SUPREME COURT OF NOVA SCOTIA

Citation: *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2013 NSSC 9

Date: 20130107
Docket: Hfx No. 192468
Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited,
a body corporate

Plaintiff/Defendant by Counterclaim

v.

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

Defendants/Plaintiffs by Counterclaim

v.

W. Eric Whebby Limited

Third Party by Counterclaim

v.

Garden Crest Developments Limited

Fourth Party by Counterclaim

Judge: The Honourable Justice M. Heather Robertson

Heard: June 18, 19, 20, 21, 22, 25 & 26, 2012 in Halifax, Nova Scotia

Written Decision: January 7, 2013

Counsel: Robert G. Grant, Q.C., Sara Scott and Taayo Simmonds, Articled Clerk, for Defendants/Plaintiffs by Counterclaim
George W. MacDonald, Q.C., Michael Blades and Sarah McInnes, Articled Clerk, for Third Party by Counterclaim

David G. Coles, Q.C., Matt A. Conrad and Dana MacSween, Articled Clerk, for Fourth Party by Counterclaim

Robertson, J.:

[1] This suit arose when contaminated soil excavated from peninsular Halifax was sold for use at a residential site on Forward Avenue on the City's mainland. The two companies that agreed to the purchase, sale and use of the soil for residential use are liable in the resulting costs of reclamation and mitigation of damages. My reasons are as follows:

BACKGROUND

[2] In May 2002, an amount of earth fill in excess of 268 truck loads was trucked from lands owned by Garden Crest Developments Limited ("Garden Crest") located at the corner of Spring Garden Road and Summer Street in Halifax, by W. Eric Whebby Limited ("Whebby"), to lands located on Forward Avenue in Halifax, owned by United Gulf Developments Limited and Greater Homes Inc. ("United"), a site of future residential development where 15 high-end homes were to be constructed.

[3] Whebby had won the contract for the excavation of the Garden Crest site. Whebby contracted with a competitor, Doug Boehner Trucking and Excavating Limited ("Boehner"), who had also tendered on the Garden Crest project and lost, to sell soil to his company. Boehner was then contracted to United at Forward Avenue to provide excavating services there. The Garden Crest site needed fill removed and the Forward Avenue site needed fill delivered to complete these respective developments.

[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.

[5] It is the cost of the remediation of this site that was the subject of a law suit and subsequent trial in the Supreme Court of Nova Scotia in 2006, an appeal to the Nova Scotia Court of Appeal in 2007 and this new trial before me in 2012. A

complicating issue following the first trial was that a newly installed recording system in the court had malfunctioned, leaving no record of that proceeding.

THE PLEADINGS

[6] After the delivery of the soil to Forward Avenue Boehner sued United for payment for its services. United defended and counterclaimed against Boehner for the costs of the remedial actions required to remove the contaminated material from the Forward Avenue site. United obtained summary judgment on its counterclaim against Boehner for damages to be assessed. Boehner third partied Whebby and claimed indemnity and contribution for any amount it was required to pay United. Boehner based its claim on the *Sale of Goods Act* ("*SGA*") and in negligence. Boehner's *SGA* claim was for breach by Whebby of the implied conditions of fitness for purpose and of merchantability. In negligence, Boehner alleged a breach of the duty of care Whebby owed to it.

[7] Whebby defended the claim by Boehner claiming contributory negligence and failure to mitigate on Boehner's part. Whebby then fourth partied Garden Crest, claiming indemnity or contribution from Garden Crest for any amount Whebby was required to pay to Boehner. Whebby claimed that Garden Crest had breached the express and implied terms of the contract that there would be no contaminated material other than those disclosed in the soils report that it had seen. Whebby also claimed that Garden Crest had negligently misrepresented the state of the soil and breached its duty to disclose to it the state of the soil.

[8] Once United obtained summary judgment for damages to be assessed against Boehner, it amended its counterclaim to add claims against Whebby based in negligence and nuisance.

[9] Whebby then cross-claimed against Garden Crest in negligence and breach of contract for any amount Whebby should be required to pay to United.

[10] Garden Crest denied all liability.

[11] The Court of Appeal rendered its decision on September 6, 2007 (2007NSCA92). That decision and a subsequent ruling made by the Nova Scotia Court of Appeal in October 2011, somewhat limit the issues that I am required to decide. They found that Whebby owed a duty of care to both United and Boehner.

United's nuisance claim against Whebby was dismissed as was Boehner's claim against Whebby with respect to the fitness of the soil for the purpose for which it was intended to be used under s 17(a) of the *SGA*.

[12] Finally a ruling of the Nova Scotia Court of Appeal made on October 21, 2011 declared that the issues of breach of contract and negligent misstatements as between Whebby and Garden Crest, were live issues for this trial.

[13] Subsequent to the appeal heard in 2007, Greater Homes Inc. was petitioned into bankruptcy on May 25, 2012. Mark Rosen was appointed Trustee. The evidence before me of Saeid Saberi of Greater Homes was that Mark Rosen provided authorization to "United" to proceed with the trial on behalf of Greater Homes. Accordingly, I have proceeded on that basis.

[14] It is now for me to determine the parties' respective obligations to one another, relating to the claims of negligence, breach of contract and obligations arising or not, pursuant to the *SGA*. I will also address their respective responsibilities to remediate any damage suffered, to mitigate damage and determine what damages are owed and by whom.

LAW & EVIDENCE

[15] The elements of negligence are set out in A.M. Linden, *Canadian Tort Law*, 8th Edition at p. 109:

> . . . A cause of action for negligence arises if the following elements are present: (1) the claimant must suffer some damage; (2) the damage suffered must be caused by the conduct of the defendant; (3) the defendant's conduct must be negligent, that is, in breach of the standard of care set by the law; (4) there must be a duty recognized by the law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar or reduce recovery, that is the plaintiff must not be guilty of contributory negligence and must not voluntarily assume the risk.

[16] In this case it is very clear that damage was suffered by reason of the delivery of the contaminated soil from the Garden Crest site to Forward Avenue. The amount of damage is easily quantified as it relates directly to the charges for reclamation (removal of the soil).

[17] The Nova Scotia Court of Appeal already found there is a *prima facie* duty of care where the risk of harm would be foreseeable and the relationship between the parties sufficiently proximate *Boehner, supra ,* para. 40:

> 40 Where the risk of harm is foreseeable and the relationship between the parties is sufficiently proximate, there will be a *prima facie* duty of care: see, e.g. *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 12. Here, the risk of harm as a result of depositing contaminated soil was foreseeable, so the issue is whether Whebby's relationship to United and Boehner was sufficiently proximate to justify the potential imposition of liability.

[18] The Court of Appeal then stated at paras. 41 and 42:

> 41 A number of factors are relevant to the question of proximity, for example, the closeness or otherwise of the causal connection between the act and harm suffered, the expectations, representations, reliance, assumed or imposed obligations, physical closeness and the nature of the interests involved: see *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 50; Cooper v. Hobart, 2001 SCC 79, [2001] 3 S.C.R. 537 at para. 34.
>
> 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.

[19] The Court then concluded at para. 49:

> 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. Related to that is the question of whether any negligence by Boehner contributed to the loss.

[20] The issue is before this Court whether Whebby breached the standard of care. The conduct of United and Boehner upon receiving the soil also impacts on Whebby's liability and quantum of damage. Any duty owed by Garden Crest to Whebby must also be examined, were they aware of the unsatisfactory state of the soil or the potential use to which it might be put.

[21] Whebby had a contract with Garden Crest to excavate the soil. Whebby entered into a contract with Boehner to sell the soil. Boehner had a contract with United. Liability may also arise through these contracts.

[22] As well, liability may arise by operation of s. 17.6 of the *SGA*, R.S.N.S. 1989, c. 408 (*SGA*).

[23] G.H.L. Fridman, *Sale of Goods in Canada*, 5th Edition, (Toronto: Thompson Canada Ltd., 2004) at pp. 167-168 states:

> The *Sale of Goods Act*, section 15 [our section 17], implies into certain contracts of sale conditions as to the fitness and quality of goods. No other warranties or conditions to such effect may be implied into such a contract, except under this or other legislation, or where such an implied warrant or condition is annexed to the contract by the usage of trade. Thus, *caveat emptor* is still the general rule, excluded only where statute or custom permits the implication of a warranty or condition as to quality or fitness or the parties have expressly incorporated such a warranty or condition into their contract. . . .

[24] Section 17(b) of the *SGA* addresses the implied condition of merchantability:

> (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

[25] The elements to be proven under s. 17(b) of the *SGA* were set out by Palmeter, A.C.J. in *Sound Images Inc. v. Solar Audio & Recording Ltd.,* 1995 CarswellNS 606 (S.C.) at para. 17. In order to find that goods supplied were not of merchantable quality, the complainant must provide that:

(a) the goods were bought by description;

(b) from a seller who deals in goods of that description; and

(c) the goods were not of marketable quality.

[26] The Court of Appeal in *Borgo Upholstry Ltd. v. Canada (Attorney General),* 2003 NSSC 32, aff'd 2004 NSCA 5, at para. 32, the implied condition is negated once an examination is carried out which ought to have revealed the defect:

> [32] Once these factors are proven, establishing the existence of a warranty of "marketability" or "merchantability", (both of which terms are used interchangeably in reference to quality) there is a further proviso in s. 17(b):
>
> > . . . provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

[27] The defect must be a patent defect. 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. The defect in the goods must have been existent at the time of delivery.

[28] I will now examine the evidence in light of these legal principles.

[29] In November 2001, Whebby had won the contract to excavate the Garden Crest site and began work in May 2002. Its work was to be completed in two stages – Phase I, the northern portion of the property, the redevelopment of the old Summer Gardens apartment house and the second stage – Phase II, the southern remaining (1/3 portion of the lands) fronting on Spring Garden Road. These are depicted on a plan prepared by Servant Dunbrack Land Surveyors, Exhibit 6, Tab 3.

[30] Whebby's contract was terminated before much of the Phase II excavation commenced.

THE SOIL

[31] The 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, (near Bore Hole 8 - Exhibit 1, Tab 55 last page). The Garden Crest soil was the subject of environmental assessment by Jacques Whitford Environment Limited ("Jacques Whitford") for the owners of Garden Crest.

[32] The first report of January 25, 1999 referred to as the geo-technical report which examined sub-surface conditions to provide recommendations with respect to the design of building foundations. It noted at Bore Hole 7 "a petroleum hydrocarbon odour detected." Whebby read this report before tendering on the excavation contract.

[33] The second report was entitled Phase I and Limited Phase II Environmental Site Assessment found at Exhibit 1, Tab 54. It also confirms the presence of hydrocarbons above levels set out in Nova Scotia Department of Environment residential criteria in the area of Bore Hole 7. Historical information regarding a suspected leaking underground storage tank that had earlier been remediated, was noted along with staining to the dirt floors in a few of the basements of the buildings that were to be demolished to allow redevelopment.

[34] The report's executive summary specifically noted actual and potential environmental contamination and concerns associated with the subject property. It read:

> 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 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;

- Based on the age of the subject buildings, lead piping and/or lead based solder may be present in the piping system; and

- Suspected presence of friable asbestos in pipe and pipe elbow insulation in the subject buildings.

[35] Doug Boehner Trucking and Excavating Limited (Boehner) also tendered to excavate the Garden Crest site. Paul Behner (who has adopted a different spelling of his father's name) was the general manager of Boehner and met with representatives of Garden Crest. He was given access to both the first and second report and testified that he had read them before submitting his tender. Arguably he had a greater knowledge of the soil conditions at Garden Crest than did Whebby, who only saw the first report.

[36] Jacques Whitford would be called upon again throughout the events of 2002-2003 to monitor and test soils from the Garden Crest site.

[37] Whebby won the excavation contract and began its work in May 2002 at the Garden Crest site. Whebby's project manager, Jay Mason, looking for a site to dispose of Garden Crest fill learned of Paul Behner's need for fill at the project he had begun for United at Forward Avenue. They agreed to a price of $25.00 for each truck load of general fill brought to Forward Avenue. Paul Behner sold the fill on to United for $75.00. This was intended to defray Whebby's trucking costs. Garden Crest did not know Whebby intended to sell any of the soil being excavated.

[38] The fill was largely delivered over the course of a few days in late May 2002, commencing on the long weekend in May. The fill was stockpiled on lots 7 and 8 (shown on Exhibit 3) at the rear of the Forward Avenue site. Its intended use was as backfill for the residential foundations being built. The evidence of Saeid Saberi of Greater Homes ("United") was that one foundation on lot 14 had already been poured by May 2002. Paul Behner and Jay Mason met at the site to make arrangements just before the first delivery of the fill. Paul Behner's evidence is that this was just before the May 18 long weekend, most likely on Thursday, May 16. Jay Mason of Whebby, knew of the intended use of the fill to backfill the residential site, as acknowledged in his discovery evidence.

[39] Paul Behner testified that he asked for clean fill without contamination or debris. He recalled in evidence that at the end of their conversation he said, "Jay, I looked at this tender for Garden Crest. As you know there are some issues with the fill at the site." He testified his intent was to convey that he was only interested in clean fill and that he conveyed to Jay Mason "be careful what you haul." Mr. Behner then testified that Mr. Mason "assured me every truck load leaving the site was inspected by Jacques Whitford."

[40] The events took place ten years ago. Mr. Behner's recall of the request he made and the assurance he received could not have taken place as he suggests, because Jacques Whitford was not on site at Garden Crest before the long weekend in May. Further Jay Mason in his testimony did not recall that he and Paul Behner had any discussions about the quality of the fill.

[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. Garden Crest then retained Jacques Whitford immediately to conduct a remediation of the area.

[42] Jacques Whitford tested the soils in the area of the tank for hydrocarbon impacts on May 21 and May 27, 2002. Their reports are found at Exhibit 6 and Exhibit 10.

[43] These dates are confirmed by from the documents before the Court and the evidence of Jay Mason, that Jacques Whitford attended the site for the purpose of remediating the old fuel tank. The date of May 21, 2002 appears on the Jacques Whitford notes, Exhibit 6, Tab 1. Jay Mason signed an invoice dated May 21, 2002 for "hauling contaminated soil to Envirosoil."

[44] We also know that by then a stockpile of construction material was being amassed by Whebby near Bore Hole 8 (See Exhibit 1, Tab 55 last page) from the excavation in the area of 1528 Summer Street, materials left behind and buried in the foundations of buildings demolished by another contractor before Whebby came on the site.

[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. It was also critical that any construction debris being stockpiled at the site also not be loaded into trucks departing for 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. 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. (Exhibit 11)

[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. He directed the back hoe operator who filled the trucks and it was his job to ensure the trucks containing the contaminated soil went to Envirosoil and not to Forward Avenue.

[49] Jacques Whitford had a site person inspecting the shovelfuls of contaminated soil, supposedly being directed to the remediation site. He used his nose to sniff each shovelful according to Chris Tucker's testimony. In that way, he knew if the soil contained hydrocarbons. It would later be tested at Envirosoil Depot .

[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.

[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. Jay Mason did not go to Forward Avenue to inspect the soil himself, nor did he talk to Jacques Whitford directly. Had the Jacques Whitford inspection been made at Forward Avenue, one would expect their invoices would show the details of this activity. They do not. No one from Jacques Whitford testified at this trial.

[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.

[53] Jay Mason, has been in the business a long time. He began his career as a survey technician, moved into excavation work as a foreman, estimator and then into project management. Jay Mason estimated this contract on behalf of Whebby himself, using the information from the first geotechnical report. As project manager he over saw the excavation work stopping at the site two or three times a day or as little as once every other day. He relied on the work of the foreman Chris Tucker. He received the call from Chris Tucker when they unearthed the old leaking oil tank. He made the call to Mr. Haddad of Garden Crest to notify him of this find. His fax to Mr. Haddad is in evidence at Exhibit 1 Tab 62. Mr. Haddad contacted Jacques Whitford. Mr. Mason was also concerned about the demolition debris found in the old foundations. He agreed with Mr. Haddad, it was to remain on site and be stockpiled.

[54] With respect to pyritic 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.

[55] Mr. Mason testified Whebby was removed from the site in early June. Mr. Mason also agreed on cross-examination that part of Whebby's business is the sale of topsoil and fill, as is indicated at the bottom of Whebby's printed letterhead.

[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. He testified he was unfamiliar with

the term PAH (polycyclic aromatic hydrocarbon). He agreed that heavy metals were not something he knew about. He of course had heard of arsenic and lead and also knew that soils on old peninsular Halifax could present quality problems. For these reasons, once he learned of the hydrocarbon spill on May 21, he wanted Jacques Whitford to go to Forward Avenue to ensure that fill was okay.

[57] Mr. Tucker's evidence was less straight forward and his memory poor. Mr. Tucker is now age 39 and began work in the construction industry doing form work for foundations for approximately nine years. He then joined Whebby, laying pipes to drain excavation sites. He moved upward in the company to become the site supervisor at Garden Crest, responsible to load the trucks with the fill being removed. He described the soil as being "just fill – some rocks, old bricks and bottles." 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 reported this to Jay Mason and testified that the reclamation of this site and removal of soils to Envirosoil began under the supervision of Jacques Whitford. Chris Tucker could not recall if they demolished and removed the foundation of 1528 Summer Street. He could recall that one foundation was retained where there was a facade. Chris Tucker could not also recall what he did with the tank once discovered. 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.

[58] United and Boehner were first alerted to a problem with the fill that had been delivered, by neighbours. One in particular, Dr. Patricia Manuel, an Associate Professor of Planning at Dalhousie University made several calls to Kevin Riles, Vice President of United and also sent an email outline the neighbours' concerns on June 15, 2002. (See Exhibit 1, Tab 3)

[59] The email inquired in strong language as to the quality of the fill:

> Hello Kevin:
>
> > What can you tell me about the 'toxic soil' now on the site? Yes, you read
>
> > correctly - 'toxic'.

> Kevin, I have been receiving calls from neighboursasking me what I know about

> the fill that has been brought to the site over the past weeks.

> People are calling it toxic. I do not know a lot about this fill. I had a

> good look, when it first arrived, at the material at the very far end of the

> site - it appears to be Halifax Till - moderately coarse; slaty with good deal

> of clay; Other stuff is less recognizable to me. Some of the stuff close to

> the front of the property looks like material from an old developed site.

> There is a lot of foreign material in it. People here are telling me it is

> from the excavation at the corner of Spring Garden Road and Summer Street.

> Wherever it is from, it is causing a concern around here.

>

> What are the sources of all the fill material now sitting on this site?

> What is the content of the fill?

> What is the landuse history of the source locations?

>

> Something to consider - the land at the end of this street was a clean

> environment. It has gone through tremendous abuse. The natural materials are

> being replaced with materials foreign to the site. If this is material from

> other previously undisturbed natural environments that is not so bad (although

> that has its own issues associated with it), if it material from

> urban/commercial/industrial land subject to all manner of uses, that is

> another matter - fill from previously used sites does have the potential to be

> dirty. Lead is always a concern in urban fill.

>

> I don't think I should have to get these calls, but I am certainly willing to

> help sort out the concern. ...

[60] The email indicates it was sent June 15, 2002. It is in evidence at Exhibit 1, Tab 3. However Patricia Manuel was never called by any party to testify. The document is hearsay and cannot be used for the truth of its contents. It can however be considered as the catalyst for the subsequent response made by other witnesses who did testify at this trial, particularly as it relates to the mitigation of damage.

[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.

(Exhibit 1 Tab 3)

[63] Steven Milligan testified that initially he merely "took Paul Behner at his word" then during the months of July and August, he asked Paul Behner to provide United with written confirmation from Jacques Whitford. Finally in September 2002 United was forced to respond to the Department of Environment

concerns raised following a complaint they had received. (The evidence of Steven Milligan and Chris Elliot.)

[64] As to the test results of the materials at Forward Avenue, these were eventually done by AMEC, an engineering firm engaged by United. Steven Milligan testified he had been the engineer overseeing AMEC's work for United, until June 4, 2002 when he left AMEC and joined United. Chris Elliot another AMEC Engineer then was responsible for the testing results sent to Steven Milligan on behalf of United.

[65] It is significant that neither Paul Behner nor Steve Milligan said they detected any odour when the soils were being distributed around the foundations in July and August. But Mr. Milligan admitted that he did smell hydrocarbons from the stockpile in October and could then also describe a brownish rusty colour.

[66] A comparison of the tests done by Jacques Whitford and AMEC is helpful.

THE AMEC TESTS

[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 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.

THE JACQUES WHITFORD TESTS

[70] Garden Crest's counsel submitted that apart from some hydrocarbons discovered around Bore Hole 7 and the issue of contaminated soil from the oil

tank near Bore Hole 9, a comparison of Jacques Whitford's test results found at Exhibit 10 do not compare with the AMEC results. He also maintained that no PAH's were found in Phase II, the southern portion of the Garden Crest site and that it was unlikely PAH contamination could be attributed to the Garden Crest soil from Phase I, the northern portion of Garden Crest that made its way to Forward Avenue. I respectfully disagree.

[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. Mr. Daniel Chedrawe's evidence was that he took a decision to reclaim and contain some contaminated soils at the site. Environmental regulations do permit this type of contaminated soil to be buried around commercial buildings. However, on-site remediation is not permitted around residential buildings where people live the full day.

[75] Although it is impossible to account from 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.

[78] Mr. Daniel Chedrawe, as a developer, was in my view more sophisticated in matter of environmental regulations. That is why he engaged Jacques Whitford to conduct testing of the site back in 1999, before purchase. It is unfortunate that he did not accept the recommendation of Jacques Whitford to do a more extensive Phase II Environmental Site Assessment. However, on the evidence before me, it is clear that Mr. Chedrawe dealt with what he believed to be the extent of the hydrocarbon issue by having Jacques Whitford attend to the site after May 21. It is also clear that he was not aware of the presence of PAH's (heavy metals) before June 4, 2002, a date after which Whebby had already removed the soils and sold them on to Boehner.

[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 the soil it excavated. The soils reports prepared by Jacques Whitford of the Garden Crest site never purported to be exhaustive. There were no representations made by Garden Crest that untested areas were free of contamination. The excavator was to report any visible contaminants. Jacques Whitford would then

be called in to supervise the site. They did so once the punctured oil tank was found. The hydrocarbon soil should then have been taken off site for remediation.

[80] Garden Crest did not know where the general fill was being taken by Whebby. Mr. Chedrawe 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.

[81] When he finally visited Forward Avenue with his partner Mounir Haddad, in early October and describe the stockpiled material, he 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.

OTHER SOILS

[83] There was another theory of the source of the contamination advanced by counsel for Garden Crest. It was that soils brought to Forward Avenue from an HRM emergency sewer water line excavation site in a neighbourhood street, was the source of the contamination. I do not accept this as being plausible.

[84] In the early days of June 2002, some additional (but an unspecified amount) of material was excavated from a city street and placed on the Forward Avenue site temporarily, closer to the front of the stock pile, (last soil in) and then returned to that same street excavation when the pipe was repaired.

[85] I accept Paul Behner's evidence that this soil was temporarily on site and not a significant amount compared to all the soil delivered from Garden Crest. Behner testified that the Whebby foreman merely used the Forward Avenue site as a staging site for the sewer repair – where they brought materials from a street

trench they dug and cycle it through in a couple of days, then brought it back to the trench when the repair was completed.

[86] I am satisfied that this discrete operation could not account for all of the contamination documented on the Forward Avenue site. Further, it would be very unlikely that soil from such a street repair would contain construction debris of the type generated at Garden Crest and found at Forward Avenue.

WHO IS LIABLE

[87] With respect to the claims of "United" against Whebby, I find that Whebby cannot defend successfully by asserting that custom in the excavation industry was that soil was never tested prior to being removed from one site and delivered to another or sold for use in another site. To say that Whebby either had no duty of care or met the appropriate standard of care based on such a practice of the industry is not reasonable. Indeed, I have had no evidence of the "practice in the industry." Even if there was such a practice, it would fail to meet environmental regulations and societal expectations that such activity would not cause harm by the transport of hazardous materials, unsuitable for residential use to the Forward Avenue site. Particularly in residential settings, people dig and garden around their houses, and spend many hours of the day on their properties and must be saved harmless from contaminated and hazardous soils.

[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 to 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 circumstance. 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. Accordingly, Whebby is liable for the reclamation costs of the Forward Avenue site.

[89] With respect to United's claim pursuant to s. 17(b) of the *SGA*, it arises by operation of the assignment of action, *Boehner v. Whebby* to United (Exhibit 4).

[90] United argues there is by virtue of 17(b) an implied condition that the soil sold should be of a merchantable quality. However, if the buyer examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. The defect must to patent.

[91] In Fridman's, the Sale of Goods in Canada, supra at p. 196, the author notes that:

> ...the implied condition as to merchantable quality is inoperative where the defect rendering the goods unmerchantable is patent and the buyer knows or ought to have known of it as a result of an examination made by him, thereby exonerating the seller of any liability as respects the quality of the goods. But the *proviso* does not apply where no examination that the buyer could or would normally have made would have revealed the defect.

[92] I agree that the defect of undetectable heavy metals is latent. Hydrocarbons presence and demolition debris is not. Yet I am unconvinced on the evidence before me that Paul Behner relied on Whebby in the purchase of these goods. As noted by the Court of Appeal, in *Doug Boehner & Excavating, supra,* reliance must play a key role in any analysis or liability under s. 17 of the *SGA*.

[93] Paul Behner and Jay Mason were colleagues and competitors in the excavation industry. They were both in the business of moving general fill and till from one site to another. 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. In short, he knew what goods he was getting from Garden Crest. I find he had no reliance upon Whebby and that there was no sale by description and thus no implied condition of merchantable quality under the *Act*. He had the opportunity to examine the fill and chose not to.

[94] Nevertheless Whebby remains liable in negligence for the remediation of the Forward Avenue site. 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. Much evidence was heard with respect to the complete remediation of the site. Extra cost in excavating and removing soils that had been

placed around the foundations, after United ought to have known of the issue of the suitability of the soil, are easily severed from the total cost of reclaimation, had the soil merely remained in the stock piles and then remediated. The remediation costs are before the Court as Exhibit 2. They are as follows:

	Net	HST	Gross
Engineering and Consulting Fees	67,739.51	10,160.96	77,900.47
Excavation & trucking fees	20,104.50	30,465.67	233,570.17
Dumping Charges	182,435,40	.00	182,435.40
Professional Fees	20,307.27	2,841.35	23,148.62
Miscellaneous Costs	5,491.59	720.75	6,212.34
Total Costs Incurred to Date	**479,078.27**	**44,188.73**	**523,267.00**
Additional Authorized Costs Rector Colavecchia Roache - Claim Analysis	2,200.00	330.00	2,530.00
Total Remediation Costs	**481,278.27**	**44,518.73**	**525,797.00**

[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. The invoices supporting this expense are found in Laurdon Contracting Invoice #1704 (Exhibit 2, Tab 13) and Hammond Electric invoices (Exhibit 2, Tabs 37, 38, 39, 40 and 41). Boehner and United are liable to pay these costs in the sum of $38,501.47.

[96] I reject Whebby's submission that mitigation should be calculated at 50 percent. They have offered no evidence to support such a quantification of the remedial costs.

WHEBBY and GARDEN CREST

[97] Nor in my view can Whebby succeed in passing off responsibility to Garden Crest, not in a claim of negligence or arising from the terms of its contract with Garden Crest.

[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] It is correct that contaminated materials found on site were to be dealt with as an extra. 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. Quite the contrary, concerns about the soils were raised by Jacques Whitford in both 1999 reports. The reports indicated the investigation of the lands were limited to the samples taken from the ground and were not intended to represent areas that were not tested. The reports did not purport to be an exhaustive environmental assessment.

[101] Whebby cannot reasonable argue that they relied on the reports to suggest the soils were clean, but for the noted problem areas. 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. The reports were red flags and they were told to be observant of any possible contaminates as the excavation progressed.

[102] A warranty that the soils were free from contamination, would be unreasonable and flies in the face of the evidence.

[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. There is no suggestion in any of the evidence before me that once contaminated soils were found Whebby treated the contract as being breached. Further, Whebby had no reason to conclude that the entire area they were excavating was free of contamination.

[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 contained in the Jacques Whitford reports. The reports did not claim to be exhaustive. So far as the reports went, the representations were true.

[106] In the circumstances, Garden Crest cannot be said to have acted unreasonably in relying on the Jacques Whitford reports for their accuracy in communicating with its contractors. Indeed, Garden Crest could not have been imputed to have any knowledge of further contaminates - PAH's (through the knowledge of its acknowledged agent Jacques Whitford) before June 4, 2002 when Envirosoil's tests first raised the concern (Exhibit 10). In short, Garden Crest provided Whebby with the information it knew about the soils and expected Whebby to remove the soils to a disposal site, not sell the soil for residential use. There is no negligence on the part of Garden Crest in its dealings with Whebby.

[107] In the result Whebby is liable in negligence for the losses sustained by United in the amount of $525,797.00 less the mitigation cost of $38,501.47 to the account of United. Whebby's claims against Garden Crest are dismissed.

[108] I will be happy to hear submissions on costs in writing failing any agreement between the parties.

Justice M. Heather Robertson