

Notice of undertaking

Introduction

As a qualifying body, we, the Financial Services Authority (the FSA), can challenge firms using terms which we view as unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). So we review contract terms which are referred to us by consumers, enforcement bodies and consumer organisations. This has led to National House-Building Council (NHBC) undertaking not to use the term identified in its NHBC Buildmark policy which we consider may be unfair.

We have a duty under the Regulations to notify the Office of Fair Trading (OFT) of the undertakings we receive. The OFT has a duty to publish details of these undertakings, which it puts on its consumer regulation website. We also publish the undertakings on our website. Both publications will name the firm and identify the specific term and the part of the Regulations which relate to the term's fairness.

Even if firms have not given an undertaking or been subject to a court decision under the Regulations, they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These will be of potential value in showing the likely attitude of the courts, the FSA, the OFT or other qualifying bodies to similar terms or terms with a similar effect. Ultimately, only a court can determine the fairness of a term and, therefore, we do not recommend terms that have been revised by a firm to address our concerns as being definitely fair.

We cannot approve terms for the purposes of the Regulations; it is for firms to assess the fairness of their terms and conditions under the Regulations and in the context of the product or service in question.

It is important to bear in mind that wording that is fair in one particular agreement is not necessarily fair in another. When we accept an undertaking given to us from a firm to revise a term, this means that, on the evidence available at the time, we consider the term to be improved enough so that further regulatory action is not required.

National House-Building Council undertaking in relation to its NHBC Buildmark policy terms and conditions

Name of business	National House-Building Council	Lead organisation	FSA
Trading sector	Insurance	Contract identifier	Buildmark policy document

Definitions

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‘NHBC Requirements’ The mandatory requirements that we publish in the NHBC Standards which are in force either:

- a. *in the case of a Home with newly built foundations, when the Builder begins the construction of the foundations; or*
- b. *in any other case, when the Builder begins construction, conversion or renovation of the Home.’*

Background

NHBC’s Buildmark is an insurance policy which covers defects in the way a consumer’s new home is built. In this contract of insurance, ‘Defect’ was defined as a ‘breach of any mandatory NHBC Requirement by the Builder...’, and ‘NHBC Requirements’ were defined as the mandatory requirements published in the ‘NHBC Standards.’ The defined term ‘Defect’ was used throughout the contract and in particular in several substantive terms which set out what was covered by the Buildmark cover and when a claim could be made.

NHBC Requirements are technical requirements that must be met by a builder when building domestic properties. They are supported by detailed performance standards and guidance, all of which are published in the NHBC Standards.

Application of the Regulations

Generally, a term is deemed to be unfair under Regulation 5 of the Regulations if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer.

Neither the NHBC Requirements nor the NHBC Standards were set out in, or provided with, the Buildmark contract. Therefore, a consumer could not see what the NHBC Requirements were, in order to determine whether or not such Requirements had been breached and therefore whether there was a defect in the building of their home. The lack of provision of the NHBC Requirements meant that consumers would not know whether they were entitled to make a claim under the policy.

We therefore considered that this term was likely to be unfair, in that contrary to the requirement of good faith, the term caused a significant imbalance between the rights and obligations of NHBC and the consumer, to the detriment of the consumer, as follows:

(i) Significant imbalance to the detriment of the consumer

The imbalance was caused by the fact that NHBC had set out technical requirements in the NHBC Standards that the consumer was not aware of. In our view, this imbalance was significant, because the primary purpose of the insurance cover was to cover the situation where a builder did not meet those Requirements, and the consumer was not told what those Requirements were, whereas NHBC had full knowledge of them.

We considered that this could cause detriment to a consumer, because the term:

- did not allow a consumer to determine what a defect was and therefore whether a claim could be made;
- could deter a consumer from exercising their rights under the policy because they were given insufficient information as to what a defect was, which could result in the consumer not attempting to claim under the policy. This could cause significant financial detriment to the consumer, who might pay for the remedial work themselves to put right the defect, whereas they could instead be covered by the policy; and

- could prevent a consumer from being able to assess whether or not a claim under the policy had been fairly rejected, as NHBC might state that the building work had met the NHBC Standards, but the consumer did not have the equivalent information to be able to challenge that decision.

(ii) *Good faith*

The requirement of ‘good faith’, according to case law, means that the supplier should deal openly and fairly with the consumer. We considered that the lack of provision of any information as to what the NHBC Requirements were was likely to be contrary to the requirement of good faith, as without this information, consumers would be unable to assess whether they were able to make a claim.

How the term has changed

The above term has been amended so that it refers to a new page in the policy document where NHBC’s technical requirements (as published in the NHBC Standards) are set out. A statement on this page also notifies consumers that, if they have a further technical query, they may obtain the relevant sections of the NHBC Standards free of charge by contacting NHBC.

The amended term (see ‘New term’ box below), together with the details of the technical requirements and the option for consumers to obtain relevant sections of the NHBC Standards, redresses the previous imbalance between the parties, as the policy document now provides more information for consumers as to what the NHBC Requirements are. The issue of consumer detriment is addressed, as consumers will now have more information to enable them to determine what a defect is and whether they can make a claim under the policy. In addition, if NHBC rejects their claim, consumers will have more detailed information to assist them in assessing whether their claim has been fairly rejected. The term also addresses the issue of good faith as consumers now have more information to help them assess whether they are able to make a claim.

NHBC will issue versions of the policy document containing the amended term from April 2012. It will also as soon as practicable add an insert setting out the amended term to any policy documents containing the current term issued to new consumers prior to this date and will also place the wording on its website. It will in any case treat all consumers who have the benefit of a Buildmark contract as if the new term already applied.

New term

Definitions

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‘NHBC Requirements The mandatory ‘technical requirements’ that we publish in the NHBC Standards which are in force when the Builder begins the construction of the foundations (including ground improvement techniques) or (where pre-existing foundations are used) begins construction work.

Please see below for information about our ‘technical requirements.’

To be added to the policy document:

‘Technical Requirements

NHBC has ‘technical requirements’ which must be met by your Builder when building your Home. The first five (R1 – R5) apply to all homes. The sixth, R6, applies only to converted and renovated homes.

NHBC Standards

The technical requirements are supported by detailed performance standards and guidance, which are published in the NHBC Standards. In the event of a technical query, if you would like to see these, please contact us and we will provide you with the relevant sections free of charge.

Technical Requirements

The Builder shall ensure that the work complies with the Technical Requirements.

<p>R1 Statutory requirements</p>	<p>Work shall comply with all relevant Building Regulations and other statutory requirements relating to the completed construction work</p>
<p>In England, Wales and the Isle of Man, NHBC will generally accept work that accords with the relevant Approved Documents and their supporting documents. Exceptions would be where NHBC has a higher standard or where there is doubt as to whether the recommendation in the Approved Document is appropriate to a particular application. In Scotland and Northern Ireland, account shall be taken of the relevant Building Standards and Regulations.</p> <p>Building Regulations and rules of Statutory Authorities primarily cover matters of health and safety. Matters affecting durability and serviceability also need to be considered. NHBC Standards do not apply to:</p> <ul style="list-style-type: none"> <input type="checkbox"/> health and safety matters relating to building operations <input type="checkbox"/> handling and use of certain building materials <input type="checkbox"/> planning matters. 	
<p>R2 Design requirement</p>	<p>Design and specification shall provide satisfactory performance</p>
<p>Account shall be taken of:</p> <p>a) The land quality, including:</p> <ul style="list-style-type: none"> i) climate ii) topography iii) geology and ground conditions iv) contamination v) workings below ground vi) previous use of the site vii) any other aspect, on or adjacent to the site, which could affect the design. <p>Where appropriate, the land quality will have to be determined by a person acceptable to NHBC.</p> <p>b) The structural adequacy of the works. The design, with appropriate factors of safety, should satisfactorily allow for loads during and after construction and for their transfer to the supporting structure, or foundation, without undue movement, including:</p> <ul style="list-style-type: none"> i) self weight ii) all imposed loads, including wind loads iii) construction loads. <p>c) The geographical location of the site, including:</p> <ul style="list-style-type: none"> i) climate ii) topography. <p>d) The position of the dwelling on the site, especially with reference to the dwelling’s</p>	

exposure to the weather, including exposure at early stages in the development of a site, even if it is eventually protected by structures built later.

e) The position of building elements within the construction works, including the inter-relationship of materials and constructions.

f) The security of the dwellings.

**R3
Materials requirement**

All materials, products and building systems shall be suitable for their intended purpose

The structure of the home shall, unless specifically agreed otherwise in writing with NHBC, have a life of at least 60 years. Individual components and assemblies, not integral to the structure, may have a lesser durability and need planned maintenance, repair or replacement during that period.

Proper account shall be taken of the use and location of materials, products and building systems in relation to:

- durability of both the structure and individual components and assemblies
- geographical location
- position on the site
- position within the structure.

Materials, products and building systems will normally be acceptable if they comply with the following:

a) Materials and products used for critical functions

Functions critical to performance are: structure, fire resistance, weatherproofing, durability, thermal and sound insulation, services including heating appliances and flues.

Any of the following are acceptable:

i) performance in accordance with standards set by NHBC,

or

ii) where no NHBC standard is set, compliance with the relevant British Standard or equivalent European Technical Specification approved by a Committee for Standardisation, provided they are used in accordance with the relevant Code of Practice,

or

iii) compliance with standards not lower than those defined in a relevant British Standard specification or equivalent, provided their use is accepted by NHBC,

or

iv) satisfactory assessment by an appropriate independent technical approvals authority accepted by NHBC, including:

British Board of Agrément (BBA), Building Research Establishment (BRE), or a body authorised under Annex 4 to the Construction Products Directive,

or

v) use of materials and products in accordance with well established satisfactory custom and practice, provided that such custom and practice is acceptable to NHBC,

or

vi) acceptance, in writing, by NHBC that the quality and use is satisfactory.

b) Materials and products used for non-critical functions

Compliance with the above acceptance criteria for critical functions or strictly in accordance with manufacturers' recommendations for the specific use.

c) Reclaimed materials

Reclaimed materials may only be re-used with the prior agreement of NHBC. Independent certification of suitability may be required.

d) Proprietary building systems

Reference should be made to *R3(a), (iv)*.

e) Timber durability

Reference should be made to *Chapter 2.3 'Timber preservation (natural solid timber)'* (each section).

<p>R4 Workmanship requirement</p>	<p>All work shall be carried out in a proper, neat and workmanlike manner</p>
<p>The Builder shall ensure that:</p> <ul style="list-style-type: none"> a) the conditions of the materials, products and the completed work are satisfactory b) appropriate precautions are taken to prevent damage c) account is taken of the following: <ul style="list-style-type: none"> i) the requirements of the design ii) suitable methods of unloading and handling iii) proper protection during storage iv) use of correct installation methods v) protection against weather during construction (including excessive heat, cold, wetting or drying) vi) protection against damage by following trades. 	
<p>R5 Structural design requirement</p>	<p>Structural design shall be carried out by suitably qualified persons in accordance with British Standards and Codes of Practice</p>
<p>The following shall be designed by Chartered Civil or Structural Engineers whose status (including professional indemnity insurance) is accepted by NHBC:</p> <ul style="list-style-type: none"> a) foundations on hazardous ground where the hazard makes special consideration necessary. This would not apply to matters for which NHBC sets Standards, such as building near trees, except where specified to the contrary b) foundations and superstructure of every building over three storeys in height c) certain types of foundations and retaining walls, as required in the individual Chapters of the NHBC Standards d) any structural element which is not based on specific design criteria as laid down in the Chapters of the NHBC Standards e) any dwelling not constructed in accordance with UK traditional practice. <p>Other structural elements may be designed by a Chartered Civil or Structural Engineer or others whose status (including professional indemnity insurance) is accepted by NHBC. The structural design shall take account of the durability requirement in <i>Technical Requirement R3</i> Materials requirement.</p> <p>In England, Wales, Northern Ireland and the Isle of Man, structural design may be undertaken by the Builder's own Engineer or a Consulting Engineer employed by the Builder. Where specialist subcontractors undertake the design, it must be separately appraised by the Builder's own Engineer or by a Consulting Engineer employed by the Builder to ensure that the site investigation, choice of foundations, siting and construction of dwellings are properly taken into account and that the design is appropriate for the loading and conditions.</p> <p>In Scotland, the Engineer shall be independent of the Builder and specialist subcontractor. Account shall be taken of all parts of the following Eurocodes and their respective National Annexes.</p> <ul style="list-style-type: none"> BS EN 1990 (Eurocode 0) Basis of structural design BS EN 1991 (Eurocode 1) Actions on structures BS EN 1992 (Eurocode 2) Design of concrete structures BS EN 1993 (Eurocode 3) Design of steel structures BS EN 1995 (Eurocode 5) Design of timber structures BS EN 1996 (Eurocode 6) Design of masonry structures BS EN 1997 (Eurocode 7) Geotechnical design <p>Alternatively, designs in accordance with BS 8103 'Structural design of low rise buildings' will be acceptable.</p> <p>The Builder shall:</p> <ul style="list-style-type: none"> <input type="checkbox"/> require the Engineer to issue clear instructions for site personnel <input type="checkbox"/> not permit departure from the design without the Engineer's written consent 	

require the Engineer or his representative to carry out such inspections as may be required by NHBC to ensure the adequacy of the design and construction.

The Builder shall ensure that the Engineer visits the site during construction:

- i) when the foundations have been designed under this Technical Requirement, or
- ii) when specifically required by NHBC in these Standards.

The Engineer shall satisfy himself that the design is suitable for the conditions encountered on the site of each dwelling.

When requested by NHBC, the Builder shall:

- produce such design documents, calculations and prescribed forms of certification as NHBC requires for scrutiny
- provide design documents and assembly instructions, solely for the use of NHBC staff
- arrange for NHBC staff to have access to places where off-site fabrication is taking place.

**R6
Survey Requirements for conversions and
Renovations**

**Existing buildings shall be surveyed to
determine their condition and the work
required to bring them into a durable and
habitable state**

The survey(s) should be carried out in accordance with clause C1.

A detailed survey should be carried out by a competent and qualified person with knowledge and experience (e.g. an RICS Building Surveyor), whose status (including professional indemnity insurance) is accepted by NHBC.

Specialist surveys should be carried out by suitably qualified and experienced specialist surveyors.

Account shall be taken of:

- the former use of the building
- the present condition of the building
- any previous conversion and renovation works
- the geographical location
- any tests required to confirm the suitability of the existing structure and/or materials
- the structural condition of the existing building and the effect of the proposed conversion and renovation works. The application of Technical Requirement R5 is appropriate where the advice of an Engineer is required.
- other specialist advice
- the work necessary to ensure that the building meets the Technical Requirements
- new work which could affect the existing structure

Past performance should not be assumed to satisfy Technical Requirements R1 to R5 as future durability will be a major consideration.'

Other information

- We remind firms of the Insurance Conduct of Business Rule 6.1.5 which states that:

A firm must take reasonable steps to ensure a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed

- National House-Building Council was fully co-operative in providing this undertaking to us.

Undertaking published 17 January 2012