

The complaint

Mr B 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.

In particular he has complained that:

- There are significant issues with the render and external wall insulation system to the main elevations of the building.
- The building hasn't been constructed in line with construction drawings and to the manufacturer's approved details, resulting in inherent defects that require extensive works to rectify.
- The poor nature of the construction of the external wall insulation has resulted in water penetration to several flats within the development over a number of years.
- NHBC had previously identified that the cause of water ingress was due to the windows, which he says is not correct.
- NHBC have acknowledged there are fundamental issues with the construction of the external elevations, however, have declined the claim without providing substantive reasons, only referencing that cladding is not covered under the policy.

Mr B believes that NHBC should meet the costs of the extensive works required to ensure that the building is wind and watertight, estimated at approximately £555,000, under the terms of the Buildmark policy.

What happened

On 2 March 2022, I issued a provisional decision explaining why I was not intending to uphold this complaint. This is what I said:

What happened

Mr B is an owner of a flat within one of the two buildings that are the subject of this complaint. Mr B is represented in his complaint by a company who I will refer to as 'R'. R is also representing 25 other owners and policyholders in the two buildings, who have separate, but the same, complaints with our service. The buildings form part of a larger development, however, not all of the owners in the development have brought this complaint to our service.

Mr B, and the other 25 owners, are aware that what I say here in respect of Mr B's complaint will apply to the same complaints brought by the other 25 owners who are represented by R.

The development was completed in 2006. In September 2014, the building was

inspected by a surveyor engaged by the co-owners to identify the causes of damage to the common parts, which were allowing water ingress into the building. As the damage had appeared in years 3 to 10 of the warranty period, in October 2014, a section 3 claim was made to NHBC.

NHBC completed an investigation report in May 2015, which recorded their decision on whether to accept the claim regarding water ingress to windows was 'pending'. The 2015 investigation report said the claim regarding defective render and cope sealant had been rejected as the cost of repairing the damaged patches of render wouldn't exceed the minimum claim value.

Further investigations were carried out by or on behalf of NHBC between 2015 and 2018. But, while noting a number of potential causes of the damage, they didn't lead to a conclusive determination of the cause of water ingress, or damage to the render.

The owners commissioned two further reports in January and March 2020 which identified leakages around windows that was likely due to leaks in the seals between the window frames and render. The reports also said the cladding system hadn't been installed in accordance with the approved construction drawings. They also noted deterioration of the render surface, cracking to the render, and bulging of the render.

After consulting with the manufacturer of the cladding system, NHBC made the decision to reject the entire claim, in August 2020. R challenged NHBC's claim decision and received their final response letter in April 2021, not upholding the complaint. Unhappy with NHBC's response, Mr B brought his complaint to our service.

Our investigator looked into Mr B's concerns and issued her view, partially upholding the complaint on 7 December 2021. In summary she said:

- A number of the reports mentioned that the sealant around the windows and the way the windows had been installed may be causing the water ingress. However, the warranty didn't provide cover for that damage.*
- While the owners wanted the whole cladding system to be replaced, the warranty only provides cover for damaged areas of the render. So, NHBC should rectify the damaged render in meeting their liability under the warranty.*
- The warranty didn't provide cover for faulty or incorrect installation of components, so, any damage caused by the faulty installation of the cladding system wasn't covered.*

Our investigator concluded that NHBC needed to settle the claim, in relation to the damaged render, by paying Mr B the amount that he's legally liable to contribute towards the cost of repair of the damaged render, or, if NHBC deems it to be appropriate, to repair the damaged render.

NHBC accepted our investigator's view, with the caveat that they'd need to re-visit the property to assess the extent of damaged render they may be liable to repair, and to reconsider whether the repairs would meet the common parts minimum claim value.

Mr B didn't accept the view. His representatives, R, made the following comments:

- *They asked whether the ombudsman deciding this complaint would have an appropriate construction technology background and be suitably qualified to understand the ‘intrinsic construction technology aspects that are crucial to arrive at a judgment on the issue’.*
- *They repeated their view that the render system installed is not fit for purpose and has not been since the time of construction, due to faulty installation.*
- *They noted our investigator’s conclusion that there is external render present on the building, which all the reports (including NHBC’s) mention is defective and is a possible cause for water ingress. R said they believe that conclusion differs from the NHBC’s decision to decline the claim on the basis that the system in place is deemed a cladding system, which is excluded from policy cover.*
- *They do feel the whole system is inadequate and installed incorrectly and completing an effective repair would require the whole external render to be replaced.*
- *They say the most significant aspect of this accepted incorrect installation is the flush detailing around windows, which is contributing to the water ingress issues.*
- *They think the incorrect installation of the cladding system should be considered a ‘Defect’.*

I’ve taken these comments into account in coming to my provisional decision on this 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 role of the ombudsman in deciding this complaint

R has asked whether I am suitably qualified to understand the construction technology aspects of this complaint. I would like to address that question before I proceed to give my provisional decision on this complaint.

Paragraph 4(1) of Schedule 17 of the Financial Services and Markets Act 2000 (FSMA) requires FOS Ltd to appoint and maintain a panel of persons “appearing to have appropriate qualifications and experience to act as ombudsmen for the purposes of the scheme”. In accordance with that provision in FSMA, I have been appointed as an ombudsman, by the Financial Ombudsman Service’s board of non-executive directors on the basis that I have the relevant skills and experience to decide this complaint.

I think it would also be helpful if I explain my role in deciding this complaint.

This service is an informal dispute resolution service, established under Part XVI of FSMA as “a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person”. In my role as the independent person I’m responsible for resolving this dispute in accordance with the Dispute Resolution Rules (DISP) detailed in the Financial Conduct Authority’s handbook of rules and

guidance (available online). In accordance with DISP 3.6.1, I'm required to decide this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, as required by DISP 3.6.4, in considering what is fair and reasonable in all the circumstances of the case, I need to take into account relevant laws and regulations, regulations, regulator's rules guidance and standards, codes of practice and where relevant, good industry practice.

I also take account of all of the arguments and information provided by both parties, and where that evidence is incomplete, contradictory or inconsistent, I'll make my decision based on what I think more likely than not happened, applying the standard of proof of the balance of probabilities.

I'd finally add that if Mr B doesn't accept my decision on his complaint, his legal rights will not be affected and he will be free to seek advice on pursuing the resolution of his complaint elsewhere, for example in the commercial division of the Court of Session.

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

What is the damage to the common parts?

During the period of time that Mr B's claim has been ongoing, damage and defects have been identified in the following common parts:

- the curtain wall comprising the cladding system on the eastern elevation of the block;*
- the window seals and surrounds; and*
- the render on the eastern elevation of the building.*

As result of defects in the above areas, damage has also been identified in the following areas:

- internal walls and ceilings of the building*

Mr B has also complained about damage to the internal parts of his flat. I've considered this complaint in a separate provisional decision issued on the same date as this provisional decision. So, I won't be addressing his complaint regarding damage to his flat in this decision about the common parts damage.

Has a defect caused the damage, and if so, has the defect occurred in an area covered by the Buildmark policy?

In deciding this complaint, I'm largely reliant on the expert evidence that has been provided and the persuasiveness of that evidence. Where the evidence is incomplete, unclear, or contradictory, I base my decision on the balance of probabilities, that is, what I think more likely than not happened.

In coming to my provisional decision on this complaint, I've reviewed the following ten reports:

October 2014 - report provided by owners to NHBC in support of claim

May 2015 - NHBC investigation report

December 2015 - NHBC investigation report

March 2017 - NHBC investigation report
January 2018 – first report from NHBC’s external consultant
July 2018 - second report from NHBC’s external consultant
October 2018 - leak detection survey report from a different NHBC external consultant
January 2020 - report provided by owners to NHBC
March 2020 - report provided by owners to NHBC
June 2020 - report from the manufacturer of the cladding system provided to NHBC

Throughout the reports the causes of the water ingress and damaged render have been the subject of extensive debate and a notable lack of consensus. In addition to a number of possible causes that were suggested, the following observed issues with the buildings were referenced throughout the reports: defective silicone sealant around the parapet copes; deterioration of mastic around windows; failing window seals, installation of windows faces flush with the render which reduced weather protection; missing drain covers; poorly applied sealant; incorrect installation of the parapet capping and the curtain wall; failure to install expansion joints in the cladding system, which was likely to have caused cracking; parapet roof detailing which stopped the water being shed clear of the roof and instead led it to run down the render face; incorrect installation of sills and flashing to shed water away from the face of the finished render; poor repairs and lack of maintenance.

So, there are clearly a number of issues with the building that have been identified in the various reports and investigations that have been carried out between 2014 and 2020. However, the building warranty underwritten by NHBC doesn’t cover everything that might go wrong with the development. The Buildmark policy sets out the terms of the agreement between NHBC and Mr B and details what is and is not covered by the warranty. The policy separates the cover into sections.

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

3. “What NHBC will pay for

A. The full Cost, if it 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, bungalow, maisonette or flat and its garage or other permanent outbuilding, 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
- Floor decking, screeds and staircases, 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 not include a curtain wall or cladding system. The Buildmark policy terms and conditions have been amended over time, and I note that some later policies did include curtain walling, and/or cladding alongside “External render and external vertical tile hanging”. However, this policy does not. So, it is only those parts listed above, that are covered.

The list of common parts covered by the Buildmark policy also does not include external windows, their seals, or surrounds.

So, subject to the common parts minimum claim value being met (approximately £80,000) and the claim being notified to NHBC within the ten-year period of the warranty, it is only Damage caused by a Defect in one of the above listed parts that will be covered by the warranty.

Having regard to the list of common parts covered by the policy, I’m satisfied NHBC’s decision to decline Mr B’s claim, in respect of damage caused by a defect in the curtain wall, cladding, external windows and seals, was made in accordance with the policy terms and conditions, and was fair and reasonable in the circumstances.

Although the reports have largely commented on damage caused to the internal walls and ceilings of the flats, there has been some comment about damage being caused by water ingress into the common parts of the building. The render has also been referred to as defective and damaged. Provided the damage to the walls and ceiling in the communal areas, or the damage to the render, was caused by a defect in one of the parts listed, (in this case, the render) then the related damage could be covered by the policy (subject to the remaining policy terms).

Has the internal Damage, or render damage, been caused by a Defect?

I’ve next considered whether the damage to the communal walls and ceilings, and the damage to the render, was caused by a ‘Defect’.

Mr B’s representatives consider that acceptance by NHBC that the cladding system has been installed incorrectly, should be considered to be a ‘Defect’.

But, ‘Defect’ is defined as “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”.

So, the Buildmark policy provides that it’s part of NHBC’s remit, to provide insurance for damage which is caused by non-compliance with its technical requirements.

It is here that I consider Mr B’s complaint fails. To conclude that NHBC was liable to cover the cost of repair to the damaged areas of render and the common parts affected by water ingress, I’d need to be persuaded that the cause of the damage was due to a breach of the relevant NHBC technical requirements, in relation to the render, and I’m currently not.

NHBC’s requirements applicable at the time of construction of the buildings address render in two separate contexts, neither of which are relevant to this complaint. There are a number of technical requirements which address the mixing and application of render to an external wall (for example, in Chapter 6.1: ‘External Masonry Walls’). However, in this case, the builder wasn’t responsible for applying the render to the

building. Rather, the render was applied to panels, before they were attached to the building. So, those requirements wouldn't be applicable here.

There are also a number of technical requirements that refer to render in the context of insulated render systems (for example, in Chapter 6.9: 'Curtain walling and cladding'). But as I've already explained, neither cladding systems nor curtain walls are included in the list of Common Parts covered by the policy.

I concluded by saying I was currently of the view that the damage claimed for, to and caused by the render, wasn't covered by the policy. So, I was not intending to uphold the complaint.

I asked both parties to let me have any final comments or evidence to consider before I issued my final decision on the complaint. NHBC had nothing further to add. However, Mr B's representatives asked that I consider the following comments before making my final decision:

- All of the reports and relevant communications have been provided, aside from a document showing "As Constructed" drawings for the development which was enclosed with their response.
- They've queried where the information has come from which suggests the render was applied to panels before they were attached to the building, as that is not their understanding of how the render was applied in this instance.
- The system in place is an external wall insulation system. The build-up of the system, as noted on the drawings comprises a sheathing board, insulation board, reinforcing mesh and Dryvit finish, understood to be a 3mm acrylic render. The system has been constructed defectively as it hasn't been formed as an Outsulation Rail System.
- The details on the "As Constructed" drawings aren't accurate because they show the render finish to be well outwith the plane of the windows, when in reality, they have been constructed on a flush plane.
- It seems that the external wall insulation system has been completely omitted and the render applied directly to the sheathing board on the external face of the steel framing system. So, the simple reason the render is failing is due to faulty installation.
- Our investigator previously conceded that cover is provided for external render, although it's not clear whether that includes rendered panels.
- The most significant aspect of the incorrect installation is in the flush detailing around windows, which is contributing to the water ingress issues.
- They agree with our investigator's comment that the building warranty doesn't cover faulty installation unless that's what caused the damage.
- The technical detailing around the external wall insulation system is quite specific and has not been followed on site. As there is no other way in which performance can be achieved, the failure to follow that detailing does amount to a defect.

In conclusion, they say that due to the lack of cover at parapet and to windows, rainwater run-off is directly hitting the render service and leading to its deterioration. The external render system installed is not fit for purpose and hasn't been since the time of construction. In their opinion, the deterioration of the render surface, cracking to the render surface, and

bulging of the render can be attributed to the installation issues, due to lack of protection to the surface through construction detailing.

I've taken these 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 B's representatives have referred to comments made by our investigator which they believe support their arguments. However, Mr B didn't accept our investigator's view. Rather, he requested an ombudsman's decision on the complaint. So, I issued a provisional decision, explaining why I was taking a different view to our investigator and I explained why the installation of the cladding system wasn't covered by the Buildmark policy. Now that a final decision has been issued on this complaint, it is my conclusions, detailed in this decision, that provide this service's final view on the complaint. Those conclusions supersede any earlier views expressed by our investigator.

A question has been raised by Mr B's representatives as to why I referred to rendered panels in the provisional decision, as they don't believe render was applied to panels. In her view dated 7 December 2021, our investigator quoted a reference to rendered panels that was included in the report from NHBC's external consultant, who I've referred to as 'A'. As rendered panels are referred to in technical reports, I'm satisfied that they were likely included in at least part of the building's cladding. However, having reviewed the evidence again, it appears that some render was likely applied directly to external walls, in addition to rendered panels being installed as part of the cladding system. But, that doesn't lead me to come to a different conclusion on this complaint. I will explain why.

If some of the render had been applied directly to an external wall, then parts of NHBC's technical requirements would be relevant here. However, as I explained in the provisional decision, I would still need to be persuaded that the damage claimed for was caused by a breach of those technical requirements, in relation to the common part covered, i.e. the render. I would also need to be persuaded that the cost to repair the patches of damaged render on the external walls would likely exceed the common parts minimum claim value (which, as at 2015 was estimated to be in excess of £80,000). After considering all of the available evidence afresh, I'm still not persuaded that either the damage claimed for was due to a breach of NHBC's technical requirements in relation to the render, or that the cost of repair of the damaged render would likely exceed the common parts minimum claim value.

In their submissions, Mr B's representatives agree the damage to the building has been caused by the incorrect installation of the external cladding system, which has essentially failed to provide protection from inclement weather. Specifically, they said: "*the deterioration of the render surface, cracking to the render surface, and bulging of the render can be attributed to the installation issues, due to lack of protection to the surface through construction detailing*". Mr B's representatives also agree that other factors have contributed to the damage, in particular, the flush detailing around the windows leading to water ingress. So, that isn't in dispute. What they do challenge, is whether these issues with the building are sufficient to engage cover from the Buildmark policy.

As I explained in the provisional decision, curtain walling, and or external cladding systems are not covered by the warranty. Therefore, any faulty installation of such a system is not covered by the warranty. While damage caused by a defect in the external render is covered, I'm not persuaded the damage to the building that Mr B is claiming for, was caused by a defect in the render. The evidence as a whole persuades me that the incorrect

installation of the external cladding system is likely the main cause of the damage to the building. As that isn't covered by the Buildmark policy, I remain of the view that NHBC fairly and reasonably declined Mr B's claim. So, for the reasons detailed in my provisional decision, and this final decision, I don't uphold Mr B's 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 B to accept or reject my decision before 15 April 2022.

Carolyn Harwood
Ombudsman