



<u>Decision Ref:</u>	2022-0257
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Rental Property
<u>Conduct(s) complained of:</u>	Rejection of claim
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant, a landlord, held a **Property Owner's Insurance Policy** with the Provider. The policy period in which this complaint falls, is from **24 July 2019** to **23 July 2020**.

This complaint concerns the Provider's declination of the Complainant's claim for loss of rental income as a result of his tenants' temporary closure, due to measures imposed by the Government to curb the spread of the coronavirus (COVID-19).

The Complainant's Case

The Complainant submitted a claim to the Provider in **June 2020** for the loss of rental income because his tenants, which trade as a public house and separately as a restaurant, were unable to pay the Complainant rent, due to the closure of their businesses for a period, as a result of measures imposed by the Government to curb the spread of COVID-19.

In making his claim, the Complainant notes that Section 2, '**Rental Income**', of the applicable **Property Owner's Insurance Policy Document** provides at pg. 16 that:

*"The **Underwriters** shall indemnify **You** under this section in respect of **Damage** resulting from interruption of or interference with the **Business** during the **Indemnity Period** following:*

- a) any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **Premises** or within a 25 miles radius of it ..."*

The Complainant says that as the insured premises are in Dublin City Centre, there were multiple cases of COVID-19 within a 25 miles radius, including a number of persons both employed and occupying the insured premises who were diagnosed with COVID-19.

Following its assessment, the Provider's Claim Administrators wrote to the Complainant on **16 July 2020** to advise that it was declining indemnity, a position it reiterated in its letter to the Complainant of **9 October 2020**.

The Complainant submitted a complaint to the Provider in relation to the claim declination and following its review of the matter, the Provider wrote to the Complainant's Representative on **29 December 2020** to advise that it was standing over its previous decision to decline indemnity. The Provider has since maintained this position.

In its letter to this Office dated **21 January 2021**, the Complainant's Representative submits:

"... that the losses sustained by [the Complainant] are covered under the terms of the policy ..."

As a result, the Complainant seeks from the Provider to admit and pay his claim for loss of rental income as a result of his tenants' temporary closure due to measures imposed by the Government to curb the spread of the COVID-19. In this regard, in its letter to this Office dated **16 November 2021**, the Complainant's Representative advises that:

"[The Complainant's] claim...for the appropriate quarters from the 1st of April 2020 to the 30th of June 2021 in relation to the insurance claim now totals €178,125.00"

In its letter to this Office dated **14 December 2021**, the Complainant's Representative confirmed that the Complainant, on a strictly without prejudice basis, settled his High Court proceedings against his tenants and that this involved a write-off of a portion of the rent arrears.

The Provider's Case

Provider records indicate that the Complainant submitted a claim to the Provider in **June 2020** for the loss of rental income when his tenants, which trade as a public house and separately as a restaurant, were unable to pay the Complainant rent, due to the closure of their business for a period, as a result of measures imposed by the Government to curb the spread of COVID-19.

Following its assessment, the Provider's Claim Administrators wrote to the Complainant on **16 July 2020** to advise that the Provider was declining indemnity, as follows:

"... Unfortunately, your policy does not provide cover in this instance as the loss that is being claimed for is not the result of a specific occurrence or outbreak of COVID-19.

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As you will be aware, our policy terms exclude cover for disease and epidemics generally. The policy does provide a limited degree of cover in respect of local occurrences or outbreaks of disease. However, the fact that an outbreak may have been reported within a 25-mile radius of your premises does not automatically trigger cover. For your policy to respond, the interruption/interference with the business must have been caused by a specific occurrence of the disease at the premises or within a 25-mile radius, which does not appear to be the case here.

We should explain that loss due to reduced economic activity or closure of your premises, whether voluntarily or by order of the Government, as a result of the wider impact of COVID-19 is not a loss that is covered by this policy.

In any event, we also understand that you are claiming for loss of rent in circumstances where a tenant has unilaterally decided not to pay rent, notwithstanding that the tenant remains contractually obliged to do so; the policy is not intended to cover losses of that nature ...”

Following a query from the Complainant, the Provider’s Claim Administrators wrote to the Complainant on **9 October 2020**, as follows:

“... We have carefully considered the circumstances and information relating to your claim to ensure that we have reached the correct decision regarding policy cover.

Firstly, it is important for us to highlight the Contamination and Pollution Exclusion (Page 23) is applicable to sections One, Two, Three and Four of the Policy unless otherwise stated. This provision excludes all liability arising from disease: “this Certificate shall not cover any liability, loss or Damage due to...epidemic and disease...”

The policy does provide a limited degree of cover in respect of local instances of disease under the Murder, Suicide or Disease Clause (Section 2, page 16). It states that:

- *Cover is provided “in respect of Damage resulting from interruption of or interference with the Business during the Indemnity Period following; a) any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the Premises or within a 25 miles radius of it”*
- *The Indemnity Period is the period during which the results of the business are affected “in consequence of” the damage (Certificate Definitions, page 30).*

It is clear from these provisions that cover is available only where there is a specific occurrence or outbreak of a notifiable disease within 25 miles of the Premises and where interruption to the insured business is “in consequence of” that occurrence. The fact that an outbreak may have been reported within a 25 mile radius of your premises does not automatically trigger cover.

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There is no cover under the Policy for losses caused by governmental restrictions/advice or for those cause (sic) by general fear/reduced economic activity due to COVID-19. As stated above, cover is available only for losses caused by the occurrence of a notifiable disease within 25 miles of the premises.

It is clear from the Contamination and Pollution Exclusion that the insurers were not offering pandemic cover. That is made clear by the explicit reference to “epidemic” within the exclusion. This is also consistent with the local nature of the triggers under the Murder, Suicide or Disease clause. It is clear, therefore, that the cover under these sections is limited to the effects of specific local occurrences of COVID-19, as opposed to the consequences of the COVID-19 pandemic more generally (which are not insured).

To date, no evidence has been provided to suggest that the interruption suffered as caused by an occurrence of COVID-19 within a 25 mile radius of the premises. Rather, based on the information provided, all of the losses claimed are the result only of either general fear of the COVID-19 pandemic and/or government restrictions/advice, and therefore, unfortunately, do not fall within the coverage provided by the policy.

In any event, we also understand that you are claiming for loss of rent in circumstances where your tenants have unilaterally decided not to pay rent, notwithstanding that the tenants presumably remain contractually obliged to do so; the policy is not intended to cover losses of that nature”.

The Complainant subsequently submitted a complaint to the Provider in relation to the claim declinature and following its review of the matter, the Provider wrote to the Complainant’s Representative by way of Final Response Letter on **29 December 2020** to advise that it was standing over its previous decision to decline indemnity, as follows:

“I understand that [the Complainant]...is the freeholder of the following premises [the Insured Properties]...and that [the Complainant] receives rental income from commercial tenants at these premises (the Tenants) ...

On 8 June 2020, [the Complainant’s Representative] notified [the Provider’s Claims Administrator] of a claim under the Policy for losses said to have been sustained as a result of COVID-19, following closure of...the Insured Properties and non-payment of rent by the Tenants.

On 9 July 2020, [the Complainant’s Representative] provided Insurers with the additional information ... The additional information provided that [the tenants] have been affected and were suffering a loss and that the “Remainder of property is under renovation” and that with the “new opening date 29th June...”

“...hopefully both premises are now up and running albeit limited capacity.”

[The Claims Administrator] provided a response to [the Complainant's] claim on 16 July 2020 which stated that the "policy does not provide cover in this instance as the loss that is being claimed for is not the result of a specific occurrence or outbreak of COVID-19". [The Claims Administrator] explained that "For your policy to respond, the interruption/interference with the business must have been caused by a specific occurrence of the disease at the premises or within a 25 mile radius, which does not appear to be the case here" and that "loss due to reduced economic activity or closure of your premises, whether voluntarily or by order of the Government, as a result of the wider impact of COVID-19 is not a loss that is covered by this policy".

[The Complainant's Representative] provided a response on 18 August 2020, which advised that "the contents (of your letter) are not accepted" and that "his Solicitor will now take up the matter and any costs incurred will form part of the claim".

The Insured further explained on 27 August 2020 that "a number of persons both employed and occupying both premises suffered from the disease and in any event it is a matter of public record that persons within a 25 mile radius of both premises suffered from the disease. St Vincent's Hospital, Elm Park, Dublin 4 treated patients with this disease as one of the many speciality hospitals [and] that hospital is well within the 25 mile radius". The Insured further explained that "The local authority Dublin City Council and the Government of Ireland ordered premises to be closed including those, the subject matter of my claim. Victims suffering from the disease were on both sets of premises and in any event were within 25 mile radius of it. This is a matter of fact. The Government of Ireland ordered that both premises be closed down for the specific period claimed which is the subject matter of the claim". The Insured attached a copy of an email from [one of the tenants] confirming COVID-19 at the premises. This email stated "I had COVID in late March" and "20% of the...staff have had Covid at some point in the last 5 months, most likely according to advice prior to reopening on 29 June; we know this from antibody [tests] done...recently; this is private and subject to GDPR; as a safety precaution, each one was asked to attend to their own doctor and non (sic) have been asked to self isolate by their doctor". The email...also stated "I have not made a claim under any insurance policy but reserve that right". In addition to this, the Insured also attached a copy of [a national newspaper] article of 25 April 2020 confirming 21 deaths at St Mary's Hospital, Phoenix Park "which is located nearby approximately [x] miles from the subject property".

[The Claim Administrator] provided a response on 9 October 2020 which explained "that cover is available only where there is a specific occurrence or outbreak of a notifiable disease within 25 miles of the Premises and where interruption to the insured business is "in consequence of" that occurrence. The fact that an outbreak may have been reported within a 25 mile radius of your premises does not automatically trigger cover" and that "we also understand that you are claiming for loss of rent in circumstances where your tenants have unilaterally decided not to pay rent, notwithstanding that the tenants presumably remain contractually obliged to do so; the policy is not intended to cover losses of that nature".

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The Complaint

You sent a complaint to [the Provider] on behalf of the Insured on 20 October 2020. The basis of the complaint is that you consider that the Insured's claim for loss of rental income, due to the impact of COVID-19, should be covered under the Policy. Your complaint explained that "Our client does not agree with the interpretation nor with the conclusion made by [the Claims Administrator] in regard to the terms of the policy. Our client wishes to appeal the decision made on this occasion which we understand was made by way of a complaints process which is now being notified to you in accordance with the complaints process".

On 27 November 2020, you sent a further letter to [the Provider] which explained that "In previous correspondence there is some suggesting that in order to qualify a closure order of the premises is required. That is not correct. There is clearly damage resulting from interruption of or interference with the business of the insured. There has been a direction by the Irish Government that public houses should shut. This clearly causes interruption of or interference to the insured's business".

The Policy

Having myself reviewed the Policy wording in light of the information which you have provided, I have noted the following relevant terms and conditions.

Certificate Exclusions

Contamination and Pollution Exclusion

1. This Certificate shall not cover any liability, loss or Damage due to contamination, soot, deposit, impairment with dust, chemical precipitation, poisoning, epidemic and disease including but not limited to foot and mouth disease, pollution, adulteration or impurification or due to any limitation or prevention of the use of objects because of hazards to health. (underlining added)

It is clear from this general exclusion that, as epidemic and disease is excluded, the Policy does not respond to any loss or damage due to a pandemic (an outbreak of a disease which equates to an epidemic and occurs over a wide geographic area and affects an exceptionally high proportion of the population) such as COVID-19.

There is limited cover that is then brought back into the Policy with the following clause (which I have redacted to include only the most pertinent sections).

Section 2 - Rental Income (continued)

Murder Suicide or Disease

The Underwriters shall indemnify You under this section in respect of Damage resulting from interruption of or interference with the Business during the Indemnity Period following:

a) any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the Premises or within a 25 miles radius of it

The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the Business shall be affected in consequence of the Damage. (underlining added)

*There is no dispute that COVID-19 constitutes a human infectious disease under the Policy. However, in order for the cover to operate under the Policy, the Murder Suicide or Disease clause would require losses to follow and be in consequence of i.e. as a **direct** result of an occurrence of COVID-19. The Insured would therefore need to demonstrate that there had been a specific case of COVID-19 at the Insured Properties or within a 25 mile radius, which **directly** led to the claimed losses.*

Please note that the Policy does not respond to losses caused by governmental restrictions or orders requiring businesses to close and/or other steps taken as a precautionary measure to limit the spread of the virus. The closure of the Insured Property is in response to such government restrictions and this does not trigger cover under the Policy. Nor is the Policy a form of rent guarantee cover in circumstances where the Tenants have not paid the rent due (notwithstanding the closure of the Insured Properties) and the Insured has rights of recourse against the occupiers to recover the rent.

As the Insured has been unable to demonstrate how any specific occurrences of COVID-19, either at the Insured Properties or within a 25 mile radius, have directly led to losses, the conditions of the Murder Suicide or Disease clause have not been satisfied.

Conclusion

In the circumstances, I have not been persuaded that there is cover in force for this claim or that [the Provider] have acted unreasonably in the application of the Policy terms and conditions”.

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The Provider says that following its subsequent review of COVID-related business interruption claims in light of the Irish High Court decision of 5 February 2021 in ***Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc*** [2021] IEHC 279 ('the FBD Test Case'), as well as the UK Supreme Court decision of 15 January 2021 in ***The Financial Conduct Authority v Arch Insurance (UK) Ltd & others*** [2021] UKSC 1 ('the FCA Test Case'), it wrote to the Complainant in **February 2021** (and again on **9 April 2021**), as follows:

“... The Outcome of the Test Case and FBD Proceedings

As set out in earlier letters to you, the purpose of the FCA Test Case was to resolve certain key contractual uncertainties and ‘causation’ issues in relation to certain business interruption policies. However, the FCA made clear at the outset that the FCA Test Case would not consider additional causation issues specific to loss of rent and similar claims under a property owners policy (for example, whether the non-payment of rent by a tenant due to the government shutdown triggers cover under the policy). Equally, the FBD Proceedings did not relate to or consider the cover offered by property owner policies.

The UK Supreme Court held that in principle the Notifiable Disease clauses at issue in the FCA Test Case provide cover for business interruption losses as a result of the COVID-19 pandemic (and the government and public response to it). However, it remains for each individual policyholder to establish that its claim falls within the specific wording of its policy. We have carefully reviewed and considered the UK Supreme Court judgment and have concluded that the judgment does not impact the overall analysis of our property owner policies.

Cover under your Policy

Your Policy is not a rent guarantee policy of insurance. Although it contains a Notifiable Disease extension that is substantively the same as certain of the wordings considered in the FCA Test Case, your Policy provides cover for loss of rent (as defined in the Policy) only where rent is no longer payable under the terms of the lease as a result of an insured peril (e.g. prevention of access to the premises or an occurrence of a Notifiable Disease as specified in the Policy).

This is on the following basis:

- *Your Policy provides an indemnity in circumstances where the “Gross Rentals” falls below the “Standard Gross Rentals”.*
- *“Gross Rentals” are defined as “the money paid or payable to you...” by your tenants.*
- *“Standard Gross Rentals” are defined as the “Gross Rentals” (being the money paid or payable to you) during the period in the twelve months prior to the loss.*

In other words, for there to be an insured loss the “Gross Rentals” must fall below “Standard Gross Rentals” as a result of an event covered under the Policy.

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As “Gross Rentals” include both money paid and payable, any shortfall between “Gross Rentals” and “Standard Gross Rentals” is limited to rent that would have been due but is not now due under the terms of the lease as a result of an event insured under the Policy.

It is not sufficient for cover under your Policy simply to show that your tenant(s) have not paid the rent in circumstance where the rent is still payable. You have not provided any evidence that the various government advice, restrictions or regulations arising out of the COVID-19 pandemic have the effect that rent ceased to be payable by your tenant to you and the recent judgments in the FCA Test Case and FBD Proceedings do not alter this policy requirement. In the absence of such evidence, unfortunately your Policy does not respond to your claim ... ”

The Provider says it declined the Complainant’s claim because he failed to establish that he suffered a loss covered by his **Property Owner’s Insurance Policy**.

The Provider says that the claim was for rent that is said to have gone unpaid to the Complainant after his commercial tenants ceased trading at his insured property. The Provider notes that the Complainant asserts that his tenants were compelled to cease trading owing to the public health emergency and that, as a consequence, their subsequent failure to make contractual rent payments gave rise to an insured loss under the policy.

The Provider says that Section 2, ‘Rental Income’, of the applicable **Property Owner’s Insurance Policy Document** provides cover to an insured for lost rental income on the occurrence of certain enumerated insured risks. The risk the Complainant claims for is:

*“... any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **Premises** or within a 25 miles radius of it ... ”*

The Provider says that the cover provided by Section 2, ‘Rental Income’, is not unlimited or unqualified and as with all insurance agreements, this cover is subject to the terms, conditions, endorsements and exclusions set out in the **Policy Document**.

In this regard, the Provider notes that Section 2, ‘Rental Income’, at pg. 15 of the **Policy Document** provides that:

“The insurance is limited to loss due to;

- i. loss of **Gross Rentals***
- ii. increase in cost of working*

and the amount payable as indemnity thereunder shall be;

- i. the amount by which the **Gross Rentals** during the **Indemnity Period** shall be in consequence of the **Damage** fall short of the **Standard Gross Rentals**”.*

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The Provider says that in summary, the policy provides an indemnity in circumstances where, in a period not exceeding three months, the “*Gross Rentals*”, defined as “*the money paid or payable...*” to the policyholder by their tenants, fall below the “*Standard Gross Rentals*”, defined as the Gross Rentals during the period in the twelve months prior to the loss.

It says that because “*Gross Rentals*” captures money paid or payable, any shortfall between “*Gross Rentals*” and “*Standard Gross Rentals*” is limited to rent that would have been due but it not now due under the terms of the lease, as a result of an event insured against by the policy. The Provider says there is no insured loss under the policy where the tenant fails to pay rent that is due under the terms of the relevant lease.

In its **Formal Response** to the complaint investigation by this Office dated **2 November 2021**, the Provider noted that the Complainant did not contend that the rent had ceased to be payable as a result of an insured event under the policy. The Provider says that on the contrary, by letter dated **7 January 2021**, the Complainant’s Representative provided an updated quantification of rent “*due up to the 4th of December 2020*”. The Provider says that this statement clearly recognised that the contractual rent due from the Complainant’s tenants remained payable and continued to accrue for at least several months after the onset of the pandemic.

The Provider says that the **Property Owner’s Insurance Policy** does not cover the non-payment of rent where a tenant remains obliged to discharge the rent payable under the applicable lease. The Provider notes that it is possible to obtain creditor / rent guarantee insurance against non-payment of rent due, but that this type of loss is not covered by the **Property Owner’s Insurance Policy**. The Provider says it was therefore entitled to decline the Complainant’s claim.

The Provider says it carefully considered the Complainant’s complaint against the policy with the benefit of legal advice and it revisited its position in light of legal developments and renewed submissions on behalf of the Complainant.

In that regard, the Provider says it advised the Complainant in its letter dated **9 April 2021** that it has “*now considered the impact of the FCA Test Case and FBD Proceedings on your claim*”. This is a reference to the UK Supreme Court decision of 15 January 2021 in ***The Financial Conduct Authority v Arch Insurance (UK) Ltd & others*** [2021] UKSC 1 (‘the FCA Test Case’) and the Irish High Court decision of 5 February 2021 in ***Hyper Trust Ltd t/a The Leopardstown Inn v. FBD Insurance plc*** [2021] IEHC 279 (‘the FBD Test Case’). The Provider says that these judgments, which provided legal clarity on matters bearing on the assessment of the Complainant’s claim, both post-dated its **Final Response** letter of **29 December 2020** to the Complainant.

The Provider says that its letters of **29 December 2020** and **9 April 2021** should be read in light of the two highly significant, intervening legal cases.

The Provider says it is important to note that, although the courts have clarified the relevant law regarding causation, a policyholder must also show that it has incurred an insured loss. The Provider's position remains that the Complainant had not done so, in this instance, in that there is no insured loss under the policy where the tenant fails to pay rent that is due under the terms of the relevant lease, and that the contractual rent due from the Complainant's tenants remained payable and it continued to accrue for at least several months after the onset of the pandemic.

In its **Formal Response** to the complaint investigation by this Office dated **2 November 2021**, the Provider recognised that the Complainant appeared to be in the unfortunate position of having, to date, not been paid the full rent due by his tenants under their leases. In this regard, the Provider says that the tenants' failure to pay, appears to have been the result of difficult trading conditions arising from the COVID-19 pandemic and the necessary public health restrictions imposed by the Government. However, the financial impact on the Complainant of his tenants' omission to pay the rent due is not covered by his **Property Owner's Insurance Policy**.

The Provider notes that cover for non-payment of rent is typically available through policies known as rent guarantee policies, and that the cover offered through the **Property Owner's Insurance Policy** is clearly not intended to be triggered where a tenant remains obliged to discharge the rent due and owing under the terms of the lease.

The Provider is satisfied that it declined the Complainant's claim in accordance with the terms and conditions of his **Property Owner's Insurance Policy**.

The Complaint for Adjudication

The complaint is that the Provider wrongfully or unfairly declined the Complainant's claim in 2020, for policy benefits in respect of loss of rent received, as a result of his tenants' temporary closure due to measures imposed by the Government to curb the spread of COVID-19.

Decision

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

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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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 **7 June 2022**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

I note that the Complainant, who held a **Property Owner's Insurance Policy** with the Provider, submitted a claim in **June 2020** for the loss of rental income because his tenants, which trade as a public house and separately as a restaurant, were unable to pay the Complainant rent, due to the closure of their business for a period, as a result of measures imposed by the Government to curb the spread of the COVID-19.

In making his claim for loss of rental income, the Complainant relied upon the following wording of Section 2, 'Rental Income', at pg. 16 of the applicable **Property Owner's Insurance Policy Document**:

"Murder Suicide or Disease

*The **Underwriters** shall indemnify **You** under this section in respect of **Damage** resulting from interruption of or interference with the **Business** during the **Indemnity Period** following:*

- a) *any human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **Premises** or within a 25 miles radius of it ...*

*The insurance by this Extension shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the **Business** shall be affected in consequence of the **Damage**".*

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

I note that Section 2, 'Rental Income', at pg. 15 of the **Policy Document** provides that:

"The insurance is limited to loss due to;

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- i. *loss of **Gross Rentals***
- ii. *increase in cost of working*

and the amount payable as indemnity thereunder shall be;

- i. *the amount by which the **Gross Rentals** during the **Indemnity Period** shall be in consequence of the **Damage** fall short of the **Standard Gross Rentals**".*

I am conscious also of the '**Certificate Definitions**' section of the **Policy Document** provides the following relevant definitions at pgs. 30 - 31:

"Gross Rentals

*The money paid or payable to You for tenancies and associated income derived from the letting of the **Premises** ...*

[My underlining for emphasis]

Standard Gross Rentals

*The **Gross Rentals** during that period in the twelve months immediately before the date of the **Damage** which corresponds with the **Indemnity Period** ...".*

As a result, for there to be a loss of rental income, which is insured under the policy, the "*Gross Rentals*" must fall below the "*Standard Gross Rentals*" as a result of an event covered under the policy.

Given that the policy definition of "*Gross Rentals*" captures money paid or payable, I accept that any shortfall between "*Gross Rentals*" and "*Standard Gross Rentals*" is limited, in the present matter, to rent that would have been due but, which becomes no longer due, under the terms of lease as a result of an event insured under the policy.

In that regard, I accept the Provider's position that there is no insured loss under the **Property Owner's Insurance Policy** when the tenant fails to pay rent that remains due under the terms of the relevant lease.

The Complainant's Representative notes that the Provider's Claims Administrator advised in its letter of **9 October 2020** that the reason the Complainant's claim was declined was because,

"... To date, no evidence has been provided to suggest that the interruption suffered as caused by an occurrence of COVID-19 within a 25-mile radius of the premises. Rather, based on the information provided, all of the losses claimed are the result only of either general fear of the COVID-19 pandemic and/or government restrictions/advice ..."

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In my opinion, it would have been more helpful to the Complainant if the Provider, at that point, had set out the information which it ultimately made available in its letters of **February 2021** and **9 April 2021** (in respect of the policy definitions of “Gross Rentals” and “Standard Gross Rentals”) but I am conscious that the Claims Administrator also stated in the correspondence of **9 October 2020**, that:

“... In any event, we also understand that you are claiming for loss of rent in circumstances where your tenants have unilaterally decided not to pay rent, notwithstanding that the tenants presumably remain contractually obliged to do so; the policy is not intended to cover losses of that nature.”

[My underlining for emphasis]

The insured event at issue here is the outbreak of COVID-19 on or within a 25-mile radius of the premises. I am satisfied that the policy cover for such an outbreak is limited to 3 months from the occurrence of the loss, and in terms of rental income, is limited to rent that would have been due but which is no longer due under the terms of the lease, owing to an insured peril.

There is no evidence before me indicating that the Complainant’s lease with his tenants contained any such term that would have such a bearing on his policy cover with the Provider. Rather, it seems from the evidence that he considered the rent in question to remain contractually payable, throughout the period of the Government-directed closure(s).

In its letter to this Office dated **19 March 2021**, the Complainant’s Representative submits that:

“... both tenants in question were in the restaurant/bar business. They were ordered to close which left a situation where they advised that they had no means to pay the rent. [The Complainant’s] broker...has indicated that provided [the Complainant] can prove that he attempted to recover the rent but was unable to do so he is of the view that cover applies under Section 2 of the Policy ...”

In its letter to this Office dated **14 December 2021**, the Complainant’s Representative confirmed that the Complainant, on a strictly without prejudice basis, settled his High Court proceedings against his tenants and that this involved a write-off of a portion of the rent arrears.

In that regard, I am of the opinion that the fact that rent was due and payable to the Complainant under the relevant lease agreement/s, was not negated by any subsequent agreements between him and his tenants to write-off either part or full rent arrears. In that regard, the very process of writing-off rent, in and of itself, is an acknowledgement that the rent was due and payable, but remained outstanding, before then being written off.

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Having regard to all of the above, I take the view that the evidence does not support the complaint that the Provider wrongfully or unfairly declined the Complainant's claim in respect of a loss of rent received, as a result of his tenants' temporary closure due to measures imposed by the Government to curb the spread of COVID-19.

Whilst I appreciate that this decision will be disappointing for the Complaint, I am satisfied on the evidence before me that the Provider was entitled to decline the Complainant's claim and that this complaint cannot reasonably be upheld.

Conclusion

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

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



MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

29 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.

