An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0254
Sector:	Insurance
Product / Service:	Other
Conduct(s) complained of:	Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a limited company engaged in the provision of employee relations solutions ("the Complainant Company") and held a 'Business Policy' of insurance with the Provider.

This complaint was made to the FSPO in **February 2021**, and it concerns a claim for business interruption losses arising from the outbreak of coronavirus (COVID-19).

The Complainant Company's Case

By email dated **30 March 2020**, the Complainant Company's Broker ("the Broker") advised the Complainant Company in respect of the cover available under its policy for business interruption, as follows:

> *"As per our conversation on the phone I can confirm* [the Provider] *will only cover business interruption for Covid 19 (Notifiable disease cover) if the business was closed due to someone contracting the virus."*

The Complainant Company responded the same day, stating it did not accept the Provider's position on cover and requested that the Broker advise as to the claims process.

On **7 April 2020**, the Broker notified the Provider of the Complainant Company's intention to proceed with a claim for business interruption losses due to the outbreak of COVID-19, as follows:

> *"Please be aware the above client is looking to proceed with a claim under the BI section of this policy Due to Convid19* (sic).
>
> *I have asked the client to quantify their claim and I will advise once they do."*

By email dated **9 April 2020**, the Provider wrote to the Broker, providing a claim reference number and the name of the claims hander.

In an email to the Broker dated **15 April 2020**, the Complainant Company, stated in part, as follows:

> *"The principal question we raised, however, is relatively straightforward. Does* [the Provider] *accept that the business interruption insurance which we purchased covers this situation, where we have been obliged to close our* […] *to Government restrictions resulting from Covid-19, and where other customers have formally notified us they cannot continue work in relation to their normal activities, enter their premises or conduct normal business* […]
> *Our principal concern at the moment is that it has previously been indicated to us that* [the Provider] *"will only cover interruption for Covid-19 (Notifiable disease cover) if the business was closed due to someone contracting* […]
> *Can it be confirmed that* [the Provider] *is accepting claims for business interruption due to Covid-19?"*

On **16 April 2020**, the Provider wrote to the Broker acknowledging the claim notification. In this letter, the Provider recorded the date of loss as **13 March 2020** and the type of loss as business interruption due to COVID-19. The letter also set out the basis of the cover provided under the '**Notifiable Diseases Section'** of the Complainant Company's policy, 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."*

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This letter also requested the following information to allow the Provider to assess the Complainant Company's claim:

> *"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."*

The Provider wrote to the Broker on **3 June 2020** requesting a response to its earlier correspondence. By email dated **17 June 2020**, the Broker wrote to the Provider, as follows:

> *"The has* (sic) *advised they do not accept the position of* [the Provider]*, as indicated to them and wish to make a formal complaint."*

The Provider responded to the Broker on **18 June 2020**, as follows:

> *"Can you please explain the basis for the complaint since we issued a letter to your office on 16/4/20 requesting various details to enable us investigate and consider the claim* […]*. A reminder letter was also issued on 3/6/20* […]*."*

On **8 July 2020**, the Provider wrote to the Broker requesting a response to its earlier correspondence regarding the assessment of the claim.

The Complainant Company emailed the Broker on **16 June 2020** in respect of the claim and the Provider's position on cover. The Complainant Company also attached a letter to this email. It appears that both the Complainant Company's email and letter were forwarded to the Provider by the Broker on **16 July 2020**. The Complainant Company's email states, as follows:

> *"Further to our telephone conversation, please find attached letter which has been sent by post.*
> *Also attached is a copy of the Proposal that we received from* [the Former Broker] *at the time of renewal.*

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As you will see, we do not accept the position of [the Provider]*, as indicated to us, and are now formally requesting confirmation that the insurance covers the business interruption as outlined in the proposal.*
In the absence of such confirmation, we wish to progress a formal complaint to [the Provider]*, in the first instance.* […] *We also expect that the product that was sold to us by* [the Former Broker] *is adhered to.* […]*."*

The letter referred to by the Complainant Company in the above email is dated **12 June 2020** and states, in part, as follows:

*"**Background***

[The Former Broker] *forwarded in invitation to renew Policy No* [662]*, Policy Holder* [the Complainant Company] *dated September 28th, 2019 by email dated October 30th, 2019.*

[…]

The specification for the Business Interruption forming part of the Business Policy [662] *is contained on Page 4 of the Proposal document.*

Item 1 indicated that the insurance relates to Gross Revenue for a maximum indemnity period of twelve months and the sum insured of €250,000.

The basis of cover indicated that there would be a deductible/excess of €500 for each and every incident or occurrence.

Item 1 relating to the Gross Revenue indicates that the insurance under Item 1 is limited to

A. Loss of Gross Revenue
B. Increase in cost of working and the amount payable as shall be
a) […]
b) […]

The proposal provided that if the sum insured by this item be less than the annual gross revenue (or a proportionately increased multiple thereof where the maximum indemnity period exceeds twelve months) the amount payable shall be proportionately be reduced. Revenue is indicated as the money paid or payable to the insured in respect of services rendered in the course of the business at the premises. Standard Gross Revenue is indicated as the gross revenue during that

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period in the twelve months immediately before the date of damage which corresponds with the Indemnity period. Annual Gross Revenue is indicated as the gross revenue during the twelve months immediately before the date of the damage.

There is an indication that in relation to both such adjustments shall be made as may be necessary to provide for the trend of the business and for the variations or in special circumstances of affecting the business either before or after the damage which would have affected the business had the damage not occurred so that the figures thus adjusted shall represent as nearly as may reasonably practicable the results which but for the damage would have been obtained during the relevant period after the damage.

Specific References to Business Interruption in the proposal

The reference to Business Interruption in the proposal indicates that it covers loss resulting in interruption of or interference with the business carried on by the insured at the premises in consequence of damage by an insured peril to property used by the insured at the premises for the purposes of the business.

The principle extensions to the Business Interruption section cover

- *Interruption or Interference with the business in consequence of an occurrence of a notifiable disease[1], the discovery of vermin or pests at the premises, an accident causing defect in the drains or other sanitary arrangements at the premises, all of which cause restrictions on the use of the premises on the order or advice of the competent local authority up to €250,000 any one loss.*

- *Damage caused by insured peril which causes an interruption to public utilities in respect of any one occurrence or in any one period of insurance not exceeding €250,000.*

- *Damage caused by an insured peril to insured property in the immediate vicinity of the premises which prevents or hinders the use of the premises or access thereto up to a limit of €250,000 in any one period of insurance. The principle exclusions and limitations for Material Damage and Business Interruption is indicated as excluding unoccupied buildings unless they are notified to us and specific precautions are taken to inspect or protect the property as specified in the policy.*

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- *Riot, Civil commotions, strikers, locked out workers, theft, theft damage to buildings, metered utilities, tenants liability to landlord, accidental escape of water from an automatic sprinkler installation or escape of water from any tank, apparatus or pipe in respect of anu* (sic) *unoccupied building.*

- *Theft not involving force or violent entry or exit from the premises.*

- *Accidental damage, theft, storm or flood to moveable property in the open*

- *Frost, ware and tear, gradual deterioration in latent defect, faulty or defective design in materials.*

[Footnote 1] ***Please note that the Proposal Document does not state that the occurrence of a notifiable disease must be at the premises but that restrictions on the use of the premises are caused on the order of the competent authority, who are the Government in this case.***

Quantification of Claim.

It has not been possible up to now to quantify the claim, as the interruption has continued. Our understanding of the policy means that we need to provide evidence of the gross revenue for the twelve months prior to the Government's order.

We can also provide:

- *evidence of reduction in turnover since March 2020*

- *evidence of business interruption due to the postponement of contracts.*

- *Evidence of gross income since the commencement of the interruption.*

We would welcome advice in relation to the format required for quantification and/or if additional evidence will be required.

Response to notification of Claim

We are concerned that the initial response on March 30th, 2020 after we notified [the Former Broker]*, initially on March 26th, 2020 was that "*[the Provider] *only cover business interruption for Covid 19 (Notifiable disease cover) if the business was closed due to someone contracting the virus."*

This was followed with further confirmation of this position by email dated April 15th, 2020, which stated:

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"Business Interruption cover is provided within your Insurance policy, and generally responds to claims, arising from physical property damage at the insured premises, which results in loss of revenue to your business. Whilst policy wordings vary, the outbreak of a disease is very unlikely to be considered as "damage" within the meaning of the policy.

Unfortunately we cannot confirm that [the Provider] *are accepting claims for business interruption due to Covid-19. We have referred your case to* [the Provider] *and they have advised that cover only in place if someone in the Workplace contracted Covid-19."*

There was a subsequent request for us to indicate "Has anyone on the premises has (sic) *contracted covid 19 or been asymptomatic"*

We wish to state clearly that we do not accept that this aspect has any relevance to the Business Interruption Insurance we purchased.

Conclusion

We are now formally requesting confirmation that the insurance covers the business interruption as outlined in the proposal.

In the absence of such confirmation, we wish to progress a formal complaint to [the Provider]*, in the first instance.* […]*."*

By email dated **23 July 2020**, the Provider emailed the Broker, as follows:

"Please find attached copy e-mail sent to your office on 18/06/20 querying the basis for a complaint in relation to the claim as [the Provider] *have written to your office twice i.e. an acknowledgement letter on 16/4/20 and a reminder letter on 3/6/20 requesting various details to enable us to investigate and consider the claim.*

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

The policyholder's letter attached to your email of 21/7/20 would seem to be referring to the policy and not the claim in which case I will forward onto our underwriter for their review."

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On **4 August 2020**, the Broker emailed the Provider apologising for the delay in responding (which was due to annual leave), stating as follows:

> *"Yes I can confirm that the policyholder's letter attached to my e-mail of 21/7/20 is for the underwriters attention.*
>
> *Also as advised covid19 never occurred at the client's premises so the client can't provide the details requested."*

In a further email on **4 August 2020**, the Broker stated, as follows:

> *"There seems to be abit* (sic) *of confusion in relation to the above.*
>
> *The client is looking to make a complaint regarding your stand on the BI claim in relation to Covid19 (Occurring at the premises).*
>
> *The client wants to make a claim but covid19 didn't occur at their premises."*

The Provider wrote to the Broker on **4 August 2020** to advise that it was declining the claim, 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.* […]*."*

By letter dated **5 August 2020**, the Provider wrote to the Broker acknowledging receipt of the complaint.

By letter dated **20 August 2020**, the Provider advised the Broker that it was upholding its decision to decline the claim, as follows:

> *"We received notification of your claim on the 7/4/20 and on the 16/4/20 we wrote to you requesting information to support your claim.*
>
> *On the 3/6/20 and 8/7/20, we issued reminders to you requesting the information to support your claim to enable us to review and consider.*

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On the 4/8/20, we received an e-mail from you stating that there was no occurrence of the Notifiable Disease at the Premises.

On the 5/8/20, we issued a letter to you declining the claim advising that your claim in respect of Business Interruption resulting from Covid-19 is not covered by your Policy as there was no outbreak of the Notifiable Disease at the Premises, and 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.

Please note that Our Notifiable Disease Extension wording will only respond if the following circumstances exist

1. *The outbreak of the Notifiable Disease is at the Premises and*
2. *The closure of the Premises is brought about on the advices of the competent authority as a result of an outbreak at the Premises.*
3. *There is verified financial loss directly resulting from 1. And 2. Above*

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 appreciate this is a challenging time for you and we empathise with your situation that is outside your control. However our position is that as with all claims we must be bound by the terms and conditions of your insurance policy. Having completed our review, our decision to decline your claim remains unchanged and no cover can be provided."

By email dated **29 September 2020**, the Complainant Company wrote to the Broker requesting certain policy documentation and raised certain queries regarding the 'Notifiable Disease Extension'. By email dated **27 October 2020**, the Broker emailed the Provider requesting this documentation and the following information:

"I would appreciate if you could highlight for us where it states within any of the documentation:

1. *The outbreak of the notifiable disease is required to be <u>at the premises,</u> or*

2. *That the closure of the premises is brought about by the advices of the competent authority <u>as a result of an outbreak at the premises</u>*

3. *There is a verified financial loss <u>directly resulting</u> from 1 and 2 above*

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> *We would also appreciate if you could indicate where in such documentation it states that the Indemnity period is from "the date at which the restrictions at the premises are applied for a maximum period of up to three months and is subject to and limited as noted in the policy"."*

The Provider responded to the Broker the same day, as follows:

> *"The Business Interruption wording is outlined in the policy documents '**Business Interruption Section Extension continued' (page 50 of 109 of the policy document).***
>
> *This outlines the cover in relation to Notifiable Disease.*
>
> *In relation to your points raised, they are outlined as follow* (sic)*:-* ***Notifiable Disease Section***
>
> *Your specified queries:*
>
> *1) On section 6) – (1) (i)*
> *2) Special Conditions (A) (ii)*
> *3) B (i)*
>
> *It also states on this section that the maximum indemnity period is 3 months.* […]*."*

The Complainant Company considers that its claim for business interruption losses is a result of its temporary closure due to the outbreak of COVID-19 and is covered by the terms and conditions of its Business Policy. In this regard, the Complainant Company sets out its complaint in the Complaint Form, as follows:

> *"An insurance Policy, including business interruption was purchase*[d] *for period 17/11/2019 to 16/11/2020.*
> […]
> *The basis for, and our understanding of, the policy based on information provided through* [the Broker]*, is set out in attached documents.*
> *The claim and initial complaint to* [the Provider] *were processed through* [the Broker].
> *The Claim was refused by* [the Provider]*."*

As a result, 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:

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"We are setting out a calculation based on a comparison between 2019 and 2020 Period 17/11/18 to 17/11/19 = €232,926.97 --- Period 17/11/19 to 17/11/20 = €161,409.38
This amounts to a loss of €71,516.97 This figure is based on initial estimate. Accounts for 2020 not completed
We have not employed the services of a loss assessor/account at this point based on advice from [the Broker]
We wish to receive the fair amount lost due to business interruption. If we are required to avail of the service of a loss assessor or accountant, we expect these costs to be paid also."

The Provider's Case

The Provider says the Complainant Company, a limited company trading as a management consultant, held a business insurance policy with it since **17 November 2018**. On **7 April 2020**, the Provider says the Complainant Company's Broker submitted correspondence stating an intention to claim for business interruption losses attributable to COVID-19 under the Business Interruption section of the policy.

The Business Interruption Notifiable Disease Extension, the Provider says, provides cover for loss of income where an outbreak of a Notifiable Disease is at the Premises and the closure of the Premises, by order of the competent local authority, is as a direct result of an outbreak of a Notifiable Disease at the Premises.

The Provider says the Business Interruption Notifiable Disease Extension of the Complainant Company's 'Small Business' insurance policy document issued on **29 November 2018** states, on page 50, as follows:

"The insurance by this Policy will 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

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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

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.

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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."

[Provider emphasis]

The Provider says it acknowledged receipt of the claim notification and responded to the Broker with a claim reference on **9 April 2020**. This was followed, the Provider says, by a letter to the Broker dated **16 April 2020**, requesting the following supporting information to allow it to consider the claim:

"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 the claim.*

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

The Provider says a response was not received and a reminder letter issued to the Broker on **3 June 2020**. The Provider says this reminder made reference to the letter dated **16 April 2020** and asked again for the supporting documents requested.

The Provider says it received an email from the Complainant Company via the Broker on **18 June 2020**. In this email, the Provider says the Complainant Company advised that it did not accept the Provider's position and that it wished to make a formal complaint. The Provider says the nature of the complaint was not clear from this communication. On the same day, the Provider says it responded asking the Broker to confirm the basis for the complaint. At this stage, the Provider says the claim was under active investigation and no decision had been made on whether the policy cover would engage in respect of the claim. The Provider says no response was received to its enquiries.

The Provider says it issued a further reminder on **8 July 2020** which referenced the previous two letters dated **16 April 2020** and **3 June 2020**, and again asked for all relevant claims information.

On **4 August 2020**, the Provider says it received an email notification from the Broker that there was no occurrence of COVID-19 at the Complainant Company's Premises.

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The Provider says the Business Interruption Notifiable Disease Extension provides cover where there is an outbreak of a disease at the Premises causing an 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 outbreak of the Notifiable Disease is at the Premises and

2. The closure of the Premises is brought about on the advice of the competent authority as a result of an outbreak 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 the first and second criteria outlined above had not been satisfied. Subsequently, the Provider says it wrote to the Broker on **4 August 2020** advising that the claim was not covered under the policy because there was no outbreak of the Notifiable Disease at the Premises, and any restrictions on the use of the Premises by the competent authority were not brought about as a direct result of an outbreak of the Notifiable Disease at the Premises.

In respect of the definition of the term Notifiable Disease, the Provider refers to page 50 of the policy document dated **29 November 2018** and cites the following passage:

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

The Provider says it would consider that COVID-19 falls within the definition of a Notifiable Disease as per the policy wording.

In terms of whether there was an occurrence of COVID-19 at the Complainant Company's premises, the Provider says the Broker submitted correspondence stating an intention to claim for losses attributable to COVID-19 under the Business Interruption section of the policy and that the letter issued to decline the claim was sent on **4 August 2020**. From **7 April 2020** to **4 August 2020**, the Provider says it wrote on three occasions to the Broker. In this respect, the Provider refers to its letter of **16 April 2020** and the information requested in this letter. The Provider says it did not receive a response to this letter. The Provider says it issued a reminder letter on **3 June 2020** but did not receive the required information.

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Another reminder letter issued on **8 July 2020**, the Provider says, and it received an email response from the Broker on **4 August 2020**, in which the Broker confirmed that there had been no occurrence of Covid-19 at the Complainant Company's Premises.

The Provider says it has not been supplied with any evidence which supports the occurrence of a Notifiable Disease at the Complainant Company's Premises. The Provider says it would therefore conclude that there has not been an occurrence of a Notifiable Disease at the Premises prior to, at the time of, or shortly after its closure in **March 2020**.

In respect of the Health Act 1947 (Affected Areas) Order 2020, the Provider says this declares that the State is an area ***where it is known or thought to be sustained human transmission of Covid-19***. The Provider says this Order does not prove that the Complainant Company has suffered an occurrence of a Notifiable Disease at the Premises, nor does it remove the requirement placed upon the policyholder of proving that there was an occurrence of a Notifiable Disease at the premises.

The Provider says the Complainant Company's policy is quite clear and defines premises (at page 49, 'Business Interruption Section extensions') as:

> ***"Premises will only mean those locations stated in the Premises definition. In the event that the policy included an extension which deems loss, destruction or damage at other locations to be an incident, such extension will not apply to this Extension"***.

At page 55, 'Material Damage/Business Interruption Sections Definitions', the Provider says premises is defined as ***"the location of Property Insured as stated in the Schedule"***. As per the supporting documents and information received from the Complainant Company, the Provider says it does not accept that there was an outbreak of COVID-19 at the insured premises at that time. The Provider says it does not believe the Health Act (Affected Areas) Order 2020 had any implications for the Complainant Company's entitlement to payment of benefits under the policy.

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 requirements laid down by its Business Interruption Notifiable Disease Extension are, as follows:

> *"The Notifiable Disease Extension under this Policy provides cover when:*
> *1. The outbreak of the Notifiable Disease is at the Premises, and;*
> *2. The closure of the Premises is brought about on the advices of the competent authority as a direct result of an outbreak of the Notifiable Disease at the Premises"*

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The Provider says no evidence has been provided to support the occurrence of a Notifiable Disease at the Premises or to support that the closure of the Premises had been brought about on the advices of the competent authority as a direct result of an outbreak of the Notifiable Disease at the Premises.

The Provider says it considers its decision to decline the Complainant Company's claim to be fair and reasonable. Based on the policy wording, the Provider says there is no cover in this scenario and therefore, the claim was correctly declined.

The Complaint for Adjudication

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

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant Company was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. 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 **4 February 2022**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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In response to the Preliminary Decision of this Office, the Complainant Company made detailed submissions, and advised that it was:

> *"seeking that the final decision finds in favour of the complaint. Otherwise, we are seeking a full oral hearing to address the issues and facts involved and where we can have representation."*

In reviewing the Complainant Company's request, I have had regard to the Supreme Court judgment of Finnegan J in ***J&E Davy v. Financial Services Ombudsman [2010] IESC 30.*** In this regard I note that Finnegan J quoted from the judgment of Costello P, in Galvin v Chief Appeals Officer [1997] 3 IR 240, as follows:

> *"There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. This case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."*

I have also considered the decision of ***Ryan v Financial Services Ombudsman***, unreported, High Court, 23 September 2011, in which MacMenamin J stated that *"[t]he Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing"* (page 35). He added that *"[i]t is important to recognise that, if the Ombudsman's office is to be permitted to carry out its statutory function effectively, it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law*". (Page 35).

In ***Star Homes (Middleton) Ltd v The Pensions Ombudsman*** [2010] IEHC 463 Hedigan J held that:

> "*The Ombudsman has a discretion whether or not to hold an oral hearing and in these circumstances the Ombudsman was entitled to take the view that the conflict surrounding the P45 was not such as to require him to hold an oral hearing. The applicant has also failed to satisfy this court that it had an explanation which required an oral hearing to adjudicate upon. If an oral hearing were granted in this case its effect would simply be to allow the applicant to re-iterate what the applicant had already submitted to the respondent in writing, therefore fair procedures did not require the holding of an oral hearing in this case. In any event there are further reasons that support the Ombudsman's decision herein."* (Para 7.1).

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In ***Dola Twomey v. Financial Services Ombudsman*** unreported, High Court, 26 July 2013 Feeney J stated as follows:

> *"An oral hearing may be required as a matter of fair procedures, but such a requirement arises when there is a clear identified dispute as to particular events central to the case, and where there is not sufficient documentary evidence available to enable the FSO come to a conclusion on the evidence and where the resolution of the dispute requires oral evidence."* (Page 14).

In this instance, I am satisfied that there is adequate documentary evidence available upon which the conflicts between the Complainant Company and the Provider, can be resolved. Accordingly, following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Policy documents and terms of business interruption cover

In its email of **29 September 2020**, the Complainant Company indicated that it did not receive the policy document which contained the terms and conditions applicable to its business interruption cover, which set out the following requirements for cover: an outbreak of a notifiable disease at the insured premises, closure brought about on the advice of the competent authority as a result of the outbreak and a verified financial loss resulting from this.

In an email to this Office dated **23 April 2021**, the Complainant Company stated that:

> *"The attached pdf document titled 'Schedule' by the sender is the actual document we received by email from* [the Former Broker] *on* [Provider] *headed paper. The document was authored by a* [named individual] *and titled: '*[Provider] *Renewal terms 2019' in the document properties. It was provided to us as one complete document.*
>
> *I wish to highlight that there are references to Business Interruption on Pages 1 of 12; 4 of 12; 5 of 12; page 1 of the Combined Property & Liability Insurance: Insurance Product Information Document; page 2 of 4 under the heading 'Small Business Policy Summary of Cover'.*
>
> *We did not receive any other documents at the time the policy was renewed in 2019 and we relied on the attached information. We did not receive a separate 'Policy Schedule' or 'Policy Terms and Conditions'*

/Cont'd…

A document purporting to be a Policy Document was forwarded to us in March 2021 by [the Broker]*, however, we do not accept that this is a valid document. We would expect that* [the Provider] *should be able to provide such documents, if they exist, given that they appear to have refused the claim based on them. However, if they do exist we were not provided with them."*

In response to the Provider's Complaint Response (dated **3 June 2021**), the Complainant Company delivered a further submission dated **28 June 2021**, stating, in part, as follows:

"The insurance policy (2018) provided by [the Provider] *refers to the Policy being in the name of* [a Complainant Company director]*, and we did not receive a copy of the policy that you received from* [the Provider] *nor an updated policy with the correct name* [of the Complainant Company]*.*

We are attaching a copy of an email received from [the Former Broker] *clarifying that the policy was being updated. You will also note that the additional documentation provided by* [the Former Broker]*, indicating that it was to be read in conjunction with the policy.*

Similarly, when we received the schedule in 2019 (Also Attached) this also indicated that the document was to be read in conjunction with the policy.

This document clearly included the following on page 2 of 4 (or page 17/25). ***This does not specify the Notifiable Disease must occur at the premises.***

"Business Interruption Section

Covers loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of Damage by an Insured Peril to property used by the Insured at the Premises for the purpose of the Business.

Principal Extensions

Covers interruption or interference with the Business in consequence of:

- *an occurrence of a Notifiable Disease, the discovery of vermin or pests at the Premises, an accident-causing defect in the drains or other sanitary arrangements at the Premises, all of which cause restrictions on the use of the Premises on the order or advice of the competent authority up to €250,000 any one loss.*

/Cont'd…

- *Damage caused by an insured Peril which causes an interruption to Public Utilities in respect of any one occurrence or in any one Period of Insurance not exceeding €250,000*
- *Damage caused by an insured Peril to property in the immediate vicinity of the Premises which prevents or hinders the use of the Premises or access thereto up to a limit of €250,000 in any one Period of Insurance"*

We have understood at all stages that the references to Business Interruption, which in 2019 included a further increase in premium paid for Business Interruption, would amend the overall policy to take account of the new schedule which was the basis on which we had been offered the renewal of the policy.

In a submission dated **10 August 2021**, the Provider stated, in part, as follows:

"We can confirm that the full policy document forwarded to [the Office of the Financial Services and Pensions Ombudsman] *was the same one that was issued to the Complainant Company's Broker when this policy was purchased in November 2018.*

A request was received from the Complainant Company's Broker to amend the complainant company's address and company name on the 10th December 2018. This was completed and an Endorsement schedule issued to the Complainant Company's Broker reflecting these changes.

[…]

One of the documents to which the Complainant Company refers to in the recent emails is a Quotation Summary. This is an indication of cover given to a customer enquiring about a quotation. Whilst this document does not explicitly state that the occurrence of a notifiable disease must be at the premises, it is clear that the Quotation Summary is a summary document and is subject to the terms and conditions as set out in the policy wording […]

In this regard, the business insurance policy is a contract between the Provider and the policyholder and the Business Insurance Policy document and Schedule should be read as one contract, and the separate Quotation Summary does not form part of a contract of insurance."

/Cont'd…

In a submission dated **7 September 2021**, the Complainant Company stated, in part, as follows:

> *"*[W]*e remain resolute that the insurance cover offered to us in the renewal in 2019 covers the situation we found ourselves in.*
>
> *In this context it should be noted that the renewal in 2019 involved a significant increase in the amount paid on a percentage basis for Business Interruption. In 2018 the total amount of the premium for Business Interruption was €27.54 and in 2019 it was €65.71.*
>
> *In relation to the recent letter to you from* [the Provider] *we wish to comment as follows:*
>
> *The wording in the summary document referred to by* [the Provider] *clearly covered our situation. The quote received through the broker which included the pricing and schedule was in the name of* [the Complainant Company] *and dated September 28th, 2019.*
>
> [The Provider] *have not produced a policy document for* [the Complainant Company] *for 2019/20. It should be noted that the policy documents for 2018/19 and for 2019/20, provided by* [the Provider] *and the Broker during this process include the 2018 prices as well as the breakdown in relation to the different elements of the insurance for 2018.*
>
> [The Provider] *state that "Our documentation clearly states that the policy documents including any endorsements or renewal schedules should be read jointly with the original policy wording". It should also be noted that the wording contained above indicates that any endorsements or renewal schedules should be read* ***jointly*** *with the original policy wording. A plain English reading of the word jointly means equally, together with, conjointly or side by side with. At the very least, it should mean that it has some weight in determining the overall contract.*
>
> *Our position is that we understood that the wording in the summary document and the invitation to renew received through the broker, once accepted, and paid for, would have been used to amend the 2018/2019 policy to reflect the wording in the 'RENEWAL SCHEDULE: Forming part of Business Policy Number* [662]*' issued by* [the Provider] *to our broker on September 28th, 2019. This 12-page Renewal Schedule stated that the principal extensions included cover for* ***"interruption or interference with the Business in consequence of: an occurrence of a Notifiable Disease, …***

/Cont'd…

[Other extension] … which cause restrictions on the use of the Premises on the order or advice of the competent authority up to €250,000 any one loss."

We believe that it was reasonable of us to expect that the terms of the original policy were updated by the new terms provided to us. If this is not the case and we were sold a product which purported to provide cover for a situation such as has arisen, and that then that wording is made meaningless by another document then we would view this as a serious matter. This means that the terms of the indication of cover given to a customer is routinely nullified by the policy, and is, essentially, the mis-selling of a product. If it is the case that [the Provider] *are correct, then we were purchasing and paying for a benefit that in fact did not exist. We cannot and will at no stage accept this.*

[The Provider's] *letter indicates that they were in contact with the complainant company's insurance broker in November 2020. It should be pointed out that this contact was in relation to a new policy for 2020/2021. We asked for clarity in relation to the Business Interruption section of the policy going forward and this was provided to us. The benefits applying to this aspect of the insurance policy going forward are significantly different from what was indicated in 2019/2020. We have continued insurance cover through those brokers for now because the Business Interruption aspect is part of the overall business insurance we require. The company indicates that they issued a complete policy wording on the 10th November 2020 which reflected the changes made to the policy on the 10th December 2018. This means that there was no updated policy between 10th November 2018 and the 10th November 2020. We believe that it is reasonable to expect that policy documents would be updated by* [the Provider].

[The Provider] *have not explained the discrepancy between the various documents i.e., the 2018 policy document they provided, the* [Provider] *schedule dated the 28th September 2019 provided, and the document provided by the brokers to us dated 10th November 2020 purporting to be a policy document with a schedule for* [the Complainant Company] *which does not reflet either of the other documents."*

In respect of the 'Quotation Summary', the Complainant Company states, as follows:

"In our view this comment confirmed that the wording provided in that Summary Document, which is on [Provider] *headed paper, did not limit business interruption claims to the "at the premises" element.*

/Cont'd…

> *Elsewhere, it is stated by* [the Provider] *that "the separate Quotation Summary does not form part of a contract of insurance." If this is the case, then that document, which was forwarded as part of a 12-page Renewal Schedule in September 2019 is grossly misleading, and its effect could then only be to mis-sell a product, whether intended or not."*

It appears from the evidence that a Business Policy (policy number ending 662, which is the policy number in respect of the policy the subject of this complaint) was first incepted with the Provider in **November 2018**. By letter dated **29 November 2018**, the Provider wrote to the Former Broker enclosing the applicable policy document, dated **29 November 2018**. The 'Schedule' contained in the policy document recorded a Complainant Company director as the 'Insured'.

It appears that in **December 2018**, the Former Broker instructed the Provider to amend the 'Insured' to the Complainant Company. In this respect, the Complainant Company has provided a 'Endorsement Schedule' dated **11 December 2018** which records the Complainant Company as the 'Insured' in respect of policy number ending 662. The purpose of the Endorsement Schedule appears to have been to amend the Schedule. In particular, it is stated under the heading 'BUSINESS INTERRUPTION' on page 4 of the Endorsement Schedule that: *"The Specification is amended to read as follows:"*. In this respect, I note the business interruption cover on page 6 of the **November 2018** Schedule is identical to the business interruption cover on page 4 of the **December 2018** Endorsement Schedule, the only difference being the address of the insured premises.

On considering the evidence, I note that the only amendment to the Business Policy incepted in **November 2018** was a change in the name of the insured party and the address of the insured premises. Accordingly, I am satisfied that the policy document which issued in **November 2018** contained the cover applicable to policy number ending 662, regardless of the fact that the insured party changed, and that this policy document contained the terms and conditions of the cover applicable to the Complainant Company's Business Policy.

In such circumstances, I am of the view that there was no requirement to issue a new policy document for the Complainant Company. I consider that the Endorsement Schedule was sufficient to demonstrate that the insured party had changed. I am also of the view that the existing terms and conditions of cover, as set out in the **November 2018** policy document, remained in place. I do not accept that a change in the insured party required the issuing of a new policy document nor am I satisfied that this change somehow altered or affected the terms on which the cover was originally incepted.

The Provider's letter to the Former Broker dated **28 September 2019** contained an *"invitation to renew this Policy"*, being policy number 662.

/Cont'd…

On considering the 'Renewal Schedule' dated **28 September 2019**, I note the business interruption cover in this document is identical to the cover in the Endorsement Schedule. I also note that there is no indication in the Renewal Schedule or the Provider's letter, that the terms applicable to the Business Policy for the previous period of insurance were different from the terms that would be applicable on renewal or to the terms contained in the **November 2018** policy document when cover was originally incepted.

In my opinion, the Provider was not necessarily required to issue a new policy document at each of the Complainant Company's renewals of cover, if the terms and conditions had not been changed. I consider it to have been sufficient for the Provider to have issued a renewal schedule in advance, or at the time of the policy renewal date. In the context of the present complaint, I am of the view that the Provider was only required to issue a policy document if there had been a change to the terms contained in the policy document previously supplied, or if a request had been made for a copy of the policy document.

When the Provider wrote to the Former Broker in respect of the renewal of the Complainant Company's Business Policy on **28 September 2019**, it enclosed a 'Renewal Schedule', an 'Insurance Product Information Document' and a 'Small Business Policy Summary of Cover'.

The **Product Information Document** is a two-page document, which on the first page, stated that:

> *"This document outlines the main benefits and restrictions associated with the* [Provider] *Business Policy.* ***This is not a policy document and does not reference all of the benefits, terms, conditions or exclusions.*** *Complete pre-contractual and contractual information on the product is provided in the full policy documentation.* […]*."*

The Product Information Document explains 'What is insured?' and 'What is not insured?'. In terms of what is insured, the Product Information Document states the following in respect of business interruption:

> *"**Business Interruption (Optional)***
> *Covers financial loss resulting from the interruption of your Business after a loss covered by the material damage section.*
>
> *Principal Extensions:*
> *- Notifiable Disease*
> *- Prevention of Access*

/Cont'd…

The '**What is insured?**' section continues on the second page. At the top of page two, it is stated that:

> ***"This is not a complete list of extensions. Please refer to your policy document/schedule."***

In terms of what is not insured, the Product Information Document lists a number of exclusions on cover.

Beneath this list, it is stated that:

> ***"This is not a complete list of exclusions. Please refer to your policy document/schedule."***

On pages one and two of the Product Information Document, restrictions on cover are listed. Beneath this list, it is stated that:

> ***"This is not a complete list of restrictions. Please refer to your policy document/schedule."***

The **Summary of Cover** is a four-page document. On the first page it is stated that:

> *"This document outlines the main benefits and restrictions associated with* [a Provider] *Small Business Policy. It* ***does not*** *list all of the benefits, terms, conditions, limitations, exceptions and exclusions associated with the Policy, a copy of which is available from the Company or your Insurance Intermediary on request.*
>
> […]
>
> *Please take time to read the Policy and your Schedule to ensure that you understand the cover provided.*
>
> *You should review and update your cover periodically to ensure it remains adequate."*

On page two of the **Summary of Cover**, it stated under the heading 'Business Interruption Section', as follows:

> *"Covers loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of Damage by an Insured Peril to property used by the Insured at the Premises for the purpose of the Business.*

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Principal Extensions

Covers interruption or interference with the Business in consequence of:

- *an occurrence of a Notifiable Disease, the discovery of vermin or pests at the Premises, an accident causing defect in the drains or other sanitary arrangements at the Premises, all of which cause restrictions on the use of the Premises on the order or advice of the competent authority up to €250,000 any one loss.*

- *Damage caused by an insured Peril which causes an interruption to Public Utilities in respect of any one occurrence or in any one Period of Insurance not exceeding €250,000*

- *Damage caused by an insured Peril to property in the immediate vicinity of the Premises which prevents or hinders the use of the Premises or access thereto up to a limit of €250,000 in any one Period of Insurance*

Principal Exclusions and Limitations (Material Damage and Business Interruption)

Cover excludes:

- *Unoccupied buildings unless they are notified to us and specific precautions are taken to inspect and protect the property as specified in the Policy.*
- *Riot, Civil Commotion, Strikers, Locked-Out Workers, Theft, Theft Damage to Buildings, Metered Utilities, Tenants Liability to landlord, Accidental Escape of water from any automatic sprinkler installation or escape of water from any tank apparatus in respect of any Unoccupied building*
- *Theft not involving forcible and violent entry to or exit from the premises*
- *Accidental Damage, Theft, Storm or Flood to moveable property in the open*
- *Frost, wear and tear, gradual deterioration, inherent vice, latent defect, faculty or defective design or materials"*

Having considered the Product Information Document and the Summary of Cover, I am satisfied that these documents clearly, in plain language and using bold font state that they contain an 'outline' of the cover offered by the Business Policy.

Further to this, the Product Information Document and the Summary of Cover expressly refer the Complainant Company to the 'policy document', the 'Policy' and the 'Schedule' as containing the full terms and conditions of cover associated with the Business Policy.

/Cont'd…

I note that the **Product Information Document** expressly states that:

> *"**This is not a policy document and does not reference all of the benefits, terms, conditions or exclusions.**"*

I also note that the **Summary of Cover** states that:

> *"It **does not** list all of the benefits, terms, conditions, limitations, exceptions and exclusions associated with the Policy"*

I am also conscious that the **Summary of Cover** continues by advising the Complainant Company to *"take time to read the Policy and your Schedule to ensure that you understand the cover provided."*

I also note, in terms of the extensions, exclusions and restrictions applicable to the Business Policy, the Product Information Document states that the lists of extensions, exclusions and restrictions referred to are not complete lists and expressly refers the Complainant Company, using bold text, to the policy document/schedule.

I also note that neither the Product Information Document nor the Summary of Cover state that they contain the fully extent of the terms on which the Complainant Company's policy was being offered nor do either of these documents refer to the other document as containing the full terms of cover.

In terms of the Summary of Cover, I am satisfied that use of the word '**Summary**' is reasonably sufficient to indicate that the information contained in this document was a summary and not intended to be a complete and comprehensive statement of the cover offered by the Business Policy. Indeed, in its more recent submissions, since the Preliminary Decision of this Office was issued, the Complainant Company has confirmed that "*We have never contended that it was a full and comprehensive statement.*"

The point made by the Complainant Company however is that:

> *"… it was a summary of the cover provided. For the decision to indicate that the word 'Summary' does not mean what it means in plain English, is very disturbing."*

This argument however must be viewed in the context of the contents of the **Summary of Cover** which referred a reader to the full policy document and stated that:

> *"It **does not** list all of the benefits, terms, conditions, limitations, exceptions and exclusions associated with the Policy"*

/Cont'd…

It appears the Complainant Company understood that the Product Information Document and the Summary of Cover formed part of the Renewal Schedule. However, on considering this documentation, I do not accept this was a reasonable conclusion to form. While the Product Information Document and Summary of Cover formed part of the renewal documentation, I do not accept that they formed part of the Renewal Schedule. In my opinion, it was reasonably clear that the Renewal Schedule, Product Information Document and Summary of Cover were separate and distinct documents.

The purpose of the Product Information Document and the Summary of Cover, as is reasonably clear from the language of these documents, was to provide an outline of the cover offered by the Business Policy. I am not satisfied that it was reasonable for the Complainant Company to rely on these documents as containing the precise terms of cover. Furthermore, there is nothing in the Product Information Document or the Summary of Cover to suggest that the cover previously offered to the Complainant Company had changed, or that this cover was being amended to reflect any of the information contained in these documents, nor do I accept that an increase in the business interruption premium necessarily meant that there was any alteration in cover. Consequently, although the Complainant Company has made clear, since the Preliminary Decision of this Office was issued, that it fervently disagrees with the details I have set out above, this remains my position. For the reasons outlined above, I do not accept that the Complainant Company's contention that:

> "*a contract occurred through the offer of a renewal on the basis contained in the summary and schedule, and we paid additional sums of money for this.*"

Neither do I accept the Complainant Company's contention that the summary of cover was "*in essence, a false and misleading description*."

In terms of the provision of a policy document to the Complainant Company, I am satisfied that the applicable policy document (being the **November 2018** policy document) was supplied to the Complainant Company's Former Broker. In circumstances where the Complainant Company had engaged the services of a broker, I am satisfied that it was reasonable for the Provider to provide a copy of the policy document to the Former Broker in **November 2018** and that there was no further requirement placed on the Provider to provide a copy of the policy document directly to the Complainant Company. If the Complainant Company wished, it could of course have sought a copy from the Broker, or from the Provider, particularly if it wished, as suggested by the **Summary of Cover**, to:

> *"take time to read the Policy and your Schedule to ensure that you understand the cover provided."*

/Cont'd…

On reviewing the policy document, I note it states on page 2 that:

> *"In consideration of the Insured having paid or agreed to pay the Premium* [the Provider] *will indemnify the Insured in the manner and to the extent described within this Policy on the terms set out and subject to its terms Definitions Exclusions Extensions and any Endorsement.*
> […]
>
> *The Policy comprising the Introduction Schedule Specification Definitions Insuring Clauses Extensions Exclusions Conditions and any Endorsements shall be read as one contract and any word and expression to which specific meaning has been attached therein shall bear such specific meaning wherever it may appear."*

The above passage identifies the documentation forming part of the Complainant Company's contract of insurance with the Provider, which does not include the Product Information Document or the Summary of Cover. It is my opinion that when the Business Policy was incepted in **November 2018** (with the Complainant Company being substituted as the insured party in **December 2018**), these were the documents on which the contract of insurance was based. It is also my opinion that when the policy was renewed, these were the documents upon which renewal of cover was based.

Leading on from this, in the Complainant Company's letter dated **12 June 2020** and its submission dated **28 June 2021**, the Complainant Company refers to the business interruption section of the Summary of Cover and noted the absence of a requirement for there to be an occurrence of a notifiable disease at the insured premises. The Complainant Company also relies on the Summary of Cover as forming the basis of the cover which it understood it was purchasing on renewal, and that this would amend *"the overall policy"*.

In this respect I note that when the Provider wrote to the Former Broker on **29 November 2018** enclosing the policy document, it appears that certain other documentation accompanied the policy document, including a 'Small Business Policy Summary of Cover' dated **29 November 2018**. On reviewing this document, I note that the description of the business interruption cover in this Summary of Cover appears identical to the Summary of Cover dated **29 September 2019**, referred to above. In particular, I note the absence of a requirement for there to be an occurrence of a notifiable disease at the insured premises. There is however, such a requirement in respect of the 'Notifiable Disease' extension on page 50 of the **November 2018** policy document. Consequently, I do not accept the Complainant Company's position that the policy document was required to be amended on foot of the Summary of Cover dated **29 September 2019** or that there was some alteration in the business interruption cover arising from the **September 2019** Summary of Cover, thereby necessitating an amendment to the policy document.

/Cont'd…

Assessment of the business interruption claim

I note that the Complainant Company held a Business Policy of insurance with the Provider at the time of the claim notification in **April 2020**. The Complainant Company's Renewal Schedule for the period **17 November 2019** to **16 November 2020** states on page four, that the Complainant Company held business interruption cover in respect of 'Gross Revenue' with a sum insured of €250,000.00 and a 12-month indemnity period.

In light of the above details and discussion, I am satisfied that the terms and conditions appliable to the Complainant Company's business interruption cover are set out in the policy document issued on **29 November 2018**.

In this respect, the 'Notifiable Disease' extension of the 'BUSINESS INTERRUPTION SECTION EXTENSIONS' ("the Notifiable Disease Extension") states on page 50, as follows:

> *"**Notifiable Disease***
>
> *The insurance by this Policy will extend to include loss resulting from interruption or interference with the Business carried on by the Insured at the Premises in consequence of:*
>
> *1. (i) any occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises*
>
> *(ii) 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*
>
> *which causes restrictions on the use of the Premises on the order or advice of the competent authority*
>
> *4. any occurrence of murder or suicide at the Premises.*
>
> [My underlining for emphasis]

/Cont'd…

Special Conditions

(a) Notifiable Disease shall mean illness sustained by any person resulting from

(i) food or drink poisoning or

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

(b) For the purposes of this Extension:

Indemnity Period means the period during which the results of the Business will be affected in consequence of the occurrence, discovery or accident, beginning:

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

(ii) in the case of 4 above with the date of the occurrence

and ending not later than the Maximum Indemnity Period thereafter.

Maximum Indemnity Period shall mean 3 months.

[My underlining for emphasis]

Premises will only mean 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 will not apply to this Extension.

(c) The Company will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.

(d) The Company will 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 will not exceed €250,000 in respect of any one occurrence or €250,000 in any one Period of Insurance."

/Cont'd…

It can be seen from the wording of clauses 1 to 4 of the Notifiable Disease Extension 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 Notifiable Disease Extension further requires the imposition of restrictions on the *use of the Premises*. Accordingly, it is my opinion that the Notifiable Disease Extension 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 Notifiable Disease Extension expressly state that *"Premises will only mean those locations stated in the Premises definition"*.

The term 'Premises' is defined (at page 16) of the policy document as: *"the location of Property Insured as stated in the Schedule."* '**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 business premises.

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

/Cont'd…

In reaching this conclusion, I note the following passages from the judgment of McDonald J. in the 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 Notifiable Disease Extension 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 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 take the view that for cover to become operative pursuant to clause 1(i), the Complainant Company must show there was an occurrence of a Notifiable Disease at its premises. Similarly, in respect of clause 1(ii), 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(i) or clause 1(ii) were the cause of restrictions being imposed on the use of the premises by a competent 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 and that the restrictions on the use of the premises by the competent authority was not brought about as a direct result of an outbreak of a Notifiable Disease 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 Extension. As stated above, it is my opinion that to trigger the cover provided by clause 1 of the Notifiable Disease Extension, the Complainant Company must, in essence, show there was an occurrence of COVID-19 at its premises, which resulted in restrictions being imposed on the use of the premises, by the competent authority.

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In a submission dated **28 June 2021**, the Complainant Company states that the Provider is *"seeking to impose an impossible standard"* in respect of providing evidence of the occurrence of a notifiable disease at its premises. In particular, the Complainant Company refers to the difficulty in obtaining a COVID-19 test in **March/April 2020** because the testing criteria were dictated by the HSE. The Complainant Company says this allowed for asymptomatic people to be present in the workplace. The Complainant Company also says there was (and is) no obligation on an employee to notify an employer that they were suffering from COVID-19 and an employer cannot require an employee to notify it if they had COVID-19.

In line with the cover provided by the Notifiable Disease Extension, I am satisfied that the Provider is entitled to verify whether there was an occurrence of COVID-19 at the premises as part of its assessment of the claim.

It is my opinion that the Complainant Company must show the Provider, on the balance of probabilities, that there was an occurrence of COVID-19 at its premises. In this respect, 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. While the Complainant Company has identified certain difficulties in this regard, I do not accept that the Provider imposed an impossible standard on the Complainant Company. In the Provider's letter dated **16 April 2020**, I note the Provider left it open to the Complainant Company to provide whatever information it considered would demonstrate the occurrence of COVID-19 at its premises.

In its submission of **28 June 2021**, the Complainant Company states that:

> *"In relation to the potential outbreak of the notifiable disease at the premises we have never provided information in relation to whether an outbreak occurred or not.*
>
> *We believe that it does not require for the outbreak to occur at the premises based on the documentation that we have provided"*

However, contrary to this, in an email dated **4 August 2020**, the Broker advised the Provider that:

> *"covid19 never occurred at the client's premises so the client can't provide the details requested"*

On considering the evidence, I note the Complainant Company did not supply any evidence to show there was an occurrence of COVID-19 at its premises at the time of its closure.

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In light of the above details regarding the operation of the cover provided by the Notifiable Disease Extension, I do not accept the Complainant Company's position that there was no requirement for it to demonstrate to the Provider that there was an outbreak of COVID-19 at its premises.

In terms of the closure of the Complainant Company's business, I note that the Provider recorded the date of loss as **13 March 2020**, suggesting that the Complainant Company closed its business on this date. However, there do not appear to have been any restrictions in place on this date, requiring the Complainant Company to close its premises nor has the Complainant Company provided evidence of any such restrictions in place on this date. Indeed, it says in its recent submission that it did not close its offices on 13 March 2020, and it says that it acted to close its offices, following the government announcements/directions.

I note in that regard that on **15 March 2020**, the Government called on all public houses and bars (including hotel bars) to close from that evening, until at least **29 March 2020**. In this respect, I note the Complainant Company is engaged in the provision of employee relations solutions. As a result, I am not satisfied that this announcement applied to its business.

On **24 March 2020**, the Government adopted certain NPHET recommendations for the nationwide closure of non-essential businesses. It appears this announcement likely applied to the Complainant Company's business. However, it appears from the available evidence that the Complainant Company closed its business prior to this announcement. As a result, it appears that this announcement was not the cause of the closure of its business. Further to this, even if the closure of the premises arose because the Complainant Company was required by the Government to close, this would not in itself, give rise to policy cover, because the provisions of the Notifiable Disease Extension within the parties' contractual arrangements, require the imposition of restrictions on the use of the insured premises, as a result of the occurrence of COVID-19 at the premises.

On considering the announcement made on **24 March 2020**, I am of the view that there is no evidence available to establish that this was in response to any occurrence of a notifiable disease at the insured premises. Furthermore, in light of the proper interpretation of the Notifiable Disease Extension, I do not accept that the Government announcement on **24 March 2020** was sufficient to trigger the cover contained in this extension.

As discussed above, for cover to become operative, there must be an occurrence of COVID-19 at the Complainant Company's premises and, as a result of this occurrence, restrictions must be imposed on the premises by the competent authority. While restrictions were imposed on the use of the premises, I am not satisfied these restrictions were in response to an occurrence of COVID-19 at the Complainant Company's premises.

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In a recent submission the Complainant company has said:

> *"Finally, we wish to highlight that this is a genuine claim and in no way frivolous. We have debt warehoused with Revenue for over €50,000 which is a direct result of business interruption. What we have sought at all times, is the application of the wording provided to us at the time of renewal of the policy in 2019. This is written in plain English and has been provided to the investigation."*

For the reasons explained in detail above however, I do not accept that the terms of cover for the Complainant Company for the period from November 2019 onwards, were limited to the details in the Quotation Summary, sought to be relied on.

I completely accept that the Complainant Company's claim for benefit under the policy is anything other than frivolous. One can well understand the financial pressure caused to the Complainant Company by the impact on its business from March 2020 onwards. While I appreciate that the Complainant Company has likely suffered significant disruption to its business because of COVID-19 and that this decision comes as a disappointment, I am satisfied for the reasons outlined above, that the Provider was entitled to decline the Complainant Company's claim.

I note that in a submission dated **7 September 2021**, the Complainant Company says a telephone call conversation took place on **23 September 2020** with the agent appointed as its point of contact in relation to its complaint. The Complainant Company describes the conversation as relating to non-receipt of a response to its formal complaint. The Provider responded to the Complainant Company's submission on **13 September 2021** advising that it had no further comments or observations to make.

At Item 7 of the evidence called for by this Office, the Provider was requested to provide a recording of all telephone calls between the Complainant Company and/or its representatives and the Provider, in relation to the conduct the subject of this complaint from **1 March 2020**. In its Complaint Response, the Provider responded to Item 7 as follows: *"No calls made or received."*

It is the Complainant Company's evidence that a telephone conversation took place on **23 September 2020** regarding its complaint. This has not been disputed by the Provider. On considering the nature of the formal complaint made by the Complainant Company, I am satisfied that it relates to the conduct the subject of the present complaint. As a result, I am satisfied that the Provider should have supplied a copy recording of this conversation as part of its response to this complaint. However, the Provider has failed to do so.

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When responding to a complaint, it is important that the Provider conduct a thorough review of its records to ensure that all information relevant to a complaint is provided, particularly when such information is expressly requested. While it is disappointing that a recording of this telephone call has not been provided, I accept from the Complainant Company's own account of the call that the conversation which took place at that point in September 2021, can have had little bearing on the Provider's decision to decline the claim. That decision to decline had already been made and confirmed in the Provider's Final Response Letter dated **4 August 2020**.

The Complainant Company, in its submissions made, after the Preliminary Decision of this Office was issued, contends that:

> *"The decision does not address, at all, the issue that we have raised in relation to the letter from the Central Bank, dated March 20th, 2020, [Extract below], which indicated that where there was any doubt in relation to cover of this nature the benefit should apply to the policy holder."*

One of the portions from the CBI letter quoted by the Complainant Company in its submissions is:

> "Although the Central Bank expects that most policy wordings are clear in terms of what cover is provided and what cover exclusions are in place, where there is a doubt about the meaning of a term, the interpretation most favourable to their customer should prevail."

I do not however accept that there is any ambiguity in the cover offered by the Complainant Company's policy of insurance, such that the Provider is required to resolve such an ambiguity in favour of the Complainant Company.

I am satisfied on the evidence, for the reasons outlined above, that the Provider was entitled to decline the Complainant Company's claim and that accordingly, it is not appropriate or reasonable 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.

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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 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.