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| <u>Decision Ref:</u> | 2021-0436 |
| <u>Sector:</u> | Insurance |
| <u>Product / Service:</u> | Service |
| <u>Conduct(s) complained of:</u> | Rejection of claim Complaint handling (Consumer Protection Code) Failure to process instructions in a timely manner Failure to process instructions |
| <u>Outcome:</u> | Rejected |

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading as a beauty salon, holds a business insurance policy with the Provider. This complaint concerns a declined business interruption claim and the policy period in which this complaint falls, is from **9 July 2019** to **8 July 2020**.

The Complainant's Case

The Complainant's Representative notified the Provider on **16 March 2020** of a claim for business interruption losses as a result of the temporary closure of the Complainant's business on **14 March 2020** for a period, due to measures imposed by the Government to curb the spread of coronavirus (COVID-19).

In making her claim, the Complainant notes the 'Business Interruption Section Extensions' at pg. 49 of her business insurance **Policy Document**, as follows:

"6. Notifiable Disease

The insurance by this Policy will extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:

- 1. (i) any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises*

(ii) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease ...

which causes restrictions on the use of the Premises on the order or advice of the competent authority.

Special Conditions

(a) Notifiable Disease means illness sustained by any person resulting from:

- (i) food or drink poisoning or*
- (ii) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent authority has stipulated will be notified to them”.*

The Complainant’s business was closed from **14 March 2020** to **30 June 2020**.

Following its claim assessment, the Provider wrote to the Complainant on **2 September 2020** to advise that it was declining indemnity in the matter, as follows:

“... Although you have advised there was an occurrence of a Notifiable Disease at the Premises, the restrictions on the use of the Premises by the competent authority was not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises ...”

The Complainant’s Representative later emailed the Provider on **12 February 2021** asking that it review its claim decision in light of the Irish High Court decision of 5 February 2021 in ***Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc*** [2021] IEHC 279 (‘the FBD Test Case’)

Following its review, the Provider sent its **Final Response** letter to the Complainant’s Representative on **11 March 2021** advising that it was standing over its decision to decline the claim.

The Complainant set out her complaint in the **Complaint Form**, as follows:

“[The Provider] is refusing to pay my insurance valid claim for business interruption defined at page 49 of the Policy Booklet “Clause 6, Loss resulting from the occurrence of a notifiable disease at the premises”. I had a breakout at my premises and cover is in place”.

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In addition, in its email to this Office on 23 June 2021, the Complainant's Representative states:

"[The Complainant's] case is the following in summary:

- 1. She had business interruption cover in place which extended to cover her business in the event that an infectious disease broke out in or around her premises.*
- 2. A breakout occurred in or around the premises at the time of the closure.*
- 3. [The Provider] are saying that because the premises was not specifically closed by the competent authority that cover would not be given".*

As a result, the Complainant seeks for the Provider to admit and pay her claim for business interruption losses and in this regard, when she submitted her **Complaint Form** to this Office in February 2021, the Complainant submitted, as follows:

"I am seeking payment of claim. ... in the sum of €41,261."

The Provider's Case

The Provider says that its records indicate that it received an email from the Complainant's Representative on **16 March 2020** expressing an intention to claim for losses attributed to COVID-19, as follows:

"We have a query regarding the closure of a business due to the [COVID-19] outbreak.

As far as we can see there is cover in place up to €250,000.00 as this is listed as a notifiable disease".

The Provider acknowledged receipt of the claim notification and confirmed the claim reference to the Complainant's Representative by telephone on **19 March 2020**.

The Provider says it emailed the Complainant's Representative on **20 March 2020** to advise that the Complainant's claim would not be covered by the terms of her business insurance policy. The Complainant's Representative emailed the Provider on **27 March 2020** asking for a detailed reason for its claim declination.

The matter was then reviewed internally by a senior claims handler and the Provider emailed the Complainant's Representative on **9 April 2020** acknowledging its initial handling error and confirming that the claim was still under consideration. The Provider says that this was a human error, due to a lack of experience in dealing with this type of claim.

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Separately, on **9 April 2020**, the Provider wrote to the Complainant's Representative as follows:

"To enable us to investigate and consider your claim please let us have details of the occurrence of COVID-19 at your Premises. This should include the following:

- *The date of the occurrence or when it was first brought to your attention;*
- *The date on which the restrictions were put in place;*
- *The period of the restrictions; and*
- *Copies of any notices or relevant documents in support of your claim.*

Once we have the required information, we will come back to you as quickly as possible with a decision on cover".

The Complainant's Representative emailed the Provider on 20 April 2020 to advise that:

"Can you note it has been confirmed that an employee has been confirmed as having Covid 19 we understand".

The Provider says it later received an email from the Complainant's Representative on **18 August 2020** advising that:

"... Our client confirms that she closed her premises on the 14th March 2020 following the outbreak of Covid-19 a highly infectious disease on her premises ..."

The Provider says that the Complainant's Representative attached a large number of documents to this email in support of the claim, however these documents did not include any of the requested information referenced in its letter dated **9 April 2020**.

Having determined that the documents provided were not of relevance to its requests, the Provider emailed the Complainant's Representative on **25 August 2020** as follows:

"Can you please advise if the premises were closed by the competent authority as a direct result of an occurrence of Covid-19 at the premises? If so, please submit documentation to support this."

The Provider received an email from the Complainant's Representative on **28 August 2020** advising that:

“We are advised that the premises was closed by the Government being the ultimate competent authority ... 16th / 17th March 2020.”

In this regard, the Provider says that as of **July 2021**, it had not been supplied by the Complainant or her Representatives with the date of the occurrence of COVID-19 at the Complainant’s premises, the date on which restrictions were put in place or the period of the restrictions, as first requested in its letter to the Complainant’s Representative on **9 April 2020**.

In assessing the Complainant’s business interruption claim, the Provider referred to Section 6, ‘**Notifiable Disease**’, of the ‘**Business Interruption Section Extensions**’, at pg. 49 of the applicable **Policy Document**, as follows:

“The insurance by this Policy will extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:

1. *(i) any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises*

(ii) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease ...

which causes restrictions on the use of the Premises on the order or advice of the competent authority.

Special Conditions

(a) Notifiable Disease means illness sustained by any person resulting from:

(i) food or drink poisoning or

(ii) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent authority has stipulated will be notified to them”.

In this regard, the Provider says that the Business Interruption Notifiable Disease Extension provides cover for loss of income where there is an occurrence of a notifiable disease at the premises and the restrictions on the use of the premises, by order of the competent local authority, is a direct result of an occurrence of the notifiable disease at the premises. In order for this Extension to apply, the Provider says the following criteria must be satisfied:

1. The occurrence of a Notifiable Disease is at the Premises and;
2. The restriction on the use of the premises is brought about on the advices of the competent authority as a result of an occurrence of a Notifiable Disease at the Premises.

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3. There is a verified financial loss directly resulting from 1 and 2 above. The Provider says it has not been supplied with evidence to support the occurrence of a notifiable disease at the Complainant's premises. Were it satisfied that evidence of the occurrence of a notifiable disease at the Complainant's premises had been made available, the Provider says the second requirement, referenced above, would still need to be met, namely, that the restrictions on the use of the Complainant's premises were brought about on the advices of the competent authority as a direct result of the occurrence of the notifiable disease at the premises.

The Provider says that in the large number of documents submitted by the Complainant's Representative, it could find no evidence to support the occurrence of COVID-19 at the Complainant's premises or evidence that any restrictions on the use of the premises were brought about on the advices of the competent authority as a result of an occurrence of COVID-19 at the premises.

Following its claim assessment, the Provider wrote to the Complainant on **2 September 2020** to advise that it was declining the claim, as follows:

"I regret to advise that your claim in respect of Business Interruption resulting from COVID-19 is not covered by your Policy for the following reason(s):

Although you have advised there was an occurrence of a Notifiable Disease at the Premises, the restrictions on the use of the Premises by the competent authority was not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises".

The Provider says that the Complainant's Representative later emailed on **12 February 2021** asking that it review its claim decision in light of the Irish High Court decision of 5 February 2021 in ***Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc*** [2021] IEHC 279 ('the FBD Test Case') Following its review, the Provider sent its **Final Response** letter to the Complainant's Representative on **11 March 2021** advising that it was standing over its decision to decline the claim, as follows:

" ... It is important to note that both the Financial Conduct Authority (FCA) case in the UK and the FBD plc case judgements are based on the specific wordings and policies tested. Both of these cases concerned so called "radius clauses", where policy indemnity was provided for the occurrence or an outbreak of a notifiable disease at or within a certain specified radius of an insured premises. In contrast, under the terms of [the Complainant's] Policy indemnity is confined to outbreaks 'at the Premises'.

In the FBD case the Court specifically addressed the geographic limitation (25 miles) in the context of the FBD wording in question, and I refer to paragraph 126 d): "It is also clear from the terms of this part of s.3 of the policy that it was envisaged that a public house could be the subject of an imposed closure following an outbreak of

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contagious or infectious disease not only on the premises but within 25 miles of the premises.

It may be stating the obvious but this demonstrates very clearly that such a circumstance was expressly envisaged and was insured against. The policy did not confine itself (as it could have done) to closures as a result of outbreaks on the premises". The clear implication here is that if the policy indemnity was confined to an outbreak "at the premises" then that limitation would stand. Furthermore, the Court recognised [the Provider's] policy (refer paragraph 78 b) as an example of a policy under which cover is restricted to outbreaks at the premises itself.

I note that restrictions on the use of the premises were not put in place on the order or advice of the competent authority.

Our position is that as with all claims we must be bound by the terms and conditions of your insurance policy. Having completed my review, our decision to decline your claim is correct and no cover can be provided."

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined to admit and pay the Complainant's claim for business interruption losses as a result of the temporary closure of her business between **March** and **June 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 on **26 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.

I note that the Complainant, a sole trader trading as a beauty salon, notified the Provider on **16 March 2020** of a claim for business interruption losses as a result of the temporary closure of her business from **14 March 2020** for a period, due to measures imposed by the Government to curb the spread of coronavirus (COVID-19).

Following its claim assessment, I note the Provider wrote to the Complainant on **2 September 2020** to advise that it was declining indemnity as the restrictions on the use of the Complainant's premises by the competent authority had not been brought about as a direct result of an outbreak of COVID-19 at the premises.

On **12 February 2021**, I note the Complainant's Representative emailed the Provider asking that it review its decision in light of the recent Irish High Court decision of 5 February 2021 in *Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc* [2021] IEHC 279 ('the FBD Test Case').

Following its review, I note the Provider sent its **Final Response** letter to the Complainant Company on **11 March 2021** advising that it was standing over its original decision to decline the claim.

The Complainant's business insurance policy, like all insurance policies, does not provide cover for every possible eventuality; rather the cover is subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

I note that Section 6, '**Notifiable Disease**', of the '**Business Interruption Section Extensions**', at pg. 49 of the applicable **Policy Document**, as follows:

"The insurance by this Policy will extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:

2. (i) any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises

(ii) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease ...

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which causes restrictions on the use of the Premises on the order or advice of the competent authority.

[My underlining for emphasis]

Special Conditions

(a) *Notifiable Disease means illness sustained by any person resulting from:*

- (i) *food or drink poisoning or*
- (ii) *any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent authority has stipulated will be notified to them”.*

I note that COVID-19 and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on **20 February 2020**. However, in order for the cover provided by the Complainant’s Business Interruption Notifiable Disease Extension to be triggered, I am satisfied that the policy wording clearly stipulates that there must have been an occurrence of the disease, in this case COVID-19, at the Complainant Company’s premises and that this particular outbreak caused restrictions on the use of the premises on the order or advice of the competent authority.

In this regard, in its email to the Provider on 20 April 2020, I note the Complainant’s Representative advised:

“Can you note it has been confirmed that an employee has been confirmed as having Covid 19 we understand”.

It is an insurance standard that the onus rests on the policyholder, in this instance the Complainant, as the insured, to show the operation of an insured peril, in this case, that there was an occurrence of COVID-19 at its premises and that this occurrence caused restrictions on the use of her premises on the order or advice of the competent authority.

I note that in its email to this Office dated 21 July 2021, the Complainant’s Representative submits, among other things, that:

“... as you will see from our claim submission which we submitted...we confirmed the dates and cause of closure and reopening as requested.

[The Complainant] was and remains in a position to give the names of the persons who unfortunately were infected with Corvid at the time ...”.

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In addition, in its email to this Office dated 2 September 2021, the Complainant's Representative submits:

" ... The clause came into effect by virtue of the breakout of Covid on the premises and the closure of the premises by a competent authority".

Furthermore, in its email to this Office dated 15 September 2021, the Complainant's Representative submits:

" ... [The Complainant's] case remains that her business is covered because there was an outbreak at the premises, one condition of cover, and secondly that [the Complainant's business] was closed by a competent authority, the Government".

However, having examined the documentary evidence before me in full, I note there is no evidence available confirming that there was an occurrence of COVID-19 at the Complainant's premises, or that the Complainant notified the competent authority of the occurrence of COVID-19 at her premises, or that the competent authority then placed restrictions on the Complainant's use of her premises, as a result of that occurrence of COVID-19.

As a result, I am of the opinion that it remains a matter for the Complainant to supply the Provider with evidence confirming the operation of the insured peril, in this case, that there was an occurrence of COVID-19 at her premises and that this particular outbreak caused restrictions to be placed on the use of the premises, on the order or advice of the competent authority.

At the moment, as there is no evidence indicating that the policy cover provided by the Complainant's Business Interruption Notifiable Disease Extension was triggered, I am satisfied that the Provider was entitled to decline the Complainant's business interruption claim, in accordance with the business insurance policy terms and conditions.

In addition, I accept the Provider's position that as the Notifiable Disease Extension in question is an "on premises" hybrid clause, that it is different from and outside the scope of the Irish High Court decision of 5 February 2021 in ***Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc*** [2021] IEHC 279 ('the FBD Test Case'), as well as the 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'), which both related to a number of policy wordings that did not contain an "on or at premises" stipulation.

Having regard to all of the above, the evidence does not support the upholding of the Complainant's complaint that the Provider wrongly or unfairly declined to admit and pay her claim for business interruption losses, as a result of the temporary closure of her business between March and June 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.

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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 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.