SUPREME COURT OF NOVA SCOTIA
Citation: *3021386 NS Limited v. Harding*, 2022 NSSC 174

Date: 20220708
Docket: Hfx. No. 309535
Registry: Halifax

Between:

3021386 Nova Scotia Ltd.

Plaintiff

v.

Municipality of the District of Barrington, a corporation, Tri-County Regional School Board

-and-

Donald G. Harding

Defendants

Trial Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	April 12, 14, 19, 20, 21, 22, June 14, 15, 16, 17 and June 30, 2021, in Halifax, Nova Scotia
Additional Submissions	March 17, 2022
Counsel:	Christopher I. Robinson, for the Plaintiff Justin E. Adams and Bhreagh MacDonald, for the remaining Defendant, Harding

By the Court:

Overview

[1] This case is about Mr. Kenneth Anthony's gamble on behalf of the Plaintiff company (I will refer to Mr. Anthony as "Anthony", and the Plaintiff numbered company as "the Plaintiff"). The gamble was acquiring a large property at 3752 No. 3 Highway, Barrington Passage, Nova Scotia ("the Property"), at a low cost.

[2] The Municipality of the District of Barrington ("the Municipality") offered the Property for sale through a Request for Proposal ("RFP"), with the express qualification that no environmental assessment would be provided. The Plaintiff, through Anthony, made an offer of $25,001.00 on an "as is" basis, without any environmental assessments or assurances. These terms were part of an effort to make the Plaintiff's bid more attractive to the Municipality. The Municipality had rejected bids, after a previous RFP, one of which had specifically requested environmental due diligence. Anthony's willingness to forego environmental assurances arguably achieved their purpose, as the Plaintiff's bid was successful. Anthony was nevertheless able to convince the Municipality to obtain environmental due diligence on the Property. Anthony alone requested and reviewed the environmental reports received through the Municipality. Anthony alone indicated his satisfaction, on behalf of the Plaintiff, with the quality of that environmental reporting.

[3] After the purchase, the Plaintiff claims it discovered that the soil on the site was contaminated with hydrocarbons. The presence of hydrocarbons was allegedly caused by the earlier presence of underground tanks (UFT's), for fueling school buses. A claim for damages was advanced.

[4] Anthony's gamble, while still a successful business venture for the Plaintiff, resulted in the Plaintiff acquiring a property with unanticipated environmental contamination.

[5] This litigation followed three years later. In 2009, the Plaintiff sued the Municipality and the Tri-County Regional School Board ("the Board") alleging, *inter alia*, negligence, breach of contract, breaches of the *Petroleum Management Regulations* and the *Education Act*, and misrepresentations with respect to the future condition of the property. Those initial pleadings made no mention of the sole

remaining defendant, Donald G. Harding ("Harding"), a lawyer who had acted for both parties to the transaction.

[6] Four years later, in 2013, the Plaintiff amended its pleadings to add Harding as a defendant. The Plaintiff now alleges that Harding had represented that the Board would deliver the Property in a "clean" state; failed to advise that the Plaintiff undertake a Phase II environmental assessment; failed to advise the Plaintiff about the impact of an alleged "hold harmless" clause; and failed to advise the Plaintiff with respect to "…the potential for a dispute and conflict to develop…". It is further alleged that Harding held confidential discussions with the Municipality which were not shared with the Plaintiff.

[7] On April 8, 2015, the Plaintiff discontinued its action against the Municipality. In 2021, the Plaintiff's claims against the Board were dismissed on way of summary judgment by the Nova Scotia Court of Appeal (2021 NSCA 4).

[8] While the Municipality and the Board are no longer parties, the substance of this litigation remains unchanged. This litigation is an attempt to shift the blame for the business decision Anthony and the Plaintiff made fourteen years ago when, on Anthony's initiative, the Plaintiff acquired the Property without conducting adequate environmental due diligence to identify the later-discovered contamination.

Background

[9] In 2002, the Board decided to close the former Barrington Municipal High School. The Municipality owned the land on which the high school was situated. The Board occupied the Property while the school operated, a span of "about 45 years" until the Property was to be returned to the Municipality, according to the RFP.

[10] The Municipality issued a RFP on February 1, 2006, for the development of the Property. Two bids were received, including one submitted by Anthony on behalf of Anthony Properties Ltd, another company he controlled. Neither bid was accepted. A second RFP was issued in October 2006. The second RFP stated, in section 2.3, that "[t]he Municipality will not provide any environmental assessment on this property."

[11] On October 30, 2006, Anthony submitted two offers under the second RFP, one on behalf of the Plaintiff company and another on behalf of Anthony Properties Ltd. The Anthony Properties offer was accepted. (In the Agreement of Purchase

and Sale ("APS"), however, the Plaintiff company was substituted as the purchaser by agreement.) The APS with the Municipality was signed by Anthony on behalf of the Plaintiff on November 30, 2006. The Board was not a party to the APS. Harding acted as solicitor for both the Municipality and the Plaintiff in relation to the APS.

[12] The Property was not turned over to the Municipality until January 22, 2007. In the interim, the Board removed oil tanks from the Property. The Board provided a soil analysis report from AGAT Laboratories dated February 5, 2007. The acquisition by the Plaintiff closed on February 16, 2007.

[13] The Plaintiff alleges that after it purchased and began developing the Property, hydrocarbon contaminants were discovered, requiring substantial remediation costs. The Plaintiff's claim against Harding is in solicitor negligence, negligent misrepresentation, and breach of a dual retainer.

Credibility and Reliability

[14] In this case, as in so many others, the assessment of the evidence depends upon findings of credibility. I refer to the statement of O'Halloran, J.A. in *Faryna v. Chorny*, (1951), [1952] 2 D.L.R. 354, 1951 CarswellBC 133 (B.C.C.A.):

> 9 ...the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time...
>
> . . .
>
> 11 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be

> telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> 12 The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[15] In *Baker-Warren v. Denault*, 2009 NSSC 59, the Forgeron, J. made the following observations about credibility, at para 19 (citations omitted):

> With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:
>
> > a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses...;
> >
> > b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
> >
> > c) Did the witness have a motive to deceive;
> >
> > d) Did the witness have the ability to observe the factual matters about which he/she testified;
> >
> > e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
> >
> > f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions...;
> >
> > g) Was there an internal consistency and logical flow to the evidence;
> >
> > h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
> >
> > i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[16] In short, helpful considerations when assessing the credibility of witnesses include attitude and demeanor, prior inconsistent statements, external and internal consistency, motive to mislead, ability to record events in memory, and application of common sense to the evidence to consider whether it suggests the evidence is impossible, improbable, or unlikely.

[17] As I review the evidence, I will provide additional commentary. I will say at the outset that where Anthony's evidence conflicts with that of other witnesses, including Harding's, I prefer the other witnesses' evidence. As I will discuss in this decision, I found that Anthony's evidence neither accorded with the documentary evidence nor with other witnesses' credible evidence. Anthony's' shifting recollections, shifting blame, and variety of explanations and excuses does nothing to give the court any confidence in his evidence.

Evidence and Findings of Fact
Kenneth Anthony

Business acumen and Relationship with Harding

[18] The president of the Plaintiff company testified at length about his background and business as a developer in Barrington Passage, and about his relationship with Harding, who he described as his "best friend." At the time of this transaction, Anthony estimated Harding had been his lawyer for over ten years, acting for his companies in 70 or more real estate deals. He only used other lawyers if there was a conflict of interest. Simply put, he said, Harding "had my back." Harding had offices in Shelbourne and Barrington Passage, and lived near Anthony in Shelburne. Around the time of the purchase, in 2006 to 2007, they met two to four times a week, and talked several times a week.

[19] The closeness of their relationship was one of the few things that Anthony and Harding actually agreed upon in their testimony.

[20] Anthony described the Plaintiff company as a real estate business owning many properties. Anthony was involved with the day to day business, including "finding deals" and maintaining properties. He did not deal with financing, which was handled by his business partner Steven Lockyer, who did not testify.

[21] Anthony described Steven Stoddart ("Stoddart"), a former Board official, as a good friend, whom he had known for 15 to 20 years. Anthony also said he had known Brian Holland ("Holland"), the Municipal Clerk, for 15 to 20 years. All of this testimony was given to suggest that the closeness of the players in this deal resulted in Anthony relaxing his requirements and being duped into forgoing the usual environmental diligence. I do not accept this, as I will explain in detail later.

Environmental Assurances or Lack Thereof

[22] Anthony said he learned six months before the RFP was circulated that the Property was going to be sold, through "word on the street." He said he spoke to Harding, Holland, and Stoddart about the Property, with a view to having one of his companies purchase it. He described himself as like a "dog with a bone" in pursuing the Property, though he gave no specifics about these conversations.

[23] Anthony intended to build condominiums on the Property. He testified that potential oil contamination was a major issue for him. Anthony knew there were gas pumps on the property, used to fuel school buses. He testified that he wanted a clean-up of the property before he would purchase it. He said he told this to Harding at a Tim Horton's, or at Dan's Ice-Cream, sometime well before November 20, 2006, in October or November. He said he also inquired as to what would happen if the Board did not clean up the Property. Anthony testified that Harding told him that the Board would have to pay if there was any pollution, saying "polluter has to pay".

[24] Anthony said he also spoke to Holland about the Property about three times, concerning the oil tanks and the air quality in the building. There is no documentary evidence to support his evidence of these alleged conversations. Harding and Holland deny that any such conversations happened. Anthony's own emails and letters do not support his *viva voce* evidence about these alleged conversations.

[25] In the face of the other evidence, Anthony insisted that he was given assurances that the Property would be "clean" by Harding and Holland prior to the presentation to the Council. Anthony maintained that these alleged assurances were separate and apart from anything in writing, or any discussions with Council. He insisted that extra-contractual verbal representations were made by Holland and Harding. I reject this claim given his lack of reliability.

[26] It is also noteworthy that, despite alleging that Harding made such representations, Anthony did not name Harding as a defendant when he started this proceeding, but only referenced assurances by the Municipality and Holland; Anthony said Harding was his "very best friend at the time." He testified that he knew in 2009, when he started this claim, and when he testified in 2012, that he had received these alleged assurances from Harding.

[27] Anthony said he and Holland spoke on an unknown date before he submitted his proposals, and before the November 14, 2006, meeting, and that Holland gave him assurances at that time. However, both proposals submitted on behalf of his

companies pre-dated November 14, 2006. Anthony was directed to his discovery, where he said he spoke with Harding between November 15 and November 30, 2006. On direct, he was adamant that he had received assurances before November 14, and he maintained that his recollection at trial was better than at discovery.

[28] On discovery, Anthony indicated that the prior assurances were from Holland only. At trial, he said he thought the question was whether anyone else was present, not if others had given assurances. In the 460 pages of the 2012 discovery, he never mentioned Harding's alleged assurances. He explained at trial that he was not suing Harding then. On discovery in 2014, he said assurances were given between November 14 and November 30. Finally, at trial, he insisted the assurances were definitely before the October 2006 RFP. There was a myriad of inconsistencies on this point. Anthony's evidence has changed and developed over time in what appears to be a response to changing trial strategy.

[29] Anthony agreed that if his discovery evidence was accurate, then any assurances would have been made after the two proposals were submitted, and after Holland's letter indicating that the Municipality was not providing any environmental assurances. This evidence is in contrast with paragraph 15 of Anthony's affidavit of October 15, 2018, where he stated that Harding told him in November 2006 that the Board would return the property "clean" to the Municipality.

[30] Anthony's version of these alleged discussions is a moving target, not only as to timing but as to location. In his 2014 discovery, he could not say where these conversations occurred. In his direct evidence at trial, he said they happened at Dan's ice-cream shop or maybe Tim Horton's. On cross-examination, Anthony said he was guessing, and in fact was not sure where they happened. The unreliability of this evidence further undermines the claim that any such assurances where made.

[31] As noted earlier, the first RFP did not lead to an agreement, and a second RFP for the development and sale of the Property was issued in October 2006. The new RFP contained the following clause:

> 2.3 **Environmental Assessment**
>
> The Municipality will not provide any environmental assessment on the property.

[32] Anthony read clause 2.3 of the RFP before submitting a proposal. After speaking to Holland, he understood that no environmental assessment would be provided. Since he intended to tear down the school building, he was not concerned about its condition. However, Anthony said, he understood that the oil tanks would be dealt with by the Board.

[33] In his evidence, Anthony distinguished the air quality and mold issues in the school building from soil issues on the property. However, this is not a distinction recognized by the RFP, or by any other witness. Nor did Anthony draw this distinction in conversations or correspondence prior to the purchase and closing.

[34] After reviewing the RFP, Anthony wrote to Holland on October 2, 2006, to confirm that he was interested in purchasing the Property. The letter reads as follow:

> I am writing you in regards that I understand that there is a meeting this evening in regards to the Old High School. I wanted to reconfirm my position on my offer. I am still very interested although there seems to be a downturn in our local economy. There also appears to be 8 new apartments under construction and taxes have increased marginally. None of these issues concern my confidence in this project. It is all the more reason why we need development and more businesses here.
>
> I am trying to make this as easy as possible as I am taking most of the risks.
>
> 1.Buy property as is, No Phase 1 or other major concerns that could be a Major problem if this is done.
>
> 2.I look after tearing down old school, very expensive, I look after cost overruns, permits an [sic] I even put in my proposal if I don't tear it down by a certain time, then Council can buy the property back from me at half price. I plan on tearing the old school down almost immediately and have no plans of leaving it standing or just sitting on it. To market this location properly, it needs to come down so people can view the land better.
>
> 3. New development creates new jobs, tax base and people staying and buying local. I have the proven track record, the knowledge, the contacts, to bring more jobs and development here. Again, who else has brought companies like McDonalds, Atlantic Superstore, Tim Hortons, Shoppers Drug Mart, Subway, Movie Gallery, Great Canadian Dollar store, etc and the list goes on. It takes a lot of work, money and time I am willing to commit the above to keep Barrington going. We have started losing $$$ again to Yarmouth. They have attracted new businesses and now it seems local people are doing more shopping there. We have to try and stop this trend and bring more businesses here and not only keep our people here but again attract Shelburne and Pubnico to shop here.

> 4. The soccer field would be nice to have but it would be a political minefield. That is why I am not asking for the soccer field and highly recommend for the Municipality to keep it in their hands. It is but better for the community use and makes much more sense politically.
>
> I am available at XXX XXXX cell and XXX XXXX office anytime day or night.
>
> [Some content excised]
>
> [The foregoing quotation has not been edited for grammatical errors.]
>
> [Emphasis Added]

[35] Anthony described this letter as his "sales pitch." He said he did not think of it as a response to the RFP. Describing his stated willingness to purchase with no Phase I environmental assessment, he said it was "more in regards" to the air quality and asbestos in the school building, and he did not need a Phase I because he intended to demolish the building. I do not accept Anthony's evidence on this point. It is obvious given the timing of the letter that this correspondence was in response to the second RFP. This is clear from paragraph one, where Anthony says he will buy the property "as is."

[36] Anthony wrote again to Council on behalf of his numbered company on October 30, 2006, setting out three options for the purchase of the Property. He confirmed in his testimony that his intention in providing three options was to be the successful bidder. The October 30, 2006, letter stated:

> Enclosed are our 3 options which is solely at the Municipality of Barrington choice.
>
> Option #1 – Offer $25,000.00 and Annex comes with it once it is in the Municipality of Barrington ownership. This option is for the whole property and I will be taking the old High School down and renovating the new into either condos, apartments, with maybe even some retail at the bottom levels.
>
> Option #2 – Offer $50,000.00 with deduction of $2,000 for every full or part time job that is created on that site within 24 months to a balance of 0 of 25 jobs are created.
>
> Option #3 – Offer $10,000.00 with the purchaser guaranteeing one of these 3 at the purchasers sole discretion.:
>
> A) A minimal of 24 unit Hotel (motel) commencing construction within 24 months (from when Annex is turned over to purchaser)
>
> B) At least 20 to 35 full time jobs guaranteed within 24 months on this site. This would be a complete new business and not a relocation of an

> existing one. This could include WalMart, Canadian Tire, Empire Theatres, etc. which would easily surpass 20 jobs.
>
> C) An additional $75,000 to the purchase price, if either (A or B) is not delivered within the time frame as stated (24 months from when the Annex is turned over to the purchaser)
>
> …
>
> This project would be a partner deal with myself (Ken Anthony) and Steve Lockyer (Halifax). We together run 3021386 NS Ltd. which is a multi million dollar company dealing in apartments and commercial realastate. Steve is a business person in Halifax who deals in condos having ownership or part ownership in present developments such as The Brewery Market – Halkirk Developments, Lexton Court condos, The Brickyard. He also is president of Cornwallis Financial. His partnership and contacts on this large project would ensure the success as well as the right mix of commercial tenants.
>
> [The foregoing quotation has not been edited for grammatical errors.]

[37] Anthony said the letters of October 2 and October 30, 2006, make no reference to environmental issues because in his mind the only such issue related to the building, which he intended to have demolished. He believed that the Board would return the Property to the Municipality in a clean state, based on representations he claimed he received from the Municipality and from Harding.

[38] In the letters of October 2006, Anthony was asserting his business acumen. This is contradictory to his attempts at trial to describe himself as an uneducated man reliant on all of those around him. I do not accept his attempts to depict himself as an unsophisticated person who was duped in this process. He has demonstrated he was far from a neophyte in the bidding and development process.

[39] Anthony testified that Council accepted option 1. On November 14, 2006, he wrote to Council, to confirm the purchase of the "old high school", enclosing a cheque for $25,000. He wrote:

> Thank you for the recent motion in regards to the purchase of the Old High School. I am looking very much forward to do this project and am anxious to proceed immediately.
>
> I have enclosed a copy of the cheque I issued (in trust to Don Harding) for the amount of $25,000.00. I have also enclosed a copy of my insurance starting tomorrow so I will take over full responsibility of liability and normal insurance coverage.

> The demolition permit has been paid and applied for and will be issued only after Council approves the sale. This demolition permit can be confirmed by Mr. Holland.
>
> I am asking Council for the following misc items:
>
> 1. Power be shut off immediately for the Junior High so we can tear it down commencing this Monday morning.
>
> 2. Within approximately 3 months, a letter from Jacques Whitford stating the oil tanks have been removed and it is acceptable, no contamination. The Old Annex building, I would expect to be turned over in approximately 3 months and my plans are again to tear it down immediately when passed over.
>
> 3. Approval to commence demolition and renovations immediately. I want the old Junior High down by Dec. 1st/06. I also want to get aerial photos with the building down before snow falls which his why I am in a rush to start marketing.
>
> 4. Council to allow work on condo bylaws that would make it acceptable for at least 12 condos be hooked up on 1 sewer system. I know that 12 units would be owned by each individual condo owner and from there go in a common area sewer line owned by the Condo corporation and then in the Municipal sewer system. There are no condo bylaws and I am obviously starting to commence on a demo site ASAP for viewing for sometime in January/07.
>
> 5. The lawyer Don Harding can look after both sides on this land transaction. Geomap is starting surveying on Monday. Most of the property has been surveyed but a new line approximately 25 feet from the soccer filed parking lot will have to be surveyed as shown.
>
> 6. I understand the Chamber will be using the site Dec. 2nd and I am ore than happy to work with them and have a heated room available as well for that evening.
>
> [The foregoing quotation has not been edited for grammatical errors.]
>
> [Emphasis added]

[40] Anthony testified that at the time of this letter he believed that Harding was representing him. He said he had never bought property without environmental assurances from the vendor. The November 14 letter makes the first reference to an environmental assurance, in the nature of a "Jacques Whitford" letter, with specific mention of oil tank removal. There is no reference to prior assurances from Holland or Harding. Having submitted a proposal with no assurances offered or requested, Anthony now sought a "Jacques Whitford" letter or assurance. (Jacques Whitford is an engineering and consulting company whose services include environmental assessment.)

[41] On November 15, 2006, Holland emailed Harding indicating acceptance by the Municipality of the Anthony Properties proposal:

> Last night Council agreed to accept the proposal on Anthony Properties Ltd for the purchase of the former BMHS property.
>
> Please provide an Agreement of Sale for the property that will include the following:
>
> 1. Sale price $ 25,001.
>
> 2. Purchaser responsible for survey and title migration costs.
>
> 3. Description is contained in the RFP document and will be confirmed by the survey.
>
> 4. The Annex property will be included in the sale and transferred together with the rest of the property as soon as it is available from the School Board.
>
> Also, Council approved Mr. Anthony's request for permission to begin demolition of the old "junior high school" portion of the buildings right away.
>
> Thyank you,
>
> Brian
>
> [The foregoing quotation has not been edited for grammatical errors.]

[42] Prior to this email there are no documents indicating Harding was involved in the transaction. The evidence indicates that Harding was not involved in this negotiation or in the formation of the agreement until Holland asked him to prepare the APS. Harding forwarded Holland's email to Anthony on November 20, 2006, with the question, "Anything else you wanted in there?" Anthony testified that in response, he wrote, by hand, a fifth item on a printout of the email as follows:

> 5. Letters from Jacques Whitford the land is clean and up to environmental standards.
>
> Close Jan 22/06

[43] Anthony testified that he delivered the printed-out email, with his additional notation, to the front desk at Harding's office, on November 20, 2006. Anthony testified that he wanted to make sure the land was contamination-free despite his response to the RFP expressly indicating that there would be no environmental assessment provided by the Municipality. He testified that he never discussed this with Harding, then or later.

[44] On November 15, 2006, Darryl Wilson, who worked for the insurance company Bell and Grant had emailed Holland and others, ostensibly to suggest the Municipality include certain requirements in the APS.

[45] Mr. Wilson's email included suggestions to Holland concerning the contents of the APS:

> I offer my thoughts pending Cowan's feedback. The Municipality should have its solicitor structure a formal written legal agreement with Mr. Anthony surrounding planned activities in and around the District's property/building prior to the formal transfer of the property/remaining building to Mr. Anthony. The agreement should contain an indemnification/hold harmless clause in favor of the District. As well, the agreement should have an insurance clause outlining the minimum types and amounts of coverage (as set out by the District and its solicitor) to be carried out not only by Mr. Anthony but also any contractors (including R T Excavating) performing operations on the site on his behalf. Insurance outlined in the agreement as required should not only include general liability (with removal/weakening of support inclusions removed), non-owned auto liability, and auto liability, but depending on exposures present, should also include asbestos/lead abatement liability, and environmental liability. The agreement should require that the district be shown as Additional Insured on policies where permitted. As well, the District should consider having the agreement require Mr. Anthony to carry Builders Risk coverage on the building including the District's interest in the event he or his contractor were to damage the portion of the building to remain standing.
>
> As an aside, the District should require the School Board to supply documentation evidencing no contamination on the site prior to the property reverting to the District – this may have already been done – especially where the School Board have been conducting fueling operations there.
>
> [The foregoing quotation has not been edited for grammatical errors.]

[46] In a subsequent email to Harding, on November 20, 2006, Holland provided him with the insurer's comments:

> We have been advised by the insurance company to include certain requirements in the Agreement of Sale to Anthony Properties Ltd. Please review their comments attached, and include the requirements you believe necessary. Also attached is a copy of the insurance certificate received from R&T excavating Ltd. They are the company doing the demolition of the old junior high school.
>
> [The foregoing quotation has not been edited for grammatical errors.]

[47] Anthony indicated at trial that he did not see Mr. Wilson's email until discovery. Asked if he was certain of this, he said, "120% fact not an opinion." He

then laughed and said "sorry." This was a sarcastic response after receiving the court's decision about the refusal of the expert opinion from Mr. Finley. I will address this email and the fact Anthony did not review it later in this decision. This is not the only example of Anthony's sarcastic approach to his testimony. Anthony noted in his testimony that he addressed a letter to Harding, "Dear Don (Q.C.)", volunteering that Q.C. meant "Quite Costly." There were many interjections of this kind by Anthony during his direct and cross-examination, giving the impression that he was not taking the proceeding seriously.

[48] On November 21, 2006, Anthony wrote to Holland. Amongst other issues, he raised the matter of the tanks:

> I do have a few questions though, in which I was assured the tank was empty. Please re confirm that Steven Stoddart has had the tank emptied and without any oil, gas, etc as Steve was supposed to have stated. I believe then there should be no issues. I trust that Steve S and the School Board have started the environment concerns and commencing to get Jacques Whitford in as promised. I was also going to ask when the 3 months or closing up the Annex would taking place. I am in no major rush but it would for development purposes be nice to have the Old Annex out of the way.
>
> We will be continuing to tear down the old School tomorrow morning as well as commencing on the model suite in the Senior High. We will be staying away from the tank until the School Board completes there work and making sure it is up to Environmental regulations.
>
> Please keep me posted and I will call Steve early Tuesday morning.
>
> All the best, and again, We will not be doing any digging into the ground or going over the site where there is a tank.
>
> regards kb
>
> [The foregoing quotation has not been edited for grammatical errors contained in the original.]

[49] Anthony confirmed that he sent this email to ensure that the Board was going to clean up any contamination and obtain a "Jacques Whitford" report. Parenthetically, it was Anthony personally following up about environmental concerns. It is noteworthy that he was not doing this through Harding, who by his own evidence, he understood to be his lawyer, and who, he testified, he expected to handle matters of this kind. The implication is that he in fact understood Harding's role to be limited, or, at the least that he did not seek Harding's advice on the environmental issue. It is also noteworthy that Anthony's representations and agreements in the proposal were different than after the Plaintiff's successful bid;

he first agreed to an "as is" sale, then began demanding Jacques Whitford reports and environmental assurances after acceptance of his successful bid.

[50] Anthony began work on the Property in November 2006. He fenced off an area and started moving in surveyors, excavators, and electricians by November 14. At that point, there was no APS signed yet, and he did not yet own the property. However, Anthony said, he had "assurances" and was prepared to demolish the school, in order to avoid tax implications by finishing demolition by December 1. This is before Harding was even asked to prepare the APS on November 15, 2006. This is another example of Anthony forging ahead and not seeking legal advice.

[51] On November 21, 2006, at 8:43 a.m., Holland emailed Stoddart about the situation on the Property. The message was cc'd to Anthony:

> Mr. Anthony has been informed of your concerns and has told me he will call you this morning.
>
> At the present time he is demolishing the old Junior High School and removing the debris from the site. He will also be starting construction of a "model suite" in the Senior High School.
>
> He will not be demolishing or constructing anything near the oil tanks in the Annex or the Senior High School.
>
> The demolition will not affect the area around the oil tank behind the Junior High School as that tank has been fenced off so the machinery will not intrude on it.
>
> In any case you informed me by email on November 1, 2006 that the oil tank behind the Junior High School had been pumped out, so there can be no contamination from it. Nevertheless, the sooner it is removed and the letter from Jacques Whitford is provided, the better.
>
> Thank you for your cooperation in this endeavour.
>
> Brian
>
> [The foregoing quotation has not been edited for grammatical errors.]

[52] Anthony said he understood this was Holland following up on Anthony's earlier email setting out his expectations of the Board. Anthony forwarded the email to Harding on December 1, 2006.

[53] Anthony sent an email to John Hogg ("Hogg"), at the Board on November 30, 2006, in regard to the proposed rental of the annex building, on the Property by the Board. In that email, Anthony referred to the oil tanks:

> The School Board is responsible for taking out the in-ground oil tank where the buses gas up and solely responsible for the clean-up and a letter from Jacques Whitford were acceptable qualified company saying it is environmentally clean. I will then allow the tank to stay there until the end of this lease and therefore the Board doesn't have to remove it within the next 60 days as planned or promised. Therefore, I will be proposing "purchasing" the property prior to the tank removal but guarantee from the Mun. of Barrington and the School Board and it will be cleaned up prior to vacating the premise.

[54] Anthony also forwarded this email to Holland on December 5, 2006, but neither copied nor forwarded it to Harding. Anthony said he was writing to those individuals to ensure the property was clean before being passed to the Municipality. Anthony did not receive a reply to the email. In referencing the lack of response, he said "sooner or later silence becomes betrayal." There is no documentation or correspondence to support Anthony's stated belief that the property was going to be "clean." In fact, his emails after the fact show he had a concern about oil tanks, and knew it was the Board he had to discuss this with. He was again taking the lead and not involving Harding.

[55] Anthony received an email from Stoddart, copied to Hogg and Phil Landry, on December 6, 2006, in which Stoddart spoke about turning the Property back over to the Municipality, with a tentative date for the transfer on or before January 22, 2007. Anthony said he had assumed the Board owned the property, but learned from Harding that the Board was transferring it back to the Municipality. Anthony received an email from Stoddart apparently replying to Holland:

> Hi Brian
>
> I just wanted to clarify that I will be communicating with you until the property is returned to the Municipality. Please see Ken's email below.
>
> Thanks
>
> Steven Stoddart
>
> Director of Operations, Tri-County Regional School Board…

[56] This email was apparently sent to Anthony in error, being intended for Holland at the Municipality.

[57] The state of relations between Anthony, the Municipality, and the Board during the winter of 2006-2007 is illustrated by an exchange of correspondence on January 22, 2007. Stoddart had forwarded Holland the following letter, respecting the hand over of the Property:

> Dear Mr. Holland:
>
> We have removed the diesel pump and tank from the property. Everything appears to be okay and soil samples have been taken and sent to the lab for analysis.
>
> I am prepared to turn the property over to the Municipality today, January 22, 2007, under the following condition:
>
> I need to have use of the old board office until the end of February 2007. I will have the power and oil disconnected on or before that date.
>
> I require the use of the facility as it is taking some time to get the phone lines connected at our new location and we still have material in the building we need to remove.
>
> I hope this meets with your satisfaction.
>
> [The foregoing quotations has not been edited for grammatical errors.]

[58] Holland forwarded Stoddart's letter to Anthony with the query, "[d]oes this cause any problems." Anthony replied:

> Dear Brian, Thanks for your comments on the drawings.
>
> In regards to Steve S. letter, I find the environment to be very weak. I need better assurances and more paperwork then, …it is being reviewed and everything appears to be OK. Please confirm how long the soil samples will be back clean of any environmentally concerns. As for the end of Feb/07, I had originally planned on taking the Annex building down by the end of Jan/07 for development purposes and using the main entrance doors on the Senior High. Are they prepared to pay any rent as the last time, I talked to John Hogg, rent was going to be $600.00 plus HST per month if they needed it.
>
> Please review and let me know as again, I expected the land to be available by Jan. 22nd/07 and clean with proper paperwork that eliminated any Environmental concerns.
>
> Best regards KB Anthony
>
> [Emphasis Added]

[59] The following exchange of emails ensued:

> From: Brian Holland
>
> To: Ken Anthony
>
> Sent: Monday, January 22, 2007 1:58 PM
>
> Subject: Former BMHS Property

> Steve Stoddart just called regarding the old high school. He says he cannot deal with a "third party" and must deal with the Municipality.
>
> He wants to have the closing postponed to February 2nd, He believes he can get everything out by then and the phones changed over to the their new location. He will have the paperwork on the oil tanks by February 1st. As soon as I receive it, I will copy it to you.
>
> If this is satisfactory we will aim for that date.
>
> Brian
>
> …
>
> From: Ken Anthony
>
> To: Brian Holland
>
> Sent: Monday, January 22, 2007 2:35 PM
>
> Subject: Re: Former BMHS Property
>
> Thanks makes more sense, let's hold off until Feb. 1st and keep it easy and clean. No problem here as long as he has the proper paperwork on the oil tanks. Will he have the above ground oil tank for the Annex gone? Thanks KB
>
> …

[60] Anthony testified that when he emailed Holland on January 22 at 1:38 p.m. indicating that he found the "environment to be very weak," he was referring to the fact that soil samples were being delivered to the lab for analysis, and that this was not the type of report he wanted. He said he wanted "zero environmental concerns," meaning no oil tanks. By contrast, by "environmental issues" he meant the air quality of the buildings. As of January 22, 2007, he said, he expected something in the nature of a Jacques Whitford report. However, this was never made explicit in the above communication and is in contrast to the express terms of the RFP. The issue of environmental assurances now became a moving target over the following months and years, as shown in emails and Anthony's testimony. He began by bidding on an RFP with no environmental assurances and accepting "all the risk" to demanding escape clauses in the APS and letters of comfort all while "getting a steal of a deal."

[61] Anthony emailed Holland on January 29, 2007, at 10:45 a.m. inquiring "how are we doing on the environment?" Holland responded on January 30 at 8:58 a.m., indicating that Stoddart had promised to have the documentation on February 1, 2007. Anthony responded at 9:36 a.m. that "the only outstanding issue is the

Environment concerns which I would like proper paperwork. You can understand any lender would obviously want this as well." This is one of the only emails on the topic copied to Harding, and the first time he mentions a lender in the face of a $25,000 deal.

[62] On February 1, 2007, at 8:25 a.m., Holland emailed Anthony directly. Harding was not copied on this email, which stated:

> Sorry I didn't reply sooner.
>
> Since the environmental information will not be available until today it appears we have no choice but to delay the date of sale. Friday, February 16, would be an acceptable closing date. As soon as the environmental information is received it will be forwarded to you.
>
> Regards,
>
> Brian

[63] Anthony copied Harding on this exchange. Anthony said his references to paperwork meant a Jacques Whitford letter confirming that there was no oil contamination, but that was not specifically stipulated in the email. Anthony never received a report from Jacques Whitford, but did receive an AGAT Laboratories report addressed to the Board on February 5, 2007. Based on this report, Anthony concluded that there was no concern from three oil tanks located at the annex building, the senior high, and the junior high, respectively. AGAT Laboratories did not find any hydro-carbon contamination detectable in the 12 samples they received. Anthony testified that he still expected a Jacques Whitford letter respecting the entire Property to follow, though he did not tell anyone this. He instructed Harding to close.

[64] Parenthetically, Anthony's testimony appears to be contrived and crafted in this regard. The APS includes no requirement for a letter from Jacques Whitford indicating that the entire Property was free of any contamination. What it does allow is a dissatisfied Anthony to walk from the deal. Anthony received the AGAT report and then instructed Harding to close the deal. Anthony could have refused to close, but did not. Throughout the negotiations, however, Anthony made statements in emails, letters, and proposals indicating that he would assume all the risk in the transaction. While Anthony claimed that he relied exclusively on his lawyer, and that he was not familiar with legal requirements, the evidence also indicates he was an experienced real estate developer, who was comfortable communicating directly with a variety of actors connected to this deal, usually without copying his lawyer, and certainly not seeking legal advice. He also had an APS which he admitted he

did not read through. It is puzzling how someone with his real estate portfolio would treat an APS in such a casual manner. Furthermore, the evidence is clear that Anthony did not rely on Harding for environmental advice. Harding was not an expert in that area, nor did Anthony think he was.

[65] It was put to Anthony that he closed the property transaction without receiving a Jacques Whitford letter; he responded that he did not have any real concerns, and he did not follow-up, "so my bad on that." Exactly! As I will explain further, I do not accept his attempts to rewrite history and foist his decisions to purchase a property "as is' on to his lawyer when all other attempts at redistributing the liability have failed.

Environmental Knowledge

[66] Anthony conceded that he was aware of at least three tanks on site. He also knew the Property was actively used as a fueling station for buses. He denied being concerned about the risk of contamination, however, saying "no, not really," because he understood the Board was giving over the Property, and it would be "clean". Again, he attempted to explain his concern about environmental issues as being only in relation to the buildings, and not the soil, as he says he was given assurances. Absolutely no other witness or documents support these alleged assurances.

[67] The evidence indicates that Anthony had access to information that could have put him on notice of potential contamination concerns. On August 30, 2000, Jacques Whitford was retained by another company of Anthony's, K&J Anthony Properties Limited, to conduct a Phase I environmental site assessment of properties at 3723 and 3737, Hwy No. 3, Barrington Passage. The executive summary of the assessment included the following relevant portions:

> Between August 8 and 14, 2000, Jacques Whitford Environmental Limited (JWEL) conducted a Phase I environmental site assessment (ESA) of the properties and buildings located at 3723 and 3737, Hwy no. 3, Barrington Passage, Nova Scotia.
>
> Based on the information gathered and on observations made during this investigation, the Phase ESA revealed evidence of potential contamination. Potential contamination is based on the following:
>
> > Potential on-site migration of petroleum hydro-carbons from former/existing underground tanks on adjoining properties to the North (Barrington Municipal High School Board Office) and West (T.L. Swaine Ltd.).
>
> To address potential contamination, we recommend the following:

> Conduct a Phase II ESA to investigate the potential on-site migration of petroleum hydro-carbons from off-site sources.

[68] Anthony agreed that he understood that the references to adjoining properties included the Property. It was put to Anthony that if these risks existed in 2000, there would be similar risks with regard to the Property in 2006. He confirmed that he knew there were oil tanks on the site, but as to the reference to former and existing underground tanks on the adjoining properties, he said, "I never picked up on that." Again, this is not credible evidence. This is in contradiction to his "hands" on approach to his business dealings. In any event, Anthony alone had this information; not Harding.

[69] The next page of the 2000 Jacques Whitford report summarized the findings and conclusions, and noted that adjoining properties were potential sources of contamination. The level of environmental contamination and concerns were said to be moderate. In the "findings" section, it stated:

> "Former/existing underground tanks on the adjoining properties to the North (Barrington Municipal High School, School Board Office) and West (T.L. Swaine Ltd.) represent potential sources of petroleum hydro-carbons which may have impacted the subject properties".

[70] In fact, the number of oil tanks on the Property is noted at page seven of the report:

> <u>Barrington Municipal High School (adjoining property to the north)</u>
>
> Five tanks are registered to this property. Two of the tanks are listed as "removed" and were reportedly underground tanks. The three remaining tanks included two underground tanks and one above ground tank, which are listed as "currently in use".
>
> The former/existing underground tanks on this property are considered upgradient to the subject properties and represent a potential environmental concern.

[71] Anthony said it was unlikely that he read this part of the report, since his "normal practice" was to read only the executive summary. He would have the court accept that his "normal practice" was to skim reports and legal documents. If this is the case, this is foolhardy; if not, his evidence was neither credible or reliable. Either way, he had the information, and was the only party who did. Harding did not.

[72] Attached to the August 2000 Jacques Whitford report was a print-out dated January 3, 1996, showing the petroleum storage tank registration. This document indicates that two underground tanks had been removed, having been installed in 1956 and 1968. Two other tanks were still in place, installed in 1983 and 1991, and another was underground, installed in 1989. This suggested that the Property had held five tanks, two of which had been removed by 1996. After receiving this report in 2000, Anthony obtained a Phase II report.

[73] Anthony agreed that in his second proposal, dated October 2, 2006, he had proposed to buy the Property " 'as is', No Phase I or other major concerns that could be a Major problem if this is done." Anthony acknowledged that "as is" meant that he would accept the Property in the condition that it was in. He added the proviso, however, that he accepted this because he expected reassurances in regards to the tanks beforehand.

[74] Anthony acknowledged that, in saying that he would not require a Phase I, he was obviously indicating that he would also not require a Phase II. He did not agree, however, that it followed that any problems that arose on the Property after closing would have been his to deal with. He maintained that he expected a Jacques Whitford letter confirming the property was "clean." However, he admitted that there was no reference to a Jacques Whitford letter in the October 2, 2006, proposal. Anthony nevertheless claimed that Holland told him that any tanks on the Property would be removed and the Property would be "clean." Holland denied making any such statement. Where Holland's evidence differs with Anthony's, I accept Holland's. There is no other evidence supporting Anthony's claims. Further, his conduct before the deal belies this assertion.

[75] As described earlier, Anthony responded to the original February 2006 RFP. The Municipality rejected his proposal of October 2, 2006, by letter from Holland dated October 10:

> Dear Mr. Anthony:
>
> **RE: FORMER B.M.H.S. PROPERTY PROPOSALS**
>
> After much research Council has reviewed the proposals received on this property and has decided not to accept the proposals.
>
> Because of the strong sentiment expressed by the community, it is necessary that the Municipality retain the track and field property at the western end of the former Barrington Municipal High School. As a result this property will not be sold.

> Also, it has taken some time for the Municipality to obtain agreement from the Tri-County Regional School Board for the return of the Annex property at the eastern end of the school. The School Board has now agreed to return this property and this property will be sold by the Municipality as part of the former B.M.H.S. property.
>
> Also, the Municipality has investigated requirements for environmental assessments. As a result Council has determined that the Municipality will not complete any environmental assessments on the property.
>
> As a result of the information obtained and the change in circumstance, the Municipality will not be accepting your proposal that has been previously submitted on the property.
>
> The Municipality will be re-advertising the sale of this property in the very near future and will again be seeking proposals on the specific property that is now available for sale.
>
> Thank you for your time and consideration in this matter. It is much appreciated.

[76] Importantly, the following paragraph deserves particular emphasis:

> Also, the Municipality has investigated requirements for environmental assessments. As a result, Council has determined that the Municipality will not complete any environmental assessment on the property.
>
> [Emphasis Added]

[77] Anthony received this letter. On October 12, 2006, Holland wrote to advise him of a further RFP on the Property. As noted earlier, the October 2006 RFP stated, at section 2.3:

> 2.3 . Environmental Assessment
>
> The Municipality will not provide any environmental assessment on the property.

[78] This statement did not appear in the first RFP. Anthony acknowledged in his testimony that this problem was not a surprise to him. It was clear that the other contracting party, the Municipality, was not providing environmental assurances. Nevertheless, he submitted a proposal on October 30.

RFP and Knowledge Prior to Retention of Harding

[79] As has been described, the genesis of the APS was an RFP process initiated by the Municipality. I have described Anthony's evidence that he thought the Board owned the Property. While he purported not to recall the contents of the February RFP, he agreed that section 1.1 clearly indicated that the Property was owned by the

Municipality, and that the Board would return the Property to the Municipality in early 2006. He agreed that it was clear from the RFP that it was the Municipality seeking the proposals.

[80] While he said he did not recall the contents of his response to the first RFP, Anthony was referred to an undated offer by Anthony Properties of $25,000 which he acknowledged was his response. He said the figure of $25,000, was based on his expectation of the cost of tearing down the old school, as well as "taxes, costs overruns, environmental, etc." He said that by "environmental" he meant the building, not soil issues. He agreed that this distinction was not specified in the bid, and that he neither sought nor received any advice from Harding before he submitted the proposal.

[81] Although he claimed not to recall, Anthony apparently met with Council after submitting the original proposal, judging by an invitation from Holland dated May 25, 2006. The proposals from the first RFP were evaluated by Holland in a memorandum dated August 2006. East Bay Realty, unlike Anthony Properties, indicated that the Municipality would be responsible for providing a satisfactory environmental assessment and appraisal. Anthony Properties, by contrast, indicated "no environmental assessment or evaluation required."

[82] Anthony claimed to recall the second RFP, though not the first. There is a big difference: the second bid indicated that the property was "as is." This is another example of his selective memory and his tendency to tailor evidence regarding his stated assumption of risk. As has been noted, he denied recall of many events, and denied reading materials which would be unhelpful to his case.

Retention of Harding

[83] Harding was approached by both Anthony and the Municipality to represent them concerning the transaction of this property. Harding wrote to Anthony on November 22, 2006, setting out the conditions of his dual retainer:

> I have recently discussed with you acting for you in the proposed purchase of certain real estate as noted above. Subsequent to our conversation I have also been requested by the Vendors to act on their behalf in the transaction.
>
> A solicitor may so act for both parties if both parties consent and the lawyer advises as follows:
>
> a) that the lawyer intends to act in the matter not only for that client or prospective client but also for one or more clients or prospective clients;

> b) that no information received from one client respecting the matter may be treated as confidential with respect to any of the others;
>
> c) that if a dispute develops in the matter that cannot be resolved, the lawyer cannot continue to act for any of the clients and has a duty to withdraw from the matter, unless they agree, preferably in writing, before the lawyer begins to act, that the lawyer may continue to act for one of them even if a dispute develops in the matter.
>
> Although we do not anticipate that a conflict will arise in this transaction should one arise it will then be necessary for our firm to withdraw entirely from the matter, and refer both parties to separate solicitors.
>
> If you are in agreement with this, kindly sign and return a copy of this letter signifying consent thereto. A similar consent is being obtained from the Vendors. Please give me a call if you wish to discuss this matter further.

[84] Anthony confirmed that he recognized the letter, and his signature on it, though he could not confirm the date. He said he signed the letter because Harding asked him to, but did not discuss the document with Harding. Once again, I found this claim not to read documents to be a crafted response intended to disassociate himself from any responsibility.

[85] Anthony testified that Harding never explained the implications of his role as a lawyer acting for both parties. He said Harding never told him that he was not going to be giving advice and would only put the agreement into written form. However, it is clear from the evidence that Anthony never retained Harding, nor did he seek his advice prior to bidding on the two RFPs.

[86] Harding addressed the dual retainer in his affidavit dated October 5, 2018:

> 57. I had no involvement in the offer, negotiation, or acceptance of the terms of purchase and sale, which had been agreed to between the parties. I did not provide any advice to either party about what should or should not be included in their agreement nor did I provide advice as to the benefits or risks associated with any terms they instructed me to include.
>
> …
>
> 60. Because of my dual retainer on behalf of 386 NSL and the Municipality, I did not give advice to either party concerning the form or content of the Agreement of Purchase and Sale ("APS") or steps they might respectively take to protect their positions. My role was to reduce the terms of the accepted offer to written form.

[87] There is no apparent dispute that Harding did not negotiate the deal, but did reduce its terms to writing. More will be said about Harding's role. I do not accept,

however, that he was simply a scribe for the parties. But, it is clear on the face of the various communications that Anthony had direct contact with Holland and others, and did not involve Harding, or even inform him of the discussions leading up to the acceptance of the Plaintiff's bid.

[88] Anthony signed the APS as President of the Plaintiff company on November 30, 2006. Anthony said he retrieved the APS from Harding's office and returned it after signing. He and Harding never discussed its contents. He also testified that he did not read the document, but merely "perused" it and signed it. The school demolition had already been completed when the APS was signed on November 30.

[89] Harding's evidence does not correspond to Anthony's recollection. Harding said they did discuss the APS. As to the communications between signing and closing, Harding's affidavit states, at para. 69:

> Between the signing of the APS and closing, Anthony, Stoddard and Holland communicated directly among themselves concerning any issues arising on the transaction. I was not involved in those communications and, typically, was not copied on written correspondence.

[90] As discussed earlier, Harding sought Anthony's input into the APS by e-mail. Anthony's handwritten note on the printed out email to Harding demanding a letter from Jacques Whitford concerning the oil tanks, and requiring that everything be up to environmental standards, is not reflected explicitly in the APS. However, clause 9 permitted the Plaintiff to refuse to close if environmental information provided was unsatisfactory:

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

[91] Anthony denied reading clause 9.

[92] Clause 12 of the APS dealt with insurance. It stated:

> 12. The Purchaser agrees to provide the Vendor with such proof of insurance as required by the Vendor with respect the Purchaser and its agents use and demolition of the property prior to the Purchaser commencing work or taking possession of the premises.

[93] This clause was not referenced in any communication between Anthony and Holland respecting the APS. However, Anthony said Holland had indicated that he must insure the Property before the school was demolished. Harding did not speak to Anthony about clause 12. As noted earlier, the school was already demolished by the time the APS was signed. Anthony was taking steps immediately after his bid was successful to work on the Property. He was focused and determined.

[94] Anthony denied being informed that Harding's dual retainer was limited to the conveyancing aspects of the property transaction. He denied Harding's evidence that he did not discuss simple legal concepts with Anthony, although he could not say what was meant by a "simple legal concept." Anthony also testified that he spoke to Harding about Phases I and II environmental assessments, but this evidence was vague, in that he said he would discuss these issues in terms of incorporating them into an APS so that he was "solid on paper" and "along these lines."

[95] With his experience in residential and commercial developing, Anthony acknowledged he understood that in order to have terms included in the APS, he would have to advise his lawyer. He acknowledged that Harding would not prepare an APS based on his own knowledge, but based on information Anthony would provide to him. Anthony also acknowledged that he had drafted agreements himself in the past. Anthony acknowledged that an APS was a significant document, whose preparation included aspects of due diligence, financing, inspection, and insurance. He agreed that due diligence included such things as septic and environmental testing, and that environmental testing included soil and hydro-carbons. He understood that a Phase I report included document review and ascertaining if there was a possibility of contamination, but not digging in the soil, which would be a Phase II matter.

[96] Anthony admitted on cross-examination that he handled environmental concerns, not Harding. When he had questions about the environmental condition of a property, he would look to consultants such as Ecco or Jacques Whitford. This was illustrated by his review of a previous closing, where he did not involve Harding in these aspects of the deal.

[97] Despite all this, Anthony alleges that Harding failed to recommend that he obtain a Phase II for the subject property. He agreed that his expectation was premised on Harding having a role in that aspect of the Property deal. He agreed there was no documentary evidence supporting any such reliance on Harding. Despite lack of evidence that he had ever consulted Harding regarding

environmental assessments, however, he mentioned that if there were any red flags in environmental reports, he would do so. Beyond this bare assertion, there was no evidence of this. For instance, when Anthony initially said that he found "the environment to be weak" in early 2007, he did not consult Harding. After extensive cross-examination, it was clear that Anthony had experience with environmental reports. He agreed Harding was not an environmental expert. The Plaintiff's assertions about Harding providing environmental assessment advice is not supported by his own evidence, and is in direct contrast to Harding's own *viva voce* and affidavit evidence. He ultimately agreed he could not point to a time where he looked to Harding to give him advice on environmental assessments. It is clear that Anthony dealt with such matters himself, although as has been noted, he claimed not to read beyond executive summaries.

[98] Anthony acknowledged that he understood (without being advised by Harding) that if he was not satisfied with regards to due diligence, he would lose his deposit. Anthony also knew that everything had to be completed for the closing date, because after closing, any issue that arose was at his risk. He understood that the concept of "buyer beware". The RFP was clear that the property was being sold "as is."

[99] Anthony swore an affidavit on October 15, 2018, in support of his opposition to a Summary Judgment Motion. At paragraph 77 he stated:

> And the Property transaction is a perfect example of a circumstance where Harding's advice was critical. Had Harding advised me that the Board was not going to be providing the Muni with any assurances regarding the environmental cleanliness of the whole Property, I would then have been able to use my due diligence knowledge and been able to demand a Phase I or Phase II assessment be provided to me by the Board prior to the closing of the purchase. But I was never advised by Harding that the Muni wasn't going to be getting what he had earlier told me they would be getting.

[100] This flies in the face of Anthony's own evidence that he did not rely on Harding and that Holland gave him direct assurances. Anthony's affidavit evidence and trial testimony is a veritable cornucopia of unsupported claims, contradictions, and inconsistences.

[101] Evidence of previous transactions demonstrates that Anthony would obtain environmental reports of his own accord when he judged it necessary. Five years prior to this transaction, Anthony was president of 3021386 NS Ltd., which was involved in a potential purchase of the former Mabel's Fruit and Vegetable Stand

property on Highway 303, in Conway. The property had been a former Irving service station, and a preliminary environmental assessment by ECCO was performed at Anthony's request, recommending a Phase II report. In reading this correspondence, Anthony acknowledged that red flags were raised because there was no conclusive evidence that the petroleum had been removed. The preliminary report indicated that the costs of an investigation could be between $10,000 and $100,000, or more for remediation. As a result of this information, Anthony decided not to go forward with the purchase. This is but one example of several that were referenced in the evidence of a prior potential development where Anthony dealt with environmental concerns, on his own with no reliance on Harding.

[102] Anthony's evidence of how matters proceeded in respect of the second RFP raise concerns about credibility and reliability. As noted earlier, Anthony submitted proposals on behalf of both a numbered company and Anthony Properties, on October 30, 2006. Contrary to his initial recollection, it emerged from reference to Council records on his cross-examination that it was, in fact, his proposal of the same date on behalf of Anthony Properties Limited (not the numbered company) which was accepted. The fact that he could not correctly recall which offer letter was accepted until he was cross-examined impacts my assessment of the reliability of his evidence. This is just one of many instances where his recollection is faulty.

[103] Anthony emailed Holland on November 8, 2006, indicating that he was moving forward with inspecting the site and meeting with insurance representatives, among other matters respecting the Property, even before Council had accepted his offer, and requesting that Council move up its meeting because he was leaving for Halifax later that day. He also indicated that he knew that Harding was representing the Municipality. Harding had told him to get the approval of the Municipality for him to represent Anthony as well. However, the amended Notice of Action and Statement of Claim states:

> Mr. Anthony was subsequently informed by Mr. Harding that he would also be representing the Municipality with respect to the sale of the Subject Property.

[104] The fact is that Anthony knew that Harding was representing the Municipality, and he also wanted Harding to represent him if Council agreed. As noted earlier, on November 14, 2006, after Anthony's RFP was accepted, he wrote to Council requesting, *inter alia*, a "letter from Jacques Whitford." In the same letter, he wrote, "The lawyer Don Harding can look after both sides in "this land transaction." Anthony testified that he did not consult with Harding before sending this letter, or while preparing it. Anthony knew there were oil tanks on the site.

Initially, Anthony did not believe that he spoke at or attended the Council meeting. However, he was referred to the following Council minutes from the regular meeting on November 14, 2006:

> Mr. Anthony appeared before the meeting for the purpose of further explaining his proposal and his intention develop the property.
>
> Mr. Anthony informed Council that he wished to demolish the Junior High School portion of the property as soon as possible. Mr. Anthony would like to demolish this building because the Assessment Roll is completed as of December 1st, of each year. He would like to have this property demolished prior to the completion of the Assessment Roll so that the assessment would be reduced accordingly. Mr. Anthony submitted a copy of a certified cheque which he has provided to the Municipal Solicitor in the amount of $25,000.00 for the purchase of the property. He has also provided a draft of the insurance coverage on the property which will be put in place on November 15th…
>
> [The foregoing quotation has not been edited for grammatical errors.]

[105] This is an another example of the frailty of Anthony's memory. In questioning, he indicated that these events were 15 years ago, and he simply forgot that he addressed Council. By a unanimous motion on November 14, 2006, Council agreed to enter into an APS with Anthony's company.

[106] The next day on November 15, 2006, Anthony was writing to his insurance agent advising that he wanted to commence work "asap" and that he had scheduled the demolition for "Monday morning." Anthony agreed that when his company was demolishing the buildings on the site, he did not have a date for closing. He agreed that his November 14, 2006, letter did not link the Jacques Whitford request to the closing date. He agreed that when a transaction is closed, due diligence must be completed. He maintained, however, that this was not a "normal transaction", because of the "comfort zone" he had, and the assurances he said Harding and Holland provided him. He could not point to any documentary support for this view, but said he asked, and no one said "no". He said "maybe it's my fault because they never said no to me", and added, "sooner or later silence becomes betrayal".

[107] The Council resolution, ostensibly finalized November 6, 2006, predates the November 14 letter from Anthony, with its request for a Jacques Whitford letter. In particular, the resolution states:

> FORMER B.M.H.S. PROPERTY

> A recommendation from the Clerk-Treasurer was previously circulated to members, by email, regarding the proposals received on the former B.M.H.S. property.
>
> Page 4, Committee of the Whole Council Meeting, November 6, 2006
>
> It is the recommendation of the Clerk-Treasurer that he proposal received from Anthony Properties Limited be accepted by the Municipality. This proposal appears to be the best of the alternatives provided. It would provide $25,001.00 for the property to the Municipality. The property would then become taxable and produce tax revenues to the Municipality. Mr. Anthony would develop the property in the future so as to add to the Municipality's tax base and to create jobs in the area. The portion of the property that is not usable would be demolished by the owner and removed from the site, and finally the Municipality would not become involved in environmental issues with the property as it would be sold on an as is/where is basis. The sale of the property would also allow the Municipality to retain ownership of the track and field for use of the public.
>
> Resolution COW061114
>
> Moved by S. Strang and seconded by D. Messenger that it be recommended o Council that the former Barrington Municipal High School property be sold to Anthony Properties Limited and that the appropriate Agreement of Sale be completed, including the stipulation that the purchaser is responsible for all survey and legal costs for the purchase of the property.
>
> Motion carried unanimously.
>
> [Emphasis Added]

[108] While Anthony conceded that there was no express suggestion that Harding would look into environmental concerns, he expected that Harding would include a clause in the agreement requiring a Jacques Whitford letter or assurance. I note that he did, in fact, include an opt-out for the Plaintiff in Clause 9 of the APS.

[109] In Anthony's affidavit of October 15, 2018, he stated:

> 29. Despite the assurances I had received for many months from Holland and Harding regarding the Board and the requirement that the Property be clean when it is handed back to the Muni, I wanted to be sure there was a requirement in writing that the Board must provide proof of no contamination.

[110] It was put to Anthony that this paragraph suggested that he was not relying on assurances from Harding or Holland, but was taking other steps. He agreed that he was not prevented from raising his request for a Jacques Whitford letter after he received the soil samples in the AGAT Report.

[111] Anthony confirmed that he was familiar with the RFP proposal evaluation undertaken by the Municipality in August 2006, which included the Anthony's Properties Ltd. proposal that stated, "No environmental assessment or evaluation required." He agreed that this evaluation occurred after his proposal and presentation in May 2006. Anthony was referred to his letter of October 2, 2006, to Holland and Council, in which he wrote:

> I am trying to make this as easy as possible as I am taking most of the risks.
> 1. Buy proper as is, No Phase 1 or other major concerns that could be a Major problem if this is done.

[112] It was put to Anthony that the RFP had not come out before he received the alleged assurances, and that he wrote to Council that he would buy "as is" with no Phase I. Anthony now said he had assurances about the environmental state of the property before the RFP appeared. Again, this is a shifting account by Anthony. In prior discovery evidence he had pointed to the end of November.

[113] It was further put to Anthony that he gave a media interview after his bid was accepted in which he said the property was a "steal of a buy." While he claimed not to recall, he did not deny this. He was referred to a news article, dated November 17, 2006, which included the following passages:

> BMHS sold for condos and commercial units
>
> The former Barrington Municipal High School Property in Barrington Passage has been sold.
>
> The Municipality of Barrington finalized a deal with K.B. Anthony Properties Ltd. at last Tuesday night's (Nov. 14) council session.
>
> Proprietor Ken Anthony is purchasing the property, excluding the athletic complex area, for $25,001.
>
> "I think it was a steal of a buy," said Anthony, who is starting work immediately by demolishing the junior high and converting the senior high section into condominiums.
>
> "The building (senior high) is solid as a rock," said Anthony. "All the infrastructure is there so it's more or less cosmetics.".
>
> That section of the school has also been given a clean bill of health. "There are no environmental concerns there," said Anthony, who has already started to build a demo suite…

[114] Anthony agreed that he gave the interview, including the remark that "there are no environmental concerns here." He said he could not recall how he knew this on November 17, 2006.

Soil Analysis, Jacque Whitford Letter, and Closing

[115] Anthony was asked whether, when he referred to a letter from Jacques Whitford with regards to the tanks being removed in response to an email from Harding on November 20, 2006, he meant the tanks that were identified as being removed by the Board. He denied this, and said it was in reference to any tanks on the Property. He was directed to his affidavit of October 15, 2018, where, at paragraph 25, he stated:

> By this point I had become aware that there were at least two oil tanks that the Board were having removed, and that the Board would then have the area where the tanks had been located, tested for any soil contamination. I was focussed on the tank removals that the Board and the Muni had made me aware of, and not making sure that those areas were not contaminated. I presumed that the Muni, with Harding's advice, was doing what it needed to do to assure itself that the Board couldn't return the Property to the Muni in a contaminated state.

[116] Anthony agreed that his focus in that paragraph was on the oil tanks that the Board was removing. His affidavit went on, at paragraph 47:

> On November 21, 2006 Holland email me and copied Stoddart, and when referencing an oil tank behind the junior high school building he says "…the sooner it is removed and the letter from Jacques Whitford is provided, the better." As Holland notes in his email, I called Stoddart directly and he and I spoke about that tank and the other diesel fuel tank and the Board was also having removed from the Property, along with the environmental clearances that the Board was going to be providing to the Muni, as Holland references in his email.

[117] This paragraph makes it clear that Anthony's reference to Jacques Whitford was in relation to oil tanks being removed by the Board. Anthony's response at trial was that he did not recall that evidence in his affidavit. He accepted, however, that his focus at that time was on the two tanks being removed by the Board.

[118] Anthony emailed Holland on November 21, 2006, again on the matter of tanks:

> Thank you Brian for calling me this evening and letting me know of the concerns of Stevie Stoddart and the School Board. I immediately called Ronnie Ryer who is

> doing my work and he assured me he was not close or going over the capped off area where it was stated it was a oil tank. I … with Brian OConnor before work commenced and he stated that Stevie Stoddart assured him it was empty. We are for safety precautions ..ing around it first thing in the morning and will keep it fenced off until the School Board gets a clean bill of health, as well as eventually the …2 areas. (Annex and behind Sr High gym area.)
>
> …do have a few questions though, in which I was assured the tank was empty. Please re confirm that Steve Stoddart has had the tank emptied … without any oil, gas, etc. as Steve was suppose to have stated. I believe then there should be no issues. I trust that Stevie S and the School … have started the environment concerns and commencing to get a Jaques Whitford in as promised. I was also going to ask when the 3… or closing of the Annex would be taking place. I am in no major rush but it would be for development purposes be nice to have the Old … out of the way.
>
> We will be continuing to tear down the old School tomorrow morning as well as commencing on the model suite in the Senior High. We will be …way from the tank until the School Board completes there work and making sure it is up to Environmental regulations.
>
> Please keep me posted and I will call Steve early Tuesday morning.
>
> All the best, and gain, We will not be doing any digging into the ground or going over the site where there is a tank.,
>
> regards KB
>
> [The foregoing quotation has not been edited for grammatical errors.]

[119] It was put to Anthony that there were only three areas of the property that he was concerned about: a capped-off area where there was an empty oil tank, the annex, and the senior high. He answered that his intention in demanding a Jacques Whitford letter was not to address specific locations, but to confirm there was no contamination anywhere on the Property, in accordance with the assurances he claimed to have received, regardless of the RFP. Anthony subsequently received the AGAT lab results, which were not in relation to the whole property, but closed anyway.

[120] After the message quoted above, Anthony was copied on an email from Holland to Stoddart, on November 21, 2006:

> Mr. Anthony has been informed of your concerns and has told me he will call you this morning.
>
> At the present time he is demolishing the old Junior High School and removing debris from the site. He will also be starting construction of a “model suite” in the Senior High School.

> He will not be demolishing or constructing anything near the old tanks in the Annex or Senior High School.
>
> The demolition will not affect the area around the oil tank behind the Junior High School as that tank has been fenced off so the machinery will not intrude on it.
>
> In any case you informed me by email on November 1, 2006 that the oil tank behind the Junior High School has been pumped out, so there can be no contamination from it. Nevertheless, the sooner it is removed and the letter from Jacques Whitford is provided, the better.

[121] This email indicated a connection between the requested Jacques Whitford letter and an oil tank behind the junior high school that had been pumped out. This email was forwarded to Harding, who had not originally been in the exchange, on December 1, 2007. Anthony agreed that there was no evidence that Harding knew of any contamination on the Property. He also agreed that Harding was not involved in the exchange of emails between the Municipality and the Board concerning the tanks, other than being copied on one email.

[122] From the time of the acceptance of his proposal on November 14, 2006, Anthony was on the property until the closing in February 2007. Throughout that time, he did not see any tanks being removed, and did not see any evidence of holes or test pits being dug. I am satisfied that he knew that no Phase I or Phase II environmental assessments or significant soil inspection of the entire property was being done.

[123] Anthony was prepared to close without the tanks being removed. On December 6, 2006, he emailed Stoddart as follows:

> Steven, I may close early as the property has been paid for, for a few weeks now. I want to make sure that the oil tank contamination is cleaned up and a letter from Jacques Whitford, etc.
>
> Please follow through as it would be nice to move quickly as you did with the first oil tank. I know you are on a time restraint but as long as I have a guarantee on the oil, then I will work with you.

[124] Anthony confirmed that Harding was not copied on this email. There is reference to "oil contamination." Anthony was not sure whether the reference to contamination was in error, or whether he was referring to removal of a second tank, or something else. This was but one of many emails dealing with the transaction that Harding was not copied on. On December 12, 2006, Holland emailed Anthony as follows:

> Subject: BMHS Property
>
> The oil tank was removed from behind the senior high yesterday.
>
> I'm waiting for the invoice from Wayne Robichaud.
>
> I have also called DEL about it and am waiting to hear back from them.
>
> They told me as long as an approved person removed the tank it was not necessary to have engineers report on the above ground tank unless there was a problem found during removal. As far as I know there were no problems.
>
> I have taken pictures of the site after the removal for our records.

[125] Stoddart wrote to Holland on January 22, 2007, reporting on the status of the property:

> We have removed the diesel pump and tank from the property. Everything appears to be okay and soil samples have been taken and sent to the lab for analysis.
>
> I am prepared to turn the property over to the Municipality today, January 22, 2007, under the following condition:
>
> I need to have use of the old board office until the end of February 2007. I will have the power and oil disconnected on or before that date.
>
> I require the use of the facility as it is taking some time to get the phone lines connected at our new location and we still have material in the building we need to remove.

[126] Harding was copied on an email from Anthony to Holland on the same day, in which Anthony said:

> I find the environment to be very weak. I need better assurances and more paperwork then… it is being reviewed and everything appears to be ok. Please confirm how long the soil samples will be back clean of any environmental concerns.

[127] Anthony agreed that Harding had no direct connection to this communication, as he was dealing with any environmental issues himself. He agreed it was possible he copied Harding because the message dealt with the closing date, but he maintained that he was also updating Harding on his environmental concerns. However, as I have described, the other evidence and the history of the relationship make it clear that he was not seeking advice from Harding on the environmental condition of the property.

[128] On February 7, 2007, Holland provided Anthony with the AGAT Reports concerning soil samples covering the following locations:

1. The oil tank behind the junior high;
2. The diesel tank and furnace oil tanks behind the annex building; and,
3. The above-ground tank behind the senior high school.

[129] Anthony did not seek Harding's advice about these results. He testified that he could read a sample and did not need assistance. On February 13, 2007, Anthony emailed Harding, copying Holland, and stated, "I reviewed the Environmental report and am prepared to sign off and purchase the property as soon as possible." This email confirmed Anthony was satisfied with the soil samples and instructed his counsel to proceed with the closing. He gave those instructions without consulting Harding, and knowing full well he did not have a "Jacques Whitford" letter or a Phase I or II Environmental Assessment, and making no mention of outstanding environmental issues. On cross-examination, Anthony acknowledged that clause nine of the APS allowed him to walk away from the deal if he was not satisfied with the environmental conditions, yet he did not raise the issue before closing. His answer was that he was into the project at that point in the amount of $200,000.

[130] Between the closing on February 16, 2007, and November 30, 2007, there was not one email communicating Anthony's request for a Jacques Whitford letter. The issue only reappeared after contamination was discovered. Moreover, he said he pursued the action against the Board, because they polluted the Property. He acknowledged that his company discontinued the action against the Municipality.

[131] It appears the only area Anthony was concerned about was around oil tanks being removed. For instance, his email to Hogg, on November 30, 2006, already quoted, included a reference to Board responsibility for "taking out the in ground oil tank … and a letter from Jacques Whitford or acceptable qualified company stating that it is environmentally clean," and indicating that he would then be ready to close before the Municipality and the Board vacated. He did not confirm in writing the assurances that Harding allegedly provided because Harding was his "best friend" and it would almost be an insult. Anthony also confirmed that there is no evidence he raised a Jacques Whitford letter or satisfaction regarding oil contamination when he was before Council.

Discovery

[132] In Anthony's discovery of December 5 and 6, 2012, he said he expected the Board or the Municipality to provide a "clean bill of health" in relation to the property:

Q. Right but you were asking a specific question, within approximately three months a letter from Jacques Whitford stating the oil tanks have been removed and it is acceptable no contamination.

A. Yes he said the school board is going to look after it before its' passed over.

Q. Okay. You don't reference, when you make this request regarding Jacques Whitford and have been removed, no contamination are you talking about a Phase 2? What are you looking for?

A. All the oil tanks removed, yes, well I'm not sure if there's anything in the ground. I know there's basically the oil tank at the in behind the school and there's one over at the annex and whatever other oil tanks so they were just going to give me a clean bill of health, I relied strictly on the Municipality.

Q. My question though is, you knew at that time what a Phase 2 was, right?

A. Yes I do, correct.

[133] Anthony's evidence at discovery is not supported by the actions and steps he took in responding to the RFP. He went on to agree that he recognized an APS as a legal contract, and that the APS contained no reference to a Jacques Whitford letter; Anthony said "[t]he only thing would be number 9." He went on:

Q. Right, but in terms of the representation, just so that we can be clear on this, we're talking about the representations that the Municipality are making on the property?

A. M-hm.

Q. This indicates that they're not making any representations, no representations about the condition of the property?

A. But agrees to obtain from the school board, so they are looking after getting a letter or something in regards from the school board.

Q. Yeah that being satisfactory to you, right?

A. Correct.

Q. All right. So what they're saying, you'd agree, is that they will agree to get, obtain from the school board and/or their consultants an opinion as to the removal of the tanks and the conditions of the property being satisfactory to the purchaser, and that's you?

A. That's correct.

Q. Not satisfactory to them?

A. That's correct.

Q. The Municipality being them, right?

A. Yes.

Q. You had to be satisfied?

A. Yes.

[134] At discovery Anthony agreed unequivocally that he reviewed the APS before signing. At trial, he attempted unsuccessfully to distance himself from that position. On discovery, the following exchange occurred:

> Q. So again, I'm suggesting that the answer you're giving there is that you reviewed the - - were aware that you had the option not to close, you reviewed the environmental information that was provided and instructed Mr. Harding to close because at the time you were relying on reports that you were going to get a clean bill of health, is that not what you intended to say in December of 2012?
>
> A. Correct.

[135] Anthony also confirmed in discovery that he was dealing with environmental issues in relation to the subject property, and that the issues of concern were not limited to air quality. He also agreed that he never asked Harding to review any environmental information. Anthony attempted to add nuance to this answer at trial by suggesting he relied on Harding when all the evidence refutes this position.

[136] Anthony confirmed on discovery that he did not rely on Harding for advice on environmental issues or for referrals on environmental experts, only to suggest the opposite at trial.

Remediation

[137] In December 2007, oil contaminated soil was found on the Property by an excavator. Anthony hired an environmental engineering firm to assess the contamination. In the result, three areas of contamination were delineated. The Plaintiff remediated Area 1 at its own expense and proceeded with the development of the Property. Areas 2 and 3 have not yet been remediated. The cost to remediate Area 1 was approximately $140,000; the estimate to remediate Areas 2 and 3 is said to be $690,000.

[138] In early 2008, approximately a year after closing, Anthony learned that an oil tank remained on the property. He said he called Holland and indicated his surprise, then asked Russell Finlay to undertake a Phase I assessment. Two more oil tanks were located, and contaminated soil was found behind the junior high. Anthony

testified that he believed the remediation work would be expensive, so he stopped the work after about a week, intending for the Board to take responsibility.

[139] Anthony said the plaintiff paid invoices from R&T Excavating Limited, Ecco Environmental, Robichaud's Pumping Service, and Geo-Map Surveying and Engineering. The work invoiced included testing pits, soil samples, and clean-up.

[140] Anthony testified that the remediation has never been completed due to cost, and he wanted to deal with the litigation before spending additional funds.

Steven Lockyer

[141] Steven Lockyer ("Lockyer") did not testify, but his discovery evidence, given on September 7, 2014, was entered as an exhibit at trial by the Defence. As noted in Anthony's evidence Lockyer dealt with financing, environmental issues, and conditions of properties for the plaintiff company. He confirmed that prior to February 2007, in loaning money for property purchases, his practice was to require information about the environmental conditions of the property. He said he would always require an environmental assessment, and sometimes a Phase II, because remediating environmental issues can be very costly.

[142] Lockyer testified that Anthony, who ran the company's operations, was responsible for obtaining Phase I environmental assessments and letters from the Department of Environment. He was not aware if Harding dealt with, or reviewed environmental reports in any property transaction, but said this was not part of Harding's retainer. In describing the company's normal procedures Lockyer said:

> A. We always bought property getting Phase I. That was just a standard thing on all my lending and all my purchases, we require a Phase I environmental clean, no soil contamination. That's just a standard that we – in all documents that you've shown me, we've never deviated from that, and we wouldn't deviate from that on this transaction.
>
> …
>
> Q. But my question is, sir, can you point to one transaction, a single transaction, where you didn't delegate that task to your operations manager but instead had your solicitor retain an environmental expert to provide a Phase - - -
>
> A. Right, it was the operations manager's responsibility.
>
> [Emphasis Added]

[143] Lockyer's discovery does not corroborate Anthony's evidence and further supports a rejection of Anthony's attempts to impose liability on Harding.

Brian Holland

Environmental Assurances and Retention of Harding

[144] As noted earlier, Holland was Clerk/Treasurer for the Municipality. He helped prepare and send copies of the RFPs to Council, and to their counsel Harding, and facilitated the advertisement of the RFP. Holland wrote to the Board on February 2, 2005, inquiring as to the approximate time when the Property would be returned, stating, "We anticipate receiving an assurance that there will be no environmental concerns outstanding at the time of transferring ownership back to us." Holland was initially asked by the Council to seek environmental assurances from the Board, particularly respecting air quality in the junior high portion of the building. He had no authority over buying and selling properties on behalf of the Municipality, except for bid less tax sales, where he had authority to place a minimum bid. Holland did not have authority to negotiate on behalf of the Municipality.

[145] Holland prepared the first RFP, dated February 1, 2006, and he was responsible for reviewing the proposals and making recommendations to Council. Two responses were received to the first RFP, one from East Bay Realty and the other from one of Anthony's companies. East Bay Realty requested copies of environmental evaluations and appraisals.

[146] Holland said that on receipt of this inquiry, the Municipality reviewed the proposals and considered the fact that they had no information about the current state of the Property. This resulted in the decision to reject both proposals and prepare a new RFP indicating that no environmental guarantees or assessments would be provided. Holland wrote to Stoddart, the Board's Director of Operations, on June 20, 2006, as follows:

> As we discussed this morning the Municipality will soon be accepting ownership of the former Barrington Municipal High School from the Tri-County Regional School Board.
>
> In order for the Municipality to be able to use this property or to be able to dispose of it to developers, it is necessary that there be a written environmental clearance provided by the School Board. Could you please ensure that the Tri-County Regional School Board provides an environmental clearance either from the Department of Environment and Labour or as a Phase II Environment Assessment,

> along with the asbestos audit that has been done in the building and any other environmental clearance that may be required for the building.
>
> Your cooperation in providing this information so that the Municipality may properly deal with the property and the buildings is much appreciated.

[147] Holland wrote to Stoddart again on July 11, 2006, concerning the fueling of buses. Stoddart responded on July 25, 2006:

> Thank you for your letter of July 11, 2006 regarding the exchange of property at the old Shelburne County School Board Office site.
>
> I will have my staff proceed with the necessary work involved to complete the exchange as outlined in your letter.
>
> As you are aware before we can abandon the existing site, I have to have a new diesel fuel pump and tank installed at the new site and the existing pump and tank removed from the existing site. When the existing tank is removed there will be a soil analysis completed to ensure there is no soil contamination.
>
> When this work is completed I will notify you immediately. If you or interested parties in the property wish to access the site please feel free to contact me.
>
> I wish to thank you and the Municipal Council for your continuous cooperation in the transition of the former B.M.H.S. property.

[148] This letter did not refer to a Phase II assessment, but to a soil analysis. In evaluating the proposals, Holland noted that Anthony Properties stated, "no environmental assessment or evaluation required." He said the lack of a requirement for an environmental assessment was discussed in a closed door Council session with Anthony present. Holland said he referred to the company's "environmental risks assumed by developer" statement in his summary to Council because the developer informed Council they would be taking all of the environmental risks. Holland was referred to his letter to Anthony on October 10, 2006, explaining why the earlier proposals were rejected:

> After much research Council has reviewed the proposals received on this property and has decided not to accept the proposals.
>
> Because of the strong sentiment expressed in the community, it is necessary that the Municipality retain the track and field property at the western end of the former Barrington Municipal High School. As a result this property will not be sold.
>
> Also, it has take some time for the Municipality to obtain agreement from the Tri-County Regional School Board for the return of the Annex property at the eastern end of the school. The School Board has now agreed to return this property and

> this property will be sold by the Municipality as part of the former B.M.H.S. property.
>
> Also, the Municipality has investigated requirements for environmental assessments. As a result Council has determined that the Municipality will not complete any environmental assessments on the property.
>
> As a result of the information obtained and the change in circumstance, the Municipality will not be accepting your proposal that has previously been submitted on the property.
>
> The Municipality will be re-advertising the sale of this property in the very near future and will again be seeking proposals on the specific property that is now available for sale.
>
> Thank you for your time and consideration in this matter. It is much appreciated.
>
> [Emphasis Added]

[149] Both East Bay Realty and Anthony were advised that their proposals were rejected. East Bay Realty had requested an environmental assessment, while Anthony's company had not. The June 20, 2006 letter to the Board was not responded to in any positive way and was not given to Harding when he was retained. It is also irrelevant in that the deal was negotiated and finalized without environmental assurances. Clause 9 of the APS was protection for the Plaintiff and Anthony never received any environmental assurances, as I have found as fact.

[150] Holland said the Board did not want to provide an environmental assessment. In order to sell the property, Council decided that no environmental assurances would be provided. The Municipality's solicitor advised them to include a clause to that effect in the RFP. There was some evidence this was advice from Harding. This is the only evidence of any involvement of Harding until after the bid was accepted.

[151] Holland denied Anthony's claim that he gave him assurances that the Property would be "clean", saying "I did no such thing". Holland's evidence was as follows:

> A. And I'll tell you same thing now as I told them then I did no such thing and never did. I'll you same thing as I told them then, there was a time that I went to Tim Horton's for dinner in Barrington Passage and Mr. Harding and Mr. Anthony were sitting at a table having their dinner and talking and I said hello to them and I went over and I sat down and I had my dinner with them. Uh, at dinner time I don't talk business. I'll talk about baseball or hockey or kids or whatever. But at dinner time I get away from business and have a break. They wanted to talk business so I stayed and I just kept my mouth shut and listened and then I said thank you when I was done eating and left. And I made sure from then on I had resolved never to

> have dinner with them again. And any time I saw them at Tim Horton's after that I just waved and said hi and kept going.

[152] Holland maintained throughout his evidence that he never gave any verbal assurances to Anthony. He said he limited any communications with regards to the Property, had no knowledge of Board operations, and could give no such assurances about the Property. Holland said he knew the Property would be sold on an "as is" basis, with no environmental evaluations or guarantees.

[153] Holland confirmed he received, and forwarded to the councillors, the letter addressed to him and the councillors of October 2, 2006, wherein Anthony stated:

> I am trying to make this as easy as possible as I am taking most of the risks. 1. By property as is, No Phase 1 or other major concerns that could be a Major problem if this is done.
>
> [Emphasis Added]

[154] Stoddart confirmed the removal of fuel tanks in an email to Holland, copied to Hogg and Phil Landry at the Board, on November 1, 2006.

[155] Holland said Anthony met with Council to discuss the Property. He later received a letter from Anthony, dated November 14, 2006, discussing the purchase of the BMHS. This was the letter in which Anthony wrote:

> 2. within approximately 3 months, a letter Jacques Whitford stating the oil tanks have been removed and it is acceptable, no contamination. The Old Annex building, I would expect be tu rned over in approximately 3 months and my plans are again to tear it down immediately when passed over.

[156] The day after Anthony's letter, Holland emailed Stoddart, informing him of Anthony's request for a letter from Jacques Whitford:

> Mr. Anthony has asked that Jacques Whitford provide a letter within 3 months that the oil tanks have been removed and the soil tested and there is not contamination. This includes the Annex building which he also intends to demolish.

[157] Holland recalled that Anthony wanted a Jacques Whitford letter stating that the oil tanks were removed and that there was no contamination, but could not recall how Council responded. (He also recalled that Anthony had asked for Harding to represent both parties to the transaction.) Holland understood that the request for a Jacques Whitford letter was in relation to the removal of the tanks and tests to be done in respect of those locations, not in relation to the entire Property.

[158] The Council minutes indicate that Anthony attended the meeting with Council on November 14, 2006, to discuss the proposal:

> Mr. Anthony appeared before the meeting for the purpose of further explaining his proposal and his intention to develop the property.
>
> Mr. Anthony informed Council that he wished to demolish the Junior High School portion of the property as soon as possible. Mr. Anthony would like to demolish this building because the Assessment Roll is completed as of December 1st of each year. He would like to have this property demolished prior to the completion of the Assessment Roll so that the assessment would be reduced accordingly. Mr. Anthony submitted a copy of a certified cheque which he has provided to the Municipal Solicitor in the amount of $25,000.00 for the purchase of the property. He also has provided a draft of the insurance coverage on the property which will be put in place on November 15th. This will be done in order to allow for demolition of the building. Mr. Anthony is requesting Council's approval to start demolition of the building on November 15th, or as soon as possible thereafter, in order to achieve demolition of the property prior to the closing of the Assessment Roll.
>
> Resolution C061127
>
> Moved by D. Messenger and seconded by L. Stewart that Anthony Properties Limited be permitted to begin work on demolition of the former Junior High School portion of the building at the former Barrington Municipal High property as soon as possible providing the following conditions are met:
>
> 1. A certified cheque is provided to the Municipal Solicitor in the amount of the purchase price of $25,000.00
>
> 2. Mr. Anthony purchase adequate property insurance coverage to safeguard against any claim against the Municipality as a result of the demolition of the property.
>
> Motion carried unanimously.
>
> Having completed his discussion of the matter, Mr. Anthony then retired from the meeting.

[159] The Minutes make no reference to a request for environmental assurances.

[160] Holland subsequently emailed Harding on November 15, 2006, providing instructions to draft the APS:

> Last night Council agreed to accept the proposal on Anthony Properties Ltd. for the purchase of the former BMHS property. Please provide an Agreement of Sale for the property that will include the following:
>
> 1. Sale price $25,001

> 2. Purchaser responsible for survey and title migration costs
>
> 3. Description is contained in the RFP document and will be confirmed by the survey.
>
> 4. The Annex property will be included in the sale and transferred together with the rest of the property as soon as it is available from the School Board.
>
> Also, Council approved Mr. Anthony's request for permission to being demolition of the old "junior high school" portion of the buildings right away.

[161] On the same day, Holland wrote to Stoddart at the Board about the motion to sell the Property to Anthony Properties:

> At last night's Council meeting a motion was passed to sell the former BMHS property, including the Annex, to Anthony Properties Ltd. Mr. Anthony has asked the Municipality to provide the following:
>
> 1. The power to the Junior high be shut off immediately so the building can be demolished. I have called N.S. Power and they are sending someone to look at it next week. In the interim Ken Anthony has had Allan Brannen, a local electrician, shut off the power to the Junior High so the building can be demolished He has also arranged for Ron Ryer to start demolition on Monday, November 20th.
>
> 2. Mr. Anthony has asked that Jacques Whitford provide a letter within 3 months that the oil tanks have been removed and the soil tested and there is no contamination. This includes the Annex building which he also intends to demolish.
>
> 3. He has asked that the Annex be turned over to him by the end of three months. This will require the School Board to be moved out and have the tanks removed and reports done by Jacques Whitford by then.
>
> Please confirm that these tasks will be completed as required as Council is anxious to have the transaction completed and development begun on the property as soon as possible.

[162] On January 22, 2007, Stoddart wrote to Holland indicating that the diesel pump and tank had been removed from the Property, adding "everything appears to be okay and soil samples have been taken and sent to the lab for analysis". It appears that this letter was forwarded to Anthony in an email that day. In response, Anthony emailed Holland, copying Harding, on the same day with his view that "the environment" was "very weak", and calling for "better assurances".

[163] Holland received a soil report from the Board authored by AGAT Laboratories, which he forwarded to Anthony via email on February 7, 2007. The email indicated that the samples covered "the locations of the oil tank behind the

junior high school, and the location of the diesel tank and furnace oil tanks behind the annex building."

[164] Holland did not recall Anthony asking for a Jacques Whitford letter after this, nor did he ask for one before or after closing. Holland understood that the AGAT report was in response to the request for a Jacques Whitford letter.

[165] Later that year, Holland received a call from Anthony about apparent oil on the Property. In a memo to file dated December 5, 2007, Holland wrote:

> Last Friday afternoon Ken Anthony called me informing me that Ronnie Ryer, who is excavating post holes for him at the former High School property, had uncovered what looked to be oil in the ground and asked that I go up and view it. I told him I would and went up and viewed it with our Building Inspector Andrew Goreham. Andrew took some pictures of it while we were there. As a result of this I returned to the office and then called Steve Stoddart at the Tri-County Regional School Board and informed him of it and asked him if he would take a look at the property. He informed me he would be in the area the following Monday and look at it that afternoon and talk to me at that point.

[166] There was an exchange of emails on December 4 and 5, 2007, between Holland and Anthony, which Holland forwarded to Stoddart on December 5. These are of interest not only for what is said, but for the fact that no reference is made by Anthony of any alleged assurances:

> From: Ken Anthony
>
> To: Brian Holland
>
> Sent: Wednesday, December 5, 2007 11:26 AM
>
> Subject: Re: Former High School
>
> Hi Brian. I still haven't heard anything. I have ECCO Environment coming today to do a report on the actual school. I need this for the $200,000 (Affordable Housing Grant) as I talked about. I need to know ASAP of the School Boards thoughts as I will not let time slip by. I know Don arding [sic] can not act and I am presently preparing and meeting with a Halifax lawyer.
>
> Please let the School Board understand that they are 100% responsible and that they will be accountable for costs delays of this project, responsible on the $200,000 grant, as well as all other damages.
>
> I believe the School Board is quite familiar with me and the last Court case that I won against them. I trust this can be rectified in a timey fashion. All the best and I appreciate your support to date. Regards Ken

……

From: Brian Holland

To: Ken Anthony

Sent: Tuesday, December 4, 2007 11:54 AM

Subject: Former High School

This morning I spoke with Steve Stoddart by telephone. He viewed the site last Sunday afternoon. He is going to consult with Phil Landry and then will let me know what action they will take. He said he would prefer to communicate through the Municipality.

Brian

[167] Holland said he forwarded this exchange to Stoddart because he wanted him to know, as the Board had been in possession of the property, that Anthony was alleging liability against the Board. Holland did not recall Anthony alleging that the Board or the Municipality did anything wrong. Anthony also did not refer to any assurances from Holland about a guarantee as to the state of the Property.

[168] According to Holland, the Board suggested sharing the cost of removing the contaminated, but the Municipality rejected this idea. Holland said his instructions were based on the fact that the Municipality had sold the property with no assurances or environmental representations; the APS was entered into on an "as is" basis.

[169] After further correspondence between Anthony, Holland, and Stoddart, in early February 2008, Council asked Harding to write to the Board. At this point, Harding was in a potential conflict of interest and should not have involved himself. However, as discussed later this did not cause the loss. Harding wrote to Phillip Landry at the Board on February 18, 2008:

Dear Mr. Landry:

As you are aware the Barrington Municipal High School was declared surplus and turned back to the Municipality of Barrington. As expressed in a letter of June 20, 2006, the School Board was to provide full disclosure and complete environmental assessments as well as remedy any and all environmental contamination on the site in order for the Municipality to make use or dispose of the land. Under the *Education Act*, the School Board had control and conduct of the property.

Subsequent it has come to our attention that there is serious environmental contamination on the property. The School Board must take the steps to remedy this contamination immediately as obligated under the *Education Act* and *Environment Act*. In acknowledgement of the statutory obligations the School

> Board has agreed all along that it would take the necessary steps to clean up the property but has not been diligently proceeding.
>
> We look forward to your confirmation that the appropriate steps will be taken as soon as possible to remedy the contamination on site.

[170] This letter was an attempt to engage the Board.

[171] Holland wrote to Stoddart on February 29, 2008, as follows:

> Dear Steven:
>
> Please find enclosed the following:
>
> 1. Request for Proposals.
> 2. Anthony Response.
> 3. Agreement of Purchase and Sale.
>
> Mr. Anthony is in the process of compiling his reports and will provide those in the near future.
>
> All the correspondence and conversations between the Municipality and the School Board officials make it clear that the Municipality expected the property to be clean and certified clean with no environmental concerns. The School Board was also clear both in correspondence and discussions that development could or would go on with the property which would require it to be clean. You are aware that all parties involved relied on the School Board to ensure that there was no contamination. Now it has come to light that the School Board's environmental reports were not complete and further clean-up is required. Please confirm that the School Board will honour its' obligations in this respect so that the Developer can continue with its' work. Our community needs the development. We appreciate your cooperation and early response.
>
> We look forward to your cooperation.

[172] Holland said he was instructed by Council to write this letter in an attempt to spur the Board to take action.

[173] Prior to the RFP's, in a letter to the Board dated February 2, 2005, Holland had written, "we anticipate receiving an assurance that there will be no environmental concerns outstanding at the time of transferring ownership back to us." Holland said he understood this to mean not only that any sick building issue would be addressed, but that there would be no environmental concerns on the entire Property. Then on June 20, 2006, Holland wrote to Stoddart stating the following:

> In order for the Municipality to be able to use this property or to be able to dispose of it to developers, it is necessary that there be a written environmental clearance provided by the School Board. Could you please ensure that the Tri-County Regional School Board provides an environmental clearance either from the Department of Environment and Labour or as a Phase II Environment Assessment; along with the asbestos audit that has been done in the building and any other environmental clearance that may be required for the building

[174] Holland understood that Council saw this as more of a demand than a request. There was no satisfactory response given from the Board. The RFP was revised and reissued. The fact remains that the Municipality made no assurances and sold the Property "as is."

[175] Holland denied Anthony's claim that in the Fall of 2006 he told Anthony that the Property was coming back to the Municipality from the Board "clean", saying, "No sir. Absolutely not.". I found Holland's evidence to be both credible and reliable on this point. Where Anthony's evidence conflicts with Holland's, I prefer Holland. He was clear and never gave conflicting evidence. No documents impeach him on this point. He presented as an earnest witness attempting to give an honest account.

Harding's Dual Retainer

[176] As noted earlier, Harding wrote to Anthony (directed to the numbered company) on November 22, 2006, addressing the conditions of his representation of the parties. After noting that both parties had asked him to act on their behalf, he set out the conditions of a dual retainer, including the lack of confidentiality as between clients and the requirement to withdraw in the event of a dispute.

[177] The description of Harding's role in the letter differed somewhat from the description in Harding's Affidavit of October 3, 2018, where he said at para. 60:

> Because of my dual retainer on behalf of 386 NSL and the Municipality, I did not give advice to either party concerning the form or content of the Agreement of Purchase and Sale ("APS") or steps they might respectively take to protect their positions. My role was to reduce the terms of the accepted offer to written form.

[178] Holland denied advising Council that if they permitted the dual retainer they would not be getting advice on the content of the APS and how to protect their position. He also denied that Harding told him that if the dual retainer was agreed to, the Municipality could not receive legal advice from Harding.

[179] Holland said he emailed Harding on November 20, 2006, attaching an email from Darrell Wilson, their insurance adjuster, describing certain requirements the insurer wanted included in the APS. Holland said he asked Harding to include these items in the APS. This is consistent with Harding's Affidavit of October 3, 2018, at para 57:

> I had no involvement in the offer, negotiation, or acceptance of the terms of purchase and sale, which had been agreed to between the parties. I did not provide any advice to either party about what should or should not be included in their agreement nor did I provide advice as to the benefits or risks associated with any terms they instructed me to include.

[180] Harding's affidavit indicates that Harding would not give advice on terms or provisions to either party (para. 57). Holland indicated that he did not understand this, so he never advised Council. Harding emailed him, copying Anthony, on November 20, 2006, asking whether there was anything else he wanted in the APS; Holland said he had not seen this email prior to the litigation. Holland said Harding never discussed Anthony's request for a letter from Jacques Whitford. Holland said he provided Harding with the thoughts of the insurer, but he was relying on Harding's expertise to include in the APS what was necessary. The insurer's email included four recommendations: an insurance clause, a written agreement, an indemnification, and no contamination. The latter was not done, as the Board never specifically agreed, and the Municipality decided to sell on an "as is" basis. Holland testified that he expected Harding to mention anything else he thought should be in the APS, but Holland did not call him after he sent the email to him.

[181] Holland said he did not understand that everything shared with Harding would be shared with Anthony, including the insurer's email. This all supports the view that Harding may have done a poor job explaining his dual retainer and the limitations it imposed. It does not, however, demonstrate that his failings caused Anthony's alleged damages.

[182] Holland recalled a suggestion by the Board in December 2007 to share the cost of removing the contaminated soil. He had an exchange of emails with Stoddart on this issue:

> To: Brian Holland
>
> From: Steve Stoddart
>
> Sent: December 20, 2007 8:26 AM
>
> Subject: Re: Old BMHS property (Ken Anthony)

> Committee of the whole council considered this request to pay half the cost of removal of the contaminated soil at the former high school property, and has recommended to deny this request. They are unwilling to pay any of the costs.
>
> Brian
>
> ……..
>
> From: Steve Stoddart
>
> To: Brian Holland
>
> Sent: Friday, December 14, 2007 2:45 PM
>
> Subject: Old BMHS property (Ken Anthony)
>
> Brian
>
> I would suggest that we agree to have the pile of contaminated soil removed from the site and share the cost.
>
> I can make arrangements if you want.
>
> Let me know as soon as possible. Give me a call if you want.
>
> Thanks
>
> Steve

[183] Holland did not recall whether Harding or any other lawyers were involved in this exchange. He did not recall himself or Council consulting Harding on this issue.

[184] To Holland's knowledge, the only issues at the time that the Board relinquished the Property to the Municipality were the three above-ground oil tanks.

[185] Holland came across as an earnest, credible, and reliable witness. He took the process seriously and was very respectful throughout. I have accepted his evidence and find as fact that he did not give any assurances to Anthony.

Steven Stoddart

Environmental Assurances and the RFP

[186] Stoddart, who was retired by the time the matter came to court, was Director of Operations at the Board at the time of the negotiations with Anthony. He dealt with property and student transportation. He testified that the Board's use of the Property ended in 2007. At that point, it was no longer being used as a school, but as a depot for fuelling buses.

[187] On June 6, 2006, Stoddart received a letter from Holland indicating that the Municipality required either a written environmental clearance from the Department of Environment and Labour or a Phase II Environmental Assessment. Stoddart acknowledged that no such clearance was provided. He discussed the request with his supervisor, Superintendent Landry, and never responded to Holland specifically refusing a Phase II or an environmental clearance. On July 4, 2006, he wrote the following to Holland:

> Before we turn the property back to the Municipality we have to remove the existing unground diesel fuel tank and have soil analysis completed and approved by the Department of Environment.

[188] He wrote again to Holland on July 25, 2006:

> As you are aware before we can abandon the existing site, I have to have a new diesel fuel pump and tank installed at the new site and the existing pump and tank removed from the existing site. When the existing tank is removed there will be a soil analysis completed to ensure there is no soil contamination.

[189] Stoddart confirmed that the tanks were removed by Robicheau Pumping and a soil analysis was done. He said underground tanks and an above-ground furnace tank were removed.

[190] On November 21, 2006, Holland emailed Stoddart asking if they could have everything completed by the proposed closing date of January 22, 2007. Stoddart responded the same day indicating the Board would make every effort, but that the only issue might be with regards to the diesel pump and tank. He explained in his testimony that the Board needed to have the tank removed and obtain the reports.

[191] Stoddart wrote to Holland on January 22, 2007, advising him that the diesel pump and tank had been removed, and that "everything appears to be okay and soil samples have been taken and sent to the lab for analysis." He testified that at that point he thought everything was fine, because Robicheau Pumping had not seen any contamination.

[192] Directed to Anthony's email stating that "I find the environment to be weak", Stoddart said he did not recall Holland informing him that Anthony was not satisfied. Stoddart candidly acknowledged that he had a hard time remembering these events. He recalled receiving the soil testing report from AGAT Laboratories after the three tanks had been removed. Throughout his evidence, Stoddart at times seemed

confused and lacking in clear memory. He said he did not specifically recall the Municipality looking for a letter in addition to the AGAT report.

[193] Holland wrote to Anthony with respect to the AGAT report on February 7, 2007. This email was not copied to Harding. Holland wrote:

> The environmental information has finally been received from the School Board.
>
> Attached is a copy of the report they received from AGAT Laboratories who did the testing of the soils on the site.
>
> This report covers the locations of the oil tank behind the junior high school, and the location of the diesel tank and furnace oil tanks behind the annex building.
>
> I have also sent a copy of Wayne Robicheau's report to the Dept. of Environment for the removal of the above-ground tank behind the senior high school The DEL inspector, Colin Van Vulpen, has this report and has indicated it is acceptable.

[194] Stoddart said he had no recollection of what transpired after the AGAT report was received and forwarded to the Municipality. He did not recall the closing. He recalled that the Board was later contacted about oil contamination (he assumed by Holland, but was not sure). To refresh his memory, Stoddart was referred to a letter he wrote on December 7, 2007:

> Thank your for your e-mail of December 5, 2007.
>
> At this time, the School Board has no reason to believe that it has any responsibility or liability in respect of the Barrington High School site which it returned to the Municipality last year.
>
> However, if Mr. Anthony is alleging that the School Board has some liability, it will be necessary to review any reports prepared by ECCO Environment in respect of the site before commenting further on those allegations.
>
> Given what appears to be Mr. Anthony's position, if Mr. Anthony undertakes any remediation on the site, the School Board requests that it be given sufficient notice of those actions so that it can have someone in attendance to review the actions which have been taken.

[195] Stoddart said he reported to his supervisor concerning the contamination found on the Property, but could not say with any certainty if this was passed on to the Board. Anthony had located a small amount of contamination, and Stoddart was instructed by his supervisor, Phil Landry, to have the Board clean that area, which he believed was done. He proposed to Holland on December 14, 2007, that the Board and Municipality agree to share the cost of removing the contaminated soil, but

Holland responded on December 20, 2007, that the Committee of the whole Council had denied this request.

[196] Stoddart was referred to a Jacques Whitford letter of October 10, 2011, addressed to him, concerning soil remediation at the Digby Consolidated High School, where contamination was found after removal of an underground tank. He was shown the affidavit of Lovitt Blades (Blades), sworn on February 24, 2014. Blades is a retired inspector for the Nova Scotia Department of Environment. His affidavit included a list of underground storage tanks. Stoddart confirmed that he knew there was a list, but he was not sure whether it had been provided to the insurers, nor could he recall being told that there were underground storage tanks that had to be removed. While Blades's affidavit indicated that he was involved with that Board, Stoddart, without prompting, said that information could have been provided to his predecessor, Joe Bateman. Blades's affidavit stated:

> 15. During late 1994 or early 1995 (in the dead of winter?[in original?] I went to the Barrington Municipal High School ("BMHS") in Barrington Passage for a preliminary site inspection regarding two USTs – one had been installed in 1956 and the other in 1968. Both USTs were being used to hold fuel oil for the boiler heating systems in the school buildings.
>
> 16. I was met at the site by Joe Bateman who was the maintenance supervisor for the school buildings. There were two buildings: the junior high which had been constructed in the 1950s and the senior high which was built in the 1960s.

[197] Stoddart could not say who was responsible at the Board for the removal of the underground storage tanks in the late 1990s, and he could not recall the details of contamination at other schools discussed in Blades's affidavit.

[198] As to Anthony's request, conveyed to him by Holland on November 15, 2006, Stoddart confirmed that he understood the kind of letter Anthony was seeking. He acknowledged that his response to Holland did not mention the request for a Jacques Whitford letter, and that he did not tell Holland verbally that the Board would not provide one. On December 5, 2006, Anthony forwarded Stoddart the email he had sent to Hogg on November 30, 2006, which stated, in part:

> 5. The School Board is responsible for taking out the in ground oil tank where the buses gas up and is solely responsible for the cleanup and a letter from Jacques Whitford or acceptable qualified company stating that it is environmentally clean. I will then allow the tank to stay there until the end of the lease and therefor the Board doesn't have to remove it within the next 60 days as planned or promised Therefore I will be closing (purchasing) the property prior to the tank removal but

> guaranteed from the Mun. of Barrington and the School Board that it will be cleaning up prior to you vacating the premises.

[199] Stoddart confirmed that he neither responded to Holland nor to Anthony in relation to that email. Anthony again emailed Stoddart, copied to Holland, on December 6, 2006, indicating the possibility that the deal might close early, and adding, "I want to make sure the oil contamination is cleaned up and a letter from Jacques Whitford, etc."

[200] Stoddart said he attempted to email Holland in response to this message to advise that he would not be communicating with Anthony going forward. He confirmed in his testimony that he did not want to speak to Anthony directly. He testified that he did not want to discuss the transfer of the Property with Anthony.

Donald Harding

Overview of Practice and Friendship with Anthony

[201] Harding testified his legal practice is a general practice, about half of which would have been property work in 2006 and 2007. He was called to the Bar in 1983. He acted for Anthony in real estate transactions, and they then became friends in the 1990s. He described Anthony as "almost like a brother." They spoke most days, and took family vacations together. Harding resided and worked in Shelburne, while Anthony was in the Barrington area. Harding described himself as Anthony's "general counsel", and said he had acted for Anthony on over a hundred occasions, handling both property cases and civil litigation, none going to trial. He said Anthony was a good client and this matter was the only "hiccup" they had. He added that Anthony was usually "a few steps ahead" of him, and called him a "deal-maker" and a "risk taker." Harding described Anthony as a sophisticated client who could draft his own legal documents and who was familiar with legal proceedings.

[202] Harding said Anthony had extensive experience with environmental assessments, both Phase I and Phase II. Anthony had dealt with environmental issues on properties in various places, including Truro, Liverpool, and Yarmouth. Harding said he played no role on those issues. As a general practitioner, he had no speciality in environmental issues. He said he did not have the knowledge to read Phase I or Phase II reports. He would consult Anthony about who he should refer clients to for environmental issues. He testified that Anthony never asked for any advice on environmental concerns, adding "no, he would have laughed at me."

[203] When he was retained as a lawyer for property purchases, Harding said, Anthony would reach an agreement first, then ask him to assist with financing and documentation. Anthony would handle the due diligence, and Harding handled conveyancing, and dealt with title and restrictive covenants. Anthony had his own surveyors. Anthony professed surprise at Harding's suggestion that he was only retained for the "conveyancing aspects" of property deals. Harding said, however, that while Anthony may not have used the term "limited retainer", he clearly expected Harding to address the conveyancing aspects.

[204] Harding reviewed an undated letter to him from Anthony with regards to a property transaction, containing a list of 18 items, with some referenced as "Don to do". Harding said this was typical from 2000 onward, that the work was broken down between himself and Anthony. Harding said he never reviewed environmental reports, which went straight to Anthony or to the bank. He said there was never a transaction where he thought Anthony did not understand the risk.

The Property

[205] Harding recalled that Anthony was actively pursuing the Property, but he did not have any specific recollection of the initial discussions, as he was not involved. Harding was referred to paragraph 12 of Anthony's affidavit of October 15, 2018, where he stated:

> Harding knew over the years I had been involved in some land purchases during which environmental issues had occurred, and specifically soil contamination from old oil tanks; Harding was my lawyer on dozens of property transactions, and he and I spoke continually about all my land deals, all the issues that could arise, and how to deal with them, and my deal regarding the Property, while similar, was different insofar as Harding told me that the Board would make sure the land was clean before they could return it to the Muni.

[206] Harding said he never would have told Anthony that the Board would make sure the land was clean before returning it to the Municipality. He denied discussing soil contamination with Anthony. Harding said he could not recall much about the first RFP, and said he was never asked by the Municipality to assist with the return of the Property from the Board.

[207] Harding said he did not see Holland's letter to Stoddart of June 20, 2006, requesting an environmental clearance from the Department of Environment and Labour or a Phase II Environmental assessment, until this proceeding. He said he was never consulted by Anthony concerning his response to any of the RFPs,

including the undated "Proposal for former BMHS", in which Anthony set forth the proposal from Anthony Properties. Harding said he only became involved after the proposal was accepted by the Municipality, when he was asked to put into effect the APS. Advised of Holland's evidence that the Municipality sought his advice regarding the second RFP of October 2006, Harding said he deferred to Holland's evidence. With regards to clause 2.3 of the October 2006 RFP, Harding said he may have drafted it or approved it. He denied seeing any of Anthony's proposals prior to being accepted. He said he was not consulted on Anthony's October 2, 2006 correspondence to Holland. Nor was he consulted about Anthony's pledge to buy the property "as is, No Phase I or other major concerns that could be a Major problem if this is done."

[208] Harding confirmed that "as is, where is" was a term of the trade indicating the buyer is accepting all the risks. In regard to Anthony's letter of November 14, 2006, raising various "misc items", Harding said the only thing he was asked about was whether he would take on a joint retainer on behalf of both Anthony's company and the Municipality. Anthony did not consult him with regards to any other issues raised in that letter. Harding said he was not aware of any of the contents of this letter beforehand and did not know demolition would be started prior closing.

[209] Harding said he was not aware of Anthony attending Council to discuss his proposal, and said his own first involvement with the transaction was on November 15, 2006, when Holland sent him the following email:

> Last night Council agreed to accept the proposal on Anthony Properties Ltd. for the purchase of the former BMHS property.
>
> Please provide an Agreement of Sale for the property that will include the following:
>
> 1. Sale price $25,001.
>
> 2. Purchaser responsible for survey and title migration costs.
>
> 3. Description is contained in the RFP document and will be confirmed by the survey.
>
> 4. The Annex property will be included in the sale and transferred together with the rest of the property as soon as it is available from the School Board.
>
> Also, Council approved Mr. Anthony's request for permission to begin demolition of the old "junior high school" portion of the building right away.
>
> Thank you,
>
> Brian

[210] After receiving this email, Harding drafted a conflict letter and drew up the APS. Once the agreement was signed, he worked on the title migration. He said the only thing he added to the agreement was the ability of Anthony to walk away from the deal, in Clause nine.

[211] Harding emailed Anthony on November 20, 2006, attaching Holland's November 15 message with regards to the contents of the APS, and asked Anthony "anything else you want in there?" This was the message that Anthony delivered in hard copy to his office, with the notation, "Letter from Jacques Whitford, oil tanks are removed and up to Environment standards. Close Jan 22/06." Harding testified that the lack of specific mention of a letter from Jacques Whitford in the APS was intended to protect Anthony, by being drafted more broadly. He drafted clause nine of the APS as follows:

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

[212] Harding testified that he drafted this clause in order to enable Anthony to have the ultimate say, so that he could use anyone and not be limited to Jacques Whitford, given that Anthony was using ECCO at that time. In Harding's view, clause nine gave Anthony complete discretion. He believed they discussed this but could not recall the particulars of the conversation.

[213] With respect to the "hold harmless" clause, Harding explained that by the time the agreement was drawn up, the building was already demolished. As a result, he thought the "hold harmless" clause was moot, because the mischief it was intended to rectify was the building.

[214] Harding was referred to Mr. Wilson's email to Holland of December 15, 2006:

> As an aside, the District should require the School Board to supply documentation evidencing no contamination on the site prior to the property reverting to the District – this may have already been done – especially where the School Board had been conducting fuelling operations there.

[215] Harding said that this was essentially a moot point because the Municipality had received all the documents they were going to get from the Board. Harding said there was nothing new here and that Anthony had full knowledge. The fact is no

such documentation was forthcoming which spurred the Municipality to change its RFP and re-issue the RFP with no environmental assurances.

[216] Harding said his conflict letter (sent to both parties to the transaction) was based on the Code of Ethics of the Canadian Bar Association. He said it was not common for him to accept joint retainers, and he was very careful for whom he accepted it, because of the necessary level of client cooperation, communication, and sophistication. Harding did not think there would be any conflict in this instance, given that it was an "as is" purchase with nominal cost.

[217] Harding provided Anthony and Lockyer a memorandum regarding the certificate of title. He included disclaimers in this letter, indicating, for instance, that lawyers cannot certify boundaries, the physical condition of the property, or environmental law compliance with regards to the property. The disclaimer about physical condition and environmental law compliance stated:

> **Disclaimer – Physical Condition & Environmental Law Compliance:** We give no opinion on either the physical condition of the Property or its compliance with environmental laws governing the Property; if you are concerned with either of these matters we encourage you to have inspectors qualified in those disciplines examine the Property on your behalf.

[218] Harding testified that he had sent similar certificates of title to Anthony in every past property transaction. In this case, the APS was not signed, and the Plaintiff company took possession of the Property and began demolition before the joint retainer was signed.

Knowledge of Transaction

[219] During the litigation, Harding became aware that he had not been copied on the majority of the correspondence relating to the transaction. Harding's evidence was that he was kept in the dark about many aspects of this deal. He was copied on communication extending the closing date, but otherwise Anthony was in control, specifically in respect of the environmental disclosure. He said he had not seen (until litigation) emails from Holland to Stoddart of November 15, 2006, referring to Anthony's demand for a Jacques Whitford letter, nor had he seen Stoddart's response indicating that the three month deadline should not pose a problem, but that once Anthony started demolishing the building they would not be responsible for any contamination of the soil that might be caused by the demolition. He also did not see Anthony's November 21, 2006, email to Holland, regarding the oil tanks; the

email from Holland to Stoddart, copied to Anthony, on November 21, 2006, and the response from Anthony to Holland, with regards to demolition and the pumping-out of the oil tanks behind the junior high; from Holland to Stoddart, and the response on November 21, concerning the closing date and the diesel pump and tank completion; from Anthony to Mr. Hogg and to Stoddart and Holland on November 30 and December 5, 2006, respectively, with reference by Anthony to the Board being responsible for removing the ground oil tank and for the clean-up, and a letter from Jacques Whitford that it was environmentally clean; on December 5, 2006, regarding removal of the oil tank, between Holland and Anthony; from Stoddart to Anthony, Mr. Hogg, and Mr. Landry about a closing date, returning the property to the Municipality, and the use of the Board office; and from Anthony to Stoddart and Holland on December 6, 2006, with a response for Stoddart (mistakenly to Anthony), which should have gone to Holland, with regards to cleaning up oil contamination, and a letter from Jacques Whitford.

[220] Harding said Anthony never advised him that Stoddart was refusing to communicate with him. Harding said his advice was not sought except with regards to the closing date.

[221] Holland emailed Anthony on December 12, 2006, stating:

> The oil tank was removed from behind the senior high school yesterday.
>
> I'm waiting for the invoice from Wayne Robichaud.
>
> I have also called DEL about it and am waiting to hear back from them.
>
> They told me as long as an approved person removed the tank it was not necessary to have engineers report on the above ground tank unless there was a problem found during removal. As far as I know there were no problems.
>
> I have taken pictures of the site after the removal for our records.

[222] Harding said he never saw this email prior to the litigation. The following was stated by Anthony in his affidavit of October 15, 2018, in para. 66:

> The Muni's insurer voiced some pointed criticisms of the PSA and asked questions about the School Board and tank removal, about which issues Holland would have certainly consulted Harding, as it was he who had drafted the PSA…I was never advised of Holland's discussions with Harding about the insurer's PSA concerns. Why was the insurer concerned about the lack of a "hold harmless clause"; why would such a clause be recommended? Harding never addressed these issues with me, issue he clearly would have addressed with Holland, both as PSA was being drafted, and now after.

[223] Harding said he did not recall any communications with Holland about the insurer's concerns about the APS. Harding was also not aware of communications between Stoddart and Holland about the diesel pump and tank being removed from BMHS on January 15, 2007.

[224] Harding confirmed that the January 22, 2007 closing date was extended by the parties. He recalled that the due diligence was not complete and Anthony was not ready to close. Harding said he was not consulted about the extension, but was copied on an exchange of emails between Holland and Anthony, on January 30 – February 1, 2007, in which Anthony stated that the "only outstanding issue is the Environment concerns which I would like proper paperwork." Anthony and Holland then agreed to extend the closing date to February 16.

[225] Harding recalled being on a cruise in the Caribbean with Anthony at the time of the January 30 – February 1 email exchange. The "outstanding issues" referred to by Anthony were environmental concerns. Harding testified that he was never consulted on what the "proper paperwork" was that Anthony wanted.

[226] Harding was not aware until the litigation of the email of February 5, 2007, from Stoddart to Holland, indicating that he contacted Robichaud's Pumping to provide a letter stating that the results met requirements, nor had he seen Holland's email to Anthony on February 7, 2007, attaching the soil testing report received from AGAT Laboratories. Harding believed he received the AGAT report in some form, but Anthony did not speak to him about the results.

[227] The next thing that happened was that Harding received a call from Anthony on February 13, indicating that he was ready to close and that he was satisfied with the testing based on the email of February 7. Harding recalled asking Anthony for a copy of the email for the file. Contained in Harding's file is an email from Anthony to Harding, copied to Holland on Tuesday, February 13, 2007, with he subject, "finalizing School deal", which stated:

> I reviewed the Environment report. Prepared to sign off and purchase the property as soon as possible. I would like copy of any keys that are out there especially for the Old Annex. Thank you or being so co-operative. I hope to see you at the Open House in the near future.

[228] Anthony made no reference to additional testing or a Jacques Whitford letter.

[229] When Anthony later complained about contamination on the Property, Harding referred him to alternative counsel. In December 2007, Anthony took the

position with Holland that the Board was responsible for the contamination. There was subsequent correspondence between Stoddart and Holland, as well as some involving Anthony, between December 7, 2007, and February 13, 2008, relating to the contaminated soil: in particular, who was responsible and what steps would be taken. Harding said he was not aware of these emails nor was his advice sought at the time. Harding was aware that the Board had offered to contribute to the remediation of the contamination, but his advice was not sought, and he considered himself to be "out the loop." Harding was referred to the letter dated February 18, 2008, which he was instructed on behalf of the Municipality to write to the Board, care of Mr. Landry to express Council's expectation that the Board would take necessary steps to remedy the contamination.

[230] Harding said he was not involved in the matter thereafter, until Anthony alleged that he had committed professional negligence. He denied telling Anthony that the Property would be transferred "clean," and denied any discussion with Holland that confirmed that commitment.

[231] Harding became emotional speaking about the friendship between himself and Anthony, recounting that the two still continued to socialize for years after Anthony sued him. He testified that it took him a long time to adjust to the fact that he had lost a friend. Harding was asked to comment on para. 30 of Anthony's affidavit, sworn October 15, 2018 which states:

> My proposal was accepted by the Muni council on November 14, 2006, and I was anxious to get the development process started. Although I of course knew Harding was the Muni's lawyer, and that he was my lawyer as well, and that typically the same lawyer can't act on behalf of both a buyer and a seller, I trusted Harding completely, and knew that he would always look after my interest, so I told Holland that I had no problem with Harding representing both sides.

[232] Harding testified that he felt the same way. He described having an open retainer with Anthony, meaning that he would provide him with advice and open up files. Harding was referred to paragraphs 38 and 39 of Anthony's affidavit of October 15, 2018, which states:

> Per Holland and Harding's statements to me, the Board was going to make sure the Property had a "clean bill of health" before the Muni would accept its return, and the reason both those people were giving me those assurances, is because they both knew I would not purchase land that had contaminated soil.
>
> Therefore, because the Muni wasn't going to accept the property unless it was environmentally clean, and because I wasn't going to buy land that wasn't

> environmentally clean, and Harding was the lawyer for both of us on the Property transaction, I was confident that Harding would protect both of us as against the Board who were the ones that had to make to ensure the Property was environmental clean.

[233] Harding adamantly denied making any such representations or assurances. He was also referred to Anthony's evidence of his own limited understanding of legal aspect of his property transactions:

> Harding also says that he and I have, "…spend countless hours discussing the commercial and legal aspects of transactions [I] have been involved in" – that statement is very true. And it is because of all those discussions over the years, that Harding would be acutely aware of my limitations when it comes to fully grasping the effect of certain legal verbiage and terms, and the manner in which they can impact my interests. And those limitations are exactly why I have relied on Harding for his advice and legal guidance over all those years, to protect me from pitfalls and to limit my potential mistakes – simply put, that's what I paid him for.

[234] Harding testified that he had no awareness of any limitations that Anthony had grasping legal terms. He noted that Anthony had dealt with hundreds of APS and legal documents. Harding agreed that he had suggested a buyer obtain a Phase I in the past (though not a Phase II), but said Anthony was so ahead of him with regards to the understanding of Phase I and Phase II assessments that he never had advice sought from him nor given.

[235] With respect to the email from Mr. Wilson setting out the insurer's suggestions, which Holland forwarded to him with a request to review and "include the requirements you believe necessary", Harding said he did not tell Holland that he was not providing him with advice. In fact, Harding did not respond at all despite having read the email. Harding did forward a November 15 email from Holland, indicating what should be in the APS, to Anthony. This was the email that Anthony returned to him in hard copy, with an additional item handwritten on it. Harding recalled discussing Anthony's insurance coverage on the property with Anthony and Holland, after November 14.

[236] In reviewing the Wilson email, Harding took the view that the first two recommendations were unnecessary. Because the building was already demolished, it made the act of formalizing the agreement simpler, in Harding's view. He was referred to the third recommendation in Mr. Wilson's email as follows:

> As an aside, the district should require the school board to supply documentation evidencing no contamination on the site prior to the property reverting to the district

> – this may have already been done – especially where the school board have been conducting fuelling operations there.

[237] As a result of clause 2.3 of the October RFP, it was determined that there was no need to address this recommendation. As part of the RFP process, the Municipality indicated that they had everything they expected from the Board, and there would be no representations made. Harding was of the view that because the RFP indicated there were no environmental representations to anyone, the clause was not needed, despite the fact that he had two clients on this property agreement.

[238] Harding acknowledged he was consulted after the first RFP when Council looked for environmental reports, and that he wrote to Stoddart on June 2, 2006, about a clearance or Phase II, and never got a response. The reason he was consulted on the second RFP was to ensure the Municipality was not exposed because of the Board's failure to respond about environmental assessments or Phase IIs. (He agreed that he made an error at paragraph 46 of his Affidavit in that regard.)

[239] Harding agreed that the property, assessed at $1.5 million, was being sold for $25,000 because there was no guarantee about environmental cleanliness. This was why Anthony was getting a "steal of deal".

[240] Harding admitted that he did not tell Anthony that he would potentially lose the entire purchase price if the deal fell through, since it was the same as the deposit. He suggested that his was a simple legal concept that he thought Anthony would understand. This evidence was difficult to accept. The deposit being the whole purchase price is unusual. However, again the issue did not cause the loss the Plaintiff is claiming.

[241] Harding could not recall any property transaction involving Anthony where the vendor was not the occupier of the land. Harding was asked whether he was confused about who owned the Property and that he had originally thought the Board, not the Municipality, held title. He testified that he knew that the Municipality held title to the Property throughout, despite statements on discovery to the effect that he was not sure who owned the land. Harding said he believed his discovery answers were incorrect, and that his recollection was better at trial. This is unlikely. However, even if Harding was initially confused as to ownership, it is clear on all the evidence that this was not an issue.

[242] Anthony denied ever seeing the June 20, 2006, letter from the Municipality to the Board looking for an environmental clearance or Phase II. He denied that

Holland, or anyone else, discussed this with him. Again, in the face of the language in the RFP, the bid and Anthony's discussions at Council, he knew the risks he was taking.

Law and Analysis

The issues in this matter are as set out in *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4. The following issues must be decided:

> 57. In terms of the negligence claims, the issues are whether Mr. Harding's behaviour breached the standard of care, whether the Company sustained damages and whether the damages were caused in fact and in law by Mr. Harding's alleged breach…
>
> 58. At the root of these questions is the nature of the dual retainer assumed by Mr. Harding and the basis on which the Company closed the purchase transaction.
>
> 59. With respect to the claim of negligent misrepresentation, the issues are whether Mr. Harding made any representations and, if so, whether they were untrue, inaccurate, or misleading; whether Mr. Harding acted negligently in making any representations; whether the Company relied in an reasonable manner, on any negligent misrepresentation and whether such reliance was detrimental to the Company…

[243] The plaintiff seeks special damages of $138,273.39 "as restitution for the expense incurred… to remediate a portion of the property," and special damages of $689,300 (or such other amount discussed by the evidence at trial) "to remediate the soil contamination that remains on the Property."

[244] In short, the Plaintiff argues this transaction was new ground for Anthony and the Plaintiff company, and alleges that Harding failed to explain the alleged legal implications of the situation regarding the ownership versus possession of the Property to Anthony. This claim arises from the Board's alleged failure to remediate after tank removal. On February 18, 2008 Harding wrote to the Board regarding the contamination, stating, "…the School Board was to provide full disclosure and complete environmental assessments as well as remedy any and all environmental contamination on the site in order for the Municipality to make use of or dispose of the land." The Plaintiff argues that this assertion mirrors the assurances Harding allegedly gave Anthony in 2006.

[245] Harding denies making any such assurances about the condition of the property to Anthony. Anthony had the option – as provided in the APS – to leave the deal but decided – on his own- without any Phase I or Phase II to close the deal.

He did so at his own risk. Harding argues he did not fail in any respect in his representations.

Negligent Misrepresentation

[246] Turning now to the claims advanced against Harding. I begin with negligent misrepresentation.

[247] The Supreme Court of Canada enumerated the elements required to establish negligence in *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27:

> 3 A successful action in negligence requires that the Plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the Plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

[248] A negligent, though honest, representation made by one person to another, in circumstances where the person making the representation knows, or ought to know, that the other may rely upon it, may form the basis of an action in damages for financial loss resulting from such reliance: see *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

[249] Iacobucci J. set out the elements as follows in *Queen v. Cognos Inc*., [1993] 1 S.C.R. 87:

> 33 The required elements for a successful *Hedley Byrne*, *supra*, claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted…

[250] The first question is whether there was a representation in this case. I find as fact that Harding did not make a representation to the Plaintiff company, through Anthony, that could ground a claim in negligent misrepresentation.

[251] The Amended Notice of Action states at paragraph 16H:

> 16H. On or about November 20, 2006 Mr. Harding advised Mr. Anthony that the Plaintiff did not require the clause Mr. Anthony requested regarding the "letter from

> Jacque [sic] Whitford" because the School Board was going to look after cleaning-up the Subject Property. Mr. Anthony accepted the advice of Mr. Harding and as a result the agreement of purchase and sale did not contain a clause requiring a letter from Jacque[sic] Whitford regarding environmental standards.

[252] I accept Harding's evidence that he did not make any such representation to his client. Furthermore, Anthony asked for a clause in the agreement to have some environmental assurance satisfactory to him. Such a clause was included, and Anthony decided to close the property transaction with the AGAT report.

[253] Even if I had not made this finding, there is significant doubt as to whether a claim for misrepresentation with respect to a future event is actionable in Nova Scotia. In *Northern Petroleum v. Sydney Steel Corp*. (1999), 180 N.S.R. (2d) 141 (S.C.), affirmed at 2000 NSCA 104, Justice MacAdam stated at para. 61:

> In Nova Scotia, the tort of negligent misrepresentation is restricted, absent fraud, to statements of existing fact or statements that although containing references to the future are, at least, in part untrue, inaccurate or misleading in respect to an existing fact. The statements by the defendant as to the approximate quantities of bunker "6C" it would be using in the future were not such statements of existing fact and as such, cannot form the foundation for a claim in tort on the basis of negligent misrepresentation.

[254] Given my finding on the evidence that the alleged misrepresentation did not occur as well as the state of law regarding future statements, in any event, I conclude that the Plaintiff has not made out the claim in negligent misrepresentation.

Solicitor's Negligence

[255] The Plaintiff claims that Harding was negligent in advising and representing the parties to the transaction under the dual retainer. The Amended Notice of Action contains the following allegations:

> 16I. The Plaintiff says that at no time did Mr. Harding inform them that the Municipality had requested a "hold harmless" clause in their favour be included in the purchase and sale agreement, or that Mr. Harding had advised the Municipality to include such a clause in the agreement.
>
> 16J. The Plaintiff further says that at no time prior to the closing of the purchase did Mr. Harding advise the Plaintiff that a Phase II environmental assessment or similar investigation should be required to be performed on the Subject Property.
>
> 16K. The Plaintiff says that had the vendor been required to conduct a Phase II environmental assessment, the wide-spread hydrocarbon contamination of the soil

> in the Subject Property would have been discovered, which would have allowed the Plaintiff to reassess the terms under which it would agree to purchase the Subject Property.
>
> …
>
> 30B. The Plaintiff claims against the defendant, Donald Harding, on the basis that he breached his duty owed to the Plaintiff as a reasonable and prudent solicitor in the circumstances, insofar as he did not advise the Plaintiff that a Phase II environmental assessment or similar investigation should be undertaken on the Subject Property prior to the closing of the purchase, and that Mr. Harding failed to advise the Plaintiff of the potential impact of the 'hold harmless' clause that was included in the purchase and sale agreement.
>
> 30C. The Plaintiff claims against the Defendant, Donald Harding, on the basis that he breached his agreement with the Plaintiff and the terms of his retainer, and breached his duty owed to the Plaintiff as a reasonable and prudent solicitor in the circumstances, insofar as he failed to recognize and advise the Plaintiff as to the potential for a dispute and conflict to develop once the Plaintiff raised its concerns regarding the removal of oil tanks and assurances as to environmental standards.
>
> 30D. The Plaintiff claims against the Defendant, Donald Harding, on the basis that he breached his agreement with the Plaintiff and the terms of his retainer, insofar as he held confidential discussions with the Defendant, Municipality, regarding the inclusion of the 'hold harmless' clause in the purchase and sale agreement, and those discussions were not shared with the Plaintiff.

[256] Harding acknowledges he owed a duty of care to the Plaintiff in the course of his representation in relation to this property transaction. The next element is the standard of care.

[257] The Nova Scotia Court of Appeal considered the standard of care for professional negligence in *R. v. Gardner and Fraser*, 2021 NSCA 52. Beveridge J.A., for the court, said the following (citations omitted):

> [69] In civil litigation that alleges negligent conduct by a member of a trade or profession, the general rule is evidence from someone with expertise in that occupation or undertaking is usually necessary in order for the trier of fact to determine the parameters of the standard of care…
>
> …
>
> [72] In civil cases, the failure to identify the appropriate standard of care constitutes legal error … In criminal cases with the life and liberty of the accused at stake, it cannot be any less so.
>
> [73] How then is a trier of fact to determine what the content of the standard of care is and whether it was breached? These are quintessentially questions of

> fact. They can be determined, as described above, by credible expert opinion evidence or other evidence that permits the trier to draw the necessary inferences. That evidence may include what others do or should do in similar circumstances and any policies or directives relevant to the conduct.

[258] For a claim of professional negligence against a lawyer, the lawyer's conduct and conformity with the expected standard of care is evaluated on the basis of the "reasonably competent solicitor": *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. But what would a "reasonably competent solicitor" do in these circumstances?

[259] While the "reasonably competent solicitor" standard applies in most negligence claims in this proceeding, the Plaintiff's claim against Harding is also cast as an alleged failure to warn it to undertake a Phase II Environmental Site Assessment.

[260] In *Fasken Campbell Godfrey v. Seven-Up Canada Inc., et al* (2000), 47 O.R. (3d) 15 (Ont. C.A.), the Ontario Court of Appeal affirmed the principle that there is no "general retainer" standard of care requiring a lawyer to consider and safeguard all aspects of a client's interests, including the avoidance of risk. The Court explained the interplay of surrounding circumstances, instructions and client sophistication with the duty to warn in the following terms:

> [38] The trial judge correctly set out the law regarding a solicitor's duty to warn a client about the risks involved in a transaction or course of action. He summarized the case law in this area at p. 471:
>
> > Defining the scope of the solicitor's retainer is an essential element in cases where the client's complaint is that the solicitor failed to warn the client of a risk. In *Midland Bank Trust Co. v. Hett, Stubbs & Kemp,* [1978] 3 All E.R. 571 (Ch. D.), Oliver J. stated that there was nothing like a "general retainer" in the sense that a solicitor is duty bound to consider all the aspects of the client's interests generally when consulted for a particular aspect of the problem (at 583). The duty to warn only arises when an ordinarily competent and prudent solicitor would have issued a warning, taking into account all of the surrounding circumstances, including the form and nature of the client's instructions and the sophistication of the client.

[261] In *Fasken, supra*, the court held that at the point the lawyer was retained, the deal was a *fait accompli*. This is the case in the matter before me. The response to the RFP was completed and the offer accepted before Harding was even approached to accept a dual retainer.

[262] The duty and standard of care for lawyers was outlined by the Supreme Court of Canada in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147:

> 66 A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. See *Hett v. Pun Pong* (1890), 18 S.C.R. 290 at 292 (S.C.C.). The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, Lawyers — Negligence — Standard of Care (1985), 63 Can. Bar Rev. 221. Hallett J., in referring to the standard of care as that of the "ordinary reasonably competent" solicitor, stressed the distinction between the standard of care required of the reasonably competent general practitioner and that which may be expected of the specialist. It was on the basis of this distinction that he disregarded the evidence of one of the expert witnesses concerning the practice in real estate transactions involving corporations.

[263] The distinction between a general practitioner and a specialist was also addressed in *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Ct. J.), varied on other grounds, (1996), 88 O.A.C. 398:

> 102 Where a solicitor holds himself out to his client as having particular expertise in a given area of law, such as in respect of sophisticated real estate transactions, a higher standard applies. The requisite standard is not that of a reasonably competent solicitor or ordinary prudent solicitor, but that of a reasonably competent expert in commercial real estate transactions.

[264] Where a civil claimant alleges negligent conduct by a member of a trade or profession, the general rule is that evidence from an expert in that field is usually necessary in order for the trier of fact to determine the parameters of the standard of care. There are cases, however, where the breach of the standard of care will be apparent without expert evidence. There are at least two recognized general exceptions where expert evidence is not needed:

(a) for non-technical matters or those of which an ordinary person may be expected to have knowledge; and

(b) where the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard.

[265] In *Poulain v. Iannetti*, 2015 NSSC 181 (reversed, but not on this point, 2016 NSCA 93), Rosinski J. held that the defendant lawyer was negligent in failing to

provide advice to the Plaintiff regarding loss of income benefits under the Section B provisions of a standard automobile policy. In the course of his reasons, he considered when expert evidence is necessary to prove solicitor negligence:

> [48] In *Central Trust Co*., *supra*, both the Plaintiff and defendant called expert opinion evidence from senior Nova Scotia lawyers. In that case, the court concluded at para. 63:
>
> > With respect, I am in agreement with the conclusion of the Appeal Division on the issue of negligence. The fact that the capacity of a corporation to borrow and give security may be limited or subjected to certain conditions by the provisions of the applicable *Companies Act* is such basic knowledge that a reasonably competent solicitor must be held to possess it, whether he is a general practitioner or a specialist.
>
> [49] Notably, in *Poulain v. Iannetti*, 2013 NSCA 10, at para. 20, Justice Hamilton stated:
>
> > Mr. Poulain's testimony that he retained Mr. Iannetti to represent him on his Section B claim gave rise to a duty of care, as the judge recognized. Mr. Poulain's evidence that the only advice he received from Mr. Iannetti, with respect to whether he should accept the settlement offer with respect to his entitlement to wage replacement benefits under Section B, was that he should take it if he needed the money, allows an inference to be drawn that the standard was breached. There was nothing technical in this situation. Such advice would not inform Mr. Poulain of what he was giving up -- the possibility of receiving 14 years, as opposed to two years, of wage loss replacement benefits under Section B if his evidence that he is totally unable to work as a result of the injuries he sustained in the accident is accepted. An ordinary person without particular expertise could draw an inference that this frugal advice, if it was the advice given by Mr. Iannetti, was negligent without the need for expert evidence.

[266] Professional negligence claims against a lawyer are unique because the judge adjudicating the claim has expertise in the subject occupation. Neither of the two exceptions articulated above relies on a judge's expertise as a former lawyer, and the case law is unsettled as to the use that can be made of that expertise in determining the standard of care. What does seem clear, however, and consistent with common sense, is that a judge should only take judicial notice of the standard of care expected of a lawyer in cases where the court collectively (and not just individual judges on the court) could make a finding without the assistance of expert evidence.

[267] There are cases that support a judge drawing from the court's experience in determining the standard of care without an expert, and there are cases which say

the opposite. Those cases where no expert was required include*: Poulain v. Iannetti, supra*; *Malton v. Attia*, 2013 ABQB 642; *ter Neuzen v. Korn*, [1995] 3 SCR 674; *Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal denied, [2011] S.C.C.A. No. 319; and, *Urquhart v. MacIsaac*, 2017 NSSC 313, affirmed 2019 NSCA 25. The following are cases where an expert was needed: *Mraz v Herman*, 2016 ABCA 313; *Adeshina v. Litwiniuk & Co*., 2010 ABQB 80; *Zink v. Adrian*, 2005 BCCA 93, at para 44; and *Tran v. Kerr*, 2014 ABCA 350.

[268] *Tran v. Kerr*, supra, merits a closer look. In that case, the appellant lawyer represented multiple parties in what turned out to be a fraudulent real estate transaction. The clients included the respondent, who acted as the "straw buyer" in the mortgage fraud scheme, and who ultimately ended up with a deficiency judgment against her in the amount of $66,136. After paying the default judgment, the respondent sued the appellant, alleging that he was negligent in failing to advise her of the consequences of executing a high ratio mortgage, and that he acted in conflict of interest. The appellant admitted acting as the respondent's lawyer in the transaction. He denied knowing that the transactions were fraudulent or otherwise suspect. He also alleged that the respondent caused or contributed to her own losses by entering into a transaction that she knew was suspicious.

[269] Notwithstanding the absence of expert evidence on the standard of care, the trial judge held that the appellant was liable to indemnify the respondent for the full amount of the deficiency judgment. The appellant appealed on multiple grounds, arguing, among other things, that the trial judge erred in not requiring expert evidence on the standard of care. On this issue, the Court of Appeal wrote:

> 21 When a suit is brought for professional malpractice (either in the form of a breach of contract claim, or for negligence) it is customary, and usually necessary, for there to be expert evidence on the standard of care: ... There are cases where the breach of the standard of care will be apparent without expert evidence: ... There is also possibly a narrow exception with respect to malpractice by lawyers. Since all judges were once lawyers, and are familiar with the practice of law and the legal system generally, there are cases where a judge can take judicial notice of the standard of care expected of lawyers.
>
> 22 In this case the trial judge dealt with the absence of expert evidence by reference to his own experience:
>
> > Well, you're wrong. You're talking to a lawyer that practised real estate law for 26 years in Medicine Hat. You're talking to a judge who, as a lawyer, sat for 10 years on the ethics committee as they considered the amendment to the Code of Conduct that dealt with lawyers representing more than one

> client. There is no question that the -- there is a general knowledge available, particularly to this Court, about what the standards are that faced the lawyer who was acting for more than one client. There is plenty of evidence in front of me that would suggest that that standard had not been made - met, rather - and that there are numerous breaches by this lawyer - on the evidence we've heard, just the Plaintiffs - by this lawyer of the course of conduct that was required of any lawyer acting on behalf of any client to a real estate transaction. I don't even have to look at your brief. The application for a non-suit is dismissed. Thank you, Sir.

The appellant correctly argues that the trial judge erred in proceeding in this fashion.

23 As the professions (including the legal profession) become more highly specialized, the circumstances in which a trial judge can properly take judicial notice of the standard of care become narrower and narrower. Judicial notice is only properly taken in cases where the court collectively (and not just individual judges on the court) could make a finding of the standard of care without the assistance of expert evidence: *Malton v. Attia*, 2013 ABQB 642 at para. 214, 90 Alta LR (5th) 1; *MacDonald v. Taubner*, 2010 ABQB 60 at para. 330, 485 AR 98. Judicial notice can only be taken of facts that are notorious and undebatable.

24 The trial judge inappropriately relied on his own experience in setting the standard of care. His personal experience was not shared by other members of the Court. Other judges who had different career paths (e.g. they were labour lawyers, insurance lawyers, criminal law lawyers, etc.) would not have been able to take judicial notice of the standard of care of a conveyancing lawyer in Calgary in 2006.

25 Many of the standard procedural safeguards are absent when a trial judge sets a standard of care in the absence of expert evidence. The rules require that expert opinions (and the witness's qualifications) be disclosed in advance. Cross-examination is available on both, and the opposing side has the option of calling rebuttal evidence. None of these opportunities are available when the trial judge takes judicial notice of the standard of care, so ". . . courts should be restrained and cautious about setting the standard of care absent such evidence": *Adeshina v. Litwiniuk & Co.*, 2010 ABQB 80 at para. 175, 24 Alta LR (5th) 67. [Emphasis added]

[270] The court noted that in the absence of expert evidence, one way to establish the standard of care would be through admissions by the defendant (para. 26).

[271] In *Mraz v. Herman, supra*, a different panel of the same court endorsed the view that “only rarely” should judges determine the standard of care without expert evidence:

> 42 Some additional comments are necessary as regards the trial judge's finding about evidence of the standard of care of a lawyer.

43 The starting point is *Adeshina v. Litwiniuk & Company*, 2010 ABQB 80, 483 AR 81 at 160-176. After reviewing the leading authorities, the trial judge held at para 175:

> Expert evidence is not the only available source of relevant information, but there are serious risks to a plaintiff who fails to tender expert evidence on the standard of care expected. The Plaintiff always and ultimately carries the burden of proof and non-technical matters are limited. While it is true that a court remains free to accept all, part, or none of an expert's testimony, evidence on standard of care is informed by those currently engaged in the enterprise at issue. Their opinions are tested by cross examination. In my view courts should be restrained and cautious about setting the standard of care absent such evidence. [Emphasis added in Mraz]

44 In *Malton v. Attia*, 2013 ABQB 642, 573 AR 200 the trial judge cited Southin JA's *obiter* concurring reasons in *Zink v. Adrian*, 2005 BCCA 93, 208 BCAC 191 :

> 43 ... in cases of alleged negligence by a solicitor, judges can only rarely make such a finding in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question.
>
> 44 The judge can only properly do so, in my opinion, if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge." ... There is an underlying reason - the expert witness can be cross-examined with a view to showing he knows not whereof he speaks. But the parties have no means of discrediting a judge's implicit assertion that he knows the proper way to conduct a certain kind of legal business. One must not overlook that the reason some judges are judges is that whilst they were practising the profession they were of a standard far above that of the ordinary reasonably competent member of the profession.

45 *Malton* also cited the leading majority decision of the British Columbia Court of Appeal, *Roberge v. Huberman*, 1999 BCCA 196, 121 BCAC 28:

> [56] There may be cases in which the issue as to standard of duty turns so much on the question of "appropriate documentation" that only lawyers practising in the particular field can throw light on the question. Evidence of that kind is undoubtedly useful in some cases, most commonly where the issues involve abstruse questions of conveyancing practice. The issues in this case are sufficiently removed from such areas that it may be doubtful that expert evidence would be helpful to the court. The test for determining whether expert evidence is necessary was stated thus in *R. v. Abbey*, [1982] 2 S.C.R. 24 by Dickson J. (as he then was), speaking for the court, at 42:
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature

> of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": (*R. v. Turner* (1974), 60 Cr. App. R. 80, at p. 83, per Lawton L.J.).

46 The judge in *Malton* concluded that: "judicial knowledge of and expertise on the conduct of legal practice should flow from the institution involved, rather than the background and experience of a particular judge. ... a judge should not evaluate lawyer conduct from the judge's own personal experience, but rather via judicial notice, which flows from things a finder of fact knows as common knowledge": para 214. In *Tran v. Kerr*, 2014 ABCA 350, 584 AR 306 this Court cited the underlined passage in the quote in para 43 above from *Adeshina* with approval noting that "[m]any of the standard procedural safeguards are absent when a trial judge sets a standard of care in the absence of expert evidence": para 25. The Court also cited *Malton* with approval at para 23:

> As the professions (including the legal profession) become more highly specialized, the circumstances in which a trial judge can properly take judicial notice of the standard of care become narrower and narrower. Judicial notice is only properly taken in cases where the court collectively (and not just individual judges on the court) could make a finding of the standard of care without the assistance of expert evidence.

While *Tran* confirmed that the law was correctly stated in *Malton*, *Tran* did not comment on the application of the rule to the facts of that case.

47 The bulk of modern authority suggests that in most circumstances judges are not ideally situated to determine whether a lawyer's standard of care in a particular circumstance was sufficient to discharge his or her fiduciary obligations. ...

48 When lawyer negligence is alleged but judicial notice has not been taken, there are three reasons why expert evidence is preferable: first, specialized areas of practice are becoming more common; second, once appointed, judges become quickly removed from day-to-day details of practice; and third, judges cannot be cross-examined on their opinion. [Emphasis added]

[272] In *Malton v. Attia*, supra, the court reviewed the principles underlying the view that a trial judge should not alone wade into the standard of care for a lawyer as follows:

> 42 Several general principles are advanced by *Attia* for why a judge cannot evaluate the standard of care for a lawyer:
>
> > a) a trial judge, as expert, cannot be tested by cross-examination, negating a "pillar of our adversarial legal system";

> b) a trial judge may inappropriately apply an elevated standard of care based on the judge's 'pre-judicial' practice as a lawyer;
>
> c) a trial judge's knowledge of legal practice may be obsolete due to a long period on the bench;
>
> d) where a trial judge has specialized in a particular kind of litigation, such as family law, criminal law, or corporate matters, the trial judge will lack the necessary experience to evaluate litigation as a whole; and
>
> e) a senior lawyer would provide a helpful context:
>
> > i. in aspects of legal practice in which a trial judge is not involved, such as "client management, strategy concerning claims to advance as the start or in trial, settlement offers, etc",
> >
> > ii. specialized areas of practice,
> >
> > iii. with specialized clients, such as persons with limited resources, or large institutional clients, and
> >
> > iv. as that lawyer can evaluate colleagues from a comparable position.

[273] In *Johnson (c.o.b. Chornoby Johnson Law Office) v. Demerais*, 2017 SKQB 316, DuFour J. helpfully summarized two distinct lines of authority, in a case where expert evidence had not been called at trial:

> 14 One question to be addressed here is whether, in these particular circumstances, opinion evidence from an "expert lawyer" was required for Ms. Demerais to discharge the onus to prove that Ms. Johnson was negligent in the way she handled the family law proceeding. The law in this respect is not settled.
>
> 15 Some courts have determined that there need not be an opinion from an expert as to that which a reasonable lawyer would have done in the particular circumstances. In *Janik v. Stillman*, 2016 ONSC 1801, the court held that judges are familiar with the practice of law and the legal system generally and, as such, they are often able to determine the applicable standard of care without the assistance of an expert. In *Malton v. Attia*, 2013 ABQB 642, 90 Alta LR (5th) 1 [*Malton*], the court held, at paragraph 134, "a trial judge brings with him or herself a body of knowledge that generally makes expert lawyer standard of care evidence unnecessary."
>
> 16 Another line of authority holds that only rarely should judges determine the standard of care without expert evidence. At paragraph 43 of *Mraz v. Herman*, 2016 ABCA 313, 42 Alta LR (6th) 1, the Alberta Court of Appeal agreed with *Adeshina v. Litwiniuk & Co.*, 2010 ABQB 80, 24 Alta LR (5th) 67, that, "evidence on standard of care is informed by those currently engaged in the enterprise at issue" and, "courts should be restrained and cautious about setting the standard of care absent such evidence." At paragraph 48, the court held that there are three reasons

why expert evidence is preferable: "first, specialized areas of practice are becoming more common; second, once appointed, judges become quickly removed from day-to-day details of practice; and third, judges cannot be cross-examined on their opinion." The underlying rationale in respect of the last factor was explained by the British Columbia Court of Appeal in *Zink v. Adrian*, 2005 BCCA 93 at para 44, [2005] 4 WWR 420: "... the expert witness can be cross-examined with a view to showing he knows not whereof he speaks. But the parties have no means of discrediting a judge's implicit assertion that he knows the proper way to conduct a certain kind of legal business."

17 In *Tran v. Kerr*, 2014 ABCA 350, [2015] 1 WWR 70, the Alberta Court of Appeal held that the trial judge erred by applying a standard of care based, not on expert opinion evidence, but on his own experience as a former real estate lawyer. At para. 23, the Court of Appeal held that judges can take judicial notice of the standard of care, "... in cases where the court collectively (and not just individual judges on the court) could make a finding of the standard of care without the assistance of expert evidence" and, even then, "[j]udicial notice can only be taken of facts that are notorious and undebatable."

18 It has also been held that expert opinion evidence in professional negligence actions is not necessary where "the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard" (*Krawchuk v Scherbak*, 2011 ONCA 352 at para 135, 106 OR (3d) 598).

[274] Justice DuFour continued:

19 Whether the conduct of the lawyer was clearly egregious or whether the facts are notorious and undebatable or whether all or only few members of the court might have the ability to divine the standard can be relevant factors to consider, but, in my view, they are but factors that fit into a larger matrix. Here, I have found guidance by referring to the established doctrine of the admissibility of expert opinion, concepts of basic fairness, the reputation of the administration of justice and access to justice.

20 First, admissibility as set out in *R v Mohan*, [1994] 2 SCR 9. Two of the four tests for admissibility established by the Supreme Court are relevant to this discussion - that the opinion be proffered by a properly qualified expert and the necessity of the opinion in assisting the trier of fact.

21 In my view, it is anathema to the judge's role as a finder of fact to self-declare oneself to be an expert, eschewing the safeguards that accompany a proper inquiry into qualifications: direct examination and cross-examination. Judges, whether or not they feel personally qualified to divine the standard of care to be applied, ought to tread cautiously before entering too far into the fray.

22 Then, necessity. In *Malton*, at para. 165, the court asked "whether an expert, presumably a lawyer, can tell me anything that I do not already know about

> appropriate conduct for a lawyer who runs a civil lawsuit in the Alberta Court of Queen's Bench" and answered, at para. 175, "I disagree with [the party] who argues I need an expert lawyer to tell me how to do my job." I see the issue somewhat differently. It is not that the expert lawyer is telling the judge how to do his or her job, it is the expert opining on how the defendant lawyer did his or her job.
>
> 23 There will be instances where an expert opinion as to the standard of care to be applied to a lawyer's conduct will not be necessary, such as a very simple, straightforward case involving a lawyer who has missed a limitation period. Even missed limitation periods, however, can be sufficiently complex so as to require expert opinion going to the applicable standard of care in the particular circumstances at bar ...
>
> 24 There is also the issue of basic fairness to the parties. The judge as expert presents as an impenetrable black box. The parties are faced with a nigh on impossible task of trying to figure out how to prepare and present their cases if they do not know which judge will hear the case, what that unknown judge's opinion might be or the underlying assumptions upon which it will be based. Until, of course, after judgment is rendered. Too late.
>
> 25 These considerations should not, in my view, end the analysis. The court must also take into account access to justice. Generally speaking, lawyers who have risen to the level in the profession where they are recognized as experts will charge a fairly hefty hourly rate. As such, "[m]ost Canadians cannot afford to sue when they are wronged ... [w]ithout an effective and accessible means of enforcing rights, the rule of law is threatened." (*Hryniak v. Mauldin*, 2014 SCC 7 at para 1, [2014] 1 SCR 87 [*Hryniak*]).
>
> 26 Flowing from the above are the implications for the reputation of the administration of justice. There is a delicate balance. Proceeding without an expert lawyer's opinion, on the one hand, may leave the impression that the ultimate decision was determined by "the length of the Chancellor's foot" or skewed by individual bias. Requiring an expert opinion, on the other hand, may lead to only the well-heeled being able to pursue legal redress.
>
> 27 In summary, in my view, there are no words or phrases or general descriptions that are sufficiently magical in themselves to lead to a just determination in all cases as to whether expert lawyer opinion evidence going to standard of care is necessary. Courts ought to be cautious before proceeding without it, but not so much that regular folks with limited resources are denied the opportunity to have their complaints against lawyers adjudicated. Established practice and doctrine must sometimes yield to considerations of "proportionality, timeliness and affordability" (*Hryniak* at para 56).

[275] I also note the comments of Stewart, J. in *Gilbert v. Marynowski*, 2017 NSSC 227, holding that expert evidence was required on the issue of solicitor’s negligence.

> 35. There is ample authority for the principle that "as a general rule, it will not be possible to determine professional negligence in a given situation without the benefit of expert evidence": *Krawchuk v. Scherbak*, 2011 ONCA 352, [2011] O.J. No. 2064 (Ont. C.A.), at para. 132, leave to appeal refused, [2011] S.C.C.A. No. 319 (S.C.C.). The Nova Scotia Court of Appeal has similarly held that professional malpractice will normally require expert evidence on issues such as standard of care and causation: see *Szubielski v. Price*, 2013 NSCA 151, [2013] N.S.J. No. 685 (N.S. C.A.), at para. 12 (dealing with alleged dentist's malpractice).
>
> 36 In *Krawchuk* the Ontario Court of Appeal identified two exceptions to the general rule that determining a professional standard of care requires expert evidence:
>
> > 133 The first exception applies to cases in which it is possible to reliably determine the standard of care without the assistance of expert evidence. As explained by Southin J.A. at para. 44 of *Zink*, this will be the case only where the court is faced with "nontechnical matters or those of which an ordinary person may be expected to have knowledge."
> >
> > . . .
> >
> > 135 The second exception applies to cases in which the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard: see *Cosway v. Boorman's Investment Co.*, 2008 BCSC 1482, at para. 35. As can be seen, this second exception involves circumstances where negligence can be determined without first identifying the parameters of the standard of care rather than identifying a standard of care without the assistance of expert evidence.

[276] Based on the jurisprudence, the following principles appear to be uncontroversial:

1. Where a suit is brought for professional malpractice it is customary, and usually necessary, to lead expert evidence on the standard of care;
2. However, there are cases where the breach of the standard of care will be apparent without expert evidence;
3. There are at least two recognized specific exceptions where expert evidence is not needed:

   (a) where the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard; and,

> (b) for non-technical matters or those of which an ordinary person may be expected to have knowledge.

[277] Where things get difficult is with respect to the unique role of judges' experience with the practice of law and the legal system generally. The Alberta Court of Appeal stated in *Tran* that "there are cases where a judge can take judicial notice of the standard of care expected of lawyers" and that "[j]udicial notice is only properly taken in cases where the court collectively (and not just individual judges on the court) could make a finding of the standard of care without the assistance of expert evidence": paras. 21 and 23. The same court in *Mraz* stated that "[t]he bulk of modern authority suggests that in most circumstances judges are not ideally situated to determine whether a lawyer's standard of care in a particular circumstance was sufficient to discharge his or her fiduciary obligations": para. 47.

[278] With respect to the standard of care expected of a lawyer working under a joint retainer, the case law suggests that the lawyer is required to bring reasonable care, skill and knowledge to the performance of the services the lawyer undertakes to perform. The standard includes advising the client on all matters relevant to the retainer, as is reasonably necessary; protecting the client's interests; warning the client about any risks of the transaction; and drawing the client's attention to, and explaining unusual clauses in a document that might affect the client's interests. If the lawyer obtains material information from one client, the lawyer must share that information with each of the other clients. The lawyer must not favour one client over another.

[279] The Plaintiff submitted an excerpt from LIANSwers (May 2021) which is, on its face, a newsletter with information to assist lawyers reduce the likelihood of being sued for malpractice, issued by the Lawyers Insurance Association of Nova Scotia. On the face of the document is the following quote: "The material presented is not intended to establish, report, or create the standard of care for lawyers." The Plaintiff nevertheless relied on this document in closing to describe the standard of care applicable to Harding. This document speaks to the unbundling of legal services and the risk to clients in doing so. In addition, the document has remarks relating to conveyancing practices and limited-scope retainers. The following excerpt was emphasized by the Plaintiff:

> A lawyer who accepts a limited scope retainer must advise the client about the nature, extent and scope of services that the lawyer can provide and must confirm in writing to the client what services will be provided, prior to completing the work.

> The lawyer should set out in writing the limitations of such limited scope retainer and caution the client on the risks.

[280] This document then references a 2012 Rule in the Nova Scotia Barristers Society *Code of Professional Conduct*. It does not refer back to expectations in 2006 or 2007. As such, it is, to that extent, irrelevant to the scope of duty at the relevant time. Furthermore, there is no discussion or guidance in relation to lawyers practicing in rural areas where the availability of legal services are not plentiful. Does this affect the standard? Did it back in 2006-2007? No guidance has been furnished to the court. I place no weight on this material.

[281] The Plaintiff advanced this claim without any expert evidence addressing the standard of care. The court is left asking itself how to determine the standard of care in a dual-retainer, real estate transaction, in a rural area, in 2006-2007, in relation to advice concerning environmental contamination?

[282] There is no dispute that a lawyer owes a client a fiduciary duty to act in the best interests of that client (*Boardman et al. v. Phipps*, [1966] 3 All E.R. 721 (H.L.); *Davey v. Woolley* (1982), 35 O.R. (2d) 599 (Ont. C.A.), leave to appeal to S.C.C. refused, (1982), 37 O.R. (2d) 499n.

[283] As stated in *R. v. Neil*, 2002 SCC 70, a lawyer has a duty to avoid conflicting interests; a duty of commitment to a client's cause; and a duty of candour with the client relevant to the retainer. *1483677 Ontario Ltd. v. Crain*, 2015 ONSC 6217, involved the evidence of an expert on the issue of lawyers' conflict of interest. On the issue of the standard of care and its relationship to the Rules of Professional Conduct, Wilson J. wrote:

> 155 The applicable standard of care is that of a reasonably competent solicitor: *Ristimaki v. Cooper*. A lawyer who is retained must bring "reasonable care, skill and knowledge to the performance of the professional service which he [or she] has undertaken." As well, "a solicitor's conduct must be viewed in the context of the surrounding circumstances. The reasonableness of the lawyer's impugned conduct is judged in light of the surrounding circumstances such as the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client."
>
> …
>
> 161 I am guided by the comments of Justice Cromwell in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, where he discussed the relationship between the Law Society of British Columbia's *Professional Conduct Handbook* (1993) and the law of solicitor's negligence.

162 At para. 29, Cromwell J. stated the following:

> [...] there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship … They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence …

[284] While not prohibited, dual retainers in real estate matters have been the subject of discussion in many a case. The words of Laskin, C.J., for the majority, in *McCauley v. McVey*, [1980] 1 S.C.R. 165, at 168, are apt:

> ... However simple and uncomplicated a real estate transaction may appear, it is the prudent course, if other solicitors are available in the area, for a solicitor to act in one interest only and thus avoid the embarrassment of possible later withdrawal, to the detriment of both parties for whom he had agreed to act.

[285] In *Davey v. Whoolley, Hames, Dale and Dingwall*, (1982), 133 D.L.R. (3d) 647, 1982 CarswellOnt 844, leave to appeal denied, 37 O.R. (2d) 499 (note), the Ontario Court of Appeal said the following about dual retainers:

> 9 It was submitted by counsel for the defendants that it is not a hard and fast rule that solicitors cannot act on both sides of a transaction and, indeed, that it is not uncommon for solicitors, particularly in rural areas, to represent both vendor and purchaser on a real estate deal provided they make full disclosure and both parties consent to their acting. This may well be true although even in the case of a so-called "simple" real estate deal, I doubt that it is good practice. In any event the solicitor unquestionably assumes a dual role at his own risk, the onus being on him in any lawsuit that ensues to establish that the client "has had the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded": see London *Loan & Savings Co. of Canada v. Brickenden* [1933], S.C.R. 257 at p. 262 (Crocket J. quoting from Lord O'Hagan in *McPherson v. Watt* (1877), 3 App. Cas. 254 at p. 266). Even on the simple real estate deal the consequences of conflict can manifest themselves in a failure to make the requisition that allegedly should have been made and would have been made if the solicitor had been motivated solely by a concern for the Plaintiff. On a transaction of the degree of complexity of the one before the Court on this appeal I think it is clear that the solicitor cannot act on both sides and all the more so when there is

> superadded to the divided loyalty owed to the two clients adverse in interest the personal financial interest of the solicitor's senior partner.

[286] In *Davey v. Wooley*, Wilson J.A. (as she then was) explained that the fiduciary duty to act in the client's best interests also applies where the conflicting interests are between clients. She said:

> 8 … A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests. This is not confined to situations where his client's interests and his own are in conflict although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so. The underlying premise in both these situations is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith. [Citation omitted.]

[287] In my view, the following points can be distilled from the jurisprudence:

- The Code of Professional Conduct requires that before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

  (a) the lawyer has been asked to act for both or all of them;

  (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

  (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

- Consent in writing, or a record of the consent in a separate written communication to each client is required.

- A failure to comply with the Code of Professional Conduct is not necessarily a breach of the standard of care. Whether a lawyer has breached the standard of care requires consideration of the lawyer's conduct as a whole.

- A professional negligence claim against a lawyer is typically accompanied by a claim of breach of fiduciary duty. The case law suggests that it can be difficult to separate the two concepts due to their interrelated nature.
- That said, the case law is clear that a lawyer is required to bring reasonable care, skill and knowledge to the performance of the services the lawyer undertakes to perform. The standard of care has been held to include advising the client on all matters relevant to the retainer, as is reasonably necessary; protecting the client's interests; warning the client about any risks of the transaction; and drawing the client's attention to, and explaining, unusual clauses in a document that might affect the client's interests. In the joint retainer context, if the lawyer obtains material information from one client, the lawyer must share that information with each of the other clients. The lawyer must not favour one client over another.

[288] I am troubled by the lack of expert evidence on the standard of care in these circumstances. I find the Plaintiff has failed to prove what the standard was at the time. There is no question that once Harding decided to act for both the Plaintiff and the Municipality, he was walking "the tight rope of fiduciary obligations" (*Barrett v. Reynolds*, 1998 NSCA 109, at para. 57). The prudent course, if other solicitors are in the area, would be to avoid a potential conflict and only act for one side of a real estate transaction: *McCauley v. McVey*. However, what did Harding do or not do in this matter that caused a loss? Having already found as fact that he did not give any environmental assurances, and indeed was never even asked for advice on environmental issues, what did his professional conduct or omissions cause with regards to damages? Does a standard exist requiring Harding to raise environmental issues in the face of a client who is experienced and is not seeking such advice? Yes, the APS is in several different fonts and is not the picture of perfect drafting – it is inelegant to be sure. In addition, the deposit was the purchase price. The latter is obviously unusual. However, none of this exhibits negligence which caused or contributed to the Plaintiff closing the deal and later facing remediation costs from contamination. Furthermore, Harding may not have explained to Anthony the email from the Municipality's insurer and what was suggested should be in the contract. While this is not what is contemplated in a dual retainer, it had no bearing on Anthony's decision to close the deal. Also, Harding probably should not have written to the Board after the fact in 2007 given the potential for a conflict but this is again not the issue before me. Despite these issues, the responsibility falls on Anthony.

Anthony came to court trying to rewrite the contract, reinvent his solicitor-client relationship and alleviate his own responsibility.

[289] Given the absence of expert evidence assisting me to determine the standard of care, I am not satisfied that the plaintiff has provided the basis necessary to make a finding on that element. I am not satisfied that this is a situation where the standard can be determined without expert evidence. In the event I am wrong, I will go on to consider causation.

Causation

[290] In *Gilbert v. Marynowski*, *supra*, Justice Stewart held that she could not find a breach of the standard of care by the Plaintiff's counsel without expert evidence. Even if there was a breach, however, she said the following with respect to causation:

> 53 The requirement for a claimant to establish causation was summarized in *Musgrave v. Ford*, 2016 NSSC 157, [2016] N.S.J. No. 253 (N.S. S.C.), where LeBlanc J. said:
>
> > 38 Mr. Musgrave must show that he would not have sustained the damages in question but for the negligence of Mr. Ford. If he would have suffered the loss even if Ford had met the requisite standard of care, then the negligence did not cause the Mr. Musgrave's loss: see *Rice v. Condran*, 2012 NSSC 95; *BSA Investors Ltd v. Mosly*, 2007 BCCA 94 at para 29.
>
> 54 A finding of breach of duty is a separate issue from causation. Causation cannot be assumed from a breach of duty. There must be proof that the breach of duty by the professional caused damage or loss to the client. A client who proves the existence of a duty, a beach of the standard of care, and damages will still be unsuccessful unless a causal link between the breach of the standard of care and the damages is established. In keeping with the traditional "but for" test for causation, the assertion of causation in this case rests on the assertion that the Marynowskis would have behaved differently — and specifically that they would not have entered into the APS — if only Ms. Malone had reviewed the terms and Mr. Cassidy had confirmed the financing condition. In that respect, Neilson J. (as she then was) commented in Newton v. Marzban, 2008 BCSC 328, [2008] B.C.J. No. 472 (B.C. S.C.), at para. 761:
>
> > 761 In considering that issue, I am mindful that I must resist the tendency to view the Plaintiff's decision to settle with "the acuity of vision given by hindsight": *Karpenko v. Paroian, Courey, Cohen and Houston* (1980), 117 D.L.R. (3d) 383 at 398 (Ont. H.C.J.). I adopt the view of Groberman J. in *Sports Pool Distributors Inc. v. Dangerfield*, 2008 BCSC 9at para. 97, that in cases of professional negligence a bare assertion that a client would have behaved differently if he or she had received proper advice should be

> viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of Southin J.A. in *Hong Kong Bank of Canada v. Touche Ross & Co.* (1989), 36 B.C.L.R. (2d) 381 at 392 (C.A.):
>
> > It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.

[291] The fact is Anthony gave instructions to close the deal without seeking any advice in relation to the environmental condition of the Property from Harding. Why would he? Harding was not an environmental expert and Anthony had experience in this area. Nor had he or any of his companies ever requested such advice from Harding in the past. Should Harding have provided advice on this issue? Should a reasonably competent counsel provide advice in relation to environmental assessments generally and Phase 2 assessments in particular? As I have already held, I cannot assess that question without expert evidence. But I am, in any event, satisfied that the lack of such advice was not a cause of any damages to the Plaintiff, because I am not convinced that Anthony would have acted differently even if Harding had departed from tradition and offered advice on environmental issues. Anthony had made an agreement where he was content to take on this risk paying $25,000.00 for a million dollar property. As in *Upper Valley Dodge Chrysler v. Cronier Estate* (2005), 10 B.L.R. (4th) 201 (Ont. C.A.), this was a situation where the lawyer was retained to document a transaction the parties already agreed to and the plaintiff would have gone through with in any event.

[292] However, despite that, it is prudent to review the following. While the parties have at various times referred to clause 9 of the APS as a "hold harmless" clause, this is not an accurate description of its language. As stated in *Tri-County Regional School Board v. 3021386 Nova Scotia Ltd.*, 2021 NSCA 4:

> 31 …The Board was the former occupier of the property but was not an owner. The property was owned by the Municipality. The Company and the Municipality executed the APS, which addressed the condition of the property in what the Company refers to as a "hold harmless" clause:
>
> > 9. The Vendor makes no representations about the condition of the property but agrees to obtain from the School Board and or their consultants an opinion as to the removal of tanks and the condition of the property being satisfactory to the purchaser.

> 32 In *Seven Estate Ltd. v. Co-operators General Insurance Co.* [1997 CarswellBC 2652 (B.C. S.C.)], 1997 CanLII 2372 the court refers to the following definition of a "hold harmless" clause:
>
> > [73] A "save harmless" or "hold harmless" clause is defined *in Black's Law Dictionary* (St. Paul: West, 1990), as "a contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility."
>
> 33 This is not the effect of clause 9. Rather, it confirms the Municipality makes no representations with respect to the condition of the property but agrees to obtain from the Board or their consultants an opinion about the removal of oil tanks. It would be the Company's decision whether the opinion was satisfactory. That said, I will refer to clause 9 as the "hold harmless" clause as that is the term used throughout these proceedings to describe it.
>
> 34 Pursuant to the terms of the APS, the Company agreed to purchase the property on the basis that the Municipality was not making any representations about the condition of the property, and without taking any steps to investigate the environmental condition of the property itself. The only obligation on the Municipality was to provide an "opinion" from the Board "and or" their consultants that was satisfactory to the Company. The Company received the AGAT Laboratories opinion anticipated by the "hold harmless" clause from the Municipality and was satisfied with it as it chose to proceed with the closing.
>
> 35 The Company could have protected its interest through the APS by negotiating terms that would address any potential environmental or contamination concerns, or any other concerns with the condition of the property. Additionally, pursuant to the "hold harmless" clause it appears the Company could have requested further information from the Municipality if the opinions provided were not satisfactory. This is not a situation where the contract was silent on the matter at issue. The Company chose not to take either of the contractual "paths of protection" (*Maple Leaf*, *supra*, at para. 68) that were available to it.

[293] The court further stated:

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

[294] There is a plethora of evidence that the Plaintiff accepted the risk when it bid and was successful in purchasing land “as is”, with “no environmental assurances” and then closing the transaction after receipt of soil analysis.

[295] As Stewart J. did in relation to causation, in *Gilbert v. Marynowski*, I reject the evidence of Anthony on behalf of the company that if he had gone over the APS line by line he would have done something different. He had the benefit of clause 9 and could have pursued one of two other courses of action. He could have either asked for more testing or information concerning the state of the Property, or he could have terminated the APS and walked away from the deal. He chose neither. He was content to rely on the soil testing done by AGAT and go forward with the purchase. He did so with no reliance on, or advice sought from Harding.

[296] *Rice v. Condran*, 2012 NSSC 95, indicates that in order to be entitled to damages for the negligent legal advice, an aggrieved plaintiff must demonstrate a causal connection between the breach of the standard of care and the resultant action or inaction of the client.

[297] In *MacCulloch v. McInnes Cooper & Robertson*, 2001 NSCA 8, Bateman J.A. discussed this element in detail. She said for the court:

> 59 *Sykes v. Midland Bank Executor & Trustee Co.*, [1970] 2 All E.R. 471 (Eng. C.A.) , referred to by Granger, J. in *Sorkos*, is commonly cited for the proposition that, where negligent advice has been given by a solicitor, the clients who suffered damage must prove that had proper advice been given, they would not have entered into the transaction or would have entered it on different terms…
>
> …
>
> 64 Causation, particularly in cases of negligence through advice not given, is primarily a question of inference by the trial judge as was recognized in *Allied Maples Group v. Simmons & Simmons*, [1995] 4 All E.R. 907 (Eng. C.A.). There Allied Maples acquired assets of the Gillow Group. They complained that in the course of the acquisition the defendant solicitors had insufficiently advised them as to the "first tenant liabilities" that might and did eventuate from leases originally held by the Gillow company. The judge held that Allied Maple must prove on balance of probability that, had it received proper advice, it would have taken steps to negotiate with Gillow to obtain protection. There was ample evidence to support the judge's findings on this. The Law Lords agreed that where the complaint is one of advice not given, the hypothetical question of what the Plaintiff would have done requires that the judge draw an inference. While such inferences are not as insulated from review by appellate courts as are findings of primary fact, deference is nonetheless due given the advantage enjoyed by the trial judge.
>
> 65 Stuart-Smith, L.J. said at pages 914 - 915:
>
> > 1. What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists on some positive act or

> misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. ...
>
> 2. If the defendant's negligence consists of an omission, for example to provide proper equipment, or to give proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the Plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The Plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary way, where the action required of the Plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it...
>
> Although the question is a hypothetical one, it is well established that the Plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case the Plaintiffs had to prove that, if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The judge held that they would have done so. I accept Mr Jackson's submission that since this is a matter of inference, this court will more readily interfere with a trial judge's findings than if it was one of primary fact. But even so, this finding depends to a considerable extent on the judge's assessment of Mr Harker and Mr Moore, both of whom he saw and heard give evidence for a considerable time. Moreover, in my judgment there was ample evidence to support the judge's conclusion. Mr Jackson's attack on this finding was, as I have explained, something of an afterthought and not, I think, undertaken with great enthusiasm. I am quite unable to accede to it.

[298] In order to prove causation, the Plaintiff must demonstrate that but for Harding's alleged negligence it would have acted differently and thus avoided the loss it is alleged to have suffered. From the evidence, I conclude that causation cannot be found when one considers the following:

(a) There was no evidence of past transactions wherein Harding provided advice to Anthony, the Plaintiff, or any other entity affiliated with Anthony with respect to environmental due diligence. Harding was not consulted by Anthony or the Plaintiff for advice or with respect to the content of the proposals submitted in reply to the February and October RFPs.

(b) Anthony's proposals in response to the October RFP specifically disclaimed a request for a "Phase I" environmental site assessment.

(c) Anthony knew (or reasonably ought to have known) of the risk of environmental contamination on the Property based on his possession of the Jacques Whitford Phase I Environmental Site Assessment prepared in 2000 with respect to 3723 and 3737 Highway No. 3. He alone had this information.

(d) Without the need for any advice or warning from Harding, Anthony understood the nature, purpose and reasons for requesting a Phase I and Phase II environmental site assessment with respect to a property.

(e) Anthony was aware that, at all times material hereto, there was no obstacle preventing him from retaining an environmental expert on behalf of the Plaintiff to review the environmental reporting or to conduct environmental site assessments with respect to the Property.

(f) Anthony agreed that the agreement of purchase of sale entitled the Plaintiff to refuse to close the transaction if it was not satisfied with the condition of the Property or the soil anaylsis.

(g) All communications concerning the condition of the Property, inclusive of environmental testing, were exchanged directly by Anthony, on behalf of the Plaintiff, and Holland, on behalf of the Municipality. With limited exceptions, Harding was not copied on the aforementioned correspondence. Harding was not consulted by, and did not provide advice to the Plaintiff or the Municipality concerning these issues.

(h) On January 22, 2007 (the original closing date), Anthony informed the Municipality that he was not satisfied with the information provided concerning the environmental condition of the Property. The closing date was extended by agreement. Harding was not consulted by, and did not provide advice to the Plaintiff or the Municipality concerning these issues.

(i) Anthony was solely responsible for reviewing the environmental reporting received from the Municipality, and he did in fact review the environmental reporting received, communicated his satisfaction with same, and instructed Harding to close the transaction.

[299] Anthony understood the nature and purpose of environmental site assessments, inclusive of Phase II site assessments. He had experience with assessments prepared for other properties, and could have obtained such an assessment or other professional assistance if he so decided. Anthony, on behalf the Plaintiff, elected not to proceed in this manner.

[300] It is equally undisputed that Anthony was solely responsible for reviewing the environmental reporting received concerning the Property. This was wholly consistent with the remainder of the transaction - Anthony equally did not seek Harding's advice concerning the content of the Plaintiff's proposals to the Municipality.

[301] For these reasons, I conclude that the plaintiff has not established the element of causation.

Damages

[302] The Plaintiff also advanced this claim without any expert evidence concerning the extent of alleged contamination or of the cost of remediation.

[303] The Plaintiff called evidence from Russell Finley (Finley), a civil engineer who works as a hydro-geologist, with 35 years of experience working with contaminated sites. Finley testified that Anthony sought a Phase I assessment of the Property, which he completed after the closing of the APS. Finley oversaw the identification of potential environmental concerns and the need for additional work, preparing several reports, although he was not advanced as an expert witness. I rendered an earlier decision in relation to these reports (2021 NSSC 155) concluding that much of his intended evidence constituted inadmissible opinion evidence.

[304] In fact, the evidence was that not all of the remediation has been completed, with the Plaintiff deciding to await the results of the litigation. The Plaintiff argues that I can decide liability and then have the parties return to the issue of damages at another time, although the Plaintiff did not seek to bifurcate its claim. The Plaintiff relies on *Doucet-Boudreau v. Nova Scotia (Department of Education*, 2003 SCC 62, where LeBlanc J. had retained jurisdiction to receive ongoing reports as to the provincial government's progress in building school facilities mandated by *Charter* language rights. These ongoing reports were rooted in the application of s. 24 of the *Charter*. This is not the case before me.

[305] There is no evidence before the court as to the quantity of soil contamination or the cost to remediate what may exist on the site. This is simply an area without evidence. I also do not have any information on what effect on the market value of the Property this alleged contamination may have. There is a dearth of evidence on a plethora of issues.

[306] There is no basis to conclude that the Plaintiff has suffered a loss or that its claim should be quantified on the basis of remediation costs allegedly incurred. The Plaintiff has produced no expert report quantifying its loss or even supporting the environmental remediation conducted on the Property on that basis alone.

[307] In *340268 v. Rohcan*, 2017 ONSC 6676, the court declared itself seized to obtain additional information. The issue was what level of remediation should be performed, who was required to perform it, and to what level. The court directed the parties to obtain and present additional information before a final decision was made. This case is distinguishable, given the nature of the agreement between the parties and the declarations requested by both parties. *Rochan* was premised on contractual interpretation and obligations, not a negligence action.

[308] The general rule is that all issues should be tried together unless it is just and convenient to try them separately, considering the interests of the parties and the proper administration of justice. No severance motion was ever advanced by the Plaintiff. The defendant appropriately proceeded on the basis that all issues would be dealt with at once.

[309] Given the lack of evidence, even were other elements established, I am unable to make any finding as to the scope of the alleged damages suffered by the laintiff.

Conclusion

[310] The Honourable Justice Muise presided over a proceeding wherein 3021386 Nova Scotia Ltd., the Plaintiff before me, brought a claim from an implied grant of easement to the numbered company to draw water from the soccer field well (*3021386 Nova Scotia Ltd. v. Barrington (Municipality),* 2014 NSSC 1). This was in relation to lands adjacent to the Property. The water being drawn into the old Senior High School was being drawn from a well by the soccer field, not the courtyard well as believed. In the process of deciding the numbered company had failed to establish the implied easement, Justice Muise stated at para. 88:

> My conclusion regarding unfairness to the Municipality is further supported by the fact that, during the request for proposals process, Mr. Anthony, initially on behalf of Anthony Properties Ltd., and ultimately on behalf of the Applicant Numbered Company, indicated that he did not need an environmental assessment prior to closing and was prepared to assume the environmental risks associated with the property.

[311] No party before me raised estoppel or otherwise suggested that this issue had been previously decided. Yet it bears mention that in an earlier proceeding this was stated. After weeks of evidence, I have found that Anthony – on behalf of the Plaintiff assumed these risks and I so conclude based on the *viva voce* evidence of the parties and other witnesses and based on the raft of documents placed before me.

[312] The claim against the remaining defendant, Harding, is rooted in an alleged breach of the standard of care of a reasonable and prudent solicitor, in his alleged failure to advise the Plaintiff to seek a Phase II environmental assessment, failure to advise of the impact of the "hold harmless" clause in the APS, and a breach of the dual retainer regarding the removal of the oil tanks and assurances as to the environmental standards. Furthermore, the Plaintiff alleges the defendant breached the dual retainer when he had discussions with the Municipality about the inclusion of the "hold harmless" clause in the APS and failed to share those discussions with the Plaintiff.

[313] I do not accept Anthony's version of events. I reject any suggestions he has made that he relied on Harding in relation to the environmental condition of the Property or that Harding made any representations at all on that subject. He did not. Where the evidence of Anthony conflicts with the evidence of Harding, I accept that of Harding. The "as is" transaction is antithetical to Anthony's subsequent suggestions that he was seeking and given environmental assurances.

[314] This is a tale of Anthony's gamble to purchase a significant property at a significantly reduced cost. The colloquial phrase: he rolled the dice and came up snake eyes, comes to mind. However, despite any remediation cost, Anthony still got what he was looking for. A steal of a deal. Maybe not the steal he was hoping for, but still a million dollar plus property for $25,000.01.

[315] Simply put, Anthony was the author of any Plaintiff's misfortune. Not Harding. The claim is dismissed.

[316] If the parties are unable to agree on costs, they may provide written submissions within one month of the date of release of this decision.

Brothers, J.