DRN-3192716

## The complaint

Mr and Mrs M complain that National House-Building Council (NHBC) unfairly declined a claim they made on their Buildmark building warranty policy.

## What happened

Mr and Mrs M purchased a new apartment, which is covered by a ten-year building warranty policy. Within the first two years of the cover, they made a claim due to the pooling of water on their balcony.

The developer is responsible for putting right defects that are identified during the first two years of the policy. However, NHBC became responsible for Mr and Mrs M's claim, under the contract of insurance, because the developer failed to comply with NHBC's resolution service recommendations.

NHBC had concluded there was a defect, hence its recommendations to the developer. But after taking responsibility for the claim, NHBC then changed its position. NHBC said there wasn't a defect, on the basis the drainage and falls were acceptable.

Before the claim was declined, between 2016 and 2018, NHBC had paid Mr and Mrs M £550 compensation. This was largely due to delays. Those complaints *weren't* brought to our service 'in time', so that period isn't something I'm considering here.

After the claim was declined, NHBC offered Mr and Mrs M a further £2,000 compensation. This was on the basis that, in 2016, it had incorrectly concluded there was a defect.

Mr and Mrs M remained unhappy, so they referred a complaint to our service. Our investigator made the following findings:

- He noted the reports and photos showed there was rainwater permanently pooling under the balcony floor slabs. He wasn't persuaded NHBC's performance standard for rainwater drainage was being met. So, he concluded, as per the policy terms, there was a defect (which is covered under the section of the policy that applies).

- The balcony forms the roof of the apartment below. He also noted the performance standard in question requires flat roofs to have a fall of not less than 1:40, and the membrane had been found to be level.

- He accepted the membrane would perform with ponding (and there hadn't been any water ingress into Mr and Mrs M's property, or the property below). But he was still satisfied there was a defect, *i.e.* he didn't consider there to be adequate rainwater disposal. So, he thought NHBC should accept the claim.

- He agreed with NHBC, that the claim was for a common part of the building, which could have implications for how NHBC settles the claim.

- He thought the £2,000 compensation for the further delays and inconvenience, was fair.

NHBC accepted our investigator's outcome, but it said it was unclear on how the claim is to be settled. Mr and Mrs M were happy our investigator had found the claim should succeed, but they disagreed the claim was for a common part of the building. They also noted the £2,000 compensation was for delays up to 2019, and there's since been further delay.

Because Mr and Mrs M disagreed with parts of our investigator's findings, the complaint has been passed to me for a final 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.

NHBC has now accepted that the water pooling on Mr and Mrs M's balcony is a defect. So, I don't need to make a finding about this.

The issues that remain are whether the claim is for a common part of the building, how the claim should be settled, and what compensation should be paid. I'll address these in turn.

*Common part*

The claim is for the drainage of water on Mr and Mrs M's balcony. So, in my mind, there are two elements to consider – the balcony and the drainage.

The policy terms define 'common parts' as:

- *"… any of the following for which the Owner is legally obliged to share responsibility for cost and upkeep with the Owners of other Homes covered by Buildmark (or similar cover that we may issue):*

  *a. the parts of a building containing or providing support to a flat or maisonette;*
  *b. …*
  *c. any drainage system serving your Home;*
  *d. …"*

I've not included 'b' or 'd' from the above definition, as I don't consider them to be relevant to this complaint.

So, the first point to determine is whether the claim involves parts of the building that come under 'a' or 'c'. If so, the second point is whether Mr and Mrs M share responsibility for the cost and upkeep of those parts with the other apartment owners in the block.

In respect of 'c', Mr M argued there isn't an issue with the drainage system, but rather, the issue is the water isn't reaching the drainage system as there isn't a suitable fall. However, our investigator concluded the purpose of the membrane is to resist the passage of water into the property below whilst it drains away, so he found this to be part of the drainage system. He also highlighted that the performance standard being relied upon has 'drainage' in its name.

Overall, I agree with the conclusions of our investigator, for the same reasons. The purpose of the fall and membrane, as I understand it, is to ensure water drains away. Also, it's not reasonable, in my view, to determine the issue is a defect because there's a breach of NHBC's drainage performance standard, but yet conclude the defect isn't part of the drainage system. I understand Mr and Mrs M have already accepted this point.

I don't necessarily consider the membrane or fall to be part of the various drainage services referred to in the lease agreement. But nevertheless, I'm persuaded that these items ought reasonably to be considered part of the 'drainage system' under the policy terms.

In any event, regardless of the issue being one of drainage, as I understand it the balcony is a continuous structure that forms the balcony of more than one property, and the roof of the apartments below. Therefore, in respect of 'a', I'm satisfied the balcony is a part of the building that contains, or provides support to, a flat.

So, this means, I'm satisfied that under the policy, the claim is for a defect to a common part, *providing* the responsibility for the repair is shared between some or all of the apartment owners, *i.e.* the leaseholders. I've referred to the lease agreement to determine the responsibilities.

The lease defines 'premises', 'common parts of the building' and 'building'. The 'premises' are defined as "*the flat shown edged red on Plan number 1".* The lease also lists what the premises do and don't include. The 'commons parts of the building' definition lists various areas and services. The 'building' definition includes the premises and common parts.

As per clause 5.3 of the lease agreement, the landlord covenants to:

- *"… maintain, repair, redecorate, renew and (in the event in the Landlord's reasonable opinion such works are required) improve …*

  *(a) the load bearing framework and all other structural parts of the Building, the roof, … and all parts of the Building which are not the responsibility of the Leaseholder under this Lease …*

  *(c) the Common Parts of the building ..."*

Whilst the leaseholder, on the other hand, covenants:

- *"To refund to the Landlord on demand (where Outgoings relate to the whole or part of the Building or other property including the Premises) a fair and proper proportion attributable to the Premises, such proportion to be conclusively determined by the Landlord (who shall act reasonably)"*

- *"To pay the Service Charge in accordance with Clause 7 (Service Charge Provisions)"*

The service charge provisions and related definitions set out the following:

- The 'service charge' definition includes *"the Specified Proportion of the Building Service Provision"*

- The 'specified proportion of the building service provision' is defined as "*… a fair and reasonable proportion (to be assessed by the Landlord's surveyor) of the elements of the Service Provision in relation to the costs incurred for the Building."*

- The ‘service provision’ includes:

  *“(a) the costs of and incidental to the performance of the Landlord’s covenants contained in … Clause 5.3 …*

  *(d) any Outgoings assessed, charged, imposed or payable on or in respect of the whole of the Building or in the whole or any part of the Common Parts of the Building.”*

In my view, it’s reasonably clear from the parts of the lease I’ve quoted, that the landlord is responsible for the structural elements and common parts of the building; and the related upkeep costs are recovered from the leaseholders by way of the service charge. So, the question that remains is whether the balcony is a structural element, or common part of the building, under the lease.

The commons parts definition doesn’t expressly include balconies. However, it does include *“… other parts of the Building which are intended to be or are capable of being enjoyed by some or all of the owners tenants and occupiers of other premises in the Building”.*

Clearly, Mr and Mrs M’s private balcony area isn’t intended to be used by the occupiers of other premises. However, as noted, it’s a continuous structure that forms their neighbours’ balcony, with the private areas simply separated by a dividing fence. So, in my view, the continuous balcony is a ‘part’ of the building that’s enjoyed by the occupiers of multiple premises, and it falls within the common parts definition within the lease.

Equally, the premises definition doesn’t expressly include balconies. But the definition does expressly exclude *“the load bearing framework and all other structural parts of the Building”* and *“the roof, foundations, joists and externals wall of the Building”.*

I’ve not seen anything that leads me to believe the balcony isn’t loadbearing or a structural part of the building. Furthermore, the balcony forms the roof of the apartments below, and roofs are excluded from the ‘premises’ definition.

Also, throughout the lease, it refers to balconies being attached to the premises, or accessible from them, rather than being part of them.

I’m mindful that the leaseholder covenants *“to repair and keep the Premises (and the floor of the balcony …) in good and substantial repair and condition …”.* But equally, the leaseholder also covenants *“not to: (a) make any alterations or additions to the exterior of the Premises or any balcony attached to it …”.* Whilst I’m persuaded that a leaseholder has an obligation to keep their private balcony floor in good condition, in the context of the rest of the lease agreement, I’m not persuaded they are responsible for significant repairs or alterations.

In response to our investigator’s findings, Mr and Mrs M agreed their balcony wasn’t outlined in red on the plan. However, they noted it’s outlined in green and referred to as 'the external flat ownership boundaries'. They noted the ‘premises’ definition includes ‘rights’ granted by the lease, which includes*: “the right to use the private balcony or terrace (edged green on Plan 1 if any) accessible directly from the Premises for quiet relaxation only”.*

As I understand it, Mr and Mrs M are of the view that the premises include the rights under the lease, and because the rights include use of the private balcony, the balcony is part of the premises. However, I'm not persuaded that's a reasonable interpretation of the lease, or its intention. I say this because the listed rights include the use of common parts and communal roof terrace, but clearly, that doesn't make them part of the leaseholders' premises, rather than a common part.

So, having considered the lease in the round, I'm persuaded that it's reasonable for NHBC to consider the balcony a common part, rather being part of Mr and Mrs M's apartment. I'll set out what that might mean for the repairs and claim settlement, under the next heading.

*Settling the claim*

Our investigator didn't make a finding on how the claim should be settled. The parties have now agreed the defect is covered by the policy, but NHBC will now have to investigate the remedy. The claim settlement isn't something I can decide here, without the necessary investigations having taken place or the arguments presented about what each party propose.

The defect isn't causing any damage, albeit it's affecting Mr and Mrs M's enjoyment of their balcony. As I understand it, NHBC is concerned that a repair would be disproportionate if it invalidates the membrane's warranty, given the membrane serves multiple properties.

Our investigator suggested that if NHBC didn't consider it could reasonably repair the defect, it may need to consider paying compensation to reflect the loss of enjoyment of the balcony. Understandably, Mr and Mrs M have explained that they wouldn't be happy with this, and they want the issue repaired. They say if NHBC isn't prepared to repair, they want the settlement to reflect the quote from a party who can do the repairs.

Mr and Mrs M have also questioned whether the membrane is on their balcony, due to the areas quoted on the membrane warranty. On the other hand, if the membrane is on their balcony, they question the validity of its warranty given their balcony hasn't received the required annual inspections. They also note the warranty's validity can be maintained if works are completed with the manufacturer's approval. As such, Mr and Mrs M say the membrane warranty shouldn't prevent NHBC from completing repairs.

Ultimately, these are all issues that will need to be investigated by NHBC when considering the appropriate settlement. NHBC may need to engage with the manufacturer to determine what works are necessary and what works can be done. It's also clear from the lease that NHBC will need to engage with the landlord, as works to the balcony can't be undertaken without the landlord's permission.

If the claim were to be cash settled, Mr and Mrs M would need to engage with the landlord to have it comply with its repair obligations under clause 5.3. A cash settlement would also only likely reflect Mr and Mrs M's share of the repair costs, as per the lease. My understanding of the lease is that it's for the landlord to determine the share of each leaseholder, as opposed to there being a specific pre-determined percentage. If so, the parties will likely need to engage with the landlord about this.

In summary, what I've decided here is that, having accepted there's a defect to the balcony which is covered by the policy, NHBC now needs to investigate how it can best settle the claim – bearing in mind it's for a common part of the building.

If, after those investigations, Mr and Mrs M are unhappy with the proposed settlement, or if they are unhappy with those investigations, they can make a new complaint about that matter.

*Compensation*

As explained by our investigator, this complaint only covers the period of 28 December 2018 onwards. This is because the complaints about the periods before, weren't referred to our service 'in time' under the rules this service is bound by.

I don't doubt that Mr and Mrs M suffered considerable upset by having their claim declined by NHBC after it took responsibility for the repairs. I also accept that living with the balcony issue since December 2018, and pursuing the matter, has caused them a fair amount of inconvenience.

However, the £2,000 compensation offered by NHBC is broadly in-line with the sum I would have awarded for Mr and Mrs M's experience, had NHBC not made this offer. As such, I'm satisfied the offer is fair.

Given the delays so far, should Mr and Mrs M accept my final decision, I would reasonably expect NHBC to act promptly in respect of investigating the claim settlement.

**My final decision**

For the reasons I've set out above, I uphold this complaint.

My final decision is National House-Building Council should:

- accept the common part claim for the defect to Mr and Mrs M's balcony, in respect of the water pooling; and promptly investigate repair and settlement options; and

- pay Mr and Mrs M the previously offered £2,000 compensation (if it hasn't yet done so)

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before 29 December 2021.

Vince Martin
**Ombudsman**