

complaint

Miss S is unhappy with her new home building warranty provider National House-Building Council in relation to assistance she sought from it when the developer of her home wouldn't repair defects.

background

Miss S bought a new home in August 2016. She noticed issues with it and contacted the developer. When it failed to resolve the issues Miss S contacted NHBC. A meeting took place in April 2017 during which 41 issues with the property were considered. NHBC felt around half were defects according to its warranty and recommended the developer fix them by 5 June 2017. No recommendations were made regarding items 33 and 35. NHBC did feel item 40 was a defect and recommended it be resolved.

In May 2017, before the deadline set by NHBC had been reached, NHBC amended its resolution report in respect of item 40. Upon further consideration, NHBC said, it was felt this issue didn't equate to a defect. Therefore, it was no longer making any recommendation in respect of this item.

The 5 June deadline came and went without the recommended work being completed. Miss S and the developer blamed each other for this.

NHBC felt a further resolution meeting was necessary in order to determine what work remained outstanding. It said that without that the claim couldn't progress. Miss S wasn't prepared to allow for that to happen though. She felt this was just a tactic to allow the developer, who had already failed to meet a deadline, more time to complete work. Miss S complained to this service.

Our investigator felt that NHBC's liability as an insurer had begun when the 5 June deadline passed without all of the work being completed. And during her assessment of the complaint NHBC said it would be prepared to make a cash settlement for all of the work detailed on the resolution report which remained outstanding. But to do that it would need to go back to the property to carry out a further assessment. It also agreed to pay £300 compensation as recommended by the investigator.

Miss S wasn't happy with this. She said NHBC had already assessed the problems. So that should allow it to determine a cash settlement. She wanted to know what the cash settlement would include. She said items 33 and 35 were now issues that needed resolving. And she wanted to know if resolution of item 40 would be included in the settlement. She also wanted to know how the settlement might account for things like drainage (because she believes that at least some of the problems with her garden, detailed in the report, stem from water running off neighbouring land). She said £300 compensation wasn't enough.

Our investigator told both parties that she felt NHBC's offer to settle in cash, subject to an assessment visit, was fair and reasonable. She said she'd ask it to include items 33 and 35. But she said in her view that item 40 wasn't a defect so she couldn't ask it to include an amount for resolving that in its settlement. She said £300 compensation was, in her view, fair and reasonable.

Miss S remained unhappy. NHBC didn't make any further response. The complaint was passed to me for a decision to be made. I felt the complaint should be resolved in the way

suggested by the investigator, but I noted I couldn't comment on items 33, 35 and 40. I issued a provisional decision to explain my views. I said:

my provisional findings

NHBC isn't an insurer in the conventional sense. Part of its remit is to provide insurance covering (amongst other things) major defects for years three to ten after a property has been completed. It also carries out a number of other (non-insurance, non-regulated) activities including setting standards for UK house builders, ensuring that new homes are built to certain standards and – most relevant to this complaint – providing a dispute resolution service in the first two years of the warranty. The dispute resolution service is intended to help the builder and the homeowner resolve any differences they may have in that period. The primary responsibility for putting right defects during this time lies with the builder.

This service doesn't consider NHBC to be carrying out a regulated activity until:

- A resolution report has been issued, and*
- The builder has failed to complete the work in the resolution report by the deadline set.*

Just because the deadline passes, doesn't mean NHBC has to immediately take on responsibility for completing the work. It may choose to keep liaising with the developer in order to get it to fulfil its obligations. But, if it passes without the developer completing all the work NHBC recommended it do, NHBC is seen to be carrying out regulated insurance activity from the date of the deadline. Which means we can consider whether, from that point, it has acted fairly and reasonably.

I can see here that Miss S was frustrated. And that whilst NHBC felt it was stuck, to some extent, in the middle of the developer and Miss S, it's clear that there were significant delays by the developer in the run up to the deadline passing. And because NHBC, when the deadline passed, was carrying out an insurance activity, that meant its liability towards Miss S changed. It was no longer just acting as a mediator between her and the developer, it was acting as Miss S's insurer. So it had a responsibility to treat her fairly and reasonably.

NHBC was initially intent on getting the developer to complete the work. But I'm aware that there were delays before the deadline passed. And NHBC noted itself that there was conflicting information from both Miss S and the developer about who was responsible for work not getting done. I think NHBC should have recognised that, whether or not there was some truth on both sides, Miss S and the developer were never going to be able to resolve things between themselves.

I think NHBC could reasonably have looked to take over from the builder sooner. Particularly given the amount of defects and the clear frustration its policyholder was experiencing. Had NHBC asked for a second meeting sooner, and made it clear this was with a view to it taking on the outstanding work, I think Miss S would have been more minded to agree to that.

But whilst I understand Miss S's frustration at being asked to cooperate with a further meeting now, that is what I would have recommended, whether or not things had moved on as they have. And now that NHBC is looking to settle the claim, it's vitally important that it gets a chance to fully assess what work is needed to correct the defects and, by doing that, it can determine what a fair settlement for that will be.

That is a very different assessment to the one that occurred previously when NHBC determined whether the issues equated to defects it was liable for under the policy and made recommendations for resolving them. For example, the resolution report says things like 'this doesn't comply with our technical requirements, the developer should carry out work to ensure that it does'. So NHBC hasn't actually decided what work is required. It fairly has to be given that opportunity. Miss S might say it should have done that before but before NHBC wasn't in charge of rectifying the problems – it was only the arbiter of what needed fixing, not how, or at what price. As I said above, NHBC's role has changed.

I know Miss S has concerns about certain items on the report and how they can be resolved. NHBC visiting and carrying out a further assessment should allow clarification in these respects to be provided. And, whether it does or not, once it has decided what it thinks needs to be done and at what price, Miss S will have chance to consider all of that. If she thinks its offer is unfair or unreasonable – in light of the liability established in the resolution reports – she'll be able to make a further complaint.

But it is the resolution report completed in April and the updated report regarding item 40 issued in May 2017 against which NHBC will be assessing necessary work. That is what it has become liable for. The resolution reports aren't completed as part of regulated activity. So I can't consider the content of them; whether they're right or wrong, or incomplete in any way. Taken together the reports show that items 33, 35 and 40 aren't defects and no recommendation for resolution in respect of them has been made.

That means that the developer hadn't failed to meet any recommendations in respect of these items when the deadline set by NHBC passed. In turn that means that, regarding these items NHBC isn't carrying out a regulated insurance activity. And because these items aren't seen as being part of a regulated activity, I can't make any finding or direction about them.

I can see this situation has been frustrating for Miss S. But having a situation that results in a claim will necessarily result in some inconvenience. There will often be a need for appointments to take place, for example. I know Miss S bought this home, at least in part because of the warranty. But the warranty doesn't guarantee that the home will be free of defects, only that a route is available to resolve them if they're found. And that route, naturally, results in some inconvenience.

But if Miss S is inconvenienced or upset due to any failures of NHBC, it might be appropriate for it to pay her compensation. As I said above, I think NHBC should have offered the meeting sooner, and on the basis it was taking over the work. I think this would have prevented the parties reaching deadlock in the way they did and, by so doing, avoided a lot of the frustration and upset that occurred. Having considered what Miss S has said and taken into account the relevant circumstances, I'm satisfied that £300 compensation is fair and reasonable.

NHBC said it was satisfied by what I'd said. Miss S was unhappy. In summary she said:

- The detail within the resolution report, coupled with what NHBC knows about the houses in the development from its building control work, should provide ample detail for a settlement to be calculated. And it's been sent other evidence regarding some issues.
- Last time there was a visit, lots of people attended unannounced and it was intimidating. Their behaviour was unprofessional. If NHBC does make a further visit it should be restricted to only sending one person.

- If this is settled in cash then a direction should be made making it clear that work being carried out won't invalidate the warranty.
- £300 isn't enough. She now knows others on her estate whose homes have defects and they've received thousands of pounds of compensatory upgrades and/or discounts. £300 also barely accounts for the time she's spent already and the time she'll have to spend getting quotes for work to be done.
- There's the inconvenience of living in an unfinished property for three years too.

my findings

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

The resolution report does give some detail. For example, it says the developer should:

"ensure the wall is smooth and uniform in colour, texture and finish".

But that isn't sufficient, even if coupled with site plans that show the size of each wall, to create a scope and costing for what is necessary to meet that direction. For example, it doesn't say whether the whole wall needs rectifying, or if there are localised patches that need bringing into line with the rest. It also doesn't explain what the cause of the problem is which means one can't know what is needed to resolve it. The wall being uneven might mean all the plaster has to be taken off and re-applied. Or maybe a skim coat would sort the issue. Or perhaps some sanding and re-painting. The resolution report was designed to identify an issue and direct the builder to resolve it. It wasn't designed to give the type of detail required to scope the necessary work and cost it.

I'm satisfied it's reasonable that NHBC wants to re-visit to carry out a scoping exercise to allow it to cost the work. I can't reasonably direct it to only have one person attend such a meeting. For example, NHBC would often send a technician or a surveyor to carry out such an exercise, but it's possible they may feel someone else with specific expertise in some areas might also be required – perhaps regarding the drainage issue in the garden. It might well prejudice either or both NHBC and Miss S if I were to make this kind of restriction. But I will say that NHBC should liaise with Miss S so that a suitable appointment can be arranged and so that she is aware of who will be attending her home.

Miss S carrying out work won't invalidate the warranty. The cover will remain in respect of the developer's work. But any report of damage or defects will always be subject to the warranty terms and will likely have to be validated.

I understand that Miss S thinks £300 isn't enough but I can't base my awards on what she says others have received. And my award doesn't take into account all of the upset and inconvenience Miss S has had. As I explained provisionally, I'm restricted in what I can take into account. So the meetings, time spent and inconvenience Miss S suffered, prior to the deadline of 5 June 2017 are all beyond my purview.

I also explained provisionally that NHBC's involvement doesn't mean that it guarantees a home free of defects. So I don't award compensation on the basis of there being defects. The warranty just provides a recourse when defects arise. So when NHBC begins carrying out a regulated activity, because defects have been found, the general upset and inconvenience that goes along with that – time spent, meetings, arranging for and getting work done – aren't things I award compensation for either.

My compensation awards are designed to make up for the distress and inconvenience caused by an insurer when that insurer gets things wrong, when they fail their policyholder in some way. I've explained provisionally how I think NHBC failed Miss S and what I think fair and reasonable compensation for that is – £300. I remain of that view.

my final decision

I uphold this complaint. I require National House-Building Council to, subject to it being allowed reasonable chance to assess the items, consider settlement for Miss S's claim to allow her to complete the work that remains outstanding but needs to be done in order to resolve the defects at her home as recommended in the April 2017 resolution report.

I further require National House-Building Council to pay Miss S £300 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss S to accept or reject my decision before 16 September 2019.

Fiona Robinson
ombudsman