

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 heating systems across the development, which means other leaseholders have likely been affected. However, as this complaint has been brought solely by Mr W, I'm only considering issues relevant to the cover he is entitled to under his individual warranty. 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 his heating system was installed without sufficient access points for future maintenance or repairs. Mr W says NHBC provided building control services in this case and failed in its duty to ensure the system met the requirements of Building Regulations. He raised claims under two separate sections of the warranty, but both were declined by NHBC.

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 said there was no valid claim under part one of section 3 of the warranty because the heating system was installed in line with the manufacturer instructions and was working as intended, so she didn't think there was a defect. She also said the heating system wasn't one of the specified parts of the home covered under section 3, so the claim wouldn't be covered, even if there had been a defect. Under part two, she said the issue wasn't with a chimney or flue, and there was no present or imminent danger to the health or safety of the occupants, and so there was no cover.

Our investigator also considered whether there was a valid claim under section 4. But again, this required that there be a present or imminent danger to the health or safety of the occupants, in order for a claim to succeed. So, she was satisfied that NHBC's decision to decline the claim was fair and reasonable.

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.

Part 1 of 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 doesn't include heating systems.

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."*

What 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.

So, it is the damage, and not the defect(s), which is specifically covered under part 1 of section 3 of the warranty.

Alternatively, part 2 of section 3 says that:

“We will pay you the Cost of putting right any Defect in a flue or chimney that serves your Home and causes a present or imminent danger to the physical health and safety of anyone normally living in your Home. Alternatively, we may at our option arrange to get the necessary work done at our expense.”

Claim under section 3

Having carefully considered the cover the warranty provides under this section, and the issues raised by Mr W, I think NHBC’s decision that there is no cover under either part of section 3 is in line with the policy terms and is fair and reasonable in the circumstances.

I say this because no damage as a result of a defect with the heating system has been identified. Rather, the complaint is about a lack of access for future maintenance. When inspected by the manufacturer, the heating system was considered to have been installed in line with the manufacturer guidance and to be performing as expected. So, I don’t think it’s been shown that there is damage as a result of a defect.

And in any event, the heating system is not one of the specified parts of the home covered under part 1 of section 3.

Under part 2 of section 3, defects with chimneys or flues are covered where the issue presents an imminent danger to the health or safety of the occupants. Mr W has argued that the air source pump extraction vents of the heating system perform the same function as a flue, and so should be covered.

I’m not sure whether I agree with Mr W’s argument or not. But even if I did, the second requirement is that the issue with the chimney or flue presents an imminent danger to the health or safety of the occupants. And I’ve not been provided with any persuasive evidence that there is such a present or imminent danger.

So, for these reasons, I’m satisfied NHBC’s decision that there is no valid claim for the issues reported under section 3, is fair and reasonable.

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.

As explained in the above section, I don't consider there has been any persuasive evidence provided to support that such an imminent danger exists. And I note that Mr W seems to accept this is the case too.

I also haven't seen evidence that any of the sections of Building Regulations, relevant to section 4, gave specific guidance about access points for heating systems, which has been breached. But even there was such evidence, there is no evidence of a present or imminent danger caused by the lack of access. So, as with section 3, I'm satisfied that NHBC's decision not to accept a claim under section 4 is in line with the terms of the policy and is fair and reasonable in the circumstances.

I fully appreciate Mr W's strength of feeling, and I've carefully considered his arguments that there may be a danger to the health or safety of the occupants in the future. But, as explained above, a potential, future risk to health and safety isn't covered under Mr W's policy, only a present or imminent danger.

I also understand that Mr W feels it's unreasonable that the system could have been designed and installed without sufficient access points for future maintenance. And while I sympathise with his view on this, that doesn't automatically mean that responsibility for correcting this falls to NHBC. Rather, NHBC is required to provide the cover set out in the policy. And I've not seen anything which would lead me to conclude that the lack of access points to the heating system ought to be covered under the relevant sections of the policy in these circumstances.

So, Mr W's arguments here don't alter my conclusion that NHBC's decision on the claim is both in line with the terms and conditions of Mr W's policy, and that is fair and reasonable in the circumstances.

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