An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0501
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Poor wording/ambiguity of policy Rejection of claim
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a hotel and restaurant, (referred to below as "the Complainant Company") held an insurance policy with the Provider.

The complaint concerns a claim for business interruption losses arising from the outbreak of coronavirus (Covid-19).

The Complainant Company's Case

On **23 June 2020**, the Complainant Company's Broker notified the Provider that the Complainant Company *"is looking to put through a claim for loss of gross profit under the BI section of their policy as a result of covid-19."*

The Provider wrote to the Complainant Company's Broker on **10 August 2020** to advise that it was not in a position to confirm cover under the policy, based on the information provided and it requested that the Complainant Company respond to the attached list of questions. The Provider also enclosed an Explanatory Note in respect of non-damage business interruption cover.

On **10 September 2020**, the Complainant Company emailed the Provider attaching its response to the list of questions and also made a formal complaint, as follows:

"I have been a client of [the Provider] *for several years (claims free) and it is with extreme regret that I now find myself having to lodge an official complaint re; the manner in which I have been treated by your company in respect of the following:*

A. The lengthy delays in replying to correspondence emailed to you on my behalf by my brokers […] *in connection with my claim.*

B. Your eventual refusal to indemnify me in respect of my loss of business as a result of the temporary closure of my business due to Covid 19.

You have shown a total disrespect for me as a customer and a total lack of empathy by failing to reply in a timely fashion to my broker's email.

I am attaching details of my claim and would ask you to reconsider your decision and to engage with me in reaching an amicable settlement, without further delay."

Following its review of the complaint, the Provider wrote to the Complainant Company on **19 October 2020**, as follows:

"Your complaint

Your emails state in summary that:

1. *You are dissatisfied with the delay in replying to correspondence sent by your broker to* [the Provider] *in connection with your claim;*

2. *You would like us to reconsider providing an indemnity to you in respect of business interruption losses suffered as a result of the temporary closure of your business due to Covid-19.*

We will respond to each of these points in turn below.

1. ***The timeline of correspondence relation to your potential claim***

Your broker emailed us on 23 June 2020 to notify a potential claim for a loss of gross profit under the Business Interruption section of your policy and requested guidance in relation to how to proceed. Your broker had previously indicated on 19 March 2020 prior to renewal of your policy on 20 March 2020 that you were "closed for business and would not reopen until the virus is under control".

We emailed your broker on 10 July 2020 with a claims reference and indicated that we would write again with a detailed response as soon as possible. Your broker contacted us again on 21, 29 July and 4 August. We wrote to your broker on 10 August indicating that we verify the validity of every claim received and there we were not in a position to confirm cover under the policy based on the information provided and we requested that certain information outlined in our letter be provided so that we could consider whether the claim is covered under the policy. We also explained the business interruption cover available under the policy and provided an Explanatory

/Cont'd…

Note explaining the cover available under the policy for non-damage business interruption cover (ie where there has been no damage to property).

You responded to our letter by email dated 10 September 2020, providing details of your claim and asking that we reconsider our decision and advised that you wished to make a formal complaint. We regret that we did not acknowledge this email until 1 October when you sent a further email by way of follow up. On 1 October 2020, [a Senior Claims Handler] *emailed you on my behalf, providing a complaint reference and a copy our complaints handling procedures.*

In relation to your complaint in relation to length of time which passed between your notification of a potential claim on 23 June and our letter of 10 August, we were reviewing cover under our policies at the highest level in [the Provider] *during this time. While we try to respond to every communication as quickly as possible, you will appreciate that we have received a high volume of queries in relation to COVID-19 against the background of the unprecedented nature of the current situation which has continued to evolve since the initial public health measures in response to the pandemic in March 2020.*

2. ***Review of your claim***

You have asked us to reconsider providing indemnity for business interruption losses you have suffered arising from COVID-19.

By way of clarification, we note that your broker had notified a potential claim but we had not issued a declinature letter. We requested information in our letter of 10 August 2020 so that we could verify the validity of your claim and consider it on an individual basis before communicating a coverage position. We did however explain in our letter and accompanying Explanatory Note the circumstances in which cover is available under your policy.

We have considered the additional information you provided by way of responses to our queries to enable us to review your claim. Given that your broker advised that the business was closed prior to renewal of your policy on 20 March 2020 we have considered your claim under the policy for the period 22 March 2019 to 21 March 2020.

Your claim

We note that your business is a country house hotel with a restaurant. You have indicated that the interruption began in March 2020 (according to your broker this was prior to 19 March 2020) and concluded at the end of June 2020. You have indicated that during this period, the business was closed and you had personal access to the premises but only to ensure its security.

/Cont'd…

Based on 2019 turnover, you estimate that the financial loss you have suffered as a result of the period of closure is €272,000. You have indicated that, if the premises had been open, you would not have experienced financial loss.

Outcome of review

We have reviewed the information you have provided and we regret that we must inform you that unfortunately your policy does not respond to your claim and we must now formally decline your claim.

(a) The Specified Disease Extension

The cover available under the Specified Disease Extension applies in respect of occurrences of particular diseases contracted by a person at the premises. The diseases are listed in the extension and do not include COVID-19 (Section 15 (Page 58)). There is no cover for business interruption losses arising from COVID-19 under this extension.

(b) Prevention of Access – non-damage extension ("POA-ND" Extension)

The POA-ND Extension does not extend cover in the circumstances which arise, as explained in our letter of 10 August 2020 and Explanatory Note. However, it might be helpful to explain our position again in relation to cover under this extension.

The POA-ND Extension must be read as a whole with reference to both what is covered and what is not covered, together they defined the cover and make clear that the cover under this Extension does not apply to infectious diseases.

The POA-ND Extension covers loss resulting from an interruption or interference with the business at the insured premises as a result of "access to or use of the premises being prevented or hindered by any action of government the Gardaí emergency services or a local authority due to an emergency which could endanger human life or neighbouring property".

However, this insuring clause is subject to an exclusion (exclusion iii) and does not provide cover where the "closure or restriction in the use of the premises [was] due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely in the occurrence of an infectious disease[)]*".*

That being so, the scope of the cover under the insuring clause is delineated by an exclusion (exclusion (iii)) and cover under this extension is not extended to an occurrence of an infectious disease. Alternatively, if cover is triggered under the POA-ND Extension, cover is excluded under exclusion (iii).

/Cont'd…

When the extension is read as a whole and in conjunction with the Specified Diseases extension which also uses the phrase "competent local authority", it is clear that the government comes within the definition of "competent local authority" within the meaning of the exclusion. The "competent local authority" is any one of the authorities referred to in the insuring clause (ie, the government, Gardai, emergency services or local authority).

If there is an insured event, will the Policy provide cover for BI losses?

However, whilst we do not agree that there has been an insured event, we have also considered the cover that would be available under the POA-ND Extension if there was an insured event and we have considered the additional information you provided in this regard.

An insured event alone is not sufficient to trigger cover. Where the premises has closed, the losses suffered must ***result from*** *the prevention of access to the premises and not from some other reason.*

This means that losses that would have been suffered in any event (ie had access to or use of the premises not been prevented or hindered in the specific circumstances set out in the POA-ND Extension) are not recoverable under the policy. It appears that the losses suffered would have been suffered in any event if the premises had remained open, as a result of stay at home measures, social distancing requirements and the general lockdown.

We recognise that this is a difficult time for our customers. Unfortunately your policy does not respond to provide cover for his claim and we understand that this is disappointing for you. […]*."*

The Complainant Company set out its complaint in its **Complaint Form** to this Office, that**:**

"[The Provider] *are refusing to honour the terms of our Insurance policy with respect to Business Interruption due to COVID 19. We are a Hotel & Restaurant in* [location] *and had to close our business in March until the end of June due to covid 19 restrictions imposed by the government. We are claiming under Business Interruption -"Section 2 Prevention of access - Non-Damage" clause in the policy for €20,000.* […]*."*

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 business for a period, following the restrictions announced by the Government, due to the outbreak of Covid-19, and states that:

/Cont'd…

"We are looking for compensation for the period of business interruption due to Covid19 where lockdowns were in place ie. for the period March to 28th June and again from October."

The Provider's Case

The Provider says it declined the Complainant Company's claim for business interruption losses because it does not fall to be covered under the Complainant Company's policy. The Provider says the Complainant Company has claimed for business interruption losses under the prevention of access – non-damage extension ("POA-ND Extension") of its policy. However, the Provider says there is no cover for claims arising from Covid-19 under the POA-ND Extension.

Background

The Provider says the Complainant Company is a limited company trading as a hotel and restaurant and purchased an insurance policy with it covering the period **22 March 2019** to **21 March 2020**.

On **19 March 2020**, the Provider says the Complainant Company's Broker advised, in the context of the renewal of cover, that the Complainant Company's business was closed and would not re-open until the virus was under control. The Provider says the Complainant Company has not indicated the precise date on which the business was closed.

On **23 June 2020**, the Provider says it was notified of a claim under the policy by the Complainant Company's Broker. By email dated **10 July 2020**, the Provider says it responded, indicating that it would write again with a detailed response as soon as possible and it provided a claim reference. The Provider says the Complainant Company's Broker contacted it again on **21 July**, **29 July** and **4 August 2020**. The Provider says it wrote to the Complainant Company's Broker on **10 August 2020** indicating that it verifies the validity of every claim received and that it was not in a position to confirm cover under the policy based on the information provided. The Provider says it requested certain information outlined in the letter, so that it could consider whether the claim was covered under the policy and it explained the business interruption cover available under the policy. The Provider says an Explanatory Note accompanied this letter and explained the cover available under the policy for non-damage business interruption cover, where there had been no damage to property.

The Provider says the Complainant Company responded to its letter by email dated **10 September 2020**, providing additional information in relation to the claim. The Provider says that this email asked that the Provider re-consider its decision and advised that the Complainant Company wished to make a formal complaint.

Regrettably, the Provider says, due to an oversight, it did not acknowledge this email until **1 October 2020** following a further email from the Complainant Company. The Provider says

/Cont'd…

it provided a complaint reference and a copy of its complaints handling procedure on **1 October 2020** and sent an update to the Complainant Company on **12 October 2020**.

Following its review of the complaint, the Provider says it issued a Final Response letter on **19 October 2020**, addressing the specific grounds of complaint and clearly set out the reasons for declinature. The Provider says this letter explained that there was no coverage under the policy for the loss, and in particular, there was no cover under the POA-ND Extension. The Provider says the Complainant Company subsequently made a complaint to this Office.

Cover

The Provider says the cover under the policy was explained to the Complainant Company in its letters of **10 August** and **19 October 2020**.

The Provider says the core business interruption cover provided by the policy responds to physical property damage at the insured premises resulting in the business being interrupted or interfered with. The Provider says there has been no damage to the property in this instance.

The Provider says there are two extensions which can, in certain specified circumstances, provide cover for business interruption losses where there is no damage to property. These are (i) the Prevention of Access – Non Damage (POA-ND) Extension and (ii) the 'Specified Disease Murder Food Poisoning Defective Sanitation Vermin' extension ("Specified Disease Extension").

The Provider says the **POA-ND Extension** covers loss resulting from an interruption or interference with the business at the insured premises as a result of

> *"[a]ccess to or use of the premises being prevented or hindered by an action of government, the Gardai, emergence services or a local authority due to an emergency which could endanger human life or neighbouring property."*

The Provider says however that this cover is subject to an exclusion where the:

> *"closure or restriction in the use of the premises [was] due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease)".*

It refers to this as the "Infectious Disease Exclusion". The Provider says the POA-ND Extension does not therefore extend cover under the policy, to Specified Diseases or to any other human infectious diseases.

/Cont'd…

The Provider says the Infectious Disease Exclusion delineates and confirms the scope of the cover, as set out in *FCA v. Arch insurance (UK) Limited* and *Crowden*, discussed below. Viewing the provision as a whole, the Provider says it is clear that the objective intention of the policy wording, is to limit the cover for infectious diseases to the Specified Disease Extension, and to the specified diseases listed in that extension.
The Provider says that the only cover provided in respect of infectious disease is that provided by the Specified Disease Extension, which does not cover Covid-19, as it is not included in the specified diseases listed in the policy.

<u>"Competent local authority"</u>

The Provider says the phrase "*competent local authority*" in the Infectious Disease Exclusion refers to any one of the authorities referred to in the operative clause (that is, *"government, the Gardai, emergency services or a local authority"*) which is competent to act in the locality of the premises. In this way, the Provider says the reference to *"competent"* local authority in the Infectious Disease Exclusion distinguished the "local authority" referred to in the exclusion from the "local authority" referred to in the operative clause. Furthermore, the Provider says it has never been the case that the only authority competent to act in relation to public health protection (including in relation to infectious diseases) is a local government authority. The Provider says the government has always been an authority with competence to act in relation to local and public health matters.

The Provider says the Health Act 1947 (the "1947 Act") sets out the provisions relating to public health and provides for the Minister to make regulations to introduce certain changes. By definition, the Provider says, the "Minister" for the purposes of the 1947 Act is the Minister for Health. Section 31 of the 1947 Act permits the Minister for Health to make regulations providing for the prevention of the spread (including the spread outside the State) of an infectious disease. Regulations may also be made for their enforcement and execution by officers of the Minister for Health and by health authorities and their officers (and also, with the consent of specified ministers, enforcement and execution by officers of other authorities, for example sanitary authorities or Customs & Excise).

The Provider says the Health (Prevention and Protection and other Emergency Measures in the Public Interest) Act 2020 was enacted by the Oireachtas on **20 March 2020** (although some of its measures came into effect on earlier dates, namely **9** or **13 March 2020**). This Act amended the 1947 Act and conferred certain powers on the Minister for Health.

The Provider says that section 31A of the 1947 Act (as amended) now provides that the Minister for Health may make Regulations for the purpose of preventing, limiting, minimising or slowing the spread of Covid-19, including: restrictions on travel within and outside the State; restrictions on persons requiring them to remain at home or at another location; the prohibition of events; safeguards required to be put in place by owners and occupiers of a premises or a class of premises (including the temporary closure of such premises).

The Provider also says that, furthermore, under section 31B, the Minister for Health may make an "*affected areas order*" declaring an area or region of the State to be an area where

/Cont'd…

there is known or thought to be sustained transmission of Covid-19. In addition, the Provider says that closures effected in response to the various announcements made by An Taoiseach are clearly *"closure or restriction in the use of the premises … due to the order or advice of the competent local authority"*.

The Provider says that the Complainant Company has not indicated the date on which it closed, nor has it identified the particular order or advice on foot of which it closed its business.

The Provider says the relevant advice in relation to hotels and restaurants was the post-cabinet statement of An Taoiseach on **24 March 2020**, in which he advised that, amongst other measures, all hotels were to limit occupancy to essential non-social and non-tourist reasons, and all cafes and restaurants were to limit supply to take away food or delivery. This statement by An Taoiseach, the Provider says, was clearly an *"order or advice"* within the meaning of the Infectious Disease Exclusion, directed to the nation.

In addition, it was confirmed by the High Court in the recent decision of *Ryanair DAC v An Taoiseach, Ireland and the Attorney General* [2020] IEHC 461, delivered on **2 October 2020** that the government advice to avoid non-essential travel and to restrict movements on entry to the State is properly characterised as "advice". Subsequently, and in any event, the Provider says once these measures were put on a mandatory statutory footing by regulations made by the Minister for Health (S.I. 121 of 2020), they fell within the term *"order or advice"* within the meaning of the Infectious Disease Exclusion.

If however, the Provider says, the meaning of "the competent local authority" in the Infectious Disease Exclusion was in any doubt, the restrictions imposed in Kildare, Laois and Offaly in **August 2020** clearly demonstrate that the government is a competent local authority. The legal basis for these lockdowns was the Health Act 1947 (Section 31A - Temporary Restrictions) (Covid-19) (Relevant Counties) Regulations 2020 (S.I. 295 of 2020). The Provider says these regulations were made by the Minister for Health on **8 August 2020** pursuant to the powers conferred on the Minister by section 5 and section 31A (inserted by section 10 of the Health (Prevention and Protection and other Emergency Measures in the Public Interest) Act 2020) of the 1947 Act. Subsequently, specific local restrictions were introduced in Dublin and Donegal by Ministerial regulations (S.I. 352 of 2020 and S.I. 375 of 2020).

Again, the Provider says this demonstrates that the *competent* local authority is not confined to a local authority and may include any of the entities in the POA-ND Extension (i.e. *"government, the Gardai, emergency services or a local authority"*). The Provider says that the English Divisional Court in *Financial Conduct Authority v Arch & ors* [2020] EWHC 2448 (Comm), (the "FCA Test Case"), discussed this issue in detail. In short, the Provider says the court found that *"competent local authority"* included the government.

<u>Contractual Interpretation</u>

/Cont'd…

The Provider has set out a brief summary of the relevant principles of contractual interpretation and says that the test to be applied is an objective one, to be determined on the basis of what a reasonable person in the position of the parties would have believed.

Construction of exclusions

The Provider says that recent English case law has clarified the construction of exclusions in insurance policies. The Provider submits there is no reason why these authorities would not be considered persuasive before an Irish court. The Provider says the use of the word "excluding" (such as in the POA-ND Extension) does not mean that the Infectious Disease Exclusion is to be construed in the same way as an exemption clause exempting liability, for example for negligence. The provision is an example of delineation of cover, to be construed by reference to ordinary principles of construction.

The Provider says this position is summarised in *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm), where, after considering the judgment of the UK Supreme Court in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57, the court found that *"insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford."*

The Provider says the court in *Impact Funding* held that:

> *"An exclusion must be read in the context of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly … But the general doctrine, to which counsel also referred, that exemption clauses should be construed narrowly, has no application to the relevant exclusion in this policy.*
> *An exemption clause, to which that doctrine applies, excludes or limits a legal liability which arises by operation of law, such a liability for negligence or liability in contract arising by implication of law"*.

That is, *"The fact that a provision in a contract is expressed as an exemption does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly"*.

Viewing this provision as a whole, the Provider says, it is clear that the Infectious Disease Exclusion, delineates the scope of cover. The Provider says the Irish Supreme Court considered exclusions in insurance contracts in *Analog Devices v Zurich Insurance* [2005] IR 274, however, it did not consider whether exclusions could be said to delineate cover, which has since been considered and settled more recently by the English courts in *Impact Funding* and *Crowden*, and confirmed in relation to the Provider's particular exclusion in the FCA Test Case.

<u>FCA Test Case</u>

/Cont'd…

The Provider refers to the decision of the Divisional Court in England in a test case which was brought by the Financial Conduct Authority ("FCA") seeking the court's interpretation of various business interruption covers, the FCA Test Case.

The Provider says eight insurers participated in the test case, including the Provider. Although aspects of the judgment were appealed to the UK Supreme Court (which delivered judgment on **15 January 2021**), the Provider says the particular finding of the Divisional Court concerning cover under the POA-ND Extension was not appealed by any party. The Provider submits that this is an important judgment which is likely to be a persuasive authority in this jurisdiction.

The Provider says the key sections of the FCA Test Case decision regarding its cover and the operation of the Infectious Disease Exclusion is at paragraph 373 of the judgment, where the court stated:

> *"we agree with* [Counsel for the Provider] *that the question of the construction of the infectious disease carve-out has to be approached on the basis that it is a provision delineating the scope of cover, not in any sense an exemption clause. The applicable principles are as summarised by the judge in Crowden and there is no place for the application of the principle of contra proferentum, to the extent that principle has any application in the modern law of construction of contracts."*

The Provider says the court also found that:

> *"the phrase "competent local authority" must mean the same in the carve-out as it does in the specified disease clause … 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."*

As a result, the Provider says the regulations issued by the government fell within the meaning of the order or advice of a competent local authority, and *"Accordingly, the carve-out applies and there is no cover under either* [Provider] *wording in respect of the closure of or restriction in the use of the premises."*

The Provider says the court's decision that there was no cover in its policy wording is reflected in the declarations ordered by the court, in particular paragraph 16.1, as follows:

> *"16.1 In relation to the provision in* [the Provider policy] *1.1-1.2 excluding "closure of restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious diseases" ("the infectious disease carve-out"):*
>
> *(a) "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;*

/Cont'd…

> *(b) The actions of the government in response to COVID-19, including the 20 and 23 March government advice and the 21 and 26 March Regulations, were "the order or advice of the competent local authority as a result of an occurrence of an infectious disease"; and*
>
> *(c) Accordingly, the infectious disease carve-out applies and there is no cover in respect of the closure of or restriction in the use of the premises."*

The Provider says that these conclusions of the Divisional Court and the declarations in relation to the Provider's policy are not under appeal to the Supreme Court. The Provider says this reflects the coverage position in the current complaint.

For completeness, the Provider says it notes the decision of the High Court in the case of *Hyper Trust Limited v. FBD Insurance plc* [2021] IEHC 78. The Provider says it has considered this decision and remarks that it concerns the interpretation of a different clause. The Provider submits that the findings on coverage are therefore not applicable to the interpretation of the POA-ND Extension.

Causation

The Provider says that because there is no coverage under the policy, there is no need to consider causation. However, should this Office find that there is cover under the policy, the Provider says its position is that cover would only be available under the POA-ND Extension where the loss **results from** an interruption of or interference with a business and the interruption or interference **results from** access to / use of the premises being prevented or hindered by the defined action of government or other specified authority.

Given its position on cover, the Provider says the losses of the Complainant Company have not been analysed to confirm whether they result from the interruption of or interference to the business.

Quantum

The Provider says that in its Complaint Form, the Complainant Company states that it is claiming under the Business Interruption section of its policy for €20,000.00. The Provider says the Complainant Company states that it is seeking:

> *"compensation for the period of business interruption due to COVID-19 where lockdowns were in place, i.e. for the period March [2020] to 28 June [2020] and again from October [2020]"*.

On that basis, the Provider says the Complainant Company is seeking the full amount under the POA-ND Extension. In its email of **10 September 2020**, in which the Complainant Company provided additional information, the Provider says the Complainant Company indicated that it had suffered financial losses of €272,000.00 based on its **2019** figures. The Provider says that the maximum indemnity under the extension shall not exceed three months.

/Cont'd…

The Provider says that, to the extent this Office determines that there is cover for the losses claimed under policy (which is denied), the Complainant Company will need to prove the quantification of it losses in accordance with the policy terms and conditions.

In the event that this Office intends to deal with quantification of losses, the Provider says it would require the opportunity to fully consider any relevant financial information and request additional information if required and provide expert evidence in relation to quantification.

Furthermore, the Provider says it should be noted that if cover is triggered under the policy, the claim must be adjusted pursuant to the relevant provisions of the policy, including the Basis of Settlement provisions in the Business Interruption section including the business trends adjustment, which would require the losses claimed to be reduced. In particular, the losses are to be:

> *"adjusted as necessary to provide for the trend of the business and any other circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred so that the adjusted figures represent as near as possible the results which would have been obtained during the relative period after the damage had the damage not occurred."*

The Provider says it considers that the decision of the English Divisional Court in the FCA Test Case is clear, and it is noted that although certain aspects of the Divisional Court's decision were appealed to the English Supreme Court, the particular findings relating to cover under the Provider's policy wording were not appealed by any party.

The Provider says it would be a persuasive authority in Ireland which would likely be followed by an Irish court and it should therefore be followed by this Office. The Provider says while it acknowledges that ***section 12(11)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** provides that the Ombudsman shall act in an informal manner and according to the equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form, nevertheless, it submits that in circumstances where the issue for consideration is one of contractual interpretation and a purely legal question, this Office must have regard to the legal principles and that both parties should be given the opportunity to submit written legal submissions on these issues and the jurisdiction of this Office in relation to questions of legal interpretation, in advance of the adjudication of this complaint.

The Complaint for Adjudication

The complaint is that the Provider declined to admit and pay the Complainant Company's claim for business interruption losses as a result of the temporary closure of its business for a period, following the restrictions announced by the Government due to the outbreak of Covid-19.

/Cont'd…

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 **29 July 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.

I note that the Complainant Company operates a hotel and restaurant business. By email dated **19 March 2020**, the Complainant Company's Broker advised the Provider that the Complainant Company *"is closed for business now and will not reopen until the virus is under control and it is safe to do so"*.

Some days later, on **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential businesses. In the context of the present complaint, the Government recommended that all hotels were to limit occupancy to essential non-social and non-tourist reasons, and that all cafes and restaurants were to limit supply to takeaway food or delivery.

On **23 June 2020,** the Complainant Company's Broker notified the Provider of a possible claim for business interruption losses. The Provider responded to the Complainant Company's claim notification on **10 August 2020,** seeking further information in respect of the claim.

/Cont'd…

I note that in the '*Business Interruption Claims information required from policyholder in order to consider claim*' completed by the Complainant Company and returned to the Provider on **10 September 2020**, the Complainant Company responded to questions 3 and 4, as follows:

> *"3 Has there been an interruption to or interference with your business and if so what is the nature of the interruption or interference?*
>
> *Answer: Closed by Government in March in the interest of public health and safety*
>
> *4 Has there been an action of the Government, the Gardai, emergency services or a local authority which has specifically resulted in access to or use of your premises being prevented or hindered?*
>
> *Answer: Yes, due to Government restrictions introduced in the interest of public health & safety"*

On **19 October 2020**, the Provider informed the Complainant Company that the cover provided under the policy did not respond to the circumstances of the Complainant Company's claim and that the Provider was formally declining the claim.

In this respect, I note that the Complainant Company held a policy of insurance with the Provider. In its Complaint Response, I note the Provider advises that a policy of insurance was in place covering the period **22 March 2019** to **21 March 2020**, although a copy of the relevant policy schedule was not supplied. Further to this, I note from the policy schedule contained in the Schedule of Evidence, that the Complainant Company renewed its cover with the Provider effective from **22 March 2020**. It can be seen from this policy schedule that the Complainant Company had business interruption cover in respect of gross profit with a sum insured of €639,000.00 and a maximum indemnity period of 12 months.

The terms of the business interruption cover provided by the Complainant Company's policy are set out at **section 4, 'Business interruption'**, of the applicable policy document.

The cover provided under section 4 is set out at pg. 52 of the policy document, as follows:

> *"If any property used by **you** at the **premises** suffers **damage** during the **period of insurance** and as a result the **business** at the **premises** is interrupted or interfered with **we** will pay **you** for each item in the schedule the amount of loss as a result of the interruption or interference in accordance with the Basis of settlement.* […]*."*

/Cont'd…

In terms of the limit of lability for business interruption claims, the policy document states at pg. 53 that:

> *"**Limit of Liability***
>
> ***Our** liability shall not exceed the sum insured for each item or any other limit of liability stated in this section and in total **our** liability shall not exceed the total sum insured for all items unless expressly varied in this section."*

Extension 2 ("the POA-ND Extension") of the business interruption section of the policy document states at pgs. 54 and 55, as follows:

> *"**Extensions***
>
> *The insurance cover provided by this section is extended to cover loss resulting from interruption of or interference with the **business** carried on by **you** at the **premises** as a result of the following*
>
> *Unless specifically stated otherwise these extensions do not increase **our** liability as stated in the Limit of liability paragraph to this section*
> […]
>
> ***2. Prevention of access – Non-damage***
>
> *Access to or use of the **premises** being prevented or hindered by any action of government, the Gardaí emergency services or a local authority due to an emergency which could endanger human life or neighbouring property*
>
> *Excluding*
>
> *(i) any restriction of use of less than 4 hours*
> *(ii) any period when access to the **premises** was not prevented or hindered*
> *(iii) closure or restriction in the use of the **premises** due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements*
> *(iv) closure or restriction in the use of the **premises** due to **vermin***
>
> *Limit*
> *€20,000 any one period of insurance*
>
> ***Special condition***
>
> *The maximum indemnity period under this extension will not exceed 3 months"*

/Cont'd…

[my underlining above for emphasis]

I note that the POA-ND Extension provides cover where access to an insured premises is prevented or hindered arising from actions of certain authorities, due to an emergency which could endanger human life or neighbouring property. However, the scope of this cover is subject to, and limited by, a number of exclusions.

Of particular relevance to the Complainant Company's claim and this complaint, is exclusion (iii) above which excludes cover under the POA-ND Extension arising from the closure or restriction in the use of an insured premises due to an order or advice of the competent local authority, as a result of an occurrence of an infectious disease or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease ("the Infectious Disease Exclusion").

In determining whether the Provider is required to admit the Complainant Company's claim under the POA-ND Extension, it is first necessary to determine whether the Infectious Disease Exclusion is triggered. If that exclusion is triggered, then the Complainant Company is not entitled to an indemnity pursuant the POA-ND Extension.

In the FCA Test Case, the English High Court considered the proper interpretation of a clause very similar to the DOA-ND Extension and an exclusion which is essentially identical to the Infectious Disease Exclusion contained in the Complainant Company's policy. In this respect, the Court in the FCA Test Case was of the view that the exclusion in question applied in the context of Government advice and Regulations introduced in response to Covid-19.

In considering the term 'competent local authority', 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. The Court's reasoning as to the proper interpretation of the exclusion clause was, as follows:

> *"374. We also agree with* [Counsel] *that the phrase "competent local authority" must mean the same in the carve-out as it does in the specified disease clause. In the latter, given the legislative background which can legitimately be taken into account in construing the phrase, we consider it inherently unlikely that the parties intended the scope of cover provided by the clause to be limited to local outbreaks of a specified disease for which only the local district council or other local authority* […] *issues orders or advice. A number of the specified diseases are* […] *on the list of notifiable diseases under the 2010 Regulations, no doubt at least in part because of their capacity to lead to more widespread infection or contagion than in a particular locality. Many of those diseases, at least historically, have been widespread, not just the plague or diphtheria or tuberculosis but in more recent times, measles, mumps and rubella.*
>
> *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*

/Cont'd…

relevant restrictions in the locality on the use of the premises, including central government.

376. Given that the phrase has that meaning in the specified disease clause, as we have said it must have the same meaning in the infectious disease carve-out. The order or advice contained in the 20 and 23 March government advice and in the 21 and 26 March Regulations was the order or advice of the competent local authority, and was as a result of an occurrence (in fact many occurrences) of an infectious disease. Accordingly, the carve-out applies and there is no cover under either [Provider] *wording in respect of the closure of or restriction in the use of the premises."*

Further guidance as to the proper interpretation of the Infectious Disease Exclusion can be seen in the Irish High Court decision of McDonald J. in *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited & Or* [2021] IEHC 263, delivered on **19 April 2021**. In particular, the Court dealt very briefly with the term 'other competent authority' and stated, in a manner consistent with the views expressed in passages from the FCA Test Case cited above, as follows:

"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 Infectious Disease Exclusion, it is my opinion that, reasonably interpreted, the Government in this country comes within the meaning of the term 'competent local authority' for the purposes of this exclusion. In that regard, I do not accept the Complainant Company's specific argument, per its submissions since the preliminary decision of this Office was issued, that this exclusion within the policy, refers only to local authorities, rather than to Government.

It is also my opinion that the Government's adoption of the NPHET recommendations and subsequent announcement on **24 March 2020** that all non-essential businesses close, constitutes an 'order or advice' of the competent local authority. Furthermore, it is quite clear that the measures announced by the Government on **24 March 2020** were in response to an 'infectious disease' (that is, COVID-19). In this respect, I note that on **20 February 2020**, the Infectious Diseases (Amendment) Regulations 2020 amended and provided for the inclusion of COVID-19 on the list of *"Diseases specified to be infectious diseases"* contained in the Infectious Disease Regulations 1981.

The Infectious Disease Exclusion requires the order or advice of the competent local authority to be *"as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease)"*. However, looking at the language used in this exclusion and giving these words their plain and ordinary meaning, I am of the view that this exclusion does not seek to impose any requirement as

/Cont'd…

to where the occurrence or discovery must take place. In such circumstances, I do not consider that the occurrence of the infectious disease or discovery of the organism must be at the insured premises or within a particular distance of the insured premises.

The date on which the Complainant Company closed its business is not entirely clear. In this respect, I note that in its Broker's email of **19 March 2020**, it is stated that the Complainant Company *"**is** closed for business now"* [My emphasis]. However, in the responses provided by the Complainant Company on **10 September 2020** to the Provider's list of questions, the Complainant Company advised that its business was closed by the Government in **March 2020** and that these restrictions were the cause of disruption to its business – which would appear to be a reference to the Government's announcement on **24 March 2020**. No further clarification in that respect has been offered by the Complainant Company, since the Preliminary Decision was issued by this Office to the parties in July 2021

If it is the case that the Complainant Company closed its business before **24 March 2020**, the Complainant Company has not provided any evidence to show that the closure of its business and therefore, the circumstances underpinning its claim, comes within the cover provided by the POA-ND Extension.

On the other hand, if it is the case that the Complainant Company closed its business in response to the Government's announcement on **24 March 2020**, it is my opinion that the closure of its business in these circumstances falls squarely within the Infectious Disease Exclusion. Accordingly, cover under the POA-ND Extension is not triggered.

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 for business interruption losses, for the reasons explained above.

The Complainant Company's Broker notified the Provider of the Complainant Company's intention to submit a claim for business interruption losses on **23 June 2020**. A Senior Claims Handler responded to the Broker on **10 July 2020** referring to a conversation earlier that day between the Broker and another of the Provider's staff members, advising that:

> *"Cover for BI losses due to COVID-19 is still under consideration.*
>
> *I will write again with a detailed response as soon as possible."*

Following this, the Broker emailed the Senior Claims Handler on **21 July 2020** advising that the parties were awaiting confirmation in respect of cover provided under the policy and the documentation required to assess the claim. It appears that a response was not received to this email.

The Broker emailed the Senior Claims Handler again on **29 July 2020** noting that a response had yet to be received from the Provider. The Broker also emailed another of the Provider's agents on **29 July 2020** asking that she look into matters. Despite contacting separate

/Cont'd…

individuals within the Provider, it appears that a response was not received to either of these emails.

The Broker emailed these Provider's staff members again on **4 August 2020** requesting a response to the claim. The Broker also pointed out that his previous emails had not been responded to and that the last communication received from the Provider, had been on **10 July 2020**.

The Senior Claims Hander wrote to the Broker on **10 August 2020** in a generalised manner in respect of the Complainant Company's claim, the assessment process and the cover provided for business interruption claims under the policy. This letter also enclosed a list of questions in respect of the claim and an Explanatory Note in respect of business interruption cover.

However, I note that this letter did not acknowledge the Broker's previous and unanswered emails nor did it apologise or seek to offer an explanation for the absence of a response. I also note that the letter did not apologise for the delay in responding to the Complainant Company's claim notification or seek to offer any explanation in this regard either.

The Complainant Company furnished the Provider with its response to the list of questions on **10 September 2020** and also advised the Provider that it wished to make a formal complaint. I note that in this email, the Complainant Company expressly asked that the Provider acknowledge its receipt. However, the evidence shows that this email was not acknowledged by the Provider.

By email dated **1 October 2020**, the Complainant Company emailed the Provider noting the absence of a response to its previous email (including the absence of an automated response) and requested an update on its complaint. The Provider responded to this email the same day, as follows:

> *"Thank you for your emails of 10th September and 1st October 2020.*
>
> *I am sorry to learn that you have been dissatisfied with the service that we have provided.*
>
> *I will be your point of contact in relation to this complaint.* […]
>
> *I can assure you we will conduct a thorough investigation into the issues that you have raised and will provide you with a response as soon as possible.* […]*."*

The Provider issued an update in respect of the complaint on **12 October 2020** and issued a Final Response letter dated **19 October 2020** ("the FRL").

In terms of the Complainant Company's claim notification on **23 June 2020**, I note that it took 13 business days for the Provider to acknowledge the claim, on **10 July 2020**. While the Provider is likely to have received a large number of claims arising from Covid-19, it is nonetheless incumbent on the Provider to promptly acknowledge each claim notification.

/Cont'd…

I also note that the Provider has not offered any explanation as to why it took 13 business days to acknowledge the Complainant Company's claim. Accordingly, it is my opinion that there was an unwarranted delay on the part of the Provider in acknowledging the Complainant Company's claim notification.

In respect of the length of time between claim notification and the letter of **10 August 2020**, the FRL states that the Provider was reviewing cover under its policies and that it had received a high volume of queries in relation to Covid-19. While this may have been the case, I would consider it reasonable for the Provider to have issued a reasonably detailed update to the Complainant Company or to its Broker during the intervening period, in order to keep the parties appraised of matters, and I do not consider the Provider's email of **10 July 2020** to be sufficient in this regard.

Furthermore, it is quite clear from the evidence that the Provider failed to respond in a timely manner, or at all, to the emails from the Complainant Company's Broker. In respect of these emails, I do not consider the explanation in the FRL in relation to the delay between the claim notification on **23 June 2020** and the letter of **10 August 2020** to be a sufficient reason for not responding to the Broker's emails.

As can be seen from these emails, the Broker made express requests for an update and expressed clear dissatisfaction with the delay on the part of the Provider in responding, and the absence of any response, to his emails.

In respect of the communications between the Provider and the Broker, the FRL outlined the timeline of communication between parties, however, the Provider did not appear to acknowledge its shortcomings in responding to the Broker or to offer any apology in respect of this. The Final Response Letter is quite perfunctory in addressing this aspect of the complaint and it is very disappointing that an apology or explanation was not offered by the Provider.

In respect of the delay in acknowledging the Complainant Company' complaint, the FRL advised that this delay was due to an oversight and explained that the Provider regretted that the complaint was not acknowledged until **1 October 2020**.

Provision 10.9 of the ***Consumer Protection Code 2012*** is clear in that complaints must be acknowledged within five business days of being received, and that regular updates should be provided at intervals of not greater than 20 business days from the date a complaint was made.

The evidence shows that due to the Provider's oversight, the Complainant Company's complaint was not acknowledged nor was an update provided within the appropriate timeframes. Further to this, it appears from the Provider's email of **1 October 2020** that the investigation into the complaint was significantly delayed and only began on **1 October 2020**, approximately 15 business days after the complaint was made. However, I note that

/Cont'd…

the FRL issued on **19 October 2020**, which is within the 40 business day period prescribed by Provision 10.9.

Although there were very clear shortcomings on the part of the Provider in terms of its handling of the Complainant Company's claim, its conduct in relation to the Complainant Company's Broker and its handling of the formal complaint, it is not clear why the Complainant Company's formal complaint was not, to some extent, upheld by the Provider. This is surprising, particularly as the Provider expressly conveyed regret in respect of its conduct surrounding the acknowledgement of the Complainant Company's complaint.

It is also disappointing to see from the manner in which the FRL is drafted, that the Provider did not appear to consider there to have been any shortcomings in respect of its conduct towards the Complainant Company's Broker.

Accordingly, I am satisfied that the Provider's handling of the Complainant Company's claim, its conduct towards the Complainant Company's Broker, and its handling of the Complainant Company's complaint fell short of the required standard of dealing and that this conduct was improper within the meaning of ***Section 60(2)(g)*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

Therefore, I consider it appropriate to partially uphold this complaint and to direct pursuant to ***Section 60(4)(d)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, that the Respondent Provider pay compensation to the Complainant Company as directed below, to mark its poor standard of dealing.

Conclusion

- My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2)(g).***

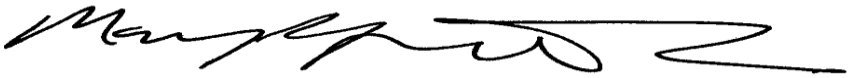
- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainant Company in the sum of €1,000, to an account of the Complainant Company's choosing, within a period of 35 days of the nomination of account details by the Complainant Company to the Provider.

- I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

- The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

/Cont'd…

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

10 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.