DRN-3652793

The complaint

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

What happened

Mr W owns a new-build apartment that's covered by a ten-year building warranty policy. In 2020, the managing agent commissioned a fire safety report. The report recommended remedial work to areas of Mr W's building. The report set out the following:

- The storey height of Mr W's building is under 18m, so the functional requirement at the time of construction was: *"The external walls of the building shall adequately resist the spread of fire over the walls…".*

- Had the building been over 18m, the requirement would have been 'B-s3, d2' above 18m and 'C-s3, d2' below 18m. Both of these are lesser standards than the current guidance, that the external cladding should achieve at least 'A2-s1, d0'.

- The metal cladding system on Mr W's building is one of aluminium composite panels with combustible insulation behind. The current guidance requires the removal of the panels and replacement with a material that achieves at least 'Euroclass A2, s1-d0'. The insulation may also require replacement.

- The brick and blockwork are non-combustible materials. As will be the render coat, unless acrylic. The insulation provided to the cavities is combustible, however, this was an acceptable detail at the time of construction.

- The timber cladding on Mr W's building is also combustible, with untreated timber generally achieving 'Euroclass D' at best. With appropriate treatment, timber may achieve 'Euroclass B'. Treating the timber cladding should meet the functional requirement that applied at the time of construction. Alternatively, the timber cladding could be replaced with a material that achieves 'Euroclass A2'.

- The timber cladding lacks cavity barriers behind the void. This isn't in accordance with the guidance, and barriers should be provided.

- Balconies are formed from either the building as walkways or from a steel frame with timber decking. The latter construction doesn't comply with current guidance, which recently clarified that balconies form part of the external envelope of the building. So, to comply with current regulations they should be of limited combustibility or better.

- Treated timber can achieve 'Euroclass B-s3, d2'. The open timber decked balconies at Mr W's building could allow fire spread between floors and over external walls, therefore, they didn't meet the functional requirement that applied at the time of construction for buildings under 18m.

The managing agent provided the report to NHBC, with the intention of recovering the cost of the remedial works via the leaseholders' building warranty policies. However, NHBC declined the claim.

The relevant part of the policy is section 4, which covers the builder's non-compliance with certain building regulations that applied at the time of construction, if causing a present or imminent danger.

NHBC explained to the managing agent the building complied with the building regulations that applied at the time of construction. NHBC set out the following:

- Aluminium composite panels – at the time of construction, for buildings with a storey height under 18m, there were no restrictions on the combustibility of the insulation within the external walls.

- Timber cladding – at the time of construction, timber greater than 9mm thick and installed as an external surface was allowed (without any treatment) to areas of external wall that are below 18m.

- Balconies (timber decking) – at the time of construction, balconies weren't considered part of the external wall or external surface, so none of the recommendations or provisions applied.

- Render system and brick system – no defects were identified in the managing agent's report.

- Cavity barriers (aluminium composite panels, the render system, and the brick system) – no defects were identified in the managing agent's report.

- Cavity barriers (timber cladding) – at the time of construction, for buildings with a storey height under 18m, there was an exemption for the cavities formed behind cladding, providing they don't contain combustible insulation. The timber clad external wall constructions of Mr W's building don't have any combustible insulation behind them.

Mr W complained NHBC was referring to outdated building regulations. However, NHBC noted it had assessed the claim in-line with the policy terms, and correctly applied the building regulations that applied at the time of construction.

One of our investigators considered Mr W's complaint, but he didn't think it should be upheld. He noted the following:

- The Building Regulations 2000 applied at the time of construction. The fire safety requirements and supporting guidance are found in Approved Document B (the March 2003 edition).

- Mr W's building is less than 18m tall and isn't within 1,000mm of a boundary.

- At the time of construction, the following requirement applied: *"The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building."*

- Within the guidance that supports the above requirement, there were no provisions or requirements for the materials used in the external walls of a residential building less than 18m tall that isn't within 1,000mm of a boundary. There were also no provisions in place for balconies.

Mr W disagreed with our investigator's outcome, so his complaint has been passed to me for a final decision. Mr W has made the following points:

- As per the fire safety report commissioned by the managing agent, the aluminium composite cladding and insulation are combustible, as are the timber fixtures and timber balconies. The balconies could allow fire to spread between the floors and over the external walls of the building. Therefore, it's clear there are external wall materials that don't resist the spread of fire as required by the applicable building regulations.

- The guidance within Approved Document B also sets out the periods of minimum fire resistance. Mr W noted NHBC hadn't provided proof of the fire resistance tests referred to within the guidance.

- Approved Document B also refers to Regulation 7, which hasn't been considered. Regulation 7 required building work to be carried out with adequate and proper materials which are appropriate for the circumstances for which they are used. Materials should meet the approved British or European testing standards.

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.

This service is generally reliant on the technical expertise of others. Where there's a dispute about defects and damage, or building regulations, we consider the submissions of the two parties to determine what, on balance, we are more persuaded by. We tend to place more weight on those considered to be industry experts. Therefore, it's not my role to determine whether building regulations were breached by the original builder, but rather, it's to consider whose arguments and evidence I find more persuasive.

Whilst Mr W would like the current building regulations to be considered, the section 4 policy terms are clear. There must be a present or imminent danger due to a breach of the fire safety building regulations that applied *at the time of construction*.

The Approved Document B that applied at the time the building was constructed states the following requirement in relation to 'external fire spread': "*The external walls of the building shall adequately resist the spread of fire over the walls and from one building to another, having regard to the height, use and position of the building."*

The Approved Document then provides guidance on how that requirement can be achieved. The following information is provided in relation to the arguments that have been made during the claim and Mr W's complaint:

Fire resistance:

- The fire resistance limits depend on the distance of the external wall from the relevant boundary. So, it's possible for some or all of the walls to have no fire resistance, except for any parts that are load bearing.

- If the external wall of a building is 1,000mm or more from the relevant boundary, a reduced standard of fire resistance is accepted in most cases and the wall only needs fire resistance from the inside. The relevant fire resistance periods are specified in Appendix A, via Table A1 and Table A2.

External surfaces:

- Provisions are made to restrict the combustibility of externals walls that are less than 1,000mm from the relevant boundary, or externals walls of high buildings. The provisions are specified in Diagram 40.

- The external surfaces of walls should meet the provisions in Diagram 40. As should the surface of the outer cladding which faces the cavity (of a wall of 'rainscreen' construction).

External wall construction:

- The use of combustible materials for cladding framework, or the use of combustible thermal insulation as an overcladding or in ventilated cavities, may present a risk of fire spread in tall buildings even if the provisions in Diagram 40 have been satisfied. In a building with a storey 18m or more above ground level, the insulation material used in ventilated cavities in the external wall construction should be of limited combustibility.

In respect of fire resistance, I've not seen any expert opinion that the building elements don't meet their minimum fire resistance periods. The Table A1 and Table A2 information explains if the external wall is 1,000mm or more from the relevant boundary, there's only a minimum fire resistance period in relation to fire exposure from inside the building to outside. Whilst the managing agent's report raises issues with the combustibility of the external walls, it doesn't raise an issue with the spread of fire from inside to outside (which may be adequately resisted by internal construction details and materials).

Mr W would like NHBC to provide evidence of the fire resistance tests, which he says NHBC should have undertaken at the time of construction. I don't know whether NHBC would have been required to undertake such tests whilst providing the building control function for the building, or whether the builder would have been required to use materials that had been certified as compliant with the national and/or European tests. But in any event, given no expert opinion has been provided that supports the fire resistance requirements weren't complied with, I don't require any information from NHBC on this point.

In respect of the external surface classification, Diagram 40 provides five building scenarios, with reference to their use, height, and distance from the relevant boundary. The managing agent's report explains *had* the building been over 18m, the requirement would have been 'B-s3, d2' above 18m and 'C-s3, d2' below 18m. That requirement was only for residential buildings above 18m which were *1,000mm or more from the relevant boundary*. Whilst for residential buildings less than 1,000mm from the relevant boundary, irrespective of height, the requirement was 'B-s3, d2'. Therefore, it can be inferred from the report that Mr W's building is 1,000mm or more from the relevant boundary, which is consistent with what NHBC says.

So, it's my understanding that Mr W's building is a residential building with a building height less than 18m, and its external walls are 1,000mm or more from the relevant boundary. In this Diagram 40 scenario, there was 'no provision' (*i.e.* requirements) for the external surfaces or walls.

For context, and as noted above, in respect of the other residential building scenarios, the external wall surfaces had to meet various classifications, such as ‘B-s3, d2’ or ‘C-s3, d2’, depending on a combination of the building’s height and distance from the relevant boundary.

The managing agent’s report acknowledges the building is under 18m, and in respect of the external surfaces, it only refers to requirements that applied to taller buildings. So, I find the expert opinion to be consistent in respect of the aluminium composite panels and timber cladding not breaching the building regulations that applied *at the time of construction*.

That said, the managing agent’s report also refers to the functional requirement of adequate resistance to the spread of fire over external walls, and it explains treating the timber should meet this requirement. Whilst this implies the timber cladding didn’t comply with the building regulations that applied at the time of construction, I haven’t seen the timber had to be treated.

As explained above, Diagram 40 confirms for residential buildings under 18m, where the relevant boundary is 1,000mm or more from the external wall, the external wall surfaces aren’t required to meet a classification. But rather, there were ‘no provisions’ for the external walls or surfaces.

Furthermore, the Diagram 40 scenarios explain that for a residential building taller than 18m, where the relevant boundary is 1,000mm or more from the external wall, the wall up to 18m above ground had to meet classification ‘C-s3, d2’, *or* timber cladding at least 9mm thick is acceptable. NHBC says the timber cladding on Mr W’s building meets this minimum thickness, even though there was no such requirement for buildings below 18m.

Turning to the balconies, the managing agent’s report points towards the timber decking not complying with *current* guidance. But the report again refers to the functional requirement that applied at the time of construction, *i.e.* adequate resistance to the spread of fire. The report also notes treated timber can achieve ‘B-s3, d2’. However, even if balconies were considered part of the external surfaces or walls, the Diagram 40 scenarios explain the ‘B-s3, d2’ classification only applied to a residential building under 18m that’s less than 1,000mm from the relevant boundary.

NHBC also says the Building Regulations 2000 make no reference to balconies in relation to fire safety, and the Approved Document B that applied at the time of construction makes no reference to external balconies except where they provide a route of escape. NHBC says none of the balconies at Mr W’s building provide a route of escape. Having reviewed the information referred to, I haven’t seen anything that contradicts what NHBC says.

In respect of the external wall construction, the managing agent’s report notes the presence of combustible insulation behind the aluminium composite panels. However, the Approved Document that applied at the time of construction only refers to the combustibility of insulation in the ventilated cavities of the external walls of buildings over 18m.

In addition to the above requirement for external fire spread, the Approved Document B that applied at the time of construction states the following requirement in relation to ‘internal fire spread (structure)’: *“The building shall be designed and constructed so that the unseen spread of fire and smoke within concealed spaces in its structure and fabric is inhibited.”*

The Approved Document then provides guidance on how that requirement can be achieved, including information about cavity barriers.

In respect of the lack of cavity barriers within the voids behind the timber cladding, NHBC says for buildings under 18m, there was an exemption for cavities formed behind cladding if they don't contain combustible insulation. I've reviewed the Approved Document that applied at the time of construction, and I've seen this information is set out in the section covering 'concealed spaces (cavities)'. NHBC says there's no combustible insulation behind the timber cladding. The managing agent's report doesn't comment on whether there's combustible insulation behind the timber cladding, so I accept what NHBC says.

Mr W has also briefly referred to Regulation 7. However, I've not seen any expert opinion that suggests the requirements of Regulation 7, or the requirements within its Approved Document, were breached. Equally, Mr W hasn't referred to anything specific. As such, there are no arguments for me to consider in relation to Regulation 7.

So, having reviewed the arguments of both parties and the available information, I'm not persuaded NHBC unfairly declined the claim.

Notably, the managing agent appointed a fire safety expert, and NHBC provided a response to the expert's findings. I haven't seen that the managing agent's appointed expert disputed NHBC's response, which I would reasonably expect them to do so if they disagreed with NHBC's interpretation of the building regulations that applied at the time of construction.

My final decision

I'm sorry to disappoint Mr 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 W to accept or reject my decision before 28 October 2022.

Vince Martin
Ombudsman