

The complaint

Mr and Mrs W complain National House-Building Council (NHBC) unfairly declined a claim on their Buildmark building warranty policy, for fire safety issues.

What happened

Mr and Mrs W own a new-build apartment that's covered by a ten-year building warranty policy. The policy started in September 2012.

In May 2021, Mr and Mrs W contacted NHBC about fire safety issues at their block. The cost of remedying the issues might be passed on to the leaseholders who own the apartments.

During the final eight years of cover (*i.e.* years 3-10), sections 3, 4, and 5 apply. Section 5, which covers land contamination, isn't relevant to this complaint.

Section 3 covers any physical damage to the property if caused by a 'defect' in certain parts of the building, and (not relevant to this complaint) defects in flues or chimneys if causing a present or imminent danger. A 'defect' is defined as a breach of any mandatory NHBC requirement during construction.

Section 4 covers the builder's non-compliance with certain building regulations that applied at the time of construction, if causing a present or imminent danger. Section 4 only applies if NHBC provided building control.

NHBC declined the claim under section 3 on the basis there was no physical damage being caused by the fire safety issues. NHBC explained section 4 doesn't apply because it didn't provide building control.

Mr and Mrs W brought a complaint to our service, but one of our investigators didn't think it should be upheld. Mr and Mrs W disagreed, so their 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.

I find the section 3 policy terms to be clear. During years 3-10, physical damage is covered if it's been caused by a 'defect' in a part of the building that's listed in section 3. Whilst I accept remedial work has been recommended to put right various fire safety issues, I haven't seen anything that shows physical damage has been caused by those issues. There's simply no cover, under section 3, for defects that haven't caused physical damage.

Mr and Mrs W argue 'damage' should be interpreted to include financial damage. However, section 3 specifically refers to physical damage, not damage. I don't consider 'physical damage' can reasonably be interpreted to include financial loss.

Mr and Mrs W also make the point that the purpose of a latent defects policy is to cover the cost of remediating the defect, not just the cost of any damage caused. I don't dispute what they say. Whilst section 3 is, technically, only covering the physical damage, NHBC would need to put the defect right that caused the insured damage to provide an effective and lasting repair. Nonetheless, it remains the case that for a defect to be covered under section 3, it needs to have caused physical damage.

I also find the section 4 policy terms to be clear. That part of the policy only applies if NHBC provided building control. The policy schedule shows that wasn't the case. NHBC says the council carried out the building control inspections for Mr and Mrs W's building.

Mr and Mrs W have asked our service for time to study the Building Safety Act 2022, so they can understand the impact on their complaint. However, whilst I understand, going forward, builders will have to ensure certain cover is in place for the homeowners when building or converting a property, I've not seen anything to suggest the Act will retrospectively make a building warranty provider responsible for defects which aren't covered by an existing policy.

In any event, what I need to consider here, is whether NHBC's claim decision was in-line with the terms of Mr and Mrs W's policy, and whether its claim decision was fair and reasonable given the wider obligations that applied at the time. In respect of those considerations, I'm not persuaded NHBC did something wrong.

My final decision

I'm sorry to disappoint Mr and Mrs W, 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 W to accept or reject my decision before 5 August 2022.

Vince Martin
Ombudsman