

The complaint

Ms C complains National House-Building Council trading as NHBC turned down a claim she made on a buildings warranty policy.

What happened

The details of this complaint are well known to both parties, so I won't repeat them in detail here except to say Ms C made a claim to NHBC for it to deal with cracking in her property.

My provisional findings

I issued a provisional decision on 9 December 2022. I said I intended to uphold the complaint for the following reasons:

- *"Ms C has explained she was assured by both the builders of the property and NHBC literature, that she could expect to see settling cracks in the property in the first few years after completion. I don't think it was unreasonable for Ms C to think this as it is quite usual for it to happen. Nor do I think Ms C would have the relevant experience or expertise to be in a position to be able to differentiate between settling, and structural cracking.*
- *Ms C has given testimony which has remained consistent and which I find persuasive regarding the types of cracks that appeared in the property over time. And I'm satisfied this explains why she later reported the larger cracking in 2017.*
- *Ms C answered the cracking questionnaire honestly, as she had reported cracks to the builder during the first two years. However, this doesn't mean the cracking she later reported to NHBC was the same or does it automatically mean the builder 'misdiagnosed' the cause of the cracking previously. Based on what I've seen, I'm persuaded it's as likely that settling cracks did appear quite soon after the property was completed and that the likely structural cracking which Ms C reported to NHBC, only presented itself much later*
- *Bearing in mind my above points, I also I don't think it is reasonable for NHBC to decline the claim based solely on the answer Ms C gave in the cracking questionnaire and the fact a report paraphrased this situation later on.*
- *Ms C has explained there was a delay in providing information to NHBC due to some personal issues which required her attention. Having considered this, I don't think it was an avoidable delay on her part. She has also explained that the managing agent of the property changed around the time the claim was reported and this prevented her from obtaining some of the information NHBC required.*
- *The fact the policy has now lapsed doesn't mean NHBC should not deal with the claim. It was initially registered when the policy was live and therefore it is one that should be dealt with.*

- *Having considered everything, I think it is more likely than not Ms C presented a valid claim under Section 3 of the policy. And therefore, bearing in mind what I have said above, on a fair and reasonable basis I think NHBC should now consider that claim in line with the remaining terms and conditions of the policy.”*

Responses to my provisional findings

Ms C said she accepted my provisional decision and had nothing further to add.

NHBC said that Ms C first contacted it in 2017 but it didn't become aware of the builder's involvement until 2020 so it was prevented from engaging with them earlier. It says the timeline of events isn't entirely clear but the evidence available suggested the cracking was in the same locations and therefore would remain the responsibility of the builder to rectify.

However, NHBC recognises that further investigation could be warranted to see if the cracks were the same as initially reported at building completion, and/or if they are now in different areas. NHBC requested that Ms C be asked to provide such evidence before it is considered if the claim should fall under Section 3 of 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.

NHBC has said Ms C didn't make it aware of the builder's previous involvement in 2017 and when she did so in 2020 the policy had expired. So by that point it was too late to consider the claim under Section two of the policy, and it was therefore prevented from engaging with the builder about the issues by using its resolution service. NHBC explains that given the cracking was reported during the first two years of the warranty policy, the builder should retain some liability for the repairs.

I understand NHBC's position here and why it would be favourable to have considered the claim under Section 2 of the policy. However, I also have to be mindful that it didn't ask this question of Ms C in 2017, nor is this question on the cracking questionnaire that she was sent and was returned in 2019. NHBC is more knowledgeable of the policy cover than Ms C and therefore I think the onus should have been on it to ask the correct questions at the earliest opportunity. Here it appears NHBC is trying to limit its liability by relying on the fact Ms C didn't provide a response to an email until 2020, however I don't think this is fair.

As part of my consideration of the complaint I sought evidence as to the cracking that was initially reported, in order to consider whether this should in fact be a claim more suited to be correctly considered under Section two of the policy. However, that evidence can't be obtained. Ms C explained that she moved into the property in the early stages of the development when the rest of the houses were still being built. The area was therefore unfinished with builders remaining on site. So, when she reported any snagging issues (and cracking) all she needed to do was make a telephone call and someone was sent. She has confirmed that no photos were taken until required for the cracking questionnaire in 2017.

So, where the evidence is incomplete or inconclusive, as it is here, I have to consider what I think more likely than not happened on the balance of probabilities. And here, as set out in my provisional decision, I have concluded it is more likely than not the structural cracking presented itself after year two of the policy and therefore was not the same as initially reported by Ms C.

So, having considered everything, I think on the balance of probabilities this claim should be

dealt with by NHBC under Section 3 of the policy cover.

Putting things right

NHBC should now deal with Ms C's claim under Section 3 of the policy and in line with the remaining terms and conditions of the policy.

My final decision

My final decision is that I uphold Ms C's complaint against National House-Building Council trading as NHBC. It should put things right as I have set out in the section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 14 February 2023.

Alison Gore
Ombudsman