FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 37
A116/13

Lord President
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the cause

by

ANGELA McMANUS and ROBERT McMANUS

Pursuers and Reclaimers

against

SCOTT WILSON SCOTLAND LIMITED

Defender and Respondent

Pursuers and Reclaimers: R D Sutherland; Allan McDougall, Solicitors
Defender and Respondent: Duncan QC, P. Reid; CMS Cameron McKenna Nabarro Olswang LLP

7 July 2021

Introduction

[1] This is a reclaiming motion in the lead case of a group of 44 actions for damages arising from the same circumstances (see Court of Session Direction No 1 of 2013, Personal Injury Actions relating to alleged ground contamination at the Watling Street Development in Motherwell). The other actions remain sisted. The pursuers challenge the

Lord Ordinary's decision to absolve the defender of liability for personal injury said to have been caused to the pursuers by exposure to contaminated vapours.

[2] Between about 1912 and 1939 there was an iron and steel works adjacent to the Watling Street site. From 1945 to 1947, part of the site was occupied by the Ministry of Supply for the purpose of dealing with clothing and surplus equipment from demobilised soldiers who had returned from World War Two. From 1947 to the late 1970s or early 1980s there was an engineering works on the site. The works were occupied by companies in the AIE Group, in particular Metropolitan Vickers and Satchwell Sunvic.

[3] The Watling Street housing development was planned and completed between 1990 and 2001. The defender is the successor entity to a firm of engineers that entered into engagements with a number of parties at different times in connection with the development of the site. For convenience we shall also refer to that predecessor as the defender. The other contracting parties were the Scottish Development Agency ("the SDA") (which became Scottish Enterprise), Lanarkshire Development Agency ("LDA"), City Link Development Company Limited ("City Link"), and Scottish Homes. The pursuers' case is that the defender breached duties of care they maintain were owed to them as future residents in respect of the investigation and remediation of contamination at the site.

[4] The action was formerly directed against four defenders: City Link; the present defender; North Lanarkshire Council; and Lanarkshire Housing Association Limited ("LHA"). However, the Council was assoilzied on 20 September 2013, and the actions against City Link and LHA were dismissed on 13 January 2016 ([2015] CSOH 178). A reclaiming motion against the dismissal of the action against City Link was not insisted upon, and a reclaiming motion against dismissal of the action against LHA was refused on 14 February 2017 ([2017] CSIH 12).

The pursuers' case

[5] The pursuers' case against the defender is that its duties included investigation of the extent of contamination of the site; advice on remedial steps required to make the site suitable for residential development; and preparation of a scheme for, and the administration and supervision of, remediation. They aver that the defender knew or ought to have known that various solvents and other organic compounds would have been used on the site, and that there was a high degree of probability that there would be associated ground contamination by volatile organic compounds ("VOCs"), including trichloroethylene ("TCE") and tetrachloroethylene ("PCE"), and by semi-volatile organic compounds ("SVOCs"). The ground on which the houses which the pursuers occupied were situated is said to contain VOCs and SVOCs. TCE is said to have been detected. The pursuers' case is that at different stages the defender did not exercise the skill and care required of a reasonably competent environmental consultant, and that as a result it breached the duty which it owed to future residents such as the pursuers.

The proof

[6] The Lord Ordinary heard a proof before answer on two issues:

1. What duties (whether contractual or delictual) did the defender owe in relation to the work it undertook at the Watling Street site, to whom did it owe those duties, and what was the scope of those duties?
2. Did the defender breach any of those duties in the course of the remediation of the Watling Street site?

The proof lasted 12 days. The pursuers led evidence from six factual witnesses: Dr Peter Smith, a senior staff member at the Strathclyde Regional Chemist (the "RC"); Scott McKinnon and Ronald McLetchie from City Link; Hugh Blackwood, the defender's project manager and, from 2005, chief executive; Samuel (known as Stewart) Proud, who became involved in the project for the defender in 1994 as an assistant civil engineer; Roger Doubal, a chartered civil engineer for the defender who was also involved from 1994; and Kenneth O'Hara, the defender's nominated project manager from 1990. The Lord Ordinary gave a brief overview of those witnesses' evidence at paras [18] - [24] of his opinion ([2020] CSOH 47). The pursuers led two expert witnesses: Elizabeth Copland, a chartered geologist specialising in contaminated geology; and Dr Raymond Cox, a consulting engineer. The only witness adduced for the defender was an expert witness, Philip Crowcroft, a chartered engineer specialising in land condition. That specialism became an accredited one in 2002 under the auspices of the Specialists in Land Condition Register Ltd, which Mr Crowcroft had chaired. The Lord Ordinary set out a history of the site at paras [3] - [5], and he described the various stages of the defender's involvement with the site at paras [6] - [17]. For present purposes it is not necessary to rehearse all of that material.

[7] Discussions about development of the site between City Link, as developer, and the SDA took place in 1986. The SDA was granted conditional outline planning consent for residential development. The site was divided into four parcels of land: Plots A, B1, B2 and C. One of the planning conditions was to carry out a detailed investigation of soil at the site to establish the nature, concentration and distribution of contaminants. The applicant would require to remove or render harmless any contamination found.

[8] Thorburn Associates were commissioned by the SDA to prepare a geotechnical investigation to determine the soil conditions. Thorburn's report, dated June 1988, referred

to the former iron and steel works and to the former engineering works. The appendices to the report included a plan showing existing ground levels.

[9] By 1990 City Link had proposed to develop Plot A. They engaged a firm of architects to prepare the draft housing layout. They contacted the defender with a view to it designing road and infrastructure works, and between February and May 1990 there was discussion at meetings and in correspondence about the investigation of the site for contamination. By letter dated 29 May 1990 the defender provided a proposal to City Link for an investigation for potential contamination. However, no engagement in terms of that proposal was agreed. It was superseded by a subsequent joint proposal by the defender and the RC.

[10] The RC had considerable experience of contamination studies for the SDA and others around former industrial sites in the west of Scotland. On 22 June 1990 the defender wrote to the RC seeking a proposal for contamination studies relating to the site. It enclosed "various copies of old OS sheets collected during our own desk studies", the Thorburn report, and that report's appendices. Answers to two questions were sought with a view to residential development of the site: (1) "is the site contaminated?", and (2) "what would be the appropriate measures and cost of cleaning up the [site] to the satisfaction of the District Council Planners?" Dr Smith replied with proposals on 25 July 1990. He saw no need to request further information from the defender. He mentioned "a little first hand experience" the RC had in respect of a small area of the site. In 1984 the RC had investigated whether there was pollution below tanks that had held effluent from the process of metal plating. The tanks had been intact, with no evidence of leakage. The RC's proposals were produced on the basis of this information and the information sent by the defender. The RC advised that contamination by heavy metals and possibly acids, cyanide and oil could be expected from the engineering processes. It recommended a grid arrangement of

investigation pits, carried out in a single phase or over two phases, and that samples should be analysed for pH, loss on ashing, sulphate, sulphide, cyanide, cyclohexane extractable material, copper, nickel, zinc, lead, cadmium, chromium and arsenic. While that would not be a comprehensive analysis, it would cover all the likely major contaminants on the site.

[11] The RC's proposals led the defender to send City Link and the SDA a joint proposal from it and the RC dated 1 August 1990. The defender pointed out that its own input was significantly reduced compared to the proposal of 29 May 1990 because of the RC's involvement. The joint proposal reflected the proposals which the RC had made to the defender: *viz.* a single stage survey with pits excavated on a 50m grid; or a first phase of investigation with pits 100m apart, and a later second phase of investigation with further pits. The RC would undertake the fieldwork and prepare a factual report. The defender would manage the project and provide an assessment of the results and investigations. The suite of contaminants to be tested for was that identified in the Interdepartmental Committee on the Redevelopment of Contaminated Land ("ICRCL") Guidance Note 59/83 – Guidance on the Assessment and Redevelopment of Contaminated Land (Second Edition, July 1987) as being likely possible contaminants where a site had been used as an engineering works. The guidance note provided action levels and (lower) trigger levels for each contaminant. The joint proposal took a conservative approach and proposed that trigger levels would be sufficient to justify action.

[12] On 10 September 1990 the SDA instructed the defender and the RC to proceed with the two phase approach in the joint proposal. For phase 1 the RC excavated 13 trial pits. Samples were examined for the most likely pollutants. Cyclohexane extractable matter ("CEM") was assessed for the presence of organic material. The CEM test identifies the

presence of organic matter but does not identify the particular material involved. No CEM exceeding the trigger level was detected.

[13] In early 1992 the defender sent LDA, now dealing with the site, a proposal for phase 2, with estimated costs. 50m pit spacing was recommended. Pits would be within, rather than duplicative of, the areas already sampled. A selective analysis of the samples would follow. The RC would carry out the fieldwork. LDA accepted the proposal and instructed the commencement of phase 2. The defender sent the RC a plan showing proposed inspection pits. For this phase, the RC was directly employed by the defender, rather than LDA. Work began on 17 February 1992.

[14] The RC's factual phase 2 report of April 1992 stated that the pits excavated omitted areas covered by phase 1 and that the phase 1 and phase 2 reports gave good cover of the site as a whole. CEM was recorded, probably due to oil. In general, the higher results were associated only with the surface. In May 1992 the defender produced a report titled "Summary of Contamination Studies and Associated Development Costs". The conclusion was that the level of contamination was typically low. There was ash and slag on the ground, probably residual from the iron and steel works. The defender recommended the layer of ash on the site should be removed to landfill. The deeper made ground, ie ground that had been placed on natural ground in particular areas following upon earlier activity at the site, should be excavated and removed, or capped. It advised that it would be prudent to verify the cleanliness of the site and identify areas of deeper made ground which required treatment. It proposed three possible remediation options, including removal of all made ground off-site and its replacement with clean fill.

[15] The site was divided into four parcels for remediation, *viz.* A1 to A4. On 15 October 1992 City Link wrote to LDA expressing a preference for the removal of all made ground.

LDA asked the defender to prepare a proposal for the removal of all made ground, but also alternatively for the removal of only contaminated made ground and a more limited import of clean fill. The defender produced the tender documentation to be used for bids by contractors. CEM testing was not included on the basis that the investigations carried out showed that the major contaminants of concern were in the ash and slag. Any CEM contamination could be identified through sight or smell during remediation or subsequent verification.

[16] On 17 November 1992 the defender wrote to LDA confirming the contract was for the removal of contaminated material, based on the alternative option. Removal of all made ground was prohibitively expensive. The purpose of the works was to release the whole site for residential development. The defender stated its belief that the remediation proposed was appropriate for development of the site for residential purposes.

[17] On 15 December 1992 the defender provided a duty of care letter to Scottish Enterprise. (On 5 July 1994 a further letter in identical terms was provided at Scottish Enterprise's request because the letter of 15 December 1992 had been lost.) The heading was "Remediation of Contaminated Ground; Duty of Care Undertaking". The letter stated:

> "We have been appointed as the Engineer by Lanarkshire Development Agency ('LDA') in respect of the remediation of the Site … so that on completion of the remediation works all contamination within or affecting the Site shall be removed so as to enable the entire Site to be developed for residential purposes and to this end we have been instructed *inter alia* to carry out all necessary investigation at the Site, to recommend the remediation works which are required, to prepare building contract documentation (including the bills of quantity and specification) in respect of remediation works recommended by us, to supervise the execution of the remediation works by the contractor and to issue a Certificate of Substantial Completion on the remediation works being satisfactorily completed (all hereinafter referred to as 'the Project')."

The defender undertook to have exercised the reasonable skill, care and diligence expected of a professional and competent engineer, and to do so in any future documents or services supplied in connection with the Project. The beneficiaries of the obligations undertaken were the proprietors of the site and holders of standard securities.

[18] In 1993 I & H Brown was appointed as the contractor for the remediation works. In turn, it appointed Clyde Analytical as sub-contractor for the analytical work. More material than anticipated required to be removed, giving rise to difficulty in obtaining landfill space. As a result, the defender was asked to estimate the cost of capping soil on area A4 instead of removing it. It proposed burying this remaining material on site. In April 1993 it sent the LDA a report titled "Proposal for the Burial of Ash on Site Below Future Residential Development".

[19] In July 1994 the defender produced its "Report on Post-Remediation Condition". This included logs of all validation trial pits supervised by Clyde Analytical, results of analytical testing and discussion of the verification procedure. Removal of most of the ash and the contaminated made ground had taken place. The report indicated that once the final layout of the development was known a suitable strategy should be implemented for those areas where ash remained, but that the site was now "an area with an acceptably low level of contamination, and therefore considered to be suitable for residential development". It stated that the remediation objectives had been substantially achieved, except for localised areas across the site not addressed for practical reasons; and it highlighted areas that might require further removal of ash and slag once the site layout was known.

[20] In the course of remediation, deep buried brick structures were found in parcel A2. LDA decided that these should be demolished. In November 1994 the defender was asked to manage and report upon the resulting further remediation works. Verification testing

was carried out by another contractor, Central Building Contractors ("CBC"), with analysis by Altec Laboratory Services Limited. The defender provided Altec with the testing regime, including tests additional to those that had been in the original testing schedule identified by the RC. In April 1995 the defender produced an "Addendum Report on Post-Remediation Condition", dealing with the parts of parcel A2 in respect of which Altec carried out verification testing. The report concluded that if the area was to be used for residential development further contaminated material would require to be removed. Alternatively, if it was to be open space it could be capped with imported material.

[21] On 25 November 1994 Rennick Partnership wrote to the defender advising they had been instructed by Wilcon Homes Northern Limited, which was developing Plot C, to prepare a ground investigation report. Rennick indicated that there was a strong chemical smell in a trial pit. The pit was outside the areas investigated by the RC or verified by I & H Brown and Clyde Analytical. A representative from the defender visited the pit. The defender's Mr Doubal wrote to Rennick on 30 November stating that the nearest three pits at the time of the defender's site investigation had not revealed anything untoward; and that the remediation carried out there had been verified by post-treatment investigation using pits, testing and reporting.

[22] City Link applied for planning permission for the western part of the site on 3 May 1995. On 3 August 1995 City Link forwarded a letter to the defender from solicitors acting for Wilcon Homes complaining that the defender did not appear to be prepared to investigate the chemical smell which Rennick had raised with it. The defender indicated that it had offered to provide further comment to Rennick if further information was provided but that none had been provided. It was still willing to assist if required. On 4 September 1995 Rennick sent a laboratory analysis from Kerr Mellor Associates which

showed that TCE had been found in the ground near the pit. On 15 September 1995 the defender, City Link and the LDA met to discuss a report from Kerr Mellor. The view of the meeting was that the contaminated material should be removed, with capping or *in situ* treatment considered inappropriate. In October 1995 the defender advised City Link that the removal of all of the solvent contaminated soil may be the only course of action able to satisfy the perceptions of prospective purchasers and their advisors. The defender provided a statement of the likely additional cost of that work.

[23] North Lanarkshire Council granted City Link's planning application on 10 January 1996. On 5 September 1997 Scottish Homes wrote to the defender seeking a fee offer for the provision of general site condition reports in relation to Plot B. Scottish Homes told the defender that data was sought for information only, and housing associations bidding to have housing on Plot B would require to satisfy themselves of the condition of the site for the purposes of their specific proposals. The defender gave a fee offer with proposals for further work. This was accepted, with a request for site reports by 30 September 1997. The defender engaged Wimtec Environmental Ltd to carry out supplementary trial pit investigation and testing. Plot B was considered in two sections, B1 and B2. The defender produced reports titled "Watling Street, Motherwell Plot B1 - HAG competition Site Condition Report" and "Watling Street, Motherwell Plot B1 - GRO competition Site Condition Report" in October and November respectively. Both included comments based on conditions recorded during investigation and remediation works. The reports stated that there had been ground investigations, but that conditions existing may not have been revealed. The reports included inspection pit records and trial pit logs.

[24] The contractor dealing with the development of Plot A was Central Building Contractors Limited ("CBC"). In 1999 the defender expressed concern about a landscaping

bund created by CBC using ash and slag. The defender had not been informed about the proposed bund.

[25] CBC carried out further remediation works during the construction phase, based on analysis of soil samples prepared by Scientifics Ltd. The defender was asked to prepare a report in relation to the removal of remaining ash and slag. The draft report of June 2001, "Supplementary Post-Remediation Report Following Completion of Phase 3 at Development Site A", was addressed to City Link. The report relied upon information provided to the defender by CBC and Scientifics, with the involvement of Paisley University, in respect of the supplementary remediation works carried out. The report concluded:

> "To the best of our knowledge the supplementary remediation works have been completed and the degree of risk of harm from chemical contamination has been reduced to an acceptably low level consistent with the residential use of the site".

[26] The Lord Ordinary summarised the pursuer's expert evidence at paras [25] - [27] of his opinion, and he outlined Mr Crowcroft's evidence at paras [28] - [32]. In Mr Crowcroft's opinion, in performing their obligations the defender had acted in accordance with the ICRCL guidance and with normal practice at the material times.

[27] The Lord Ordinary held that in view of the nature of the potential contaminants, the seriousness of the injuries they could cause, and the fact that a significant number of individuals could be exposed to potential harm, there was sufficient proximity between the defender and future residents on the site for the defender to have owed a duty of care to those residents. However, the nature and terms of the defender's involvement at each stage was very important (*South Australia Asset Management Corporation* v *York Montague* [1997] AC 191, at 211; *Hughes-Holland* v *BPE Solicitors* [2018] AC 599, para [38]). The scope of the duty owed by the defender to the pursuers was not as wide as the pursuers contended. The defender had not assumed responsibility for the advice and methodology put forward by

the RC. The defender's duty of care to future residents had been to exercise reasonable care when performing its agreed role under the various contracts.

[28] The defender had not breached that duty. The Lord Ordinary accepted Mr Crowcroft's evidence that the defender, under reference to the test in *Hunter* v *Hanley* 1955 SC 200 (LP (Clyde) at 206), had complied with normal practice and exercised reasonable skill and care in carrying out the work which it had done. Mr Crowcroft had first-hand experience and he was very well qualified to give evidence as to normal practice at the material times.

[29] The Lord Ordinary was satisfied that the defender undertook a desktop study. There were references in the defender's files to that exercise, and there was a contemporaneous reference to "our own desk studies" in the defender's first letter to the RC. The desktop study undertaken had been more comprehensive than that done by Thorburn in relation to the neighbouring Java Street site.

[30] The grid and phased approaches had been normal practice at the time. The scope of the investigations carried out at the site was based on the RC's advice which had also been in accordance with normal practice. The SDA had decided the grid of sampling it was prepared to pay for. The defender gave clear warnings that there could be other areas of contamination which had not been identified. The various uses of the site and the unknowns in relation to processes actually carried out there underpinned the methodology for investigation and the eventual choice of remediation approach, *viz.* removal of all contaminated made ground. Visual and olfactory methods to identify localised hotspots were important. A remaining contaminant might well be identified during later works using such methods.

[31] The defenders had not had a duty to review their work when TCE was discovered near the trial pit in 1995, for the reasons given at para [61] of the Lord Ordinary's opinion.

[32] Evaluation of testing complied with the relevant guidance. One would look to the ICRCL lists of substances and their trigger or action values and speak to someone with knowledge of industrial processes, such as the RC. CEM testing had provided coverage for organic substances, but avoided the cost of detailed analysis looking for individual organic compounds. The ICRCL guidance did not recommend testing for every contaminant which might possibly be associated with the prior use of a site. That would be wholly disproportionate.

[33] It was reasonable for the defender to rely on the advice of the RC. The RC was the expert in detecting contamination and in interpreting the significance of the industrial history of the site. The joint proposal was a joint project in which the defender's own input was significantly reduced as a result of the involvement of the RC, who had been separately appointed by the SDA. The defender did not present the RC's advice as its own. *Try Build Ltd* v *Invicta Leisure Tennis* (2000) 71 Con LR 140 and *South Lakeland DC* v *Curtins Consulting Engineers Plc* (unreported, 23 May 2000) were different on the facts. The defender also reasonably relied on the RC for guidance as to remediation strategy. It did not separately assume responsibility for this. In relation to tendering, and undertaking the supervision of remediation, the defender complied with practice. The defender's reports gave a thorough exposition of the remediation carried out, but made clear there could still be problems requiring action. The SDA was told that the work was "not a comprehensive analysis but would cover all of the likely major contaminants on site." Verification was managed by a person experienced in dealing with contaminated land.

[34] The pursuers failed to establish particular information that the defender should have identified or what would have been taken from it. Dr Cox's suggestion of TCE and/or PCE use by the Ministry of Supply was speculation about a possibility. The ground had since been substantially disturbed by the demolition and construction of buildings, and the removal of the upper metre of soil. Any TCE or PCE would have been likely to have become volatile and dispersed. The suggestion of the burial, rather than removal and incineration, of solvent contaminated sludge was also speculation. Dr Cox and Ms Copland could not say where localised or targeted testing should have taken place. There was evidence of looking and testing for organic contamination. Ms Copland did not assert that testing should have been more extensive or differently focused.

[35] In producing the Supplementary Post-Remediation Report in 2001, it was reasonable for the defender to rely upon what they had been told was done by CBC and Scientifics. The defender had no reason to consider that this work had not been performed responsibly.

Submissions

Pursuers

[36] The Lord Ordinary had not clearly identified what the agreed role of the defender was. It was not merely satisfying a duty to the pursuers to exercise ordinary care and skill when performing its various contractual obligations. The defender had undertaken responsibility for the investigation and remediation of contamination at the site. That assumption of responsibility gave rise to a duty of care to the pursuers. The defender had taken direct responsibility for investigation and remediation because it had undertaken responsibility for the investigation for contamination during the meetings and

correspondence between February and May 1990, culminating in the proposal of 29 May 1990. Moreover, it had adopted the RC's work as its own.

[37] The Lord Ordinary had been plainly wrong in finding in fact either that the defender had produced a desktop study which it sent to the RC or, if it did that, that it was adequate. The defender had not carried out or facilitated a sufficiently extensive inquiry into the past use of the site. What was required, as a desktop study, was stated in the guidance applicable at the time. Those requirements were not met. It was not sufficient simply to have given the RC the information which the defender had provided. The RC's limited prior knowledge could not be relied upon to elide the duty to provide adequate information. The defender itself recognised the limited value of the Thorburn report. The RC was a chemist, not an industrial expert. The Lord Ordinary was not entitled to accept Mr Crowcroft's evidence on this point without balancing it against all of the other information. He had not identified an actual report produced by the defender; none had been lodged, and it had not been mentioned in other correspondence where one would expect it to be. Various documents had referred to desktop studies or material, but they had not described what in fact these were. Something the defender described as "our own desk studies" had been sent to the RC, but no consideration had been given to whether it met the required standard of detail as regards manufacturing processes, identification of possible solvents, where these would have been found on the site, and how they may have been transported across it. An adequate desktop study should have revealed this information.

[38] The defender ought to have made provision in the Bills of Quantities for the remediation work for CEM testing at the validation stage.

[39] The defender had a duty to review its prior work upon the apparent discovery of TCE in 1995. While City Link were aware of the incident, they did not appreciate its significance.

[40] Some of the factors taken into account by the Lord Ordinary went beyond the scope of the proof, because they concerned causation rather than the existence of a duty or the occurrence of a breach. Examples included the absence of evidence about locations for targeted testing, and precisely what would have emerged had the defender reviewed its work after the TCE discovery.

Defender

[41] What the defender ought to have discovered or have done at different stages were matters within the scope of the proof. They involved the scope and content of the defender's duty. The Lord Ordinary was entitled to take into account the deficiencies in the evidence in this respect. Neither Ms Copland nor Dr Cox gave evidence on how information not discovered would have directed the investigation differently, such as where localised testing would have taken place; what a review after the TCE finding would have involved, and what its outcome would have been; or how remediation ought to have been conducted.

[42] The Lord Ordinary correctly identified that the defender had relied on the RC to interpret the significance of the industrial history of the site. Dr Smith's evidence was that more information could have been sought if he had thought it necessary. The Lord Ordinary accepted the evidence of Mr Crowcroft about the existence and sufficiency of the desktop study. There was evidence which entitled the Lord Ordinary to conclude that the desktop study was consistent with the ICRCL guidance and normal practice. A grid approach to investigation was preferable to a targeted approach where the likely location of

potential contaminants on a site was unknown. CEM testing would pick up solvents, even if it would not specifically identify them. The suite of testing used accorded with the ICRCL guidance and with normal practice.

[43] It did not appear to be suggested that the remediation strategy had been inappropriate to deal with the contamination revealed by the investigation stage. The approach to remediation was recommended by the RC and was in line with normal practice. The contamination was associated with the ash and slag forming made ground, which was to be removed. It was reasonable to rely on sight and smell to pick up any further contaminants during remediation and later construction work. There was evidence the contractors did detect some other contaminants by such means. The defender's reports made clear what had been done and warned of the possibility of undetected contamination.

[44] The Lord Ordinary had been entitled to assess the expert evidence in the way which he had. The question was whether he was plainly wrong (*Thomas* v *Thomas* 1947 SC (HL) 45; *McGraddie* v *McGraddie* 2014 SC (UKSC) 12). There was no basis in the present case for the court interfering unless that question was answered in the affirmative (cf *Ted Jacob Engineering Group* v *Morrison* 2019 SC 487, at para [10]). The content and manner of Ms Copland's evidence had been unimpressive, and the only basis upon which she was able to speak to normal practice at the material times was by reference to the contemporaneous guidance. She had no personal knowledge or experience of practice at those times. Mr Crowcroft's opinion, which he was well placed to give, had been that the defender did not depart from normal practice, *per* the second part of the test in in *Hunter* v *Hanley* 1955 SC 200 (LP (Clyde) at 206). The pursuers had not engaged with the Lord Ordinary's finding on that critical issue.

[45] The defender had not owed a duty to future residents to review its earlier work when TCE was noted in 1995. The Lord Ordinary had been correct to reject the contention that the defender had such a duty.

Decision and reasons

Expert evidence

[46] The most fundamental of the difficulties which the pursuers have is that the Lord Ordinary accepted the expert evidence of Mr Crowcroft and he rejected Ms Copland's evidence where it differed from Mr Crowcroft's. He provided clear and convincing reasons for doing that. We are not persuaded that it has been demonstrated that the Lord Ordinary went plainly wrong in that regard. The upshot is that the pursuers have failed to make good their case of breach of duty by the defender.

Scope of duty of care

[47] The pursuers maintained that the Lord Ordinary erred in finding (para [55]) that the extent of the defender's duty of care to the pursuers was to exercise reasonable care when performing its agreed role under the various contracts. Ultimately the essence of the submission appeared to be that, standing the terms of the defender's pre-contractual communications with City Link and the terms of the engagements which it ultimately entered into in relation to investigation and remediation, the defender undertook or assumed responsibility to the SDA for the RC's advice and methodology in relation to the investigation and remediation of the site; and that accordingly it owed a duty of care in that regard to future residents on the site.

[48] We are not persuaded that the Lord Ordinary erred in rejecting that contention or in determining the scope of the defender's duty in the way which he did. We are not convinced that the pre-contractual communications with City Link had the effect which the pursuers contended for. The proposal of 29 May 1990 was superseded by the joint proposal, and the defender made it very clear that its role under the joint proposal was not as wide as its role would have been had the earlier proposal been accepted. The defender did not present the RC's advice in the joint proposal as its own - the RC was separately appointed by the SDA in terms of that proposal. In our opinion the Lord Ordinary was correct to decide as he did.

[49] In any case, we are not satisfied on the evidence that any aspect of the RC's advice or methodology in relation to the investigation or the subsequent remediation was other than in accordance with the ICRCL guidance and normal practice at the material times. Accordingly, even if, contrary to our view, the defender assumed responsibility for all or part of the RC's advice or methodology, it would not have assisted the pursuers.

Desktop study

[50] The main thrust of the reclaiming motion was that the defender was in breach of its duty to take reasonable care in carrying out a desktop investigation of the site. It was not disputed that the defender had owed that duty to persons such as the pursuers.

[51] The first submission relating to this issue was that there was no evidence upon which the Lord Ordinary was entitled to conclude that a desk top study was carried out by the defender. In our opinion the submission is ill founded. Mr Crowcroft spoke to there being a good number of indications in the defender's files of a desktop study having been carried out. Mr O'Hara researched old ordinance survey plans. There was evidence of there having

been a site visit. Moreover, the defender's contemporaneous correspondence refers expressly to it having carried out such a desk study exercise (see the letter of 22 June 1990 which the Lord Ordinary refers to at para [56]). The ultimate outcome of that study appears to have been the material which the defender provided to the RC. In our view the Lord Ordinary was entitled to conclude that a desktop study was indeed carried out by the defender.

[52] The second submission was that if a desktop study was carried out the Lord Ordinary ought to have held that it had been inadequate. There had been insufficient inquiries to identify the activities carried on by all previous occupants of the site and the specific locations on the site where those activities had taken place. The pursuers went so far as to suggest that a proper desktop study would have ascertained that solvents were likely to have been used on the site and it would have identified where those solvents were most likely to be found. In our opinion there are two fundamental difficulties with that submission.

[53] The first difficulty is that in Mr Crowcroft's view what the defender did was in accordance with normal practice at the time. The defender's investigations identified that there had been an iron and steel works on the site, and that later there had been an engineering works. The defender provided what it considered to be the relevant parts of the material which it had ingathered to a recognised contamination expert, the RC, who was able to consider it alongside the knowledge which he already had of the site from a previous investigation. The RC did not consider it necessary for the defender to carry out any additional investigations. The defender relied upon the RC to interpret the significance of the site's industrial history and advise accordingly.

[54] The second difficulty is that the pursuers failed to establish any material additional piece of information about the site which ought to have been discovered by the defender or any reasonably competent practitioner exercising ordinary skill and care; or what should properly have been taken from such information by such a person. On the evidence the pursuers simply failed to make good the contention that a proper desktop study would have ascertained that solvents were likely to have been used on the site, and that it would have identified where those solvents were most likely to be found.

Site investigation and the remedial solution

[55] We understood the pursuers ultimately to accept that, on the basis of the information made available to the RC by the defender, the RC's site investigation and remediation strategies were in accordance with the relevant guidance and normal practice. In any case, that was the evidence of Mr Crowcroft and the Lord Ordinary accepted that evidence. In our view, once again, it cannot be said that he was plainly wrong to do so.

[56] In so far as the pursuers did criticise the RC's site investigation and remediation strategies, the criticisms were premised on the basis that the information which the defender made available to the RC, and the underlying desk study, were inadequate. Since we have decided that the Lord Ordinary was entitled to conclude that the defender exercised reasonable care in carrying out the desktop study, it follows that the grounds of appeal which are premised on there having been a breach in that regard fall away. As already indicated, that is the position even if our conclusion that the defender did not assume responsibility for the RC's site investigation and remediation strategy is incorrect.

[57] The pursuers submit that the defender was negligent in not providing a specific item in the Bill of Quantities for CEM testing at the validation stage. We disagree. The evidence

was that that was a reasonable course to take because it was thought that any major contaminants were likely to be in the ash and slag layer of made ground which was removed from the site, and visual and olfactory detection were to be relied upon to detect any organic contaminants elsewhere. There were in fact instances of suspected organic material being so identified and of testing then being instructed. Moreover, in terms of the remediation contract the contractors were obliged to remove all unsuitable material from the site. The defender's approach was in accordance with normal practice at the time according to Mr Crowcroft.

The discovery of TCE

[58] At paragraph [61] of the Lord Ordinary's opinion he rejected the pursuers' contention that it was the defender's duty to review the site investigation and remediation strategy when it became aware that TCE had been detected near trial pit 15 on Plot C. In our opinion he was correct to do so.

[59] A professional person may in some circumstances have a duty to review work which he has already performed (see eg the discussion in *New Islington & Hackney Housing Association Ltd* v *Pollard Thomas & Edwards Ltd* [2001] PNLR 20, Dyson J at paras [17] - [26], and in *Shepherd Construction Ltd* v *Pinsent Masons LLP* [2012] PNLR 31, Akenhead J at paras [31] - [35]). In our view the issue in the present case is whether in the circumstances which the defender found itself in 1995 no reasonably competent practitioner exercising ordinary skill and care would have failed to review the site investigation and remediation strategy.

[60] Mr Crowcroft was clear that in his opinion it would not have been in accordance with normal practice at the time to review the earlier work in the circumstances. The

defender's understanding at the time was that the TCE detected was a localised hotspot, and that the affected ground was to be removed. Kerr Mellor Associates had certainly treated it in that way - they had not thought it necessary to test other parts of Plot C for solvents. It was an inherent and acceptable part of the grid investigation strategy that there might be localised hotspots of contamination in one or more areas between the trial pits. It was in accordance with normal practice to proceed on the basis that such areas would be likely to be detected by visual or olfactory means during remediation, excavation or construction on the site. The discovery of the TCE near trial pit 15 confirmed that that strategy was working. City Link and the LDA were made aware of the discovery and they did not instruct that the defender's past work be reviewed.

[61] The Lord Ordinary accepted Mr Crowcroft's evidence on these matters and he rejected the evidence upon which the pursuers relied. Once again we are not persuaded that he was plainly wrong to do so. On the contrary, his reasons for preferring Mr Crowcroft's evidence to Ms Copland's are clear and compelling. They included the fact that Ms Copland did not properly address the test in *Hunter* v *Hanley* 1955 SC 200.

The remaining grounds of appeal

[62] We are not persuaded that any of the remaining grounds of appeal are well founded. We are satisfied on the evidence that the Lord Ordinary was entitled to conclude that the defender did not fail to exercise ordinary care and skill in the preparation of any of the reports which it prepared, and that it did not fail to exercise such care and skill in performing any other aspect of the work which it was engaged to perform.

[63] Finally, we are not attracted to the contention that the Lord Ordinary had regard to matters which were irrelevant and inadmissible in view of the scope of the preliminary

proof. In particular, we reject the submission that the choice of remediation approach and its anticipated effects were irrelevant to the issue whether the defender breached the duty of care incumbent upon it. The remediation strategy involved the removal of the surface layer of made ground which was expected to be contaminated, and the investigation strategy took that into account. In any case, we agree with the defender that the evidence now complained about was adduced without objection, and that it was not suggested to the Lord Ordinary during the pursuers' closing submissions that the evidence was irrelevant or otherwise inadmissible.

Disposal

[64] We shall refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary.