

complaint

Mr G complains about National House-Building Council's ("NHBC") handling of his building warranty claim.

Background

Mr G contracted with a builder to build his new home. The home was completed in February 2002. NHBC issued its *Buildmark* building warranty around the same time.

Mr G first notified NHBC that there were problems with the construction and finish of his house in September 2003. Because he'd notified his claim within the first two years, NHBC considered it under section 2 of the policy, '*The first 2 years after completion*' (the builder's liability period). NHBC arranged to visit the property and to assess if the claim was suitable for NHBC's Resolution Service (the voluntary resolution service offered under section 2 of the policy).

NHBC was initially reluctant to offer this Resolution Service due to an ongoing contractual dispute Mr G had with the builder. There were also defects noted on Mr G's list which NHBC said were unsuitable for its Resolution Service. NHBC also asked Mr G for information about the building contract so it could decide whether it should consider the dispute. But, in July 2004, Mr G decided he didn't want to give this information to NHBC and subsequently decided not to pursue his dispute through its Service.

It wasn't until November 2006 that Mr G contacted NHBC again about the claim, having instructed solicitors to act on his behalf. They told NHBC that Mr G now wished to pursue a resolution through its service. NHBC said that due to the time that had passed it didn't feel Mr G's case was suitable for it. In addition, the builder's liability period (Section 2) had also now passed.

Mr G's solicitors disagreed and provided information to show issues with the floor joists had been raised during the first two years of the builder's liability period. Ultimately, NHBC agreed to consider the problem reported with the floor joists.

But it said it couldn't provide cover or assistance in relation to any contractual dispute between Mr G and the builder. It also said that it wouldn't consider any problems with the windows at the house. This was for two reasons: because Mr G hadn't raised this issue within the first two years and problems with windows weren't covered under Section 3 (which provides cover for years 3 to 10 after completion).

NHBC visited Mr G's property and completed its Resolution Report in September 2007. The report was confined to problems with the floor joists and was sent to Mr G's solicitors and the builder. NHBC chased the parties for an update on its suggested resolution on several occasions in the next two years but, it wasn't until November 2009 that Mr G's solicitors asked NHBC to re-visit the claim.

In 2012 Mr G's new solicitors contacted NHBC who agreed to look at the claim again. This resulted in a further Resolution Report being completed in October 2012 which instructed the builder to complete remedial (engineered) works to the floor joists by February 2013. There then followed discussions between NHBC and the builder about its liability for the works and, in October 2013, the builder said it wouldn't comply with the report because it wasn't liable

for any damage (believing it to be the result of a faulty design rather than faulty workmanship) and it considered the claim was now time-barred.

In January 2014, NHBC took over liability for the claim from the builder. It told Mr G's solicitors that it intended to cash settle the claim. It said it needed to make a further visit to the property so a tender document could be prepared, and quotes obtained. NHBC had no response to this proposal until June 2014 and the visit took place that September. NHBC's engineer recommended that new metal joists be installed throughout the first floor. Mr G's solicitors continued to enquire about which defects were going to be covered – in particular the problems with the windows – and why indemnity wasn't being provided under the *Buildmark* policy.

In April 2015, Mr G's solicitors made a complaint to NHBC. They complained about the lack of clarity from NHBC about why it wouldn't indemnify Mr G in full. They also said that in March 2015, NHBC had told Mr G it would meet the significant costs he'd incurred when instructing experts. They said NHBC had since denied giving this assurance. NHBC replied and fully explained what would happen going forward. It said it would allow Mr G to nominate two contractors which NHBC would then invite to tender. It would then calculate from this information an amount to offer Mr G as a cash settlement. There would then be ongoing contact about associated costs such as alternative accommodation.

NHBC also said that in respect of the additional items Mr G had raised, namely the windows and rainwater goods, it had consistently said that they weren't suitable for its Resolution Service. It said there'd also been contractual and legal disputes which would've made its simple dispute Resolution Service inappropriate for certain other issues. It said it wasn't liable under section 2 or section 3 of the *Buildmark* policy for these issues. It acknowledged that the matter had taken a very long time but didn't think it was at fault for all the delays. Insofar as it was, it said it would pay £500 compensation to Mr G for any distress and inconvenience caused.

Unhappy with this outcome, Mr G complained to this service. Our adjudicator investigated the complaint but didn't think it should be upheld.

He concluded that because NHBC's Resolution Service wasn't regulated, it was outside of this service's jurisdiction. So, he said he couldn't look at whether NHBC's decision to limit its Resolution Report to the floor joists alone was fair. He noted that when NHBC ultimately took over liability for the claim from the builder, there were periods when NHBC caused some delay, but was satisfied that it needed to exhaust the possibility of the builder remedying the defects before it could calculate what any settlement may be. He thought that NHBC's offer of £500 compensation for these delays was fair. Our adjudicator also thought NHBC had no contractual liability to meet the costs Mr G had incurred instructing experts.

Mr G's solicitors responded to our adjudicator's view. They said:-

- we did have jurisdiction to consider the Resolution Service report.
- NHBC was wrong not to have inspected the property in 2003 because of a dispute about the retention (of funds) between Mr G and the builder. They said all defects should've been inspected then.
- when Mr G contacted NHBC again in 2006, NHBC was obliged to consider the defects under section 2 not section 3. The only notification Mr G made to NHBC was in 2003.
- NHBC's view, formed in 2006, that its liability only extended to indemnifying Mr G for those defects admitted by the builder was wrong.
- that NHBC had undertaken to pay Mr G's professional fees in 2013
- that NHBC was responsible for delaying the claim.
- the windows were a load bearing wall which were covered by the policy.
- NHBC's offer to Mr G is inadequate even to rectify the defects NHBC accepts liability for.

my findings

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

I can see that NHBC has, in the last couple of months, made a settlement offer to Mr G. I note that his solicitors think that it's inadequate. Unfortunately, I can't look at this settlement offer as part of this complaint. I can only look at matters up to the date of NHBC's final response to Mr G – April 2015. If Mr G remains unhappy about the settlement he needs to make a new complaint to NHBC. It can then investigate his concerns after which, he may then be able to make a further complaint to this service.

Mr G notified NHBC about 72 defects with his newly built home in September 2003. As the notification was made within the first two years after completion it fell within section 2 of the *Buildmark* policy. The policy says that during this period the builder must put right, within a reasonable timeframe, any *defect* or *damage* notified to him in writing. It also says that if the builder is given written notice then he remains liable, even after the two year period of cover ends.

The *Buildmark* policy defines what *damage* and *defects* are. I don't propose to set out the definition here, only to say that not every item that appeared on the list constituted *damage* or a *defect* as defined by the policy. Section 2 explains what NHBC will cover *if* the builder doesn't meet his obligations.

"What NHBC will pay for...

*The **Cost** of any work contained in a Resolution Service report which is accepted by you and which the **Builder** does not complete ...within the time set...*

*If the **Builder** doesn't deal with your complaint to your satisfaction, contact the NHBC...We will usually offer our Resolution Service...*

The Resolution Service

*...When we offer our Resolution Service, we will investigate any **Defects** or **Damage** which you have complained to the **Builder** about and he hasn't put right...We will normally offer our Resolution Service. However, we can only help with disputes about*

Defects or Damage. We will not be able to help you if you have dispute about such matters as financial or contractual issues.....”

Section 3 covers years 3 to 10 after completion. It says:

“What NHBC will not pay for....

*Anything which was or could have been reported to the **Builder** under Section 2.”*

I'm satisfied that the issues Mr G had (except perhaps those related to the window frames and the rainwater goods which I will comment on below) were notified within the first two years after completion. As such they fell under section 2 of the warranty. This service doesn't deal with complaints about a builder's performance of his obligations or about NHBC's Resolution Service. So I can't look at any aspect of Mr G's complaint that arises from NHBC's provision of that service. I've noted that Mr G's solicitors state that we have jurisdiction to consider such complaints, but we don't. This is not a complaint that would fall within our voluntary jurisdiction, as has been suggested. Complaints about the Resolution Service aren't complaints about a regulated activity.

As the defects were notified in the first two years they were excluded from cover under Section 3 – as stated above.

I understand that NHBC attended Mr G's property in November 2003 and carried out an investigation into the 70 or so items on the list. So, I'm unclear why Mr G's solicitors say this visit never happened.

It seems to me that in 2006/2007 NHBC narrowed its liability to issues relating to the first floor joists. My understanding of the sequence of events that led to this decision is as follows. In July 2004, Mr G withdrew from the Resolution Service to pursue the builder, architect and engineer directly. It seems that the builder also claimed against Mr G for a release of retained funds. It was not until late 2006 that Mr G contacted NHBC to say he now wished to use the Resolution Service. He sent in a report he'd recently had done listing the remedial works he wanted carried out. NHBC noticed that some of the items Mr G was now reporting (and wishing to use the Resolution Service for) hadn't been reported in the first two years after completion (as required by the policy). Consequently, it declined to deal with these items. It also said other items were of a contractual nature – it wouldn't deal with these either as such disputes were excluded by the policy. Finally, it said it wouldn't deal with the rest of the items due to the length of time that had passed since completion.

NHBC's decision prompted a complaint by Mr G. On investigating that complaint NHBC realised that the issues concerning the first floor joists had been notified within the first two years. Consequently it confirmed it would investigate these further.

So, I'm not altogether clear why Mr G's solicitors now state that NHBC formed a view in 2006 that its liability only extended to defects admitted by the builder. The evidence I've seen doesn't allow me to reasonably conclude this was what happened.

Turning now to the issue of Mr G's professional fees, I can see that NHBC said to him in 2013 that, subject to provision of an invoice, it was willing to pay an amount equivalent to a day of his consultant engineer's time along with the cost of him attending a site meeting. This was so Mr G's consultant engineer could review the proposed remedial scheme for the first floor joists. NHBC said it made this offer as a goodwill gesture. This offer was further

extended in January 2015 to pay for the engineer's attendance at another site meeting.

I can see Mr G has also asked for NHBC to meet his architect's and legal fees. His solicitors have asked it to exercise its discretion to do so under the terms of the policy. NHBC has said that it didn't consider an architect's involvement to be necessary to progress the claim.

The *Buildmark* policy excludes liability for professional fees except those incurred with NHBC's specific written consent. Other than that mentioned above, I've not seen any other written evidence that NHBC said it would meet Mr G's professional fees. It's exercised its discretion not to pay the fees claimed and I don't think it's done so unreasonably. Given the lack of any contractual liability for professional fees, I think the above offer reasonable.

I don't disagree that this has been a protracted claim. I can't agree though that the delays are all the fault of NHBC. Insofar as NHBC has caused a delay, it has offered Mr G compensation of £500. I think this amount is reasonable compensation for the delays caused by NHBC. I don't propose to award any further compensation.

The problems with the window frames weren't reported within the first two years. They appear to have first been mentioned to NHBC around the start of 2007. The problem reported by Mr G was that the window frames weren't of the right quality and weren't those which had been specified (presumably in the contract).

NHBC told Mr G that this problem wasn't something it could help him with. It said the matter hadn't been reported within the first two years so couldn't be considered as part of the Resolution Service. It also said this particular dispute was a contractual one between Mr G and the builder, something which was also excluded under the policy. NHBC also explained that section 3 of the policy also didn't extend cover for actual physical damage caused by a defect to window frames – only to multiple glazing panes. So, NHBC said the claim failed. I don't think this was an unreasonable decision for NHBC to have reached. I also don't think I can, in all reasonableness, agree that window frames constitute a load bearing wall as Mr G's solicitors have suggested.

I understand that the issue with the rainwater goods was first raised by Mr G in the autumn of 2014. NHBC has declined to cover this under section 2 or section 3 (presumably because it wasn't first notified until 12 years after completion). I don't think it's done so unreasonably.

I think NHBC has informed Mr G which parts of his claim it can and can't consider and why. It's also done so consistently. Unfortunately for Mr G, he isn't entitled to indemnity for all the issues he's raised and I don't think, where NHBC has declined liability, it's done so unfairly.

my final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 11 April 2016.

Claire Woollerson
ombudsman