

The complaint

Mr C and Mrs G complain National House-Building Council (NHBC) unfairly declined a claim they made on their ten-year building warranty policy, for cracked quoins and brickwork on their apartment block.

What happened

The subject of this complaint is a building of 17 apartments. Mr C is also representing the other leaseholders that own apartments in the building, who have separate, but the same complaints with our service, in relation to their separate policies. All the parties are aware that what I say here in respect of Mr C and Mrs G's complaint, also applies to the same complaints brought by the other leaseholders.

Each apartment is covered by a ten-year policy. The cover started in 2008. The managing agent reported cracked quoins and brickwork to NHBC in 2015. During years three to ten, section 3 of the policy applies. Section 3 covers physical damage if it's been caused by a 'defect' in certain parts of the building. A defect is defined as a breach of any mandatory NHBC Requirement in its published Standards.

The policy also includes various exclusions and a claim must meet the minimum claim value. The minimum claim value depends on when the claim was made, as it increases each year in-line with the Royal Institution of Chartered Surveyors' House Re-building Cost Index. When NHBC was notified of the cracking in 2015, the minimum claim value was £964.

The part of the building damaged is a common part. This means each leaseholder has their own separate claim for their share of the repair costs. Therefore, for the claims to succeed, the repair costs must exceed $17 \times £964 = £16,388$. The policy terms explain the costs are based on what NHBC would have to pay if it arranged for the repairs to be done.

There have been other claims referenced during this complaint. In 2014, claims were made for rainwater damage caused by a defective parapet roof/terrace and secret gutter. It's my understanding those claims were accepted and repairs completed. I also understand that one apartment continued to experience water ingress, but NHBC has recently agreed to undertake further repairs. Whilst those claims aren't the subject of the complaint I'm considering here, the gutter leaks are relevant to Mr C's arguments.

In terms of the claims for cracked quoins and brickwork, in 2015, NHBC's claim investigator set out his findings in a report. The report referred to the findings of NHBC's structural engineer, who had produced a separate report.

In summary, NHBC concluded that the predominant cause of the cracking to the quoins and brickwork, in the areas noted in its reports, had been caused by a defect. It found there was a lack of movement joints in some locations, which had resulted in cracking during thermal movement. However, its estimated repair costs came to about £14,000, which didn't meet the collective minimum claim value of £16,388. So, NHBC declined the claim.

In 2017, Mr C complained about the claim decision on behalf of all the leaseholders. He said the repairs had been undervalued. Mr C also argued the cracked quoins and brickwork were linked to the gutter leaks, and therefore, that the repairs should form part of those section 3 claims. He also said the damage should be covered under section 4. NHBC maintained the cracking was unrelated to the gutter leaks, and that the repair costs had been calculated correctly.

In 2019, one of our investigators explained to Mr C he hadn't seen any expert opinion that contradicted NHBC's findings, but if the leaseholders were to obtain such information, we would give it consideration.

In 2020, the leaseholders commissioned an engineer's report. The report made the following conclusions and recommendations:

- Whilst thermal movement has occurred, and additional movement joints should be installed, the primary cause of the cracking to the stone quoins was shrinkage.
- The cracking of the quoins has occurred where the wall was most saturated by the gutter leaks, which has exacerbated the shrinkage.
- The cracking could cause instability of the return wall since it's no longer bonded to the main length of the wall. The damaged quoins should be replaced, along with adjacent fractured brickwork.
- Shrinkage has also caused cracking through several stone cills, and one stone lintel. The shrinkage could cause damage to the damp proof course beneath the cills, if present, which will permit water ingress in the future. The cracks also render the cills vulnerable to frost damage. So, the cracked cills should be replaced.

The leaseholders also obtained a quote for about £30,000. The quote was for the installation of two movement joints; replacing 17 quoins; and replacing 12 cills.

Mr C provided the report and quote to NHBC. He said, in 2015, NHBC failed to identify the full extent of the cracking and remedial work to the quoins. He also noted that NHBC had declined several cracked cills on the basis they were a decorative feature. Mr C said the cills are an essential structural element, and the damp proof membranes beneath them were needed to prevent water ingress. So, he said the 2015 estimated claim value was unreliable and the required repairs would have exceeded the collective minimum claim value. Mr C also repeated arguments about the quoin cracks being linked to the gutter leaks, and the damaged being covered under section 4.

In response, NHBC said the cracking was due to thermal movement of the brickwork panels on the most exposed side of the building. It said the cracking wasn't due to shrinkage in the individual units. NHBC said there was no evidence to suggest the thermal movement was related to, or affected by, water penetration from the gutters.

NHBC noted that, in 2015, only one stone cill was found to be damaged. It also said the cills are cracked due to thermal movement and there being no slip plane between the stonework and brickwork. NHBC said the damp proof course is only required as a slip plane to reduce the risk of differential movement; and there isn't a requirement, in respect of water ingress, for a damp proof membrane beneath the cills. NHBC also noted the window frames have integral cills with drips, which confirms the stone cills are a decorative feature. Therefore, NHBC said the cills shouldn't form part of the claim or estimated repair costs.

NHBC said, even if the additional cracked stone quoins were now included (but not the cills), the cost of the repair still wouldn't exceed the minimum claim value.

The leaseholders were unhappy with NHBC's response, so they brought the matter back to our service. One of our investigators didn't think their complaints should be upheld. Mr C disagreed on their behalf, so their complaints have 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.

Where evidence is inconclusive, incomplete or contradictory, I've reached my decision on the balance of probabilities. This means I've determined what I consider is more likely to have happened, based on all the evidence that is available and the wider surrounding circumstances.

Should the cracking be covered under Section 4?

Section 4 provides cover if there's a 'present or imminent danger' because the builder failed to comply with certain building regulations. Section 4 only applies if NHBC provided the building control service during construction.

I haven't seen NHBC has responded to Mr C's point about section 4. However, I understand NHBC provided the building control service, and therefore, the leaseholders had the benefit of the section 4 cover during years three to ten.

For a section 4 claim to succeed, it needs to be shown that an applicable building regulation was breached, *and* there's a present or imminent danger because of that breach.

Nothing has been presented that shows an applicable building regulation was breached. But even if one was breached, I'm not persuaded the cracking presents a present or imminent danger.

The leaseholders' engineer noted he was concerned about the ongoing stability of the return walls and recommended the fractured quoins and bricks be replaced. But that was on the basis he hadn't been able to verify if sufficient ties had been installed. I can't reasonably decide the cracking presents a danger without such investigations, and it's for the leaseholders to support their claims.

Ultimately, I haven't seen anything that leads me to believe the cracking presented a present or imminent danger in 2015, or indeed, that it presents such a danger now. As such, I'm not persuaded the cracking should be covered under section 4.

Should the cills form part of the section 3 claims for cracked quoins and brickwork?

NHBC concluded there was a defect causing damage to the quoins and brickwork, *i.e.* a lack of movement joints. I haven't seen any expert commentary which links the damaged cills to that defect. NHBC has maintained the cill cracks aren't related. The leaseholders' engineer also hasn't linked the cill cracks to the lack of movement joints, but rather, he reported the damage had been caused by shrinkage. So, I'm not persuaded the cills form part of the claims for cracked quoins and brickwork, or that cill repairs should be included when calculating the value of those claims.

Should the cills be covered under separate section 3 claims?

There's the question of whether the cills should be covered under separate claims, subject to the repair costs meeting the collective minimum claim value. However, I'm not persuaded those claims would succeed.

The leaseholders' engineer says the cills have cracked due to shrinkage. But if so, damaged caused by shrinkage is excluded under section 3.

NHBC points towards a lack of a damp proof course in the bed joints beneath the cills, to act as a slip plane during movement. However, under section 3, NHBC only needs to put that defect right if the damage caused by it is covered. NHBC says the cills are an aesthetic feature only, and the cracking doesn't impair structural stability or weather tightness. Cosmetic damage that doesn't impair either of those things is also excluded.

I haven't seen any expert opinion that supports the cills are a structural element. So, I accept what NHBC says about this. NHBC also says there's no requirement for a damp proof course beneath the cills, in relation to weather tightness. Even if NHBC is wrong about this, and the leaseholders' engineer is right that a damp proof course should be present to prevent water ingress, section 3 doesn't cover preventative measures for damage that might occur in the future. As per the policy terms, unless physical damage is reported before a policy expires, that isn't cosmetic, a section 3 claim won't succeed. I haven't seen there's been water ingress in the location of the cills, so I'm persuaded that the cracks are, at this time, cosmetic.

For completeness, I also note the leaseholders' engineer reported a stone lintel above one of the balcony doors had cracks. I haven't seen this damage was raised within the ten-year period of cover. But in any event, like the stone cills, the engineer concludes the damage has been caused by shrinkage, which is excluded.

Was NHBC's 2015 repair scope accurate?

Section 3 covers the full 'cost' of putting right any physical damage if it's caused by a defect in certain parts of the property, providing those costs exceed the minimum claim value and subject to the policy exclusions.

The policy terms define 'cost' as "*the cost we would have had to pay if we had arranged for the work to be done*". Therefore, NHBC was entitled to calculate the claim value based on the rates it would have had to pay via its contractor network. Nonetheless, NHBC had to apply that term fairly, by accounting for all the covered works.

Mr C says NHBC failed to identify all the damaged quoins in 2015. NHBC's 2015 reports and engineer's drawing refer to damaged quoins on the south-east corner and midway along the east elevation, and its repair scope refers to the areas highlighted on the drawing. Mr C has pointed towards photos of the east elevation, that show cracked quoins in two areas which weren't included on the drawing. Mr C says the photos were taken before NHBC's survey, and they show damage was missed from the scope used to calculate the claim value.

On the other hand, NHBC says its reports reflected the damage that was present in 2015. It also says, even if all 17 quoins had been included in its repair scope, based on its rates, the collective minimum claim value wouldn't have been exceeded.

Having reviewed NHBC's 2015 repair scope, it's not clear how much the repair costs would have increased by, if at all, by including all 17 quoins. The number of quoins to be replaced on the scope isn't specified. But rather, it says all the damaged quoins and bricks are to be replaced in the two affected areas, and a single sum is provided for those repairs and the movement joints. So, it's not clear from the scope what the 'per quoin' cost was. It's also unclear if replacing additional quoins in other areas on the east elevation would have increased scaffolding costs.

However, whilst I've not seen the repair scope would have remained below the collective minimum claim value with the additional quoins, I'm not persuaded missed damage can reasonably be argued with an alternative report and quote over four years later.

In 2015, the managing agent reported a vertical crack on the south-east corner, which it said looked like thermal movement. NHBC observed vertical cracks on the south-east corner and midway along the east elevation, related to thermal movement, due to the lack of movement joints (a defect). Given NHBC had inspected the east elevation, *on balance*, I don't consider it likely it would have missed cracks that were related to the accepted defect.

Even if, in 2015, some cracks were present in other areas on the east elevation, it doesn't necessarily follow that those cracks were related to the lack of movement joints. NHBC's engineer commented in his report that it's likely some early-age shrinkage cracking had occurred. In addition, the leaseholders' engineer concluded shrinkage was the primary cause of the cracks to the quoins. As explained above, shrinkage isn't covered under section 3. So, the photos presented, don't, *on balance*, persuade me the cracks not included in NHBC's reports were defect related.

Ultimately, if the leaseholders intended to dispute the accuracy of NHBC's report or claim value, it was for them to commission a report and/or quote at that time. I can't reasonably decide that all the damage now present was present in 2015, even *if* it is related to the accepted defect rather than shrinkage. Given the two recommended movement joints weren't installed, I accept further damage will have likely occurred since 2015.

After NHBC declined the claim, it was for the freeholder to carry out repairs to prevent further damage. I understand each of the leaseholders has a share of the limited company that own the freehold, and some are directors. But either way, in my view, NHBC isn't responsible for the further damage that's likely occurred because repairs weren't undertaken.

To summarise, I'm not persuaded NHBC's repair scope didn't accurately reflect the defect related damage that was present in 2015, or that its scope can reasonably be challenged over four years later via an alternative report and quote, when the damage is likely to be worse.

Were the quoin and brickwork cracks caused by the gutter leaks?

Mr C has also argued that the quoins and brickwork have cracked as a consequence of the water leaking from the gutters. So, he says the repairs should form part of those accepted claims.

Mr C says the gutter issue related to the entire roof perimeter, and the insulation beneath the waterproof membrane was found to be saturated and materials were rotting. He's provided photos of that damage, and he says it shows there's been ongoing water ingress into the structure since 2008. He also says the quoin and brickwork cracks are directly below the worst areas of rot, and the water ingress has saturated the quoins and brickwork.

This service is generally reliant on the technical expertise of others. When there's a dispute about damage, we consider the submissions of those involved to decide what, on balance, we are more persuaded by. We generally place more weight on the submissions of those considered to be industry experts.

Here, we have opposing views from two suitably qualified parties; the leaseholders' engineer and NHBC. However, I don't consider either party has provided *persuasive* evidence that supports their position or undermines the opposing position. There haven't been detailed arguments presented in respect of how the water would, or wouldn't, have caused the cracks.

Nonetheless, given it's the leaseholders who assert there's a link between the water ingress and the cracking, it's for them to show, on balance, that's the case. Having considered the arguments and evidence presented, I'm not persuaded they have done that.

The leaseholders' engineer made the following statements in his report, in relation to the cracked quoins:

- *"It is thought that their cracking is linked to the defective gutters."*
- *"The cracking seems to have occurred on corners where the water penetration from the defective gutter was worst."*
- *"It is notable that the cracking of the quoins has occurred where, I am informed, the wall was most saturated due to the gutter leaks."*

I don't find the engineer's statements, or the language used, to be particularly conclusive. It's also evident his conclusions are based on what he was told about the walls being saturated in certain locations, rather than on what he observed. So, I'm not persuaded the findings in his report show, on balance, there's a link.

Equally, even if a link could be shown, for me to reasonably decide the cracking should form part of the defective gutter claim, I would need to be persuaded the water ingress was the *main* cause of the cracking. But here, the leaseholders' engineer has concluded that the primary cause is shrinkage (which as noted above, isn't covered):

- *"It is considered that the primary cause of cracking of the reconstituted stone is due to shrinkage, exacerbated by the previously leaking gutter."*

So, whilst I accept saturated and rotten materials beneath and around the roof were found, and there's been water ingress into the nearby apartments, I haven't seen anything that persuades me the leaking gutters were the main cause of the cracking.

My final decision

I'm sorry to disappoint Mr C and Mrs G, and the other leaseholders, but for the reasons I've set out above, I don't uphold their complaints.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs G, on behalf of all the leaseholders with the same complaint, to accept or reject my decision before 30 March 2022.

Vince Martin
Ombudsman