Decision Ref:	2022-0221
Sector:	Insurance
Product / Service:	Retail
Conduct(s) complained of:	Rejection of claim Failure to provide product/service information Failure to process instructions
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a sole trader trading as a coffee shop and sandwich bar, held a 'Small Business Insurance – Shop Policy' with the Provider. The complaint concerns a claim for business interruption losses arising from coronavirus (COVID-19).

The Complainant's Case

In **April 2020**, the Complainant made a claim under the '**Murder Suicide or Disease'** extension of 'Section 4(a) – Business Interruption' of her 'Small Business Insurance – Shop Policy' for business interruption losses arising from COVID-19. This claim was later admitted and settled by the Provider.

By email dated **22 October 2020**, the Complainant's Broker notified the Provider of a further claim for business interruption losses, as follows:

> *"We wish to put you on notice of a BI Claim. Due to Covid-19 restrictions Insured only able to offer a Take Away Option to customers since the 1/10/2020 and this is going to continue for a further 6 weeks assuming that the Take Away Option will sustain some income.*
>
> *Income is looking to be down by 80 to 90% for the period referred to above and we wish to register a BI claim."*

Following its assessment, the Provider wrote to the Complainant on **17 November 2020**, to advise that it was declining the claim, as follows:

> *"We have reviewed your policy and note there has been a previous business interruption claim relating to the Covid-19 Pandemic. That claim covered losses for a three-month period from 16/03/2020.* [The Provider] *paid that claim under the Murder Suicide and Disease extension of your policy. Under that clause the maximum cover is for three months business interruption during the indemnity period of the policy. We have copied in the relevant section of your policy below, and we would draw your particular attention to the final paragraph which we have highlighted.*
>
> *In these circumstances the settlement of the earlier claim exhausted the full benefit to which you are entitled under the Murder Suicide and Disease extension of your policy. Accordingly,* [the Provider] *will not be in a position to deal with this claim.* […]
>
> ***Section 4(a) - Business Interruption***
>
> *F Extensions of Cover*
>
> ***1 Murder Suicide or Disease***
>
> […]
>
> *The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the Business shall be affected in consequence of the Damage"*

By letter dated **26 November 2020**, the Complainant's Loss Assessor wrote to the Provider disputing its entitlement to decline the Complainant's claim, as follows:

> *"I must advise that I would dispute your grounds for declining admission of this claim. The claim is a distinct and clearly separate claim from the previous one. You appear to be trying to extend the indemnity period from the previous claim, albeit this is patently not the case. There is nothing in the Policy wording that limits cover to only "one" claim per period of cover, under Section 4(a). F Extensions of Cover.*
>
> […] *Please note that, where there is any ambiguity in policy wording, the Insured is entitled to the benefit of any doubt. However, in this instance, I cannot even see that there is any ambiguity!"*

/Cont'd…

Following an internal review, by letter dated **4 January 2021**, the Provider advised the Complainant that it was upholding its decision to decline the claim, as follows:

> *"We note that in this claim you seek cover under the Murder Suicide and Disease extension of your policy in respect of losses stated to arise from 01/10/2020.*
>
> *In accordance with our internal procedures this letter sets out the results of our internal review and constitutes a final response by us to your complaint/request to review your claim.*
>
> *We have reviewed your policy and note there has been a previous business interruption claim relating to the Covid-19 Pandemic. That claim covered losses for a three-month period from 16/03/2020* [the Provider] *paid that claim under the Murder Suicide and Disease (MSD) extension of your policy.*
>
> *Cover under the MSD clause is triggered, among other things, following "any human infections disease". The occurrence of Covid-19 was the trigger for your previous claim. The policy is not triggered for a second time by the same occurrence of disease. New or more stringent lockdown measures do not constitute an insured peril.*
>
> *Under the MSD clause the maximum cover is for three months business interruption during the indemnity period of the policy. We have copied in the relevant section of your policy below, and we would draw your attention to the final paragraph which we have highlighted.*
>
> *In these circumstances the settlement of the earlier claim exhausted the full benefit to which you are entitled under the Murder Suicide and Disease extension of your policy.*
>
> *Accordingly,* [the Provider] *will not be in a position to deal with this claim and we are proceeding to close our file.*
>
> *We understand that this decision will come as a disappointment and we assure you it is not a decision we have taken lightly. We hope this letter helps you to understand why the policy does not respond to your claim."*

The Complainant considers that her more recent claim for business interruption losses from October 2020, due to the outbreak of COVID-19 is covered by the terms and conditions of her business insurance policy. In this regard, the Complainant sets out her complaint in her Complaint Form (received on **22 January 2021**), as follows:

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> *"Claim lodged for business interruption on 2nd lock down. Claim declined by* [the Provider] *as they had paid out on 1st lockdown* […]
>
> *I contend that nothing in policy wording precludes admissibility on a second claim."*

As a result, the Complainant seeks for the Provider to *"accept liability for this claim."*

Subsequent to this, the Complainant's Loss Assessor emailed this Office on **24 February 2021**, with a further submission, as follows:

> *"*[The Provider's] *policy extension, 4(a) Extension 1 a) is a "composite" one comprising as follows –*
> *1. any human infectious or human contagious disease*
> *2. an outbreak of which the local authority has stipulated shall be notified to them*
> *3. manifested by any person within a 40 kilometres radius of the shop.*
> *The indemnity period begins with the occurrence of the loss and ending not less than three months thereafter.*
>
> *I refer to the judgement of Mr. Justice Denis McDonald in the recent* [High Court] *case and specifically Sections 136 & 137 (copy attached) wherein he states:*
> *"Extension (1), … must be read as a whole in order to understand the perils covered by its terms."*
> *"when the extensions are read as a whole, it seems that the entire text of the extension constitutes the relevant peril"*
>
> *Elsewhere, he agrees that every single manifestation within 40 kilometres triggers cover as long as the other conditions are met.*
> *In view of this, I would contend that* [the Provider] *are not entitled to "pick and mix" the conditions in the extension, especially as their wording makes no reference to excluding recurring diseases."*

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The Provider's Case

The Provider says the present claim is made under the 'Murder Suicide or Disease' extension ("MSDE") of the Complainant's policy for business interruption arising from COVID-19 related "lockdown" measures imposed and affecting the Complainant's business from **1 October 2020**.

The Provider says this claim must be considered in the context of the claim already made under the MSDE clause and paid by the Provider, for losses incurred for a three-month period commencing on **16 March 2020**.

The Provider says that the MSDE clause provides, as follows:

> *"F Extensions of Cover*
> *1 Murder Suicide or Disease*
> *The Company shall indemnify the Insured in respect of Damage as defined in this Section resulting from interruption of or interference with the Business during the Indemnity Period following*
>
> *a)* *any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the Shop Office or Surgery or within a 40 kilometres radius of it* […]
>
> *The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the Business shall be affected in consequence of the Damage."*

The Provider accepts that COVID-19 is a disease within the definition of sub-clause a). The Provider also accepts that by the date of loss of the **March 2020** claim, such disease had manifested within 40 kilometres of the insured premises. The Provider further says that this clause contains an internal limit of three months. The Provider says it paid the claim made in **March 2020** for losses for a three-month period and the Complainant accepted such payment in satisfaction of that claim.

For the Complainant to succeed in the present claim, the Provider says she must demonstrate that the insured peril has occurred. For reasons set out below, the Provider believes it is clear that the insured peril is COVID-19, manifested by any person at the premises or within 40 kilometres of the premises. The Provider says there is only one trigger for cover. The Provider says the trigger occurred in **March 2020**, leading to the payment of the claim made at that time.

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The Provider submits that a second trigger did not occur and accordingly, there is no basis for the second claim now, made for "lockdown" measures taken in **October 2020**.

The Provider says the FCA Test Case in the UK considered two clauses very similar to certain Provider wordings, namely the "disease" clauses.

The Provider refers to the following passage from the English Divisional Court at paragraph 225:

> *"We understood it to be common ground, however, and in any event appears clear, that the phrase "an outbreak of which the local authority has stipulated shall be notified to them" simply identifies the relevant human infectious or contagious diseases as being notifiable diseases, including those notifiable under the 2010 Regulations. AIDS and AIDS-related conditions are not relevant. Accordingly, for the purposes of simplicity, Clause 7.3.9 can be shortened as follows: "interruption or interference with the business arising from: (a) any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it …". That is the relevant insured peril."*

The Provider says this was the subject of an appeal to the UK Supreme Court, which agreed with this finding, and confirmed at paragraph 84 of its judgment that:

> *"rather than using the term "notifiable disease" and providing a separate definition of that term – to incorporate the definition into the body of the clause itself".*

the Provider says, thus, that the reference in the Complainant's policy to "*an outbreak of which the local authority has stipulated shall be notified to them*" does not form part of the insured peril, but is rather a description of the type of infectious or contagious disease which would trigger the insured peril. The "outbreak" is not a separate element of the insured peril.

The Provider says the trigger for the insured peril is therefore, COVID-19 manifested by any person whilst at the premises or within a 40-kilometre radius of it. In the present case, the Provider says the insured peril is COVID-19 being manifested within the geographical radius and that occurred in **March 2020**. The Provider says that this is when the outbreak began, and the pandemic has persisted since that date and there is no new occurrence triggering a further claim. The Provider says the purpose of the three-month limit is to limit the insurer's liability where, as it the case with the COVID-19 pandemic, there is an outbreak of disease which continues for a longer period. The Provider says the clause must be read as a whole and that the proposition contended for by the Complainant would render the three-month limitation meaningless.

/Cont'd…

The Provider says the Complainant cites "lockdown" measures as the basis for her claim and that it is evident from the policy wording that new or additional measures or restrictions (which do not themselves constitute an insured peril) made in response to the same COVID-19 disease, do not trigger any claim.

In respect of the Complainant's reference to paragraphs 136 and 137 of the Irish High Court case issued by Mr. Justice McDonald on **5 February 2021**, the Provider says the insured peril in its policy wording is very different from the policy wording in the High Court case, as the Provider's wording does not include any reference to "imposed closure" or restrictions.

The Provider says it is correct to say that there are no words excluding a "second" claim, but that is neither necessary nor relevant. The Provider says that the issue is whether the "second" claim now made, is covered under the policy wording. For the reasons set out above, the Provider says the claim is not covered and it is never necessary in any insurance policy to exclude matters which are not within the scope of cover in the first place. What the Complainant is claiming for, the Provider says (in what she describes as her second claim) are in fact losses which flow from the same insured peril which grounded her claim in **March 2020**. That claim, the Provider says, has been paid for the full three-month period provided for in the MSDE clause. Had there been no three-month limitation on cover, the losses would be covered as having flowed from the occurrence of the insured peril in **March 2020**.

The Provider says that, in principle, the MSDE clause of the Complainant's policy would allow for more than one claim during the indemnity period, subject to the three-month limitation, but each such claim would have to arise from the occurrence of a separate and distinct insured peril, but in this instance only one insured peril has occurred.

The Provider says it is a principle of insurance that there must be an occurrence of a peril insured under a policy, before a claim may validly be made. It is also a well-established principle that a policyholder may not claim twice for the same occurrence of that peril. The Provider says COVID-19 is the peril in respect of which the Complainant claims, and there has been only one occurrence of the COVID-19 pandemic. The Provider says this gave rise to a valid claim in **March 2020** which was admitted and paid.

The Provider says the limitation period of three months is designed to protect the insurer against an outbreak of disease which continues for a longer period, as has occurred with COVID-19 and any attempt to interpret the clause to permit serial claims for COVID-19 is wholly inconsistent with the clause in its plain ordinary meaning.

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The Provider says the MSDE clause is a pure disease clause, not an imposed closure or denial of access or similar hybrid clause. There is no reference in the MSDE clause to lockdowns, restrictions or other government-imposed measures. Therefore, the Provider says lockdown measures do not constitute any element of the insured peril in this wording, and do not constitute a trigger for cover.

The Provider says the **March 2020** claim exhausted all benefit to which the Complainant was entitled under the MSDE clause in respect of COVID-19. The insured peril is COVID-19 being manifested within the geographical radius, which occurred in **March 2020**.

The Provider says the pandemic has persisted since that date; there has been no new trigger for cover under the MSDE clause.

In respect of the 12 month indemnity period for business interruption claims, set out in the Complainant's policy schedule, the Provider says although there is a general indemnity period of 12 months for business interruption claims (for example, for business interruption claims following damage to property under section A), there is a specific sub-limit indemnity period applicable to the Murder, Suicide or Disease extension which provides that insurance under that extension shall be a maximum of three months. That is, the MSDE clause has a specific time related limitation of cover, which is a common feature of insurance policies. The Provider says that, as a result, there is no cover for the Complainant's claim under the business interruption cover in section A.

The Provider says that the matters of interpretation raised in correspondence with the Complainant were in the context of the claims made in respect of COVID-19 and not otherwise. The perils insured under each sub-clause of the MSDE are different. Were there to be more than one insured peril occurring during the same period of insurance, the Provider says, then each could give rise to a separate claim, subject to the same three month limitation. If, for example, in **October 2020**, a murder had occurred at the premises which gave rise to losses which subsisted for a long period of time, the Provider says the policy would cover the loss but only for the first three months after the murder.

The Provider says it has dealt fairly with the Complainant and that her initial claim for losses commencing in **March 2020** was dealt with efficiently and fairly. With regard to the claim which is the subject of this complaint, the Provider says that, for the reasons set out above, the decision to decline is not only correct, but it is also fair and reasonable. The Provider says it is fully aware of the difficulties faced by policyholders and it has engaged with the Complainant and her representatives to explain as clearly as it can, the reasons why the claim has been correctly declined. The Provider says the terms of the policy are very clear, as is the limitation on the extent of the cover provided.

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The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined the Complainant's **October 2020** claim for business interruption losses, 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 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 **27 April 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

The First Claim

I note that by email dated **27 April 2020**, the Complainant's Broker notified the Provider of a claim under the Complainant's policy for business interruption losses due to the outbreak of COVID-19. By letter dated **27 April 2020**, the Provider wrote to the Complainant to acknowledge her claim. In this letter, the 'Loss Date' was stated as **12 March 2020**. Further to this, a Provider 'Loss Adjustor Instruction' form records the 'Loss Date' as **12 March 2020**, the 'Policy Inception Date' as **16 March 2020** and the 'Cover Effective From' date as **16 March 2020**.

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I note that subsequently, the Provider's Loss Adjusters prepared a Preliminary Report dated **18 May 2020** in respect of the Complainant's claim. In this report, the '*Time, Day and Date of Loss*' is stated on the first page as Monday **16 March 2020**. The report continues, as follows:

> *"**Circumstances of Claim:***
>
> *We were advised the insured closed their premises on 16 March 2020, primarily due to concerns for customers and staff and government restrictions.*
>
> *Staff were consequently immediately let go at that stage and the business has currently remained closed with no turnover.*
>
> ***Supposed Cause:***
>
> *The World Health Organisation announced that the COVID-19 virus was a worldwide pandemic on 11 March 2020. The government sought to restrict mass gatherings on 13 March 2020 and subsequently pubs were closed on the evening of 15 March 2020.*
>
> *A number of trade bodies called for a directive from government in respect of their own specific business the week commencing 16 March 2020 and a social shutdown and closure of non-essential businesses was ordered by the government on 25 March 2020.*
>
> *The insured chose to close their business on 14 March 2020 in advance of any request from the Government to close non-essential businesses.*
>
> ***Interruption Features:***
>
> ***<u>Business interruption Sum Insured: €750,000</u>***
>
> *The insured has confirmed that no member of staff or customer has tested positive for Covid-19, to their knowledge. In addition they are not aware of any member of the public affected although there are 127+ reported cases of individuals within the County* […] *area as reported by the HSE. The insured would not be in a position however to identify them and to date they can only provide media reports in this regard.*
>
> *The insured took the decision to close the premises due to their own concerns and there is currently no turnover.* […].

/Cont'd…

Policy Liability:

[…]

<u>Policy Terms & Conditions</u>

[…]

The insured chose to close their business largely due to safety concerns for staff and customers on the 16th March 2020. The social shutdown of non-essential business did not take place until 25 March 2020. The Covid-19 virus was however deemed a pandemic on 11 March 2020 and consequently was a notifiable disease from that date forward. […].*"*

In a Final Payment Report prepared by the Provider's Loss Adjusters dated **16 October 2020**, the 'Date of Loss' is stated as Thursday **12 March 2020**. By letter dated **16 October 2020**, the Provider wrote to the Complainant to advise that her claim had now been settled in the amount of **€6,405.00**. I note that on this letter the 'Loss Date' was also stated as Thursday **12 March 2020**.

The Second Claim

The Complainant's Broker notified the Provider of a claim for business interruption losses due to the COVID-19 by email dated **22 October 2020**. The Provider wrote to the Complainant on **17 November 2020**, to advise that it was not in a position to deal with her claim, because the policy benefit provided by the MSD Extension, had been exhausted by reason of the previous claim.

The Complainant's Loss Assessor wrote to the Provider on **26 November 2020** disputing its decision to decline the Complainant's claim, arguing that there was nothing in the Complainant's policy limiting cover under the MSD Extension to one claim for the period of cover. In a letter dated **4 January 2021**, the Provider wrote to the Complainant, maintaining its position regarding the declinature of her claim, in relevant part, as follows:

"The policy is not triggered for a second time by the same occurrence of disease. […] *Under the MSD clause the maximum cover is for three months business interruption during the indemnity period of the policy.* […] *In these circumstances the settlement of the earlier claim exhausted the full benefit to which you are entitled under the Murder Suicide and Disease extension of your policy."*

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The Policy Schedules

The Complainant's policy schedule in respect of her **2019** policy renewal shows that she held a '**Small Business Insurance – Shop Policy'** covering the period **16 March 2019** to Sunday **15 March 2020**.

The Complainant's policy schedule in respect of her **2020** policy renewal shows that she held a '**Small Business Insurance – Shop Policy'** covering the period Monday **16 March 2020** to **15 March 2021**. In the context of the present complaint, I note accordingly that the Complainant was covered in respect of business interruption, with a sum insured of **€750,000.00** for a 12-month indemnity period during the dates specified.

The Policy Documents

The Provider has supplied copies of two Small Business Insurance policy documents dated **October 2016** and **May 2019**. In terms of the passages cited below, I note that the wording contained in each policy document is the same.

The insuring clause on page 4 of the policy documents states as follows:

> *"The Company in consideration of the payment of the premium shall provide insurance against loss destruction damage or liability occurring at any time during the period of insurance (or any subsequent period for which the Company accepts a renewal premium) in accordance with the Sections of the Policy shown as operative in the Schedule subject to the exclusions provisions and conditions of the Policy."*

In the context of the above clause, the term '**Period of Insurance'** is defined on page 8 of the policy documents as: *"As specified in the Schedule"*.

Section 4(a), 'Business Interruption', at page 25 of the policy documents, sets out the cover provided under the policy in respect of the business interruption. A number of 'Extensions of Cover' are set out at Part F on page 26 of the policy documents. In the context of this complaint, Section A of the MSD Extension, provides the following cover:

> ***"1 Murder Suicide or Disease***
> *The Company shall indemnify the Insured in respect of Damage as defined in this Section resulting from interruption of or interference with the Business during the Indemnity Period following*

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> *a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the Shop Office or Surgery or within a 40 kilometres radius of it*
>
> […]
>
> *The insurance by the Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the Business shall be affected in consequence of the Damage"*

The term 'Indemnity Period' under Section 4(a) "Business Interruption", is defined on page 25 of the policy documents, as follows:

> *"**Indemnity Period***
> *The period beginning with the happening of the Damage and ending not later than the number of months shown in the Schedule during which the results of the Business are affected as a result of the Damage"*

Analysis

In determining the cover provided by Section "a)" of the MSD Extension of the Complainant's policy specified on Page 26 under "**F**" of **Section 4(a) Business Interruption**", I note that an essentially identical provision came for consideration before the England and Wales High Court in *The Financial Conduct Authority v. Arch Insurance (UK) Limited & Ors* [2020] EWHC 2448 (Comm), with judgment delivered in **September 2020** ("the Test Case"). For the purposes of clarity, the relevant provision, Clause 7.3.9(a), was cited by the Court at paragraph 204 of the judgment, as follows:

> *"**Murder, suicide or disease***
>
> *interruption of or interference with the business arising from:*
>
> *a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **premises** or within a twenty five (25) mile radius of it;"*

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In identifying the insured peril, the Court stated, as paragraph 225, as follows:

> *"225. We turn therefore to the main issues of construction of Clause 7.3.9. It is a clause which is expressed in a somewhat convoluted way. We understood it to be common ground, however, and in any event appears clear, that the phrase "an outbreak of which the local authority has stipulated shall be notified to them" simply identifies the relevant human infectious or contagious diseases as being notifiable diseases, including those notifiable under the 2010 Regulations. AIDS and AIDS-related conditions are not relevant. Accordingly, for the purposes of simplicity, Clause 7.3.9 can be shortened as follows: "interruption or interference with the business arising from: (a) any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it …". That is the relevant insured peril."*

The decision in the Test Case was appealed to the UK Supreme Court (*The Financial Conduct Authority v. Arch Insurance (UK) Limited & Ors* [2021] UKSC 1), with judgment delivered on **15 January 2021**, ("the Appeal Case").

In respect of Clause 7.3.9(a), the Supreme Court stated, as follows:

> *"84. It can be seen that what has been done in drafting sub-clause (a) of this wording is - rather than using the term "notifiable disease" and providing a separate definition of that term - to incorporate the definition into the body of the clause itself.* […]
>
> *85. The wording* […] *is something of an outlier in that, unlike the clauses we have considered so far, the clause has as its subject a disease, rather than an occurrence of illness sustained by a person resulting from a disease.* […]*."*

Having considered the matter at length, I accept that, on a proper construction of Section a of the MSD Extension of the Complainant's policy, the insured peril does not necessarily include the following passage:

> *"an outbreak of which the local authority has stipulated shall be notified to them"*

It is my opinion that this aspect of Section a is for the purpose of identifying or classifying the relevant disease as a notifiable disease and imposes a notifiable disease requirement rather than imposing a requirement for there to be an outbreak of a notifiable disease. I am inclined to the position that, as opposed to expressly including the term 'notifiable disease' and providing a separate definition of this term, Section a incorporates a definition of 'notifiable disease' by means of the above passage.

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In these circumstances, I am satisfied that the insured peril under Section a is:

> *"interruption of or interference with the Business during the Indemnity Period following any* [notifiable] *human infectious or human contagious disease* […] *manifested by any person whilst in the Shop Office or Surgery or within a 40 kilometres radius of it"*
>
> ("the Insured Peril")

For the purposes of the Insured Peril, I note that it is not disputed that COVID-19 is a notifiable human infectious or human contagious disease.

In terms of the requirement for the notifiable disease to have been *"manifested"* by a person whilst in the insured premises or within a 40 kilometre radius of it, I note in the judgment of McDonald J. in the Irish High Court case of *Brushfield Limited (T/A The Clarence Hotel) v Arachas Corporate Brokers Limited & Or* [2021] IEHC 263 (dated **19 April 2021**), McDonald J. stated, as follows:

> *"145.* […] *The fact that no such case* [of acute encephalitis] *has been reported is particularly important in light of the language of para. 1 of the MSDE clause which requires that the condition (in this case acute encephalitis) be "**manifested** by any person whilst at the premises or within a 25 mile radius of it" (emphasis added). That word "manifested" is important. The Shorter Oxford Dictionary, Vol. 1, at p. 1691 gives the following relevant definition of the verb manifest: "Make evident to the eye …; show plainly, reveal, display … by action …, evince; be evidence of…". Those dictionary definitions are consistent with the way in which the word "manifested" would ordinarily be understood. There is nothing in the language of para. 1 of the MSDE clause or the policy as a whole that suggests that "manifested" should be given some different meaning. Nor is there anything in the relevant context which would suggest that a different meaning should be given to the word.* […]*."*

In the Test Case, the UK High Court interpreted the term *"manifested"*, as follows:

> *"224.* […] *Clearly someone who is displaying symptoms of a disease can be said to "manifest" it. We consider that it would also be the case that a person "manifested" the disease if, though superficially asymptomatic, he or she was diagnosed with the disease, because the disease would have "manifested" itself to the diagnoser. We do not consider that it is possible to speak of someone who is asymptomatic and has not been diagnosed as having the disease as having "manifested" it."*

In the Appeal Case, the UK Supreme Court noted, at paragraph 84, that *"*[t]*hat aspect of the court's interpretation is not disputed."*

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Therefore, I am satisfied that Section "a)" of the MSD Extension operates to provide cover when a notifiable disease (such as COVID-19) is manifested (with manifested being interpreted in a manner consistent with the above judgments) by any person while in the Complainant's premises or within 40 kilometres of the premises.

According to the policy, once the Insured Peril is complete, the Provider will indemnify the Complainant in respect of damage resulting from interruption of or interference with her business during the *"Indemnity Period"*. As can be seen, the term 'Indemnity Period' is defined at page 24 of the business interruption section. This is described as the period beginning on the happening of any damage and ending not later than the number of months shown in the policy schedule – in this instance, 12 months. However, the MSD Extension incorporates its own limitation on cover, in that the insurance provided by this extension is stated to apply for no more than a three-month period beginning with the occurrence of the loss. In the case of both of these provisions, there is a requirement for the results of the business to be affected by the damage, which I understand to be the manifested notifiable disease – in this instance, COVID-19.

Having considered the cover provided by the MSD Extension, I am of the opinion that the Insured Peril operates on an individual notifiable disease basis, in that the Insured Peril is complete, and cover is triggered, in respect of any notifiable disease, once that particular notifiable disease has manifested in the manner prescribed by Section a during the period of insurance, subject to any limitations on cover.

Further to this, if the Insured Peril arises during a particular period of insurance, I do not accept that Section a operates to provide cover when the same notifiable disease is manifested on several or subsequent occasions, or in respect of several or subsequent occurrences or outbreaks of the same notifiable disease, during that particular period of insurance. I accept nevertheless, that Section a would appear to provide cover in respect of more than one claim during the same period of insurance, as long as each claim arises from a separate and distinct notifiable disease, or other MSD trigger.

On considering the parameters of that cover under the MSD Extension, it is my opinion that the indemnity available to the Complainant is for the loss incurred as a result of COVID-19 for a maximum of a three month period beginning on the date when the loss first occurred during which the results of the Complainant's business are affected, to a maximum amount of €750,000.00, being the sum insured in respect of business interruption (as provided in the policy schedule). I believe this to be the extent of the cover available under the MSD Extension and I do not accept that during the policy period, this extension provides cover for subsequent claims, for the same disease outbreak, once the three-month cover provided by the MSD Extension has been exhausted.

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In the context of the present complaint, COVID-19 is the notifiable disease said to have manifested within the meaning of the MSD Extension. As outlined above, where such a claim is admitted under the MSD Extension for COVID-19, I do not accept that the Provider is required to admit a further claim during the same period of insurance, for interruption/interference arising from the same notifiable disease, being COVID-19, once the cover provided by this extension has been exhausted.

However, I note that the insuring clause in each of the two policy documents states that the Provider shall provide insurance against loss and damage for example, occurring at any time during the period of insurance.

As a result, I am satisfied that because the MSD Extension was operative during both the 2019/2020 and 2020/2021 periods of insurance, the Complainant was entitled to make a claim pursuant to the MSD Extension for losses arising from COVID-19 in respect of each separate period of insurance once the relevant policy provisions were satisfied.

For that reason, and in circumstances where there was an absence of clarity of the date of loss, I wrote to the Provider on **5 January 2022** pointing out that in certain documents put before this Office in evidence, the date of loss had been identified as Thursday 12 March 2020, whereas in other documentation, the date of loss was identified as Monday 16 March 2020. I advised the Provider that the precise date of the Complainant's loss in March 2020 was of particular significance in the context of this complaint, because of the specific periods of insurance cover, made available by the policy terms agreed, for each of the 2019/2020 and 2020/2021 periods of insurances. I pointed out to the Provider that:-

> *"In the Preliminary Report prepared by the Loss Adjusters, the date the insured premises closed is identified as 14 March 2020, but also 16 March 2020. In addition, the Provider's "Loss Adjuster Instruction" form records the "Loss Date" as 12 March 2020, the "Policy Inception Date" as 16 March 2020 and the "Cover Effective From" date as 16 March 2020.*
>
> *It is noted by this Office that 12 March 2020 falls within the 2019/2020 period of insurance. In those circumstances, it is unclear as to why the Provider or its Loss Adjusters deem cover to be effective from 16 March 2020, being relevant only to the 2020/2021 period of insurance, rather than also being relevant to the 2019/2020 period of insurance."*

Accordingly, I asked the Provider to clarify whether it accepted that the claim was admitted and assessed incorrectly under the 2020/2021 policy of insurance, whereas it ought to have been assessed under the 2019/2020 policy and, if the Provider accepted such an error on its part, I asked whether it also accepted in such circumstances that the Complainant's October 2020 claim, had been wrongly declined.

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The Provider responded on 21 January 2022 explaining that the Complainant's original notification of loss in March 2020:

> *"… when initially made did not include any reference to when the business interruption losses had occurred and therefore, in the interests of facilitating the early registration and deployment of a Loss Adjuster to validate the claim, [the Provider] initially recorded 12 March 2020 as the date of loss, until such time as the Complainant provided further details in relation to same"*
>
> [this was because 12 March 2020 was the date on which the Government made an announcement that the COVID-19 outbreak was being treated as a pandemic.]

The Provider also advised that, following the provision of additional information by the Complainant through her Public Loss Assessor, the actual date of closure of the Complainant's premises and the date of loss was confirmed by the Provider's Loss Adjuster as **Monday 16 March 2020**, being a date falling within the 2020/2021 policy of insurance.

Insofar as the Loss Adjuster had also identified 14 March 2020 as the date on which the premises was closed, the Provider pointed out that the Complainant's premises was in fact open for trading on Saturday 14 March 2020, and because the Complainant's premises does not open on Sundays, it was closed the following day Sunday 15 March. The Provider pointed out that the Complainant's premises did not open on Monday 16 March and accordingly it was clear that the date of loss arose on 16 March 2020, and the correct policy under which to consider cover was the 2020/2021 policy of insurance.

I note that since the preliminary decision was issued to the parties, the Complainant's representative has submitted that it is relevant that the Complainant decided on Saturday 14 March, that the premises would be closed and notified her staff that day of her decision. He advised that:

> *"I attach email dated 09/05/2222 from the insured confirming she closed the premises on 14/03/2020, giving the staff notice thereof, which must surely be the date of loss. The interruption period would be measured from 16/03/2020"*

I note indeed the Complainant's email which confirms that:

> *"All staff signed on pup Monday, as it was their first day out of work"*

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In my opinion, it is not the date when the Complainant made the decision to close which is relevant, but rather it is the date when the business interruption took effect, thereby causing the Complainant loss. The Complainant has confirmed that the loss took effect on **Monday 16 March 2020**, which was the date when her staff were first out of work; this is the date when the loss began.

In those circumstances, I am satisfied to accept that the Complainant's loss on foot of which the first claim was pursued, arose from losses which commenced on 16 March 2020. Accordingly, in my opinion the Complainant's claim fell to be assessed under the 2020/2021 period of insurance and the cover in place during this period of insurance. Therefore, following on from the above discussion of the Insured Peril, and the cover provided by the Complainant's policy, I accept that the Provider was entitled to decline the Complainant's **October 2020** claim.

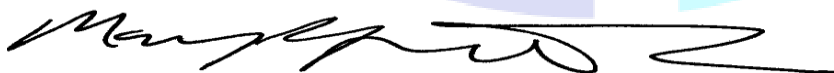
I do not accept the Complainant's representative's contention relying on the comparison of two different murders during a 12-month period of insurance. The claim which arose in this matter was not triggered by a murder. In this instance, the Complainant's business interruption losses were covered for a period of limited to three months, and she received an indemnity and payment from the Provider in respect of those losses from March 2020, such that this element of cover was thereby exhausted for the 12-month indemnity period in question, when she was obliged to close her business again in October 2020.

Accordingly, for the reasons outlined above, and in the particular circumstances which arose, I am satisfied that there was no wrongdoing on the part of the Provider and there is no reasonable basis upon which to uphold this complaint.

Conclusion

My Decision, pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

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



MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

29 June 2022

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PUBLICATION

<u>Complaints about the conduct of financial service providers</u>

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.

<u>Complaints about the conduct of pension providers</u>

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.