DRN-2707579

Financial Ombudsman Service

The complaint

Mr D complains about the way National House-Building Council ("NHBC") dealt with a claim made against his building warranty.

What happened

Mr D has the benefit of a warranty with NHBC. Shortly after moving into his newly built property, he identified a number of faults and reported these to NHBC. A resolution report was carried out and a number of faults were identified as needing to be remedied. Several updated resolution reports were issued with new deadlines to complete the works. But ultimately, a date around the middle of September 2018 was given for the builder to fix the problems before the warranty would take effect.

In line with the terms of warranty, Mr D allowed the builder the opportunity to rectify the problems but doesn't believe they have done so and has now asked NHBC to take over the claim.

Shortly after the deadline for the works to be completed, Mr D accepted a cash settlement from the builders for the outstanding works as he was unhappy with the quality of the repairs. However Mr D now says that the settlement figure of £21,000 was too low and that it will cost around a further £15,000 to complete the works. He says he felt he had no choice but to accept the amount that was offered.

In its final response, NHBC stated that all the items in the resolution report had been rectified with the exception of a retaining wall. And it noted that Mr D hadn't always received the best service so offered him £200 compensation in recognition of any distress and inconvenience it had caused.

Our investigator considered the complaint and thought that NHBC should take on liability for the retaining wall and pay Mr D £500 compensation, which was a better reflection of the distress and inconvenience it had caused to him. The investigator didn't think he could recommend the £15,000 Mr D had asked for as he hadn't seen any evidence of the extra costs – but he thought that NHBC should consider these if Mr D could provide it with evidence.

Both parties initially accepted our investigator's findings. However after doing so, NHBC saw a copy of the settlement agreement and believes it changes the position.

On 1 March 2021 I issued a provisional decision. In it I said:

"I've reviewed the resolution report, which states that the builder must complete the outstanding work to the property by 17 September 2018. And having reviewed the correspondence after that date, it seems clear that there was work still outstanding by that point. So, that would be the date that I would expect the NHBC warranty to take effect and for NHBC to take on liability for any work outstanding.

However in this instance Mr D reached a settlement with the builder about some of the outstanding work that was due to take place and accepted a settlement figure in respect of some of the works. It isn't for me to comment on the contract Mr D entered into, rather it is my role to consider what I believe to be fair and reasonable in the circumstances of this complaint.

The settlement agreement made it clear that Mr D was accepting a sum of money in lieu of the builder completing all of the outstanding work except a retaining wall, which it was due to return and complete. So taking this into account, I don't think it would be fair and reasonable for me to ask NHBC to take on liability for works that Mr D has already agreed to settle for a cash sum directly with the builder.

I realise that Mr D says the sum of money paid to him wasn't enough to cover the outstanding works, however I think it would be fair for Mr D to take that up with the builder directly as Mr D has previously chosen to settle these items directly with the builder.

But, it's also clear from Mr D's agreement with the builder that the retaining wall remained outstanding and that appears to continue to be the case. The builder stated in the agreement that it intended to complete the works, however from the correspondence I've seen, it seems that Mr D and the builder haven't been able to progress this matter.

As this item was clearly outstanding after 17 September 2018 and hasn't been remedied outside of the resolution scheme, I think it's fair and reasonable that NHBC takes on liability for correcting the issues with the retaining wall. I say that because under usual circumstances, once a builder has failed to comply with a resolution report, NHBC will take on liability for the work and I don't think this is any different to that situation.

NHBC has argued that, as the settlement agreement comments on the wall and includes a promise from the builder that it will be done, Mr D has pursued it outside of the resolution service. And I have considered its arguments in that regard. However, the settlement agreement is between the builder and Mr D – and NHBC isn't a party to it. Therefore, I don't think it would be fair and reasonable to exclude NHBC from its liability under the warranty when it is clear that the issue hasn't been resolved and that Mr D hasn't accepted any other settlement in respect of that aspect of his claim.

I have also considered the issue of compensation for the distress and inconvenience caused to Mr D as a result of this issue. NHBC was aware the retaining wall wasn't repaired in September 2018, when I think it should have taken on liability for the repairs to the retaining wall under the warranty. In September 2019 when it issued its final response the wall still hadn't been rectified and to my knowledge it remains in need of repair to this date.

I appreciate that NHBC believes the settlement agreement has complicated the matter, however I can see that Mr D made NHBC aware of these discussions at the time and NHBC could have done more to obtain a copy of the agreement if they had wanted to see it. And in addition to this, I think there have been significant delays. So taking all of this into account, I think NHBC should pay Mr D £500 in recognition of the distress and inconvenience it has caused him through its handling of the claim."

Both parties responded to my provisional decision with additional comments. NHBC said that the builder was still willing to carry out the works to the wall but that Mr D was refusing to let that happen – so it doesn't think it should have to take on liability for the retaining wall. And Mr D responded to comment on the circumstances around his acceptance of the settlement from the builder.

The complaint has now been passed back 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 remain of the opinion that this complaint should be upheld in part. I'll explain why.

NHBC has said that Mr D isn't cooperating with the builders, who remain willing to carry out the works to the retaining wall and have provided me with some evidence of this. While I can see that more recently Mr D has specified that he would like NHBC to carry out the works, I can also see that the builder has had several years to carry out these works and Mr D has provided them with the opportunity to do this on several occasions. I've also seen that Mr D has moved out of his property while works have taken place in the past.

Mr D has given the builder significant opportunity to carry out the works and when the last deadline for the resolution report passed in September 2018, I think it would have been fair and reasonable for NHBC to take on liability for the outstanding works under the warranty as it was clear that the builder was taking an unreasonable amount of time. So the comments made by NHBC don't change my determination and I remain of the opinion that NHBC should take on the outstanding works that haven't been settled by the builder – namely the retaining wall.

Mr D has made several comments in relation to the circumstances surrounding his acceptance of the settlement figure, which he states is far lower than it will cost to carry out the works. I sympathise with the situation Mr D found himself in and that he has said he only accepted the builder's offer as he thought it was the only way he was going to get a settlement.

However I also have to consider the nature of Mr D's buildings warranty with NHBC, which, for this section of the policy, only comes into effect if the builder doesn't rectify the issues that have been identified in the resolution report. Mr D agreed to a settlement, albeit under difficult circumstances, in resolution of most of the outstanding works to his property. He signed a settlement agreement with the builder directly that clearly stated the agreement was in full and final settlement of the outstanding works. So taking everything into account, I remain of the opinion that I don't think it would be fair and reasonable for me to ask NHBC to take on liability for the cost of the outstanding works that have already been settled directly with the builder.

Mr D has asked that I specify that the wall needs to be double thickness, however this isn't something NHBC has considered yet so it wouldn't be appropriate for me to make a finding until it has reviewed the works that need to happen in order to bring the wall up to NHBC's technical requirements. NHBC will only be required to ensure the wall is double thickness if that is outlined in its technical requirements.

Mr D has also commented on the distress caused to his daughter by the actions of the builders however I can't consider the actions of the builder – only those of NHBC. And as neither party has raised any further comments on the compensation I have recommended in recognition of the distress and inconvenience caused to Mr D as a result of NHBC's actions, I see no reason to depart from this now.

Putting things right

NHBC should put things right by:

- Taking on liability for the outstanding works to the retaining wall

- If it hasn't already done so, NHBC should pay Mr D a total of £500 in respect of this complaint.

My final decision

My final decision is that I uphold this complaint in part. National House-Building Council should put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 30 April 2021.

Sara Falzon
Ombudsman