

## **The complaint**

Mrs C and Mr C complain about National House-Building Council's decision to decline a claim made under their property warranty.

## **What happened**

Mrs C and Mr C have a Buildmark property warranty with National House-Building Council (NHBC) which covers their home.

These warranties provide cover in three sections. Some cover is provided during the building of the property. Then, in the first two years after completion, NHBC expect the builder to deal with any problems, but provide a resolution service if there is a dispute between the homeowner and the builder. And finally, NHBC provide a further 8 years of insurance to cover any serious problems with the property arising from a defect in the way it was built.

Mrs C and Mr C made a claim towards the end of the period of the warranty when they noticed cracking in the outside wall of their house.

NHBC carried out an inspection and concluded that the damage was merely cosmetic – and caused by weathering. And they declined the claim on that basis.

Mrs C and Mr C commissioned their own report from a qualified surveyor. He concluded that the cracking was a result of structural movement in the property. And he made a recommendation about the remedial work he thought was necessary.

Mrs C and Mr C provided that report to NHBC and made a complaint to them about their decision to decline the claim. NHBC didn't change their position and maintained that the decision to decline the claim was correct. So, Mrs C and Mr C brought their complaint to us.

Our investigator looked into it and thought NHBC were wrong to decline the claim. He found the surveyor's report more convincing than NHBC's own inspection report. He said NHBC should carry out the remedial work recommended by the surveyor – and pay Mrs C and Mr C the £350 it had cost them to commission the surveyor's report.

NHBC disagreed and asked for a final decision from an ombudsman.

I agreed with our investigator that the complaint should be upheld. But because I thought it should be resolved in a different way, I issued a provisional decision.

This gave both NHBC and Mrs and Mr C the opportunity to comment on my thinking and/or provide more information or evidence before I make my final decision.

## **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.

The warranty says that in years 3-10, NHBC will pay the full cost of repairs to physical damage caused by a "defect" in any of certain parts of the property (including the walls).

A "defect" is essentially defined as a failure by the builder to meet NHBC's mandatory building requirements – as set out in the relevant guidance.

There are a number of caveats and exclusions set out in the warranty policy documents.

NHBC say they will not pay any claim where the cost of the required repairs is £1,000 or less (indexed). This is referred to as the "*minimum claim value*" (MCV).

They also say they will not pay for repairs where the claim relates to:

*"... shrinkage, thermal movement or movement between different types of materials."*

or

*"... cosmetic damage such as minor cracking, spalling or mortar erosion to brickwork, which does not impair the structural stability or watertightness of the home."*

The original NHBC inspection report said the claim should be declined on the grounds of the latter exclusion (cosmetic damage). But it also said the likely cause of the cracking was thermal and/or moisture expansion of the brickwork.

NHBC have also said that the cost of the required repairs would not meet the MCV, even if it they were to accept (which they don't) that the damage is caused by a defect in the build.

Mrs C and Mr C's surveyor measured the cracks at between 1.5mm and 4mm. He also noted a crack in the windowsill adjacent to the cracking in the brickwork. He said the brickwork was supported by a lintel above the integrated garage's door – which is underneath the wall where the cracks have appeared. And he took measurements to show that this lintel wasn't level.

His conclusion was that the cracking was due to structural movement in the lintel above the garage door.

So, we have a difference of opinion between the two experts who've inspected the property about the cause of the cracking.

I can't resolve that difference of opinion one way or the other. We aren't qualified experts and our service doesn't carry out independent inspections of buildings.

I can however try to pick my way through the warranty policy and the implications of its terms as they apply to this particular case.

I should start by saying I don't agree with the NHBC inspector's conclusion that the claim should be declined because the damage is cosmetic.

As Mrs C and Mr C's surveyor pointed out, the Building Research Establishment (BRE) has published guidance on cracking in buildings.

I don't think there's any dispute about the measurements taken by the surveyor which showed the cracks in Mrs C and Mr C's house to be between 1.5mm and 4mm.

The BRE guidance describes cracks between 1mm and 5mm as "easily filled" but requiring some external repointing to ensure weatherproofness.

The relevant exclusion in the warranty document (as quoted above) says NHBC don't cover cosmetic damage such as minor cracking which doesn't affect the stability or *watertightness* of the home (my emphasis).

It appears the cracking in Mrs C and Mr C's home is wide enough – according to the BRE – to affect the watertightness of their home. So, I can't reasonably say that particular exclusion would apply in this case.

However, the NHBC inspection also said that the cracking was due to thermal shrinkage or movement – and there's another exclusion in the warranty which applies where that is the cause of any damage.

This conflicts with the surveyor's report, which said the problem was structural movement – as shown by the fact the garage door lintel isn't level.

NHBC have pointed out that the lintel above the garage door doesn't support the brickwork and blockwork where the cracking has appeared. There's a further steel lintel above the ceiling of the garage – and set back from the opening where the garage door is.

This may not have been apparent to the surveyor. He himself says in his report that he hasn't carried out a full building survey and hasn't inspected "*parts of the structure which were concealed, inaccessible or unexposed at the time of the inspection*".

So, there's no real surprise he didn't realise that the ceiling of the garage masked from view the steel lintel which supports the crack-affected wall.

It seems to me then that the surveyor's logic – which places the blame for the cracks on the non-level garage door lintel – falls away here.

That doesn't necessarily mean that the cracks are due to weathering and thermal movement, as NHBC suggest, but it certainly makes that more likely as the explanation for the cracking.

NHBC have also pointed out that the idea that there is structural movement causing the cracking isn't supported by any evidence of: movement on the gable wall to which the brickwork is attached; or other cracking or other indications of movement elsewhere on the exterior of the building; or any cracking inside (which one might expect if there were structural movement); or any sign of movement to the garage roof.

I should also say at this point that if there is structural movement in the property, that may not be due to any defect in the build. If, for example, it were due to subsidence around the property, NHBC most likely wouldn't be liable to cover the cost of repairs under the terms of the warranty.

All of that said, I'm not convinced as yet that the cause of the cracking has been definitively identified. And that being the case, I'm minded to ask NHBC to inspect the property again. I think that should be done as soon as practicable – and at the latest within a month of my final decision on this case being accepted by Mrs C and Mr C.

If it remains the case that there are no other potential signs of structural movement – more than two years after NHBC's original inspection – I think it would be safe to say that the cracking was caused by thermal movement and weathering rather than by any more serious underlying structural issues with the house.

I understand NHBC's arguments about the MCV. And I fully recognise that both the NHBC and the surveyor are basically in agreement about what needs to be done to remedy the situation.

Whatever the cause, both think the affected area needs to be re-pointed. And I believe NHBC agree with the surveyor that the cracked sill would also need repair or replacement.

I haven't seen any detailed costings from NHBC to suggest all of that work – including the sill – would come in at less than the MCV. It may be worth NHBC providing those costings now, in response to this provisional decision.

I think that will be irrelevant if the suggested further inspection confirms that there is no structural movement at the property and the cracking was in fact caused by thermal movement.

If that is the case, NHBC can rightly say that the relevant exclusion (for shrinkage, thermal movement etc.) in the warranty policy applies – and so won't be liable to pay out whatever the cost.

But that costing information may be useful to me if other information comes to light in response to this provisional decision – for example, from Mrs C and Mr C - which supports the argument that there is structural movement at the property.

Of course, if NHBC's further inspection shows that the cracking is caused by something other than thermal movement, I would expect them to consider the claim again in line with the terms of the warranty."

In summary, I said that for the reasons set out above, I was minded to ask NHBC to carry out a further inspection of the property.

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

Mrs C and Mr C responded to my decision to say they were pleased to agree a further inspection, but disappointed that I'd considered the damage might conceivably be shrinkage or thermal movement (as described in the exclusion set out in the policy).

They said it was unlikely the composite lintel under the window would have cracked due to shrinkage or thermal movement and that it was more likely this was a result of significant stress.

They also referred to damage to the lintel above the garage door and to bowing of the door frame. Again, they think this can't be due to shrinkage, but must indicate more significant movement. And they included new photographs to show the building as it appears now –

particularly around the area which is showing cracking etc.

NHBC responded to say they were happy to agree to a further inspection of the property to investigate the causes of the damage reported by Mrs C and Mr C. They've very helpfully, in my view, suggested having those investigations carried out by one of their structural engineers – who are independent of their claims handling function.

NHBC also provided me with detailed costings to show that if the required repairs are as they originally envisaged – i.e. essentially re-pointing and replacement of the composite sill – that would fall below the MCV set out in the policy.

### **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.

I've looked again the evidence we had before I made my provisional decision and I've considered very carefully the comments NHBC and Mrs C and Mr C have provided in response to that provisional decision.

Having done so, I haven't changed my mind. I think the fairest possible outcome here is for NHBC to re-inspect the property so that we might have some greater certainty about the cause(s) of the damage.

I understand Mrs C and Mr C's arguments about the damage to their house and why they think it isn't caused by shrinkage. And I'm grateful for the further photographs they provided to show the cracking as it appears now.

But I think that was exactly why I thought NHBC should go back now and take another look at the property, to see whether the damage as it now presents itself indicates a more serious root cause.

I'm very grateful to NHBC for agreeing to use a structural engineer to carry out the further investigations. I'd also expect that engineer to fully engage with Mrs C and Mr C's arguments about the damage as it's now presenting itself.

If he or she should decide that in their opinion the damage *is* due to shrinkage or thermal movement (as per the original NHBC inspection report), I'd expect a thorough explanation to be provided to Mrs C and Mr C to justify that opinion.

I would also expect that the structural engineer is very clear about exactly what remedial works need to be carried out to repair the damage. I'm mindful of the fact that the costings NHBC have provided to me very recently (which fall below the MCV) might change if the engineer identifies further work that might need to be done to rectify, for example, more recent damage.

To be clear, the planned investigation will need to answer two questions. One, is the damage caused by shrinkage, thermal movement or movement between different type of materials (and so excluded under the policy)? And, if not, two – exactly what work is necessary to repair the damage.

### **Putting things right**

In summary, NHBC should arrange a further inspection of the property, as soon as practically possible and convenient for Mrs C and Mr C (and at the latest not more than one month after the date on which Mrs C and Mr C accept this decision).

That inspection should be carried out by an NHBC structural engineer, who must be prepared to engage with the evidence and arguments presented by Mrs C and Mr C and to comprehensively justify his or her conclusions.

NHBC should then re-assess the claim on the basis of the findings in the new inspection report. And if the claim is accepted, NHBC should also pay Mrs C and Mr C the £350 it cost them to obtain their own surveyor's report.

### **My final decision**

For the reasons set out above, I'm upholding Mrs C and Mr C's complaint.

National House-Building Council must arrange a further inspection of the damage to Mrs C and Mr C's property, by a structural engineer and within a month of the date Mrs C and Mr C accept this decision - and then re-assess Mrs C and Mr C's claim on the basis of that inspection's findings.

If the claim is then accepted, they should also pay Mrs C and Mr C £350 to cover the cost of the surveyor's report they commissioned.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr C to accept or reject my decision before 8 June 2021.

Neil Marshall  
**Ombudsman**