



<u>Decision Ref:</u>	2022-0238
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Rental Property
<u>Conduct(s) complained of:</u>	Rejection of claim Delayed or inadequate communication Poor wording/ambiguity of policy
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is a landlord, and he held a **Commercial Property Owners Policy** with the Provider. The policy period in which this complaint falls, is from **27 January 2020** to **26 January 2021**. This complaint concerns the Provider's rejection of the Complainant's claim for loss of rental income as a result of his tenants' temporary closure due to measures imposed by the Government to curb the spread of the coronavirus (COVID-19).

The Complainant's Case

The Complainant submitted a claim to the Provider in **February 2021** for the loss of rental income as his tenants, trading as hairdressers, were unable to pay him rent between **March 2020** and **June 2020**, due to the closure of the tenants' business during that period, as a result of measures imposed by the Government to help curb the spread of COVID-19.

In making his claim, the Complainant notes that under Section 2, 'Loss of Rent', of the applicable **Commercial Property Owners Insurance Policy Document**, the 'Section Definitions' includes:

"3. NOTIFIABLE DISEASE

Illness sustained by any person resulting from:

(a) food or drink poisoning

(b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated must be notified to them.

The definition of DAMAGE is extended to include for this Section 2 only:

(a) (i) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES ...”

Following its assessment, the Provider wrote to the Complainant on **19 March 2021** to advise that it was declining his claim, as follows:

“The applicable extension in this policy states:

The definition of DAMAGE is extended to include ...

an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES.

We have carefully reviewed the information provided. Unfortunately, we cannot see any evidence of an outbreak of Covid-19 at the Premises. Given this, we are sorry to advise that the policy does not respond on this occasion.

If you feel that we have misunderstood the information provided or that the Policyholder has additional contemporaneous evidence (for example test results or relevant sickness records [redacted for data protection]) of any person(s) who can be shown to have had Covid-19 and were at the Premises at the relevant time, please let us know ...”

The Complainant, in his email to the Provider on **8 April 2021**, complained about its decision to decline indemnity, as follows:

“I say as a Landlord, having a contract with your offices, my policy had been triggered because DAMAGE has occurred (Section 2) LOSS OF RENT as defined under Damage on the policy as result of “any human infectious or human contagious disease (clause 3b), which Covid is precisely described as.

Significantly, there is no mention of disease having to occur at the premises on the policy clause 3b. [An] outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES comes under the extension on the policy.

The extension reads, “to include” an outbreak at premises this different than what is now been asserted by [the Provider] whereby, the disease has to have actually occurred at the premises for the policy to respond.

Reference to the tenants, [a different insurer’s] policys, government instructions, social distancing etc, I see as not relevant as they not mention on the policy.

[The Provider] are asserting the text on the policy does not create any liability for insurer, however it was still necessary to redraft 2021 policy with exclusion on diseases. Details of Section 2 on loss of rent are omitted.

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I have submitted evidence of the DAMAGE in accordance with the Section conditions and believe but for Covid the damage would not have occurred.

I hope this email clarifies what are the material facts”.

Following its complaint review, the Provider wrote to the Complainant on **13 May 2021** to advise that it was standing over its decision to decline his claim, as follows:

“We have now completed a thorough review of all aspects of this case and the most recent matters raised by you as per your correspondence dated 23rd April 2021. We confirm once again details of the cover provided under the policy as per the policy wording:

WHAT IS INSURED

1. WE will pay for loss of RENT occurring during the INDEMNITY PERIOD resulting from DAMAGE by an insured cause under Section 1 to any of the following:

- (a) the CONTENTS or glass insured under this section*
- (b) the BUILDINGS of the PREMISES shown in the Schedule*
- (c) property in the vicinity of the PREMISES which prevents or hinders the use of the PREMISES or access to it*

DAMAGE

The word DAMAGE shall mean loss or damage or destruction

The loss has not occurred due to any of the above. We further reviewed cover under the Notifiable Disease Extension. Per the policy, this is defined as follows:

- 3. NOTIFIABLE DISEASE**
- Illness sustained by any person resulting from:*
- (a) food or drink poisoning*
 - (b) any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)] an outbreak of which the competent local authority has stipulated must be notified to them.*

The above does define the type of illness/disease etc, however in order for policy indemnity to be met the event must comply with the below extension.

The definition of DAMAGE is extended to include for this Section 2 only:

- (a) (i) an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES.*

*As can be seen from the above, damage has been extended to include section 2 - Loss of Rent (you will note above the main trigger for loss of rent is as a result of a claim under section 1 - Material Damage), which goes on to state that there must be an outbreak of any notifiable disease **occurring at the premises.***

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Accordingly, we consider that interpretation of the insuring clause in the Policy is that, it provides insurance as follows (to be amended as appropriate for each of the other perils in the extended definition of DAMAGE, ie 3.(a) (i)): "WE will pay for loss of INCOME occurring during the INDEMNITY PERIOD, resulting from [an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES]."

As no evidence has been provided of any outbreak occurring at the premises, we are, unfortunately, unable to provide any further assistance".

In his letter to this Office dated **10 July 2021**, the Complainant submits that:

"I believe [the Provider] are now reinterpreting the wording on the policy to avoid covering for loss of Rent due to Covid 19.

... I am only concerned with the text on my policy and as importantly what's not on the policy to be equally significant. I have familiarised myself with extensions on insurance policies and how they work.

***Section 2 on the policy 3b** covers for Loss of rent as a result of "any human infectious or human contagious disease [an] outbreak of local authority has stipulated must be notified to them" which I say triggers my policy.*

*The policy continues under the extension to also cover [an] outbreak occurring at the premises. It's [an] extra, as explained by [an] insurance underwriter in a recent High Court Judgement which I refer to [**Hyper Trust Ltd t/a The Leopardstown Inn & Ors v. FBD Insurance plc** [2021] IEHC 279].*

[The Provider] now claim because the outbreak didn't occur at the premises there is no cover".

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

"[The Provider] refuse to pay out loss of rents €9,100 because the disease [COVID-19] did not start on the premises".

The Provider's Case

The Provider says that the Complainant submitted a claim in **February 2021** for the loss of rental income because his tenants, trading as a hairdressers, were unable to pay the Complainant the weekly rent of **€175.00 (one hundred and seventy-five Euro)** between **March 2020** and **June 2020**, due to the closure of the tenants' business for that period, as a result of measures imposed by the Government to help curb the spread of COVID-19.

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The Provider says that the Complainant's **Commercial Property Owners Policy** provides defined, specific and clear cover in respect of notifiable diseases. For cover to operate, the Provider says there would need to have been an outbreak of any notifiable disease at the premises. The Provider notes that in the case of the Complainant's claim, no outbreak of any notifiable disease occurred at the insured premises.

The Provider says that Section 2 of the **Commercial Property Owners Policy Document** deals with 'Loss of Rent'. Definition 3 is concerned with Notifiable Disease, which allows consideration for:

"Illness sustained by any person resulting from:

(a) food or drink poisoning

(b) any human infectious or human contagious disease [excluding Acquired Immune Deficiency Syndrome (AIDS)] an outbreak of which the competent local authority has stipulated must be notified to them".

The Provider says that the policy definition of Damage is extended for Section 2 only to allow for loss of rent resulting from an outbreak of any Notifiable Disease occurring at the Premises or which is attributable to food or drink supplied from the Premises.

The Provider says that the claimed losses sustained by the Complainant occurred as a result of the closure of the Premises which was not because of an outbreak of any Notifiable Disease occurring at the Premises.

The Provider says it has not been notified of any person(s) who sustained illness from food or drink poisoning or any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)), an outbreak of which the competent local authority has stipulated must be notified to them, as set out in the **Policy Document**. The Provider also says that it has not been made aware of any Damage as a result of an outbreak of any Notifiable Disease occurring at the Premises.

The Provider notes that the **Preliminary Report** dated **12 March 2021**, arising from its Loss Adjusters' contact with the Complainant on **15 February 2021**, noted that although COVID-19 is a notifiable disease, there was no known incident of COVID-19 on the premises at the time of closing. The Provider outlined this in its correspondence to the Complainant's broker on **19 March 2021**. The Provider says this letter also invited the Complainant to let it know if there was any evidence of an outbreak at the Premises.

The Provider confirms that it has no record of any evidence from the Complainant supporting the occurrence an outbreak of COVID-19 at the premises.

The Provider says that the High Court judgement referred to the Complainant, namely ***Hyper Trust Ltd t/a The Leopardstown Inn & Ors v. FBD Insurance plc*** [2021] IEHC 279, refers to a policy underwritten by a different insurer for a specific industry and contains different policy terms and conditions than those contained in the Complainant's **Commercial Property Owners Policy Document**. The Provider says that the policy concerned in the High Court judgment, offered indemnity for imposed closure of the premises by order of the local or Government authority following outbreaks of contagious or infectious diseases on the premises or within 25 miles of same. The Provider says that this extent of cover is not available under the Complainant's policy, because the cover is restricted to an outbreak occurring at the premises.

The Provider says it is satisfied that it correctly assessed the Complainant's claim, in accordance with the policy terms and conditions, and that the Complainant's policy does not provide cover for the circumstances of this particular claim. The Provider says its aim is to deal with claims promptly, efficiently and fairly and that it diligently gathered and carefully reviewed all information provided by its Loss Adjusters, prior to the claim decision being made. The Provider confirms that its handling and management of COVID-19 related claims are the subject of much internal governance and oversight, to ensure customers are treated fairly.

The Provider says it is acutely aware, and fully empathises, with the enormous difficulties and financial loss the Complainant, and many others, have faced because of COVID-19. However, for a claim to be paid under a contract of insurance, the Provider says that such a claim must be the result of an event that the policy provides cover for. The Provider says it is satisfied that the policy wording is specific and clear regarding cover in respect of Notifiable Diseases and that for the cover to operate, there would need to have been an outbreak of, in this case, COVID-19 occurring at the premises.

Accordingly, the Provider maintains that it has applied the policy cover in a fair and reasonable manner and that it declined the Complainant's claim in accordance with the terms and conditions of the **Commercial Property Owners Policy**.

In addition, the Provider adds that it is currently undertaking a review of its policy wordings across a number of its product suites as part of standard practice and that the notifiable disease policy wording is included in that review.

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined the Complainant's claim for loss of rental income as a result of his tenants' temporary closure due to measures imposed by the Government to curb the spread of COVID-19.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant 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 **2 June 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.

I note that the Complainant notified the Provider in **February 2021** of a claim for the loss of rental income when his tenants were unable to pay him rent, between **March 2020** and **June 2020**, due to the closure of the tenants' business for that period, because of measures imposed by the Government to help curb the spread of COVID-19.

This complaint arises because following its assessment, the Provider wrote to the Complainant on **19 March 2021** to advise that it had declined the claim because the closure of the Complainant's premises was not as a result of an outbreak of COVID-19 occurring at the premises. I note the Complainant has written to the Provider on a number of occasions regarding its decision to decline indemnity, and that the Provider has at all times maintained its position.

The Complainant's **Commercial Property Owners Policy**, like all insurance policies, does not provide cover for every eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation.

I note that Section 2, 'Loss of Rent', of the applicable **Commercial Property Owners Policy Document** defines 'Notifiable Disease', as follows:

"3. NOTIFIABLE DISEASE

Illness sustained by any person resulting from:

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- (a) food or drink poisoning
- (b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated must be notified to them”.

The **Policy Document** defines ‘Damage’ as:

“DAMAGE

The word DAMAGE shall mean loss or damage or destruction”.

I am satisfied that Section 2, having defined ‘Notifiable Disease’, then extends the policy definition of ‘Damage’ to include, for loss of rent only, the insured peril of an outbreak of any notifiable disease at the premises or which is attributable to food or drink supplied from the premises, as follows:

“The definition of DAMAGE is extended to include for this Section 2 only:

- (a) (i) *an outbreak of any NOTIFIABLE DISEASE occurring at the PREMISES or which is attributable to food or drink supplied from the PREMISES ...”*

[My underlining for emphasis]

As a result, I take the view that in order for the notifiable disease cover to be triggered, there must first be the operation of the insured peril, that is, an outbreak of COVID-19 occurring at the premises.

In that regard, I note that the Provider-appointed Loss Adjuster in its **Preliminary Report** dated **12 March 2021**, stated at pg. 3, as follows:

“In order for this contingency to be operable key ‘triggers’ are required, namely closure by a competent authority coupled with the discovery of an outbreak of a notifiable disease on the premises. On analysis of the events leading up to the closure we note that the premises closed due to Government instructions that all nonessential services and premises should close and whilst COVID-19 is a notifiable disease there was no known incident of COVID-19 on the premises at the time of closing.

[My underlining for emphasis]

Noting the above observation, we consider that this loss falls outside the policy cover as stated as there was no reported outbreak of COVID-19 on the premises at the time of closing”.

I note that this report suggested that a key trigger was “*closure by a competent authority*” coupled with the discovery of an outbreak of a notifiable disease. This was incorrect. Had the contents been shared with the Complainant the report would likely have contributed to confusion and inconvenience for the Complainant.

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I note however that since the preliminary decision of this Office was issued, the Provider has confirmed that no such confusion was caused to the Complainant, because the Loss Adjustor's Report was not provided to the Complainant during the course of the processing of the claim. Rather the report was included in the evidence submitted to the FSPO.

The Provider submits that the purpose of the loss adjuster's report, is to gather information, but it does not to make a decision on the policy covers. This decision is, and was, made by the Provider, upon full consideration of all available evidence and in conjunction with the policy wording. I accept this, and I note that the reasons for declining the claim were as set out in the Provider's communications with the Complainant on **19 March 2021** and **13 May 2021**, and with the Complainant's broker on **1 April 2021**. It is however disappointing that the Provider, having confirmed that the report was carefully reviewed by it, prior to making the claim decision, made no reference to the error in question, when submitting that evidence to this Office.

The report itself is also disappointing, given that policyholders will rely on the expertise of a financial service provider and its agents during any liaison, when seeking to interpret the relevant policy provisions. In this instance, although there is reference to a competent authority within the definition of notifiable disease, this is where the provisions of the policy note that certain infectious diseases must be notified to the competent local authority. There is nothing within the policy provisions however relevant to the Complainant's situation, which required a claim to be supported by evidence that a premises had been closed by the competent authority.

Insofar as the policy provisions are concerned, I am satisfied that the onus is on the policyholder, as it is in all insurance claims, to show the operation of an insured peril and in that regard, I note the Complainant has not verified to the Provider that there was an outbreak of COVID-19 at the premises.

Accordingly, I am satisfied on the evidence that the Provider was entitled to decline the Complainant's claim, for the reasons outlined above. Whilst I have noted the misleading and confusing contents of the Provider's Loss Adjuster's Report of March 2021, I accept that during the relevant claim period, the contents were not shared with the Complainant and, in my opinion, the error in question therefore caused no loss or inconvenience to the Complainant, because the claim was declined on the basis of appropriate reasons, as set out in the Provider's communications with the Complainant on **19 March 2021** and **13 May 2021**, and with the Complainant's broker on **1 April 2021**.

Having regard to all of the above, I am satisfied that the evidence does not support the complaint that the Provider wrongly or unfairly declined the Complainant's claim for loss of rental income as a result of his tenants' temporary closure due to measures imposed by the Government to curb the spread of COVID-19. Consequently, the complaint cannot reasonably be upheld.

Conclusion

My Decision, pursuant to *Section 60(2)(b)* 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)

20 July 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—

- (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.