An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0325
Sector:	Insurance
Product / Service:	Rental Property
Conduct(s) complained of:	Rejection of claim
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is a landlord who was renting his premises to a tenant. He held a **Commercial Property Owners Policy** with the Provider.

The Complainant's Case

The Complainant submitted a claim to the Provider in **February 2021** for the loss of rental income when his Tenant, which trades as a public house and restaurant, ceased to pay the Complainant rent, due to the temporary closure of the Tenant's business, as a result of measures imposed by the Government to curb the spread of the coronavirus (COVID-19).

In making this claim, the Complainant relied upon the following wording in Section 9 & 10, 'Business Interruption Clauses', of the **Commercial Property Owners Policy Document**:

> *"**Infectious Diseases Clause***
>
> *This Section is extended to include loss as directly resulting from interruption of or interference with the **Business** carried on by **You** at the **Premises** in consequence of…*
>
> *b) an outbreak of a **Notifiable Disease** within 25 miles of the **Premises**".*

Following its assessment, the Provider declined the Complainant's claim.

The Complainant's Representative emailed a complaint to the Provider on **10 May 2021** in relation to the claim declinature and following its review, the Provider wrote to the Representative on **19 July 2021** to advise that it was standing over its previous decision to decline indemnity because the Complainant's Tenant was not permitted to withhold rent, as a result of an inability to trade as a public house and restaurant, due to the Government restrictions.

The Complainant's Representative sets out the Complainant's complaint in the **Complaint Form**, as follows:

> *"*[The Complainant] *owns a property on the outskirts of* [location redacted] *known as* [name redacted] *bar and restaurant. Since June 2018 the premises has been rented to* [the tenant]*. Due to the Government's instructions in response to the outbreak of COVID-19* [the tenant] *were obliged to close* [the bar and restaurant] *on 16th March 2020. As such,* [the tenant] *considered that the lease was suspended and stopped paying the rent …*
>
> *The policy schedule confirms that in this particular case the Insured has this extension insured up to a limit of indemnity of €23,000.00 so* [the Complainant] *notified the claim to his insurers.*
>
> *However,* [the Provider] *have declined the claim on the grounds that under the terms of the lease the tenant remains obliged to continue paying rent despite being closed due to the outbreak of a notifiable disease such as COVID-19.* [The Provider] *further state that only in circumstances where there is physical damage or destruction to the property following an insured event does the lease allow the suspension of the rent …*
>
> *In support of our argument to have this claim paid we wish to make the following points:*
>
> ***1.0** Pages 10 and 11 of the lease deal with the issue of insurance. Section C 1.1 requires that the lessor insure the demised premises against damage by fire, lightning, explosion, etc.... and such other perils as the Lessor may from time to time reasonably decide. In this case* [the Complainant] *purchased the policy which is written on an All Risks basis and included the Infectious Disease Clause extension… So all matters insured against are effectively insured events as per the wording of the lease.*
>
> *If the policy fails to operate in cases such as these then in what circumstances would the Notifiable Disease extension provide indemnity? - quite clearly it was designed for situations such as this.*
>
> ***2.0*** [The Provider] *further argue that in order for the rent to be suspended there must be damage or destruction to the Insured property by an insured risk (presumably* [the Provider] *mean physical damage or destruction). Obviously while the outbreak of*

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COVID-19 has rendered the premises unfit for use and occupation it hasn't resulted in any physical damage or destruction to the property (how could it ever).
[The Complainant] *is asking that the FSPO broaden the definition of destruction or damage to incorporate more fully the insured events covered by his All Risks policy which might render the property unfit for use and occupation. We imagine that the drafters of the lease never envisaged a situation such as this.*

***3.0** The final point we would like to make is that the policy wording does not require damage or destruction to the property for this extension to operate, it simply requires that the policyholder sustain a loss.*

It seems incredulous that [the Provider] *believe the tenant is still legally required to pay rent in circumstances where the Government has instructed that the tenant no longer use the premises"*.

In addition, in his email to this Office of **25 May 2022**, the Complainant's Representative submits that:

"The lease allows [the Complainant] *to insure the premises against such insured perils as he sees fit. He subsequently took out an All-Risks policy which had an infectious diseases extension.*

The lease provides for a rent suspension in the event of the premises being destroyed or damaged by an insured peril and while COVID-19 did not cause physical damage to the premises, the effect of COVID-19 and the subsequent Government instructions caused the premises to close".

As a result, the Complainant states in the **Complaint Form** he completed and submitted to this Office that he seeks from the Provider for *"the claim* [to be] *paid"* and to be *"compensated for breach of contract"*.

The Provider's Case

The Provider says that the Complainant was renting his Premises to the Tenant on foot of a **Lease Agreement** dated **1 June 2018** for a business trading as a pub and restaurant.

The Provider says that the Complainant submitted a claim in **February 2021** for loss of rental income when the Tenant ceased to pay the rent due, allegedly because of the temporary closure of the Premises as a result of measures imposed by the Government to curb the spread of COVID-19. The Provider says it declined this claim for cover, in line with the terms and conditions of the Complainant's policy.

The Provider says it wrote to all interested policyholders in **February 2021**, as follows:

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"We write further to prior correspondence in relation to both the UK court proceedings commenced by the UK Financial Conduct Authority (FCA) against certain insurers in respect of certain business interruption policies (FCA Test Case) and proceedings taken against FBD Insurance in the Irish High Court (FBD Proceedings).

As you may be aware, the UK Supreme Court handed down its judgment in the FCA Test Case on 15 January 2021 which means that the FCA Test Case has concluded. The Irish High Court also delivered its judgment in the FBD Proceedings on 5 February 2020. We have now considered the impact of the FCA Test Case and FBD Proceedings on your claim and following careful consideration of both judgments and your claim, unfortunately we are writing to advise that your claim as presented is not covered by your Policy …

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 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".*

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- *"Gross Rentals" are defined as "the money paid or payable to you…" by the 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.

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. There is no insured loss as a result of the non-payment of rent that remains due under the terms of the lease in any circumstances, not only in relation to the Notifiable Disease extension.

It is not sufficient for cover under your Policy simply to show that your tenant(s) have not paid the rent in circumstances where the rent is 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 that the Complainant's Representative emailed it a complaint on **10 May 2021** in relation to the claim declinature and following its review, the Provider wrote the Representative on **19 July 2021** to advise that it was standing over its previous decision to decline indemnity, as follows:

*"I understand the complaint concerns the declinature of a claim for loss of rent under a commercial property owners policy (the **"Policy"**). Having carefully considered the information available to me, I have not upheld this complaint and will explain why …*

Insurers were notified of the Insured's claim for loss of rent in February 2021, and invited the Insured to provide further information in support of the claim. Additional information including the lease agreement was received, which Insurers considered in line with the Policy terms and conditions, concluding there was no cover under the Policy.

A dispute was raised following the declinature, which was considered by Insurers, however it was confirmed that Insurer's position remained unchanged and there was no cover under the Policy …

The circumstances presented to Insurers is that the Insured's loss is the failure of their tenant to pay rent due, and which remains payable under the terms of the lease agreement.

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The Policy terms make clear that it is not sufficient for a policyholder to demonstrate that an insured risk has occurred. They must also demonstrate that an insured loss has been suffered.

The insurance purchased by the Insured provides cover (in accordance with the Policy's terms and conditions) in respect of the insured property and, in certain circumstances, the rental income derived from leasing the insured property where the tenant is no longer obliged under the terms of the applicable lease to discharge the rent payable.

A tenant is not permitted to withhold rent as a result of an inability to trade due to government restrictions. The letting agreement clearly only provides for the suspension of rent if there is destruction or damage to the insured property by an insured risk. No such destruction or damage has occurred in this instance.

An inability to trade due to the COVID19 pandemic does not mean that leased premises can be regarded as damaged or destroyed nor could they be considered unfit for occupation.

The Insured is in the unfortunate position of being unable to collect the contracted rent from the tenant. This appears to be due to the impact of the government directions in response to the COVID19 pandemic on the Insured's tenant.

However, such losses are not covered by the Policy. Cover for non-payment of rent is typically available through policies known as rent guarantee policies. The cover offered through the Policy is clearly not triggered where a tenant remains obliged to discharge the rent due and owing under the terms of the lease …

In the circumstances, I find that Insurers have reasonably considered the claim, and I am satisfied the declinature is in line with the terms and conditions of the Policy".

The Provider says that before addressing its claim decision, it is first useful to deal with the relevant provisions of the Lease in respect of the payment of rent and when and how that payment can be suspended.

The Provider notes that the term of the Lease is 4 years and 10 months, that is, from 1 June 2018 to 31 March 2023. The rent payable is €1,000 per week plus VAT, plus an additional turnover rent of 5% of gross turnover above €700,000, payable at the end of the first month at the beginning of each financial year. The Provider says that the Lease is clear as to when rent is payable and it obliges the Tenant to pay the reserved rent to the Complainant, without any deductions whatsoever.

The Provider says that the Tenant is obliged by Clause 22 of the Lease to take out insurance, to include public and employer liability insurance, to cover its indemnities to the Complainant in respect of injury to any person or damage to property relating to the Premises or the operation of its business from the Premises.

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The Provider notes there is no obligation under the Lease for the Tenant to have insurance cover in respect of its own business interruption loss, as this would be a commercial matter for the Tenant alone and it says that it does not know if such cover was purchased by the Tenant.

The Provider does not dispute that the relevant COVID-19 regulations which were implemented by the Government, obliged the Tenant to close the Premises for trading purposes for a period of time.

The Provider notes that in his submission, the Complainant's Representative confirms that after the introduction of Government measures in response to the outbreak of COVID-19 in March 2020, the Tenant *"considered that the lease was suspended and stopped paying the rent"*.

The Provider says there is no justification or explanation provided as to the basis for this action by the Tenant and it says that it is clear that the Government instructions of themselves, did not suspend any leases or any obligations on tenants to pay rent.

The Provider says that in this regard. the courts have clearly established, both in Ireland and the UK, that COVID-19, in itself, is not a basis for terminating a lease, as held in ***London Trocadero (2015) LLP v. Picture house Cinemas Ltd & others*** [2021] EWHC 2591 (Ch), nor does it have the effect of frustrating a lease. The Provider also refers to the decision of the Irish High Court in ***Foot Locker Retail Ireland Limited v. Percy Nominees Limited*** [2021] IEHC 749, in which the Court ruled out the existence of a doctrine of partial frustration in Irish law, as well as ***Oysters Shuckers Ltd v. Agriculture Manufacture Support (EU) Ltd*** [2020] IEHC 527, in which the Irish High Court held that the obligation to pay rent is an integral and fundamental part of a contract and, while it may be suspended in circumstances specifically provided for in a lease, the court could not imply such terms into a lease.

The Provider says that furthermore, the Department of Enterprise, Trade and Employment's **Code of Conduct between Landlords and Tenants for Commercial Rents** clearly recognises at pg. 1 that lease obligations remain in place, unless the parties have agreed otherwise, as follows:

> *"Commercial leases are a matter primarily for the parties concerned and that both parties remain obliged to meet the terms of the lease unless a renegotiation is achieved. Any changes to agreements must be agreed in accordance with the terms and conditions of the existing contract".*

The Provider says that the only basis on which the Tenant would be entitled to stop paying rent, is if the terms of the Lease entitled the Tenant to do so.

The Provider says it is useful therefore to set out what the Lease in question provides in relation to rent suspension. Section C, Clause 1.1 of the Lease obliges the Complainant to insure the Premises against:

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> *"…damage by fire, lightning, explosion, malicious damage, storm or tempest, bursting or overflowing of water tanks apparatus or pipes and impact from road vehicles, denial of access and such other perils as the Lessor may from time to time reasonably decide in the full reinstatement cost thereof including the cost of demolition, shoring, site clearance and removal of debris and an amount to cover Architects and other fees and taxes including the Third Party liability of the Lessor in connection with the Demised Premises…"*

The Provider says that the **Commercial Property Owners Policy** the Complainant put in place with it, meets that obligation under the Lease and notes that there is no obligation on the Complainant under the Lease to insure the Premises against damage from any other perils other than the specified perils identified at Section C, Clause 1.1 of the Lease.

The Provider notes that Clause 1.1 goes on to state that *"if the Demised Premises is destroyed or damaged by any of the insured Risks"* then any proceeds of insurance obtained by the Complainant in respect of such risks are to be applied to *"rebuild and reinstate the Demised Premises to make them substantially the same as they were prior to the destruction or damage"*. The Provider says it is self-evident that this clause relates to the physical destruction of the Premises.

The Provider notes that Clause 1.1 further provides that:

> *"If the destruction or damage to the Demised Premises renders them unfit for use and occupation and provided the insurance has not been vitiated nor payment of any insurance monies refused by reason of any act or default of the Tenant the rent payable under this Lease shall be suspended in such proportion as is fair according to the nature and extend* (sic) *of the damage to the Demised Premises and the suspension shall last until the Demised Premises are again rendered fit for use and occupation".*

The Provider says that this rent suspension provision clearly arises in certain limited and defined circumstances where the Premises has been destroyed or damaged such as by events including fire, lightning, water leaks, explosions etc. and that the rent suspension lasts for as long as it takes to rebuild or reinstate the Premises and render it fit again for use and occupation.

The Provider confirms that the Lease does not provide for any rent suspension in any other circumstances.

The Provider respectfully submits that the mere closure of the Premises, whether in response to COVID-19 regulations or otherwise, does not suspend the Tenant's obligation to continue to pay rent to the Complainant. The Provider says that while it is accepted that a Tenant in such circumstances, may find it difficult to pay rent if it is not trading, this is precisely the type of scenario that the Tenant may decide to insure itself against. The Provider says that the Tenant continues to have an obligation to pay rent to the Complainant even where it is not trading, and the Tenant is not permitted to withhold rent as a result of an inability to trade due to Government restrictions.

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In response to the Complainant's Representative's comments that the Complainant *"purchased the policy which is written on an All-Risks basis and included the Infectious Disease Clause extension outlined above. So, all matters insured against are effectively insured events as per the wording of the lease"*, the Provider says that this argument fundamentally confuses and conflates the terms of the Lease and the terms of the Policy, in that the Lease and the Policy are separate documents entered into between separate parties and have to be considered as such.

The Provider says that under the terms of the Lease, the Complainant could, but did not have to, insure the Premises against damage from *"such other perils as the Lessor may from time to time reasonably decide"*. The Provider notes that in this case, the Policy included cover for rental losses sustained by the Complainant in specified circumstances. The Provider says that this is not an additional *"peril"* that the Premises are insured against in respect of damage to the Premises, and rather, it is a specific personal financial exposure the Complainant seeks to provide some protection against from his own financial perspective and the fact that the Complainant took out this additional cover for his own purposes does not alter the terms of the Lease between the Complainant and the Tenant. The Provider submits that this is a basic point of legal interpretation, as otherwise no lease or other contract could be interpreted at all, by reference to its own terms.

The Provider says it is clear that the rent suspension provisions under the Lease are confined to circumstances where the Premises has been physically *"destroyed or damaged"*. Despite this clear wording in the Lease, the Provider notes that the Complainant's Representative confirms that the Complainant:

> *"is asking that the FSPO broaden the definition of destruction or damage to incorporate more fully the insured events covered by his All Risks policy which might render the property unfit for use and occupation"*

The Provider says that there is no reasonable basis on which the Financial Services and Pensions Ombudsman could interpret the Lease provisions in this manner and that case law has clearly established that COVID-19 does not constitute physical damage, see for example, the UK case of ***TKC London Limited v. Allianz Insurance plc*** [2020] EWHC 2710 (Comm) and the Irish case of ***Headfort Arms Limited T/A The Headfort Arms Hotel v. Zurich Insurance PLC*** [2021] IEHC 608.

In response to the Complainant's Representative's comments that *"we imagine that the drafters of the lease never envisaged a situation such as this"*, the Provider agrees entirely with this statement and suggests that the FSPO should not, in its view, interpret the Lease in any way other than by reference to the ordinary meaning of the words used by the parties to the Lease. In response to the Complainant's Representative's comments that *"it seems incredulous that* [the Provider] *believe that the Tenant is still legally required to pay rent in circumstances where the Government has instructed that the tenant no longer use the premises"*, the Provider says this is in fact exactly what the law provides, as is abundantly clear from the recent Irish and UK case law referred to above and the aforementioned **Code of Conduct between Landlords and Tenants for Commercial Rents**.

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The Provider says that this code makes it clear that a tenant is not permitted to withhold rent as a result of an inability to trade due to Government restrictions, absent an agreement with their landlord in respect of same. In that regard, the Provider reiterates that the Lease only provides for the suspension of rent, if there is destruction or damage to the Premises and that no such destruction or damage has occurred in this instance.

The Provider notes that the Complainant holds a **Commercial Property Owners Policy** with it. In response to the Complainant's Representative's comments that *"the policy wording does not require damage or destruction to the property for this extension to operate, it simply requires that the policyholder sustain a loss"*, the Provider agrees that the Policy requires proof of loss as defined in the Policy. The Provider says that in this case, the Complainant did not suffer an insured loss and it for that reason that the claim has been denied.

The Provider says that the Policy provides cover in respect of the Premises and, in certain circumstances, covers loss of rental income where the Tenant is no longer obliged under the terms of the applicable Lease to discharge the rent payable, as a result of an insured peril, for example, destruction or damage to the insured property by an insured risk or, in this case, an occurrence of a Notifiable Disease within 25 miles of the Premises. The Provider notes that in all cases, an insured loss is required.

The Provider notes that the Policy provides cover for loss of rental income on the following basis, as set out in the **Policy Document**:

- The Policy provides cover for a shortfall arising in circumstances where the 'Gross Rentals' fall below the 'Standard Gross Rentals'.

- 'Gross Rentals' are defined as *"the money paid or payable to you for tenancies and other charges and for services rendered in the course of the Business at the Premises"*. [original underlining by the Provider for emphasis]

- 'Standard Gross Rentals' are defined as the Gross Rentals during the period in the twelve months prior to the loss.

The Provider says that the 'Gross Rentals' must fall below 'Standard Gross Rentals' as a result of an event covered under the Policy. As 'Gross Rentals' includes both money paid or 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.

The Provider says that a covered shortfall does not arise merely because a tenant has not paid rent - the shortfall will only be covered where the rent is also not payable, in that it is not legally due. The Provider says its position is that there is no insured loss in this case, as a result of the non-payment of rent by the Tenant in circumstances where that rent remained at all times due and owing to the Complainant.

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The Provider notes the relevant Notifiable Disease policy wording in this case is, as follows:

> *"**Infectious Diseases Clause***
>
> *This Section is extended to include loss as directly resulting from interruption of or interference with the **Business** carried on by **You** at the **Premises** in consequence of…*
>
> *b) an outbreak of a **Notifiable Disease** within 25 miles of the **Premises**".*

The Provider says it does not dispute that there were cases of COVID-19 within a 25 mile radius of the Premises at the time in question, nor does it dispute that the relevant COVID-19 regulations which were implemented by the Government obliged the Tenant to close the Premises for trading purposes for a period of time; however it also says that these matters do not mean that the Policy covers the claim made by the Complainant.

The Provider notes that the Complainant's Policy is not a rent guarantee policy of insurance. The Provider says in that regard that although it contains a Notifiable Disease extension, the Policy provides cover for loss of rent, only where rent is no longer payable under the terms of the Lease and this is on the basis that for there to be an insured loss suffered, the 'Gross Rentals', which includes both money 'paid and payable, must fall below the 'Standard Gross Rentals' as a result of an event covered under the Policy. The Provider reiterates that in this case, there is no insured loss as the rent under the Lease is payable, even if not actually paid. The Provider says that it is on this basis, that it declined the Complainant's claim.

In response to the Complainant's Representative's comments that "*If the policy fails to operate in cases such as these then in what circumstances would the Notifiable Disease extension provide indemnity? - quite clearly it was designed for situations such as this"*, the Provider submits that if the Lease allowed for the non-payment or suspension of rent by the Tenant due to closure of the premises as a result of the occurrence of a Notifiable Disease, a pandemic, or some other wording which encapsulated COVID-19, then the Policy would provide cover because the underlying rent would no longer be payable under the Lease and a shortfall between the Gross Rentals and the Standard Gross Rentals would arise. The Provider says, however, that this is not what happened.

The Provider is satisfied that all steps in its process for assessing COVID-19 claims have been complied with in this case and that once the claim was submitted, the Lease and the Policy was reviewed by the insurers and detailed correspondence was exchanged with the Complainant's Representative to set out the reason for declining the claim made.

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

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The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly declined the Complainant's claim for the loss of rental income when his Tenant, which trades as a public house and restaurant, ceased to pay the Complainant rent, due to the temporary closure of the Tenant's business as a result of measures imposed by the Government to help curb the spread of the coronavirus (COVID-19).

Decision

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

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **29 August 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. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant submitted a claim to the Provider in **February 2021** for the loss of rental income because his Tenant, which trades as a public house and restaurant, was unable to pay the Complainant rent, due to the temporary closure of the Tenant's business as a result of measures imposed by the Government to curb the spread of the coronavirus (COVID-19).

In making this claim, the Complainant relied upon the following wording in Section 9 & 10, 'Business Interruption Clauses', at pg. 29 of the applicable **Commercial Property Owners Policy Document**:

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*"**Infectious Diseases Clause***

*This Section is extended to include loss as directly resulting from interruption of or interference with the **Business** carried on by **You** at the **Premises** in consequence of…*

*b) an outbreak of a **Notifiable Disease** within 25 miles of the **Premises**".*

I note that on **20 February 2020**, the Minister for Health signed ***Statutory Instrument No. 53/2020 - Infection Diseases (Amendment) Regulations 2020*** to include the coronavirus (COVID-19) (SARS-Cov-2) on the list of notifiable diseases.

I note that the Provider declined indemnity on the basis that the Complainant's Tenant, under the terms of the Lease in place, remained legally obliged throughout the period of the Government-instructed closure of its business, to discharge the rent due and owing to the Complainant.

It must be noted that the Complainant's **Commercial Property Owners 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.

The contract of insurance the Complainant holds with the Provider provides him with cover, subject to the policy terms and conditions, in respect of the insured Premises and will, in certain circumstances, also provide him with cover in respect of the rental income derived from leasing the insured Premises when the tenant is no longer obliged under the terms of the lease, to discharge the rent payable.

In that regard, in order to assess a loss of rental income, I note that Special Clause BI5, 'Gross Rentals/Estimated Gross Rentals Basis of Loss Settlement', of 'Business Interruption Sections 9 & 10' at pg. 33 of the **Policy Document** provides that:

"The insurance under this item is limited to:

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

and the amount payable as indemnity thereunder shall be:-

*a) in respect of loss of **Gross Rentals** during the **Indemnity Period** which fall short of the **Standard Gross Rentals** in consequence of the **Damage**".*

The 'Certificate Definitions' section of the **Policy Document** provides the following relevant definitions at pgs. 43 - 45:

*"**Gross Rentals***
*The money paid or payable to **You** for tenancies and other charges and for services rendered in the course of the **Business** at the **Premises** …*

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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** …"*

Accordingly, in order for there to be an insured loss of rental income, the "Gross Rentals" must fall below the "Standard Gross Rentals" as a result of an event covered under the Policy. In that regard, I accept the Provider's position that because *"Gross Rentals"* captures money paid or payable, any shortfall between the *"Gross Rentals"* and the *"Standard Gross Rentals"* is limited, in the present matter, to rent that would have been due, but which is no longer due under the terms of the lease, as a result of an event insured under the policy.

I note that the **Lease Agreement** between the Complainant and his Tenant dated **1 June 2018** provides, among other things, that:

"THE LESSOR HEREBY CONVENANTS WITH THE LESSEE

To insure or cause to be insured at all times throughout the term the Demised Premises excluding any trade fixtures and fittings of the Lessee hereto against damage by fire, lighting, explosion, malicious damage, storm or tempest, bursting or overflowing of water tanks apparatus or pipes and impact from road vehicles, denial of access and such other perils as the Lessor may from time to time reasonably decide in the full reinstatement cost thereof including the cost of demolition, shoring, site clearance and removal of debris and an amount to cover Architects and other fees and taxes including, the Third Party liability of the Lessor in connection with the Demised Premises …

If the destruction or damage to the Demised Premises renders them unfit for use and occupation and provided the insurance has not been vitiated nor payment of any insurance monies refused by reason of any act or default of the Tenant the rent payable under this Lease shall be suspended in such proportion as is fair according to the nature and extend (sic) *of the damage to the Demised Premises and the suspension shall last until the Demised Premises are again rendered fit for use and occupation".*

I am satisfied that this Lease Agreement allows for the suspension of rent, where there is destruction or damage to the Premises that renders the Premises unfit for its intended use by the Tenant. There is, however, no provision in the Lease for the suspension of rent in the event of an outbreak of a Notifiable Disease within 25 miles of the Premises.

In that regard, I acknowledge the Provider's position that if the Lease Agreement in question had expressly allowed for the non-payment or suspension of rent by the Tenant due to closure of the premises as a result of the occurrence of a Notifiable Disease, a pandemic, or some other wording which encapsulated COVID-19, then the Complainant's Policy would provide cover, because the underlying rent would then no longer be payable and a shortfall between the Gross Rentals and the Standard Gross Rentals would arise.

In this case, the Complainant's Tenant was prevented from opening and trading as a licenced premises due to a Government restriction introduced as a response to a serious public health concern, and not because of any damage to the Premises itself, which was capable

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of opening and operating as a licenced premises as soon as the Government eased its restrictions in that regard.

The Lease Agreement is a private contract entered into by the Complainant and his Tenant and, in my opinion, it would not be appropriate for this Office, as the Complainant's Representative has suggested, to broaden the ordinary meaning of the term *"destruction or damage"* in the Lease Agreement, to encompass the circumstances of the Complainant's claim.

Having regard to all of the above, I am of the opinion that the evidence does not support the complaint, as I am satisfied that the Provider was entitled to decline the Complainant's claim, in accordance with the policy terms and conditions, and that accordingly, on the evidence before me, this complaint should not 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)

26 September 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.

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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.