

The complaint

Mr C and Mrs C complain that National House-Building Council declined a claim under their new build warranty policy.

What happened

Mr C and Mrs C bought a new build home in 2018. They have a '*Buildmark*' warranty policy with NHBC. This provides protection for the home for the first ten years after completion.

In the first two years, NHBC provide an arbitration service for disputes between the policyholder and the builder of the home. And if the builder fails to rectify certain faults, NHBC will step in and carry out any necessary rectification work and/or repairs.

In years 3-10, NHBC provide insurance for the policyholder. They will carry out or pay for any necessary rectification work or repairs to certain parts of the home *if* damage has been caused by a failure to build the home in line with NHBC's specified requirements.

Mr C and Mrs C made a claim in June 2021 (which was in years 3-10 of the policy) because the floor tiles in their kitchen / hallway were lifting. Amongst other issues, this was blocking access to a cupboard because its door would no longer open.

NHBC carried out an inspection in August 2021 and subsequently declined the claim. They agreed the tiles were lifting by about 40mm and had become de-bonded from the concrete floor beneath.

But they said this was likely due to thermal and moisture movement and shrinkage of materials – and damage caused by such movement is specifically excluded from the cover provided by the warranty.

They also said the policy only covered defects in the build (failures to meet NHBC's building requirements) in specified parts of the building. And that there was a specific exclusion relating to damage which only affects floor coverings.

Mr C and Mrs C made a complaint to NHBC, but they maintained their decision to decline the claim was correct. So, Mr C and Mrs C brought their complaint to us. Our investigator looked into it and didn't think NHC had done anything wrong.

Mr C and Mrs C disagreed and asked for a final decision from an ombudsman.

They believe the problem with their kitchen / hallway flooring is due to a failure by the builder to meet the relevant building standards. And they want NHBC to settle their claim in full and compensate them for their trouble and upset.

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 think it's important, first of all, to understand exactly what the terms of Mr C and Mrs C's warranty are.

Section 3 of the policy booklet sets out the cover provided in years 3-10 of the warranty. It says:

"This section protects you if there is physical damage to your home because the builder failed to build the following parts of your home to meet the NHBC requirements:

- *Foundations, walls, external cladding.... roofs, ceilings, balconies, load-bearing floors, flues, chimneys and access steps...*
- *Staircases, floor decking (for example, floorboards) and screeds (for example a cement-based top layer applied to the structural floor... if they fail to support normal loads.*
- *Retaining walls....*
- *Double or triple glazing panels to outside windows...*
- *Drainage below the ground...."*

Section 3 also contains a list of exclusions from the cover provided under this Section of the policy. It says:

"You cannot claim for the following:

- *....*
- *Damage which only affects floor coverings (such as tiling, laminate and wooden flooring), including any fixing material such as adhesive or grout."*

Mr C and Mrs C are also provided some cover under Section 4 of the policy. This only comes into play if NHBC provided the building control service when the home was being built. In the case of Mr C and Mrs C's home, NHBC *did* act as building control and so Section 4 is in play.

It might have been helpful if NHBC had pointed this out to Mr C and Mrs C when they made their claim and when they later made their complaint. I can't see that NHBC did that at any point.

Section 4 provides cover if:

"... there is an immediate danger to someone's physical health or safety because the builder failed to meet the following Building Regulations when building the main structure of your home."

The relevant Building Regulations are then defined as Parts A (Structure), B (fire safety), C (site preparation and resistance to contaminants and moisture), J (combustion appliances and fuel storage systems), K (protection from falling, collision and impact), and N (Glazing...).

As NHBC pointed out in their inspection report, there's also a section of the policy which sets out general conditions and exclusions. This says the policyholder can't claim for (amongst

other things):

“Damp, condensation, shrinkage, thermal movement (expansion and contraction as a result of temperature changes) and movement between different types of materials that is not a result of the builder failing to meet the NHBC requirements.”

There's nothing inherently unfair in NHBC's warranty terms. There's a basic principle here that we need to keep in mind. An insurance provider (or underwriter) is entitled to define the risk that they are willing to take on in providing cover for a policyholder.

As long as what's covered is clear, the consumer then has a choice whether to accept the cover at the price being offered. If they don't like the terms, or the price, they can seek cover elsewhere. The insurance market is competitive – and if an insurer restricts the cover they provide more than their competitors, at the same price, they're unlikely to do much business.

So, NHBC are entitled to decide what kind of cover they offer and what exclusions and conditions are put around that cover. As long as they make that clear to the consumer, there's nothing unfair or unreasonable in the way their warranty offering is constructed. And I should say I don't think any of the terms set out above are obscure, ambiguous or unusual for this kind of policy.

I understand, of course, that these warranties are most often sold to the builder or developer, who then pass them on to the first homeowner. I'm not suggesting Mr C and Mrs C failed to understand the cover provided.

But that doesn't alter the fact that NHBC are entitled to set out what they will cover and what they won't. The cover the builder may have bought is what it is – it doesn't increase in scope simply because it's passed on to a property owner.

In effect, NHBC offer to cover damage caused to the home if the builder fails to meet one or more of their requirements when building the fundamental structure of the home (Section 3) or, if they provided building control, where there's an immediate danger caused by a failure to meet certain Building Regulations (Section 4).

And they're entitled to think they have no obligation to assist the policyholder in other circumstances, even if there have been obvious failures on the part of the builder which have later caused issues for the homeowner.

I know this will disappoint Mr C and Mrs C, but looking at the terms of the policy, I can't say that NHBC have acted unfairly or unreasonably in declining their claim. I'll explain why.

Mr C has told us – and he told NHBC – very clearly and eloquently what he thinks caused the damage to his tiles. He says that the builder failed to lay the tiles properly and in line with the relevant requirements and standards.

These – and specifically British Standard 5385-1 – recognise that damage will be caused to flooring laid on top of many types of floor, because of contraction or expansion in the material the floor is made of, *unless* movement joints are included in the flooring.

These joints are made of flexible material and allow the tiles to shift with the contraction and/or expansion of the floor. Usually, in this kind of case, tiles will not be laid right up to and abutting surrounding walls or doorframes. There will usually be a gap filled with more flexible material.

Mr C has provided evidence that there were no movement joints in the affected area of his

flooring, where the tiles directly abut a door frame. This has caused the tiles to 'tent' because, put quite simply, they have nowhere else to go as the underlying floor expands and/or contracts.

I have absolutely no reason to doubt Mr C's explanation of the cause of the problem with the tiles. Mr C points out that the concrete floor underneath his tiles would have shrunk when drying but will have continued to shrink by small but perhaps significant amounts over the course of the next few years. And this has caused the tiles to lift because of the (inappropriate) way they were laid.

I have to say, I don't think Mr C's explanation is a million miles away from the opinion given by NHBC's surveyor. They also said the issue was down to movement in the floor underneath the tiling. Although they didn't mention that this might have been avoided if the required movement space and joints had been allowed during the build.

It seems to me, from the evidence provided by Mr C, that he has at least a very strong case that the issues with his tiles were a direct result of the builder failing to meet BS-5386-1. Mr C describes that as "shoddy workmanship" and it's not for me to argue with that.

Certainly, Mr C and Mrs C moved into a new build property and within three years or so, the floor in their kitchen is lifting and requires extensive – and expensive - work to put right. I can understand why Mr C and Mrs C are angry and frustrated about that.

However, what I have to bear in mind is that we're not a building ombudsman. No matter how much I can sympathise with Mr C and Mrs C, I have to make a decision about the financial service (the insurance) provided to Mr C and Mrs C by NHBC. I can't uphold a complaint against NHBC as an insurance provider because Mr C and Mrs C have had such a frustrating experience with their builder.

This brings me back to the terms of the policy and what it covers and doesn't cover.

In brief, Section 3 covers damage caused by failures to build certain parts of the house in line with the relevant requirements, as set out in the terms quoted above. Those specified parts of the house include load-bearing floors, floor-decking (such as floorboards) and screeds. They don't include floor coverings.

I come back to the point I made earlier. Essentially, NHBC offers a warranty which covers the fundamental structure of the house. The floor tiles aren't part of that fundamental structure – and that's also made clear in the policy terms.

Even if they were, there is then the exclusion specific to Section 3, which says that claims can't be made where the damage only affects floor coverings. The tiles in Mr C and Mrs C's home are a floor covering, as the terms quoted above make clear – tiling is specifically given as an example of a floor covering.

There's no suggestion or evidence at this time to say there's damage to any other part of the home. And NHBC have told Mr C and Mrs C that if they discover damage to the floor underneath the tiling, then they'll take another look at the claim.

So, I don't think Section 3 covers the damage to Mr C and Mrs C's tiling. I've also considered whether it might be covered under Section 4 (again, as quoted above).

However, I don't think there's cover under Section 4 either, for two main reasons. One, I'm not convinced that there is any "immediate danger" to anyone at the property because of the lifting in the tiles. I don't want to underestimate the inconvenience and annoyance caused to

Mr C and Mrs C by the lifting of the tiles and by the restricted access to their cupboard. But I don't think it's likely anyone is in immediate danger, as things stand.

And two, even if I did think there was immediate danger, this Section specifies the parts of the Building Regulations which would have to be disregarded by the builder for NHBC to pick up the claim. It's not all of the Building Regulations. It's essentially those parts which relate to parts of the house covered under Section 3 – the fundamental structure as I referred to it earlier.

I don't believe any of the parts of the Building Regulations specified under Section 4 of the warranty cover floor coverings. And none of those specific parts of the Regulations require compliance with BS-5385-1.

I should also mention the general exclusion which applies to all Sections of the warranty (again, quoted above), which says that there's no cover for issues caused by, amongst other things, shrinkage or thermal movement. And I note that Mr C's own explanation of the cause of the problem suggests that it is likely down to shrinkage and/or movement in the floor underneath the tiling.

In summary, it seems to me that there's a strong case to say that the builder failed to meet the relevant standards when laying Mr C and Mrs C's tiling. But nonetheless I can't justifiably say that NHBC acted unfairly or unreasonably in declining Mr C and Mrs C's claim. Put bluntly, not all of the builder's errors are covered by the warranty.

Finally, I should mention that Mr C has made it clear in his recent correspondence with us that he's not happy with the way NHBC carried out the building control function for his property. Essentially, he thinks building control should have picked up the clear failure (in his view) to lay the tiling in line with the relevant standards.

I should be clear that it's not for us to comment on that. We can look into complaints about financial services and products. So, our focus has to be on NHBC as a provider of insurance. We can't look at how they perform the other aspects of their role. As I said earlier, we aren't a building ombudsman – or a building control ombudsman for that matter.

If Mr C wishes to raise a complaint about that aspect of NHBC's role, he may - as I understand it - make a complaint to the Construction Industries Council Approved Inspectors Register (CICAIR).

They are the body designated by the Secretary of State to register Building Inspectors who carry out building control functions. I believe they can carry out investigations into such complaints and, where appropriate, conduct hearings which may impose sanctions on an individual Buildings Inspector.

My final decision

For the reasons set out above, I don't uphold Mr C and Mrs C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 3 March 2022.

Neil Marshall
Ombudsman