

The complaint

Mr and Mrs B complain that National House-Building Council, trading as NHBC, has declined a claim under their Buildmark policy for damage to their home.

What happened

In February 2019, Mr and Mrs B made a claim under section three of their Buildmark policy for damage to their home relating to an issue with their flooring. In March 2019, NHBC accepted the claim following an initial investigation, but following a further investigation which took place in September 2019, NHBC changed its position and declined the claim.

NHBC said the main cause of the damage wasn't a failure to meet technical requirements but rather a lack of ventilation in the sub-floor void, which it believed had led to dry rot forming around the timbers. It said the air bricks used in the walls had been blocked, but that these weren't a load-bearing element of the wall, as the property would remain fully supported if the air bricks were removed. It said the air bricks weren't therefore covered and that a lack of ventilation wasn't a defect covered under section three of the policy.

NHBC recognised it should've arrived at the decision to decline the claim sooner, and for that reason it offered Mr and Mrs B £5,000 in compensation. Mr and Mrs B were unhappy with this, so referred their complaint to our service.

Our investigator considered the case and recommended that it should be upheld. She said the NHBC technical standards hadn't been met during the build, due to a lack of adequate ventilation. And that as there wasn't anything in the policy excluding defective air blocks or inadequate ventilation, NHBC should accept the claim.

NHBC disagreed with our investigator's assessment, so the complaint has come to me to decide.

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 decided to uphold Mr and Mrs B's complaint. I'll explain why.

In order for me to determine whether NHBC must accept Mr and Mrs B's claim, I have to consider whether there's been damage to an area covered by the policy and caused by a defect as defined in the policy terms.

So I've looked at what Mr and Mrs B's policy says. It states, under section three, that NHBC will pay for and put right: *“any physical damage to your Home which is caused by a Defect in respect of any of the following parts of your house, bungalow, maisonette or flat, or its garage or other permanent outbuildings:*

- a) foundations;*
- b) load-bearing walls;*
- c) non load-bearing partition walls”*

“Defect” is defined in the policy booklet as *“The breach of any mandatory NHBC Requirement by the Builder or anyone employed by or acting for the Builder”*.

NHBC further defines “NHBC Requirement” as *“The mandatory Technical Requirements that we publish in the NHBC Standards and the Standards for Conversions and Renovations 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.”*

The damage to Mr and Mrs B’s converted property is extensive. The evidence shows dry rot which has affected the ground floor timbers of the home and significant fungal decay, which came to light after NHBC’s initial investigation.

I’ve considered first whether the damage was caused by a defect as defined by the policy. The mandatory Technical Requirements include at R1: *“Work shall comply with all relevant Building Regulations and other statutory requirements relating to the completed construction work”* and it’s this Technical Requirement which I think has been breached here.

The requirements include, among other things, a stipulation that building work will be carried out in accordance with the relevant “Approved Documents” - which include government guidance on how to comply with the Building Regulations. Proper account must be taken of the “use and location of materials, products and building systems”. And 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 would think NHBC regard ventilation as a critical function. But in any event, the builder was required to comply with NHBC standards or British Standards - or if not, with the manufacturer’s instructions when it came to ventilation systems throughout the property. I appreciate there is no apparent requirement for ventilation to a sub-floor void, but as I explain below, I do not think the defect in this case applies only to the sub-floor void area.

The reports by Britannia Preservations and Peter Cox state that the defect has been caused by a lack of ventilation. But having considered both reports carefully, I don’t think I can safely conclude that the lack of ventilation isn’t a result of something else which may be covered by the policy.

By NHBC’s own admission in its letter dated 15 April 2020 to Mr and Mrs B, *“the air bricks are installed within the load-bearing wall”*. And it’s not disputed by either party that the defect relates to the air bricks, which NHBC says have been blocked. NHBC suggests this is sometimes carried out by the home-owner. However, I have no reason to think Mr and Mrs B blocked them, as I find their testimony that they’ve had no access to the area persuasive. So I think it’s more likely that the air bricks were blocked at some point during the build. And as the issue with ventilation stems from the blocking of the air bricks – which have been installed within the load-bearing wall, I’m satisfied that the defect is within an area covered by the policy.

NHBC has said that because the air bricks don’t provide a load-bearing function, the part of the home that’s affected doesn’t fall under “load-bearing walls” or any other part of the home defined in the policy and for which the policy provides cover. And that for this reason, together with the fact that the expert reports say the cause of damage is a lack of ventilation which isn’t covered, NHBC says the claim cannot be accepted.

I’m not convinced by NHBC’s argument. Firstly, the policy doesn’t specifically exclude

ventilation issues. It also doesn't say that the defect to a load-bearing wall must involve an element of the wall which is essential in order for the wall to carry out its load-bearing function. I note the policy also provides cover for damage caused by a defect to non load-bearing partition walls, the load-bearing part of the floors and retaining walls necessary for the structural stability of the home. So I think NHBC's restrictive interpretation is unfair in this case and I think it's most likely that the intention of the wording was to cover any aspect of the load-bearing wall with which there is a defect – not just those parts of the wall which provide a load-bearing function.

It follows therefore, that I'm satisfied Mr and Mrs B's claim is for damage to an area covered by the policy and caused by a defect as defined in the policy terms.

NHBC has said it won't pay for Mr and Mrs B's legal fees because the policy says professional fees are excluded unless reasonably incurred with NHBC's written consent. While I note what NHBC has said about this, I don't think it's fair for Mr and Mrs B to be out of pocket in pursuing this claim. So I think would be fair for NHBC to cover the cost of their legal fees, which I think were reasonably incurred.

Mr and Mrs B have also said that the claim has caused them a great deal of stress, and they've highlighted some personal and health reasons that have exacerbated the level of trouble and upset they've experienced as a result of NHBC unfairly declining the claim. So I'll require NHBC to pay Mr and Mrs B compensation for the trouble and upset caused.

Putting things right

NHBC should do the following to put things right for Mr and Mrs B:

- Deal with Mr and Mrs B's claim in line with the terms and conditions of their policy.
- Pay Mr and Mrs B's solicitor's fees of £2,379 plus 8% interest on this amount from the date Mr and Mrs B paid their fees to the date of settlement.
- Pay Mr and Mrs B £1,500 compensation for trouble and upset.

My final decision

My final decision is that I uphold this complaint and I direct National House-Building Council to put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 11 April 2021.

Ifrah Malik
Ombudsman