

complaint

Mr and Mrs S are unhappy with National House-Building Council (NHBC) because they found out their new home had been built without planning permission or building control and when they repaired it NHBC wouldn't reimburse their costs.

background

Mr and Mrs S bought a new home in 2009. In 2011 the NHBC new build warranty was issued. Around the time it was issued there was a problem with the roof and Mr and Mrs S got in touch with NHBC. Under section 2 of the policy – which in this case makes the builder liable for resolving defects and damage – NHBC told the developer to resolve the problem. When it didn't do so NHBC took over and the roof was sorted by the end of February 2012.

NHBC wasn't contacted again regarding Mr and Mrs S's home until 2014. At this time Mr and Mrs S's solicitor wrote to NHBC and said they were looking to sell the house and had to lower the price because work needed to be done in order to get necessary building control certificates. NHBC wrote back to the solicitor and said, as it was now more than two years after its warranty had been issued, if the solicitor could provide details of what defects were present, it would consider a claim under section 3. The solicitor sent some detail and NHBC called it twice to discuss the matter but, despite leaving two telephone messages with a person at the solicitor's office, the solicitor didn't respond.

In 2015 Mr and Mrs S contacted NHBC. They said the house had now been sold and they'd incurred costs carrying out repairs. They said their house had been built without a building control certificate being issued, they'd had to do lots of work to bring it up to standard and their solicitor told them they should contact NHBC for a refund. They said the builder was bankrupt. They said they'd like their money straight away. NHBC contacted the local authority in the area of Mr and Mrs S's home and were told it had tried to visit the property around the time the build was completed but hadn't been able to gain access, the inspector had never gone back so the house had never passed the building control inspection.

NHBC told Mr and Mrs S that it wasn't involved in building the property, carrying out building control (which the local authority had done), or selling the property. It said the warranty didn't have an option for providing compensation in these circumstances. In response to a further enquiry NHBC said it doesn't carry out any building control work in the area of Mr and Mrs S's home and they'd need to contact their local authority to complain about their losses, the warranty wouldn't compensate them in this respect. NHBC's final response explained that it wasn't involved in the building control process and its agreement with the builder required the house to be built in line with its technical requirements, and if it wasn't then, in certain respects, the warranty offered cover. Mr and Mrs S complained to this service.

Our adjudicator noted that no details had been provided to allow NHBC to consider a claim under section 3 of the warranty. He also accepted that NHBC wasn't responsible in respect of building control in this instance. He felt NHBC's responses had been fair and reasonable.

In a further view the adjudicator explained that whilst the problem Mr and Mrs S had faced was that their home hadn't been issued with a building control certificate, NHBC wasn't responsible for carrying out building control. He said that whilst it inspected the property that was done to determine its own risk in respect of issuing the warranty. Its actions in that respect didn't have any connection to the warranty contract that later existed between it and Mr and Mrs S. NHBC's warranty here was unrelated to any issue of building control consent.

He also explained that a claim under section 3 required damage to have been caused to certain parts of the property by a defect – detail of which was never provided to NHBC.

Mr and Mrs S said that surely once the claim had been made in 2014, NHBC should have inspected the property and only if it was satisfied that none of the issues were covered could it have fairly declined the claim. And yet NHBC didn't do that, or even contact them. Mr and Mrs S provided some details of the problems with the property that they'd fixed, asked for NHBC to show when it had inspected the property prior to issuing the certificate and said they'd never been issued with details of the warranty.

Our adjudicator explained to Mr and Mrs S that the inspections that NHBC carry out in order to gauge its risk, aren't something that we have jurisdiction over, because they aren't related to it carrying out insurance activity. He noted that no details had been presented to NHBC in 2014 that suggested any claim under the warranty was likely to be successful, so it hadn't progressed the claim or inspected the property. He felt this was fair and reasonable. He also felt it wouldn't be possible for NHBC to retrospectively consider whether damage or defects had been present at the property that might be covered under the warranty.

Mr and Mrs S said they felt harmed and cheated and couldn't understand why we wouldn't do anything about it. All defects were reported to NHBC by the solicitor and as it was a solicitor making the claim it is unclear how it could fail. Since selling the house, Mr and Mrs S said, they purchased a property which they re-built themselves and in doing so had to purchase a warranty. So they said they knew that in order to get a warranty all the proper building control documents had to be provided. They felt NHBC should produce the documents it had received and on which basis it had seen fit to issue their warranty. Our adjudicator said that as he hadn't been able to resolve their concerns, their complaint would be passed to an ombudsman.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, and with regret for the distress I know this will cause Mr and Mrs S, I'm not minded to move away from the views issued by our adjudicator.

I realise that this is an awfully tricky position for Mr and Mrs S to be in. Every party that was involved in this matter that they complain about seems to be found blameless for the situation they've found themselves in. I can only imagine how frustrating that must be for them. But that doesn't mean I can ignore the situation and evidence as it pertains to NHBC's liability. And NHBC has to have failed them in some way in respect of that liability, resulting in some kind of loss or differing circumstances that otherwise wouldn't have occurred, in order for a complaint against it to succeed (meaning it would have to act to put things right).

NHBC doesn't just act as an insurer. So not everything it does is subject to our jurisdiction. Any activity that NHBC carries out before the warranty is issued isn't something we can look at. Not least because the parties that initially contract for the provision of the warranty are the developer and NHBC. The homeowner isn't a party to that process. Only once NHBC agrees to issue a warranty and the house is purchased does that warranty transfer to the homeowner. So whilst I fully understand why Mr and Mrs S want to know more about what happened in the run up to NHBC issuing their warranty, in respect of inspections and documentation received, I can't look at whether or not what NHBC did at that time was fair and reasonable.

I can share with Mr and Mrs S though some detail that NHBC has passed to us. NHBC has said that going back to around 2009 it wasn't prepared to agree to issue a warranty because work was required to bring the property in line with its technical requirements (which are distinct from building control checks). NHBC has said that the next thing that happened from its perspective was that Mr and Mrs S contacted it in 2011 to make a claim for the roof. At that time, because the property had been purchased, NHBC felt it was appropriate to issue the warranty. And issuing the warranty enabled it to deal with the claim.

Because we don't have jurisdiction over the early activity NHBC carries out in checking a property prior to issuing a warranty, I'm not familiar with what is normally investigated. I know Mr and Mrs S have recently built or re-built a property themselves and have gone through the process of obtaining a warranty. I am aware that the warranties issued for self-build properties often have different terms and conditions and liabilities to those provided under schemes available to developers. Those warranties also create a lasting contract between the warranty provider and the person responsible for building the property because in the instance of a self-build, the builder is also the homeowner. Which means the homeowner can benefit from cover in respect of defects and/or damage regarding the work they completed. This is different to where a house is built and then sold to the first owner who then benefits from the NHBC policy agreed with the developer. In that instance, if there are defects, NHBC may be able to claim its costs for repair back from the developer. So the nature and basis of the two types of cover are distinctly different and may well involve very different processes in their agreement phases.

In any event, from the detail I've shared with Mr and Mrs S above, I think the warranty NHBC issued here likely didn't follow the normal processes anyway. Rather NHBC seems to have been prepared to step away from its normal processes, in order to assist Mr and Mrs S, by issuing the warranty without completing at least some of its usually required checks. But I'm satisfied that if a properly made claim had been put to NHBC, the absence of those checks, and even the absence of the building control certificate, wouldn't have prevented the claim from proceeding.

The difficulty for Mr and Mrs S is that, and despite them having sought representation from a solicitor in order to try and get things done in the right way, no proper claims regarding the defects and damage were made to NHBC. NHBC did receive letters from the solicitor. The initial letters demanded payment without any substantiation of loss. When NHBC responded asking for evidence from the solicitor some details were then provided but these weren't sufficient to persuade NHBC, even on the face of it, that there was a valid claim under the policy. And when NHBC sought further detail from the solicitor to try and establish if there was something the warranty needed to respond to, no further contact from the solicitor was received.

I know from what they've said that Mr and Mrs S were told by their solicitor that all they had to do was submit receipts for work done to NHBC, but that simply isn't how claims work – under all home insurance policies and warranties that I'm aware of the insurer has to have the chance to assess the claim first. And because NHBC didn't receive any response from the solicitor, it wasn't able to do that. That wasn't, in my view, its fault. And because NHBC had received contact from the solicitor, with an authorisation signed by Mrs S stating that NHBC could deal with the solicitor in relation to all queries about the property, it had no good reason to contact Mr and Mrs S directly when the solicitor didn't respond to its enquiries. Even if NHBC had done so, I'm not confident that would have changed anything. At best I think Mr and Mrs S, at that time, would have passed the letter on to the solicitor, but the

solicitor had already failed to answer NHBC's reasonable and direct enquiries. So I'm not persuaded that receiving a copy of a letter sent to Mr and Mrs S would have prompted the solicitor to reply.

I know Mr and Mrs S have provided some photos of the damage they repaired, that they spent thousands doing this and the house was still sold at a loss. But for a claim to succeed under the NHBC warranty, even looking at section 2 which makes NHBC liable for a bankrupt builder's responsibility to resolve damage and defects, it isn't sufficient merely to know that there is something wrong with a property. A defect is defined in the warranty as something which doesn't comply with NHBC's technical requirements. And damage is defined as being physical damage caused by a defect. NHBC wasn't able to assess the damage because the solicitor didn't reply to it, and the damage has now been fixed and the house sold. All that remains as evidence is some photos and repair data. Unfortunately that means there is no way that NHBC can reasonably now determine whether it's likely that the damage that Mr and Mrs S had to fix was caused by a defect. NHBC's inability in this respect hasn't arisen, in my view, out of any failure on its part. Therefore, I can't fairly and reasonably require it to consider a claim under the policy.

NHBC warranties that apply to homes built in certain countries do offer cover for fixing certain issues in a home that haven't been built in line with building regulations (distinct from NHBC's own technical requirements). But Mr and Mrs S's home wasn't built in those countries so this part of the warranty was never applicable to them.

I appreciate that Mr and Mrs S say they didn't receive a copy of the NHBC warranty but I'm not persuaded that even if they had the situation would have been any different. I say that because I know that Mr and Mrs S felt unable to deal with the situation they found themselves in as they didn't understand the processes involved. That was why they had their solicitor handle things. Having a copy of the warranty wouldn't have allowed them to understand and manage the situation especially given the wider circumstances of the property sale and (at that time) recently discovered non-compliance with building regulations. If the solicitor didn't have a copy of the warranty and chose to act and provide advice to them without it, I can't fairly and reasonably blame NHBC for that. The solicitor was a professional who should have known and understood the importance of verifying contract documents. A policyholder's entitlement depends heavily upon the agreed contract terms. If the solicitor didn't have a copy of the warranty he should reasonably have thought to ask for it. There is no evidence that he did so.

With regret for the upset and frustration I know this will cause Mr and Mrs S, and as I explained at the beginning of these findings, I don't uphold their complaint. I don't know why or how they came to be able to purchase a property that had been built without the required planning permission or building control consent – but I am satisfied that regarding the cover offered by the warranty provided, NHBC has acted fairly and reasonably. I haven't found that it failed Mr and Mrs S and so I can't fairly or reasonably require it to do anything to help put right the position they're in. But I do hope that they are able to understand why I've come to this conclusion and that they will eventually be able to find the party/parties responsible for their loss. If they wish to see the 2014 correspondence and telephone notes between NHBC and their solicitor that we have on file they should let us know and our adjudicator will provide copies.

my final decision

I don't uphold this complaint. 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 S to accept or reject my decision before 18 July 2019.

Fiona Robinson
ombudsman