

The complaint

Mrs B's complaint is about a claim she made on her Great Lakes Insurance SE Absence of Easement (Access/Services) insurance policy.

Mrs B says Great Lakes unfairly declined her claim.

What happened

Mrs B took out an Absence of Easement (Access/Services) insurance policy following the purchase of her property.

In 2022 she made a claim on the policy after a dispute arose with her neighbour over a shared driveway between her property and his. At that time the neighbour was threatening to construct a permanent fence on the shared driveway which would have restricted Mrs B's vehicular access to the rear of her property.

Great Lakes accepted the claim at that time and instructed a panel firm to correspond with the neighbour who then decided not to construct the fence. They also instructed an expert valuer to find out whether there was any reduction in value to Mrs B's property in the event she was prevented from using the driveway. The expert concluded there was not.

Mrs B then asked Great Lakes if they could assist her further. Instead of constructing a fence, the neighbour started placing temporary obstructions over the driveway which continued to prevent her use of it. Great Lakes declined the claim. They said that the obstructions were easily removable and there was no loss to Mrs B in any event because there was no reduction in market value to her property as a result of the neighbour's actions. Mrs B didn't agree so complained to this Service.

Our investigator considered Mrs B's complaint and concluded it should be upheld. He said that the neighbour was preventing Mrs B from freely exercising her right of access over the shared driveway and that the policy indemnifies "Loss" (as defined) which covers this situation. As such he recommended that Great Lakes reconsider Mrs B's claim under the remaining policy terms.

Great Lakes don't agree, so the matter has been passed to me to decide.

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 uphold Mrs B's complaint, for broadly the same reasons set out by the investigator. I'll explain why.

The starting point is the policy terms. They provide cover for an "*Adverse Interest*" which is defined as "*An estate, right, title or interest arising out of an Insured Risk... which is asserted adverse to or in derogation of Your title to the Property*".

In this case Mrs B has a shared right of access to her land together with her neighbour which is being obstructed. I appreciate the neighbour isn't currently announcing in correspondence that he's entitled to block the shared right of access, but his actions do in my view, amount to the same thing. By placing temporary obstructions across the shared right of access and then calling the Police when Mrs B removes them, the neighbour is essentially acting in derogation to Mrs B's right to freely access her right of access.

The policy says it will "Indemnify the Insured for "Loss". "Loss" covers: "

1. *Reasonable legal and other professional fees and expenses which the Insurer allows or requests You in writing to incur so as to commence, defend or make a settlement in a legal action relating to an Adverse Interest relating to an Insured Risk defined in this Appendix (which may include making an application to a court or the Upper Chamber (Lands Tribunal)).*
2. *The cost of an out-of-court settlement relating to an Adverse Interest relating to an Insured Risk defined in this Appendix which the Insurer allows or requests You in writing to make.*
3. *Damages, compensation, costs and/or expenses (but not fines or other penalties) which You have to pay because of an Order relating to an Insured Risk defined in this Appendix.*
4. *The cost of altering, demolishing and/or reinstating all or part of the Property or anything built on it if this is required by an Order relating to an Insured Risk defined in this Appendix or is done with the Insurer's written consent.*
5. *Reduction in the Market Value of the Property caused directly by an Insured Risk calculated at the date of a Loss Event by reference to:*
 - (a) *the Market Value of the Property prior to an Order relating to an Insured Risk defined in this Appendix on the assumption that the Insured Risk does not exist; and*
 - (b) *the Market Value of the Property following an Order relating to an Insured Risk defined in this Appendix.*
6. *Any money the Insurer allows You in writing to pay to a third party to free the Property from the Adverse Interest relating to an Insured Risk defined in this Appendix.*
7. *Any money (including capital expenditure and legal and other professional fees) which You have spent on the Property which has now been lost because of an Order relating to an Insured Risk defined in this Appendix.*
8. *Any other costs and expenses You incur with the Insurer's written consent because of an Insured Risk defined in this Appendix."*

In this case Great Lakes says Mrs B's claim isn't covered because the expert evidence they've obtained makes clear there's no diminution in market value to the property in the event that Mrs B was prevented from using the driveway. But as I've set out above, that's not the only "Loss" the policy covers. And in any event the expert report itself doesn't take into account the fact that there is and remains a neighbour dispute between Mrs B and her neighbour, which would ordinarily render any property difficult, if not impossible to sell when that dispute is declared as part of the sales process. I say so because her neighbour

continues to place items to restrict her right of access across the shared driveway, then call the Police when she removes them.

As can be seen from the terms above, the policy also covers legal costs for defending or making a settlement in a legal action relating to an “*Adverse Interest*” relating to an Insured Risk. Given the problems Mrs B is currently experiencing, I take the view that the property should extend to covering her in these circumstances.

Great Lakes have said the policy covers a specific set of insured risks which include where:

“ 1. You do not have a documented legal right to:

(a) access the Property from the public highway with or without vehicles over a defined route in existence at the Inception Date (“the Access Way”); and/or

(b) connect into and use the services serving the Property at the Inception Date (“the Services”).

(c) allow You to maintain and repair the Access Way and/or the Services.

(d) allow You rights of access to enable You to repair/maintain the Property.”

They say that paragraph 1(a) is potentially relevant here as Mrs B and her neighbour hold a mutual right of way over the driveway and that this was communicated by their panel firm to the neighbour in response to his threat to construct a permanent fence through the centre of it.

Great Lakes say that unless the neighbour is positively asserting he has the sole benefit of the driveway or creates a permanent obstruction preventing Mrs B’s use of the driveway, his actions don’t amount to an actual infringement with it. Rather they say this creates a potential infringement, which is not covered under the policy. They’ve also cited case law to support the position that the actions of the neighbour are not in any event substantial enough to amount to an actionable infringement. Great Lakes go on to say that even if the neighbour’s actions amount to an actionable interference with Mrs B’s right of access, this would not equate to a “*Loss*” as defined by the policy.

I’ve considered Great Lakes further submissions in respect of the position and whilst I understand the points they’re making, I don’t agree with them. I can’t see how the placing of temporary items over a right of way on each occasion cannot be viewed as an interference with it, such that they wouldn’t constitute an infringement. The fact that those items are temporary in nature, don’t in my view prevent them from being an interference- whether or not they are removable. And although Great Lakes have said the items are easily removable, I don’t think this ‘ease’ accounts for the subsequent problems Mrs B encounters when she removes them, like her neighbour calling the Police on each occasion. And although Great Lakes have cited case law to support their position, I don’t think the case they’ve cited in relation to an electronic gate is analogous to this one, which requires Mrs B to physically remove the obstructions herself before she can access the land- then deal with the fall out of doing so with the Police. They’ve also referred to a case in which they say the relevant question is whether the right of way can be substantially and practically exercised as conveniently before. I find it difficult to see how Mrs B’s complaint falls into this category given the facts of her complaint.

Finally, Great Lakes have made the argument that even if the neighbour’s actions amount to an actionable interference with Mrs B’s right of access, this would not equate to a “*Loss*” which is defined by the policy. Again, I don’t agree. By interfering with the right of access by

trying to prevent Mrs B's use of it, the neighbour is effectively asserting an "*Adverse Interest*", which is a type of "*Loss*" that is covered under the policy. I've explained why this is when I defined "*Adverse Interest*" at the start of this decision.

Putting things right

Great Lakes should consider Mrs B's claim under the remaining terms of the policy. In doing so, they should not seek to limit cover based on the terms they've cited to turn down Mrs B's claim or any of the ones they've made to this Service in response to this complaint.

My final decision

For the reasons set out within this decision, I uphold Mrs B's complaint against Great Lakes Insurance SE and direct them to put things right in accordance with what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 18 July 2023.

Lale Hussein-Venn
Ombudsman