

The complaint

Ms P has complained about National House-Building Council's (NHBC's) suggested settlement for a claim she made under her NHBC Buildmark warranty.

What happened

Ms P, and several other residents at her housing development, have made a claim to NHBC about water ingress at their properties. This means that, in addition to Ms P, other leaseholders have also been affected by the issues complained about. But this complaint has been brought solely by Ms P, so my decision will only address her entitlement under her warranty.

The bulk of the protection provided by Ms P's NHBC warranty runs for 10 years from completion of her property. The cover is split into different sections each offering different levels of cover.

NHBC was notified about a claim for water ingress through the windows at Ms P's development in 2013. This was around 6 years into the warranty, when section 3 of the cover would have applied. The claim involved multiple apartments and was brought by the resident's association, on behalf of the leaseholders.

NHBC investigated and subsequently declined the claim. It said that for windows, under section 3, the warranty only covered defects with the double or triple glazing panes and didn't extend to any other part of the window or frame.

The resident's association requested NHBC consider the claim under section 2 of the warranty as this provided less restrictive cover if the issues were first reported to the builder in the first two years of the policy. It provided evidence that 15 of the leaseholders had raised water ingress issues with the builder during this time. This included Ms P.

Further investigations were undertaken and NHBC issued resolution reports, for various apartments, directing the builder to carry out works by a specified date. When this wasn't completed, NHBC took over responsibility for the claims (as it's required to under the terms of the warranty). It carried out further investigations which identified a defect with the installation of the brise soleils on the side of the building. Ms P says this defect affects all 30 apartments on that side of the building.

NHBC's position is that it will only settle the claims for the leaseholder's who raised the issues with the builder within the first two years of the warranty – which includes Ms P. But Ms P isn't happy with this. She says the issue is affecting 30 apartments. She argues that unless all the defects are repaired, the building will not be watertight, which will possibly impact her directly.

One of our investigators considered Ms P's complaint, but she didn't think it should be upheld. She explained that NHBC were only required to cover the brise soleil issue for the leaseholders who reported the water ingress issues to the builder within the first two years of the warranty. Our investigator also considered Ms P's concern that the building would not be watertight unless NHBC repaired all of the defective brise soleils. But she said she hadn't seen any evidence to suggest that, once suitable repairs had been carried out to Ms P's apartment, that the outstanding issues with other apartments would result in further damage to her apartment.

Our investigator also commented on the length of time the claim had taken overall. But she explained we couldn't consider Ms P's concerns about this, as part of this complaint, for several reasons. These included that delays and commination issues up to 2016 had been addressed in a final response letter issued in 2016, which Ms P was out of time to refer to our service and that the bulk of the time taken on this claim happened before NHBC took over the claim – which is something our service doesn't have the power to consider. She also said that Ms P hadn't complained to NHBC about any delays since it took over the claim, so we couldn't consider any concerns she may have about that, as part of this complaint, either.

Ms P didn't accept our investigator's opinion. So, because no agreement has been reached, the complaint has 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.

There has been extensive background to this complaint which I don't intend to repeat in full detail. Instead I'll summarise and focus on what I believe to be the key issue relevant to deciding the complaint which has been referred to us, namely whether NHBC needs to remedy the issues affecting all of the apartments, as part of Ms P's claim on her warranty. This isn't meant as a discourtesy to either side. Rather, it reflects the informal nature of our service, and my role within it.

Our investigator explained various reasons why we couldn't consider the time taken on the claim as part of this complaint, and this doesn't appear to remain in dispute. So, I won't make any further comment or findings on this issue. I'll focus instead on what does remain in dispute.

What the warranty covers

NHBC's Buildmark policy provides cover for major problems with newly built or converted properties where there has been a breach of its technical requirements. The policy is bought by the builder and passed on to the consumer when they purchase the property. The cover provided by the policy is split into five sections.

Section 2 is the relevant section in this complaint (as NHBC accepted this was the relevant part of the policy, rather than the more restrictive section 3). This section states that the builder is responsible for remedying any defects or damage which are identified and notified to the builder within the first two years of cover:

“The Builder’s obligations

This part of the cover tells you what the Builder must do if he is given notice of Defects or Damage in your Home. This notice must be given as soon as possible within the period of cover (my emphasis).”

In the warranty document there is specific emphasis on the words, Defect, Damage and Home:

“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.

...

Damage

Physical damage to the Home caused by a Defect.

...

Home(s)

The house, bungalow, apartment or maisonette referred to in the Buildmark Offer, together with any of the following which are included in the original Contract:

- a) Any Common Parts;*
- b) ...”*

This means that under section 2 of the warranty, Ms P is covered for either damage or defects which are affecting her home or its common parts (my emphasis).

Common parts are defined as:

“Common Parts

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 apartment or maisonette;*
- b) Any garage, permanent outbuilding, retaining wall, boundary wall, external handrail or balustrade, path, drive, garden area or paved area newly built by the Builder at the date of the Insurance Certificate.*
- c) Any drainage system serving your Home.*
- d) Any existing garage, permanent outbuilding, retaining wall or boundary wall, that forms part of the Common Parts and is sold to the First Owners under the original Contract.”*

The warranty document also sets out the circumstances in which NHBC may offer its resolution service, and when it will take over responsibility for remedying issues under section 2:

“The Resolution Service

If there is a disagreement about the Builder’s obligations, we will usually try to resolve matters under our Resolution Service. See the important note below.

When we offer our Resolution Service, we will investigate any Defects or Damage which you have complained to the Builder about and which he has not put right within a reasonable time. We may need to visit your Home. We will then issue a report informing both you and the Builder of any work that he must carry out to fulfil his obligations under this Section.

The Builder must carry out the work within a reasonable period of time, which will be set by NHBC. You must allow the Builder reasonable access during normal working hours to carry out the work.

If the Builder does not carry out the work within the time set and has not agreed a programme with you to complete the work, we will, at our option, pay the Cost of the work detailed in our report or arrange for the work to be done.”

So, in order for NHBC to be responsible for remedying issues under section 2, the issues must have been identified and reported to the builder within the first two years of cover. NHBC must also have directed the builder to remedy the works within a deadline, and the builder must have failed to do so.

The claim decision

In this case NHBC has accepted that Ms P raised the issues with water ingress, with the builder, within the first two years of the warranty. NHBC has issued a resolution report directing the builder to remedy the issues, and it has failed to do so within the time given. So NHBC has taken over responsibility for remedying the issues with Ms P's apartment. This is what I would have expected NHBC to do, taking into account the relevant terms and conditions of the warranty.

I understand Ms P is unhappy that NHBC will only be repairing the damage and defects with the 15 apartments who reported the issue to the builder within the first two years (including her own). She states that unless the issue is remedied for all 30 affected apartments, the building will not be watertight.

I should reiterate here that I'm only considering Ms P's claim in this decision. This means my focus is on what *she* is entitled to under the terms of her warranty, not the entitlement of other leaseholders under their own warranties. Under section 2, Ms P's warranty covers her for either damage or a defect to her home and its common parts only. So, an issue with any part of the building which doesn't amount to her home or its common parts isn't something she is able to claim for.

In this case the damage Ms P identified and reported to the builder, within the first two years, was affecting her home (and other leaseholder's homes), not the common parts of the building. And the defects which were later identified are to the windows, window frame (brise soleil) and the door of her home, not to the common parts of the building. This is supported by the lease document I've seen which includes windows and doors (including their frames) as part of the property rather than the common parts. This means Ms P doesn't have an entitlement to claim, under her warranty, for the damage or defects affecting other apartments as they aren't part of her home or its common parts.

That said, our service would expect any repair carried out by NHBC to be lasting and effective. So, I've considered Ms P's argument that this wouldn't be the case unless all affected windows are repaired. But I haven't seen any persuasive evidence to suggest that the repairs to Ms P's apartment will not be lasting or effective, due to the fact that other apartments will not have their own issues remedied by NHBC. I accept that other apartments themselves may not be watertight until their own defects are remedied. But whether it's NHBC that's responsible for remedying those defects, rather than the freeholder or leaseholders themselves, is a matter between NHBC and those parties.

However, if Ms P is able to obtain additional expert evidence which shows that the water ingress damage to her apartment has been caused by a defect in another apartment, I would expect NHBC to consider this further.

Having carefully considered all the available evidence, I'm satisfied that NHBC is required to cover Ms P's claim for the defect(s) and damage affecting her home – which it has already offered to do. But, based on everything I've seen, I don't think NHBC is responsible for remedying the issues with other apartments, as part of Ms P's claim. Should other leaseholders wish to complain about NHBC's decision on their own claims, they should do so directly with NHBC in the first instance.

My final decision

For the reasons set out above, I've decided not to uphold Ms P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P to accept or reject my decision before 17 June 2022.

Adam Golding
Ombudsman