

The complaint

Mr and Mrs W complain that National House-Building Council (NHBC) has declined their claim under their Building Warranty for damage to their home in respect of their master bedroom and bathroom floors dropping, and cracks in the wall.

What happened

Mr and Mrs W made a claim to NHBC through their representative (a firm of consulting engineers - "P") in September 2020. This concerned sloping floors in their master bedroom and bathroom. They also claimed for two cracks in the wall between the flashing and the rear left-hand and right-hand upper windows.

NHBC carried out a site investigation. The claims investigator said that *"Whilst there was some unevenness noted underfoot to the bathroom and bedroom floors there was no indication of any failure of the structural elements of the floor, and no evidence of the floor decking failing to support normal loads and as such no physical damage was noted and the items of claim would not be considered valid."*

In respect of the cracking to the outside walls the claims investigator said that as the policy excludes minor cracking which does not affect the structural integrity or weather tightness of the property, the claim wasn't covered. He saw that this cracking had been noted in a Home Buyers report Mr and Mrs W had had prepared for them in December 2019 when they bought the property. It didn't appear to have altered since then.

Mr and Mrs W had a report carried out by P which concluded that *"We believe that a claim is valid with regards to the beam and floor. There is a defect within the floor and beam with deflection of floor and cracking of rear brickwork due to an insufficiently designed beam."*

NHBC carried out a desktop study following receipt of that report. It subsequently concluded that the claim must be declined. It reiterated that though there was evidence that there was some unevenness underfoot, there was no evidence that any physical damage had been caused. In respect of the external cracking it reiterated that this was minor damage and excluded under the warranty.

On referral to the Financial Ombudsman Service our Investigator ultimately said that NHBC should accept Mr and Mrs W's claim for damage to the floors in the main bathroom and master bedroom, as these floors had deflected to the point that packing is required. He said that the claim for the external cracking was excluded.

NHBC disputed this – it said that *"the floors are out of level and not deflecting. Deflection is the deformation of the structure when a load is placed on it, all materials deflect in this way and will vary depending on load. There is no evidence that the floor is failing to support a normal load."* It further said that the evidence about the furniture being packed was not there when its investigator visited the property.

P said that all three bedrooms should be included in the claim. However our Investigator pointed out that the claim was only made for the master bedroom and bathroom. This was

confirmed by NHBC.

I issued a provisional decision. In it I said that I didn't think that NHBC had carried out a sufficient investigation to establish, in respect of the floors, where there was a defect. So I said that NHBC should reconsider the claim and carry out such an investigation.

Both parties accepted my provisional findings.

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 set out below, in italics, my provisional findings. Where parts of those findings were originally in italics, I have also underlined them:

"NHBC has said that the claim for the floors isn't covered because there is no physical damage. There was no cracking and no evidence that it wasn't able to support normal loads. I think I have to establish here what is physical damage and what is a "Defect", since the responses of both parties appear to me to confuse the two terms.

Under the terms of the warranty NHBC (my emphasis) "will pay you the full Cost, if it is more than £1,200 Indexed of putting right any physical damage to your Home which is caused by a Defect." It then goes on to list the parts of the property to which this applies. This includes "load-bearing parts of the floors"

Damage is defined as "Physical damage to a Home caused by a Defect." The policy does not go on to define physical damage.

"Defect" is defined as "The breach of any mandatory NHBC Requirement by the Builder or anyone employed by or acting for the Builder. Failure to follow the guidance supporting an NHBC Requirement does not amount to a Defect if the performance required by the NHBC Requirement is achieved by other means".

So I have to look first at whether there is physical damage. In this warranty, NHBC hasn't chosen to define physical damage. And although there are various definitions online of what physical damage is, I don't think it's helpful to use them to define such damage under this warranty. I think physical damage is something which you can see or feel (as opposed to for example financial damage), and which has affected the normal function of the item in question. Here, the floors are clearly uneven and out of true, to the extent that furniture has to be packed to make them level. NHBC has made the point that it has only recently seen the photos of the furniture. But I think even without that there is physical damage.

But the damage has to be caused by a Defect. Here I think the issue is confused because NHBC has said that the floor is not deflecting and that there is no evidence it is failing to support a normal load. Both those issues seem to me to be concerned with whether or not there is a "Defect".

I don't think NHBC's investigation report of September 2020 addressed the issue of a defect though – to me, it concentrated on whether there was physical damage. A Defect in this type of policy would usually be where NHBC building standards have not been complied with. P's report of February 2021 says of the floor that "Deflection was noted to the rear first floor element of bedrooms and bathroom. This deflection was some 25mm over 1750mm to the bathroom and bedrooms." It said this is well above the deflection allowed in the relevant

British Standard. P further said that "If the joists were inserted with a deflection of 25mm then the NHBC have not discharged their duty with regards to complying with their own mandatory requirements."

NHBC carried out a desktop study following receipt of that report. It said it "has not been possible to carry out an independent assessment of the loadings or confirm those used by [P]. It is noted that their calculations assume a full uniform distribution of loadings from the wall panel and the main roof above the beam."

It concluded:

"In order to accurately assess the validity of the claim or provide the necessary evidence to refute it we need to check spans, loads, etc via a site visit to verify the accuracy of the calcs and also to undertake a level survey of the floors to accurately ascertain the out of level of the flooring to determine if there is a non-compliance with NHBC Standards."

No such further site visit was carried out, presumably because NHBC said there was no physical damage. Whilst P felt there was a defect, I do think NHBC's view on this will be important. So I think it should carry out that further site visit and reconsider the claim. If Mr and Mrs W are unhappy with that reconsideration they could make a further complaint about it. I'll set out my proposed directions below.

external cracking

This is clearly physical damage. But under the terms of the warranty (section 3) NHBC will not be liable for: "cosmetic damage such as minor cracking, spalling or mortar erosion to brickwork, which does not impair the structural stability or weather tightness of your Home." I think this is minor damage which doesn't appear to have changed since the Home Buyer's report in December 2019. Although P has suggested the cracking may cause water to come in, I've seen no evidence that it is in fact doing so.

So I don't need to consider whether there is a defect. I think NHBC reasonably declined this part of the claim.

flooring in other rooms

P has said the claim covers all three upstairs bedrooms. However the claim that was made to NHBC and upon which it carried out a report, relates only to the master bedroom and the bathroom. Mr and Mrs W may wish to make a further claim for the other rooms. If NHBC does accept the claim for the bathroom/master bedroom hopefully it might be amenable to extending it to the other two rooms."

As both parties have accepted my provisional findings, I remain persuaded by those findings which are now final and form part of this final decision. I should add that when NHBC carries out its further investigation I would hope that it will include the other two upstairs rooms, to save having to carry out a wholly new investigation for the same issue. I can't require NHBC to do so as factually as far as I'm aware no claim has been made in respect of the other two rooms but it would make sense, if such a claim is now made, to include it

Putting things right

NHBC should reconsider the claim in respect of the floors and carry out a further site visit in accordance with the recommendations in its desktop study, to determine if the floors are in compliance with NHBC standards.

My final decision

I uphold the complaint and require National House-Building Council to provide the remedy set out under “Putting things right” above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr and Mrs W to accept or reject my decision before 20 April 2023.

Ray Lawley
Ombudsman