

Complaint

Mr H is a director of company Y and complains that National House-Building Council ("NHBC") refuse to reimburse legal costs and professional fees incurred as a result of a declined insurance claim.

Background

NHBC provided a ten-year warranty to company Y for a block of flats. The warranty covers some problems that may arise from a breach of NHBC's technical requirements. And of relevance for this complaint is the cover from years 3 to 10 for damage arising out of a defect (breach of NHBC technical requirements).

One of the flats had an escape of water event and a subsequent claim was dealt with by the household insurer. During this claim a wider issue with floor joists was discovered and referred to NHBC.

In a NHBC report from June 2013 NHBC declined a claim under the building warranty because although it was apparent the floor joists had no preservative to protect from moisture, NHBC considered the damaged joists arose out of a constantly wet environment due to the escape of water and rainwater entering the floor void. But in September 2014 NHBC accepted the claim and informed company Y and the flat residents in a newsletter.

Company Y had engaged legal firms and issued legal proceedings against NHBC, the builder and another party. Proceedings were stayed several times and, in the end, NHBC filed a strike out application with the court. Company Y discontinued proceedings, at least against NHBC, in May 2016 and the court awarded costs against company Y. Notwithstanding NHBC's legal costs of more than £30,000, NHBC hasn't sought to recover those fees. The basis of the strike out application was the hopelessness of company Y's case against NHBC.

Company Y wants NHBC to pay its legal and professional fees, but our investigator considered it only appropriate for some fees incurred up to the point NHBC accepted the claim. She explained that legal and professional costs weren't something we'd ordinarily ask a business to pay given we're an informal resolution service and free to use. She didn't think company Y's legal action had persuaded NHBC to change its view. But she did say NHBC should pay some costs associated with inspecting the damage (£6,726.72 + simple interest at 8%).

NHBC accepted the investigator's view but Mr H for company Y did not.

my findings

I've considered all available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done so, I agree with the investigator that some of company Y's costs should be reimbursed – but not the legal costs or the representative's fees, or fees incurred after NHBC accepted the claim in September 2014.

The power to award costs is set out in the rules that govern our procedures. The guidance to the relevant rule is set out in the Financial Conduct Authority's handbook (DISP 3.7.10) which states:

'In most cases complainants should not need to have professional advisers to bring complaints to the Financial Ombudsman Service, so awards of costs are unlikely to be common'.

I appreciate this guidance talks about costs involved in bringing a complaint to our service. But equally policyholders shouldn't ordinarily need professional advisers to make a claim to their insurer. If professional fees are, in the ombudsman's view, necessary for the policyholder to incur in bringing a complaint or making a claim then I can, in upholding a complaint, require an insurer to pay these where fair and reasonable to do so.

I appreciate why company Y instructed a surveyor for the claim as NHBC hadn't accepted it. The circumstances had some complexities and so being able to present evidence that supported the claim necessarily needed to come from an appropriate expert – in this case the surveyor. And I agree this report formed part of the reasoning why NHBC accepted the claim. Company Y also paid local contractors to do work in the property which allowed for a full examination of the problem, such as taking up carpets and creating hatches so the void under the floor could be viewed and monitored. So, I think these costs were necessary and NHBC should refund them. NHBC should pay the costs associated with inspecting the damage (£6,726.72 + simple interest at 8%). NHBC has accepted this.

However, I don't consider this claim necessitated the appointment of solicitors to act upon company Y's concerns. Solicitors were instructed in 2013 and instructions continued long after NHBC accepted the claim. We are free to use service and if company Y were unhappy with NHBC's handling of this matter they could've raised a complaint with NHBC, and subsequently to our service if they remained dissatisfied, without incurring any fees. I don't agree with company Y that it was only as a result of commencing legal action that NHBC accepted the claim. While company Y initially engaged solicitors in 2013, legal proceedings weren't served on NHBC until March 2015. This was after NHBC accepted the claim in September 2014.

NHBC has provided evidence that following a site visit and report on 4 September 2014 it accepted the problem was caused by an underlying defect and as such an insurable event. So, although it took NHBC longer to accept this claim than company Y would've liked, I don't agree it wouldn't have been accepted at all had they not incurred the cost of legal proceedings.

It's also important to note that when legal proceedings were discontinued, NHBC were awarded the right to reclaim its legal costs from company Y. As a gesture of goodwill NHBC has decided not to recoup these costs. It appears the court found company Y responsible for NHBC's legal costs, so it wouldn't be appropriate for me to say NHBC should be responsible for company Y's legal costs. In any case, for the other reasons stated, in my view it wasn't necessary to incur legal costs to have the claim met.

Mr H has spent time and effort dealing with the claim and complaint for company Y. The directors of company Y at the time instructed Mr H to act on its behalf at a cost. There is always a certain amount of time and commitment that is required when dealing with any claim. Other than NHBC took a bit longer than company Y would have liked in dealing with the claim, I'm satisfied reimbursing the fees related to inspecting the damage detailed earlier is fair and reasonable in all the circumstances. But in keeping with what the investigator said, it would in my determination be disproportionate and unfair to require NHBC to cover company Y's legal costs, particularly given the court made an adverse cost award against company Y, and Mr H's costs that company Y agreed to pay.

So, in summary, I consider company Y should be reimbursed the costs incurred for investigatory work and the surveyor's fees up until the claim was accepted in September 2014. But I feel a complaint could've been brought to NHBC and this service without the use of professional advisors. I therefore do not consider it appropriate or fair to make an award for company Y's other costs.

I've also considered, based on correspondence from company Y, whether compensation should be awarded to the individual residents in this case. However, this complaint has been brought to us regarding the costs incurred by company Y. And so, it's the impact of any failings on company Y as a legal entity I can consider and not on individual flat owners. I'm not satisfied NHBC's conduct has caused company Y inconvenience such that fairly warrants financial compensation.

my final decision

My final decision on this case is that National House-Building Council should:

- Reimburse company Y £6,726.72 for the costs incurred for the damage investigatory work;
- pay 8% simple interest on this amount from the date the costs were paid to the date NHBC issues payments.

Under the rules of the Financial Ombudsman Service, I'm required to ask company Y to accept or reject my decision before 20 April 2020.

Sean Hamilton
ombudsman