

The complaint

Mr and Mrs J have complained about AXA XL Insurance Company UK Limited's (AXA) handling of, and decision to decline, a claim they made on their New Home Warranty.

What happened

There has been extensive background to this complaint as the claim and complaint have been ongoing since 2023. I don't intend to revisit the full background or every individual point of dispute in detail. Instead, I'll broadly summarise the key events and will focus my decision on the issues I believe to be key to delivering a fair and reasonable outcome. This isn't meant as a discourtesy to either side. Rather, it reflects the informal nature of the Financial Ombudsman Service, and my role within it.

Mr and Mrs J's property is covered by a New Home Warranty, underwritten by AXA. Mr and Mrs J made a claim to AXA, for damage caused to their downstairs neighbour's property resulting from what they say is the defective installation of their bathroom floor.

AXA has declined to cover the claim on the basis that the lack of waterproof membrane below the bathroom floor hasn't been evidenced, and that even if such a membrane is not present, that doesn't amount to a defect as defined by the warranty. AXA has accepted the level of service it provided could have been better and has offered £250 compensation.

An investigator here considered the complaint but didn't think it should be upheld. He said in order to be covered by the warranty, a defect (as defined in the warranty) with the installation needed to be identified. But he didn't agree the absence of a waterproof membrane beneath the bathroom floor amounted to a defect. He also highlighted that it hadn't actually been shown that there was no membrane. So, he didn't think AXA acted unfairly by declining the claim.

The investigator acknowledged Mr and Mrs J had experienced some poor communications and avoidable delays to the progress of their claim. But he said the compensation amount offered by AXA was in line with what he would have recommended for these issues, and so he didn't think AXA needed to take any further action.

Mr and Mrs J didn't accept our investigator's findings. They remain of the view that the absence of a waterproof membrane beneath their bathroom floor does amount to a defect.

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.

Having done so, while I appreciate it will likely come as a disappointment to Mr and Mrs J, I agree with the outcome reached by the investigator.

I'll explain why below, by first setting out the relevant terms and conditions of the cover provided under the New Home Warranty.

What the warranty policy covers

Mr and Mrs J's policy document details the terms, conditions, and definitions applicable to the cover AXA provides. I've focussed on the key points relevant below:

"4.1 Defects Insurance Period (Years 0-2)

If, during the Defects Insurance Period, the Insured notifies the Developer of any Defect, the Developer is required to

i) Effect a repair, replacement or rectification of such Defect as soon as practicably possible;

ii) Reimburse the Insured for all costs including lifting and refitting carpets, storage and alternative accommodation should the nature of any repair, replacement or rectification be such that the Insured and/or the occupants have to vacate the Housing Unit(s) whilst such repair, replacement or rectification Work is carried out."

A defect is defined as:

"A failure to comply with, for example the following:-

- The current Building Regulations in England and Wales;*

.....

Failure to follow the standards within the Building Regulations and Building Standards, or associated guidance, does not in itself amount to a Defect, as it may be possible to meet the recommended performance in other ways.

For any Housing Unit(s) under this Policy which relates to the conversion, refurbishment, renovation or extension of a New Development, the definition of Defect shall only be deemed to include any of the Works carried out by the Builder as part of the conversion, refurbishment, renovation or extension."

What all the above means in practice, is the relevant section of the warranty requires the developer to put right a defect. And in order to be considered a defect, an issue needs to constitute a breach of the relevant building regulations.

This section of the warranty also sets out when AXA will be required to intervene, what it is required to do, and when it might become responsible for dealing with a defect directly:

"The Insurer(s) will cover the Insured, during the Defects Insurance Period, against the cost of repairing, replacing or rectifying any Defect in the Housing Unit(s) for which the Developer is responsible and which is approved and notified to the Developer during the Defects Insurance Period and which is notified to the Insurer within 6 months of the expiry of the Defects Insurance Period.

The Insurer(s) will not be liable unless:

- i) the Developer has refused to respond to the Insured's Defect notification*
and/or; the Developer has withheld consent to resolve the dispute by using the Mediation service offered by the Administrator
and/or; the Developer has accepted the Mediation decision after using the Mediation service but has failed to carry out the Works or repairs stated in the Mediator's report within the time frame stipulated; and/or
- ii) the Developer has not effected the repairs or Works determined by a binding legal process;*
- iii) and/or iii) the Developer has failed to effect such repair, replacement or rectification Work due to its insolvency.*

In the event of a claim under this section, the Insurer(s) has/have the option of either paying the cost of the repair, replacement or rectification Works or arranging to have the repair, replacement or rectification Works carried out."

The claim decision

In this case, AXA has considered and declined the claim directly, following the early involvement of the developer and the mediation process set out in the above terms being followed.

Gaps and cracking of the grouting have been identified, which are allowing water to get beneath the tiles. AXA, and the mediator, attributed these to normal settlement of the property rather than an installation issue. But the developer has offered to put right the grouting issue on a without prejudice basis.

Mr and Mrs J don't agree this is a fair way to deal with their claim. They maintain that no waterproof membrane has been installed beneath their bathroom floor, and that this amounts to a breach of the relevant building regulations.

AXA has offered two main reasons why the claim wouldn't be covered, based on the opinions of its loss adjuster and the independent loss adjuster it used as a mediator:

- The building regulations do not require the bathroom floor to have a waterproof membrane below the tiles. This requirement only applies to wet areas, such as showers, steam rooms or wet rooms.
- The 'as built' drawings of the property confirm the inclusion of a waterproof membrane, and it hasn't actually been shown that this isn't present.

Mr and Mrs J have pointed to several parts of the British Standards, which they say demonstrate that the absence of the waterproof membrane meets the warranty definition of a defect. In particular:

BS5385-1 2018

6.1.1.3 Tanking

In wet areas, e.g. showers, wet rooms and steam rooms, substrates should be protected with suitable proprietary tanking membrane system

The weight capacity of the tanking system should be capable of carrying the load of the tiles and adhesive. If mechanical fixings are to be used the membrane manufacturer should be consulted

Where the substrate is to be protected with a tanking membrane the weight restrictions of the installation might be reduced therefore the membrane manufacturer should be consulted

NOTE This can be a proprietary sheet membrane or a liquid applied water impermeable product"

BS5385-4 2015

"7.2.3 Installations not immersed but subject to occasional wetting

In installations where contact with water is only intermittent, and the installation has an opportunity to dry out between periods of use, e.g. domestic (not power) showers, 7.2.1 and the following should apply

- a) The background should preferably be cement and sand rendering or dense concrete. Sheet and boards should not be used unless they are dimensionally stable in changing moisture conditions. Tiles should be solidly bedded in water resistant adhesive.*
- b) The joints between tiles should be water-resistant but additional protection can be obtained by using an impervious grout.*
- c) The gaps between wall and shower tray/bath should be sealed, particularly where the installation is located on a suspended floor.*

NOTE 1 For water sensitive backgrounds e.g. gypsum plaster, additional protection in the form of a waterproof taking system may be considered.

NOTE 2 The use of impervious grouts and adhesives is no substitute for a tanked installation"

I've thought very carefully about the above, as well as the other available evidence and arguments provided by both parties. Having done so, I don't think the alleged absence of a waterproof membrane amounts to a defect under the warranty.

I say this because 6.1.1.3 (above) sets out what is meant by 'wet areas'. The examples given are, in my view, indicative of areas which are designed to get significantly wet on a regular basis through their normal everyday use, and so would need to be completely watertight. But a normal bathroom floor is not intended to be used in this way. Rather, they would be designed to come into contact with small amounts of water only, as opposed to being regularly immersed or saturated.

I appreciate Mr and Mrs J's arguments that the areas around the bath/shower or toilet are more likely than others to become wet. But I still don't think this means they are required to be designed to be as equally watertight as the inside of a shower or wet room. And ultimately, if that was the intention of 6.1.1.3 (or any of the other standards they have referred to) – I would expect that it would clearly state as much. But it doesn't. Instead, as already explained, it only refers to areas designed to be regularly saturated with water/humidity as part of their normal use.

I can see that 7.2.3 (above), provides guidance specifically for areas where contact with water is intermittent. And I can see that the notes mention waterproof tanking as an option. But again, this seems to me to be referring to areas which will definitely get wet during normal use, and then have the opportunity to dry out – such as the walls around a non-power shower – rather than a bathroom floor which *might* get mildly wet when someone climbs out of a bath or shower. And in any event, I note that 7.2.3 doesn't expressly state that areas where contact with water is intermittent *must be* tanked (waterproof membrane). Rather it says waterproof tanking *might be* considered.

Based on the above, I'm not persuaded that the alleged absence of a waterproof membrane beneath Mr and Mrs J's bathroom floor amounts to a defect, as defined by their policy. And based on this, I'm satisfied AXA's decision to decline the claim is fair.

Additionally, even if I were minded to decide that the absence of the membrane was a defect – which, as explained, I'm not – I'm not persuaded it has been evidenced that no membrane is present. I know the report commissioned by the management company suggested that the tiles appeared to have been fitted directly onto OSB flooring. But these findings were based on the view of the flooring void from below, and the mediation report explained in detail that it wasn't possible to identify the floor construction above the OSB flooring from below:

“The ‘as-built’ drawings confirm the inclusion of a waterproof membrane which has been installed above the 25mm layer of insulation and below the 70mm screed. The point of egress of the water as depicted in the video footage obtained by the leaseholder of flat 4 would support this as the area of defective grouting in the first floor bathroom is situated in the center of the floor and the point of egress for the water is located at a point along the perimeter of the flooring where the decking has been cut to allow the waste pipes to be routed under the flooring.

This would suggest that the water has travelled along the membrane to the easiest point of egress which is remote from the point of damaged grouting. Our inspection of the ceiling void (facilitated by photographic evidence) revealed that the floor construction above the OSB decking could not have been identified and therefore there was no evidence of a lack of water-proof membrane.”

I find the above to be both logical and persuasive. So, in the absence of an intrusive inspection of the area immediately below Mr and Mrs J's tiles which demonstrates there is no membrane, I'm not persuaded it has been sufficiently evidenced that this is missing.

That said, as already explained, even if the membrane were shown to be missing, I'm not satisfied this would amount to a defect under the warranty terms, and so it wouldn't change my decision that AXA's decision to decline the claim was fair.

Service issues

It isn't in dispute that there have been some service issues during the handling of this claim. AXA accepts it could have communicated more clearly at times, including being clearer initially about the reason for declining the claim. It also accepts there were some small avoidable delays. AXA has offered Mr and Mrs J £250 compensation for these issues.

I've thought carefully about the things AXA did wrong during its handling of the claim. I fully appreciate it would be frustrating, confusing and distressing not to receive adequately clear information during a claim for issues with your new property. But I think the vast majority of the upset and inconvenience Mr and Mrs J have experienced in this case stems from the claim decision itself – which I think was fair – rather than the handling of the claim or the communication issues. When considering the claim handling issues, and the impact those issues, in isolation, would have had on Mr and Mrs J, I think the £250 already offered is sufficient to fairly put things right.

My final decision

AXA XL Insurance Company UK Limited has made an offer to pay Mr and Mrs J £250 compensation for the distress and inconvenience it has caused them.

I think this offer is fair in all the circumstances.

So, my decision is that AXA XL Insurance Company UK Limited should settle the complaint by paying this amount – if it hasn't done so already.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs J to accept or reject my decision before 21 April 2025.

Adam Golding
Ombudsman