

The complaint

Mr V has complained about National House-Building Council's (NHBC's) decision not to cover a claim he made under his Buildmark warranty.

What happened

There have been numerous separate claims considered by NHBC regarding Mr V's building. Some have related to claims for defects or damage to individual flats, and others have concerned common parts – such as the roof or the cladding. This particular complaint is about NHBC's decision not to cover repairs for defective cladding. So, it's this issue that I'll be focusing on here.

There have been various parties involved the claims and complaints made, acting as representatives of either Mr V, other leaseholders or NHBC. For ease of reference, I'll only refer to Mr V or NHBC in this decision, even when referring to evidence or arguments put forward by their respective representatives.

It isn't in dispute that there is a defect with the cladding, nor that there have previously been defects with the roof and the windows of certain flats in the building. But NHBC's position is that since repairs were carried out to the roof and windows (under separate claims) there's been no further evidence of water ingress to the building. So, NHBC says no further works are required as there is no damage – which is a requirement for a claim to be considered under the section of cover it says applies to this claim.

But NHBC has offered to carry out a further inspection to see if there is ongoing water ingress to the relevant flats or common areas. And it agrees that cover is likely to engage if ongoing damage, as a result of a defect, is discovered.

Mr V disagrees. He says the cladding defect remains and that NHBC previously accepted the claim and drew up a schedule of repairs. He wants NHBC to fulfil its promise and repair the defective cladding.

One of our investigators considered the complaint, but she didn't think it should be upheld. She said there was no evidence of ongoing water ingress to Mr V's flat or the common areas of the building. She said the relevant section of the policy which applied to the claim for the cladding was section 3 – which meant there needed to be damage, caused by a defect, for cover to engage. So, as there appears to be no damage caused by the defective cladding, she thought NHBC's position was fair.

Mr V didn't accept our investigator's opinion. So, because no agreement had been reached, the complaint was passed to me to decide.

Having considered the available evidence and arguments, I was minded to reach a slightly different conclusion to that reached by our investigator. So, I issued a provisional decision and asked that all parties provide any further evidence or arguments they wanted me to consider before I reached a final decision.

Here's what I said in my provisional decision:

"What I've provisionally 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.

What I'm considering in this decision

There has been extensive background to this complaint as various claims have been ongoing or in dispute since 2013. I don't intend to comment on every individual issue or disagreement which has happened. Instead, I'll focus on what I believe to be the key issues relevant to reaching a fair and reasonable outcome in this particular complaint. This isn't meant as a discourtesy to either side, rather it reflects the informal nature of our service and my role within it. But I'd like to reassure the parties that I have carefully considered everything they've submitted, even if I haven't commented on it specifically.

Mr V is a director of the Property Management Company (PMC) responsible for his building. He has sought to raise a complaint in this capacity, on behalf of all the leaseholders of the building. However, the PMC isn't a policyholder, and so cannot bring a claim or complaint in its own right. Nor has Mr V provided evidence that the leaseholders have specifically authorised him (or the PMC) to bring a claim or complaint on their behalf.

That said, Mr V is a leaseholder, and policyholder, in his own right for his own flat. So, he is able to bring a claim or complaint about NHBC's handling of a claim for his individual flat and/or about its handling of a claim for his proportion of any common parts. It's in this capacity that I am considering Mr V's complaint.

What the warranty covers

NHBC's Buildmark warranty provides cover for specific major problems with newly built or converted properties where there has been a breach of its technical requirements. The policy is bought by the builder and passed on to the consumer when they purchase the property.

In a building made-up of multiple properties, such as Mr V's, an individual policy is issued to each leaseholder and provides cover for their individual home as well as cover for their proportion of any common parts. The cover provided by the policy is split into several sections, which largely depend on how much time has elapsed since completion of the building or housing unit. Each section of the policy provides different, or differing levels, of cover.

Issues identified within the first two years of cover (section 2) are the responsibility of the builder to put right. NHBC's responsibilities under section 2 are to provide a mediation service (called the resolution service) where there is a dispute with the builder and policyholder and, in certain circumstances, to take over the builder's responsibilities if they fail or refuse to put things right within a reasonable time.

Section 2 provides cover for either damage or a defect – as defined by the warranty document. This means that a defect, in isolation, can be covered under section 2. This differs from section 3 (years three to ten of cover) which only covers damage, caused by a defect, in specified parts of the home or common parts of the building.

The key to this complaint is whether the issues with the cladding should be considered under section 2 or section 3. This is because, at present, no damage as a result of the defect with the cladding has been identified. So, if the cladding claim falls under section 3 – as NHBC suggests it should – then there is no cover as section 3 requires damage. However, if the cladding claim falls under section 2, as Mr V suggests it should, then NHBC could potentially be responsible for rectifying the defective cladding, as a defect in isolation can be covered under section 2.

Which section should apply?

Section 2 of the warranty requires that any damage or defect is notified to the builder within the notification period. The notification period for section 2 depends on whether the issue being claimed for affects a common part or not.

As the cladding is common part, I think the common parts notification period reasonably applies here. This notification period is explained in the policy document:

“For a Defect or Damage to your Home that does affect Common Parts, the notification period is the period:

- a) starting on the first of the dates of Completion for the Homes that share the Common Parts; and*
- b) ending the earlier of:*
 - i) three years from that date;*
 - ii) two years from the date of the last of the dates of Completion for the Homes that share the Common Parts.”*

NHBC has provided evidence that the earliest completion date for a home which shared the common parts was 21 July 2011 and the latest completion was 31 October 2011. Based on this, the common parts notification period for section 2 ended on 31 October 2013. This means for the cladding claim to be considered under section 2, the issue with the cladding must’ve been notified to the builder on or before that date.

NHBC accepts it caused some confusion about which section of the policy the cladding claim would fall under. It says the cladding issue was only identified following water ingress claims made by three leaseholders, including Mr V, in February 2015. But in July 2015 it says it incorrectly merged those claims with a separate section 2 claim – which is why it initially confirmed it would cover the cladding under section 2.

However, NHBC’s position now is that the cladding issue was only discovered and notified in 2015, significantly after the section 2 notification period had expired. So, it says the claim for cladding must be considered under section 3. But section 3 only covers damage, caused by a defect. A defect alone isn’t sufficient for cover to engage under section 3. And as there is currently no evidence of damage caused by the cladding, or active water ingress to any of the flats or common parts, NHBC says it is not responsible for remedying the defective cladding.

I’ve carefully reviewed the evidence provided by both sides. Having done so, I’ve not seen anything to suggest that the defect with the cladding was identified or reported to the builder before the end of the section 2 notification period.

I note that water ingress to certain flats was reported around August 2013. This was investigated by NHBC under its resolution service and covered off in a resolution report which was issued in January 2014. The cause of the water ingress was determined to be missing 'Illmod seals' around the windows – rather than an issue with the cladding. In fact, this resolution report made no mention of any concerns about the cladding. The first mention of issues with the cladding was in a later resolution report issued in 2015. So, based on the evidence I've seen, I don't think it would be reasonable to conclude that the cladding issue should be considered under section 2, because it doesn't appear to have been discovered or notified within the applicable period.

It follows that I think the cladding issue should be considered under section 3. And as explained, in order for cover under section 3 to engage there must be damage, caused by a defect.

NHBC's investigations did initially conclude that the issues with the cladding were likely causing the water ingress to Mr V's flat. However, since repairs to the roof (under a separate claim) have been completed, it appears that no further water ingress has occurred. The roof claim was settled by a cash settlement in 2019 – so it seems likely the roof repairs will have been concluded for some time. Therefore, based on the evidence currently available, I'm persuaded that the cause of water ingress to Mr V's flat was most likely due to issues with the roof and/or windows, as opposed to the issue with the cladding.

So, as the issue with the cladding doesn't appear to be causing damage to Mr V's flat, or any of the common parts, I think NHBC's position, that there is no cover for the defective cladding under section 3, is in line with the terms of the policy and is fair and reasonable in the circumstances.

That said, NHBC has offered to carry out a further inspection to determine whether there is further, active water ingress. If there is, and the cause of that ingress is the defective cladding or windows (issues reported during the appropriate notification period for section 3 – which has since expired) then NHBC accepts it will be responsible for putting things right. I think NHBC's position here is fair and reasonable.

I'm minded to conclude that NHBC's position on the claim for the cladding is fair and reasonable. But I don't think this absolves NHBC of responsibility for the frustration and loss of expectation it caused Mr V when it incorrectly committed to covering the cladding under section 2, then later changed its position – albeit correctly in my view. So, in addition to its offer to carry out a further inspection, I think NHBC should pay Mr V £200 to compensate him for the impact of its error here."

I said I was intending to direct NHBC to pay Mr V £200 compensation, in addition to carrying out a further inspection in line with the offer it had already made.

NHBC responded to confirm it accepted my provisional decision and had nothing further to add.

Mr V provided a detailed response along with various supporting documents. To summarise, he said:

- He does represent all the leaseholders, and this isn't disputed by NHBC. NHBC has had numerous "authority to act forms" from leaseholders in the past.

- The wealth of evidence he has supplied is sufficient to demonstrate a causal link between the cladding issue, and the water ingress around the windows which was reported within the relevant notification period.
- He doesn't accept NHBC's suggestion that it mistakenly merged two claims. NHBC confirmed on numerous occasions, even as recently as 2016, that it would deal with the cladding issue under section 2. An offer was made and accepted, so he wants NHBC to honour it.

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've also carefully considered Mr V's response to my provisional decision. But having done so, I've not been persuaded that my provisional conclusions were incorrect. I'll explain why in more detail below.

Firstly, I don't dispute that Mr V may have been authorised by certain leaseholders to deal with certain aspects of their concerns directly with NHBC. I've seen some authorisation forms signed in 2019. But that doesn't mean that Mr V is able to bring this particular complaint (opened in 2021) to our service on behalf of all leaseholders in his capacity as a director of the PMC.

As explained in my provisional decision, the PMC is not a policyholder and as such cannot bring a claim or complaint without authorisation from one (or more) policyholders. In this case, Mr V is a policyholder in his own right, so I'm able to consider his complaint. But I've not been provided with authorisation from any other policyholder to confirm they want our service to consider their complaint or that they want Mr V to be their representative.

Our investigator explained to Mr V, via his representative, what steps needed to be completed for us to join other leaseholders to this complaint. But we weren't provided with the information we required to do this. So, as with my provisional decision, I'm only considering Mr V's claim and complaint here, as an individual leaseholder.

Mr V says his evidence is sufficient to demonstrate a clear link between the window issue and cladding issue. But I don't agree. I've considered all the information provided, and from what I've seen, none of the evidence suggests that the Ilmod seal issue is connected to the cladding issues identified in 2015. The cladding survey carried out in 2016 makes no mention of the windows or seals and, crucially, none of the documentation from prior to 31 October 2013 (expiry of the notification period) mentions any concerns about the cladding.

Mr V says that after the seals were initially replaced there were further instances of water ingress – which shows that the issues are connected. I've thought about this. But as explained in my provisional decision, I think it's more likely than not that the further water ingress was caused by the issues with the roof. This is because since the roof claim has been settled, and repairs carried out, no further evidence of water ingress has been observed or provided.

In order for me to be persuaded that the cladding issue should be considered under section 2, I'd need to see evidence that either:

- It was notified to the builder (or NHBC in the event of the builder's insolvency) within the relevant notification period, or
- Clear evidence that the cladding issue was the proximate cause of the initial water ingress, which was reported within that notification period.

But, for the reasons I've already explained, I don't consider that either of the above applies here. The cladding issue wasn't identified until 2015 and I haven't seen any persuasive expert evidence to suggest that the initial water ingress wasn't a result of the missing Ilmod seals (as identified at the time), the issue with the roof (as later identified), or a combination of both.

No repairs have been carried out to the cladding at this stage. So, it stands to reason that if the cladding issue had been the cause, or a contributory factor, to the initial water ingress, that there would be ongoing, active water ingress. But, to this point, there's been no clear evidence of water ingress as a result of the cladding issue. And Mr V has confirmed that the roof repairs have addressed the water ingress. So, in these circumstances, I've not been persuaded to change my provisional decision.

That said, NHBC has confirmed to our service that it is prepared to carry out an additional site visit to inspect the various properties (with appropriate permission), and/or common areas, affected by water ingress to establish whether there is still any active water ingress (as a result of the window or cladding issues). And if any is discovered, NHBC will consider whether it is responsible for remedying the issues under the terms of the warranty. In the circumstances, I consider this to be a fair and reasonable offer with respect to Mr V's complaint about his property and his share of the common areas.

I appreciate Mr V's frustration with the fact that NHBC offered to cover the cladding issue under section 2 before changing its position. But I don't consider it would be fair or reasonable to hold NHBC to an offer it made in error – where the remedy it offered isn't something I believe would be covered under the policy in these circumstances. Instead, I think NHBC ought reasonably to compensate Mr V for the loss of expectation he suffered as a result of NHBC's incorrect offer. That's why I provisionally recommended NHBC should pay Mr V £200 compensation. I remain of the view that this is a fair and reasonable way to settle this aspect of Mr V's complaint.

My final decision

For the reasons set out, I uphold Mr V's complaint in part.

National House-Building Council must:

- Carry out a further inspection to identify whether there is active water ingress as a result of defects with the windows or cladding – as it has already offered to do.
- Pay Mr V £200 compensation for the distress and inconvenience it has caused him.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 9 December 2022.

Adam Golding
Ombudsman