

The complaint

L is a management company for a group of houses situated in the same road. It's represented by Mr P. L complains that National House Building Council (NHBC) has unfairly declined to cover repairs to the drainage system servicing the houses on a building warranty.

What happened

The houses managed by L were built in 2013 and have an NHBC Buildmark warranty which covers damage caused by defects in the first 10 years after construction.

This complaint is linked to a long running dispute between L and NHBC going back to 2015 when issues with the drainage at the houses was noted. Eventually those issues were traced to an electrical fault in the pumping station which served the houses. That fault has been repaired and there's been no repeat of the drainage issues.

In May 2018, NHBC produced a Resolution Report outlining work which it considered was necessary under the warranty in order to repair defects which had been discovered during its investigations into the drainage issues. This made reference to works being required to pipework and manholes.

This work was due to start in March 2019. But the works as planned would have entailed an access road being closed for a significant length of time. NHBC reviewed its position when it became apparent that alternative plans were needed to allow emergency vehicle access to the houses. It said it no longer considered that the works were required under the terms of the Buildmark warranty. The drainage issues had been resolved by the completion of the electrical work.

L complained to NHBC, who rejected the complaint. It said that the issues with the pipework and manholes weren't the cause of the drainage issues. So it said a claim for repairs to these parts would be considered a new claim on the warranty. It said no damage had been caused by the defects, and so any claim wouldn't be covered.

Mr P, on behalf of L, brought the complaint to our service. He argued that if NHBC didn't repair the pipework and manholes, the residents of the houses would find it impossible to get insurance at the end of the warranty period. And the cost of the repairs was likely to be more than the residents could afford. He argued that the issues identified were defects related to the original construction and not the fault of the residents.

Our investigator said he didn't think NHBC had done anything wrong. He observed that the terms and conditions of the policy required that repairs would only be covered where there was damage caused by a defect. He didn't consider that the issues with the pipework and manholes had caused damage. L disagreed with this, saying that the work was necessary because the houses could potentially become uninhabitable if the sewage system failed. It's asked for an ombudsman's decision.

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.

My provisional decision.

In my provisional decision, I said:

I've started by looking at the terms and conditions of the warranty. These say that NHBC will pay the full cost *"of putting right any physical damage to your home which is caused by a defect in respect of ... below-ground drainage for which you are responsible."* The terms and conditions give definitions of some of these terms.

A *"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."*

A *"Home"* is defined in the warranty as *"the house, bungalow or flat referred to in a Buildmark Offer,"* including *"the drainage system serving the house, bungalow, flat or maisonette for which the owner is responsible."*

"Damage" is defined as *"Physical damage to a home caused by a defect."*

It doesn't appear to be in dispute that the issues with the pipework and manholes do amount to a defect. The report produced by NHBC in December 2016 during its assessment of the claims indicate that they didn't conform to the relevant Building Regulations. It's also not disputed that these items form part of the drainage system, and are considered part of the residents' homes as defined by the policy.

But NHBC disputes that the defects which have been identified have caused any damage, and so argues that there's no cover for a claim to repair the defects. It's accepted that the original drainage issues which led to these defects being discovered were caused by other, unrelated defects which have been repaired. There's no dispute that repairs to the pipework and manhole defects would be a new claim on the warranty.

In his submissions to our service, Mr P doesn't address whether the defects have caused damage. He told our investigator that the defects didn't appear to be the cause of the drainage issues which had previously been the subject of a claim with NHBC. He's made no reference to any other damage having been caused by the defects.

Mr P's argument on behalf of L is that the defects may potentially cause significant damage in the future, and that this may be after the expiry of the warranty in 2024. But the terms and conditions of the warranty don't provide cover for works to repair any defect which could cause damage in the future. In order for a claim to be successful, the defect needs to have actually caused damage during the period of cover.

But even so, I think the current condition of the pipework and manholes indicates that damage has occurred already as a result of the defects. This is because the NHBC Resolution Reports refer to mis-shapen, or *"bellied"* pipework and benching needing to be replaced, and weep holes needing to be filled.

The May 2018 Resolution Report identified that water had *"infiltrated"* the drainage system and resulted in this work being required. This suggests to me that the drainage

system has been damaged, as the water should not be there normally. And it seems to be accepted that a defect has allowed the water to infiltrate the system.

The shape of the pipework has been affected, and the walls of the manholes have holes in them. This is, I'm satisfied, "*physical damage*" I particularly note that one of the manholes is described as needing "*reconstruction of the benching and investigation into the source to ensure it is not mains water and no further damage from cavitation of the sub-soil around the chamber has taken place.*"

The reference to "*further damage*" is important here. It suggests to me that there's an acknowledgement that the manhole is already damaged. And if that's the case, and it's accepted that the damage is caused by a defect, then it would seem to be covered by the warranty's terms and conditions.

So I'm satisfied that the issues identified with the pipework and manholes should have been considered under the warranty. And to put things right, NHBC should carry out the works identified as being required in the Resolution Report dated 29 May 2018. I'm satisfied that the work identified in that report is to repair damage caused by defects, as defined by the policy.

The response to my provisional decision

Both NHBC and Mr P, on behalf of L, responded to my provisional decision.

NHBC disagreed that the pipes had been damaged. It said that the functionality of the pipes hadn't been affected by the issues identified. But it said that as it had previously said it would resolve the issue, it would now cover this. But it wanted to make a cash settlement in accordance with the terms and conditions of the policy.

Mr P said he accepted the findings of the provisional decision. After being told about NHBC's suggested way of settling the claim, he said he'd prefer if NHBC carried out the works itself. But if it was entitled to make a settlement, he wanted L to be provided with a detailed breakdown of the costs NHBC would incur in carrying out the repairs.

My findings

NHBC argues that, as the pipes are functioning, the issues identified don't amount to damage. It says it would consider damage to be blockages or the system backing up, or where defects were causing a physical inconvenience.

I don't agree with this. NHBC's own reports confirm that the pipework is bellied, benching needs replacing and weep holes need to be filled. In the absence of any further definition of "*physical damage*" in the policy, I have to take the ordinary meaning of the words. And I think that pipes that are the wrong shape, and holes which require filling do fall within the ordinary meaning of "*damage*."

NHBC argues that, as there was no damage, there's no cover for a claim for these works under the relevant section of the warranty. But as I think there was damage, it seems to me that, notwithstanding any other exclusions and that the claim would need to meet the warranty's remaining terms and conditions, a claim for this damage under that section should be successful. NHBC hasn't suggested that there's any other reason why a claim under this section would be unsuccessful.

NHBC has said it accepts the part of the decision which said the works should be completed, on the grounds that it had indicated it would carry out the works as part of a previous

resolution. But it wants to pay a cash settlement to L, equivalent to the costs of the works in line with the policy terms and for the amount the works would cost NHBC.

I understand Mr P's position, on behalf of L, that he'd prefer for NHBC to make arrangements for the works to be carried out. It seems that was NHBC's original intention, and finding suitable contractors and making arrangements for the works to be carried out will be inconvenient.

The warranty's terms and conditions say that NHBC "*will pay you the full cost*" of putting right damage caused by a defect, and that "*alternatively, we may at our option arrange to get the necessary work done at our expense.*" So I'm satisfied that the terms and conditions don't require NHBC to make arrangements to carry out works. It only needs to cover the costs of those works. I'm not satisfied I can, or should, require NHBC to make arrangements to carry out these works.

But I don't think it's fair for NHBC to limit the amount it pays to what it would have cost if it had arranged to carry out the repairs. It's likely that NHBC will have suppliers for works who will be paid a certain rate, and that these rates won't be available to L who will have to locate and contract suppliers through normal channels. If NHBC wants to limit its liability, it can arrange for its contractors to carry out the works. NHBC should pay the reasonable costs incurred by L to carry out the necessary works. As the settlement will be based on the amount L pays for the works to be carried out, I don't see that there's any need for L to be provided with a breakdown of the costs which NHBC would incur. Those costs aren't relevant to the settlement which will be required.

So I'm satisfied that, based on the evidence available to me, NHBC should cover the repair works which were identified as being required in the Resolution Report of 29 May 2018. It's fair for NHBC to be allowed to decide whether it wishes to make the arrangements to carry out these works, or make a settlement to L for the reasonable costs L incurs in having the works carried out.

My final decision

It's my final decision to uphold this complaint. To put things right, National House-Building Council must cover the repair works which were identified as being required in the Resolution Report of 29 May 2018 by either:

- Making arrangements for the works to be carried out at its expense; or
- Making a settlement to L for the reasonable costs incurred by L in having the necessary works carried out.

Under the rules of the Financial Ombudsman Service, I'm required to ask L to accept or reject my decision before 28 August 2020.

Ben Williams
Ombudsman