

## **The complaint**

Miss G complains National House-Building Council (NHBC) hasn't treated her fairly after she made a claim on her building warranty policy.

## **What happened**

In 2014, Miss G bought a new-build apartment. The completion date was 24 May 2014. The property is covered by a 'ten-year' building warranty policy. There are two sections of the policy that are relevant to this complaint: section 2 and section 3.

Section 2 covers the builder's liability period ('years 0-2'), and section 3 covers NHBC's liability period ('years 3-10').

If the common parts aren't affected by the claim, the section 2 notification period is two years from the date of completion. But if the common parts are affected, the section 2 notification period is either three years from the first date of completion for the homes sharing the common parts, or, if earlier, two years from the last date of completion for the homes sharing the common parts.

The notification period for section 3 is eight years, and it simply follows section 2, *i.e.* the section 3 notification period starts the day after the section 2 notification period ends. Therefore, the start date of the section 3 notification period depends on whether the common parts are affected by the claim.

Under section 2, the original builder is responsible for putting right any 'defect' or 'damage' that's reported during the relevant section 2 notification period. The policy terms define a 'defect' as a breach of any mandatory NHBC requirement, and 'damage' as physical damage caused by a 'defect'.

However, if there's a dispute between the homeowner and the builder about issues raised under section 2, NHBC can, at its discretion, offer its resolution service. If NHBC issues a resolution report requiring the builder to act, and the homeowner accepts the report in full, but the builder fails to comply, NHBC becomes responsible for those required actions.

Under section 3, NHBC is responsible for putting right 'damage' in certain parts of the building, that's reported during the relevant section 3 notification period.

On the day of completion, the builder completed a demonstration report. The report noted the living room window and the kitchen window were leaking. Miss G went on to make a section 2 claim.

In February 2016, NHBC issued a resolution report. The report noted the builder had carried out various works to the façade, which had resolved the water ingress issues at Miss G's apartment. So, NHBC didn't require the builder to act in relation to the water ingress.

In July 2016, NHBC issued a second resolution report. The report noted the water ingress had returned at the curved lounge window. NHBC required the builder to investigate the cause and to ensure NHBC's technical requirements were met by 12 September 2016.

In February 2020, NHBC issued a third resolution report. The report noted there were water ingress issues at the curved lounge window, the dining area window, the master bedroom window, and the small bedroom window. However, NHBC said only leaks at the curved lounge window were reported within the section 2 notification period. So, NHBC didn't consider the other windows were suitable for resolution.

NHBC's third resolution report required the builder to undertake works to the curved lounge window by 21 July 2020, to ensure NHBC's technical requirements were met. Because the builder failed to do so, NHBC became responsible for those works under the contract of insurance.

Miss G went on to complain about delays in relation to the curved lounge window works, and about NHBC's decision not to consider any of the other leaking windows. In July 2021, NHBC issued a final response to Miss G's complaint. NHBC set out the following:

- In respect of the curved lounge window, because the window frame and surrounding cladding are common parts, a cash settlement would be paid to the managing agent for it to complete the work.
- In November 2020, NHBC asked the managing agent for an investigation quote. A quote was received in January 2021. NHBC asked for more detail in relation to the quote, which was received; but NHBC tried to get the original builder to undertake the investigations instead. NHBC said it would now take over the investigations. NHBC offered Miss G £600 compensation for the delays.
- NHBC accepted the water ingress at the kitchen window was first raised within two years of the completion date. However, NHBC said it wouldn't be considering any other items under its resolution service as the section 2 notification period for the common parts had expired before Miss G bought her apartment. NHBC noted it shouldn't have provided its resolution service for the curved lounge window, but having done so, it was committed to dealing with that item.

In December 2021, one of our investigators concluded £600 was fair compensation for the delays relating to the curved lounge window. However, he didn't think we could consider other parts of Miss G's complaint. Because Miss G was unhappy with our investigator's outcome, her complaint was passed to me to decide.

In August 2022, I issued a jurisdiction decision setting out what points we can, and can't, consider. In my decision, I explained:

- We *can* consider matters relating to the curved lounge window, and whether NHBC should have considered the other windows under section 3.
- We *can't* consider the findings of NHBC's resolution service in relation to the other windows, or NHBC's decision not to offer its resolution service for some windows.

In August 2022, I also set out my provisional findings about the matters we can consider. In that 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."*

*I've carefully considered all of Miss G's submissions. However, it isn't my role to comment on every point or to answer every question raised. 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 or responded to questions 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.*

*I'm only considering events up to 19 July 2021, i.e. the date of NHBC's final response letter. If Miss G has complaints points about events since 19 July 2021, she needs to put those to NHBC first, so it has an opportunity to respond.*

*Are the common parts affected?*

*Miss G argues her windows aren't common parts of the building. She's provided a section of her lease agreement which sets out what parts are common parts and what parts are demised.*

*Whilst I accept the internal parts of the windows are part of the demised premises, it's clear the external parts of the building, including the external decorative finishes of the windows, are common parts. In any event, the remedial work is likely to affect the external walls surrounding the windows.*

*So, overall, I'm persuaded the claim affects the common parts and the relevant section 2 and section 3 notification periods apply.*

*Are the notification periods for claims affecting the common parts, fair?*

*Miss G says the notification periods for claims affecting the common parts are unfair. I can understand her point of view, given the section 2 notification period for claims affecting the common parts, could have already started, or expired, before the homeowner buys their apartment.*

*However, I find the notification periods to be set out clearly in the policy terms, and I see no reason for them not to apply here. Miss G didn't buy her policy in the conventional sense. It was purchased by the builder to pass to the eventual homeowner. If Miss G is unhappy about what the builder told her, in respect of the cover being provided, that's a matter between her and the builder.*

*During which notification period were the windows first reported?*

*Miss G completed on 22 May 2014. As noted above, on that date, the builder recorded her living room window and kitchen window were leaking.*

*I've also seen Miss G completed a satisfaction survey for NHBC on 25 July 2014. She noted all the windows in her property were leaking, but the builder was trying to resolve the issue. In addition, I've seen a letter from NHBC, from September 2014, which confirms Miss G emailed NHBC on 29 August 2014 about water ingress via the windows.*

*In NHBC's final response letter, in July 2021, it explained the section 2 notification period for claims affecting the common parts, expired before Miss G bought her apartment. However, I've seen an email from NHBC, from September 2021, which explained, based on the data currently held, the notification period expired on 5 June 2014. NHBC explained not all the completion dates were up to date, so the notification period may have expired earlier.*

Clearly, the expiry date of the section 2 notification period is of importance to Miss G's claim, in respect of section 2 or section 3 applying. I will set out the implications of different expiry dates under the next four sub-headings.

If section 2 expired between 22 May and 5 June 2014 – lounge and kitchen window

If the relevant section 2 notification period expired between 22 May and 5 June 2014, then the living room window (which I understand is the curved lounge window) and the kitchen window fall under section 2. This is because, as per the demonstration report, those two windows were raised with the builder on 22 May 2014.

NHBC declined to provide its resolution service for the kitchen window. As explained in my jurisdiction decision, that's not something I can consider.

But, if the relevant section 2 notification period expired between 22 May and 5 June 2014, then NHBC's reason for not offering its resolution service for the kitchen window appears flawed. Therefore, if the expiry date is confirmed as between those dates, then I invite NHBC to revisit its decision not to offer its resolution service for the kitchen window. If NHBC declines to do so, I have no power to comment further on the matter.

If section 2 expired before 22 May 2014 – lounge and kitchen window

If the relevant section 2 notification period expired before 22 May 2014, then it follows that the lounge window and the kitchen window were raised during the section 3 notification period.

In this scenario, NHBC should have considered the lounge window and the kitchen window under section 3.

In respect of the lounge window, although it was considered under section 2 (rather than section 3), NHBC has become liable for putting right any defect and damage due to the breached resolution deadline. So, if the window has incorrectly been considered under section 2, it's my understanding that no detriment has been caused.

Other windows

NHBC says the latest the relevant section 2 notification period expired was 5 June 2014. I've not seen the other windows were raised by that date. Whilst Miss G recalls they were, I've not seen anything that supports her recollection. The earliest document I've seen that references the other windows is the satisfaction survey, which is dated 25 July 2014.

Therefore, unless NHBC can demonstrate the other windows were raised before the relevant section 2 notification period expired, I intend to decide they were raised during the relevant section 3 notification period. It would therefore follow that NHBC should have considered the other windows under section 3.

Section 3 – next steps

When responding to my provisional decision, NHBC will need to evidence when the relevant section 2 notification period expired.

But based on the information provided so far, I consider it likely that some windows, if not all, fall under section 3. I haven't seen NHBC has given section 3 any consideration. Therefore, I intend to decide NHBC needs to consider the other windows that fall under section 3.

*In my view, it's enough that Miss G raised her leaking windows with NHBC. It's not for her to explicitly state which parts of the policy she wishes to claim under. NHBC are the experts here, so it should have guided her accordingly.*

*So, if some windows fall under section 3, then the compensation award will reflect NHBC's failure to consider that cover.*

#### *The lounge window – delays*

*It's my understanding that, in 2020, NHBC was made aware of another dispute between the builder and Miss G in relation to further water ingress at her apartment. NHBC went on to issue a third resolution report, and it became responsible for putting right any defect and damage relating to the lounge window due to the breached resolution deadline.*

*NHBC required investigations around the window first, so it could determine if there was still a defect causing the water ingress.*

*I've seen no reasonable explanation for the year long delay between the breached deadline in July 2020 and the final response letter in July 2021. It's also not clear why NHBC tried to revert to the builder for the investigations, given it had already failed to meet the resolution deadline. In my view, NHBC should have arranged the investigations itself or coordinated with the managing agent which is responsible for the building.*

#### *Compensation*

*NHBC has offered Miss G £600 compensation for the delay between the breached deadline in July 2020 and its final response in July 2021. However, I intend to increase this award to £1,200.*

*A year's delay is significant. Furthermore, I currently don't consider NHBC has treated Miss G fairly by not proactively considering section 3. I consider £1,200 to be a fairer reflection of the upset and inconvenience caused by those matters.*

#### *The lounge window – investigations*

*I understand NHBC carried out its investigations in November 2021. Miss G has told us the investigations found a condensation issue, rather than a defect causing water ingress.*

*Miss G has also shared an email from a contractor that was involved in the investigations. The contractor says NHBC instructed those involved not to find a defect, only signs of historic water ingress.*

*It's not appropriate for me to consider those issues as part of this case. I understand NHBC is looking into the contractor's accusations, and as explained at the start of my provisional findings, I'm only considering events up to 19 July 2021. However, if Miss G is unhappy about events since that date, she can make a new complaint.*

#### *Settlement method*

*Miss G has raised concern NHBC is involving the managing agent, and that it intends to pay the settlement to the managing agent.*

*The policyholder is Miss G, not the managing agent. However, neither Miss G nor NHBC can carry out work on the common parts of the building without the freeholder's permission. The managing agent acts on the freeholder's behalf, and it will need to be involved in the repair scheme. Where the building warranty provider isn't completing the common parts repairs itself, it's not unusual for the cash settlement to be paid to the managing agent so it can organise the work.*

*Ultimately, if Miss G doesn't consider NHBC is treating her fairly when making the settlement for the lounge window, or the other windows, she can make a new complaint. Likewise, if NHBC determines no settlement is to be made following its investigation into the lounge window, or following its consideration of section 3, she can make new complaints about those matters."*

In response to my provisional decision, NHBC wrote to Miss G (and provided me with a copy of its letter). The letter was dated 12 August 2022. To summarise, NHBC set out the following:

- NHBC clarified that the section 2 notification period for claims affecting the common parts expired on 8 May 2016. NHBC acknowledged it had previously given Miss G incorrect information about the expiry date, and that she had first raised the water ingress via her windows during the section 2 notification period.
- NHBC previously provided its resolution service for the curved lounge window. NHBC became responsible for the required actions after the builder failed to comply with the resolution report. Following an investigation, NHBC concluded the water ingress had been resolved by the builder, but there was a condensation issue. Because this was a new issue, section 3 applied. NHBC acknowledged it had incorrectly declined the section 3 claim on the basis that condensation is excluded under section 3. NHBC clarified that condensation is only excluded if not caused by a 'defect', and further investigations are needed to determine whether a section 3 claim would succeed.
- In respect of the curved lounge window investigation, NHBC has reviewed the file note covering the pre-investigation meeting. Whilst NHBC was specific in terms of what the contractors were instructed to do, there's no evidence this direction extended to the outcome of the investigation.
- To put matters right, NHBC will now further assess the condensation issue at the curved lounge window under section 3; provide its resolution service for the other windows; appoint a specialist claims consultant to manage the claim; and offer £3,000 compensation on top of the £1,200 I intended to award (so, £4,200 in total).

Miss G provided her comments in response to my jurisdiction decision, provisional decision, and NHBC's letter. To summarise, Miss G set out the following:

- Miss G expressed her disappointment I couldn't consider certain matters relating to the resolution service.
- Miss G asked whether NHBC would still be liable for rectifying the damage if it paid the claim settlement to the managing agent, but the managing agent didn't fulfil its obligations.
- Miss G disagreed the notification periods were clear in the policy terms, given neither NHBC nor our service was able to work out what the specific dates were.

- In reference to the policy sale, Miss G noted insurers are responsible for the conduct of their intermediaries.
- If the claim had been correctly dealt with eight years ago, under section 3, NHBC would have been immediately liable for the repairs.
- Miss G welcomes NHBC's offer of an additional compensation payment, but what she really wants is for her windows to be fixed. She said she had no choice but to accept NHBC's offer to use their resolution service in relation to the other windows.

In September 2022, in view of the responses to my first provisional decision, I set out my further provisional findings. In my second 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.*

*In my first provisional decision, I explained I was only considering events up to 19 July 2021. However, given how matters have since moved on, and the offer being made by NHBC, it wouldn't be helpful to either party, or practical, to limit my findings to 19 July 2021. So, I'll now consider events up to the date of NHBC's recent letter, i.e. 12 August 2022.*

#### Water ingress – applicable policy section

*Whilst I accept the policy terms don't specify the dates for the notification periods, it remains my view that the notification periods are set out clearly, i.e. the terms confirm how the dates are to be calculated.*

*It also remains my view that Miss G wasn't sold the policy. The policy was purchased by the builder, and it simply came with Miss G's new home. Whilst I accept the builder likely used the policy to give potential buyers of the property confidence, NHBC isn't responsible for how the builder positioned the cover. The builder wasn't acting as NHBC's intermediary.*

*NHBC has now clarified that the section 2 notification period for claims affecting the common parts, expired on 8 May 2016. This means all the water ingress issues fall under section 2, given they were raised with NHBC before that date.*

*I see no reason to doubt the 8 May 2016 date. Having reviewed the lease agreement, NHBC considers responsibility for the common parts of the apartment block to be shared amongst the properties within the block, whereas responsibility for the common parts of the site are shared amongst all the properties on the site. The common parts in question are windows, so it's the dates of completion within Miss G's block that are of relevance, as opposed to the other dates of completion across the site. I find NHBC's interpretation of the lease agreement to be reasonable.*

*NHBC has clarified that the first completion date within Miss G's block was 9 May 2013, and the last was 4 March 2016. As per the policy terms, the section 2 notification period is either three years from the first date of completion for the homes sharing the common parts, or, if earlier, two years from the last date of completion for the homes sharing the common parts. The earlier date is three years from the first completion date, i.e. 8 May 2016.*

### Lounge window – water ingress

NHBC's resolution service has already considered the curved lounge window. Because the builder failed to ensure NHBC's technical requirements had been met, NHBC became responsible for that required action under section 2.

NHBC says its investigation found the water ingress issue at the lounge window had been resolved by the builder's previous works, and the ongoing issue was being caused by condensation.

I've reviewed the investigation report, which was completed by a third-party engineer. The engineer couldn't find any evidence of water penetrating from outside. Whilst the engineer couldn't identify the cause of the water droplets recorded by Miss G, he concluded they could be due to condensation. He recommended further investigations to confirm that condensation was the issue.

Miss G points towards an allegation made by a contractor involved in those investigations. The contractor says NHBC instructed those involved not to find a defect, only signs of historic water ingress. The contractor that made the allegation, wasn't the engineer responsible for the investigation – and nor were they employed by the same firm.

As per the contractor's email in which the allegation was made, it's evident there's been a relationship breakdown between that contractor and NHBC due to a dispute about unpaid invoices. I'm mindful the contractor may have an ulterior motive for making the allegation. I'm also mindful that five months passed between NHBC's alleged instruction and the allegation, so the contractor's recollections may not be accurate. As such, I'm not persuaded I can reasonably place much weight on the allegation.

On the other hand, I've reviewed the file note from the pre-investigation meeting, and the engineer's report, and I haven't seen anything that leads me to doubt the credibility of NHBC's instructions or the engineer's report.

Therefore, based on the information presented, I'm persuaded NHBC has met its obligations under section 2, in relation to the water ingress issue at the lounge window that was first reported during the section 2 notification period. NHBC has commissioned an intrusive survey which found no evidence the external water penetration was still ongoing.

However, should it later be found that water is still penetrating from outside, then it follows NHBC would need reconsider its liability under section 2.

### Lounge window – condensation

NHBC has identified a potential condensation issue within the section 3 notification period. NHBC has accepted it unfairly declined the issue under section 3 and it has offered to investigate the matter further. It follows that I consider NHBC's proposal to be fair.

If Miss G is unhappy with NHBC's further claim decision under section 3, in respect of the condensation, she's free to make a further complaint.

### Other windows – water ingress

NHBC has now offered to provide its resolution service for the remaining windows. As explained in my jurisdiction decision, I can't direct NHBC to offer its resolution service. Nonetheless, it follows that I consider NHBC's offer to be fair.



*If Miss G is unhappy with NHBC's outcome following the resolution service process, she can make a new complaint. However, as per my jurisdiction decision, this service would only be able to consider a complaint about a section 2 claim if certain criteria have been met.*

### Settlement method

*As explained in my first provisional decision, if NHBC goes on to offer a cash settlement for any of the repairs, but Miss G doesn't consider NHBC is treating her fairly by involving the managing agent, she can make a new complaint. I don't consider it appropriate for me to comment on scenarios that are yet to arise. Should a dispute later arise about a cash settlement, or about who is to be responsible for the works, we can consider those arguments, and what's fair and reasonable in the circumstances, at that time.*

### Compensation

*It's evident NHBC hasn't treated Miss G fairly, and she's suffered a fair amount of upset and inconvenience as a result.*

*As noted in my first provisional decision, in respect of the water ingress at the curved lounge window, there was a year's delay between the builder breaching the resolution deadline in July 2020, and NHBC taking responsibility in July 2021.*

*In respect of the water ingress at the other windows, NHBC gave incorrect information about the section 2 notification dates. Having incorrectly concluded those water ingress issues had been raised after the section 2 notification period had expired, it failed to consider section 3 (albeit, it's now been established that section 3 doesn't apply to the water ingress claims).*

*In February 2020, NHBC decided not to offer its resolution service for the other windows based on an incorrect conclusion about the section 2 notification dates. That matter is outside of my jurisdiction, so the impact on Miss G is not something I can award compensation for. But nevertheless, NHBC's error is apparent.*

*In respect of the potential condensation issue, NHBC incorrectly applied an exclusion to decline that section 3 claim.*

*NHBC has offered to increase the compensation to £4,200. Bearing in mind the matters that are within my jurisdiction, the delays since July 2020, and the impact on Miss G, overall, I'm satisfied NHBC's offer is fair."*

NHBC accepted my second provisional decision. Miss G reiterated her concerns about the potential claim settlement being paid to the managing agent. She asked for assurances about NHBC's responsibilities in the event it decided to rely on the managing agent to complete the remedial works.

### **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.

The only point that has been made in response to my second provisional decision, relates to the potential settlement method for the issues NHBC is now considering. However, I can't add anything further to what I've already said in my two provisional decisions, under the heading 'settlement method'.

Having reconsidered all the information that has been presented, I've reached the same outcome I reached in my second provisional decision, for the same reasons.

### **My final decision**

For the reasons I've set out above, and in my two provisional decisions, I uphold this complaint. My final decision is National House-Building Council should:

- consider the condensation issue at the curved lounge window under section 3; and
- pay Miss G £4,200 compensation, in total (if £600 has already been paid, a further £3,600 would be due).

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss G to accept or reject my decision before 28 October 2022.

Vince Martin  
**Ombudsman**