

## The complaint

Mr and Mrs M complain that National House-Building Council (NHBC) declined a claim under their buildings warranty policy.

## What happened

Mr and Mrs M bought a new-build house around 5 years ago. This had an NHBC Buildmark policy.

There were issues over time with the driveway outside the house, which is surfaced with pavers. This kept 'sagging' for want of a better description. Mr and Mrs M attempted minor repairs. But the problem persisted and got worse. So, they commissioned an expert report to identify the cause of the problem.

Because of size of the hard-standing around house, there's a surface water drainage tank (an attenuation tank) under the driveway. This collects rainwater during heavy rain and then feeds it into the main drains under the road outside the property.

The expert found that the side of tank has essentially buckled inwards. The reason being the weight of cars parked on or using the driveway.

The tank's manufacturer says that if the tank is being used in an area traffic passes over, it needs to be protected by a layer of concrete under the surface of the driveway.

It seems the plastic tank isn't strong enough in itself to bear the weight of motor vehicles. Unsurprisingly then, it's bent out of shape.

The expert report also says the worst of the subsidence in the driveway is above where the tank has buckled – and where the ground around the tank has therefore fallen downwards.

Mr and Mrs M made a claim for the damage to the driveway under Section 3 of their NHBC Buildmark policy.

NHBC declined the claim. It appears they considered the claim before they'd seen the expert report commissioned by Mr and Mrs M.

NHBC said the drainage system and tank were still functioning, as drains – i.e. they were collecting water and passing it into main drain. Therefore, there was no "defect" as defined in the policy, even though the installation appears to have been carried out incorrectly.

They said the issue was caused by a failure to prepare the ground under the drive properly and not by a building "defect" in the drainage system.

It also appears that the installation wasn't in line with the planning drawings – which showed a concrete 'shell' over the tank. These drawings were to satisfy the local authority's

requirements for 15 cubic metres of capacity in the tank to take away excess rainwater runoff from the hard-standing.

Mr and Mrs M weren't happy their claim was declined and they complained to NHBC. And when NHBC maintained their position, they brought their complaint to us.

Our investigator looked into and didn't think NHBC had done anything wrong. Mr and Mrs M disagreed and asked for a final decision from an ombudsman.

Because I disagreed with our investigator's view, I decided to issue a provisional decision. This allowed both Mr and Mrs M and NHBC an opportunity to provide further information and/or comment before I make my final decision, which is this service's last word on the matter.

### **My provisional decision**

In my provisional decision, I said:

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

There's no dispute in this case that the attenuation tank under driveway was installed incorrectly. NHBC have said so in correspondence with Mr and Mrs M.

So, the questions for me are whether the damage to the driveway was caused by the poor installation of the tank. And if so, whether that damage is caused by a "defect", as defined in the NHBC warranty, and so is covered under that policy.

I'll answer the first question by reference to the independent expert report commissioned by Mr and Mrs M. This says without any equivocation that there's a significant drop in the ground around the tank.

It says the tank has distorted and buckled inwards on one side, reducing capacity. And it says the most significant settlement to the driveway is, "*in the position where the attenuation tank sides had deflected inwards severely*".

The report concludes that the tank hasn't been installed correctly - and this has caused the damage to the tank, which has made it, "*compromised and... not fit for purpose*". The installation is not as per the buildings regulations drawings submitted to the local authority. And does not comply with the manufacturer's instructions.

There is no other expert inspection report. In the absence of any contradictory opinion, I'm satisfied the tank is damaged due to poor installation and this has caused the subsidence and damage to Mr and Mrs M's driveway.

I'll move on now to the question of whether this damage is covered under the policy.

The policy says that in years 3-10 - a period we're definitely in now and at the time of the claim - NHBC will pay for physical damage to the home caused by a "defect".

"Home" is defined in the policy and includes paths, drives and garden areas and paved areas built by the builder. So, Mr and Mrs M's driveway is part of their "home". And it has certainly suffered physical damage.

I have to consider whether that damage was caused by a "defect".

First, the policy says defects are only covered if they are in certain parts of the structure of the home. Drainage systems are listed in the policy as one of those parts of the structure. So, any "defect" in the drainage systems may give rise to a claim if it's caused damage.

The policy then defines a "defect" as follows:

*"The breach of a mandatory NHBC requirement by the Builder.... Failure to follow the guidance supporting an NHBC Requirement does not amount to a defect if the performance required by the NHBC requirement is achieved by other means."*

NHBC requirements include, amongst other things, a stipulation that building work accords with the relevant "Approved Documents" - which are government guidance on how to comply with the Building Regulations.

NHBC also sets out requirements for building materials. These say the structure of the home (which includes drainage systems) should have a life of at least 60 years, unless otherwise agreed in writing beforehand.

They say when it comes to durability, proper account must be taken of the "use and location of materials, products and building systems".

And they say materials, products and building systems will usually be acceptable if they comply with NHBC standards or British Standards (where used for critical functions, including services) or (if used for non-critical functions) either those standards or the manufacturer's recommendations.

I'm assuming NHBC regard drainage as a critical function - especially as the requirements are set out by the local authority in this case. But either way, the builder was required to comply with NHBC standards or British Standards - or if not, with the manufacturer's instructions.

NHBC standards - which underpin their broad requirements - say (in Section 5.3 Drainage Below Ground) that private drainage systems should be "*sufficient to cope with the intended capacity*" (paragraph 5.3.4). And "*adequately durable and protected against damage*" (paragraph 5.3.8).

And in amplification of this last point, the paragraph goes on to say that issues which should be taken into account include "*loads for overlying fill and traffic*".

When I take all of this into account, bearing in mind the conclusions of the expert report and NHBC's admission that the installation of the tank was incorrect, I have to conclude that the builder did not comply with NHBC's requirements - particularly around durability.

Nor do they appear to have complied with the standards underpinning that durability requirement. They haven't protected the attenuation tank from damage. They ignored the manufacturer's instructions about how to do that. And they haven't taken into account the effect of traffic passing over the tank. They've also ignored the local authority approved drawings.

So, I'm satisfied there is a "defect", as defined in the policy, because a part of the structure of the house (the drainage system) has not been built in accordance with NHBC's requirements and standards.

That means the damage to Mr and Mrs M's driveway is covered under the policy. And NHBC should pay for the damage to be repaired.

When I look at NHBC's explanation for their declining the claim, as put to Mr and Mrs M, I can see they rely on two arguments.

One, they say the damage to the driveway isn't caused by the poor installation of the tank. It's caused by poor preparation of the ground beneath the driveway.

I'm afraid that's now flatly contradicted by the expert evidence. As I say, NHBC may not have seen the independent expert report at the time, so to an extent it's understandable they came to a different conclusion based on the evidence they had.

However, they did repeat that line of argument after Mr and Mrs M had provided the report, when they were dealing with Mr and Mrs M's complaint. I'm not sure whether they engaged their own in-house expert at that point, but if not, they might wish to do so now before they respond to this provisional decision.

NHBC also said there was no "defect" because the drainage system and tank still performed its purpose - it was still taking water from the hard-standing areas around the house and delivering it to the main drains in the road.

I assume they meant that the builder - whilst not complying with their requirements and standards - had found an alternative means to deliver the function satisfactorily. And here I refer back to the second part of the policy's definition of a "defect", which says:

*"Failure to follow the guidance supporting an NHBC Requirement does not amount to a defect if the performance required by the NHBC requirement is achieved by other means."*

It is true to say that the tank still moves rainwater into the main drains. However, because it's buckled inwards, it doesn't deliver the capacity intended (the 15 cubic metres required by the local authority).

I also think NHBC's argument rests on a very narrow definition of the "performance required" by the tank. I can't imagine they're saying the tank can crumple under the weight of the traffic above as long as water can still pass through it. In my view, any reasonable definition of the "performance required" by the tank would be that it maintains its structural integrity and is durable.

And again, I refer back to the independent expert report which concludes that the tank is not fit for purpose.

To summarise, in my view, there is damage to Mr and Mrs M's home. That is caused by the collapse of one side of the attenuation tank. And that is in turn is caused by a "defect" because the builder didn't comply with NHBC requirements and didn't find an acceptable way to deliver the required function by other means.

So, NHBC should settle Mr and Mrs M's claim and pay for the necessary repairs to their home.

I'm also satisfied Mr and Mrs M have suffered not insignificant trouble and upset as a result of NHBC not settling their claim. They've been without the full amenity of their driveway for a considerable period. And they've had the worry and stress caused by

believing they might have to pay for the substantial repairs to their property themselves.

For those reasons, I'm minded to require NHBC to pay Mr and Mrs M £250 for their trouble and upset.

### **The responses to my provisional decision**

Mr and Mrs M said they broadly agreed with my provisional decision.

But they said they were aggrieved that NHBC had now been given an opportunity to have their own expert inspect the property.

And they wanted reassurance that manhole covers which had been installed as part of the drainage system - and which had now 'failed' were also to be covered by the requirements I was placing on NHBC.

NHBC disagreed with my provisional decision.

They said the attenuation tank's installers had followed the "*direct requirements*" of the manufacturer. The logic being that the manufacturer's instructions said that protecting the tank with concrete should be done "*if required*". And so left discretion for the installer as to whether that was in fact necessary.

They also repeated the argument that the collapse of the ground around the tank was not a result of poor installation of the tank, but due to "*the failure to provide adequate ground protection above it*". A task which they said was not the responsibility of those who installed the tank.

### **What I've decided – and why**

I've considered again all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint, including the responses to my provisional decision.

In response to Mr and Mrs M's comments, it wasn't my intention to suggest NHBC should now appoint an expert to inspect their driveway. I was suggesting that NHBC should ask their expert to look at the expert report Mr and Mrs M had provided. I thought this might help resolve the matter, although that appears to have been optimistic.

In any case, NHBC have not sought to inspect the driveway or asked for time to do so. So this is of no consequence.

And it was my intention that NHBC should put right all the damage to the driveway caused by the poor installation of the drainage tank and system, including the manhole covers which provide access to the system. The expert report Mr and Mrs M provided is clear that the system - including manhole covers - were installed without any regard for protection from traffic which might pass over them.

I find NHBC's arguments against my provisional decision unconvincing.

It's true that the manufacturer's published manual refers (several times) to a concrete slab, to be placed over the tank "*if required*". But as the expert report says, the manufacturers are clear that a slab is required when traffic is to pass over the site of the tank. And the manual

says the installer should take into account external loading on the tank.

The same point is made in NHBC's own technical requirements, which I quoted in my provisional decision. For the sake of clarity and at the risk of repetition, these require durability and protection against damage. And they specifically say that account should be taken of the weight of traffic passing over any underground drainage systems

In brief, I don't believe NHBC are right that the manufacturer gives no clear instruction. But even if they were, NHBC's own requirements should be taken into account by the builder / installer.

As for NHBC's suggestion that there is no problem with the tank's installation, but only with the preparation of the ground around and above it, I find this to be a very difficult and semantic distinction to understand.

The fact is the tank failed because it was supposed to be installed with a concrete slab above it, to allow for the weight of traffic on what was clearly intended to be a usable driveway. To say that the placing of the slab is not a (necessary) part of the tank's installation in these circumstances is not sustainable, in my view.

### **Putting things right**

So, to summarise, I haven't changed my mind about the outcome of this complaint. I still believe NHBC should pay for repair of the damage to Mr and Mrs M's driveway. To be clear, I leave it to NHBC to decide whether to carry out these repairs themselves or pay for agreed works to be carried out by a contractor appointed by Mr and Mrs M.

And my view about the trouble and upset caused to Mr and Mrs M by NHBC's handling of their claim remains the same.

### **My final decision**

I uphold Mr and Mrs M's complaint.

National House-Building Council must carry out or pay for repair of the damage to Mr and Mrs M's home caused by the poor installation of the attenuation tank and drainage system. And they must pay £250 to Mr and Mrs M for their trouble and upset.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and Mr M to accept or reject my decision before 29 June 2020.

Neil Marshall  
**Ombudsman**