

The complaint

Mr E has complained about National House-Building Council's (NHBC's) decision to decline a claim he made under his NHBC Buildmark warranty.

What happened

The subject of this complaint is a building comprising multiple separate properties. In 2017 Mr E and the other leaseholders, via their property management company, made a claim through NHBC. This was for cracking damage, to both individual properties and some common parts of the building, which they suspected to have been caused by subsidence. They also reported the issues to their building insurer.

The damage to the property, which is the subject of this complaint, has been reported as:

- Cracking to external brickwork
- Movement joints have opened up
- Possible subsidence
- Below ground drainage cracked

Several reports and investigations have been undertaken at the property, instructed by either the residents, NHBC or the building insurer.

NHBC's investigations have included, among other things, soil analysis, drainage surveys and a period of 12 months monitoring for movement at the property, overseen by a structural engineer. Based on the investigations, NHBC concluded that none of the areas of damage had been caused by a defect in any of the parts of the home or common parts which are covered under the terms of the warranty.

Mr E didn't accept NHBC's conclusions. He feels its investigations haven't been adequate and is dissatisfied that the cause of the damage still hasn't been identified. He feels NHBC and his building insurer should come together and arrange to put right the issues at the property.

One of our investigators considered Mr E's complaint, but she didn't think it should be upheld. She explained that the investigations completed had shown that the damage reported hadn't been caused by a defect, as defined by the policy. She was persuaded by this evidence and so didn't conclude that NHBC had acted unreasonably in the circumstances.

Mr E didn't accept our investigator's opinion. So, because no agreement has been reached, the complaint has been passed 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.

Firstly, the initial claim raised with NHBC was brought by the property management company, on behalf of all the residents. But this complaint has been brought to our service by Mr E only. So, in assessing the complaint, I'll focus only on what Mr E is entitled to under his individual warranty.

Secondly, I understand that Mr E, and the other residents of his building, are in the process of obtaining further expert reports in support of their position. But any new evidence regarding the issues at the property would first need to be presented to NHBC for consideration. In this complaint, I'll only be considering the decision NHBC made in 2020 based on the evidence it had available at the time, along with its stated position in its final response letter from August 2020.

Should the residents (including Mr E) provide further evidence to NHBC which changes its position, but its new position still leaves them dissatisfied, they may be able to raise a new complaint with our service.

Finally, this claim has involved both NHBC and Mr E's building insurer. But in this decision, I'm focusing solely on the actions of NHBC.

What the policy covers

NHBC's Buildmark policy provides cover for specific major problems with newly built or converted properties where there has been a breach of its technical requirements. The policy is bought by the builder and passed on to the consumer when they purchase the property. The cover provided by the policy is split into several sections.

Section 3 of the policy is the relevant section in this complaint. This section states that NHBC will pay for:

"The full Cost, if it is more than £1000 Indexed, of putting right any actual physical Damage caused by a Defect in any of the following parts of the house, bungalow, maisonette or flat and its garage or other permanent outbuilding, or its Common Parts:"

It then goes on to list the various specified parts which are covered, which include foundations and below ground drainage which Mr E is responsible for.

Within the policy booklet there is also specific emphasis on the words "Damage" and "Defect" and individual definitions for each:

*"Damage
Physical damage to the Home caused by a Defect*

Defect

A breach of any mandatory NHBC Requirement by the Builder or anyone employed by him or acting for the Builder. Failure to follow the guidance supporting the NHBC Requirements does not in itself amount to a Defect, as there may be other ways that the required performance can be achieved.”

So, Mr E’s warranty doesn’t guarantee that his property will be free from defects. Rather, it covers repairing any damage which has been caused by a defect (as defined) to one, or more, of the specified parts of the home or common parts. When considering a claim, NHBC are looking at whether it meets the requirements under the policy. This means it is looking to see whether damage is being caused by a defect as defined. NHBC isn’t necessarily looking to identify or determine other issues which might be present, such as damage being caused for another reason, if it’s clear a defect (as defined) isn’t the cause of the damage being claimed for.

The claim

Mr E, and the residents, raised a claim with their building insurer. This was declined for several reasons, including:

- normal settlement of a new structure wasn’t covered,
- faulty or defective workmanship wasn’t covered, and
- that losses should be recoverable through a warranty or guarantee, and so weren’t covered

A claim was also reported to NHBC and it undertook several site visits and investigations. I’ll summarise the findings of these below.

The monitoring results found little to no movement at the three crack locations monitored over a one-year period. However, they did identify a discrepancy in the depth of the bed joint at the left-hand gable to the right. And they concluded that the left-hand gable had continued to settle by approximately 5mm since commencement of the monitoring.

The soil investigations identified stiff clay beneath the underside of the foundations which was unlikely to be susceptible to heave or shrink as a result of moisture change within the clay. However, it was recommended that a high water demand tree in the vicinity be managed moving forward to reduce the risk of clay shrinkage induced movement. No issues were identified with the depth or width of the foundations or the bearing capacity of the surrounding soil.

CCTV drainage investigations concluded that there was some damage to the inside of the drainage pipe located closest to the gable wall. But there was no evidence of puncturing or that these markings were impacting the performance of the drain. The investigations also confirmed that a drainage run in the vicinity of the car park (which is prone to flooding) was blocked. NHBC attempted to clear this via jet-wash, but it was unsuccessful. NHBC identified the blockage as silt and leaves, and recommended this was dealt with by the property management company as part of normal maintenance.

A later excavation of the drainage run, including the joints and areas where there were markings, found the surrounding soils were completely dry. The conclusion was there was no evidence to suggest there had been any leakage, or consequent softening of the ground around the foundations, at any time.

Reports of internal cracking and poorly fitting doors were inspected, including in Mr E's home. It was concluded that the movement identified wasn't close to the gable wall, and so was unlikely to be related. The report concluded that any internal movement was most likely due to shrinkage of the timber frame – which isn't covered under section 3 of the warranty.

Based on the results of the various reports and investigations, NHBC declined the claim for the damage reported. It stated that the cracking damage, both externally and internally, hadn't been caused by a defect. It also said the damage was minor and not of any structural concern and that it could be made good as part of routine building maintenance.

In terms of the drainage, NHBC said it was in good condition and not leaking water into the ground. It highlighted that the parking bay drainage wasn't performing as expected but said this was due to a lack of maintenance. It attributed the flooding in the parking bay to a blockage rather than any construction related defect.

Mr E says NHBC's reports and investigations haven't been thorough enough. In particular he highlights that the drainage investigations have focused on the drain closest to the gable end and omitted detailed considerations of the drainage adjacent to the car park – which he says is comprised of a gully drain and soakaway. Mr E says the positioning and performance of the soakaway trench is likely responsible for the ponding reported in the car park and that water ponding could be responsible for washing away the ground beneath the foundations – causing the cracking damage reported as part of the claim.

I've thought carefully about everything both sides have said and provided. While I can see that NHBC's drainage investigations did focus primarily on the drainage closest to the gable wall, I don't think they omitted the drainage to the car park. This drainage was commented on in several of the reports, initially in August 2018. NHBC explained that the gully for the surface water to the car park was blocked and that the blockage should be attended to by the managing agent as part of building maintenance. NHBC's engineering report later concluded that the surface water drains were in reasonable condition and did not appear to be leaking water into the ground. The engineer stated that it was clear that the flooding in the car park had been caused by the blocked pipe from the corner gully, which was preventing rainwater from draining into the soakaway. NHBC explained its findings on the drainage to Mr E (via the property management company) in its investigation report of May 2020. This stated that as the surface drainage was performing, and not contributing to the structural issues, there was no cover for this item under the warranty. So, based on the above, I can't reasonably conclude that NHBC failed to consider the car park drainage as part of its investigations.

When assessing Mr E's claim, NHBC conducted and commissioned multiple reports and investigations into the reported damage at the property. From what I've seen, these reports and investigations were undertaken by suitably qualified and experienced people/companies. The investigations completed are also consistent with those I would expect to see carried out in cases of suspected subsidence damage.

As I've explained, the key to cover being provided under section 3 of the warranty is that damage has been caused by a defect (as defined) in one or more of the specified parts of the home or common parts. While Mr E has highlighted some other potential defects with the car park drainage, including potential breaches of building regulations, there is currently no expert evidence to support Mr E's view that these issues are causing or contributing to the reported damage at the property.

I appreciate Mr E Would like NHBC to continue investigating until it conclusively diagnoses the cause (or causes) of the damage. But as I've explained, when looking at the claim, NHBC is considering whether damage is being caused by a defect (as defined) as that is what is covered under the policy. If NHBC has demonstrated that a defect isn't the cause and therefore that there isn't any policy cover, then I don't find it unreasonable that it then wouldn't carry out further investigations on behalf of Mr E. And most relevant here is that, at the time of NHBC's claim decision, none of the available expert reports linked any of the reported damage to a defect in one of the specified parts covered under section 3. So, based on the information contained within the reports, I think the conclusions NHBC reached at the time (that the damage was not caused by a defect) were reasonable.

As I understand it, Mr E and the residents of his building are in the process of commissioning a new structural engineer's report. And the building insurer are reconsidering their position on the claim following the results of NHBC's claim decision – which will include further investigations. Should any of the new reports or investigations call into question the decision reached by NHBC, Mr E (and/or the residents) should share this information with NHBC for consideration. And should they remain unhappy with NHBC's position, following consideration of the new evidence, they can refer their concerns to our service as a new complaint.

But, based on the evidence available at the time of its claim decision, I'm satisfied NHBC's decision to decline the claim for the reported damage was in line with the policy terms, and that it was fair and reasonable in the circumstances.

My final decision

For the reasons set out above, I've decided not to uphold Mr E' complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 14 March 2022.

Adam Golding
Ombudsman