

The complaint

Mr and Mrs G complain that National House-Building Council (NHBC) hasn't treated them fairly, following claims on their Buildmark building warranty policy.

During the claims and complaint, Mr and Mrs G have been represented by their solicitor. But for ease, I'll simply refer to Mr and Mrs G.

What happened

Mr and Mrs G built a residential property on farmland. The new-build property was covered by a ten-year building warranty policy, which started in October 2010.

NHBC has, over the years, updated its policy terms. Importantly, I'm only considering the policy terms that apply to Mr and Mrs G, as per their policy start date.

During the first two years of cover, section 2 of the policy applies. If a 'defect' or 'damage' is found to the 'home' during the first two years, the builder is, in the first instance, responsible for putting those issues right. The policy defines a 'defect' as a breach of any mandatory NHBC Requirement during construction, and 'damage' is defined as physical damage caused by a defect. The definition for 'home' includes paths, drives, and gardens.

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 report is accepted "*in full*" by the homeowner, but the builder fails to comply, NHBC becomes responsible for those required actions.

In addition, NHBC will become responsible for a) the builder's obligations under section 2 if the builder is insolvent, and b) any court or arbitration awards made against the builder in relation to the builder's obligations under section 2, if those awards aren't settled.

During the final eight years of cover (*i.e.* years 3-10), sections 3, 4, and 5 apply:

- Section 3 covers a) damage in certain parts of the building, and b) defects in flues or chimneys if causing a present or imminent danger.
- Section 4 covers the builder's non-compliance with certain building regulations, if causing a present or imminent danger. Section 4 only applies if NHBC provided building control.
- Section 5 covers 'land' contamination which has resulted in a 'statutory notice' being served on the homeowners. In addition, NHBC can, at its "*sole discretion*", provide cover if the homeowners reasonably believe a 'statutory notice' could be served on them. The policy defines 'land' as the ground that surrounds and supports the 'home'. The definition of 'statutory notice' refers to specific legislation.

Within the first two years of the policy, Mr and Mrs G told NHBC about numerous issues with their property. The issues included deposited asbestos in the topsoil around their land. The asbestos was from the farm outbuildings that had been demolished by the builder. They explained it was their intention to pursue claims under sections 2 and 5 of the policy.

NHBC maintained section 5 wasn't applicable as the contamination had been identified in years 0-2, and that a section 5 claim wouldn't succeed in any event. There's been a lot of correspondence between the two parties, but I'll simply summarise the events and points that I consider to be important to my decision.

In 2014, in response to the section 2 claim, NHBC issued a resolution report. Mr and Mrs G didn't accept the report. Instead, they pursued their dispute with the builder via arbitration. In 2019, a further section 2 claim was made for the arbitration awards. Around the same time, Mr and Mrs G also told NHBC new issues had been identified whilst repairing the property. In 2021, NHBC paid out the section 2 policy limit for the arbitration awards.

In 2021, Mr and Mrs G complained. In summary, they said:

- NHBC hasn't dealt with their claims promptly and fairly. This has led to Mr and Mrs G incurring costs, whilst they disputed and negotiated with NHBC.
- NHBC failed to investigate the alleged defects, and rejected evidence provided by Mr and Mrs G, which made it impossible for them to accept the resolution report. They were also treated with hostility by NHBC. Mr and Mrs G were left with no option but to engage in costly arbitration.
- Whilst the arbitration awards included the cost of remediating the asbestos, only the areas that fall under the definition of 'home' form part of the further section 2 claim. There's still a section 5 claim to be made for the remaining areas of the land.

NHBC responded to the complaint. In summary, it said:

- Because the resolution report wasn't accepted by Mr and Mrs G, there was nothing further NHBC could have done until it was presented with the arbitration awards. Once the key reports were received, NHBC promptly indicated it would pay the section 2 policy limit, and it made an interim payment whilst the terms of the settlement agreement were finalised.
- Given the asbestos was identified during years 0-2, the issue is solely a section 2 claim. Section 5 only applies to contamination identified during years 3-10.
- In any event, the contamination has been in place for 12 years and the local authority hasn't indicated it intends to issue a statutory notice. NHBC considers it unlikely the local authority would issue a statutory notice, and if it were to, the notice would be served on the builder's company directors.
- If NHBC were to accept the section 5 claim, it would be limited to the policy definition of 'land'. Mr and Mrs G's home is situated on 30 acres of land, and the definition doesn't cover all the land owned. Much of the land immediately adjacent to their home has already been covered by the section 2 claim settlement.

Mr and Mrs G referred their complaint to our service. One of our investigators didn't think we could consider parts of the complaint. He didn't uphold the parts he did consider. Because Mr and Mrs G disagreed with our investigator, the complaint has been passed to me to decide.

I've already issued a jurisdiction decision setting out what points we can, and can't, consider. In my decision, I explained that we *can't* consider any matters relating to the *initial* section 2 claim and NHBC's resolution service. That includes its investigation and conduct leading up to the resolution report, the requirement for the resolution report to be accepted in full, and the legal and arbitration costs Mr and Mrs G say they incurred due to the handling of their initial section 2 claim.

I will now set out my findings about the matters we can consider. Those are, the section 5 claim, the further issues discovered during the property repairs, the costs incurred whilst disputing the section 5 claim, and the costs incurred whilst making the *further* section 2 claim in respect of the arbitration awards.

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.

Although I've carefully considered all the submissions, it isn't my role to comment on every point made. It's for me to determine the crux of the complaint, and to address the issues I consider relevant to its outcome. Where I've not directly commented on points that are within our jurisdiction, this isn't intended as a discourtesy. It's simply a reflection of the informal nature of our service, its remit, and my role in it.

The section 5 claim

Mr and Mrs G argue the remaining contaminated land, that didn't form part of the section 2 claim settlement for the arbitration awards, can be claimed under section 5 which has a separate policy limit.

There are *potentially* three questions that need to be considered here:

- a) Can a section 5 claim be made given the contamination was identified during the first two years of the policy?
- b) If a section 5 claim can be made, does the remaining land in question fall within the policy definition of 'land', *i.e.* does it surround *and* support the 'home'?
- c) If a section 5 claim can be made and the remaining land in question falls within the policy definition of 'land', bearing in mind a statutory notice hasn't been issued, is NHBC exercising its "*sole discretion*" fairly by declining the claim?

The policy terms explain the notification period for a section 5 claim is years 3-10. The terms also explain NHBC won't be liable for anything that was (or could have been) notified to the builder in years 0-2 as per its responsibilities under section 2, or was (or could have been) subject to a valid section 2 claim had the builder not met its responsibilities.

Mr and Mrs G argue that section 2 only covers the 'home', and the policy definition of 'home' doesn't extend to the wider land beyond the paths, drives, and garden. As such, they argue the contaminated land beyond the paths, drives, and garden couldn't have been notified to the builder within years 0-2 or been the subject of a valid section 2 claim. In my view, their arguments aren't without merit. I also note the resolution report refers to asbestos left in garden areas, so it's not clear if the wider land was being considered under section 2.

However, even if I were to accept the wider land wasn't, or couldn't have been, considered under section 2, that wouldn't automatically lead me to conclude it could be claimed under section 5. In respect of question 'b', I accept there's a reasonable question about whether the wider land can reasonably be said to be supporting the 'home'. So, it's questionable whether the wider land is covered at all, regardless of when the contamination was discovered.

But importantly, for this complaint, I don't need to consider question 'b' or make a finding on whether the wider land is supporting the home. Having considered the policy terms, I'm not persuaded a section 5 claim can be made given the contamination was identified during years 0-2, *i.e.* I'm persuaded the claim fails on question 'a'.

I say this because, the cover is clearly divided into three separate periods: before completion (section 1), years 0-2 (section 2), and years 3-10 (sections 3, 4, and 5). The policy terms are clear the builder is responsible for any issues with the 'home' that are identified during years 0-2, unless NHBC becomes responsible following the operation of its resolution service, the builder is insolvent, or court or arbitration awards haven't been settled. If section 5 provided additional cover for contamination identified during years 0-2, on top of section 2, I would reasonably expect that to be set out in the policy terms and for the section 5 notification period to start from year zero. But that isn't the case.

Ultimately, it wouldn't be logical, in my view, to conclude section 5 covers contamination that had been identified during years 0-2 when the homeowner can't claim under section 5 until year three. Particularly, given the policy clearly places responsibility on the builder for any issues that arise during the first two years and NHBC only becomes responsible for those issues if specific criteria are met.

There's been a lot of correspondence between the parties about whether Mr and Mrs G hold a reasonable belief a statutory notice could be served on them. However, like question 'b', I don't need to consider question 'c' either.

The further issues discovered during the property repairs

In 2019, around the time the arbitration awards were presented to NHBC, Mr and Mrs G explained they had discovered further and more extensive structural issues during the repairs, which they wished to claim for.

If indeed they were new issues, sections 3 and 4 would potentially apply. This is because, those issues had been discovered during years 3-10.

However, there's a single policy limit for sections 2 and 3. As such, given NHBC had agreed to pay that policy limit in respect of the section 2 claim for the arbitration awards, there was no section 3 claim to be made. Section 4 only applies if NHBC provided building control during construction, which isn't the case here.

Therefore, it follows that NHBC didn't need to act in relation to the further issues identified during years 3-10.

The costs incurred whilst disputing the section 5 claim

There's been protracted correspondence between the parties' legal representatives, about whether a section 5 claim should succeed. However, based on what I've seen, that correspondence was largely initiated, and continued, by Mr and Mrs G.

NHBC stated from the outset it didn't consider section 5 to be the appropriate policy section given the contaminated land had been identified during years 0-2, and that in any event, a section 5 claim wouldn't succeed due to the statutory notice requirement. Mr and Mrs G could have referred a complaint to our service about those matters for free, rather than engaging in costly legal correspondence.

I haven't seen anything that leads me to believe NHBC is responsible for Mr and Mrs G's decision to instruct a solicitor, or for the costs they incurred debating the section 5 claim. Particularly, as I'm not persuaded NHBC unfairly declined the claim.

The costs incurred whilst making the further section 2 claim

Mr and Mrs G say NHBC unfairly challenged their further section 2 claim for the arbitration awards, and only accepted it after considerable expenditure was incurred by them. They also say NHBC caused delays by attempting to exclude all future claims and the right to refer to our service from the settlement agreement.

NHBC says it quickly accepted the claim after the key reports were received. It also says the delays were caused by Mr and Mrs G taking time to provide the necessary information and respond to correspondence, and by them requesting changes to the settlement agreement so they could preserve their right to claim under section 5.

NHBC also questions the legal costs being claimed by Mr and Mrs G, in relation to their further section 2 claim.

Ultimately, I haven't seen anything that shows NHBC acted unreasonably, caused delays, or proposed unfair settlement terms following Mr and Mrs G's section 2 claim for the arbitration awards. Again, I haven't seen anything that leads me to believe NHBC is responsible for Mr and Mrs G's decision to instruct a solicitor, or for the costs they incurred in relation to their further section 2 claim.

My final decision

I'm sorry to disappoint Mr and Mrs G, but for the reasons I've set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs G to accept or reject my decision before 26 July 2022.

Vince Martin
Ombudsman