

The complaint

Mr K has complained about the National House-Building Council's (NHBC) decision to decline a claim made on his behalf by the managing agent, in relation to damage to the exterior wall of the block in which he owns a flat.

What happened

I issued a provisional decision on this complaint on 19 July 2021, explaining why I was not intending to uphold Mr K's complaint.

Here's what I said in my provisional decision:

What happened

The subject of this complaint is a building made up of nine flats (the "block"). Mr K owns a flat within the block. The block forms part of a larger development comprising 69 properties. Mr K is also representing the other eight leaseholders in the block, who have separate, but the same complaints with our service. All the parties are aware that what I say here in respect of Mr K's complaint, also applies to the same complaints brought by the other leaseholders. All of the nine leaseholders have provided their consent for us to investigate their complaints.

In 2015, the owners of the flats in the block noticed that cracking had appeared on one of the exterior walls. They also observed damage to some of the interior parts of block. On 26 February 2015, the managing agent wrote to NHBC to give notice that the owners wished to submit a claim in relation to a structural defect and damage caused to the property.

A meeting was arranged at the property to discuss the following defects in relation to the common parts:

- *vertical cracking on the external walls around the windows, sills and reveals*
- *left hand gable wall displaced at DPC level with overhang 10mm*

NHBC issued an investigation report dated 14 December 2017 which concluded the claim had been made beyond the expiry date for the common parts, so was deemed to be non-valid and no further action was required for the two items detailed above.

The managing agent challenged NHBC's decision on the basis that the period of cover for the apartments only expired in late 2015. As the claim was submitted in February 2015, they believed it should be covered.

NHBC didn't agree. They said the leases for the apartments established that all of the properties within the development were responsible for the common parts of all of the buildings and not just the properties within this specific block. NHBC said that based on the earliest completion date of 31 January 2003 and the latest of 14 October 2005, the common parts expiry date, calculated in accordance with the policy terms was 30 January 2014 which was prior to the date the claim was made.

The managing agent argued, in response, that each block is only responsible for the common parts within their own block. They explained that the dwelling houses and any other flat blocks don't pay towards the common area of the flat block in question, and vice versa. As part of their service charge, all of the properties pay towards grass cutting and wider estate repairs such as unadopted roads, footpaths etc.

In May 2018, the managing agent complained to NHBC about the lack of response from NHBC to their emails, and about the decision made by NHBC to decline the claim. On 22 June 2018 NHBC issued their final response letter (FRL). NHBC accepted that several emails from the managing agent hadn't been responded to at all, or within a timely manner. The case handler apologised and said that feedback had been provided to the relevant departments.

However, with regard to the claim decision, the case handler explained that the formula for calculating the term of cover for the common parts was provided to the managing agent in an email on 11 May 2018. She also set out the calculations in some detail, making reference to the terms of the lease and the Buildmark Policy, and clarified that by her calculations the cover for the common parts expired on 29 January 2014 (on the basis that the builder's liability period ended on 30 January 2006). The FRL concluded that the claims team were correct in saying that cover for the common parts had expired prior to the claim being reported to NHBC on 26 February 2015, so NHBC was unable to consider the claim any further.

Mr K was unhappy with NHBC's response so brought his complaint to this service.

Our investigator issued her view on 4 December 2020 upholding the complaint. She thought that, taking account of what is fair and reasonable, it wasn't fair to say there's no cover under the warranty based on NHBC's assertion that the warranty for common parts of the building had expired. She was of the view that as every property owner in the development had their own individual warranty, and the warranty confirmed they were entitled to the amount they were legally liable to contribute towards the cost of repairs. She concluded that at the time of the claim being registered in February 2015, there were a number of properties in the development with valid warranties, and therefore there would be a number of warranty holders entitled to their portion of cover under the warranties.

Mr K accepted our investigator's view, but NHBC did not. They said they understood that the Financial Ombudsman Service will consider what is fair and reasonable, however, they didn't agree that this meant the policy terms could be ignored, and in particular, the terms in relation to the common parts set out on pages 12 and 20 of the Buildmark Policy. NHBC said that the policyholders weren't entitled to their proportion of common parts cover, because the common parts claim was made after the common parts cover's expiry date. NHBC also explained that the lease confirms that all of the properties on the development share responsibility for the repair and maintenance of the common parts; the common parts are not limited to particular blocks.

NHBC requested an ombudsman's decision on the complaint.

What I've provisionally 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.

The first issue I've considered is whether the common parts, for the purposes of calculating the common parts period of cover, are comprised of the entire development or the block in which the affected flats are located. I've focused on the provisions of the lease for apartment plot 8, dated 26 August 2005 to shed some light on this issue, and have summarised the relevant provisions below:

- Paragraph 1.5 defines the "Development" as "the land and buildings and works described in the First Schedule..... being known for development purposes as R,edged blue on plan 1", which essentially comprises the whole of the development.*
- Paragraph 1.9 defines the "Maintained Property" as "the parts of the Development which are more particularly described in the Second Schedule.....and the maintenance of which is the responsibility of the Management Company". The Second Schedule includes, among other things, the structural parts of the Buildings including the load-bearing walls and all external parts of the buildings not used solely for the purpose of one flat.*
- Paragraph 1.10 defines the "Maintenance Expenses" as "the monies actually expended or reserved for periodical expenditure by or on behalf of the Management Company during the term of the lease, in carrying out the obligations specified in the Sixth Schedule of the lease". The obligations set out in paragraph one of the sixth schedule include, among other things, repairing, rebuilding, pointing or otherwise treating as necessary, and keeping the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof.*
- The "Lessee's Proportion" detailed in the Particulars at the beginning of the lease is described as 0.021% of the proportion of the Maintenance Expenses payable by the Lessee in accordance with the provisions of the Seventh Schedule.*

In summary, the owner of that flat is required, under the terms of the lease, to pay 0.021% of the costs of maintenance and repair of the parts of the Development that the Management Company is responsible for maintaining. I note there is no reference here to specific parts of the development, for example, a particular block, as suggested by the managing agent.

The managing agent has confirmed that in practice, each block pays for its own upkeep and repair – so on that basis they believe the term of cover for the common parts under the Buildmark Policy, should be calculated by reference to the affected block only. However, NHBC disagrees and says the lease doesn't suggest the policyholder's liability is limited to any particular block.

I've next considered the definition of 'Common Parts', in the Buildmark Policy, which includes:

"Any of the following for which you are legally obliged to share responsibility for cost and upkeep with the Owners of other Homes:

- a) The parts of a building containing a flat or maisonette...."*

So, to work out what parts of the development are included in the definition of the common parts, I need to have regard to the documentation that sets out what the

policyholder is legally obliged to share responsibility for. In this case, the legal obligations are set out in the lease document I've referred to above. I understand that the managing agent may choose, in practice, to share the costs of maintenance and repair for the development differently to that set out in the lease. However, that doesn't alter the legal obligations of the policyholder. Taking everything into account, I'm currently satisfied that NHBC are correct in calculating the common parts period of cover, taking account of the first and last completion date, on the development.

The next issue I've considered is whether NHBC has correctly calculated the term of cover for the common parts, in accordance with the policy terms and conditions.

The Buildmark Policy gives cover for the first two years (Section 2) during which the builder is liable to repair any defect or damage. In the next 8 years (years 3 to 10 – Section 3), NHBC agrees to cover the repairs needed to put right damage caused by a defect, subject to the policy terms and conditions being satisfied. Cover for the property starts from the date of the insurance certificate, which is usually the date of completion of the sale of the property to the first owner.

The Buildmark Policy sets out special provisions for common parts:

“Section 2

The cover in Section 2 starts on the date of the earliest Insurance Certificate for a Home which shares the relevant Common Parts. It ends 3 years from that date, or 2 years from the date of the last Insurance Certificate for a Home which shares those Common Parts, whichever is the earlier.

Sections 3, 4 and 5

The cover in Sections 3, 4 and 5 starts from the date cover under Section 2 expires. It ends 8 years from that date”.

Under the policy terms and conditions, the period of cover provided for claims in relation to the common parts is worked out via the formula detailed above and set out on page 20 of the policy document.

The cover expires eight years after the earlier of the following:

- the date of completion of the first property plus three years (31 January 2006); or*
- the date of completion of the last property plus two years (14 October 2007).*

So, eight years after the earlier of the above two dates is 30 January 2014. As the damage was notified to NHBC in February 2015, at the time of notification, the cover for damage to the common parts had expired, as NHBC first explained to the managing agent in May 2018. I'm therefore currently satisfied that the cover for the common parts had expired at the time Mr K made his claim.

What remains for me to decide is whether it is fair and reasonable for NHBC to restrict common parts cover in this way and in particular that it was right to apply it to these circumstances.

A building warranty essentially covers the building. For the individual property itself, in this case, each of the nine apartments in the block, that cover lasts for ten years. However, the period of cover for the common parts is calculated in accordance with the sections I've referred to above.

I think it's reasonable for NHBC to set a time limit for common parts where different

parts of the development (sharing those parts) are completed at different times. This would otherwise lead to a situation where common parts cover recommences every time a new property is completed within the development. I'm therefore currently persuaded that, in this case, overall the term in the policy detailing when the cover for common parts begins and ends, and the application of it to this case, is fair and reasonable.

I concluded that the cover for the common parts expired in January 2014, but Mr K's claim wasn't made until February 2015. I said that as the claim was made 13 months after the cover had expired for the common parts, I was of the view that NHBC hadn't acted unreasonably in declining the claim.

I asked both parties to let me have any final information or arguments they wanted me to consider by 16 August 2021. NHBC said they didn't have any further submissions to make. However Mr K made the following comments:

- the insurance certificate is misleading as every owner within the blocks would assume the policy covers them until the date stated on the certificate, and
- it took the Ombudsman months to review the case and to understand the policy, so regular owners or purchaser would not be able to understand it.

I've taken these additional comments into account in making my final decision on this complaint.

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 K believes the insurance certificate is misleading, as the owners would assume they were covered by the policy until the expiry date. He's also suggested that the time it's taken for a decision to be issued on this complaint also indicates that regular owners wouldn't be able to understand the policy terms and conditions.

While I accept that understanding the period of cover for the common parts isn't as simple as referring to an expiry date, because several calculations need to be carried out, I don't agree the insurance certificate is mis-leading. As I've explained in the provisional decision, the policy documents do set out the formula for calculating the period of cover for the common parts. And when NHBC was asked, in 2018, to provide an explanation of how the expiry date had been arrived at, the claims handler did so. Such a request for clarification could have been made at any time during the term of cover.

I also don't agree that the time it's taken for a decision to be issued on this complaint means the policy terms are difficult to understand. There are a number of factors that affect the time it takes for a complaint to reach the final stage of our process.

After carefully considering Mr K's representative's additional comments, I haven't been persuaded to change my decision. So, for the reasons set out in this decision, and my provisional decision, I don't uphold this complaint.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 1 October 2021.

Carolyn Harwood
Ombudsman