

complaint

Mr R is unhappy about the time it's taken for the National House-Building Council ("NHBC") to repair the outside wall of his property and remove the efflorescence affecting the balcony. Mr R is represented in his complaint by his uncle, Mr O.

background

I issued a provisional decision on this complaint on 11 August 2020 explaining that I was intending to partially uphold Mr R's complaint.

Here's what I said in my provisional decision:

background

On 5 October 2016 Mr O contacted NHBC to report damage to the property. NHBC confirmed the property was covered under the warranty until November 2016 and said the repair of the cracked render would be covered by the policy.

The property was inspected, and a report issued on 14 November 2016 confirming the original builder would repair the cracked render. The works were completed in February 2017, but Mr O wasn't happy with the quality of the works. In April 2017, NHBC assessed the repair and agreed it wasn't up to standard. Recommendations were given to the builder as to how to properly repair the render.

In October 2017 NHBC took over settlement of the claim because the builder had failed to properly progress matters. NHBC contacted Mr O to arrange for repairs to take place in April 2018 – because certain weather conditions were required for the works – but further delays followed.

The works haven't been progressed between April 2018 and the current time, due to various circumstances occurring. NHBC hasn't been able to obtain updates from their contractor for months at a time and Mr O has continued to insist that the works take place at a particular time of year. Mr O also had sensitive personal circumstances in 2019 which meant he didn't feel able to progress matters, so NHBC say they'd left it with him to contact them to arrange a time for the works to start.

Mr O brought the complaint to our service in January 2019. In October 2019, one of our investigators began looking into his complaint. Mr O said he didn't have the time last year to deal with the claim as during the summer of 2019 he was taking care of his father, who passed away in August 2019. Mr O said he was looking for increased compensation for the ongoing delays in having the works completed, and for the loss in rent due to the tenants not being able to make use of the balcony. He's also complained that NHBC hasn't sorted out the efflorescence in the balcony, which he thinks should be covered by the warranty.

In November 2019 NHBC sent us a copy of the title and pointed out that Mr O was not the property owner, although in his communications with them, he'd talked about the property as if he was owner. Our investigator contacted Mr R, the owner who said that Mr O was his uncle and was representing him in the complaint.

NHBC investigated the further delays that had occurred from October 2018 to November 2019 and issued a further final response letter to Mr O on 19 November 2019 not upholding his complaint. In that FRL they said that it had been agreed works would commence in spring 2019, following their last final response letter, but due to Mr O's personal circumstances he hadn't been able to provide a date for repairs to start. They said that their contractor had been in contact with Mr O at regular intervals and had asked that he get in contact when he felt able to schedule the works.

With regard to the issue of efflorescence, NHBC explained that it's a type of white deposit found on masonry and is formed when water reacts with the natural salts contained in the construction material and mortar. They said that the water dissolves the salts, which are then carried out and deposited onto the surface by the natural evaporation that occurs when air comes into contact with the surface of the brick. Efflorescence is not considered a defect, because although it's unsightly, it is harmless and in NHBC's view should be left to weather away by itself. As it's not considered a defect, it's not covered under the terms of the Buildmark Policy.

Mr O didn't accept the conclusions reached by NHBC. He said the efflorescence was caused by the last unsatisfactory repair and although cleaned in February 2019, it had now returned.

Our investigator issued her first view on the complaint in January 2019. She concluded that the £500 compensation offered by NHBC was sufficient to compensate Mr O for the delays in completing the works up to October 2018. She also concluded that the efflorescence was not covered by the policy as it was naturally occurring, rather caused by a defect, and there was no evidence that it was caused by the builder when the first repair was carried out.

Mr O didn't agree with our investigator's view and provided additional information to be considered. Our investigator issued a second view on 26 February 2020, explaining that NHBC's contractors cleared the efflorescence in February 2019 as a goodwill gesture, but that wasn't covered by the policy so she wouldn't be upholding that part of the complaint. She explained that NHBC had offered an additional £250 in compensation for the delays from October 2018 to the present time which she thought was fair. Finally, our investigator requested that Mr O provide NHBC with some dates in April 2020 for the works to commence.

Mr O still didn't agree with our investigator's view and asked for an ombudsman's decision on the complaint.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

It's not in dispute that delays have occurred in the settling of this claim, which have caused inconvenience to Mr R, which he should be compensated for. NHBC has offered £750 compensation, which our investigator concluded was fair and reasonable in the circumstances. What remains for me to decide is the degree to which the delays were caused by NHBC's actions, and whether the compensation should be increased to reflect that. But before I go on to do that, I first need to

address a point of clarification which has an impact on the provisional conclusions I'll reach on the amount of compensation due.

The nature of Mr O's communications with NHBC and our service, have incorrectly led to him being treated as the homeowner. In fact, Mr R is the policy holder and homeowner. So, in considering any distress or inconvenience that NHBC's actions have caused, I can only take account of the impact on Mr R, who is NHBC's customer. I have no power to require NHBC to pay compensation to a third party, such as Mr O.

Mr O has told us that he's had to spend a lot of time trying to resolve this matter but as he's a third party to this complaint, I can't take account of the inconvenience he's suffered, when deciding what compensation may be due from NHBC.

Mr O has also said he feels that he (meaning Mr R) has lost out on some rent, because he hasn't been able to increase the rent while this matter has been ongoing. However, before I can award compensation for loss of rent, I'd need to be provided with evidence of actual loss, which I haven't currently seen. Rather, it seems to me that Mr R decided not to increase the rent while the repair was unresolved. That decision isn't something NHBC is responsible for.

I also note that Mr R was represented at all times, during the period of the claim and subsequent complaints to our service, by Mr O. This will have lessened the impact of NHBC's actions on him, directly. However, given the claim has been ongoing for nearly four years, I accept that the delays have caused Mr R some inconvenience. So, I've next considered who caused the delays, and whether NHBC should pay additional compensation to Mr R for the impact those delays have had on him.

After the claim was made, in late October, a report on the repairs was issued by mid-November 2016 and the works were completed in February 2017. Given the works needed to be completed in particular weather conditions, I'm satisfied that the claim was progressed within a reasonable time at this early stage. However, from this point delays began to occur.

Mr O complained about quality of the repairs and the appearance of the finish that had been achieved. In April 2017, NHBC agreed that the works needed to be redone by the builder. No progress was made with the repairs up to October 2017, when Mr O expressed concern about the work being completed during the winter, and following a request from him, in November, NHBC agreed that the works be delayed until spring 2018.

In late April 2018, NHBC's new contractor contacted Mr O to arrange a time to start the repair works. But in July 2018, the works were delayed as the weather was too hot. Then in October 2018, Mr O again said that, on the basis of the weather cooling down, the works should be delayed until spring 2019. He also raised the issue of the efflorescence and asked who would remove it that from the balcony. The contractor attended the property in February 2019 to clean the efflorescence and deliver the render samples to Mr O.

At the end of May 2019, the contractor informed NHBC that Mr O had chosen the colour for the render and the works were to be scheduled for early June. In October the contractor confirmed that due to Mr O's circumstances, the work hadn't been

arranged yet. In November the contractor advised that due to Mr O's personal circumstances, he didn't feel it was fair to push Mr O to commit to a date for the works to be done so had left it with him to contact them when he was ready.

Mr O has denied being contacted with any sort of regularity by NHBC or its contractors. However, he hasn't provided any evidence to support that. NHBC have provided their contact log and details of emails and calls that were made throughout this period. Having weighed up the available evidence, I'm currently of the view that throughout its handling of the claim, NHBC most likely did make regular attempts to communicate with Mr O.

I also note that although NHBC was willing to have the repairs done in the autumn or winter, each year Mr O insisted that the works be delayed to the following spring. Given that once the paint had been ordered, the works would only take a day, I think that Mr O's actions led to some avoidable delays.

However, I also note that there were several months during the winters of 2017 and 2018 and the summer of 2019 when NHBC didn't seem able to contact their own contractors to progress the settling of the claim, which I consider also led to avoidable delays.

If Mr O had cooperated sooner with NHBC, by making himself available to view the samples, and by providing dates for the works to commence, then I think the day's work could possibly have been completed by the end of October 2017, weather permitting. And although NHBC's actions have contributed to the overall delay, I can't hold NHBC responsible for the delays caused by Mr O. These delays continued into 2019, when Mr O wasn't able to progress the matter due to his own personal circumstances. Although I'm sorry to hear of the situation Mr O was in, the claim was Mr R's to make, and he could have appointed another representative to progress matters for him during that time.

In considering the impact of the delays on Mr R, I've thought about what the consequences were for him, of not having the works completed. In February 2017 the render was repaired – just not to an acceptable decorative standard. There is no suggestion that any further damage occurred to the property as a result of the sub-standard repair – it appears to have been a cosmetic matter. Nor do the outstanding works appear to have prevented Mr R from letting the property.

So, it seems to me, taking account of the avoidable and unavoidable delays, the main impact on Mr R of the works not yet being completed, is the extra time he's had to spend, over the last four years, communicating about this matter with Mr O or NHBC and the inconvenience of having the matter unresolved. And I'm currently of the view that the offer of compensation NHBC has made, of £750 is fair and reasonable in the circumstances of this complaint.

I've next considered Mr O's request for NHBC to remove the efflorescence under the terms and conditions of the policy. Mr O first raised his concerns about the efflorescence with NHBC in October 2018, which was approximately 11 months after the term of the policy expired. He argued that the efflorescence was caused by the builders who completed the first repair in February 2017.

However, NHBC's disputed that and provided a detailed explanation of how efflorescence comes to appear on external parts of a building. Having considered the contradictory points of view, I find NHBC's explanation to be the most persuasive, so I don't accept it was caused by the builder's actions. And, even if Mr O could provide evidence that he'd raised the issue with NHBC before the end of the policy term, as our investigator explained, the cover provided under years 3 to 10 of the policy, is only for damage caused by a defect. The definition of "defect" doesn't include damage caused by a naturally occurring process. So even if NHBC had been notified of the efflorescence during the policy term, they wouldn't be responsible for taking any steps to remove the efflorescence under the terms of Mr R's policy. So, I'm not currently minded to uphold this element of Mr R's complaint.

I said I was intending to conclude that NHBC's offer to pay £750 to settle the complaint was fair in all the circumstances.

NHBC responded to say they felt the provisional decision set out an accurate reflection of the events and they had no further comments to add.

Mr O spoke to our investigator to say he didn't agree with the provisional decision. He explained that:

- he felt that I'd made assumptions rather than relying on facts and evidence;
- he disagreed with my suggestion that he had in any way delayed the completion of the works. He said he regularly tried to contact NHBC and asked them to do the work;
- he feels it's unfair that I haven't taken into account the fact that he wasn't able to increase the rent due to the efflorescence;
- he remains of the view that the efflorescence is a defect caused by NHBC's "substandard" repairs, and not due to any natural causes;
- he's unhappy the work still hasn't been completed and says NHBC hasn't been in touch with him at all during this time. He appreciates that everything was closed during Covid but he would have liked to at least receive an update from NHBC; and
- for a number of personal reasons, the last few months have been very difficult for him.

Mr O followed up with an email and added the following:

- he feels that I've caused injury and hurt to his feelings by saying he'd caused delays;
- NHBC didn't contact him until September 2019 to show him a sample of the render;
- he wanted to clarify for the record that he has never directly asked for any compensation to be awarded for himself, and he is acting as Mr R's agent / representative which he is charging him for; and
- he hasn't increased the rent due to the ongoing problems and he doesn't feel he should have to prove that.

Mr O also said, in relation to the efflorescence, he believes the fact that NHBC had their contractor clean off the efflorescence indicates liability and he also doesn't believe that I'm qualified to make the comments I made in relation to the efflorescence. He said I should be asking why the NHBC got their contractor to clean it if they were not responsible for it in the first place. Mr O has provided photographs from before and after the efflorescence and residue appeared. He said that it was only after the NHBC contractors carried out their work that they had the "unsightly and unacceptable problem".

Mr O disputes that NHBC asked him to liaise with their contractor directly and requested a copy of all correspondence from NHBC in relation to this issue – which our investigator provided. Mr O said that the contractor only got in touch with him in October 2019 when he called to choose a colour and he said work would start in two weeks, but he didn't make contact again. He said he never advised the contractor that the work should start next spring. He doesn't believe the contractor has anything to do with him and he denies it was agreed that they would agree a schedule between themselves. On that point, NHBC responded to say that the contractor is best placed to make the arrangements directly with Mr O, rather than communications going via the NHBC.

Mr O also said there must be a cut-off date for the work to be satisfactorily completed, and further compensation should be paid for the continuing delays. He added that the contractors could come whenever they wanted to, they just needed to notify him of a date. Finally, Mr O said that if the efflorescence / residue builds up on the new coating, the NHBC will need to rectify the problem, and if they fail to do so, he will come back to our service.

NHBC have said that it was Mr O's choice to wait for the complaint to be resolved, rather than having the works done in the meantime. They've added that it's not uncommon for works which aren't in dispute to be completed while a complaint is being considered, and then once the ombudsman's decision has been issued, any other work required would be done.

As I hadn't set out a proposed timeframe for the works to be done, in my provisional decision, I emailed both Mr O and NHBC with the following wording, to request their comments on:

"I require NHBC to arrange for their contractor to contact Mr R or his representative, as soon as possible and within two weeks from the date that NHBC is notified that Mr R has accepted this final decision, to agree a start date and period of time within which the works at Mr R's property at 115 Hurstbourne Crescent will be completed (taking account of appropriate weather conditions). NHBC is to then arrange for their contractor to complete the outstanding works, as set out in this decision, during that agreed period of time (subject to appropriate weather conditions being present during the agreed time). If the works need to be postponed because the predicted weather during the agreed period changes so as to prevent the works being done, then NHBC is to arrange for their contractor to contact Mr R or his representative to arrange a new date for the works to be done, at their earliest opportunity, taking account of the weather."

NHBC responded to say they were generally satisfied with the proposed wording, but also asked that I address any difficulties that may arise, in arranging a time, due to national or local lockdowns, or cancellation of appointments by the homeowner or his representative.

Mr O replied to say they agree that there needs to be a timescale of when the work needs to be completed by. He also said he'd also appreciate it if I would look at the efflorescence issue because he remains of the view that if that is not resolved, it will run down the new work, which will then have to be redone.

I've taken these additional comments into account in making my final decision.

my findings

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, I've come to substantially the same conclusions as those reached in my provisional decision. I will explain why, under the following headings: "*Efflorescence*"; "*Compensation for delays*"; and "*Completion of works*".

Efflorescence

I've carefully considered Mr O's additional evidence regarding the efflorescence and NHBC's liability to remove the efflorescence, on the basis that it was caused by the actions of their contractors.

On the one hand, I have a detailed explanation from NHBC of how efflorescence comes to appear on the external parts of a building. This was included in their final response letter to Mr O dated 19 November 2019. They said that "*efflorescence is a type of white deposit found on masonry and is formed when water reacts with the natural salts contained in the construction material and mortar. The water dissolves the salts, which are then carried out and deposited onto the surface by the natural evaporation that occurs when air comes into contact with the surface of the brick*". NHBC also added that efflorescence isn't considered to be a defect that would be covered by the policy. Having reviewed the policy terms and conditions, I agree that the appearance of the efflorescence itself wouldn't be covered by the policy. However, if it was caused by NHBC's contractors in the course of carrying out other repairs to the property, then I would be minded to require NHBC to deal with the efflorescence.

On the other hand, Mr O has said the efflorescence was caused by NHBC's contractors when they were carrying out works in 2017, so it should therefore be removed by NHBC. In response to the provisional decision Mr O provided photographs from before and after the efflorescence and residue appeared. He said that it was only after NHBC's contractors carried out their work that "*they now had the unsightly and unacceptable problem*". Mr O also said that the fact NHBC had their contractor clean off the efflorescence indicates liability. I've thought about Mr O's argument here, and while that could be one explanation, another equally plausible explanation is that NHBC agreed for the work to be done as a gesture of goodwill. The other concern Mr O had, in relation to my provisional findings on the efflorescence, was that he didn't believe I was qualified to comment on the efflorescence. However, my role isn't to provide technical expertise on efflorescence. As the decision maker, my role is to weigh up the evidence provided by both parties to the dispute and decide which evidence I find to be the most persuasive, which is what I am doing in this decision.

I accept the photos do demonstrate that efflorescence and residue have appeared on the exterior surface of the property as described by Mr O. However, the evidence provided isn't sufficient to persuade me that the appearance of the efflorescence was caused by the actions of NHBC's contractors. Where the evidence is inconsistent, as it is here, I make my decision on the basis of the balance of probabilities, that is, what is most likely to be the case. And taking everything into account, I think it's more likely that the efflorescence naturally occurred in-line with the explanation provided by NHBC.

So, for these reasons, I'm neither persuaded that the efflorescence was caused by NHBC's contractors, nor that the removal of the efflorescence is covered by the policy terms and

conditions. It follows that I won't be asking NHBC to take any further action in relation to the efflorescence.

Compensation for delays

Before addressing this second element of the complaint I would first like to apologise to Mr O for any upset he was caused by my discussion of the delays in having the works done, in the provisional decision. I would also like to offer my condolences for the bereavements he's suffered during the current pandemic. I understand that it has been a very difficult time for him. I'd like to clarify that the reason for referring to delays that weren't due to the actions or inaction of NHBC or their contractors, was to help explain why I'd reached the conclusion that compensation in the sum of £750, was sufficient. I can only award compensation for avoidable delays caused by NHBC, so I set out the factors leading to the overall delay but clarified that not all of the delays were caused by NHBC.

I've explained the timeline of events in some detail in my provisional decision, which is repeated in the background to this final decision, so I don't intend to repeat that again here. But I will respond to one comment made by Mr O about not being contacted by NHBC in relation to having the works done. Our investigator sent Mr O excerpts of contact notes and emails provided by NHBC. That evidence confirms NHBC or their contractors did try to contact Mr O on a number of occasions between 2017 and 2019 to seek to progress the works. I don't think they did enough to make sure the works were done within a reasonable timeframe, which is why I consider the offer of £750 compensation is appropriate to recognise that NHBC could have managed the claim better.

However, having considered all of the evidence afresh, I remain of the view that £750 is sufficient to compensate Mr R for the impact the delays have had on him.

Mr O has expressed the view that the contractors could attend the property at any time to carry out the works. However, as the property is tenanted, it wouldn't be appropriate for the contractors to turn up unannounced to complete the works.

Mr O also felt that further delays had been caused by NHBC waiting for the outcome on this complaint, before completing the works. NHBC disagreed and said that they were happy to complete the agreed works and await my decision on the outstanding works in dispute.

Throughout the complaint, Mr O has said that the efflorescence needs to be addressed, or the issue will recur, leading to another complaint being made. So, Mr O's request for the works to be done has been conditional on the efflorescence also being addressed, which is one of the main issues in dispute.

I've thought carefully about this, but I don't think that any additional compensation needs to be awarded for further delays in having the works completed. I say this because the works Mr O wants to be done, and the works that NHBC are willing to do, are different, and the key issue in dispute here. So, I don't think it unreasonable for NHBC to await a decision on what works they are required to do, before starting the works.

Date to complete works

As the repair to the render needs to be done in the right weather conditions, it isn't possible for me to set a specific date by which time the repair works to the render need to be completed. However, NHBC does need to complete this claim, and Mr O and Mr R need to

co-operate with NHBC's contractor in arranging a suitable time for the works to be done, and then allow the contractor to do the works at that agreed time.

In partially upholding this complaint, I require NHBC to arrange for their contractor to contact Mr R or his representative, as soon as possible and within two weeks from the date that NHBC is notified that Mr R has accepted this final decision, to agree a start date and period of time within which the works at Mr R's property at 115 Hurstbourne Crescent will be completed (taking account of appropriate weather conditions, and any restrictions arising from any local or national lockdown relating to the covid-19 pandemic). NHBC is to then arrange for their contractor to complete the outstanding works during that agreed period of time (subject to appropriate weather conditions being present during the agreed time). If the works need to be postponed because the predicted weather during the agreed period changes so as to prevent the works being done, or additional local or national lockdown restrictions come into force, or Mr R or his representative cancel the appointment, then NHBC is to arrange for their contractor to contact Mr R or his representative to arrange a new date for the works to be done, at their earliest opportunity, taking account of the weather and applicable lockdown restrictions.

As I'm only upholding this complaint in part, Mr R may choose not to accept the decision. If Mr R doesn't accept this decision, then it won't be legally binding on him and he will be free to pursue the resolution of his complaint outside of this service.

my final decision

My final decision is that the National House Building Council have made an offer to pay £750 to settle the complaint and I think this offer is fair in all the circumstances. So, the National House-building Council should pay £750 to Mr R and arrange for their contractor to make contact with Mr R or his representative in accordance with the direction included above to complete the works and settle Mr R's claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 12 December 2020.

Carolyn Harwood
ombudsman