An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0024
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Rejection of claim Delayed or inadequate communication
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is a partnership trading as a medical diagnostic imaging centre. It held an office insurance policy with the Provider in 2020.

The Complainants' Case

The Complainants' Broker notified the Provider in **April 2020** of a claim for business interruption losses, as a result of the temporary closure of the Complainants' business on **13 March 2020** for a period, due to an outbreak of coronavirus (Covid-19) at the Complainants' premises.

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

> *"We have now received our Loss Adjuster's report and our understanding of the events which give rise to the claim are that following on from the Government announcement on 12 March 2020, the Insured made the decision to close their premises on 13 March 2020 due to health and safety concerns and as a number of patients cancelled appointments.*
>
> *As you are aware, the Business Interruption section of the Policy is set out in Section 2(b).*

The definition of DAMAGE is extended to include for section 2(b) only:-

"1(a) an outbreak of any NOTIFIABLE DISEASE occurring at the Premises or which is attributable to food or drink supplied from the PREMISES."

NOTIFIABLE DISEASE is defined as:-

"Illness sustained by any person resulting from:-

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

The loss insured is set out in Section 2(b) under the heading "WHAT IS INSURED". As is clear therefrom, for any loss to fall within cover, it must result from DAMAGE by an insured cause.

We have carefully considered the Policy and do not consider that the claim is covered. In particular, we are satisfied that the claim is not covered for the following reasons, each of which apply independently of each other:-

1. *The closure of the Premises was not "as a result" of an outbreak of any Notifiable Disease occurring at the Premises. The closure arose from preventative measures taken by the Government, arising from national considerations due to the global pandemic including in particular, social distancing measures.*

2. *Any loss which has occurred, has occurred as a result of the consequences of the pandemic and in particular the requirements of social distancing, including the restrictions on the gathering of persons, travel restrictions, requirements for remote working and the economic slowdown and has not occurred as a result of an outbreak of a Notifiable Disease occurring at the Premises.*

3. *It is clear that the agreement to indemnify in respect of the risk specified Section 2(b) Clause 1(a) is provided only where the business interruption loss has been caused by the matters specified at Clause 1(a). Having regard to the Government directions as regards social distancing, including restrictions on travel and the widespread public concern regarding the risks of infection and the economic slowdown, any business interruption loss has been caused by such social practices and public health concerns and not by the matters specified at Clause 1(a). …"*

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The Complainants wrote to the Provider on **10 July 2020** requesting that it reassess their claim, as follows:

> *"I am writing to you with additional information, not initially sought by yourselves, which validates our claim under the terms of business interruption loss cover in our policy.*
>
> *The last day of operation prior to the forced closure of our business was Friday, March 13, 2020. Our business did not reopen on Monday, March 16 for the following reasons:*
>
> *1. On Tuesday, 10 March 2020, a business partner and Consultant Radiologist, who had recently attended and worked at the business premises, became acutely unwell with symptoms consistent with Covid-19. He did not attend the business premises for the remainder of that week and, on Monday, 16 March 2020, he was advised by telephone to self-isolate for two weeks by the Occupational Health Department in* [hospital] *to limit the potential risk of disease transmission.*
>
> *2. On Sunday, 15 March 2020, a second business partner – also a Consultant Radiologist – was informed that a few days prior he had unknowingly been a close contact of a patient, who had subsequently been diagnosed with Covid-19. This unprotected contact occurred on Thursday, March 14, 2020. The partner had attended the business premises on Friday, 15 March 2020, in the morning, without the knowledge that he might be carrying Covid-19 as a result of this significant exposure. The Occupational Health Department,* [hospital]*, advised the partner (initially by telephone on Sunday, March 15) that he should self-isolate for a two-week period to eliminate the risk of disease transmission.*
>
> *Both partners were continually monitored by the Occupational Health Department at* [hospital]*, where they also work, for the two-week quarantine period. We can provide evidence of this.*
>
> *Because of recent presence of these two partners on the business premises there was a high likelihood that the disease was on the premises and it was for this reason that we ceased operations after Friday, March 13 2020 – in an effort to protect staff and clients from contracting Covid-19 (by then a notifiable disease) on the premises. Not, as you have stated in your correspondence, secondary to "preventative measures taken by the Government, arising from national considerations due to the global pandemic including in particular, social distancing measures".*
>
> *The business remained closed until the middle of last month (June 2020) in accordance with Government guidelines."*

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Following a review of their complaint, the Provider wrote to the Complainants on **17 September 2020** advising that its decision to decline the claim remained unchanged, stating that:

> *"We issued two emails via your broker … dated 11th August 2020 & 21st August 2020 seeking further information. An email from* [the] *Loss adjusters acting on our behalf was sent on 18th August 2020 requesting some more information directly from you. We have received no response to date. In a last effort to seek some clarity surrounding the issues raised in your letter dated 10th July, a telephone call was made by our loss adjustor … on 15th September who spoke to* [Doctor A] *who could not provide us with any further details.*
>
> *Unfortunately we can not progress matters any further in the absence of a reply from you. …"*

The Complainants submitted a Complaint Form to this Office dated **19 August 2020**. In a letter accompanying the Complaint Form, the Complainants set out their complaint, as follows:

> *"*[The Provider] *have declined to recognise our claim for losses sustained as a result of the forced closure of our business for a three-month period between mid March and Mid June of this year …*
>
> *Firstly,* [the Provider] *have stated that cover is refused as the closure of the premises was not "as a result" of an outbreak of any notifiable disease occurring at the premises. They say that the closure arose from 'the preventative measures taken by the government arising from national considerations due to the global pandemic including in particular social distancing measures'.*
>
> *This was not the case, as we will outline below.*
>
> *Second and effectively thirdly …* [the Provider] *went on to state that any loss which occurred was the result of the consequences of the pandemic and the generalised requirements as regards social distancing including the restrictions on gatherings of people, travel restrictions and requirements re remote working.*
>
> *This was also not the case.*
>
> *We contacted* [the Provider] *in writing on July 10, 2020 to provide them with detail, not initially sought, regarding the circumstances surrounding the forced closure of our business from Monday March 16, 2020. We assert that this additional information regarding the circumstances forcing the closure of our business validates our claim under the terms of business interruption loss cover in our policy.*
>
> *The last day of operation prior to the forced closure of our business was Friday, March 13 2020. Our business did not reopen on Monday, March 16 for the following reasons:*

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1. *On Tuesday, 10 March 2020, a business partner* [Doctor A]*, himself a Medical Consultant, who had recently attended and worked at the business premises, became acutely and severely unwell with symptoms consistent with Covid-19. He did not attend the business premises for the remainder of that week and, on Monday, 16 March 2020, he was advised by telephone to self-isolate for two weeks by the Occupational Health Department in* [hospital] *to limit the potential risk of disease transmission.*

2. *On Sunday, 15 March 2020, a second business partner* [Doctor B] *– also a Consultant Radiologist – was informed that a few days prior he had unknowingly been a close contact of a patient, who had subsequently been diagnosed with Covid-19. This prolonged unprotected contact occurred on Thursday, March 12, 2020. The partner had attended the business premises on Friday, 13 March 2020, in the morning, without the knowledge that he might be carrying Covid-19 as a result of this significant exposure. The Occupational Health Department,* [hospital]*, advised the partner (initially by telephone on Sunday, March 15) that he should self-isolate for a two-week period to eliminate the risk of disease transmission.*

Both partners were continually monitored by the Occupational Health Department at [hospital]*, where they also work, for the two-week quarantine period.*

Because of recent presence of these two partners on the business premises it was our unanimous medical opinion, given what was known about the virus at that point in time – particularly the ability of the virus to survive on hard surfaces from between days to weeks (depending upon the type of surface) – that there was a high likelihood that the disease was on the premises and it was for this reason that we decided not to reopen the business on Monday 16 March 2020 – in an effort to protect staff and clients from contracting Covid-19 (by then a notifiable disease) due to the high likelihood that there had been an outbreak at the premises the previous week.

The business remained closed until the middle of June 2020. During this time five of the seven partners in the business, had to self-quarantine for two week periods due to exposure to Covid-19 positive patients or because they had developed symptoms consistent with Covid-19. It was not possible for us to safely reopen the business for a three month period due to the continual high risk that one of the Partners might transmit the virus unbeknowingly to a client or other staff member – due to the inherent risk associated with our continued exposure to the virus in the public hospital [hospital] *where all of the Partners also work.*

We think that it is pertinent to note that given the nature of our business – which involves the provision of medical imaging/care – it was an entity which was never actually legally required to shut unlike say for example the public houses, shopping centres or non-essential retail/service outlets. There was certainly no requirement to shut from the 13th March, 2020.

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The reason we closed our business, despite there being demand for our services, even in the extreme portion of the lockdown, was out of medical prudence, due to there having been – even at a very early stage of the outbreak; when few cases had been confirmed nationally – occurrences of Covid-19 infection (on a balance of probabilities) at the premises which pointed towards there being a high likelihood that he type of work being done by the Partners was particularly high risk. We were not the victim of an automatic shutdown like for example public houses were but rather decided to shut following the two 'outbreaks' at the premises in such quick succession to each other and at such an early stage in the pandemic.

One of the two Partners [Doctor A] *initially suspected to have Covid-19 was tested for the virus and the test was negative. The second partner* [Doctor B] *was not offered testing by* [hospital]*. Testing is of limited relevance to our claim, as the sensitivity of the Covid-19 tests that were available in Ireland in March fell somewhere between 60 and 70%. This means that the test had a false negative rate of between 30 and 40%. Put another way, if 10 patients who had Covid-19 were tested only 6 or 7 of them would test positive. The remaining 3-4 patients in this scenario, while positive, would remain undiagnosed. It is for this reason that clinical judgement has to be used. Despite testing negative for Covid-19 on 17 March 2020,* [Doctor A] *was not allowed to return to work at* [hospital] *for a two week period, until his symptoms had fully resolved and he was no longer contagious.* [Doctor B] *was not offered testing because the risk associated with him transmitting the disease would not have been negated by a negative test result and so that advice from the Occupational Health Department,* [hospital]*, was that he too self-isolate for a two week period to ensure there was no development of symptoms – which would be more reassuring but which still does not exclude the possibility of infection. Given the nature and severity of* [Doctor A's] *symptoms and the extent of* [Doctor B's] *unprotected exposure to the virus, by March 15, it was highly likely that there had been an outbreak on the business premises and it was impossible for us to reopen on the morning of Monday, March 16, as a result.*

We would finally like to reiterate that being engaged in the provision of medical services, our business was not legally required to shut on the 13th March, 2020 – the ban on bars was announced on the 15th March but the more substantive 'lockdown' was not announced until the evening 24th March, 2020. Even after the lockdown was announced at what was at its most severe level, medical facilities, including our own business, were exempted from the national shutdown as were all medical staff."

As a result, the Complainants seek for the Provider to admit their claim for business interruption losses. In this regard, the Complainants state on their Complaint Form that:

"Our business was forced to close for a 3 month period between mid March and mid June, 2020. Our claim is for loss of earnings over this three month period under the terms of the business interruption clause in our insurance policy with [the Provider]*. We would like to be reimbursed for this lost income secondary to the forced closure of our business."*

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The Provider's Case

The Provider says the Complainants' claim was declined following an investigation and interview of Doctor A on **8 April 2020**. The Provider says that at no stage was there any issue raised (during a site visit), of an outbreak of Covid-19 on the premises, nor was the Provider made aware of one of the Complainants showing symptoms. The Provider refers to a copy of a Loss Adjuster's report in this regard. The Provider says the claim was declined as it did not fall within the cover available under the policy.

The Provider says the cover provided for business interruption is set out in the 'Business Interruption' section of the policy at section 2(b). The Provider says the definition of the term 'DAMAGE' is extended for section 2(b) only, to include:

> *"1(a) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES."*
>
> *NOTIFIABLE DISEASE is defined as:-*
>
> *"Illness sustained by any person resulting from:-*
> - *food or drink poisoning*
> - *any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)], an outbreak of which the competent local authority has stipulated must be notified to them."*

The Provider says the loss insured is set out in section 2(b) under the heading 'WHAT IS INSURED'. The Provider says that as is clear therefrom, for any loss to fall within cover, it must result from DAMAGE by an insured cause. For this reason, the Provider says there is no cover in respect of the claim, for the following reasons:

- The closure of the Premises was not *"as a result"* of an outbreak of any Notifiable Disease occurring at the Premises. The closure arose from preventative measures taken by Government, arising from national considerations due to the global pandemic including in particular, social distancing measures.

- Any loss which has occurred, has occurred as a result of the consequences of the pandemic and in particular the requirements of social distancing, including the restrictions on the gathering of persons, travel restrictions, requirements for remote working and the economic slowdown and has not occurred as a result of an outbreak of a Notifiable Disease occurring at the Premises.

- It is clear that the agreement to indemnify in respect of the risk specified at section 2(b), clause 1(a) is provided only where the business interruption loss has been caused by the matters specified at clause 1(a). The Provider says having regard to the Government directions as regards social distancing, including the restrictions on travel and the widespread public concern regarding the risks of infection and the economic slowdown, any business interruption loss has been caused by such social distancing practices and public concerns and not by the matters specified at clause 1(a).

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The Provider says that in an effort to investigate the complaint, it sought more information from the Complainants which it did not receive as part of the complaint process. The Provider says a Final Response letter issued in accordance with its responsibilities under the Consumer Protection Code 2012.

The Provider says in the absence of the Complainants sending a reply, the Provider was unable to carry out further investigations and therefore it maintained the declinature of the claim. The Provider says that the "evidence" referred to in the Complainants' letter of **10 July 2020** was not provided. The Provider says the test results referred to by the Complainants, were a negative test based on a sample taken on **17 March 2020** and an Antibody test in **October 2020**. The Provider submits that these cannot be relevant to the Complainants' decision to close in **March 2020**.

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined the Complainants' claim for business interruption losses as a result of the temporary closure of their business for a period in **March 2020**, due to the outbreak of COVID-19.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants were 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 **6 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.

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

The investigation of this complaint was commenced in **December 2020**, and by email dated **10 March 2021,** the Provider informed this Office that it wished to agree the settlement of the Complainants' claim, following the completion of further investigations. In this regard, I note that the Provider's Loss Adjuster emailed Doctor A, on **8 April 2021** to advise that liability for the claim had been accepted by the Provider and it requested an itemised breakdown of the loss incurred during the period of interruption.

To facilitate discussions between the parties regarding the settlement of the claim, this Office temporarily suspended the investigation of this complaint. However, the Complainants informed this Office by email on **4 May 2021** that the parties were unable to reach a mutually acceptable settlement.

Following this, this Office wrote to the parties on **14 May 2021** to inform them that the complaint would proceed to adjudication, and a Preliminary Decision was issued to the parties on **6 July 2021.** There have been further submissions and communications between the parties and this Office, since that time.

I note that at the beginning of **April 2020,** the Complainants' Broker notified the Provider of a claim under the policy, for business interruption losses. Following this, it appears that the Provider retained a Loss Adjuster to assess the Complainants' claim. The Loss Adjuster subsequently prepared a Preliminary Report dated **23 April 2020**. In this report, it states that a site visit took place on **8 April 2020,** with Doctor A being present at the time.

This report states, in relevant part, as follows:

> *"**Circumstances of Claim:***
>
> *Your policyholder advises that on 13th of March 2020 they made the decision to close the business on health and safety grounds. A number of patients had been asking about Covid-19 and they themselves were worried and appointments began to be cancelled.*
>
> *As outlined previously, all of the radiologists operating from this private venture are also HSE employees. The radiologists were concerned that they may be exposed from working in local hospitals. For that reason, they felt it would be reckless for them to continue with any further scanning.*
>
> *Given the pandemic is ongoing in Ireland and lockdown is currently in place, closure is likely to remain to be the case until such time as Covid-19 public health scare has evaporated, and businesses resume normal activity.*

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Reported Cause:

The Insured decided to close the business as a result of the Covid-19 outbreak in Ireland and the resultant health and safety concerns. The Insured advises there was no outbreak of Covid-19 at the premises or in any of the other medical venture that operate from the premises at [the premises address].

[My emphasis]

The World Health Organisation announced that the Covid-19 virus was a worldwide pandemic on 11th March 2020. The government sought to restrict mass gatherings on 13 March 2020 and subsequently pubs were closed on the evening of 15th March 2020.

A number of trade bodies called for a directive from government in respect of their own specific business the week commencing 16th March 2020 and a social shutdown and closure of non-essential businesses was ordered by the Government on 27th March 2020. The latest Government information is that closure of non-essential businesses will continue until 5th May 2020. How matters will develop and whether this practice will be allowed to re-open at that time is not known.
…

Policy Liability:
…

Insured Peril, Summary & Opinions

The Insured advises as far as they are aware none of their staff or clients had COVID-19 and that there was no outbreak of COVID-19 at the premises.

In the circumstances there would appear to be no DAMAGE and the material damage section of the policy is not triggered. The Notifiable Disease cover is as follows: …

In light of the above wording and the fact that it would appear there has not been an outbreak of COVID-19 at the PREMISES, it would appear the loss would not fall for consideration under the policy. …"

[My emphasis]

I note that on **2 June 2020**, the Provider wrote to the Complainants' Broker to advise that it had declined the Complainants' claim. In this respect, I note that the Complainants held an office insurance policy with the Provider. The Complainants' policy schedule records that the Complainants had business interruption insurance in the amount of **€300,000** with a 12 month indemnity period.

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Business interruption insurance is provided for at section 2(b) of the policy, which provides the following cover:

"WE will pay for loss of INCOME occurring during the INDEMNITY PERIOD, resulting from DAMGE by an insured cause under Section 2(a) to any of the following:

- *the CONTENTS or glass insured under this section*
- *the BUILDINGS of the PREMISES shown in Schedule.*
- *property in the vicinity of the PREMISES which prevents or hinders the use of the PREMISES or access to it.*

Provided that:

- *at the time of the DAMAGE this policy shall be in force covering YOUR interest in the property at the PREMISES against DAMAGE and*
- *a valid claim has been admitted under Section 2(a) of this Policy …."*

I note however that for the purpose of section 2(b), the definition of damage is extended, as follows:

"The definition of DAMAGE is extended to include for this Section 2(b) only:

1. *(a) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES.*
   (b) the discovery of vermin or pests at the PREMISES which causes a competent local authority to restrict the use of the PREMISES
   (c) closure of the PREMISES by the appropriate local authority because of defects in the drains or other sanitary arrangements.
   (d) murder or suicide occurring at the PREMISES."

The term 'notifiable disease' is defined, as follows:

"Illness sustained by any person resulting from:

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

In light of these policy provisions, it is my opinion that to trigger cover under section 2(b) of the policy there must be *damage*. In the context of this complaint, clause 1(a) contains the relevant definition of the damage. To satisfy this definition of damage, there must be *"an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES"*.

In terms of the requirement in clause 1(a) for *an outbreak* of a notifiable disease, I note that this term is not defined in the Complainants' policy. However, in ***Hyper Trust Limited v. FBD Insurance plc*** [2021] IEHC 78, McDonald J. referred to the Health Protection Surveillance Centre's definition of *outbreak*, stating that:

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> *"**179.** … In my view, reasonable persons in the position of the parties to the* [Insurer's] *policy would consult the HPSC definition if they were in any doubt about the meaning of the word "outbreak" as used in the policy. None of the parties to the proceedings objected to the court availing of the HPSC definition in its interpretation of the policy."*

In the following paragraph, McDonald J. took the view that a single instance of Covid-19 was sufficient to come within the meaning of the term *outbreak*, stating:

> *"**180.** … it is clear from the definition of "outbreak" that a single instance of a serious disease such as Covid-19 within the 25 mile radius would be sufficient to satisfy the definition …."*

I note that Clause 1(a) further requires an outbreak of *any notifiable disease*. In this respect, I note that the Infectious Diseases (Amendment) Regulations 2020 amended and provided for the inclusion of coronavirus (Covid-19) (SARS-Cov-2) on the list of notifiable diseases contained in the Infectious Disease Regulations 1981. I also note that the Provider has not disputed that Covid-19 is a notifiable disease for the purposes of section 2(b) of the policy. Therefore, in light of the policy definition of notifiable disease, I am satisfied that Covid-19 comes within, and is, a notifiable disease for the purposes of section 2(b) of the policy.

Clause 1(a) also requires the outbreak of the notifiable disease to occur *at the premises*. The policy expressly states that the definition of damage is extended for the purposes of business interruption claims pursuant to section 2(b). This definition extends to include damage under four sub-clauses, 1(a) to (d).

For clause 1(a), the outbreak of the notifiable disease must occur *at the premises* or be attributable to food or drink supplied *from the premises*.

For clause 1(b), the discovery of vermin or pests must be *at the premises*;

Clause 1(c) requires the closure of the premises; and

Clause 1(d) requires murder or suicide to occur *at the premises*.

As can be seen, the language used in each of these sub-clauses is "premises" specific.

In this respect, the policy schedule identifies the 'Risk Address' as the Complainants' office/business premises and the language used in defining the term premises (and related terms) is very specific and confined to the buildings and grounds comprising the Risk Address.

For instance, 'Premises' is defined as: *"The Buildings and the land within the boundaries belonging to them."*

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I note that 'Buildings' is defined as:

> *"… the structure of the Office, including all OUTBUILDINGS, at the PREMISES and includes:*
>
> *(a) landlord's fixtures and fittings therein and thereon*
> *(b) walls gates and fences*
> *(c) car parks yards and pavements*
> *(d) telephone gas water and electric installations …*
> *(e) foundations*
> *(f) drains and sewers within the perimeter of the PREMISES …."*

'Outbuildings' is defined as: *"… BUILDINGS other than the main Office, which are not accessible to the public."*

Accordingly, it is my opinion that giving the words of the definition of damage at section 2(b) their plain and ordinary meaning, reasonable interpreted, clause 1(a) requires there to be an outbreak of a notifiable disease actually and specifically at the Complainants' premises to trigger cover under section 2(b) of the policy in respect of business interruption losses arising from Covid-19.

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, where he made certain remarks regarding an *at the premises* requirement contained in a clause somewhat similar to 1(c) 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."*

Accordingly, I am satisfied that to trigger cover under section 2(b), clause 1(a) requires an outbreak (i.e. a single incident) of any notifiable disease (i.e. Covid-19) occurring at the Complainants' business premises.

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It is the Complainants' position that Doctor A and Doctor B both had Covid-19 while on the insured premises and this was the reason for the closure of the business. In such circumstances, I believe that the Complainants are required to demonstrate to the Provider, on the balance of probabilities, that either Doctor A or Doctor B were at the premises, while infected with Covid-19.

In respect of Doctor A, I note that the Complainants have provided a negative Covid-19 test dated **18 March 2020** in respect of a swab taken on **17 March 2020**. The laboratory test result in respect of this swab states:

"SARS-CoV-2 (Altona) Not Detected

	This test is not INAB accredited.
	This assay is not CE marked and therefore is for research use only.
	…
INAB Accreditation	*…*
	A negative result may not exclude infection."

The Complainants have also provided a 'Covid-19 Antibody Test Result' dated **7 October 2020** for Doctor A in respect of a sample taken on **6 October 2020**. The result of this test is as follows:

"Anti-SARS CoV 2 Ig RESULT : DETECTED"

The following information is also contained on the test result document:

"What does the result mean?

If your test result is positive/Ab detected you will need to attend/contact your GP to establish what the next stage of your evaluation should be. The clinical correlation is vital and allows the GP to establish whether your test is due to a current, recent, or previous infection. The antibody test alone cannot establish this information without a detailed clinical assessment. Your GP will decide if a further nose and throat swab for SARS-CoV-2 PCT testing is required.

Please note: A negative/Ab not detected test result does not rule out early infection with SARS-CoV-2. Therefore, this test cannot be used to diagnose acute infection. This assay does not distinguish between IgG, IgM and IgA if present. Titre may decline and become negative over time. Not all interfering substances, endogenous or exogenous, have been determined, interpretation caution is advised. …

Antibody tests can indicate if there is evidence of likely prior infection with the virus.

At present we do not have sufficient evidence to use tests for antibody to SARS-CoV-2 to:

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- *Exclude infection*
- *Provide information about whether the patient remains infected*
- *Indicate protective immunity to re-infection*

SARS-CoV-2 antibody DETECTED
Consistent with infection with SARS-CoV-2 at some time. Clinical correlation is essential. This test detects [both IgG and IgM], but a history of symptoms or confirmed COVID-19 at least six weeks ago make current infection less likely. …

SARS-CoV-2 antibody NOT detected
No serological evidence of SARS-CoV-2 infection. Clinical correlation is essential. This does not exclude current or past infection with SARS-CoV-2. …"

Further to this, the Complainants have furnished a letter dated **8 October 2020** from a Consultant Respiratory Physician and Clinical Lead for the management of Covid-19, at the hospital where Doctor A and Doctor B both work. In respect of Doctor A, the letter states:

"[Doctor A]*, a Consultant Radiologist at* [hospital]*, contacted me over the weekend of 13th/14th March 2020. He had been on annual leave the previous week and had developed symptoms consistent with Covid-19 on Tuesday, March 9th 2020. His symptoms included persistently elevating temperature (greater than 38 degrees Celsius for one week), a dry cough, shortness of breath and severe fatigue. These symptoms were severe and lasted for approximately 11 days.* [Doctor A] *was vaccinated against influenza last winter. I recommended that* [Doctor A] *should not attend work while he was symptomatic with a respiratory viral illness and would need a COVID-19 test. I suggested that he should get this test in the community as he did not require hospital admission. Considering this fact and the nature, severity and duration of his symptoms I suspected* [Doctor A] *had Covid-19 on clinical grounds. As such, he was advised, by myself, as Covid-19 Lead Clinician for the Hospital, to not attend work from Monday, 15th March 2020 for a two week period (he had been on leave from the Hospital the previous week when he initially became symptomatic), and self isolate. He subsequently tested negative for Covid-19, on the basis of a single PCR test, it should be noted that these tests have sensitivity of approximately 70% (they will not diagnose 30% of COVID-19 infections), which is consistent with our local experience highlighted above.* [Doctor A] *has subsequently had a positive Sars-CoV-2 antibody test, indicating that he has had COVID-19."*

The Complainants have also made certain submissions and provided academic articles regarding the sensitivity and accuracy of Covid-19 testing and the likelihood of false negatives.

I note that the evidence is that around **13/14 March 2020,** Doctor A contacted the Clinical Lead for Covid-19 management in the hospital where he works, and described symptoms consistent with Covid-19.

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It appears that, in accordance with protocols at that time, the Clinical Lead did not examine Doctor A in person but, on considering the symptoms described, suspected on clinical grounds, that Doctor A had Covid-19, and was advised to self-isolate, and not attend work for 2 weeks. It appears that Doctor A then took a Covid-19 test and received a negative test result for Covid-19 around **18 March 2020**. Later in the year, Doctor A took a Covid-19 antibody test in **October 2020** which detected the presence of Covid-19 antibodies, indicating that at some point prior to this test, Doctor A contracted Covid-19.

While I accept that Covid-19 testing does not detect all cases of the virus, I do not accept that the Provider was obliged to accept that this necessarily means that Doctor A, despite his symptoms, and the subsequent presence of Covid-19 antibodies in October 2020, was infected with Covid-19 around the time of the closure of the Complainants' business on **13 March 2020**.

In the first instance, it cannot be ignored that Doctor A received a negative test result for Covid-19 in **March 2020**. I also note that no further Covid-19 tests were taken by Doctor A at this time, to confirm the accuracy of this test. While the Complainants have made submissions regarding the potential for false negative test results and the sensitivity of Covid-19 tests, I do not accept, in the present circumstances, that this is evidence that Doctor A's particular test was incorrect or unreliable. If, as the evidence suggests, that Covid-19 tests detect in the regions of 60% to 70% of cases then, on the balance of probabilities, the test taken by Doctor A would, more likely than not, detect Covid-19. The fact that Doctor A did not receive a positive test result would therefore suggest, on the balance of probabilities, that he was unlikely to have had the virus at that time.

While the Doctor A consulted the Clinical Lead for Covid-19 management, I note that a physical examination did not take place nor were any investigations or tests carried out to confirm a diagnosis of Covid-19. There also does not appear to have been any follow-up consultation to discuss Doctor A's condition, particularly in light of the negative Covid-19 test. It appears that the height of the Clinical Lead's evidence is that, he *suspected* Doctor A had Covid-19 on clinical grounds, and I recognise his experienced position in which he formed that suspicion. However, I do not consider that the Provider was obliged to accept that a suspected case of Covid-19 was sufficient to satisfy the requirements of clause 1(a) of the Complainants' policy.

Since the preliminary decision of this Office was issued, the Complainants have submitted that, with regard to Doctor A:

> *"There is nothing else realistically that would have accounted for his clinical presentation other than covid-19. Even in the absence of a positive* test [the Clinical Lead] *may have been 60-90% certain in his clinical diagnosis and this should be ascertained. Real world decisions regarding the management of patients are not made on the basis of the PCR test result as they are so unreliable. With the classical symptoms of covid, even in the absence of a positive PCR test, it is the clinical diagnosis that determines management."*

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> *Our clinical lead* [Doctor C] *has previously stated that the period in early March was the only sick leave* [Doctor A] *took in 2020. While it is possible that he picked up covid-19 at a later time in 2020 and was asymtomatic (to explain his subsequent positive antigen teat) this is not the most likely scenario.*
>
> [Doctor A] *was very unwell with the symptoms of covid-19 and a clinical diagnosis was made by a well respected respiratory consultant, even in the absence of a positive PCR test, and* [Doctor A] *was managed accordingly. As we see it the only thing left to determine is how certain* [the Clinical Lead] *was in his diagnosis?*

I accept that in the absence of a PCR positive test result, a suspected case of COVID-19 may nevertheless be medically managed by the treating doctor, as if it were in fact, a confirmed case of COVID-19. Such a practice does not however equate to evidence that COVID-19 exists.

In any event, it is not the role of the FSPO to determine whether or not Doctor A was suffering from COVID-19 in early March 2020. Rather, the FSPO must determine whether the Provider acted reasonably when it made a decision in **June 2020**, to decline the Complainants' claim for benefit under the policy, and to subsequently decide in **September 2020**, to stand over that decision.

I note in that regard that at the time of those decisions by the Provider, the results of the antibody test taken by Doctor A in October, were not yet available, and as a result, could not have been taken into account by the Provider.

The antibody test was taken almost 6 months after Doctor A's negative Covid-19 test in **March 2020**. I accept that the results of this test would mean that at some point prior to the date of the test, Doctor A was likely to have been infected with Covid-19. However, I do not accept that this means that the Provider was obliged, when this test result became available, to accept that Doctor A had Covid-19, at the time when the Complainants closed their business on **13 March 2020**, nor do I agree that this means that the Provider was obliged to accept that the **March 2020** Covid-19 PCR test was wrong.

In light of the prevalence of Covid-19 in the State during this period, it is my opinion that it is at least arguable that Doctor A may have contracted the virus at any point during this 6 month period. At this remove, it is not possible to say, with a sufficient degree of certainty, or on the balance of probabilities, that it was prior to or at the time of the closure of the Complainants' business in March 2020.

When the Complainants made their complaint to this Office, they sent an accompanying letter stating that:

> *"It was not possible for us to safely reopen the business for a three month period due to the continual high risk that one of the Partners might transmit the virus unbeknowingly to a client or other staff member – due to the inherent risk associated with our continued exposure to the virus in the public hospital* [hospital] *where all of the Partners also work."*

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Further to this, in a submission dated **18 January 2021**, the Complainants state that:

> *"All of the partners in the business are full time employees (Consultant Radiologists) of the HSE working between* [named hospitals]*. As such all partners were working as usual without even taking annual leave entitlements throughout the pandemic in HSE hospitals. Closing the business did not therefore did not significantly reduce our risk of exposure to contracting the virus as we were continually exposed to this risk in the public hospital system where we continued to work throughout the period when* [the business] *was temporarily closed."*

These passages would tend to suggest that Doctor A was regularly in an environment where he was exposed to the risk of contracting Covid-19 in the period following the closure of the Complainants' business and prior to this antibody test in **October 2020**.

Further to this, it appears that Doctor A was the person who met with the Loss Adjuster on **8 April 2020** and is described in the Loss Adjuster's report as the 'Insured'. I am conscious in that regard that, in the Loss Adjuster's report the month after the Complainants' premises had been closed, it is stated that:

> *"The Insured advises as far as they are aware none of their staff or clients had COVID-19 …."*

Therefore, looking at evidence as a whole, I take the view that the Provider was entitled to form the opinion, in June 2020, and again in September 2020, on the balance of probabilities, that Doctor A was not infected with, nor did he have Covid-19 at the time of, or prior to, the closure of the Complainants' business.

In respect of Doctor B, the Complainants' evidence is that Doctor B was informed on **15 March 2020** that around **14 March 2020** he was a close contact of a confirmed case of Covid-19. In the above-mentioned letter dated **8 October 2020** from the Consultant Respiratory Physician and Clinical Lead for the management of Covid-19, it states in respect of Doctor B that:

> *"On the evening of Sunday, March 14th 2020, I telephoned* [Doctor B]*, a Consultant Radiologist at* [hospital]*, to inform him that a patient, referred to him for the insertion of a chest drain had, unknown at the time, been Covid-19 positive. Due to the nature of the procedure and his prolonged unprotected (inadequate PPE used) exposure to the patient* [Doctor B] *was deemed to be a close contact.*
> *In accordance with guidelines he too was advised to self-isolate for a two week period commencing Monday 15th March 2020. Later that week it became known that* [Doctor B] *had performed another procedure on a different patient the previous week, again without the use of adequate PPE, who was also subsequently diagnosed with Covid-19.* [Doctor B] *was not tested as it was not policy at the time, and would not have changed his work status."*

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As can be seen, this paragraph also notes that Doctor B was advised of a further close contact with a confirmed case of Covid-19, which occurred prior to the closure of the Complainants' business.

With respect to Doctor B, I note that no evidence has been offered to show or suggest that Doctor B had any symptoms consistent with Covid-19 around **14/15 March 2020** or that any form of clinical diagnosis of Covid-19 was made. I also note that Doctor B did not undergo a Covid-19 test or an antibody test.

In essence, the Complainants' position in respect of Doctor B appears to be, that as he was deemed a close contact of a confirmed case or cases of Covid-19 and due to his presence on the insured premises, there was a high likelihood that the virus was on the premises.

For the purposes of clause 1(a), I am not satisfied that simply because Doctor B was a close contact of a confirmed case or cases of Covid-19 means, on the balance of probabilities, that the Provider was required to accept that he had contracted or was infected with the virus. It is my opinion that clause 1(a) requires more than simply being deemed a close contact. Therefore, having considered the evidence, I am not satisfied that the Provider was required, on the balance of probabilities, to accept that that Doctor B was infected with or had Covid-19 at the time of, or prior to, the closure of the Complainants' business.

In the context of the Complainants' claim under section 2(b) of their policy for business interruption losses arising from Covid-19, it is my opinion, as stated above, that the Complainants are required to show, on the balance of probabilities, that either Doctor A or Doctor B were at the premises while infected with Covid-19. However, having considered the available evidence, I am not satisfied that the Complainants established to the provider in June 2020, or in September 2020, on the balance of probabilities, that Doctor A or Doctor B were, in the first instance, infected with Covid-19. Accordingly, I take the view that the Provider was entitled to form the opinion that there was no outbreak or any instance of COVID-19 at the Complainants' premises such that cover pursuant to section 2(b) was triggered. I accept in that regard that in June and September 2020, the Provider was entitled to decline the claim.

In some respects, this determination is somewhat academic, as I note that in March 2021, the Provider advised that liability for the claim was then admitted, and that it wished to agree settlement of the claim, following on completion of further investigations. Whilst it remains unclear to this Office what additional information came to light, giving rise to this altered position, this is nevertheless a welcome development, as I note that liability has been admitted, and it will be a matter for the parties to now work together, with a view to reaching agreement on the quantum of any benefit payable.

I appreciate that the Complainants likely suffered significant disruption to their business during 2020, as a result of COVID-19, and that my decision regarding the actions of the Provider in originally declining the claim, in June 2020 and September 2020, will come as a disappointment. Nevertheless, now that liability for the claim has more recently been admitted, I would urge the parties to continue to liaise, with a view to agreeing the appropriately adjusted figure for benefits payable to the Complainants under the policy.

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I am satisfied accordingly that the Provider was originally entitled in June and September 2020, to decline the Complainants' claim for business interruption losses, as a result of the temporary closure of their business for a period in **March 2020** due to the outbreak of COVID-19. I accept that the Provider was entitled to maintain that position, on the basis of the evidence and information which had been made available to the Provider at those times, and accordingly, I am satisfied that it is not appropriate to uphold 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

12 January 2022

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.