An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0031
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as an accommodation, restaurant, cookery school and wedding venue business ("the Complainant Company"), holds a policy of insurance 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

Under cover of email dated **30 March 2020**, the Complainant Company's broker ("the Broker") forwarded a 'Claim Notification' to the Provider on behalf of the Complainant Company containing the following details:

> *"Cause of Loss:* *Infectious Disease*
> *Date of Loss:* *16/03/2020*
> *Date Loss Reported:* *27/03/2020*
> *Claim Status:* *REPORTED*
> *Summary Description:* *Business forced to close to Covid 19*
> *Business forced to close due to Covid 19 outbreak"*

By email dated **2 April 2020**, the Provider responded to the Broker to advise that the Complainant Company's claim was not covered by the policy, as follows:

> *"Unfortunately, the Business Interruption section of the policy does not respond to closure as a result of COVID-19, and I am writing to explain why this is the case.*
>
> *Having reviewed you client's policy* […] *the cover available to them under the policy includes an extension to the Business Interruption section for losses due to the prevention of access to the insured premises, see Business Interruption – Extension 2 Prevention of Access – Non-damage. However, despite this, the losses in this case are due to an excluded cause, that being the decision of Government to take certain measures to seek to control the spread of the pandemic. This is not an event which is insured under the policy.*
>
> *Whilst, therefore, there is cover for prevention of access there is an express exclusion as follows:*
>
> ***Page 54, Extension 2 Prevention of Access – Non-damage, Exclusion (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"*
>
> *Therefore, our non-damage prevention of access extension excludes business interruption losses due to prevention of access caused by the occurrence of an infectious disease, where the closure is on the order or advice of the competent local authority. Unfortunately, subject to any further information or representations you may wish to provide us with on behalf of your client, for this reason it appears that your client's claim is not covered under the policy.*
>
> *We do provide businesses with cover for established infectious diseases whose impact is assessable (known as Specified Disease Cover). These diseases are set out in the policy and only those listed are covered: COVID-19 is not included on the list of disease covered by this insurance. This is because, in common with most of the market, our insurance policies are not designed and priced to cover pandemics. A key principle of insurance is that the losses of the few are paid by the many. In a pandemic situation the losses are many and the market is not designed to cover such scenarios."*

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By email dated **7 April 2020**, the Broker responded to the Provider, as follows:

> *"However, it would be my interpretation that cover would apply in that the direction of government to close "is due to an emergency which could endanger human life". The exclusion (iii) would not apply as this relates to an advice from a local authority, which this is not.*
>
> […]
>
> *The client here has been insured with* [the Provider] *for 10 years and I have always relayed the virtues of* [the Provider's] *wording and dealing with yourselves, so I would be very appreciative if you could review again and revert with a positive response on this.*
>
> *I know the regulator has issued advices in relation to wordings and interpretations in relation to Covid-19, urging insurers to find in favour of the consumer, which I firmly believe we should do in this case."*

The Broker emailed the Provider again on **24 April 2020** querying the information required by the Provider and seeking confirmation as to whether a loss adjuster would be appointed. Provider records indicate that a telephone conversation took place between the Broker and the Provider on **8 May 2020**. The file note in respect of this conversation states, as follows:

> *"Returned* [the Broker's] *call – advised our position has not changed and final response should be with him next week.*
>
> *He advised he is very disappointed."*

Following its review of the complaint, the Provider wrote to the Complainant Company on **3 July 2020** setting out its response, as follows:

> *"**Your complaint***
>
> *The emails from your broker state in summary that:*
>
> 1. *His interpretation of the policy is that cover should apply as the direction of government to close "is due to an emergency which could endanger human life".*

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2. *Exclusion (iii) does not apply as it relates to an advice from a local authority.*

We will respond to each of these points in turn below. However in the first instance it may be helpful to explain the business interruption cover provided as part of your policy.

Your Business Interruption cover

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. We understand that there has been no damage to property in this instance, however, please let us know if this understanding is incorrect* […]

*There are two extensions which can, in certain circumstances, provide cover for business interruption losses where there is no damage to property: "Prevention of access – non-damage" (Extension 2) and "Specified Disease Murder Food Poisoning Defective Sanitation Vermin" (Extension 15). We have explained the cover available under these extension in the "**Explanatory Note**" below.*

Having set out what we hope is a clear explanation of the cover provided for financial losses for business interruption in cases where there is no material damage to your business premises we have addressed the specific points raised in your letter below.

(a) Cover should apply as the direction of government to close "is due to an emergency which could endanger human life["]

Your broker has referred to the "Prevention of access – non-damage" extension (Extension 2) which covers loss resulting from an interruption or interference with the business at the insured premises as a result of assess or use of the premises being prevented or hindered by an action of government, the Gardai, emergency services or a local authority due to an emergency which could endanger human life or neighbouring property. 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)". Extension 2 does not therefore extend [the Provider's] *coverage to Specified Diseases or to any other human infectious diseases. The only cover provided in respect of Specified Diseases is that provided by Extension 15, which does not cover COVID-19.*

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[The Provider's] *policies are not designed to cover losses arising from the occurrence of a general pandemic such as COVID-19 in the circumstances which arise at present.*

In addition, even if the policy did in principle extend to COVID-19, cover would still only be available under Extension 2 where the loss ***results from*** *an interruption of or interference with your 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. Losses that you would have suffered in any event as a result of the downturn in economic activity and the general lockdown are therefore, in principle, not covered.*

We note your broker's reference to the statement from the Central Bank of Ireland in relation to its 'Expectations of Insurance Undertakings in Light of COVID-19' dated 27 March 2020. We have taken this statement into account in assessing your claim. However, based on information currently provided, your claim unfortunately does not meet the policy requirements in order to trigger cover. It is clear from the statement that the Central Bank does not expect insurers to cover claim that are not covered under the policy terms and conditions.

(b) Exclusion (iii) in Extension 2 does not apply as the restrictions were not advice of a competent local authority

As set out in the Explanatory Note, Extension 2 does not extend [the Provider's] *coverage to Specified Diseases or to any other human infectious diseases. The only cover provided in respect of Specified Diseases is that provided by Extension 15, which as explained above does not cover COVID-19.*

In addition, the reference to "competent local authority" in the exclusion distinguishes the "local authority" referred to in the exclusion from the "local authority" referred to in the operative clause. In the context it is used, it means any of "government, the Gardai, emergency services or a local authority" and it therefore would apply to exclude cover, if cover was triggered.

(c) Comments on delay

[…]

Outcome of investigation

We are satisfied based on the information you have provided that your broker's interpretation of the policy is not correct.

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We appreciate that this decision will come as a disappointment and we wish to assure you that it is not a decision we have taken lightly.

We hope this letter helps you to understand why we consider based on the information currently available that the policy does not respond to your claim. […].*"*

The Complainant Company has set out its complaint, as follows:

"Simply in [the Provider's] *own words; (b) Exclusion (iii) in Extension 2 does not apply as the restrictions were not advice of a competent local authority as set out in the Explanatory Note, Extension 2 does not extend* [the Provider's] *coverage to Specified Diseases or to any other human infectious disease. The only cover provided in respect of Specified Diseases is that provided by Extension 15, which as explained above does not cover COVID-19. In addition, the reference to competent local authority in the exclusion distinguishes the local authority referred to in the exclusion from the local authority referred to in the operative clause. In the context it is used, it means any government, the Gardai, emergency services or a local authority and it therefore would apply to exclude cover, if cover was triggered. …… they are extending, for their own benefit, the interpretation of "competent local authority" to mean a far wider context of authority which is not stipulated in their document. The written word is there for a reason - to make the policy clear & understandable - to ignore the written word & add ones own interpretation undermines the whole policy document and hence reputation of said Insurance Company."*

In a submission dated **28 October 2020**, the Complainant Company stated, as follows:

*"Section 2 above – '**Prevention of access – non-damage**'*

*In which the 1st 2 lines it clearly states **'access to or use of the premises being prevented or hindered by any action of government …… which could endanger human life …'***

On 24th March 2020 the whole hospitality industry (and many other industries) were closed down due to Covid-19 to 29th June 2020.

Covid-19 sadly caused many deaths and hence was a clear danger to human life.

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Now, there is an exclusion to this, quoted above in (ii) which clearly excludes ***'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 …'***

Whilst I agree it was an occurrence of an infectious disease, it clearly ***was not*** *the competent* ***local*** *authority that closed us down – it was* ***as stated in the 1st 2 lines – the government that closed*** *us down. There is* ***no reference to any form of infectious disease in these 1st 2 lines, nor is there any reference to closure by the government due to infectious disease in exclusion (iii).***

If exclusion (iii) had the phrase 'competent authority' as opposed to 'competent local authority' then its' meaning would be totally different.

The written word is there for a reason – to make the policy clear and understandable – I believe the wording above does make it clear – 'that access or use of the premises was prevented or hindered by the action of the ***government****' and the exclusion to this clearly excludes closure or restriction of same due to infectious disease – but only by the 'competent* ***local*** *authority' – with zero mention of government or competent authority."*

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. Explaining how it wishes this complaint to be resolved, the Complainant Company states, in its Complaint Form, that:

"We have been closed, on advice of the Government, since 16th March 2020. The maximum claim in this section is €20,000 I believe. Hence €20,000".

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 insurance policy. However, the Provider says there is no cover for claims arising from Covid-19 under the POA-ND Extension.

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Background

The Provider says the Complainant Company is a limited company trading as an accommodation, restaurant, cookery school and wedding venue. The Provider says the Complainant Company purchased an insurance policy with it covering the period **12 September 2019** to **11 September 2020**.

On **30 March 2020**, the Provider says it was notified of a claim under the policy by the Complainant Company's Broker. By letter dated **2 April 2020**, the Provider says it responded, explaining that there was no coverage under the policy for the loss, and in particular, there was no coverage under the POA-ND Extension.

On **7 April 2020**, the Provider says the Broker responded asking the Provider to review the claim and revert with a positive response. The Provider says the Broker telephoned on **8 May 2020** expressing disappointment in the position taken by the Provider. The Provider says the Broker instructed that the call should be logged as a complaint in accordance with the ***Consumer Protection Code 2012***. The Provider says it wrote to the Complainant Company on **18 May 2020** providing a complaint reference and a copy of its Complaints Procedure.

Following a further review of the complaint, the Provider says it issued a Final Response Letter dated **3 July 2020**, clearly setting out the reasons for the declinature and explaining the cover in the Explanatory Note which accompanied the letter. The Provider says it continues to rely on the Final Response Letter and Explanatory Note. The Provider says it stated that based on the information provided by the Complainant Company to date, the policy did not respond to the claim. The Provider says it confirmed that it was prepared to review the claim should the Complainant Company wish to submit additional information, and that it attached a list of questions setting out the information needed in order to carry out the review. The Provider says the letter of **3 July 2020** also confirmed that it could alternatively be treated as a final response letter if the Complainant Company wished to do so.

The Provider says the Complainant Company did not elect for its claim to be reviewed and made a complaint to this Office. The Provider says a copy of the Complainant Company's responses to the questions raised in the letter of **3 July 2020** is included in its Schedule of Evidence, however these responses were received by the Provider on **25 September 2020** during the mediation process with this Office's Dispute Resolution Service and was not information provided in respect of the claim or prior to a complaint being made. The Provider says this information was provided for the purpose of mediation.

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The Provider says it sent an email to this Office on **30 November 2020** as it had come to its attention that there was an error in the Summary of Complaint which quotes a section of the letter of **3 July 2020** on pages two and three. The Provider says the Summary of Complaint contains a section at the bottom of page three *"(c) Pandemics are not expressly excluded"*. The Provider says this extract does not actually appear in the Final Response Letter dated **3 July 2020**. The Provider says it requested that this Office issue a corrected Summary of Complaint in its email dated **30 November 2020**.

Cover

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 the POA-ND Extension and 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 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)"* ("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.

The Provider says it notes that an additional ground of complaint which was not raised by the Complainant Company was included by this Office in the Summary of Complaint, namely *"Pandemics are not expressly excluded"*. The Provider says it has requested that the Summary of Complaint should be corrected and re-issued, but the Provider addresses this ground in the event that the Summary of Complaint is not corrected. The Provider says it has explained above, the scope of the cover under the POA-ND Extension and that its policies do not provide cover for pandemics such as Covid-19 and therefore it was not necessary to expressly exclude such risks.

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The Provider says the Infectious Disease Exclusion delineates and confirms the scope of the cover, as set out in the case of *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm), 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 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. The Provider says its policies are not designed to cover losses arising from the occurrence of a general pandemic, such as Covid-19.

[*In a submission dated **2 July 2021**, the Provider corrected and changed the word 'subjective' to 'objective']

<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 provided 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. The Provider says 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. The Provider says that 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).

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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 section 31A of the 1947 Act (as amended) now provides that the Minister 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). Further, under section 31B, the Minister may make an "affected areas order" declaring an area or region of the State to be an area where there is known or thought to be sustained human transmission of Covid-19. In addition, the Provider says 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 restrictions began on **7 March 2020** when An Taoiseach announced that for a two week period until **12 April 2020** (subsequently extended) everybody must stay at home except in certain circumstances. To underpin these measures, the Provider says the Minister for Health signed the Health Act 1947 (Section 31A – Temporary Restrictions) (Covid-19) Regulations 2020 (S.I. 121 of 2020) relating to Section 31A of the Health Act 1947 (as amended) on **10 April 2020**. The Provider says a further regulation was issued at this time, the Health Act (Affected Arears) Order 2020 (S.I. 120 of 2020), declaring that *"the State (being every area or region thereof) is an area where there is known to be sustained human transmission of Covid-19"* under Section 31B of the Health Act 1947.

The Provider says the Complainant Company has stated that it was *"closed, on advice of the Government since 16th March 2020"*. The Provider says the Complainant Company has not identified the particular advice on foot of which it closed its business, and it is possible that the advice to which reference is made was a statement from government on **15 March 2020**, in which the government advised that, amongst other measures, public houses and bars (including hotel bars) should close from the evening of Sunday **15 March 2020** until at least **29 March 2020**. The Provider says this advice did not advise the closure of restaurants or hotels. That being so, the Provider says the advice was not directed towards the Complainant Company, but in any event, if the Complainant Company was advised to close, this was *"advice"* within the meaning of the Infectious Disease Exclusion.

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The Provider says the relevant advice that advised the closure of 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, the Provider says 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 (*"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>

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.

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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.

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Contra proferentum

The Provider says the general principles of contractual interpretation include the principle of contra proferentum. In *Analog Devices*, the Provider says Geoghegan J. quoted Clark (4th edition of Contract Law in Ireland) which sets out the general principle:

> *"If the exempting provision is ambiguous and capable of more than one interpretation then the courts will read the clause against the party seeking to rely on it"*.

The Provider says Geoghegan J. said that the words in an insurance contract must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance.

In *Emo Oil v Sun Alliance* [2009] IESC 2, the Provider says the Supreme Court cited Clark, the Law of Insurance Contracts (5th edition), as follows:

> *"In the past some courts were quick to find ambiguity in policies of insurance, in order to apply the canon of construction contra proferentum, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that contra proferentum ought only to be applied for removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First there must be genuine ambiguity".*
>
> [Provider emphasis]

The Provider says there is no ambiguity in the policy wording and the principle of contra proferentum does not therefore apply. In addition, the Provider says recent English case law (which has yet to be considered by the Irish courts) has established that courts should not automatically apply a contra proferentum approach to construction, as in *Crowden*, cited with approval in the FCA Test Case:

> *"The Court should not adopt principles of construction which are appropriate to exemption clauses – i.e. provision which are designed to relieve a party otherwise liable for breach of contract or in tort of the liability – to the interpretation of insurance exclusions, because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford.*

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> *To this end, the Court should not automatically apply a contra proferentum approach to construction. That said, there may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the Court would be entitled to opt for the narrower construction."*

The Provider says it has considered the Central Bank of Ireland's Business Interruption Insurance Supervisory Framework (the "CBI Framework") which sets out the Central Bank's expectations of insurance firms handling Covid-19 related business interruption insurance claims, which states:

> *"The Central Bank is aware that in many cases BI insurance policy wording will be clear in relation to customer entitlements concerning COVID-19 related claims. However, where there is a doubt about the meaning of a term, the interpretation most favourable to the customer should prevail."*
>
> [Provider emphasis]

Similarly, the Provider says in a letter issued to the insurance industry on **27 March 2020**, known as the "Dear CEO Letter", the Central Bank of Ireland said that:

> *"Although the Central Bank expects that most policy wordings are clear in terms of what cover is provided and what cover exclusions are in place, where there is doubt about the meaning of a term, the interpretation most favourable to their customer should prevail."*
>
> [Provider emphasis]

The Provider submits that there is no ambiguity in the policy wording and the principle of *contra proferentum* does not therefore apply. The Provider says the policy is clear and unambiguous and there is no doubt about the meaning of any terms.

FCA Test Case

The Provider refers to the decision of the Divisional Court in England in a test case which was brought by the Financial Conduct Authority (the "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. The Provider submits that this is an important judgment which is likely to be a persuasive authority in this jurisdiction. The Provider says applications were brought for a leapfrog appeal to the UK Supreme Court and the appeals were heard on **16 November 2020**.

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It is important to note, the Provider says, that the Provider has not appealed the decision and the FCA has not appealed the findings as regards the Provider's policy wording.

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 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.

Causation

The Provider says that as 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.

The Provider says 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. The Provider says this means that losses that would have been suffered in any event (had access 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.

The Provider says the Complainant Company has stated that the interruption to its business began on **16 March 2020**. The Provider says the losses suffered during the period of the lockdown would have been suffered even if the business was permitted to remain open throughout the lockdown. The losses suffered from this date were not therefore caused by a prevention of access, as required under the POA-ND Extension, rather they were caused by the situation brought about by the pandemic, social distancing requirements and the general lockdown.

The Provider says that losses suffered by the Complainant Company would have been suffered in any event as a result of the downturn in economic activity and the general lockdown and are therefore not covered".

/Cont'd…

The Provider says the business trends clause in the policy provides that 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 obtained during the relative period after the damage had the damage not occurred."*

The Provider says this is in similar terms to the trends clause in *Orient-Express Hotels v Assicurazoni General SpAv (UK)* [2010] EWHC 1186 (Comm), and the "but for" test must be applied in this case. The Provider says the loss would have occurred irrespective of any interruption of or interference with the premises as a result of the insured peril. In other words, the *"but for"* test is not satisfied and there is no cover.

Quantum

The Provider says the Complainant Company acknowledges that the limit of cover under the relevant section of the policy is €20,000.00 and states that it is seeking the full amount. The Provider says the Complainant Company has indicated (in response to the Provider's questions as provided for the first time during the mediation process with this Office) that booking cancellations have totalled €176,517.46 in the profit and loss accounts provided to this Office. The Provider says it further notes that the maximum indemnity period under the extension shall not exceed three months.

To the extent this Office determines that there is cover for the losses claimed under the policy (which is denied), the Provider says the Complainant Company will need to prove the quantification of its 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 have to be given 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.

/Cont'd…

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."*

Provider's Concluding Comments

In the Claims Questionnaire completed by the Complainant Company, it is stated that:

> *"[The Provider's] interpretation of local authority to mean government as well, has led them to change [its] policy schedule for 2020/21 to include the word 'government' – which was not present [in its] 2019/20 policy".*

Responding to this, the Provider says it concluded that the meaning of the term "competent local authority" included the Government for the reasons outlined above. The Provider says the Complainant Company's policy renewed on **12 September 2020** and a renewal notice issued to the Complainant Company on **30 July 2020**. The Provider says a notice to policyholder enclosed with the renewal notice contained a summary of changes to the policy wording. The Provider says the notice explained that following the recent Covid-19 outbreak and other similar events, the reinsurance market had introduced explicit exclusions for pandemics, epidemics and other similar events into the reinsurance agreements with insurers to state expressly and emphasise that such events are not covered by reinsurance. The Provider says the notice went on to explain:

> *"for this reason, we need to mirror such exclusions in your policy to reaffirm that it does not provide any cover for any infectious or communicable diseases, pandemics or epidemics."*

The Provider says the notice explained the specific amendments made to the Specified Diseases Extension, the Prevent of Access Extension and Equipment breakdown cover cyber exclusions.

In relation to Exclusion (iii) to Extension 2, the Provider says the notice explained that this part of the clause had been removed as the exclusion was no longer required following the addition of the over-arching infectious or communicable disease exclusion at policy level and the removal of all specified diseases cover.

/Cont'd…

The Provider says the Complainant Company cancelled its policy from **18 September 2020**.

The Provider says there is no cover under the Complainant Company's policy for the current claim, for the reasons set out above. The Provider says it is satisfied that it dealt with the Complainant Company's claim in a timely and appropriate manner and refers to a timeline of correspondence and events in this regard.

The Provider says the question to be decided by this Office, namely whether there is cover under the policy in respect of the Complainant Company's claim, is a purely legal question. The Provider says it considers that the decision of the English Divisional Court in the FCA Test Case is clear and while there is an appeal of the Divisional Court's decision to the UK Supreme Court, the relevant aspects of the decision relating to cover under the Provider's policy wording are not under appeal. 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 Complaint for Adjudication

The complaint is that the Provider declined to admit and pay the Complainant Company's claims 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.

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.

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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 26 November 2021, outlining my preliminary determination 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 issue of my Preliminary Decision, both parties made further submissions, copies of which were exchanged between the parties.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this office, I set out below my final determination.

In relation to the Provider's position regarding causation, set out on page 17 above in the *Provider's Case* section of this Decision, the Complainant Company has, in its post Preliminary Decision submission, commented:

> "*Firstly, there was an 'infectious disease', this disease then became so widespread it became a pandemic. The government in Ireland & all over world at various times closed down & restricted – country-wide - various businesses of which hospitality was one.*
>
> *It's obvious that there would be a downturn in economic activity.*
> *I am not claiming because there was a downturn of economic activity".*
>
> [Complainant Company's emphasis]

/Cont'd…

The Complainant Company responded in its post Preliminary Decision submission to the Provider's submission that "*its policies* [referring to its 2019/2020 policies] *do not provide cover for pandemics such as Covid-19 and therefore it was not necessary to expressly exclude such risks"* by stating**:**

> "*the Preliminary Decision says [the Provider] policy is not designed to cover losses arising from the occurrence of a general pandemic such as Covid-19 – I agree – their 2019/2020 policy certainly isn't designed for anything to do with a pandemic – but – importantly – it does not say this.*
>
> *Clearly, [the Provider] have re-designed their 2021/2022 policy to expressively declare that there is no cover for a pandemic.*
>
> *The difference in the clear wording of 2021/2022 [the Provider's] policy re pandemics and the lack of any such wording in the 2019/2020 speaks for itself.*
>
> *I also note that this was brought to FSPO attention by me – but not mentioned in the Preliminary Decision".*

While I note the submissions of the Complainant Company, it must be noted that the policy terms and conditions which are applicable to the investigation and adjudication of this complaint is the 2019/2020 version. Furthermore, it should be noted that just because an insurance policy doesn't explicitly exclude an event such as pandemic, this does not automatically mean that such an eventuality or matter is covered by the policy. The policy document must be read as a whole, and my decision has been reached based on my consideration of the full policy document and in particular, the DOA-ND Extension and Infectious Disease Exclusion and the submissions made by both parties and the evidence adduced during the course of the investigation and adjudication of the complaint.

Analysis

The Complainant Company operates a business which trades as an accommodation, restaurant, cookery school and wedding venue business. On **15 March 2020**, the Government called on all public houses and bars (including hotel bars) to close from that evening until at least **29 March 2020**. Following this, on **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential businesses.

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In particular, the Government recommended that all hotels were to limit occupancy to essential non-social and non-tourist reasons, all cafes and restaurants were to limit supply to takeaway food or delivery; and all organised social indoor and outdoor events of any size were not to take place.

By email dated **30 March 2020**, the Complainant Company's Broker notified the Provider of the closure of the Complainant Company's business due to the outbreak of Covid-19.

By email on **2 April 2020**, the Provider informed the Broker that the cover provided under the policy did not respond to a closure due to Covid-19 and that the Complainant Company's losses were due to an excluded cause, being the decision of the Government to take certain measures to seek to control the spread of Covid-19.

In this respect, I note that the Complainant Company holds a policy of insurance with the Provider. The policy schedule states that the period of insurance covers the period **12 September 2019** to **11 September 2020**. It can be seen from pg. 3 of the policy schedule that the Complainant Company had business interruption cover in respect of gross profit with a sum insured of €1,000,000.00 and a maximum indemnity period of 24 months, and cover in respect of rent receivable with a sum insured of €10,000.00 and a maximum indemnity period of 18 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. 51 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.* […]"

In terms of the limit of lability for business interruption claims, the policy document states at pg. 52 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".*

/Cont'd…

Extension 2 ("the POA-ND Extension") of the business interruption section of the policy document states at pgs. 53 and 54, 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…

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) 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 this is the case, then it is my opinion that 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.*

/Cont'd…

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

The Complainant Company has, in its post Preliminary Decision submission, questioned that my "*preliminary decision &* [the Provider] *takes into account a decision made in a different jurisdiction & indeed outside the European Union – namely England of a similar case"*. The Complainant Company's submission continues, and it states:

> "*2 questions;*
> *1) Why?*
> *2) We see* [the Provider] *& the Preliminary Decision has taken some suitable quotes from this decision - could we have, please, the whole wording of both the actual policy and the decision made on it. Reason – if the Preliminary report and* [the Provider] *are using this to base their & back up their decision – I think it would be fair to allow us to see the same information in the context of a whole document".*

This office wrote to the Complainant Company in response to its post Preliminary Decision submission, on **17 January 2022.** This communication informed the Complainant Company that this office was not a party to the proceedings and therefore does not have the full policy documentation considered by the court. The Complainant Company was also provided with a link to both the English High Court and English Supreme Court decisions.

/Cont'd…

In relation to the Complainant Company's first question as to "*why*" the decisions were reviewed and considered as part of my decision, they had formed a part of the Provider's submissions to this office during the investigation and adjudication of this complaint. As detailed previously, all submissions have been exchanged with both parties. I considered all submissions and evidence in arriving at my decision. Furthermore, it is appropriate that this office consider any legal precedent which may be relevant in the adjudication of a complaint.

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 my Preliminary Decision I stated:

> "*while extensive submissions have been furnished on behalf of the Complainant Company in respect of the proper interpretation of the policy, in particular the meaning of 'competent local authority', 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 Irish Government comes within the meaning of the term 'competent local authority' for the purposes of this exclusion*".

The Complainant Company has, as part of his post Preliminary Decision submission, stated:

> "*in the Preliminary Decision document, I note that there are plenty of references and quotes to* [the Provider's] *wordings and their interpretation of words and little or no reference to much of our own comments within the Preliminary Decision.*

/Cont'd…

> *To consider the document as a stand-alone document, I feel there needs to be more acknowledgement of comments I have made*".

It should be noted that my decision has been reached after a full review of all documentation and submissions on file. As detailed previously, much of the Complainant Company's submissions comment on the proper interpretation of the policy, in particular, the meaning of 'competent local authority'. The Complainant Company, in its post Preliminary Decision submission, states:

> *"To try to use a court decision on a completely different phrase to coerce to a same meaning of a different phrase is not proper and fair use of the judicial system, the English language and this adjudication service.*
>
> *This certainly is not a 'reasonable interpreted' meaning of 'other competent authority' v 'competent local authority'.*
>
> *I therefore request that this Preliminary Decision to be reconsidered".*

While I have considered the post Preliminary Decision submission of the Complainant Company, it remains my view that 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 Irish Government comes within the meaning of the term 'competent local authority' for the purposes of this exclusion.

It is also my opinion that the Government's call for all public houses and bars (including hotel bars) to close on **15 March 2020** and 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 **15 March** and **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)"*.

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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 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.

It appears from the evidence that the Complainant Company closed its business on **16 March 2020**. In the Broker's Claim Notification, the date of loss was recorded as **16 March 2020**, with the loss described as:

> *"Business forced to close to Covid 19*
>
> *Business forced to close due to Covid 19 outbreak"*

In the Complaint Form it is stated that:

> *"We have been closed, on the advice of Government, since 16th March 2020."*

If it was the case that **15 March 2020** announcement did apply to the Complainant Company's business activities, then I accept that the Infectious Disease Exclusion would have been triggered, thereby excluding cover.

In terms of the Government's announcement on **24 March 2020**, it is my opinion that the business closures called for in this announcement were applicable to the Complainant Company and fall squarely within the Infectious Disease Exclusion. Accordingly, by virtue of the Infectious Disease Exclusion, cover under the POA-ND Extension was 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 my decision will come as a disappointment, I accept that the Provider was entitled to decline its claim for business interruption losses.

For the reasons set out in this Decision, I do not 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.

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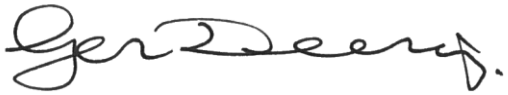
The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

25 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.