

**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

**Judge:** The Honourable Justice Joel E. Fichaud

**Appeal Heard:** January 31, 2014, in Halifax, Nova Scotia

**Subject:** Negligence - Breach of Contract

**Summary:** In 2002, contaminated soil from one construction site (Summer Street Project) was delivered, for use as foundation backfill, to another residential construction site (Forward Avenue Project). The contaminants included petroleum hydrocarbons, polycyclic aromatic hydrocarbons, arsenic and lead. Garden Crest was the owner and Whebby was the excavator at the Summer Street Project. United Gulf was the owner and Doug Boehner Trucking was the back-filler at the Forward Avenue Project. United Gulf paid \$525,797 to remediate the contamination at the Forward Avenue site. Litigation followed to assign liability for these remediation costs. The judge of the Supreme Court held that United Gulf must absorb \$38,501.47 for failure to mitigate and Whebby was liable in negligence to United Gulf for the remaining \$487,295.53. The judge did not assign liability to Doug Boehner Trucking, and dismissed Whebby's claim over against Garden Crest. Whebby appealed to the Court of Appeal.

**Issues:** Did the judge commit an appealable error respecting (1) Whebby's liability to United Gulf for negligence, or (2) Doug Boehner Trucking's liability, or (3) Garden Crest's liability to indemnify Whebby?

**Result:** The Court of Appeal dismissed the appeal.

Respecting Whebby's liability - Based on the trial judge's findings, supported by the evidence: (1) Whebby's standard of care was to be reasonably attentive to the detectable odour of hydrocarbons and, if hydrocarbon contaminants either were suspected or reasonably could have been suspected, then to halt deliveries to Forward Avenue until the soil was tested; (2) Whebby breached that standard; (3) had Whebby complied with the standard, the contaminated material would not have arrived at Forward Avenue. Whebby's grounds of appeal against the judge's award for Whebby's negligence were dismissed.

Respecting Doug Boehner Trucking - Whebby did not sue Boehner. There was no basis for the Court of Appeal to order Boehner to indemnify Whebby. If Whebby sued Boehner, and if Boehner was negligent, then Boehner and Whebby would be concurrent tortfeasors, each liable to United Gulf for the full amount, and any contribution would be *inter se* between Boehner and Whebby.

Respecting Garden Crest - Garden Crest and Whebby had an agreement for the handling of contaminated material. One of the terms was that the contaminated material would be left on the Summer Street site. Whebby removed the contaminated material, and delivered it to Forward Avenue, despite the detectable odour of petroleum hydrocarbons. This breached the agreed protocol. Garden Crest was unaware that the contaminated material was removed from Summer Street and was unaware that any material had been sent to Forward Avenue for residential use. Garden Crest neither breached its contract, supplemented by the agreed protocol, nor was it negligent. The judge made no error, under the standard of review, by dismissing Whebby's claim for indemnity against Garden Crest.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 49 pages.*