

The complaint

Mr and Mrs N have complained about National House-Building Council's (NHBC's) handling of their warranty claim for defects in the heating and hot water system that served their property. In particular, Mr and Mrs N are unhappy that NHBC hasn't repaired the defects in the underground pipework which forms part of the heating system.

What happened

Mr and Mrs N are represented in their complaint by Mr K, who is also a representative for other owners and policyholders in the development who share Mr and Mrs N's concerns.

The background to this complaint is complex and well-known to the parties. So, instead of repeating it, I've focused on providing a summary of the complexities of the heating system, mentioned in the evidence. And I've also set out a brief timeline of the events relevant to this complaint, to provide context for the conclusions I've reached in this decision.

The communal heating and hot water system

Mr and Mrs N are the owners of a property in an estate comprised of 54 properties that were constructed between 2008 and 2011 (the development). A communal heating and hot water system was installed to service all of the properties in the development. A management company was set up on completion of the development to manage the common parts, including the communal heating system.

The system functioned by way of a District Heating Main (DHM) system comprised of a biomass boiler, back-up boiler and underground hot water pipe network. Heat from the DHM system was distributed into a Heating Interface Unit (HIU) installed in each property. In such a system, the boiler is usually programmed to maintain a target temperature in a thermal heat store. A series of insulated pipes distribute hot water underground to each individual property in the district heating scheme. The flow and return within each pipe are usually connected to a heat exchanger, such as the HIU, in each property.

In the period during which the communal heating and hot water system served the development, a significant number of issues were reported by the residents and the management company to NHBC. Works were carried out on NHBC's behalf to address the issues with the system until March 2018, when NHBC concluded the issues had been substantively resolved. This included the carrying out of detailed tests and investigations, replacing different components of the system (including the HIUs), and completing repair works to the system.

A number of investigations were carried out into the issues with the pipework, such as the pooling of surface water in valve pits and other sections of the pipework. Those investigations revealed that some of the problems were caused by the design of other services in the development. For example, the existence of a gas membrane under the ground precluded the original installer of the pipework from burying pipes at a greater depth, and had a tendency trap ground water, which couldn't be drained due to capping in parts of the pipework system.

The number of different contractors involved with the installation of the various components of the heating system, and then carrying out repairs, also added to the complexity. Different parts of the system were commissioned at different points in time and certificates were often provided by third party contractors directly to the property owners or the management company.

Works carried out by NHBC's contractors following the 2014 resolution report benefitted from a six-year installation warranty. The parts that were replaced or repaired at this point had their own manufacturers warranties. As issues with the system continued to arise over time, it wasn't clear whether, or to what extent, they were new defects, problems with the repairs to the initial defect, failed parts, or the result of lack of appropriate maintenance and / or servicing. NHBC and its contractors, and the managing agent and owners, all expended significant resources of time and/or money, in trying to resolve the many issues with the communal heating system. In 2019, the management company (with the approval of the owners) decided to move the properties over to an alternative electric heating and hot water system.

Mr and Mrs N have clarified that their complaint is limited NHBC's liability to repair the defects in the underground pipework. However, due to the interconnected nature of the central heating system, at times in this decision it's been necessary for me to refer to other parts of the system. However, my decision will be limited to whether or not NHBC likely repaired the defects identified in the underground pipework to the extent needed to discharge its liability under the warranty.

To provide context for the findings I've set out in the next part of this decision, I've set out below a brief timeline of the key events relevant to this complaint:

Timeline of key events

2008 to 2011 – The 54 properties comprising the development were built.

July 2012 – NHBC was first informed of problems with the communal heating and hot water system.

22 October 2012 – NHBC's first resolution report was issued, recommending the developer supply commission certificates and operating instructions to the homeowners and consider implementing recommendations in a September 2012 Energy Report.

23 November 2012 – As the developer failed to comply with recommendations in the report, from this point, NHBC assumed the developer's liability for the cost of tests, investigations or work in its place. NHBC appointed consulting engineers, who I will refer to as C, to carry out further investigations into the system.

31 January 2014 – NHBC and C produced an updated resolution report with significantly more recommendations than were included in the earlier report and proceeded to carry out those works.

23 October 2014 – A pressure test certificate was issued by C which confirmed leaks in the pipework had been resolved.

5 January 2015 – F, the supplier of the pipework, provided confirmation that NHBC's contractor had carried out all remedial work on the areas identified and the system was fully operational.

16 February 2018 – NHBC offered the management company £150,000 in settlement of the claim regarding the biomass boiler, which was ultimately accepted by the management company.

March 2018 – NHBC handed the system back to the management company, following a period of providing fuel, and maintaining and servicing the biomass boiler and system.

June 2018 – A jointly appointed independent expert, R, issued a report on the extent to which they thought NHBC had satisfied the recommendations in the January 2014 recommendation report.

November 2018 – The supplier of the pipework, F provided a short report on the current issues with the pipework.

July 2019 – The management company complained to NHBC and they issued a final response letter to Mr N confirming its decision to decline a claim he made regarding blocked pipework, filters and the loss of heating and hot water to his property.

August 2019 – A significant leak occurred outside one of the properties in the development prompting the management company to move the remaining properties over to an alternative electrical heating and hot water system.

Mr and Mrs N came to our service because they were unhappy with NHBC's response to their complaint. Our investigator looked into what had happened and issued his first view not upholding the complaint on 4 July 2022 and provided the parties with the time to provide any response or further evidence. His second view was issued on 26 August 2022, also not upholding the complaint, which again, was followed by a period of time for the parties to provide any further arguments or information.

I'm reaching the same conclusion as our investigator. Given the opportunities the parties have had to provide their evidence on this complaint, I consider it appropriate to now issue a final decision on this complaint.

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, I've reached the same conclusion as our investigator and I won't be upholding this complaint. I'll explain the reasons for my decision below, broken into subsections for ease of reference.

My role, the informality of this service, and considerations relevant to the available evidence

Before I explain the decision I've reached, I think it helpful if I first clarify a few preliminary matters which are relevant to the way I've come to my decision on this complaint.

As the parties may be aware, the Financial Ombudsman Service is an informal dispute resolution service, established under Part XVI of the Financial Services and Markets Act 2000 as "a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person"). As the independent person, it's my role to resolve this dispute by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

Both NHBC and Mr and Mrs N have told me that there is a vast amount of information that

could be provided, to support their respective arguments, in relation to this warranty claim. The lengthy period of time during which works have been undertaken, and the number of claims that have been made on the warranties for properties in the development, among other factors, have contributed to the extensive records. I am confident that the parties have had the opportunity to provide all relevant information that is available and in response to the two views issued by the investigator.

Given the time that has passed since the section two claim was first made, some records can no longer be provided, for example, particular commissioning certificates issued by third parties. So, while there is a large amount of evidence to consider, the evidence is also incomplete. Where the evidence is incomplete, contradictory or inconsistent, I've made my decision based on what I think more likely than not happened, applying the standard of proof of the balance of probabilities.

I'd finally add that as an informal dispute resolution service we don't have the same extensive powers as the courts, for example, to compel third party witnesses to provide evidence relating to the complaint. However, if Mr and Mrs N don't accept my decision on their complaint, their legal rights will not be affected and they will be free to seek to pursue the resolution of their complaint elsewhere, for example in the Construction and Technology Court.

What is NHBC liable for under the warranty terms and conditions?

When Mr and Mrs N's property was sold to them by the developer, NHBC issued a warranty for their property. The warranty also provided cover for their liability in relation to the common parts of the development which they are legally obliged to share responsibility for cost and upkeep with the other owners in the development. The common parts are defined in the warranty as including the heating system. The warranty didn't guarantee there wouldn't be any defects in the property or development, but it meant that any defects which were notified to the developer and/or NHBC within the first two years after completion of the property, would be resolved. Also, any damage caused by a defect in specific parts of the property or common parts, found in years three to ten after the property was completed, would be fixed.

The management company first contacted NHBC on behalf of Mr and Mrs N, and other owners, about a number of problems they'd experienced with the heating system in June 2012. The issues left residents without heating or hot water on numerous occasions. The problems included leaks, blockages, failure of various component parts and, eventually, the total failure of the biomass boiler. NHBC agreed that some of the identified issues were defects and recommended the developer repair them. When the developer (referred to as the "Builder" in the warranty terms) didn't comply with NHBC's recommendation, NHBC agreed to take over liability from the developer in November 2012.

The key issue in dispute between the parties is whether or not NHBC discharged its liability under the warranty to repair the defects in the communal heating system, and more particularly, the underground pipework.

In coming to my decision on this complaint, I've first considered the terms of the building warranty to decide whether, on the balance of probabilities, NHBC complied with its obligations to Mr and Mrs N, as detailed in the warranty terms and conditions.

As with most warranties and insurance policies, the Buildmark warranty doesn't cover everything that might go wrong with a property or development. In the first two years it covers *Defects* or *Damage* and in years three to ten it covers *Damage* caused by a *Defect*. Mr and Mrs N's claim was made in the first two years of the period of cover provided by the

warranty, so their initial claim was covered by section two of the warranty.

Part 1 of Section two of the warranty terms and conditions, requires the Builder to: *“Within a reasonable time, at its own expense, in a workmanlike manner and in accordance with NHBC Requirements,.....put right or repair any Defect or Damage notified to it during the relevant notification period”*.

Part 2 of Section two of the warranty terms and conditions details NHBCs obligations, and says, *“1) We will pay you the Cost of any test, investigation or work that is required by a Resolution Report that you accept in full, which the Builder does not complete in a workmanlike manner and in accordance with NHBC Requirements within the time set in the Resolution Report. Alternatively, we may at our option arrange to get that test, investigation or work done at our expense”*.

Defect has a specific meaning attributed to it in the policy terms and conditions. It is defined as a breach of any mandatory NHBC Requirement by the Builder or anyone employed by or acting for the Builder. This is important because it provides more limited cover than would be available if the normal meaning of the word “defect” was used.

The warranty also contains a number of limitations on NHBC’s liability to carry out works, and says NHBC won’t be liable for the following (among other things):

- *The effects of wear and tear, neglect or failure to do appropriate maintenance; and*
- *The effects of dampness, condensation or shrinkage not resulting from a Defect.*

As the Defects were notified under section 2 of the warranty, NHBC’s initial liability to repair the defect needs to be considered by reference to what was detailed in the relevant resolution report (31 January 2004), so I’ve next considered the work NHBC was liable to undertake, as detailed in that resolution report.

NHBC appointed C, to investigate the *“Centralised Boiler Plant and DHM installation”* on its behalf. Following their investigations, C and NHBC prepared the January 2014 resolution report, which detailed a large number of recommendations in relation to the central heating system. However, as this complaint only relates to the underground pipework, I’ve only set out below the recommendations included in the resolution report, which relate to the underground pipework:

- Repair and reinstatement of the leaking district heating pipework both above and below ground including the installation of thermal insulation to meet the manufacturer’s requirements. Pressure test the completed works and re commission the whole installation to meet the design requirements.
- Install Valve Jackets as originally specified.
- Install pipework identification in accordance with BS 1710:2001 for building services installations.
- Replace all unapproved pipework fittings associated with the F 600 pipe with manufacturer endorsed products. The pipework shall be tested to 1 ½ times the working pressure following remedial works.

The parties disagree on the extent to which NHBC carried out the works required to discharge its liability to repair the pipework, as detailed in the resolution report. So, I’ve next considered the evidence and arguments submitted by the parties in relation to that. While I

won't refer to each and every point raised by the parties, I have given careful consideration to all of the information that I've been provided. This isn't meant as a discourtesy, rather, it reflects the informal nature of our service, and my role in answering the crux of the complaint and the key issues I consider relevant to its outcome.

On the one hand, NHBC have said that significant investigations into the heating system had been undertaken, including pneumatic and hydraulic testing, thermal imaging, listening devices and sniffers which discovered a number of leaks. NHBC added that those leaks were subsequently repaired by their contractors where they occurred. Once the DHM integrity was reinstated, pressure testing was performed at 5bar which passed, confirming that there were no leaks occurring to the DHM. NHBC concluded that the system had been working and maintained up until the point that it handed the maintenance over to the management company in March 2018.

However, Mr and Mrs N believe there were still problems with the heating system when it was handed back to the management company. In support of their position, Mr and Mrs N have provided a report from a jointly appointed independent expert, who I'll refer to as R, dated June 2018 and a report from the supplier of the pipework, F, who inspected the pipework system in November 2018, to provide R with a response to some questions raised in its report. Mr and Mrs N argue that the two reports provide conclusive evidence of NHBC's failure to discharge its liability regarding the pipework, under the warranty.

I've considered the evidence with regard to the following three periods: January 2014 to 23 October 2014 (the date of resolution report up to the final pressure test confirming works were completed) (the first period); October 2014 to November 2018 (the period following the pressure test certificate to the date that the reports were issued by R and F) (the second period); and November 2018 to August 2019 (when the last of the properties in the development were moved across to an electrical heating and hot water system following a major leak at a property in the development) (the third period).

First period: January 2014 to October 2014

NHBC have said that the works necessary to satisfy the recommendations in relation to the pipework, as detailed in the January 2014 resolution report, were completed near the end of 2014. Where unapproved fittings had been identified, NHBC said they'd been replaced and pressure testing was satisfactorily completed. I've seen a copy of a pressure test certificate issued on 23 October 2014, confirming that between the DHM back to the Boiler House, a 24-hour hydraulic test was carried out at 5Bar, by a 5Bar Hydraulic Water Pump, and no leaks were detected. F, the supplier of the pipework, investigated the pipework on several occasions, and while certain issues were identified, he confirmed in a 2015 email that NHBC's contractors had carried out remedial work on all the areas identified and the system was now fully operational.

But, Mr N has said that the pressure test only confirmed that at that moment in time, there were no leaks in the system. He believes all of the issues hadn't been satisfactorily resolved, so the pressure test certificate was not confirmation that the resolution report recommendations had been met. He says that the only reasonable evidence of NHBC's liability being discharged would be confirmation that all of the pipework had been installed in accordance with manufacturers specifications together with a commissioning certificate. In Mr N's view, confirmation from F that the system was fully operational wasn't enough.

However, I've not seen any evidence to suggest the owners had raised any other issues with the pipework at that time, which NHBC had ignored. So, based on the testing carried out at the time, and the email from F in 2015, I can only conclude that NHBC had likely fulfilled the recommendations of the January 2014 resolution report with regard to the pipework – at this

stage.

Second period: October 2014 to November 2018

Aside from a list of individual leaseholder complaints, which mainly relate to issues with the HIUs, limited evidence of other issues with the heating system arising, following the 2014 works, has been provided.

In March 2018, NHBC handed over the DHS to the management company. NHBC says at that time the system had been regularly maintained and was in working order. It agreed to investigate any further concerns raised under the certificate of repair following the completion of works by their contractors but said it would need to be satisfied that the regular maintenance had been carried out by the management company and owners since then. NHBC also said that up to the point that the system was handed over to the management company, C had been monitoring the water usage over a significant time with little evidence of any leaks showing, suggesting no leaks were occurring.

However, as NHBC and the management company jointly commissioned R to provide an independent review of the remedial works that had been carried out I think it's reasonable to conclude that some problems with various elements of the DHS likely continued throughout this period.

Both parties are familiar with the content of the reports issued by R and F, so I'm not going to refer to the findings in detail. Rather, I'll summarise what I think the reports tell us about the state of the pipework and the extent to which NHBC had met the requirements of the resolution report, or otherwise, during this time.

I've reviewed a copy of R's report, which includes comments and responses from NHBC's contractor, C. I understand that C's comments were also shared with R. There are comments in the report that invite further comment and clarification. For example, when discussing insulation, R said that, following previous investigations, identified sections of pipework had been insulated, however, it wasn't clear whether more uninsulated pipework existed within the system. Similarly, in relation to unapproved fittings, R said they understood unapproved fittings in exposed sections of the pipework had been replaced, however, R speculated that there could be non-approved fittings in other parts of the systems. But I note that no further discussion or clarification was obtained after the report was issued.

R's report confirmed that having tested water in valve pits, it was clear that it wasn't water from within the pipes, so didn't provide evidence of current leaks. Comments were made about efficiency and water usage, which C challenged, however, those issues also weren't ultimately agreed on or resolved.

There were two recommendations included in the report, relevant to the pipework. Recommendation 3 said the heat network should be replaced, in accordance with the manufacturer's specification. C responded to this by saying that the management company had agreed the scope of works with NHBC, back in 2014, based on advice from F, the supplier of the pipework, following a site visit. It therefore wasn't appropriate to redefine the scope of works necessary to meet the recommendations in the resolution report, some four years later.

Recommendation 4 said that the situation of pipework and valves being submerged in water and drainage needed to be remedied by works carried out to the manufacturer's requirements. However, C responded to say that the gas membrane (which precluded the original pipework installer from burying the pipes at a greater depth) has a tendency to trap ground water, which is why standing water developed within some inspection and valve pits,

and it wasn't possible to drain due to capping.

In my view, the preceding examples demonstrate that R's report provided a starting point for resolving any outstanding issues, but the report itself contained further questions, and C's comments highlighted areas where it wouldn't be possible to implement R's recommendations or wasn't appropriate.

Also, there were some concerns expressed in the report about what might happen in the future. However, a warranty is designed to respond to damage or defects that have arisen. It doesn't cover events that may occur in the future. So, while it's possible (as the entire pipe network wasn't excavated) that non-approved fittings remained in the system, the warranty, in years 3 to 10, would only provide cover for remedial works, should damage caused by a defect occur, during the term of the warranty.

In any event, the dialogue about the outstanding issues seems to have stopped here. I think because the management company had likely decided by then to pursue the implementation of an alternative hot water and heating system, which I will comment further on later in this decision. The management company did seek comment from F in response to the report, which I'll turn to next, however, that also didn't provide conclusive answers to their outstanding concerns.

In an attempt to provide some clarification on some of the issues included in R's report, the management company asked F to come and inspect the pipework in November 2018 (approximately 10 years after the system had been installed). The person from F who attended was there to provide a view on the current state of the pipework, but also to provide a quotation for remedial works required. He commented that the installation went against many of F's recommendations. He also criticised the insulation of the pipes, the lack of end caps and the burial levels of the pipes. He summarised the installation as being "*a catalogue of errors*".

In response to his report, NHBC sought comments from the employee at F who inspected and gave advice on the pipework back in 2014. He said that the gas membrane precluded the original installer from burying at a greater depth. He also said that a structural engineered solution was employed to roadway crossings where the buried depth was identified as insufficient. He observed that the comments from his colleague were based on their current product range, some of which were new since the works had been carried out and he was of the view that some of the comments related to the aesthetics, rather than the engineering.

The evidence on the state of the pipework at this time is further clouded by comments in an email from F to the management company, dated February 2019 in which F said, "*It has been decided whilst attending the last site visit.....the reason for the lack of efficiency within your district heating system was due to the HIUs that had been recommended and installed...It became apparent that it was not the F district heating pipes that are also installed within the residential project, as first thought....*". One reason for not abolishing the district heating network, given in the email was that "*the pipe network is already installed and working to how it should be*". Later F says, "*I have mentioned that the pipe system is currently performing as we would expect it to, it's losing less than one degree Celsius from the plant to the index point / last property.*" F did say that there were issues he would expect can only deteriorate over time, including pipes being buried under roads at incorrect depths.

After considering this evidence, I'm not persuaded that it demonstrates NHBC more likely than not, failed to implement the recommendations of the January 2014 resolution report, with regard to the pipework. While the reports make observations and suggest reasons why various issues arose with the pipework, they don't persuade me that one explanation is more

persuasive than another. Before I'm able to decide that NHBC have done something wrong here, I need to be persuaded of that on the balance of probabilities, and I'm not.

Third period: November 2018 to August 2019

Following the handover of the system by NHBC back to the management company the next evidence I've considered, relating to problems with the pipework is an email exchange between Mr N and NHBC in February 2019.

Mr N contacted NHBC about below ground pipework into his property being blocked up by detritus, and blocking his HIU filters, leading ultimately to a complete failure of hot water and heating in the property. NHBC queried whether there had been a system shut down because in their experience, that had often caused problems with detritus entering the system. Mr N said that there was a local power cut which caused the main boiler to shut down. He agreed that the power cut and resulting cooling down and heating up of the DHM had caused residual dirt in the system to re-mobilise. However, Mr N remained of the view that despite numerous attempts by NHBC to flush the system to clear the blockages, the problem remained, so NHBC had never resolved the issues.

NHBC on the other hand, denied liability and said it wouldn't be responsible for wear and tear or defects or damage caused because normal maintenance or servicing wasn't carried out. NHBC added that if repairs fail because they've been affected by a new defect, NHBC would only be liable if the new defect was covered by the warranty. And if a claim was being made for poor workmanship under the certificate of repair (issued after works were completed by NHBC's contractor) it would only be liable to address any issues if it could be shown that regular maintenance and servicing had been carried out since the repairs had been completed.

Then, in August 2019, a contractor on site noticed a large water leak outside one of the properties and NHBC were informed that the underground water pipe's integrity had failed leading to a substantial leak. Before sending its own claims assessor to assess the damage, NHBC asked for the maintenance and servicing records for the DHS, which weren't provided. However, the management company said that the leak was proof of the inadequate nature of the installation, even after the repairs had been carried out by NHBC's contractors. They also provided a letter from a heating engineer who'd attended the site to investigate the leak which explained that it was only when the water supply from the heat main was turned off that the leak stopped. He therefore concluded that the only resolution for the issue would be to excavate and replace the faulty heat main, which he acknowledged would be a costly and disruptive solution.

During this period, complete maintenance and servicing records weren't provided by the management company to NHBC. And, Mr N accepted that not all residents followed the recommendations to maintain the internal parts of the system. But Mr N also queried how it would be possible for residents or the management company to maintain pipework that was buried underground. While it may have been difficult to maintain underground pipes, the interconnected nature of the central heating system would indicate that lack of servicing of one part of the system, could likely impact another part of the system. So, although it could be the case that the August 2019 water leak was due to inadequate installation or repair by NHBC or its contractors, it could equally have been due to lack of servicing of the system, wear and tear, or it could have been a new defect.

I also note that by August 2019 most of the residents at the development had moved over to an electric heating system. So, the management company's solution to the problems caused by the leak was to decommission the final few houses still using the DHS. Mr N acknowledged in his submissions that some properties didn't complete routine maintenance on other components of the DHS while waiting for the electric heating systems to be installed, as it would have constituted an unnecessary cost to the residents. He also said there were significant failures of many components as the system was wound down. These factors also could have caused or contributed to the August 2019 leak. So, while it's accepted a serious leak occurred, the evidence doesn't persuade me that it's more likely than not, the leak was caused by any action or inaction on NHBC's part.

In conclusion, Mr and Mrs N believe that NHBC has failed to discharge its liability under the warranty with regard to the pipework as no commissioning certificates were provided and they believe the issues that continued to arise with the district heating system, after NHBC handed it back to the management company, are further evidence of this failure.

However, after carefully considering all the available evidence, I've decided not to uphold this complaint. Testing that was carried out after the recommendations were implemented in 2014 indicated that the works most likely had been completed. NHBC ceased to be involved with the system from March 2018, and the first major issue which arose was fifteen months later, in August 2019. At that time the management company had already moved most of the properties across to an alternative heating and hot water system and the old system appears to have not been maintained during this transition period. It was clearly a complex central heating system which was costly to maintain. And despite the time and resource NHBC expended, in remedying defects with the system, problems continued to arise. It's understandable that the management company and owners made the decision to move to an alternative system, however, it doesn't follow that NHBC should be responsible for the cost of the new system.

While a number of different explanations have been proposed by Mr and Mrs N and the management company, as to why the district heating system, including the pipework, was ultimately deemed to be unfit for the development, I haven't been persuaded that more likely than not, this was due any failure by NHBC to satisfy the requirements set out in the January 2014 resolution report and discharge its liability under the warranty. I therefore do not uphold this complaint.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs N to accept or reject my decision before 21 December 2022.

Carolyn Harwood
Ombudsman