An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0478
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Rejection of claim Premium rate increases
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a public house, ("the Complainant Company"), holds a 'Hospitality Policy' of insurance with the Provider.

The complaint concerns a claim for business interruption losses arising from the outbreak of coronavirus (COVID-19) and an increase in the Complainant Company's renewal premium.

The Complainant Company's Case

By emailed dated **20 October 2020**, the Complainant Company's Loss Assessor notified the Provider of a claim for business interruption losses as a result of the temporary closure of the Complainant Company's public house on **9 October 2020** due to an outbreak of COVID-19 on its public house premises.

By letter dated **6 November 2020**, the Provider wrote to the Complainant Company acknowledging the notification of its claim. In this letter, the Provider advised the Complainant Company of the cover available under the applicable policy and requested additional information regarding the claim, as follows:

> *"The cover, provided under the Notifiable Disease Extension of your Policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a Notifiable Disease at the Premises, which causes restrictions on the use of the Premises on the order or advice of the competent authority. The Indemnity Period is from the date on which the restrictions on the Premises are applied for a maximum period up to three months, and is subject to a limit as noted in your Policy.*

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 of the Notifiable Disease at your Premises or when it was first brough to your attention;
The date on which the restrictions by the competent authority 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."

In response to the Provider's request for additional information, the Loss Assessor wrote to the Provider by email on **9 November 2020**, as follows:

"[The Company Director/'S'] *has explained the loss in the context of the following timeline:*

1. *His son* ['G'] *had shown symptoms of COVID19 on the 7th of October and they had taken the decision that he* […] *should not work. The business employees are* [S] *and* [G] *only.*
2. [S] *was contacted on the 9th October by the HSE to advise him that he and* [G] *were considered to be close contacts of two customers who had tested positive for COVID19.*
3. [Named individual] *and* [named individual] *[his daughter] had tested positive for COVID19 on the 8th and 10th of October respectively. They were customers of the business in attendance at a celebration of a Holy Communion.*
4. *In light of the HSE's advice to isolate, neither* [S] *nor* [G] *could operate the business and the business closed on the 9th of October.*
5. *Both* [S] *and* [G] *subsequently tested positive for COVID19.*
6. *The period of interruption must be at least four weeks from the date of closure."*

Text messages sent by the HSE to the named individuals at paragraph 3 above, regarding COVID-19 test appointment were attached to this email.

Following its assessment, the Provider wrote to the Complainant Company on **18 November 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):

No restrictions on the use of the Premises were brought about by the competent authority as a direct result of an occurrence of a Notifiable Disease."

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In response to this correspondence, the Loss Assessor wrote to the Provider by email dated **18 November 2020**, as follows:

> *"We contend that restrictions on the use of the premises were brough about by a competent authority as a result of an occurrence of disease.*
>
> *As was explained previously, in light of the HSE's advice to isolate, neither* [S] *nor* [G] *could operate the business and the business was compelled to close on the 9th of October. Both* [S] *and* [G] *subsequently tested positive for COVID19. The effect of the HSE's directions to the Insured and his son were to restrict the use of the premises.*
>
> [The Provider] *will also appreciate that, in the current climate – where the capacity to test and trace is consistently under pressure – there may not be time or resources for a specific order to be made in order to protect Public Health. Instead, the Government relies upon the buy-in and support from businesses to do the 'right thing' in often difficult circumstances.*
>
> *We would ask that you review this decision to repudiate liability.* […]*."*

The Provider responded to the Loss Assessor on **11 December 2020** advising that it had reviewed the claim and that the decision to decline the claim remained.

It appears that a formal complaint was made around **4 January 2021**. By email dated **12 January 2021**, the Provider emailed the Complainant Company *"to find out if the HSE provided any advice to you specifically in regards to your premises"*. Replying the same day, S advised, as follows:

> *"I informed by hse that there was a outbreak at my premises due to customers who were here after a communion had tested positive. We were named as close contacts and told to isolate and test was arranged for us by hse. hse notified staff and myself to isolate immediately. I notified hse that we were closing immediately due to close contacts and I spoke to them on 2 further occasions, once when they rang back for close contacts and a week later when I became concerned about scale of outbreak. I also notified* […] *garda Station and informed them that I had to close with immediate effect. hse informed me about outbreak, arranging tests for all staff members. we subsequently tested positive. We had no reason to contact hse. they contacted us with advice."*

In response to this, by letter dated **28 January 2021**, the Provider wrote to the Complainant Complaint, as follows:

> *"Your complaint concerns the declinature of two claims for Business Interruption due to Covid-19 and also the increase in your renewal Premium.*
>
> *In addressing your complaint regarding your claims for Business Interruption I think that it is helpful to summarise the key events as the claims progressed and I have set those out below.*

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We received notification of your claim (reference […]*) on the 7th April 2020 from your* [Broker]*. We wrote back to your broker on the same day requesting details to enable us to investigate and consider your claim. On the 15th April 2020 we received a complaint, via your broker, from you concerning the wording of this letter. We acknowledged your complaint and sent you a letter on the 20th April 2020 advising that we still required information from you to enable us to investigate and progress your claim. We reassured you that no decision would be made on your claim until all the information we had requested had been provided by you. On the 22nd April 2020, we received further information from you to support your claim. On the 8th May 2020, we wrote to you to advise that your claim was not covered and explained the reason(s) why your claim was not covered. All correspondence for this claim was sent via your broker* […]

We received notification of your second claim (reference […]*) on the 20th October 2020 from* [the Complainant Company's] *Loss Assessors. We then sought a signed mandate from them confirming their appointment once we received this, we wrote to* [the Loss Assessor] *on the 6th November 2020, requesting details to enable us to investigate and consider your claim. On the 9th November 2020, we received information from* [the Loss Assessor] *to support your claim. On the 18th November 2020, we wrote to* [the Loss Assessor] *to advise that your claim was not covered and explained the reason(s) for the declinature.*

I have now concluded my review of both claims files and your complaint.

In reviewing both claims and the information you provided to our office to support your claims, I note that:

You closed your business on the 15th March 2020 in line with the government guidelines that were brought about by national considerations resulting from the global pandemic; including in particular, the requirements of social distancing and public concerns. We understand that the Gardaí visited your property to enforce this guidance on the same date and that there had been confirmed cases of Covid-19 in [the county]*; and that;*

You closed your business on the 9th October 2020 when you and your sole employee (your son) tested positive for Covid-19. We understand that as you and your son, the only employee, were required to isolate in line with HSE guidelines, you were not able to open your business as you had no staff to do so.

Your insurance policy sets out the detailed terms and conditions of your insurance. In order to be covered by the policy, the loss must result from one of the causes of loss that are outlined in your policy document.

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The Notifiable Disease Extension of your policy, operates only where there is loss resulting from interruption or interference with the business as a result of an occurrence of a Notifiable Disease at the Premises, which causes restrictions on the use of the Premises on the order or advice of the competent authority.

The Indemnity Period is from the date on which the restrictions on the Premises are applied for maximum period up to three months, and is subject to a limit as noted in your Policy.

In reviewing both claims, I understand that no restrictions on the use of the Premises were 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 claims is correct and that no cover can be provided.

We note your premium queries and following consultation with our Underwriting Team, we would advise as follows:

1 Query in relation to the renewal premium of €8,118.60 inclusive of 5% Government Levy for the period 12th October 2020 to 11th October 2021:

The 2020 renewal premium increase versus New Business premium is due to a combination of factors as follows:-

a) Prior year claims experience is a factor in Renewal rating. We were notified by your broker of a Public Liability claim, with a current estimate of £80,750, which we were not aware of when calculating the 2019 New Business premium. It has also been recognised that another Public Liability claim had been settled for a significantly lower value.

b) Projected exposures for 2020 - 2021 have reduced due to the impact of Covid-19 on your business activities and this has been accounted for in the calculation of your renewal premium. Notwithstanding this, a minimum premium is still required in respect of on-going Public Liability (PL) exposures, such as your Liability exposure as occupier of the premises, possible exposures associated with contractors in for cleaning, maintenance or possibly for other activities associated with premises re-opening preparations, and this is reflected in the minimum PL premium calculation.

However, we understand and empathise with the difficulties facing businesses in these unprecedented times and have decided to re-consider our premium requirement in respect of Public Liability. We propose to reduce this to €5,250 down from €6,300; both figures are inclusive of 5% Government Levy. The resulting outcome would be a revised 2020 Renewal Premium of €7,060.60 inclusive of 5% Government Levy. If you wish to avail of this offer please instruct your intermediary to contact us.

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2. *Query in relation to refund to reflect reduced activity in the 2019 - 2020 insurance period:*

A reduced activity adjustment return for COVID impact, up to a maximum of 15% of the Employers/Public/Products Liability Section premiums, is available subject to receipt of an Auditors Certificate of wages and turnover for the period of insurance ending 11th October 2020. On receipt of same, we will be happy to calculate the level of return premium due based on the information provided and up to the maximum of 15% allowable. If you wish to pursue this matter, please provide us with the requested information via your intermediary. […]*"*

The Complainant Company considers that its claim for business interruption losses is a result of the temporary closure of its public house due to an outbreak of COVID-19 at its public house premises and is covered by the terms and conditions of its Hospitality Policy. In this regard, the Complainant Company sets out its complaint in its Complaint Form, as follows:

"I have business interruption for infectious diseases and prevention of access and [the Provider] *is declining my legitimate claim. customers developed covid and hse contacted me and my son who are only staff in pub to isolate immediately. we tested positive a few days later as did several of my customers.* [The Provider] *are stating that no authority forced us to close and on that basis my claim is declined. we were asked to isolate and forced to close as we did the correct thing by hse advice. I sent details of customers details from hse plus our positive results. i find this very unfair as they declined first claim in March due to no presence of covid in pub. despite my policy saying in immediate vicinity."*

As a result, the Complainant Company seeks for the Provider to admit and pay its claim for business interruption losses as a result of the temporary closure of its public house due to an outbreak of COVID-19 and also seeks an explanation for the increase in its policy renewal premium, as follows:

"I would like [the Provider] *to honour their contract and also question why policy has increased by 1500 euro despite closed most of year."*

Following this, the Complainant Company wrote to this Office on **23 February 2021**, as follows:

"[O]*ne further issue is the fact that hse contacted me and told me to isolate as customers got covid and organised a test for me and son. i have proof from hse of texts confirming the customers who tested positive and named us as close contacts."*

By emails dated **3 March 2021**, the Complainant Company furnished text messages showing that S and G tested positive for COVID-19 in respect of COVID-19 tests taken on **12 October 2020** and **11 October 2020** respectively.

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The Complainant Company wrote to this Office by email dated **25 March 2021**, as follows:

> *"*[W]*e believe that our prevention of access clause with extension for notifiable disease clause in immediate vicinity satisfies the requirement for trigger of cover. On 9 October following confirmation that a customer tested positive, we were advised to isolate and test was arranged by contact trace and both I and staff member tested positive. I have in my possession records of positive tests results from all who were in pub on Sat the 3 October and records of them in pub on that day through contact tracing book. I was first notified by hse on Friday to isolate and then the positive case rang me and sent a photograph of people whose numbers he required cause they were in his company. in total excess of ten people subsequently tested positive from this gathering who were at this communion party in pub. As both staff member* [G]*, myself and* [named individual] *are from different households not to mention the others, it is recognized that a cluster of covid was evident in pub. a cluster is defined as two or more confirmed cases of covid from a laboratory from people of different households connected to same facility. we done right thing and all we were asked to by hse and advised. I shut pub immediately on receiving news of positive case and us a close contact. i contacted* [the local] *garda station where I spoke to a sergeant* […] *and advised her of closure due to covid on premises and we placed add on social media advising customers who were in premises on 3 October that they may be contacted by hse. We contacted all patrons from tracing book to notify them of covid on premises. we have all the evidence from people and reference numbers from hse of positive cases* […] *we would also like to point out that we received letter from insurance company broker in March stating that there had to be covid on premises for cover to be triggered and another on 12 October confirmation of our closure. We would also like to point out that we feel very let down by* [the Provider's] *stance on this situation cause we have a valid and genuine evidence and* [the Provider] *has caused us terrible stress and financial insecurity by not honouring their contract. we would also like to point out that we didn't hide from our creditors and honoured our rent insurance etc up to date and not look at our contract clause for a way out by claiming force majeure or clause that we have to stay open during term of lease which we could have.* […]*."*

The Provider's Case

The Provider says that on **20 October 2020**, the Complainant Company's appointed representative submitted correspondence dated **20 October** stating an intention to claim for losses attributable to COVID-19 under the Business Interruption section of the policy with effect from **9 October 2020**. The Provider says this was followed by a formal notification of claim on **6 November 2020**.

The Provider says the Business Interruption Notifiable Disease Extension provides cover for loss of income where the outbreak of the disease is at the Premises and the closure of the Premises, by order of a local or government authority, is as a direct result of an outbreak of the disease at the Premises.

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The Provider has cited the Business Interruption Notifiable Disease endorsement at page 14 of the policy document issued on **23 March 2020**.

On **6 November 2020**, the Provider says it issued correspondence to the Complainant Company and its appointed representative requesting the following information to progress the claim:

1. The date of the occurrence of the Notifiable Disease at the Premises or when it was first brought to the Complainant Company's attention;
2. The date on which the restrictions by the competent authority were put in place;
3. The period of the restrictions; and
4. Copies of any notices or relevant documents in support of the claim.

On **9 November 2020**, the Provider says it received a reply from the Complainant Company's appointed representative advising that the Complainant Company's owner and its other employee started showing symptoms of COVID-19 on **7 October 2020** and that they took the voluntary decision not to work. The Provider says it was also noted that following an organised event (a Holy Communion celebration) which took place at the insured premises, two of the customers present at the event tested positive for COVID-19. Subsequent to this, the Provider says on **9 October 2020**, the Complainant Company's owner and its other employee were contacted by the HSE to advise that they were classified as close contacts and that they should self-isolate. The Provider says it was advised that both the Complainant Company's owner and its other employee subsequently tested positive for COVID-19.

The Provider says the Business Interruption Notifiable Disease Extension provides cover where there is an outbreak of a disease at the Premises causing an interruption or interference with the Business carried on at the Premises. In order for this extension to apply, the Provider says the following criteria must be satisfied:

1. The outbreak of the Notifiable Disease is at the Premises;
2. The closure of the Premises is brought about on the advices of the competent authority as a result of an outbreak at the Premises; and
3. There is a verified financial loss directly resulting from 1 and 2 above.

Based on the information on file, the Provider says the second criterion outlined above has not been satisfied. The Provider says it wrote to the Complainant Company on **18 November 2020** advising that the claim was not covered under the policy because no restrictions on the use of the Premises were brought about by the competent local authority as a direct result of an occurrence of a Notifiable Disease.

In terms of the occurrence of COVID-19 at the insured premises, the Provider says the Complainant Company's representative advised that the Complainant Company's owner and its other employee were contacted by the HSE and advised to self-isolate as two customers had tested positive for COVID-19; they were considered to be close contacts of the affected parties.

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The Provider says that evidence has been provided to show that the Complainant Company's owner and its other employee, contracted COVID-19. The Provider says this evidence is in the form of a number of text messages from the HSE. The Provider says a text message confirms that the Complainant Company's owner made an appointment to be tested on **12 October 2020** and a subsequent message was sent by the HSE on **13 October 2020** confirming a positive test for COVID-19. The Provider says a similar set of text messages were provided to show that the other employee was also tested and confirmed positive for COVID-19.

The Provider refers to the definition of Notifiable Disease in the Special Conditions of the Business Interruption Section Extensions wording at page 14 of the policy document and acknowledges that there was an occurrence of a Notifiable Disease at the Complainant Company's premises in **October 2020**.

Addressing whether there were any restrictions on the use of the premises arising from the occurrence of COVID-19 at the premises in **October 2020**, the Provider cites the following passage from the Business Interruption Section Extension:

> *"The Notifiable Disease Extension under this Policy provides cover when:*
> 1. *The outbreak of the Notifiable Disease is at the Premises, and;*
> 2. *The closure of the Premises is brought about on the advices of the competent authority as a direct result of an outbreak of the Notifiable Disease at the Premises"*
>
> [Provider underlining for emphasis]

The Provider says it would hold that the closure of the insured premises was not brought about on the advices of the competent authority, as a direct result of the notifiable disease at the premises.

Referring to the information sought in its letter of **6 November 2020**, the Provider says the Complainant Company's representative responded with a timeline. In summary, the Provider says the timeline provides information on contact from the HSE, the advice to self-isolate due to close contact and the subsequent positive test. The Provider says it was noted that in light of the HSE advice to isolate, the Complainant Company's owner could not operate the business and the business closed on **9 October 2020**.

The Provider says the response from the Complainant Company's representative failed to demonstrate that restrictions were put in place by the competent authority and no documents were forwarded to support any such restrictions being imposed by **any competent authority**.

The Provider says that on **18 November 2020** it wrote to the Complainant Company to formally decline the claim, as follows:

> ***"No restrictions on the use of the Premises were brought about by the competent authority as a direct result of an occurrence of a Notifiable Disease."***

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The Provider says the matter was raised as a complaint by the Complainant Company's owner on **4 January 2021**. The Provider says it asked the Complainant Company's owner if the HSE provided any advice **specifically in regard to their premises**. The Provider says the Complainant Company's owner advised that the HSE contacted him to warn that close contacts may have exposed him to COVID-19. The Provider says the Complainant Company's owner advised that he notified the HSE that he was closing the business immediately, due to the close contacts.

The Provider says it is of the view that every effort was made to identify whether there was a restriction on the use of the premises arising from a Notifiable Disease at the premises in **October 2020**, and also whether any such restriction was on the order or advice of a competent local authority. The Provider says no such evidence was forwarded to support this position.

The Provider says it is not aware of any legal requirements, guidelines or advice from Government or local authorities in **October 2020** that would have imposed or caused restrictions to be imposed on the use of the Complainant Company's premises arising from an occurrence of COVID-19 at the premises. The Provider says no such requirement, guideline or advice from a competent authority was ever issued, to its knowledge.

The Provider says the fact that both the Complainant Company's owner and its other employee contracted COVID-19 in **October 2020** did not cause or result in an order restricting the use of the insured premises. The Provider says the instructions issued to both persons to isolate, firstly as close contacts and subsequently as confirmed cases, were in a personal capacity only, and not related to the Complainant Company's business premises.

The Provider says the Complainant Company's owner took the decision voluntarily to close the business and, as previously mentioned, the Provider was not aware of any further advice being issued from a competent authority in relation to the insured premises as a direct result of an outbreak of COVID-19 at that premises.

Additionally, the Provider says that at the time the Complainant Company voluntarily closed its business on **9 October 2020**, Government restrictions were already in place from **6 October 2020** and further strengthened from **21 October 2020** across a wide range of businesses/services. In relation to the Complainant Company's business as 'Publican', the Provider says the following restrictions would have applied:

6 October 2020	Pubs that do not serve food remain closed. No indoor dining is allowed in restaurants, cafés and pubs serving food. Outdoor dining should be restricted to 15 people at any one time.
21 October 2020	Bars, cafés, restaurants and wet pubs may provide take away and delivery services only. Wet pubs in Dublin remain closed.

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The Provider says these, and measures pertaining to other business types, were implemented by Government to prevent the spread of COVID-19 in the community and were not specific to the Complainant Company's business premises or indeed related to the illness which befell the Complainant Company's owner and its other employee.

In respect of the Complainant Company's renewal premium the Provider says that in its letters of **28 January 2021** and **1 March 2021**, it set out the basis on which the 2020 renewal premium was calculated. The Provider says it explained that both risk exposure (occupation, property sums insured, projected turnover and wages for the next 12 months) as well as prior claims experience were the factors which were used to calculate the renewal premium for the period **October 2020** to **October 2021**.

In relation to risk exposures, the Provider says these were provided by the Complainant Company through its Broker in **September 2020**. The Provider says that prior claims from previous insurances through an updated verified five year Claims Experience, as well as any valid claims attaching to the Provider policy (of which there were none during the previous period of insurance, as a business interruption COVID-19 claim had been notified but declined on the basis that the triggers for cover had not been met) were also factored into the renewal premium calculation.

In relation to prior claims, the Provider says it received an update that one previous claim had been withdrawn and payment was in respect of costs only. The Provider says this was factored into its calculation. Additionally, the Provider says a new claim (incident date of **4 February 2019**) with an estimate cost of €80,750.00 was included, which was not accounted for in previous (New Business) premium calculations as it was not notified to the Provider until after the inception of the policy, post **October 2019**.

The Provider says that the basis for the increase in renewal premium for the period **October 2020** to **October 2021** was solely related to prior claims experience. The Provider says that activity in the previous period is not a factor for consideration in a renewal premium, as it relates to a previous period.

The Provider says it would like to clarify that an initial premium increase in the order of €1,590.85 was reconsidered and reduced to €1,058.00 as a gesture of its understanding of the ongoing difficulties faced by the business during these unprecedented times and following representations from the Complainant Company. The Provider says this was communicated in its letter of **28 January 2021**.

The Provider says it advised the Complainant Company in this letter that a reduced activity adjustment return for COVID-19 impact on the business of up to 15% of the combined premium for the Employers/Public and Products Liability Sections was available subject to receipt of an Auditor's Certificate of wages and turnover for the period ending **11 October 2020**. The Provider says it reminded the Complainant Company of this rebate possibility in its letter of **1 March 2021**, but to date, the Provider has not received the required documentation evidencing reduced turnover/wages for the period to allow the Provider to process this return premium.

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The Complaint for Adjudication

The complaint is that the Provider:

1. wrongfully or unfairly declined the Complainant Company's claim for business interruption losses as a result of the temporary closure of its public house due to an outbreak of COVID-19 at its business premises in **October 2020**; and

2. wrongfully increased the Complainant Company's policy renewal premium for the period **October 2020** to **October 2021**.

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.

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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

The Business Interruption Claim

The Complainant Company holds a 'Hospitality Policy' of insurance with the Provider. In the context of the present complaint, the Complainant Company held such a policy of insurance covering the period of **12 October 2019** to **11 October 2020**. In terms of the cover in place during this period, at page 5 of the applicable 'Endorsement Schedule' and at page 7 of the applicable Hospitality Policy 'Schedule', I note that the Complainant Company was insured for business interruption in respect of 'Gross Profit' for a maximum indemnity period of 12 months, with a sum insured of €180,000.00.

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The cover provided in respect of business interruption is set out at page 14 of the Endorsement Schedule under the heading 'Endorsements applicable to BUSINESS INTERRUPTION' ("the Business Interruption Endorsement"), as follows:

> *"The insurance by this policy shall subject to all the exclusions and conditions of the policy (except in so far as they may be hereby expressly varied) and the special conditions set out below extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:-*
>
> *1. (a) <u>any occurrence of a Notifiable Disease</u> (as defined below) <u>at the Premises</u> or attributable to food or drink supplied from the Premises*
>
> *(b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease*
>
> *2. the discovery of vermin or pests at the Premises*
>
> *3. any accident causing defect in the drains or other sanitary arrangements at the Premises*
>
> *<u>which causes restrictions on the use of the Premises on the order or advice of the competent local authority</u>*
>
> [My underlining for emphasis]
>
> *4. any occurrence of murder or suicide at the Premises.*
>
> *Special Conditions*
>
> *1. Notifiable Disease shall mean illness sustained by any person resulting from*
>
> *(a) food or drink poisoning or*
>
> *(b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated shall be notified to them.*
>
> *2. For the purposes of this memorandum:*
>
> *Indemnity Period shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident, beginning –*
>
> *(a) in the case of 1, 2 and 3 above, with the date from which the restrictions on the Premises are applied*

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(b) in the case of 4 above, with the date of the occurrence or discovery

and ending not later than the Maximum Indemnity Period thereafter.

Maximum Indemnity Period shall mean 3 months. Premises shall mean only those locations stated in the Premises definition; In the event that the policy includes an extension which deems loss destruction or damage at other locations to be an incident such extension shall not apply to this memorandum.

3. The Company shall not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.

4. The Company shall only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident.

The liability of the Company shall not exceed €250,000 in respect of any one occurrence or €250,000 in any one Period of Insurance."

It can be seen from the wording of clauses 1 to 4 of the Business Interruption Endorsement that the perils identified under each of those sub-clauses, must occur *at the Premises*; in the context of clauses 1 to 3, the Business Interruption Endorsement further requires the imposition of restrictions on the *use of the Premises*. In my opinion, the Business Interruption Endorsement wording is clear and unambiguous, in terms of imposing a premises specific "*at the Premises/use of the Premises"* requirement.

The term 'Premises' is defined (at page 19) of the Hospitality Policy document as: *"the location of Property Insured as stated in the Schedule."* 'Property Insured' is defined as:

"(a) ***Buildings at the Premises:***

buildings being built mainly of brick, stone or concrete and roofed […] *including:*

(i) landlord's fixtures and fittings
(ii) outbuildings
(iii) walls, gates and fences
(iv) piping ducting cables wires […]
(v) yards car-parks roads and pavements."

In this respect, I note that the location of the Property Insured as stated on the Complainant Company's Endorsement Schedule and Policy Schedule is its public house premises.

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Given the very clear premises specific requirement in the Business Interruption Endorsement, the definition of the terms 'Premises' and 'Property Insured', and the express identification of the Complainant Company's public house premises, as the insured premises, it is my opinion that giving the words of clause 1 of the Business Interruption Endorsement, their plain and ordinary meaning, reasonably interpreted, clause 1 requires there to be an occurrence of a Notifiable Disease actually and specifically at the Complainant Company's public house premises (or the discovery of an organism actually and specifically at the public house premises which is likely to result in the occurrence of a Notifiable Disease).

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in the recent High Court case of *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company* [2021] IEHC 263 (delivered on **19 April 2021**), where he made certain remarks regarding an *at the premises* requirement contained in a clause somewhat similar to clause 3 of the Business Interruption Endorsement above:

> *"167.* […] *Those words "at the premises" are also to be found in paras. 2 and 3 of the MSDE* [Murder, Suicide or Disease] *clause where they are clearly used in a premises specific sense. The inclusion of the word's "at the premises" strongly suggest to me that the relevant closure must be prompted by a specific defect in the drains or other sanitary arrangements at the premises in question and not as a consequence of concerns about the way in which public bars or hotels are run generally or their ability to contribute to the spread of COVID-19. In turn, it seems to me to follow that the order of the public authority envisaged by para. 5 is an order directed at the particular defect found at the premises. This suggests that the order will be a premises specific one.*
>
> *168. For all of these reasons, I have come to the conclusion that para. 5 of the MSDE clause will only apply where there is a specific order of a public authority requiring closure of all or part of the premises as a result of a defect in the drains or other sanitary arrangements at the premises."*

Therefore, for cover to become operative pursuant to clause 1(a), the Complainant Company must show there was an occurrence of a Notifiable Disease at its premises. Similarly, in respect of clause 1(b), the Complainant Company must show that an organism was discovered, at its premises, which was likely to result in the occurrence of a Notifiable Disease. When the Complainant Company satisfies these requirements, it must be shown that either of the instances in clause 1(a) or clause 1(b) were the cause of restrictions being imposed on the use of the premises by a competent local authority.

At this point, I note it is not disputed that COVID-19 is a Notifiable Disease for the purposes of clause 1 or that there was an occurrence of COVID-19 at the Complainant Company's public house premises/the insured premises. However, the basis for the Provider's declinature of the Complainant Company's claim is that restrictions were not imposed on the use of the insured premises, by a competent authority, as a direct result of COVID-19.

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I am satisfied that for cover to become operative under the clause 1, the occurrence or discovery of COVID-19 at the insured premises must cause restrictions on the use of the premises and these restrictions must be *"on the order or advice of the competent local authority"*.

In considering the term 'competent local authority', I note that the proper interpretation of such a term was considered by the England and Wales High Court in *The Financial Conduct Authority v. Arch Insurance (UK) Limited & Ors* [2020] EWHC 2448 (Comm), delivered on **15 September 2020**. In its judgment, the Court took the view that this term referred to whichever authority was competent to impose the relevant restrictions, in the locality, on the use of the premises, stating that:

> *"375.* […] *The narrow meaning for which the FCA contends leads to an artificial and illogical result. In our judgment,* [Counsel] *is right that the phrase "competent local authority" means whichever authority is competent to impose the relevant restrictions in the locality on the use of the premises, including central government."*

Further guidance as to the proper interpretation of such a phrase can be seen in the decision of McDonald J. in *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited* referred to above. In this case, the Court considered, very briefly, the term 'other competent authority', stating that:

> *"209.* […] *It seems to me that there is a significant point of distinction between the language of the clause in the* [Insurer 1] *policy and the language of the* [Insurer 2] *clause which referred not only to the police but also to "other competent … authority". The use of the words "competent" is striking. It immediately suggests that the action taken would be competent (i.e. within the powers of the relevant body concerned).* […]*."*

In light of the foregoing case law and having regard to the terms of the Business Interruption Endorsement, it is my opinion that for cover to become operative, the Complainant Company must show that specific restrictions were actually imposed on its public house premises, on the order or advice of a competent local authority, being an authority with the power to impose restrictions on the insured premises, as a result of the occurrence of COVID-19 at the premises.

In the course of its submissions, the Complainant Company has sought to demonstrate how the closure of the insured premises constitutes a restriction for the purpose of the Business Interruption Endorsement.

In this respect, I note that a Complainant Company director (S) was in contact with the HSE and An Garda Síochána in respect of the occurrence of COVID-19 at the insured premises in **October 2020**. However, there is no evidence to suggest that either the HSE or An Garda Síochána, imposed any restrictions on the use of the insured premises.

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In an email dated **18 November 2020**, the Complainant Company's Broker suggested that in light of the capability/capacity of the test and trace system, there may not have been sufficient time or resources for a specific order to be made in respect of the insured premises. In a submission dated **2 July 2021**, the Complainant Company points to the collapse of the test and trace system in **October 2020** and states that if the HSE had been aware of the extent of the cases associated with the insured premises, a compulsory order would have been made.

While the Complainant Company and its Broker consider that restrictions would have been imposed on the insured premises, if there had not been such a demand on the HSE test and trace system and had the HSE been aware of the number of cases of Covid-19 associated with the insured premises, the parties have not supplied any evidence to support their positions that restriction would, in fact, have been imposed.

Further to this, regardless of whether or not restrictions would have been imposed, the Business Interruption Endorsement is clear in that it expressly requires the actual imposition of restrictions on the use of the insured premises. Accordingly, I do not accept that the argument made by the Complainant Company or its Broker, as outlined in the previous paragraph, is sufficient to satisfy the requirements of the Business Interruption Endorsement in the Complainant Company's policy.

In an email from the Complainant Company's Broker dated **9 November 2020**, it is stated that:

> *"In light of the HSE's advice to isolate, neither* [S] *nor* [G] *could operate the business and the business closed on the 9th of October."*

In this respect, I do not accept that a direction given to a Complainant Company director or a staff member to self-isolate or restrict their movements, constitutes a restriction on the use of the insured premises within the meaning of the Business Interruption Endorsement. Neither do I accept that such a direction is capable of satisfying the requirements of the Business Interruption Endorsement. Although these were restrictions imposed on two individuals who happened to own/work for the Complainant Company, it is my opinion that this is very distinct from a restriction being imposed on the use of the insured premises.

In submissions dated **23 May 2021** and **2 July 2021**, it is contended that had the Complainant Company remained open for business, it would have breached its duty of care to staff and customers and also exposed the Provider to multiple claims. However, I do not accept that this suffices to show that any restrictions were imposed on the use of the insured premises. It is my view that these submissions show the Complainant Company closed the insured premises for reasons other than the imposition of restrictions on the use of the premises.

While the Complainant Company considers that it had no option but to close its premises and that it was forced to do so, I am not satisfied that the closure of the premises was brought about by any restrictions on the use of the premises by a competent local authority within the meaning of the Business Interruption Endorsement.

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It is my opinion that the Business Interruption Endorsement requires the Complainant Company to show that the occurrence of COVID-19 at its premises in **October 2020** caused restrictions on the use of the premise which were imposed on the order or advice of a competent local authority. However, having considered the matter at length, the evidence shows that the decision to close the premises, while motived by or associated with the presence/occurrence of COVID-19 at the insured premises, was taken by the Complainant Company itself and not on the order or advice of any competent local authority.

Accordingly, whilst the Complainant Company has said that it "*had covid on premises*" in October 2020, I am not satisfied the Complainant Company has established that restrictions were imposed on the use of its premises, on the order or advice of a competent local authority as a result of the occurrence of COVID-19 at its premises in **October 2020**.

While I appreciate that the Complainant Company has likely suffered significant disruption to its business as a result of COVID-19 and that this decision will come as a disappointment, I am satisfied that the Provider was entitled to decline its claim.

The Policy Renewal Premium

In its Complaint Form, the Complainant Company says it is seeking to *"question why policy has increased by 1500 euro despite closed most of year."* In its Complaint Response, the Provider says the 2020/2021 renewal premium was based on risk exposure and prior claims experience. The Provider further says that the increase in the renewal premium solely related to the Complainant Company's prior claims experience.

In terms of the premium charged in respect of the Complainant Company's 2020/2021 policy renewal, it is important to note that this Office will not interfere with the commercial discretion of a financial services provider in relation to matters such as the calculation of a renewal premium in respect of a policy of insurance unless such conduct is unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainant Company within the meaning of ***Section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

The Hospitality Policy Schedule in respect of the cover in place for **October 2019** to **October 2020** indicates that the premium payable by the Complainant Company was €6,525.75. By letter dated **29 October 2020**, the Provider wrote to the Complainant Company's Broker following the renewal of its Hospitality Policy. The total premium payable in this respect was €8,118.60, representing an increase of €1,592.85 on the previous year.

In its Final Response letter dated **28 January 2021**, the Provider explained that the renewal premium was based on the notification of two public liability claims, one with an estimated value of £80,750.00 - which the Provider was not aware of when calculating the '2019 New Business premium', and one which had settled for a lower value. This letter also advised that projected exposures had reduced due to the impact of COVID-19, but a certain premium was still required in respect of public liability exposures.

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In this respect, the Provider proposed to reduce the Complainant Company's renewal premium by reducing the public liability premium from €6,300.00 to €5,250.00, giving an overall renewal premium of €7,060.60.

I note that by email dated **11 February 2021**, the Complainant Company wrote to the Provider in respect of the renewal premium, as follows:

> *"After reviewing your colleague's letter of decline i would like to point out some misinformation which may have influenced the premium. I do not have 2 claims which one was settled but it was withdrawn cause basically never happened. The other claim is been hotly disputed by insurance company and me due to the claimant coming into premises and violently assaulting 2 customers and me. i feel I am penalised unfairly due to fact that wrong information was given to* [the Provider] *which may have loaded premium. I am not commenting on declined business interruption claims as I have passed this on to a solicitor."*

The Provider responded to this email on **1 March 2021**, in relevant part, as follows:

> *"*[C]*oncerning your further comments on historic claims information which may have influenced the 2020 Renewal Premium, we can advise as follows:*
>
> *Prior claims experience is a factor in how we calculate renewal premiums. The verified claims experience from your previous insurer(s) was provided to us by your broker* […]. *This confirmed (two) Public Liability Claims as follows:*

Date of Loss	***Details of Incident***	***Payments Made***	***Reserve O/S***	***Current Position***
1. *22/12/2017*	*Third Party alleged assault*	*€990.00*	*€0*	*Withdrawn Claim Closed*
2. *04/02/2019*	*Third Party alleged assault*	*£0*	*£80,750*	*Outstanding*

> *If you require further clarification on this information please contact your Broker.*
>
> *The 2020 renewal premium was based on the risk exposure and claims information provided by your broker. Mindful of the difficulties facing the Hospitality sector caused by on-going lockdowns, we proposed a revised 2020 renewal premium of €7,060.60 inclusive of 5% Government Levy within out correspondence to you dated 28th January 2021.*
>
> *In addition, we highlighted the possibility of a reduced activity return premium adjusted for the period of insurance ended 11/10/2020; up to a maximum of 15% under the Employers/Public/Products Liability Sections. To help progress, please provide us with a certified statement of wages and turnover from your accountant via your broker.* […]*."*

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In an email to the Complainant Company's Broker dated **4 March 2021**, the Provider explained the reason for the reduction in renewal premium, as follows:

> *"Following on from Insured's complaint and our further review of the 2020 renewal premium, we agreed to revise the premium to €7,060.60 inclusive of 5% levy. To achieve this revised premium, we reduced the Public Liability Minimum and Deposit premium to €5,000 + 5% levy.*
>
> […] *We await accountant certified of wage and turnover for the period ending 11/10/2020 to confirm the reduced activity adjustment return."*

In a submission dated **23 May 2021**, the Complainant Company states, as follows:

> *"as regards the price of policy, I refer to earlier letter from* [the Provider] *where they state 2017 was settled and were not aware of second claim in 2019 renewal. Claim wasn't settled but withdrawn and if so why wasn't refund given if 2019 claim wasn't notified before renewal. 2019 policy was 3:5 k higher due to a claim that was withdrawn, this makes no sense nor does assertion from* [the Complainant Company's Broker] *that it was due to activities on my website. something very wrong here as a I don't have website, claim in 2017 withdrawn and they had known bout claim in Feb 19. its clear to us that a mix up occurred between intermediary and* [the Provider] *regarding claim that was withdrawn. i would also question why policy was so high if I had music removed from it at renewal. i also like to point out that I only got refund from* [the Provider] *from public liability in March after I made complaint to."*

The Complainant Company considers that certain *misinformation* may have influenced the Provider's calculation of the 2020/2021 renewal premium. In this respect, the Complainant Company states that rather than being settled, the **December 2017** claim was withdrawn. The Complainant Company also disputes that the Provider was unaware of the **February 2019** claim at the 2019/2020 policy renewal.

In terms of the **December 2017** claim, I note that in the Provider's letter of **1 March 2021**, the information provided by the Complainant Company's Broker records a payment of €990.00 being made in respect of this claim, and also records the claim as 'Withdrawn Claim Closed'. As a result, while the claim may have been withdrawn, I note that an amount appears to have been paid in respect of, or in settlement of, this claim.

In any event, I am not satisfied that any reference to this claim as 'settled' as opposed to 'withdrawn' is sufficient to show that the 2020/2021 renewal premium was based on incorrect information which resulted in an increase in the renewal premium. I am satisfied that the Provider is entitled to have regard to the Complainant Company's claims history when calculating the appropriate renewal premium, which would include the **December 2017** claim.

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In terms of the **February 2019** claim, it is my opinion that regardless of whether the Provider was aware of this claim prior to the 2020/2021 renewal date, it is nonetheless an outstanding claim with quite a large reserve allocated to it, details of which appear to have been supplies to the Provider by the Complainant Company's Broker as part of the 2020/2021 renewal process. In such circumstances, I am satisfied that this claim is a matter which the Provider was entitled to take into consideration when calculating the appropriate renewal premium.

In its submission dated **23 May 2021**, the Complainant Company says there was a mix up between the Broker and the Provider as to which claim was withdrawn. In a submission dated **2 July 2021**, the Complainant Company disagrees with the Provider's position that it was not aware of the **February 2019** claim, at the 2019 renewal. In each submission, the Complainant Company appears to rely on an increase in the 2019/2020 renewal premium in support of its position.

Having considered the matter, I do not accept that any increase in the 2019/2020 renewal premium is sufficient to show there was a mix-up between the **December 2017** claim and the **February 2019** claim or that the Provider was in fact aware of the **February 2019** claim. Further to this, neither the Complainant Company nor the Provider have submitted any documentary evidence which would suggest that a mix-up occurred. To the contrary, the following passage in an email from the Complainant Company's Broker dated **20 October 2020** would suggest that there was no such mix-up between Broker and the Provider:

> *"I have already argued the point that the claim from 2017 has been withdrawn but they are concerned that another claim for an alleged assault has been reported and is still ongoing."*

In submissions dated **23 May 2021** and **2 July 2021**, the Complainant Company refers to correspondence received from its Broker which attributes an increase in the renewal premium to activity on the Complainant Company's website. However, the Complainant Company says it does not have a website. In its Complainant Response, the Provider says that 'activity' in the previous period is not a factor for consideration in a renewal premium.

In its email dated **20 October 2020**, the Complainant Company's Broker states, as follows:

> *"As you can see* [the Provider] *have increased their premium for the coming year. They have reviewed the risk activities and your website etc and also the 5 year claims experience, based on the information they have, they have* (sic) *applied a loading to the premium."*

Having considered the evidence, there does not appear to be any Provider record which would suggest that any purported website activity on the part of the Complainant Company formed part of the calculation of the 2020/2021 renewal premium. Any comments in this regard appear to have emanated from the Complainant Company's Broker, however, the Complainant Company has not established that these comments were, in fact, based on information which came from the Provider.

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In its submission of **23 May 2021**, the Complainant Company also seeks to question *"why policy was so high if I had music removed from it at renewal."* In this respect, I note that 'music' does not appear to have formed part of the 2020/2021 renewal premium nor does it appear that cover in respect of 'music' was provided as part of any previous policy or included as part of any previous policy premium.

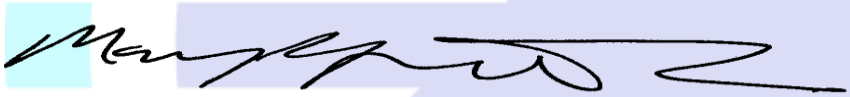
Having considered this aspect of the complaint, I am not satisfied that the increase in the Complainant Company's 2020/2021 renewal premium was unreasonable, unjust, oppressive or improperly discriminatory. Accordingly, I am not satisfied that the Provider wrongfully increased the Complainant Company's renewal premium for the period **October 2020** to **October 2021**.

Therefore, I do not consider it appropriate to uphold any aspect of this complaint

Conclusion

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

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



MARYROSE MCGOVERN
Deputy Financial Services and Pensions Ombudsman

3 December 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.