

The complaint

Mr and Mrs D are unhappy with the settlement offered by National House-Building Council (NHBC) for a claim they made under their Buildmark policy for damage to their home and building.

What happened

The subject of this complaint is a development comprised of multiple separate properties. Mr and Mrs D are the residents of one of the properties, and the holder of a Buildmark policy covering their property and their share of any common parts.

Mr and Mrs D's complaint has been brought on their behalf by one of the other residents, acting as their representative. For simplicity, any reference to evidence or arguments put forward by Mr and Mrs D, includes evidence or arguments put forward on their behalf, by their representative.

Mr and Mrs D's claim includes remedial work to the common parts of the development, relating to water staining, water ingress, defective cladding fixings and an unidentified banging noise. Because there is damage and defects to the common parts of the development, other residents, in addition to Mr and Mrs D, will also have been affected. But this complaint has been brought solely by Mr and Mrs D, and so this decision only relates to what they are entitled to under their individual warranty. I'll issue separate decisions for the other residents who have brought separate, but essentially the same, complaints.

Mr and Mrs D's complaint includes concerns with delays since the conclusion of a previous complaint, NHBC's insistence on paying a cash settlement rather than completing all the works, and that its investigation into the banging noise was inconclusive.

In addition to the various issues NHBC has accepted are covered under Mr and Mrs D's policy, NHBC's claim investigations identified defective and/or missing cavity barriers within the external walls – a fire safety risk. Mr and Mrs D accept their policy doesn't provide cover for fire safety issues. But they say the works required to correct the issues which are covered by their policy will also address the majority of the fire safety issues, and the cost of the remaining fire safety works will be minimal. They want NHBC to arrange and complete all the works, on the basis the residents will reimburse the cost of the fire safety works.

NHBC says new information about the fire safety issues came to light since its offer to carry out the remedial works which is why it was now seeking to pay a cash settlement. But it offered to stay involved with the process of putting all the required works to tender, to support the residents.

NHBC maintained the investigations into the banging noise were adequate, and that they suggested the planned remedial works to the cladding should resolve the noise. However, should it not, NHBC confirmed it would review matters further at that stage. NHBC did accept that there had been avoidable delays since the conclusion of the previous claim. It offered Mr and Mrs D £150 compensation for this.

An investigator considered Mr and Mrs D's complaint, but he didn't think it should be upheld. He agreed that there had been further unreasonable delays in the progression of the claim since the previous complaint, but he thought NHBC's offer of compensation was fair. He also thought its investigations into the banging noise and its position on this was reasonable.

The investigator didn't think NHBC had acted unfairly by deciding not to carry out the remedial works, given the discovery of the fire safety issues. And he thought NHBC's proposal to cash settle the claim related works, but to stay involved to support the residents with the tendering of all the required repairs was fair.

Mr and Mrs D responded to explain why they felt the investigator's conclusions were unfair. They said the fire safety works required were minor in comparison to the overall works and it wasn't reasonable for NHBC to change its decision to carry out the works when the claim had been ongoing for eight years. They said all the works need to be done together, but it will be disproportionately difficult for the residents to arrange and manage the works in comparison to NHBC. They said the residents were happy to commit to reimbursing the cost of the fire safety works.

NHBC said that at this stage, the extent of the fire safety works required wasn't known as a fire engineer was needed to investigate and establish this. If the fire safety works required were confirmed to be minimal as Mr and Mrs D suggest, NHBC could take over the remainder of the works once the issues were put right – although it suggested this was unlikely as the investigations and required remedial works could prove to be extensive. NHBC maintained that the best course of action was for the residents to accept a cash settlement and arrange all the works themselves – and that NHBC would remain involved and support them with the cost and arrangements of the tender process.

The investigator issued a second assessment which outlined NHBC was willing to consider carrying out all the works, if the residents funded the fire safety works. But at this stage, he explained the scale and cost of those works remained unknown. So, in the absence of the fire engineer report, the investigator said NHBC's offer to cash settle the works covered under the policy and to support the residents with the tender process was fair. But he also said NHBC should honour its offer to carry out the claim related works, if the fire engineer's report proved it was both practical and affordable for the residents to first carry out the fire safety works.

Mr and Mrs D didn't accept our investigator's findings. So, 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.

Having done so, and while I appreciate it will likely come as a disappointment to Mr and Mrs D, I've reached the same overall outcome as our investigator. I'll explain why, addressing what I consider to be the key issues at the heart of this complaint. That means I won't necessarily comment on every single event which took place or issue which has been raised. This isn't meant as a discourtesy, rather it reflects the informal nature of the Financial Ombudsman Service, and my role within it. But I'd like to assure the parties that I have carefully considered everything they have said and provided when reaching my decision.

Banging noise

Mr and Mrs D raised concerns about the acoustic testing NHBC arranged to investigate this issue. They said this needed to take place in warmer months when the banging was most prevalent, but NHBC carried this out in March/April 2023. However, I can see that NHBC was informed by one of the residents that the banging noise was most severe between April and November. So, like the investigator, I don't think it was unreasonable for NHBC to arrange investigations when it did. I'm also mindful that these had already been delayed due to a COVID-19 issue, so I can see why NHBC arranged them as early as possible with the window it was told about.

I can see that the investigations into the banging noise were inconclusive. But NHBC's claim investigator believed the defective cladding fixings were most likely the cause, and so the issue would be remedied by the planned remedial works. NHBC has confirmed that if the remedial work to the cladding doesn't resolve the noise issues, it will investigate further at that stage. I think this is a fair and reasonable position to take at this stage, based on the available evidence.

NHBC's change of position

Mr and Mrs D are unhappy that NHBC previously offered to arrange and carry out the remedial works itself (via a network contractor) but has since insisted on a cash settlement.

Mr and Mrs D made a previous complaint to the Financial Ombudsman Service about NHBC's change of position. In that decision, the ombudsman decided it was unfair for NHBC to insist on a cash settlement on the basis that there *might be* unidentified fire safety issues, because there was no evidence of issues of that nature at that stage. NHBC was directed to carry out additional investigations into whether there were any fire safety issues and to pay compensation.

As already explained, NHBC's subsequent claim investigations have identified fire safety issues – missing and/or defectively installed cavity barriers. And Mr and Mrs D's policy doesn't provide cover for these fire safety issues. So, as the position is fundamentally different now than it was when NHBC offered to carry out the works, in principle, I don't consider it was unfair for it to change its position on how it would settle the claim.

The offer to cash settle

This is, in my view, the real key issue at the heart of this complaint. Mr and Mrs D complain that NHBC is unfairly placing the burden of arranging and managing the claim related works on the residents, on the basis that some minor, non-claim related, fire safety works also need to be carried out.

NHBC's position is that the scale of the fire safety works, and the costs involved, aren't yet known because no fire engineer's inspection has been carried out or report provided. NHBC has agreed to reconsider its position should a fire engineer's report be provided which confirms the fire safety works required are sufficiently minor. But in the absence of such evidence, NHBC believes the works are likely to be fairly significant, and so it doesn't believe it is reasonable for NHBC to take on responsibility for such works when they aren't covered under the terms of the policy.

Mr and Mrs D argue that NHBC is much better placed to arrange and manage works of this scale, and that it should do so for all the required works, with the residents agreeing to fund or reimburse the works required solely for the fire safety issues. Mr and Mrs D have further argued that the fire safety works are minor in comparison to the overall works required and so should be considered as de minimis (insignificant or immaterial).

Initially Mr and Mrs D suggested the fire safety works were likely to cost in the region of £10k. However, more recently, Mr and Mrs D have provided an estimate from a contractor used by NHBC for claims of this nature, which suggests the fire safety works shouldn't amount to more than 10% of the total cost of all the works required. This estimate suggests the total remedial scheme could cost around £550k, meaning the estimated fire safety works would be around £55k. Mr and Mrs D maintain that 10% should be considered de minimis, and that NHBC should have no reason to question the competence of the contractor given NHBC uses them itself.

I shared this contractor's estimate with NHBC for its comments. NHBC highlighted that cost is not the only reason it is reluctant to take on the fire safety works – although it highlighted that £50k was significantly more than the £10k originally suggested by Mr and Mrs D.

NHBC says its main concern with taking on any fire safety works is taking on liability for issues which are simply not covered under the warranty. NHBC did though comment that it wasn't clear from the estimate whether the estimated costs were solely for materials or for materials and labour. And NHBC pointed out that the estimate made it clear that a fire engineer's report was still required – meaning the final scale, extent and cost of the fire safety works remained unknown as the estimate was subject to change.

Based on the above, NHBC maintains its position is fair. That is, it will cash settle the works which are covered under the policy but will remain involved in the process as well as covering the cost of a consultant and putting the works to tender.

I've thought carefully about all the evidence and arguments here. And having done so, I don't think NHBC's position is unfair or unreasonable. I say this because there is no cover under Mr and Mrs D's policy for the fire safety issues present. So, if I were to direct NHBC to take responsibility for the issues, I'd be directing it to take on responsibility for a risk it never intended to be responsible for. Were I to do this, NHBC would then inherit responsibility for issues with the works carried out, meaning a continued liability for those fire stopping materials following conclusion of the claim. I don't think this would be fair in the circumstances. I also don't think it would be fair to expect NHBC to project manage non-insured works on behalf of the residents, as this falls outside the scope of its responsibilities as the warranty provider.

I do appreciate Mr and Mrs D's argument that NHBC are better placed to arrange and manage the works given their expertise and network of contractors and experts. But as the fire safety issues aren't covered under the policy, and as there still hasn't been a fire engineer report to properly identify the extent of the works required, I think it would be unfair and unreasonable to direct NHBC to take on responsibility and ongoing liability for the fire safety works.

Mr and Mrs D's policy is clear that NHBC can decide whether to settle a claim by arranging the works or by paying a cash settlement. And while it might not always be fair to allow NHBC to stick rigidly to the terms of the policy and to cash settle large or complex claims, in these particular circumstances, I do think it is fair for NHBC to cash settle the claim related works. Particularly because some of the required works will overlap with the fire safety works, and so having all the works carried out at once will be the most cost effective and minimally disruptive solution. I also note that NHBC has committed to remaining involved in the process, covering the cost of a consultant and putting the works to tender. I think this offer is fair and reasonable in the circumstances.

That said, NHBC has previously agreed to consider the practicality of allowing the residents to fund the fire safety works first, before then taking on and carrying out the claim related works (via one of its contractors). But it can only do this once the full scale of the fire safety works is known – i.e., once a fire engineer's report has been completed. So, should this report be able to be completed and provided to NHBC within a reasonable period of time, and should it show that a solution to the fire safety issues is both practical and affordable for the residents to complete within a reasonable timeframe, I'd expect NHBC to honour this offer. However, should no fire engineer's report be provided within a reasonable time, or should the cost or complexity of the fire safety works prove such that the residents cannot arrange to have it carried out promptly, then I think NHBC can fairly and reasonably cash settle the claim related repairs.

Delays and compensation

It's not in dispute that there have been some avoidable delays since the conclusion of the previous complaint. The acoustic testing into the banging noise needed to be postponed for several months due to a COVID-19 risk with one of the residents who preferred it to be rescheduled. Clearly this isn't solely the fault of NHBC. But there were some delays in rearranging the testing which NHBC has accepted responsibility for.

NHBC has apologised for the delays its responsible for and offered to pay Mr and Mrs D £150 compensation. Taking into account the period of delays which can reasonably be attributed solely to NHBC and the impact these delays, in isolation, have had on Mr and Mrs D, I think NHBC's offer of compensation is fair and reasonable.

Mr and Mrs D have also argued that the costs involved in rectifying the fire safety issues will have increased as a result of delays which NHBC is responsible for. They feel NHBC should cover that element of the fire safety works as compensation for consequential losses flowing from its delays.

I've thought carefully about this argument, but I'm not persuaded it would be fair to conclude that NHBC is solely responsible for the hypothetical increased cost of completing the fire safety works. I say this because, even had NHBC not caused some delays between the conclusion of the last complaint and now, I think Mr and Mrs D would still have pursued their complaint about NHBC's refusal to take on the fire safety works to the point of my final decision. So, even notwithstanding the delays, I don't think we'd be in a fundamentally different position now. Therefore, it wouldn't be fair to conclude that it's solely NHBC's actions which have resulted in the costs of the fire safety works increasing, or to direct it to cover those hypothetical increased costs.

Putting things right

NHBC has agreed to consider the practicality of allowing the residents to fund the fire safety works first, before then taking on and carrying out the claim related works – subject to receipt of a fire engineer's report. So, if this report is completed and provided to NHBC within a reasonable period of time, and if it shows that a solution to the fire safety issues is both practical and affordable for the residents to complete within a reasonable timeframe, I'd expect NHBC to honour this offer.

However, if no fire engineer's report is provided within a reasonable time, or if the report demonstrates that the cost or complexity of the fire safety works means the residents cannot arrange to have it carried out promptly, then I think NHBC can fairly and reasonably cash settle the claim related repairs – as it has already offered to do - provided it also fulfils its offer to remain involved in the tendering process.

NHBC should also pay Mr and Mrs D £150 compensation for the distress and inconvenience it has caused them – if it hasn't done so already.

My final decision

National House-Building Council has offered to settle the complaint by doing what I've set out under the 'Putting things right' section above – and I think this offer is fair in all the circumstances.

So, my decision is that National House-Building Council must do as I've set out under the 'Putting things right' section.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs D to accept or reject my decision before 29 November 2024.

Adam Golding
Ombudsman