Decision Ref:	2022-0118
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Claim handling delays or issues Rejection of claim
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading as a public house and restaurant, held a commercial combined insurance policy with the Provider. The policy period in which this complaint falls, is from 1 December 2019 to 30 November 2020.

The Complainant's Case

Following discussions with the Licensed Vintners Association and the Vintners Federation of Ireland, the government, arising from the outbreak of coronavirus (COVID-19) and as part of the government measures introduced to curb the spread of COVID-19, called on all public houses and bars in the Republic of Ireland to temporarily close from 15 March 2020.

The Complainant's Representative notified the Provider by email on **19 March 2020** of a claim for business interruption losses as a result of the temporary closure of his business on 15 March 2020 for a period.

In making such a claim, the Complainant relied upon the following wording of Extension 3.3.4, 'Infectious diseases/murder or suicide' ('the infectious disease extension'), of the 'Business Interruption' section at pg. 27 of the applicable Commercial Combined Insurance Policy Document:

> *"The insurer will pay to the insured: …*
>
> > *Loss resulting from interruption of or interference with the business in consequence of any of the following events: …*

c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises".

The Complainant Company says that following its assessment, the Provider wrote to the Complainant's Representative on **18 May 2020** to advise that it was declining indemnity as it had concluded that the Complainant's losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension policy wording.

The Complainant wrote to the Provider on **5 June 2020** to complain about its decision to decline indemnity, as follows:

"I am surprised that you have rejected my claim for loss suffered because of business interruption on the basis that you do not believe there is any cover as the notified circumstances do not fall within the terms of the insurance policy. Having discussed the matter with my solicitor, I wish to appeal your decision.

I ask you to consider the following:-

1. *By the Infectious Diseases (Amendment) Regulations, 2020 the Government designated Covid-19 a 'notifiable disease'. The Government also advised businesses to close in the context of Covid-19.*

2. *"Notifiable disease", at Section 15.61.2 of the policy, is defined as "any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them ...".*

3. *Section 3.3.4 (Infectious diseases/murder or suicide) of the insurance policy states that the insurer will pay to the insured "Loss resulting from interruption of or interference with the business in consequence of any of the following events" which events includes "any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises".*

4. *There are documented cases of Covid-19 in University Hospital Kerry, Tralee. University Hospital Kerry, Tralee is within 25 miles of my business premises.*

5. *It is self-evident that the direction from the Government constitutes a notification by a competent local authority that Covid-19 is a "human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified".*

6. *My business premises closed because of the government direction to do so as part of its program to contain the spread of Covid-19.*

The Government direction and the closure of my business premises was in consequence of Covid-19. It is clear that the resultant interruption or interference of my business was in consequence of the occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises.

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> *The policy clearly states that the insurer will pay to the insured "Loss resulting from interruption of or interference with the business in consequence of any of the following events", which events includes "any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises". I respectfully suggest that it is clear that the notified circumstances do fall within the terms of the insurance policy.*
>
> *As I'm sure you are aware, the Central Bank* [of Ireland]*, in addressing the matter of business interruption insurance cover, has stated that the Government advice to close a business in the context of Covid-19 is to be treated as a direction and it has set out its expectation that, where there is a doubt about the meaning of a term in an insurance policy, the interpretation most favourable to the insured should prevail"*.

Following the completion of its review, the Provider wrote to the Complainant on 19 June 2020 to advise that it was upholding its decision to decline indemnity in this matter.

The Complainant sets out his complaint in the Complaint Form he completed, as follows:

> *"A claim was submitted by the Complainant for business interruption cover under an Insurance Policy following the Government Direction that businesses are to cease trading because of the Covid-19 pandemic. The claim was refused* [by the Provider] *on the basis that the notified circumstances and losses do not fall within the terms of the insurance policy … This decision was appealed to the Provider … The appeal was refused … The reasons given for the refusal of cover are not accepted by the policyholder. The policyholder does not agree with the Provider's interpretation of the wording of the insurance-policy and resultant refusal of cover".*

The Complainant advised at that time, that he sought for the Provider to admit and pay his claim for business interruption losses as a result of the temporary closure of his public house and restaurant on 15 March 2020 for a period due to the outbreak of COVID-19 and in that regard, when he submitted his Complaint Form to this Office, the Complainant submitted as follows:

> *"The policy-holder wishes the complaint to be resolved by the FSPO finding in his favour by a finding that the Provider did not interpret the wording of the insurance policy correctly, particularly (but not exclusively) in light of the Central Bank* [of Ireland]*'s stated expectation that where there is a doubt about the meaning of a term in the insurance policy, the interpretation most favourable to the insured should prevail. Financial loss to be calculated".*

The Complainant's complaint is that the Provider wrongly or unfairly declined to admit and pay his claim for business interruption losses as a result of the temporary closure of his public house and restaurant on 15 March 2020, due to the outbreak of COVID-19.

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The Provider's Case

The Provider says that the Complainant, who held a commercial combined insurance policy, submitted a claim on 19 March 2020 for business interruption losses as a result of the temporary closure of his public house and restaurant from 15 March 2020. In order to assist and to provide context, the Provider first set out a chronology of the material facts relevant to, and measures taken in respect of, the COVID-19 pandemic in Ireland, (including where the Complainant's business interruption claim fits into that chronology), as follows:

20 February 2020: COVID-19 became a notifiable disease in Ireland, as did its virus agent SARS-CoV-2, by way of the *Infectious Diseases (Amendment) Regulations 2020*.

29 February 2020: First diagnosis of COVID-19 in Ireland.

11 March 2020: First death in Ireland attributable to COVID-19.

12 March 2020: On the advice of the National Public Health Emergency Team (NPHET), the Government announced the following measures to control the spread of COVID-19:

a. the closure was ordered of museums, galleries, tourism sites, schools, crèches, other childcare facilities and higher education institutions; and

b. no mass gatherings involving more than 100 people indoors or 500 people outdoors.

In addition, a statement from An Taoiseach also stated:

> *"… Public transport will continue to operate … Shops will remain open … Businesses are to take a sensible and level-headed responsible approach … Restaurants, cafes, and other businesses can stay open but should look at ways to implement the public health advice on social distancing".*

14 March 2020: Second death in Ireland attributable to COVID-19. By this date, there were 129 confirmed cases of COVID-19 in the country.

15 March 2020: Following discussions with the Licensed Vintners Association and the Vintners Federation of Ireland and with their support, the Government requested that all public houses and bars, including hotel bars, close from 15 March 2020 to at least 29 March 2020. The Complainant accordingly closed his public house/restaurant.

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20 March 2020: The *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020* was enacted, which at that time was valid until 9 November 2020. This Act empowered the Minister for Health, on an emergency basis, to prohibit and restrict the holding of certain events and to close certain premises.

24 March 2020: The Government adopted the following NPHET recommendations:

a. non-essential retail outlets were closed to members of the public;

b. all theatres, clubs, gyms/leisure centres, hairdressers, betting shops, marts, markets, casinos, bingo halls, libraries and other similar outlets were closed;

c. all hotels were limited to non-social and non-tourist occupancy;

d. all playgrounds and holiday or caravan parks were closed;

e. all organised social indoor or outdoor events of any size were not to take place; and

f. all cafes and restaurant were to operate on a take-away or delivery basis, with strict physical distancing measures applied to queuing for this service.

27 March 2020: From midnight, strict public health measures came into force requiring all members of the public to stay at home, excluding essential service workers.

8 April 2020: An Garda Síochána were given additional powers under the 7 April 2020 Regulations to levy fines for not complying with the above restrictions.

1 May 2020: The Government published its ‘Roadmap for Reopening Society and Business’, setting out its plans for easing COVID-19 restrictions and enabling a phased reopening of Ireland’s economy, with Phase 1 on 18 May 2020, Phase 2 on 8 June 2020, Phase 3 on 29 June 2020, Phase 4 on 20 July 2020 and Phase 5 on 10 August 2020.

18 May 2020: Phase 1 of reopening commenced with the following enterprises allowed to recommence trading:

a. hardware stores;

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b. builders' merchants and those providing essential supplies and tools for gardening;

c. farming and agriculture; garden centres and farmers markets;

d. opticians/optometrists/outlets providing hearing test services, selling hearing aids and appliances;

e. retailers involved in the sale, supply and repair of motor vehicles, motorcycles and bicycles and related facilities (for example, tyre sales and repairs); and

f. office products and services; electrical, IT and phone sales, repair and maintenance services for home (not including homeware stores).

8 June 2020: Phase 2 of reopening commenced with all retail outlets permitted to recommence trading, but all workers otherwise still required to work from home where possible.

29 June 2020: Phase 3 of reopening commenced with businesses such as hairdressers, barbers, beauty salons, spas, tanning, tattooing and piercing services allowed to reopen. In addition, public houses that served food re-opened. The Provider assumed that the Complainant re-opened his public house/restaurant on this date.

Against this background, the Provider was notified by the Complainant's Representative by email on 19 March 2020 of a claim for business interruption losses as a result of the temporary closure of the Complainant's public house/restaurant on 15 March 2020.

The Provider says that following its assessment, it wrote to the Complainant's Representative on 18 May 2020 and to the Complainant himself on 25 May 2020 setting out the reasons why it did not consider there to be cover for the claim, under the terms and conditions of the commercial combined insurance policy, as follows:

> *"I note that on the 15th March 2020,* [the Complainant] *ceased trading following a directive from the Government to close all Public Houses and that the reason for closure of their business was a direct result of Government stipulations. As a consequence of the present situation* [the Complainant] *has suffered a loss of revenue and have sought to establish the extent of cover under your policy.*
>
> ***The Coverage Position***
>
> *The main policy is triggered in the event that business interruption losses arise as a consequence of damage to the property insured (subject to any exclusions). As we understand it,* [the Complainant's] *claim is based upon the economic effects that the*

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Covid-19 situation has had on [the Complainant's] *business. The policy does provide some limited cover, by way of extensions, for certain situations where the business is adversely affected by a specific event, happening at or near the premises. The extension of relevance to Covid-19 claims of this nature is the Infectious Diseases/Murder or Suicide Extension.*

Infectious Diseases/Murder or Suicide Extension

In the event that, losses have arisen due to the occurrence of Covid-19, cover may be available under the Infectious Diseases/Murder or Suicide Extension. This Extension is designed to be the only potential source of cover for losses arising from diseases such as Covid-19.

The Extension may respond where:

(a) Loss results from the occurrence of a notifiable disease at the premises; or

(b) Loss results from the occurrence of a notifiable disease within the specified vicinity of the premises.

Covid-19 was added to Irish government list of notifiable diseases on 20 February 2020. This Extension will therefore respond in respect of losses suffered after that date as a consequence of the occurrence of Covid-19 at the relevant locations. Cover will not be back-dated to apply to any losses suffered before Covid-19 became notifiable in Ireland.

It is important to note that this Extension will only provide cover where loss is in consequence of the occurrence of Covid-19 at the relevant locations, and not where losses are in consequence of, for example, wide-scale government measures. The effect of (for example) government-mandated blanket shutdowns, or the effect of the Covid-19 outbreak on the regional, national or global economy, will not trigger cover. Cover will only be available where a specific outbreak of Covid-19 at the premises, or within the specified vicinity, has had a direct effect on the business.

Where a case of Covid-19 has occurred at the insured premises, it is likely that cover under the Extension would be engaged to the extent that that occurrence has required the premises to close for a short period, subject to the terms and conditions of the policy. Where it is shown that there has been an occurrence of Covid-19 within the radius of the relevant premises as specified in the policy, interruption loss at the premises will only be recoverable to the extent that that loss is in consequence of that particular occurrence, and not some other cause.

Conclusion

Having carefully considered [the Complainant's] *claim, unfortunately I do not believe there is any cover, as the notified circumstances and losses do not fall within the terms of* [the Complainant's] *policy, for the reasons set out above".*

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The Provider says that the Complainant wrote to the Provider on 5 June 2020 to complain about its decision. It says that following its review, it issued a final response letter to the Complainant on 19 June 2020, detailing how the losses he incurred fell outside the scope of policy cover, specifically the infectious disease extension, as follows:

> *"Whilst we had considered that the circumstances of the losses being experienced by* [the Complainant] *fell outside the scope of policy cover, in order to ensure that the correct decision was made we sought legal opinion on the policy wording, with particular reference to Extension 3.3.4 (Infectious diseases/murder or suicide). Our letter of 25th May 2020 detailed the findings of the review, which confirmed we had correctly interpreted the wording and that on this occasion the losses* [the Complainant] *are experiencing fall outside the scope of the policy.*
>
> *Having now completed my review of the file, I can see no basis on which to reconsider the decision on policy cover. The policy is very specific in that for consideration to be given under Extension 3.3.4 losses must be in consequence of an occurrence of a notifiable disease at the premises, or in consequence of an occurrence of a notifiable disease within a radius of twenty five (25) miles of the premises, there being no cover for losses resulting from measures introduced to curtail the spread of Coronavirus or the extremely challenging economic conditions that exist at present"*.

The Provider noted that the Complainant completed a FSPO **Complaint Form** on 10 August 2020, as follows:

> *"A claim was submitted by the Complainant for business interruption cover under an Insurance Policy following the Government Direction that businesses are to cease trading because of the Covid-19 pandemic. The claim was refused* [by the Provider] *on the basis that the notified circumstances and losses do not fall within the terms of the insurance policy … This decision was appealed to the Provider … The appeal was refused … The reasons given for the refusal of cover are not accepted by the policyholder. The policyholder does not agree with the Provider's interpretation of the wording of the insurance-policy and resultant refusal of cover".*

The Provider says that the relevant extension in the 'Business Interruption' section of the Complainants' commercial combined insurance policy is Extension 3.3.4, 'Infectious diseases/murder or suicide' ('the infectious disease extension'), which reads, as follows:

> *"The insurer will pay to the insured: …*
>
> *3.3.4 Infectious diseases/murder or suicide*
>
> *Loss resulting from interruption of or interference with the business in consequence of any of the following events:*
>
> *a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*

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b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;

c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises;

d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;

e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;

f) any occurrence of murder or suicide at the premises;

provided that the

g) insurer shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property;

h) insurer shall only be liable for loss arising at those premises which are directly subject to the incident;

i) insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed EUR50,000 or fifteen per cent (15%) of the total sum insured (or limit of liability) for this insured section, whichever is the lesser, any one claim and EUR10,000 any one period of insurance".

The Provider acknowledges that the final part of this clause contains a typographical error and should actually read:

*"…any one claim and **EUR100,000** any one period of insurance".*

When it responded on 7 December 2020 to the formal investigation by this Office, the Provider noted that COVID-19 and its virus agent SARS-CoV-2, were designated as notifiable diseases in Ireland on 20 February 2020.

Reading the provisions relevant to this matter together, therefore, the Provider said that the infectious disease extension provides cover for losses resulting from:

(i) interruption of or interference with the business;

(ii) *"in consequence of"* any of the following events:

a. any occurrence of COVID-19 at the premises;

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b. any discovery of any organism at the premises likely to result in the occurrence of COVID-19;

c. any occurrence of COVID-19 within a radius of 25 miles of the premises;

(iii) provided that the Provider shall only be liable for loss arising at those premises which are directly subject to the *"the incident"*.

The Provider said that (i)-(iii) above constitutes the insured peril which must proximately cause the financial losses claimed by the Complainant. If proved, the maximum recoverable by the Complainant under the business interruption infectious disease extension would be €9,000, this being 15% of the business interruption sum insured (€60,000).

The Provider said its key consideration concerned when business interruption could be said to be *"in consequence of"* occurrences of COVID-19 within a 25 mile radius of the insured premises. The Provider's view was that to trigger cover those occurrences within the radius had to be the specific proximate cause of the interruption, in the sense that, but for those occurrences, no interruption would have been suffered. If the interruption would have occurred in any event, independent and irrespective of the local occurrences within the 25 mile radius, the Provider said there was no cover. In that regard, the Provider said that it is not enough that there simply happened to be such occurrences in the radius.

The Provider, in its response to the formal investigation by this Office, noted that this position, on the exact clause *"c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises)* wording, was considered by the English High Court in the 15 September 2020 decision of *The Financial Conduct Authority v. Arch Insurance (UK) Ltd and others* [2020] EWHC 2448 ('the FCA Test Case'), wherein the English High Court considered the extent of COVID-19-related coverage, if any, under 21 separate business interruption coverage wordings for test case purposes.

The Provider noted that the wording of its infectious disease business interruption extension that was under consideration before the English High Court in the FCA Test Case was identical to the wording of the business interruption extension 3.3.4 'Infectious diseases/murder or suicide' contained in the Complainant's commercial combined insurance policy.
In this regard, the Provider noted that the English High Court stated in the FCA Test Case, as follows:

> *"In* [the Provider's wording]*, there is a combination of factors which together, to our minds, indicate that the cover is…intended to be confined to the results of specific (relatively) local cases …*
> *In the first place, the insuring clause itself identifies the matters in (a) to (f) as "events".*
> *This indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way …*
> *This is the context within the clause in which* [the clause] *refers to "any occurrence of a notifiable disease".*

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Given the reference to "events", and taken with the nature of the other matters referred to in (a), (b) and (d) to (f), the emphasis in (c) appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles.
It is the "event", which is constituted by the occurrence(s) of the disease within the 25 mile radius, which must have caused the business interruption or interference.

If there were occurrences of the disease at different times and/or different places [i.e. outside the 25 mile radius] *then these would not constitute the same "event", and the clause provides no cover for interruption or interference with the business caused by such distinct* [outside-the-radius] *"events".*

This focus of the clause is then emphasised by the fact that in (h), it is stated that the insurer is only liable for loss arising at those premises which are directly subject to the "incident" … These uses of the word "incident" appear to us to reinforce the fact that the clause is concerned with specific events, limited in time and place …

Given our construction of [the clause]*, the issues as to causation largely answer themselves. We accept that the words "in consequence of" imply a causal relationship.*

As we have found that this clause…is drawing a distinction between the consequences of the specific cases occurring within the radius and those not doing so., because the latter would constitute separate "events", we consider that insureds would only be able to recover if they could show that the case(s) within the radius, as opposed to any elsewhere, were the cause of the business interruption.

In the context of this clause, it does not appear to us that the causation requirement could be satisfied on the basis that the cases within the area were to be regarded as part of the same cause as that causing the measures elsewhere, or as one of many independent causes each of which was an effective cause, because this clause, in our view, limits cover only to the consequences of specific events [within the 25 miles radius]*".*

The Provider maintained that the effect of this extract from the FCA Test Case – and the effect of the infectious disease extension as a matter of Irish law even without reference to that decision – was that:

(i) the Complainant in the present case would only be able to recover under clause c) of the infectious diseases extension – for business interruption that is *"in consequence of … c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises"* – if he could show that his business interruption had been proximately caused by the specific occurrence(s) of the disease within the 25 mile radius (being the relevant "event" and insured peril);

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(ii) this is entirely consistent with section 55(1) of the *Marine Insurance Act 1906* (a pre-independence statute that is in force in Ireland), which provides that:

> *"Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against"*;

(iii) further, as stated in the Irish insurance text, 'Buckley on Insurance Law', at paras. 8.71, 8.76 and 8.77:

> *"The fundamental rule of insurance law is that the insurer is only liable for losses proximately caused by a peril covered by the policy … The use of words such as "in consequence of" or "originating from" does not…prevent the operation of the doctrine …* [Further]*, words such as "caused by" or "arising from" are unambiguous. Such words have been interpreted as relating to the proximate cause …";*

(iv) for proximate cause purposes, therefore, it was the Provider's position that a two-step test had to be undertaken:

a. firstly, the "but for" test (factual causation) had to be applied. This boiled down to a simple question: what would have happened had the insured peril not occurred, that is, had there been no *"occurrence(s) of* [COVID-19] *within a radius of 25 miles of the* [Complainant's] *premises"*?:

i. if the business interruption and losses would have occurred in any case through a separate independent event (in the form of incidents of COVID-19 outside the 25 mile radius, or a government order to close that would have been imposed whether or not there were local incidents within the 25 mile radius), then the incidents of COVID-19 within the radius (being the insured peril) did not cause the interruption and losses, such that those losses were not covered;

ii. alternatively, if it could be said that "but for"/without the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents within the radius were the factual cause of those losses – the business would not have suffered the same losses in any case;

b. secondly – and assuming factual causation has been satisfied as in (ii) above – were the incidents inside the 25 mile radius also the proximate cause (that is, the dominant or effective cause) of the presented losses (legal causation)?;

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c. if the above tests were satisfied by the Complainant, that is, "but for" the local 25 mile COVID-19 events/incidents the business interruption losses would not have occurred, the losses would be covered.

The Provider said that as these tests were not satisfied in the present matter, the Complainant's ensuing losses from the business interruption that occurred on and after 15 March 2020 when he was government-directed to close, were not recoverable, as follows:

(i) The government-directed closure interruption related only to the public house element of the Complainant's business, not the restaurant element of his business, and in any case was not *"in consequence of"* (that is, proximately caused by) the insured peril, being the local "event" of *"occurrences of* [COVID-19] *within* [the 25 miles radius]*".* Even if there were such cases within the radius, it could not be stated that "but for"/without such local occurrences, the closure order would not have been imposed, and the Complainant's business would have continued. That closure directive would have been (and was) imposed and the business would not have continued/the losses would have been suffered, in any case, due to the separate uninsured incidents of COVID-19 outside the radius, elsewhere in the country. . In this regard, the Provider was mindful of the statement in the English High Court in the FCA Test Case in a different context, as follows:

> *"Even if these were a total closure of insured premises pursuant to the* [Government] *Regulations, there could only be cover if the insured could demonstrate that it was the risk of COVID-19 in the vicinity, in that sense of the neighbourhood* [i.e. in the present case, the 25 mile radius]*, of the insured premises, as opposed to in the country as a whole, which led to the action of the government in imposed the Regulations. It is highly unlikely that that could be demonstrated in any particular case …";*

(ii) Proof of closure losses being proximately caused by factors outside the 25 mile radius was considered to be found in the fact that when the 24 March 2020 closure direction by the government issued to all non-essential businesses (not just public houses and restaurants), that direction included businesses in counties which had no, or virtually no, reported cases of COVID-19 at all at that time (that is, Wexford, Monaghan, Roscommon, Leitrim and Carlow). That was proof that even if there had been no cases of COVID-19 within a particular 25 miles radius, closure of non-essential businesses by order would have – and did – issue in any case. Insofar as that was the position on 24 March 2020, that was even more evidently the position earlier on 15 March 2020, when the Complainant closed his pub business at the request of the government;

(iii) As the interruption losses experienced by the Complainant on and after 15 March 2020 were in consequence of a government direction to public houses introduced as a national response to reduce the spread of the virus nationally

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> (which is an uninsured peril), and were not a local response to specific occurrences/incidents/events in the Complainant's 25 mile radius (which is the insured peril), clause c) of the business interruption infectious diseases extension was not considered by the Provider to be triggered.

In its response of 7 December 2020 to the formal investigation by this Office, the Provider also noted that the Central Bank of Ireland, in its '*Expectations of Insurance Undertakings in Light of COVID-19'* correspondence to Insurers dated 27 March 2020, had stated that:

> *"The Central Bank is of the view that where a claim can be made because a business has closed, as a result of a Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as a direction".*

In this regard, the Provider accepted that the government request to the Complainant and other publicans to close their pub businesses on 15 March 2020 amounted to a direction to do so. The Provider noted, however, that there was no direction on that date for the restaurant elements of pub businesses to close.

The Provider maintained, for the reasons set out extensively above, that the government direction of 15 March 2020 was not imposed *"in consequence of"* (that is, was not proximately caused by) local incidents of Covid-19 within the 25 mile radius of the Complainant's premises (the insured peril under the infectious diseases extension), such that the ensuing losses were not covered by the extension. The Provider noted that the Complainant had a restaurant business at the same premises that was required to close from 24 March 2020. Though it was permitted to operate on a take-away basis at all times thereafter, the Provider said that there was no evidence from the Complainant that it operated on a take-away basis for the purposes of mitigating his alleged loss.

The Provider therefore concluded in its response of **7 December 2020** to the formal investigation by this Office, that the Complainant's ensuing losses did not fall within the scope of cover provided by the relevant business interruption infectious disease extension (section 3.3.4) of the commercial combined insurance policy and in that regard, the Provider was satisfied that it had declined indemnity in this matter, in accordance with the terms and conditions of the Complainant's commercial combined insurance policy.

Although this was the position of the Provider during all material times in 2020, nevertheless, on **24 February 2021**, the Provider wrote to the Complainant as follows:

> *"… As you may be aware, a recent Court decision on 5 February 2021 arising out of cases brought by Hyper Trust Ltd and others against the insurer FBD in the Irish High Court (the FBD Decision) considered the operation of certain business interruption coverage clauses in the context of Covid-19. While the terms of your* [Provider] *policy were not before the Court, various aspects of the Court decision have provided welcome clarity as regards the operation of cover under clauses such as the notifiable disease extension in your* [Provider] *policy.*

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> *As a result of that clarity,* [the Provider] *are pleased to confirm that policy cover for your above claim is now admitted in principle, subject to validation detailed below. This is the case even though we have previously indicated that there is no cover available under the notifiable disease extension in your policy, which has led to your above reference to the FSPO. The reason for this change is because the above FBD Decision has now clarified the manner in which your notifiable disease extension operates as a matter of Irish law. We are therefore now upholding your complaint…"*

Similarly, in its letter to this Office dated **31 March 2021**, the Provider advised that in light of the High Court decision of 5 February 2021 on the scope of COVID-19-related business interruption in *Hyper Trust Ltd v. FBD Insurance plc* ('the FBD Test Case'), as well as the UK Supreme Court decision of 15 January 2021 in the FCA Test Case, decisions that were not available at the time of its original submission to the FSPO on 7 December 2020, the Provider's position had changed. The Provider said that the analysis and decisions of both Courts did not now support the 7 December 2020 reasoning of the Provider, which underpinned its original denial of coverage of the Complainant's claim under the infectious disease extension in his policy.

The Provider says that the FBD Test Case did not consider the precise infectious disease extension wording at issue in the complaint at hand, but it was concerned with a similar clause which provided business interruption cover where the relevant insured's business was:

> *"affected by:-*
>
> *(1) Imposed closure of the premises by order of the Local or Government Authority following: …*
> *(d) Outbreaks of contagious or infectious diseases … within 25 miles same".*

The Provider says in its letter to the FSPO dated 31 March 2021 that in brief:

(i) the FBD Test Case found that under the above extension Covid-19-related business interruption was covered as:

   (a) there was an occurrence of Covid-19 within a radius of 25 miles of the premises; and

   (b) the said occurrence was an equal proximate cause, along with occurrences outside the radius, of the business closure/interruption suffered;

(ii) such "equal cause" proof was found in NPHET documentation on 11/12 March 2020 which referenced the general national situation as the basis for closing schools/museums/tourist sites on 12 March 2020 (and subsequently non-essential businesses such as the Complainant's restaurant on 24 March 2020), that is, the closure recommendation was triggered by the conglomeration of individual instances of Covid-19 everywhere in the country, each instance being an equally efficient proximate cause of the closure and ensuing interruption;

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(iii) in the absence of any relevant evidence to the contrary, therefore, the Provider now acknowledges and accepts that a "within radius" occurrence of Covid-19, where reasonably proven by the Complainant, is an equal proximate cause of the interruption claimed by the Complainant along with occurrences outside the radius, such that cover will trigger in those circumstances under the infectious diseases extension in the policy;

(iv) the Provider will accordingly not now argue (as it originally did on 7 December 2020) that the occurrences outside the radius, as opposed to those within the radius, were the proximate cause of the interruption, such that no cover triggers.

The Provider, more recently, said that the FBD Test Case also ruled that negative business trends related to Covid-19, insofar as that forms part of the insured peril, cannot be used to reduce the indemnity calculation. This is the case whether those trends pre-dated or post-dated the triggering of the insured peril, that is, the occurrence of a case of Covid-19 within the 25-mile radius.

In addition, in a letter of 29 June 2021, the Provider accepted that the operation of the Complainant's restaurant on a take-away basis would not have been economic given the location, and therefore, it was no longer the intention of the Provider to pursue an argument in respect of the Complainant's failure to mitigate his alleged loss. The Provider accepted the Complainant's Representative's advice on 26 February 2021 that:

> *"… no sum should be deducted…as a result of any decision or non-decision not to operate a take-away service for the reason…that the operation of a take-away service was not a viable business option for the Complainant that would have provided a profitable return for him due to the location of the restaurant within such a rural and sparsely populated area."*

The Provider says it now considers any mitigation of loss issue academic, and this will not be pursued further. In light of these concessions, the Provider has said that its Loss Adjuster wrote to the Complainant on **15 March 2021** setting out the Provider's intended steps for adjusting the claim, as follows:

> *"… The Notifiable Disease Extension has an inner limit of 15% of the available sum insured. The policy sum insured in respect of business interruption is €60,000 and this produces a policy inner limit of €9,000.*
>
> *Based on our preliminary calculations we believe that* [the Complainant's] *losses will exceed the policy limit of €9,000.00 and accordingly we are now in a position to issue settlement proposals in the amount of €9,000.00.*
>
> *In addition to the claim offer as relayed, Insurers have confirmed that, in recognition of* [the Complainant] *having likely incurred costs and inconvenience in submitting and preparing their complaint to the FSPO, they are pleased to advise that they will be making a €750.00 redress payment to* [the Complainant] *in that regard"*.

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The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined to admit and pay the Complainant's claim for business interruption losses as a result of the temporary closure of his public house and restaurant on **15 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. 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 **22 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 substantive submissions from the parties, within the period permitted, the final determination of this office is set out below.

The Complainant, who held a commercial combined insurance policy with the Provider, closed his public house from 15 March 2020, following a government direction to do so.

In this regard, I note Press Release on 15 March 2020 from the Department of An Taoiseach 'All pubs advised to close until March 29' (available at https://www.gov.ie/en/press-release/20fc58-all-pubs-advised-to-close-until-march-29/), as follows:

> *"Following discussions today with the Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI), the government is now calling on all public houses and bars (including hotel bars) to close from this evening (Sunday 15 March) until at least 29 March.*

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The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.

For the same reason, the government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.

The government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night.

While the government acknowledges that the majority of the public and pub owners are behaving responsibly, it believes it is important that all pubs are closed in advance of St. Patrick's Day.

The Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI) both supported this decision and urged all their members to close in line with the government's request.

The government and the LVA and VFI also discussed the support measures for businesses and their staff affected by the COVID-19 crisis which have been put in place last week.

The government will continue to monitor the situation, including the compliance of all pubs with this request, as well as any further or different measures which might be required in the future.

The effectiveness of the Guidelines on Social Distancing in other parts of the hospitality and leisure industry, for example restaurants and cinemas, will also be kept under review and subject to further consultation with stakeholders in the coming days".

As a result, the Complainant's Representative notified the Provider by email on 19 March 2020 of a claim for business interruption losses as a result of the temporary closure of the Complainant's public house and restaurant from 15 March 2020.

I note that following its claim assessment, the Provider wrote to the Complainant's Representative on 18 May 2020 and to the Complainant himself on 25 May 2020 to advise that it was declining indemnity as it had concluded that the Complainant's losses did not fall within the scope of cover provided by the relevant infectious disease extension policy wording, a decision it upheld upon review in its letter to the Complainant of 19 June 2020.

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I note that in his letter of complaint to the Provider on 5 June 2020, the Complainant stated:

> *" … There are documented cases of Covid-19 in University Hospital* [redacted] *University Hospital* [redacted] *is within 25 miles of my business premises".*

Notwithstanding the Government direction on 15 March 2020 requesting all public houses and bars in the Republic of Ireland to temporarily close from that date, I am mindful that the Complainant, in making his business interruption claim to the Provider, was relying upon the presence of active COVID-19 cases within a 25 mile radius of his public house.

I note Extension 3.3.4, 'Infectious diseases/murder or suicide', of the 'Business Interruption' section at pg. 27 of the Commercial Combined Insurance Policy Document states:

> *"**The insurer will pay to the insured:***
>
> *3.3.4 Infectious diseases/murder or suicide*
>
> ***Loss resulting from interruption of or interference with the business in consequence of** any of the following events:*
>
> *a) any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises;*
>
> *b) any discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;*
>
> ***c) any occurrence of a notifiable disease within a radius of 25 (twenty five) miles of the premises**;*
>
> *d) the discovery of vermin or pests at the premises which cause restrictions on the use of the premises on the order or advice of the competent local authority;*
>
> *e) any accident causing defects in the drains or other sanitary arrangements at the premises which causes restrictions on the use of the premises on the order or advice of the competent local authority;*
>
> *f) any occurrence of murder or suicide at the premises;*
>
> *provided that the*
> *g) insurer shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property;*
>
> *h) insurer shall only be liable for loss arising at those premises which are directly subject to the incident;*

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i) ***<u>insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed</u>*** *EUR50,000 or* ***<u>fifteen per cent (15%) of the total sum insured</u>*** *(or limit of liability) for this insured section, whichever is the lesser, any one claim and EUR10,000 any one period of insurance".*

[underlining added for emphasis]

In its letter to this Office dated 31 March 2021, the Provider says that the final part of this clause contains a typographical error and should actually read:

"…any one claim and ***<u>EUR100,000</u>*** *any one period of insurance".*

Irrespective of any such typographical error within the policy, I note that the 'Insured Details' section of the Complainant's Schedule of Insurance with the Provider for the period 1 December 2019 to 30 November 2020 states:

"BUSINESS INTERRUPTION - INSURED
Indemnity Period: 12 months - €60,000".

Therefore, taking account of the wording of extension 3.3.4 i) and the Schedule of Insurance, I am satisfied that the maximum amount recoverable <u>per claim</u> by the Complainant under the business interruption infectious disease extension is 15% of €60,000, or **€9,000**.

In its letter to this Office dated **26 February 2021**, the Complainant's Representative asserts that there is *"manifest ambiguity"* in the wording of extension 3.3.4 i) and submits that:

"… the Complainant ought to be given the benefit of claiming a limit of indemnity of €60,000.00 for his business interruption claim herein as this is the figure which is clearly represented by [the Provider] *to be the Complainant's limit of indemnity in his Schedule of Insurance".*

Similarly, in its letter to this Office dated **30 April 2021**, the Complainant's Representative states:

"… the Complainant re-asserts his contention that given the manifest ambiguity that arises interpreting the above clause [extension 3.3.4 i)]*, it is submitted that the Complainant ought to be given the benefit of claiming a limit of indemnity of €60,000 for his business interruption claim herein as this is the figure which is clearly represented by* [the Provider] *to be the Complainant's limit of indemnity in his Schedule of Insurance".*

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I note that if the typographical error referred to by the Provider is accepted, the wording of extension 3.3.4 i) ought to read:

> *"… insurer's maximum liability under this cover extension clause in respect of any one claim shall not exceed EUR50,000 or fifteen per cent (15%) of the total sum insured (or limit of liability) for this insured section, whichever is the lesser, any one claim and EUR100,000 any one period of insurance"*.

I am satisfied that quite apart from the unfortunate typographical error that the Provider has acknowledged, it is clear from the actual policy wording that the limit of indemnity available under the infectious diseases extension is restricted to the lesser of €50,000 or €9,000 (this latter sum representing 15% of the total sum insured/limit of liability for business interruption purposes, which is itemised as €60,000 on the applicable Schedule of Insurance). The maximum amount recoverable per claim by the Complainant under the business interruption infectious disease extension is therefore **€9,000**

I am conscious of the Provider's original position as outlined in its Complaint Response to this Office of 7 December 2020, that:

> *"… for proximate cause purposes, therefore, a two-step test must be undertaken:*
>
> a. *firstly, the "but for" test (factual causation) must be applied. This boils down to a simple question: what would have happened had the Insured Peril not occurred i.e. had there been no "occurrence(s) of [COVID-19] within a radius of 25 miles of the [Complainant's] premises"?:*
>
>   i. *if the business interruption and losses would have occurred in any case through a separate independent event (in the form of incidents of COVID-19 outside the 25 mile radius, or a government order to close that would have been imposed whether or not there were local incidents within the 25 mile radius), then the incidents of COVID-19 within radius (being the Insured Peril) did not cause the interruption and losses, such that those losses are not covered;*
>
>   ii. *alternatively, if it can be said that "but for"/without the event comprising the local occurrences within 25 miles the business would not have suffered the relevant interruption/losses, then the local incidents within the radius are the factual cause of those losses – the business would not have suffered the same losses in any case;*
>
> b. *secondly – and assuming factual causation has been satisfied as in ii. above – were the incidents inside the 25 mile radius also the proximate cause (i.e. the dominant or effective cause) of the presented losses (legal causation)?;*

c. *if the above tests are satisfied by the Complainant i.e. "but for" the local 25 mile COVID-19 events/incidents the* [business interruption] *losses would not have occurred, the losses will be covered …*

However, the requirements for showing proximate cause…are not satisfied in the present matter …

Regarding the Complainant's business interruption losses that occurred post-15 March [2020] *(i.e. after closure of its pub in accordance with the government's request on that date, which is treated by* [the Provider] *as a directive)* [the Provider's] *position is that those post-15 March losses are…not recoverable;*

This is because that government-directed closure interruption…was not "in consequence of" (i.e. proximately caused by) the Insured Peril, being the local "event" of "occurrences of [COVID-19] within [the 25 mile radius]". Assuming for a moment that there were such occurrences within the said radius (which is for the Complainant to prove/document), it cannot be stated that but for/without those local occurrences (which is the Insured Peril) the closure directive would not have been introduced, and the Complainant's business would have continued. The closure directive would have been (and was) introduced, and the business would not have continued/the losses would have been suffered, in any event, due to separate uninsured incidents/events of COVID-19 outside the radius, elsewhere in the country …

Proof of this is found in the fact that when the 24 March [2020] *closure direction by the government issued to all non-essential businesses (not just public houses and restaurants), that direction included businesses in counties which appear to have had no, or virtually no, reported cases of COVID-19 at all at that time (i.e. Wexford, Monaghan, Roscommon, Leitrim and Carlow…). This is proof that even if there had been no cases of COVID-19 within a particular 25 miles radius, closure of non-essential businesses by order would have – and did – issue in any case. Insofar as that was the position on 24 March, that was even more evidently the position on 15 March (when the Complainant closed his public house at the request of the government)".*

More specifically, I note the Provider's position that:

"… it cannot be stated that but for/without those local occurrences (which is the Insured Peril), the [government] *closure directive would not have been introduced … The closure directive would have been (and was) introduced, and the business would not have continued/the losses would have been suffered, in any event,* ***due to the separate uninsured incidents/events of COVID-19 outside the*** **[25 mile]** ***radius, elsewhere in the country*** *…"*

[underlining added for emphasis]

In its detailed chronology of the material facts relevant to, and measures taken in respect of, the COVID-19 pandemic in Ireland, I note that the Provider advises that on 14 March 2020, the date prior to the Complainant closing his public house and restaurant, there were 129 confirmed cases of COVID-19 in the country.

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In that context, I have examined the specific policy wording relevant to the Complainant's claim, which can be extracted from the business interruption extension 3.3.4, 'Infectious diseases/murder or suicide', hereinafter 'clause 3.3.4 c)', as follows:

> *"The insurer will pay to the insured: …*
>
> > *Loss resulting from interruption of or interference with the business in consequence of …*
> >
> > *c) any occurrence of a notifiable disease within a radius of 25 (twenty-five) miles of the premises".*

Having examined the matter in detail, I am of the opinion that for cover to have been triggered by clause 3.3.4 c), there had to be a loss to the policyholder, arising from the interruption of or interference with the business, as a result of the insured peril, that is, in this instance, because of the occurrence of COVID-19 within 25 miles of the Complainant's business premises.

I am of the opinion that the reasonable interpretation of the plain meaning of clause 3.3.4 c) is that ***"any"*** occurrence of a notifiable disease, in this case COVID-19, within a radius of 25 miles of the Complainant's business premises, once that occurrence has caused an interruption of or interference with the business resulting in loss, is sufficient in itself to trigger cover. I am satisfied that there is no stipulation within the policy provisions that other occurrences of the notifiable disease elsewhere outside of the 25-mile radius, will in some manner nullify or cancel the operation of the insured peril, which the policy specifies.

In this regard, I take the view that if it had been the intention of the underwriters, that the occurrence of the notifiable disease must only be within a radius of 25 miles of the policyholder's premises (and not also beyond that 25 mile radius) in order for the particular insured peril at clause 3.3.4 c) to operate, it would have been open to the underwriters to have specified that particular requirement in the policy wording. In this instance, however, the underwriters did not do so.

As a result, it seems to me that once there is an occurrence of a notifiable disease within a radius of 25 miles of the policyholder's business premises, then cover is triggered. This is the position regardless of whether there are also occurrences of this notifiable disease elsewhere outside of that radius.

I am satisfied that even if the official response to the notifiable disease, that is occurring both within and outside of the radius is, or becomes, a national response - in this case, the Government direction on 15 March 2020 requesting all public houses and bars in the Republic of Ireland to temporarily close from that date - it does not follow from the policy provisions that the interference with or interruption to the policyholder's business, is not thereby covered.

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That said, I accept the Provider's position that it is not sufficient to simply point to a case or cases of COVID-19 within the 25-mile radius of the policyholder's premises and expect cover to be triggered. Instead, I am satisfied that it must also be shown that the particular case or cases referred to, interrupted or interfered with the policyholder's business, causing financial loss.

Accordingly, it would appear to me that the question then to be asked is whether the insured peril, that is, *"any occurrence of a notifiable disease* [COVID-19] *within a radius of 25 miles of the* [Complainant's] *premises"*, resulted in *"an interruption of or interference with"* the Complainant's business.

I note that section 15, 'General definitions and interpretation', of the applicable Commercial Combined Insurance Policy Document defines 'notifiable disease' at pg. 81, as follows:

> *"**Notifiable disease***
>
> *Notifiable disease means illness sustained by any person resulting from:*
>
> *food or drink poisoning, or*
>
> *any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS), an AIDS related condition or avian influenza"*.

In this regard, on 20 February 2020 the Minister for Health signed Statutory Instrument No. 53/2020 - Infection Diseases (Amendment) Regulations 2020, to include the coronavirus (COVID-19) (SARS-Cov-2) on the list of notifiable diseases. The 'Notifying Infectious Diseases' page of the Health Protection Surveillance Centre website states, at https://www.hpsc.ie/notifiablediseases/notifyinginfectiousdiseases/, as follows:

> *"All medical practitioners, including clinical directors of diagnostic laboratories, are required to notify the Medical Officer of Health(MOH)/Director of Public Health (DPH) of certain diseases. This information is used to investigate cases thus preventing spread of infection and further cases. The information will also facilitate the early identification of outbreaks. It is also used to monitor the burden and changing levels of diseases, which can provide the evidence for public health interventions such as immunisation"*.

I am therefore satisfied that the occurrence of a notifiable disease by its nature, can and does attract public health interventions, the purpose of which is to assist in preventing the spread of infection and further cases. The inclusion by the underwriters of business interference cover for policyholders, in the event of a notifiable disease occurring within 25 miles of the policyholder's premises (thereby covering a surrounding area of almost 2,000 square miles, or approximately $^{1}/_{16}{}^{th}$ of the country) suggests to me that the policy recognises that notifiable diseases, by their nature, will often trigger the implementation of measures, including public health measures, over a specified area, for the purpose of seeking to limit the spread of the notifiable disease in question.

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I note the aforesaid Department of An Taoiseach 'All pubs advised to close until March 29' Press Release of 15 March 2020 stated that:

> *"Following discussions today with the Licenced Vintners Association (LVA) and the Vintners Federation of Ireland (VFI), the Government is now calling on all public houses and bars (including hotel bars) to close from this evening (Sunday 15 March) until at least 29 March.*
>
> *The LVA and VFI outlined the real difficulty in implementing the published Guidelines on Social Distancing in a public house setting, as pubs are specifically designed to promote social interaction in a situation where alcohol reduces personal inhibitions.*
>
> *For the same reason, the Government is also calling on all members of the public not to organise or participate in any parties in private houses or other venues which would put other peoples' health at risk.*
>
> *The Government, having consulted with the Chief Medical Officer, believes that this is an essential public health measure given the reports of reckless behaviour by some members of the public in certain pubs last night".*

It is understood that this Government direction for all public houses and bars nationwide to close from 15 March 2020, was made in response to the inevitable difficulties of ensuring that those patrons and staff in such premises at all times abide by the social distancing measures introduced by the Government in March 2020 due to the outbreak across Ireland, of the notifiable disease of COVID-19.

I am therefore satisfied that the interruption of or interference with the business caused by the presence of the notifiable disease and the consequent measures directed by the Government, in response, gave rise to the Complainant experiencing business interference losses.

Whilst the business interruption losses caused to the Complainant no doubt also arose as a result of measures taken by the public authority to limit the spread of COVID-19, the Government direction for the closure of all public houses, is not in itself enough to trigger cover for the Complainant, under the policy in question, unless he can show the presence of a notifiable disease within 25 miles of his premises.

In this regard, there is no documentation before me indicating that the Complainant, as part of his business interruption claim, provided the Provider with evidence of the occurrence of a case of cases of COVID-19 within 25 miles of his business premises in and around the time he closed his public house and restaurant on 15 March 2020.

Though it was a matter for the Complainant to establish that as a matter of fact there were active cases of COVID-19 within a 25 mile radius of his business premises on the date that it closed, I take the view that it would have been appropriate for the Loss Adjuster to have asked the Complainant during its interview with him if there were any such cases, and then to have invited him to submit proof of same. It did not however do so.

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I note in his letter of complaint to the Provider on **5 June 2020**, the Complainant stated:

> *" … There are documented cases of Covid-19 in University Hospital* [redacted] *University Hospital* [redacted] *is within 25 miles of my business premises".*

I take the view that it was thus made clear to the Provider from at least **5 June 2020** that the Complainant, in pursuing his business interruption claim, was seeking to rely upon the presence of active COVID-19 cases within a 25 mile radius of his business premises.

I note section 2 of the S.I. No. 120/2020 - Health Act 1947 (Affected Areas) Order 2020 (7 April 2020) stated:

> *"It is hereby declared that the State (being every area or region thereof) is an area where there is known or thought to be sustained human transmission of COVID-19".*

I am therefore of the opinion that the Provider ought to have admitted the Complainant's claim for business interruption losses from no later than 7 April 2020, or from any date during the period between 15 March 2020 (when he closed his business premises on foot of the government direction to do so) and 6 April 2020, in circumstances where the Complainant was able to furnish the Provider with proofs of the operation of the insured peril referred to at clause 3.3.4 c) of the policy, that is, *"any occurrence of a notifiable disease* [in this case, COVID-19] *within a radius of 25 (twenty five) miles of the premises"*, between 15 March and 6 April 2020, thereby triggering the cover prior to 7 April 2020.

In considering the present complaint, I have noted the High Court decision last year of Mr Justice McDonald in *Hyper Trust Limited v. FBD Insurance plc & Ors* [2021] IEHC 78 (the FBD Test Case), which considered a number of policy provisions similar to the one that is the subject of this complaint. I note the following concluding paragraphs of McDonald J.'s decision:

> *"275. … In my view, the relevant insured peril is not confined to the imposed closure of the insured premises. The relevant peril is the imposed closure following outbreaks of infectious or contagious disease (in this case Covid-19) on or within 25 miles of the premises. I am also of the view that cover is not lost where the closure is prompted by nationwide outbreaks of disease provided that there is an outbreak within the 25 mile radius and that outbreak is one of the causes of the closure.*
>
> *276. … it seems to me that the outbreaks which occurred within 25 miles of each of the plaintiffs' premises … were, in any event, a proximate cause of the imposed closure of public houses announced by the government on 15th March, 2020. The fact that outbreaks outside that 25 mile radius were also proximate causes of the government decision does not alter that conclusion. …."*

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I am cognisant of the provisions of the Financial Services and Pensions Ombudsman Act 2017, which prescribes at section 12(11) that:

> *"… the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form."*

I am conscious that in considering whether this complaint should be upheld, pursuant to the provisions of section 60(2) of the FSPO Act 2017, I should be mindful that those provisions are identical to the then equivalent provisions in the governing legislation of the Financial Services Ombudsman, which came under the scrutiny of Mr Justice Hogan (of the High Court at the time) in *Koczan v. FSO* [2010] IEHC 407. Hogan J., having referred to the powers given to the Financial Services Ombudsman, and in advance of quoting from those same provisions, observed:

> *"The Ombudsman's task, therefore, runs well beyond that of the resolution of contract disputes in the manner traditionally performed by the Courts. It is clear from the terms of s.57BK(4) that the Ombudsman must, utilising his or her specialist skill and expertise, resolve such complaints according to wider conceptions of* ex aequo et bono *which go beyond the traditional limitations of the law of contract. This is further reflected by the terms of s.57CI(2) …."*

I am conscious too of the Provider's regulatory obligation under the Central Bank of Ireland's Consumer Protection Code, to act honestly, fairly and professionally in the best interests of its customers in its dealings with them. I take the view that in this instance, the Provider did not act fairly in its dealings with the Complainant in the assessment of the claim for benefit payment, made by the Complainant under his insurance policy on 19 March 2020.

Accordingly, having considered the matter at length, and for the reasons outlined above, on the evidence before me, I consider it appropriate to uphold the complaint against the Provider, that it wrongly or unfairly declined to admit and pay the Complainant's claim for business interruption losses, incurred as a result of the temporary closure of his business on 15 March 2020 due to the outbreak of COVID-19.

In a matter such as this, I would usually indicate an intention to direct the Provider to rectify the conduct complained of by admitting the Complainant's claim for business interruption losses with effect from 15 March 2020, for assessment of the benefit payment to be made, in accordance with the terms of the policy.

I note however that the Provider advised this Office in its letter of **31 March 2021**, as follows:

> *"… in light of the concession…that coverage under the Infectious Disease Extension is triggered given the FBD Test Case judgment, such that a sub-limit of €9,000 is potentially available, that* [the Provider's] *loss adjuster sent the attached 15 March 2021 letter to the Complainant setting out* [the Provider's] *intended steps for adjusting the claim. That letter stated:*

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> *"… The Notifiable Disease Extension has an inner limit of 15% of the available sum insured. The policy sum insured in respect of business interruption is €60,000 and this produces a policy inner limit of €9,000.*
>
> *Based on our preliminary calculations we believe that* [the Complainant's] *losses will exceed the policy limit of €9,000.00 and accordingly we are now in a position to issue settlement proposals in the amount of €9,000.00.*
>
> *In addition to the claim offer as relayed, Insurers have confirmed that, in recognition of* [the Complainant] *having likely incurred costs and inconvenience in submitting and preparing their complaint to the FSPO, they are pleased to advise that they will be making a €750.00 redress payment to* [the Complainant] *in that regard"*.

Consequently, on 15 March 2021, almost one year after the Complainant's Representative first notified the Provider of the Complainant's claim, the Provider agreed to admit and pay the claim for business interruption losses in the amount of **€9,000**, this representing the maximum amount recoverable for any one claim made by the Complainant, under the business interruption infectious disease extension.

Nevertheless, I take the view that the Provider's decisions to decline the Complainant's claim in **May 2020** and to stand over that decision in **June 2020**, and to further maintain that position in **December 2020** in its response to the formal investigation of this complaint by this Office, was inappropriate and unfair and that it was unreasonable and unjust within the meaning of ***section 60(2)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, because the Provider's assessment of the policy criteria was incorrect, in the context of the particular claim which the Complainant sought to make. Accordingly, I consider it appropriate to direct the Provider to rectify the conduct complained of by admitting and paying the claim expeditiously, if it has not already done so.

I note that since the preliminary decision of this Office was issued, the Provider submitted in March 2022, that the more appropriate basis for the Decision of this Office, was considered by the Provider to be ***section 60(2)(e)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** i.e. that the declinature conduct complained of was based wholly or partly on a mistake of law or fact.

I also note that the Provider, in its letter of 15 March 2021, offered the Complainant a redress payment of €750 *"in recognition of* [his] *having likely incurred costs and inconvenience in submitting and preparing their complaint to the FSPO"*. Subsequently, in a letter from the provider's representative to the Complainant's legal representatives, this figure of €750 was increased to €2,650, which together with the maximum claim benefit of €9,000, led to an offer of €11,650, an offer which was repeated by the Provider in its communication to this Office in October 2021.

That higher compensatory measure offered in the autumn of 2021 was, in my opinion, not only one which was made late in the day, but also it still fell short of what was adequate.

/Cont'd…

In the circumstances and, for that reason, in addition to directing the Provider to rectify the conduct complained of by admitting and paying the claim expeditiously (if it has not already done so) I consider it appropriate to direct compensation, as outlined below, in order to compensate the Complainant for the tremendous inconvenience he encountered over a prolonged and very difficult period, as a result of the Provider's disappointing approach to this claim, and its unsatisfactory, unreasonable and unjust failure to recognise the claim as one which was potentially covered by the plain meaning of the policy wording, subject to the receipt of the required proof.

I note that the parties have been in direct communication concerning the fees of the Complainant's representative and it was to be hoped that they would be in a position to agree figures.

This Office was however advised in in December 2021, that it had not been possible for the parties to resolve the matter and the Complainant's representative asked that this Office:

> *"… proceed to adjudicate on (i) the amount of compensation to be paid to the Complainant by the Provider under the Policy of Insurance and (ii) the matter of costs."*

The details above outline the decision of this Office regarding the complaint made to this Office in 2020, regarding the Provider's decision at that time to decline the Complainant's claim. Insofar as the question has also recently been raised, regarding certain legal costs that the Complainant appears to have incurred, it should be noted that the FSPO has no role to play; the adjudication of legal costs is a matter for the Office of the Legal Costs Adjudicators of the High Court (formerly known as the Taxing Masters Office).

The details published on the website of this Office a guidance leaflet entitled "***How to make a complaint to the Financial Services and Pensions Ombudsman (FSPO)***", which make clear that a Complainant does not require professional representation when using the services of this Office, and that any costs incurred for retaining professional representation, are the Complainant's responsibility, as they are not recoverable through this Office. The full guidance document can be accessed at:

https://www.fspo.ie/documents/How_to_make_a_complaint_to_the_FSPO_leaflet.pdf

Although this issue as to any legal costs incurred by the Complainant, falls outside the jurisdiction of this Office, I note that the Provider has indicated a willingness to engage with the Complainant's representative regarding such costs, and since the preliminary decision of this Office was issued on 22 February 2022, it seems that the Provider has agreed to discharge legal costs of €12,500, exclusive of VAT, to the Complainant's legal representatives.

Insofar as the substantive complaint is concerned however, for the reasons outlined in detail above, I am satisfied that this complaint should be upheld.

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Conclusion

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

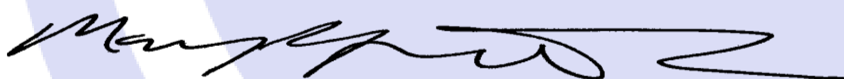
- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by expediting the payment of the Complainant's claim (if it has not done so already) which the Provider has, since March 2021, accepted to be in the amount of the policy inner limit of **€9,000**.

- I also direct the Provider to make a compensatory payment to the Complainant in the sum of **€3,000**, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

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

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

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)

5 April 2022

PUBLICATION

Complaints about the conduct of financial service providers

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—

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(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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.