



<b><u>Decision Ref:</u></b>	2021-0442
<b><u>Sector:</u></b>	Insurance
<b><u>Product / Service:</u></b>	Other
<b><u>Conduct(s) complained of:</u></b>	Claim handling delays or issues Poor wording/ambiguity of policy Rejection of claim
<b><u>Outcome:</u></b>	Rejected

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant is a limited company, trading as a tourist attraction visitor centre and café that also provides guided tours, and is referred to in this decision as ‘the Complainant Company’. The Complainant Company held a business insurance policy with the Provider, and this complaint concerns a declined business interruption claim during the policy period from 9 July 2019 to 8 July 2020.

#### **The Complainant Company’s Case**

The Complainant Company’s broker notified the Provider on **19 April 2020** of a claim for business interruption losses as a result of the temporary closure of the Complainant Company’s business from 13 March 2020 for a period, due to measures imposed by the government to curb the spread of coronavirus (COVID-19).

In making its claim, the Complainant Company notes that the ‘Business Interruption Section’ of the applicable **Policy Document** states at pg. 40:

#### ***“6.3.4 Murder, Suicide and Notifiable Disease***

*This Section is extended to include the Insured’s loss under the Gross Profit, Gross Revenue, Gross Rentals or Stand Alone Increased Cost of Working Specifications, as applicable, resulting from murder, suicide or a Notifiable Disease occurring at the Premises during the Period of Insurance”.*

The term 'Notifiable Disease' is defined at pg. 11 of the **Policy Document** as:

*““Notifiable Disease” means:*

*(a) food or drink poisoning; or*

*(b) any human infectious or human contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS), the Ebola Virus Disease or SARS), an outbreak of which the competent local authority has stipulated shall be notified to them;*

*being sustained by any person on the Insured's Premises”.*

The Complainant Company's business was closed from **13 March 2020** to **8 June 2020**.

Following its claim assessment, the Provider wrote to the Complainant Company on **15 July 2020** to advise that it was declining indemnity as there had been no specific incident of COVID-19 infection suspected or confirmed at the Complainant Company's premises.

On **10 February 2021**, the Complainant Company's broker 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'), 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').

Following its review, the Provider sent its **Final Response** letter to the Complainant Company on 22 March 2021 advising that it was standing over its decision to decline the claim.

The Complainant Company sets out its complaint in the **Complaint Form** it completed in November 2020, as follows:

*“We have business insurance with [the Provider] which includes business interruption. We had to close our business due to the COVID lockdown in March 2020 and applied for compensation ... but were told we weren't covered for Covid-19. We do not agree with this opinion because we had been insured with the same company before the virus came into being so the Business Interruption clause could not name coronavirus as a cause of the interruption, but still charged us for loss of business. We think this is a very shallow and thin excuse”.*

As a result, the Complainant Company seeks for the Provider to admit its claim and states in the **Complaint Form**:

*“We are covered for €67,000 for Business Interruption, so want to be reimbursed for this amount. Our turnover for 2019 was €375,000 and it has been only €100,000 for this year to date [November 2020]”.*

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## **The Provider's Case**

Provider records indicate that it received an email notification from the Complainant Company's broker on **19 April 2020** of a claim for business interruption losses as a result of the temporary closure of the Complainant Company's business, as follows:

*"I wish to make a claim under the Business Interruption Section of [our] Insurance Policy as our business had to close in March due to a Government Directive to counteract the spread of Covid 19 ..."*

The Provider notes that on 12 March 2020, the Health Executive Service (HSE) Social Distancing Guidelines were imposed nationwide to help curb the spread of coronavirus (COVID-19), which caused a significant downturn in trade nationwide. Later, on 24 March 2020, the Government officially directed all non-essential businesses to close.

In assessing the Complainant Company's business interruption claim, the Provider referred to Section 6, 'Business Interruption Section', at pg. 35 of the applicable **Policy Document** (April 2019), as follows:

### **"6.1 Operative Clause**

*This Section covers the Insured's loss, as set out in the Business Interruption Specifications stated as Operative in the Schedule, resulting from interruption of or interference with the Business in the Republic of Ireland in consequence of:*

- (a) any event which gives rise to a payment by the Insurer under the Material Damage Section or under any extension of that Section (other than 5.2.16 - Loss of Licence); or*
- (b) other events as set out in each Business Interruption Specification;*

*and all subject to all the terms, conditions and exclusions of this Section and of the policy as a whole.*

The Provider refers to Section 2, 'Policy Definitions', of the **Policy Document** defines "Damage" at pg. 8 as:

**"2.7 "Damage" means accidental loss of or physical damage to tangible property and, in respect of the Liability Section only, the accidental loss of possession of tangible property ...**

The Provider says that with regard to 6.1 (a) above, as there has been no Material Damage to the Complainant Company's premises, this policy cover has not been triggered.

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The Provider notes the Business Interruption Extension 6.3.4, 'Murder, Suicide and Notifiable Disease' ('the Notifiable Disease Extension'), at pg. 40 of the **Policy Document**:

*"This Section is extended to include the Insured's loss under the Gross Profit, Gross Revenue, Gross Rentals or Stand Alone Increased Cost of Working Specifications, as applicable, resulting from murder, suicide or a Notifiable Disease occurring at the Premises during the Period of Insurance".*

Section 2, Policy Definitions', defines "Notifiable Disease" at pg. 11 as:

**"2.34 "Notifiable Disease" means:**

- (a) *food or drink poisoning; or*
- (b) *any human infectious or human contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS), the Ebola Virus Disease or SARS), an outbreak of which the competent local authority has stipulated shall be notified to them;*

*being sustained by any person on the Insured's Premises".*

The Provider says the Notifiable Disease Extension is only triggered in respect of Business Interruption loss "resulting from" an occurrence or outbreak of a Notifiable Disease "at the Premises", and evidence to support this is required. In other words, the loss claimed must directly result from the authorities closing or restricting the use of the insured premises as a result of the occurrence of a notifiable disease at the premises.

The Provider acknowledges that COVID-19 is a notifiable human, infectious or contagious disease and was classified as such within the Republic of Ireland on 20 February 2020. It further agrees that the appropriate authorities closed or caused restrictions on the use of the Complainant Company's premises.

However, in order for the Notifiable Disease Extension to respond, the Provider says the proximate cause of the losses suffered must be a specific occurrence of, in this case, COVID-19 at the Complainant Company's premises which results in closure or causes restrictions on the use of the premises. In this instance, the Provider says it has been advised by the policyholder that there has not, to its knowledge, been an outbreak or occurrence of COVID-19 at the Complainant Company's premises.

In this regard, the Provider is of the view that the Complainant Company's premises was closed as a result of the general Government order to close non-essential businesses, and not because of the presence of COVID-19 at the premises.

The Provider says the Notifiable Disease Extension is an “on premises” hybrid clause, which is different from and outside the scope 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’), 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’).

The Provider says that following a review of the claim documentation and the timeline of events, it is satisfied that it dealt with the Complainant Company’s claim in an acceptable period of time, given the adverse climate due to the effects of COVID-19. In this regard, the Provider notes that the Complainant Company’s broker first notified it of the loss on **19 April 2020**. The Provider says the Loss Adjuster it appointed, managed expectations from the outset and provided a decision on the policy coverage to the broker on **19 May 2020**, which was within a relatively short period of time given the disruption the global pandemic was having on organisations.

The Provider does acknowledge that there was a delay between the Loss Adjuster conveying the policy coverage decision to the broker on 19 May 2020 and it sending a formal declinature letter to the Complainant Company on 15 July 2020. In this regard, the Provider says the exceptional circumstances associated with COVID-19 and the associated, unprecedented claims frequencies, with claims volumes being many times normal levels, did result in an unavoidable delay in sending the Complainant Company a formal letter regarding policy liability.

### **The Complaint for Adjudication**

The complaint is that the Provider wrongly or unfairly declined to admit and pay the Complainant Company’s claim for business interruption losses as a result of the temporary closure of its 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 Company was given the opportunity to see the Provider’s response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

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A Preliminary Decision was issued to the parties on **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 substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant Company, a limited company trading as a tourist attraction visitor centre and café that also provides guided tours, notified the Provider by way of its broker on 19 April 2020 of a claim for business interruption losses as a result of the temporary closure of the Complainant Company's business from 13 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 Company on **15 July 2020** to advise that it was declining indemnity as there had been no specific incident of COVID-19 infection suspected or confirmed at the Complainant Company's premises.

On **10 February 2021**, I note the Complainant Company's broker 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'), 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').

Following its review, I note the Provider sent its **Final Response** letter to the Complainant Company on **22 March 2021** advising that it was standing over its original decision to decline the claim.

The Complainant Company's business 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 Section 6, 'Business Interruption Section', at pg. 35 of the applicable **Policy Document** (April 2019) provides that:

**"6.1 Operative Clause**

*This Section covers the Insured's loss, as set out in the Business Interruption Specifications stated as Operative in the Schedule, resulting from interruption of or interference with the Business in the Republic of Ireland in consequence of:*

- (c) any event which gives rise to a payment by the Insurer under the Material Damage Section or under any extension of that Section (other than 5.2.16 - Loss of Licence); or*

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*(d) other events as set out in each Business Interruption Specification;*

*and all subject to all the terms, conditions and exclusions of this Section and of the policy as a whole.*

I note Business Interruption Extension 6.3.4, 'Murder, Suicide and Notifiable Disease' ('the Notifiable Disease Extension'), at pg. 40 of the **Policy Document** provides that:

*"This Section is extended to include the Insured's loss under the Gross Profit, Gross Revenue, Gross Rentals or Stand Alone Increased Cost of Working Specifications, as applicable, resulting from murder, suicide or a Notifiable Disease occurring at the Premises during the Period of Insurance".*

[My underlining for emphasis]

In this regard, Section 2, Policy Definitions', of this **Policy Document** defines "Notifiable Disease" at pg. 11 as:

*"2.34 "Notifiable Disease" means:*

*(a) food or drink poisoning; or*

*(b) any human infectious or human contagious disease (other than Acquired Immune Deficiency Syndrome (AIDS), the Ebola Virus Disease or SARS), an outbreak of which the competent local authority has stipulated shall be notified to them;*

*being sustained by any person on the Insured's Premises".*

I am satisfied 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 Notifiable Disease Extension of the Complainant Company's policy to be triggered, I am satisfied that the policy wording clearly stipulates that there has to have been an occurrence of the disease, in this case COVID-19, at the Complainant Company's premises.

It is an insurance standard that the onus rests on the policyholder, the Complainant Company, 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.

In this regard, in its email to the Loss Adjuster on 19 May 2020, I note the Complainant Company's broker advised:

*"[The Complainant Company] don't have evidence that Covid 19 was on their premises, equally, they don't have evidence that it was not on their premises".*

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As the Complainant Company has not supplied any evidence of an occurrence of COVID-19 at its premises, I am satisfied that the policy cover provided by the Notifiable Disease Extension was not triggered.

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 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'), 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, I am of the opinion that the evidence does not support the complaint that the Provider wrongly or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses as a result of the temporary closure of its 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.

#### **Conclusion**

This complaint is not upheld pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**.

**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**

23 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.