

The complaint

Mr M complains National House-Building Council (NHBC) unfairly declined his building warranty claim.

What happened

Mr M bought a new-build property that was covered by a ten-year building warranty policy. The policy started in July 2011. Three sections of the policy are relevant to his complaint. Those are sections 2, 3, and 4.

During the first two years of cover (*i.e.* years 0-2), section 2 of the policy applies. During the last eight years of cover (*i.e.* years 3-10), sections 3 and 4 apply.

Under section 2, the original builder is responsible for putting right any 'defect' or 'damage' that's reported during the first two years. The policy defines a 'defect' as a breach of any mandatory NHBC requirement during construction, and 'damage' as physical damage caused by a 'defect'.

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.

Section 3 covers 'damage' in certain parts of the building, that's reported during the last eight years. The covered parts of the building are listed in section 3.

Section 4 covers the builder's non-compliance with certain building regulations that applied at the time of construction, if the issue is causing a present or imminent danger, and it's reported during the last eight years. The applicable regulations are listed in section 4.

In January 2021, Mr M made a claim for missing thermal insulation. He was experiencing cold conditions in his home. Because the claim was made during years 3-10, NHBC considered sections 3 and 4. NHBC declined the claim under both sections.

Mr M referred a complaint to our service. He's since made the following points to us and NHBC:

- The missing insulation falls under the following building regulations that are covered by section 4: Part A – structure; Part B – fire safety; and Part J – combustion appliances and fuel storage systems.
- The insulation manufacturer's product sheet confirms the insulation has acoustic benefits. Therefore, the insulation is part of the structure of the property.

- The missing insulation is a fire risk. The manufacturer's product sheet confirms the insulation is non-combustible and achieves a 'Euroclass A1 Reaction to Fire' classification.
- The insulation is an integral part of the fire safety system. It enabled the property to achieve its overall 60-minute integrity and insulation statutory requirement for fire safety.
- NHBC carried out extensive fire safety renovations in 2018. The missing insulation should have been picked up during those renovations.
- Due to the missing insulation, the heating system can't function properly as any heat it generates is lost. Therefore, the heating system is defective
- There's published guidance which recommends a minimum indoor temperature of 18°C in winter. A temperature below 18°C is considered to pose a risk to health. NHBC's own standards refer to a minimum of 21°C, or 18°C in the bedroom.
- Mr M has monitored the temperature in his property over a period of two months, and on twelve days, the temperature recorded was below 18°C despite his heating being on. The lowest temperature recorded was 12.6°C. Mr M has also provided thermal images of the walls, and he says the images show insulation is missing in places.
- Mr M recalled he had raised a heating issue with the original builder during the first two years of the policy. So, he thought the claim should also be covered under section 2.
- NHBC has told Mr M it won't be offering its resolution service under section 2, due to the passage of time since the issue was raised with the builder. Mr M says there are no such time limits in the policy, and the terms state NHBC *will* act if the builder doesn't fulfil its obligations under section 2. Mr M says NHBC hasn't applied its discretion fairly or in-line with the policy terms when deciding not to offer its resolution service.

NHBC has made the following points to Mr M:

- In respect of section 2, the policy terms explain NHBC should be contacted *as soon as possible*, and NHBC *may* offer its resolution service. NHBC noted that Mr M last spoke to the builder about the heating issue in 2013.
- In respect of section 3, there's no physical damage, so the necessary requirements for a valid section 3 claim don't exist.
- In respect of section 4, thermal insulation isn't integral to fire safety. It's simply there to reduce heat loss from the property.
- The vertical spread of fire is controlled by cavity barriers at floor level. The insulation inside the timber frame, which is well separated from the flat below by timber and plasterboard, doesn't play any critical role in preventing the spread of fire. Many materials have some fire resisting properties but aren't deemed to be critical to compliance, and this location and type of insulation is not a necessary part for compliance with Approved Document B.
- Approved Document J provides guidance on the safe installation and usage of heat producing appliances, this doesn't include thermal insulation.

- The thermal images aren't conclusive, and there's no proof that insulation is missing. The timber frame construction has quilt insulation set vertically between the timber studs, so it's unlikely that pieces would be missing from the base as gravity would normally cause the quilt to fill this space.

One of our investigators didn't think we could consider NHBC's decision not to offer its resolution service under section 2. She also didn't think Mr M's claim had been unfairly declined under sections 3 and 4. Because Mr M was unhappy with her outcome, his 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't* consider NHBC's decision not to offer its resolution service under section 2.
- We *can* consider NHBC's claim decision under sections 3 and 4.

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.

Section 3

For section 3 to apply, there must a) be physical damage in a part of the property that's listed in section 3, and b) it must have been caused by a breach of a mandatory NHBC requirement.

I haven't seen anything that suggests the alleged missing insulation has caused physical damage. As such, irrespective of whether missing insulation is a breach of a mandatory NHBC requirement, I'm satisfied NHBC fairly declined the claim under section 3.

Section 4

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 M has taken his own temperature readings and thermal images, no evidence has been provided from a suitably qualified expert to support his interpretation of the information he's gathered. But even if thermal insulation is missing from the external walls, I haven't seen anything that persuades me the issue is a breach of the building regulations that applied at the time of construction.

Mr M has referred to three building regulations: Part A – structure; Part B – fire safety; and Part J – combustion appliances and fuel storage systems. I'll address these in turn.

Approved Document A (structure) sets out the requirements in relation to loading; ground movement; and collapse. NHBC says missing insulation wouldn't impair the ability of the structure to comply with Part A. Having reviewed the applicable Approved Document A, I haven't seen any guidance relating to insulation, so I accept Part A isn't relevant here.

In respect of Approved Document B (fire safety), NHBC has pointed towards the parts that it considers relevant to this complaint.

Approved Document B requires external walls to adequately resist the spread of fire. NHBC says because the external walls are 1,000mm or more from a relevant boundary, they must be protected from a method of exposure direction that is from inside to outside. NHBC says this protection is provided by fire resistant boarding being applied to the inner face of the timbers, not by insulation installed within the studwork zone of the external wall.

NHBC also says, even if the external walls were within 1,000mm of a relevant boundary, and therefore, there was a requirement for the external wall to be protected from exposure from outside to inside, the protection that would be required to the timber frame wouldn't be the insulation, it would be an externally applied fire-resistant board.

NHBC also says, because Mr M's building has a storey height of less than 18m, the building regulations placed no constraints on the combustibility of materials in either the cladding or backing wall zones of the external wall. As I understand it, the inference being that the insulation isn't considered to be part of the building's fire safety system.

Approved Document B also requires the unseen spread of fire and smoke within concealed spaces to be inhibited. NHBC says cavity barriers are required where extensive cavities exist, but if insulation was missing, that wouldn't constitute an extensive cavity, and nor would insulation need to be installed to mitigate the spread of smoke and fire.

In summary, NHBC says missing thermal insulation wouldn't create a fire hazard to external walls, and nor has the external wall failed to comply with any of the requirements of the building regulations.

Mr M hasn't provided anything from a suitably qualified expert to support his position that the applicable fire safety building regulations were breached, due to missing insulation. I've also not seen anything in the applicable Approved Document B, that supports his argument the insulation forms part of the building's fire safety system. On the other hand, NHBC has provided an explanation from its technical expert, and it's pointed towards the relevant guidance within Approved Document B to support what it says. So, it follows I'm more persuaded by NHBC's submissions, than the submissions of Mr M.

In respect of Approved Document J (combustion appliances and fuel storage systems), I've not seen anything that shows Mr M's heating system is defective. In relation to the alleged missing insulation, having reviewed the applicable Approved Document J, I haven't seen any guidance relating to insulation within external walls. As such, I accept NHBC's conclusion that Part J isn't relevant here.

Whilst I acknowledge Mr M is unhappy with his home's heat retention, I've not seen anything that persuades me the issue is covered by his building warranty policy."

In response to my provisional decision, NHBC confirmed it had no further comments. Mr M set out why he disagreed with both my jurisdiction decision and provisional decision. He reiterated points previously made, and set out the following new points:

- The complaint wasn't limited to missing insulation from the external walls, it included missing insulation from the internal walls. The thermal images Mr M provided were for external and internal walls.
- Mr M provided a report from 2015 which highlighted various fire safety concerns, and a presentation from 2018 which explained the investigations and works that were to be undertaken by NHBC's appointed contractor. He questioned why NHBC spent a year, at great expense, checking every single internal wall around the perimeter of every flat to ensure it was properly fire sealed, if it considered the missing thermal insulation wouldn't create a fire hazard.

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.

Mr M reiterated several points in response to my jurisdiction decision. It's not my intention to be discourteous by not responding to those points, but they aren't relevant to our jurisdiction. As I previously explained, I can't consider NHBC's decision not to offer its resolution service, because Mr M's complaint about that matter doesn't relate to a regulated activity. Mr M says NHBC is contractually obliged to provide its resolution service, but even *if* he's correct here, that doesn't mean the resolution service falls under one of the regulated activities we can consider (which are set out in Financial Conduct Authority Handbook).

Turning to my provisional decision, Mr M reiterated previous points, and made new points, in relation to section 4. I'll address the new points.

In my provisional decision I said even *if* thermal insulation is missing from the external walls, I haven't seen anything that persuades me the issue is a breach of the building regulations that applied at the time of construction. In response, Mr M hasn't provided anything that supports missing insulation from *external walls* is a breach of the applicable building regulations. So, my findings on this point remain the same.

However, Mr M pointed towards the *internal walls* and the 2018 presentation. I've reviewed the 2015 report and the 2018 presentation he's provided, but neither of those documents refer to missing insulation.

I've also reviewed the applicable Approved Document B in respect of the requirements for 'internal fire spread'. I accept materials had to meet certain classifications, and there were requirements for compartmentation and cavities, but I've not seen the internal walls, compartments or cavities had to be insulated for fire safety reasons.

The 2018 presentation explains the contractor will be checking that services passing through the 30-minute and 60-minute compartment lines are suitably sealed, and it will be rectifying any issues.

Mr M points towards the 2018 works being relevant to the issue of insulation. But based on the information I've seen, as I understand it, sealing the compartment lines where services pass through was needed to prevent the spread of fire. It didn't have anything to do with insulation.

Mr M argues gaps in the insulation will allow air to circulate, which in turn is a fire hazard because oxygen/air causes fire to spread. But I haven't seen anything in the applicable building regulations, or from a suitably qualified expert, which supports Mr M's theory insulation was required at the time of construction to prevent the spread of fire.

In my view, the 2015 report and 2018 presentation don't support there's missing insulation in the internal walls, that missing insulation is a fire risk, or missing insulation breached the applicable building regulations.

Mr M says his thermal images are reliable and NHBC hasn't proved otherwise. But the point here is, even *if* insulation is missing, I've not seen missing insulation would breach the building regulations that applied at the time of construction. A breach of those building regulations is required for a section 4 claim to succeed.

I'm sorry to disappoint Mr M, but having carefully considered all the information that's been provided, I'm not persuaded NHBC unfairly declined his claim under sections 3 or 4.

My final decision

For the reasons I've set out above, and in my provisional decision, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 11 November 2022.

Vince Martin
Ombudsman