



<u>Decision Ref:</u>	2021-0432
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Professional Indemnity
<u>Conduct(s) complained of:</u>	Rejection of claim Failure to process instructions in a timely manner
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading as a public house, holds a '**Material Damage & Business Interruption**' insurance policy with the Provider. This complaint concerns a declined business interruption claim and the policy period in which this complaint falls, is from **31 January 2020** to **30 January 2021**.

The Complainant's Case

The Complainant says he notified the Provider in **March 2020** of a business interruption claim as a result of the temporary closure of his public house from **15 March 2020**, due to measures imposed by the Government to curb the spread of the coronavirus (COVID-19).

In making such a claim, the Complainant relies upon Section F, 'Business Interruption', of the applicable **Policy Wording**, which states at pgs. 59 - 60, as follows:

" ... INFECTIOUS DISEASES AND OTHER CLOSURE

The insurance by this Section is extended to include loss directly resulting from interruption of or interference with the Business carried on by You at the Premises in consequence of:

(a) Infectious Disease manifested by any person whilst at the Premises;

(b) an outbreak of an Infectious Disease within 25 miles of the Premises ...

Special Provisions

(a) Infectious Disease means illness sustained by any person resulting from any of the following human infectious or human contagious diseases

<i>Acute Encephalitis</i>	<i>Acute Poliomyelitis</i>
<i>Anthrax</i>	<i>Chicken Pox</i>
<i>Cholera</i>	<i>Diphtheria</i>
<i>Dysentery</i>	<i>Legionellosis</i>
<i>Legionnaires Disease</i>	<i>Leprosy</i>
<i>Leptospirosis</i>	<i>Malaria</i>
<i>Measles</i>	<i>Meningococcal Infection</i>
<i>Mumps</i>	<i>Ophthalmia Neonatorum</i>
<i>Paratyphoid fever</i>	<i>Plague</i>
<i>Rabies</i>	<i>Rubella</i>
<i>Scarlet Fever</i>	<i>Smallpox</i>
<i>Tetanus</i>	<i>Tuberculosis</i>
<i>Typhoid Fever</i>	<i>Viral Hepatitis</i>
<i>Whooping Cough</i>	<i>Yellow Fever”.</i>

Following its claim assessment, the Provider wrote to the Complainant’s Representative on **16 October 2020** to advise that it was declining the claim because COVID-19 was not listed as one of the infectious diseases covered by the policy.

The Complainant submitted a complaint to the Provider on **15 February 2021** regarding its decision to decline the claim, wherein he stated as follows:

*“Our claim was lodged in March 2020. It took months for us to secure the refusal...letter of 16th October 2020 from [the Provider’s Claims Administrator] and the contents of which we do not accept. You are undoubtedly aware of the English Supreme Court decision in the FCA test case [**The Financial Conduct Authority v Arch Insurance (UK) Ltd & others** [2021] UKSC 1] and of the Irish High Court decision involving the insurer, FBD [**Hyper Trust Ltd t/a The Leopardstown Inn & Ors v. FBD Insurance plc** [2021] IEHC 279].*

...we specifically purchased the cover available under the additional provisions which included that entitled “Infectious Diseases and Other Closure” extension. That wording provides indemnity for losses resulting from interruption of or interference with the business after an outbreak of an infectious disease within 25 miles of the premises. It cannot be disputed that there was such an outbreak. We will be able to prove our losses incurred since early 2020 and continuing to this day.

Most consumer policyholders like ourselves are not medical experts. Any reasonable person when seeking, or being offered, [business interruption] cover for 'infectious diseases' would assume that the authoritative classification of such terminology was being employed. Only infectious diseases which are notifiable would result in enforced closures of businesses and the level of restrictions we have suffered. The list of such diseases is published by the Health Protection Surveillance Centre (HPSC) in Ireland. In the long version dated February 2020, Covid-19 was added for the first time and a simplified version was published on 6th March 2020 ...

It is reasonable to suggest that it would be a matter of indifference to policyholders whether the disease was viral or bacterial, or of unknown cause. The critical intention was to ensure that there was insurance to cover financial losses where outbreaks resulted in business restrictions, subject to compliance with other relevant terms and conditions in the insurance contract.

We would question whether insurers can offer coverage with one hand and take it away with the other. The specified list on pages 59 to 60 of the policy seems to be a distinction without a difference, given that 'plague' is covered. The immunological classification is irrelevant to the policyholder who effects insurance against financial loss. However, many of the diseases which are on the list could equally have resulted in business restrictions because of developing knowledge on how to control outbreaks of contagious or infectious diseases.

There is no rational discernible basis on which this policy should choose those particular diseases, which includes some that are not on the official list and omits others which are notifiable. We are also advised that acute encephalitis is one of [the] consequences of Covid-19 and we, therefore, argue that this is an insured peril".

Following its review, the Provider sent its **Final response** letter to the Complainant on **2 April 2021** advising that it was standing over its decision to decline the claim because COVID-19 was not listed as one of the infectious diseases covered by the policy. It also stated that it did not receive a claim from the Complainant's Representative until **2 October 2020**, and not in March 2020 as contended by the Complainant, with its claim decision issuing just two weeks later, on **16 October 2020**.

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

"Our complaint relates to both the handling and the outcome of our Business Interruption claim for financial losses following Covid-19 restrictions. Our situation fulfils all the criteria in the additional optional policy extension we purchased for Infectious Disease and Other Closure bar one, which is that Covid-19 is not listed. However, that virus did not manifest until December 2019 and many of the other listed diseases had pandemic potential.

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*It is our submission that, to quote Mr Justice McDonald in the FBD case [the Irish High Court decision of 5 February 2021 in **Hyper Trust Ltd t/a The Leopardstown Inn & Ors v. FBD Insurance plc** [2021] IEHC 279], it is permissible to provide context to the policies which a reasonable person considering entering into the policy of insurance might have known and might have had in mind when we elected to purchase this additional cover.*

Consumer policyholders are not medical experts and would be entitled to assume that Infectious Diseases would mean the official classification, subject to any specific clear exclusions of which there are none in the relevant extension to our policy ...

... our business has been interrupted for over a year now”.

The Complainant seeks for the Provider to admit and pay his claim for business interruption losses sustained as a result of the temporary closure of his business in **March 2020** due to measures imposed by the government to curb the spread of COVID-19 and in this regard, when he submitted his **Complaint Form** to this Office, the Complainant advised:

“We are seeking payment for loss of business as per our business interruption policy”.

The Provider’s Case

The Provider says that its records indicate that it received a notification from the Complainant’s Representative on **2 October 2020** of a claim for business interruption losses as a result of the temporary closure of the Complainant’s business.

The Provider referred the matter to its appointed Claims Administrator on **6 October 2020** and following its review, the Claims Administrator emailed the Complainant’s Representative on **12 October 2020** stating there was no cover under the policy. In addition, the Claims Administrator then wrote to the Complainant’s Representative on **16 October 2020** advising of the reasons for the claim declination, as follows:

“We have considered [the Complainant’s] claim under the Business Interruption section of your policy. The relevant clause of this section responds to accidental Damage by a Defined Peril specified as being applicable to Section A (Material Damage) in your Schedule. The Defined Perils insured under Section A broadly relate to physical damage from a number of sources, such as fire or flooding, but do not include diseases, such as COVID-19. This means that there has been no Damage caused by an insured Defined Peril, for which [the Complainant’s] policy would respond.

The Business Interruption section includes extensions that apply automatically to your policy and we have considered [the Complainant's] claim under the Prevention of Access and the Prevention of Access - Non Damage extensions. The Prevention of Access extension responds to accidental Damage to property in the vicinity of your Premises. The Prevention of Access - Non Damage extension responds to a specified set of circumstances and explicitly excludes liability for the consequences of an infectious or contagious disease. Cover is not available under the Prevention of Access extension as there has been no Damage to property nor under the Prevention of Access - Non Damage extension as [the Complainant's] claim does not fall within scope of one of the specified circumstances and, in any case, COVID-19 would fall under the exclusion for infectious and contagious diseases.

In addition to the automatic extensions, the Business Interruption section also includes optional extensions that may apply to [the Complainant's] policy if they have been purchased. [The Complainant] has purchased the Infectious Diseases and Other Closure extension and we have also considered [the Complainant's] claim under this extension. The Infectious Diseases and Other Closure extension responds to Infectious Diseases that are specifically listed in the extension. Cover is not available under this extension in relation to [the Complainant's] claim because the list of Infectious Diseases for which there is cover does not include COVID-19”.

The Provider next received a written complaint from the Complainant on **15 February 2021**. Following its review, the Provider sent the Complainant its **Final Response** letter dated **2 April 2021**, as follows:

“We understand your complaint relates to the handling of your business interruption claim and in particular, the time it took to receive a response to your claim. You also don't agree with the claim declination decision.

As part of our investigation, we have considered the relevant information, available evidence and whether you have been treated fairly. We have reviewed the circumstances of your complaint and have reached the following conclusion:

In respect of the claims handling process, we have considered the claim file in some detail and can see that a claim was submitted [to the Provider] on 2nd October 2020 by [your Representative]. [The Provider] referred this matter to our claims administrator...on 6th October. Our claims administrator has confirmed that they had no knowledge of the claim before this date. We note a response was then sent on 16th October 2020.

Therefore, unfortunately, we are unable to uphold your complaint in respect of any delay in the handling of your claim. Your complaint should be redirected to your broker ...

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In respect of your business interruption claim, unfortunately our position remains unchanged. As explained in the letter from [our Claims Administrator] to your broker...the Business Interruption section of your policy includes a Prevention of Access and a Prevention of Access - Non Damage extension. The Prevention of Access responds to accidental 'Damage' to property in the vicinity of your Premises. The Prevention of Access - Non Damage extension responds to a specified set of circumstances and explicitly excludes liability for consequences of an infectious or contagious disease.

In summary, cover is not available under the Prevention of Access extension as there has been no Damage to your property. Cover is also not available under the Prevention of Access - Non Damage extension as your claim does not fall within the scope of one of the specified circumstances. In accordance with your policy wording, Covid-19 would fall under the exclusion for infectious and contagious diseases.

In addition, the Business Interruption section also includes optional extensions and you purchased the Infectious Diseases and Other Closure extension. This extension also responds only to Infectious Diseases that are specifically listed in the policy wording. Cover is therefore not available under this extension as this list does not include COVID-19.

Therefore, we are sorry to advise that we are unable to uphold your complaint”.

The Provider says that it is satisfied that when the Complainant's claim was first notified in **October 2020** (and not **March 2020**, as suggested by the Complainant), it was processed and responded to within an appropriate time frame, and that the claim and the Complainant's ensuing complaint were handled in accordance with the relevant provisions of the Central Bank of Ireland's **Consumer Protection Code 2012 (as amended)**.

In assessing the Complainant's business interruption claim, the Provider referred to the following insuring clauses in Section F, 'Business Interruption', of the applicable **Policy Wording**, which states at pg. 59:

“INFECTIOUS DISEASES AND OTHER CLOSURE

The insurance by this Section is extended to include loss directly resulting from interruption of or interference with the Business carried on by You at the Premises in consequence of: ...

(a) Infectious Disease manifested by any person whilst at the Premises;

(b) an outbreak of an Infectious Disease within 25 miles of the Premises”.

The Provider says that clauses (a) and (b) are triggered by losses directly resulting from interruption to the insured business in consequence of occurrences of an infectious disease. The Provider notes that “*Infectious Disease*” is defined in the **Policy Document** in the ‘Special Provisions’ section immediately following the insuring clauses, as a closed list of specific diseases, as follows:

“(a) Infectious Disease means illness sustained by any person resulting from any of the following human infectious or human contagious diseases

<i>Acute Encephalitis</i>	<i>Acute Poliomyelitis</i>
<i>Anthrax</i>	<i>Chicken Pox</i>
<i>Cholera</i>	<i>Diphtheria</i>
<i>Dysentery</i>	<i>Legionellosis</i>
<i>Legionnaires Disease</i>	<i>Leprosy</i>
<i>Leptospirosis</i>	<i>Malaria</i>
<i>Measles</i>	<i>Meningococcal Infection</i>
<i>Mumps</i>	<i>Ophthalmia Neonatorum</i>
<i>Paratyphoid fever</i>	<i>Plague</i>
<i>Rabies</i>	<i>Rubella</i>
<i>Scarlet Fever</i>	<i>Smallpox</i>
<i>Tetanus</i>	<i>Tuberculosis</i>
<i>Typhoid Fever</i>	<i>Viral Hepatitis</i>
<i>Whooping Cough</i>	<i>Yellow Fever”.</i>

The Provider notes that the Complainant submits that clause (b), “*an outbreak of an Infectious Disease within 25 miles of the Premises*”, should provide cover in connection with any notifiable disease, including in particular COVID-19, but the Provider says there is no basis for that interpretation. The Provider says that the list of specific diseases, by its definition, is a closed list that does not include COVID-19, and that this list reflects that the parties have agreed that the cover provided by clause (b) is triggered by losses resulting from certain, but not all, diseases, that is, only those diseases that are listed.

The Provider says that closed list disease clauses are to be contrasted with infectious or notifiable disease clauses of a different type: those that define a notifiable disease (or equivalent) as any disease that is or becomes notifiable. Disease clauses of the latter type were considered in the now concluded UK Supreme Court decision of 15 January 2021 in ***The Financial Conduct Authority v Arch Insurance (UK) Ltd & others*** [2021] UKSC 1 (‘the FCA Test Case’). The Provider says that the exclusion of closed list disease clauses, like the clause contained in the Complainant’s policy, from the FCA Test Case reflects that there can be no reasonable expectation that those clauses provide cover for losses caused by diseases not listed, including COVID-19.

The Provider says that the English High Court in the recent case of ***Rockliffe Hall Ltd v Travelers Insurance Company Ltd*** [2021] EWHC 412 (Comm) (‘*Rockliffe Hall*’) considered some of the arguments that the Complainant appears to make, as to why the closed list of specific diseases should be interpreted as including COVID-19.

The Provider says that those arguments are that:

- A. *“Plague”* should be read as a general terms for any infectious disease with a high mortality rate, rather than a reference to the specific disease caused by the bacterium *yersinia pestis*. The Provider says the Complainant appears to make the same argument by stating that the *“specified list [of diseases] seems to be a distinction without a difference, given that ‘plague’ is covered”*.
- B. The policy definition of *“Infectious Disease”* contains diseases which are sometimes caused by COVID-19 and, in light of this, the closed list of specific diseases should be interpreted as including CXOVID-19. The Provider notes that the Complainant alludes to this argument by stating that *“acute encephalitis is one of [the] consequences of Covid-19”*.

The Provider notes that in *Rockliffe Hall*, the English High Court dismissed unhesitatingly arguments A and B in the context of a claim for cover of COVID-19 business interruption losses, under a clause which was triggered by a closed list of specific diseases, similar to that contained in the Complainant’s policy. As regards argument A, the English High Court said, at para. 55, that it would be *“fanciful in the extreme to suppose that any reasonable reader would consider the meaning”* of ‘plague’ to be any disease with a high mortality rate. Of argument B, the Court said, at para. 72, that *“the reasonable person in the position of the parties would not understand [acute encephalitis] to refer to COVID-19”*, in that that would be, at para. 72, *“an Alice in Wonderland approach”*. The Provider considers that these comments from the English High Court apply equally to the Complainant’s claim and his complaint.

In addition, the Provider also notes that in *Rockliffe Hall*, the English High Court, at para. 60, stated that if a list of diseases is intended to be non-exhaustive, then there is *“no sensible reason for...a long list”*. The Provider agrees and considers that this reasoning similarly applies to the closed list of specific diseases contained in the Complainant’s policy. In this regard, the Provider says that if the clause was intended to provide cover for any notifiable disease, as the Complainant contends, then the list of specific diseases is redundant. The Provider says that that interpretation cannot be correct.

The Provider says that in keeping with the English High Court’s approach in *Rockliffe Hall*, it is clear that the cover purchased, and clause (b) in particular, responds to a closed list of specific diseases, which does not include COVID-19. The Provider says it would be a misinterpretation of the agreement between the parties, as expressed in the policy language, to say that the list of specific diseases should in fact be interpreted as including any notifiable disease and in particular COVID-19.

As the Complainant’s policy is governed by Irish law, the Provider notes that the claim declination appears to be challenged by the Complainant in the **Complaint Form** on the basis of the alleged similarity of the applicable business interruption terms of the policy with those at issue in the test cases considered by the Irish High Court in *Hyper Trust Ltd t/a The Leopardstown Inn & Ors v. FBD Insurance plc* [2021] IEHC 279 (‘the FBD Test Case’), however the Provider says its position is not affected by this judgment.

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The Provider says the only policy provision of potential relevance to the Complainant's claim is the Infectious Diseases Extension, as follows:

"...loss directly resulting from interruption of or interference with the Business carried on by You at the Premises in consequence of: ...

(b) an outbreak of an Infectious Disease within 25 miles of the Premises".

It is further stated by the Provider that the policy provides that:

"Infectious Disease means illness sustained by any person resulting from any of the following human infectious or human contagious diseases ...",

with the diseases covered then listed.

The Provider says that because the Infectious Diseases Extension only responds to business interruption that is in consequence of one of the listed infectious diseases, and because COVID-19, and its virus agent SARS-CoV-2, are not on that list, cover is not available to the Complainant under this Extension.

The Provider notes that the FBD Test Case and its outcome has no relevance to this conclusion, as the relevant policy terms in that case covered, among other things, interruption:

"... as a result of the business being affected by:-

(1) Imposed closure of the premises by order of the Local or Government Authority following: ...

(d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same ..." ('the FBD Extension').

The Provider notes that "*contagious or infectious disease*" was not defined in the FBD policy and that the High Court ruled that outbreaks of COVID-19, being a "*contagious or infectious disease*", within the relevant 25 mile radius could be regarded as an equal cause, along with outbreaks outside the radius, of the Government's imposed public house closure order of 15 March 2020, thereby triggering cover for ensuing interruption.

The Provider says that the Complainant's policy only covers business interruption that is in consequence of the outbreak of one of the listed diseases set out in the closed list of specific diseases contained in the **Policy Wording**, and that because this list does not include COVID-19 or its virus agent SARS-CoV-2, there is no coverage for interruption in consequence of that disease.

In addition, the Provider notes that the decision of the High Court on 19 April 2021 in ***Brushfield Ltd v. Arachas Corporate Brokers Ltd and Axa Insurance DAC*** held that “*Acute Encephalitis*” (brain inflammation), which is one of the listed diseases set out in the closed list of specific diseases contained in the Complainant’s policy, is not COVID-19 nor SARS-CoV-2, in that there was no evidence before the Court of any case of COVID-19-related acute encephalitis within the 25-mile radius of the Dublin city centre premises in that case, and no reported acute encephalitis associated with COVID-19 in Ireland.

Further, the Provider says that all NPHE (National Public Health Emergency Team) and Government documentation and announcements have indicated that the dominant cause of the closures/business interruptions were increasing rates of COVID-19 infection and the urgent need to prevent the intermixing of people in order to control the spread of that COVID-19 infection, and not acute encephalitis.

Accordingly, the Provider is satisfied that it assessed and declined the Complainant’s business interruption claim in accordance with the policy terms and conditions, in that the Infectious Diseases Extension only responds to business interruption that is in consequence of one of the listed infectious diseases and that COVID-19, and its virus agent SARS-CoV-2, are not on that list.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant’s claim for business interruption losses sustained as a result of the temporary closure of his business in March 2020, due to measures imposed by the Government to curb the spread 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.

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A Preliminary Decision was issued to the parties **27 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 holds a **'Material Damage & Business Interruption'** insurance policy with the Provider, closed his public house from **15 March 2020**, following a Government direction to do so.

In that regard, I note the Department of An Taoiseach's **Press Release** of **15 March 2020**, 'All pubs advised to close until March 29' (available at <https://www.gov.ie/en/press-release/20fc58-all-pubs-advised-to-close-until-march-29/>), as follows:

"Following discussions today with the Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI), the government is now calling on all public houses and bars (including hotel bars) to close from this evening (Sunday 15 March) until at least 29 March.

The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.

For the same reason, the government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.

The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night.

While the government acknowledges that the majority of the public and pub owners are behaving responsibly, it believes it is important that all pubs are closed in advance of St. Patrick's Day.

The Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI) both supported this decision and urged all their members to close in line with the government's request.

The government and the LVA and VFI also discussed the support measures for businesses and their staff affected by the COVID-19 crisis which have been put in place last week.

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The government will continue to monitor the situation, including the compliance of all pubs with this request, as well as any further or different measures which might be required in the future.

The effectiveness of the Guidelines on Social Distancing in other parts of the hospitality and leisure industry, for example restaurants and cinemas, will also be kept under review and subject to further consultation with stakeholders in the coming days”.

I note the Complainant says the Provider was first notified in **March 2020** of his business interruption claim as a result of the temporary closure of his public house from **15 March 2020**, due to measures imposed by the government to curb the spread of the COVID-19.

I note that following its assessment, the Provider’s Claims Administrator wrote to the Complainant’s Representative on **16 October 2020** to advise that it was declining the claim because COVID-19 was not listed as one of the infectious diseases listed in the Business Interruption Infectious Diseases Extension in his policy.

The Complainant’s ‘Material Damage & Business Interruption’ insurance policy, like all insurance policies, does not provide cover for every eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

Section F, ‘**Business Interruption**’, of the applicable **Policy Wording** sets out the cover at pg. 53, as follows:

“COVER

We will pay up to the Sum Insured or any other stated limit of liability for each item shown in the Schedule in respect of interruption or interference with the Business in consequence of accidental Damage by any of the Defined Perils which are covered only if they are specified as being applicable in Section A in the Schedule occurring during the Period of Insurance to property used by You at the Premises for the purpose of the Business. Provided that at the time of the Damage there is in force an insurance covering Your interest in the property at the Premises against such Damage and that payment shall have been made or liability admitted in respect of the Damage or payment would have been made or liability would have been admitted but for the operation of a provision in such insurance excluding liability of losses below a specified amount”.

I note the Complainant’s business was not closed or interrupted as a result of damage to the property; instead the Complainant temporarily closed his public house due to the outbreak of COVID-19 in Ireland and the measures imposed by the Government to curb the spread of this virus.

The Complainant's **Policy Schedule** confirms that his business interruption policy cover includes the optional '**Infectious Diseases And Other Closure**' extension ('the Infectious Diseases Extension').

In this regard, I note that the Optional Extensions to Section F, 'Business Interruption', of **Policy Wording** states, among other things, at pgs. 59 - 60, as follows:

"4. INFECTIOUS DISEASES AND OTHER CLOSURE

The insurance by this Section is extended to include loss directly resulting from interruption of or interference with the Business carried on by You at the Premises in consequence of:

- (a) Infectious Disease manifested by any person whilst at the Premises;*
- (b) an outbreak of an Infectious Disease within 25 miles of the Premises ...*

Special Provisions

(a) Infectious Disease means illness sustained by any person resulting from any of the following human infectious or human contagious diseases

- | | |
|-----------------------------|--------------------------------|
| <i>Acute Encephalitis</i> | <i>Acute Poliomyelitis</i> |
| <i>Anthrax</i> | <i>Chicken Pox</i> |
| <i>Cholera</i> | <i>Diphtheria</i> |
| <i>Dysentery</i> | <i>Legionellosis</i> |
| <i>Legionnaires Disease</i> | <i>Leprosy</i> |
| <i>Leptospirosis</i> | <i>Malaria</i> |
| <i>Measles</i> | <i>Meningococcal Infection</i> |
| <i>Mumps</i> | <i>Ophthalmia Neonatorum</i> |
| <i>Paratyphoid fever</i> | <i>Plague</i> |
| <i>Rabies</i> | <i>Rubella</i> |
| <i>Scarlet Fever</i> | <i>Smallpox</i> |
| <i>Tetanus</i> | <i>Tuberculosis</i> |
| <i>Typhoid Fever</i> | <i>Viral Hepatitis</i> |
| <i>Whooping Cough</i> | <i>Yellow Fever".</i> |

[My underlining for emphasis]

I am satisfied that in order for this Infectious Diseases Extension to provide business interruption cover, there must be the operation of the insured peril, that is, that the business interruption must have been caused by the presence of one of the specified infectious diseases, on the insured premises or by an outbreak of one of those diseases within a 25 mile radius of the insured premises.

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I note in the **Complaint Form** he completed, the Complainant submits that:

“Our complaint relates to both the handling and the outcome of our Business Interruption claim for financial losses following Covid-19 restrictions. Our situation fulfils all the criteria in the additional optional policy extension we purchased for Infectious Disease and Other Closure bar one, which is that Covid-19 is not listed. However, that virus did not manifest until December 2019 and many of the other listed diseases had pandemic potential ...

Consumer policyholders are not medical experts and would be entitled to assume that Infectious Diseases would mean the official classification, subject to any specific clear exclusions of which there are none in the relevant extension to our policy”.

I note that although COVID-19, and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on 20 February 2020, by way of the **Infectious Diseases (Amendment) Regulations 2020**, it is not one of the infectious diseases specified in the Complainant’s policy. Indeed, I note the **Policy Wording** makes no reference whatsoever to the term ‘notifiable disease’ but instead confirms cover for a defined list of specific infectious diseases. In that regard, it is important to note that not all infectious diseases are notifiable diseases.

I note that in his complaint to the Provider on **15 February 2021**, the Complainant submitted, amongst other things, that:

“ ... There is no rational discernible basis on which this policy should choose those particular diseases, which includes some that are not on the official list and omits others which are notifiable ... ”

The Complainant’s ‘Material Damage & Business Interruption’ insurance policy with the Provider is like any other contract, in that it is based on the legal principles of offer, acceptance, and consideration. Each year, the Provider may offer terms which can be accepted by those seeking insurance, who then elect to pay the premium requested, which represents the consideration aspect of the contract, in return for the cover offered.

In that regard, it is a matter for the Provider, as the insurer, to determine and clearly set out what cover it is prepared to offer to potential policyholders, and once such cover is offered, a proposer for insurance can decide if those terms are acceptable or whether, alternatively, cover should be sought elsewhere.

I am satisfied that the Infectious Diseases Extension policy wording, contained in the Complainant’s policy very clearly identifies and defines the precise circumstances in which that cover will be triggered, in that the business interruption being claimed for, must have been caused by the presence on the Complainant’s premises of one of the infectious diseases within the meaning of and listed in the **Policy Wording**, or by an outbreak of one of those diseases, within a 25 mile radius of the premises.

/Cont’d...

As the Complainant's claim circumstances do not satisfy the insured peril in the business interruption Infectious Diseases Extension of his policy with the Provider, I am satisfied that the Provider was entitled to decline the Complainant's claim in accordance with his policy terms and conditions.

Finally, while the Complainant says the Provider was notified of his business interruption claim in March 2020 and failed to provide a claim decision until October 2020, there is no evidence before me indicating that the Provider or its Agents were notified of the Complainant's claim at that time. Instead, I note from the documentary evidence before me that the Provider says it was first notified of the Complainant's claim on **2 October 2020** and that its Claims Administrator wrote to the Complainant's Representative on **16 October 2020**, two weeks later, to confirm it was declining the claim. In the absence of any evidence confirming the Complainant's position that the Provider was first notified of his business interruption claim in March 2020, I take the view that the Provider assessed the Complainant's claim in a reasonable time frame.

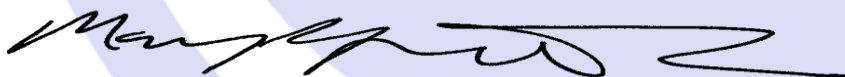
Having regard to all of the above, the evidence does not support the complaint that the Provider wrongfully or unfairly declined to admit and pay the Complainant's claim for business interruption losses sustained as a result of the temporary closure of his business in March 2020, due to measures imposed by the government to curb the spread of COVID-19.

It is my Decision therefore, on the evidence before me that this complaint cannot be upheld.

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

18 November 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.

