NOVA SCOTIA COURT OF APPEAL

Citation: ***W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.***, 2014 NSCA 54

Date: 20140604
Docket: CA 413797
Registry: Halifax

Between:

W. Eric Whebby Limited

Appellant

v.

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

Respondents

Judges:	Oland, Fichaud and Beveridge, JJ.A.
Appeal Heard:	January 31, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Fichaud, J.A.; Oland and Beveridge, JJ.A. concurring.
Counsel:	George W. MacDonald, Q.C., and Michael Blades, for the appellant Robert G. Grant, Q.C. and Sara L. Scott for the respondents United Gulf Developments Limited and Greater Homes Inc. David G. Coles, Q.C., Geoffrey J. Franklin and Ryan Blood (Articled Clerk), for the respondent Garden Crest Developments Limited The respondent Doug Boehner Trucking & Excavating Limited not appearing

Reasons for judgment:

[1] In 2002, contaminated soil excavated from one construction site was delivered, for use as foundation fill, to another residential construction site. Both were in Halifax. The contaminants included petroleum hydrocarbons, polycyclic aromatic hydrocarbons, arsenic and lead. The eventual remediation costs at the second site exceeded $525,000. Litigation followed to sort out who was responsible. The parties are the owners of the two sites and the contractors who were responsible for excavation on the first site and backfilling on the second. After a trial, an appeal and a re-trial, the matter is back in this Court.

1. Background

[2] In 1999, the Respondent Garden Crest Developments Limited ("Garden Crest") acquired a parcel of land on Summer Street, bordering Spring Garden Road, in Halifax. Garden Crest aimed to redevelop the property for mixed residential and commercial use ("Summer Street Project"). The Summer Street Project was divided into two stages. The first was the reconstruction of the old Summer Gardens Apartment building on the northern portion of the site. The second involved the remaining one-third of the land bordering Spring Garden Road to the south.

[3] Garden Crest hired Jacques Whitford and Associates Limited, engineers, as its environmental consultant. Before excavation began, Jacques Whitford prepared two reports. Its initial report, dated January 25, 1999, assessed subsurface conditions and made geotechnical recommendations for site preparation and design of building footings ("Geotechnical Report"). The second, dated March 3, 1999, investigated actual and potential environmental contamination at the site ("Environmental Site Assessment Report").

[4] For the Geotechnical Report, Jacques Whitford drilled nine boreholes. The Report identified the composition and volume of materials encountered at each. The Geotechnical Report noted, for borehole 7, a "slight petroleum hydrocarbon odour at 1.8 m increasing to strong at 3.1 m". Borehole 7 was located on the southern portion of the site, scheduled for the Project's second stage. Soil samples were sent for testing, with the results to be reported separately.

[5] For the Environmental Site Assessment Report, a Phase I environmental site assessment was performed on February 15, 1999, and a limited Phase II

environmental assessment was performed on February 19, 1999. The Phase II environmental site assessment was an in-depth analysis that included soil sampling and a range of tests to identify contaminants. This Phase II assessment was limited to the vicinity of borehole 7 and tested only for petroleum hydrocarbons.

[6] The Environmental Site Assessment Report's executive summary included:

> Sources of actual and potential environmental contamination are associated with the following:
>
> - The confirmed presence of petroleum hydrocarbon contamination in the soil exceeding the Nova Scotia Department of the Environment (NSDOE) Level I (residential) criteria, which we believe are applicable to this site. As part of a previous geotechnical investigation, hydrocarbons were noted in one borehole (BH 7) and laboratory analysis identified total petroleum hydrocarbon concentrations of 1010 mg/kg and 2470 mg/kg at this location, at depths ranging from 1.8 to 3.0 metres below ground surface. These impacts may be related to a suspected underground tank near this location (on the southwest side of the building at 5863 Spring Garden Road);
> - Ms. Maxine Warner of Brenhold Realties recalled that remediation was performed on the adjoining property to the southwest to address contamination associated with an underground storage tank;
> - The reported presence of an abandoned underground storage tank (to the rear of the building at 1528 Summer Street) on the subject site;
> - Observed oil staining on dirt floors (around boilers) in basements at 5823-5831/5871 Spring Garden Road and 1544 Summer Street; …

[7] In November 2001, Garden Crest called for bids to excavate the Summer Street Project. The Appellant W. Eric Whebby Limited ("Whebby") and the Respondent Doug Boehner Trucking & Excavating Limited ("Boehner") were among the bidders. The information to bidders included the Geotechnical Report. When Boehner requested more information, Garden Crest provided the Environmental Site Assessment Report to Boehner. Whebby did not request further information, and was not given the Environmental Site Assessment Report.

[8] Whebby submitted its Quotation on November 26, 2001. On November 27, 2001, Garden Crest accepted Whebby's bid, and signed the bottom of Whebby's Quotation document to confirm the contract. Whebby's Quotation document included a fixed price for Whebby's excavation and site work, and qualified Whebby's "Scope of Work" with:

Not Included:

…

- Excavation of contaminated material
- Any other items not specifically mentioned

[9] Garden Crest and Whebby verbally agreed to a protocol for the handling of contaminated materials. The trial judge found (2013 NSSC 9):

> [79] Both Garden Crest and Whebby understood that any contamination found would be an extra. Garden Crest expected Whebby to be vigilant with respect to soil it excavated.
>
> …
>
> [103] … A protocol was clearly in place, that Whebby was to immediately contact Garden Crest if contaminates were found and Jacques Whitford would be called in to oversee the reclamation of the soils and their removal from the site to Envirosoil. …

Envirosoil operates a contaminant treatment facility in Bedford.

[10] In late April or early May, 2002, Whebby began to excavate the northwest corner of the site, during the Summer Street Project's first stage, moving southward. Whebby loaded the material directly onto waiting trucks who removed the material from the site.

[11] Whebby needed to dispose of the excavated material. If it couldn't find another contractor who would take it, Whebby would have to pay for its disposal. Whebby began by offering the soil free to other contractors who needed fill. They would bring their trucks for loading at the Summer Street site.

[12] One such contractor was Boehner, who had bid unsuccessfully on the excavation work for the Summer Street Project. Boehner's general manager was Paul Behner (who has changed the spelling of his father's name).

[13] Boehner was under contract to bring fill to another residential redevelopment project at Forward Avenue in Halifax. The Respondent United Gulf Developments Limited ("United Gulf") owned the Forward Avenue land and would install the services and building pads. The Respondent Greater Homes Inc. then would buy the land and build fifteen single family homes around a *cul-de-sac* ("Forward Avenue Project"). Greater Homes Inc. since has entered bankruptcy, and its trustee in bankruptcy has authorized United Gulf to proceed with the

litigation in its stead. Nothing turns on the distinction between the identities of United Gulf and Greater Homes Inc. I will refer to "United Gulf" as the owner of the Forward Street Project.

[14] The Forward Avenue site was rocky, and Boehner needed soil for foundation backfill. Jay Mason was Whebby's project manager at the Summer Street Project. Mr. Mason phoned Mr. Behner about taking the Summer Street excavated soil as fill for Forward Avenue. On Thursday or Friday, May 16-17, 2002, immediately before the long weekend, Mr. Mason went to the Forward Avenue site to speak with Mr. Behner. Mr. Behner requested 250 to 300 loads of fill, to be stockpiled on lots 7 and 8 at Forward Avenue. They agreed that Whebby's trucks would deliver and Boehner would pay $25 per load to Whebby. The trial judge (para 38) found that "Jay Mason of Whebby, knew of the intended use of the fill to backfill the residential site, as acknowledged in his discovery evidence".

[15] Garden Crest was not told of the arrangement between Whebby and Boehner. The trial judge found:

> [37] … Garden Crest did not know Whebby intended to sell any of the soil being excavated.
>
> …
>
> [80] Garden Crest did not know where the general fill was being taken by Whebby. Mr. Chedrawe [of Garden Crest] testified that he knew generally that fill was taken to disposal sites on mainland Halifax or to the Bedford Basin in-fill site in the case of pyritic slate that would be neutralized in salt water. He had absolutely no knowledge that Whebby contracted to sell the fill for use at a residential site.

[16] The trial judge said (para 31) "[t]he evidence is that soil from the Phase I excavation was delivered to Forward Avenue, and possibly some soil from Phase II at the border of these two areas, …". The judge (para 38) found that "[t]he fill was largely delivered over the course of a few days in late May 2002, commencing on the long weekend in May". The long weekend began Saturday, May 18.

[17] At this time Whebby was excavating near the foundation of 1528 Summer Street. On Tuesday, May 21, there was a problem. The trial judge said:

> [41] Whebby continued to excavate at the Garden Crest site until the old oil tank was found buried there on May 21. Oil from the tank had impacted the soil. …

[18] Chris Tucker was Whebby's excavation foreman. After the oil tank was unearthed, Mr. Tucker halted excavation. He informed Mr. Mason about the oil tank. Mr. Mason relayed the information to Mr. Haddad of Garden Crest. Mr. Haddad contacted Jacques Whitford, who sent someone to the Summer Street site. On May 21, Jacques Whitford began testing the soil around the excavated oil tank. (Trial Decision, paras 42, 53, 57). On May 21, under Jacques Whitford's supervision, the removal of contaminated soil from that vicinity proceeded, and that soil was taken to Envirosoil's treatment facility. Meanwhile, Mr. Tucker resumed Whebby's excavation in another area of the site.

[19] The judge described the parties' reaction, respecting the Forward Avenue fill, to the news of the damaged oil tank on May 21, 2002:

> [47] It is the evidence of Jay Mason that he was concerned enough that contaminated soil could have been delivered to Forward Avenue, after the fuel tank was discovered, he asked that Jacques Whitford be sent to Forward Avenue to check the fill already delivered.
>
> [48] Unfortunately this never occurred. Chris Tucker the Whebby site supervisor was in charge of loading material to the trucks. …
>
> [51] Chris Tucker did not recall Jay Mason's request to have Jacques Whitford go to Forward Avenue. Yet Jay Mason's evidence was that he not only gave this instruction but that Chris Tucker replied and assured him, it had been done and that Jacques Whitford said it looked okay at Forward Avenue. Jay Mason conveyed this assurance to Paul Behner. …
>
> [52] With respect to evidence of Jay Mason and Chris Tucker, I find Jay Mason to be more credible. His evidence is to be believed, whereas Chris Tucker suffered all too many convenient lapses in memory in my view.
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> …
>
> [61] Steven Milligan testified to United's awareness of concerns about soil quality and that he approved the response developed by Kevin Riles, Vice-President of United after consultation with him and Paul Behner.
>
> [62] Rather than cause the soils to be tested at this time, June of 2002, Mr. Milligan testified that he accepted the assurances given to Paul Behner by Jay Mason. He testified that his assurance was relayed by Kevin Riles to Dr. Manuel by email:
>
> > Our contractors have confirmed that the material transported to Forward Avenue was inspected by Jacques Whitford Ltd., who are one of the best known and most respected environmental and soil engineering firms in Nova Scotia.

[20] The judge found that Whebby's deliveries to Forward Avenue continued after the incident with the oil tank on May 21 (Trial Decision, paras 45-46, 72-73, 82). On May 24 2002, Whebby invoiced Boehner for delivery to Forward Avenue of 268 loads, at $25 per load plus HST, for $7,705.

[21] After the damaged oil tank was found on May 21, 2002, Jacques Whitford tested the soils at Summer Street on May 21 and 27, 2002. The judge said, of the Summer Street test results:

> [71] It would have been a great help to the Court if Garden Crest had Jacques Whitford testify as to the test results shown in Exhibit 6 and Exhibit 10. But absent that opportunity, I am still able to conclude that much of the Garden Crest site in both phases were contaminated with PAH's and that the soils were also contaminated with hydrocarbon.
>
> [72] Exhibit 10 shows the Jacques Whitford test results – some samples taken at the Garden Crest site in the Phase I area and some taken at Envirosoil after delivery of remediated soils were taken there. The samples were taken on May 21 and May 27, while trucking of general fill to Forward Avenue continued.
>
> [73] The results reveal the presence of hydrocarbons, lead, arsenic, and also other PAH's (heavy metals). These results may also be cross-referenced to Exhibit 6, pp. 68-70, field notes from Jacques Whitford relating to this time frame. Exhibit 6 also contains the invoice from Envirosoil dated May 31, 2002 for hydrocarbon soil delivered there for processing.
>
> [74] Exhibit 6 also demonstrates that soils from Phase II contaminated with both hydrocarbons and heavy metals were trucked away to Envirosoil in early 2003.
> …

[22] At Forward Avenue, the foundations for all but one of the homes were poured in June and July 2002. Then the perimeters were backfilled from the stockpile that had arrived from Summer Street. One Forward Avenue lot had been backfilled in January 2002, without Summer Street soil, for use as a showcase home.

[23] By September 2002, a Forward Avenue neighbour had complained to the provincial Department of Environment about the stockpile of fill. The Department contacted United Gulf. United Gulf had the stockpile investigated by AMEC Earth and Environmental Limited ("AMEC"), environmental engineers.

[24] In October - November 2002, AMEC tested the fill that Whebby had delivered to the Forward Avenue site. AMEC's Chris Elliot, an environmental engineer, conducted the investigation. The judge said, of AMEC's investigation:

> [4] Subsequently the fill delivered was discovered to be contaminated with hydrocarbons, heavy metals and unsuitable construction debris. The soil was required to be removed from the Forward Avenue site by order of the Department of Environment.
>
> …
>
> [67] Found at Exhibit 1, Tab 8 and Exhibit 9, residential lot samples were taken at location shown on p. 2 Exhibit 1, Tab 8, at FA3-FA8. Further tests of material remaining in the stockpile at the rear of the Forward Avenue site, FA1 and FA2, FA9 and FA10.
>
> [68] AMEC tested the soils in early November 2002. Chris Elliot inspected the site. His evidence is that the soil smelled like creosote. The results show that the soils tested positive for hydrocarbons at five test sites above levels allowed by the RBCA Guidelines.
>
> [69] The soils [at Forward Avenue] also tested positive for arsenic, "unnaturally high" according to Chris Elliot as well as exceedances of lead and various PAH's including naphthalene, phenanthrene, pyrene and other surrogate PAH's.

[25] Based on the results of these investigations by Jacques Whitford and AMEC, the judge found that the Summer Street site, and Whebby's deliveries to Forward Avenue, contained contaminants that were unsuitable for residential property. These were TPHs (total petroleum hydrocarbons), PAHs (polycyclic aromatic hydrocarbons) and heavy metals (arsenic and lead) that exceeded residential standards.

[26] TPHs were described by Mr. Elliot as "a total mixture of petroleum" that often enters the soil from spills of furnace oil. PAHs comprise a variety of compounds. Mr. Elliot testified that "[s]ome of them are quite harmful, and in particular, one that I note is exceeded here, benzo(a)pyrene, is a suspected human carcinogen as well". PAHs form as a by-product of burning coal or heating oil. Until the 1940s, Halifax homes generally burnt coal for heat, and often the remnants were thrown on the soil in the yard. Mr. Elliot testified that "in downtown Halifax, for example, historic use of coal and other organic – particularly coal, but other sorts of things, has led to widespread arsenic and lead and PAH contamination of soils in downtown Halifax." Mr. Elliot testified that arsenic is a carcinogen and lead can have neurological effects.

[27] The judge found:

> [75] Although it is impossible to account from [*sic* for] every shovelful of earth taken from the northern portion of Phase I at Garden Crest and possibly some soil

> along the border of Phase II, a reasonable person could not help but conclude that contaminated soil unsuitable for residential use was moved from there to Forward Avenue. …

[28] United Gulf then paid to re-excavate at Forward Avenue and dispose of the contaminated soil. This included the material that had been backfilled around the perimeters of the foundations during the summer of 2002. The remediation followed the requirements of the provincial Department of the Environment. The judge (para 94) found that United Gulf's remediation costs totalled $525,797. This included engineering consulting, excavation, trucking, dumping, professional fees, claims analysis and miscellaneous expenses. Of this, the judge (para 95) found that $38,501.47 related to the "discrete costs of excavating around each of the 14 foundations", which had been backfilled in the summer of 2002.

2. The Litigation

[29] The lawsuits began.

[30] On January 15, 2003, in a mechanics' lien action, Boehner sued United Gulf for payment of its services. United Gulf defended and counterclaimed against Boehner for the remediation costs. On April 16, 2004, Associate Chief Justice MacDonald (as he then was) of the Supreme Court granted summary judgment to United Gulf on its counterclaim against Boehner, with damages to be assessed. Those damages have not yet been assessed.

[31] On December 16, 2003, Boehner third partied Whebby, claiming indemnity for any amount that Boehner owed to United Gulf. Boehner's causes of action were negligence and breach of the implied conditions of fitness for purpose and merchantability under the *Sale of Goods Act*, R.S.N.S. 1989, c. 408, ss. 17(a) and (b). On January 16, 2004, Whebby defended.

[32] On January 16, 2004, Whebby fourth partied Garden Crest, claiming indemnity for any amount owing by Whebby to Boehner. Whebby's causes of action were negligence, negligent misstatement and breach of express and implied terms of the contract between Whebby and Garden Crest.

[33] On October 29, 2004, United Gulf amended its pleading to add a direct claim against Whebby for negligence and nuisance. On January 13, 2005, Whebby defended, alleged that United Gulf failed to mitigate, and cross-claimed against Garden Crest for any amount that Whebby would owe United Gulf. Whebby's

pleaded causes of action against Garden Crest were breach of the express and implied terms of contract, negligent misstatement and negligence.

[34] On February 4, 2005, Garden Crest filed a Defence that denied any liability.

[35] The matter was tried in March 2006 before Supreme Court Justice Charles Haliburton, who issued a decision on April 21, 2006 (2006 NSSC 130). The judge apportioned responsibility for the costs of remediation, $500,118. 28, as: $36,002 owing by Garden Crest; $221,510 owing by Whebby; $121,303 owing by Boehner; and $121,303 to be absorbed by United Gulf.

[36] On appeal, the Nova Scotia Court of Appeal overturned the decision and ordered a new trial (2007 NSCA 92). Justice Cromwell's reasons noted that the recording system had failed during the trial, meaning there was no transcript, and identified several errors by the trial judge. The Court of Appeal held that Whebby owed a duty of care in negligence to United Gulf and Boehner, discussed the standard of care, dismissed Boehner's claim against Whebby for the implied condition of fitness for purpose under s. 17(a) of the *Sale of Goods Act*, and dismissed United Gulf's claim against Whebby for nuisance. Later I will discuss several passages from the Court of Appeal's decision.

[37] On December 22, 2009, by Order of Supreme Court Justice Coughlan, Boehner's counsel of record withdrew and Boehner's recognized agent was designated as its addressee for service. In February 2010, Boehner assigned its claims to United Gulf. Boehner did not appear by counsel at the subsequent trial before Justice Robertson or on this appeal.

[38] On October 20, 2011, the Court of Appeal clarified its earlier order to confirm that "all of the issues between Whebby and Garden Crest that were raised in their pleadings, namely, negligence, negligent misstatement and breach of contract, ought to be tried" in the new trial (2011 NSCA 97, para 1).

[39] In June 2012, Supreme Court Justice Heather Robertson conducted the second trial. She issued a decision on January 7, 2013 (2013 NSSC 9), followed by an Order on February 22, 2013. The judge:

(a) apportioned to United Gulf the responsibility to absorb $38,501.47 (the expense of excavating around the individual foundations that had been backfilled in the summer of 2002), for failure to mitigate;

(b) did not quantify United Gulf's summary judgment against Boehner;

(c) dismissed Boehner's claim against Whebby for the implied condition of merchantability under s. 17(b) of the *Sale of Goods Act*;

(d) did not rule on Boehner's third party claim against Whebby;

(e) allowed United Gulf's direct claim of negligence against Whebby for damages of $487,295.53 (the remediation cost of $525,797 less the $38,501.47 apportioned to United Gulf for failure to mitigate) plus prejudgment interest;

(f) dismissed Whebby's claims against Garden Crest.

[40] Later I will discuss the judge's reasons.

[41] On May 3, 2013, Justice Robertson ordered that (1) the prejudgment interest payable by Whebby to United Gulf be quantified as $95,956.50, (2) Whebby pay to United Gulf costs of $18,993.87 for the 2006 trial, $18,993,87 for the 2012 trial, $6,000 for the 2007 appeal, and $2,749.01 disbursements, and (3) Whebby pay to Garden Crest costs of $18,993.87 for the 2006 trial, $18.993.87 for the 2012 trial, $6,000 for the 2007 appeal and $3,850.42 disbursements.

[42] Whebby appeals to this Court from the judge's rulings on items (b), (e) and (f) from the decision of January 7, 2013. There are no cross appeals.

3. Issues

[43] Whebby's factum states the following grounds of appeal:

(a) Did the Learned Trial Judge commit the following palpable and overriding errors of fact:

(i) Finding that debris was a source of contamination and that debris affected the suitability of the material for use as general fill;

(ii) Finding that demolition debris stockpiled in phase 2 of the Site had subsequently been delivered to Forward Avenue; and

(iii) Finding that Garden Crest provided Whebby with all of the information which Garden Crest knew about the soils in question?

(iv) Finding that Garden Crest terminated its contract with Whebby on June 4, 2002;

(v) Finding that the delivery of fill to Forward Avenue commenced on the long weekend in May 2002.

(b) Was Whebby held to an incorrect and unreasonable standard of care in the course of the determination of negligence against it at Trial?

(c) If Whebby was negligent as determined at Trial, should Boehner similarly be found to have acted negligently and to be the proximate cause of the damages claimed?

(d) What knowledge on the part of Jacques should be imputed to Garden Crest?

(e) Should Garden Crest be held responsible for the remediation costs?

(f) Even if Whebby was negligent as determined at Trial, did Whebby *cause* [appellant's emphasis] all of the damages claimed by United Gulf and should Whebby be held liable for all such damages?

[44] I will re-arrange these submissions under three headings:

1. Did the trial judge commit an appealable error by ruling that Whebby was liable in negligence for the quantified damages? This involves aspects of items (a), (b) and aspects of (f) in Whebby's list of issues.

2. Did the judge commit an appealable error by not attributing liability to Boehner? This involves item (c) and aspects of (f).

3. Did the judge commit an appealable error by not attributing liability to Garden Crest? This involves aspects of items (a), (d), (e) and aspects of (f).

By appealable error I mean an error that offends the standard of review.

4. Standard of Review

[45] This Court reviews issues of law, including a point of law that is extractable from a mixed question of fact and law, for correctness. Issues of fact, including a mixed question of fact and law with no extractable legal error, are reviewed for palpable and overriding error, meaning an error that is both clear and determinative. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras 8, 10, 19-25, 31-36. *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at paras 4, 65, 69, 72-74.

[46] Whebby asserts process errors by the judge - misapprehension of evidence, ignoring relevant evidence, considering irrelevant evidence, and failing to deal with issues that were submitted to the judge. I will address those applications of the appellate standard of review, if necessary, when I come to those submissions.

[47] Whebby's submissions are heavily factual. Much of these reasons assess the evidential support for the judge's findings.

5. First Issue – Whebby's Liability to United Gulf

[48] The judge (para 15) recited the elements of negligence from Allen M. Linden, *Canadian Tort Law*, 8th ed, (Markham, Ontario: LexisNexis Canada Inc., 2006), p. 109. I will address duty of care, standard of care, breach of the standard, and causation of loss.

(a) Duty of Care

[49] The judge (paras 17-19) accepted the Court of Appeal's un-appealed earlier ruling (2007 NSCA 92, para 49) that Whebby owed a duty of care to United Gulf. On this appeal, Whebby does not seek to re-litigate the Court of Appeal's earlier determination, and acknowledges its duty of care.

(b) Standard of Care

[50] The judge (para 20) described the critical issue as whether Whebby breached its standard of care.

[51] Justice Cromwell's comments in the 2007 decision usefully frame the similar issues, respecting the standard of care, that also arise on this appeal:

> [42] The judge did not err in finding the required proximity here. Whebby was to dump soil on United's land for the obvious purpose of it being used as residential fill. The parties acted, therefore, in close physical proximity. Whebby knew that it was acting at the instance of United's contractor, Boehner. The contamination of the soil was the immediate cause of United's damage. All of these considerations support the judge's conclusion that there was sufficient proximity.
>
> [43] Whebby submits that its duty could be no higher than that imposed by the contract and, given the judge's dismissal of Boehner's claims under the **SGA**, the judge had, in effect, imposed absolute liability in tort. I do not accept this view.
>
> [44] Admittedly, there is some confusion in the judge's reasons on this point. He described Whebby's duty as being to deliver clean fill. But that is not a duty of care in negligence. Negligence is concerned with taking reasonable care to avoid foreseeable injury and damage to those to whom one is in proximity. As Fleming puts it, "Negligence is a matter of risk, that is of recognizable danger of harm": John G. Fleming, **The Law of Torts**, 9th ed. (Sydney, Australia: LBC

> Information Services, 1998) at 115. The duty described by the judge was not of this character, and, if applied, would impose strict liability.
>
> [45] However, in determining liability, my view is that the judge decided that Whebby and Boehner had failed to act reasonably by not testing the soil given what the judge found to be obvious problems with it for use as residential fill. As I will discuss later, this was consistent with the tenor of the evidence from the excavators themselves that they would rely on the appearance of the soil. So I do not think it was inconsistent with Whebby's contractual obligations to Boehner to impose a duty to take reasonable care. The contractual stipulations, of course, may well be highly relevant to determining the standard of care. But they do not, in my view, negate a duty of care as between Whebby and Boehner. There was no contract between Whebby and United and contractual stipulations do not negate the existence of a duty of care between them.
>
> [46] Whebby makes extensive submissions in its factum based on the proposition that there should be no duty of care with respect to latent defects. It is common ground that metal contamination is not patent to the senses and there is no evidence that Whebby knew of such contamination. It follows, in Whebby's submission, that it should not be found to have acted unreasonably in relation to this latent and unknown defect.
>
> [47] Respectfully, my reading of the judge's decision is that he did not impose liability on that basis. Rather, he imposed liability on the basis of Whebby and Boehner's failure to take reasonable care that the soil was suitable for use at a residential subdivision. In short, he found that they both had failed to test the soil once its appearance should have made it obvious to both of them that it was unsuitable.
>
> …
>
> [49] I conclude that the judge did not err in finding that Whebby owed Boehner and United a duty of care. The next issue is whether he erred in finding that Whebby breached that duty. …

[52] I will add several of Justice Cromwell's comments on the initial trial judge's finding that Whebby breached the standard of care. I do not cite these as pertinent to the facts for the current appeal, which turn entirely on the evidence in the current record. I cite them only as elaboration on how Whebby's standard of care was defined for the 2006 trial and 2007 appeal:

> [52] The judge found that one key consideration disposed of the negligence issues in relation to both Boehner and Whebby. That key consideration was this: it was or should have been obvious to both Whebby and Boehner that the soil was unsuitable for use around residential properties. This went to Boehner and Whebby's negligence because, once they saw the obvious defects, they failed in

> the duty to take reasonable care by delivering it to or spreading it around United's site without testing it.
>
> [53] As I said earlier, my view is that the judge did not find that Whebby and Boehner had a general duty to test soil or that Whebby or Boehner should have been alerted to the latent risk of heavy metal contamination which turned out to be the major problem with the soil. Rather than any general duty to test, the judge found that reasonable care required testing once there were indications of problems. …
>
> [55] In short, the basis of the judge's findings of negligence on the part of both Whebby and Boehner was that the exercise of reasonable care to provide clean soil required them to have the soil tested because of the problems with it that were or ought to have been obvious to them. As the judge put it in para. 75 of his reasons, the appearance of the material "…when initially stockpiled by Boehner should have alerted prudent persons to a genuine possibility of problems with contamination and the general suitability of the fill." Implicit in this is the inference that testing would have revealed the presence of heavy metal contamination which, as noted, turned out to be the major problem.

[53] This Court did not fault Justice Haliburton's definition of the standard of care. Rather, this Court overturned the decision and ordered a new trial, because the judge relied on inadmissible evidence for his finding that Whebby breached it:

> [57] Whebby submits that the judge relied on inadmissible hearsay evidence in making his finding about the obvious unsuitability of the soil. Respectfully, I agree with this submission. In reaching this critical finding, the judge relied on the description of the soil made by a neighbour in an e-mail to United. That evidence was hearsay and inadmissible for that purpose. The judge therefore erred in law in relying on that evidence.

[54] I will turn to the current appeal.

[55] Justice Robertson assessed Whebby's standard of care, and its breach, in these terms:

> [75] Although it is impossible to account for every shovelful of earth taken from the northern portion of Phase I at Garden Crest and possibly some soil along the border of Phase II, a reasonable person could not help but conclude that contaminated soil unsuitable for residential use was moved from there to Forward Avenue. Not enough care was taken by Whebby to ensure that all hydrocarbon contaminated soil was taken to the Envirosoil establishment. The fact that Whebby carelessly trucked construction debris to Forward Avenue, that was to be stockpiled at Garden Crest speaks to their obvious breach of the standard of care required. This material was not suitable for sale in a residential use. Whebby had

> a duty to ensure it could be safely used residentially and this would have required having the soil tested. Such testing would then have revealed the heavy metals, particularly the arsenic and lead.
>
> [76] The Garden Crest site is in the old Halifax, where hydrocarbon contamination and pyritic slate abound. Old houses, with various types of heating plants, old boilers, old fuel tanks along with the disposal of coal clinkers deposited outdoors, during the long lifetime of these old residential buildings created an environmental hazard just waiting to be discovered.
>
> [77] Although I have no evidence before me of trade practice in the excavating industry, with respect to environmental testing practices, it is fair to say that in 2002 excavating companies knew they needed to be on the lookout for the smell of hydrocarbon contamination and possibly pyritic shale but not much else. Yet, they did know that such soil would not be suitable for residential use. Jay Mason's instincts were good and he realized there could be an issue but failed to follow up personally, as Whebby's contract with Garden Crest neared its end.
>
> …
>
> [88] Once Whebby decided to sell the fill, they had to take care to determine the fill would be suitable for this residential use. The failure [by] Whebby to ensure the fill material was free of contaminates was a breach of the standard of care. The standard of care is that expected of an ordinary, reasonable and prudent contractor in the circumstances. Whebby sold contaminated soil to Boehner and trucked it to Forward Avenue. As a result it breached the standard of care owed to Boehner and United. By agreeing to supply the fill, particularly questionable fill from old peninsular Halifax, Whebby assumed the responsibilities of ensuring that the fill would be suitable for residential backfill. Had they tested the soil, all of its defects would have been apparent. I find Whebby was negligent in the sale of 268 truck loads and further free delivery of additional soil from Garden Crest, as they completed the Phase I excavation at that site. …

[56] The judge spoke of Whebby's duty to "ensure" that the soil was safe for residential use. This is reminiscent of Justice Haliburton's comments in the first trial that Whebby had a duty to bring clean fill. As this Court said in the first appeal (para 44), Whebby's standard is to use *reasonable care* to avoid the foreseeable injury of delivering contaminated fill. A duty to ensure a result, circumventing the standard of reasonable care, would be strict liability. Whebby is not liable for any tort of strict liability. If the judge had applied strict liability, then her ruling should be overturned.

[57] In that vein, Whebby's factum (para 67) submits that Justice Robertson "held Whebby to a standard of perfection – to guarantee a specific outcome – and allowed liability without fault, which is the classic definition of strict liability".

Whebby (para 63) also says that the judge focussed on today and "failed to determine what the standard of care was in 2002".

[58] It is clear, however, that Justice Robertson fashioned Whebby's standard of care in terms of reasonableness. She said (para 88) "[t]he standard of care is that expected of an ordinary, reasonable and prudent contractor in the circumstance". And she considered that standard as of 2002. The judge particularized the standard of reasonableness by finding (para 77) "in 2002 excavating companies knew they needed to be on the lookout for the smell of hydrocarbon contamination and possibly pyritic shale but not much else" and "they did know that such soil would not be suitable for residential use".

[59] Whebby's factum says (para 69):

> Extremely important in Whebby's submission is that the evidence at Trial was clear to the effect that fill was assumed to be free of contamination unless a reason existed to suspect otherwise.

The difficulty for Whebby is that, based on the judge's finding, in 2002 the smell of hydrocarbons was a known reason for an excavator to suspect otherwise. Reasonable care meant that an excavator in 2002 should have been "on the lookout for the smell of hydrocarbon contamination", as the judge put it, because hydrocarbons had detectable odour and were known to be unsuitable for residential use. The judge's statement that the excavator should "ensure" uncontaminated delivery by testing described the reasonable precautions to be taken *after* the excavator either suspected, or reasonably should have suspected, the contamination.

[60] This standard is consistent with that described in the Court of Appeal's 2007 decision, where Justice Cromwell said:

> [52] … That key consideration was this: it was or should have been obvious to both Whebby and Boehner that the soil was unsuitable for use around residential properties. This went to Boehner and Whebby's negligence because, once they saw the obvious defects, they failed in the duty to take reasonable care by delivering it to or spreading it around United's site without testing it.
>
> [53] As I said earlier, my view is that the judge did not find that Whebby and Boehner had a general duty to test soil or that Whebby or Boehner should have been alerted to the latent risk of heavy metal contamination which turned out to be the major problem with the soil. Rather than any general duty to test, the judge

> found that reasonable care required testing once there were indications of problems. …

[61] The standard also is consistent with the protocol between Whebby and Garden Crest for excavation and disposal of contaminated soil. The judge found that Garden Crest "expected Whebby to be vigilant with respect to the soil it excavated" and "Whebby was to immediately contact Garden Crest if contaminates were found and Jacques Whitford would be called in" (Trial Decision, paras 79 and 103).

[62] Whebby submits that the judge's definition of the standard was unsupported by evidence. Its factum (para 69) says:

> Mason testified that very little was known, and very little consideration was given, by the industry to soil contamination in 2002.

[63] There was evidence before Justice Robertson to support the standard. The judge cited the testimony of Whebby's Mr. Mason about his concerns in 2002:

> [47] It is the evidence of Jay Mason that he was concerned enough that contaminated soil could have been delivered to Forward Avenue, after the fuel tank was discovered, he asked that Jacques Whitford be sent to Forward Avenue to check the fill already delivered.
>
> …
>
> [56] Mr. Mason testified about events now ten years past. But he seemed to have good recall and was willing to admit his own failings. He agreed that he was aware that soils found to be contaminated were unfit for residential use and would have to be treated. He knew that soils containing construction debris or hydrocarbons were unfit for residential use. …

[64] Mr. Mason knew in 2002 that soils contaminated with hydrocarbons were unfit for residential use. That was why, after the May 21 event, he asked Mr. Tucker to have Jacques Whitford check the deliveries made to Forward Avenue. Similarly, Whebby's 2002 protocol with Garden Crest channelled "contaminated" material for special treatment by Jacques Whitford (above para 9). Mr. Mason knew that Jacques Whitford's domain over "contaminated" material included soil containing hydrocarbons. Mr. Mason testified:

> **Q.** So that it was your express statement in the agreement that any contaminated material that was discovered by Whebby on the site would be the responsibility of the owner of Garden Crest Developments Limited to attend to?

A. That's correct.

Q. Yeah. And you didn't stipulate what type of contaminated material that had to be?

A. That's correct.

Q. So, it could be hydrocarbon-contaminated material, right?

A. Yes.

…

Q. Right. Did you ask your superintendent Chris Tucker to ask Jacques Whitford to go out to the Forward Avenue to ensure that contaminated soil was not delivered to that site?

A. That's correct.

Q. And you did that as a precautionary measure, didn't you?

A. Yes.

…

Q. Right. And to be clear, what you asked Mr. Tucker to do is to have Jacques Whitford go out and inspect the Forward Avenue site?

A. Correct.

Q. You wanted to make sure that if there was any hydrocarbon on that site, on the Garden Crest site, that it did not go out to the Forward Avenue site?

A. Correct.

[65] Similarly, the testimony of Mr. Behner, another excavator, includes the following exchange:

THE COURT: So, Mr. MacDonald, would – I think I take this from Mr. Behner's evidence, that if you inspected a load, there were two things that he would have been concerned about. One was the presence of pyritic shale, and two, the presence of hydrocarbon.

MR. MacDONALD: The first one, what was that you said?

THE COURT: Pyritic shale.

MR. MacDONALD: Yes.

THE COURT: And the second concern would have been hydrocarbons.

THE WITNESS: Yes.

[66] The definition of the standard of care is a mixture of law and fact. The judge cited the appropriate legal standard of an ordinary, reasonable and prudent contractor in the circumstances. The particular application that fleshes out the legal standard depends largely on the evidence and inferences from the evidence: see *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120.

[67] Here the evidence was that, in 2002, an ordinary, reasonable and prudent contractor would know that hydrocarbon-contamination was unsuitable for residential fill. So the contractor's standard was to exercise a reasonably attentive "lookout" for the detectable odour of hydrocarbons. If the odour either was detected or reasonably could have been detected, the contractor would have "reason to suspect" contamination, as Whebby's factum terms it. Then the excavator's standard would have the fill tested before just dumping it at a residential site for backfilling.

[68] There is no extractable error of law or palpable and overriding error of fact in the judge's definition of Whebby's standard of care.

(c) Breach of the Standard

[69] The judge found that the soil Whebby moved to Forward Avenue emitted an identifiable odour of hydrocarbons, and their presence was patent and detectable:

> [27] ... Construction debris and the obvious appearance of or smell of hydrocarbons would be patent defects. The presence of non-detectable heavy metals would not without testing.
>
> …
>
> [68] AMEC tested the [Forward Avenue] soils in early November 2002. Chris Elliot inspected the site. His evidence is that the soil smelled like creosote. The results show that the soils tested positive for hydrocarbons at five test sites above levels allowed by the RBCA [Risk Based Corrective Action] Guidelines.
>
> …
>
> [92] I agree that the defect of undetectable heavy metals is latent. Hydrocarbons presence and demolition debris is not. …

[70] Whether the smell of hydrocarbons was detectable is critical for whether Whebby breached its standard of care.

[71] Justice Robertson heard substantial evidence to support the finding that the hydrocarbons' odour was detectable.

[72] Speaking generally of hydrocarbon odour, Whebby's Mr. Mason testified:

> **Q.** And you know yourself that you can't tell whether a pile of material contains hydrocarbons just by looking at it?
>
> **A.** Well you can smell it.

Mr. Behner said:

> **Q.** Thank you. Hydrocarbons, you might be able to smell them, you may not be able to smell them. Correct?
>
> **A.** I don't agree with that. I think you could smell it.
>
> **Q.** You think you always can smell it.
>
> **A.** Yes.

Similarly, Garden Crest's Mr. Chedrawe, a property developer, testified:

> **Q.** Well this –
>
> **A.** This is – you're dealing with hydrocarbons which are easily detectable when you excavate.
>
> **Q.** Easily detectable?
>
> **A.** Yeah.
>
> **Q.** How?
>
> **A.** From odour. You can smell -

[73] Speaking of the stockpile at Forward Avenue, delivered by Whebby, AMEC's Mr. Elliot testified:

> **Q.** What about hydrocarbon?
>
> **A.** Yes.
>
> **Q.** Can you see it?
>
> **A.** Sometimes you can. Generally you smell it.
>
> **Q.** Generally you smell it?
>
> **A.** Yes.
>
> …
>
> **Q.** When you first saw the – went out to the site and saw the pile did you see any indication of hydrocarbon?
>
> **A.** No, but there was an odour.

Q. I'm sorry?

A. There was an odour. I didn't see anything visually, no.

Q. But you could detect an odour?

A. Yes.

…

Q. Okay. So, you say you saw fragments of concrete –

A. Yes.

Q. – brick, lumber, ceramics, plastic, glass, tin cans, rebar, metal strapping and roofing materials "that emitted an odour similar to creosote". Now, what did, the roofing materials?

A. No, the general soil.

Q. The general soil. Similar to creosote. So, is that what gave you the –

A. That combined with the visual observations. Creosote is a petroleum hydrocarbon that is high in PAHs.

Q. And that was – was that just generally on the pile, you didn't have to dig into the pile to smell it?

A. Correct.

[74] Despite the hydrocarbons' noticeable odour, the fill went to Forward Avenue on Whebby's trucks. That fact invited an inference that Whebby failed to keep an attentive "lookout", under its standard of care, to detect the noticeable odour. How did this happen?

[75] Mr. Tucker supervised the loading and dispatch of trucks to Forward Avenue. Mr. Tucker was Whebby's point man to be "on the lookout" for hydrocarbon odour in the execution of Whebby's standard of care. The judge was unimpressed by both Mr. Tucker's testimony and his apparently cavalier approach to the dispatch of fill. Justice Robertson said:

> [52] … Chris Tucker suffered all too many convenient lapses in memory in my view.
>
> …
>
> [57] Mr. Tucker's evidence was less straight forward and his memory poor. … He testified he did not smell any odour until he got near the old buildings at 1528 Summer Street, where the oil tank was discovered, smashed up within the foundation about two-thirds of the way down. … He did not recall any conversations with Jacques Whitford or any instructions from Jay Mason to have

> Jacques Whitford visit Forward Avenue. He described his job as "to get rid of the fill". He also testified it was not his job to care, he merely did as he was directed.

[76] Mr. Tucker testified about the Summer Street site:

> **Q.** Did you notice any odour at all?
>
> **A.** Not – not until we got into an area out by the old building.

Yet Mr. Tucker did not cease loading the trucks for Forward Avenue when they "got into [the] area out by the old building" at 1528 Summer Street. He continued until they unearthed the damaged oil tank.

[77] After the oil tank was discovered on May 21, Mr. Mason told Mr. Tucker to have Jacques Whitford inspect the fill delivered to Forward Avenue for hydrocarbon contamination. Mr. Tucker later told Mr. Mason that Mr. Tucker had so instructed Jacques Whitford, and that Jacques Whitford had cleared the fill at Forward Avenue. But, in fact, Mr. Tucker had not contacted Jacques Whitford, and Jacques Whitford had neither examined nor approved the fill at Forward Avenue. It appears, from the trial judge's findings, that Mr. Tucker was untruthful to his superior, Mr. Mason. Mr. Mason testified that he was unaware, until the trial, that Mr. Tucker had not relayed his direction to Jacques Whitford. The result was that the contamination at Forward Avenue was not resolved in short order on May 21, 2002, after a Jacques Whitford inspection to detect the patent odour of hydrocarbons, followed by testing to detect the other latent contaminants.

[78] The judge's findings on these points are quoted above (para 19).

[79] The judge's findings on the exchange between Messrs. Mason and Tucker are supported by the testimony.

[80] Mr. Mason testified:

> **Q.** Right. Did you ask your superintendent Chris Tucker to ask Jacques Whitford to go out to the Forward Avenue to ensure that contaminated soil was not delivered to that site?
>
> **A.** That's correct.
>
> …
>
> **Q.** Right. And to be clear, what you asked Mr. Tucker to do is to have Jacques Whitford go out and inspect the Forward Avenue site?
>
> **A.** Correct.

…

Q. No. You had this concern and you relayed it to Mr. Tucker and you directed him to request Jacques Whitford to make an inspection at Forward Avenue?

A. Yes.

Q. And Mr. Tucker told you that Jacques Whitford did that?

A. Yes.

Q. And he told you that Jacques Whitford said the soil looked okay?

A. He told – he told me that – I can't recall exactly what he said.

Q. What in substance did he say?

A. He said that Jacques Whitford had told him that it looked – it was okay. Generally, but that wouldn't be the specific words. It might have been something to the effect of, "Yeah, it's all right" or – I'm not – specific words I'm not sure of.

…

Q. You – in fact, you didn't speak to anyone other than Chris Tucker about this concern that you had?

A. That's correct.

Q. And Chris Tucker was dealing with the Jacques Whitford person on site?

A. Yes.

…

Q. Have you subsequently, through this many year process, learned that in fact Mr. Tucker did not ask Jacques to go there?

A. No.

Q. You don't know?

A. No.

…

Q. But your understanding of this conversation you had with Mr. Tucker was that Jacques, based upon some visual inspection, supposedly said, "This soil is fine"?

A. I asked him to do it and he told me it was done. I had no reason to believe that it wasn't.

[81] Mr. Tucker testified:

Q. Okay. Now what did you understand or what did Jay tell you was to be done in terms of the excavation and your work on the Garden Crest Development project?

A. Load all the fill down to bedrock and make sure it got off the site.

…

Q. - you ran into this tank?

A. We ran into a tank, yeah.

Q. Where, if you can recall, was the tank located?

A. Inside the foundation. Looked like it was smashed up and pushed inside the foundation, about two-thirds down the building.

Q. I see. So this debris you say it was pushed in. Did it seem like it had been purposely put there?

A. Yeah, it was crushed.

…

Q. And it would be a fair description, would you agree, of the materials inside the foundation that it contained fragments of concrete?

A. Yes, it was –

Q. Okay, that would be in there? Brick?

A. Yeah.

Q. Inside the foundation? Lumber?

A. Yes.

Q. Ceramics?

A. I don't remember. Possibly.

Q. There was a lot of junk in there, right?

A. A lot of junk.

Q. Plastics?

A. I can't remember plastics.

Q. Rebar?

A. Yes.

Q. Metal strapping?

A. Yes.

Q. Roofing material?

A. Yes.

Q. And that was the type of material that you'd find –

A. Yes.

Q. – inside the – inside the foundation that you had to excavate, correct?

A. Yeah.

Q. The materials that I've just described were not typically present in the remaining materials on site that you were excavating?

A. No.

Q. No.

A. There's nothing outside of that.

Q. Nothing like that in the other areas that you were excavating?

A. No.

…

Q. All right. Okay. You said in response to my friend's question that you do not recall asking Jacques Whitford to visit the Forward Avenue site?

A. No, I don't remember asking.

Q. No. I take it you do not recall ever being asked by Mr. Mason to request that Jacques Whitford inspect the Forward Avenue site? Your answer's no?

A. No.

Q. You do not recall advising Mr. Mason that Jacques Whitford had visited the Forward Avenue site and that it looked okay?

A. Once again, I don't remember that part of it.

…

Q. You were told by Mr. Mason, "Trucks are gonna come. Load them up with this fill and take them out to Forward Avenue"? That's how you knew to do that, because he told you to do it?

A. Yes. I was – that was my job was to get rid of the fill.

Q. Did you ever ask him whether this has been tested for metal contamination?

A. No, it wasn't –

Q. Sorry, what did you say?

A. No, I didn't.

Q. And you knew it wasn't tested, didn't you?

A. Well I didn't know that either.

> **Q.** Did you care?
>
> **A.** It wasn't my job to care. I was doing his directive.

[82] Mr. Tucker was Whebby's employee and loading the trucks was in the course of his employment, for the purpose of Whebby's vicarious liability to United Gulf.

[83] Because Mr. Tucker had incorrectly told Mr. Mason that Jacques Whitford had cleared the fill at Forward Avenue, Mr. Mason did not halt the deliveries to Forward Avenue, pending testing. To the contrary, Whebby's deliveries to Forward Avenue continued after the incident with the oil tank on May 21. Justice Robertson said:

> [45] Once Jacques Whitford and Whebby were aware of the contaminated soil (behind the 1528 Summer Street foundation) being excavated near Bore Hole 9 (Exhibit 1, Tab 55, last page), it was then crucial that materials inspected by Jacques Whitford on site not be transported to Forward Avenue. …
>
> [46] I am satisfied that while the fuel tank spill was being remediated by Jacques Whitford, soils were still being delivered to the Forward Avenue site. Even after 268 truck loads were delivered, more soil was delivered without charge as Jay Mason told Paul Behner "don't worry you won't be charged for extra. We are just finishing out the job." Whebby continued to excavate into the first week of June.
>
> …
>
> [72] … The samples [for the Jacques Whitford tests] were taken on May 21 and May 27, while trucking of general fill to Forward Avenue continued.
>
> [73] The results reveal the presence of hydrocarbons, lead, arsenic, and also other PAH's (heavy metals). …
>
> [82] … Daniel Chedrawe's evidence does not dissuade me in my finding that the soil at Forward Avenue is one and the same, 268 loads plus, and some additional soil "just to finish up" from the excavation of Phase I Garden Crest, and it was badly contaminated.

[84] Whebby disputes the judge's finding. Its factum says (para 62):

> … The evidence at Trial clearly established that the deliveries of the fill to Forward Avenue were complete or nearly complete *before* [factum's italics] the long weekend which began on Saturday May 18, 2002. …

[85] There was evidence to support the trial judge's findings of continued deliveries after May 21. Mr. Behner testified:

> **A.** Well, after being reassured of that, it was just straightforward do the deal. And I went away for the weekend. I came back. It appeared to me that we had what we needed delivered. I can't recall if that was Monday or Tuesday. There was a discussion with Jay that "We're good. We don't need anymore fill."
>
> **Q.** Okay. Describe that discussion.
>
> **A.** To the best of my knowledge, we communicated and we said, "We've got enough fill."
>
> **Q.** All right. And what did Mr. Mason say in response to that?
>
> **A.** Okay. That was fine. And there was a subsequent conversation because I learned that more material was coming. And so I called Jay and said – we agreed that we didn't need anymore fill, and Jay said, "That's okay. We're just – we're almost finished, and I won't be charging you for what I delivered."

The "Tuesday" after the long weekend was May 21, 2002. On May 24, 2002, Whebby invoiced Boehner $7,705 for delivery of 268 loads of fill. Mr. Behner testified:

> **Q.** … At any point after May 24th, 2002, did Whebby's deliver additional material to the Forward Avenue site?
>
> **A.** Yes.
>
> **Q.** And can you tell us about that?
>
> **A.** I received a phone call from Steve Milligan, who was upset as to why more trucking – more material was being brought to Forward Avenue. …
>
> …
>
> **THE COURT:** Do you know what day he called you?
>
> **THE WITNESS:** Well, it was well after the invoice. June sometime. It was well after.
>
> …
>
> **Q.** Mr. Behner, can I refer you again to Tab 65 of Exhibit 1, which is the invoice from W. Eric Whebby to Doug Boehner Trucking Limited. The description of the work is "268 loads of fill." What would you say about the accuracy of the number 268 in reference to the loads of fill?
>
> **A.** Well, 268 loads is what they obviously invoiced for. For sure, we didn't get any less than 268 loads. I'm pretty certain that we got a lot more than 268 loads.

> **Q.** And why do you say that?
>
> **A.** Because Jay confirmed that they were still hauling and that I wouldn't be charged for what was brought into the site. That really wasn't the point. We had enough material, so –

[86] The judge cited other evidence to corroborate her view that Mr. Tucker exercised an inattentive "lookout" for unsuitable material loaded for Forward Avenue. She found that Whebby delivered unsuitable debris to Forward Avenue. She rejected Mr. Tucker's testimony that all this debris has been stockpiled at Summer Street. The judge said:

> [45] … It was also critical that any construction debris being stockpiled at the site also not be loaded into trucks departing for Forward Avenue.
>
> …
>
> [50] As to the debris, Chris Tucker testified the soils being excavated were largely clean of construction debris, until the foundation of 1528 Summer Street was found to be filled with debris. His evidence was that the debris was stockpiled on the site but I am satisfied much of this material was also loaded on trucks and delivered to Forward Avenue.
>
> …
>
> [75] … The fact that Whebby carelessly trucked construction debris to Forward Avenue, that was to be stockpiled at Garden Crest speaks to their obvious breach of the standard of care required. This material was not suitable for sale in a residential use. ...
>
> …
>
> [81] When he finally visited Forward Avenue with his partner Mounir Haddad, in early October and describe[d] the stockpiled material, he [Garden Crest's Mr. Chedrawe] testified: "I was kind of appalled – it was an awful looking pile of fill." He testified that he was certain the materials had not come from Garden Crest.
>
> [82] But Mr. Chedrawe's own site did contain construction debris and hydrocarbon contaminated soil and soil stained with various metals. Daniel Chedrawe's evidence does not dissuade me in my finding that the soil at Forward Avenue is one and the same, 268 loads plus, and some additional soil "just to finish up" from the excavation of Phase I Garden Crest, and it was badly contaminated.

[87] Whebby's factum (para 56) asserts that the judge's findings are palpable and overriding errors, and says the judge gave "no consideration to the only evidence

on this point which was that construction debris was perfectly acceptable in general fill".

[88] There was evidence to support the judge's findings. Mr. Behner testified:

> **Q.** So, Mr. Behner, can you elaborate on what the standard specifications provide with respect to the quality of the material to be used for backfill?
>
> **A.** Again, you're referring to the standard specification?
>
> **Q.** The standard specifications.
>
> **A.** Well, the materials are to be clean, free from contaminants. There is a very specific language and a definition of what that is, so –

Mr. Elliot, the AMEC environmental engineer, inspected the stockpile of delivered fill on lots 7 and 8 at Forward Avenue, and reported in a letter of October 7, 2002:

> … Also noted within and around the fill pile were fragments of concrete, brick, lumber, ceramics, plastics, glass, tin cans, rebar, metal strapping and roofing materials ...

Garden Crest's Mr. Chedrawe visited the Forward Avenue site in October 2002, and described his observations of the stockpile:

> **Q.** Well, let's stop you there. Let me – you see a pile which you say is fill. How would you describe what you saw that day?
>
> **A.** Well, you know, I recall driving up the street that's all R1 homes, no commercial and no – you know, it's a residential – truly a residential area. Then you see this soil there, it's totally out of place and out of character. Like how would someone dump this stuff here? And like I was kind of appalled to see.
>
> If there – because, you know, at that time, accusations started flying that it came from our site, but you know, you sit here and say, "Well, this is ludicrous because …" I'm not saying it didn't come from our site but, you know, the pile was an awful looking pile of fill.

Mr. Chedrawe added that the stockpile had "construction debris, dark soils, everything you can think of in this pile" and "it wasn't a very pretty sight".

[89] The trial judge (paras 81-82) found that the spectacle which "appalled" Mr. Chedrawe was "one and the same" as the excavated material from Summer Street.

[90] I respectfully disagree with Whebby that the only evidence was that the delivered material was "perfectly acceptable" for residential fill. It was the trial

judge's function to appraise the differences between the testimony of Mr. Tucker and others. In my view, the judge made no palpable and overriding error in her finding that, despite Mr. Tucker's testimony, the material was unsuitable for residential fill and that its dispatch to Forward Avenue indicated that Whebby – particularly Mr. Tucker – had maintained a careless lookout for unsuitable fill.

[91] There is another point of significance to the judge's finding about the delivery of the unsuitable debris. Mr. Tucker said that the oil tank was found "smashed up" and "crushed" within the foundation walls of 1528 Summer Street. The judge found (para 41): "Oil from the tank had impacted the soil." Mr. Tucker acknowledged there was a smell of hydrocarbon in the "area" of the building (above para 76). Those same foundation walls contained the debris that should have been placed at Summer Street in what Whebby termed the "unsuitable" stockpile. The judge found (para 50), "much of this material was also loaded on trucks and delivered to Forward Avenue". That fact explains how both the "appalling" debris and the petroleum hydrocarbons that accompanied it from the same area arrived at Forward Avenue.

[92] Whebby's delivery of pyritic slate to Forward Avenue also is consistent with the judge's view that Whebby was insufficiently attentive to the suitability of its deliveries to Forward Avenue.

[93] AMEC's Mr. Elliot testified about the risk from pyritic slate:

> **A.** The previous use of pyritic slate has often resulted in environmental damage just because – the result of the use of the pyritic slate often results in the formation of sulphuric acid, which leaches metals in the groundwater or into the surface water. A good example of that would be major fish kills that happened out at Halifax Airport in the 1980s when they used pyritic slate in the –
>
> **THE COURT:** Fish kills?
>
> **THE WITNESS:** Yes, fish kills.
>
> **THE COURT:** In the lakes around the airport?
>
> **THE WITNESS:** In the lakes and streams, yes, as a direct result of the use of pyritic slate.

[94] Mr. Behner explained his appreciation of whether pyritic slate from Summer Street should have arrived at Forward Avenue:

Q. You indicated earlier in your evidence when you said that you had looked at the project and you were aware of some difficulties with the soils in your discussion with Mr. Mason. What were you referring to then?

A. Well I think the Geotechnical Report referred to two primary areas of concern. The biggest that was a concern to me was the rock/slate formation. And once that was excavated, what to do with that material. Well, that material had to be removed and put into an approved location.

Q. Right. That's the so-called pyritic slate.

A. Yes.

…

Q. Your concern with the slate, that has to do with the problem that occurs when you – dealing with Halifax slate and it meets the air, isn't it?

A. Yes.

Q. It becomes pyritic?

A. Yes.

Q. And it has to be disposed at particular sites?

A. Yes.

Q. Normally in the Bedford Basin?

A. That's correct.

…

THE COURT: Okay. And all I'm trying to understand is, okay, clean fill. Does clean fill contain a bunch of slate?

THE WITNESS: It's not supposed to.

[95] Whebby's contract of November 27, 2001 with Garden Crest included in Whebby's "Scope of Work" – "Remove and Dispose of pyretic slate". The trial judge recited Mr. Mason's expectation for the disposal:

> [54] With respect to pyretic shale Mr. Mason testified he had expected to haul it to Bedford Basin for disposal but had simply stockpiled the shale late in the excavation of Phase I, as their contract with Garden Crest began to fall apart, over the issue of the costs of drilling and blasting.

[96] Garden Crest's Mr. Chedrawe also expected that the pyritic shale would be disposed in "the Bedford Basin in-fill site" to "be neutralized in salt water" (Trial Decision, para 80).

[97] But this isn't what happened. Mr. Elliot testified that the stockpile of delivered material at Forward Avenue held 300 tonnes of pyritic slate. He said this volume was below the threshold (500 tonnes) that would offend provincial regulations. Nonetheless, 300 tonnes of pyritic slate was dumped at Forward Avenue instead of being "disposed" according to the Whebby - Garden Crest contract at the Bedford Basin disposal site, as Messrs. Mason, Behner and Chedrawe had expected.

[98] The judge's findings respecting the breach of the standard of care are supported by evidence. Based on those findings, Whebby did not exercise the required reasonable "lookout" for observable contamination. The critical contaminant that was reasonably detectable, but not detected, was the odour of hydrocarbons. This failure appears to have occurred because Mr. Tucker was more focussed on moving material off-site than exercising reasonable attentiveness for detectable contaminants. The judge made no error of law or palpable and overriding error of fact in her determination that Whebby breached the standard of care.

(d) Causation

[99] Whebby's factum (para 73) notes the judge's finding (para 77) that "in 2002 excavating companies knew they needed to be on the lookout for the smell of hydrocarbon contamination and possibly pyritic slate but not much else". Whebby then states:

> In other words excavation contractors in 2002 were not aware of the risks of PAH and heavy metal contamination. Somehow, however, the Learned Trial Judge went on to find a breach of the standard of care due to Whebby having not guaranteed the avoidance of such risks.

Whebby submits that United Gulf's costs stemming from the disposal of PAHs and heavy metals are not caused by a breach of Whebby's standard of care.

[100] I respectfully disagree.

[101] Had Whebby complied with its standard of care, Whebby would have noticed the detectable odour of hydrocarbons in the area, and then would have taken reasonable precautions. Those reasonable precautions would have included halting deliveries to Forward Avenue until testing analyzed the soil. The cessation of deliveries would have forestalled the delivery of PAHs and heavy metal

contaminants to Forward Avenue. The assumption that further deliveries to Forward Avenue would have ceased pending testing is supported by Mr. Mason's testimony (discussed above paras 63-64). The testing is what Jacques Whitford undertook at Summer Street after May 21, 2002 and what AMEC did at Forward Avenue in October, 2002. As the trial judge found, (para 75), "[s]uch testing would then have revealed the heavy metals, particularly the arsenic and lead". This is what the actual testing by Jacques Whitford and AMEC revealed (above paras 21, 24). Once the PAHs and heavy metals had been detected by testing, of course that material would not have gone to Forward Avenue. As a result, Whebby's breach of the standard of care at Summer Street led to the remediation at Forward Avenue for both the patent hydrocarbon contamination and the latent contaminants, including the heavy metals, that were sourced from the same problematic area of the Summer Street site.

[102] This approach to causation is consistent with that set out in the 2007 decision of this Court, (para 55, quoted above, para 52).

(e) Conclusion - Whebby

[103] The judge neither erred in law nor made a palpable and overriding error of fact. I would dismiss Whebby's appeal from the ruling that Whebby is liable to United Gulf in negligence for the assessed damages.

6. Second Issue – Boehner's Liability

[104] United Gulf's summary judgment against Boehner (with damages to be assessed) was issued on April 16, 2004. Justice Robertson's Decision and Order did not quantify those damages. Neither her Decision nor Order discusses whether Boehner was liable to indemnify Whebby as a concurrent tortfeasor. Whebby says the judge's failure to determine these issues is an error of law. Whebby's material also cites Boehner's contributory negligence and failure to mitigate.

[105] It is helpful to untangle the threads of argument on the topic of Boehner's responsibility.

(a) Quantification of the Summary Judgment

[106] The summary judgment belonged to United Gulf, not Whebby. It was up to United Gulf whether or not to seek quantification. United Gulf chose not to do so. It is hard to conceive how a judge can intercede with an unrequested damages

award. As I will discuss (para 125), a plaintiff may seek to recover the full amount from either of two concurrent tortfeasors, leaving the tortfeasors to claim contribution from each other. This principle would be meaningless if the plaintiff's choice to proceed against one tortfeasor was contributory negligence or failure to mitigate. In my respectful view, the judge did not err by failing to quantify United Gulf's summary judgment.

(b) Boehner's Failure to Mitigate

[107] I summarized the pleadings earlier (paras 30-34). Whebby was sued twice, once by Boehner and once by United Gulf. On December 16, 2003, Boehner sued Whebby as a Third Party, to claim indemnity for amounts that Boehner would be required to pay United Gulf. On October 29, 2004, United Gulf sued Whebby directly.

[108] Justice Robertson allowed United Gulf's direct claim against Whebby on United Gulf's pleading of October 29, 2004. The judge did not rule on Boehner's Third Party claim against Whebby.

[109] A plaintiff's failure to mitigate reduces its own damages award.

[110] As the judge did not allow Boehner's claim against Whebby, there was no damages award to reduce, from Boehner's failure to mitigate.

[111] The judge treated Boehner's backfilling of the foundations, in the summer of 2002, as United Gulf's failure to mitigate. Justice Robertson said:

> [94] … However, with respect to the duty to mitigate, if the cost of remediation was increased by the actions of Boehner or United, this is not to the account of Whebby. …
>
> [95] I agree with counsel for United that discrete costs of excavating around each of the 14 foundations constitutes the possible total amount of the mitigation costs to the account of United, the sum of $38,501.47. …

Boehner's backfilling led to this re-excavation that reduced United Gulf's damages against Whebby by $38,501.47.

[112] The judge did not explain how Boehner's conduct in the summer of 2002 became United Gulf's failure to mitigate. But United Gulf has not cross-appealed that issue.

[113] The judge quantified the failure to mitigate by the only party with judgment against Whebby - United Gulf - and reduced United Gulf's damages award against Whebby by that amount. There is no appeal of, nor any basis to overturn, the judge's calculation of $38,501.47 as the expense of re-excavation.

(c) Boehner's Contributory Negligence

[114] Contributory negligence refers to negligent conduct by the plaintiff. It is a partial bar to the plaintiff's recovery. As Boehner did not obtain judgment against Whebby, Boehner's contributory negligence did not come into play. United Gulf was the plaintiff on the only claim that has resulted in this judgment against Whebby. Boehner was an independent contractor, and was neither an agent nor an employee of United Gulf. So Boehner's alleged "contributory negligence" would not reduce United Gulf's award. This is discussed further below (paras 121-25).

(d) Contribution Between Tortfeasors

[115] The substance of Whebby's submission to this Court appears to be that Boehner should be ordered to indemnify Whebby for Whebby's judgment debt to United Gulf. Sections 3(b) and 4(1) of the *Tortfeasors Act*, R.S.N.S. 1989, c. 471 permit a court to order just and equitable contribution between tortfeasors. I will consider Whebby's submission from that perspective.

[116] Whebby submits that the trial judge erred in law by failing to address a material issue that Whebby placed before the trial judge. Whebby's factum says:

> 49. … The failure to deal with a material issue is an error in the exercise of the adjudicative function and in the absence of findings at the Trial level on a material issue, This Honourable Court is unable to exhibit the degree of deference that is otherwise required, and is free to render its own assessment.

[117] What "material issue", respecting Boehner, did Whebby ask the trial judge to determine?

[118] Whebby's pre-trial memorandum said:

> **Issues**
>
> 19. It is submitted that the following are the issues to be determined at trial:
>
> I. Is Whebby liable to Boehner or United in negligence for the delivery of contaminated soil?

II. Is Whebby liable to Boehner pursuant to s. 17(b) of the *Sale of Goods Act*, R.S.N.S. 1989, c. 408?

III. Did United and/or Boehner mitigate its losses and/or were they contributorily negligent?

IV. If Whebby is liable to Boehner or United, is Garden Crest required to indemnify for such amounts?

Only Issue III pertains to Boehner's responsibility. The pre-trial memorandum's submission on Issue III said, in its entirety:

III. Did United and Boehner mitigate their losses and/or were they contributorily negligent?

48. It is anticipated that the evidence will show that after the delivery of the fill to Forward Avenue, United and/or Boehner had ample opportunity to make its own investigation as to the nature of the fill that had been delivered and stockpiled. During this time, the fill had not been spread or used throughout the development.

49. Throughout an extended time after the fill had been delivered it remained in large stockpiles. Evidence will be led that concerns as to the nature of that fill were brought to the attention of United. United and its contractor took no action on these concerns and instead went ahead and directed the placement of the fill throughout the Forward Avenue development. Once it was discovered that the nature of this fill required that it be removed, the cost of removing it from the areas it had been placed had been greatly increased. Had United, or its contractor Boehner, taken this early opportunity it could have greatly reduced the loss it incurred. Instead, United and Boehner missed this important chance.

50. It is trite law that a litigant who alleges a loss must have taken steps to limit its loss. It will be shown that United and Boehner missed a key opportunity to do so. Whebby submits that should it be found liable to United and/or Boehner for any loss due to the nature of the fill, than it should only be liable for the cost of the disposal of such fill if it had been stockpiled in a confined location.

The Memorandum's Conclusion said, in its entirety:

Conclusion

64. Whebby submits that it is not liable in negligence or contract to United and/or Boehner for the removal and disposal of contaminated fill from Forward Avenue. Further, if Whebby is found liable for delivery of contaminated soil to Forward Avenue, it says United failed to take steps to mitigate its loss or was contributorily negligent. In the alternative, should it be found liable, any such loss should be borne by Garden Crest who had a contractual duty to dispose of

> any contaminated fill and/or negligently misrepresented the nature of the fill that Garden Crest disposed of.

[119] After the close of evidence, the transcribed oral submissions of Whebby's counsel, respecting Boehner, generally replicated those in Whebby's pre-trial memorandum.

[120] Whebby did not sue Boehner. Whebby's submissions did not ask the judge to order that Boehner indemnify Whebby for damages that Whebby was required to pay United Gulf. Rather, Whebby asked the judge to reduce any damages award against Whebby because of failure to mitigate and contributory negligence. I have discussed mitigation and contributory negligence earlier (paras 107-14). The judge responded to the submissions that were made to her. The judge did not err in the exercise of her adjudicative function by ignoring a submitted issue. I would dismiss this ground of appeal.

[121] Whebby's factum says (para 83) "Whebby's plea of contributory negligence against Boehner entitles Whebby to an apportionment of fault as is mandated in the *Contributory Negligence Act*", R.S.N.S. 1989, c. 95. Though it isn't entirely clear, Whebby's submission appears to assume that the *Contributory Negligence Act*'s apportionment of fault would reduce United Gulf's recovery from Whebby by the amount of Boehner's apportioned share of contributory negligence.

[122] If that is Whebby's assumption, I respectfully disagree. The *Tortfeasors Act* takes precedence over the *Contributory Negligence Act* respecting the scheme and ultimate effect of contribution between tortfeasors: *Parkland (County of) v. Stetar et al.*, [1975] 2 S.C.R. 884, at p. 898, per Dickson, J. (as he then was) for the Court. I will explain what that means in this case.

[123] Whebby and Boehner each were excavators who had access to the contaminated material, Whebby at Summer Street and Boehner at Forward Avenue. Whebby says that, if Whebby should reasonably have detected hydrocarbons, triggering a suspicion and a duty to test before delivering the material, then Boehner had the same duty before using the material as backfill. Whebby submits that Boehner should be held to the same standard of care as Whebby, and if Whebby breached it, so did Boehner.

[124] That may be so. The submission is consistent with the trial judge's findings (Trial Decision para 93).

[125] But such a ruling would not reduce Whebby's judgment debt to United Gulf. Boehner and Whebby would be concurrent tortfeasors, each a cause of United Gulf's loss and each responsible to United Gulf for the full amount. The *Tortfeasors Act* governs contribution between tortfeasors for their concurrent liability to an injured party. Any obligation by Boehner to contribute to Whebby is *inter se* between Whebby and Boehner, and would be determinable by a court if Whebby sued Boehner for contribution. Lewis N. Klar et al, *Remedies in Tort*, loose-leaf, (Scarborough, Ont.: Carswell), vol 4, § 35, 36, 36.1. G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010), pp. 853-73. Counsel informed the Court that Boehner may be insolvent. If so, the result would be that United Gulf can recover the entire judgment from Whebby, and Whebby's lawsuit against Boehner for contribution (if one is brought) might be meaningful only on paper.

(e) Conclusion - Boehner

[126] I would dismiss Whebby's grounds of appeal respecting Boehner.

7. Third Issue – Garden Crest's Liability

[127] Whebby's factum frames its submissions against Garden Crest at trial and on appeal:

> 88. Whebby alleged that Garden Crest ought to have been found liable for the remediation costs on three bases: (i) breach of an express contractual term, (ii) breach of an implied contractual term, and (iii) negligence. No liability was imposed upon Garden Crest whatsoever. Whebby appeals the Learned Trial Judge's failure to find that Garden Crest breached an express contractual term and the failure to find that Garden Crest had been negligent in the circumstances. …

[128] At trial, Whebby submitted that Garden Crest impliedly warranted in contract that the Summer Street site was uncontaminated except for the contaminants disclosed in the Geotechnical Report. Whebby's implied warranty argument was not raised on appeal. I will address Whebby's submissions, on the appeal, that Garden Crest breached an express contractual term and that Garden Crest was negligent.

(a) Breach of Contract

[129] Whebby cites its contract of November 27, 2001 with Garden Crest (above para 8), which qualified Whebby's "Scope of Work" with: "**Not Included:**

Excavation of contaminated material". Under the parties' protocol, Whebby would notify Garden Crest of any contaminated material, then Garden Crest would pay for its disposal. Whebby's factum submits:

> 90. The fact that the parties contemplated the existence of contaminated material (TPH) at Summer Street led to the inclusion of this contractual term. The issue was whether this term was breached by Garden Crest's refusal to accept responsibility for any of the costs associated with remediating the fill. The Learned Trial Judge failed to deal with this issue.
>
> 91. Whebby says the evidence establishes that Garden Crest should be contractually responsible for the costs of delivering the fill to a disposal site and having it remediated.

[130] Whebby's factum says the judge "failed to deal" with the submitted issue. So it is necessary to examine what issues Whebby submitted to the judge.

[131] Whebby's Fourth Party Statement of Claim against Garden Crest pleaded:

> 12. Whebby says that by including the term of the Contract excluding excavating contaminated material, the Fourth Party impliedly warranted that there would be no uncontaminated material on the Lands other than that which was disclosed in the Soils Report.
>
> 13. Whebby says that the Fourth Party breached the express and implied terms of the Contract that there would not be any contaminated material in the Lands other than that which was disclosed in the Soils Report.

[132] Whebby's Pre-trial Memorandum said, on the topic:

> 54. By allowing Whebby to remove soil that was contaminated without giving them notice, Garden Crest breached an implied condition that the contract did not include the removal and disposal of contaminated soil. Further, by the express provisions of the contract Garden Crest is responsible to pay the cost of disposing of contaminated soil.

[133] Whebby presented the judge with submissions that (1) Garden Crest warranted that the soils would be free from undisclosed contaminants, (2) Garden Crest breached the contract by "allowing Whebby to remove" contaminated soil, and (3) the Contract provided that Garden Crest, not Whebby, would pay for the disposal of contaminated soil.

[134] As to the first point - Garden Crest's alleged warranty - the judge said:

> [98] Whebby claims that Garden Crest breached an implied term of its contract that the Garden Crest lands were free of contaminates and the express term of the contract that excavation of contaminated material was not included in the contract.
>
> [99] … However, it was certainly contemplated by the parties that contaminated soils may exist.
>
> [100] Garden Crest made no representations either express or implied that their soils were clean. …
>
> …
>
> [101] … It would be an unreasonable term, if not preposterous one in the circumstances, to suggest Garden Crest warranted clean soil. Nor do I find in any of the testimony before me that Whebby ever concluded that there was no contamination in the soil. …
>
> [102] A warranty that the soils were free from contamination, would be unreasonable and flies in the face of the evidence.
>
> [103] … Further, Whebby had no reason to conclude that the entire area they were excavating was free of contamination.

[135] As to the second point - Garden Crest's "allowing Whebby to remove" the contaminated soil - the judge said:

> [99] It is correct that contaminated materials found on site were to be dealt with as an extra. …
>
> [103] Whebby also claims that Garden Crest allowed them to remove contaminated soil from the site. This is not supported by the evidence. A protocol was clearly in place, that Whebby was to immediately contact Garden Crest if contaminates were found and Jacques Whitford would be called in to oversee the reclamation of the soils and their removal from the site to Envirosoil. In part, this occurred. However, Whebby failed to alert Garden Crest of their concerns that some contaminated soils could have been transported to Forward Avenue. Further, Whebby never informed Garden Crest they were selling the soil for residential use. …

[136] The judge dealt with the first and second points.

[137] The judge's reasons (paras 99, 103) also dispose of Whebby's third point – that disposal of contaminated soil was to be an extra at Garden Crest's expense. I will elaborate.

[138] Whebby's contract claim, as presented to the Court of Appeal, essentially is this. The contract of November 27, 2001 provided that "[e]xcavation of

contaminated material" was outside Whebby's scope of work. This meant that Garden Crest would have to pay for its disposal. The material at Forward Avenue was contaminated soil from Summer Street. So Garden Crest remains responsible to pay for its disposal, despite Whebby's relocation of the soil to Forward Avenue.

[139] The flaw in this submission is that the Garden Crest -Whebby contract was supplemented by an agreed protocol that the contaminated material would stay on the Summer Street site (trial judge's findings quoted above, para 9). The point of the protocol was that Whebby not remove it. Garden Crest's agreement with Whebby that Garden Crest would pay for the disposal of contaminated material, under Jacques Whitford's supervision, applied to the material that Whebby left on site according to the protocol.

[140] Whebby's Mr. Mason described the protocol:

> **Q.** If you run into soil that's – if it's questionable.
>
> **A.** They would have been instructed, anybody that is on site working under me, to – that contaminated soil is not part of our scope of work, if we are – if we encounter anything that they would be to notify me immediately and *not remove it*.
>
> **Q.** And you would then deal with it?
>
> **A.** I would contact the owner and tell them that they had contaminated soil on site, and how did they want us to proceed. [emphasis added]

[141] The judge found (para 103) that the "protocol was clearly in place". Whebby's factum acknowledges (para 14) that the protocol "was discussed with Whebby and Whebby was obliged to follow it".

[142] Whebby, not Garden Crest, breached the agreement. Whebby moved the contaminated material off site. By doing so, Whebby acted outside its "Scope of Work" under the Agreement of November 27 and contravened the protocol.

[143] Whebby could have avoided the contravention. Earlier I discussed at length (1) Whebby's failure to take reasonable care to heed what the judge found to be the detectable odour of hydrocarbon contamination, and (2) Whebby's delivery to Forward Avenue of what the judge found to be patently unsuitable debris that accompanied the contaminated soil from the same area.

[144] Whebby did not tell Garden Crest that Whebby had moved material to Forward Avenue. Nor was Garden Crest informed of Mr. Mason's concern, after

May 21, that material delivered to Forward Avenue may have been contaminated. Until October 2002, when Boehner - not Whebby - informed Garden Crest about the Forward Avenue problem, Garden Crest believed that the contaminated material had been left at Summer Street, then processed from there by Jacques Whitford and Envirosoil according to the protocol. These facts offer no raw material to construct a breach of contract by Garden Crest.

[145] The judge made no error in her conclusion that Garden Crest did not breach its contract with Whebby. I would dismiss this ground of appeal.

(b) Negligent Misrepresentation in November 2001

[146] Justice Robertson's Decision said:

> [104] With respect to Garden Crest having made negligent misrepresentations as to the state of the soil and failing to provide notice of further contamination including the presence of PAH's, I find that no such negligent misrepresentations were made.
>
> [105] The only representation made by Garden Crest were [*sic*] contained in the Jacques Whitford reports. The reports did not claim to be exhaustive. So far as the reports went, the representations were true.

[147] In November 2001, the bid packages from Garden Crest contained only the Geotechnical Report. Garden Crest gave the Environmental Site Assessment Report to a bidder who requested further information, as Boehner did, but not to Whebby, who did not request further information. Whebby contests the judge's statement that the "Jacques Whitford reports" were given to Whebby.

[148] The judge's para 105 should have read "report" instead of "reports". Only the Geotechnical Report was in the bid package given to Whebby. But the judge was aware that the Environmental Site Assessment Report had not been given to Whebby. Earlier, the judge's Decision says:

> [93] … Paul Behner had indeed tendered on the Garden Crest project and lost. Arguably he had greater knowledge of the soil conditions than did Whebby, having reviewed the environmental assessment. …

[149] Whebby's Statement of Claim (Fourth Party) of January 16, 2004 against Garden Crest pleads (para 14) that Garden Crest "negligently misrepresented the state of the soil on the Lands by providing Whebby with a Soils Report that did not disclose the existence of lead and arsenic contamination". Whebby's Cross-claim

of January 13, 2005 against Garden Crest pleads (para 11) that Garden Crest "negligently misrepresented the state of the soil on the Lands by providing Whebby with a Soils Report that did not disclose the existence of any contamination in the soils other than possible hydrocarbon contamination in the soils on the southern section of the Lands".

[150] The "Soils Report" is Jacques Whitford's Geotechnical Report. Whebby pleads that by providing this Report to Whebby, Garden Crest committed the tort of negligent misrepresentation.

[151] A pre-contractual negligent misrepresentation that induces a contract may be an independent tort that supports a cause of action in negligence. The standard is "to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading": *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at page 121.

[152] The Geotechnical Report assessed subsurface conditions only at nine specified boreholes. To all appearances, this borehole information was accurate. No evidence suggests otherwise. The Report did not purport to be all-encompassing, did not comment on the site outside the boreholes, and (page 5) recommended that further inspection be performed "after excavation to ensure that all unsuitable materials are removed". Garden Crest's provision of the Geotechnical Report to Whebby was not a misrepresentation.

[153] I agree with the judge's conclusion that Whebby has not proven the tort of pre-contractual negligent misrepresentation by Garden Crest.

(c) Negligence After May 29, 2002

[154] Whebby submits that: (1) by May 29, 2002, Jacques Whitford had determined that the Summer Street site tested positive for PAHs and heavy metals; (2) Garden Crest either knew this on May 29, 2002 or had deemed knowledge of that fact known to its "agent", Jacques Whitford; (3) Garden Crest was negligent by failing to notify Whebby, after May 29, 2002, that the Summer Street soil was contaminated by PAHs and heavy metals; and (4) the judge justified Garden Crest's failure to disclose by wrongly ruling that the Whebby - Garden Crest contract terminated on June 4, 2002. Whebby says that, had Whebby known of the contaminants at Summer Street, Whebby could have interceded at Forward Avenue before the contaminated fill was backfilled there. This would have reduced the eventual expense of re-excavation at Forward Avenue. Whebby's factum (para 94)

says the judge's comments on the issue "were flawed legally and factually and should be overturned on Appeal".

[155] I will address the components of Whebby's submission.

[156] **First** - whether Jacques Whitford was Whebby's agent. Whebby submits (para 87) "the effect of agency is that Garden Crest is fixed with knowledge of PAH and heavy metal contamination in the fill no later than May 29, 2002". Whebby says that Garden Crest then owed Whebby a duty to notify Whebby of the PAH and heavy metal contamination.

[157] Whebby's assertion that Jacques Whitford was Garden Crest's agent was not pleaded. The point first appears as a concluding comment in the post-trial oral submissions of Whebby's counsel. That was not sufficient notice. Had agency been pleaded, the parties could have assessed what evidence was required to address the allegation. For instance, evidence of the agent's alleged authority might have been critical. As it was, nobody called a Jacques Whitford witness to testify at this trial. Had Garden Crest known that agency was alleged, then Garden Crest might have introduced testimony from Jacques Whitford, or at least questioned its own witness, on that topic. After the evidence closed, it was too late for Whebby to introduce the agency issue.

[158] **Second** – the Whebby-Garden Crest contract's termination date. Whebby (factum para 61) says that the trial judge "found that Garden Crest terminated its contract with Whebby on June 4, 2002 (Decision, para 46)", which "is plainly incorrect", and "was a critical factual error as the Learned Trial Judge obviously (albeit incorrectly) considered June 4, 2002, to be a cut off in terms of Garden Crest's duty to notify Whebby of any further contamination of which it became aware". The further contaminants are the PAHs and heavy metals that Jacques Whitford had identified on May 29 in the Summer Street soil.

[159] The trial judge's finding, challenged by Whebby, was:

> [46] … Whebby continued to excavate into the first week of June. According to Daniel Chedrawe's evidence Whebby was terminated and the contract was over on June 4. Whebby subsequently placed a lien on the Garden Crest site indicating its last work on the site was June 7.

Whebby points to other evidence that the Whebby - Garden Crest contract continued formally until June 25, 2002.

[160] Evidence supported the trial judge's finding. Mr. Chedrawe testified:

> **A.** … On June 4th, in the afternoon, when Dan from Jacques left me a message, at that point, all relationship with Whebby's had pretty well ceased and ended. …

Exhibit 11 is Whebby's Claim of Lien for Registration, dated July 19, 2002, against Garden Crest, which claims for unpaid work "up to and including June 7, 2002". Mr. Chedrawe's testified that, after the first week of June, further communications between Garden Crest and Whebby were guided by lawyers. In substance, the contract was over in early June.

[161] In my view, the judge's findings bear no palpable and overriding error. Neither did the judge identify June 4 as a "cut off" date.

[162] **Third** – whether Garden Crest was negligent. The allegation is negligence during the currency of the contract. In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, at para 106, Justices Iacobucci and Major for the Court said "[n]othing prevents reliance on a concurrent or alternative liability in tort if the contract does not limit or negative the right to sue in tort", but "courts will look to the contract as informing that duty". Similarly, in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at page 27, Justices La Forest and McLachlin (as she then was) for the majority said that the tortious standard may be affected by "the principle of primacy of private ordering – the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort".

[163] The Whebby-Garden Crest contract of November 27, 2001 did not limit or negative Whebby's right to sue in tort. But Whebby and Garden Crest had channelled, or privately ordered, their responsibilities respecting contaminated soil into the agreed protocol: *i.e.* Garden Crest expected Whebby to be vigilant, or reasonably attentive to observable contaminants and, if contaminants were observed or reasonably could have been observed, Whebby was to leave the material on site, and then Garden Crest would pay for inspection by Jacques Whitford and appropriate disposal. In my view this is the appropriate standard of care, informed by the protocol.

[164] Garden Crest knew nothing of Whebby's deliveries to Forward Avenue. From May 21 until October, 2002, Garden Crest thought all the contaminated soil

from Summer Street was being streamed by the protocol and headed for remediation at Envirosoil after Jacques Whitford's inspection. The judge found:

> [37] … Garden Crest did not know Whebby intended to sell any of the soil being excavated.
>
> …
>
> [103] … However, Whebby failed to alert Garden Crest of their concerns that some contaminated soils could have been transported to Forward Avenue. Further, Whebby never informed Garden Crest they were selling the soil for residential use. …

[165] This sequence offers no basis for the assertion that Garden Crest was negligent, or should have acted differently in June 2002 to avoid a reasonably foreseeable loss either at Forward Avenue or to Whebby for any deliveries by Whebby.

[166] **Fourth** – whether it makes a difference. Whebby's deliveries to Forward Avenue had ceased by June 4. For two weeks since May 21, Whebby knew of the petroleum hydrocarbon contamination at Summer Street, and Mr. Mason knew that petroleum hydrocarbons were unsuitable for residential use at Forward Avenue. The judge's findings and Mr. Mason's testimony are reviewed above (paras 19, 63-64, 80). Yet nobody from Whebby had interceded at Forward Avenue. Nothing suggests that Whebby would have been more protagonistic in the few weeks after June 4. In any case, the judge reduced United Gulf's award, for failure to mitigate, by the costs of re-excavating ($38,501.47) around the 14 foundations that had been backfilled in the summer of 2002. Whether the Garden Crest - Whebby relationship ended in substance on June 4, 2002, or the formal contract limped on for a few weeks, had no impact on United Gulf's damages award for its losses at Forward Avenue.

(d) Garden Crest's Windfall

[167] Whebby's factum summarizes its submission:

> 101. … If the contamination was identified while the material was still on Site, Garden Crest would have borne those costs. … Whebby did nothing more than move the fill from one location to another. Why then should Garden Crest escape responsibility for categories of costs which it would have incurred in any event? Why should Garden Crest essentially receive a free pass in respect of significant contamination issues originated from its land? It should not.

[168] The gist of Whebby's submission is - Whebby's judgment debt was Garden Crest's windfall, so it's only fair that Garden Crest should cover Whebby's shortfall.

[169] The problem is that this submission isn't founded on any fault of Garden Crest. Garden Crest was unaware that Whebby had sold or delivered fill to Forward Avenue. Garden Crest believed that "contaminated material" would not be excavated by Whebby, as provided in the Whebby - Garden Crest contract of November 27, 2001. The protocol between Whebby and Garden Crest required that the contaminated material remain at Summer Street and that Whebby notify Garden Crest of the contamination, for which Garden Crest would have Jacques Whitford supervise a safe disposal. Because of this protocol, after the oil tank incident of May 21, 2002, Garden Crest believed that all its contaminated soil was being remediated at Envirosoil under the direction of Jacques Whitford.

[170] Whebby's submission belongs in a claim for unjust enrichment, a cause of action that need not establish Garden Crest's fault. But Whebby has not pleaded unjust enrichment. Whebby's pleaded causes of action against Garden Crest are based on fault – *i.e.* breach of contract or negligence. The issues between Whebby and Garden Crest that the Court of Appeal's ruling of October 20, 2011 designated for trial – "namely, negligence, negligent misstatement and breach of contract" - did not include unjust enrichment (above para 38). Getting a "free pass" is not breach of contract or negligence.

[171] Garden Crest was entitled to notice in Whebby's pleadings that Garden Crest faced what really is a claim for unjust enrichment. Notice would have affected the course of discoveries, pre-trial preparation and the evidence elicited at trial. After the close of evidence and the trial judge's decision, Whebby cannot unfurl an unjust enrichment claim in the Court of Appeal.

[172] I reject Whebby's "free pass" argument. Garden Crest's liability should be assessed under Whebby's pleaded causes of action, for breach of contract, negligence and negligent misstatement.

(e) Conclusion – Garden Crest

[173] In my view, the judge's dismissal of Whebby's claim against Garden Crest involved no error of law or palpable and overriding error of fact. I would dismiss those grounds of appeal.

8. Conclusion

[174] I would dismiss Whebby's appeal, and order Whebby to pay appeal costs in the amounts of $7,500 plus reasonable disbursements to United Gulf, and $7,500 plus reasonable disbursements to Garden Crest. These awards are roughly 40% of the costs awarded for the 2012 trial.

Fichaud, J.A.

Concurred: Oland, J.A.

Beveridge, J.A.