

The complaint

Mr W complains National House-Building Council (NHBC) unfairly declined a claim on his building warranty policy, relating to the block paved areas in his development.

What happened

Mr W owns a new-build apartment that's covered by a ten-year building warranty policy. The policy started in 2011. Mr W is also a director of the Residential Management Company ('RMC'). The RMC has appointed a third-party, who I'll refer to as 'B', to help the leaseholders in the development make their claims.

Whilst, at this time, only Mr W has approached our service, both B and NHBC are aware that what I say here, would likely apply to the other leaseholders too if they were to bring the same complaint to our service.

In 2018, claims were made on the development for movement and cracking in the apartment blocks, retaining walls, and roads; defective cladding; and defective drainage.

The complaint brought to our service only concerns the claim decision for the block paved areas, *i.e.* the main access roadway, communal areas, and parking bays. Whilst I'm not considering the other items that were, or are still being, investigated by NHBC; I will comment on the claim decision for the retaining walls.

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' if caused by a 'defect' in certain parts of the flat or its 'common parts'. I'll outline the parts of the policy definitions that are relevant to this complaint:

- 'Damage' – physical damage to the 'home' caused by a 'defect'.
- 'Defect' – a breach of any mandatory NHBC requirement during construction.
- 'Home' – the flat, any 'common parts', the drainage system serving the 'home' for which the policyholder is responsible, retaining walls, path, drive, and paved areas.
- 'Common parts' – the parts of the building containing a flat, any drainage system serving the 'home', retaining walls, path, drive, and paved areas.

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.

In NHBC's investigation report, in relation to the block paving, it commented that the general surfacing shows varying degrees of settlement movement. NHBC concluded remedial work was required to the sub-base, which would mean lifting and relaying the paving. However, NHBC said the damage wasn't covered by the policy.

In July 2020, B complained about NHBC's claim decision for the block paved areas. B said it was evident the areas in question had sunk and heaved due to defective foundations. B said NHBC was liable under section 3 because damage to the common parts had been caused by a defect in the foundations.

B also said NHBC was liable under section 4, because the damage presented a trip hazard, and the developer had breached building regulations in relation to structure and site preparation.

NHBC said, whilst damage caused by defective foundations is covered under section 3, the term 'foundations' refers to the support given to a building. NHBC noted the paving blocks are supported on a laying course, road base, sub-base, and subgrade, which isn't considered to be a foundation.

In respect of section 4, NHBC explained the applicable building regulations don't extend to the sub-base or makeup below the surface finish. As such, NHBC concluded there hadn't been a breach of building regulations.

B, on behalf of Mr W, brought a complaint to our service. One of our investigators didn't think it should be upheld. Because B disagreed, Mr W's complaint was passed to me to decide.

I've already issued a provisional decision, explaining I intended to uphold the complaint. 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."

Block paved areas

Paths, drives, and paved areas fall under the definition of 'home'. So, it's not disputed that the settlement issues have caused physical damage to the home.

However, for the damage to be covered under section 3, it needs to have been caused by a defect in one of the parts listed within section 3. The only part listed that could be relevant here is 'foundations'.

NHBC says the term 'foundations' refers to the support given to a building. But, notably, the term 'foundations' isn't defined in the policy.

Whilst I accept, in the construction industry, the term 'foundations' commonly refers to the load bearing part of a building, more generally, it can reasonably be used to refer to the natural or prepared ground that structures, such as block paving, are laid upon. I'm not persuaded the "average" policyholder would read the policy terms and understand 'foundations' was only referring to the support given to a building.

NHBC has interpreted the term 'foundations' very narrowly. In the absence of a clear policy definition, I'm not persuaded NHBC's approach is fair and reasonable. Given the term is somewhat open to interpretation, and in the context of the cover being provided (which includes paths, drives, and paved areas) I'm minded to interpret the term in favour of the policyholder.

I understand NHBC has recently accepted the leaseholders' claims for one of the blocked paved areas on the basis defective drains have contributed to the damage, and drainage investigations are to be undertaken in other areas. However, regardless of any drainage issues, for the reasons explained above, I intend to decide all the damaged block paved areas should be covered under section 3.

Because I intend to decide Mr W's block paving claim should succeed under section 3, it's not necessary for me to consider section 4 at this time.

Fees and compensation

B hasn't mentioned its fees or compensation at this stage. However, for completeness, I'll set out my intended outcome in relation to those matters.

It's my understanding that B was appointed before NHBC issued its first investigation report. Where the insured chooses to appoint a third party to represent them in their claim, we generally don't expect the insurer to cover those costs.

Equally, a complaint could have been brought to us for free, without B's involvement. It's uncommon for us to make awards for professional representation, and I've not seen anything that persuades me I should reasonably do so here.

I consider it likely that NHBC's claim decision for the block paved areas will have caused Mr W some inconvenience, particularly because he volunteered to have his complaint considered by our service ahead of the other leaseholders in the development. In recognition of that, I intend to award him £150 compensation.

Retaining walls

The retaining walls are suffering from movement and cracking. NHBC declined the damage on the basis the walls aren't necessary for the structural stability of a building.

Retaining walls fall under the definition of 'home'. However, for the damage to be covered under section 3, it needs to have been caused by a defect in one of the parts listed within section 3. There are two parts listed that could be relevant:

- 'foundations'*
- 'retaining walls necessary for the structural stability of the house, bungalow, flat or maisonette, its garage or other permanent outbuilding'*

I accept the retaining walls in question aren't necessary for the structural stability of a building.

However, if the defects causing the movement and cracking are in the foundations of the retaining walls, that damage should, subject to the other policy terms and conditions, be covered. In other words, section 3 covers physical damage to the home (which includes retaining walls), if caused by a defect in its foundations.

Having spoken to NHBC about this matter, it's confirmed it will revisit its claim decision for the retaining walls. Should NHBC maintain its decision to decline the retaining walls, for either the same or a different reason, Mr W is free to make a complaint about that.

The other leaseholders' claims

Because only Mr W has approached our service, I can only make a direction in relation to his share of the repair costs.

However, if my final decision follows what I've said here, it would be in NHBC's interests to settle the other leaseholders' block paving claims on the above basis, and reconsider their retaining wall claims, to avoid similar complaints."

NHBC accepted my provisional decision, but it made the following points:

- The damage to the paved areas has *potentially* been caused by a defect in the laying course and/or sub-base. The complaint is therefore focused on whether the laying course and sub-base can reasonably be termed 'foundations'.
- The term 'foundations' was intended to strictly refer to the support given to a building, and in the construction industry, this is what the term 'foundations' commonly refers to. However, NHBC accepts there's not a clear definition of 'foundations' in Mr W's policy and a broader approach could be applied.
- Not all the homeowners on the development have the same policy version as Mr W. In the event other homeowners make a complaint, they will be subject to the policy wording that applies to them.
- NHBC now agrees that, if there's a defect in the laying course and/or sub-base, then the defect is in the foundations of the paving blocks, and therefore, the damage is covered under Mr W's policy.
- However, NHBC's investigation didn't conclusively find there had been a failure of the laying course and/or sub-base. An assumption was made, which may have been incorrect. There's been inadequate investigations due to NHBC's conclusion the damage wasn't covered.
- NHBC says it would need to excavate the paving, test the subsoil, and compare the actual sub-base depth with the required sub-base depth from its standards to establish if the design was appropriate.
- If the design wasn't adequate, this would be a defect. However, a degree of variation in levels should be anticipated – this is covered by current NHBC standards which note: *"displacement and variations in surface levels, including scuffing and pitting, may arise due to settlement, natural ground movement and traffic"*.

B, on behalf of Mr W, accepted my provisional decision. However, B asked that I reconsider its professional fees and extend the decision (including the £150 compensation) to all the leaseholders. B made the following points:

- Mr W is a director of the RMC, and the RMC has authority to make decisions about the site. As such, although this complaint was made using Mr W's details, it was always intended for the complaint to be on behalf of all the leaseholders.
- It was B who identified the various issues at the site, and it was B who then raised the claims to NHBC. Without B's involvement it's unlikely claims would have been made in connection with the roads. B noted the average policyholder wouldn't understand the complexities involved.

- It's also highly probable that the average policyholder would have given up after the claims were declined, or after their complaint was rejected by NHBC, or after their complaint wasn't upheld by our investigator. Instead, B took matters forward.
- The whole claims process has been ongoing since May 2018, which means all the residents have been living in limbo with a variety of defects for over four years.
- Consequently, the claims process has been a very stressful endeavour for all concerned.

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 accept that as a director of the RMC, Mr W has authority to make decisions about the site. However, the building warranty policies under which the claims have been made, are held individually by the leaseholders. The RMC has no right to make claims under the leaseholders' policies, or to bring a complaint to our service.

I can't consider the other leaseholders' claims for their share of the repair costs unless they bring their own complaint to our service. Likewise, I can't consider their inconvenience, or make a compensation award to them. Because only Mr W has brought a complaint to us, I can only make a direction in relation to him and his policy.

That said, *subject to* the other leaseholders' policy terms, I would reasonably expect NHBC to apply what I've said about Mr W's block paving and retaining wall claims, to the other leaseholders' claims.

To be clear, I've only considered the policy terms that apply to Mr W. So, at this stage, I've no view on the other policy versions that apply across the site. But ultimately, if any of the other leaseholders are unhappy with the approach NHBC takes in relation to their claims, they can raise their own complaint.

In respect of the block paving repairs, I provisionally decided NHBC should settle Mr W's claim for his share of the repair costs. However, I accept NHBC's point that a 'defect' (as defined by the policy terms) hasn't yet been proved. Therefore, I find it reasonable for NHBC to be given an opportunity to complete more thorough investigations.

However, it follows that, if a 'defect' is found in the foundations of the block paving, NHBC will need to settle Mr W's claim for his share of the block paving repairs costs. If NHBC determines the issue isn't a 'defect' in the foundations, then Mr W can raise another complaint, and if necessary, bring that complaint to our service.

I'm mindful I've not considered section 4 as part of this complaint. So, should Mr W need to bring a further complaint to our service about the block paving following NHBC's further investigations, we can, if necessary, consider section 4 at that time.

Turning to B's professional fees, it wasn't my intention to undermine the value B has added to the leaseholders' claims and this complaint. I acknowledge that building warranty claims, particularly those involving common parts, can be complex and daunting for the "average" policyholder. But, nonetheless, that doesn't change what I said in my provisional decision about professional representation and related fees.

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:

- investigate the block paving foundations, and if a 'defect' is found in the foundations which is causing 'damage', settle Mr W's claim for his share of the repair costs (as per his lease agreement);
- reconsider Mr W's claim for his share of the retaining wall repair costs (as per his lease agreement); and
- pay Mr W £150 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 7 September 2022.

Vince Martin
Ombudsman