

The complaint

Mr and Mrs T are unhappy with how National House-Building Council (NHBC) propose to repair their drive and the private road leading to their property under the Buildmark policy.

What happened

The policy commenced on 2 March 2018. In April 2018 Mr and Mrs T reported issues to the builder of their property that there were problems with the tarmac surface on their drive and shared road leading to their property and next door's property. They remained unhappy so they reported the issues to NHBC in June/July 2018.

NHBC investigated under its resolution service, and a resolution report was issued on 28 September 2018. This required the builder to undertake further investigations, testing the tarmac to confirm that it is the correct specification/thickness for the location so that NHBC could further consider if it complied with its technical standards.

Testing was undertaken and an updated resolution report was issued on 24 May 2019. This confirmed that the builder is required to undertake remedial works to the drive and shared road.

Unfortunately, the builder hasn't agreed to do the corrective works and as such NHBC has stepped in to fulfil the builder's obligations. These were in NHBC's opinion just to perform localised repairs.

Mr and Mrs T don't think this is fair and believe NHBC ought to replace the drive and shared road completely owing to the findings of the resolution report and lab results of the core samples taken.

Our investigator didn't uphold the complaint. He felt based on the policy that NHBC were entitled to repair just the physical damaged areas – areas that have become sunken or suffered breakup of the surface. He acknowledged whilst the construction of the road hadn't met the technical requirements set out by NHBC, this would only be a breach where satisfactory performance wasn't being obtained.

Mr and Mrs T disagree they don't feel that satisfactory performance is being obtained on the drive or shared road given the deterioration across the surfaces that have appeared over the last two years. They feel it should be rectified fully and not just patched up. So, they have requested that the complaint be passed to an ombudsman to consider.

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.

Mr and Mrs T's claim comes under section two of the Buildmark policy, this covers years zero to two from the date of completion of the property.

The NHBC guarantee says:

'You are protected by the NHBC guarantee for what we (in a resolution report) or a court (in a judgment or, in Scotland, a decree) decides the builder should have done to meet their responsibilities under the builder warranty.

If the builder does not meet these responsibilities, we will do so on their behalf. Or, if we choose to, we will pay you what it would cost us to have the work done.'

In this case we know the builder hasn't met their responsibilities and NHBC are stepping in on their behalf. The builder's requirements under the policy says:

'If you tell the builder during the warranty period that they have failed to meet the NHBC requirements, they must put this right within a reasonable time. This includes:

- *repairing physical damage to your home resulting from their failure; ...*

So, the key term here is NHBC are responsible for 'repairing physical damage', so ordinarily that's all we'd expect them to do – unless they needed to go further in order to carry out a lasting and effective repair.

I note the policy doesn't define 'physical damage' and like our investigator I agree the common understanding of physical damage is tangible damage i.e. damage that can be perceived by touch or feel.

I can understand why Mr and Mrs T will be disappointed by this as I suspect their expectations were not managed very well by NHBC. I say this as the updated resolution report issued in May 2019, is not clear in the scope of work that is required. However, like most insurance policies we would not expect an insurer to cover undamaged property.

It is not disputed that there are areas on the drive and shared road that are suffering from physical damage, I have also looked at the reports and photographs provided by the parties and I can see there are areas that have become sunken and/or the surface has broken up. However, from what I've seen this damage is only apparent in certain areas and on the whole, the surface is currently performing. So, whilst certain areas have suffered physical damage this can't be said to be affecting the whole drive and road surface.

So, based on the terms of the policy I'm satisfied that NHBC has been fair when saying it will carry out a localised repair of the damaged areas of the drive and road.

I understand Mr and Mrs T feel that because the samples taken have shown that the technical requirements were breached that the whole drive and road should therefore be replaced.

NHBC do publish standards on the technical requirements, performance standards and guidance for the design and construction of homes which is deemed acceptable by NHBC. These requirements are not necessarily the same as building regulations.

A breach of the technical requirements occurs when a builder hasn't considered a technical requirement when constructing a property and this element doesn't therefore provide satisfactory performance as a result.

In Mr and Mrs T's case, the core samples taken for testing didn't meet the requirements set by NHBC under Chapter 10's requirements for sub base thickness for private drives.

The specification required is a 100mm base and 20mm wearing course, whereas the test samples that were taken showed a 200mm base and 120mm wearing course has been used.

So, although these samples show the technical requirements hadn't been met, it's important to note that NHBC requirements are performance based. This means if the element under consideration is performing satisfactorily then it will be deemed to have met the technical requirements and wouldn't therefore be defective even if the construction hadn't met the original technical requirements.

So, even if there were more breaches (or 'failures' according to the policy term), they're only covered if they cause physical damage.

From what I've seen although there are certainly areas of the drive and road that are not performing as intended and are therefore defective that doesn't necessarily mean that the performing areas of the drive and road are defective. I'm not persuaded that the defective areas affect the overall performance of the drive and road especially given they only form a small part of the overall surface.

In summary I'm not persuaded NHBC has done anything wrong I therefore don't uphold this complaint and NHBC now need to conduct the repairs to the areas of the drive and road that have physical damage or offer a cash alternative as required under the Buildmark policy.

My final decision

For the reasons given above I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T and Mr T to accept or reject my decision before 23 November 2020.

Angela Casey
Ombudsman