An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0450
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Poor wording/ambiguity of policy Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading as a solicitor, holds an office insurance policy with the Provider. This complaint concerns a declined business interruption claim and the policy period in which this complaint falls, is from 13 August 2019 to 12 August 2020.

The Complainant's Case

The Complainant notified the Provider of a claim for business interruption losses due to the temporary closure of his business premises from **27 March 2020**, due to measures imposed by the Government to help curb the spread of the coronavirus (COVID-19).

In making such a claim, the Complainant relies upon Section 2(b), '**Business Interruption'**, at pg. 20 of the applicable **Policy Wording**, as follows:

> *"… The definition of DAMAGE is extended to include for section 2(b) only:-*
>
> *1.(a) an outbreak of any NOTFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES".*

The Policy defines 'Notifiable Disease' as an:

> *"Illness sustained by any person resulting from:-*
> - *food or drink poisoning*

- *any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated must be notified to them"*.

Following its assessment, the Provider emailed the Complainant's Broker on **2 June 2020** to advise that it had declined the Complainant's claim, as follows:

> *" … We have carefully considered the Policy and do not consider that the claim is covered. In particular, we are satisfied that the claim is not covered for the following reasons, each of which apply independently of each other:-*
>
> 1. *The closure of the Premises was not "as a result" of an outbreak of any Notifiable Disease occurring at the Premises. The closure arose from preventative measures taken by the Government, arising from national considerations due to the global pandemic including in particular, social distancing measures.*
>
> 2. *Any loss which has occurred, has occurred as a result of the consequences of the pandemic and in particular the requirements of social distancing, including the restrictions on the gathering of persons, travel restrictions, requirements for remote working and the economic slowdown and has not occurred as a result of an outbreak of a Notifiable Disease occurring at the Premises.*
>
> 3. *It is clear that the agreement to indemnify in respect of the risk specified Section 2(b) Clause 1(a) is provided only where the business interruption loss has been caused by the matters specified at Clause 1(a). Having regard to the Government directions as regards social distancing, including restrictions on travel and the widespread public concern regarding the risks of infection and the economic slowdown, any business interruption loss has been caused by such social practices and public concerns and not by the matters specified at Clause 1(a)".*

The Complainant wrote to the Provider on **19 June 2020** in relation to its decision to decline indemnity, as follows:

> "**1.** *Whilst we note your position we would, respectfully, disagree with your interpretation of the conditions contained in Section 2(b) of* [the policy]. *Your interpretation of the wording "as a result" where it relates to the closure of the Premises is not acceptable and is not agreed in circumstances where it is abundantly obvious that the interruption to the business and the restrictions of the Premises from which we operate did arise directly "as a result of the Covid 19 "notifiable disease" and not as a result of actions taken by the Government, rather the actions taken by the Government are part of overall preventative measures taken directly "as a result" of the outbreak of this notifiable disease.*
>
> ***2.*** *Your contention that any loss having occurred has occurred as a result of the "consequences" of the pandemic rather than as a result of the outbreak of a Notifiable Disease occurring at or near the Premises is, again, disputed in its*

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entirety and we would, respectfully, suggest that, once again, it is abundantly and blatantly obvious that the interruption to our business and the consequential loss that we have suffered as a result of this interruption has occurred "directly" as a result of the consequences of the pandemic and the effect of the Notifiable Disease at our premises.

In very simple terms, the effect of the Covid 19 notifiable disease had a direct effect at our premises and did cause Business Interruption which resulted in consequent losses as described.

3. *At point 3. you go on to state that the agreement to indemnify is limited to circumstances where Business Interruption is caused by the matters specified at Clause 1(a), which is an outbreak of any Notifiable Disease occurring at the premises or which is attributable to an outbreak*

Your contention that the loss is as a result of Government directions rather than the Notifiable Disease is not accepted and, again, it is our contention that the Business Interruption and the consequential loss as a result of the Business Interruption is, and was, caused directly as a result of the Notifiable Disease as specified in Clause 1(a).

Any actions taken subsequently by the Government were actions taken with the intention to restrict and reduce the extent of Business Interruption and Loss which actions, we would contend, have been successful but the cause of the Interruption to the Business was specifically Notifiable Disease and, therefore, it is entirely improper to seek to deny cover in this circumstance.

It is my intention to pursue this matter. We have been fortunate in that our losses have been mitigated in so far as we possibly can, that all preventative actions have been taken to ensure that the Business Interruption is as limited as possible and that the consequential losses are kept to the minimum. However, the Business Interruption that has been suffered and the losses suffered therefrom fall definitively within the definition of cover under the policy herein and, therefore, I would respectfully suggest, should be afforded cover immediately and I would ask that you would refer this matter for review … "

The Provider emailed the Complainant on **6 July 2020** reiterating the contents of its claim declinature letter to the Complainant's Broker of **2 June 2020**.

Following further correspondence from the Complainant, the Provider wrote to the Complainant on **21 August 2020**, as follows:

"We have reviewed the matter again and now respond to your specific queries [in your letter of **19 June 2020**]*, as requested:*

Comment 1 *- We regret that you disagree with our interpretation of the conditions contained in Section 2b of the Policy. We respectfully take this opportunity to re-*

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iterate that Policy cover only operates if there is an actual outbreak of a notifiable disease occurring at the insured premises, as defined within the policy schedule. In this regard, we outline the relevant Policy wording below for ease of reference.

> *"The definition of DAMAGE is extended to include for section 2(b) only:- 1 (a) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES "*

In this instance, we note that there was no outbreak of any notifiable disease occurring at the insured premises.

Comment 2 *- Again, we regret that you disagree, but our Policy wording specifically states cover is only operative where there is an actual outbreak of any notifiable disease occurring at the premises.*

Comment 3 *- As outlined previously, as the business interruption losses are not as a result of an outbreak of any notifiable disease occurring at the premises; such losses are not covered by the Policy.*

In view of the above and for the reasons previously outlined, we are not in a position to overturn our decision with regards to the declinature of your claim"

In his letter to the Provider dated **28 April 2021**, the Complainant submitted, among other things, that:

> *"The definition of damage is extended in Section 2(b) subsection 1(a) to include an outbreak of any notifiable disease occurring on the premises … And under subsection 1(c) the definition of damage is extended to include "the closure of the premises by the local authority because of defects in the drains or other sanitary arrangements".*
>
> *… Without getting into the interpretation of the language at this point is it abundantly clear that there was an occurrence of a notifiable disease i.e. Corona Virus or COVID-19 and that the business, our business, was obliged to close by way of Government or Local authority directive to close our doors to the public as a result of "sanitary arrangements" …"*

Similarly, in his letter to this Office dated **9 August 2021**, the Complainant set out this position, as follows:

> *"…* [Section 2(b), Subsection 1(c)] *related to the closure of the premises by direction of the local authority as a result of defects in drains or other sanitary arrangements. I made this point on several occasions to* [the Provider] *that even in circumstances where they are arguing that business interruption would not be covered in circumstances where a notifiable disease did not occur specifically on the premises, which we cannot say whether it did or did not, but even in circumstances where they would not allow cover in those circumstances they must consider cover in circumstances where our premises were closed by direction of local authority and/or*

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government as a result of sanitary arrangements, sanitary arrangements extending to include issues of social distancing, hygiene and other such sanitary arrangements directed by government and local authority as a result of COVID-19 restrictions."

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

"Our Business was closed as a result of Government Direction from the 27/03/20 as a result of Covid 19 restrictions.

Our Business suffered very specific and easily quantifiable losses from the 27/03/20 - 08/08/20 directly as a result of loss of income and turnover caused by our closure.

Our Business Policy schedule document very clearly covers losses suffered as a result of Business Interruption up to a maximum of €300.000.00 for an indemnity period of twenty four months.

Section 2B on Page 20 of the [Provider] *policy goes into further definition of "damage", "notifiable disease" and other relevant definitions.*

Our contention simply is that as a direct result of an interruption to our business, our business suffered loss of income of approximately €100,000, that the closure of our business as a result of Covid 19 restrictions constitutes "Damage" under the terms of the [Provider] *policy and that as we had asked for specific cover for Business Interruption on our Policy of Insurance to cover an instance exactly such as what transpired during Covid 19 and that said cover was given to us as a part of our policy and paid for as part of our Premium that* [the Provider] *should be obliged to offer us appropriate cover for our losses in this regard and despite voluminous correspondence in this regard they have failed to do so".*

As a result, the Complainant seeks for the Provider to admit and pay his claim for business interruption losses and in that regard, he submits in the **Complaint Form** he completed that:

"A very conservative estimate of our loss of Income as a result of Business Interruption between March and August 2020 is €100,000.00

Monthly Income for Months April May, June and July 2019 was €160,000.00

Monthly Income for Months April May, June and July 2020 was €59,000.00 as a result of Covid 19 restrictions on trading and business interruption".

The Provider's Case

The Provider says that the Complainant notified it of a claim for business interruption losses due to the temporary closure of his business premises from **27 March 2020**, due to measures imposed by the Government to help curb the spread of the coronavirus (COVID-19).

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The Provider says that the Complainant's office insurance **Policy Wording** includes Section 2(b), '**Business Interruption'**, which provides cover for loss of income on the occurrence of damage resulting from an insured cause. "*Damage*" under this section is extended to include an outbreak of any notifiable disease occurring at the premises, or which is attributable to food or drink supplied from the premises, as follows:

> *" … The definition of DAMAGE is extended to include for section 2(b) only:-*
>
> *1.(a) an outbreak of any NOTFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES".*

The Policy defines '**Notifiable Disease'** as:

> *"Illness sustained by any person resulting from:-*
> - *food or drink poisoning*
> - *any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated must be notified to them".*

Following notification of his claim, the Provider-appointed Loss Adjuster made contact with the Complainant on 1 April 2020. The Provider says the Complainant confirmed to its Loss Adjuster, at a site meeting on **3 April 2020,** that there had been no outbreak of COVID-19 within the premises, nor had any member of staff or customers tested positive for COVID-19, to his knowledge, prior to the time of closure. The Provider notes that in its **Preliminary Report** dated **8 April 2020**, the Loss Adjuster confirmed, as part of its review, that there had been no outbreak of any notifiable disease at the premises. As a result, the Provider emailed the Complainant's broker on **2 June 2020** to advise that it had declined the Complainant's claim because the closure of his premises was not as a result of an outbreak of COVID-19 occurring at the premises.

The Provider says it has comprehensive procedures in place to ensure that all claims relating to COVID-19 are thoroughly investigated and reviewed and that the policy cover is considered in detail, prior to any decision being made in respect of policy cover.

The Provider says that the Complainant's policy provides defined, specific and clear cover in respect of notifiable diseases. For cover to operate, there would need to have been an outbreak of a notifiable disease occurring at the insured premises. In the case of the Complainant's claim, the Provider says there is no evidence indicating an outbreak of a notifiable disease having occurred at the insured premises.

Instead, the Provider says the closure of the premises was due to the Complainant being unable to carry out his business due to the preventative measures taken by the Government arising from national considerations due to the COVID-19 pandemic including, in particular, social distancing measures.

In circumstances where the Complainant had confirmed that there was no indication or evidence that there was an outbreak of COVID-19 on the insured premises, to the best of

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his knowledge, and had not made any submissions to the contrary, the Provider respectfully submits that the information garnished by its Loss Adjuster was sufficient, and no further enquiries were necessary to make a claim decision.

However, the Provider also respectfully submits that, if the Complainant had made any submissions to suggest, or infer, that there had been an outbreak of COVID-19 at the premises, prior to the closure of the business, at any point during its correspondence with him, then the Provider would have requested such evidence for review.

The Provider notes that the Complainant disagrees with its interpretation, and application, of the policy working in Section 2(b) generally, however the Provider says it is confident in its interpretation and application of the relevant policy wording, as set out above.

The Provider also notes that the Complainant has advised that he cannot conclusively say there was an outbreak of COVID-19 at his premises and infers that the Provider cannot say that there was not an outbreak of COVID-19 at his premises during the period in question. The Provider says this is an important point, as the onus of proof rests with the Complainant to establish that the insured event, in this case an outbreak of COVID-19 occurring at the insured premises, has occurred. The Provider is satisfied that the Complainant has not discharged this onus of proof and it says that it is also confident, on the balance of probabilities, that no outbreak of COVID-19 occurred on premises.

The Provider notes that Section 2(b), Subsection 1(c) extends the definition of *"Damage"* to include closure of the insured premises by the appropriate local authority, because of defects in the drains or other sanitary arrangements, as follows:

> *" … The definition of DAMAGE is extended to include for section 2(b) only:- …*
>
> *1.(c) closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements".*

The Provider says there has been, to its knowledge, no order of a public authority regarding any defect in the sanitary arrangements at the Complainant's premises and in the absence of a premises-specific order, the clause in question cannot apply.

In relation to the Complainant's contention that *"sanitary arrangements"* includes social distancing, the Provider says the policy wording is very specific with regard to outlining cover, and for any loss to fall within cover, it must result from damage by an insured cause. In that regard, the Provider says the losses sought to be claimed, were not as a result of the closure of the premises by the appropriate local authority because of defects in the drains or other sanitary arrangements; rather the closure arose from preventative measures taken by the Government, arising from national considerations due to the global pandemic including, in particular, social distancing measures.

The Provider says the term *"sanitary arrangements"* should be construed in conjunction with the word *"drains"* and when it is interpreted in this way, the term *"sanitary*

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arrangements" cannot be extended to cover closures arising from the inability of a premises to supress transmission of the COVID-19 virus to a level acceptable to the public authorities.

Further, the Provider refers to the High Court decision of 19 April 2021 in ***Brushfield Ltd (t/a The Clarence Hotel) v. Arachas Corporate Brokers Limited and AXA Insurance Designated Company*** [2021] IEHC 263, where it was held that closure arising from an inability to enforce social distancing could not be said to constitute a defect in the sanitary arrangements at the premises.

Here, the Court also held that the policy language must always be interpreted in the context of the policy as a whole and in the context of the relevant factual and legal background and that it is wrong to attempt to construe the terms of a contract through the prism of the dispute that currently exists between the parties. Instead, the Court found that it must place itself in the position of the parties at the time the policy was put in place and construe its terms by reference to how they would be understood by a reasonable person in the position of the parties at that time. Having done so, McDonald J stated:

> *"… I have to question whether the practice of social distancing or physical distancing could be said to have been reasonably known to reasonable people in the position of the parties to the AXA policy at the time the policy was put in place in April, 2019.*
>
> *Even if one were to take the view that social distancing was reasonably known as a concept in 2019, I find it difficult to accept that a reasonable person in April, 2019 would have characterised the practice of social distancing or physical distancing as a "sanitary arrangement". Again, it is important to consider the meaning of those words in context and to keep in mind that para. 5 is directed at defects in sanitary arrangements which could lead to the closure of premises by a public authority. I was not referred to any statutory or regulatory provision dealing with any aspect of sanitary conditions that would have permitted a public authority, at the time the policy was put in place in April 2019, to close premises by reason of an inability to enforce social distancing. In those circumstances, I find it very difficult to accept that a reasonable person, in April, 2019, would have considered that the phrase "a defect in…other sanitary arrangements" would cover such an eventuality … "*

The Provider says its aim is to deal with claims promptly, efficiently and fairly. The Provider is satisfied that it diligently gathered and carefully reviewed all information provided by its Loss Adjuster, prior to the decision being made on the Complainant's claim.

The Provider confirms that its handling and management of COVID-19 related claims are the subject of much governance and oversight, to ensure customers are treated fairly. The Provider is acutely aware, and fully empathises, with the enormous difficulties and financial loss the Complainant and many others have faced because of COVID-19. However, for a claim to be paid under a contract of insurance, the Provider says it must be as a result of an event that the policy provides cover for. The Provider says that although it remains sympathetic to the Complainant for the losses which he has sustained, it must apply policy

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cover in a fair and reasonable manner and unfortunately, the claimed for losses are not covered by the Complainant's policy.

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 as a result of the temporary closure of his business premises from **27 March 2020** for a period, due to measures imposed by the Government to help curb the spread of the 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 **4 November 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 notified the Provider of a claim for business interruption losses due to the temporary closure of his business premises from **27 March 2020**, due to measures imposed by the Government to help curb the spread of the coronavirus (COVID-19).

Following its assessment, the Provider emailed the Complainant's Broker on **2 June 2020** to advise that it had declined the claim, because the closure of the Complainant's premises was not as a result of an outbreak of COVID-19 occurring at the premises. Rather the Provider took the view that the closure arose from preventative measures taken by the Government,

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arising from national considerations due to the global pandemic including in particular, social distancing measures.

I note the Complainant has written to the Provider on a number of occasions regarding its decision to decline indemnity, and that the Provider has at all times maintained its position.

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

I note that Section 2(b), '**Business Interruption'**, of the applicable **Policy Wording** states at pg. 20:

> *" … The definition of DAMAGE is extended to include for section 2(b) only:-*
>
> *1.(a) an outbreak of any NOTFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES".*

The Policy defines '**Notifiable Disease'** as:

> *"Illness sustained by any person resulting from:-*
> - *food or drink poisoning*
> - *any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated must be notified to them".*

I am satisfied that in order for this Notifiable Disease Extension to provide business interruption cover, there must be the operation of the relevant insured peril as specified in the policy, that is, that the business interruption must have been caused by the outbreak of a notifiable disease <u>on the insured premises</u>, in this instance, an outbreak of COVID-19.

In that regard, in its **Preliminary Report** dated **8 April 2020**, I note that the Provider-appointed Loss Adjuster advised at pg. 3 that:

> *"*[The Complainant] *has confirmed that there was no outbreak within the premises nor any member of staff or customers have tested positive for Covid-19, to his knowledge".*

I am satisfied that the notifiable disease 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 <u>on the insured premises</u> of an outbreak of a notifiable disease.

I am satisfied that the onus is on the claimant, as it is in all insurance claims, to show the operation of an insured peril and in that regard, I note the Complainant has advised the

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Provider that to the best of his knowledge, there was no outbreak of COVID-19 within his premises.

Section 2(b), '**Business Interruption'**, of the **Policy Wording** also provides at pg. 20 that:

> *" … The definition of DAMAGE is extended to include for section 2(b) only:- …*
>
> *1.(c) closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements".*

I note the Complainant suggests in his letter to this Office dated **9 August 2021** that the term *"sanitary arrangements"* should be extended to encompass the practice of social distancing and hygiene arrangements (presumably, such as mask wearing and regular hand washing) as directed by the Government as a result of COVID-19.

In that regard, the concept of "social distancing" is one of the tools which was introduced, and has since been widely promoted, as a measure for reducing the spread of COVID-19, amongst a population. The rationale for this practice is that by remaining at a distance of at least 2 metres from other individuals, and in limiting social contacts to a minimum, the opportunities whereby individuals come in contact with infected persons are reduced, thereby limiting the spread of the virus itself.

I accept the Provider's position that *"sanitary arrangements"* should be construed in conjunction with the word *"drains"* in Section 2(b), Subsection 1(c), and that when interpreted in this way, the term *"sanitary arrangements"* cannot reasonably be extended to cover closures such as that which the Complainant experienced.

I take the view it would be unreasonable to interpret the term *"sanitary arrangements"* in the context of Section 2(b), Subsection 1(c) to include the concept of social distancing. In that regard, I am also conscious of the High Court decision of 19 April 2021 in ***Brushfield Ltd (t/a The Clarence Hotel) v. Arachas Corporate Brokers Limited and AXA Insurance Designated Company*** [2021] IEHC 263, which is quoted from above.

Having regard to all of the above, I am satisfied that the Provider was entitled to adopt the position which it did. In my opinion, 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 as a result of the temporary closure of his business premises from **27 March 2020** for a period, due to measures imposed by the Government to help curb the spread of the coronavirus (COVID-19).

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

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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

26 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.