



<u>Decision Ref:</u>	2022-0054
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Service
<u>Conduct(s) complained of:</u>	Claim handling delays or issues Poor wording/ambiguity of policy Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is a limited company trading as a guesthouse, referred to below as ‘the Complainant Company’. It incepted a business insurance policy with the Provider on **25 April 2010**, which was thereafter renewed annually. The policy period in which this complaint falls, is from **25 April 2019** to **24 April 2020**. This complaint concerns the Provider’s decision to decline the Complainant Company’s business interruption claim in **2020**.

The Complainant Company’s Case

The Complainant Company notified the Provider on **14 April 2020** of a claim for business interruption losses, sustained as a result of the temporary closure of its business due to measures imposed by the Government to curb the spread of COVID-19.

Following its assessment, the Provider wrote to the Complainant Company on **21 April 2020** to advise that it had declined the claim for business interruption losses, as the policy did not provide cover in the claim circumstances.

The Complainant Company sets out its complaint in its letter to this Office dated **22 March 2021**, as follows:

“We own and operate [a castle].

Our primary business is [duration] rentals of the castle to American groups of [numbers redacted] persons as we only have [X] bedrooms and are a small family business.

The castle has been fully closed to all guests since Thursday the 12th March 2020, due to the COVID restrictions. All our bookings had to be cancelled for 2020 and now most have cancelled for 2021. This leaves us at practically the loss of our entire income for 2020 & 2021. Our customers simply could not take up their bookings.

We took out a business interruption policy with [the Provider] a number of years ago. When taking out this policy it was explained to me by [the Provider] that in the event of anything happening which would affect our ability to generate revenue through no fault of our own, we would be covered. Clearly, we have been unable to access the castle to generate any income, and it is very unlikely that we will be able to do for the foreseeable future.

We put in a claim to [the Provider] during May 2020 and I have attached their letter declining our claim but due to our customers' inability to access the castle we believe that our claim is valid and should be accepted by [the Provider]. I feel very aggrieved by this decision. If they are now declining the [claim] on the grounds that there is no valid cover, then it is clearly a case of mis-selling a financial product and a gross misrepresentation at the time I purchased the policy".

In addition, in its email to this Office on **9 September 2021**, the Complainant Company submits, as follows:

"I took out this [business insurance policy]...on the advice given to me by local [Provider] office...my understanding after hearing about the policy from the sales person was that if my business was interrupted through no fault of my own that I had cover and this was the smart thing to do so I've been paying for the policy now for over 10 years without ever making a claim.

On the outbreak of COVID-19 my immediate reaction was that at least I had taken out the 'Business Complete' insurance policy and I'd be covered for losses incurred because after all, I had 'Business Complete Cover', only to have my claim rejected on the grounds that Covid-19 wasn't covered, my observation is that the terms 'Business Complete' and 'Business Interruption' are both misleading terms and false advertising to the customer. The term 'Business Complete' gives the impression that you are entirely covered for any business interruption to your business providing you the policyholder are not at fault.

Of course [the Provider] will say "Well you didn't read the small print in your policy document" but the reality is that no small business should have to sift through the small print of an 80 page legal document which you would need a degree in law to try and decipher whether or not you actually have cover or not, it's clear that the policy name is designed to give the impression that you are getting 'Complete Business Cover' which is just simply misleading, [the Provider] should be held accountable for using misleading terms which falsely claim to offer 'Complete Business Cover'".

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The Complainant Company seeks for the Provider to admit and pay its claim for business interruption losses sustained as a result of the temporary closure of its business due to measures imposed by the Government to curb the spread of COVID-19 and in this regard, when it submitted its **Complaint Form** to this Office, the Complainant Company submitted as follows:

“We wish to be compensated for loss of income during 2020 & 2021”.

The Provider’s Case

The Provider says that the Complainant Company contacted the Provider on **14 April 2020** to register a claim for business interruption losses sustained as a result of the temporary closure of its business from **15 March 2020**, due to measures imposed by the Government to curb the spread of COVID-19 pandemic.

The Provider says that business interruption is only covered by the Complainant Company’s business insurance policy, in certain defined circumstances, none of which include closure or interruption as a result of COVID-19.

In broad terms, the Provider says there are three distinct reasons why it declined the Complainant Company’s claim, as follows:

1. The claim did not come within the terms of the business interruption cover as set out in Section 2, ‘Business Interruption’, of the business insurance policy document.

Section 2, ‘Business Interruption’, of the applicable Business Complete Insurance **Policy Document** defines business interruption at pg. 36, as follows:

“Business interruption

*Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**”.*

The Provider says it is apparent from this definition that cover is only provided in circumstances where the business is interrupted as a result of damage to the property, and that this is repeated at pg. 39 of the **Policy Document**, as follows:

“Cover

*The Company will indemnify the Insured for the amount of loss against each item insured shown in the schedule, in the manner and to the extent as described under ‘Basis of settlement’ below, following **damage** caused to property used in connection with the Insured’s **business** as the **premises** by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy”.*

The Provider says the bold highlighting, as it appears in the original **Policy Document**, emphasises in as clear a way as possible the fact that a business interruption claim can only be made as a result of damage to the premises and not in any other circumstance, and also that those highlighted words have specific definitions under the policy and must be considered in light of same.

The Provider says that it is quite clear that the interruption to the Complainant Company's business in this case arose, not as a result of damage to the premises, but rather as a result of both the suite of public health measures including social distancing measures introduced in mid-March 2020 and other Governmental restrictions which prohibited the making of unnecessary journeys by the public.

In summary, the Provider says the policy only responds to claims for business interruption arising from damage caused to the premises and as the Complainant Company's claim is manifestly not such a claim, it maintains that it was correct to decline the claim.

2. COVID-19 is not a notifiable disease for the purpose of the infectious diseases extension in Section 2, 'Business Interruption', of the policy document.

The 'Additional extensions that apply to section 2: Business interruption' of the applicable **Policy Document** provides at pg. 45, as follows:

"H. Human notifiable diseases, murder or suicide

*This extension provides cover against **business interruption** resulting from the following.*

- A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises** ... "*

The Provider says the bold highlighting, as it appears in the original **Policy Document**, emphasises the requirement that the notifiable disease or organism must actually be present on the premises. The Provider says that it is important to note that this Extension is confined to a specified and finite list of diseases, described as notifiable diseases, which is listed at pg. 45 of the **Policy Document**, as follows:

"Notifiable diseases

<i>Acute encephalitis</i>	<i>Acute poliomyelitis</i>
<i>Anthrax</i>	<i>Bubonic or pneumonic plague</i>
<i>Chickenpox</i>	<i>Cholera</i>
<i>Conjunctivitis</i>	<i>Diphtheria</i>
<i>Dysentery</i>	<i>Legionellosis</i>
<i>Legionnaires' disease</i>	<i>Leprosy</i>

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<i>Leptospirosis</i>	<i>Malaria</i>
<i>Measles</i>	<i>Meningitis</i>
<i>Mumps</i>	<i>Paratyphoid fever</i>
<i>Rabies</i>	<i>Rubella</i>
<i>Scarlet fever</i>	<i>Smallpox</i>
<i>Tetanus</i>	<i>Tuberculosis</i>
<i>Typhoid fever</i>	<i>Viral hepatitis</i>
<i>Whooping cough</i>	<i>Yellow fever”.</i>

The Provider says that it is quite clear that COVID-19 is not a notifiable disease for the purpose of this Extension.

The Provider has sought and obtained expert advice and evidence on this issue, which confirmed that COVID-19 is an entirely new disease that could not reasonably be described as a subset of any of the diseases on the list of notifiable diseases, none of which are coronaviruses. It says that the viruses that give rise to the listed notifiable diseases are actually taxonomically distinct from SARS-CoV2, the virus agent of COVID-19.

In addition, the Provider says that recent judgments of the English and Irish High Courts firmly support its position that COVID-19 cannot be redefined as a different disease for the purpose of fitting into a restricted list of diseases such as that contained in the **Policy Document**.

The Provider refers to the English High Court decision of ***Rockliffe Hall Ltd v. Travelers Insurance Company Ltd [2021] EWHC 412 (Comm)*** and notes that Cockerill J was dealing with an application by the defendant insurer to strike out the case on the basis that it disclosed no reasonable grounds for bringing the claim. The claim was for business interruption cover in the context of the COVID-19 pandemic in circumstances where the relevant policy extension contained a definition of “infectious disease” that was confined to a specified list of diseases on which COVID-19 did not appear. One of the diseases listed was “plague”, and the insured argued that this was sufficiently broad, to cover COVID-19, especially construed *contra proferentem*.

The Provider notes this argument was emphatically rejected by the High Court, and the claim was dismissed. Cockerill J stated at para. 37 that the starting point was that only diseases on the list counted as “infectious diseases” for the purposes of the policy. At para. 55, she said it was fanciful in the extreme to consider that a reasonable reader would read the word “plague” and consider that it could encompass COVID-19, but rather such a reader would assume that it meant the specific disease of bubonic, pneumonic and septicaemic disease caused by *Yersina pestis*. At para. 57, Cockerill J suggested that the argument advanced by the plaintiff, that the term somehow encompassed COVID-19 was based on a minute, blinkered and reductive focus on the individual components of the clause. For similar reasons she rejected, at para. 69, the argument that the inclusion in the list of the term “encephalitis” could encompass COVID-19 and held at para. 88 that there was no ambiguity in the meaning of the terms “plague” and “encephalitis”, and accordingly the principle of *contra proferentem* interpretation could not assist the policyholder to achieve a different result.

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The Provider also refers to the Irish High court decision of ***Brushfield Ltd v. Arachas Corporate Brokers Ltd and Axa Insurance DAC [2021] IEHC 263***, and notes that McDonald J was faced with a similar argument advanced by the plaintiff policyholder that a closed list of diseases that did not include COVID-19 on its face, nevertheless encompassed it due to the inclusion in the list of “acute encephalitis”. McDonald J rejected this argument, noting at para. 115 that “*critically, neither COVID-19 nor any variant thereof is included in the list of specified diseases contained in [the] clause*”. McDonald J cited the aforementioned English High Court decision of ***Rockliffe Hall Ltd v. Travelers Insurance Company Ltd*** with approval at para. 149. The Provider says that his finding was that COVID-19 was not listed in the list of diseases, and so there was no cover in respect of it, as summarised at para. 229.

The Provider says it is clear from a plain reading of the list of notifiable diseases that are covered by the policy, that COVID-19, a disease of very recent origin, does not come within the list. The Provider further says that it is clear from the expert evidence it adduced, that none of the other diseases in the list could possibly be regarded as encompassing COVID-19 and, thus, there is no cover for COVID-19. The Provider reiterates that this is the conclusion that has been reached by the courts in both Ireland and England where they have considered similar issues.

3. The infectious diseases extension only covers business interruption arising from the presence of a specified human notifiable disease on the premises or caused by food and drink supplied from the premises.

Quite apart from the fact that COVID-19 is not a notifiable disease for the purpose of the policy, the Provider says that it is quite clear that the Complainant Company is not asserting that the temporary closure of its business was caused by the disease or the organism causing it, SARS-CoV2, being present on the premises, or present in food or drink supplied from the premises. The Provider notes that no evidence has been put forward by the Complainant Company to suggest that COVID-19 was present on its premises at the date it was closed.

Insofar as the Complainant Company suggests that the fact of the Government bringing in restrictions on businesses nationally, means that COVID-19 was present at every business, the Provider says that is clearly unsustainable. The implementation by the Government of public health measures intended to prevent the spread of an infectious disease clearly does not mean that the disease, is present everywhere that is affected by the public health measures. The Government was concerned to limit the possibility of social interaction, and accordingly hospitality businesses were closed; this was a preventative measure, and was not related to the presence of COVID-19 on the premises of any particular hospitality business, such as that of the Complainant Company. In that regard, the Provider says the Complainant Company would need to provide specific evidence of the presence of COVID-19 on its premises, prior to its closure, and it has failed to do so.

Accordingly, having regard to the very clear policy wording, the temporary closure of the Complainant Company’s business on **15 March 2020** for a period, does not come within the terms of the Human Notifiable Diseases Extension.

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The Provider notes that the explanation for declining indemnity as set out above, is essentially the same as previously given to the Complainant Company in its correspondence of **21 April 2020**.

It is the Provider's position that the terms of the Complainant Company's business insurance policy are abundantly clear. It says that whilst it is very much alive to the very difficult situation which the Complainant Company, along with many other businesses, finds itself in, the Provider is satisfied that it is quite clear that the policy is not responsive to a business interruption claim, arising from the closure of the Complainant Company's business, by reason of the COVID-19 pandemic.

Accordingly, the Provider is satisfied that it correctly assessed and declined the Complainant Company's claim in accordance with the terms and conditions of its business insurance policy.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses sustained as a result of the temporary closure of its business due to measures imposed by the Government to curb the spread 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. 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 **20 January 2022**, 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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In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant notified the Provider on **14 April 2020** of a claim for business interruption losses sustained as a result of the temporary closure of its business due to measures imposed by the Government to curb the spread of COVID-19.

I note that following its assessment, the Provider wrote to the Complainant Company, some seven days later, on **21 April 2020**, to advise that it had declined the claim for business interruption losses because the policy did not provide cover in the claim circumstances.

It should be noted that the Complainant Company's business insurance policy, like all insurance policies, does not provide cover for every possible eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation, which explains the extent and the limits of cover.

I note in that regard that Section 2, **Business Interruption**, of the applicable business insurance **Policy Document** defines business interruption at pg. 36, as follows:

"Business interruption

*Interruption of or interference with the **business** carried on by the Insured at the **premises** in consequence of **damage** to property used by the Insured at the **premises** for the purpose of the **business**".*

I note that the Complainant Company's business was not however closed or interrupted as a result of damage to its property. Instead, the Complainant Company temporarily closed its business because of the situation which prevailed, as a result of the outbreak of COVID-19 in Ireland.

In this regard, I note the '**Additional extensions that apply to section 2: Business interruption**' section of the **Policy Document** provides at pg. 45, as follows:

"H. Human notifiable diseases, murder or suicide

*This extension provides cover against **business interruption** resulting from the following.*

- *A case or cases of any of the notifiable diseases (as listed below) at the **premises**, or caused by food or drink supplied from the **premises**.*
- *Any organism likely to cause a notifiable disease (as listed below) being discovered at the **premises** ...*

Notifiable diseases

<i>Acute encephalitis</i>	<i>Acute poliomyelitis</i>
<i>Anthrax</i>	<i>Bubonic or pneumonic plague</i>
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<i>Dysentery</i>	<i>Legionellosis</i>
<i>Legionnaires' disease</i>	<i>Leprosy</i>
<i>Leptospirosis</i>	<i>Malaria</i>
<i>Measles</i>	<i>Meningitis</i>
<i>Mumps</i>	<i>Paratyphoid fever</i>
<i>Rabies</i>	<i>Rubella</i>
<i>Scarlet fever</i>	<i>Smallpox</i>
<i>Tetanus</i>	<i>Tuberculosis</i>
<i>Typhoid fever</i>	<i>Viral hepatitis</i>
<i>Whooping cough</i>	<i>Yellow fever".</i>

I am satisfied that in order for this notifiable disease extension to provide business interruption cover, there must be the operation of the insured peril, that is, that the business interruption must have been caused by the presence of a notifiable disease on the insured premises, or caused by food and drink supplied from the premises, **and** that the said notifiable disease must also be one of those diseases specified in the list within the policy.

Although COVID-19, and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on **20 February 2020**, by way of the ***Infectious Diseases (Amendment) Regulations 2020***, it is not one of the notifiable diseases which are specified in the Complainant Company's **Policy Document**.

As the claim circumstances do not satisfy the insured peril in the business interruption notifiable disease extension, I am satisfied the Provider was entitled to decline the Complainant Company's claim, in accordance with the terms of its business insurance policy.

I note the Complainant Company says in its email to this Office on **9 September 2021** that:

"... I took out this [business insurance policy]...on the advice given to be by local [Provider] office...my understanding after hearing about the policy from the sales person was that if my business was interrupted through no fault of my own that I had cover and this was the smart thing to do so ..."

I take the view that it is not reasonable for a customer to expect an insurance policy to cover every possible eventuality, because any insurance cover offered, will always be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

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The Complainant Company's business insurance policy with the Provider is a contract like any other, it is based on the legal principles of offer, acceptance, and consideration. The Provider may offer terms, and these terms can be accepted by those seeking insurance, who then elect to pay the premium requested, which represents the consideration for the contract. In that regard, it is a matter for the Provider to decide the extent of the cover it is willing to offer and in paying the premium, the customer chooses to accept this cover and its limits.

I note from the evidence before me that the Provider furnished the Complainant Company with a copy of the applicable **Policy Document**. I am satisfied that the relevant 'Additional extensions that apply to section 2: Business interruption' section of this **Policy Document** is clear, in that it only provides cover where the business interruption has been caused by the presence of one of the listed notifiable diseases on the insured premises, or is caused by food and drink supplied from the premises. I do not accept in that regard, as appears to be suggested by the Complainant Company, that the "*Business Complete*" name ascribed to the policy, offered some form of guarantee of cover, in any circumstances of loss.

Having regard to all of the above, I am satisfied that the evidence does not support the complaint that the Provider wrongfully or unfairly declined to admit and pay the Complainant Company's claim for business interruption losses sustained as a result of the temporary closure of its business, due to measures imposed by the Government to curb the spread of COVID-19.

Accordingly, on the evidence before me, I take the view that this complaint cannot be upheld.

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
Financial Services and Pensions Ombudsman (Acting)

11 February 2022

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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.

