

The complaint

Mr E is unhappy National House-Building Council (NHBC) has declined a claim made under his building warranty.

What happened

The subject of this complaint is a building comprising of multiple separate properties. In 2017, Mr E and the other leaseholders, via their property management company, made a claim to NHBC for cracking to the property which they suspected to be subsidence related.

The claim was declined by NHBC, and a complaint about that decision was brought to this service.

One of my ombudsman colleagues issued a final decision on the complaint in February 2022. In this he thought NHBC had fairly declined the claim and he didn't recommend NHBC do anything further.

After the period which that final decision considered, Mr E obtained a drainage report which he says supports that there is a defect with the drainage which could be causing cracking and possible subsidence. This was submitted to NHBC, but they maintained the claim decision.

A new complaint was therefore brought to this service about NHBC's continued declinature of the claim.

One of our investigators looked into things but didn't think the complaint should be upheld. He said that the report obtained didn't show there was damage being caused by a defect which should be covered, so he said NHBC hadn't acted unfairly by maintaining the claim decision or refusing to do anything further.

The investigator also said that he'd only considered whether NHBC, as the insurer, had fairly declined the claim made under the policy. He said that NHBC's role outside the insurance contract, such as its legal responsibilities under contract in relation to the developer and the sale of the property, wasn't something he could consider.

As an agreement couldn't be reached, the case was passed to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I've reached the same outcome as our investigator.

This complaint has been brought to this service by Mr E, with involvement of the property management company acting as a representative. Mr E has presented his individual views on matters too, and that a claim should be covered under his building warranty. The other leaseholders haven't presented arguments individually.

Mr E's building warranty extends to cover his share of common parts which he has shared responsibility for. My consideration here is the claim and cover Mr E is provided under his building warranty.

The policy

Mr E's NHBC policy ran for a period of ten years from November 2008 to November 2018, so has now expired. The policy is split into separate parts and which section applies depends on when the claim was made within that ten-year period. The claim was made in 2017. So, the relevant section of the policy which applied here was Section 3. This says:

"What NHBC will pay for

A The full Cost, if it is more than £1000 Indexed, of putting right any actual physical Damage caused by a Defect in any of the following parts of the house, bungalow, maisonette or flat and its garage or other permanent outbuilding, or its Common Parts:

- *Foundations*
- *Load-bearing walls*
- *Non load-bearing partition walls*
- *Wet-applied wall plaster*
- *External render and external vertical tile hanging*
- *Load-bearing parts of the roof*
- *Roof coverings*
- *Ceilings*
- *Load-bearing parts of the floors*
- *Staircases and internal floor decking and screeds where these fail to support normal loads*
- *Retaining walls necessary for the structural stability of the house, bungalow, flat or maisonette, its garage or other permanent outbuilding*
- *Double- or triple-glazing panes to external windows and doors*
- *Below-ground drainage for which you are responsible."*

Damage is defined as:

"Physical damage to the Home caused by a Defect."

And Defect is defined as:

“The breach of any mandatory NHBC Requirement by the Builder or anyone employed by or acting for the Builder. Failure to follow the guidance supporting the NHBC Requirements does not in itself amount to a Defect, as there may be other ways that the required performance can be achieved.”

This means that for a claim to be valid under the policy, there needs to be Damage, caused by a Defect (as defined), to a specific covered area, and that the repairs cost more than £1,000 Indexed. All these criteria need to be met in order for a claim to be covered. A Defect or Damage in isolation isn't covered. And the policy provides cover for repairing the Damage caused by the Defect. So, the policy doesn't guarantee the property will be free from defects.

The previous case

Mr E brought a previous complaint to this service. One of my ombudsman colleagues considered the case and issued a final decision in February 2022.

In summary, he said the damage to the property which was the subject of the complaint was:

- Cracking to external brickwork
- Movement joints have opened up
- Possible subsidence
- Below ground drainage cracked

He said there was no evidence to support there was any leakage from the drains which was affecting the property or its foundations. He concluded that the evidence didn't support there was damage caused by a defect, so he didn't think NHBC had acted unfairly by declining the claim.

The ombudsman also considered the investigations carried out by NHBC were sufficient in reaching that conclusion and said that they didn't need to do anything else or to investigate the cause further.

The ombudsman said that if any new reports were obtained which call into question the conclusions reached by NHBC, they should be submitted to NHBC for consideration, before referring back to this service to consider the new information as a new separate complaint. A new report was obtained and sent to NHBC to consider, and their claim position was maintained, which is why there is this follow-on case that I'm considering here, to take into account that new report.

However, during our investigator's consideration of this case, Mr E has submitted a number of arguments and evidence, including referring to third-party conclusions from 2018, which were previously submitted and available to the ombudsman who issued a final decision on the previous case. As these arguments and evidence which Mr E continues to present were available to my ombudsman colleague when reaching his final decision, I won't be commenting or revisiting those points, arguments or evidence again here. The ombudsman's decision taking into account those points, evidence and arguments was final.

My final decision here is limited to considering whether the new report and evidence provided by Mr E, not available or presented to my ombudsman colleague when reaching his previous final decision, demonstrates Mr E has a valid claim under his building warranty. I'll also consider some separate points Mr E has raised which weren't part of the previous case or final decision.

The new report

Mr E obtained a drainage survey report in November 2021, this wasn't considered as part of the previous case or final decision, so I'll consider whether this demonstrates Mr E has a valid claim under his NHBC building warranty.

The drainage report noted that three of the gullies do not catch surface water due to the gradient of the slope. Instead, water is only accessing into the system via a single four-inch gully. Therefore, in periods of heavy rain they said the car park is susceptible to flooding. They said the soakaway is working to an extent, but they were unable to confirm the capacity due to no access to the system.

Whilst this does note an issue with the drainage, and that the car park is prone to flooding, I don't think this demonstrates there is a valid claim under the building warranty. Whilst mentioning issues with the drainage, this doesn't demonstrate or conclude damage, or the reported cracking, is being caused as a result of the issues with the drainage.

As outlined above, the policy covers Damage caused by a Defect as defined. The presence of either damage or a defect in isolation isn't covered. And based on this report, there isn't any evidence which demonstrates damage is being caused by a defect as defined. So, I don't think NHBC has acted unfairly by maintaining the claim decision based on this new report.

The cause of cracking

I note Mr E is of the view that NHBC should continue investigations into the cause of the cracking, however, I won't be directing NHBC to do this.

Firstly, in the final decision issued in February 2022, my colleague decided that the investigations NHBC had carried out were sufficient, and they didn't need to do anything further. And I'm satisfied that the new report obtained by Mr E also doesn't show there is damage being caused by a defect. I'm satisfied NHBC has reached a fair and reasonable conclusion, so they don't need to carry out any further investigations.

However, I do note that the building insurer is currently carrying out further investigations into the cracking which are due to be completed in 2024.

As explained by our investigator, if those investigations conclude that there is damage being caused by a defect then Mr E should submit the new evidence demonstrating that to NHBC to consider further. And if he remains unhappy with the decision NHBC reaches based on this new evidence, then he'd be free to submit a further new complaint to this service in line with our usual rules and timescales to consider that new evidence. But based on the evidence provided here, which didn't form part of the previous case and final decision, I think NHBC has fairly declined the claim.

Signed statement and qualifications

Mr E has said that NHBC should provide a signed statement from a registered structural engineer outlining why the claim has been declined, along with providing qualifications of people involved in the claim.

However, this isn't something I'm going to direct NHBC to do. NHBC has assessed whether there is cover under Mr E's building warranty and provided their written conclusions and reasons why (including in their final response of November 2022). I'm satisfied this is sufficient, so I'm not going to direct them to provide a statement or qualifications.

Other expert opinions

Mr E has said that other building experts say that the foundations need stabilising as a matter of urgency. However, no new reports or evidence, which wasn't available for consideration by my ombudsman colleague when reaching their final decision, have been provided which demonstrate there is damage being caused by a defect as defined.

NHBC's responsibility outside the insurance cover

Mr E considers NHBC is responsible for holding the developer to account and therefore in his view they are also directly, and legally liable, for any associated failings by the developer regardless of the insurance cover.

This includes Mr E's view that NHBC should be responsible, under contract with the developer, for the developer allegedly failing to construct the drainage in accordance with the planning granted.

However, as explained by our investigator, our consideration here is NHBC's role and responsibilities as an insurer in relation to the insurance policy and cover this provides, as that is a regulated activity which falls within our jurisdiction. NHBC didn't carry out building control, so Mr E doesn't have insurance cover under Section 4 of the policy which provides additional cover for failures to comply with building regulations where NHBC carried out the building control. So, I've not considered whether NHBC has any responsibilities, under the insurance contract, in relation to this.

Matters outside the insurance policy provided by NHBC, such as its legal liabilities and contractual obligations in relation planning permission, the sale of the property and to the developer, and by extension of that to Mr E, don't form part of the insurance cover or that regulated activity, so this isn't something which this service can decide as it doesn't fall within our jurisdiction.

My final decision

It's my final decision that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 2 January 2024.

Callum Milne
Ombudsman