

## **complaint**

The leaseholders of a block of flats complain that National House-Building Council (“NHBC”) declined two parts of their claim on their building warranty.

All the leaseholders in the block are party to this complaint.

Throughout this claim and complaint all leaseholders have been represented by the directors of the building management company, that I will refer to as W. For ease of reading all references to W refer to the actions of the directors, on behalf of all leaseholders.

## **background**

W is the management company for a block of 56 flats. The building came with a ten-year building warranty provided by NHBC. From around 2015, W experienced problems in the common areas of the building, that led to it raising a number of claims under section 3 of the warranty.

In 2018 W raised another claim that encompassed a number of different issues. NHBC investigated the claim and accepted some elements of it. However, it declined W’s claim for defects relating to the walls around the fire doors and the roof of the building.

In relation to the fire doors, it said while it agreed there were defects with the walls surrounding the doors, there was no physical damage. And it is a condition of section 3 that both are present for a claim to be accepted.

In relation to the roof, NHBC said it declined the claim as flat roofs are excluded from warranty cover.

W didn’t agree with these declinations and made a complaint. It said it disagreed with NHBC’s interpretation of the term ‘physical damage’ and felt that a reasonable interpretation would support there being physical damage to the walls around the fire doors. It also felt the claim should be considered under section 4 of the warranty as the defect presents a fire risk.

W also said that while flat roofs aren’t specifically mentioned as being covered under the warranty, ‘load bearing walls’ were. And it felt the roof would meet the definition of a load bearing wall.

NHBC didn’t uphold W’s complaints so it brought it to this service.

Our investigator didn’t uphold the complaint. He said in order to meet a reasonable definition of physical damage, there needs to be tangible damage to the property. And he didn’t agree that the walls that surround the fire doors displayed any tangible damage caused by the defects. Further he said that as NHBC hadn’t carried out building control on the building, section 4 of the policy wouldn’t apply.

He also didn’t agree that the roof of the building would meet a reasonable definition of a load bearing wall. And as flat roofs aren’t listed as part of the inclusions of the warranty, it was reasonable that NHBC declined this part of the claim.

W didn't agree with our investigator's opinion. It said that the warranty specifically covers 'load bearing parts of the roof' and felt the roof falls into this definition. It referred to an expert opinion and a recent court case that it felt was relevant.

In relation to the walls surrounding the fire doors, W didn't agree there wasn't tangible physical damage. It said a reasonable definition that had been used in a recent court case against an insurer defined physical damage as 'a material difference in the physical condition of the new home from its intended physical condition' and felt the gaps around the doors fitted this definition. So it was reasonable to say there was both a defect and damage.

W asked for its complaint to be reviewed by an ombudsman.

### **my provisional findings**

When the complaint came to me, I came to a different outcome to our investigator. So I wrote to both W and NHBC to explain my findings.

I agreed that W had done enough to show there was both a defect and physical damage present on the main and tank room roof of the building. And I thought that W made a compelling argument as to why this would reasonably be covered under the warranty. Following discussions with NHBC, whilst it didn't agree the roof was covered by the policy, it offered to carry out the required repairs to rectify the defects to the roof highlighted in the complaint, as a gesture of goodwill. I was satisfied this was fair.

However, I agreed with our investigator that NHBC had acted fairly by declining the claim for the walls surrounding the fire doors. For a claim to be successful under section 3 of the warranty, there needs to be both a defect and physical damage. And while I agree there is a defect – the gaps around the doors, I haven't seen anything to show that this has caused any physical damage.

W has said it doesn't agree with the definition of 'physical damage' that has been applied by NHBC when assessing the claim. It has proposed other definitions that it says show there is physical damage.

When there isn't a definition listed in a policy, this service considers a reasonable definition of the term and phrase. I agree with our investigator that in order for there to be physical damage, there needs to be tangible damage to the property as well as a defect. And I've not seen anything to show that the defect has caused any tangible damage.

W has said that a reasonable definition of physical damage can be taken from a recent court case in which it was defined as '*a material difference in the physical condition of the new home from its intended physical condition.*' However I don't agree this would reasonably apply here. NHBC's warranty states that both a defect and physical damage need to be present in order for a claim to be successful. It's therefore reasonable to conclude that the definitions of these two terms need to be sufficiently different. I don't consider the definitions of physical damage proposed by W to be sufficiently different from that of a defect. So I don't agree the application of this definition would be a reasonable reading of the wording of the warranty.

### **response to my provisional findings**

W responded to my provisional findings and agreed to the proposals. However, it raised concerns about the timescales for the work being carried out, due to previous delays it has experienced. It also requested to use its own contractor to carry out the repairs to the roof.

NHBC responded to confirm it would agree to cover the repairs to the roof.

### **my findings**

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

As neither party has offered any further comment on the walls around the fire doors, I see no reason to depart from my provisional findings on this point. So, I won't require NHBC to do anything further in relation to this part of the claim.

Regarding the claim for the roof, I have considered W's comments about the timescales for the repair work. While it isn't possible to guarantee when work will be completed, as it can be delayed due to circumstances outside of NHBC's control, I understand the need to ensure the next steps are carried out promptly. Particularly due to the length of time the claim has been ongoing. I proposed that timescales are agreed for the commencement and completion of the work. Both NHBC and W have agreed to adhere to the following timescales, unless NHBC are prevented from doing so due to unforeseen circumstances:

- NHBC will make contact with W within two weeks of the acceptance of this decision to arrange a date for the investigatory work.
- The date for investigations to begin should be arranged within the three months after this contact.
- Repairs will then be completed within six months of the investigatory work finishing – subject to unforeseen factors that prevent this, such as adverse weather.

I have also considered W's request that repairs are carried out by its chosen contractor, but I don't think it would be fair to require NHBC to cover the cost of this. NHBC work with a small number of contractors who are familiar with its policies and work at agreed rates. So, I think it's reasonable that it instructs one of its panel to carry out the investigatory work and repairs.

For these reasons, I maintain my provisional decision that NHBC should carry out the required investigatory and repair work to the main and tank room roof of the building, using its appointed contractors and based on the timescales above.

### **my final decision**

For the reasons I've given, I uphold W's complaint. I require National House-Building Council to:

- Identify and repair any current defects that are found to be causing the issues raised in this complaint relating to the main roof and tank room roof of the building.
- Carry out repairs where there is found to be a defect relating to issues raised in this complaint – this is limited to addressing problems with water ingress, water drainage and water proofing of the tank room and main roof. Repairs will be to address these issues and bring the roof in line with NHBC building regulations.
- Repair any damage caused by the identified issues to the flats or common areas directly below the affected roofs.
- Appoint its own contractors to carry out the investigatory and repair work.

- Adhere to the timescales laid out in this decision, unless it is prevented from doing so due to unforeseen circumstances.

Under the rules of the Financial Ombudsman Service, I'm required to ask W to accept or reject my decision before 4 September 2021.

Sophie Goodyear  
**ombudsman**