

complaint

Mr and Mrs W have complained about National House-Building Council (NHBC). It provided a warranty for their home (they've since moved) and handled a claim in relation to that property under the warranty. Mr and Mrs W believe that NHBC handled the claim poorly causing them various financial losses.

background

The warranty began in 2000. Mr and Mrs W made a claim in 2005 when they noticed their concrete floor was cracked. The claim was declined at that time as it was felt the crack wasn't structurally significant (so not covered by the policy). However, into 2011 NHBC had further reports of issues with the floors in other properties on the same development and it got back in touch with Mr and Mrs W. Following further investigations being carried out it was decided that the floor slab needed replacing.

Mr and Mrs W moved out of their home in November 2013 to allow for the repairs. It was felt these would complete by May 2014. The alternative accommodation was arranged by the developer (rather than NHBC) and NHBC agreed to cover the cost of a year's lease, from November 2013 to November 2014.

In May 2014 NHBC felt the repairs were complete and a meeting took place at the property with Mr W. Some snagging issues were noted – primarily some finishing on the kitchen cabinet corners and tiling in the bathroom. NHBC said it would arrange for the garden to be tidied, to re-lay the carpets and to fix the agreed snagging issues. It said, in an email dated 25 June 2014, that the home was ready to be re-occupied and it wouldn't pay council tax beyond 31 July 2014.

Into July the garden was done and it was reported that the fixtures of the home had been re-fitted. In August it became apparent the fixtures hadn't been re-fitted. Mr and Mrs W identified other snagging issues too, such as radiators needing painting. They said their lease on the alternative accommodation was nearly up and reminded NHBC it had always been their intention to sell their current house once it was fully reinstated. They said they needed it in show home condition – complete with all fixtures – in order to market and sell it at the optimum price. Mr and Mrs W said it was highly unlikely it could now be sold before the lease was up and they'd have to extend the lease for six-months. They said they expected NHBC to reimburse this to them, as well as cover their additional bills (the alternative accommodation was bigger and more costly to run than their home), and council tax on their home (the exemption period for unoccupied properties had expired).

Mr W also asked NHBC what it was going to do about dampness in the kitchen. He said this had been caused by the contractors breaching the damp proof course and it was meant to have been rectified. NHBC said it had been rectified and it had seen proof of this. Mr W didn't challenge NHBC on this point again.

In November 2014 NHBC issued a final response letter to Mr and Mrs W. In the letter NHBC noted that discussions were on-going regarding settlement for replacing the carpets (that it hadn't been able to satisfactorily re-lay), as well as costs for other work such as re-fitting a light and painting the radiators. NHBC said it would pay £1,500 compensation as it felt there had been some delay in resolving matters. NHBC also said that it would pay for an additional two month's rent, but not the full six-months of the lease. It said the home had been habitable since September 2014.

Following this letter the parties continued to correspond over matters. In January 2015 agreement was reached on settlement for the outstanding repair/reinstatement issues. In February and March 2015 agreement was reached on payment for extra usage costs and the council tax costs (the latter of which NHBC covered until the end of March 2015). Mr W notified NHBC that the house was under offer with its sale due to complete in April 2015.

On 9 April NHBC noted that the house appeared to have sold as it seemed to have new occupants. Later that month it settled costs in relation to a further snagging issue raised by Mr and Mrs W. Mr and Mrs W then did a subject access request (SAR) regarding data held on NHBC's files. Following receipt of that they contacted NHBC. They said the content showed lies and mistreatment. They said these lies had contributed to the complexity and length of their claim, and this had caused them a loss of earnings. They felt the data also raised concerns about how NHBC deals and communicates with developers and the like.

Mr W then issued court proceedings regarding his lost earnings. In the claim submission to the court he said his business had turned away work it would otherwise have done because he had been dealing with NHBC's claim. He said the business lost around ten days of work with its average earnings being £4,000 per week. The court claim was later dismissed because the court felt the rightful claimant should have been Mr W's business (a limited company) not himself.

Mr and Mrs W remained unhappy with NHBC. In December 2016 they wrote to it and said they felt it was responsible for the additional rent they'd had to pay on the rental property, earnings they'd lost and for compensation to account for upset caused to them. Some correspondence then occurred via NHBC's solicitors.

In October 2017 Mr and Mrs W wrote to NHBC again. They said NHBC had shown no regard to them for the cost of its failures. They stated that whilst their home had sold in April 2015 that had been at a loss against the value they would likely have achieved if they'd been able to market it earlier (which the necessity for a repair and/or NHBC's delays in carrying that out had prevented them from doing).

A further final response was issued by NHBC in December 2017. In short the letter denied liability for any further rental costs, any lost earnings and any diminution in value of the sold property. Mr and Mrs W then complained to this service.

Our investigator didn't feel that NHBC needed to pay anything more. Mr and Mrs W were unhappy about this. They asked for an ombudsman's consideration. I issued a provisional decision. My findings were:

"what I can and can't look at

I will consider Mr and Mrs W's claim regarding loss of earnings. But, as I set out above, it seems that it isn't necessarily Mr and Mrs W's earnings that are being complained about (or not only theirs). The limited company owned by Mr and Mrs W is not a customer or potential customer of NHBC's, or a person for whose benefit the policy was arranged. Not in relation to the warranty at the heart of this complaint. This means the limited company isn't eligible to complain to us and I can't consider any complaint about any loss it allegedly incurred; such as not being able to take on projects and thereby losing the benefit of any income from them.

I also can't look at whether NHBC's handling of the claim caused Mr and Mrs W any distress and inconvenience (separate to any concerns they have about financial losses). NHBC

addressed the issue of distress and inconvenience in its final response issued in 2014. It didn't ever re-open that issue or comment on it again in its subsequent final responses. Mr and Mrs W's complaint to us, made in 2018, was made more than six months after the 2014 letter and our rules say we can't consider complaints addressed in a final response more than six months after that final response was issued. Not unless the business consented to us doing so, or exceptional circumstances prevailed which prevented the complaint being made within the required timeframe.

NHBC hasn't consented to us looking at any complaint about compensation. And it didn't, unlike some other subjects in the 2014 letter, re-set the referral clock at any time by issuing further final responses. Nor have I seen that any exceptional circumstances prevented this part of the complaint being made to us before 2018. In fact as so much other activity continued, I think Mr and Mrs W could easily have referred this part of their complaint to us in good time but didn't do so. Therefore, I can't look at anything to do with compensation for upset caused by delays in the claim up to November 2014.

But I can consider upset caused by activity that occurred after the 2014 final response letter.

However, I also need to separate the claim upset (pre-November 2014) from any distress and inconvenience that Mr and Mr W may have been caused in relation to the detail about their claim they found following the SAR. The activity that detail related to occurred during the period I can't consider, so I won't consider upset generated by the activity itself. But part of the complaint about the SAR is that the detail provided showed 'unprofessional conduct' (my summary term). So I'll look at upset caused by Mr and Mrs W's discovery of that. Plus I'll consider whether the detail found did likely lead to any loss of earnings for Mr and Mrs W (not the limited company). Because that is a financial loss that may or may not need compensating for and NHBC didn't give a final response on this issue until December 2017.

I'll also look at the rental costs and lost value. Whilst the rental costs were considered in the 2014 response, NHBC accepts that it re-opened this issue by continuing to discuss it. It then issued further referral rights for Mr and Mrs W to come to this service in respect of this issue in its letter of December 2017. The same letter also gave NHBC's first final response on the loss of value issue.

Whilst this service often issues separate decisions to deal with jurisdictional and merits points separately, I'm mindful of the age of the original claim at the heart of this matter. I'm also mindful that I am satisfied I can consider the main issues that Mr and Mrs W have complained about to us in 2018 – rental costs, misconduct leading to lost earnings and diminution in the value of the property they sold. Therefore, I will continue now to consider those matters.

rental costs

Looking at the detail of what issues remained outstanding in May 2014, I think the house was habitable at that time, I understand that Mr and Mrs W didn't want to move back – and had no intention of doing so as they'd settled in the area they'd chosen to go and live in in 2013. But, with only minor snagging issues outstanding, and fitment required of the fixtures, the home wasn't uninhabitable. I also don't think it was in such a poor state that it wouldn't have been possible to start marketing it for sale. It's possible that marketing at that point would have meant interest in it was limited and/or that the best price wouldn't have been achieved but I don't think it's fair to say it couldn't reasonably be marketed.

It was because the property hadn't been sold (and only put on the market in October 2014) that Mr and Mrs W took on a further six-month lease for the rental property. Given what I've said above, I don't think it's fair to blame NHBC's delays in resolving the snagging issues for Mr and Mrs W's perceived need to delay the marketing of the home for sale. As such I don't think it's fair to say that NHBC reasonably has to reimburse them for the cost of the extra rental period. NHBC has paid them an amount which reflects the cost of their rent for two of the six-months. I think that's more than reasonable. If NHBC had refused to meet any of this cost I'd likely have said that was reasonable. And I say that even knowing that NHBC accepts it could have handled the snagging issues more efficiently and with better communication.

SAR information

I see Mr and Mrs W's points in this respect as broadly fitting into two areas. The first being that NHBC lied and/or mis-spoke about them (unprofessional conduct), which they feel caused issues/delays with their claim and/or a claim they had/have with the developer. The second being that the evidence brings into question the business relationship NHBC has with other companies and the way this operates.

business relationship – Dealing with the second point first; I'm not going to comment on these concerns. My role here is to look at how NHBC's actions affected Mr and Mrs W and/or their claim. It isn't this service's role to consider how businesses operate or change the way they do business, that is more the role of the regulator.

unprofessional conduct – Mr and Mrs W had asked that their claim handler was changed. This occurred but the SAR showed that the original claim handler had remained involved with their claim.

I appreciate that this may have been upsetting and/or frustrating for Mr and Mrs W to find out. But I haven't seen that this materially and negatively affected their claim. I understand they felt they couldn't trust this person and I know they're unhappy with some of the comments and opinions they're now aware he shared and made with colleagues. However, I don't see that anything he did caused delays or meant they received less than they were entitled to.

I know that in respect of the second claim handler, Mr and Mrs W felt he lied about when the property was handed back to them following the works. They said this affected the claim they have/had with the developer.

This person told NHBC that the property had been handed back to Mr and Mrs W on 31 July 2014. At this time they were out of the country. In fact a formal handover of keys didn't occur until February 2015. So I think, strictly speaking, that person was wrong to say the handover occurred in July 2014.

However, I haven't seen that this comment had any negative affect either with Mr and Mrs W's claim or with anything that was or is on-going against the developer. Regarding their claim, I know correspondence continued over the summer of 2014 and even beyond the final response NHBC issued in November 2014. The snagging issues were the main focus of that correspondence but extending the rental period and sale of the home were discussed at points too. All in all I don't think the existence of this 'misinformation' generated much, if any, correspondence that wouldn't have occurred anyway.

Further, whilst the statement wasn't strictly true, I'm not persuaded it was an unreasonable assessment of the situation. I say that because the house was deemed habitable and Mr and Mrs W had been told it was in state that NHBC felt was ready to move into, with some snagging issues having recently been completed.

I do accept that opinions being shared by NHBC staff that weren't entirely kind and were largely subjective were upsetting for Mr and Mrs W to see. I think these comments do show a lack of professionalism – although I accept that NHBC, when being asked to make essentially compensatory payments for claimed financial losses, does have to make some judgement calls about the necessity of those losses/payments.

loss of earnings

As I said above, I don't see that the comments that have caused Mr and Mrs W concern led to much extra correspondence of their own. So I can't reasonably conclude, at this stage, that the comments caused Mr and Mrs W to spend time – possibly as much as ten days – researching and replying to NHBC.

Furthermore, even if I was persuaded regarding the above, I'm mindful that I haven't seen evidence that Mr and Mrs W actually lost earnings. For example, I haven't seen that they draw a wage from the company and that they weren't paid for certain days because they didn't work.

In addition, this service doesn't routinely make awards for lost earnings. And I'm mindful that a complainant, in this sort of situation, is making a conscious choice to pursue the claim over and above the alternative of earning money. I'm not persuaded that in the circumstances here, if Mr and Mrs W did make that choice, that it's then fair or reasonable to place the resultant, and clearly foreseeable loss, at NHBC's door.

diminution in value

Mr and Mrs W say that before the repair the house was valued at around £40,000 more than what it sold for in 2015. The house was sold for the asking price, but they argue they could have asked for more if the property had been marketed earlier (at a more premium time of year).

I've said above that I think the property could reasonably have been marketed in May 2014. I'm not persuaded it's reasonable to blame NHBC for Mr and Mrs W's belief that the property needed to be in "show-home condition" before marketing or their decision not to do so because they didn't think it was. They seem to have been aware that putting it on the market at the right time of year would maximise the sale price, but they didn't do so because they felt it needed to be in better condition to achieve the best value. I think they took a greater financial risk by waiting than by marketing the property earlier, even given the snagging issues outstanding. I don't think it's fair to say NHBC has to pick up any financial loss that resulted.

In saying that I'd add that I haven't seen evidence that persuades me there was an actual financial loss/diminution in value. Knowing what an estate agent valued it at some years before it was sold, and the sale price achieved doesn't prove that the higher sale price could've been achieved. To be able to reasonably say, notwithstanding what I've said above, that a loss occurred, I'd have to be satisfied when it was likely the property would have sold if put on the market in 2014, what the price would likely have been – in both the state it was in

in 2014 and the fully repaired state it should have been in. Only then could I see if the sale price that should have been achieved was likely less than what was obtained.

compensation (including claim handling post November 2014)

A lot of correspondence occurred after November 2014, and various further claims for the reimbursement of loss payments were made. I think NHBC generally handled things reasonably during this period. It responded to correspondence in good time and answered questions asked. It did, at times, ask for further evidence but it explained why this was necessary. In my view its correspondence was clear, reasonable and timely.

I appreciate, as I said above, that when Mr and Mrs W saw the content of the SAR data some upset was caused by some of the comments they discovered had been made about them. But I'm not minded to make NHBC compensate them for this. As is I said above, the comments weren't ideal but the considerations behind them were necessary for the claim.

Overall, whilst I appreciate that this has been a long, and at times, frustrating situation for Mr and Mrs W to be in, I'm not persuaded I can reasonably require NHBC to pay them any compensation. I say that in light of the constraints I've explained above, and which I have to abide by, and because I don't think it did anything wrong after November 2014 to cause any additional upset, such that would warrant an award of compensation."

In response, NHBC said it had no comment to make. Mr and Mrs W said they didn't agree with my decision. They made several points in reply, including that NHBC had broken an agreement made with them, when they agreed to it carrying out repair, to return their house to them in nothing less than immaculate condition.

my findings

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

Neither party objected to what I said provisionally about what I felt I can and can't consider. I've reviewed those findings and I'm satisfied by what I said. They now form part of the findings of this final decision.

Mr and Mrs W said they only allowed NHBC to carry out a repair to their home upon agreement of a number of conditions. They said it was well aware from the outset what it needed to do and it was easy to foresee consequences that would likely occur if it didn't meet those conditions.

I appreciate that Mr and Mrs W wanted their repair to go smoothly, particularly as they seem to have been aware of other repairs in the area that had been problematic. But even if NHBC did fail them by not meeting an agreement made, for me to make an award against it in that respect, I'd still have to be satisfied that Mr and Mrs W acted reasonably to mitigate their situation even in light of that failure. I remain of the view that they could reasonably have marketed the house in May 2014. If they had and there'd then been delays in it selling due to the outstanding repairs, NHBC may have had to compensate them for that. But choosing not to market it and instead await the consequences, which Mr and Mrs W have said were always and clearly likely to occur as a result of any delay, isn't acting reasonably to mitigate any failure by NHBC.

Whilst NHBC agreed to cover an extra two months' rent, Mr and Mrs W have argued that it was four months after the original end date for the lease that NHBC gave them the keys back for their home. I'm aware, and was aware when I issued my provisional decision, that NHBC didn't pass its set of keys for the home back to them until February 2015. But that doesn't change the fact that Mr and Mrs W could have asked for the keys at any time, including around May 2014 to allow them to place the house on the market. And I'm mindful that regardless of any initial agreement that may have existed, or any expectation that created for Mr and Mrs W, in July 2014 NHBC clearly told them its liability for additional costs would end as the house was, in its view, habitable. I remain of the view that their extended rental costs and the point at which they sold their home, along with the price they achieved for it, resulted from their choice not to market the property in May 2014.

Mr and Mrs W said they assisted with repairs wherever possible, I don't doubt that is the case. But it doesn't change or impact on anything I've said.

Mr and Mrs W dispute that NHBC answered all correspondence in good time. They said around the time they see as the crucial period, during which they had to decide whether or not to extend their lease, NHBC was taking around six weeks to reply. I explained provisionally that I could only look at NHBC's general claim handling *from* November 2014 onwards. I remain of the view that after this time NHBC's correspondence was clear, reasonable and timely.

Whilst I appreciate this will be disappointing for Mr and Mrs W, their comments haven't caused me to change my provisional findings. My provisional findings now form part of this final decision. I don't uphold their complaint.

my final decision

There are some aspects of Mr and Mrs W's complaint, as explained above, that I'm satisfied I can't consider. Therefore, I haven't considered their merits.

For the parts of Mr and Mrs W's complaint that I'm satisfied I can and, therefore, have considered; for the reasons stated provisionally and finally, I don't uphold them. I don't make any award against National House-Building Council.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs W to accept or reject my decision before 18 March 2020.

Fiona Robinson
ombudsman