

The complaint

L, a limited company, complains The National Farmers' Union Mutual Insurance Society Limited (NFU) has unfairly withdrawn legal expenses insurance (LEI) cover.

Any reference to L or NFU includes the comments of their respective agents or representatives.

What happened

The background of this complaint is well known to both parties, so I've summarised events.

- L has a commercial LEI policy which is underwritten by NFU.
- L wanted to use its LEI to legally challenge its Council's inclusion of a footpath on the definitive map. L alleges the footpath incorrectly appears as one for public use. Ultimately, L wants the footpath removed from the definitive map.
- At the time of submitting its claim to NFU, L had already appointed its own solicitor.
- Initially, NFU granted cover for the pursuance of a legal claim for "trespass" – the trespass was in respect of members of the public veering off the footpath and on to L's land.
- NFU later realised L's legal claim was not about trespass and was only about having the footpath removed from the definitive map. So NFU said there wasn't cover under the policy because there wasn't a trespass – the public were lawfully using the footpath.
- It also has said there wasn't cover under the "Public Rights of Way" section of the policy because the inclusion of the footpath on the definitive map pre-dated the start of the policy – noting that L has said its inclusion dates to the 1970s.
- In its final response, NFU said it had incorrectly granted cover, but that its position was that a claim for having the definitive map amended isn't covered under the policy. It said however, that it would consider covering reasonable costs for the time cover was validated to the date of its final response.
- Whilst agreeable to NFU considering covering reasonable costs, L remained unhappy that NFU wouldn't provide cover going forwards. So, L complained to this Service.
- An Investigator considered the complaint. He thought NFU's offer to consider covering reasonable costs was fair. But he said it should pay £200 to recognise the inconvenience L had experienced in having been told incorrectly that the claim would be covered.
- NFU accepted the Investigator's findings, but L disagreed. L said the Investigator had not understood the legal claim which was that the trespass claim was being made about the Council because of it not rectifying the entry on the definitive map and that the public using the footpath was a result of the trespass, not the cause.
- The information didn't change the Investigator's opinion and so, the complaint has

been passed to me for an Ombudsman's decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I agree with the outcome the Investigator reached and I'll explain why.

The starting point is the policy document which details the cover provided. Here, the relevant sections are those about "*Property Protection*" and "*Public Rights of Way*". I'll consider each in turn.

Property protection

Under "*Property Protection*" it says:

"We will pay COSTS and EXPENSES relating to a civil dispute relating to PROPERTY which is owned by YOU, or is YOUR responsibility, following:

- 1. any event which causes physical damage to such PROPERTY; or*
- 2. a legal nuisance (meaning any unlawful interference with YOUR use or enjoyment of YOUR land, or some right over, or in connection with it); or*
- 3. a trespass*

So, I'm satisfied that where there is a trespass, the policy will provide cover (subject to the remaining terms and conditions). I, therefore, need to consider whether it was reasonable for NFU to withdraw cover and decline the claim based on there not having been an insured peril, namely a trespass.

I've looked at L's solicitor's correspondence and note that in an email dated 26 May 2021, the solicitor said: *"With regard to the trespass point, it is correct that the dispute would not be technically pursued as a trespass. This is because the inclusion of the footpath on the definitive map means that legally anyone following the footpath is entitled to be on it."* The solicitor goes on to say: *"the point is that the footpath should not be on the definitive map – this being the point of the dispute – and as such the persons using the footpath should not be on [L's] land. From the point of view of the landowner, the effect is the same as a trespass."*

In a later email, the solicitor says: *"As long as the footpath is shown on the definitive map, there is nothing my client can do to prevent people crossing [their] land using the footpath. Therefore, my client needs to apply to delete the footpath from the definitive map to bring the interference with [their] land to an end. The legal tests involved in doing this do not involve the law of trespass, instead it requires a barrister with specialist knowledge of footpath law."* L also confirms the legal claim is not about trespass in an email from October 2021, which says – *"[...] this has absolutely NOTHING to do with trespass. This is all about getting the definitive map CORRECTED by having a footpath removed from it."*

It's not my role to consider the legal merits of L's claim, rather I must decide whether NFU has applied the terms of the policy fairly. Based on the solicitor's and L's comments – which clearly state the dispute is *not* about trespass and would *not* be pursued as a trespass - I'm satisfied it was reasonable for NFU to later withdraw cover on the basis there wasn't a "trespass" and therefore, an insured peril.

I appreciate L has since told this Service that the Council has trespassed by adding the footpath to the definitive map, but in the absence of evidence which shows there is a legal

claim with prospects to pursue an action for trespass against the Council, I'm not persuaded the legal claim is covered under the policy.

Public Rights of Way

Under "Public Rights of Way", the policy says: "*WE will pay: COSTS AND EXPENSES when opposing a definitive map modification order made by a surveying authority under s.53(2) Wildlife and Countryside Act 1981.*"

NFU has said this part of the policy doesn't apply because the issue with the footpath is historical as it pre-dates the policy *and* when NFU began offering cover to challenge modifications to the definitive map.

It's not in dispute that the footpath has been included on the definitive map for decades and so, I'm satisfied L's legal claim isn't about a modification which has taken place since the start of the policy. As such, I'm not persuaded L has proven there is a valid claim under this section of the policy; cover is available for "*opposing a definitive map modification order made by a surveying authority ...*" and that is not what L is trying to do here.

Putting things right

NFU acknowledges that it erred in agreeing to cover a legal claim for trespass - specifically in relation to persons veering off the footpath – because it had overlooked information about the legal claim which said it wasn't about trespass and was instead about having the footpath removed from the definitive map.

NFU says it agreed cover for trespass as a gesture of goodwill and because L had said the incidence of people veering off the footpath on to L's land had greatly increased. Had NFU not overlooked L's solicitor's comments - which clearly said having the footpath removed from the map wouldn't be pursued as a trespass – it would have declined the claim earlier on.

Because of this NFU has offered to consider covering reasonable costs from the time the claim was validated to the date of its final response letter. It has said the costs will be reviewed by a Costs Draftsman. Given the subject of L's legal claim isn't covered under the policy, I consider NFU's offer to be reasonable in the circumstances as ultimately, L has benefited from the policy.

I've also thought about whether compensation is warranted here. As L is a limited company, it is a separate legal entity, meaning it (and its directors) can't be compensated for any personal distress it may have experienced because of NFU's error. Whilst NFU has offered to consider covering reasonable legal costs, L has still been inconvenienced by NFU's lack of clarity – and ultimately L spent time on a matter it wasn't going to be able to pursue under the policy. And so, I agree with our Investigator that £200 compensation fairly reflects the inconvenience L experienced.

My final decision

My final decision is that I uphold this complaint and direct The National Farmers' Union Mutual Insurance Society Limited to pay L £200 compensation.

It must pay the compensation within 28 days of the date on which we tell it L accepts my final decision. If it pays later than this, it must also pay interest on the compensation from the date of my final decision to the date of payment at 8% a year simple.

Under the rules of the Financial Ombudsman Service, I'm required to ask L to accept or

reject my decision before 23 March 2023.

Nicola Beakhust
Ombudsman