

**NOVA SCOTIA COURT OF APPEAL**

**Citation: W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavation Ltd.**  
**, 2007 NSCA 92**

**Date:** 20070906

**Docket:** CA 274238

**Registry:** Halifax

**Between:**

W. Eric Whebby Limited, a body corporate

Appellant

v.

Doug Boehner Trucking & Excavating Limited, a  
body corporate, United Gulf Developments Limited,  
a body corporate, Greater Homes Inc., a body corporate,  
and Garden Crest Developments Limited, a body corporate

Respondents

and

United Gulf Developments Limited, a body corporate,  
Greater Homes Inc., a body corporate, and Garden  
Crest Developments Limited, a body Corporate

Respondents

(Appellants by cross-appeal)

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**Judge:** The Honourable Justice Thomas Cromwell

**Appeal Heard:** June 14, 2007

**Subject:** Negligence; Sale of Goods; Hearsay

**Summary:** Whebby was the excavator for Garden Crest; Boehner was the excavator for United. Whebby sold soil from the Garden Crest site to Boehner for use as residential fill at United's site. The soil turned out to be contaminated and required expensive

remediation. Litigation among the four parties ensued. The judge found all four parties responsible for the loss to varying degrees and all appealed. As a result of a mechanical failure, no trial transcript could be produced.

**Issues:** The key issues were whether the judge erred: (a) in finding that Whebby and Boehner had been negligent by not recognizing the unsuitability of the soil; (b) in finding that United had been contributorily negligent and had failed to mitigate its loss by failing to take action more promptly; (c) in finding Garden Crest negligent for failing to pass on test results to Whebby; and (d) in dismissing Boehner's claims against Whebby in contract and United's claims against Whebby in nuisance.

**Result:** Appeal allowed; cross-appeals allowed in part and a new trial ordered on certain issues. The judge's critical findings in relation to negligence were based on legal errors. The finding with respect to negligence on the part of Whebby and Boehner was based on inadmissible hearsay evidence. The judge's finding that United had failed to mitigate was inconsistent with his findings of fact. The judge's finding that Garden Crest had been negligent was premised on Garden Crest having certain information at the relevant time but the judge concluded that there was no evidence that it did. Given the nature of the errors and the state of the record, the Court of Appeal could not make the necessary findings to dispose of the case and a new trial was therefore ordered.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 38 pages.**