## complaint

Mr and Mrs B, represented by Mr B, have complained about National House-Building Council (NHBC). It provides warranties for Mr and Mrs B's home and other homes in the development where they live. Mr B says NHBC agreed to do work under the policy but then failed to complete it.

For ease, and because he has been the main correspondent throughout the complaint process, in my background and findings I'll refer only to Mr B.

The other residents have also complained and I've issued decisions for each of them under separate references.

## background

NHBC provides building warranties that cover all the homes within the development in question. During the first two years after the development was completed problems were noted with the sewers. NHBC became involved under its resolution service and, in 2015, as part of an ongoing review of the continuing problem, it issued a resolution report. The report made a recommendation for work to be done. The report set a deadline for the builder to comply with the recommendation. The deadline was 31 July 2015. The recommendation was that the builder carry out necessary work in order to have the sewage system adopted by the local water authority.

By 31 July 2015 tenders had been returned and a start date for work to start was pending. However, the builder had returned to the water authority to re-negotiate a stipulated piece of work. The water authority then wanted to arrange a site meeting and this took a while to arrange. In February 2016 the builder contacted Mr B and said that following the meeting it was waiting for a report from the water authority about what work it required to be done in order for it to adopt the sewage system. Mr B chased updates on this over the coming months but heard little more.

In June 2016 NHBC called Mr B. It said it had made a mistake in its 2015 report as adoption of the system wasn't covered by the warranty. It said a system being capable of being adopted by the water authority wasn't one of its technical requirements and so it wasn't something it should have tried to force the builder to do or something it could now take on in the builder's stead.

Mr B complained and when NHBC wouldn't change its view on carrying out the work he, and the other home owners, made a complaint to this service. NHBC had accepted it had caused a loss of expectation though and offered £4,000 total compensation to cover all upset caused to all homeowners. NHBC also said the residents didn't have ownership of the sewage system – that had remained with the builder.

When the complaint came to me for a decision I issued some provisional findings but asked for further detail regarding the issue of who was responsible for the sewage system. Further information in this respect was then provided by both sides and I issued some further findings on that issue.

Ultimately I felt that NHBC had failed the homeowners. That it needed to carry out the work it had previously recommended and that I could recommend that it do so because I was satisfied that the residents were legally responsible for the sewage system.

Mr B, on behalf of the homeowners, accepted my findings. NHBC did not. I've set out my provisional findings, NHBC's comments and my responses as part of my findings below.

**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:

*"NHBC doesn't always act as an insurer. But, where NHBC provides its resolution service, it is seen to begin acting as an insurer when:*

- *A resolution report has been issued, and*
- *The builder has failed to complete the recommended work in the report by the deadline set.*

*Once this occurs, even if NHBC continues to use the builder to complete work, it is seen to be acting as an insurer and carrying out regulated activity.*

*In this case that means that from 31 July 2015, NHBC was acting as an insurer in respect of the work it had thought was necessary at Mr B's home.*

*In respect of the work that was thought to be necessary; NHBC has been very clear with this service in the past and confirmed that recommendations are only made where defects are found by its investigators ie that NHBC accepts there is a breach of its technical requirements that needs resolving.*

*NHBC has also clearly stated that where a homeowner believes a breach has occurred but NHBC disagrees, this can't be questioned by this service such as to consider whether recommendations should actually have been made. But in this case it seems NHBC would have me accept that it made a mistake and the recommendations shouldn't have been made. To me that seems a little unreasonable.*

*In any event, even if I were minded to accept there was a genuine mistake, NHBC didn't just make it and then quickly realise this, setting matters straight with no delay or other activity occurring in between. Rather the situation was allowed to continue for many months with all involved believing this work was required under the warranty and all reasonable endeavours being made in order to comply with the recommendation. Effectively, I think it's fair to say that NHBC entered a contract for repair. And it carried out work, via the builder, which included site meetings and liaising with third-parties, in an effort to complete that contract.*

*So I don't think NHBC can so easily dismiss its liability here. But, as mentioned above, there is a problem here in respect of who owns the sewage system. NHBC has mentioned that the builder has maintained liability for it and that this has never been passed to the owners of the properties……. ….This means that I need to see details from the parties as to where liability for the system lies. If the property owners have liability then I'll likely make NHBC complete the work necessary to have the water authority adopt the system. If the homeowners have no liability then I'll likely not make any award."*

NHBC said there was no evidence the system was non-compliant; that in fact it isn't within its requirements for the system to be adopted by the water authority. Therefore, the policy simply doesn't give cover for this scenario and if it hadn't made a mistake the resolution report wouldn't have required that this work was done. I understand that is NHBC's position but this doesn't give me cause to change my view as stated above that this is not a mistake that NHBC can just fairly walk away from.

As mentioned above, following the provision of further evidence I issued my provisional findings on this issue to both parties. I said:

*"Mr B provided a land registry document which seemed to show that the individual property owners have responsibility for maintaining the sewers (my emphasis):*

*"4.1 All and any sewers drains……[etc]…. and (in so far as the same* ***are not the subject of any covenant*** *by the Transferor to repair or maintain herein contained) shall be repaired and maintained by the Transferee and other the owner or occupier of the plots using the same according to such user".*

*But NHBC produced a related covenant. The covenant seems to takes overall responsibility for the sewers away from individual property owners and places that in the arms of the management company.*

*"3 The Company hereby covenants with the Buyer that it will:*
*3.1 Provide procure and perform in relation to the Communal Facilities the Schedule Services".*

*It has been NHBC's contention all along that as the management company is owned by the developer, and as the management company is responsible for the sewers, the developer is responsible for the sewers. If that were the case then the above two documents might support that position. However, I've also seen the memorandum of association for the management company. This sets out the basis for the limited company and defines what it is there to do.*

*"a)For the benefit of the Dwellingholders, to own maintain and administer, in whole or in part…'the Development'…. And any other land….and ancillary facilities and/or any communal land which is subject to mutual covenants contained in any leases and/or transfers where such land is capable of benefitting the Dwellingholders…."*

*And*

*"b) To provide all manner of services in connection with the management administration insurance maintenance repair decoration upkeep and cleaning (together hereinafter referred to as 'the management') of the Development and to provide services to the Dwellingholders as may be necessary and in connection therewith:-*

*…..*

*(iv) To engage and employ professional and business persons such as…..main contractors and sub-contractors and retainers of all kinds necessary to the management of the Development."*

*There is no caveat within this document to say the company's role or emphasis changes depending on who the directors or shareholders are. And there is nothing that says the company only starts acting for the residents at the point when they take over the directorship/ownership of the company and/or pay fees. Therefore, I'm satisfied that the management company is legally responsible for the upkeep of the sewers and that, by virtue of the fact it was incorporated to look after the joint needs of the property owners, the property owners effectively have liability for the system. Therefore, as mentioned above, and unless I receive any further information that gives me cause to think my current view is wrong, I intend to issue a final decision that requires NHBC to undertake the work necessary to have the sewer system adopted by the local water authority."*

NHBC said the deed makes the management company responsible for the sewage system and the management company is owned by the developer and hasn't been taken over by the homeowners. It said they haven't taken on any direct responsibility for the sewage system, and haven't even made any payments towards its upkeep.

Whilst that may be the case, the management company was set up, regardless of who owned or controlled it, on very specific terms. I haven't seen anything that makes me think those terms can be ignored or discarded. I'm satisfied that the management company was put in place to act for the homeowners, in their stead. Therefore I remain of the view that the homeowners, by virtue of their management company and the deed that names the management company as the responsible party, are liable for the sewer system.

I appreciate NHBC's concerns that the developer may try and block any work; it is still the director of the management company and that could create some conflict of interest. If that does occur though then NHBC will have to deal with that, and the homeowners will need to cooperate with it. Just because there may be some difficulties faced by an insurer in complying with an award doesn't mean I shouldn't make it. There's a difference between an award being made which may possibly be difficult to comply with and an award being set out that is impossible for an insurer to ever hope to meet. I'm satisfied that my award, based on what I've seen here, doesn't fall into the latter category.

I understand that NHBC thinks the local water authority may make it impossible for NHBC to comply with my award. I accept that NHBC won't have any power over that third-party but from what I've seen so far the local water authority did negotiate with the developer and set out the works it felt were necessary for it to adopt the system. So I don't think it's likely the water authority will refuse to work with NHBC on resolving this issue.

The involvement of a third-party might well lead to some delays and frustrations being caused that are beyond NHBC's control but that, again, isn't a good reason to not make an award in this instance. It would seem unfair, at this stage, to say NHBC should be able to settle the matter in cash and walk away leaving the homeowners to sort out the situation.

Firstly that would be impractical at this point as whilst I know the water authority set out details of works necessary in 2016, as far as I'm aware no-one has costed those yet. And it isn't clear if they are still valid or might need updating in any way.

Secondly, it wouldn't be fair to put the residents in the positon of having to try and work with the water company – they simply do not have the expertise and the access to suitably qualified experts that NHBC does and that may well be needed in order to embark on as well as complete this exercise. If as time moves on and the situation changes, the parties decide to step outside of my final decision and negotiate an alternative settlement arrangement that

would be a matter for them to discuss. At this stage Mr B hasn't indicated that a cash settlement would be preferred and, for the reasons set out here, I don't think that would be a fair or workable award. I remain of the view that NHBC needs to step into the shoes of developer and complete the work it required the developer to do in its resolution report dated March 2015.

I also commented provisionally on compensation. In the event that I was making NHBC carry out the work, meaning the homeowners weren't left with any loss of expectation as a result of NHBC having made a mistake, I felt compensation wasn't necessary. Some dismay was likely caused but in this instance I'm satisfied that requiring NHBC to carry out the work is fair and reasonable redress. I'm not minded to make NHBC pay compensation in addition to that.

**my final decision**

I uphold this complaint. I require National House-Building Council to carry out all requirements of the water authority to allow full adoption by it of the sewage system on completion of the works.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 27 March 2019.

Fiona Robinson
**ombudsman**