

The complaint

Mr B complains National House-Building Council (NHBC) hasn't put right a water ingress issue that's damaging his apartment and a communal area, or replaced unsafe cladding, after he made claims on his Buildmark building warranty policy.

What happened

Mr B's new-build apartment is covered by a ten-year building warranty policy. He purchased the property in 2013.

During the first two years of cover, section 2 of the policy applies. If a 'defect' or 'damage' is found during the first two years, the builder is, in the first instance, responsible for putting the issues right. A 'defect' is defined as a breach of any mandatory NHBC Requirement during construction, and 'damage' is defined as physical damage caused by a defect.

However, if there's a dispute between the homeowner and the builder about issues raised during the first two years, NHBC can, at its discretion, offer its resolution service. If NHBC issues a resolution report requiring the builder to act and the builder fails to comply by the deadline, NHBC becomes responsible for those required actions.

Within the first two years of the policy, Mr B made a claim under section 2, due to rainwater ingress around his kitchen window.

In March 2016, NHBC issued a resolution report. The report noted there was no dampness present on the day of the inspection, and it was likely remedial works had already been undertaken. NHBC required the builder to redecorate the area, so Mr B could monitor.

The builder completed the recommended redecorations, and in June 2016, Mr B reported the issue had reappeared. The builder confirmed it would investigate. In March 2017, the builder told NHBC that cladding had been removed as part of its investigation and it was found a membrane was failing. The builder was to arrange a permanent repair.

In July 2017, following the builder's repairs, Mr B reported the issue remained. The builder said it would investigate further, by removing further areas of cladding and insulation. The builder went on to confirm it would carry out further remedial works to the façade, and it would be erecting scaffolding in January 2018.

In July 2018, the builder advised the façade works had now been delayed. In March 2019, the builder explained a fire test on the cladding was due to be completed, and the results would determine the remedial works for the cladding and Mr B's water ingress.

The fire safety investigations found the cladding to be unsafe. I understand the freeholder and the builder were to replace the unsafe cladding at no cost to the leaseholders. I also understand the freeholder and the builder are linked companies, or one of the same.

In June 2019, Mr B told NHBC the damage in his kitchen was getting worse. In August 2019, the builder completed temporary repairs. The builder also noted the re-cladding design and work schedule was progressing, but the matter wasn't straight forward.

In December 2019, Mr B told NHBC the water ingress hadn't been stopped by the temporary repairs, with issues still occurring during heavy rainfall. However, the builder noted that, due to the location of the apartment, the full repair requires road closures, so the issue can't be resolved independently of the re-cladding works. Mr B subsequently complained to NHBC.

In March 2020, NHBC issued a final response letter. NHBC noted it should have given more assistance under its resolution service *before* the builder discovered the cladding had to be replaced for fire safety reasons. NHBC offered Mr B £750 compensation. NHBC explained the unsafe cladding had, unavoidably, delayed the builder's water ingress repairs; which would now need to wait until the cladding is replaced.

NHBC's final response letter explained Mr B had six months to contact our service about his complaint; and if it wasn't referred to us within that timescale, it wouldn't give us permission to consider the matter.

In June 2020, Mr B logged two more claims with NHBC. One claim was for a water ingress issue in a communal area outside his apartment. The builder was to deal with this matter during the re-cladding works. The other claim was for the unsafe cladding itself.

The communal area water ingress claim was made under section 3 of the policy. The unsafe cladding claim was made under section 4. Those sections apply to issues that are identified during years' three to ten. Section 3 covers physical damage if it's been caused by a defect in certain parts of the building. Section 4 provides cover if there's a present or imminent danger because the builder failed to comply with certain building regulations.

In June 2020, Mr B also chased NHBC for an update, noting he was experiencing mould in his kitchen. The builder offered to apply sealant/stain block to temporarily prevent moisture ingress and staining. Mr B declined this offer and he made a further complaint.

In August 2020, the builder noted it intended to start the re-cladding works in February 2021, with the erection of scaffolding. The builder also noted the work schedule was still being finalised.

On 25 August 2020, NHBC issued a second final response. NHBC reiterated that, due to the access issues, the water ingress problem in Mr B's kitchen couldn't be resolved until the re-cladding works. NHBC said it was expecting to receive the work schedule by the end of September 2020, with scaffolding to be erected in February 2021.

In November 2020, Mr B contacted our service. He explained NHBC had failed to progress his claims within a reasonable timeframe. He also said NHBC doesn't update him unless repeatedly chased, and it's repeatedly provided incomplete, inaccurate and misleading updates.

The works didn't start in February 2021. In August 2021, one of our investigators issued his findings on Mr B's complaint. He set out the following:

- The events before March 2020 aren't within our jurisdiction. Mr B's complaint about those matters, hadn't been brought to us in time, *i.e.* within six months of the March 2020 final response letter.

- Our service also doesn't have jurisdiction over a section 2 claim unless NHBC has become responsible for the damage under the policy terms. He didn't think NHBC had become responsible for the water ingress in Mr B's kitchen.
- Nonetheless, he thought NHBC should have taken responsibility for the kitchen water ingress, given its long running history. He noted the builder was now due to start the works in October 2021, and NHBC had explained it would be ready to take over the works if this didn't happen. He thought that was fair. But he also thought NHBC should compensate Mr B £200 for the delays since March 2020.
- He noted NHBC hadn't yet considered Mr B's section 3 claim (communal area water ingress) or his section 4 claim (unsafe cladding) on the basis the builder was putting those issues right. However, he said Mr B had a right to make claims on his policy, and NHBC had a responsibility to *consider* those claims. NHBC had explained it would consider Mr B's section 3 and section 4 claims if the works didn't start in October 2021. He also thought that was fair.

NHBC accepted our investigator's findings. Mr B expressed he was unhappy about several aspects of the findings, and our investigator responded to Mr B's concerns. Because Mr B didn't ask for an ombudsman's final decision, the complaint was closed.

Mr B contacted us again in mid-October 2021. He said the builder's works still hadn't started and NHBC hadn't provided any updates. In November 2021, NHBC said the builder's works had started during the last week of October, albeit this was three weeks later than planned due to issues with licencing and access permissions.

However, Mr B said he hadn't seen any evidence the works had started, and he reiterated no updates had been provided to him by NHBC. Because Mr B remained unhappy, his complaint has been passed to me to decide.

In December 2021, NHBC provided our service with an update. NHBC shared an email from the builder, from early-November 2021, which explained the building's residents would start to see activity over the coming weeks, as hoardings, fencing and the site are set up. NHBC also explained the builder's repairs to Mr B's apartment should be completed by May 2022, and it noted Mr B had again declined the builder's offer of further temporary repairs in the interim.

I've already issued a jurisdiction decision setting out what points we can and can't consider. As explained in that decision, we *can't* consider any matters relating to the section 2 claim, for the water ingress into the kitchen. That includes the builder's delays to repairing the underlying issue and internal damage, and the communication and service Mr B has received from NHBC in relation to those matters.

I've also issued a provisional decision about the matters we can consider, which relate to the section 3 claim (communal area water ingress) and section 4 claim (unsafe cladding). In my provisional decision, I said:

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

Because the builder/freeholder is intending to resolve the water ingress and unsafe cladding, NHBC hasn't yet considered Mr B's section 3 and section 4 claims. Therefore, it's not clear whether those claims would, in principle, succeed. Those claims would be subject to the policy terms, conditions and exclusions.

I accept Mr B is entitled to make claims under his policy. I also understand his frustration that NHBC hasn't responded to those claims or taken over the remedial works given the builder's delays. However, in the circumstances, I don't consider NHBC can do much more at this stage.

Both the section 3 and the section 4 claims are for common parts of the building. Even if the issues were found to be covered under the policy terms, the claim settlements would either be NHBC carrying out the repairs, or a cash settlement for Mr B's share of the repair costs. NHBC can't undertake work to the common parts without the freeholder's permission, and it's clear the freeholder wishes to complete the works itself. Mr B also says the freeholder has committed to not passing on the associated costs to the leaseholders (including the cost of interim fire safety measures), so in that respect, Mr B has no losses to claim for. Therefore, I'm not persuaded there's currently anything for NHBC to consider.

Whilst I understand Mr B would like NHBC to work with the builder/freeholder to progress the cladding repairs, and provide updates to him, that's not NHBC's role. Those repairs aren't being completed as part of claims made under the leaseholders' Buildmark policies.

I have seen that, whilst Mr B's complaint has been with us, NHBC has pressed the builder to provide updates to Mr B and to commit to timescales. I don't consider NHBC can reasonably do much more to help him, in relation to his section 3 and section 4 claims.

Whether or not NHBC could have done more to assist Mr B with his section 2 claim, under its resolution service, is another matter. However, that's not something I can consider, as those matters aren't within our jurisdiction.

If the freeholder passes on costs to Mr B, in relation to the communal area water ingress or the unsafe cladding, or if the builder/freeholder decides against doing the repairs and the freeholder consents to NHBC undertaking repairs, NHBC should at that stage consider Mr B's section 3 and section 4 claims. I can't comment on whether those claims would succeed, as those arguments would need to be considered should the situation arise."

NHBC accepted my provisional decision.

Mr B disagreed with my jurisdiction decision. He thought we could consider matters relating to his section 2 claim. He also noted he didn't plan to respond to my provisional decision about the other parts of his 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.

I acknowledge Mr B disagrees with my jurisdiction decision, but his comments don't change what I said in that decision. It's not my intention to be discourteous, but I'm not addressing his comments about my jurisdiction decision here, as this final decision is only for the complaint points that we can consider.

In respect of the matters we can consider, neither party has provided comments in response to my provisional decision. Having reconsidered the arguments and information previously presented, my decision remains the same, for the same reasons.

My final decision

I'm sorry to disappoint Mr B, but for the reasons I've set out above and in my provisional decision, 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 4 May 2022.

Vince Martin
Ombudsman