Neutral Citation Number: [2024] EWHC 3184 (TCC)

Case No: HT-2022-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 December 2024

Before:
ADRIAN WILLIAMSON KC

SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

DARCLIFFE HOMES LIMITED

Claimant

-and-

GLANVILLE CONSULTANTS

First Defendant

GROUND AND WATER LIMITED

Second Defendant

- -
- -

Richard Sage (instructed by **Lyons Davidson**) for the **Claimant**

Siân Mirchandani KC and Will Cook (instructed by **Caytons**) for the **First Defendant**

Hearing dates: 3, 7, 8, and 9 October and 22 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 11th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Adrian Williamson KC:

Introduction and background

1. In these proceedings the Claimant property developers ("Darcliffe") claim damages for professional negligence from two defendants for, broadly speaking, erroneous advice as to their ground investigation of a proposed development of an area of land at Stoneham Farm, Tilehurst, Long Lane, near Reading ("the Site"). The First Defendant ("Glanville") and the Second Defendant ("GWL") are engineering companies that, among other things, produce reports on ground conditions.

2. The trial was heard over four days in October 2024, with closing submissions delivered on 22 November. The trial had been limited by earlier directions to an agreed list of issues. It was further limited by the fact that, before the trial started, both Darcliffe and Glanville settled all their claims against GWL. The trial thus proceeded against Glanville only. I was, therefore, required to answer Issues 1 – 8, 18 and 21 – 22.

3. The principals of Darcliffe, Messrs Denton and Smith, are very experienced in developing sites for the construction of residential homes. They gave evidence before me. I am satisfied from their evidence and the accounts of the company that Darcliffe is a well and prudently run business.

4. As a matter of background, it should be noted that Mr Denton, one of the joint Managing Directors of Darcliffe, became aware of the Site at a meeting with Mr Mike Rolls of Horstonbridge Thames Valley Limited ("Horstonbridge"), at some point in 2013. Horstonbridge had an option to purchase the Site and three other sites nearby, known as Sulham 1, 2 and 3. In 2014, Darcliffe acquired Horstonbridge's options over the Site via a development agreement. This agreement set a minimum price for the Site, which Darcliffe wished to develop.

5. In May 2014, Darcliffe engaged Glanville to provide a report. Glanville's report ("Glanville's First Report") was issued to Darcliffe in its final form on 24 July 2014.

6. Darcliffe promoted the inclusion of the Site in the local plan for the West Berkshire site allocation during the course of 2015. Glanville's First Report was one of the documents used to promote the Site.

7. In February 2016, Darcliffe asked Glanville to produce an updated report. Glanville produced the final version of their updated report ("Glanville's Second Report") on or around 29 April 2016. This was, in substance, the same as Glanville's First Report.

8. An application for planning permission was submitted on 4 May 2016. A Public Inquiry took place in 2016. Planning permission for the construction of 66 homes was granted, subject to reserved matters and legal agreements, on 1 December 2016.

9. On 6 September 2017, Matthew Jeal sent an email on behalf of Darcliffe to GWL asking them to produce a Phase 2 intrusive site investigation for the Site. GWL issued a quotation on 5 November 2017. On 6 November 2017, Mr Jeal wrote to GWL confirming their appointment.

10. GWL undertook site investigation works at the Site between 9 and 16 November 2017. These involved various investigations, including drilling two cable percussion boreholes to depths of between 18m and 19.95m below ground level. GWL circulated a preliminary draft of their Phase 2 Report on 30 November 2017. The final version of the Phase 2 Report was then produced in or around January 2018.

11. GWL carried out additional investigation works between 11 and 14 July 2018, and the results of those investigations were set out in a letter from GWL to Darcliffe dated 16 July 2018.

12. Darcliffe were notified that reserved matters under the planning permission were approved on 27 June 2019. Formal approval was received on 15 August 2019.

13. In November 2019, Darcliffe purchased the Site for circa £5m in order to build the housing development.

14. Darcliffe say that they relied upon the reports of Glanville and GWL when purchasing the Site. They allege that Glanville and GWL failed to report to Darcliffe that the Site was at high risk of ground dissolution due to the presence of chalk beneath the Site. They further allege that, after purchasing the Site, it was discovered that it is affected

by widespread chalk dissolution, and that they have had to incur substantial remediation costs when constructing the development. They claim damages of c.£7.5m for negligence and breach of contract.

15. This trial is not concerned with quantum, although it is common ground that Darcliffe will have to give credit as against Glanville for the sums recovered in the settlement with GWL.

16. Against that background, this Judgment consists of the following sections:

(a) Glanville's obligations;

(b) Glanville's performance and alleged breach/negligence;

(c) Reliance/causation;

(d) Darcliffe's losses;

(e) Miscellaneous issues;

(f) Answers to the issues.

A. Glanville's obligations (Issues 1 and 2)

17. On 5 March 2014, Mr Matthew Jeal of Darcliffe first made contact with Mr Tim Foxall of Glanville in order to request a fee proposal. On 19 March 2014, Mr Jeal sent a further email to Mr Foxall which requested a further fee proposal. This email requested that Glanville carry out, inter alia, a "Phase 1 Geo-Environmental Survey".

18. Mr Foxall duly provided a Fee Proposal on behalf of Glanville on 26 March 2014. Under the heading "Phase 1 Geo-Environmental Assessment", Mr Foxall stated:

> *"As you are doubtless aware, there are four main steps to contamination assessment; these being: i) A 'desk study' type report including a conceptual model (Phase 1 Geo-Environmental Assessment). ii) An intrusive site investigation. iii) Developed and implementation of a remediation strategy. iv)*

> *Each stage is dependent upon the findings of the preceding stage, but the first stage is essentially a desk based exercise and, given the preliminary nature of this particular project, is what I recommend is undertaken in the first instance as the findings will help demonstrate the deliverability of the sites. The assessment will identify any potential sources of contamination and, as and when a planning application is submitted, will ultimately be used to inform the view taken by the local planning authority in terms of their requirement for intrusive investigation. Obviously we will prepare our report as sympathetically as possible, but in our experience even if this study is able to suggest that there is very little or no risk on site, some local authorities can insist on a level of chemical testing at application stage on the basis that some contaminants (such as arsenic) are naturally occurring and would not be associated with an historic land use. Our report will therefore aim to demonstrate that there are no particular issues that would prevent responsible development of the site."*

19. Following negotiations over the level of fees, on 2 May 2014, Mr Jeal confirmed Glanville's appointment pursuant to the revised fee estimate which had been provided.

20. In February 2016, Darcliffe asked Glanville to produce an updated report. On 23 February 2016, Glanville provided Darcliffe with a quotation for this work, which Darcliffe accepted on 25 February 2016.

21. Absent any authority to the contrary, it seems to me that the court's task in relation to a commercial contract such as this is to determine the (relevant) scope of each party's obligations. That determination is to be derived by ascertaining the objective intentions of the parties, set in their admissible context.

22. So far as relevant, it seems to me that Glanville's core obligation was to carry out a 'desk study' type report including a conceptual model (i.e. a Phase 1 Geo-Environmental Assessment). I understood from the factual and expert evidence (discussed further below) that a Phase 1 Geo-Environmental Assessment, although a concept of American origin, is now reasonably well understood in the UK. Such an assessment requires an analysis of the ground conditions, albeit on a preliminary, desktop basis. It includes, but is not limited to, a desktop geotechnical assessment.

23. Glanville submit that I should approach the question of scope of duty guided by the recent decision of the Supreme Court in Manchester Building Society v Grant Thornton

UK LLP [2022] AC 783 ("MBS"). The majority summarised their view at [4] as follows:

(a) The scope of duty question should be located within a general conceptual framework in the law of the tort of negligence; and

(b) The scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given.

24. At [6], the majority identified that, when a claimant seeks damages from a defendant in the tort of negligence, the following six questions arise:

> *"(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)*
>
> *(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)*
>
> *(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question)*
>
> *(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)*
>
> *(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)*
>
> *(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid (the legal responsibility question)."*

25. Glanville draw my attention to questions (2) and (5) in particular. Essentially, they submit that the purpose here of Glanville's engagement was to facilitate the promotion of the Site in the local plan for the West Berkshire site allocation. Thus, they submit, the risks of harm to the Claimant against which the law imposed on them a duty to take care were limited to risks associated with such promotion. It follows, they say, that there

is not sufficient nexus between the harm for which the Claimant seeks damages (the extensive remediation costs incurred) and the subject matter of the defendant's duty of care as properly analysed.

26. For my part, it seems to me that this analysis is over complex for a case like the present. I note that the Court of Appeal has observed in Rushbond Plc v JS Design Partnership LLP [2021] EWCA Civ 1889; [2022] PNLR 9 and URS Corp Ltd v BDW Trading Ltd [2023] EWCA Civ 772; [2024] KB 827 that the six-stage checklist set out by the majority in MBS was primarily designed to analyse duties of care alleged to arise in novel situations which had not previously been considered by the courts, or where the type of loss claimed was unusual or stretched the usual boundaries imposed by law. It was not primarily intended to be applied by rote to well-known and much-reported standard duties of care.

27. In the present case I have concluded that the scope of Glanville's duty, so far as relevant, was to carry out a Phase 1 Geo-Environmental Assessment, as this term is understood in the construction industry. Of course, Glanville had numerous other duties, but these are not germane to the claim made. Obviously, they were obliged to exercise reasonable care and skill in carrying out the assessment.

28. It is true that a primary purpose of the engagement of Glanville was to advance Darcliffe's position in planning terms. That is why they were aiming "to demonstrate that there are no particular issues that would prevent responsible development of the site". However, it is a non sequitur to say that because this was a primary purpose, Glanville were not obliged to exercise reasonable care and skill in carrying out the Phase 1 Geo-Environmental Assessment as a whole. Furthermore, Glanville were, in my view, obliged to perform all the obligations of a Phase 1 Geo-Environmental Assessment as commonly understood, and Darcliffe were entitled to the benefit of such performance for whatever purpose they chose.

29. The scope of the duty, therefore, and the risks of harm to the claimant against which the law imposed on the defendant a duty to take care, was to carry out a reasonably competent Phase 1 Geo-Environmental Assessment. This case is not on all fours with the famous "mountaineer" example given by Lord Hoffmann in South Australia Asset

Management Corporation Respondents v York Montague Ltd [1997] A.C. 191, 213 where the negligent doctor is not liable because "the injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct". In the present case, if Darcliffe are right on their allegations of breach and causation, the "injury" would not have occurred if the Phase 1 Geo-Environmental Assessment had been carried out with reasonable skill and care.

B. Glanville's performance and alleged breach/negligence (Issue 4)

30. Glanville's First Report was issued, in final form, on 24 July 2014. It was said to be a Phase 1 Geo-Environmental Assessment. The introduction provided, with emphasis added, that:

> "*1.1 This report has been prepared by Glanville Consultants on behalf of Darcliffe Homes and Horstonbridge (Thames Valley) Ltd to support the promotion, through West Berkshire Council's Site Allocation and Delivery Development Plan, of Stonehams Farm for residential development.*
>
> *1.2 This report has been prepared in accordance with the National Planning Policy Framework Section 11 and Model Procedures for the Management of Land Contamination (CLR11) to assess if there is any potential risk to the site.*
>
> *1.3 The report identifies previous land uses and findings from unintrusive environmental and geological searches for the purpose of identifying issues that may adversely affect the development of the site for its intended end use."*

31. The core of the report was, so far as relevant, as follows, and again with emphasis added, under the heading "Site geology":

> *"4.1 Geological maps published by the British Geological Survey (BGS) indicate that the site is likely to be underlain by a superficial stratum of a Winter Hill Gravel consisting of sand and gravel from the Anglian period. The mapping also indicates that the site is likely to be underlain by a bedrock stratum of Lambeth Group Formation consisting of clay, silt and sand from the Paleocene period. Geological maps are included in Appendix F for reference…*
>
> *4.4 BGS borehole records are a record of boreholes, shafts and wells from all forms of drilling site investigation works. The borehole data sheet sourced from the BGS holds one recorded borehole on-site (BGS*

reference Su67se592), which has a recorded drill length of 2.7m. The BGS borehole data sheet is included in Appendix G for reference.

4.5 The borehole log described above is available to view on the BGS website. The borehole record indicates 0.15m of topsoil over a geology consisting of firm brown, very silty, sandy clay with some gravel…

4.8 Natural cavities, such as sinkholes, swallow holes and solution pipes are indicated to be located within a 1000m radius of the site. None are indicated to be located within the site …

4.10 Potential for collapsible and compressible ground stability hazards are indicated to be very low and no hazard respectively. Soft materials such as clay are vulnerable if overloaded or if ground water levels change and can result in materials collapsing or compressing.

4.11 Ground dissolution occurs when water passes through soluble rock and produces underground cavities. These cavities reduce support to the ground above. Rocks that commonly suffer with dissolution stability hazards are salt, gypsum, limestone and chalk. It is indicated that the sites geology is at a low from ground dissolution.

4.12 Landslides are dependent on such factors as geology, topography, weathering, drainage and manmade construction. The risk of damage to properties on the site from landslides is indicated to be very low."

32. As is apparent from the above text, Glanville attached to their report a good deal of publicly available information about, inter alia, ground conditions. In particular, Appendix A was a report from a company called Envirocheck, who set out extensive information as to previous ground investigations at or near the Site.

33. The reader of Glanville's First Report would have been satisfied that the Site did not present any significant problems in regard to the ground conditions. Indeed, section 9 stated that:

"9.0 Conclusion and Recommendations…

9.4 The site and surrounding area is indicated to be underlain by a Winter Hill Gravel over Lambeth Group Formation…

9.8 In conclusion, the conceptual model has demonstrated that there should be no significant geo-environmental issues that would prevent the site from being redeveloped for its intended use.

9.9 This conceptual model should be reviewed and developed following the results of any intrusive ground investigations."

34. In summary, Glanville's First Report gave a clean bill of health so far as the Phase 1 Geo-Environmental Assessment was concerned, albeit that Darcliffe were well aware that this assessment would have to be reviewed and developed following the anticipated Phase 2 investigation.

35. Glanville's Second Report was in materially identical terms and did nothing to dispel the impression created by the First Report.

36. The question for me, therefore, is whether this clean bill of health was compatible with the exercise of reasonable skill and care. Mr Raison, the expert witness called by Darcliffe, expressed the view that Glanville had "failed the test of reasonable competence". His reasoning was as follows, in summary:

> "*viii) In my view, Glanville Consultants should have reviewed and taken full account of the sensible guidance and advice given by CIRIA C574, that the presence of dissolution features should always be assumed when designing foundations for all sites underlain by calcium carbonate-rich Chalk. Glanville Consultants could have added just a single line to their report giving a suitable warning about the possibility of Chalk dissolution features. The absence of this warning is a major failing by Glanville Consultants*
>
> *ix) The Envirocheck report included tabulated records of observed Chalk dissolution features for five locations in the vicinity of the site where the geology is essentially similar to that found on the Stoneham Farm site. Glanville Consultants should have reviewed this data, carried out their own analysis and made their own conclusions. This would have been a straightforward due diligence check.*
>
> *x) In my opinion, if Glanville Consultants had competently reviewed and analysed the Envirocheck data and hazard ratings, they would have concluded that there was a significant chance that similar dissolution features could exist below the site footprint, but these had just never previously been identified.*
>
> *xi) In my opinion, Glanville Consultants should also have referenced the Chalk natural cavities database and obtained a written site assessment report as a due diligence check on the Envirocheck data. Not doing so was yet another failure by Glanville Consultants.*
>
> *xii) There is no question that any reasonably competent Geologist, Geotechnical Engineer or Specialist Consultant dealing with the ground should have been able to identify not only that the Seaford Chalk was*

> *present below the whole of the site footprint but also to have been aware of the inherent risks associated with engineering and construction in Chalk. Glanville Consultants clearly failed to do either."*

37. I was impressed by Mr Raison's evidence, which I thought to be fair and well balanced. I agree with his conclusions, for the reasons which I will now set out.

38. As a preliminary point, it should be noted that Glanville were able to offer little assistance as to how they had gone about their task. Glanville's First Report was prepared by Jordan Rayner. Although Glanville's First Report purports to deal with geotechnical matters in some detail, Ms Rayner confirms in her statement (see paragraph 8) that she is not in fact a geotechnical engineer. She says that her areas of specialism are "highways and drainage infrastructure design and project management". Ms Rayner produced a witness statement but was unable to attend the trial: her evidence was admitted pursuant to the Civil Evidence Act.

39. The Second Glanville Report was authored by James O'Kelly. Little is known about Mr O'Kelly's qualifications and experience, and he has not produced a statement in this litigation.

40. These considerations lead to my first reason for accepting the evidence of Mr Raison, namely that Glanville have been unable to proffer any real explanation for providing the clean bill of health mentioned above. On the contrary, so far as the evidence goes, Glanville do not seem to have assessed the ground conditions at all. Ms Rayner states:

> *"For a Phase 1 report, I could receive up to 600 pages of material from Envirocheck. When producing a Phase 1 report, I would translate this into a readable report. It was not my own assessment, I was simply collating and repeating information and providing a summary of the Envirocheck information in a readable, accessible form for the client, together with appendices that contained the key raw data and materials we had obtained from Envirocheck."*

41. In this regard, Glanville submitted that I should not be too concerned with "process", provided that the process, even if susceptible to criticism, produced a non-negligent result. In some professional negligence claims this may well be so. However, in the present case, I think that the process and the result are inextricably interwoven. Glanville, in the person of Ms Rayner, did not really carry out any analysis of the ground

conditions, the very job they were engaged to perform, with the result that Darcliffe received no such analysis.

42. Secondly, and following on from this lack of analysis of the Envirocheck materials, Glanville simply did not engage with the fact that the Site and its environs were underlain by chalk. If they had done so, they should have gone on to tell Darcliffe that whether or not dissolution features were actually present, their presence should be assumed until proved otherwise. Alternatively, they should have, at least, warned of the potential hazards flowing from the presence of such features nearby.

43. Thirdly, it seemed to be that Dr O'Riordan was anxious in his written evidence to give Glanville the benefit of the doubt, perhaps to an over generous extent. However, in the course of cross-examination, he accepted, realistically, that the advice given had not been adequate: see, for example, his evidence on day 4 at pp. 102/9 to 105/7 and 109/3 to 116/21.

44. Fourthly, the criticisms made by Mr Raison were largely supported by Dr Smith, the expert instructed by GWL. I did not hear from Dr Smith during the trial, but had the benefit of his observations in the Final Summary Report of Without Prejudice Joint Discussions Between Experts dated May 2024. In this document Mr Raison and Dr Smith were largely ad idem, whilst Dr O'Riordan sought to take a different path based upon his perception of the factual evidence. I did not find this convincing, for the reasons expressed by the other experts at item 5.2 of this document:

> *"Mr Chris Raison does not understand the claim by Dr Nick O'Riordan that there is ambiguity in the Witness Statement prepared by Jordan Rayner..."*

45. For all these reasons, I accept that Darcliffe have shown that Glanville were in breach of the duties identified above.

C. <u>Reliance/causation (Issues 3 and 5)</u>

46. These are essentially questions of fact.

47. I suggested to Counsel, for consideration as part of their closing submissions, that for this section of the case, the following questions arose, and I did not understand them to demur:

(a) If Glanville were in breach of duty, what was the minimum further and/or different that they were obliged to do in order not to be held negligent?

(b) In the light of the answer to (a), how would Darcliffe's corporate mind have been affected if Glanville had given non-negligent advice as thus defined?

(c) What would Darcliffe have done differently than they in fact did, the corporate mind having been affected as mentioned above in answer to (b)?

48. As regards the first question, it is apparent from Mr Raison's careful evidence that Glanville did not need to do much more than they in fact did in order to avoid a conclusion that they had failed to act with reasonable care and skill. For example, he said in his report at paragraph 14.7(g) that:

> *"All GCL had to do in their report was to provide a single simple warning about the potential for deep weathering and Chalk dissolution features in general terms."*

49. When cross examined on this point his evidence was as follows:

> *"MS MIRCHANDANI: Now, going back to your reference to there being a need for a single line warning …*
>
> *MS MIRCHANDANI: So, in your view, all Glanville had to do was provide a simple generic warning, yes?*
>
> *A Yes.*
>
> *Q And had they done that there would be no negligence?*
>
> *A That's right."*

50. It should also be noted at this juncture that Glanville's (somewhat incoherent) statement at paragraph 4.11 of their report that "*the sites geology is at a low from ground dissolution*" was not necessarily wholly incorrect so far as the assessment of risk or hazard from the ground was concerned. This is for two reasons:

(a) Mr Raison accepted in cross-examination that his "*assessment would be that a low probability was probably correct, but that's not a no probability. It's low and what we don't really understand is what Envirocheck mean by 'low'*";

(b) Envirocheck identified five categories of "hazard potential" from "high" to "no hazard". A "low" hazard was the third of these categories, so that it was certainly not a statement that there was, as it were, no risk in the ground.

51. As to question (b), I need to be satisfied, on the balance of probabilities, that Darcliffe's corporate mind would have been affected if Glanville had given non-negligent advice. In reality, the mind in question would have been that of Messrs Denton and Smith, the principals of the company. As noted above, they gave evidence before me and I have no difficulty in accepting them as honest and careful witnesses.

52. In answering this question in their closing submissions, Darcliffe argued as follows:

> *"50. If Darcliffe had known that dissolution feature should be assumed unless proved otherwise, or if Glanville had warned of the matters summarised in paragraph 49 above, Darcliffe would have investigated the potential cost implications, to pass them onto the vendor of the Land. Darcliffe would have discovered that it was not possible to determine whether dissolution features were present without carrying out very extensive intrusive ground investigation surveys, and the costs could not be predicted. It would not have gone ahead with the purchase. See: Denton W/S paragraph 13."*

53. I do not find it easy to accept that Darcliffe would have taken the drastic step of withdrawing from the transaction. Indeed, Mr Denton's written evidence on the point is more measured, namely that Darcliffe would have taken further advice to understand the potential costs implications: see his witness statement at paragraph 13.

54. Moreover, this issue overlaps with the question of "low risk". Mr Denton clearly attached some weight to Glanville's apparent assessment that the Site was at "low risk", a conclusion which was potentially within the realms of non-negligent advice. For example, he stated in cross- examination that:

> *"Q So, just so I'm clear, you at the time read the conclusion?*

> *A* *I read the conclusion that said "low risk," yes.*
>
> *Q* *You didn't read the rest of the report?*
>
> *A* *I'm not going to claim that I read the rest of the report. I may have skim read it, I'm not going to claim to have read it all, no, any more than I'd - - I'd read all of the other six that we received."*

55. I think, therefore, that Darcliffe would not have withdrawn upon receipt of a (hypothetical) non-negligent report from Glanville. Realistically, I think that they would either not have noticed the additional sentence on a "skim read" or, at most, would have drawn it to the attention of GWL when engaging them for the Phase 2 investigation.

56. In this connection, it is of note that no one at Darcliffe queried the confusing, but now said to be critical, observation by Glanville that "it is indicated that the sites geology is at a low from ground dissolution". This invited questions, such as "indicated by whom" and "a low what", but Darcliffe did not seek clarification on these matters.

57. In summary, therefore, the effect of the Glanville Reports upon Darcliffe's corporate mind was minimal. Darcliffe's corporate mind would not have been much affected, if at all, if Glanville had given non-negligent advice as defined above.

58. As to question (c), I need to be satisfied, on the balance of probabilities, that Darcliffe would have done something different than they in fact did, the corporate mind having been affected to the very limited extent mentioned above.

59. As regards this issue, the highest the evidence can be put was expressed as follows by Mr Smith in cross-examination:

> *"Q* *So, in 2017, after both Glanville reports, you commissioned GWL to carry out intrusive site investigations to investigate the ground conditions and prepare a Phase 2 report.*
>
> *A* *Yes, but had we had the information that there were dissolution features just 80 yards down the road, we would have made sure that GWL would have been alerted too, and we would have carried out not maybe just two excavations but maybe four, five, whatever. The point was we've*

never had the opportunity to do what we would have liked to have done had we been correctly briefed…

Q *So, if I could take you back then to paragraph 9.2 of your statement, what you were saying here is that if Glanville had different advice back in 2014 or 2016, you would have carried out intrusive site investigations to investigate further.*

A *We would have carried out a further investigation, yes.*

Q *Yes, and you in fact did carry out further investigations in 2017.*

A *I suspect, if we'd have had indications of ground dissolution features in the Glanville report, we would've perhaps re-briefed Ground and Water in a different way."*

60. On analysis, this really seems to be saying (putting it in more legalistic terms) that Darcliffe lost the chance to give better and more focussed instructions to GWL, which would, in turn, have prompted GWL to look more carefully for signs of ground dissolution features.

61. This is a somewhat convoluted case, and some way apart from the way in which the case has been pleaded and pursued by Darcliffe. However, leaving that aside, I do not consider that this case is made out on the evidence.

62. On the contrary, it seems to me that GWL were or, at least, should have been aware of all the relevant implications of building on the Site, without the need to be "re-briefed".

63. In particular, when Darcliffe sought from GWL "a full Phase 2 intrusive site investigation to inform the detailed design" in September 2017, they:

(a) Sought an "*interpretive report…with a full geotechnical assessment including…buried concrete classification, ground floor construction stability/dissolution risk*";

(b) Provided a link to Glanville's Phase 1 Geo-Environmental Assessment.

64. The link to Glanville's Phase 1 Geo-Environmental Assessment was important, because this allowed GWL access not only to Glanville's assessment, such as it was, but also to

the Envirocheck report, which set out the desktop state of knowledge of the ground conditions. Indeed, in GWL's report they stated at paragraph 1.3 that:

> *"This report relies upon the Glanville Phase I Geo-Environmental Assessment Report, Issue 3, dated 29th April 2016. Total reliance has been placed on this report and no liability can be taken for their short comings."*

65. Whether GWL were entitled to so rely as a matter of law is the subject of issue 18. But as a matter of fact, GWL had access to, and relied upon, the underlying information which Glanville had obtained.

66. Furthermore, GWL were in fact aware of the fact that the Site was "underlain by the Seaford Chalk Formation" (January 2018 Report para 2.4, and see also para 4.1). It follows that GWL, and Darcliffe, were in no different a position in 2017/2018 than they would have been if Glanville had provided the limited further assessment which Mr Raison contends, and I accept, should have been provided.

67. It follows that Darcliffe have, on the facts, failed to establish a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of Glanville's duty of care. That is because, in summary:

(a) The minimum further and/or different performance that Glanville were obliged to provide in order not to be held negligent was quite limited;

(b) I do not accept that Darcliffe's corporate mind would have been much affected, if at all, if Glanville had given non-negligent advice as thus defined;

(c) I do not accept that Darcliffe would have done something different than they in fact did: they would simply have engaged GWL on the terms and with the instructions which they did.

D. <u>Losses (Issues 6, 21 and 22)</u>

68. Given my findings above, these issues fall away. However, I will address the submissions made by the parties briefly.

69. Broadly speaking, Darcliffe's case is that, if they had been properly advised, they would not have proceeded with this development at all. In fact, they say, they did purchase the Site and develop it: but, in order to do so, they had to incur substantial remediation costs, which they claim. Alternatively, they seek damages on the basis established in the well-known case of Perry v Sidney Phillips & Son [1982] 1 W.L.R. 1297, 1302:

> *"…you have to take the difference in valuation. You have to take the difference between what a man would pay for the house in the condition in which it was reported to be and what he would pay if the report had been properly made showing the defects as they were. In other words, how much more did he pay for the house by reason of the negligent report than he would have paid had it been a good report?"*

70. It seems to me that, in principle, damages on a Perry v Sidney Phillips basis are recoverable. If, on this assumption, Glanville had properly performed their obligations, this loss would not have been incurred. I do not think that the primary basis of claim is sustainable, being closer to a claim arising from a breach of warranty.

71. However, Glanville submit that credit must be given for fact that, in the event, the houses developed on the Site were sold for more than Darcliffe had originally forecast. Thus, they submit, there was a single transaction, in which the unanticipated remediation costs must be reduced by the (equally unanticipated) revenues. They say that the starting point is the net loss made by Darcliffe (circa £2m, and subject to a reduction for the monies recovered from GWL, thus reducing the loss to a very small sum).

72. To resolve this question, it is necessary to consider the law in relation to collateral benefits and mitigation.

73. The starting point is that there can be no recovery generally for loss which has been avoided by ordinary or reasonably necessary means. The law is summarised thus in *McGregor on Damages 22nd Ed.*:

> "*10-111 The first subdivision of the rule can often be very simple to apply. Frequently a claimant will have taken the required reasonable steps of mitigation and thereby have avoided such part of the loss as was reasonably avoidable. No difficulty arises in such circumstances. But the claimant may have gone further and, by sound action, may have avoided*

more consequences than the dictates of the law required of them. In such circumstances the position has been definitively stated by Viscount Haldane LC in the leading case of British Westinghouse Co v Underground Ry. *He put the rule thus:*

> *"When in the course of his business he [the plaintiff] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."*

Later in his speech he said similarly:

> *"Provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage."*

He emphasised, however, that:

> *"... the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business."*

Where steps are taken by the claimant after the wrong which reduce their loss, the important practical question is to ascertain (i) which, if any, of the steps taken come within and satisfy Viscount Haldane's formulation, (ii) what subsequent transactions of the claimant are to be regarded as arising out of the consequences of the wrong and also, (iii) in the case of contract, which steps arise in the ordinary course of business. This question, which might be more neatly stated as whether the claimant's conduct was ordinary or reasonably necessary, will be considered in due course; it represents the core of the problem of mitigation by way of avoided loss."

74. However, it is important to note that, to engage this principle, the benefits to be taken into account must arise out of the consequences of the breach. This point was emphasised in the recent decision of the Supreme Court in Stanford International Bank Ltd (in liquidation) v HSBC Bank plc [2023] A.C. 761, per Lord Leggatt JSC at paragraph 55:

> *"55. SIB's argument is thus flawed because it disregards the net loss rule. This is the basic rule that applies in awarding damages for breach of contract or in tort that losses and gains arising from the breach must be netted off against each other and only any net loss awarded as damages.*

> *The leading authority for the rule as it applies to claims for breach of contract is* British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] *AC 673, where the House of Lords held that savings made by the claimant from installing more efficient turbines to replace turbines supplied by the defendant which did not comply with the contract had to be taken into account in computing damages. Viscount Haldane LC said, at p 691, that "the principle which applies here is that which makes it right ... to look at what actually happened, and to balance loss and gain". Among many authorities for the net loss rule as it applies to claims based on negligence in tort, a good example is* Hodgson v Tra*pp [1989] AC 807, 819, where Lord Bridge of Harwich said:*
>
> > *"My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character ... the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages. All this is elementary and has been said over and over again"."*

75. In this case, the benefits sought to be taken into account do not arise out of the consequences of the breach. Darcliffe sold the houses on the Site, once complete, as they had always planned to do. These sales, and the prices obtained, did not arise out of the breach.

76. Glanville also submitted that the losses claimed were irrecoverable because they fell within the second limb of the rule in Hadley v Baxendale (1854) 9 Ex. 341, i.e. that they did not arise naturally, i.e. according to the usual course of things from such breach of contract itself and were not such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. I do not agree: it seems to me that, if Darcliffe had succeeded in establishing causation and reliance, the damages claimed would fall within the first limb of that rule.

E. Miscellaneous (Issues 7, 8, and 18)

77. Issue 7, so far as relevant in view of the above, raises the matter of Contributory Negligence. The only matter in that connection which was pursued in the evidence at

trial was an alleged failure to coordinate the activities of the subsequent ground investigation and Phase 2 works undertaken by GWL in 2017 and 2018 with the geophysical magnetometer survey by TVAS in July 2019. TVAS are a company which carries out surveys for archaeological purposes.

78. What is said is that the geophysical magnetometer survey identified both geological and general magnetic anomalies over significant parts of the site, and reported the same in the form of an interpretation plot. In view of these anomalies, it is suggested that Darcliffe should plainly have provided the results of the survey to GWL in the first instance, and to Glanville for information.

79. This seems to be wholly unrealistic. I accept the evidence of Mr Ben Longworth, on behalf of Darcliffe, to the effect that this survey was to ensure that there were no difficulties, from an archaeological point of view, in developing the Site. The TVAS survey gave Darcliffe a clean bill of health in this regard, as he had hoped they would, and Darcliffe were therefore free to pursue the development. To suggest that, at this late stage, Darcliffe should have understood the TVAS survey to undermine what they had been told by Glanville and GWL strikes me as completely unreal. Glanville and GWL were, collectively, the ground investigation experts and they had raised no concerns.

80. Issue 8 would require the Court to determine whether any of Darcliffe's claims against Glanville are time-barred by reason of s.2 or s.5 of the Limitation Act 1980. Glanville's position on limitation is set out in paragraph 59 of its Defence.

81. However, this limitation defence arises only in respect of Darcliffe's alternative claim for additional planning costs. It does not arise to the extent that they are able to pursue their primary claim against Glanville for additional construction costs. Further, this limitation defence arises only in respect of any claim made in respect of the First Glanville Report in 2014. It does not apply to any claim made in respect of the Second Glanville Report in 2016.

82. In view of the findings made above, this issue falls away.

83. So far as issue 18 is concerned, I have already indicated, above, that GWL did, as a matter of fact, rely upon the Glanville Reports. As a matter of law, they were not entitled to do so, since the Glanville Reports contained the following disclaimer:

> *"This report contains confidential information intended solely for the recipient. This report has been prepared in accordance with the commissioning brief and is for the client's exclusive use unless otherwise agreed in writing. Glanville Consultants Ltd does not accept liability for any use of this report, other than for the purposes for which it is was originally prepared and provided. Third parties should not use or rely on the contents of this report without written permission from Glanville Consultants Ltd."*

F. Answers to issues

84. For the reasons given above, it is probably sufficient to say that this claim fails as a matter of causation. However, for the sake of completeness, I answer the issues put before me below:

1. What were the terms of the contracts between Darcliffe and Glanville?

   Glanville were obliged to carry out a Phase 1 Geo-Environmental Survey.

2. What duties were owed by Glanville to Darcliffe when producing the report(s)?

   Glanville owed Darcliffe a duty to produce their reports with reasonable skill and care.

3. Did Darcliffe rely upon the report(s) produced by Glanville when purchasing the Land? If so, was such reliance reasonable and/or reasonably foreseeable?

   No.

4. Did Glanville fail to exercise the degree of reasonable skill and care to be expected of a reasonably competent engineer producing a Phase 1 report(s), when it produced the report(s), in any of the respects set out in paragraph 64 of the Particulars of Claim?

Yes.

5. Have any of the alleged breaches of duty by Glanville caused Darcliffe a loss?

No.

6. Do the losses claimed by Darcliffe fall outside the scope of the duties found to be owed (under Issue 2 above) by Glanville to Darcliffe?

No. Darcliffe obtained the reports from Glanville (and GWL) to guard against this loss.

7. Was Darcliffe contributorily negligent in the manner set out at paragraph 58 of the Glanville Defence?

No.

8. Are any of Darcliffe's claims against Glanville time-barred by reason of s.2 and s.5 Limitation Act 1980?

None of the claims in tort are time-barred.

18. Did GWL rely upon the report(s) produced by Glanville when producing their own report(s)? If so, was such reliance reasonable and/or reasonably foreseeable?

GWL did rely on the reports produced by Glanville as a matter of fact, but were not entitled to do so as a matter of law.

21. What is the appropriate measure of loss in respect of each Defendant?

Darcliffe would have been entitled to the difference between the price paid for the Site and what they would have paid if the reports had been properly made showing the ground conditions as they were.

22. Does Darcliffe have to give credit for profit it made in developing the Land?

No. Darcliffe have not made a profit. The development has resulted in a loss to Darcliffe.

85. For these reasons, this claim falls to be dismissed. Counsel are invited to agree any consequential matters or, if they cannot be agreed, make proposals as to how they should be resolved.