

The complaint

Mr F complains about the decision National House-Building Council (NHBC) reached on a claim he made under his Buildmark policy. Mr F also complains about NHBC's claim handling, and about how they intend to resolve the accepted part of the claim.

What happened

The subject of this claim is a development comprised of multiple apartments. Mr F is a leaseholder of one of the apartments. He has a Buildmark Warranty covering his apartment and his share of any common or shared parts.

Mr F's claim is for remedial works to the common parts of the building relating to fire safety issues. This means, in addition to Mr F, other leaseholders will likely have been affected. But this complaint has been brought solely by Mr F, so I'm only considering what Mr F is entitled to under his individual warranty.

The Financial Ombudsman Service has already considered three previous complaints brought by Mr F. These were about NHBC's claim handling and delays in reaching a claim decision. This complaint is about the claim decision NHBC has now reached (to partly accept and partly reject the claim), and about how NHBC intend to deal with the part of the claim they accepted.

One of our investigators looked into things, but he didn't uphold the complaint. He said NHBC's claim decision overall was fair and they weren't acting unfairly by treating the claim as a claim for common or shared parts. The investigator also said how NHBC were proposing to settle the claim, using the original builder to carry out works, wasn't unreasonable or outside the policy terms.

Mr F didn't agree. In summary, he maintained that it was an individual claim, rather than shared claim and that NHBC wasn't dealing with the claim in line with the policy terms. Mr F also maintained NHBC's claim decision was incorrect and he should be given further compensation. So, Mr F asked for a final decision from an ombudsman.

I issued a provisional decision. Whilst I reached the same overall outcome as our investigator, there were some additional reasons for doing so. Therefore, I issued a provisional decision to give both parties an opportunity to comment on my initial findings before I reached my final decision.

What I provisionally decided – and why

In my 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’m issuing a provisional decision. I’ve reached the same overall outcome as our investigator, but there are some additional reasons for doing so. So, I’m issuing a provisional decision to give both parties an opportunity to comment on my initial findings before I reach my final decision.

Previous cases with the Financial Ombudsman Service

The Financial Ombudsman Service has already considered three previous complaints brought by Mr F, and my ombudsmen colleagues have issued final decisions on each of the cases. I’ve briefly summarised those cases:

- *Case one – this considered the time period up to 31 January 2023. The ombudsman said part of the complaint, about whether NHBC should have offered the resolution service under Section 2 of the policy, was outside our jurisdiction. And for the handling of the claim under Section 4 of the policy, which was in our jurisdiction, he said there weren’t any unreasonable delays.*
- *Case two – this considered the time period 31 January 2023 to 25 August 2023. The ombudsman said that whilst there were some delays, NHBC had already offered £200 compensation and the ombudsman thought that was fair.*
- *Case three – this considered the time period 25 August 2023 to 27 February 2024. The ombudsman said that part of the concerns Mr F had raised (including delays since the start of the claim) had already been considered in the previous cases, so the ombudsman said these wouldn’t be looked at again. But for some additional delays, a further £350 was awarded. The ombudsman also said the claim related to fire safety for the building, rather than Mr F’s individual apartment, and it was right that NHBC had considered the claim as a common parts claim.*

This case

NHBC has now partly accepted the claim for fire safety issues. Following investigations, NHBC accepted the claim for missing and poorly installed cavity barriers under Section 4 of the Buildmark warranty. But NHBC declined other aspects including the insulation.

This complaint concerns the declination of the claim for the insulation, how the accepted part (cavity barriers) will be resolved, and some other points Mr F has raised.

When raising this complaint, Mr F has raised some similar points and concerns which have already been considered and addressed, and/or been taken into account, in previous cases. As final decisions have already been issued taking those points into account, I won’t revisit them here. To summarise, those are:

- *If further compensation is warranted for events and delays leading up to the 27 February 2024 claim decision.*
- *If NHBC's decision not to consider the claim under Section 2 of the policy, and its decision not to offer the resolution service, was fair.*
- *If it is reasonable for NHBC to communicate with the development's management company on the claim.*
- *If the claim is for common parts, or Mr F's individual apartment.*

Whilst I won't be revisiting these points or the conclusions reached on them specifically, I may briefly refer to them if there is partial overlap with what I am addressing in this complaint.

I'll also outline here that in this case, and in previous cases, Mr F has referred to a previous ombudsman decision in relation to a completely different case (not relating to his claim or development), and he says his claim should have the same outcome.

However, as explained by my colleagues, each case is considered on its own merits. So, whilst Mr F says the same outcome should be reached on his case as the decision he's referred to, I've looked at Mr F's case on its own merits when deciding what I think is fair and reasonable – bearing in mind the individual circumstances of his case.

Treating the claim as a shared claim rather than an individual claim

Mr F maintains that the claim is for his individual apartment under his individual policy, rather than a shared claim on behalf of the block and/or other residents. He says his claim shouldn't be conditional on it being a 'shared claim' with everyone else.

NHBC has explained that, as per Mr F's lease, his ownership doesn't extend to the main structure of the building or beyond the internal plaster and plasterboard on the walls. NHBC says anything beyond that is shared/common parts of the building, and this includes the cavity barriers (which have been accepted as a valid claim) and the insulation (which hasn't been accepted).

In previous final decisions, the ombudsman said the claim was for common/shared parts of the building, rather than an individual claim for Mr F's own apartment. And on this basis, they said it was reasonable for NHBC to communicate with the managing agent for the development too. I won't be revisiting those conclusions reached by my ombudsmen colleagues.

Mr F argues that his claim can be resolved without the need for others, as the works can be completed from inside his apartment, so he says it shouldn't be a 'shared claim'. However, as outlined, NHBC is treating this as a common parts claim. And my ombudsmen colleagues said that was fair. Whilst NHBC may be able to access some of the common/shared parts which are subject of this wider claim via Mr F's apartment, it is a claim for common parts. And those areas directly outside Mr F's apartment are still common parts, so NHBC needs to treat the claim as such.

Declined part of the claim

NHBC has accepted the claim for the cavity barriers as valid, so I won't comment on those specifically in detail here as they aren't in dispute. However, Mr F complains that NHBC hasn't accepted part of the claim for the insulation.

Mr F argues that the insulation isn't compliant with building regulations, so he says NHBC should be accepting this part of the claim too, along with the cavity barriers.

The claim is being considered under Section 4 of the policy. This provides cover for:

"What you are covered for

This section protects you if there is an immediate danger to your or your neighbours' physical health or safety because the builder failed to meet the following Building Regulations when your apartment and the block were built."

Therefore, in order for a claim to be considered as valid, there needs to be a failure to meet building regulations at the time, and that this causes an immediate danger to physical health and safety. And both points need to be met for a claim to be valid under Section 4 of the policy.

The Financial Ombudsman Service isn't a qualified expert in building construction, building regulations, or determining fire risk in properties. And it's not my role here to decide whether the experts appointed reached the correct conclusions, as after all, they are experts in their field. Instead, my role is to consider all the information provided, and to decide whether, on balance, NHBC reached a reasonable claim decision against the insurance policy terms.

Investigations by various experts, including fire safety engineers, were carried out before NHBC reached the claim decision to partly accept and partly decline the claim. Ultimately the final report was carried out in September 2023. This took into account all the previous reports completed by experts too, so I'm satisfied relevant information was taken into account when the conclusions were reached. I'm also satisfied that this report was completed by a suitably qualified individual. Therefore, I don't think NHBC acted unfairly by relying on this to reach their claim decision.

NHBC asked for the report to include comment on whether the construction was in line with the Approved Documents at the time, whether the construction met building regulations in relation to fire safety, and finally, whether an immediate danger exists to the occupants of the building, as a consequence of a failure to comply with building regulations.

The report did reach the conclusion that the insulation wasn't compliant at the time of construction, which is in line with what Mr F has argued. But as outlined, there are two requirements which need to be met in order for a valid claim to be present under Section 4 of the policy. Whilst there may be a failure to meet requirements, there also needs to be an immediate danger to the physical health and safety of Mr F and his neighbours. Where one exists without the other, this isn't sufficient for a claim to be met under the policy terms.

Whilst the insulation was concluded as being non-compliant, it was the expert's opinion that there was a low risk, and no immediate danger to the physical health and safety of the occupants. So NHBC declined the insulation part of the claim on the basis both parts of the Section 4 claim requirements hadn't been met. The fire safety engineer also commented on the cavity barriers, and the issues with those, so I'm satisfied they were already aware of the wider reported problems when reaching their findings on the insulation.

However, I asked NHBC to obtain some further clarification from the fire safety engineer, as the expert in this field. I asked whether they were concluding the risk of fire occurring in the first place (something which could always happen regardless of the insulation) was low, or if a fire did occur, whether the risk of it causing an immediate danger (which is the valid claim requirement) to the occupants was low.

They explained:

"We did not say the risk of fire occurring in the first place is low, we only said if fire occurs, the risk of fire affecting the insulation material and spread to other compartments via the external wall is low."

I also asked for clarification if the non-compliant insulation had increased the risk to the occupants in comparison to if compliant insulation had been used. They explained:

"If the wall design is fully compliant then the "present and imminent danger" (PID) level would be "none". With the current arrangement (assuming that all the correct cavity barrier products were installed in the appropriate locations, and area (sic) installed correctly) the PID level is "Trivial" as there are small risks as explained.

As mentioned in our response, the risk of fire affecting the insulation material and spread to other compartments via the external wall is low, therefore the risk to the occupants affected by fire via this route of fire spread is low. We can further supplement our response to include this and address the "risk to occupants" more specifically."

Because the fire safety expert hadn't commented specifically on whether there was an immediate danger (a valid claim requirement) to the occupants due to the insulation, they were asked for further comment. They explained:

"assuming "all the correct cavity barrier products were installed in the appropriate locations, and area (sic) installed correctly", based on this, while we acknowledge that a small degree of risk of harm exists, the immediate danger to the occupants due to the external wall arrangement does not exist."

NHBC has already accepted the claim for the cavity barriers, and the fire safety expert has outlined above that once this is complete, immediate danger to the occupants due to the external wall arrangement does not exist. So, this means, that both parts of the test for a valid Section 4 claim aren't met when the cavity barriers have been rectified.

Even if it was concluded by the expert that both parts of the above requirement in the terms were met in relation to the insulation, cover under the policy would require works to be completed to remove any immediate danger. And NHBC has already accepted the claim for the cavity barriers, and these works will, in the expert's view, achieve this in any event regardless of the insulation not being compliant at the time of construction.

Therefore, unless anything changes as a result of the responses to my provisional decision, based on the information provided, I'm not minded to conclude that NHBC has reached an unreasonable position on the claim.

The claim settlement under Section 4

Mr F says NHBC said they would only be willing to cash settle the claim if the builder doesn't put things right. Mr F says the terms don't outline this is how claims would be settled under Section 4. He also says the builder has already indicated they don't intend on doing the works.

The policy terms say:

"What we will do

We will arrange to do the work needed to meet the Building Regulations that applied when the block was built.

...

Or, if we choose, we will calculate:

- what it would have cost us to do the work and provide reasonable alternative accommodation and storage; and*
- the remainder of the overall limit for section 4 when you make the claim.*

We will take the lower of the two amounts and divide it between you and your neighbours. We will then pay each of you an amount in proportion to the amount that you would each be asked to contribute towards the cost of the work under your leases or maintenance agreements (or, in Scotland, under the title deeds of your apartments)."

So, this explains it's NHBC's choice under the terms how they settle claims, including whether they arrange works, or cash settle a claim.

NHBC has accepted parts of the claim and is taking steps to arrange the works and meet the policy cover. And following the claim decision reached, there isn't any evidence that the builder has refused to carry out the works. Instead, NHBC has said the builder is willing to review these, rather than rejecting them.

Mr F argues that whilst Section 2 of the policy allows the builder to put things right first before NHBC then step in, Section 4 doesn't, and instead says NHBC will put things right. So, Mr F doesn't think the claim progression should be dependent on the builder's actions/inaction.

I agree with Mr F that under Section 4 it says NHBC will arrange to put things right, rather than that responsibility solely falling first to the builder. But NHBC is the warranty provider here and they can arrange for builders to carry out required works, covered under the policy, on their behalf. The terms don't outline a specific builder will or won't be appointed by NHBC. And the terms say NHBC will arrange this. So, by NHBC arranging for the original builder to do the works, they would still be settling a claim in line with what it says they will do under Section 4 of the policy.

Ultimately, NHBC has accepted the claim as valid under Section 4, so whether they arrange for the original builder to carry out the works, or a completely different builder, they are still responsible for ensuring that the claim is settled under the terms.

Mr F is concerned NHBC will pay a cash settlement to the managing agent, rather than to him and the other leaseholders. However, NHBC isn't looking to cash settle the claim or pay a cash settlement to the managing agents and is instead looking to arrange the works via the builder. Therefore, I won't be reaching a decision on Mr F's concerns.

If things change in the future and NHBC seeks to cash settle, then Mr F would be free to raise a new complaint about that with NHBC in the first instance, before referring it to this service in line with our usual rules and timescales. But I won't be making a decision here in respect of something that may, or may not, happen.

Claim history and delays

Mr F says that NHBC should pay him £5,000 compensation for the distress they have caused over a prolonged period since the claim was first made. He also says remedial works can take place from inside his flat, and NHBC can pay him directly what it would cost him to do the works in his flat (along with alternative accommodation costs) to resolve his claim now.

However, as mentioned above, the policy terms give NHBC the discretion whether they cash settle a claim or not. And NHBC is arranging works via the builder, and there is no obligation on them to give Mr F a cash settlement. In addition to this, as mentioned above, the claim is for common parts, so that is parts of the building with responsibility shared by more than just Mr F. Therefore, whilst the common parts directly outside Mr F's flat might be accessible from within it, it is still a common part, so will need to be treated as such, rather than an area which is just Mr F's. NHBC is arranging for the wider (accepted) works for the development, which are shared parts, to be completed instead and this is their choice under the policy.

I acknowledge Mr F is unhappy with the overall time the claim has taken. But as outlined above, my ombudsmen colleagues have considered what happened before 27 February 2024 and awarded compensation where they considered it appropriate. As final decisions have been issued taking into account periods before 27 February 2024, I won't be considering those time periods again here.

Instead, I'm limited to the period after this, up to when NHBC issued their latest final response on 14 March 2024. And I'm not persuaded NHBC has done anything wrong during that time – they reached a claim decision and approached the builder to arrange the remedial works (both of which I think are fair as outlined).

Therefore, for the time period I'm considering, unless anything changes as a result of the responses to my provisional decision, I won't be directing NHBC to pay Mr F further compensation.

Mr F has also asked for NHBC to keep him updated with progress. A previous final decision noted that NHBC had agreed to do that and said that was fair. Our investigator confirmed with NHBC that it already intends to do this as agreed."

So, I wasn't minded to uphold the complaint.

The responses to my provisional decision

NHBC didn't respond to the provisional decision.

Mr F responded. In summary, Mr F said:

- There is nothing in the policy that makes Mr F's claim settlement conditional on putting everyone's policy cover together.
- Mr F questioned where in the policy it says the claim would need to be treated as a common or shared part, and he says the insulation and cavity barriers aren't outside his flat.
- Mr F questioned whether the expert opinion supersedes regulations and referred to when NHBC made a statement during a wider fire safety enquiry.
- Mr F hasn't received confirmation from NHBC that the builder is carrying out works, and by when.

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.

And I've thought carefully about the provisional decision I reached and the responses to it. Having done so, my final decision remains the same as my provisional decision, and for the same reasons.

Mr F raised four points in response to my provisional decision which I've summarised above. However, I've already addressed both points one and two in detail in my provisional decision. And having revisited things, my view on those remains the same, and for the same reasons. So, there isn't anything further I can helpfully add as Mr F's response to the provisional decision has already been addressed in it, with detailed reasoning and explanation. So, I won't reiterate that again in full here.

Mr F has also asked whether the expert opinion is trusted more than regulations, and he's referred to a wider enquiry where NHBC commented on fire safety more generally and historically.

Whilst I note Mr F's comments, I outlined in my provisional decision:

"The Financial Ombudsman Service isn't a qualified expert in building construction, building regulations, or determining fire risk in properties. And it's not my role here to decide whether the experts appointed reached the correct conclusions, as after all, they are experts in their field. Instead, my role is to consider all the information provided, and to decide whether, on balance, NHBC reached a reasonable claim decision against the insurance policy terms."

And I then went on to consider the claim against the terms and conditions for Section 4 of the policy, which is the relevant section the claim is being made against. And in my provisional decision, I explained why I thought NHBC had reached a reasonable conclusion against the terms of the policy, which included taking into account the expert advice they obtained. My final decision on the claim outcome remains the same as my provisional decision and for the same reasons.

It's also not my role to comment on what NHBC may have said during a fire safety enquiry, about their wider operations and what they might have done differently historically. Instead, I've considered the claim against the terms of the policy and explained why I think NHBC reached a reasonable outcome.

Mr F has also said he hasn't received confirmation that the builder has been appointed and when they will be carrying out works by. However, as outlined in my provisional decision, my consideration here is limited to the time period 27 February 2024 to 14 March 2024. Whilst not part of my time period consideration, Mr F did send this service a copy of an email from NHBC in June 2024 in which they outlined the position at that time and the next steps. If Mr F requires an update on the current position, including timescales, he'd need to contact NHBC to ask for this.

My final decision

It's my final decision that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 13 September 2024.

Callum Milne
Ombudsman