DRN-2903267

The complaint

Mrs F has complained about National House-Building Council's (NHBC's) handling of a claim she made under her NHBC Buildmark warranty for defects with the waterproofing at a property she owns.

What happened

I issued a provisional decision on this complaint in March 2021, an extract of which is attached and forms part of this final decision. I set out the background to Mrs F's complaint in my provisional decision, so I won't repeat that information here.

In my provisional decision, I said I was intending to uphold Mrs F's complaint, in part. I was minded to direct NHBC to recalculate its cash settlement offer in line with the costs supplied by Mrs F's chartered surveyor – with the exception of the below costs which I said it should amend to reflect the next highest cost quoted by NHBC or its' contractors:

- Replacement woodwork not already accounted for in its' schedule (kitchen and bathroom units, internal doors etc)
- Costs for the works to radiators
- Costs for the temporary fencing
- The supply and fit of rigid board underlay
- The extra allowance to remove the stairs during waterproofing

I said the cost of the waterproofing works should be based on the independent contractor's quote.

I said NHBC should also add £1,000 for building regulation, and £170 for COVID measures in line with its improved offer. And that it should add 10% to the total amount as a contingency for unforeseen costs/works required. It should also be prepared to reconsider this amount, subject to evidence proving that it was materially insufficient to complete the works required.

I said NHBC may limit its settlement to 37.5% for the common parts areas.
Were this to result in a lower offer than that already made by NHBC, I said it should honour its original offer instead.

I also said NHBC should increase the total compensation for the distress and inconvenience it has caused Mrs F to £3,000.

I asked both sides to provide any further comments or evidence they wanted me to review before I reached my final decision.

Both sides responded with further comments and evidence for me to consider. To briefly summarise the key points raised:

NHBC

- Accepted the additional £1,000 compensation
- Agreed to recalculate its settlement offer in line with my provisional decision
- Didn't agree that it should be required to pay both a 10% contingency and be prepared to consider additional works over and above that amount. It said the 10% contingency could leave Mrs F with a cash surplus if it was more than sufficient to cover the additional works. It said it would agree to either a contingency amount, or to consider additional works required over and above the settlement amount.

Mrs F

- Mrs F said she is the only party who bears no responsibility for the issues at the property. My provisional decision is unfair as it leaves her without enough funds to complete all the necessary repairs and having to rely on the builder to cover his share.
- NHBC should cover all of the works in order to deliver a lasting and effective repair, and then seek to recover its costs from the builder as it has the funds and power to do so.
- I'm incorrect to suggest that the other two flats in the building don't have NHBC warranties.
- There were several issues with NHBC's scope of works which demonstrate that it shouldn't be relied on, such as its failure to price for the correct tiles or the removal of electrics.
- NHBC's scope of works includes several miscalculations or incorrect applications of the 37.5% common parts reduction.
- The photos I've relied on are out of date.
- It's unfair to rely on NHBC's costs for the tanking works because the works will likely have to be carried out in two stages – flat then common parts – but the quote assumes the works can be done together. Also, the quote is lower than those provided by her contractor and chartered surveyor and is three years old and so likely out of date.
- Mrs F believes that VAT is a fixed percentage which will be payable on all the works, so there's no fair justification for allowing NHBC to withhold it from the initial settlement amount.
- Mrs F told NHBC that the flat had previously been rented in 2016, but it conveniently hasn't been able to obtain those call recordings. Had it have updated its records then the builder wouldn't have become obstructive and the claim could have progressed more quickly.
- Due to NHBC incorrectly supporting the builder's assertion that the bathroom was to blame for the issues, they had to spend money unnecessarily on retiling the bathroom.
- The compensation suggested in my provisional decision is nowhere near sufficient to cover Mrs F's financial losses or the distress and inconvenience she has experienced.

Mrs F also provided further evidence from her chartered surveyor offering additional comment on some of his figures. She also provided evidence from local estate agents to show that she had looked into renting the property during the life of the claim and that those agents agree the property was unlettable.

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.

I've also carefully considered all of the additional evidence and arguments provided by both sides. Where I've reached a finding that differs from my provisional decision, I have already shared this with both parties and considered their responses before moving forward with this final decision.

Mrs F has raised many arguments and asked many questions as part of her response to my provisional decision. I don't intend to answer or respond to them all individually. Instead, as I did in my provisional decision, I'll focus on what I believe to be the key points relevant to reaching a fair and reasonable outcome in the circumstances of this complaint. This isn't intended to be a discourtesy to Mrs F, rather it reflects the informal nature of our service and my role within it.

As I see it, the key points I need to answer in this final decision remain broadly the same as those addressed in my provisional decision. Namely:

- The scope of works to be completed and the cost
- Loss of rent, loss of use and alternative accommodation
- Delays and compensation

However, unlike in my provisional decision, I will consider "the scope of works to be completed and the cost" under several subsections:

- Contingency amount
- Common parts
- Disputed items on scope of works
- VAT
- Cash settlement to be paid

Contingency amount

In response to my provisional decision, NHBC said there would be no merit in directing it to pay a contingency sum and to also expect it to consider works over and above that sum. It has since indicated that it would be prepared to consider amounts over and above the contingency sum if Mrs F first provides a full breakdown of what the contingency sum has been used for.

However, I'd clarify that the reason I suggested the contingency amount is because I think it's likely that there will be some additional claim related damage discovered once the works commence, and I don't think it would be fair for Mrs F to have to bare any of the costs which ought to be covered under her claim simply because NHBC has elected to cash settle. I appreciate there is a possibility that the contingency may be more than sufficient, but equally there is a possibility that it will be less so. It's for this reason that I remain of the view that NHBC should be prepared to consider paying further costs if Mrs F

can evidence that the contingency sum was insufficient to cover the additional claim related costs she has to pay.

I think NHBC's position that it would require a full breakdown of what the contingency sum was used for before considering costs over and above that amount is fair and reasonable.

Common parts

Mrs F remains of the view that it's unfair for NHBC to limit the settlement amount to only cover 37.5% of the works required to the common parts. She says the defect in common parts is contributing to the damage to her flat, and so no lasting and effective repair can be achieved without completing 100% of the works to both the flat and the common parts. Mrs F has again referred to a similar decision issued by our service on a complaint with broadly similar circumstances. She says this decision shows that the most important consideration should be achieving a lasting and effective repair. She says it's unfair that the precedent set by this decision is ignored.

As I explained in my provisional decision, our service looks at each case on its own individual merits – as opposed to considering *alleged* precedent set by decisions on complaints with similar, although not exactly the same, circumstances.

In this case, there are three flats in Mrs F's building – her own ground floor flat, and two first floor flats. These flats are owned by the NHBC registered builder. In my provisional decision I said these flats did not have NHBC policies attached to them. Mrs F has argued that's incorrect and has supplied evidence that the builder did obtain policies for these flats.

I've thought carefully about the additional evidence and arguments supplied by Mrs F here. I think it would be helpful to explain that NHBC Buildmark warranties are typically purchased by a builder when constructing a new build. The bulk of the protection offered by the warranty is designed to pass from the builder to the first buyer, following completion of their purchase of the property. A builder cannot retain the property/properties and claim under section 3 against defects in his own work. It's for this reason that while I accept there are, in theory, two policies covering the upstairs flats, they are not active as neither flat has been purchased from the original builder. This means NHBC is unable to cover all of the works to the common parts under the three combined warranties.

Based on the evidence in this case I accept that a defect exists (both in Mrs F's flat and in the communal hallway) and that it has caused damage. This is something that is covered by Mrs F's warranty and this isn't disputed by NHBC. But NHBC's policy is clear about how it may handle claims for common parts issues, as I highlighted in my provisional decision. That is, that it will only cover the warranty holder for their proportion of liability for the state of repair of the common parts.

Mrs F has argued that it would be fairer for NHBC to complete 100% of the works and then seek to recover its costs from the builder. Otherwise she says she may be forced to carry out works to the flat in isolation, which will likely result in the damage reoccurring which NHBC would then refuse to cover again. She says she has no way of ensuring that the builder will complete his part of the works without having to incur further legal expenses.

In my view any potential dispute, over the remaining costs, for repairs to the common parts essentially boils down to a civil matter between Mrs F and the builder – ie a leaseholder

and her freeholder. The Buildmark warranty does not provide cover for legal expenses to fund civil disputes between leaseholders and their freeholders. NHBC has also pointed out that in 2018 the builder confirmed he was prepared to cover his share of the damage to the common parts as well as any further reasonable costs he would be responsible for. He only disputed his liability for damage to Mrs F's flat – which he said was caused by her alterations to the shower. NHBC says there is no evidence to suggest the builder's position on this aspect has changed.

Ultimately, I don't think NHBC has a responsibility under the policy to do more than what it is offering to do – pay a cash settlement equal to the cost of 100% of the repairs to Mrs F's flat and her proportion (37.5%) of repairs to the common parts. That's because this will be sufficient to deliver a lasting and effective repair, subject to the builder (freeholder) covering his share of the common parts repairs. I don't think it would be fair or reasonable to direct NHBC to cover the builder's liability when this isn't something it is required to do under the terms of the policy.

It follows that my finding here is the same as I reached in my provisional decision – that it's fair for NHBC to limit the settlement for the common parts to 37.5% of the total costs of repairs to that area.

Disputed items on scope of works

Mrs F has raised several points of concern about my directed settlement. She says I have wrongly placed equal weight on the quotes of her chartered surveyor and those of NHBC and its contractors.

I should clarify here that rather than placing equal weight on the chartered surveyor's costs with any of NHBC's individual quotes, it was the weight of the other three quotes together that persuaded me that some of the chartered surveyor's costs were too high. Despite this, my provisional finding was that, for the majority of the cost items, it was fair for NHBC to base its settlement amount on the costs supplied by Mrs F's chartered surveyor rather than on those of itself or its contractors.

The only exceptions to this were where the chartered surveyor costs were significantly out of line with the other three quotes – for example the costs of architrave which were over five times higher than the nearest alternative. In my view this discrepancy was too great to merely reflect an expected difference in two contractors pricing methods. So, instead, for these items, I suggested that NHBC should instead apply the next highest figure from the three alternative quotes, which were all broadly in line.

Following the responses to my provisional decision, Mrs F has recently provided a further builder's quote, costed against NHBC's scope of works. The quote is from her Brother's building company. Mrs F says her Brother is the most likely contractor to actually complete the work, so I should place additional weight on the costs he has quoted and recalculate the settlement on this basis.

I note that, like with the chartered surveyor's quote, some items on this new quote are priced significantly higher than the three quotes provided by NHBC, whereas the majority of the figures are broadly in line. I also note that the new quote suggests an allowance is needed for site supervision and a labourer.

NHBC doesn't agree that it would be fair for me to base anything on this new quote. It says that because the builder is Mrs F's Brother, his quote cannot be considered as independent. It also questions why if Mrs F's intention was to always use her Brother's firm,

she first approached two different companies for quotes and is only now providing a new quote at this late stage. NHBC's view is that Mrs F is only introducing this new quote now to try and obtain the highest amounts for each item of work.

I've carefully considered the information provided by both sides, including the new quote provided by Mrs F. I don't agree that simply because the new quote has been produced by Mrs F's Brother, that means it's unreasonable for me to place any weight on that quote.
After all, NHBC's quotes are from firms it has a pre-existing relationship with too. However, I also don't agree that this new quote should supersede the detailed costing exercise which has already been undertaken either.

When reaching my provisional decision, I compared and considered four detailed quotes/costings, and explained at some length, why I'd come to the conclusions I had. The new information provided by Mrs F hasn't changed my thoughts here. Having carefully considered the new information, it's reinforced my view that the method set out in my provisional decision, based on the detailed costs and quotes I had compared, will deliver a fair and reasonable settlement in the circumstances of this complaint.

This means I won't be amending any of the individual figures which factor into the overall settlement, based on the new quote from Mrs F's Brother.

However, in response to my provisional decision, Mrs F's chartered surveyor did provide some additional comments on some of the costs I had questioned. I've considered his responses, and whether they should impact certain costs, below.

- Replacement woodwork – It's likely that these will have been damaged by damp conditions in the property

I accepted this was a possibility in my provisional decision. But there is currently no persuasive evidence that it has suffered damage, so it wouldn't be fair to award Mrs F the money to replace these items until this is established. This is why I suggested that NHBC should be prepared to consider covering the costs of additional claim related damage over and above the 10% contingency amount – should Mrs F be able to evidence that it is required. I remain of the view that this is fair.

- Radiators – whilst NHBC rates are consistent they equate to an operative for one hour per radiator which seems light.

I can see that the NHBC figures do appear to amount to one hour per radiator and I can see that this might not be sufficient to remove and drain then subsequently rehang, refill and test a radiator. That said, the chartered surveyor's costs are over ten times the highest alternative figure, and nothing in his additional comments has helped me to reconcile such a significant discrepancy. I can't see how ten hours per radiator would be necessary.

As I understand it, the radiators could all be removed in one go, and later rehung etc in one go. This means the system would only need to be drained once and refilled once, which would save some time. But this work will require two visits from the appropriate tradesperson, one to remove and one to refit. Taking all of this into account, I think a more reasonable cost per radiator would be £120.36. This amounts to three hours per radiator at the next highest quote of the four I have considered.

- Costs for temporary fencing - panels are £20 to buy an allowance for delivery, erection, maintenance and removal is the basis for my calculation. NHBC rates of

£10 seem light. £20 per panel for labour costs to erect, maintain, adapt throughout the 12 weeks amounts to £1,440.

The figure quoted above is over £1,000 less than included on the initial costs supplied by the chartered surveyor and is twice as high as the highest alternative quote. However, with the additional commentary from the chartered surveyor I have been able to complete some additional research. From what I've seen, £20 per panel does seem a more reasonable price than £10. So, I think NHBC should amend its settlement for this item to £1,440.

- Supply and fit of rigid board underlay – on review the figures supplied by NHBC appear adequate.

The chartered surveyors initial quote for this item was over three times higher than the closest alternative. Considering this alongside the new comments, I stand by my provisional finding. NHBC should pay the next highest cost from the three alternative quotes (its own, and the two additional contractors it obtained quotes from).

- Extra allowance to remove stairs during waterproofing – initial allowance should be sufficient as the upstairs flats aren't occupied, this wasn't made apparent originally.

Like the chartered surveyor, I was under the impression that the upstairs flats were occupied by tenants. In any event, the chartered surveyor accepts that the amounts quoted by NHBC and its contractors are sufficient. So, for this item, NHBC should pay the cost from the next highest quote.

- Site supervision – agrees a full-time supervisor isn't needed but consideration for the role of supervision is needed. Whilst the work falls outside of CDM regulations, the management and supervision allowance in the costs should not be zero. A working foreman would be the most cost-effective solution. His time should be split between his own works and time spent providing supervision. Two hours per day spent on supervision seems realistic. Therefore, he would recommend an allowance of £40 per hour, which equates to £400 per week for site supervision – a total allowance of
  £4,800, based on the 12 weeks the works are estimated to take.

NHBC's view here is that all contractors are required to have basic health and safety training. It says for the purposes of a site of this size all that is required from a health and safety perspective is someone who can call the emergency services as and when required. It says as long as the workforce are fully qualified, no further person is required. NHBC states that considering Mrs F's concerns about COVID, instructing a third person to project manage what it describes as a two-man job would be counterproductive to the proposed goal of protecting the health and safety of the workers.

It's not part of my role as ombudsman to make any independent determination on whether site supervision is required for a building site based on its size or the complexity of the works required. Rather, I make my decision based on the available evidence from those who are qualified.

It seems all parties now agree that there is no need for a standalone supervisor and that these duties should be completed by somebody already on site. What isn't clear to me is why having someone operate as a both a contractor and supervisor simultaneously would result in additional costs to Mrs F. The chartered surveyor suggests that the supervisor is likely to spend two hours per day carrying out supervisory responsibilities. But he hasn't shared any specifics about what these responsibilities should entail and

why they'd be necessary for these particular works at this particular site.

According to NHBC there will only need to be two workers on site. And it has highlighted the most basic qualification required for site staff includes basic health and safety training which will be sufficient to meet the requirements of the Health and Safety at Work Act for this particular site. Taking the above into account, and in the absence of any specific details of what the supervision aspects would entail, I'm not persuaded that one of the contractors required on site would reasonably need to spend several hours per day carrying out supervisory duties.

Based on all the evidence and arguments provided, I'm still not persuaded that it would be fair or reasonable to award additional costs for site supervision.

- COVID measures – NHBC's figure of £170 isn't sufficient. The HSE recommends FFP3 masks which cost around £60 for 10 masks. The use of 20 masks per week is not unrealistic. Add to this a reasonable amount for sanitizer and surface wipes and a cost of £1,440 for the 12-week duration of the works does not seem unreasonable.
  In addition, the Construction Leadership Council published the Site Operating Procedures which were updated on 7 January 2021 to reflect government guidance regarding working safely on construction sites. These include travelling to work separately. In order to implement this guidance contractors cannot work as efficiently as before. Whilst these costs are difficult to quantify, he would suggest the loss of two-man days per week. Based on an estimated rate of £250 per man day this equates to £6,000 for the duration of the works.

NHBC says that HSE does not make any recommendations for FFP3 facemasks and from what I've seen, I agree. The HSE website states:

> *"PPE for protection against coronavirus is generally only required for certain healthcare activities. In a non-clinical setting, there is no need to provide different PPE than you would normally have provided before the pandemic started."*

And the Site Operating Procedures referred to by the chartered surveyor states:

> *"Coronavirus (COVID-19) needs to be managed through social distancing, hygiene and the hierarchy of control and not through the use of PPE Workplaces should not encourage the precautionary use of extra PPE to protect against Coronavirus (COVID-19)"*

NHBC has broken down the £170 it offered, and provided supplier names for some of the items, which I have verified:

- A hand station = £128.40 inc VAT
- Extra refill = £6.35 inc VAT x2
- Large tub of wipes 225 number = £9.59
- Masks 100 number = £18.99
- Total costs = £169.68 inc VAT

The above costs have been calculated by the person who drew up the scope of works. So, I think it's likely he has correctly accounted for the length of the works he specified. Taking that all into account, on balance, I think £170 is sufficient to cover the costs of masks and cleaning as set out above.

In terms of the potential cost of adhering to the Site Operating Procedures, the chartered surveyor has acknowledged that this is difficult to quantify. And NHBC has highlighted that works are unlikely to start immediately after payment of the settlement as negotiations will need to be undertaken with the builder. So, it's possible that different restrictions, or even no restrictions, may apply at the time the works need to commence.

While I think it's likely that some restrictions will remain in place, it is possible that the current Site Operating Procedures may not apply by the time the works commence. So, rather than directing NHBC to pay an estimated amount upfront, for costs Mrs F may not incur, I think it would be fairer for these potential costs to be covered by the contingency amount. And, should the contingency amount prove insufficient to cover all the additional, necessary, claim related costs, NHBC should consider further, reasonable, claim related costs subject to being provided with detailed evidence of what the contingency amount was used upon.
In addition to the above items, Mrs F has also disputed some further items on NHBC's scope of works:

- Provision only for ceramic tiles in the bathroom despite the fact Mrs F's tiles are real stone which are significantly more expensive.

NHBC says the photos aren't clear enough for this to be established. Mrs F says this demonstrates NHBC's cynicism with regard to playing down costs as they have visited several times and physically removed the tiles.

I'm unable to determine whether the tiles are real stone or not based on the photos. I agree that having visited the property and removed the tiles, that NHBC ought to know what material they are. But as it says it doesn't, what's important here is a fair way forward. So, subject to Mrs F providing detailed persuasive evidence that the tiles are real stone, together with a clear explanation of the associated increased cost, NHBC should increase the settlement amount to reflect this.

- Provision required for likely damage to underfloor pipework following the breaking up of the screed

As this is a potential cost, as opposed to something definitely needed, it is what the contingency amount is designed to cover. And as I've stated, should the contingency amount prove insufficient to cover all the costs which do become necessary, NHBC should consider these additional costs.

- All electrics need removing for the tanking system to be installed

NHBC disputes that this work is required because the property has not been flooded. It says the materials such as faceplates and boxes can be removed, stored, cleaned and reused.
Mrs F doesn't agree, she says there is likely to be corrosion to items such as backing boxes which have been fixed to damp walls for several years.

Again, this is a potential cost and so can be covered by the contingency amount as above.

- Use of liquid screed

NHBC says this isn't needed as a good tradesman can achieve a flat sand and cement screed floor. Mrs F says it was NHBC's choice not to carry out the works, so this should be left at the discretion of the contractor. She says use of liquid screed will improve the aesthetic finish of this work.

Under the terms of the warranty, NHBC is entitled to decide how it settles a claim. In this case it says it cannot complete the works because the other two properties, and their share of the common parts, aren't covered by active NHBC warranties. I don't think this is unfair or unreasonable in the circumstances.

Mrs F feels it's unreasonable to rely on a scope of works drawn up by NHBC admin staff. NHBC says the scope was not drawn up by admin staff, but a specialist consultant and chartered engineer with specialist qualifications in waterproofing.

When considering what a fair cash settlement should cover, I'm basing it on the works set out in NHBC's scope of works. This is because the scope of works sets out the works NHBC would carry out if it were completing the repairs. I'm satisfied that the scope of works was drawn up by a suitably qualified person and that it includes the works required to deliver an effective and lasting repair.

So, on the basis that a flat finish can be achieved without the use of liquid screed, I'm satisfied this isn't a cost NHBC needs to cover.

- Fiberglass in the studwork

Now that it has been clarified where this is to be used, NHBC has stated that the bathroom walls, which back onto habitable areas, appear to be masonry. It says this means no insulation is needed as there is no cavity to fill. Based on this I think it's reasonable for this cost not to be included in the settlement.

- Celotex to be laid above the tanking which NHBC hasn't allowed for

NHBC says this isn't suitable for floor construction. It says its costs for the tanking are based on the independent contractors quote which allows for insulation in a wet environment.
Mrs F says that her contractor uses a different damp proofing specialist whose opinion obviously differs on the use of this material. She feels it would be unfair to exclude this cost as this effectively would mean she would be forced to use NHBC's damp proofing specialist to carry out the works.

Mrs F is free to use any damp proofing specialist she would like. What I need to decide is whether it is fair for NHBC to base its cash settlement for the damp proofing works on the design and quote provided by its damp proofing specialist. And I think it is. Just because Mrs F's contractor prefers to use Celotex in the way described doesn't mean it is the only way to achieve the required result. Ultimately, I'm satisfied that the detailed design and quote provided by the damp proofing contractor fairly reflects the works required to deliver a lasting and effective repair at a cost available to Mrs F. So, I think it's fair and reasonable for NHBC to use these costs for the cash settlement.

Mrs F has also pointed out that the damp proofing quote is several years old. She says the costs should be uplifted to account for the increased costs in today's market. She says it is well documented that the cost of materials has increased by between 15% to 80% over the past year.

NHBC has included a 17% uplift to the damp proofing quote as part of its schedule of works – which it says is sufficient to cover the uplift. This amount was calculated by its chartered engineer who is also certified in waterproofing.

I have considered the news articles Mrs F has shared about the costs of building materials

increasing. But there doesn't appear to be anything which specifically refers to the materials required for the damp proofing works. So, on balance, I'm more persuaded by the opinion of NHBC's expert. That is, that the 17% uplift is sufficient to cover the increased cost for this year.

In terms of the increasing costs of materials required for the remainder of the works, I've considered whether NHBC should include a further uplift on all materials. But I've based the majority of my recommended settlement amount on the breakdown provided by Mr C's chartered surveyor – which are based on 2021 prices. Similarly, the two additional quotes supplied by NHBC are based on 2021 rates too.

The news articles supplied by Mrs F suggest that materials have increased in price due to supply interruptions. And her Brother's quote suggested that an additional contingency would be required to account for potentially higher costs of materials. But neither the articles nor the comments from Mrs F's Brother specifically show that Mrs F will be unable to complete the required works with the amounts calculated by her chartered surveyor or NHBC and its contractors. Afterall, the availability of materials may have changed again by the time the works are ready to commence. So, in the absence of persuasive evidence that the updated settlement amount will not be sufficient for the work to be completed, I don't think it would be fair or reasonable to direct NHBC to further uplift the costs on the scope of works which have been based on 2021 prices.

That said, should Mrs F be able to evidence to NHBC that she has been unable to complete the works due to an increase in the cost of materials – across the entire industry, not just with her chosen contractor – then I think it would be fair and reasonable for NHBC to give further consideration to this, at that stage.

- No provision has been made for replacement kitchen units

I addressed this point in my provisional decision. As the kitchen units show no signs of visible damage it won't be known whether they require replacement until they are removed during the works.

I appreciate Mrs F and her chartered surveyor's views that it's likely the units have suffered damage. But this is a potential cost and so can be covered by the contingency amount. And as I've stated above, should the contingency amount prove insufficient to cover all the costs which do become necessary, NHBC should consider these additional costs.

VAT

Mrs F feels strongly that it's unfair for NHBC to be able to withhold the VAT element of his claim settlement until she provides invoices. She says VAT is a fixed amount and will be payable on all works, so she there's no justification for allowing the VAT element to be paid later. She says late payment of VAT could even affect the solvency of her chosen contractors.

NHBC has highlighted that it is standard practice for contractors to issue VAT invoices following completion of works and to allow 30 days for payment. It says one of the contractors Mrs F obtained a quote from confirms it works this way on its website. NHBC says that as the contractor Mrs F will use remains unknown the actual amount of VAT that will need to be paid is also unknown.

I've thought carefully about everything Mrs F has said about this issue. But I remain of the view that it is fair and reasonable for NHBC to delay payment of VAT until it has been

supplied with VAT invoices. This is because there is no guarantee that the contractor, or contractors, Mrs F elects to use will be VAT registered. There are numerous reasons why tradesman may not be registered, such as having a turnover below the threshold or being in their first year of trading.

NHBC does need to cover Mrs F for any VAT she is charged on the works required. But I consider that it is reasonable for NHBC to first verify the exact amounts of VAT Mrs F has been charged before paying this.

Cash settlement to be paid

NHBC recalculated its proposed settlement in line with my provisional decision. I shared these calculations with Mrs F and she highlighted several items where the amounts NHBC had allocated were not the highest from the four quotes provided. I reviewed these and noticed some items where NHBC hadn't applied the correct figure in line with the method I set out in my provisional decision. I also noted that for many of the items highlighted by Mrs F, NHBC had correctly followed the method I set out.

To reiterate here, the method set out in my provisional decision, for calculating a fair and reasonable settlement, was not for Mrs F to receive the highest amount from each of the quotes. I said it was reasonable to rely on the figures provided by her chartered surveyor, except where those figures were drastically different from the other three quotes. For these figures, I said NHBC should pay the next highest figure from the remaining three quotes. I remain of the view that this is a fair way of calculating the settlement in the particular circumstances of this complaint.

Mrs F also highlighted some items on NHBC's new calculations where the costs from her chartered surveyor, which had been used in line with my provisional findings, were drastically lower than the three alternative figures. These items applied mainly to plastering and tiling works. She suggested that for these items, she should receive the highest alternative figure.

I thought about Mrs F's argument here. I agree that following the logic of my provisional findings, it would be reasonable not to rely on the chartered surveyor's costs where they are significantly lower, the same way I haven't when they are significantly higher. But I don't agree this means Mrs F should receive the highest alternative figure. Instead, for these items, I think NHBC should apply the lowest alternative figure from the three remaining quotes. This is because this figure will be the closest to the chartered surveyor's figures, but more in line with the remaining quotes – which mirrors the approach of paying the highest alternative cost when the chartered surveyor's figures are, in my view, too high.

I've recalculated NHBC's quote in line with the above findings which differ from those in my provisional decision, such as the radiators, tiling, plaster and temporary fencing. I've also edited several items where NHBC had used an incorrect figure and amended this in line with the method set out in my provisional decision. Having done so, the new settlement calculation amounts to £79,801.88 excluding VAT and £95,762.25 including VAT. I think this represents a fair and reasonable settlement amount in the circumstances of this claim and complaint.

Loss of rent and alternative accommodation

In my provisional decision I explained that Mrs F's property hasn't been lived in for several years and that based on this, it wouldn't be reasonable to expect NHBC to pay for alternative accommodation during the period of the claim. Nothing either side has said in response has changed my mind here.

I also said that loss of rent and loss of use are specifically excluded under the terms of the policy, but that I had considered whether it would be fair and reasonable to award some costs for the periods of unnecessary delay caused by NHBC. I explained that I hadn't seen any evidence that Mrs F had attempted to rent out the property since 2017 but been unable to due to the condition of property, so I wasn't minded to award any costs for loss of rent or loss of use.

In response to my provisional decision Mrs F has provided further evidence from her previous tenant and two local estate agents, to support her view that the property was uninhabitable and unlettable and to show that she had attempted to let the property during her claim.

I've carefully considered this additional evidence provided by Mrs F. It appears that Mrs F's tenant vacated her property in December 2017. The tenant has provided a statement citing the condition of the property as the main reason for vacating. Following this, it seems Mrs F approached a letting agent in March 2018 and was advised the property could be let, subject to repair works being completed first.

Mrs F says that this appraisal was based on visits in 2016 and the letting agent didn't visit the property again at that time. This means the comment about works needing to be completed would have been based on information provided by Mrs F, rather than a first-hand inspection. Mrs F says that a later inspection did take place around the same time, and that the letting agent confirmed the property couldn't be let. But she hasn't been able to provide any further evidence to support this.

In August 2018, NHBC's claims investigator completed a report on the condition of the property. Based on this, NHBC maintained that the property wasn't uninhabitable. It said the property didn't generate high humidity and there was no sign of fungus or rot. It said the peeling paint on the walls was not sufficient to mean the property was uninhabitable. NHBC also said it was reasonable to place more weight on this site visit to one from 2017 as it had happened more recently.

In December 2018 it was confirmed the property was uninhabitable because the shower tray needed to be refitted. This had been removed during investigations in August 2018. Mrs F confirmed that she wanted the shower tray refitted in February 2019 and NHBC issued instructions for the works that same month. It appears works commenced in April 2019 and were completed in May 2019.

The reason I have highlighted the sequence of events above is because, in my view, the primary period of delay that NHBC is solely responsible for is between September 2018 and April 2019. This is the period where it had incorrectly led Mrs F to believe it would complete the remedial works.

Whether or not the damage to the property rendered it uninhabitable and unlettable is clearly disputed. But I don't think this is the key issue. I say this because, even if I were persuaded that the property was uninhabitable and unlettable, at the time NHBC caused significant delays, I would need to be satisfied that without NHBC's errors, Mrs F would have been able to complete the works and secure and place a tenant, before I would consider it fair to direct NHBC to cover losses which are specifically excluded by the policy.

In this case, I'm not persuaded that NHBC's errors are the sole cause of Mrs F being unable to repair or re-let her property. I say this because there have been ongoing issues and disputes with the builder about his liability and, more importantly, the ongoing dispute with NHBC about its liability – namely whether it should have to cover 100% of the damage

to the common parts. This issue has clearly been very important to Mrs F throughout her claim and complaint. So, taking everything into account, even if NHBC hadn't made the mistakes it has throughout the claim I don't think Mrs F would have been in a position to place a tenant and be in receipt of rent for the property. This is because I think the dispute over NHBC's liability would always have arisen and continued. And as I don't think NHBC's position on this point was wrong, I can't fairly hold it responsible for the delays that arose out of this particular dispute.

Taking everything into account, I don't think it would be fair or reasonable to award Mrs F something which is specifically excluded by the policy in the particular circumstances of this complaint. This is because I'm not satisfied that without NHBC's errors, she would most likely have been in a different position at the time.

Delays and compensation

Mrs F has stated that she told NHBC that the claim was being considered under the wrong section from the outset, rather than in February 2017 as NHBC has suggested. She says NHBC has failed to provide her with call recordings from the time and that she had a complaint about this upheld by the data protection regulator.

Mrs F argues that had the section of cover been updated immediately, she wouldn't have incurred the costs of several reports or, in her view, carried out unnecessary repairs to her bathroom. She also says that had everything happened as it should have, from the outset, the builder would likely never have become obstructive – which has led to further claim delays.

NHBC says there is no evidence to suggest that Mrs F disputed the section of cover prior to 2017. It says its call notes do not suggest this was discussed. It says it sent Mrs F information regarding the resolution service in August 2016 but received no further contact until November 2016 – at which point the section of cover wasn't mentioned. NHBC has argued that it's unlikely Mrs F would have carried out her own investigations if she always believed the claim was being looked at under the wrong section.

In addition to the arguments put forward above, I've also considered the timeline of events supplied by Mrs F when she brought her complaint to our service. In this timeline, she specifically states that she disputed the section of cover in January/February 2017.

Based on everything I've seen, I think it's more likely than not that Mrs F didn't raise her concerns about the section of cover until early 2017. I also remain of the view that NHBC were not responsible for the fact that the claim was initially considered under the incorrect section. I say this because it was relying on information provided by Mrs F's solicitor and because the builder accepted that section 2 was correct.

This means that in terms of compensation for issues around the section of cover, I'm only considering the time it took from Mrs F's notification in early 2017 to NHBC updating the claim to section 3 in August 2017.

I considered this when reaching my provisional decision and explained that while I agree NHBC could have acted more quickly to update the section of cover, I didn't think this would have materially affected the progression of the claim. I also explained that I thought the compensation paid by NHBC for this particular issue was sufficient.

Mrs F did obtain several reports, but these reports either predated the claim or were to do with the bathroom issues. And I don't agree with Mrs F's assertion that the bathroom issues were misdiagnosed, as all the reports I've seen support there was an issue which

was likely contributing to the damage in her flat.

Ultimately, I don't think it would be fair or reasonable to expect NHBC to cover the cost of reports or investigations into the bathroom issue or which predate its involvement in the claim.

I've also reconsidered Mrs F's argument that NHBC are responsible for the builder becoming obstructive. But as I highlighted in my provisional decision, I don't agree this is the case. I think issues with the builder were already materialising before NHBC became involved. For example, NHBC has pointed out that the builder failed to attend a meeting with Mrs F during her own investigations prior to NHBC's involvement and that he refused to share one of the reports he commissioned with Mrs F.

It seems to me that the builder didn't want to accept that his works were the cause of the damage to Mrs F's flat. This was particularly true once he had a report citing the issues with Mrs F's shower. I think this is the primary reason for the breakdown in the relation between the parties, not NHBC's missed meetings. So, I'm satisfied that the portion of NHBC's compensation offer (£500 of the £3,000 total) fairly reflects the impact of the missed meeting, and the delay in updating the section of cover.

In terms of the remaining compensation, Mrs F doesn't feel that the additional £1,000 recommended in my provisional decision is sufficient to reflect her losses or the frustration and time she has had to spend on her complaint.

I've already covered Mrs F's complaint about financial losses in the above section. So, in this section I'm only considering compensation for distress and inconvenience.

In this case, Mrs F has been represented by her husband, Mr D. Mr D has been the main person corresponding with the parties, engaging contractors, reviewing calculations etc. Mr D is not a policyholder with NHBC, and as such, I am unable to consider compensation for any distress and inconvenience caused to him – only that caused to Mrs F.

In my provisional decision I explained why I wasn't intending to compensate for several periods of delay in the claim – as I didn't think they were solely the responsibility of NHBC. In addition, it's worth highlighting that most claims will likely involve a certain level of inconvenience which is not anyone's fault. And in this case, there have also been the additional issues caused by the builder – which I don't think NHBC are responsible for. So, to clarify, the compensation I think NHBC should pay is to reflect the distress and inconvenience that Mrs F has suffered as a result of issues caused solely by NHBC.

So, my main considerations when reaching an amount of compensation are the delays (around six months) and loss of expectation NHBC caused when initially leading Mrs F to believe it would complete the works. Plus, the frustration and delays it caused when incorrectly limiting its initial settlement offer to one third of all of the works and making some other settlement calculation issues. Taking all of the above into account, I remain of the view that £2,500 compensation is enough to reflect the combined impact, to Mrs F, of NHBC's errors here.

It follows that I think £3,000 compensation, in total, is enough to fairly compensate Mrs F for the impact of all the errors caused solely by NHBC.

Putting things right

In order to put things right in the circumstances of this complaint, NHBC must:

- Settle Mrs F's claim by paying £79,801.88 (exc VAT) – which accounts for 100% of the damage to her flat and 37.5% of the damage to the common parts and is inclusive of a 10% contingency figure.
- Subject to receipt of VAT invoices, cover the VAT Mrs F is charged on the claim related repairs
- Consider any additional claim related costs, subject to Mrs F providing evidence of how the contingency amount was spent
- Subject to further evidence being provided by Mrs F, uplift the cost of the tiles to reflect them being real stone
- Pay a total of £3,000 compensation

My final decision

For the reasons I've explained above, and in my provisional decision (appended below), I uphold Mrs F's complaint in part.

National House-Building Council must put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs F to accept or reject my decision before 28 July 2021.

Appendix

Copy of provisional decision

What happened

There has been extensive background to this complaint which I don't intend to repeat in full detail here. Instead, I'll summarise the key events most relevant to the outcome of Mrs F's complaint.

There have been several businesses and individuals involved in the complaint – acting as representatives or agents of NHBC or Mrs F. For ease of reference I'll only refer to NHBC and Mrs F in this decision – even when referring to the actions or arguments of their representatives.

Mrs F purchased a ground floor flat in 2014. The property came with a 10-year structural defects warranty (Buildmark Policy) from NHBC.

Mrs F discovered damp issues, both in her property and in the communal hallway – which is an area the Buildmark policy would define as 'common parts'. In 2015 she reported the issues to the builder – who is also the freeholder of the building and owner of the other two flats within it. But in 2016 Mrs F reported the issues to NHBC as they still hadn't been resolved by the builder.

NHBC initially dealt with the claim under section 2 of the warranty. This section is for claims raised in the first two years of cover and provides that responsibility for putting right any defects identified first rests with the builder. Under this section NHBC can offer a discretionary resolution service to help resolve disputes between the builder and policyholder.

Looking at the claim under section 2 involved liaising with the builder about putting right the issues. But Mrs F later evidenced that the correct section of the policy was section 3.

Under section 3, there needs to be damage caused by a defect for a claim to covered. But where there is damage caused by a defect, responsibility for putting things right rests with NHBC – not the builder.

The confusion over the correct section of cover, along with some other service issues, caused significant delay to the progress of the claim. NHBC has accepted this and has offered a total of £2,000 compensation. NHBC has also accepted the claim is covered under section 3 of the warranty. But there have been disputes over the works to be included, the cost of these works, and whether costs for loss of rent and/or alternative accommodation should be covered.

One of our investigators looked into Mrs F's complaint. She explained that our service doesn't have the power to consider all of the issues brought by Mrs F. This was because NHBC had issued several final response letters more than six months before Mrs F brought her complaint to us, and because she didn't agree there were any exceptional circumstances for Mrs F not coming to us sooner. So, she said these points specifically couldn't be considered as they were outside our jurisdiction. But she said we did have the power to consider everything that NHBC covered in its final response letter from 17 December 2018, and subsequent final response letters, as the complaints had been referred in time.

NHBC accepted our investigator's view about the issues we could and couldn't consider but Mrs F didn't. I recently issued a separate decision on this element of Mrs F's complaint. So, I won't revisit the details in this decision.

In terms of the merits of Mrs F's complaint against NHBC which she said we could consider, our investigator thought:

- *NHBC's initial decision to consider the claim under section 2 was reasonable, in light of information supplied by Mrs F's solicitor. But after Mrs F explained this was incorrect, it could have acted more quickly to accept the claim under section 3.*

- *NHBC had tried to engage with the builder and to progress the claim and weren't responsible for all of the delays. She didn't agree that NHBC were responsible for the builder becoming obstructive.*

- *The £2,000 compensation offered by NHBC was enough to fairly reflect the impact of the issues NHBC were responsible for.*

- *The property wasn't occupied, so it wouldn't be reasonable to expect NHBC to cover the costs of alternative accommodation. And there is no cover for loss of rent under the terms of the policy.*

- *NHBC's initial offer to settle only one third of the entire claim was unfair. It's reasonable to pay 37.5% of the value of the common parts claim, as that is all Mrs F is entitled to under her warranty as that's her share of responsibility determined by her lease. But NHBC should pay 100% of the claim for the defect related damage to Mrs F's flat.*

- *NHBC decided to cash settle, not Mrs F, so it wouldn't be fair for NHBC to base its settlement offer on the preferential rates offered by its panel of contractors. Any cash settlement should be based on the amount it would cost Mrs F to have the work done.*

- *The quote provided by Mrs F for the works wasn't sufficiently detailed for NHBC to calculate its cash settlement. But NHBC should consider a new quote from Mrs F for the damage to her flat and pay the amount it had agreed for the common parts as this was higher than the amount on Mrs F's quote.*

Mrs F didn't accept our investigator's opinion. She feels that in order to deliver a lasting and effective repair, NHBC should pay 100% of the claim for both her flat and the common parts. She also remains of the view that NHBC should compensate her for loss of rent and for her council tax and utility costs. She also feels NHBC should provide alternative accommodation for the residents of all three flats while the works are carried out. Mrs F has provided two additional quotes for the repairs needed, one of which has been partly itemised against NHBC's schedule of works, so she says they should pay this cost.

NHBC accepted that any cash settlement should be equal to the amount it will cost Mrs F to have the works completed. It also accepted that it was wrong to initially limit its settlement to one third of the total costs. It has agreed with our investigator's assessment, in principle, but remains unhappy with the quotes supplied by Mrs F – including the ones supplied following our investigator's assessment.

So, because no agreement has been able to be reached, the complaint has been passed to me to decide.

What I've provisionally 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.

While Mrs F has highlighted several concerns, my decision focuses only on the issues I consider to be material to the outcome of her complaint. But I have carefully considered the full timeline of events when reaching my decision.

Our service's powers in relation to the issues we can and can't consider have already been addressed in my jurisdiction decision. So, I don't intend to revisit this here. Neither will I revisit, in detail, any of the issues no longer in dispute.

The issues that remain to be decided, and which I'll focus on, are:

- *The scope of works to be completed and the cost*
- *Loss of rent, loss of use and alternative accommodation*
- *Delays and compensation*

For ease of reference I'll address each of these issues

separately. <u>The scope of works to be completed and the cost</u>

Following the involvement of our service, NHBC's position is that it will pay Mrs F 100% of the costs to repair the damage (caused by the defect) in her flat and that it will pay 37.5% of the costs to repair the damage in the communal hallway (common parts). NHBC accepts that the amount it needs to pay should not be limited to the preferential rates available to it, but that it should pay the reasonable amount it will cost Mrs F to have the work done.

Mrs F doesn't agree that this approach is fair. She says that her flat is the only one effected by the defect with the waterproofing, and that the defect will need to be repaired

in order for there to be a lasting and effective repair. In order to deliver this, Mrs F feels NHBC should cover 100% of the costs for the damage to the common parts.

I've carefully considered Mrs F's arguments about this point, including the copies of similar final decisions, issued by this service on other complaints, that she's asked me to consider. But I have to consider each complaint on its' individual merits. And having done so, I don't think I can reasonably require NHBC to pay for 100% of the damage to the common parts in this case. I'll explain why.

The Buildmark policy booklet sets out, under each section of cover, NHBC's liability for common parts damage under each individual policy:

> *"When your Home includes Common Parts, our liability for all claims relating to them (subject to the limit referred to in 1) 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."*

So, in my view, the policy is clear that NHBC can limit its liability, under each individual policy, for that policyholders' proportion of common parts costs. And both sides agree that Mrs F's lease states she is responsible for 37.5% of the upkeep of the common parts.

The policy goes on to say that where a common parts claim is brought by one homeowner, NHBC may ask the other homeowners to bring a claim or proceed as if they had. But in this

case, the other two properties are not covered by NHBC warranties and so this isn't possible.

I appreciate the difficulty of situation Mrs F has found herself in, and I sympathise. But in this case, I don't think it would be fair or reasonable for NHBC be held responsible for the cost of repairs which should reasonably be met by a third party. Particularly one who isn't covered by one of its policies. In this case, Mrs F's warranty only entitles her to her share (37.5%) of the cost of repairs to the common parts. So, I'm satisfied NHBC's position on this aspect of Mrs F's claim is in line with the terms and conditions of the policy and is fair and reasonable in the circumstances of her complaint.

Mrs F has also raised concerns about the accuracy of the scope of works produced by NHBC. She says NHBC have made so many mistakes throughout her claim, such as looking at the claim under the wrong section, incorrectly highlighting the bathroom as the issue and initially limiting its liability to one third of the costs for all the repairs. She also says that the person who drafted NHBC's scope of works has never been to the site. Based on this she feels it's unreasonable to rely on NHBC's scope of works.

I've considered Mrs F's argument that the above issues should call into question the reliability of NHBC's scope of work. But I don't agree that the alleged mistakes/errors made by NHBC claim staff demonstrates that its technical claim specialist's scope of works isn't adequate. As far as I can see, the scope of works has been drawn up by a qualified individual, using the technical plans and drawings of the building alongside many photographs of the damage. It's not unusual for work schedules to be designed in this way, and I don't agree that this suggests it will be unreliable.

Mrs F has provided two alternative quotes from contractors. But from what I've seen, these don't suggest that there are significant omissions in NHBC's scope. The differences relate

mainly to the cost of the works. Mrs F has also appointed a chartered surveyor to review NHBC's schedule of works and to provide his view on reasonable costs for the works. This again came in significantly higher than the costs suggested by NHBC. But the additional works quoted for were mainly provisional sums for works which might be needed, or for replacement of certain items which NHBC suggests could be reused. So, again, I don't think this suggests that NHBC's scope of works is fundamentally inadequate.

As I haven't seen any persuasive evidence that NHBC's scope of works isn't sufficient to deliver a lasting and effective repair, I think it's reasonable for me to use it as a basis for determining what a fair cash settlement should be in this case. But I'll address some of the specific discrepancies in more detail later on.

This leaves the final dispute regarding the works to be completed – the cost. Mrs F has provided two contractor quotes and a chartered surveyor breakdown of costs based on NHBC's scope. Each of these priced the works required at over £100,000- (not adjusted for 37.5% of common parts costs).

NHBC's initial costed scope came in at around £66,000 (inc VAT). This was then later increased to around £78,000 (inc VAT) before a deduction was made for the common parts share. Following our investigator's assessment, NHBC agreed to consider further quotes provided by Mrs F. It asked that she get her contractors to add their own costs against its scope of works. Mrs F's initial two quotes were not produced in this way. And in my view, they aren't detailed enough for me to fairly conclude that they represent a fair reflection of the works required.

Because NHBC feels that the costs provided by Mrs F are excessive, it approached a further two contractors and asked them to provide quotes at the rate they would charge a private

individual – not the rates they would charge NHBC. These came in at around £69,000 and £78,000 respectively (inc VAT), not adjusted for the common parts works.

Mrs F has highlighted that her chartered surveyor has produced his costs in line with the requirements of the Royal Institute of Chartered Surveyor's (RICS). As a chartered surveyor, she argues that he is more highly qualified than the contractors used by NHBC and so feels that I should place more weight on his costs than on NHBC's.

I've carefully considered all of the evidence and arguments put forward on this issue. I accept that a chartered surveyor is highly qualified in the pricing of building works. But so are contractors who routinely carry out pricing exercises as part of their business. I don't think I can reasonably ignore NHBC's quotes based purely on the fact that Mrs F engaged a chartered surveyor. Instead I've been through each of the four quotes, (including the chartered surveyor's costs) which have been costed against the scope of works, to identify and compare the items with the biggest cost discrepancies.

Firstly, it's worth highlighting that Mrs F's chartered surveyor has quoted for replacement of multiple items which NHBC's scope suggests can be reused. For example, internal doors and kitchen and bathroom units. Mrs F argues that due to the water ingress and damp issues these items will not be suitable for reuse. NHBC has explained that it has quoted for replacement of any wood which has been in direct contact with the floor or water damaged walls – as it accepts these will have been damaged. But it suggests that the kitchen units will stand on plastic feet and are unlikely to be in direct contact with the walls. It also says the internal doors have only been in direct contact with metal hinges, which are unable to transfer moisture.

I've thought carefully about the above and about Mrs F's assertion that damp and rot will have damaged all of this woodwork. From what I've seen of the photos of the property, while there is significant water damage to walls, paintwork skirting and architrave, I can't see that any of the aforementioned woodwork has been damaged. I also haven't seen any photos of mould spores growing within the property or on any of this woodwork either.

I don't think it would be reasonable to expect NHBC to pay for the replacement of items which can be suitably reused. And based on the information available, I'm not currently persuaded it's been evidenced that the doors and kitchen units require replacement.

That said, were NHBC to be carrying out the works and further damage, caused by the defect, were to be discovered it would add these to the claim. And until some of this woodwork is removed it's impossible to know for certain whether it has suffered damage. I raised this with NHBC, and it has agreed to add a contingency amount to its cash settlement offer, to account for potential additional costs. I'll revisit this later.

In terms of my comparison of the four quotes, there are differences between them in terms of the rates and overall price quoted for each item of work. But I think this is to be expected. I don't find it unusual that different companies would charge slightly different amounts for similar works or materials. I note that the costs from the chartered surveyor are more often higher than the three quotes provided by NHBC. However, all four are often within the same 'ball park'. Where this is the case, I think it's reasonable to rely on the higher costs quoted by Mrs F's chartered surveyor. I say this because these are figures provided to Mrs F directly from a chartered surveyor who is based in her local area.

I don't doubt that the two additional quotes provided by NHBC are also reasonable or that they represent the rates these contractors would charge a private individual. But these companies are based in different areas of the UK and are providing their costs likely in the knowledge that they won't be asked to do the works. So, for the items where the costs are higher, but broadly similar, I think NHBC should meet the costs quoted for by Mrs F's chartered surveyor.

This leaves the items where there remains, in my view, an excessively large discrepancy. For example, the cost for removing, storing and rehanging radiators, the cost of the temporary fencing, the cost of replacement underlay boards and the removal of the hallway stairs. In these examples, the costs quoted for on all three NHBC quotes, while different, are broadly similar. But the chartered surveyor costs are at least twice as high as the highest alternative and often five times higher or more. I'm unable to reconcile such significant cost discrepancies without further explanation. So, based on the information I have, I don't think I can reasonably require NHBC to meet these costs. Instead, for the above items, I think it would be fair for NHBC to pay the highest cost quoted for them by its alternative contractors.

In addition to the costed scope of works, Mrs F's chartered surveyor provided a second page of costs which were not broken down into the same level of detail as the scope. Many of these were provisional costs for things which might be needed, such as costs for unforeseen damp issues or utilities redirection. As there is currently no evidence that these items will definitely need to be paid for, I don't think it would be reasonable to include them in Mrs F's cash settlement offer – at this stage. This is because doing so would result in betterment, or a cash surplus, should the costs not need to be paid. However, as mentioned previously, NHBC has agreed to include a contingency amount with its cash settlement to cover additional works which might be discovered when works commence. I

think this is a fair and reasonable alternative, in principle. But I would expect NHBC to reconsider the contingency amount, if Mrs F was later able to fairly evidence that it proved to be materially insufficient to cover the cost of additional works which were required.

The chartered surveyor's list of additional costs also included 12 weeks' site management. NHBC has explained that the works required at Mrs F's property are fairly straightforward. It says its costs include site supervision, which will be carried out by a working foreman to oversee the works while also working on the project. NHBC says a job of this size does not require a stand-alone foreman as it is neither large nor complex.

I've thought carefully about this element of the complaint. As I understand it, it's not unusual for a contractor working on a small site to also take on site supervision responsibilities. And I agree that the site isn't particularly large, or the works particularly complex in nature. So, based on the information currently available, I'm not persuaded that it would be reasonable to award the additional costs for site management quoted for by Mrs F's surveyor.

The chartered surveyor's cost summary also included two separate items for COVID related costs, each totalling £5,000 respectively. The first related to health and safety measures and cleaning, and the second to additional time on site due to social distancing measures.

NHBC disputes these costs. It says the site, and job, are not particularly large so it's likely that only a small number of contractors would need to be on site at any one time, meaning social distancing should not be an issue. It says there's no way of assessing those costs for reasonableness as they aren't broken down. But it has agreed to add around £170 to its cash settlement, which it says is sufficient to cover masks and sanitation stations for the duration of the 12 weeks the works are due to take.

Based on the information available, I don't think I can reasonably conclude that NHBC should pay an additional £10,000 for COVID related measures which haven't been quantified. So, I'm currently of the opinion that its improved offer is fair. But I'll consider any additional information Mrs F can provide about these costs before reaching my final decision.

This leaves the matter of the cost of the damp proofing works. These were quoted for by an independent contractor, and their costs have been added to all three of the quotes provided by NHBC. This item amounts to around £19,000 (not adjusted for the common parts).
Mrs F's initial quote also included prime cost sums (an estimate) for these works, split between the flat (around £18,000) and the common parts (around £5,000). And the chartered surveyor also suggested a prime cost sum of £25,000.

I've considered that the prime cost sums estimated by Mrs F's contractor and chartered surveyor are much more similar than the cost quoted by the independent contractor. But I also have to take into account that prime cost sums are estimates, whereas the quote is an actual quote. I also understand that the independent contractor was happy for its quote to be shared with Mrs F in the hopes that it would win the work. So, as the contractor was prepared to do the works for the amount quoted, I think it's fair to conclude that it represents the reasonable costs to Mrs F of having this work completed.

So, to summarise, I'm currently minded to decide that it's reasonable for NHBC to limit its liability to 37.5% of the repair costs for the common parts. I'm also satisfied that it's reasonable to rely on its schedule of works as a basis for calculating the cash settlement.

I think NHBC should meet the costs quoted for by Mrs F's chartered surveyor for all items except:

- *Replacement woodwork not already accounted for in its' schedule (kitchen units, bathroom units, internal doors etc)*
- *Cost for works to radiators*
- *Temporary fencing*
- *Supply and fit of rigid board underlay*
- *The extra allowance to remove the stairs during waterproofing*
- *The waterproofing costs*

For the above items, NHBC should instead pay the highest cost quoted by the contractors it obtained quotes from.

In addition, NHBC should add a 10% contingency cost in line with its offer. And it should be prepared to consider any evidence Mrs F may supply which fairly proves this amount was materially inadequate – once works have commenced. NHBC should also add the additional amounts it has offered for Building Regulation signoff and COVID costs.

Should this result in a lower settlement than that already offered by NHBC, I think NHBC should be prepared to honour its offer instead, so that Mrs F is not put in a worse position than we she was in before this provisional decision was given.

Mrs F has also asked that our service direct NHBC to pay any cash settlement in full upfront. But NHBC's position is that it will only pay the VAT element of the cash settlement once it receives invoices confirming the amount of VAT which has been paid. This is so that it can confirm the correct amount of VAT that Mrs F has actually paid. I think this approach fair and in line with how claims of this nature are usually settled.

<u>Loss of rent and/or alternative accommodation</u>

Mrs F would like NHBC to compensate her for loss of use of the property. She says the reason it has sat unused for as long as it has is because of the various mistakes NHBC has made with her claim. She feels the condition of the property makes it uninhabitable, and unlettable, so she feels NHBC should compensate her for loss of rent as well as council tax and utility expenses.

The terms of Mrs F's warranty set out the cover it does and doesn't provide. The general exclusions and limitations states.

> *"NHBC will not be liable for the following:*
>
> *…*
>
> *i. Any loss of enjoyment, loss of use, loss of income or business opportunity, inconvenience or distress, or any loss arising or cost incurred (or both) only indirectly, as a result of the events or circumstances that led to your claim or complaint."*

Based on this, it's clear that the policy doesn't provide cover for loss of rent or loss of use arising out of a valid claim. So, while I accept that Mrs F hasn't rented out her property during this period, I don't think it would be reasonable to expect NHBC to cover a potential loss arising from a claim which it specifically excludes under the terms of the policy.

That said, I have considered whether NHBC ought to pay loss of rent/loss of use despite these being excluded, for the periods of unreasonable delay in the claim that NHBC is solely responsible for – on a fair and reasonable basis. But I haven't seen any evidence to suggest that Mrs F was actively exploring the possibility to letting the property again, or that she was unable to do so during these periods of time because of the condition of the property. So, based on what I've seen, I don't think I can fairly require NHBC to pay loss of rent or loss of use in these circumstances. However, I will go on to consider whether it should pay additional compensation for the impact of the delays it's responsible for later in this decision.

The terms of the warranty also set out the circumstances where alternative accommodation would be covered under section 3. It states:

> *"3) We will pay you any reasonable costs that you incur by prior agreement with us for removal, storage and appropriate alternative accommodation if it is necessary for anyone normally living in your Home to move out so that work can be done."*

Based on this, it's clear that Mrs F's warranty will provide for the costs of alternative accommodation, but only for anyone normally living in the property. In this case, Mrs F's property has been vacant for several years. So, I don't think I can reasonably conclude that NHBC should be paying for alternative accommodation in these circumstances.

Mrs F has highlighted that the works required will mean that the residents of all three properties in the building will require alternative accommodation. She would like NHBC to cover these costs as part of her claim.

As I've already stated, Mrs F's property isn't being lived in, and hasn't been for several years. So, it wouldn't be reasonable to expect NHBC to make payments for alternative accommodation.

The upstairs flats are let by the freeholder of the building, who is also the original builder. This means, as I covered earlier, that neither are covered by an active NHBC warranty. In these circumstances, I don't think it would be fair or reasonable to expect NHBC to cover the cost of their alternative accommodation. I say this because neither of their flats, or their share of the common parts, are the responsibility of NHBC.

<u>Delays and compensation</u>

NHBC has already offered Mrs F £2,000 compensation for the impact of several issues. The first £500 was offered to compensate for NHBC failing to turn up at a site visit, and for the inconvenience caused by the claim initially being considered under the incorrect section of the policy.

NHBC has argued that it wasn't responsible for the fact it initially considered the claim under the wrong section. It says it looked at the claim under section 2 based on the date of completion, ie when Mrs F purchased the flat from the builder. It says the claim was raised within two years of this date, and the builder didn't dispute that the claim fell within his liability period either. It has also highlighted a letter from Mrs F's solicitor in 2015 which said the property was unoccupied prior to her purchase.

Mrs F argued that her property had been occupied prior to her purchase and so that the date of completion should be amended to the date where NHBC agreed the property

substantially agreed with its requirements. This was eventually evidenced, and NHBC amended the section of cover in August 2017.

NHBC has explained that this didn't make a difference to the progression of the claim. It says the builder was not complying with its instructions to carry our investigations under section 2 – so NHBC had been carrying these out directly. It says this is what it would have been doing if it had accepted the claim under section 3 sooner. But it accepts there was some level of inconvenience caused and that it was partly responsible for this – which, along with its claim investigator failing to attend a meeting, is why NHBC has offered £500 compensation.

I've thought carefully about everything that happened here. I can see that NHBC was relying on information from Mrs F's solicitor and the builder when initially looking at the claim under section 2. I do think NHBC could have done more to engage with Mrs F's suggestion that the section of cover should be amended sooner than it did. But even if it had, I don't think this would have significantly impacted the progression of the claim as NHBC was already attempting complete the necessary investigations itself – which is what it would have been required to do under section 3.

Mrs F has complained that the reason the builder was refusing to carry out investigations was because of NHBC's poor claims handling, including its failure to attend a site visit. It says before this happened, the builder was cooperative.

I can see that the builder did initially cooperate and obtained a report on the cause of damp issues. But it seems to me that he wasn't open to engaging fully with the damp proofing issues after his report highlighted the issues with Mrs F's shower – which weren't linked to his own works. This was despite NHBC issuing several resolution reports stating further investigations were required and highlighting potential issues with the damp proofing. I've also seen emails between Mrs F and the builder from before the missed site meeting which suggest he wasn't fully cooperative at that stage either.

I accept that NHBC failing to attend a meeting likely contributed to the breakdown of communications with the builder, but I don't agree that it was the sole or primary cause.

Instead, it seems to me that the builder simply did not want to accept that the damp issues were being caused by his work. So, taking into account everything that happened, I think
£500 is enough to fairly reflect the impact of NHBC failing to attend the meeting and not correcting the section of cover sooner.

NHBC updated the claim to a section 3 claim in August 2017. It continued to try and investigate the claim, but at this point it struggled to get cooperation from the builder. The builder seems to have failed to attend meetings which he had been invited to and put up notices in the communal areas denying NHBC permission to carry out investigations. NHBC continued to attempt to engage with the builder between August and October 2017. Around October 2017 it advised Mrs F that she may wish to obtain some legal advice. This was because neither Mrs F nor NHBC would be able to undertake works to the common parts without his consent as the freeholder.

Considering the above, I don't think I can reasonably hold NHBC responsible for the length of time spent attempting to get the builder to consent to allow investigations to conclude. So, I don't think any compensation should be paid for this period of delays.

Following this, Mrs F entered into conversations with the builder for him to purchase her flat. She asked NHBC to put the claim on hold. In April 2018 these negotiations fell through and in May 2018 she asked NHBC to reopen her claim. As this period of delay was requested by Mrs F, I don't think any compensation for this time period is due.

Between May and August 2018 NHBC were again attempting to liaise with the builder to get his permission to complete its investigations. The investigation was able to take place in August 2018. The investigation report and claim acceptance were issued in September 2018.

While I can appreciate Mrs F's frustration with the time it took to reach the point of her claim being accepted under section 3, I don't think NHBC caused any unreasonable delays or that it should pay any further compensation, beyond the £500 already paid.

When it accepted the claim under section 3, NHBC initially indicated it would arrange to complete the remedial works. Mrs F was under the impression that this would be the case until April 2019 when NHBC explained it would need to cash settle the claim and limit its liability to one third of the total cost of repairs. NHBC accepts that its actions here caused a loss of expectation, frustration and around six months' worth of delays. It has offered Mrs F
£1,500 compensation for this issue.

I've thought carefully about whether the amount offered is sufficient to compensate for the impact of this issue. I've also considered that NHBC made some mistakes in its handling of Mrs F's claim beyond this point, such as incorrectly limiting its settlement offer to one third of the total cost of repairs for both the common parts and Mrs F's flat or including all of the waterproofing costs as part of the common parts work initially. Each of these issues resulted in a lower offer than should have been made and caused understandable frustration to
Mrs F.

Mrs F has explained the level of stress this claim has caused and continues to cause. And while I've already set out that I don't think NHBC are solely responsible for the issues Mrs F has experienced, I do think it has caused more unnecessary distress than it has currently compensated for. Having carefully considered everything that has happened, and the issues I think NHBC is responsible for, I think it should increase the total amount of compensation offered from £2,000 to £3,000.

Mrs F also feels that NHBC should reimburse her for the costs of reports she has had to obtain in order to progress her claim.

From what I've seen, some of these reports either predate the claim being brought to NHBC, or relate to the issues with the shower room, which were caused by works carried out by Mrs F and not the defect covered by this claim. So, I don't think NHBC needs to reimburse these costs.

I have seen evidence to suggest that Mrs F was instructed by the builder to obtain her own report on the damp issues, when the claim was incorrectly being dealt with under section 2. NHBC later had to explain to the builder that it was for him to cover the costs of investigations, not Mrs F. But as I understand it, Mrs F did obtain a report on the issues at her own cost during this time, so I've thought about whether NHBC ought reasonably to reimburse her for this. But as I explained earlier in this decision, I don't think NHBC was initially at fault for the claim being considered under the wrong section. So, as these reports were obtained prior to the dispute over the section of cover, I don't think it would

be fair to expect NHBC to cover this cost either.

Adam Golding
Adam Golding
Ombudsman