NOVA SCOTIA COURT OF APPEAL

Citation: *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*; 2021 NSCA 4

Date: 20210107
Docket: CA 494947
Registry: Halifax

Between:

Tri-County Regional School Board, a corporation

Appellant

v.

3021386 Nova Scotia Limited, a corporation, Donald G. Harding, and the Municipality of the District of Barrington, a corporation

Respondents

and

NOVA SCOTIA COURT OF APPEAL

Citation: *Harding v. 3021386 Nova Scotia Limited*; 2021 NSCA 4

Date: 20210107
Docket: CA 495036
Registry: Halifax

Between:

Donald G. Harding

Appellant

v.

3021386 Nova Scotia Limited, a corporation, Tri-County Regional School Board, a corporation, and the Municipality of the District of Barrington, a corporation

Respondents

Judge: The Honourable Justice M. Jill Hamilton

Appeal Heard: November 16, 2020, in Halifax, Nova Scotia

Subject: Summary Judgment on Evidence; *Civil Procedure Rule* 13.04; Genuine Issue of Material Fact

Summary: 3021386 Nova Scotia Limited bought property from the Municipality of the District of Barrington, which it alleges is contaminated. It sued the Municipality, the Tri-County Regional School Board, which operated a high school on the property for many years, and Donald G. Harding, the lawyer who acted for both the Municipality and the Company on the purchase and sale transaction. The action against the Municipality was discontinued. The Board and Mr. Harding brought motions for summary judgment on evidence under *Rule* 13.04 that were dismissed by the motions judge in a single decision, on the basis there were genuine issues of material fact in dispute with respect to both motions. The Board and Mr. Harding separately appealed the decision.

Issues: The issues relating the Board's appeal are:

1. Should leave to appeal be granted?
2. Did the judge err in law by refusing to grant the Board summary judgment?
3. If so, should this Court grant summary judgment?
4. Costs.

The issues relating to Mr. Harding's appeal are:

1. Should leave to appeal be granted?
2. Did the judge err in law by refusing to grant Mr. Harding summary judgment?
3. Costs.

Result: Leave to appeal was granted to the Board and to Mr. Harding.

The Board's appeal was allowed, summary judgment was granted and costs were awarded.
With respect to the Board's motion, the judge erred by failing to consider whether the disputed facts would affect the outcome of the Company's claim in light of the applicable

law, which requires that the Board must owe a duty of care to the Company in order for the Company's claim to succeed.

Mr. Harding's appeal was dismissed and costs were awarded. With respect to Mr. Harding's motion, the judge made no error in finding the disputed facts could affect the outcome.

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Respondents

Judges:	Beveridge, Hamilton and Farrar JJ.A.
Appeal Heard:	November 16, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Hamilton J.A.; Beveridge and Farrar JJ.A. concurring
Counsel:	Ian Dunbar and Robert Mroz, for Tri-County Regional School Board Christopher I. Robinson, for 3021386 Nova Scotia Limited

and

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Respondents

Judges:	Beveridge, Hamilton and Farrar, JJ.A.
Appeal Heard:	November 16, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Hamilton J.A.; Beveridge and Farrar JJ.A. concurring
Counsel:	Justin Adams and Thomas Morehouse, for Donald G. Harding Christopher I. Robinson, for 3021386 Nova Scotia Limited

Reasons for judgment:

[1] These reasons deal with two interlocutory appeals from one decision of Justice Christa M. Brothers (2019 NSSC 224). The judge denied the motions for summary judgment on evidence of each of the appellants, Tri-County Regional School Board (the "Board") and Donald G. Harding ("Mr. Harding"), to have the claims against them of the common respondent, 3021386 Nova Scotia Limited ("the Company"), dismissed in advance of trial.

[2] For the reasons that follow, I would grant leave to appeal to both appellants, allow the Board's appeal and dismiss Mr. Harding's appeal.

Background

[3] The background of both appeals is set out by the motions judge:

> [2] In 2002, the Tri-County Regional School Board (the Board) decided to close the former Barrington Municipal High School. The Municipality of the District of Barrington (the Municipality) owned the land on which the high school was situated (the property). The Board had the authority to occupy the property while the school operated. The Board managed and controlled the school from 1982 until June 30, 2006, when the property was transferred back to the Municipality.
>
> [3] The background to the claim is the purchase of the property by the plaintiff, 3021386 Nova Scotia Limited, from the Municipality. After the purchase was completed, the plaintiff discovered the soil on the site was contaminated with hydrocarbons. There is a claim for damages allegedly resulting from soil contamination. Hydrocarbons were found in the soil, allegedly caused by the prior existence of underground fuel tanks (UFTs).
>
> [4] The Municipality issued a Request for Proposals (RFP) on February 1, 2006, for the development of the property. Two bids were received, including one submitted by Kenneth Anthony on behalf of Anthony Properties Ltd. Neither bid was accepted. A second RFP was issued in October 2006. It stated, in s. 2.3, that "[t]he Municipality will not provide any environmental assessment on this property".
>
> [5] On October 30, 2006, Anthony put in two offers, one on behalf of the plaintiff and one on behalf of Anthony Properties Ltd. The plaintiff's offer was ultimately accepted. An Agreement of Purchase and Sale (APS) was signed by the plaintiff and the Municipality on November 30, 2006. The Board was not a party to the APS. Donald Harding acted as solicitor for both the Municipality and the plaintiff in relation to the APS.

> [6] The property was not turned over to the Municipality until January 22, 2007. Oil tanks were removed from the property by the Board before then. The Board provided a soil analysis report from AGAT Laboratories dated February 5, 2007. The acquisition by the plaintiff closed on February 16, 2007.
>
> [7] The plaintiff alleges that after it purchased and began developing the property, hydrocarbon contaminants were discovered, which resulted in the plaintiff incurring remediation costs.

[4] The Company originally claimed only against the Municipality and the Board, who brought unsuccessful summary judgment motions on the pleadings (*3021386 Nova Scotia Ltd. v. Barrington (Municipality)*, 2010 NSSC 173). Mr. Harding was added as a defendant in 2013. The Company subsequently filed a Notice of Discontinuance with respect to the Municipality on April 8, 2015.

[5] With the Company's claims against the Board and Mr. Harding still outstanding, both advanced motions for summary judgment on evidence that were heard by the judge.

[6] The claims against the Board were in negligence and negligent misrepresentation. Before the judge, the Board claimed it owed no duty of care to the Company, made no representations to it and that the Company could not reasonably have relied upon any alleged representations. In addition, it argued the Company's claim was for pure economic loss, which it said was not recoverable in law.

[7] The Company's claims against Mr. Harding were in negligence, negligent misrepresentation and contract. Mr. Harding accepted he owed a duty of care to the Company. He claimed he did not breach the standard of care because he was representing both the Company and the Municipality for the limited purpose of reducing their agreement into writing and completing the steps necessary to give effect to the conveyance. He also argued he made no representations to the Company with respect to the condition of the property.

[8] In her reasons, the judge set out the provisions of *Civil Procedure Rule* 13.04 that governs motions for summary judgment on evidence and the test to be applied on such motions, set out in *Shannex Inc. v. Dora Construction Ltd.*, ("*Shannex*") 2016 NSCA 89 at paras. 33–34. She reviewed in detail the substantial affidavit evidence filed on behalf of the Board, the Company and Mr. Harding and found there were genuine issues of material fact with respect to the claims against both the Board and Mr. Harding.

[9] Some of the disputed facts she found were material with respect to the claims against the Board are:

(a) Whether or not the Board's silence in the face of e-mails from the Company to certain Board employees was a representation (para. 40).

(b) Whether or not the Company closed the transaction and took the property on an "as is, where is" basis from the Municipality, based on the AGAT Laboratories report on the condition of the property that the Board obtained pursuant to clause 9 of the APS and provided to the Municipality or whether the sale closed on the basis of representations by the Board or assurances conveyed through the Municipality (para. 41).

(c) Whether or not the Company relied on Mr. Anthony's past personal experience with environmental assessments in property transactions or on information respecting the environmental condition of the property from the Board and others (para. 42).

(d) Whether or not the Board had knowledge, or should have had knowledge, of two tanks allegedly installed in 1956 and 1969 that had been removed from the property and whether or not the knowledge was communicated to the Municipality (para. 57).

(e) Whether or not the Board made representations to the Company directly, through Steven Stoddart or John Hogg, or to the Municipality, on which the Company relied, that the Board would deliver the property back to the Municipality with no environmental contamination (paras. 60, 65).

[10] The judge found the following were some disputed material facts with respect to Mr. Harding:

(a) Whether or not Mr. Harding's retainer was a limited one, taking into account (1) the retainer letter indicating he was acting for both the Municipality and the Company and (2) the extensive past experience among the parties (paras. 78, 87–89).

(b) How Mr. Anthony's personal past property experience with environmental assessments related to Mr. Harding's role in the property transaction (paras. 79, 90–92).

(c) Whether or not Mr. Harding told Mr. Anthony the Board would make sure the property was not contaminated before it was returned to the Municipality and whether the Company relied on this (paras. 80–83).

(d) Whether or not there was discussion between Mr. Anthony and Mr. Harding following Mr. Anthony's written instruction to Mr. Harding that a term be included in the APS providing that an environmental assessment be obtained by the Municipality or the Board prior to closing, which term was not included (para. 84).

(e) Whether or not Mr. Anthony knew, or ought to have known, from his earlier receipt of a copy of an environmental assessment of an adjacent property, of the potential that this property was also contaminated (para. 85).

(f) Whether or not confidential communications took place between Mr. Harding and Brian Holland, a Municipality employee, regarding the terms of the APS (para. 86).

(g) Whether or not Mr. Harding provided advice to Mr. Anthony of the legal consequences flowing from the fact the Municipality was the owner of the property and the Board was the occupier (para. 93).

[11] The judge dismissed both motions.

[12] I will deal with the Board's appeal first.

Board Appeal

Issues

[13] The issues that must be decided to determine the Board's appeal are:

1. Should leave to appeal be granted?
2. Did the judge err in law by refusing to grant the Board summary judgment?
3. If so, should this Court grant summary judgment?
4. Costs.

Leave to Appeal

[14] The first issue, whether leave should be granted, is not subject to a standard of review analysis. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Saunders J.A. set out the test for leave to appeal:

> [18] … The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [Citations omitted]

[15] As will be apparent, the Board has raised an arguable issue. I would grant leave to appeal.

Standard of Review

[16] Saunders J.A. also set out in *Burton*, the standard of review applicable to summary judgment motions:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating [e]ffect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. [Citations omitted]

Did the judge err in law by refusing to grant the Board summary judgment?

[17] While the Board's argument is framed in terms of undisputed facts, I interpret its argument to be that the judge erred because the facts she found to be in dispute were not **material** because their determination could not affect the outcome of the proceeding given the Company's pleadings and the law applicable thereto.

[18] The Company argues the disputed facts are **material**.

[19] *Rule* 13.04 governs motions for summary judgment on evidence:

> 13.04(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > (a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[20] In *Shannex*, *supra*, Fichaud J.A. set out the test to be applied on a motion for summary judgment on evidence clarifying that a **material** fact must be more than an important fact, it must be one that will affect the outcome of the trial:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton's* first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8). [Bolding added]

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

…

- **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton's* second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton's* test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

> …
>
> • **Fifth Question:** If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action? [Emphasis in original]

[21] It is agreed there are facts in dispute. The question is whether any of these disputed facts are **material** as found by the judge. This requires us to consider the disputed facts in the context of the pleadings, the evidence presented and the applicable legal principles—to determine whether their resolution could affect the outcome of the trial; *Shannex, supra*, at paras. 34, 36; *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29 at paras. 35, 37 and 39.

[22] The Company claims the Board negligently misrepresented the environmental condition of the property to the Company, directly and by remaining silent. It also claims the Board was negligent by failing (1) to comply with certain statutory requirements, (2) to determine the environmental condition of the property, (3) to warn the Company of that condition and (4) to advise the Company of the previous UFTs on the property and their location.

[23] The first requirement that must be established for the Board to be liable to the Company on any of these claims is that it owed a duty of care to the Company at the time it purchased the property. Absent such a duty of care, the Company's claims against the Board cannot succeed, so that the disputed facts are not material as they cannot affect the outcome of the trial; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 18 ("*Maple Leaf*"); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 34.

[24] While the judge took note of the pleadings when she considered the disputed facts she found to be material, she failed to consider whether the Board owed a duty of care to the Company in relation to the environmental condition of the property. This failure led her to make an error of law when she found the disputed facts were material.

[25] The Supreme Court of Canada has consistently indicated the existence of a duty of care is determined in the same way for claims in both negligence and negligent misrepresentation. For example, in *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165 ("*Hercules"*) the Court states:

> 21 I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is

> determined differently from other negligence cases would, in my view, be incorrect; see: Jane Stapleton, "Duty of Care and Economic Loss: a Wider Agenda" (1991), 107 *L.Q. Rev.* 249. This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case. …

This principle was adopted in both *Maple Leaf, supra*, at para. 60 and *Deloitte & Touche v. Livent Inc. (Receiver of)* ("*Livent*"), 2017 SCC 63 at para. 16.

[26] The actual test in Canada for determining whether a *prima facie* duty of care exists has developed over the years. It has moved from the two-part test enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council ("Anns")*, [1978] A.C. 728 (H.L.), at pp. 751–52, where the first step focussed on foreseeability, to *Cooper v. Hobart*, 2001 SCC 79 ("*Cooper*"), with its shift to require "something more" than "mere foreseeability" (para. 42) at the first step—that "something more" being proximity. In *Cooper*, the Court said the following with respect to proximity:

> 32 On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson*, supra, at pp. 580-81:
>
> > Who then, in law, is my neighbour? The answer seems to be — persons who <u>are so closely and directly affected</u> by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.
> >
> > …
> >
> > I think that this sufficiently states the truth if <u>proximity</u> be not confined to mere physical proximity, but be used, as I think it was intended, to extend to <u>such close and direct relations</u> that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]
>
> 33 As this Court stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 24, per La Forest J.:
>
> > The label "proximity", as it was used by Lord Wilberforce in *Anns*, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of <u>such a nature that the defendant may be said to be under an obligation to be mindful of the</u>

> plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]
>
> 34 **Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved.** Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant. [Underlining in original; Bolding added]

[27] Later in *Livent, supra*, at para. 34, the Supreme Court of Canada found proximity was a distinct and more demanding hurdle than reasonable foreseeability and that it should be considered before foreseeability because the proximity relationship informs the foreseeability analysis. Most recently in *Maple Leaf, supra*, the Court, not for the first time, stressed the importance of considering the contractual options available to parties in commercial transactions as part of the proximity inquiry at the first stage of determining whether there is a *prima facie* duty of care.

[28] In *Maple Leaf, supra,* the Court was dealing with a situation where there were contractual relationships between parties in a multipartite contractual arrangement with no privity of contract between the appellant and the respondent. The respondent, Maple Leaf, provided meats to the appellant, a Mr. Sub franchisee, through an exclusive provider agreement that Maple Leaf had with the Mr. Sub franchisor. The franchisee was bound by this agreement, with some exceptions, by way of its franchise agreement with the Mr. Sub franchisor. The Court found there was not a proximate relationship between the Mr. Sub franchisee and Maple Leaf.

[29] After finding no established or analogous category of proximate relationship, the Court conducted a full proximity analysis. As will be seen in the following quotation, the Court in *Maple Leaf, supra,* tells us that (1) a crucial consideration at the first stage of the "rigorous proximity analysis" to be undertaken when determining whether a *prima facie* duty of care exists is whether the parties **could have** protected their interests under contract, (2) courts should not "lightly impose a duty in tort to insure against pure economic loss, in circumstances where the parties could have but chose not to provide for such insurance in contract" (para. 70), (3) in situations where a contract is silent on a matter it does not automatically mean there is no duty of care; rather, courts must be cautious not to "disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements" (para. 72) and (4) when parties are linked by

way of contract with a middle party, which reflects a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent contractual risk allocation by way of tort claim (para. 73). It highlights the importance of considering whether the parties could have protected their interests under contract:

> [66] Secondly, if the court determines that proximity cannot be based on an established or analogous category of proximate relationship, then it must conduct a full proximity analysis (*Livent*, at para. 29). In making this assessment, courts must examine all relevant factors present in the relationship between the plaintiff and the defendant — which, while "diverse and depend[ent] on the circumstances of each case" (*Livent*, at para. 29), include "expectations, representations, reliance, and the property or other interests involved" (*Cooper*, at para. 34).
>
> [67] In a case of negligent supply of shoddy goods or structures, the claim may arise in circumstances in which the parties could have protected their interests under contract. Even without being in privity of contract, the parties may nonetheless be "linked by way of contracts with a middle party", as Maple Leaf and the Mr. Sub franchisees are linked by way of contracts with Mr. Sub [Stapleton, Jane. "Duty of Care and Economic Loss: a Wider Agenda", (1991), 107 *Law Q Rev* 249, at p. 287)]. This is particularly the case in commercial transactions (as opposed to consumer purchases: *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 115, at para. 106). **Taken together, those contracts may reflect a "clear tripartite understanding of where the risk is to lie" (Stapleton, at p. 287). We see this consideration as crucial here when considering the "expectations [and] other interests involved" that must be accounted for in analysing the nature of the relationship** (*Cooper*, at para. 34).
>
> [68] **Given the possibility of an existing allocation of risk by contract, a proximity analysis must account for two concerns. First, the reasonable availability of adequate contractual protection within a commercial relationship, even a multipartite relationship, from the risk of loss is an "eminently sensible anti-circumvention argument" that militates strongly against the recognition of a duty of care (Stapleton, at p. 287; see also p. 286). As La Forest J., dissenting, recognized in *Norsk*, at p. 1116, "the plaintiff's ability to foresee and provide for the particular damage in question is a key factor in the proximity analysis". For example, a plaintiff may have been able to anticipate risk and remove, confine, minimize or otherwise address it by way of a contractual term (Linden et al., at §9.87). We agree with Professor Stapleton that the boundaries of tort liability should respect that "the principal alternative paths of protection which are theoretically available . . . are by way of contracts made directly with th[e] responsible party <u>or indirectly with a middle party</u>"** (p. 271 [Underlining in original]).
>
> [69] This Court recognized as much in *Design Services*, [*Design Services Ltd. v. Canada*, 2008 SCC 22 [2008] 1 S.C.R. 737] where the defendant had launched a design-build tendering process for the construction of a building. The plaintiff subcontractors and the defendant were not in privity of contract, but each were

linked to the other through a bid submitted by Olympic Construction Ltd., a prime contractor. Olympic's bid was unsuccessful, and the subcontractors sued alleging, *inter alia*, that they were in a relationship of proximity with the defendant and were owed a duty of care originating by reason of the defendant's "Contract A" obligations to Olympic that arose at the tendering stage.

[70] For this Court, Rothstein J. declined to impose a duty of care, because the plaintiffs could have arranged their affairs so as to submit a joint bid with Olympic (thereby making them a party to "Contract A" and entitling them to sue the defendant in contract for irregularities in the tendering process), yet had chosen not to do so. **He considered that the plaintiffs' voluntary choice to forego this contractual protection was an "overriding" proximity factor that was fatal to the claim (paras. 54-56). Thus courts will not lightly impose a duty in tort to insure against pure economic loss, in circumstances where the parties could have but chose not to provide for such insurance in contract**.

[71] The second concern is related to the first. If the *possibility* of reasonably addressing risk through a contractual term, even within a chain of contracts, presents a compelling argument against allowing a plaintiff to circumvent a contractual arrangement by seeking recognition of a duty of care in tort law, it follows that where the parties *have done so*, this consideration weighs even more heavily against such recognition. As Professor Stapleton explains, this particular anti-circumvention argument arises "not only [where] alternative protection by way of an arrangement with [the middle] party [was] available, but was obtained" (Stapleton, at p. 287 (emphasis added)). Again, this Court's decision in *Design Services* is instructive:

> In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract. [Underlining added in *Maple Leaf*; para. 56.]

[72] All this is not to say that contractual silence on a matter will automatically foreclose the imposition of a duty of care. Contractual silence on certain matters is inevitable, since it is impractical for even the most sophisticated parties to bargain about every foreseeable risk (Stapleton, at p. 287). **Our point, rather, is that, in the case of defective goods and structures, commercial parties between or among whom the product is transferred before it reaches the consumer will have had a chance to allocate risk and order their relationship *via* contract**. And in assessing the proximity of relations among those parties — that is, in evaluating "expectations, representations, reliance, and the property or other interests involved" — **courts must be careful not to disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements**.

> [73] In sum, under the *Anns/Cooper* framework and its rigorous proximity analysis, the determination of whether a claim of negligent supply of shoddy goods or structures is supported by a duty of care between the plaintiff and the defendant requires consideration of "expectations, representations, reliance, and the property or other interests involved", as well as any other considerations going to whether it would be "just and fair", having regard to the relationship between the parties, to impose a duty of care. **In particular, where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims. Courts must ask: is a party using tort law so as to circumvent the strictures of a contractual arrangement? *Could* the parties have addressed risk through a contractual term? And, *did* they?** In our view, and as we will explain, these considerations loom large here. [Bolding added]

[30] Therefore, in analyzing whether a *prima facie* duty of care was owed by the Board to the Company when it bought the property we must ask:

1. Is a party using tort law to circumvent the strictures of the contractual arrangement?
2. Could the parties have addressed risk through a contractual term?
3. Did they address the risk through a contractual term?

[31] The Company's claims against the Board do not relate to shoddy goods or structures, the nature of the claim considered in *Maple Leaf, supra*. Nevertheless, ours is a situation where the Company could have protected its interest in the property through contract, despite there being no contractual relationship between the Company and the Board. The Board was the former occupier of the property but was not an owner. The property was owned by the Municipality. The Company and the Municipality executed the APS, which addressed the condition of the property in what the Company refers to as a "hold harmless" clause:

> 9. The Vendor makes no representations about the condition of the property but agrees to obtain from the School Board and or their consultants an opinion as to the removal of tanks and the condition of the property being satisfactory to the purchaser.

[32] In *Seven Estate Ltd. v. Co-Operators General Insurance Co.*, 1997 CanLII 2372 (B.C.S.C.) the court refers to the following definition of a "hold harmless" clause:

> [73] A "save harmless" or "hold harmless" clause is defined in *Black's Law Dictionary* (St. Paul: West, 1990), as "a contractual arrangement whereby one

> party assumes the liability inherent in a situation, thereby relieving the other party of responsibility."

[33] This is not the effect of clause 9. Rather, it confirms the Municipality makes no representations with respect to the condition of the property but agrees to obtain from the Board or their consultants an opinion about the removal of oil tanks. It would be the Company's decision whether the opinion was satisfactory. That said, I will refer to clause 9 as the "hold harmless" clause as that is the term used throughout these proceedings to describe it.

[34] Pursuant to the terms of the APS, the Company agreed to purchase the property on the basis that the Municipality was not making any representations about the condition of the property, and without taking any steps to investigate the environmental condition of the property itself. The only obligation on the Municipality was to provide an "opinion" from the Board "and or" their consultants that was satisfactory to the Company. The Company received the AGAT Laboratories opinion anticipated by the "hold harmless" clause from the Municipality and was satisfied with it as it chose to proceed with the closing.

[35] The Company could have protected its interest through the APS by negotiating terms that would address any potential environmental or contamination concerns, or any other concerns with the condition of the property. Additionally, pursuant to the "hold harmless" clause it appears the Company could have requested further information from the Municipality if the opinions provided were not satisfactory. This is not a situation where the contract was silent on the matter at issue. The Company chose not to take either of the contractual "paths of protection" (*Maple Leaf*, *supra*, at para. 68) that were available to it.

[36] Conversely, the Board could not have protected itself through contract as it was not privy to the land transaction, having never been the legal owner of the land. The evidence shows that the Board through its employee, Mr. Stoddart, did attempt to limit the Board's involvement with the land transaction by advising the Municipality it could not deal with a "third-party"; referring to the Company.

[37] This is set out in the January 22, 2007 email from Mr. Holland to Mr. Anthony, attached as Exhibit 7 to the affidavit of Mr. Stoddart:

> Steve Stoddart just called regarding the old high school. He says he cannot deal with a "third party" and must deal with the Municipality. He wants to have the closing postponed to February 2nd. He believes he can get everything out by then and the phones changed over to their new location. He will have the paperwork on

> the oil tanks by February 1st. As soon as I receive it, I will copy it to you. If this is satisfactory we will aim for that date.

[38] The evidence further shows Mr. Anthony, on behalf of the Company, acknowledged that assertion in an email dated January 22, 2007 to Mr. Holland, attached as Exhibit Y to Mr. Anthony's October 15, 2018 affidavit:

> Thanks makes more sense, let's hold off until Feb. 1st and keep it easy and clean. No problem here as long as he has the proper paperwork on the oil tanks. Will he have the above ground [oil] tank for the Annex gone? Thanks KB

[39] It suggests there was "some understanding between the parties as to where risk would lie". Pursuant to *Maple Leaf, supra,* courts should be "careful not to disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements" (para. 72).

[40] In this case, it appears the Company is trying to circumvent the strictures of the APS. The Company could have addressed the risk of environmental contamination through a term in that agreement, and appears to have done so when it agreed to purchase the property from the Municipality with no representations as to the condition of the property, and after it reviewed the AGAT Laboratories report provided by the Board to the Municipality pursuant to the "hold harmless" clause and closed the transaction.

[41] In accordance with the principles set out in *Maple Leaf, supra*, and the *Anns/Cooper* analysis, the multipartite contractual arrangement between the Board, the Municipality and the Company, I am satisfied there is no proximate relationship between the Company and the Board with respect to the environmental condition of the property. Absent a proximate relationship, there cannot be reasonable foreseeability to establish a *prima facie* duty of care.

[42] In the absence of a duty of care none of the disputed facts found by the judge are material as they could not affect the outcome of the trial. The judge erred in finding they were material.

[43] The question then is whether this Court should grant summary judgment.

Should this Court grant summary judgment?

[44] Whether this Court should grant summary judgment requires consideration of the factors mandated by *Rule* 13.04 as explained in *Shannex, supra*. Fortunately, we have the full record from below, so are able to consider these factors.

[45] From the foregoing analysis, we know the answer to the first *Shannex* question, of whether there is a genuine issue of material fact, is No. The Board does not owe a duty of care to the Company with respect to the environmental condition of the property. Without the Board owing a duty of care to the Company, the Company's claim has no real chance of success. Indeed, the absence of a duty of care is fatal to the Company's claims. Summary judgment should be granted to the Board.

Costs

[46] The judge ordered the Board to pay costs of $2,000 to the Company. I would reverse that costs award and order the Company to forthwith pay the Board $2,000 costs. With respect to the appeal, I would order the Company to forthwith pay to the Board costs of $4,000 together with disbursements fixed at $1,500.

[47] I will now deal with Mr. Harding's appeal.

Harding Appeal

Issues

[48] The three issues to be decided with respect to Mr. Harding's appeal are:

1. Should leave to appeal be granted?
2. Did the judge err in law by refusing to grant Mr. Harding summary judgment?
3. Costs.

Leave to Appeal and Standard of Review

[49] The same principles set out in paragraphs 14 to 16 above, apply to Mr. Harding's appeal. Again, I am satisfied there is an arguable issue and would grant leave to Mr. Harding to appeal.

Did the judge err in law by refusing to grant Mr. Harding summary judgment?

[50] Mr. Harding argues the judge erred in finding there were genuine issues of material fact because she mischaracterized the Company's claims against him. He says there is no generalized claim against him that he failed to properly advise the Company. He also says there is no claim that he negligently misrepresented to the Company that the property would be free from contamination. He says without these claims the disputed facts the judge found are not material as they could not affect the outcome of the trial. He also says the judge erred by failing to consider alleged inconsistencies and bald assertions in Mr. Anthony's evidence.

[51] The Company argues the disputed facts are material and the judge made no error in her treatment of Mr. Anthony's evidence.

[52] I disagree with Mr. Harding's interpretation of the Company's pleadings.

[53] Reading the Company's amended statement of claim as generously as possible, as a whole, and considering the purpose of a statement of claim is to inform the defendant of the case it has to meet (*Thompson v. Enterprise Cape Breton Corporation*, 2011 NSSC 280 at paras. 36–38 and 44–45; *Gillard v. Gillis*, 2018 NSSC 44 at para. 21), I am satisfied the Company's claim against Mr. Harding includes a general claim of negligence in the delivery of professional legal services to the Company. For instance, this is indicated by paragraph 30B of the Company's amended statement of claim, which states Mr. Harding "breached his duty owed to the Plaintiff as a reasonable and prudent solicitor".

[54] I also disagree with Mr. Harding that the Company failed to plead negligent misrepresentation against him with respect to the environmental condition of the property. In paragraph 16H the Company sets out:

> 16H. On or about November 20, 2006 Mr. Harding advised Mr. Anthony that the Plaintiff did not require the clause Mr. Anthony requested regarding the "letter from Jacques Whitford" because the School Board was going to look after cleaning-up the Subject Property. Mr. Anthony accepted the advice of Mr. Harding and as a result the agreement of purchase and sale did not contain a clause requiring a letter from Jacque[s] Whitford regarding environmental standards.

[55] While the Company does not specifically later make a "claim" that Mr. Harding negligently misrepresented the environmental condition of the property to the Company, the details provided are sufficient to inform him of this claim.

[56] As set out previously, Mr. Harding accepts he owed a duty of care to the Company as its solicitor. This is appropriate given the evidence, as a solicitor's

relationship with their client is an established category of proximity, *Livent*, *supra,* at para. 27.

[57] In terms of the negligence claims, the issues are whether Mr. Harding's behaviour breached the standard of care, whether the Company sustained damages and whether the damages were caused in fact and in law by Mr. Harding's alleged breach; *Maple Leaf*, *supra*, at para. 18.

[58] At the root of these questions is the nature of the dual retainer assumed by Mr. Harding and the basis on which the Company closed the purchase transaction.

[59] With respect to the claim of negligent misrepresentation, the issues are whether Mr. Harding made any representations and, if so, whether they were untrue, inaccurate or misleading; whether Mr. Harding acted negligently in making any representations; whether the Company relied in a reasonable manner, on any negligent misrepresentation and whether such reliance was detrimental to the Company; *Queen v. Cognos Inc.*, *supra*, at para. 34

[60] The disputed facts found by the judge relate to these issues and could affect the outcome of the trial, hence they are material.

[61] With respect to Mr. Harding's argument about the quality of Mr. Anthony's evidence, the judge did nor err by failing to analyze in her reasons the alleged inconsistency in Mr. Anthony's discovery and motion evidence. He stated on the one hand that he presumed Mr. Harding would ensure the property was environmentally clean and then that he understood the options available to the Company at the time of closing with respect to the condition of the property and failed to ask Mr. Harding to review the available environmental information before he decided to close the transaction.

[62] Nor am I satisfied she erred by not referring to the alleged inconsistency between Mr. Anthony's affidavit evidence to the effect that he would normally not agree to buy land on an "as is, where is" basis and the Company's position that it needed Mr. Harding's advice with respect to the type of environmental assessment required.

[63] On a summary judgment motion in Nova Scotia, a judge is not to assess credibility or weigh evidence, *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61. This is for the trial judge. In light of the substantial evidence before the judge, considering these alleged inconsistencies

would have required her to do more than is appropriate on a summary judgment motion.

[64] Mr. Harding's appeal should be dismissed. The judge made no error when she found the disputed facts were material.

Costs

[65] I would order Mr. Harding to forthwith pay costs to the Company in the amount of $4,000, including disbursements.

Hamilton J.A.

Concurred in:

Beveridge J.A.

Farrar J.A.