

Complaint

Mr R's complaint is about ongoing issues with how National House-Building Council ("NHBC") have dealt with a claim made under his Buildmark policy.

Mr R has been represented by his son throughout this complaint, but for ease of reference I will refer to him directly in my decision.

All references to NHBC include its appointed agents.

Background

I'm aware that my summary of the events below is in far less detail than that provided by the parties concerned. But I'd like to reassure everyone that I've carefully considered everything that has been provided. I'll set out the events which I find relevant to my decision below.

Mr R lives in a property covered by a ten-year Buildmark policy provided by NHBC. The start and end dates of the warranty fell between 2006 and 2016.

In October 2014, Mr R notified NHBC of some damp issues in his property. NHBC investigated the issue and in December 2015 it turned down the claim. NHBC said the presence of a swimming pool was causing increased humidity. This in turn was reacting with the salts in the plaster to cause staining and damage. NHBC referred to the exclusion in the Buildmark policy which didn't cover for *"any defect or damage caused by the installation or presence of a swimming pool..."*.

Mr R complained to NHBC about its decision to turn down the claim and the time taken to deal with it. In November 2016 NHBC sent its final response, maintaining its decision to turn down the claim, but it offered Mr R £300 compensation for the distress and inconvenience it had caused for some delays in the claim. It advised him that he needed to refer any complaint to our service within six months of the date of the letter.

Mr R then appointed a number of contractors to deal with the matter. Mr R's contractors raised concerns about the cause of the ingress moisture and suggested it was likely related to other issues in the property. This included the possibility that whilst there were some smaller leaks which had been identified such as to the irrigation filter, there was also a large and as yet unidentified source of ingress which could be linked to a failure of the waterproofing within the structure.

In June 2017, Mr R asked NHBC to reconsider the claim following investigations carried out by him and by his home insurer. NHBC reviewed the further information provided and arranged and carried out investigations to determine the cause of the water ingress and damp.

After other causes of water ingress were ruled out NHBC concluded that the defect in the waterproofing meant the structures below ground weren't adequately protected from damage caused by ground water ingress. A report provided by NHBC from October 2018 stated, *"there is lateral water penetration through or over the water proof concrete wall at high level... Failure of the structural waterproofing is the most likely cause of damp ingress and damage is consistent with water over tipping the concrete wall, or water penetration through defects in its construction of the water proof concrete wall."* So in November 2018 NHBC agreed to accept the claim (about which Mr R had originally notified it in October 2014).

In February 2019 NHBC wrote to Mr R with an offer to settle the claim. NHBC said that it had determined that the total cost of repair works it had been advised were necessary would exceed its liability under the policy. It therefore proposed to pay the policy maximum (which was a substantial sum) in line with the index linked increase set out in the policy for each year the policy was in force.

NHBC said its offer was made in full and final settlement of the claim about which Mr R had notified it in October 2014, meaning it discharged its liability for the repair work or any additional costs above the policy maximum.

Mr R was unhappy with NHBC's offer and complained. In summary he said:

- The settlement offered by NHBC wasn't enough to cover the necessary repairs.
- He was unhappy with the length of time it took NHBC to deal with the claim.
- He wanted NHBC to pay for damage to a water pipe and pool cover which was caused by its contractors during the investigation.
- He was unhappy with NHBC's general level of service in dealing with the claim.

NHBC responded to Mr R and accepted there were delays in processing the claim. It offered Mr R £1,300 for the distress and inconvenience caused.

NHBC said it wouldn't increase the cash settlement offered in respect of the damage to the property as it was already at the maximum limit linked to its liability under the policy. And it didn't agree that it should pay for the damage caused by its contractors because of the time that had passed between the alleged event happening and Mr R reporting it.

Mr R accepted NHBC's cash settlement but referred the complaint to our service as he maintained it wasn't sufficient to cover the necessary repairs.

Our investigator looked at everything and concluded that our service wouldn't be able to consider any events which happened prior to NHBC's final response issued in November 2016 as Mr R hadn't referred the complaint to us in time.

Our investigator then considered the events since November 2016. They concluded that NHBC had calculated the settlement fairly and in line with the policy terms. And they were satisfied that the terms of the settlement showed that NHBC had discharged its liability for any costs relating to the defect which were over and above this settlement amount.

Our investigator didn't conclude that NHBC unreasonably delayed reaching the final settlement but did conclude that NHBC's contractors had caused damage to a water pipe and pool cover which weren't linked to the original defect. So they recommended that NHBC should pay the reasonable costs of putting this right.

Our investigator also concluded the £1,300 compensation offered by NHBC for the distress and inconvenience caused was fair in the circumstances of the claim.

NHBC accepted our investigator's conclusions. Mr R disagreed. He said he had referred his original complaint in time so felt these events should be considered. And he said that the time it took for NHBC to investigate the issue meant he was unable to sell the property. Mr R added that he was still significantly out of pocket for the repairs and had a lesser standard of living on the ground floor of the property, with rooms being out of use.

Mr R asked for the complaint to be passed to an ombudsman. In addition to the points I've already set out Mr R added that:

- The delays in NHBC settling the claim resulted in reoccurring water damage, and as such, the overall repairs are more costly.
- NHBC carried out unnecessary investigations such as digging out his jacuzzi. This has added significant costs to his reinstatement and replacement costs.
- Had NHBC been more thorough in their investigations in 2014 and identified the cause of ingress sooner, then the damage and repair costs would've been far less.
- His contractors have identified further defects with the waste drainage system which need to be put right.

The complaint has now been passed to me to make a 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.

It is clear that this has been an extraordinary and complex claim for the parties involved. In making my decision I've first looked at whether our service can consider the aspects of Mr R's complaint to which NHBC responded in November 2016.

NHBC's November 2016 final response

The rules applying to this service say that, unless the business agrees, I can't consider a complaint referred to us more than six months after the date it sends the consumer its final response letter, telling them they can refer their complaint to us. This is set out in Dispute Resolution ('DISP') rule 2.8.2R(1), which can be found online in the Financial Conduct Authority's handbook. Or we can provide a copy on request.

I've seen a copy of NHBC's final response letter, which is dated 24 November 2016. And I can see it clearly states Mr R needs to refer the complaint to our service within six months of the letter. I've checked our records and the evidence provided by Mr R and I'm satisfied that Mr R first contacted us about his intention to refer this complaint on 6 June 2017. This means it wasn't referred to us within the six-month time limit.

Mr R says he didn't receive a copy of NHBC's final response and subsequently forwarded a copy to our service when he chased the matter with them. Whilst I have no reason to doubt what he says, based upon the evidence I've seen I also have no reason to doubt that the original final response was sent by NHBC. The letter is addressed correctly and is to the same address that Mr R has provided to our service. Therefore, on balance, I think it more likely that he did receive this letter.

I've considered whether Mr R was delayed in referring the complaint to us as a result of exceptional circumstances. Mr R has been consistent in saying he didn't receive the original response on the date it was issued, but as I've determined the letter was addressed correctly, and I've seen nothing to suggest it wasn't sent as shown, I don't think this reason can be considered as an exceptional circumstance in this case. And I haven't identified any other exceptional circumstances as to why Mr R delayed in bringing his complaint to our service.

So I'm sorry to disappoint Mr R, but I will be unable to consider the events prior to 24 November 2016 in my decision because this part of the complaint was referred too late.

I'll next go on to consider Mr R's unhappiness with the settlement agreement. I'll then look at the impact of any delays in the claim and consider if NHBC is liable for any further damage that Mr R says it's responsible for. Finally I'll consider if NHBC's offer of compensation for the service provided during the claim is fair and reasonable.

NHBC's settlement

NHBC accepted Mr R's claim under Section 3 of the Buildmark Policy. The policy covers problems with a newly constructed home that can be linked to a breach by the builder of one or more of NHBC's technical requirements. And the value of a claim needs to exceed the Minimum Claim Value of the policy.

Under the section titled "*What NHBC will pay for*" it states:

*"The full **Cost**, if it is more than £1000 **Indexed**, of putting right any actual physical **Damage** caused by a **Defect**".*

The terms which cover "*How to make a claim*" explain that a policyholder must "*Contact NHBC as soon as the damage has been noticed. Give us [NHBC] the opportunity to inspect before any work is done. If we ask for them, send us copies of any correspondence, contracts, plans, quotations, receipts and any other documents or information relating to your **Home**.*"

And this section sets out NHBC's liability as:

*"the most we will pay for all claims relating to your **Home** under Sections 2, 3 and 5 together is the **Original Purchase Price** as shown on the **Insurance Certificate** up to a maximum of: £500,000 for a newly built **Home**...*

...The financial limit will be increased each year in line with the Royal Institution of Chartered Surveyors' House Re-Building Cost Index or, if less, by 12% compound per year. If we accept a claim, the cost of the claim will be deducted from the financial limit."

In April 2019 Mr R accepted NHBC's offer to pay the maximum sum under the policy in respect of the claim he notified NHBC of in October 2014. The main crux of Mr R's complaint is that the settlement offered by NHBC isn't enough to cover the repairs necessary. There is a significant shortfall between the sum Mr R accepted and the repair quotes he's provided, so I completely understand why he feels so strongly about this point.

NHBC's settlement covers the underlying damage in Mr R's property linked to the defect. I can see that the terms upon which the settlement was reached are purported to be binding on both parties and state, "*Your acceptance of this offer will also be in full discharge of NHBC's liability to you in accordance with section 3 of your Buildmark policy.*"

I can also see that NHBC has explained that in line with the terms in the Buildmark policy, it is choosing on this occasion, given the anticipated costs involved, to cash settle for its maximum potential liability as opposed to arranging for the necessary work to be carried out at its own expense.

NHBC's total sum offered matches the maximum policy liability set out in the terms above and takes into account the year on index linked increase. And I'm satisfied that within the terms of the settlement NHBC has clearly explained this means it has exhausted the financial limits available to pay for this damage. And Mr R accepted that settlement offer. While I understand he has said that he felt that he had no choice but to do so, I'm not satisfied that there is any proper basis to say that he shouldn't be bound by the settlement.

I can see that as part of referring the complaint to our service Mr R has highlighted further defects which his contractors have said are linked to the waste drainage system in the property. But as the settlement above exhausted the policy limit, I'm satisfied there is no further provision available for him to claim here. So I won't require NHBC to look into this defect further as ultimately there is no longer cover available under this section of the Buildmark policy. However, although I am satisfied that the settlement covers the damage about which Mr R notified NHBC in October 2014, I also think that I can go on to consider whether NHBC's subsequent conduct may have led to *further* damage.

Delays in the investigations

I'll now consider whether any underlying defects in/with the property can be shown to have been substantially made worse by NHBC's conduct once Mr R lodged his claim (but subsequent to November 2016).

Mr R provided a report from his contractor (S) which suggested that NHBC's delays in investigating the claim had caused up to £150,000 of damage. S hasn't been specific about what exactly they believe this damage entails, so I've considered the events which led to NHBC re-engaging with the claim and what it knew about the cause of damage at that time.

The claim was referred back to NHBC in June 2017 because Mr R's investigations via his contractors and home insurer had shown the issue of ingress was most likely structural. Therefore given the age of the property it was concluded that it was most likely a defective construction which had failed so soon after the property was built. This was in contrast to NHBC's initial findings which linked the ingress to issues with the swimming pool installation.

I can see that a number of expert reports were provided to NHBC in June 2017, and it went on to summarise the outstanding issues in the property. Having reviewed the individual reports and summary I can see there wasn't a conclusive reason provided for the ingress at this stage.

However, NHBC was now aware that the ingress was predominately happening during or shortly after rainfall, which pointed to a source of outside water entering the property. And other issues such as condensation had most likely been ruled out but not eliminated. So overall the cause of the ingress was still unknown.

I can see that NHBC's summary report mentioned possible issues with the planters which were adjoined to the exterior of the property, sources of tanking failure, and a possible leak in the irrigation system. Overall, these reports highlight there were a number of suspected causes for water ingress and as such NHBC needed to eliminate these to find out its liability for any repairs under the policy. And the insured damage it needed to see was anything that could be classed as physical damage linked to an eligible defect.

In addition, I can see that at this stage there were also a number of localised leaks which required fixing in order for NHBC to rule out any other contributory causes of water ingress.

NHBC initially asked Mr R if his contractors could provide a quote for some of the further investigations required which he agreed to. Ultimately these contractors didn't provide a quote so NHBC stepped in to arrange the investigations. So I cannot fairly attribute this period of the claim as an avoidable delay.

From reviewing the subsequent timeline of events I can see NHBC followed a process of elimination and relied on the updated opinion of the appointed experts in order to furnish further investigations. This ultimately led to the true cause and scope of the problem becoming apparent around November 2018. And whilst I appreciate this part of the claim took around 14 months to conclude, I don't think NHBC were in a position to conclude the claim any sooner or offer a settlement figure to Mr R any earlier than it did. I say this because the complexity of the claim meant there were a number of insured and non-insured areas of water damage, including pre-existing and ongoing leaks. Therefore I think it was reasonable for NHBC to explore any possible overlaps of liability with other parties such as Mr R's home insurer as part of the overall claim investigation.

I acknowledge that both Mr R and S have said the problem was likely structural from the outset and NHBC should've carried out more thorough investigations to identify the cause of the ingress. But the evidence shows that the conclusions NHBC reached in initially declining the claim weren't unreasonable – they were based on the surveyor's reports following their investigations. And once it became apparent that there was a likely different cause for the ingress NHBC re-engaged with the claim. So I can't fairly say that this period of time caused damage which NHBC should be liable for outside of its settlement terms.

Overall, having carefully considered everything here, I'm not persuaded that the overall time taken to investigate the cause of the ingress has contributed to any additional damage which can be considered separate or outside of the terms of the settlement Mr R has already received. So I'm not going to require NHBC to pay anything further here.

Additional damage

I've next considered if there are any issues which fall outside the scope of the settlement, such as any damage which can clearly be attributed to a separate event, and which isn't linked to the underlying defect being claimed for.

Mr R has shown that NHBC's contractors clearly damaged the jacuzzi pipe and our investigator was persuaded on the balance of the evidence that the same contractors were responsible for damaging Mr R's pool cover. NHBC has now accepted these costs so this aspect of the additional damage is no longer in dispute. As such I will make the same award as recommended by our investigator and require NHBC to reimburse Mr R for the reasonable costs associated with repairing the jacuzzi pipe (invoiced at £1,150) and the pool cover.

Mr R's said that NHBC's contractors caused approximately £30,000 worth of damage to the pool pumps, filtration system, cover and motors following their investigations. But following further requests for information Mr R has not provided our service with further evidence to substantiate either these costs or the actual damage caused.

I have seen an invoice provided by a contractor for reinstatement works to the jacuzzi area, but this was dated May 2017 and an accompanying note seems to indicate these costs were being met by Mr R's home insurer. But in any event, I'm persuaded that much of the repair work listed here can be fairly attributed to either investigating the cause of the ingress or linked to damage caused by the defect. So on balance it's likely that some, if not all of this scope would fall under the terms of NHBC's settlement.

In order to uphold this point in Mr R's favour, I'd need to see some firm evidence of the specific damage caused – similar to what's been shown to prove the damage to the jacuzzi pipe and pool cover. And I would also need to see how this was clearly different from any damage linked to the underlying defect in the property.

Based on the information I have from this period in the claim, I haven't seen anything further to verify these additional damage costs, so I don't uphold this part of Mr R's complaint.

Compensation

NHBC has agreed a total of £1,300 compensation for the distress and inconvenience caused since its last final response letter in November 2016. In its letter, NHBC attributes this mainly to the delays in some of the investigations and the distress caused by its contractors damaging the jacuzzi pipe.

In determining whether this offer of compensation is fair I've considered a number of factors. I've looked at any avoidable delays in the duration of the claim, and NHBC's overall service – which includes the actions of its contractors. I've also considered the amount of time Mr R spent in dealing with the various issues in proportion to the overall complexity of the claim. And I've taken into account that Mr R's son represented him for the majority of this claim – as my powers mean I can only tell a business to pay compensation for distress and inconvenience experienced by their customer who in this case was Mr R, the policyholder.

In conclusion, I can see that the investigations required by NHBC to identify the main cause of the water ingress were extensive. The extent of the ingress wasn't clear when the matter was referred back to NHBC in 2017 and as such it was required to undertake a series of works in order to eliminate other possible causes. This included works to ascertain how much of the water ingress was ongoing, how much was linked to a failure of the water proofing, and how much was due to historical or localised leaks. I've not seen anything which suggested this process took substantially longer than it should've done and in any event, I've also not seen anything which should've put NHBC on earlier notice as to the full extent of its liability under the Buildmark policy.

In order to recommend further compensation here, I'd need to be satisfied that any delays by NHBC significantly worsened the issues being caused by the underlying defect for which it has already settled. And given the extensive scope of the investigations and actions required, I'm not persuaded that it did so.

Taking everything into account, I'm satisfied that NHBC's offer of compensation fairly reflects the distress and inconvenience caused to Mr R from any delays, and the actions of the contractors in damaging the jacuzzi pipe and pool cover. So I won't be requiring NHBC to pay any more compensation.

My final decision

My final decision is that I partially uphold this complaint about National House-Building Council. In order to put things right, National House-Building Council must:

- Settle Mr R's invoice for the damaged jacuzzi pipe of £1,150;
- Pay any invoices which can be linked to reasonable costs incurred by Mr R for replacing the damaged pool cover;
- Pay 8% simple interest on these sums, from the date each invoice was paid, to the date of settlement. *

*If National House-Building Council considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr R how much it's taken off. It should also give Mr R a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 16 September 2021.

Dan Preveet
ombudsman