

complaint

Ms X and Mr Y are unhappy with the decision by National House-Building Council (NHBC) not to pay their claim for defective tiles under their building warranty.

background

Ms X and Mr Y bought their property in August 2013. They have had a number of issues with it, some of which NHBC dealt with, some the builders dealt with and some remain in dispute. The issue with the tiles is that wall tiles have been fitted to the floors of the main bathroom and the two ensuites. They raised this with NHBC in August 2014. Under its resolution service it initially asked the builders to provide evidence that the tiles were suitable. As a result of information supplied by the builders in a technical data sheet NHBC decided that the builders need take no further action. But then after receiving some technical evidence from Ms X and Mr Y it issued a further resolution report in November 2014 requiring the builders to replace the tiling by 9 January 2015. The builders couldn't do this before that date, but then provided further technical evidence to show that the tiles were suitable.

NHBC then issued a further resolution report in April 2015 saying that the builders needed to take no further action. It paid Ms X and Mr Y £750 to reflect the inconvenience and disappointment caused by this.

On referral to this service NHBC disputed that the issue was within our jurisdiction as it was operating its resolution service. I issued a decision where I found that it is within our jurisdiction, as the period for complying with the November resolution had expired. Ms X and Mr Y subsequently referred the builder's conduct of the matter under the Consumers Code for home builders. That found partly in their favour, although crucially it didn't consider the issue of whether the tiles breached NHBC's technical requirements. So we advised NHBC we would still be considering the issue. I understand that it has accepted that although has made it clear that it shouldn't be liable for any recompense already awarded to Ms X and Mr Y as a result of that referral.

I issued a provisional decision. In it I said that I thought NHBC should pay the cost of replacing the tiles in the bathroom and ensuites, in line with the quote Ms X and Mr Y had from their contractor.

NHBC accepted my provisional decision, as did Ms X and Mr Y. It raised a point about our jurisdiction in the event that it had extended the deadline in its resolution report before it had expired. Ms X and Mr Y disagreed with that point. I am making this decision on the information in this case and I don't think it's helpful to discuss a hypothetical issue. So I won't be commenting any further on that.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In my provisional decision I said that the claim was made in the first two years of the warranty, initially against the builders. Under section 2 of the warranty the builder "*will put right or repair any Defect or Damage notified to it during the relevant notification period.*"

“*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.”

NHBC relied on the tiles conforming with technical requirement R3:

“R3 Materials requirement

All materials, products and building systems shall be suitable for their intended purpose”

The builders sent samples of the tiles to a testing laboratory, which carried out an “*abrasion*” test to determine the tiles’ suitability for being walked on and their resistance to scratching. It found that the tiles “*may be used in commercial and domestic foot traffic areas as appropriate for a Class 4 glazed tile*”.

In reliance upon that NHBC determined that, despite the tiles being classified as wall tiles they are suitable for use on the floor. So it said they hadn’t breached their technical requirements.

Ms X and Mr Y obtained expert evidence from the tile association. They also contacted the manufacturer of the tiles and sent samples to it. Both said that the tiles aren’t suitable for use on the floor.

I further said that Ms X and Mr Y also contacted the laboratory that did the test for the builders. It replied “*...the differences I would point out in terms of testing or requirements between wall and floor tiles are, the water absorption (this is generally high in wall tiles which would mean a lower strength, high moisture expansion), [and] abrasion resistance (this is not normally done on wall tiles but is done on floor tiles..)*” It further said “*You should also take into account the fact that the manufacturer does not recommend them for floors.*”

The builders didn’t have a water absorption test carried out. The evidence from the testing laboratory was that the category of tiles carries a water absorption rate of more than 10%. It said that it would be pointless testing to see if they met the requirement of a floor tile as they would fail at the first hurdle. Ms X and Mr Y were advised by the tile association that floor tiles should have a maximum rating of 3%.

I further said Ms X and Mr Y had been told the tiles didn’t meet the requirements of the British standard. On the other hand NHBC had pointed out that the standard is for guidance only.

I noted that the technical requirement is quite wide, but I thought it fair to say that for a floor tile to comply with it, it should pass two tests – the abrasion test and the water absorption test. So while I appreciated that the British standard is for guidance only, I thought it fair to say that the floor tiles in question would not pass the water absorption test. And I bore in mind that they are installed in the bathrooms of the property.

I said that the testing laboratory was a little inconsistent in its evidence – on the one hand it told Ms X and Mr Y that it would be pointless testing the tiles further as they would fail the water absorption test. But on the other hand it was quite willing to do the further abrasion

test, for the builders. Overall on review of the expert evidence I was persuaded that the tiles don't comply with the technical requirement and so are a defect which should be remedied.

As both NHBC and Ms X and Mr Y have confirmed they accept my provisional decision, I won't make any further comment.

compensation

I said that NHBC was concerned that Ms X and Mr Y had already received compensation for the tiles via the Consumer Code process. I noted that in fact the process found in Ms X and Mr Y's favour on a narrow issue of advertising and loss of expectation. It didn't order the builders to replace or pay for the tiles. But it made it clear that it couldn't consider any breach of NHBC technical requirements or breach of contract. So I thought NHBC should pay for the tiles. Ms X and Mr Y have a quote for replacing them of £5,904.51 plus VAT (a total of £7,085.41). I said it should pay that sum to them.

As for trouble and upset, I accepted that Ms X and Mr Y were caused a degree of this, especially as they were told in November 2014 the tiles were going to be replaced and not told of the change of decision until April 2015. For this NHBC has paid them £750, which I thought was reasonable. I noted that it had taken a long time to get to this point but I couldn't hold NHBC responsible for that. And I thought the technical issues were finely balanced. So I didn't propose to make any further award for this element.

As for legal costs, I pointed out that this service is free to consumers and we don't normally award such costs. While I appreciated that Ms X and Mr Y felt they needed legal help that was because they had a number of wide ranging issues. For this issue I didn't propose to make an award of costs.

As both parties have accepted my provisional decision, I won't make any further comment. My views as set out above now form part of this final decision

my final decision

I uphold this complaint and require National House-Building Council to pay Ms X and Mr Y £7,085.41 within 28 days of the date on which we tell it Ms X and Mr Y accept my final decision.

If it pays later than this it must also pay interest* on the amount from the date of my final decision until the date of payment at 8% per year simple.

*If National House-Building Council considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Ms X and Mr Y how much it's taken off. It should also give Ms X and Mr Y a certificate showing this if they ask for one, so they can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms X and Mr Y to accept or reject my decision before 16 September 2018.

Ray Lawley
ombudsman

