**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2026] CSIH 21**
A65/13

Lord Doherty
Lady Wise
Lord Ericht

OPINION OF THE COURT

delivered by LORD ERICHT

in the Appeal

by

SIMON PELOSI AND OTHERS

Pursuers and Reclaimers

against

LANARKSHIRE HOUSING ASSOCIATION LIMITED

Defender and Respondent

**Pursuers and Reclaimers: R D Sutherland; Allan McDougall**
**Defender and Respondent: Johnson KC, McKinley; Brodies LLP**

30 April 2026

**Introduction**

[1] Watling Street housing development was built on a former industrial site. Tenants in the development brought separate actions against the landlord. They sought damages for personal injury caused by contaminants present in the land at the development, claiming that there had been breach of the landlord's statutory obligation, initially under section 113 of the Housing (Scotland) Act 1987, read with Schedule 10, paragraph 2, and then under section 27 and Schedule 4 paragraph 1 of the Housing (Scotland) Act 2001, to ensure that

their houses were reasonably fit for human habitation. A proof on 11 of the actions was heard together, with the outcome also being binding on the remaining actions. The Lord Ordinary held that the tenants' cases failed on both breach of duty and causation and assoilzied the landlord ([2024] CSOH 56). The tenants now reclaim (appeal) in the principal case of Pelosi and 34 other actions.

**Statutory provisions**

[2] Section 113 of the Housing (Scotland) Act 1987, read with Schedule 10, paragraph 2, provides that:

> "In any contract to which this paragraph applies there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation…"

Section 27 of the Housing (Scotland) Act 2001, read with Schedule 4, paragraph 1, provides that:

> "The landlord in a Scottish secure tenancy must—
> (a) ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation, and
> (b) keep the house in such condition throughout the tenancy."

**Background**

[3] The development site was industrial from 1900 to the 1970s, occupied originally by the Motherwell Iron and Steel Works and then by other industrial manufacturers. Thereafter it was redeveloped for housing and the first tenants moved in in 1999.

[4] The redevelopment was constructed, in part, on "made ground", ie ground formed by man-made materials placed atop the pre-existing surface. The made ground contained remnants of the materials present during its time as an industrial site, including potential

contaminants such as asbestos, ash, clinker, various metals and their derivatives, solvents, semi-volatile organic compounds ("SVOCs"), volatile-organic compounds ("VOCs"), polycyclic aromatic hydrocarbons ("PAHs") and polychlorinated biphenyls ("PCBs").

[5] As the Lord Ordinary explained at para [7], these chemicals persist in the environment. They are potentially hazardous to human health. In addition, some have the potential to evaporate over time, depending upon environmental conditions. Others will break down over time, and form new chemicals, which are also potentially hazardous. Much depends upon the particular conditions of the site where the contaminant is deposited. For the tenants, however, there exists the potential for them to come into contact with the contaminants either through inhaling fumes or directly touching them, eg in the soil or subsoil of their gardens.

**The proof**

[6] The issues at proof were (1) whether the landlord had breached its statutory duties and (2) if so, whether that had caused loss to the tenants.

[7] Thirteen tenants gave evidence about their experiences of living at the development, which included complaints of smells in their homes, of rashes, and other health issues.

[8] Expert evidence was led on contamination and on toxicology.

[9] On contamination, the tenants led evidence from Kevin Brian (environmental engineer), Michael Quint (expert on contaminated land risk assessment) and Peter Witherington (geotechnical and environmental land related issues). The landlord led evidence from Simon Firth (contaminated land practitioner specialising in human health and environmental risk assessment of subsurface contamination).

[10] On toxicology, the tenants led evidence from Professor Robert Douglas. He agreed with a number of points which had been made in a report prepared by Dr Bojan Flaks, who had previously been instructed by the tenants, but who died before the proof. The landlord led evidence from Professor Michael Eddleston.

**Lord Ordinary's decision**

[11] On breach of duty, the Lord Ordinary held that the appropriate course was to apply the 1987 Act and the 2001 Act, as construed in the authorities. The leading authority (on a predecessor provision) was *Morgan* v *Liverpool Corporation* [1927] 2 KB 131 at 145 which stated:

> "If the state of repair of a house is such that by ordinary user damage may be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation."

To succeed on breach of duty the tenants required to prove, on the balance of probabilities, that the test in *Morgan* was met.

[12] On causation, the Lord Ordinary found that a pursuer needed firstly to demonstrate on the balance of probabilities that the event in question could cause that sort of harm, and secondly that the particular harm a pursuer complained of was in fact caused by it (*Clerk & Lindsell on Torts,* 24th Edition, at paragraphs 2-28 to 2-31, *Kay's Tutor* v *Ayrshire and Arran Health Board* 1987 SC (HL) 145). The first point could sometimes allow the second to be presumed or inferred. For example, a material increase in risk may allow the inference that it did cause or materially contribute to the harm, in circumstances where it was established that the event undoubtedly caused such harm (*McGhee* v *National Coal Board* [1973] 1 WLR 1.) If there were other factors which could have caused the harm, it would have to be shown that the harm was actually caused, or materially contributed to, by the factor

concerned (*Wilsher* v *Essex AHA* [1988] AC 1074 and *Petroleum Co of Trinidad and Tobago Ltd* v *Ryan* [2017] UKPC 30).

[13] The Lord Ordinary considered that the threshold of "contaminated land" in Part 2A of the Environmental Protection Act 1990 would not determine whether or not there was a breach of duty, but the statutory guidance relevant to Part 2A produced by DEFRA and applicable to England, Wales, and Northern Ireland was useful in that it contained a four-category system of classifying risk, with land falling within Categories 1 and 2 determined to be "contaminated land". It was inappropriate to reject expert modelling data merely because it was linked to Part 2A.

[14] In relation to the environmental experts' evidence, the Lord Ordinary preferred the evidence of Mr Firth to Mr Quint. He found that Mr Firth took a more objective approach to modelling in light of the central point as to whether or not there was a breach of duty. The key point to be taken from the expert evidence of the environmental experts was that even if the figures from Mr Quint's modelling were to be accepted, the tenants would still need to lead sufficient evidence that the properties were not reasonably fit for human habitation. Where screening levels were exceeded, this did not necessarily result in a risk to human health: it merely meant that further assessment was needed. It did not prove the tenants' case. The tenants' expert evidence relied upon there being undiscovered hotspots which might cause a level of risk. However, there was no proper evidential basis for concluding that such hotspots had existed. There was no dispute that PAHs being in direct contact with soil was a linkage of potential concern as it exceeded General Assessment Criteria, but exceeding GACs did not itself demonstrate risk of injury to human health. The Lord Ordinary was not satisfied on the evidence that methyl-tertiary butyl ether was in the ground or that the levels of petroleum hydrocarbon identified showed any risk to human

health. There was no evidence to show that groundwater contamination was the cause of higher levels of contamination. There was no evidence that rashes after gardening were caused by the contaminants found on the site. There was a theoretical or minimal increased risk in cancer from the amounts of trichloroethane ("TCE") identified, but inferring breach of duty from such low-level risks was not appropriate. There was no evidence in relation to any particular property of any higher risk justifying a finding of breach of duty. The Lord Ordinary concluded from the evidence of the experts that the tenants had not established, on the balance of probabilities, that the level of contaminants on the site posed a risk to human health making the development not fit for human habitation.

[15] As it still remained possible that the tenants could prove breach of duty if the harm was caused or materially contributed to by the contaminants complained of, the Lord Ordinary went on to consider the evidence of the toxicology experts. He preferred the evidence of Professor Eddleston. Professor Douglas had focused on the tenants' witness statements. He did not attach much significance to the medical records upon which Professor Eddleston relied, and he took the witnesses' evidence at face value rather than critically assessing whether it was accurate. While the occupier witnesses were credible, there were pointers to unreliability which resulted in them not being fully accepted, so the heavy reliance on them by Professor Douglas was not fully supported. There were also other difficulties in the tenants' cases identified by Professor Eddleston. Moreover, Professor Eddleston's evidence undermined a major feature of Professor Douglas' conclusion on causation, namely the pattern of common symptoms. Further, there was no evidence that any of the tenants had suffered cancer, let alone whether any such disease was caused by the contaminants. Professor Douglas' reasoning did not contain sufficient

objective, scientific or medical grounds supporting his conclusions, and Professor Eddleston's evidence had greater force.

[16] In conclusion, the Lord Ordinary found that the lack of sufficiently supportive evidence that the levels of contamination were capable of causing, and were likely to have caused, the ailments and symptoms suffered by the tenants resulted in the tenants' case failing on breach of duty and on causation.

**The appeal**

[17] The tenants now advance 21 grounds of appeal. Their counsel grouped some of these together and dealt with others separately. We set out the various grounds and groups below, together with the particular submissions made on them. However at this stage we note more general submissions made on behalf of the landlord.

[18] Senior counsel for the landlord submitted that the Lord Ordinary did not err in any of the respects contended for in the grounds of appeal. He addressed these under five themes. First, given the restricted role of an appellate court, the tenants had failed to identify any proper basis for disturbing the Lord Ordinary's findings in fact (*Thomas* v *Thomas* 1947 SC (HL) 45, *Henderson* v *Foxworth Investments* [2014] UKSC 41, 2014 SC (UKSC) 203, *McCulloch* v *Forth Valley Health Board* [2021] CSIH 21, 2021 SLT 695, *Henderson* v *Benarty Medical Practice* [2023] CSIH 1, *McGraddie* v *McGraddie* 2014 SC (UKSC) 12, Lord Reed at para [28], *Carlyle* v *RBS* [2015] UKSC 13, 2015 SC (UKSC) 93, Lord Hodge at [22]). The second theme was immateriality: even if well-founded, many of the grounds related to issues not critical to the Lord Ordinary's findings and conclusions. The third theme was burden of proof: in several of the grounds of appeal there was a failure to engage with the fact that the tenants had the burden of proof or there was a suggestion that the

landlord had the burden of proof. The fourth theme was the limitations in the environmental evidence led by the tenants: it was the tenants, as the party with the burden of proof, who would fail if there was an inability to draw any reliable conclusions as to the level of risk at the properties. The fifth and final theme was the limitations in the toxicological evidence led by the tenants: the grounds of appeal failed to recognise, or take sufficient account of, the reasons which led to the Lord Ordinary holding, that the tenants had not discharged the burden of proof in that regard.

**The legal framework on appeal and at proof**

[19] Before turning to the individual grounds of appeal, we remind ourselves of the test which the tenants must satisfy to succeed in this appeal, and also the matters they required to have proved in order to have succeeded at the proof.

[20] The tenants invite us to take a different view of the factual evidence from that taken by the Lord Ordinary. We can interfere with the Lord Ordinary's findings of primary fact only if he has made a material error of law, made a critical finding in fact without evidence to support it, has left out of account relevant evidence, has made a finding in fact which is "plainly wrong" in that no reasonable judge could have made it, or has given unsatisfactory reasons. (T*homas* v *Thomas*, *Henderson* v *Foxworth Investments*, *McCulloch* v *Forth Valley Health Board*, *Henderson* v *Benarty Medical Practice*, *McGraddie* v *McGraddie*, *Carlyle* v *RBS*).

[21] In order to have succeeded at the proof, the tenants required to prove, on the balance of probabilities, that the landlord breached its statutory duties and caused loss to the tenants. The onus of proof was on the tenants. Individual tenants gave evidence as to their experience of living in their houses on the site and their health conditions. Before us, much of the argument for the tenants proceeded on the assumption that the onus of proof could be

satisfied by the tenants' individual witness evidence alone. As counsel for the tenants put it, there was no reasonable or rational ground on which the Lord Ordinary could have concluded other than that a tenant had suffered injury by reason of the contamination in the soil, the matter was essentially *res ipsa loquitur*. That assumption is misconceived. The Lord Ordinary required to consider and assess all of the evidence in the case, including the factual evidence from the individual tenants and the scientific evidence from the experts. The onus was on the tenants to prove their case on the balance of probabilities on the evidence as a whole.

**Ground 1: the factual evidence of the tenant witnesses**

***The ground***

[22] The first ground of appeal is that Lord Ordinary erred in law and/or misdirected himself in discounting much of the evidence of the tenants' witnesses of fact who were residents where they were not cross-examined and Professor Eddleston had no expertise in psychology or General Practice.

***Submissions for tenants***

[23] Counsel for the tenants summarised his argument on this ground as being that the non-acceptance of the witnesses of fact which the landlord chose not to challenge, coupled with the acceptance of Professor Eddleston's opinions on matters on which he was unqualified to opine, led almost inevitably to the rejection of the claim.

[24] He submitted that none of the witnesses' evidence as to commonality of their symptoms and experience, nor their explanations as to why certain ailments had not been reported to their GPs or recorded in the GPs notes, had been challenged in

cross-examination. Whilst it was accepted that it was not mandatory that unchallenged evidence be accepted by the court, there had to be some justifiable reason for not doing so. On the basis of witness evidence of the individual tenants, there was no reasonable ground on which the Lord Ordinary could have concluded otherwise than they had suffered injury by reason of contamination in the soil: the matter was essentially *res ipsa loquitur*. The Lord Ordinary accepted and relied on Professor Eddleston's opinions to the effect that the tenants would have reported the symptoms to their GPs and the GPs would have noted these: that was not evidence of fact nor opinion evidence Professor Eddleston was entitled to give. The Lord Ordinary did not consider the tenants' explanations for not reporting their symptoms. The suggestion that tenants were misremembering or exaggerating or lying should have been put to them. The Lord Ordinary's approach of ignoring the tenants' unchallenged evidence had the effect of discounting Professor Douglas' evidence focused on the commonality of symptoms. Professor Eddleston speculated about alternative explanations for the tenants' symptoms.

***Submissions for landlord***

[25] Ground of appeal 1 proceeded on an incorrect premise. The Lord Ordinary accepted that symptoms may be present without any contemporaneous record. The absence of cross-examination of the tenants was of no consequence: the landlord did not challenge their credibility. It could not be said that no reasonable judge would form the view the Lord Ordinary did on the evidence. Professor Eddleston had professional experience in diagnosing patients as a physician and attributed their linking of health problems to the housing to health anxiety arising from being told about the contamination. That was a matter within his professional expertise. In any event, the Lord Ordinary did not fully

accept his evidence. Professor Eddleston had experience of working with GPs and gave factual observations about the extent to which GPs record issues mentioned during consultations.

***Decision and reasons on ground 1***

[26] The Lord Ordinary found that while the evidence given by the individual tenants was credible, there were pointers towards a degree of unreliability, resulting in their evidence not being fully accepted (para [127]). He gave reasons for that reliability finding in paras [124] – [125]. He noted that a fair number of the tenants had some symptoms prior to moving in. He had regard to evidence about individual tenants' medical history and GP and hospital notes about problems pre-existing their time at the site or occurring afterwards. He gave careful consideration to the reasons why symptoms may not have been reported to a GP. He did not accept Professor Eddleston's view that improvement in health after leaving the site could be wholly attributed to a decrease in health anxiety.

[27] There was no error in the Lord Ordinary's approach. The onus of proof could not have been satisfied by looking solely at the factual evidence of the individual tenants' experiences and health issues. The Lord Ordinary required to consider all the evidence in the case. He was entitled to test their evidence against other evidence, including their medical records. He was entitled to have regard to the evidence of Professor Eddleston on that issue. No objection was taken to Professor Eddleston's evidence at proof. His evidence about health anxiety and note-taking by GPs was based on his experience as a clinician and was within his expertise. Each tenant witness was given the opportunity in examination -in-chief to comment on what Professor Eddleston said about them, including about having symptoms before they moved in, having symptoms not mentioned to the GP or in the GP

records, and experiencing symptoms after they moved out (Lord Ordinary's opinion para [18]). There was no unfairness in them not subsequently being cross-examined on the same points. The Lord Ordinary took a holistic and balanced view of the evidence. There were some parts of Professor Eddleston's evidence that he did not accept. He found that the individual tenant witnesses were credible but there were issues with their reliability. He was entitled to do so on the basis of the evidence before him. He gave clear and coherent reasons for his conclusions.

[28] The test for interfering with the decision of the Lord Ordinary is not met in relation to ground 1. Ground 1 fails.

**Grounds 2, 15, 16, 17 and 18: Dr Flaks' report**

***The grounds***

[29] Ground 2 is failure properly to consider the expert toxicology report of Dr Bojan Flaks. Ground 15 is misdirection in finding that "no evidence was presented which would support the conclusion that the types of contaminants and substances in the present case would have any synergistic effect." (Lord Ordinary's Opinion, paragraph 133). Ground 16 is that the Lord Ordinary erred in finding that there was no "evidence of some proper medical basis for exacerbation by contaminants of symptoms which can arise from other causes" (Opinion, paragraph 134). Ground 17 is that he erred in accepting the bulk of Professor Eddleston's evidence' (Opinion, paragraph 143). Ground 18 is not identifying points made on behalf of the tenants which differed from Professor Eddleston's (Opinion, paragraph 141) and failure to give adequate reasons. Professor Eddleston's evidence that there was no published studies or evidence in respect of low level residential exposure was

plainly wrong (ground 18(i)), and his evidence about TCE leaving the body and ceasing to have an effect was contradicted by various peer-reviewed papers (ground 18(ii)).

***Submissions for tenants***

[30] In relation to ground 16, the Lord Ordinary did not take into account Dr Flaks' evidence. Professor Eddleston did not disagree with Dr Flaks' report. In relation to grounds 17 and 18, it was not clear whether or not the Lord Ordinary took Dr Flaks' report into account. The landlord sought to ignore Dr Flaks' report.

***Submissions for landlord***

[31] The Lord Ordinary was entitled to focus on the expert evidence from those who gave evidence at proof. He had regard to Dr Flaks' report. He gave clear and coherent reasons for preferring the evidence of Professor Eddleston.

[32] The Lord Ordinary was entitled to reach the conclusions he did. No evidence was led which supported the conclusion that the contaminants would have the effects contended for by the tenants. In relation to ground 18.1 the experts joint statement acknowledged that there was a lack of published evidence of low-level exposures causing illness. The Lord Ordinary identified aspects of Professor Eddleston's evidence which he did not fully accept (eg paras [125], [141]). It was not accepted that Professor Eddleston's evidence on the matters referred to in grounds 18(i) and (ii) was wrong and there was nothing in his opinion to indicate that the Lord Ordinary thought that it was. In any case, the Lord Ordinary concluded that the limitations in the tenants' own toxicology evidence were such that that evidence did not provide sufficient support for the findings which required to be made to for them to discharge the burden of proof (eg [144]).

***Decision and reasons on grounds 2,15,16, 17 and 18***

[33] Ground 2 criticises the Lord Ordinary for failing to properly consider Dr Flaks' report. The ground is in general terms and does not specify precisely the respect or respects in which the Lord Ordinary is said to have erred. The Lord Ordinary had regard to Dr Flaks' report as part of his overall assessment of the evidence. In paras [37] to [40] he set out Dr Flaks' conclusions and Professor Douglas' critique of those conclusions. In para [140] he compared the evidence of Dr Flaks with that of Professor Douglas. He noted that Professor Douglas' report was shorter than Dr Flaks' report, that Professor Douglas' report did not examine the literature referred to in Dr Flaks' report, and that Professor Douglas did not rely upon Dr Flak's report in any detail. The Lord Ordinary provided clear and coherent reasons for preferring the evidence of Professor Eddleston on the material issues which were in dispute as between the experts. In these circumstances the test for interfering with the decision of the Lord Ordinary is not met in relation to ground 2.

[34] Ground 15 criticises the Lord Ordinary's statement in para [133] that no evidence was presented which would support the conclusion that the contaminants would have any synergistic effect. The Lord Ordinary was entitled to make that statement. Its context was the exposure of housing residents to contamination. The Lord Ordinary's statement reflected the position of the experts on both sides. It was a view which he was entitled to reach on the evidence. In their joint statement, the medical experts stated "We also acknowledge that there is a lack of experimental evidence from human volunteers regarding the symptoms from multiple exposures at the same time." The evidence of the tenants' expert Professor Douglas was that if anything existed in the literature about people living in houses exposed to low level contamination he would have been aware of it. The only

example of synergy which Professor Eddleston could provide related not to living in houses but to the combined effect of asbestos and smoking causing cancer. Dr Flaks' report gave only one example of synergy in residential exposure. Professor Eddleston distinguished that example, which related to an article about fumes from the chimneys of an oil reprocessing plant in Baton Rouge, and Professor Douglas could not express a view on it as he had not read the article. The test for interfering with the decision of the Lord Ordinary is not met in relation to ground 15.

[35] Ground 16 is in effect the same point as in ground 15. It is directed at a statement in para [134] which is consequential upon the statement criticised in ground 15. It fails for the same reasons as ground 15.

[36] Ground 17 criticises the Lord Ordinary for erring in law and/or misdirecting himself for accepting the bulk of Professor Eddleston's evidence while failing to take into account the countervailing evidence in Dr Flaks' report. The Lord Ordinary gave due consideration to Dr Flaks' report. He did not accept every part of Professor Eddleston's evidence, but took a balanced view of it. However, on the matters which are material to this ground of appeal he preferred the evidence of Professor Eddleston to evidence in Dr Flaks' report. In doing so he did not err in law or misdirect himself. The test for interfering with the decision of the Lord Ordinary is not met in relation to ground 17.

[37] Ground 18 criticises the Lord Ordinary for not identifying those points made on behalf of the tenants which differed from Professor Eddleston's reasoning. This ground is without substance. It was not necessary for the Lord Ordinary to repeat the relevant points in para [141]. They had been set out by him elsewhere (eg in para [125]). Ground 18(i) was the same point as ground 15 and fails for the same reasons. Ground 18(ii) was a criticism of the Lord Ordinary for not dealing with a disagreement between Professor Eddleston and

Dr Flaks on when TCE leaves the body. The Lord Ordinary was under no obligation to deal with every difference between the experts. He required to address the evidence which was material to the issues whether the landlord had breached its statutory duty and, if so, whether that had caused loss to the tenants. Nothing said in the ground of appeal, the tenants' note of argument or in their counsel's oral submissions satisfies us that this difference was material or that even if it had been material the omission to deal with it was a fundamental flaw which undermined the Lord Ordinary's conclusions. For these reasons, we find that the Lord Ordinary did not err in providing sufficient reasoning for his acceptance of the bulk of Professor Eddleston's evidence and the test for interfering with the decision of the Lord Ordinary is not met in relation to ground 18.

[38] For these reasons, grounds 2, 15, 16, 17 and 18 fail.

**Ground 3: Categories under Part 2A of the Environmental Protection Act 1990**

***The ground***

[39] Ground 3 is that the Lord Ordinary erred in considering that the criteria for determining whether land was "contaminated land" for the purposes of Part 2A of the Environmental Protection Act 1990 was of any relevance to the issues of (i) whether there had been a breach of the landlord's statutory duties; and (ii) if so, whether that had caused loss to the tenants (Opinion, paras [1] and [85]).

***Submissions for tenants***

[40] Part 2 of the Environmental Protection Act 1990 was of no relevance to the issues which were before the Lord Ordinary. The fact that certain tests had returned results falling below Category 4 of the 1990 Act cannot inform any determination as to whether the rashes

experienced by those gardening were caused by contamination. It was inappropriate to reject the possibility that injury could be caused by exposure to contaminants just because it is deemed low risk under Part 2A.

***Submissions for landlord***

[41] The Lord Ordinary addressed the 1990 Act because it had been referred to by experts on both sides. It provided a helpful reference point as it would be anomalous if subjects were not fit for human habitation, but remedial steps did not require to be taken under the 1990 Act. Any assistance the Lord Ordinary gained from referring to the Act was not material to his findings.

***Decision and reasons on ground 3***

[42] Part 2A of the Environmental Protection Act 1990 introduces a statutory scheme separate to that in the Housing (Scotland) Acts upon which this action is founded. It provides a scheme for identifying and remediating land in England, Wales and Northern Ireland where its contamination represents an unacceptable risk to human health. The risk to human health is categorised under four categories, running downwards with the highest risk being Category 1 and the lowest Category 4. Category 1 applies where there is an unacceptably high probability, supported by robust science-based evidence, that significant harm would occur if no action was taken to stop it. Category 4 applies where there is no risk or the level of risk is low.

[43] The Lord Ordinary did not found his decision on the Environmental Protection Act 1990 but founded it, correctly, in terms of the Housing (Scotland) Act 1987 and Housing (Scotland) Act 2001. He made it clear that "The appropriate course is to apply the terms of

the 1987 and the 2001 Act, as construed in the authorities." (para [77]). He also made it clear that his decision was not determined by the threshold for contaminated land under the 1990 Act (para [83]).

[44] In so far as the Lord Ordinary discussed the 1990 Act, it was by way of background and because the 1990 Act categories formed part of the evidence of both the tenants' and the landlord's experts. The Lord Ordinary considered the experts' modelling and expressed the view in para [85] that it was useful to know which category the risks in the present case fell within and it would be inappropriate to reject the experts' modelling data merely because it was linked to the 1990 Act.

[45] This ground of appeal criticises the Lord Ordinary for according the 1990 Act categories "any relevance". The tenants make that criticism despite themselves having led evidence about the categories. The Lord Ordinary had to consider the evidence which the tenants (and landlord) led about the categories. He was entitled to consider it when assessing the expert evidence, and to form the views about that evidence which he formed.

[46] The test for interfering with the decision of the Lord Ordinary is not met in relation to ground 3. Ground 3 fails.

**Ground 4: workplace and residential exposure**

***The ground***

[47] Ground 4 is that the Lord Ordinary erred in considering that the levels of occupational or workplace exposure deemed to be acceptable were of any relevance and failing to take Dr Flaks' opinion into account (Opinion, paras [72] and [141]).

***Submissions for tenants***

[48] There was a difference between exposure in a workplace during the working day and in a dwelling for longer periods. Disparity between occupational and dwelling house exposure was irrelevant to whether the occupiers of the dwellings suffered harm by reason of contamination. Unless each of the occupants was lying about their ailments, the tenants have shown that the reactions they experienced were caused or contributed to by the contamination of the land: that conclusion could not be avoided by praying in aid the limited scientific data in respect of low-level chronic exposure.

***Submissions for landlord***

[49] The Lord Ordinary's approach to this matter was reasonable especially in the absence of any literature relating to residential exposure. In any event, it was not material to his conclusions.

***Decision and reasons on ground 4***

[50] Both Professor Eddleston's and Dr Flaks' reports dealt with workplace exposure limits. Having considered their respective reports, the Lord Ordinary preferred the evidence of Professor Eddleston. He agreed with Professor Eddleston that "in the absence of any literature about residential exposure, the workplace exposure limits and their large safety margin, provide some assistance" (para [130]). That was a view which he was entitled to reach.

[51] Counsel for the tenants' submission was essentially that the factual evidence of the tenants should be accepted on the analogy of *res ipsa loquitur*. We reject that submission in respect of ground 4 for the reasons set out in para [21] above.

[52] The test for interfering with the decision of the Lord Ordinary is not met in relation to ground 4. Ground 4 fails.

**Grounds 5, 6 and 7: gardening rashes**

***The grounds***

[53] Ground 5 is that the Lord Ordinary erred in finding that there was no evidence that the tenants' rashes suffered were caused by contaminants found on the site (Opinion, para [108]). Ground 6 is that he erred in requiring the tenants to prove as a negative that said rashes could not have been picked up by contact with soil which did not contain the contaminants (Opinion, para [108]). Ground 7 is that he erred in not accepting that a rash developed after dermal contact with contaminated soil was caused by that contact.

***Submissions for tenants***

[54] Counsel for the tenants submitted that there was no reasonable or rational ground on which the Lord Ordinary could have concluded that the rashes suffered under gardening occurred other than by reason of the contamination of the soil. Further, the Lord Ordinary sought to place an additional evidential burden on the tenants to show that rashes could not be picked up when in contact with the soil. A property whose garden cannot be used for gardening without causing skin rashes was not fit for habitation (*Todd* v *Claperton* 2009 SLT 837, *Rendlesham Estates plc* v *Barr Ltd* [2015] 1 WLR 3663).

***Submissions for landlord***

[55] The Lord Ordinary provided clear and coherent reasons why the tenants had failed to discharge the burden of proof on this issue. He did not require the tenants to prove a negative. He was entitled to come to the conclusion which he did.

***Decision and reasons on grounds 5,6 and 7***

[56] The Lord Ordinary did not reject the evidence about rashes out of hand. He found the tenants to be credible witnesses, albeit there were some issues with their reliability (para [127]). The issue was one of causation. As the Lord Ordinary correctly stated at para [79], once it had been established that the event can cause damage the pursuer requires to prove, on the balance of probabilities, that the particular damage was caused in that way. The burden of proving that rested with the pursuer. It is not enough to say that a witness had a rash after gardening and therefore the rash was caused by contaminants in the soil. That is another expression of counsel for the tenants' *res ipsa loquitur* analogy which we have rejected in para [21] above. The tenants required also to prove that the particular rash was caused by the particular contaminant in the soil. The tenants sought to prove that by leading expert evidence. The landlord's experts disagreed with the tenants' experts. The Lord Ordinary assessed the evidence in a balanced way. He recognised that the tenants' point had some force. However, he did not accept that the tenants had proved causation in respect of the rashes. He gave reasons for that by reference to Professor Douglas' report and to the possibility that rashes could be picked up without contaminants being present. In so doing he was not requiring the tenants to prove a negative or inverting the burden of proof. He was assessing the evidence to decide whether the tenants had proved their case on the

balance of probabilities and giving reasons for concluding that they had not. He was entitled to come to the conclusion he did for the reasons he gave.

[57] The test for interfering with the decision of the Lord Ordinary is not met in relation to grounds 5, 6 and 7. These grounds fail.

**Ground 8: cancer**

***The ground***

[58] Ground 8 is that the Lord Ordinary erred in finding that the increased risk of the tenants contracting cancer by reason of the TCE contamination on site did not show the properties to be not reasonably habitable (Opinion, para [110]). In particular, he erred by (i) finding that inferring breach of duty from such levels of risk was "not appropriate" (Opinion, para [110]), (ii) failing to take into account Mr Quint's evidence on indoor air concentrations, (iii) not taking into account the severity of the consequence of the risk eventuating, (iv) finding that the tenants' expert evidence on environmental matters was not sufficient (Opinion, para [116]), (v) placing a burden upon the tenants to make good the inadequacies and gaps in the landlord's testing (Opinion, para [116]), (vi) finding that an increase in the risk of developing cancer of 1 in 100,000 was a lower screening level than adopted in the UK (Opinion, para [135]) (vii) finding that even if such an increased risk amounted to a breach of statutory duty, it did not give rise to a liability in damages (Opinion, para [136]), (viii) relying upon the pleural plaques legislation to support the conclusion that the tenants' risk of cancer was not something for which damages were recoverable (Opinion, para [136]).

***Submissions for tenants***

[59] A property which is subject to an elevated risk of its occupants contracting cancer was *prima facie* a property unfit for habitation. The Lord Ordinary's reasoning that because the risk was low there was not a breach of duty was unsupportable. The Lord Ordinary's proposition that even if the increased risk did amount to a breach of duty it did not give rise to a liability in damages was contrary to authority. His reference to the pleural plaques legislation was misplaced. That legislation was irrelevant to a claim for the suffering caused though knowing that one has an elevated risk of contracting cancer in the future.

***Submissions for landlord***

[60] The Lord Ordinary was entitled to hold that a marginal increase in risk would not render a property unfit for human habitation, and in any event, there was no evidence that any of the tenants had contracted cancer. In relation to grounds 8(iv) and (v), the tenants had the burden of proof. In relation to ground 8(vi) the Lord Ordinary made no such finding. In relation to grounds 8(vii) and (viii), an increased risk does not give rise to a liability in damages without the risk having materialised or causation being established.

***Decision and reasons on ground 8***

[61] The Lord Ordinary considered all of the evidence and concluded that although there was a theoretical risk of cancer it was at such a low level that there was no breach of duty. He noted that none of the tenants had suffered from cancer. He considered the expert evidence on both sides and preferred the evidence of the landlord's experts. He accepted the evidence of Professor Eddleston that there was no medical literature showing that low-level exposure could cause cancer problems. Even if there was a breach of duty, the tenants

had not established liability in damages for such a limited risk. He was entitled to come to the conclusions he did for the reasons he gave. The test for interfering with the decision of the Lord Ordinary is not met and ground 8 fails.

**Grounds 9 and 10: hotspots - existence**

***The grounds***

[62] Ground 9 is that the Lord Ordinary erred as to the relevance of "hotspots" of contamination and requiring the tenants to prove as a negative that the eight hotspots identified had not been removed (Opinion, para [98]). Ground 10 is that he erred in concluding that there was no proper evidential basis for saying that further hotspots existed (Opinion, para [98]).

***Submissions for tenants***

[63] The Lord Ordinary misunderstood the evidence in respect of hotspots. The tenants' case was that there was a likelihood that further hotspots exist, and therefore the contamination was likely to be greater than currently contemplated. The question was whether, as a matter of probability, further hotspots existed. Once it had been shown that hotspots existed, it was up to the landlord, not the tenant, to show they had been removed. Where there was no evidence that hotspots had been removed, there was every reason to conclude that there was further contamination on site.

***Submissions for landlord***

[64] Ground 9 proceeded on a false premise as the Lord Ordinary did not require the tenants to prove that hotspots had not been removed. There was no error in the Lord Ordinary's treatment of the hotspots issue.

***Decision and reasons on grounds 9 and 10***

[65] Between 2010 and 2012 WSP UK Ltd carried out various investigations taking samples from 64 gardens at the site. They identified that certain gardens had "hotspots" of contaminants and recommended removal of the hotspots.

[66] In proving the level of contamination on the site, the burden of proof fell on the tenants.

[67] The Lord Ordinary did not, as ground 9 claims, require the tenants to prove a negative that the hotspots had been removed. In para [98], he makes the point that the tenants' evidence was that they all suffered common symptoms, even those not living beside hotspots: consequently, it made no difference whether or not the hotspots were removed.

[68] Turning to ground 10, there was a dispute between the experts as to whether further hotspots existed. The Lord Ordinary was entitled to reject the evidence of Mr Brien and Mr Quint inferring further hotspots as these experts were unable to say where the further hotspots would be and what properties the further hotspots would affect. He was entitled to accept Mr Firth's evidence, which was that further hotspots were unlikely to exist. The Lord Ordinary was entitled to prefer Mr Firth's evidence to that of Mr Brien and Mr Quint for the reasons he gave.

[69] The test for interfering with the decision of the Lord Ordinary is not met in relation to grounds 9 and 10. These grounds fail.

**Grounds 11 and 12: statistical methodology**

***The grounds***

[70] Grounds 11 and 12 claim that the Lord Ordinary erred in using the arithmetic mean rather than a 95% Upper Confidence Limit of the arithmetic mean (Opinion, paras [88] to [92]).

***Submissions for tenants***

[71] It was unreliable to take the mean average of data points and assume that represented the likely value of the whole. There was no meaningful relationship between such a method of extrapolation and establishing breach on the balance of probabilities. Had the UCL approach been taken the Lord Ordinary would have concluded that there was a genuine risk that the concentration of VOCs in the air was unacceptably high and that this was supportive of the tenants' case.

***Submissions for landlord***

[72] The Lord Ordinary was correct that using UCL was not appropriate. In any event the modelling, let alone whether UCL should be adopted, was not material to his conclusion.

***Decision and reasons on grounds 11 and 12***

[73] There was a dispute between two experts as to whether the UCL method or arithmetical method should be used. In paras [88] - [92] the Lord Ordinary set out and considered in detail the arguments on both sides of the dispute. He preferred the method

used by the landlord's expert and set out his reasons for doing so. The test for interfering with the decision of the Lord Ordinary is not met. Grounds 11 and 12 fail.

**Grounds 13 and 14: hotspots – whole site**

***The grounds***

[74] Grounds 13 and 14 are that the Lord Ordinary erred in considering that other properties were habitable albeit that the tenants thereof had the same symptoms where there were contamination hotspots or other higher risks, there being no evidential basis and the tenants' case being that contamination has rendered the whole site unfit for human habitation (Opinion, para [111]). Ground 14 is that he erred in finding that breach of duty was not established by actual harm only in relation to specified properties (Opinion, para [111]).

***Submissions for tenants***

[75] The Lord Ordinary misunderstood the tenants' case which was that the general contamination of the site rendered the buildings unfit for habitation: it was not intended that the dwelling of each tenant should be considered individually. The fact that the site was so contaminated that ordinary gardening could result in skin rashes rendered the site unfit for habitation as well as the individual dwellings where gardening had resulted in rashes.

*Submissions for landlord*

[76] The Lord Ordinary was simply stating that it could not be inferred from symptoms amongst residents close to hotspots that the properties were not reasonably fit for human habitation. He was entitled to draw that inference.

*Decision and reasons on grounds 13 and 14*

[77] Para [111] of the Lord Ordinary's opinion does not, as the tenants submit, disclose that the Lord Ordinary misunderstood the tenants' case that it was the general contamination of the site that made the houses unfit for inhabitation. The Lord Ordinary recognised that the tenant's case focussed on general contamination. Those with hotspots had the same symptoms as those without, so breach of duty was not established by harm only in relation to the properties with hotspots. That was a point he was entitled to make on the evidence. The test for interfering with the decision of the Lord Ordinary is not met in relation to grounds 13 and 14. These grounds fail.

**Grounds 19 and 20: summary**

*The grounds*

[78] Grounds 19 and 20 summarise the cumulative effect of previous grounds.

*Submissions for tenants*

[79] The consequence of the Lord Ordinary's approach to the evidence was that the tenants' ailments were discounted, he required the tenants to prove that the physical harm could not have been caused by contaminated soil, and Dr Flaks was ignored, Professor Eddleston's views were given prominence, and the factual evidence of the tenants

was discounted. The Lord Ordinary should have accepted the tenants' evidence of fact and Dr Flaks' report and rejected Professor Eddleston's views.

***Submissions for landlord***

[80] The Lord Ordinary did not err in the manner contended for in these grounds of appeal.

***Decision and reasons on grounds 19 and 20***

[81] Grounds 19 and 20 are merely a summary of the other grounds of appeal considered above. As these other grounds have failed, it follows that grounds 19 and 20 fail also.

**Ground 21: McGhee v National Coal Board**

***The ground***

[82] Ground 21 asserts that the Lord Ordinary failed to correctly apply the principle in *McGhee* v *National Coal Board* [1973] 1 WLR in respect of a material increase in risk (Opinion, paras [80] to [82]).

***Submissions for tenants***

[83] *McGhee* involved a non-negligent potential cause of harm (working in a brick dust environment) followed by a negligent potential cause of harm (absence of showers). The lack of showers did not cause the harm but increased the risk of harm. The negligently caused increase in risk was sufficient to establish liability. In the present case, even if the tenants' ailments were not caused by the contamination, the presence of contamination increased the risk.

***Submissions for landlord***

[84] For the reasons set out in paras [79] - [82] of the Lord Ordinary's opinion, the *McGhee* principle had no application to the facts of this case. The approach taken in *Bonnington Castings* v *Wardlaw* [1956] AC 613 only applied where there was a single causal link (*Wilsher* v *Essex Area Health Authority* [1988] AC 1074). Where there are a number of possible causes, only one of which involves breach of duty, the onus remains on a pursuer to show that the breach made at least a material contribution (*Charlesworth & Percy on Negligence* (15th Edition) at § 5-27, *Clerk & Lindsell on Torts* (24th Edition) at §§ 2.30 31 and 2.49 and Gloag & Henderson, *The Law of Scotland* (15th Edition) at § 26-23). The burden of proof is not lessened where there is a lack of scientific evidence (*Kay's Tutor* v *Ayrshire and Arran Health Board* 1987 SC (HL) 145, *Petroleum Co of Trinidad and Tobago Ltd* v *Ryan* [2017] UKPC 30). The Lord Ordinary applied the correct test and arrived at the correct conclusion that the tenants had not proved their case. There were strong similarities with the *Petroleum* case.

***Decision and reasons on ground 21***

[85] In this ground of appeal, the tenants contend that the Lord Ordinary failed to apply the *McGhee* principle in respect of a material increase in risk.

[86] In *McGhee* a worker who was exposed to dust in kilns which caused him to develop dermatitis sued his employers for damages on the ground that they were at fault for not providing adequate washing facilities for removal of the dust after work. There was little doubt the dermatitis resulted from a combination of two causes: exposure to dust while working and omission to wash before leaving work. The second of those, but not the first, was attributable to the fault of the employer. The pursuer required to establish that the

employer's admitted breach of duty in not providing shower facilities caused or materially contributed to the damage. The pursuer proved that there was a precaution which if adopted by the employer, as their duty in law required, would have made it less likely that he suffered the injury. In these circumstances, the House of Lords found that as the employer's fault had materially contributed to causing the disease they were liable to the worker in damages. The distinction between (a) having materially increased the risk of contracting the disease and (b) having materially contributed to causing the disease was far too unreal to be recognised by the common law (Lord Wilberforce at p 62).

[87] The situation in *McGhee* is very different from the situation advanced by the tenants in this ground of appeal.

[88] The submission on behalf of the tenants was that even if the tenants' ailments were not caused by the contamination, the presence of such contamination increased the risk of such ailments increasing in severity and duration. That submission applies where a tenant has a pre-existing ailment which was not caused by the contamination and that pre-existing ailment is then exacerbated by the contamination. In other words, the tenants are contending that there are two causes for the damage: (1) whatever the cause of the pre-existing ailment was and (2) the contamination. That is of course relevant to only some of the ailments for which the tenants seek damages, as they also seek damages for new ailments.

[89] In circumstances where there are two or more possible causes, only one of which involves breach of duty, the onus is on the pursuer to show that the breach made at least a material contribution. (*Charlesworth & Percy on Negligence* (15th Edition) at § 5-27, *Clerk & Lindsell on Torts* (24th Edition) at §§ 2.30 31 and 2.49 and Gloag & Henderson, *The Law of*

*Scotland* (15th Edition) at § 26-23; *Petroleum Co of Trinidad and Tobago Ltd* v *Ryan*, paragraph 49).

[90] There is no error of law in paras [79] - [82] of the Lord Ordinary's opinion. He correctly identified that the tenants' case is one in which there is more than one potential cause for the harm said to have been suffered. He correctly set out what required to be proved by them. This ground fails.

**Conclusion**

[91] None of the grounds of appeal are well founded. In the principal case of Pelosi we shall refuse the reclaiming motion and adhere to the interlocutors of the Lord Ordinary dated 5 June 2024 and 2 September 2024, reserving all questions of expenses meantime. Similar orders will be made in the other related cases.