Case No: HT-2019-000464

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 543 (TCC)

Royal Courts of Justice
Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 09/03/2021

Before:

MRS JUSTICE O'FARRELL DBE

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Between:

(1) ANCHOR HANOVER GROUP
(incorporating the fully transferred society,
HANOVER HOUSING ASSOCIATION)
(2) ROBERT SHIRLEY
(3) DORIS CASTLE
(4) BARBARA GIBSON
(5) ELIZABETH PERCY
(6) SHELAGH GRAY
(7) LOUISE WYATT **Claimants**

- and -

(1) ARCADIS CONSULTING (UK) LIMITED
(2) CRESSWELL ASSOCIATES
(ENVIRONMENTAL CONSULTANTS) LIMITED
(3) OXFORDSHIRE COUNTY COUNCIL
(4) THE ENVIRONMENT AGENCY
(5) WATER ENVIRONMENT LIMITED **Defendants**

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Sonia Nolten and Jack Harris (instructed by **Pinsent Masons LLP** & **Hugh James Solicitors**) for the **Claimants**
Galina Ward (instructed by the **Environment Agency**) for the **Fourth Defendant**

Hearing dates: 3rd & 4th November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 9th March 2021 at 10:30am"**

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This claim arises out of a flood which occurred in Bicester, Oxfordshire, on 23-24 December 2013. A group of sheltered housing residences, Hanover Gardens, owned by the First Claimant Housing Association and occupied by the Second to Sixth Claimants, and a nearby cottage, leased and occupied by the Seventh Claimant, were flooded to a depth of about one metre. Extensive damage was caused to the fabric of the buildings and the residents' possessions.

2. The flood was caused by a blocked box culvert. The culvert was created in about 2012 as part of works to divert the course of the River Bure flowing through Bicester ("the Town Brook"), from its existing concrete channel to a reinstated natural open channel to facilitate the development of a shopping centre. A trash screen, comprising flat vertical metal bars positioned at 75mm intervals, was fixed to the front headwall of the culvert. The headwall and the screen were orientated at 45 degrees away from the direction of oncoming water flow. Debris became trapped against the bars, causing water to back up and escape the channel, resulting in flooding.

3. The matter before the Court is the application by the Fourth Defendant ("the Environment Agency") to strike out the claim against it and/or for summary judgment on the basis that the Statement of Case discloses no reasonable grounds for bringing the claim, the claim has no real prospect of success and there is no other compelling reason for a trial.

Background facts

4. Prior to 2010 the Town Brook ran through an open concrete channel located to the east of Hanover Gardens in Bicester.

5. On 1 March 2007 a planning application was submitted to Cherwell District Council for the proposed development of a supermarket to the east of the Town Brook, on a site which was partially within the Town Brook's floodplain.

6. The planning application included a proposal to divert the course of the Town Brook from its existing concrete channel to a reinstated natural open channel, which included the installation of a box culvert, close to Hanover Gardens.

7. The Second Defendant ("BTP") carried out hydraulic modelling and prepared a flood risk assessment with design drawings for the purpose of the planning application. The Environment Agency reviewed the model and stated that it was satisfied that it was a robust model which accurately represented the physical system and represented the best available information on which to establish risk of flooding.

8. BTP's modelling of the initial design, which did not include trash or security screens in place over the mouth of the culvert, indicated that in the event of a 1:100 year flood, water would remain in-bank for both the proposed and existing course of the Town Brook.

9. In about July 2007, construction drawings prepared by BTP introduced a trash screen over the mouth of the culvert.

10. On 26 July 2007 the Fifth Defendant ("WEL"), environmental consultants acting for the developer, made an application to the Environment Agency for consent to divert the Town Brook. The application included the construction drawings for the culvert with the trash screen.

11. On 30 October 2007 the Environment Agency granted consent to the application, pursuant to sections 109 and 110 of the Water Resources Act 1991 and the Thames Water Authority Land Drainage Byelaws 1981, subject to various conditions and disclaimers. The notes accompanying the consent included point 1:

> "The final design of the proposed trash screens shall be submitted to the Environment Agency and approved in writing before their construction."

12. On 3 September 2009 Cherwell District Council granted planning permission for the development, subject to conditions including:

> "Condition No 16
>
> Prior to development commencing a full method statement for the re-routing of the Town Brook, including details of a contingency to be in place to safely accommodate flows in the absence of the Back Brook and details of the route of the diverted River Bure downstream of the new bifurcation, shall be submitted to and approved in writing by the local planning authority.
>
> Condition 17
>
> Prior to the commencement of development detailed designs of the proposed watercourse crossings shall be submitted to and approved in writing by the local planning authority."

13. By email dated 23 December 2009, in response to a query by Ian Norriss of the Environment Agency, Guy Laister of WEL confirmed that the final design for the culvert trash screen required approval by the Environment Agency.

14. On 15 January 2010 Mr Norriss provided the Environment Agency's guidance on trash screens to Mr Laister. The guidance provided that:

> "The goal of a trash screen should not be to trap as much debris as possible. In fact the screen should trap as little as possible whilst still acting to prevent blockage of the culvert."

15. Initially, the Environment Agency recommended discharge of Condition 16 but declined to recommend discharge of Condition 17 on the grounds that there was no detailed design of the proposed crossing and the spacing of the bars of the trash screen was insufficient:

> "We are keen to see that grills are only used where necessary and agree that a grill should be placed at the entrance to the culvert at the downstream end of the new channel. However

> drawing 24306/806, rev B shows the grill to have 75mm centres. We believe that there is scope for the spacing of the bars to be greater than this. The spacing between the bars of a screen should be carefully considered in terms of safety and the screen's main function. It is counterproductive to have a screen that traps debris which would otherwise pass harmlessly through the culvert. Security screens should be designed to have a space of no more than 140mm between bars, to ensure children cannot slip through."

16. The Third Defendant ("OCC") believed that the proposed 75mm spacing of the Trash Screen bars was sufficient and should be maintained as stated in an email dated 20 January 2010 to WEL, who sent it to the Environment Agency:

> "The priority is to prevent debris entering the culvert because of its long length, changes of direction, low headroom and consequent difficulty of removing obstructions. I don't have a clear understanding at present as to what the likely flows will be through the culvert, but from experience it's all too likely that silt will build up at times of low flow and if debris is allowed into the culvert and gets caught up in the silt a blockage is likely to develop.
>
> Consequently it will be far more preferable to remove debris from the screen than to attempt to deal with an internal blockage, and the overall flooding risk will be reduced accordingly - if flows were to backup internally it wouldn't be possible to send anyone into the culvert in any case.
>
> For those reasons I would suggest retaining the bar spacing at 75mm.
>
> …
>
> If there's a continuing issue with the EA we would put forward the above as justification."

17. By letter dated 10 February 2010, the Environment Agency agreed to discharge Condition 17, stating:

> "We would usually expect to see larger grill spacing than the maximum of 75mm required by Oxfordshire County Council Highways Department. Such tight spacing can increase the maintenance requirement of the grill as debris builds up more quickly. Larger spacing could reduce maintenance demands without significantly increasing the risk of blockage within the culvert. However, as the maintenance responsibilities for this grill will fall to the Highways Department, we feel it would be unreasonable to withhold discharge of Condition 17 on these grounds."

18. Formal confirmation of the clearance of Condition 17 was issued by Cherwell District Council on 24 March 2010 and the works were carried out in 2012.

19. Heavy rainfall was experienced in the area of the culvert on 23 and 24 December 2013, although the Claimants' case is that this was not exceptional and was less than the modelling had assumed.

20. On 23 December 2013 the Environment Agency removed small amounts of debris from the trash screen.

21. At approximately 4am on 24 December 2013, a large amount of debris became trapped in the screens, causing the Town Brook to flood. When the Environment Agency removed the debris, the flood water levels subsided.

Proceedings

22. On 17 December 2019 the Claimants commenced these proceedings, seeking damages against the Defendants.

23. The Claimants' case is that the design and installation of the culvert mouth and the trash screen were not only inadequate to prevent flooding but increased the risk of flooding. The size and orientation of the trash screen, and the narrow gaps between the bars, allowed an accumulation of trapped debris, which reduced the volume of water flowing into the culvert.

24. The claim against the First and Second Defendants arises out of the hydraulic modelling, flood risk assessment and design work carried out by them in connection with the diversion works. The claim against the Fifth Defendant arises out of its involvement in the final design of the trash screen. The claim against the Third Defendant is based on its status as local highway authority, riparian owner of the culvert and screen, and its responsibility for approving the design of the same.

25. The claim against the Environment Agency is that it was negligent in:

    i) accepting the hydraulic modelling that did not include simulation with trash screens;

    ii) approving the inadequate design of the trash screen with insufficient bar spacing;

    iii) wrongly recommending that Condition 17 should be discharged; and

    iv) failing to ensure the implementation of an adequate maintenance regime to keep the trash screen clear of debris.

26. The duty of care alleged is pleaded in the Amended Particulars of Claim as follows:

> "58. It was or ought to have been reasonably foreseeable to BTP, OCC, EA and WEL, and each of them, that if:

a. the hydraulic modelling and/or the Flood Risk Assessment were not carried out with reasonable care and skill; and/or

b. the design of the Culvert and/or the Trash Screen was not carried out with reasonable care and skill; and/or

c. the Culvert and/or the Trash Screen were inadequately maintained;

there was a risk that the Trash Screen would become blocked, that water would be unable to flow into the Culvert and would overtop the New Channel, and that persons in the geographical vicinity (including the Claimants) might suffer loss and damage as a result of the escape of flood water.

59. The Claimants will rely *inter alia* on the Non-Technical Summary in respect of the development dated February 2007 which stated *inter alia* that "the proposals were developed in close consultation with [EA] and extensive hydraulic modelling was undertaken to test the effect of the proposals on the risk of flooding to the surrounding land owners."

60. In the circumstances, BTP, OCC, EA and WEL and each of them, owed the Claimants, and each of them, a duty to take reasonable care (in carrying out hydraulic modelling and/or the flood risk assessment and/or designing the Culvert and the Trash Screen and/or approving the design of the Culvert and the Trash Screen and/or maintaining the Culvert and the Trash Screen …) to prevent the Claimants from suffering loss and damage, which it is averred was a reasonably foreseeable consequence of any breach of duty on their part.

…

63. EA has alleged in correspondence that by reason that it is an executive non-departmental public body, it owed the Claimants no duty of care in tort. For the avoidance of doubt, the Claimants' case is that EA owed a duty of care in tort to them, and the claim against it in negligence is properly brought, by reason of the following facts and matters:

a. EA has a statutory power under the Environment Act 1995 to provide advice to local planning authorities in its role as statutory consultee; and

to determine applications for consent under section 1009 of the Water Resources Act 1991.

b. It was a condition of EA's determination of the application for a Flood Defence Consent that it was to approve the design of the Trash Screen before its construction. In connection with its approval of the design of the Trash Screen, EA also exercised its advisory role in recommending to Cherwell District Council that planning condition 17 should be discharged notwithstanding the gaps in the trash screens were only 75mm.

c. The Claimants' complaint about EA's approval of the design of the Trash Screen and its recommendation to Cherwell District Council are both complaints about EA's exercise of its power (not a complaint of a failure to act).

d. Further, EA was involved in the diversion of the Town Brook as a statutory consultee on flood risk in that it was *"actively involved in guiding the applicant to ensure that the proposed development would not increase flood risk"* and the imposition of planning condition 17 was specifically for the purpose of *"avoid[ing] an increase in flood risk."* In the circumstances adequate consideration of whether the diversion was likely to increase the risk of flooding would not have impeded EA from the effective exercise of its function, because determining whether the diversion presented an increased flood risk was its precise function in this instance.

e. In the circumstances the facts and matters giving rise to the claim are justiciable.

f. EA has also alleged that no duty is owed because its position was analogous to that of a planning authority, and it would be anomalous for it to over duty in circumstances where a planning authority does not. It is denied that there is an analogy between the EA and a planning authority in the circumstances giving rise to this claim. A planning authority may consider the issue of nuisance in very broad terms in the context of whether a particular development is congruent with the character of the neighbourhood, but does not come under a duty to consider whether a new development is likely to cause nuisance to

one or other individual. This would be unduly onerous and would make the exercise of its functions impossible.

g. By contrast EA was involved in the diversion of the Town Brook as a statutory consultee on flood risk, and in its own words, was *"actively involved in guiding the applicant to ensure that the proposed development would not increase flood risk"* and the imposition of planning condition 17 was specifically for the purpose of *"avoid[ing] an increase in flood risk."* In the circumstances, adequate consideration of whether the Culvert and the Trash Screen were likely to increase the risk of flooding did not impede EA from the effect of exercise of its function, which was to determine whether the diversion presented an increased flood risk.

h. Further and in any event, in *"actively guiding the applicant to ensure that the proposed development would not increase flood risk"*, and involving itself in the design of the Culvert and the Trash Screen, and in approving the said design, EA voluntarily assumed responsibility for the design, and owed the Claimants, and each of them, a duty of care in respect thereof.

i. Yet further, in involving itself in the design of the Culvert and the Trash Screen, and in approving the said design, EA caused or contributed to the danger complained of. As such EA owed the Claimants, and each of them, a duty of care in respect thereof."

The application

27. On 22 July 2020 the Environment Agency issued its application, seeking an order that the claim against it be struck out pursuant to CPR 3.4(2)(a) and/or summary judgment be given pursuant to CPR 24.1. The basis for the application is the Environment Agency's case that it did not owe any duty of care to the Claimants in the circumstances that arose and on the facts as pleaded in the Amended Particulars of Claim.

The applicable test

28. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:

…

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

29. The principles to be applied are not in dispute:

i) If the pleaded facts do not disclose any legally recognisable claim against a defendant, it is liable to be struck out. However, the application must assume that the facts alleged in the pleaded case are true.

ii) It is not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact: *Barratt v Enfield BC* [2001] 2 AC 550 per Lord Browne-Wilkinson at p.557.

iii) The court must be certain that the claim is bound to fail; unless it is certain, the case is inappropriate for striking out: *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 per Peter Gibson LJ [22]-[23].

30. CPR 24.2 provides that:

"The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; … and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

31. The test on an application for summary judgment is well established:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.

iv) The court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.

v) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where

reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

vi) However, if the court is satisfied that it has before it all the evidence necessary for the proper determination of a short point of law or construction and the parties have had an adequate opportunity to address the question in argument, it should grasp the nettle and decide it. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

vii) In multi-party litigation, the fact that similar issues will be going to trial in any event may amount to a compelling reason not to grant summary judgment: *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715.

32. The Court must consider whether, on the facts as pleaded, the claim against the Environment Agency is bound to fail, having regard to the applicable legal principles, or whether the case should be allowed to proceed to trial to allow a full investigation of the facts before determining whether a duty of care has been established.

Legislative framework

33. The Environment Agency is an executive non-departmental public body, sponsored by the Department for the Environment, Food and Rural Affairs and established by the Environment Act 1995 ("the 1995 Act").

34. The principal aim and objectives of the Environment Agency are set out in section 4(1) of the 1995 Act:

> "It shall be the principal aim of the Agency (subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) in discharging its functions so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development mentioned in subsection (3) below."

35. Section 109(1) of the Water Resources Act 1991 provided at the material time that:

> "No person shall erect any structure in, over or under a watercourse which is part of a main river except with the consent of and in accordance with plans and sections approved by the Agency".

36. Section 110 provided that a consent or approval under section 109 should not be unreasonably withheld.

37. Section 70 of the Town and Country Planning Act 1990 ("the 1990 Act") sets out the provisions for a local planning authority to determine any application made to it for planning permission.

38. Section 71(2) of the 1990 Act provides that:

> "A development order may require a local planning authority—
>
> (a) to take into account in determining such an application such representations, made within such period, as may be prescribed; and
>
> (b) to give to any person whose representations have been taken into account such notice as may be prescribed of their decision."

39. The relevant local planning authority in this case was Cherwell District Council. The relevant development order in force at the material time was the Town and Country Planning (General Development Procedure) Order 1995 ("the Development Order").

40. Article 10(1) of the Development Order provided:

> "Before granting planning permission for development which, in their opinion, falls within a category set out in the table below, a local planning authority shall consult the authority or person mentioned in relation to that category …"

41. Paragraph (p)(ii) of the table identifies the Environment Agency as the authority that must be consulted in relation to any development involving the culverting or control of flow of any river or stream.

42. By Article 11A of the Development Order and section 54(2) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") a prescribed requirement to consult includes consultation by the local planning authority with the Environment Agency.

43. Section 54(3) of the 2004 Act provides:

> "At any time before an application is made for any permission, approval or consent mentioned in subsection (2) any person may in relation to a proposed development consult the consultee on any matter in respect of which the appropriate authority is or the local planning authority are required to consult the consultee".

44. Section 54(4) provides that the consultee must give a substantive response before the end of the prescribed period which, by virtue of Article 11A(2) of the GDPO 1995, was 21 days beginning with the day on which the document in question (or the last in a series of documents) was received by the consultee (or such other period as may be agreed in writing).

45. The effect of the above provisions was to impose on the Environment Agency statutory obligations: (i) to provide a substantive response to Cherwell District

Council, or to any request for pre-application consultation, in respect of the proposed development involving diversion of the Town Brook; and (ii) to determine whether to give its consent or approval to the proposed diversion works, including the design of the proposed culvert.

Parties' submissions

46. Ms Ward, counsel for the Environment Agency, submits that the Environment Agency did not owe a duty of care to the Claimants arising out of its involvement in the diversion of the Town Brook:

    i) In providing advice to Cherwell District Council as part of the planning application process, and to the applicant for planning permission, the Environment Agency was acting in accordance with its statutory duties (not powers) under the 1990 Act and associated legislation.

    ii) In granting the Flood Defence Consent of 30 October 2007, the Environment Agency was acting in accordance with its duty to determine an application made to it under section 109 of the Water Resources Act 1991.

    iii) In clearing debris from the trash screen on 23 December 2013, the Environment Agency was acting under its general permissive statutory powers to protect or enhance the environment as set out in section 165 of the Water Resources Act 1991. It was not under any duty to do so; the legal responsibility for maintaining the culvert and trash screen lay with OCC as highway authority (and such responsibility was admitted by OCC in its Defence).

47. Ms Ward submits that there is no authority in which the courts have recognised that the Environment Agency owes a duty of care in carrying out its statutory functions. The closest analogies in the existing law are planning cases, in which the courts have held that planning authorities generally do not owe any duty of care to individual members of the public or private bodies. The Claimants cannot distinguish this case from the relevant factors in those planning cases. Further, on the facts, they are unable to establish that the Environment Agency voluntarily assumed responsibility for the design of the culvert and trash screen, or created the danger causing the flood, so as to give rise to a duty of care.

48. Ms Nolten, counsel for the Claimants, submits that it would be inappropriate for the Court to strike out the claim against the Environment Agency or grant summary judgment without a full trial of the facts.

    i) It is arguable that the circumstances of this case give rise to a duty of care. It is arguable that the Environment Agency did not act solely within its statutory powers or duties. Further, it is arguable that this was an omissions case and that the Environment Agency had a degree of control in respect of the design of the culvert and trash screen so as to amount to an assumption of responsibility.

    ii) No authority has been identified supporting a case that no duty can be owed by the Environment Agency in the circumstances of this claim. On the contrary,

the *Robinson* and *Poole* line of authority accepts that there may be a duty of care in the context of planning permission and analogous situations.

iii) Whether a duty of care is imposed is heavily fact-sensitive in each case. In the absence of evidence from all parties, the factual matrix is not clear, including the extent of the Environment Agency's involvement in the modelling and design. No documentary records have been produced to explain the Environment Agency's role in carrying out maintenance of the culvert, and whether such role was active or reactive. The other defendants have raised issues of inadequate maintenance as causative of the flooding.

Applicable legal principles

49. In *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 the Supreme Court firmly rejected the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, in favour of an approach based on precedent, and on the development of the law incrementally and by analogy with established authorities: per Lord Reed at [21] – [27] and at [29]:

> "In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

50. In *Poole Borough Council v GN* [2019] UKSC 25 the Supreme Court considered the circumstances in which a public authority might be liable for the careless exercise of its statutory powers or duties. The mere assertion of any careless exercise would not be sufficient; the claimant must show that the circumstances were such as to give rise to a duty of care at common law. Lord Reed summarised the applicable principles at [65]:

> " It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm,

> unless the imposition of such a duty would be inconsistent with the relevant legislation."

51. The imposition of a duty of care based on an assumption of responsibility was explained by Lord Goff in *Henderson v Merrett* [1995] 2 AC 145 (HL) at p.180 and in *Spring v Guardian Assurance plc* [1995] 2 AC 296 at p.318:

> "All the members of the Appellate Committee in [Hedley Byrne] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that 'the essence of the matter in the present case and in others of the same type is the acceptance of responsibility'. … Furthermore, although Hedley Byrne itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529-530. Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."

52. In *Poole* (above) Lord Reed confirmed that an assumption of responsibility could arise in the context of a public authority's performance of its statutory functions, stating at [73]:

> "Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as Hedley Byrne and Spring v Guardian Assurance plc."

53. There is no direct precedent on the question whether a duty of care arises in the circumstances of this case.

54. The closest analogies relied on by the parties are planning and similar public authority cases.

55. In *Lam v Brennan and Borough of Torbay* [1997] PIQR P488, the Court of Appeal held that no duty of care was owed by a local planning authority to plaintiffs who suffered foreseeable loss as a result of the negligent grant of planning permission for processes to be carried out on neighbouring property. Potter LJ rejected in robust terms the possibility that a breach of statutory duty in such a case could give rise to a cause of action at common law at p.502-3:

> "In our view it is quite plain that the regime of the Town and Country Planning Acts is, in the words of Lord Browne-Wilkinson in *X* at p.731G
>
> > 'A regulatory system … for the benefit of the public at large … [involving] … general administrative functions imposed on public bodies and involving the exercise of administrative discretion.'
>
> Such a system [is] one in respect of which reported decisions reveal no example of a private right of action for breach of statutory duty ever having been recognised by the court.
>
> …
>
> … given the discretionary nature of the power conferred to grant or refuse planning permission under section 29 of the 1971 Act, it seems to us clear that the policy of the Act conferring that power is not such as to create a duty of care at common law which would make the public authority liable to pay compensation full foreseeable loss caused by the exercise or non-exercise of that power."

56. In *R (D2M Solutions Ltd) v Secretary of State for Communities and Local Government* [2017] EWHC 3409 (Admin) Holgate J stated at [74]:

> "It is well-established in the law of tort that local planning authorities are generally not liable in damages for financial loss resulting from alleged negligence in the determination of planning applications."

57. In *Tidman v Reading Borough Council* [1994] 3 PLR 72 (QB), Buxton J held that a local planning authority did not owe a duty of care to the plaintiff when advising him (wrongly) that he needed to apply for planning permission for the proposed use of his premises, explaining at p.19 of the judgment:

> "…the local authority, unlike an ordinary professional adviser such as a solicitor, owe a public duty to apply the planning law and also a public duty to exercise their judgment and discretion in the general public interest. It would be inconsistent with those duties to recognise an overriding obligation to give advice in the interests of particular individuals who are engaged in the planning process. The private interest of that particular individual cannot be allowed to override the interests of the public at large in the proper performance of the planning process. Even if the officers are acting as alleged "advisers" in the *Hedley Byrne* sense, their duty is not solely to advise.

58. In *Sterling v Northern Ireland Environment Agency* [2014] NIQB 8, a case in which the defendant negligently advised the plaintiff that he was no longer authorised to

transport waste in respect of his skip hire business, a similar approach was taken by Gillen J at [30]-[32].

59. In summary the relevant principles for the purpose of this case are:

i) public authorities do not owe a duty of care at common law to private individuals or bodies simply by exercising their statutory powers or duties;

ii) analogous cases concerning planning authorities and other public bodies indicate that the absence of a duty of care extends to advice given as part of the exercise of their statutory powers and duties;

iii) a common law duty to protect from harm may arise in circumstances where the principles applicable to private individuals or bodies would impose such a duty;

iv) such circumstances may include conduct undertaken by public authorities in the exercise of their statutory powers or duties that gives rise to an assumption of responsibility as explained in *Spring* (above).

Discussion

60. The pleaded facts indicate that the Environment Agency provided comments, gave approval and provided its consent to the proposed diversion works, including the design of the culvert and trash screen, in the exercise of its statutory duties. Such actions alone would not give rise to a duty of care at common law.

61. However, the pleaded case also refers to the involvement of the Environment Agency regarding the hydraulic modelling used in the design of the diversion works. It is arguable that such conduct went beyond its statutory duties and powers and that the circumstances of the Environment Agency's involvement was such as to impose a common law duty of care to the Claimants.

62. On the pleaded facts, it is unlikely that clearance of debris from the culvert by the Environment Agency on 23 December 2013 amounted to an assumption of responsibility for maintenance of the same. However, without having before it all relevant evidence as to the circumstances in which, and the period during which, the Environment Agency carried out such work, the Court is not in a position to exclude the possibility that its conduct satisfied the test in *Spring* so as to give rise to a duty of care.

63. Despite the clear and persuasive submissions of Ms Ward on the legal principles, I am satisfied that this is a case that should be allowed to go forward to a full trial on the facts before the Court determines whether or not the circumstances gave rise to a common law duty of care on the part of the Environment Agency to the Claimants.

Conclusion

64. For the reasons set out above, in my judgment the Court is not in a position to conclude that the claim against the Environment Agency is bound to fail. The Statement of Case discloses a cause of action that has a real prospect of success.

65. In those circumstances, the Court will make the following orders:

i) The Fourth Defendant's application is dismissed.

ii) All consequential or other matters, if not agreed, will be dealt with by the Court at a further hearing to be fixed by the parties.