

The complaint

Mr G has complained about the National House-Building Council's (NHBC's) decision to decline his claim for damage to the common parts of the building, within which his flat is located.

What happened

This complaint was originally brought to our service by the company that owns the freehold reversionary interest in the building, who I'll refer to as GC. However, GC is not a policyholder. Rather, the owners of the flats in the building are the policyholders, as it is the owners who benefit from the warranties provided by NHBC.

Mr G is an owner of a flat within the building that is the subject of this complaint. Mr G is represented in his complaint by the managing agent for the building, who I'll refer to as Ms W. Ms W is also representing five other owners (who are also policyholders) of flats in the building, who have separate, but the same, complaints with our service.

All of the owners are aware that what I say here, in respect of Mr G's complaint will apply to the same complaints brought by the other five owners who are also represented by Ms W.

Mr G's flat benefitted from a building warranty provided by NHBC from February 2011. Later in 2011, the owners made a claim on the warranty in relation to stone / mortar failure and cracking to the stone windowsill. NHBC investigated the claim and issued a resolution report on 22 July 2011 requiring the builder to carry out works to repair that damage and bring the relevant parts of the building into compliance with the applicable NHBC technical standards. In November 2012 NHBC made a cash settlement to cover the cost of repairs for the failing mortar.

In April 2018 mortar fell from the north elevation of the building, leading to a claim being made with NHBC on 2 May 2018. The owners believed this to be a result of poor-quality work, or work that wasn't undertaken to the pointing and masonry at the time the building was converted.

NHBC inspected the damage on 20 June 2018. They rejected the claim on the basis that the common parts minimum claim value hadn't been met. In September 2018, the owners reported further mortar falls to NHBC and said the damage should be combined with that reported in the May 2018 claim. However, NHBC disagreed. They said the mortar failing in the joints notified to them in September, would need to be a new claim item with its own minimum claim value. As the affected area was a minor part of the building, NHBC said the claim wouldn't be accepted as it the damage didn't impair the structural stability or weathertightness of the building, and the repairs wouldn't meet the minimum claim value for the common parts.

Mr G disagreed with NHBC's response for a number of reasons. First, he said the quotes the owners had obtained were close to, or in excess of, the minimum claim amount. They couldn't see how the level of mortar falls experienced, and in particular, the deterioration of the pointing, could fail to affect the structural stability and weathertightness of the building.

And, despite the mortar falls occurring on different dates, Mr G felt they should be considered part of the same claim because they stemmed from the same cause, namely, inadequate work at the time of construction.

Mr G was also unhappy with the time taken by NHBC to respond to the owner's communications and progress the claim; he explained that the way NHBC had handled the claim had caused a significant amount of stress and unease to all of the residents. Mr G said that the freeholder company, GC (of which all the owners of the flats are shareholders) had paid £5,370 to repair the damage. In addition to refunding those repair costs, Mr G asked that a compensation payment be awarded which recognised the time and amount of correspondence the owners have had to be involved with to resolve the matter.

Ms W also said the owners felt the masonry defects posed a danger to life and they believed the exposure of insulating material where masonry had fallen off could be categorised as making the building unstable and weakening its structure and weather tightness.

After carrying out an investigation into the complaint, NHBC issued their final response on 25 October 2019, not upholding it. The complaint handler concluded that the decision to decline the claim had been made correctly.

Our investigator looked into the complaint and issued her view not upholding the complaint on 15 October 2021. She concluded that NHBC had acted in accordance with the Buildmark policy terms and conditions in declining the claim on the basis, among other things, that the cost to repair the damage hadn't met the common parts minimum claim value.

Ms W advised our investigator that Mr G and the other owners didn't accept her view, and had the following comments to make:

- They felt that NHBC should at least offer an ex-gratia payment towards the works which they had already funded on health and safety grounds, given the then impending risk of further masonry falls.
- They said NHBC had only said the works didn't meet the minimum claim value. However, no comment was given by NHBC as to the poor condition of the mortar on the building as a whole following the conversion of the building to its current use as a high end residential building. Works the owners say were completed under the NHBC Stewardship.
- Mr G strongly believes that some of the mortar detachment exposed the underlying insulation of the building and affected the weatherproofing of that area.
- Ms W said the problem was part of the general cladding / mortar issue and therefore is part of the problem for which NHBC had already accepted responsibility. She went on to say that Mr G and the owners shouldn't be penalised because they were able to get a contractor to carry out the repair work using a more limited amount of scaffolding than originally envisaged.

Our investigator considered the further comments but said they hadn't changed her view on the outcome. In particular, she said that Mr G hadn't provided any professional evidence to support his argument about the current and previous claims being the same, and she noted the fallen mortar which was the subject of the current claim, was in a different part of the building.

Mr G requested an ombudsman's decision on the 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.

Having done so, I've decided to not uphold this complaint.

Mr G has raised a number of concerns about NHBC's decision to decline his claim. I'll address those concerns under the following headings: *Was the damage caused by a defect in the common parts? Should the claims be considered as one claim and so meet the common parts minimum claim value? Is NHBC required to accept the claim on the basis that falling mortar represents a potential danger to life?*

In coming to my decision on this complaint, I've first considered whether the damage claimed for is covered by the Buildmark policy.

Was the damage caused by a defect in the common parts?

Mr G has claimed for damage caused to the external walls of the building caused by poor workmanship. He says the poor workmanship has resulted in mortar fall, issues with the pointing, and cracked windowsills. He also says it has impacted the weathertightness of the building. In addition, his representative commented that NHBC should be responsible for the poor condition of the mortar on the building as a whole following the conversion because the works were completed under "NHBC's stewardship".

I have considered these comments, however, while NHBC agreed to provide a warranty for the building, following the completion of its conversion for residential use, that doesn't mean NHBC is responsible for all of the works carried out by the builder. The warranty underwritten by NHBC doesn't cover everything that might go wrong with the building. The Buildmark policy sets out the terms of the agreement between NHBC and Mr G and details what is and is not covered by the warranty. The policy separates the cover into sections.

Because the damage claimed for, on this occasion, was notified to NHBC in year nine of the policy, the claim falls under section three which provides as follows:

"3. What NHBC will pay for

- A. *The full Cost, if is more than £1,000 indexed, of putting right any actual physical Damage caused by a Defect in any of the following parts of the house.....or its Common Parts:*
- *Foundations*
 - *Load-bearing walls*
 - *Non load-bearing partition walls*
 - *Wet-applied wall plaster*
 - *External render and external vertical tile hanging*
 - *Load-bearing parts of the roof*
 - *Tile and slate coverings to pitched roofs*
 - *Ceilings*
 - *Load-bearing parts of the floors*
 - *Staircases and internal floor decking and screeds where these fail to support normal loads*
 - *Retaining walls necessary for the structural stability of the house, bungalow, flat or maisonette, its garage or other permanent outbuilding*

- *Double or triple glazing panes to external windows and doors*
- *Below-ground drainage for which you are responsible*

The list of common parts covered by the Buildmark policy does include external render. However, subject to the common parts minimum claim value being met (£9,780), it is only *Damage* caused by a *Defect* in that listed part, that will be covered by the warranty.

So, I've next considered whether the damage to the external render was caused by a '*Defect*'. The policy provides the following definition of '*Defect*': "*A breach of any mandatory NHBC Requirement by the Builder or anyone employed by him or acting for him. Failure to follow the guidance supporting the NHBC Requirements does not in itself amount to a Defect, as there may be other ways that the required performance can be achieved*".

Mr G has submitted that the falling mortar and problems with the building's masonry would affect the weather-tightness of the building. And while that may be the case, I haven't been provided with any evidence to show that damage has been caused to the building as a result of a breach of NHBC's technical requirements in relation to the building being constructed so as to be weathertight (for example: *6.1 – D.4 – External walls shall be suitable for their exposure and resist the passage of moisture to the inside of the dwelling*; and *6.1 – D15 – Rendering, in conjunction with the surface to which it is applied, shall satisfactorily resist the passage of moisture*).

However, the technical requirements also include standards relating to the mortar being of an appropriate mix, and elements of the masonry complying with performance standards (for example: *6.1 – D5 – Mortar shall be of the mix proportions necessary to achieve adequate strength and durability and be suitable for the type of masonry*; and *6.1 – D8 – Elements constructed of natural or case stone masonry shall comply with the performance standards for brick and block masonry, where applicable*).

The June 2018 resolution report explained that the main area of significant damage was to the top of the upper central stairwell window where a length of mortar had fallen away from the stone surround. The report went on to say that the mortar found indicated the repairs carried out were undertaken using a general cement mortar background with thin veneer of stone colour matched mortar to the face, and the backing used was shredded paper.

So, the report did identify damage to the building that appears to have been caused by a defect. However, NHBC declined the claim on the basis that it didn't meet the common parts minimum claim value. I will address that next.

Should the claims be considered as one claim and so meet the common parts minimum claim value?

Page 20 of the Buildmark policy sets out the financial limits that apply to a claim relating to common parts. In particular, it says:

"The most we will pay for any claim relating to Common Parts will be the amount that you are legally liable to contribute towards the Cost of repairs".

Further down the page it says:

"For claims under section 3A.... if your share of the cost of repair is less than £1000 Indexed, NHBC will not pay your share".

After considering the various estimates provided by the owners, NHBC concluded that the cost of repairs wouldn't meet the minimum claim value of £9,780, and on that basis, declined

the claim. The owners went ahead and had the repairs done, at a cost of £5,370. In the course of her investigation, our investigator informed the owners that NHBC would have considered paying one of the estimates they'd provided, as it was within £100 of the minimum claim value. However, as the actual cost was significantly less, that offer was withdrawn.

Mr G is unhappy that NHBC withdrew their offer of settling the claim on the basis of the closest estimate to £9,780, and said that had that offer been made at the time of the claim (rather than several years later when the complaint was being considered) the owners would have proceeded with that estimate. However, as the claim had been declined, and the works needed to be done, the owners decide to engage a contractor who managed to do the repair works at a reduced cost, due to being able to manage with less scaffolding than originally envisaged.

While I can appreciate Mr G's view on this, I agree with our investigator's conclusion that NHBC acted in accordance with the policy terms and conditions when they declined the claim on the basis that the common parts minimum claim value hadn't been met. I think the most persuasive evidence of what the repair works would have cost, is the invoice the owners paid for the completed works. An estimate is just an appraisal of what the likely cost of completing the work would be. But once the work has been done, a definite figure is established. In this case the cost of repair was approximately £4,000 less than the common parts minimum claim value. I therefore consider NHBC's decision to decline Mr G's claim was in line with the policy terms and conditions and was fair and reasonable in the circumstances.

Mr G's representative has also submitted that the mortar falls which occurred after the May 2018 claim, ought to be combined into the same claim, as they resulted from the same cause, which she believed would increase the repair cost to a level that would exceed the common parts minimum claim value. However, I disagree. As I've explained, the repair costs only came to £5,370, so I'm not persuaded that combining the repair costs for the April and September damage would have brought the cost of settling the claim above the common parts minimum claim value.

Is NHBC required to accept the claim on the basis that falling mortar represents a potential danger to life?

Mr G has also said that the falling mortar was a danger to life, and as a result the owners proceeded to have the repairs done at their own cost. While I understand the owner's concern about the risks associated with falling mortar, unless NHBC had carried out a building control function under section four of the policy, they were under no obligation to carry out repairs where "*there is a present or imminent danger to the physical health and safety of the occupants of the home.*" The policy schedule confirms that section four wasn't applicable to this building, as NHBC didn't carry out building control. I therefore don't agree that NHBC ought to have accepted the claim on the basis that falling mortar represented a health and safety danger.

In conclusion, while I accept that the damage was caused by a defect, as the cost of repair didn't meet the common parts minimum claim value, I'm satisfied that NHBC acted in accordance with the policy terms and conditions when it declined the claim. I therefore do not uphold this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 6 April 2022.

Carolyn Harwood
Ombudsman