because of the tenant's temporary closure arising from the outbreak of COVID-19.

In making his claim for loss of rental income, the Complainant relies upon the following wording of **Section 2, 'Rental Income'**, at pg. 21 of the applicable Property Owner's Insurance Policy Document:

> ***"Murder Suicide or Disease***
>
> *The **Underwriters** shall indemnify **You** under this section in respect of **Damage** resulting from interruption of or interference with the **Business** during the **Indemnity Period** following:*

/Cont'd…

a. *any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **Premises** or within a 25 miles radius of it …*

*The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the **Business** shall be affected in consequence of the **Damage**".*

It must be noted that the Complainant's property owner's insurance policy, like all insurance policies, does not provide cover for every eventuality; rather the cover is subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

I note that the '**Certificate Definitions'** section of the Policy Document defines *"**Damage**"* at pg. 34 as:

*"**Damage(d)***
Accidental physical loss, damage or destruction".

The Complainant's tenant was unable to open and trade as a public house, as a result of a Government direction that all public houses and bars in the Republic of Ireland temporarily close from 15 March 2020 as part of the government measures introduced to curb the spread of COVID-19. The question arises as to whether the Complainant's ensuing loss of rental income, when his tenant was unable to pay him the rent due, can be said to be a loss of rental income arising from accidental physical loss, damage or destruction, as those policy terms are ordinarily used and understood. I am satisfied that the answer to such a question is "no".

More particularly, I note that **Section 2, 'Rental Income'**, at pg. 20 of the Policy Document provides that:

"The insurance is limited to loss due to:

*i. loss of **Gross Rentals***

ii. increase in cost of working

and the amount payable as indemnity thereunder shall be;

*iii. the amount by which the **Gross Rentals** during the **Indemnity Period** shall in consequence of the **Damage** fall short of the **Standard Gross Rentals**".*

The '**Certificate Definitions'** section of the Policy Document provides the following relevant definitions at pgs. 35 – 36:

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*"**Gross Rentals***
The money paid or payable to You for tenancies and associated income derived from the letting of the Premises …

Standard Gross Rentals
The Gross Rentals during that period in the twelve months immediately before the date of the Damage which corresponds with the Indemnity Period …".

As a result, I am satisfied that for there to be an insured loss of rental income, the "Gross Rentals" must fall below the "Standard Gross Rentals" as a result of an event covered under the Policy. In that regard, I accept the Provider's position that because *"Gross Rentals"* captures money paid or payable, any shortfall between *"Gross Rentals"* and *"Standard Gross Rentals"* is limited, in the present matter, to rent that would have been due but which is no longer due, under the terms of the lease, as a result of an event insured under the policy.

I note that the Provider has therefore declined indemnity on the basis that the Complainant's tenant remains legally obliged to discharge the rent due and owing to the Complainant, under the terms of the lease.

The Complainant has supplied this Office (and the Provider) with a copy of the lease agreement between the Complainant, as the landlord, and his public house tenant. The Complainant specifically refers to Condition 4(b) of the 'General Conditions' section at pg. 18 of the lease, as follows:

> *"b) In the case of the demised premises or any part thereof shall at any time during the term of this lease be destroyed or damaged by any of the insured risks so as to render the demised premised unfit for occupation, use and access, and the Policy or Policies or Insurance shall not have been vitiated or payment of the policy monies refused in whole or in apart in consequence to some act or default by the Tenant's servants, agents, licensees or invitees, the rent hereby reserved or a fair proportion thereof according to the nature and extent of the damage sustained shall be suspended until the demised premises shall be again rendered fit for occupation, use and access"*.

I note that in his email to this Office on 15 April 2021, that the Complainant submits, as follows:

> *"In this case, Condition 4(b) of the lease does not refer to 'property' but rather refers to the demised 'premises' which is a Licenced Premises. Therefore, the impact of the Covid-19 regulations has damaged the licenced premises by restricting the use of the licenced premises and rendering the premises unfit for use as a pub.*
>
> [The Provider] *states…that there is no definition of 'damage' in the lease. However,* [the Provider] *is not correct in stating that Condition 4(b) was intended to cover 'physical damage to the leased property'. That is not stated in the Lease.*

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> *Non-physical damage and the impact on the business in restricting the use of the Licensed Premises as a result of the Covid-19 regulations is a fact in this case.*
>
> *The premises, being a licenced premises, is damaged by the insured risk as a result of the Covid-19 regulations, so as to render the pub premises unfit for occupation, use and access. Furthermore, Condition 4(b) provides that the rent … shall be suspended until the demised premises shall be again rendered fit for occupation, use and access"*.

I do not accept the Complainant's contention that the wording of Condition 4(b) of the lease exempted the tenant from paying rent when the tenant was unable to open and trade as a public house in 2020, as result of a Government direction that all public houses and bars in the Republic of Ireland temporarily close from 15 March 2020, as part of the Government measures introduced to curb the spread of COVID-19.

Neither do I accept that the Government direction that all public houses and bars in the Republic of Ireland temporarily close from 15 March 2020, constitutes damage to the premises or renders the premises unfit for use as a pub, as the Complainant appears to suggest.

Whether or not it is reasonable to infer that the phrase *"in the case of the…premises or any part thereof shall…be destroyed or damaged"* in Condition 4(b), indicates that there must be some physical damage to the premises, or part of the premises, I am satisfied that the lease condition clearly refers to the premises being rendered unfit for the tenant to occupy, use or access, and in the particular circumstances, I don't accept that this was the position.

In this case, the tenant was prevented from opening and trading as a licenced premises due to a Government restriction introduced as a response to a serious public health concern, and not because the premises was unfit for occupation, use or access. The premises itself, was capable of operating as a licenced premises once permitted to do so when the Government eased its restrictions in that regard.

For completeness, I note in its letter to this Office dated 30 April 2021, the Provider submits, as follows:

> *"In essence, the Complainant's…submission* [is] *that the imposition of restrictions on the use of the insured premises constitutes 'damage' within the meaning of the lease. Such a construction of the lease is untenable … no definition of 'damage' is provided in the lease but it is clear that it is intended to refer to physical harm or destruction to the premises. No such damage has occurred in the Complainant's case.*
>
> *… the recent Irish High Court decision* [*Oyster Shuckers Limited t/a Klaw v. Architecture Manufacture Support (EU) Limited & Another* [2020] IEHC 527, para. 83] *clearly held that, as a matter of law, an inability to trade due to the COVID-19 pandemic did not mean that leased premises could be regarded as damaged or destroyed, nor could they be considered unfit for occupation or use, as to hold otherwise would do violence to the actual meaning of the words of the clause.*

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In a similar vein, two recent decision of the English High Court (which are persuasive authority before the Irish Courts) also reached similar conclusions confirming that:

(i) *"rent cesser" provisions in a lease which apply only in the case of physical damage are not engaged by a legal obligation to suspend trading and therefore rent continues to be payable under the lease (as is the case in the Complainant's complaint)* [*Commerz Real Investmentgesellschaft mbh v. TFS Stores Ltd* [2021] EWHC 863 (Ch)]*, and*

(ii) *a landlord has not lost rent (so as to be able to claim it under an insurance policy) unless the tenant is lawfully able to withhold rent and a tenant's ability to lawfully not pay rent depends upon the precise terms of the applicable "rent cesser" clause in the tenant's lease* [*BNY Mellon International Ltd v. Cine-UK Ltd* [2021] EWHC 1013 (QB)]*.*

Both decisions also recognised that tenants have the ability to insure their own businesses and turnover under their own business interruption policies to ensure that they are in a position to meet their own contractual obligations.

In the present case, it is clear that the insured premises remain fit for occupation, use and access as pub. The fact that the Government has imposed restrictions (as it is lawfully entitled to do) on the use of the premises during a public health emergency cannot, on any reasonable construction, constitute "damage".

The Government is entitled to pass legislation at any time which increase or ease the ordinary trading restrictions that apply to licensed premises. For example, the Government could extend or limit opening houses for licensed premises. It would be fanciful for an insured to argue that a reduction in opening hours would mean that the insured premises are no longer fit for occupation, use of access such that his tenant was entitled to pay a reduced rent.

The Complainant notes that the COVID-19 regulations have impacted on the business operated from the leased premises and we are sympathetic to the difficulties faced by the Complainant and the many others in similar situations. In a recent High Court judgment as part of the ongoing litigation by certain policyholders against FBD Insurance plc, Judge McDonald noted that:

> *"It would have been a straightforward matter for the policy to use the word "business" in defining the perils insured … but the policy does not do that. Instead, in the case of these extensions, the policy draws a distinction between the impact on the business, on the one hand, and the perils covered under the policy, on the other hand, each of which is defined by reference to the premises"* [*Hyper Trust Ltd t/a The Leopardstown Inn v FBD Insurance plc* [2020] IEHC 279, at para. 22]

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Similarly, the insurance purchased by the Complainant does not, and was not intended to, provide cover in respect of the business operating from the insured premises. Rather, it provides cover (in accordance with the Policy's terms and conditions) in respect of the insured property and, in certain circumstances, the rental income derived from leasing the insured property where the tenant is no longer obliged under the terms of the applicable lease to discharge the rent payable.

The Complainant remains lawfully entitled to collect the contracted rent from the tenant. However, the tenant may no longer be in a position to pay, its business having been impacted due to the impact of the government directions in response to the COVID-19 pandemic. Such credit risks are not covered by the Policy for the reasons set out in this and previous submissions. The cover offered through the Policy is clearly not triggered where a tenant remains obliged to discharge the rent due and owing under the terms of the lease".

I am of the opinion, given the evidence made available by the parties, that the Provider was entitled to decline the Complainant's claim for loss of rental income and that the Provider did so, in strict accordance with the policy terms and conditions. I accept that the rent, in respect of which the Complainant seeks to claim, appears to remain due and owing to him from the tenant and in those circumstances, the rent in question does not fall to be recovered by him, under his policy with the Provider.

Accordingly, taking account of the evidence made available to this Office, I am satisfied that there is no reasonable basis upon which it would be appropriate to uphold this complaint.

Conclusion

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

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

MARYROSE MCGOVERN
Deputy Financial Services and Pensions Ombudsman

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—

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(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.