

## **The complaint**

Mr G and Mrs N are unhappy with National House-Building Council's (NHBC) claim decision following ongoing leaks at their property.

## **What happened**

Mr G and Mrs N purchased an apartment in 2018. They were the second owners of the apartment, and it came with a ten-year building warranty with NHBC. The building warranty started in 2013 so at the point Mr G and Mrs N purchased the apartment, it was in year five of ten.

Problems with leaks to the wintergarden were reported by the previous owners to the developer, who carried out repair works. In 2018 further leaks occurred, and this was reported to the developer and NHBC. As the leaks were a follow on to the previous leaks and repairs, which were originally reported to the developer within the first two years of the building warranty, this was considered by NHBC under section two of the building warranty.

NHBC carried out a resolution inspection and directed the builder to carry out works to the gutter joints by the deadline they set of 23 November 2018.

NHBC also considered other reported areas of leaks to the wintergarden. NHBC said the louvres were designed to allow ventilation and not be watertight, so didn't conclude anything further needed to be done. They also said the window seals hadn't been reported to the builder in the first two years, and weren't part of previous repairs, so NHBC considered them under section three of the policy. But, NHBC said those issues wouldn't be covered.

Mr G and Mrs N dispute the conclusions reached by NHBC. And they say that the window seals should be considered under section two of the warranty, as the issue has always been present, but the defect was hidden. As Mr G and Mrs N remained unhappy with NHBC's position, they approached this service.

After approaching this service, NHBC issued a second final response taking into account additional separate bedroom ceiling leaks to areas which had previously been repaired by the developer. NHBC said Mr G and Mrs N should go back to the developer first and let them know if things came to a standstill. They also commented on some other points Mr G and Mrs N had mentioned. And NHBC offered £250 compensation for the overall service they'd provided. Our investigator also took this final response into account in her review of the case.

Our investigator ultimately upheld the complaint in part. In relation to the wintergarden, she said that whilst she recognised the issue with the window seals wasn't observed until 2018, what was important was when it was discovered and reported, not when it was present but undetected from. She said NHBC had acted fairly by considering this issue under section three of the cover, and this part of the policy didn't provide cover for the issue Mr G and Mrs N had reported.

The investigator also said that NHBC had concluded the louvres were designed to allow ventilation, and the only area NHBC had directed the builder to carry out works in the wintergarden previously was to the joints, not the window seals or louvres. She also explained that some points of the claim and complaint she wouldn't be able to consider as it didn't relate to a regulated activity.

In relation to the ceiling leaks in the bedrooms, she said these were originally reported by the first owner and repairs carried out. The repairs failed and a resolution inspection was carried out in 2018, in which NHBC directed the builder to carry out works. NHBC understood the issue was resolved in 2019.

When Mr G and Mrs N reported further leaks in 2022, the developer said they'd look into things so NHBC confirmed they wouldn't become involved at that stage. However, as it appeared the builder hadn't done anything since, our investigator recommended NHBC should appoint a claims investigator to carry out an inspection.

Whilst our investigator recognised Mr G and Mrs N wanted to use their own contractor to carry out works, she thought it was reasonable for NHBC to have the opportunity to consider things in the first instance and to outline their proposals. She said that if Mr G and Mrs N were unhappy with any proposals and settlement offer made, they'd be able to raise a new complaint and refer it to this service for consideration. She also said that the £250 compensation NHBC had offered was fair and reasonable, so she didn't recommend they increase this.

NHBC agreed with the investigator's recommendation to arrange an inspection.

Mr G and Mrs N didn't agree. They said the winter garden leaks had been accepted by the developer previously and it needed to be waterproof. They also said the developer had shown no interest in repairing the bedroom leaks, so they wanted their own external party involved instead of NHBC. They also said they would look to provide additional information. However, despite the extensions given to provide a response, and multiple chasers for any further information, Mr G and Mrs N didn't respond.

As Mr G and Mrs N had already said they didn't agree with the investigator, the case was passed to me for a final decision.

### **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, I've reached the same outcome as our investigator.

Leaks to the wintergarden were reported to the developer by the previous owner, and repairs were carried out. Further leaks occurred, and these were reported to the developer and NHBC.

As the leaks had originally been reported to the builder in the first two years of the building warranty cover, and repairs had been carried out, NHBC agreed to carry out a resolution inspection under section two of the warranty. This was completed in October 2018. In this, NHBC considered issues raised by the owner of Mr G and Mrs N's apartment at that time, and another apartment in the building.

In relation to the leaks in Mr G and Mrs N's apartment, NHBC determined there were leaks from the gutter joints. They directed the builder to carry out works to the gutter joints by a

deadline of 23 November 2018. NHBC understood these works were satisfactorily completed.

NHBC didn't accept all the reported issues or direct the builder to do anything else at that time to Mr G and Mrs N's apartment. They said the louvres were acceptable and were open to the elements.

NHBC also said the window seals hadn't been reported to the builder previously, so would need to be considered separately under section three of the warranty. I'll talk about this separately further below.

Mr G and Mrs N didn't agree with NHBC's assessment of things overall or what needed to be done. They provided their own report to NHBC which said there were other issues, and NHBC had reached the wrong conclusion on what was needed to resolve the problem, including the louvres and seals.

Under section two of the building warranty, which relates to damage or defects reported to the developer within the first two years of the policy, this is the builder's liability period. This means the builder is responsible for fixing any reported damage or defects. If the builder fails to do so, or fails to engage, NHBC can provide a resolution service under the building warranty. This is what happened in 2018.

There are a set of rules that say what I can and can't consider. These are known as the Dispute Resolution rules (DISP) and can be found in the Financial Conduct Authority (FCA) handbook, available on their website.

To be able to look into complaints, I need to have the power to do so. In the DISP rules, one of the requirements which enables this service to investigate complaints is that the activity complained about needs to be a regulated activity. Carrying out contracts of insurance is one such regulated activity. But the NHBC policy isn't just an insurance policy. This means some of the actions NHBC carries out aren't insurance.

For a regulated activity to have happened under section two of the policy, the following needs to have happened:

- A resolution report has been completed by NHBC
- The resolution report directs the builder to do something by a deadline
- The builder fails to complete the work by the deadline given

Once the above steps have been completed, and the deadline expires, NHBC can step in and take over the claim. This is because the insurance part of the warranty provided by NHBC starts, and this then becomes a regulated activity. Anything before this point, including the resolution service and the content of the resolution report isn't a regulated activity so isn't in my jurisdiction to consider.

This includes the claim handling by NHBC prior to the deadline expiring, and the content of the resolution report and NHBC's decision as to what was or wasn't a defect and what they required/didn't require the builder to do. This also means that whilst Mr G and Mrs N's report disagreed with NHBC's assessment of defects during the resolution inspection, including the louvres, I can't consider the position or outcome NHBC reached on this, or the arguments in Mr G and Mrs N's report about why NHBC's resolution assessment was wrong, because it isn't within my power to do so, under the rules which govern our service.

During the resolution inspection, NHBC's claim investigator also considered what Mr G and Mrs N had said about the window seals allowing water to enter. They said this hadn't been specifically raised with the developer in the first two years of cover, and it was now in years three to ten of the policy. So NHBC considered these under section three of the policy – which was the relevant section that applied at that time – when the window seals issue was discovered and reported. This section provides cover for damage caused by a defect, to specific listed areas. NHBC said the window seals weren't covered under section three.

Mr G and Mrs N disagree with NHBC's position of considering the window seals under section three. They say the issue with the seals has always been present since construction, but remained hidden until 2018, so they weren't able to report this sooner. Mr G and Mrs N say that not removing the adhesive tape backing when installing the panels is a defect. As this was hidden but always present, Mr G and Mrs N say this should be included as part of the developers attempt to waterproof the wintergarden, under the section two claim for ongoing leaks.

I've considered what Mr G and Mrs N have said, but I don't agree. The resolution inspection concluded the joints to the guttering weren't acceptable, and NHBC directed the developer to put this right. But in relation to any potential leaks as a result of the window seals, this wasn't part of that consideration under section two or that direction, because it wasn't reported to the developer within the first two years of the warranty. What is important here is when the damage or defect is discovered and reported, not when it was present, undetected, from.

Mr G and Mrs N have mentioned an exclusion to claims under section three, which they say means it should therefore be considered under section two instead:

*“Anything you were aware of and could have notified to the Builder under part 1 of section 2, or for which you could have made a valid claim to NHBC under part 2 of section 2.”*

However, the first part of this refers to being aware of the issue but not reporting to the builder in the first two years. However, Mr G and Mrs N weren't aware of the issue, so the first part doesn't apply. The second part relates to if the builder is insolvent, and that's why they couldn't complete works required under a resolution report, but again this isn't relevant here. Therefore, this exclusion isn't relevant and doesn't mean the claim should be considered under section two instead of three.

So, I'm satisfied NHBC were correct in considering the window seal defect under section three of the policy as it wasn't something which had been discovered or raised in the first two years of the policy cover.

Section three says NHBC will pay for the full cost, if it's more than £1,200 indexed, of putting right any actual physical damage which is caused by a defect (as defined) to certain parts of the home. However, window seals aren't a listed area, only the actual glazing panes specifically of external windows and doors are.

Therefore, as window seals aren't included within the listed areas which are covered, I don't think NHBC has acted unfairly by declining the claim on this basis. So, I'm not going to direct NHBC to do anything further in relation to the window seals.

Damp patches to the ceiling were originally reported by the previous owner to the developer. Repairs were carried out, but these failed and it was again raised with the developer and NHBC. It was understood by NHBC that this issue was resolved by 2019 following further repairs.

Mr G and Mrs N copied NHBC into an email to the developer in 2022 in which they said further leaks had occurred through the bedroom ceilings. NHBC said that the builder confirmed at that point they were looking into things, so NHBC said to Mr G and Mrs N they wouldn't be involved any further at that stage. They explained though that if matters came to a standstill, to let NHBC know. I don't think NHBC's position at that point was unreasonable.

However, since that point, Mr G and Mrs N have said the builder hadn't arranged any appointments or investigated any further. In NHBC's final response in September 2022, they said they believed the issue would still fall within the builder's liability period, as it related to previously raised issues and failed repairs. So NHBC said Mr G and Mrs N should speak to the builder again and if they do not receive a satisfactory response, NHBC can then consider whether a claims investigator should visit to carry out an inspection.

Our investigator said that given the time that has passed, they thought it would be fair for NHBC to review things and a claims investigator carry out an inspection now. NHBC agreed with this. However, instead, Mr G and Mrs N want to appoint their own contractor to complete works, and for NHBC to cover the cost of this.

Whilst I appreciate what Mr G and Mrs N have asked for, I agree with our investigator that it would be fair and reasonable for NHBC to inspect in the first instance, and to put forward any proposals. And as outlined by our investigator, if Mr G and Mrs N are unhappy with any settlement proposals that are put forward by NHBC, they may be able to refer a new separate complaint to this service for consideration.

However, I agree with our investigator that NHBC could have taken a more proactive approach when no action had been taken by the developer about the new leaks reported in 2022 to the bedroom ceilings. NHBC offered £250 compensation as part of its final response (which also commented on other points raised too). And overall, I think that amount is fair and reasonable in the circumstances, so I'm not going to direct NHBC to increase this.

NHBC also noted in their final response that Mr G and Mrs N had mentioned that some works had been arranged by their managing agent to unconnected areas for different issues, and they were looking for NHBC to refund those costs under their warranty. NHBC said they'd originally said that as they hadn't had the opportunity to inspect, and so a claim couldn't be considered. But they've since reconsidered their position and outlined that in order to make an accurate determination, they'll now pass this to their claims investigator to assess further. I think those next steps for those unrelated matters appear reasonable. If after that has happened, and if Mr G and Mrs N remain unhappy with the position NHBC ultimately reach, they may be able to refer a new separate complaint about that to this service.

### **My final decision**

It's my final decision that I uphold this complaint in part and direct National House-Building Council to:

- Carry out an inspection of the leak and damp patch in the bedroom ceilings
- Pay the £250 compensation already offered to Mr G and Mrs N (if it hasn't already done so)

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G and Mrs N to accept or reject my decision before 4 August 2023.

Callum Milne  
**Ombudsman**