

The complaint

Mr W has complained about National House-Building Council's (NHBC's) decision to decline a claim he made under his NHBC Buildmark warranty.

What happened

The subject of this complaint is a building comprised of multiple apartments. Mr W is the leaseholder of one of the apartments, and the holder of a Buildmark Warranty covering his apartment and his share of any common parts.

Mr W has complained about a defect with the installation of a shared drainage system serving his building. As the drainage system is shared, other leaseholder's, in addition to Mr W, will likely have been affected. But this complaint has been brought solely by Mr W, so I'll only be considering what he is entitled to, under his individual warranty as part of this complaint. But the conclusions I reach here would likely apply to the other leaseholders too, were they to bring the same complaint to our service.

Mr W says the drainage system was installed incorrectly, with several runs not being connected to the main sewer, resulting in sewage water running into the foundations of the building for a period of five years. The issue has since been resolved by the water authority, but Mr W raised a claim for damage to the building as a result of this issue and has complained about the efficacy of NHBC's building control function.

Our investigator considered Mr W's complaint but didn't think it should be upheld. She said our service wasn't able to consider NHBC's building control function as this activity wasn't regulated by the Financial Conduct Authority (FCA), and so fell outside of our remit.

Our investigator agreed that there was a valid claim under section 3 of the warranty, as Mr W had evidenced damage caused by a defect with one of the specified parts of the home or common parts. However, she said the cost of repairs did not meet the minimum claim value (MCV) set out in the policy, so NHBC was correct in its decision not to provide cover.

Our investigator also considered whether there was a valid claim under section 4. But this required that there be a present or imminent danger to the health or safety of the occupants, as a result of the issue, in order for a claim to succeed – and she didn't agree there was such a danger present.

Mr W didn't accept our investigator's opinion. As no agreement has been reached, the complaint has been passed to me to decide.

What I've decided – and why

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 while it will likely come as a disappointment to Mr W, I agree with our investigator's conclusions. I'll explain why.

Building control issues

One of Mr W's initial concerns was about the adequacy of NHBC's building control function. Our investigator explained that this isn't one of the regulated activities our service has the power to consider.

Mr W appears to have accepted our investigator's findings on this point, as he subsequently referred his concerns about NHBC's building control function to the appropriate body. So, as this is no longer in dispute there is no need for me to make a finding on this element of Mr W's complaint.

What the warranty covers under section 3

NHBC's Buildmark policy provides cover for specific major problems with newly built or converted properties where there has been a breach of its technical requirements. The policy is bought by the builder and passed on to the consumer when they purchase the property. The cover provided by the policy is split into several sections.

Section 3 of the policy is one of the relevant sections in this complaint. This section states that NHBC will pay for:

"We will pay you the full Cost, if it is more than £1,200 Indexed, of putting right any physical damage to your Home which is caused by a Defect in respect of any of the following parts of your house, bungalow, maisonette or flat, or its garage or other permanent outbuildings:"

It then goes on to list the various specified parts of the home, or common parts, which are covered. This includes below ground drainage systems which Mr W is responsible, or shares responsibility, for.

Within the policy booklet there is also specific emphasis on the words "Damage" and "Defect" and individual definitions for each:

"Damage

Physical damage to a Home caused by a Defect

Defect

The breach of any mandatory NHBC Requirement by the Builder or anyone employed by or acting for the Builder. Failure to follow the guidance supporting an NHBC Requirement does not amount to a Defect if the performance required by the NHBC Requirement is achieved by other means."

The policy also provides a definition for 'Common parts', 'Indexed', and explains how the minimum claim value is applied for claims involving common parts:

“Common parts

In relation to a Home, any of the following for which the Owner is legally obliged to share responsibility for cost and upkeep with the Owners of other Homes covered by Buildmark (or similar cover that we may issue):

- a. the parts of a building containing or providing support to a flat or maisonette;*
- b. any garage, permanent outbuilding, retaining wall, boundary wall, external handrail or balustrade, path, drive, garden area or paved area newly built by the Builder at the date of Completion;*
- c. any drainage system serving your Home;*
- d. any existing garage, permanent outbuilding, retaining wall or boundary wall that was sold to the first Owner under the original Contract.*

...

Indexed

Increased to allow for the effects of inflation. Any amount referred to as ‘Indexed’ was set on 1 April 2011 and the increase is applied on 1 April each year in line with the Royal Institution of Chartered Surveyors’ House Re-building Cost Index. The figure that applies to a claim is the one that is in force when the claim is first notified to NHBC.

...

When your Home includes Common Parts, our liability for all claims relating to them (subject to the limits referred to in 1) and 2) above) will be limited to that portion of the total cost of doing all the work that has to be done in connection with those Common Parts that we decide it is reasonable to attribute to your Home. However, for claims under items 1(a) to (m) in the yellow panel on the next page:

- a) if that portion is less than £1,200 Indexed, NHBC will have no liability;*
- b) if that portion is more than £1,200 Indexed or the total Cost of the repairs to the Common Parts is more than £12,000 Indexed, we will pay you your portion of the cost of the necessary work or, at our option, arrange to get the necessary work done at our expense, subject to the overall limits referred to in 1) and 2) above.”*

What all of this means is that Mr W’s warranty doesn’t guarantee that his property will be free from defects. Rather, it covers repairing any damage which has been caused by a defect (as defined) to one, or more, of the specified parts of the home or common parts. But only where the cost of repairing said damage exceeds the minimum claim value (MCV).

And as this claim relates to common parts, the minimum claim value is the higher figure, quoted above, indexed.

Claim under section 3

It doesn’t appear to be in dispute that there would be a valid claim, on the basis that there is damage to the home caused by a defect in the common parts. The issue is that NHBC says the cost of repairing the damage is £8,383.66 and the combined MCV, indexed, is £17,170. So, on that basis, NHBC says there is no cover under section 3, in line with the policy terms.

NHBC has provided a copy of its schedule of works, which supports the cost of repair does amount to £8,383.66. I note that NHBC invited Mr W to obtain and provide two alternative quotes for consideration if he believed its schedule to be incorrect. But I can’t see that any alternative quotes or repair schedules have been provided.

Based on the above, I find NHBC's repair schedule to be the most persuasive evidence as to the likely cost of repairing the damage. And as this falls significantly short of the applicable MCV, I agree that NHBC's decision not to cover the claim under this section is in line with the terms of the policy, and is fair and reasonable in the circumstances.

I understand Mr W feels it's unfair that NHBC can avoid liability for dealing with a claim on the basis that the cost of repairs is too expensive. But minimum claim values and/or excesses are commonplace in the market for these types of policies. And their presence is factored into the risk assessment and cost of the policy. Given this, and as the MCV is clearly stated within the policy literature, I don't consider it to be unfair for NHBC to apply it to Mr W's claim.

Should Mr W decide to take NHBC up on its offer of providing alternative quotes for the required repairs, he should send these directly to NHBC in the first instance. And if a further dispute arises after this, he may be able to submit a new complaint about that to our service, subject to our normal rules and timescales. But based on the evidence currently available, I think NHBC's position on this claim is fair.

What the warranty covers under section 4

Section 4 of the warranty provides additional cover where NHBC has performed the building control function. The policy booklet explains the cover provided:

"If there is a present or imminent danger to the physical health and safety of the occupants of your Home because it does not comply with the Building Regulations that applied to its construction, conversion or renovation in relation to the following specified Building Regulations, we will pay you the Cost of the necessary repairs:

Part A Structure;

Part B Fire safety;

Part C Site preparation and resistance to contaminants and moisture;

Part G Sanitation, hot water safety and water efficiency;

Part H Drainage and waste disposal;

Part J Combustion appliances and fuel storage systems;

Part K Protection from falling, collision and impact;

Part N Glazing – safety in relation to impact, opening and cleaning."

What this means is for cover under section 4 there needs to be a failure to comply with one of the relevant sections of Building Regulations, which is causing a present or imminent danger to the health or safety of the occupants.

Claim under section 4

I've considered all of the evidence provided in relation to the installation of the drainage system, and the subsequent damage it appears to have caused. And while I'm satisfied there was a defect with the drainage run, which resulted in damage, I haven't seen any evidence to suggest that there is a present or imminent danger to the health and safety of the occupants as a result. Particularly because the drainage defect has already been remedied by the water authority.

I appreciate Mr W's concern that just because there is no imminent danger, doesn't mean there won't be trouble in future. But his policy doesn't cover potential future issues. It covers either damage, caused by a defect, where the cost of repair exceeds the MCV or if there is a breach of relevant building regulations, which is causing a present or imminent danger. So, although I sympathise with Mr W's position, it wouldn't be fair or reasonable for me to direct NHBC to cover his claim in these circumstances, for the reasons I've already explained.

My final decision

For the reasons set out above, I've decided not to uphold Mr W's complaint against National House-Building Council.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 20 December 2023.

Adam Golding
Ombudsman