

## The complaint

Mr L's complaint is about the refusal of a claim under the 'Family Legal Protection' section of his home insurance policy with Liverpool Victoria Insurance Company Limited.

Liverpool Victoria is the underwriters of this policy, *i.e.* the insurer. Part of this complaint concerns the actions of the agents it uses to deal with claims on its behalf. As Liverpool Victoria has accepted it is accountable for the actions of the agent, in my decision, any reference to Liverpool Victoria includes the actions of the agents.

## What happened

Mr L says he had a right of way over land owned by a neighbour, set out in his property deeds, which allowed access to his garden and the back of his property. In late 2019 the neighbour erected a fence that prevented his right of way. Since then the dispute with the neighbour has continued and the neighbour has made various changes to the boundary but the obstruction of Mr L's right of way has continued.

Mr L says he enquired about cover with the underwriter at that time (that was not Liverpool Victoria) but was told there was no cover. Mr L therefore instructed a solicitor himself to correspond with his neighbour and try and resolve the issue but without success.

In late 2022 Mr L made a formal claim under his policy with Liverpool Victoria. It agreed to consider the claim and appointed panel solicitors.

The panel solicitors looked at correspondence between the seller's solicitors and Mr L's solicitors, when he was buying the property in 2007. They said that the correspondence indicates there were concerns regarding the right of way at that time and Liverpool Victoria therefore says the events giving rise to the claim started before Mr L took out legal expenses cover in 2018. In addition, Liverpool Victoria says the panel solicitors determined that there would not be reasonable prospects of success in a legal claim, which is also a pre-requisite of cover. Liverpool Victoria therefore refused to cover the claim.

Mr L is very unhappy about this. Mr L says the right of way is set out in his property deeds (and in the neighbour's deeds) and has been used for more than 40 years. Mr L says the right of way was discussed when he purchased the property and his solicitors queried it and was satisfied the right of way was set out in the property deeds. He says he was made aware that if the neighbour ignored the right of way in their deeds, there would potentially be a dispute but at that time there was no reason to think this would happen. Mr L says he has spent over £12,000 on legal fees, which he wants reimbursed and support for the claim going forward.

One of our Investigators looked into the matter. He said the neighbour that had caused the obstruction of the right of way did not own the property in 2007, so any comments made then could not be said to have led to this claim. The Investigator therefore didn't think it was fair to rely on the term and refuse cover on the basis that the events that led to the claim existed prior to the policy starting. The Investigator also did not think that the solicitors had carried out a full assessment of the prospects of the case and that it should be assessed further.

The Investigator therefore recommended the complaint be upheld and that Liverpool Victoria reconsider the claim.

Liverpool Victoria does not accept the Investigator's assessment. It has replied with input from the panel solicitors as well. Liverpool Victoria says that the policy excludes events that *may* lead to a claim if they start before the start of the policy and the solicitors were discussing a potential issue with the right of way, so clearly there was a situation that may lead to a claim, even if in 2007 it was not yet known when this claim would start. Liverpool Victoria also says it is irrelevant that the problems that triggered the claim did not occur until much later: *"a reasonable lawyer would conclude that the issues discussed in 2007 may lead to a claim – which is the very definition of insured event under the policy"*.

In addition, Liverpool Victoria says that, even if the claim was not excluded because the start of the events leading to the claim began before the policy, the panel solicitors had already said there were no reasonable prospects of Mr L's legal claim succeeding.

As the Investigator was unable to resolve the complaint, it has been passed to me.

### **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.

Mr L's policy covers the legal expenses of various insured events, including:

*"Pursuing or defending a claim relating to:*

- interference with your use, enjoyment or right over your home".*

However, the policy also states that:

*"We'll not pay any legal expenses if ...*

- The insured event had started before you bought this legal expenses insurance;*
- you should reasonably have known when buying this insurance that the circumstances leading to a claim under this legal expenses insurance already existed."*

An *"insured event"* is defined as being:

*"The start of an individual or series of events that may lead to a claim under this section."*

In addition to this the policy requires that the *"claim has and continues to have a reasonable chance of success"* which is defined as being *"more than a 50% chance that you will win the case and achieve a positive outcome."*

Insurers are entitled to decide what they want to provide cover for and it is not unusual or unreasonable that they want to restrict cover to unforeseen events and not cover claims that are inevitable.

I have looked at the comments made by the panel solicitors. They noted that when Mr L purchased the property, his solicitor said the right of way was granted in a conveyance in 1984 but that it was recognised there was a risk it would be challenged, as they said the extent of the right of way was unclear. The panel solicitors said: *"The correspondence between your solicitors and the sellers' solicitors dated 30th May 2007, indicates that there were concerns regarding the right of way and statutory declarations were mentioned."*

It is usual for enquiries to be made at the time of purchase about rights of way that might exist and perhaps assurances wanted from the seller's about the use of such rights. Statutory declarations are sometimes obtained to confirm that such rights have been used.

Bearing this in mind, I do not consider that the fact queries were made to confirm usage of a right of way (whether it is clearly set out in the deeds or not) means that it was the first in a series of events that led to this claim. The possibility exists that every right of way could be disputed but it seems to me there was no reason to think the right of way would be obstructed by a later purchaser of the neighbouring property, even though it was always a possibility.

Overall, I do not therefore think in the circumstances of this particular case that it is reasonable to say that the dispute about the right of way, more than 10 years after Mr L purchased the property, began in 2007 or that Mr L *"should reasonably have known ... that the circumstances leading to a claim ... already existed."*

I therefore agree with the Investigator that it is not fair or reasonable in the circumstances of Mr L's case to exclude cover on the basis that the dispute arose before the start of this policy.

As stated, in order for there to be cover under the policy, the claim also has to have a more than 50% chance of succeeding. Liverpool Victoria says that Mr L's claim fails on this ground too. However, again I agree with the Investigator that the existing assessment by the panel solicitors is not sufficient to establish this.

The panel solicitors said *"I have briefly undertaken an assessment of the legal merits of your claim. I understand that your property benefits from a right of way granted within the conveyance dated 9th September 1984, although as recognised by your conveyancer at the time there is a risk here insofar as the extent of the right of way is unclear. To consider the express right of way argument, your conveyancing file would need to be reviewed. In addition, you could perhaps look to establish a right of way via prescription in the alternative, requiring evidence of 20 years continual use of the route being claimed without secrecy, force or permission. In the event that you can establish a right of way, and subject to the extent of the interference, you may be entitled to a remedy to mitigate the obstruction to access. I understand however that you have taken steps to do this yourself, without need of litigation. Legal proceedings may therefore not be appropriate at this time."*

It appears therefore that the panel solicitors have not reviewed the entire conveyancing file, which I think is necessary before any proper assessment of prospects could be made. In addition, the panel solicitors suggest, even if the deeds do not reflect the use Mr L has had of the right of way, he could establish this by other means and it has not reviewed whether this would be possible in his case. So I do not think that the panel solicitors have properly considered if there is evidence that gives Mr L a reasonable chance of success. And even if proceedings are not appropriate at the present time, the policy would also cover trying to resolve legal issues without the need for proceedings.

I note that Mr L said he had barrister's advice which was favourable. If he has not done already, he should provide that to Liverpool Victoria.

Mr L submitted this claim in November 2020 and says he has incurred legal costs that should have been covered under the policy. If it is determined that the claim does have reasonable prospects, and therefore that Liverpool Victoria should have provided legal expenses funding to Mr L, then I would expect Liverpool Victoria to consider whether it would be fair to reimburse any of the costs Mr L has already incurred. To be clear, I make no finding on this point here, but it is something that should be considered and if necessary Mr L can revert to this service about this issue separately.

Finally, it seems to me that the incorrect refusal of this claim will have inevitably caused Mr L additional distress and trouble at a time that he needed assistance. I therefore think that Liverpool Victoria should also pay the sum of £200 compensation for this.

### **My final decision**

I uphold this complaint against Liverpool Victoria and require it to do the following:

1. reconsider Mr L's claim on the basis that the insured event happened within the period of the policy but subject to the remaining terms of the policy; and
2. pay Mr L the sum of £200 compensation for the distress and inconvenience caused by the incorrect refusal of his claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 28 February 2024.

Harriet McCarthy  
**Ombudsman**