DRN-3419387

The complaint

Mr M and Miss M complain National House-Building Council (NHBC) has unfairly declined to cover the cost of interim fire safety measures, as part of an accepted building warranty claim, which was made on their Buildmark policy.

What happened

Mr M and Miss M own an apartment in a block. They have a ten-year Buildmark building warranty policy, which covers their individual apartment and the common parts.

Mr M and Miss M, and the leaseholders of six related blocks, made claims under section 4 of their Buildmark policies. The claims were for elements of those buildings which were thought to be a fire safety risk. Section 4 only applies if NHBC provided the building control service during construction. In summary, it provides cover if there's an immediate danger because the builder failed to comply with certain building regulations that applied at the time of construction. The claims were made in May 2020.

NHBC found there had been a breach of the relevant building regulations for five blocks, in respect of the external wall constructions. It found there hadn't been a breach in relation to the balconies. NHBC's decision about the building regulations, and the remedial works its responsible for, hasn't been disputed. As such, those matters aren't being considered as part of this complaint.

Between February and May 2021, following NHBC's investigations, the claim decisions were confirmed for the six blocks. Mr M and Miss M's apartment is in one of the five blocks which had accepted claims. I understand the sixth block has a different cladding to the other five blocks, which was found to be compliant.

NHBC, in coordination with the original builder, is to undertake the required works in respect of the external wall constructions. However, the leaseholders have been subject to related costs, due to the freeholder implementing interim safety measures. As per the lease agreement, and a tribunal finding, the leaseholders are responsible for covering the freeholder's interim safety measure costs.

The initial measure was a Waking Watch, but to save costs, the freeholder later installed a fire alarm system. Mr M and Miss M have claimed for their share of the fire alarm costs, which NHBC declined. They say they were charged about £1,100.

In August 2021, Mr M and Miss M also said other outstanding costs are imminent and not yet known. More recently, they noted they also intended to claim for their Waking Watch costs.

In an email to our service, NHBC set out the following reasons for why it didn't consider interim fire safety measures to be covered by the Buildmark policy:

- The scope of NHBC's liability is clearly defined within section 4. NHBC is only liable for the actual work that is required to ensure the property is compliant with building regulations. Section 4 expressly states which costs are covered: the "*work done to meet the Building Regulations*" and "*removing and storing your possessions and alternative accommodation, if necessary, while this work is being done*."

- The Buildmark policy excludes all other costs, by stating at the top of the exclusions page that "*Buildmark does not protect you against every event or circumstance – it only protects you against the things outlined in this document*".

- Buildmark excludes consequential costs relating to fire alarms by the fact they aren't listed under section 4 as being covered. Section 4 also doesn't state NHBC accepts responsibility for all costs arising from a breach of building regulations unless those costs are excluded. Instead, Buildmark expressly states which costs it will cover.

- There's a distinction between the direct costs that arise from the works to rectify the breached building regulations and the wider costs which have little or no connection to section 4. The direct costs don't extend to installing a fire alarm system because this isn't necessary for the works to take place, or for the completed works to be considered compliant with building regulations.

- The cost of storage and alternative accommodation during the works are direct costs arising from NHBC's cover. Section 4 doesn't refer to paying for other costs relating to the period before the work starts. Storage and alternative accommodation costs are only paid whilst the works are being completed, and NHBC doesn't pay for emergency accommodation or mitigation measures prior to the work starting.

- Buildmark doesn't outline it will cover the cost of interim fire safety measures as part of section 4 because those aren't costs which it would expect to cover, given it isn't the 'Responsible Person' under The Regulatory Reform (Fire Safety) Order 2005. NHBC says it's not legally liable for those costs.

- It would be unreasonable to expect NHBC to step into the shoes of the Responsible Person. It could create confusion about whether the Responsible Person needs to comply with their obligations or give that party an excuse to avoid complying with those obligations. This would be detrimental to ensuring adequate fire safety for properties is carried out by the correct, and liable, parties.

- Creating an additional obligation to pay for interim fire safety measures beyond the clear wording of the policy creates uncertainty as to what NHBC could be liable for in the future. To widen section 4 beyond its express wording has wide-ranging implications for NHBC.

I issued a provisional decision explaining that I intended to uphold the complaint. In my provisional decision, I said:

"I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I'll set out my provisional findings under the following headings: interim fire safety measures and costs; section 4 wording; NHBC's liability for interim safety measure costs; and putting matters right.

Interim fire safety measures and costs

In my view, I can't reasonably consider the fire alarm costs in isolation, on the understanding Mr M and Miss M also intend to claim for their Waking Watch costs. The two issues are clearly linked. Therefore, I will deal with both items together.

The freeholder applied to the First-Tier Tribunal (Property Chamber), for a determination on the leaseholders' liability to pay for the interim fire safety measure costs and its legal fees relating to the application. The application was made in July 2020, and it set out the following:

- *The costs relate to six blocks, totalling 417 apartments. The Waking Watch started in December 2019, and the fire alarm installation started in July 2020 (with an estimated three-month completion timescale).*

- *The Waking Watch costs were, so far, £267,868. Those costs remained ongoing until the fire alarm system had been installed. The fire alarm installation was estimated to cost £383,974.*

- *A Fire Safety Inspection Officer identified the safety measures at the blocks weren't sufficient. The Waking Watch and the fire alarm system were recommended by the Fire Brigade. The Waking Watch costs are significant, and the fire alarm system represents a significant cost saving.*

Based on the information presented so far, I accept that the interim safety measures were a requirement due to the items accepted under the claims. Mr M and Miss M have explained that, had the freeholder not complied, the Fire Brigade would have served an enforcement notice requiring the occupants to evacuate. It also follows that the freeholder needed to follow the recommendations, from a safety perspective.

Section 4 wording

I'll briefly set out the relevant wording in Section 4, before going on to consider NHBC's arguments under the next heading:

- *"This section protects you if there is an immediate danger to someone's physical health or safety because the builder failed to meet the following Building Regulations…"*

- *"We will take responsibility for having the work done to meet the Building Regulations…"*

- *"We will also pay for … storing your possessions and alternative accommodation, if necessary, while this work is being done"*

- *"Some things are not our responsibility under Buildmark (see page 11)."*

NHBC's liability for interim safety measure costs

As per section 4, NHBC will take responsibility for having the work done to meet the relevant building regulations. I'm satisfied NHBC's liability for having that work done, begins from the date the accepted claim was made. So, if the issue that's covered under the policy presents a safety risk, then it follows NHBC is responsible for the cost of keeping the building and its occupants safe until it's met its liability. The exclusions (on page 11) don't exclude safety measures which are necessary in the interim.

I understand the point NHBC makes about the policy expressly stating what is covered, as opposed to it stating everything that's excluded. However, in the absence of a clear policy exclusion, I remain of the view NHBC is responsible for the cost of keeping the building and its occupants safe until it's met its liability. It should be noted that, even if such an exclusion existed, it would still need to be applied fairly.

The alternative conclusion would expose policyholders to costs or safety risks whilst NHBC investigates the claim and completes the work, either of which could be delayed. Even if some delays are unavoidable, it's not reasonable for policyholders to be responsible for interim safety measure costs, or to be subject to risk, when the underlying issues are covered by an insurance policy.

In any event, I don't consider it reasonable for NHBC to artificially separate the interim safety measures from the overall work that's required to put right the breached building regulations. I don't find them to be distinctly separate things. The section 4 wording asserts that NHBC will protect the policyholder if certain building regulations were breached by the builder. In the context of the cover being provided, I'm satisfied it's only reasonable to interpret that statement to mean NHBC will protect the policyholder against any immediate risks and costs associated to the breach.

Also, whilst NHBC says it doesn't cover emergency accommodation or mitigation measures prior to a repair starting, I'm not persuaded that's the case, or at least, our service wouldn't generally consider that approach to be reasonable. For instance, if a wall was in danger of collapsing due to an issue that was covered under Buildmark, we would expect NHBC to cover the cost of making the wall safe before the permanent repair is completed. If such interim measures weren't possible and the policyholders' safety was at risk, we would expect NHBC to cover the cost of their alternative accommodation. I don't find that scenario to be different to the one presented by fire safety.

Furthermore, the policy covers alternative accommodation if necessary, "while this work is being done". I'm not persuaded it's reasonable to limit 'work' to the physical repairs. In my view, NHBC's work started as soon as the accepted claim was made; it includes its claim investigations, and its planning and preparation for the eventual, permanent, repair.

In this case, NHBC hasn't needed to cover any alternative accommodation costs due to the Waking Watch service and the fire alarm system, and those costs have been passed on to its policyholders. I understand those measures are a considerable saving on providing alternative accommodation.

Therefore, I find the alternative accommodation cover to be a further reason why NHBC ought to be covering the interim safety measure costs.

I accept NHBC isn't the 'Responsible Person' under the Fire Safety Order. However, that doesn't take away from NHBC's liabilities and responsibilities under the contract of insurance. Those are the matters I'm considering here.

I also don't agree that, by deciding NHBC is responsible for the leaseholders' interim safety measure costs, it confuses who the Responsible Person is, requires NHBC to step into the shoes of the Responsible Person, or confuses the obligations of the Responsible Person. The Responsible Person is defined by the Fire Safety Order, as are their obligations. My intended decision isn't that NHBC is the Responsible Person. But simply, where interim safety measure costs have been passed on to the leaseholders, those costs ought reasonably to be considered as part of their accepted section 4 claims.

Nonetheless, whilst I acknowledge NHBC isn't the Responsible Person, when accepting a Section 4 claim for fire safety, I consider NHBC ought reasonably to be engaging with the relevant parties to understand what interim safety measures are needed. It's in NHBC's interests to ensure the most economical solution is found.

I understand the fire alarm system was explored soon after the claims were made. So, overall, I don't consider NHBC has been prejudiced by the fire alarm system not being explored sooner, as a more economical solution to the Waking Watch service.

In conclusion, I intend to decide NHBC should settle Mr M and Miss M's Waking Watch and fire alarm system installation costs, subject to the criteria under the below heading.

Putting matters right

NHBC isn't responsible for the builder breaching building regulations; it's simply responsible for the necessary work once a valid claim has been made. So, I don't consider NHBC to be liable for the interim safety measures before the claim was made. NHBC wasn't, until then, on notice that action was required.

I haven't seen the lease agreement, so I don't know if Mr M and Miss M have a responsibility to share the interim safety measure costs for all six blocks, or just the costs for their block. However, NHBC would need to settle the costs that Mr M and Miss M are responsible for under their lease, where those costs:

- *are for the blocks where an accepted section 4 fire safety claim has been made;*
- *are for interim safety measures which were needed because of the items accepted under the section 4 claims;*
- *were incurred after the date the claim was made (no reimbursement would be due for the period before the claim was made).*

The settlement would be subject to a clear breakdown of the service charges, so NHBC can be assured it's only covering the above costs. To be clear, NHBC isn't responsible for any legal fees that were passed on to Mr M and Miss M in relation to the freeholder's tribunal costs.

As explained above, I'm persuaded the interim safety measure costs should be covered until NHBC has met its liability, and that those measures form part of the overall work. In addition, the costs aren't for alternative accommodation. So, it follows that the overall policy limit for the continuous structure should apply to those costs, rather than the lower alternative accommodation and storage policy limit.

To reflect the fact Mr M and Miss M have been unfairly deprived of their money since paying the charges, the settlement would be subject to 8% simple interest per annum, from the date they paid the charges, to the date of settlement.

I also intend to award Mr M and Miss M £200 compensation, for the inconvenienced caused by having to pursue this matter.

If my final decision follows what I've said here, it would be in NHBC's interests to settle the other leaseholders' costs on the above basis, to avoid similar complaints. However, those leaseholders aren't party to this complaint, so I'm unable to make a direction in my final decision for their costs."

NHBC said whilst it disagrees with my interpretation of Mr M and Miss M's Buildmark policy, it accepts my provisional decision. However, NHBC asked me to add some clarificatory notes. NHBC said:

- Mr M and Miss M's Buildmark policy applies to new homes registered with NHBC from 1 April 2015. NHBC reviews its Buildmark policy periodically, and different generations have different wording.

- The wording of the 2015 policy differs considerably from other generations, and the difference is potentially significant for interpreting and understanding the cover provided by Section 4.

- If a policyholder with a different generation of Buildmark makes a complaint, NHBC would like to make further representations and for the relevant policy to be considered afresh by the Financial Ombudsman Service.

- My provisional decision was that NHBC should settle the costs incurred after the date the claim was made. NHBC said it often doesn't know if action is required on the first date a policyholder makes contacts about fire safety, because only a speculative concern is reported.

- Often, the policyholders simply provide a wide-ranging assessment that doesn't identify a breach of building regulations or an immediate danger, but instead it recommends surveys to establish whether that's the case.

- It's only when the policyholders provide the results of such surveys that NHBC has sufficient information to reasonably know if action is required. There can be a long lapse of time between the initial contact and the policyholders providing the information to properly 'make the claim'.

- Therefore, NHBC would like me to confirm that a claim is not effectively made until the policyholders provide sufficient information to allow NHBC to commence its assessment.

Mr M and Miss M also accepted my provisional decision, but they made the following comments for me to consider:

- Whilst Mr M and Miss M support my decision to deal with their Waking Watch costs, they haven't yet received an invoice detailing their contribution. They said they will endeavour to obtain clarity from the managing agent.

- Mr M and Miss M noted they had limited control over the cooperation and actions of the managing agent, and they queried how their complaint should be settled if there are issues obtaining information, and the next steps should a further dispute arise.

- Mr M and Miss M asked me to reconsider the compensation award. They detailed the inconvenience of pursuing the matter, and their frustrations.

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.

I'll start by addressing NHBC's response to my provisional decision, before moving on to Mr M and Miss M's response.

Other cases and/or policy versions

I've only considered the policy wording that applies to Mr M and Miss M, and how it ought reasonably to be applied in the circumstances of their case. Other complaints about such interim fire safety measures would be subject to the policy wording that applies to those complainants *and* the circumstances of their case. NHBC is free to make further representations to our service on other cases, should they reach us.

That's not to say similar complaints involving earlier or later versions of the Buildmark policy wouldn't succeed. But simply, the only matter I've considered here is Mr M and Miss M's policy wording, and how it applies to the circumstances of their case.

The point from which NHBC should be liable for interim fire safety measure costs

I accept NHBC may not be on notice it needs to act as soon as a claim is initiated. If the next steps are for the policyholders to commission the necessary investigations to support their claims, then it *may* not be fair and reasonable for NHBC to be liable for the cost of interim fire safety measures during that time. But equally, much may depend on whether NHBC caused delays or whether the initial information presented by the policyholders ought reasonably to have placed the onus on NHBC to investigate.

Ultimately, I'm only considering the arguments that relate to the circumstances of Mr M and Miss M's case. Whilst I accept NHBC's comments *may* have merit in other cases, it hasn't said that it shouldn't be liable from when Mr M and Miss M's claim was made. NHBC has acknowledged its comments don't change the outcome of Mr M and Miss M's complaint.

Complaint settlement

I can understand Mr M and Miss M's concern about obtaining information from the managing agent. However, the managing agent will need to provide a clear breakdown of the fire alarm and Waking Watch costs, as I set out in my provisional decision. NHBC can't reasonably settle either the fire alarm or the Waking Watch costs without that information.

NHBC has the resource and experience to communicate with the managing agent about this matter. Therefore, in the first instance, I wouldn't expect the emphasis to be placed on Mr M and Miss M in respect of obtaining the necessary information.

If Mr M and Miss M accept my final decision, NHBC will need to contact the managing agent and set out the information it needs to settle the complaint. It should also keep Mr M and Miss M updated. However, NHBC isn't responsible for the cooperation of the managing agent, and it may be that Mr M and Miss M need to follow up with that third-party.

At this stage, due to the lack of information about the claimed costs, I can't make a monetary award. Therefore, should a further dispute arise about what the costs are, when they were incurred, or Mr M and Miss M's share, then a further complaint can be made about that matter. In the meantime, there's no reason why NHBC can't release the compensation award.

Compensation

Mr M and Miss M point towards guidance on our website for compensation awards, and they consider an award between £300 and £750 to be appropriate. They note NHBC has had at least six opportunities over three years to put this matter right, and they estimate that on each occasion, it involved between 5-10 hours of their time.

I acknowledge that whilst Mr M and Miss M have been able to articulate their arguments clearly and pursue them with relative confidence, this has involved a fair amount of time, effort, and frustration.

However, whilst the subject of Mr M and Miss M's complaint involves fire safety, they haven't been put at risk, or their living conditions compromised, due to NHBC unfairly declining their share of the interim fire safety measure costs. I've also not been told anything that leads me to believe Mr M and Miss M was caused distress by the prospect of having to pay for the costs themselves.

NHBC has maintained its position on the interim fire safety measure costs throughout. I don't agree with the position NHBC took, but I'm satisfied its decision on this aspect of the claim only amounted to one mistake, albeit a relatively significant one. It's not my intention to dismiss the inconvenience and frustration Mr M and Miss M have experienced, but on balance, I'm more persuaded it fits into the category of 'reasonable efforts', than 'considerable distress' and/or 'significant inconvenience and disruption'.

So, in conclusion, I remain persuaded that £200 compensation is a fair award.

My final decision

For the reasons I've set out above, and in my provisional decision, I uphold this complaint. My final decision is National House-Building Council should:

- contact the managing agent and set out the information it needs to settle the complaint;

- reimburse Mr M and Miss M their Waking Watch and fire alarm installation costs, subject to the criteria I set out under the heading 'putting matters right' in my provisional decision (and included above);

- pay 8% simple interest per annum, from the date those charges were paid by Mr M and Miss M, to the date of settlement; and

- pay Mr M and Miss M £200 compensation

If NHBC considers that it's required by HM Revenue & Customs to deduct income tax from any interest paid, it should tell Mr M and Miss M how much it's taken off. If requested, it should also provide them with a certificate showing the amount deducted, so they can reclaim it from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Miss M to accept or reject my decision before 4 May 2022.

Vince Martin
Ombudsman