

The complaint

Mr U has complained about National House-Building Council's (NHBC's) decision to decline a claim he made under his NHBC Buildmark warranty.

What happened

Mr U is represented in his complaint. But for ease of reading, I'll only refer to Mr U by name in this decision, even when referring to evidence or arguments put forward by his representative.

Mr U's property is suffering from water ingress due to multiple defects with the roof of the building. NHBC has declined to cover Mr U's claim under his warranty as it says the main cause of the damage to Mr U's property was a lack of maintenance to the roof – and this is specifically excluded under the warranty terms.

Mr U says the expert evidence is clear that, regardless of the lack of maintenance, the roof requires wholesale replacement due to construction related defects. So, he feels the policy should cover his loss.

Our investigator considered Mr U's complaint but didn't think it should be upheld. She agreed with NHBC's conclusion that the damage had been caused primarily by the lack of maintenance. So, she said NHBC had declined Mr U's claim fairly.

Mr U didn't accept our investigator's opinion. As no agreement has been reached, the complaint has been passed to me to decide.

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 initial claim raised with NHBC was brought by the property management company, on behalf of multiple residents, because they share a common interest in the roof. But this complaint has been brought to our service by Mr U only. So, in assessing the complaint, I'll focus only on what Mr U is entitled to under his individual warranty.

What the warranty covers

NHBC's Buildmark policy 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. The cover provided by the policy is split into several sections.

Section 3 of the policy is the relevant section in this complaint. This section states that NHBC will pay for:

“The full Cost, if it is more than £1000 Indexed, of putting right any actual physical Damage caused by a Defect in any of the following parts of the house, bungalow, maisonette or flat and its garage or other permanent outbuilding, or its Common Parts;”

It then goes on to list the various specified parts which are covered, which includes roof coverings.

Within the policy booklet there is also specific emphasis on the words “Damage” and “Defect” and individual definitions for each:

*“Damage
Physical damage to the Home caused by a Defect*

*Defect
A breach of any mandatory NHBC Requirement by the Builder or anyone employee by or acting for the Builder. Failure to follow the guidance supporting the NHBC Requirements does not in itself amount to a Defect, as there may be other ways that the required performance can be achieved.”*

What this means is that Mr U’s warranty doesn’t guarantee that his property will be free from defects. Rather, it covers repairing any damage which has been caused by a defect (as defined) to one, or more, of the specified parts of the home or common parts.

So, it is the damage, and not the defect(s), which is specifically covered under section 3 of the warranty.

The claim

The fact that there are several, significant construction related defects with the roof, which have led to the ingress of water and damage, is not in dispute. Nor is it in dispute that no roof inspection schedule was in place, and no routine maintenance works were carried out to the roof between construction in 2009 and the claim in 2017.

The dispute here centres on whether NHBC has fairly and reasonably applied the policy conditions and exclusions it has relied on to decline Mr U’s claim.

NHBC says the dominant cause of the damage is the lack of maintenance and that the following policy exclusions apply to Mr U’s claim:

“f. Deterioration caused by neglect or failure to carry out normal or specific maintenance...

...

n. Costs that are attributable to your unreasonable delay in pursuing a claim.”

Further to this, NHBC has pointed to a general policy condition which states:

“2. You must take all reasonable steps to reduce damage to your Home. We will not pay for any work or other costs which result from your failure to do this.”

Mr U obtained a detailed expert report on the issues with the roof and property in April 2020. This report concluded that the wholesale replacement of the roof is needed as a result of the defects. Based on this, Mr U asserts that his claim should be covered as the defects are clearly the dominant cause of the damage.

I've carefully considered the evidence available. Having done so, I don't agree with Mr U's position. Rather, I think NHBC has declined Mr U's claim fairly, and in line with the policy terms. I'll explain why.

Mr U's surveyor's report comments on the type of roof at Mr U's property, and how frequently a prudent owner/managing agent should conduct maintenance:

- *“From the information made available by (management company), it appears there is not an active Planned Maintenance regime for the building in place. With regards to the roof, we have no evidence of any annual or regular inspection of the roof areas being undertaken.*
- *“In my opinion, for a property of this size, age and use, a prudent Landlord/Managing Agent should have a maintenance regime in place for such aspects as regular inspections of the roof, regular cleaning of the roof and associated gutters and outlets to reduce risk of leaks internally....”*
- *“Whilst the BBA certificate refers to an annual inspection, from my perspective I would recommend to a prudent Landlord for 6 monthly inspections of a roof of this type. This approach allows the general condition of the roof to be checked in conjunction with the clearing of rainwater outlets, removal of debris and a general roof clean which are important steps to reduce the risk of damage and/or flash flooding and leaks to the roof during extreme weather...”*

The above persuades me that no maintenance or inspections were undertaken. Therefore, I agree that the general condition relied on by NHBC, taking all reasonable steps to mitigate damage, has not been met by Mr U or the management company.

The report also sets out the surveyor's opinion on the impact the lack of maintenance likely had on the damage to Mr U's flat – which again, is what the warranty covers under section 3:

- *“In my opinion, the extent of defects that have occurred to internal apartment areas could have been mitigated to an extent had there been a regular maintenance regime in place. In such a scenario, the 6 monthly or annual inspection of the roof would have identified these issues at a much earlier stage (potentially around 2011/2012) and proactive steps could have been taken to investigate these issues **before the issues became apparent internally via the moisture ingress** (my emphasis).”*

- *“Given that the roof structure is a concrete deck, shows that any leaks through the waterproofing membrane would then have to penetrate through the insulation, vapour control layer and the dense thickness of the concrete slab itself. Therefore, whilst the first leaks were reported in 2012 and then 2013, suggests on the balance of probability that the failure of the waterproofing layer in these areas was several months before the first report of a leak.”*

The above suggests that an appropriate maintenance and/or inspection schedule would likely have identified the issues with the roof prior to any damage occurring. So, while the roof appears to have suffered from defects from when it was first constructed, I think it more likely than not, that reasonable steps to mitigate damage, such as a regular schedule of maintenance and/or inspections, would have prevented – or at the very least significantly mitigated – the damage which is the subject of this claim.

The report further explains the surveyor’s opinion as to the level of damage caused by the lack of maintenance:

- *“In my opinion, the remedial works required involve wholesale replacement of the entire waterproofing system inclusive of the insulation due to the incorrect insulation boards being installed and the other issues identified in this regard. Had they been identified earlier and perhaps around 2010/2011 then, in my opinion, on the balance of probabilities, it would still have required wholesale replacement although aspects such as the following **would not be applicable as these have been (in my opinion) a result of the prolonged delay and lack of general annual inspections and maintenance** (my emphasis):*
 - *Water damage to the apartments.*
 - *Infra-red/thermographic survey of roof slab to understand extent of moisture damage to understand extent of concrete testing required.*
 - *Concrete testing due to water damaged roof slab.”*
- *“In my opinion, on the balance of probabilities, had (management company) undertaken the normal maintenance expected as building owner/Managing Agents then I feel the repair option required of wholesale recovering would have still been necessary (to achieve an equivalent 20 year guarantee), **however the disrepair and water ingress issues internally would not have occurred to the extent currently experienced** (my emphasis).”*

Based on the above, I’m persuaded that the dominant cause of the damage was the lack of maintenance to the roof. I say this because had this been carried out, the expert evidence suggests that the damage would likely not have occurred, as the defects with the roof would have become apparent and been able to be remedied much sooner.

The surveyor’s report also makes clear that damage was evident as early as 2012. But the claim wasn’t reported to NHBC until 2017. Based on this, I think NHBC is correct to say that the exclusions quoted above, for lack of maintenance and late notification of a claim, can be fairly applied in this case.

I do accept Mr U’s argument that, irrespective of the lack of maintenance or late notification of the claim, the roof would always have required replacement. But I don’t agree that this means NHBC would have been, or ought to be, responsible for covering the cost of this.

I say this because there are multiple scenarios where, had the maintenance been carried out, this wouldn't be the case. For example, the surveyor suggests it's possible the defects could have been identified as early as 2010/2011. Had this happened, the builder, rather than NHBC would likely have been responsible for remedying the issues as any defects or damage which occur within the first two years of the warranty coverage (section 2) are the builder's responsibility not NHBC's. Or alternatively, had the defects been identified slightly later, within years 3 to 10 of cover (section 3), but prior to damage occurring then NHBC may not have been required to cover the defective roof. This is because defects, in isolation, aren't covered under section 3. Rather, as I've already mentioned, section 3 covers the damage which is caused by the defect.

Ultimately, I'm persuaded that the lack of maintenance and/or inspections in this case has been the primary contributory factor to the damage which has occurred. I accept that it's impossible to say, for certain, whether an appropriate maintenance schedule would have prevented any damage whatsoever. But I think it is clear that it would have significantly mitigated the level of damage which has occurred.

It could potentially be argued that NHBC might be responsible for covering any damage (as defined) which would have occurred up to the point when the issues ought reasonably to have been identified and a claim reported – depending on when that might have been (section 2 or section 3). But in practice, establishing either of those points at this late stage will be impossible. And in the particular circumstances of this case, I don't think such a direction against NHBC would be fair or reasonable, in any event.

Instead, taking into account the terms and conditions of Mr U's warranty, the length of time the roof went without maintenance and the length of time it took from damage occurring to the claim being reported, I think it is fair and reasonable for NHBC to decline Mr U's claim, in full.

As part of his complaint, Mr U wanted NHBC to cover the cost of the professional support he obtained. This was on the basis that he was only required to obtain professional support due to NHBC's incorrect decision to decline the claim. NHBC declined this element of the claim on the basis that professional costs are excluded, unless they were incurred with specific written consent from NHBC.

The professional costs incurred by Mr U were not authorised in writing by NHBC. And regardless of that exclusion, for the reasons I've explained above, I think NHBC's decision to decline the claim was fair. So, it follows that I'll not be making any direction against NHBC in respect of either the claim or the professional fees.

My final decision

For the reasons set out above, I've decided not to uphold Mr U's complaint against National House-Building Council.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr U to accept or reject my decision before 16 February 2023.

Adam Golding
Ombudsman