Decision Ref:	2022-0075
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a restaurant, cocktail bar and takeaway ("the Complainant Company") held a business insurance policy with the Provider.

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

The Complainant Company's Case

On or about **11 May 2020**, the Complainant Company's Broker ("the Broker") notified the Provider of a claim for business interruption losses as a result of the temporary closure of the Complainant Company's business due to the outbreak of COVID-19.

Following its assessment, the Provider wrote to the Broker on **15 May 2020** to advise that it was declining the claim, as follows:

> *"We refer to our telephone conversation held on 11 May 2020 regarding claim number* […] *raised against your client's* […] *policy number* […].

We have carefully considered your client's insurance policy to assess whether it provides cover in circumstances where your client's business had to close to assist nationwide measures introduced by the Government to slow the spread of the COVID 19 pandemic. The business interruption section of the policy is normally triggered following physical damage to the premises or stock caused by one of the insured events listed in the policy. There is also an extension against business interruption resulting from a case or cases of specifically named notifiable diseases (listed in the policy) at the premises or caused by food or drink supplied from the premises or any organism likely to cause one of the named listed notifiable diseases being discovered at the premises.

We have determined for the reasons outlined in detail below that your client's policy does not provide cover in these circumstances and unfortunately, we must decline your client's claim as a result.

The relevant wording of the policy in so far as relates to your client's claim, is as follows:

1. *Section 2 of the Policy provides cover for business interruption. "Business Interruption" is defined as:- "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**."*[1]

2. *The Policy specifies a number of additional extensions that apply to section 2 business interruption cover, one of which at clause H ("**the clause**") provides:-*

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

1. *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**.*

2. *Any organism likely to cause a notifiable disease (as listed below) being discovered at the premises.*

3. *Murder or suicide at the premises.*

/Cont'd…

Notifiable diseases

Acute encephalitis	*Diphtheria*	*Measles*	*Smallpox*
Acute poliomyelitis	*Dysentery*	*Meningitis*	*Tetanus*
Anthrax	*Legionellosis*	*Mumps*	*Tuberculosis*
Bubonic or pneumonic plague	*Legionnaires' disease*	*Paratyphoid fever*	*Typhoid fever*
Chickenpox	*Leprosy*	*Rabies*	*Viral hepatitis*
Cholera	*Leptospirosis*	*Rubella*	*Whooping cough*
Conjunctivitis	*Malaria*	*Scarlet fever*	*Yellow fever*

3. [The Provider] *have carefully considered your client's claim and do not consider that the claim falls within cover under the Policy. In particular,* [the Provider] *is satisfied that the claim notified is not covered for the following reasons, each of which apply independently of each other.*

   3.1. *The definition of notifiable diseases covered by the extension does not include Covid-19. Accordingly, it cannot be said on any view that business interruption has resulted from any of the matters specified at 1, 2 or 3.*

   3.2. *The extended business interruption cover is specifically limited by reference to the insured property. In particular, the relevant sub clauses which relate to notifiable diseases require that the notifiable disease should be at the premises or be caused by food or drink supplied from the premises or result from an organism likely to cause a notifiable disease "being discovered at the premises". None of these events occurred and accordingly, it cannot be said on any view that business interruption has resulted from any of the matters specified at 1, 2 or 3.*

   3.3. *It is clear that the agreement to indemnify in respect of the risks at 1, 2 or 3 is provided only where the business interruption loss has been caused by the matters specified at 1, 2 or 3. It is quite clear having regard, inter alia, to social distancing practices (including now the restrictions on more than 4 people gathering together outdoors) and the widespread public concern regarding the risk of infection, any business interruption loss has been caused by such social practices and public concerns and not by the matters at 1, 2 or 3."*

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By letter dated **20 May 2020**, the Complainant Company's Loss Assessor ("the Loss Assessor") responded to the Provider, as follows:

> *"Further to your letter dated the 15th of May 2020 (copy attached) declining the above claim I wish to respond as follows:*
>
> *1. I have carefully studied and reviewed your response to my client's claim for business interruption. In my view your policy wording is at variance with the Health Act 1947 and 1878 respectively. See attached letter from* [solicitor]*. I have carried out significant research is this area over the last number of weeks.* […]*."*

The letter referred to by the Loss Assessor is dated **6 April 2020** and enclosed the following *Aide Mémoire*:

> *"**Business Interruption Cover***
>
> ***Human Notifiable Diseases***
>
> ***The COVID-19 virus is the Pneumonic Plague –***
> *The definition of pneumonic is "1. Of, relating to, or affecting the lungs: Pulmonic, Pulmonary. 2 of, relating to, or affecting with pneumonia" Reference Merriam Webster*
>
> ***The World Health Organization (WHO) has** classified Covid-19 as a form of pneumonia*
>
> ***Health Act 1947***
>
> *This brings this disease under the auspices of the Health Act 1947 and allows for the making of Regulations under Section 3 1(1) the Health Act 1947. This allows the Minister for Health to make regulations for the prevention of the spread of infectious diseases generally. The powers are set out in the Second Schedule to the 1947 Act. These are comprehensive but particularly important are numbers 4 and 5 of the Second Schedule. These require adults to remain in their homes or to stay away from specified places. To contravene these is a criminal offense under Section 31(8) of the 1947 Act.*

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HEALTH (PRESERVATION AND PROTECTION AND OTHER EMERGENCY MEASURES IN THE PUBLIC INTEREST) ACT 2020

PART 3 AMENDMENT TO HEALTH ACT 1947 Definition 9. In this Part, "Act of 1947" means the Health Act 1947. Amendment of Act of 1947 10. The Act of 1947 is amended by the insertion of the following sections after section 31: "Regulations for preventing, limiting, minimizing or slowing the spread of Covid-19 31 A. (1) The Minister may, having regard to the immediate, exceptional and manifest risk posed to human life and public health by the spread of Covid-19 and to the matters specified in subsection (2), make regulations for the purpose of preventing, limiting, minimizing or slowing the spread of Covid-19 (including the spread outside the State) or where otherwise necessary, to deal with public health risks arising from the spread of Covid-19 and, without prejudice to the generality of the foregoing, such regulations may, in particular, provide for all or any of the following:

(f) the safeguards required to be put in place by owners or occupiers of premises or a class of premises (including the temporary closure of such premises) in order to prevent, limit, minimize or slow the risk of persons attending such premises of being infected with Covid-19;

By implementing the above powers, the Minister for Health has confirmed the presence of Covid-19 on business premises and ordered them to close. To wilfully open would render the owner liable to criminal charges under Section 31(8) of 1947 Act.

Under provisions of section 274 of the Public Health (Ireland) Act, 1878 (which relates to compensation for damage sustained by reason of the exercise of the powers of the said Act), shall apply to any person who sustains any damage by reason of the exercise of any powers of these regulations in relation to any matters as to which he is not himself in default.

Summary

COVID19 is occurring at premises nationally, and every business premises is restricted as to its use (some more than others). To wilfully open would render the owner liable to criminal charges under Section 31(8) of 1947 Act & current 2020 legislation.

Therefore under the current legislation outlined above, insurance companies are obliged to cover business interruption for the enforced closure period.

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Failure of businesses to comply with the Ministerial Directive exposes staff, customers, and the general public to the Covid-19 virus. This is contrary to public policy and is a clear breach of all health and safety legislation. Where business would continue to keep their doors open very significant issues arise:

1. Businesses have public liability and employer's liability cover (€6,500,000) - if doors stay open, claims are made and will be made. These cannot be defended (unless an insurance company seeks to rescind/repudiate cover based on breach of legislation- ironic if business interruption cover is not being honoured

2. Businesses are breaking the law - to engage in conduct deleterious to public health.

3. Breaks all Health and Safety Legislation

As a consequence, this would expose insurance companies to large public and employer's liability claims should they not cover business interruption claims. The cost of defending same far outweighs claims made under business interruption.

Furthermore, all insurance policies are governed by and construed in accordance with the laws of the Republic of Ireland. When directed by the State to close on the grounds of Health (In Public Interest), businesses are complying with the law of the land."

Following further communication between the Loss Assessor and the Provider, in an email dated **11 June 2020**, the Provider's Claims Manager advised that:

"We will of course take advise on the matters raised in your recent correspondence and as discussed the other day but for the moment our position on policy cover remains as set out in the attached declinature letter of the 15th May."

Responding to the Claims Manager the same day, the Loss Assessor stated that:

"Under the terms and conditions of the insurance policies, [Provider] *insurance is legally obliged to comply with Irish Law. It is clear from my research that* [the Provider] *policies do not comply with Irish Law, namely the Health Act 1947 & under provisions of section 274 of the Public Health (Ireland) Act, 1878."*

By email dated **6 August 2020**, the Provider advised the Complainant Company's Loss Assessor that its position on policy cover remained as that set out in its letter of **15 May 2020**.

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The Complainant Company considers that its claim for business interruption losses as result of the temporary closure of its business due to the outbreak of COVID-19 is covered by the terms and conditions of its business insurance policy. In this regard, the Loss Assessor states in the Complaint Form that the Provider *"has refused to compensate my client for losses suffered due to COVID 19 under their business interruption policy despite numerous email correspondence* […]*."* The Complaint Form then repeats substantially all of the above *Aide Mémoire*.

As a result, the Complainant Company seeks for the Provider to admit its claim, as follows:

> *"I estimate my client has suffered a loss in the region of €80,000.* […] *I want this claim to be agreed amicably. My client is only looking to recover the losses they are entitled to under their policy."*

<u>The Provider's Case</u>

The Provider says that following the closure of the Complainant Company's business as a result of nationwide measures introduced by the Government to slow the spread of the COVID-19 pandemic, a claim was registered under the Complainant Company's business insurance policy.

The Provider says business interruption is only covered under the 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 the claim was declined. These are as follows:

1. The claim did not come within the terms of the business interruption cover as set out in Section 2 of the policy;

2. Covid-19 is not a *notifiable disease* as defined by the infectious diseases extension in Section 2 of the policy; and

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 from the premises.

The Provider says each of these reasons are expanded upon and set out in greater detail below.

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(i) *<u>Business Interruption Cover</u>*

The Provider says business interruption is defined in section 2 of the policy at page 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****."*

As is apparent from this definition, the Provider says cover is only provided in circumstances where the business is interrupted as a result of damage to the property. The Provider says this is repeated at page 39 under the heading ***Cover*** where the policy provides:

> *"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*** *at the* ***premises*** *by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy."*

The Provider says it is relevant to note that the highlighting in bold in the above passage appears in the original policy wording. The Provider says the purpose of this was to emphasise and highlight 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. The Provider says it also emphasises that the highlighted words have specific definitions under the policy and must be considered in light of this.

It is quite clear, the Provider says, that the interruption to the 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. The Provider says this is manifestly not such a claim and it follows that the Provider was correct to decline the claim.

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(ii) Covid-19 not a notifiable disease

The Provider says there is an extension to the cover provided in respect of business interruption in Section 2 in the following terms:

> *"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**.*
> - *Murder or suicide at the **premises**."*

Again, the Provider says, it is relevant to note that the bold highlighting is present in the original policy document – this emphasises the requirement that the disease or organism must actually be present on the premises. Importantly, the Provider says, this extension is confined to a specified and finite list of diseases – described as *notifiable diseases*. The Provider has set out the list of these diseases in its Complaint Response.

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

The Provider says it sought and obtained expert advice and evidence on this issue from a named Professor and the relevant report is dated **19 July 2020**. In the course of this report, the Provider says the author discusses the origins of COVID-19 and concludes that it is an entirely new disease. The Provider says the report goes on to specifically consider the question of whether it can properly be regarded as coming within a 'sub family' of any of the notifiable diseases listed in the infectious disease extension. In this regard, the Provider says the report identifies the relevant virus families that cause the listed notifiable diseases – none of which are coronaviruses. The Provider says the report points out that the viruses which give rise to the listed diseases are actually taxonomically distinct from SARS-CoV-2 and the report concludes that:

> *"Considering both the disease agent itself and the symptoms it causes, my view is that Covid-19 cannot reasonably be described as a subset of the diseases listed in Table 1."*

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The Provider says it notes that the Complainant Company claimed that COVID-19 is a type of "pneumonic plague" (a disease which does appear on the list). The Provider says the only basis on which this assertion is advanced is (i) a dictionary reference to the meaning of "pneumonic" from an American dictionary and (ii) an unreferenced assertion that the WHO has classified COVID-19 as a form of pneumonia. The Provider says it is respectfully submitted that this unsubstantiated assertion must be contrasted with the careful and considered expert opinion expressed by its expert, which must be clearly preferred.

In addition to the above expert evidence, the Provider says two recent judgments of the Irish and English High Courts firmly support the Provider's position that COVID-19 cannot be redefined as a different disease for the purpose of fitting it into a restricted list of diseases such as that contained in the business insurance policy:

a) In the English High Court decision of *Rockliffe Hall Ltd v. Travelers Insurance Company Ltd* [2021] EWHC 412 (Comm), 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 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 in question was "plague", and the insured argued that it was sufficiently broad (especially construed *contra proferentum* the insurer) to cover COVID-19. This argument was emphatically rejected by the High Court, and the claim was dismissed.

   The Court noted at paragraph 37 that the starting point was that only diseases on the list counted as "infectious diseases" for the purposes of the policy. The Court noted at paragraph 55 that 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 would assume that it meant the specific disease of bubonic, pneumonic and septicaemic disease caused by *Yersina pestis*. At paragraph 57, the Court suggested 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, at paragraph 69, the Court rejected the argument that the inclusion in the list of the term "encephalitis" could encompass COVID-19. Further, the Court held at paragraph 88 that there was no ambiguity in the meaning of the terms "plague" and "encephalitis", and accordingly the principle of *contra proferentum* interpretation could not avail the policyholder to achieve a different result.

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b) In the Irish High Court decision of *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited & anor* [2021] IEHC 263, 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 the plaintiff's argument, noting at paragraph 115, that *"[c]ritically, neither COVID-19 nor any variant thereof is included in the list of specified diseases contained in [the] clause."* McDonald J. cited *Rockliffe Hall* with approval at paragraph 149. McDonald J's finding that COVID-19 was not listed in the list of diseases, and so there was no cover in respect of it, was summarised at paragraph 229.

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

(iii) <u>No notifiable disease on the premises</u>

The Provider says that quite apart from the fact that COVID-19 is not a notifiable disease for the purpose of the policy, it is quite clear that the Complainant Company is not asserting that the closure was caused by the disease or the organism causing it, SARS-CoV-2, being present on the premises, or present in food or drink supplied from the premises. The Provider says no evidence had 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 single business, the Provider says this is unsustainable. The Provider says 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 public health measures. The Provider says 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. 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.

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Accordingly, the Provider says having regard to the clear policy wording, the closure of the Complainant Company's business on **15 March 2020** does not come within the terms of the extension.

Conclusion

The Provider says the explanation of the reasons for the declinature as set out above is essentially the same as the reasons given to the Complainant Company in the letter dated **15 May 2020**, except that the Provider is no longer relying on the argument relating to the causation of loss. The Provider says the terms of the policy are abundantly clear. The Provider says whilst it is very much alive to the very difficult situation the Complainant Company, along with many other businesses, found itself in, it is quite clear that the policy is not responsive to a business interruption claim arising from the closure of the business by reason of the COVID-19 pandemic.

Extension H

The Provider says it does not consider that COVID-19 constitutes a notifiable disease within the meaning of Extension H (Human notifiable diseases, murder or suicide) of the "Additional Extensions that apply to section 2: Business Interruption". As outlined above, the Provider says an indemnity is provided only in respect of the notifiable diseases within the meaning of, and listed in, the policy. The Provider says COVID-19 is not such a disease and therefore there is no indemnity available under the policy.

Public health legislation

The following statement is contained in the *Aide Mémoire*:

> *"Therefore under the current legislation outlined above, insurance companies are obliged to cover business interruption for the enforced closure period."*

In response to this statement, the Provider says the legislation to which this quotation is referring, is the Public Health (Ireland) Act 1878 ("the 1878 Act") and the Health Act 1947 ("the 1947 Act") as amended by the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020. The Provider says the argument that any of this legislation somehow requires insurance companies to cover business interruption losses generally, including those of the Complainant Company, is manifestly incorrect, for a number of reasons.

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(1) The Complainant Company refers to section 274 of the 1878 Act, which provides:

> *"Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the sanitary authority exercising such powers; and any disputes as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty-pounds, the same may, at the option of either party, be ascertained by and recovered before a court of summary jurisdiction."*

As is self-evident, the Provider says, this provision relates to the entitlement of a person to seek compensation from a public authority that causes it damage as a result of the use of its powers. The Provider says this has nothing to do with any obligation imposed on insurance companies to extend an indemnity under business interruption insurance. Insofar as the Complainant Company asserts an entitlement to compensation under this provision, that is a matter for it to pursue against the relevant authority, and not the Provider.

(2) It is correct to say that the relevant sections of the 1947 Act entitle the Minister for Health ("the Minister") to implement regulations to impose drastic restrictions on society and businesses in the context of public health emergencies, including the COVID-19 pandemic. The Minister has in fact done so, and it is the use of those powers that led to the closure of the Complainant Company's premises, and its losses.

(3) There is nothing in the 1947 Act, or any regulation made under it, that imposes any obligation on insurance companies to extend an indemnity for business interruption losses in the event that the powers are used. Indeed, the imposition of any such obligation to indemnity would interfere with parties' freedom of contract, and would be constitutionally infirm as a result.

(4) The use of the powers has triggered indemnification obligations on the part of some insurers (including the Provider) where their existing insurance policies were responsive to the circumstances that had arisen. That depended on an assessment of the relevant wording of the policy – not all policies responded. For the reasons given above, the business insurance policy the subject of this complaint, does not provide cover in the circumstances. The fact the Minister imposed the restrictions concerned through the use of his statutory powers does not change the contractual obligations and entitlements under the policy.

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(5) The Complainant Company by this argument in effect suggests that all companies and individuals in the country impacted by the government measures taken in response to the COVID-19 pandemic should have automatic cover under their policies of insurance, irrespective of the wording of those policies or the nature of the cover provided, simply because the Minister utilised statutory powers under the 1947 Act. That provision only needs to be stated to be dismissed as incorrect.

In summary, the Provider says the assertion by the Complainant Company as set out in the *Aid Mémoire* that the 1878 Act and 1947 Act somehow impose obligations on the Provider to provide an indemnity where that obligation does not arise under the policy wording is incorrect, and should be dismissed.

The policy's compliance with Irish law

In an email dated **11 June 2020**, the Complainant Company's Loss Assessor states that:

> *"Under the terms and conditions of the insurance policies,* [Provider] *insurance is legally obliged to comply with Irish Law. It is clear from my research that* [the Provider] *policies do not comply with Irish Law, namely the Health Act 1947 & under provisions of section 274 of the Public Health (Ireland) Act, 1878."*

In response to this statement, the Provider says the contention that it or its policy is somehow in breach of Irish law (or any other law) is entirely rejected. As set out above, the 1878 Act relates to compensation claims against public authorities, and the 1947 Act relates to the ability of the Minister to utilise powers to impose restrictions in response to public health emergencies. The Provider says none of this legislation imposes any obligation on insurance companies or their policies.

The Provider says this argument is partially predicated on the suggestion that it would be a criminal office for the Complainant Company to open and operate in the face of the restrictions that were imposed. The Provider says the Complainant Company also notes that it could have been exposed to significant employers' liability and public liability claims if it had opened despite the public health restrictions. The Provider says it does not dispute this. However, the fact that the Complainant Company could not legally open, does not entitle it to cover for the business interruption caused by that inability, if it does not fall within the terms of the insurance policy it has purchased. Insurance policies, the Provider says, contain terms that specify when cover is triggered.

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The Provider says the trigger for cover is the occurrence of the insured event, and not the mere fact of loss. For the reasons given above, the Provider says the parties to the business insurance policy have not agreed that there is cover in respect of loss caused by COVID-19, and this is so irrespective of any criminal sanction that might be imposed on the Complainant Company for defying public health restrictions.

Accordingly, the Provider says it has not failed to comply with the provisions of Irish law, as alleged.

Concluding comments

The Provider says it is satisfied that it correctly assessed the Complainant Company's claim in accordance with the policy terms and conditions. The Provider says it is satisfied the Complainant Company's claim for business interruption losses arising from the COVID-19 pandemic do not fall to be covered under its business insurance policy for the reasons outlined in detail above.

The Provider says the decision to decline the claim was fair and reasonable, in line with the cover offered by the policy. The Provider says it is satisfied the claim for business interruption losses arising from the COVID-19 pandemic falls outside the scope of cover provided by the Complainant Company's policy.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined the Complainant Company's claim for business interruption losses as a result of the temporary closure of its business in **March 2020** due to the outbreak of COVID-19.

Decision

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

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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 **8 February 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. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Analysis

It appears from the available evidence that on or about **11 May 2020** the Complainant Company's Broker notified the Provider of a claim under the Complainant Company's business insurance policy for business interruption losses arising from the outbreak of COVID-19. However, it is not entirely clear from the evidence when the date of the Complainant Company's loss is considered to have commenced. In particular, I note the Provider's letter of **15 May 2020** records the 'Incident date' as **15 March 2020**, and the Complaint Form records the conduct complained of as occurring on **22 March 2020**.

By letter dated **15 May 2020**, the Provider declined the Complainant Company's claim, advancing three principal grounds for its declinature, namely: (i) the notifiable diseases covered by Extension H do not include COVID-19; (ii) the business interruption cover provided by Extension H is premises specific, requiring the notifiable disease to be at the insured premises; and (iii) the loss must be caused, in essence, by an occurrence of COVID-19 at the insured premises, and that any loss suffered in this instance was caused by societal behaviour and public health measures.

In this respect, I note the Complainant Company held a business insurance policy with the Provider with a period of insurance covering the period **14 March 2020** to **13 March 2021**. The Complainant Company's policy schedule states that the following policy sections are amongst the 'Operative Sections' which apply in respect of its policy:

> *"1. Property Damage*
> > *(a) Buildings, Trade Contents, Stock*
> > *(b) Money*
> > *(d) Deterioration of Stock*
>
> *2. Business Interruption"*

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The policy schedule contains a number of tables outlining the sums insured under the previously mentioned Operative Sections. In respect of 'Section 2: Business Interruption', the relevant table states, as follows:

Item	*Cover Description*	*Indemnity Period*	*Sum Insured*
1.	*Gross profit*	*12 Months*	*€1,200,000*
Total:			*€1,200,000*

Turning to the Complainant Company's policy document, Section 1(a), 'Buildings, Trade Contents, Stock', states at page 14, as follows:

> *"**Cover***
>
> *The **insured property** is covered against **damage** caused by the following perils, except as otherwise shown in the schedule."*

The perils insured against under Section 1(a) are set out beneath the above-mentioned clause under 12 numbered paragraphs. While I do not propose to set out each of these perils in detail, I note, in summary, that these perils cover fire, lightning and earthquake; aircraft and other aerial devices or articles dropped therefrom; explosion; riot, civil commotion, labour disturbances; certain physical impacts to the premises; storm and flood; escape of water; accidental escape of water; theft; subsidence, ground heave or landslip; and other forms of physical and accidental damage. As can be seen from the above-cited provisions of Section 1(a), to invoke the cover provided by Section 1(a), damage must be caused by one of the stated perils.

Section 2 of the policy deals with business interruption and, at page 39, provides the following 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** at the **premises** by any of the perils insured against under section 1(a): Buildings, Trade Contents, Stock of this policy.*
>
> *Provided that the following conditions are met:*

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1. *Payment is made or liability admitted for the **damage** under an insurance covering the interest of the Insured in the property, or payment would have been made or liability admitted for the **damage** but for the operation of a policy excess.*

2. *The total liability under this section is restricted to:*
   - *the total sum insured shown in the schedule in respect of any item listed in the schedule; or*
   - *the sum insured remaining after deducting any amount the Company has already paid under this section during the same **period of insurance**, unless the Company shall have agreed to reinstate such sum insured;*

   whichever is less."

'Business interruption' is defined on page 36 as:

> *"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**."*

'Damage' is defined at page 3 of the policy document as: *"Accidental loss, damage or destruction."*

For business interruption cover to become operative pursuant to Section 2 of the policy, it is my opinion that *damage* to property at the premises *caused* by any of the perils insured against under Section 1(a) is required. In this respect, I have considered each of the insured perils at Section 1(a) and the circumstances giving rise to the Complainant Company's claim. Having done so, I am not satisfied that the occurrence of a disease such as COVID-19 comes within any of these perils. Accordingly, it is my opinion that the Provider was entitled to form the opinion that business interruption cover provided by Section 2 of the policy was not triggered.

However, the Complainant Company's policy also contains a number of additional extensions in respect of business interruption at the '**Additional extensions that apply to section 2: Business interruption'** section of the policy document, beginning at page 43. For these extensions to apply, the policy document states, on page 43, as follows:

> ***"Additional extensions that apply to section 2: Business interruption***
>
> ***The insurance provided by the extensions in this section shall only be applicable where gross profit or gross revenue (or estimated gross profit or estimated gross revenue) are insured."***

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As can be seen from the business interruption table in the Complainant Company's policy schedule, gross profit is insured. Accordingly, I am satisfied that the additional extensions applicable to business interruption are operative on the Complainant Company's policy.

In this respect, Extension H provides, at page 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**.*
> - *Murder or suicide at the **premises**.*
>
> ***Notifiable diseases***

Acute encephalitis	*Diphtheria*	*Measles*	*Smallpox*
Acute poliomyelitis	*Dysentery*	*Meningitis*	*Tetanus*
Anthrax	*Legionellosis*	*Mumps*	*Tuberculosis*
Bubonic or pneumonic plague	*Legionnaires' disease*	*Paratyphoid fever*	*Typhoid fever*
Chickenpox	*Leprosy*	*Rabies*	*Viral hepatitis*
Cholera	*Leptospirosis*	*Rubella*	*Whooping cough*
Conjunctivitis	*Malaria*	*Scarlet fever*	*Yellow fever*

> *This extension does not cover:*
>
> - *any amount over €15,000 or the limit shown against this extension in the schedule."*

In determining whether the Provider was entitled to decline cover under Extension H, the question which must be addressed, in light of the particular wording of Extension H, is whether COVID-19 constitutes a "notifiable disease" within the meaning of Extension H.

The manner in which Extension H is drafted suggests that the cover provided for business interruption resulting from a notifiable disease or an organism likely to cause a notifiable disease, is limited to those diseases identified in the 'Notifiable diseases' table. In this respect, I note that the first and second bullet points of Extension H specifically refer to the notifiable diseases/a notifiable disease *"as listed below"*. As a result, the references to notifiable disease(s) are in my opinion, quite clearly confined to, and in the context of, the diseases listed in the table.

Further to this, there does not appear to be anything in the wording of Extension H or the way in which it is drafted to suggest the cover provided by this extension is capable of extending, or was intended to extend, to business disruption resulting from a disease which is not listed in this table. The absence of a definition of the term 'notifiable disease' in Extension H and the policy document, and the absence of any particular criteria which must be satisfied before a particular disease would be considered a notifiable disease, suggests to me that the cover provided by Extension H does not, and was not intended to, extend to diseases which are not listed in the table.

Equally, and arising from the preceding analysis, it appears to me that the cover provided by Extension H is not capable of providing, and was not intended to provide, cover for business interruption resulting from a variant or a subset of the one of the diseases listed in the table.

In considering the cover provided by Extension H, I note the following passages from the High Court decision of McDonald J. in *Brushfield Limited v. Arachas Corporate Brokers Limited and AXA Insurance DAC* [2021] IEHC 263, where a similar clause to the one at issue in the present complaint was considered:

> *"115.* [T]*he clause in the* [Insurer's] *policy is restricted to the specific diseases listed. Business interruption which arises as a consequence of the occurrence of a disease which is not on that list will not give rise to cover under para. 1 of the MSDE* [Murder, Suicide or Disease] *clause. This is a crucially important aspect of the MSDE clause in the* [Insurer's] *policy. In terms of its specificity, the MSDE clause is different to a number of disease clauses to be found in other policies available on the Irish market at the time this policy was put in place in April 2019.* […]
>
> *118.* […] *Critically, neither COVID-19 nor any variant thereof is included in the list of specified diseases contained in para. 1 of the MSDE clause. In those circumstances, it seems to me to follow that* […] *para. 1 of the MSDE clause does not provide cover for business interruption losses caused by an occurrence of COVID-19 even where that occurs on the hotel premises or within a 25-mile radius of it. It cannot be disputed that the cover available under the first paragraph of the MSDE clause is limited to business interruption which arises as a consequence of the occurrence of one of the*

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> *specific diseases expressly listed in the clause. In circumstances where COVID-19 is not listed, it must follow that there is no cover for business interruption losses which are attributable to cases of COVID-19 per se whether or not they manifested themselves either on the premises or within the relevant 25-mile radius."*

Accordingly, I am satisfied that, on a reasonable interpretation of Extension H, that the Provider was entitled to maintain the position that cover is provided only in respect of the notifiable diseases listed in the 'Notifiable diseases' table. I accept, therefore, that to trigger the cover provided by Extension H, business interruption must result from one of the notifiable diseases listed in this table.

In the *Aide Mémoire*, it is stated that COVID-19 *"is the Pneumonic Plague"*. In this respect, I note that one of the notifiable diseases in Extension H is pneumonic plague. In support of the position that COVID-19 is a pneumonic plague, the *Aide Mémoire* cites a dictionary definition of the term 'pneumonic'. However, the Loss Assessor or Complainant Company have not provided any expert evidence or any evidence beyond this dictionary definition to show that COVID-19 is a pneumonic plague. In the context of the present complaint, it is my opinion that the Complainant Company must show, on the balance of probabilities, that COVID-19 is a pneumonic plague. However, I do not accept that a dictionary definition of the term 'pneumonic' sufficiently demonstrates this.

The *Aide Mémoire* goes on to state that the World Health Organisation *"**has** classified Covid-19 as a form of pneumonia"*. However, I note that neither the Loss Assessor nor the Complainant Company have provided any evidence to support this statement. In particular, a copy of the relevant documentation in which this classification was made, or which demonstrates the making of this classification, has not been provided nor has it been shown that the World Health Organisation continue to maintain this view.

While the Provider refers to an expert report dated **19 July 2020** in its Complaint Response, I note that the Provider furnished a report dated **16 August 2020**, authored by a former director of the National Institute for Biological Standards and Control and an Honorary Professor of a Department of Infection and Immunity at an English university. On reviewing this report, I note that it contains a discussion of pandemics, and does not appear to relate to the submissions made by the Provider nor does it appear to contain the passage cited by the Provider in its Complaint Response.

By email dated **1 December 2021**, the Provider furnished a copy of a different report dated **16 August 2020** by the same author which appears to be the one intended to have been enclosed with its Complaint Response. The Provider in this email, explained the original report was dated **19 July 2020** and a new report dated **16 August 2020** was drafted for the purpose of correcting some typographical errors.

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As part of its Complaint Response, the Provider has supplied a CV for the author of its reports. On reviewing this CV, I note that the person in question has significant and long-standing experience in the areas of biological medicines, virology and vaccines and, in particular, coronaviruses. The views expressed in the report submitted by the Provider on **1 December 2021** were that COVID-19 *"is a new disease of humans"* and *"cannot reasonably be described as a subset of the diseases listed in Table 1."* I note that the 'Table 1' referred to in this report contains the same list of diseases as the 'Notifiable diseases' table in Extension H.

In a submission dated **2 December 2021**, the Loss Assessor states that the Provider's report is over fourteen months out of date and *"predates the issue of vaccines and in-depth scientific research."* The Loss Assessor further states that *"*[t]*he opinion submitted does not benefit from the available information and is seriously deficient in scientific analysis and proof."*

Although a number of months have passed since this report was prepared, I do not accept this means that the report is out of date, insofar as it addresses the list of diseases in the table . The report deals with the question of whether COVID-19 could be considered as one (or a variant) of the diseases listed in the 'Notifiable diseases' table. The Loss Assessor has not put forward any evidence to show, in this context, that the report is out of date. Further to this, the Loss Assessor has not supplied any evidence as to how 'the issue of vaccines' would influence or contradict the findings of the report; has not identified the 'in-depth scientific research' mentioned in his submissions or how this would alter or contradict the findings of the Provider's report; nor has the Loss Assessor identified how the Provider's report would benefit from further information or how (with any precision or detail, or by reference to any medical or expert evidence) the Provider's report is 'seriously deficient in scientific analysis and proof'.

The Loss Assessor also submits that:

> "[The Provider] *should produce a comprehensive and scientific-based report for an approved WHO laboratory actively involved in the research and origins of COVID 19.*
>
> […]
>
> [The Provider] *should provide an up-to-date scientific-based analysing all the viruses listed and comparing them to COVID 19. This report, at a minimum, should be from a WHO-recognized scientific institution actively involved in the research of COVID 19."*

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While the Loss Assessor calls for certain types of reports to be furnished by the Provider, the Loss Assessor has not explained what additional information would be obtained from such reports or how the adjudication of this complaint would benefit from reports of this nature. Neither has the Loss Assessor explained how such reports would support the Complainant Company's complaint or how such reports might undermine or contradict the Provider's evidence. In particular, the Loss Assessor has not put forward any medical or expert evidence to date, which contradicts the Provider's evidence, or which would support his position that the reports identified in his submissions are required. Furthermore, if the Loss Assessor is of the view that a particular type of report is required, it was at all times open to him or to the Complainant Company to commission and submit such a report in support of this complaint.

Having considered the matter, I do not accept that the Provider is required to provide a report along the lines suggested by the Loss Assessor.

The Complainant Company or the Loss Assessor have not provided any medical or expert evidence to contradict the conclusions of the Provider's report or to show that COVID-19 constitutes one of the diseases listed in the 'Notifiable diseases' table or is a variant or subset of any of the listed diseases.

Based on the expert evidence submitted, I am satisfied that the Provider was entitled to form the opinion that COVID-19 is not, from a medical or scientific perspective, amongst, or related to, the diseases listed in the 'Notifiable diseases' table. I am therefore of the opinion that it was entitled to determine that Extension H does not provide cover for business interruption resulting from COVID-19.

The Loss Assessor stated in an email dated **20 May 2020** that the Complainant Company's policy wording is at variance with the Public Health (Ireland) Act 1878 and the Health Act 1947.

In respect of the Public Health (Ireland) Act 1878 ("the 1878 Act"), the Loss Assessor appears to be relying on section 274. Section 274 states, as follows:

> *"Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the sanitary authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty-pounds, the same may, at the option of either party, be ascertained by and recovered before a court of summary jurisdiction."*

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The provisions of section 274 provide for the payment of compensation in respect of damage sustained through the exercise of the powers contained the 1878 Act. However, section 274 expressly states that such compensation is payable *"by the sanitary authority"* exercising the power which give rise to damage. The 1878 Act defines 'sanitary authority' as the *"urban sanitary authority or rural sanitary authority, as by this Act defined, as the case may be"*.

On considering the 1878 Act, the Loss Assessor or the Complainant Company have not demonstrated that the Provider exercised any powers contained in this Act nor does it appear that the Provider comes within the definition of term 'sanitary authority'. Consequently, I am not satisfied that the Complainant Company's policy or the Provider's conduct in declining its claim, is contrary to the 1878 Act.

In respect of the Health Act 1947, the Loss Assessor appears to be relying on section 31 which permits the 'Minister' (the Minister for Health), amongst other matters, to make regulations providing for the prevention of the spread of an infectious disease. I also note in the *Aide Mémoire*, reference is made to the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 ("the 2020 Act").

In the *Aide Mémoire*, it is stated that to wilfully remain open would render a business owner liable to criminal charges under section 31 of the 1947 Act and under the provisions of the 2020 Act. In the paragraph that follows, the *Aide Mémoire* states that under the current legislation insurance companies are obliged to cover business interruption claims for the enforced closure period. The *Aide Mémoire* further states that if businesses were to remain open, contrary to legislation, they would be subject to public and employer liability claims and would be breaking the law.

Having considered the matter, I do not accept that because the Complainant Company might be breaking the law or exposing itself to various types of insurance claims that this somehow triggers cover under its policy for business interruption losses or requires the Provider to admit it claims for business interruption losses. Further to this, I do not accept that the Complainant Company's policy or the Provider's conduct in declining its claim is contrary to the 1947 Act or the 2020 Act.

The basis on which cover is provided by the Complainant Company's policy is expressly provided for in the policy document. I am satisfied that, in the context of the Complainant Company's claim for business interruption losses, in order to trigger this cover, the circumstances giving rise to the claim must satisfy the particular terms and conditions applicable to business interruption cover, discussed above.

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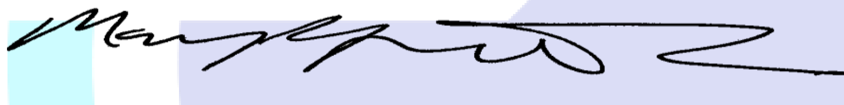
On considering the proper interpretation of the Complainant Company's policy and the parties' evidence, it is my opinion that the Provider was entitled to decide that cover was not triggered in respect of the Complainant Company's claim for business interruption losses.

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

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)

2 March 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.