An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0243
Sector:	Insurance
Product / Service:	Service
Conduct(s) complained of:	Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company trading as a public house ("the Complainant Company") held a '**Hospitality Policy'** of insurance with the Provider.

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

The Complainant Company's Case

The Complainant Company's Broker ("the Broker") notified the Provider on **9 April 2020** of a claim for business interruption losses because of the closure of the Complainant Company's business, as follows:

> *"Business forced to close to Covid 19*
> *Business forced to close due to Covid 19 outbreak"*

Acknowledging notification of the Complainant Company's claim, the Provider wrote to the Broker on **16 April 2020**, as follows:

> *"The cover, provided under the Notifiable Diseases Section of your policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a notifiable disease at the premises, which causes restrictions on the use of the premises on the order or advice of the competent*

authority. The indemnity period is from the date on which the restrictions on the premises are applied for a maximum period up to three months, and is subject to a limit as noted in your policy.

To enable us to investigate and consider your claim please let us have details of the occurrence of COVID-19 at your premises. This should include the following:

- *The date of the occurrence or when it was first brought to your attention;*
- *The date on which the restrictions were put in place;*
- *The period of the restrictions; and*
- *Copies of any notices or relevant documents in support of your claim.*

Once we have the required information, we will come back to you as quickly as possible with a decision on cover."

By letter dated **26 May 2020**, the Provider wrote to the Broker advising the Broker to provide the relevant claim information in order to proceed with the claim.

The Complainant Company wrote to its Broker on **1 June 2020**, as follows:

"The closure and hence disruption to business claim which we are making is not due to an outbreak of a virus on the premises, but due to the closure by law of an outbreak of the Covid 19 virus in the country. So we cannot supply you with documentation. […]*."*

By letter dated **23 June 2020**, the Provider wrote to the Broker advising the Broker to provide the relevant claim information in order to proceed with the claim. The letter further advised that if the Provider did not hear from the Broker within four weeks, it would close the Complainant Company's file. The Provider wrote to the Broker on **4 August 2020** to advise that it had closed the file.

On **25 January 2021**, the Complainant Company emailed its Broker in respect of renewing the claim, as follows:

"we would like to renew our claim for disruption to business for the business being closed in the last policy. I would like to know what all we can claim for and what we have to do to restart our claim. We are aware that there is a court case on the 4th Feb which will set a president (sic) *for this."*

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The Broker responded to the Complainant Company on **26 January 2021**, as follows:

> *"As per your policy wording and previous advices, the cover, provided under the Notifiable Diseases Section of your policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a notifiable disease at the premises, which causes restrictions on the use of the premises on the order or advice of the competent authority.* […]
>
> *Please see attached previous request for documentation required to proceed with this claim.* [The Provider] *will require this when the claim is re reopened* (sic) *so if you can prepare these and return to me as soon as possible."*

On **28 January 2021**, the Broker emailed the Provider, as follows:

> *"Our client has requested this claim to be reopened and reviewed based on the recent outcome of the FCA case in the UK."*

In response to the Broker's request to re-open the Complainant Company's claim, the Provider wrote to the Broker on **3 February 2021**, as follows:

> *"Please note that* [the Provider] *has considered whether the Business Interruption Insurance Test Case: Finalised Guidance for Firms applies to our policy wordings and provided the relevant information to the FCA accordingly.* […]
>
> *We have reviewed the policy wordings that* [the Provider] *has in place against the requirements of the test case and are of the view that they are not aligned. As a result of that review, any claim or complaint submitted by a customer is not a potentially affected claim or a potentially affected complaint under the FCA Business Interruption Test Case. On that basis the obligations under the Final Guidance issued by the FCA regarding the handling of claims and complaints would not apply.* […]*."*

The Complainant Company submitted a complaint to the Provider through its Broker on **2 March 2021**, *"for not considering our business disruption claim to be valid"*, as follows:

> *"We feel that the policy, covering the period in 2020 when government closed all businesses such as ours, does cover a claim for disruption to business, due to government demanding us to close our business because of the world wide covid 19 pandemic.*
> *We feel the decision made not to cover this claim is incorrect* […]*."*

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By email dated **3 March 2021**, the Provider wrote to the Broker, as follows:

> *"The cover, provided under the Notifiable Diseases Section of your policy, operates only where there is loss resulting from interruption or interference with the business as a result of any occurrence of a notifiable disease at the premises, which causes restrictions on the use of the premises on the order or advice of the competent authority. The indemnity period is from the date on which the restrictions on the premises are applied for a maximum period up to three months, and is subject to a limit as noted in your policy.*
>
> *We wrote to your office on 16th April 2020 outlining what information is required to enable us to investigate and consider our mutual client's claim.*
>
> *We issued reminders to your office on 26/5/20, 23/6/20 and on 4/8/20 we advised your office that we were closing file in the absence of hearing from you.*
>
> *On the 28/1/21 we received a further e-mail from your office requesting that the file be reopened and reviewed based on recent outcome of the FCA case in the UK and on the 3/2/21 we issued a response to your office* […].
>
> *As had been the case from the outset,* [Provider] *policies will continue to respond where a claim is triggered as set out in the terms and conditions of the policy in question. If you feel that our mutual client has a legitimate Business Interruption claim then please submit same and it will be considered in accordance with the terms and conditions of their particular policy."*

It appears that the Provider forwarded a copy of this email to the Complainant Company on **4 March 2021**.

The Provider responded to the Complainant Company's complaint on **4 March 2021**, as follows:

> *"I regret that you have been dissatisfied with the service we have provided following notification of your Business Interruption claim via your broker.*
>
> *Further to my e-mail of today and previous correspondence sent to your broker, to enable us to investigate and consider your claim please let us have details of the occurrence of COVID-19 at your premises. This should include the following:*
>
> - *The date of the occurrence or when it was first brought to your attention;*
> - *The date on which the restrictions were put in place;*

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- *The period of the restrictions; and*
- *Copies of any notices or relevant documents in support of your claim.*

The Notifiable Disease Extension of your policy, operates only where there is loss resulting from interruption or interference with the business as a result of an occurrence of a Notifiable Disease at the Premises, which causes restrictions on the use of the Premises on the order or advice of the competent authority.

The indemnity Period is from the date on which the restrictions on the Premises are applied for a maximum period up to three months, and is subject to a limit as noted in your Policy.

Once we have the required information, we will come back to you as quickly as possible with a decision on cover."

On **10 March 2021**, the Complainant Company wrote to the Provider, as follows:

"This is my response to your email, and questions on how, where and when someone contacted Covid 19 on the premises of [the Complainant Company]*. I believe as I have not given you these particulars you are rejecting our claim for business disruption. If my belief is wrong please inform me and correct me to the reason why you have decided to reject our claim.*

My claim is on the basis of the following:

1. In your requesting the date etc for the outbreak of Covid 19 on the premises etc, you recognise that Covid 19 exists and that it would be a reason, if found to have happened to have had an outbreak on our premises, to close the premises.
2. I have always stated that we closed our premises due to government and public authority demands and law. Laws passed due to the outbreak of Covid 19 in the Country and not any single premises. Forcing all licensed premises such as ours to close.
3. To date there have been 224 thousand cases of Covid 19 in the country of Ireland, and authorities have not been able to prove where any of these cases, exact date, exact time and exact location were contacted, without reasonable doubt. Yet you are asking me for these specifics. This is ridiculous and totally unreasonable.
4. Our business interruption Policy, extension 21 states that the policy recognises demands of the Public Authorities and European Authorities, (in the jaundra of buildings thereby recognising them in all jaundras) we were following these demands from these governing bodies in closing down our business.

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5. In extension 6, prevention of hindering access to our premises, irrespective of whether property is damaged or not. We were forced to close, thereby denying access to our premises for trading.
6. In extension 8. para 3 (vii) We complied with the direction and requirement of the licensing justices and government and public authorities in closing business. Complying with and future safing our public licence.
7. Employers / Public / Products liability sections definitions. Section 5a, we were compliant with keeping all pollution or contamination of buildings, or other structure, or of water or the atmosphere free from the Covid 19 virus by closure of buildings.
8. section 7. Nuisance, by closing our business we did not allow interference with any persons, employers, employees, customers, tradesmen, general public the right of uncontaminated air.
9. in accordance with the Safety Health and Welfare at Work act 2005 as we could not provide safety, health or welfare for employers, employees due to the contamination of air as directed by the authorities. We closed the premises

We complied with the demands and law of the country of Ireland of which we live by closing our Public House, our business the [Complainant Company]*. I find it unreasonable that you do not accept this to be a reason for us to have closed our business, it is for this that we are claiming business interruption.*

So can you please state for me on record, if we had not acted in accordance with the law of the land and the Covid 19 regulations that the government and HSE put in place, if we had remained open, would you have kept our insurance cover in place on these grounds and what advice would you have given to us regarding the government regulations and guidelines.

I am very disappointed in how your company has handled our claim on a business and morale basis. […]*."*

On **23 March 2021**, the Provider responded to the Complainant Company, as follows:

"I regret to advise that your claim in respect of Business Interruption resulting from COVID-19 is not covered by your Policy for the following reason(s):

1. *There was no outbreak of the Notifiable Disease at the Premises, and;*
2. *The restrictions on the use of the Premises by the competent authority was not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises*

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In respect of the remaining points raised in your e-mail, we would comment as follows:

In reference to point 4 - You can only avail of cover available under European Union and Public Authorities extension where you Buildings and Contents need to be reinstated following damage. If an additional cost is incurred as a result of European Union and Public Authorities Legislation then this additional cost would be included in the amount of reinstatement. As your claim is not in respect of damage to Buildings or contents this section is not applicable.

In reference to point 5 - this Prevention of Access extension only applies where damage, by an Insured Peril, has resulted in the inability for you to access your Premises. As there has been no such damage this section is not applicable to your claim.

In reference to point 6 of your e-mail, this cover only applies to claims for Loss of Licence under the Business Interruption Section. As there has been no impact on your trading licence this section is not applicable to your claim.

Point 7 and Point 8 of your e-mail, please refer to the Definitions within our Policy wording. These definitions are provided to add clarity to covers available under our Policy. The definitions you refer to are not applicable to this claim. […]*."*

The Complainant Company considers that its claim for business interruption losses arises from its compliance with a Government direction regarding the closure of public houses as a result of the outbreak of COVID-19 and is covered by the terms and conditions of its policy. In this regard, the Complainant Company sets out its complaint in the Complaint Form, as follows:

"My Complaint is that the insurance policy provider will not cover my claim for disruption to business. Our business (Pub) was closed on 15th March 2020 by government regulations, connected to the Covid 19 Pandemic. The business is still closed […]*."*

The Complainant Company seeks for the Provider to admit its claim for business interruption losses as a result of its temporary closure due to the outbreak of Covid-19, as follows:

"we have suffered financial loss of the business being closed. I do not know how to calculate what is a fair sum of money for the Insurance provider to pay out for these circumstances. I am hoping you can advise on a fair calculation and financial figures can be provided."

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The Provider's Case

The Provider says the Complainant Company held a business insurance policy with it since **26 June 2019**. On **9 April 2020**, the Provider says the Complainant Company's appointed representative submitted correspondence stating an intention to claim for losses attributable to COVID-19 under the Business Interruption section of the policy.

The Provider says it was noted that this business insurance policy, did not contain the Business Interruption Notifiable Disease Extension, and that this cover had not been selected at the point of sale in June 2019. The Provider says a decision was made in **March 2020** to apply an endorsement, upon request, to allow the standard Business Interruption Notifiable Disease Extension to apply.

The Provider says that the Business Interruption Notifiable Disease Extension, provides cover for loss of income, when the occurrence of a Notifiable Disease is at the Premises and the restrictions on the use of the premises, by order of a local or Government authority, is as a direct result of an occurrence of a Notifiable Disease at the Premises.

The Provider says the Business Interruption Notifiable Disease Extension wording, does not appear on the Complainant Company's original policy which issued on **15 July 2019**. The Provider says the document containing its standard business insurance Business Interruption Notifiable Disease Extension states, as follows:

> *"The insurance by this policy shall subject to all the exclusions and conditions of the policy (except in so far as they may be hereby expressly varied) and the special conditions set out below extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:-*
>
> *1. (a) any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises*
>
> *(b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease*
>
> *2. the discovery of vermin or pests at the Premises*
>
> *3. any accident causing defect in the drains or other sanitary arrangements at the Premises*

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which causes restrictions on the use of the Premises on the order or advice of the competent local authority

4. any occurrence of murder or suicide at the Premises.

Special Conditions

1. Notifiable Disease shall mean illness sustained by any person resulting from

(a) food or drink poisoning or

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

2. For the purposes of this memorandum:

Indemnity Period shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident, beginning –

(a) in the case of 1, 2 and 3 above, with the date from which the restrictions on the Premises are applied

(b) in the case of 4 above, with the date of the occurrence or discovery and ending not later than the Maximum Indemnity Period thereafter.

Maximum Indemnity Period shall mean 3 months.

Premises shall mean only those locations stated in the Premises definition; In the event that the policy includes an extension which deems loss destruction or damage at other locations to be an incident such extension shall not apply to this memorandum.

3. The Company shall not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.

4. The Company shall only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident.

The liability of the Company shall not exceed €250,000 in respect of any one occurrence or €250,000 in any one Period of Insurance."

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The Provider says that on **16 April 2020**, it issued a letter to the Complainant Company's appointed representative, requesting the following details in order to progress the claim:

1. The date of the occurrence of the Notifiable Disease at the Premises or when it was first brought to the Complainant Company's attention;

2. The date on which the restrictions by the competent authority were put in place;

3. The period of the restrictions; and

4. Copies of any notices or relevant documents in support of the claim.

The Provider says a reply was not received to this request and a reminder issued on **26 May 2020** to the Complainant Company's Broker. In this letter, the Provider says it asked for the outstanding information which would enable it to consider the claim. As no response was received, the Provider says it issued a further reminder on **23 June 2020**, again asking for the relevant information. The Provider says the third and final letter was sent on **4 August 2020**. In this letter, the Provider says because it had not received the requested information, it advised that it had closed its claim file.

On **28 January 2021**, the Provider says it received an email from the Broker containing a request to reopen the claim and to consider the claim in light of *"the recent outcome of the FCA case in the UK".* On **3 February 2021**, the Provider says it issued an email advising, as follows:

> *"We have reviewed the policy wordings that* [the Provider] *has in place against the requirements of the test case and are of the view that they are not aligned. As a result of that review, any claim or complaint submitted by a customer is not a potentially affected claim or a potentially affected complaint under the FCA Business Interruption Test Case. On that basis the obligations under the Final Guidance issued by the FCA regarding the handling of claims and complaints would not apply.* [The Provider] *shall continue to handle any claims or complaints submitted as required under provisions of the regulations, in particular, TCF, DISP and ICOBS."*

The Provider says that on **2 March 2021**, a complaint was made by the Complainant Company through its Broker. The Provider says the Complainant Company was of the view that it had a valid claim for Business Interruption losses, attributable to COVID-19 and expressed the view that the Provider had failed to properly consider the claim.

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The Provider says that it responded directly to the Complainant Company on **4 March 2021**. In this email, the Provider says it outlined the timeline to date and its position. The Provider says it was of the view that it had been very clear since the first notification of the claim, and that it had not been given the requested information to support a valid claim, despite multiple requests. The Provider says it stated that its policies would continue to respond, where a claim was triggered as set out in the terms and conditions of the policy in question. The Provider says it asked that if the Complainant Company had a legitimate Business Interruption claim, that it submit the requested supporting information which would be considered in accordance with the terms and conditions of the policy. The Provider says it also referenced the information required to consider the claim.

The Provider says that on **10 March 2021**, a detailed response was received from the Complainant Company. The Provider says the email outlined the Complainant Company's position in some detail, and asked a number of very specific questions. Of the information contained in this response, the Provider says it was noted that no information, which would help support a claim, had been provided by the Complainant Company.

The Provider says the Business Interruption Notifiable Disease Extension provides cover where there is an occurrence of a Notifiable Disease at the Premises, causing interruption or interference with the Business carried on at the Premises. In order for this extension to apply, the Provider says the following criteria must be satisfied:

1. The occurrence of the Notifiable Disease is at the Premises and

2. The restrictions on the use of the Premises are brought about on the advices of the competent authority as a result of an occurrence of a Notifiable Disease at the Premises
3. There is a verified financial loss directly resulting from 1 and 2 above.

Based on the information on file, the Provider says it had not been provided with any information to suggest that the criteria outlined above had been satisfied. Subsequently, the Provider says it wrote to the Complainant Company on **23 March 2021** advising that the claim was not covered for the following reasons:

1. There was no outbreak of the Notifiable Disease at the Premises, and

2. The restrictions on the use of the Premises by the competent authority was not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises.

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Addressing why it requested details of the occurrence of a COVID-19 at the Complainant Company's premises, the Provider says the Business Interruption Notifiable Disease Extension provides cover where there is an occurrence of a Notifiable Disease at the Premises causing interruption or interference with the Business carried on at the Premises. In order to evaluate the claim and specifically to evaluate whether the dual triggers for cover had been met, the Provider says it requested the information set out in its letter of **16 April 2020**.

In respect of the definition of the term Notifiable Disease, the Provider says the 'Business Interruption Section Extensions' wording of the Complainant Company's business insurance policy document states, as follows:

> *"Special Conditions*
>
> *1. Notifiable Disease means illness sustained by any person resulting from:*
>
> *(a) food or drink poisoning or*
>
> *(b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated shall be notified to them."*

Based on the above definition, the Provider says it would conclude that COVID-19 would meet the definition of Notifiable Disease, as per the policy definitions.

In terms of whether there was an occurrence of COVID-19 at the Complainant Company's premises, the Provider says it issued a letter to the Complainant Company's appointed representative on **16 April 2020,** requesting details in order to progress the claim. The Provider says it received no information following the issue of this letter or the reminders it issued on **26 May 2020**, **23 June 2020** and **4 August 2020**. Following the original letter and three reminders, the Provider says it did not receive any information to allow it to assess the claim. On **4 March 2021**, the Provider says it again asked for the information to allow it to assess the claim. In the detailed response from the Complainant Company dated **10 March 2021**, the Provider says the Complainant Company did not provide the requested information.

The Provider says it has not been provided with any evidence to suggest that there was an occurrence of a Notifiable Disease at the Complainant Company's business premises, either prior to or at the time of its closure in **March 2020**. The Provider says it cannot therefore conclude whether there was an occurrence of a Notifiable Disease at the premises.

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In terms of whether there were any restrictions imposed on the Complainant Company's business premises arising from the occurrence of a Notifiable Disease at the premises, the Provider says the Complainant Company has failed to demonstrate the occurrence of a Notifiable Disease at the premises. Therefore, there does not appear to have been any restrictions on the use of the premises, arising from the occurrence of a Notifiable Disease at the premises.

In its email of **2 March 2021**, the Complainant Company states that:

> *"We feel that the policy, covering the period in 2020 when government closed all businesses such as ours, does cover a claim for disruption to business, due to government demanding us to close our business because of the world wide covid 19 pandemic."*

In its email of **10 March 2021**, the Complainant Company states that:

> *"To date there have been 224 thousand cases of Covid 19 in the country of Ireland, and authorities have not been able to prove where any of these cases, exact date, exact time and exact location were contacted, without reasonable doubt. Yet you are asking me for these specifics. This is ridiculous and totally unreasonable.*
> […]
>
> *We complied with the demands and law of the country of Ireland of which we live by closing our Public House, our business the [Complainant Company]. I find it unreasonable that you do not accept this to be a reason for us to have closed our business, it is for this that we are claiming business interruption."*

Responding to these passages, the Provider refers to the Business Interruption Notifiable Disease Extension and states that the policy will respond in the specific circumstances outlined in the policy wording. The Provider says that it takes a rigid view of the interpretation of the policy wording. The Provider says the onus is on the insured, in every claim, to prove the loss. The Provider says its policy will engage for Business Interruption losses under the Notifiable Disease extension **only** when:

1. The occurrence of the Notifiable Disease is at the Premises and

2. The restrictions on the use of the Premises is brought about on the advices of the competent authority as a result of an occurrence of a Notifiable Disease at the Premises

3. There is a verified financial loss directly resulting from 1 and 2 above.

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The Provider says that based on the information provided and the applicable policy wording, the triggers for cover to engage, have not been met. Therefore, it says that the decision it took to decline the Complainant Company's claim, was fair and reasonable.

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly refused to admit the Complainant Company's claim for business interruption losses as a result of its temporary closure 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 **10 January 2022**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

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Analysis

I note that the Complainant Company held a 'Hospitality Policy' of insurance with the Provider at the time of its claim notification in **April 2020**. The Complainant Company's 'Renewal Schedule' for the period **22 October 2019** to **21 October 2020** states on pg. 5 that the Complainant Company held business interruption cover in respect of 'Gross Profit' for a sum insured of **€343,980.00** with a 12-month indemnity period.

On reviewing the Complainant Company's Renewal Schedule and policy document dated **15 July 2019**, it seems to be the position that the Complainant Company did not thereby hold business interruption cover in respect of loss arising from a notifiable disease.

In its Complaint Response, the Provider advised that a decision was taken however in **March 2020** to apply the Business Interruption Notifiable Disease Extension to policies such as the Complainant Company's policy, on request. In this respect, a 'Phone Message' note dated **16 March 2020** states, as follows:

> *"BI cover under policy. As per* […] *circulation email notif disease extension provided as BI cover is operative on* […] *product."*

In an email to this Office dated **17 June 2021**, the Provider advised, in part, as follows:

> *"*[…]
>
> ***"we agreed at the start of the pandemic that we would afford all*** [Hospitality] ***policyholders with an operative BI Section the benefit of the standard commercial Notifiable Disease Extension. The majority of*** [Hospitality] ***policyholders had the Extension via an endorsement attaching to their policy, which was provided on request. We felt it would be unfair to not make this available to all*** [Hospitality] ***customers with a BI Section."***
>
> […]
>
> *In this case the endorsement was not requested however we are applying our standard commercial Notifiable Disease Extension wording to this claim.* […]*."*

Accordingly, I am satisfied that the provisions of that the *"standard commercial Notifiable Disease Extension"* applied *de facto* to the Complainant Company's claim.

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In this respect, the Provider supplied this Office with pages. 14, 15 and 16 of a 17 page 'Endorsement Schedule' dated **13 March 2020** which contains the 'Endorsements applicable to BUSINSESS INTERRUPTION' ("the Business Interruption Endorsement"). The Business Interruption Endorsement states, as follows:

> *"The insurance by this policy shall subject to all the exclusions and conditions of the policy (except in so far as they may be hereby expressly varied) and the special conditions set out below extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:-*
>
> *1. (a) any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises*
>
> *(b) any discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease*
>
> [My underlining added for emphasis]
>
> *2. the discovery of vermin or pests at the Premises*
>
> *3. any accident causing defect 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*
>
> *4. any occurrence of murder or suicide at the Premises.*
>
> *Special Conditions*
>
> *2. Notifiable Disease shall mean illness sustained by any person resulting from*
>
> *(a) food or drink poisoning or*
>
> *(b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated shall be notified to them.*

/Cont'd…

2. For the purposes of this memorandum:

Indemnity Period shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident, beginning –

(a) in the case of 1, 2 and 3 above, with the date from which the restrictions on the Premises are applied

(b) in the case of 4 above, with the date of the occurrence or discovery

and ending not later than the Maximum Indemnity Period thereafter.

Maximum Indemnity Period shall mean 3 months. Premises shall mean only those locations stated in the Premises definition; In the event that the policy includes an extension which deems loss destruction or damage at other locations to be an incident such extension shall not apply to this memorandum.

3. The Company shall not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.

4. The Company shall only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident.

The liability of the Company shall not exceed €250,000 in respect of any one occurrence or €250,000 in any one Period of Insurance."

It can be seen from the wording of clauses 1 to 4 of the Business Interruption Endorsement that the perils identified under each of those sub-clauses must occur *at the Premises*; and in the context of clauses 1 to 3, the Business Interruption Endorsement further requires the imposition of restrictions on the *use of the Premises*.

Accordingly, it is my opinion that the Business Interruption Endorsement wording is clear and unambiguous in terms of imposing a premises specific, *at the Premises/use of the Premises*, requirement.

The 'Special Conditions' of the Business Interruption Endorsement expressly state that *"Premises shall mean only those locations stated in the Premises definition"*. The term 'Premises' is defined (at page 19) of the Hospitality Policy document as: *"the location of Property Insured as stated in the Schedule."*

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'*Property Insured*' is defined as:

> *"(a)* ***Buildings at the Premises:***
>
> *buildings being built mainly of brick, stone or concrete and roofed* […] *including:*
>
> *(i) landlord's fixtures and fittings*
> *(ii) outbuildings*
> *(iii) walls, gates and fences*
> *(iv) piping ducting cables wires* […]
> *(v) yards car-parks roads and pavements."*

In this respect, I note that the location of the Property Insured as stated on the Complainant Company's Renewal Schedule appears to be its public house premises.

Given the very clear premises specific requirement in the Business Interruption Endorsement, the definition of the terms 'Premises' and 'Property Insured', and the express identification of the Complainant Company's public house premises as the insured premises; it is my opinion that giving the words of clause 1 of the Business Interruption Endorsement their plain and ordinary meaning, reasonably interpreted, clause 1 requires that for cover to operate, there must be an occurrence of a Notifiable Disease actually and specifically at the Complainant Company's public house premises or the discovery of an organism actually and specifically at the public house premises which is likely to result in the occurrence of a Notifiable Disease.

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in the recent High Court case of *Brushfield Limited (T/A The Clarence Hotel) v. Arachas Corporate Brokers Limited and AXA Insurance Designated Activity Company* [2021] IEHC 263 (delivered on **19 April 2021**), where McDonald J. made certain remarks regarding an *at the premises* requirement contained in a clause somewhat similar to clause 3 of the Business Interruption Endorsement above:

> *"167.* […] *Those words "at the premises" are also to be found in paras. 2 and 3 of the MSDE* [Murder, Suicide or Disease] *clause where they are clearly used in a premises specific sense. The inclusion of the word's "at the premises" strongly suggest to me that the relevant closure must be prompted by a specific defect in the drains or other sanitary arrangements at the premises in question and not as a consequence of concerns about the way in which public bars or hotels are run generally or their ability to contribute to the spread of COVID-19. In turn, it seems to me to follow that the order of the public authority envisaged by para. 5 is an order directed at the particular*

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defect found at the premises. This suggests that the order will be a premises specific one.
168. For all of these reasons, I have come to the conclusion that para. 5 of the MSDE clause will only apply where there is a specific order of a public authority requiring closure of all or part of the premises as a result of a defect in the drains or other sanitary arrangements at the premises."

Therefore, I am satisfied that the Provider was entitled to maintain the position that for cover to become operative pursuant to clause 1(a), the Complainant Company must show there was an occurrence of a Notifiable Disease at its premises, and that similarly, in respect of clause 1(b), the Complainant Company must show that an organism was discovered, at its premises, which was likely to result in the occurrence of a Notifiable Disease. When the Complainant Company satisfies these requirements, it must be shown that either of the instances in clause 1(a) or clause 1(b) were the cause of restrictions being imposed on the use of the premises by a competent local authority.

The basis for the Provider's declinature of the Complainant Company's claim is that there is no evidence of the occurrence of COVID-19 at the premises. In this respect, I note it is not disputed that COVID-19 is a Notifiable Disease for the purposes of the Notifiable Disease Endorsement. As stated above, it is my opinion that to trigger the cover provided by clause 1 of the Business Interruption Endorsement, the Provider was entitled to require the Complainant Company to show there was an occurrence of COVID-19 at its premises.

In the Complainant Company's email of **10 March 2021**, the Complainant Company refers to the difficulty encountered by 'authorities' in identifying the exact time, date and location of occurrences of COVID-19 in the State, and states that to require the Complainant Company to provide such detail is ridiculous and unreasonable.

In my opinion, for cover to be triggered, the Complainant Company must furnish the Provider with sufficient information which would reasonably allow it to conclude, on the balance of probabilities, that there was an occurrence of COVID-19 at the premises. As a result, I am satisfied that the Provider's requests for information, as initially made in its letter of **16 April 2020**, were reasonable.

On considering the evidence, I note that the Complainant Company did not provide any evidence to show there was an occurrence of COVID-19 at its premises at the time of its closure on **15 March 2020**. The information provided by the Complainant Company was that there was no occurrence of COVID-19 at its premises and because of this, it could not provide the information requested by the Provider. This was expressly stated in the Complainant Company's email of **1 June 2020**.

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Further to this, the evidence shows (in particular the Complainant Company's emails of **1 June 2020**, **2 March 2021** and **10 March 2021**) that the reason for the Complainant Company's closure was not due to an occurrence of COVID-19 at its premises but the Complainant Company's compliance with the Government announcement on **15 March 2020** that all public houses and bars (including hotel bars) close from that evening until at least **29 March 2020**.

It is the Complainant Company's position that cover is triggered under the "Prevention of Access" cover under the policy, by reason of the Government imposed closed which was announced on **15 March 2020**. However, in light of the proper interpretation of the Business Interruption Endorsement, I do not accept that the Government announcement on **15 March 2020** is sufficient to trigger the cover contained in this endorsement.

I am satisfied that, for cover to become operative, there must be an occurrence of COVID-19 at the Complainant Company's premises and, restrictions must be imposed on the premises by the competent local authority, as a result of this occurrence. While restrictions were imposed on the use of the premises, insofar as the premises could not have members of the public in attendance, I am not satisfied these restrictions were in response to an occurrence of COVID-19 at the premises. Neither do I accept that the Complainant Company was prevented from gaining access to the premises.

In the Complainant Company's email of **10 March 2021**, the Complainant Company sets out the basis of its claim by referring, in part, to a number of sections of its policy. Having considered the points made by the Complainant Company in this email, I do not consider these to be sufficient to establish that cover is triggered under the Business Interruption Endorsement.

The basis for the Complainant Company's request on **28 January 2021** to re-open the claim appears to have been the because of *"a court case on the 4th Feb which will set a president* (sic) *for this."* In this respect, I note that the decision in *Hyper Trust Limited trading as Leopardstown Inn v. FBD Insurance plc* [2021] IEHC 78 was delivered on **5 February 2021** ("the Test Case") which considered the circumstances in which cover would be triggered under a particular policy of insurance. However, the Complainant Company has not addressed, either in its correspondence with the Provider or as part of its complaint to this Office, the basis on which the Test Case has set a precedent for the interpretation of the policy of insurance which is the subject of this complaint. On considering the judgment delivered in the Test Case and the Business Interruption Endorsement, which is the subject of this complaint, I am not satisfied that the decision in the Test Case has any direct bearing on the proper interpretation of the cover provided by the Provider's Business Interruption Endorsement to this policy, or the circumstances in which cover is triggered.

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I note the Complainant Company's opinion that it is entirely unreasonable for the Provider not to accept that it closed its business for a valid reason, by way of compliance with the demands and laws of the country of Ireland. I accept in this regard, that the Complainant Company closed its premises for reasons which were indeed entirely valid at that time. The terms and conditions of the insurance policy in place, however, do not provide cover for the particular reasons why the Complainant Company closed its premises, irrespective of their validity. To recover benefit payment under the policy, the specific terms of the policy must be met, in the way which has been detailed above, but in this instance the evidence shows that the Complainant Company's circumstances did not meet those specific requirements.

While I appreciate that the Complainant Company has likely suffered significant disruption to its business as a result of COVID-19 and that this decision is very disappointing to it, I am satisfied that the Provider was entitled to decline its claim.

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)

25 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

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(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.