

CANADA / JUDGMENT

Tran v. Bola

2022 BCSC 377

COURT

Supreme Court of British Columbia

DECIDED

9 March 2022

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2022 BCSC 377 Tran v. Bola

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tran v. Bola,

2022 BCSC 377

Date: 20220309

Docket: S162638

Registry: Victoria

Between:

Chan Quoc Tran, Lieu Hong Nguyen & KT604 Development Ltd.

Plaintiffs

And:

Jerry Bola, Mary Whillas Higgins, Tri-X Excavating Ltd.

Defendants

And:

Chan Quoc Tran, Lieu Hong Nguyen & KT604 Development Ltd.

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiffs and

Defendants by Way of Counterclaim:

S. A. Gray-Schleihauf

Counsel for the Defendant, Jerry Bola:

R. S. Margetts, Q.C.

and C. D. Judge

Place and Dates of Trial/Hearing:

Victoria, B.C.

April 19-23, 2021

April 26-29, 2021

September 21-22, 2021

Place and Date of Judgment:

Victoria, B.C.

March 9, 2022

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A. INTRODUCTION

- [1] The plaintiffs purchased a property at 3015 Eastdowne Road, Victoria, British Columbia in February 2014. The defendant, Jerry Bola, was their realtor and then general contractor hired to demolish an existing dwelling on the property and construct a new one.
- [2] In the subject claim the plaintiffs now seek damages for breach of contract, negligent misrepresentation, negligence and breaches of the Environmental Management Act, S.B.C. 2003, c. 53 ("EMA") with respect to the removal of an inert underground oil tank from the property and remediation of soil contaminated with furnace oil. Damages are also sought by the plaintiffs for deficiencies in the construction of the new house.
- [3] The defendant counterclaims for items that he says the plaintiffs did not pay for.
- [4] There are significant factual issues about the oil tank and soil contamination. The tank was rendered inert in 2013 with a permit and this was disclosed in the listing for the property. The plaintiffs say the defendant never told them about the tank and that the listing they received did not contain the information about the inert tank. They say they did not know about it until they took over contracting for the new house from the defendant in late 2015.
- [5] The tank was in place in 2013 when it was rendered inert but it was not found during the demolition of the old house or during the excavation for the foundation of the new house in October 2014. A neighbour testified that she saw it being removed in February 2015. At the material times there was no requirement to remove an inert oil tank but, if it was moved, a permit was required. Subsequent investigations have not found the tank and there is no permit for its removal.
- [6] In early 2016 soil contaminated with furnace oil was found on the property and the plaintiffs paid a significant amount to have the soil remediated.
- [7] The plaintiffs say the defendant knew or should have known about the underground tank and contaminated soil and had a duty to do something about it.

B. BACKGROUND

- [8] The subject matter of the claim and counterclaim is a property located at 3015 Eastdowne Road, Victoria, and the demolition of an old house and construction of a new one on the property.
- [9] The plaintiff Chan Quoc Tran is a business person in Victoria. The plaintiff Lieu Hong Nguyen is a business person in Victoria. She and Mr. Tran were married at the time of the events in issue.
- [10] The plaintiff KT604 Development Ltd. is a company incorporated under the laws of British Columbia with a business address in Victoria. Mr. Tran is the sole shareholder and director of KT604.
- [11] The defendant Jerry Bola is a real estate agent and a construction manager in Victoria.
- [12] The defendant Tri-X Excavating Ltd. is a company incorporated under the laws of British Columbia with an address in Victoria. Mr. Bola is the directing officer of Tri-X Excavating Ltd. The claim against Tri-X was dismissed by consent of all parties on October 23, 2020.
- [13] The defendant Mary Whillas Higgins was the previous owner of the property at 3015 Eastdowne Road, Victoria. The claim against Ms. Higgins was dismissed by consent of all parties on March 5, 2019.
- [14] Mr. Tran testified that he first met Mr. Bola in 2003 at a martial arts gym where Mr. Bola was an instructor and an owner. They would see each other frequently, they became friends and they would "talk about everything."
- [15] At some point Mr. Bola learned that Mr. Tran was interested in developing properties and in 2006 he helped Mr. Tran sell a property (unrelated to the subject claim). Mr. Bola permitted Mr. Tran to access a realtors' website, Interface Express, to look for development properties. Mr. Bola uses a related program, Interface. Both websites have essentially the same information but in different formats. The two sites require the same password and Interface Express automatically requires a new password every 90 days. Mr. Tran would contact Mr. Bola when the password expired and Mr. Bola would provide him with the updated password. Properties are usually listed on Interface and Interface Express a day before they are listed publicly.
- [16] Sometime around the end of 2013 Mr. Tran and Mr. Bola spoke about the property at 3015 Eastdowne Road, in the municipality of Oak Bay, and the idea of tearing down the existing house, building a new one and then selling it. There is a dispute about who first saw the listing for the property and who first told the other person about it. The information on the Interface Express site includes reference to an inert oil tank but Mr. Tran said he did not see it. No one says an oil tank was discussed at this point and nor was soil contaminated with furnace oil discussed.

[17] On Interface/Interface Express there is a tab titled "Agent Info." For the 3015 Eastdowne Road property the following information was provided on the line "Realtor Notes":

Call LS. Listing Contract altered. Clauses 5(a)(iii) & 10(b) deleted. Interior measurements by Realfoto. Lot size from BC Assessment. Buyer to verify any and all information. Dec. 2013 Oil Tank rendered inert. See Oak Bay Fire Dept. Inspection.

[Emphasis added].

[18] The Oak Bay Fire Department inspection referenced here is dated December 27, 2013 and was, according to Mr. Bola's evidence, only available on Interface, not Interface Express, although the information referencing the report was available on both sites. Captain Kivell of the Oak Bay Fire Department testified that the inspection was completed by the Assistant Fire Chief at the time. It records an inert oil tank as follows:

Render inert 300 gal ust [underground storage tank]

Cleaned and pumped out

O.K. to fill with clear sand

Ensure vent and fill hole are filled/capped.

Tank located under concrete deck at rear of structure

The person who did the actual work on the tank, including being inside it, Corey Hughes, testified that there was no contaminated soil. He and the Assistant Fire Chief would have been looking for that.

[19] The property at 3015 Eastdowne Road was listed on February 5, 2014 (it likely was listed on Interface one to two days before then). At this time Mr. Tran was travelling back and forth between Victoria and Vancouver developing some properties in each place. One published listing did not include any reference to an oil storage tank or any inspection. Another published listing said "Dec. 2013 Oil tank rendered Inert - See Oak Bay Fire Dept. Inspection." Mr. Tran testified that he did not receive the listing with the information about the oil tank until this litigation. A number of documents from the Corporation of the District of Oak Bay ("Oak Bay") were entered in evidence and an inspector from Oak Bay and Captain Kivell of the Oak Bay Fire Department testified. What Mr. Tran knew at the material times is an important issue and this evidence is discussed below.

[20] The plaintiffs agreed to purchase the property at 3015 Eastdowne Road to pursue the development project. Mr. Tran used a \$350,000 loan from his mother and funds from the sale of another property to do so. The object of the purchase was the value of the land, not the existing dwelling. Mr. Bola acted as the plaintiffs' real estate agent and agreed to be the general contractor for the development project. He was to be paid \$35,000 to oversee the demolition of the existing house and the construction of a new one. The parties now dispute the terms of this oral contact.

- [21] According to Mr. Tran, Mr. Bola said the cost of the new house would be about \$110 to \$120 per square foot and it would take nine to 12 months to complete. In a letter he wrote on November 30, 2015 Mr. Bola disputed that figure and said that because the property was in Oak Bay the agreement was \$140 per square foot. There is a dispute between the parties about the length of time it took to complete the project.
- [22] The property was purchased for \$566,000 with a contract of purchase and sale dated February 6, 2014. That was also the first date that Mr. Bola visited the site. Mr. Tran was not on site. There was no property inspection by the plaintiffs before making their offer; Mr. Tran testified that Mr. Bola said it was not necessary because the house was going to be torn down. Mr. Bola says he and Mr. Tran agreed there was no need for an inspection. Mr. Bola did do a visual inspection for asbestos and he researched and prepared the required paperwork.
- [23] The asking price was \$549,000 and Mr. Tran testified that there was one competing offer. Mr. Bola testified there were three competing offers. Mr. Tran could not remember why they made an offer at about \$16,000 more than the asking price. Mr. Bola explained this by saying that he had experience with competing offers and they adopted his usual practice: the offer was the asking price plus \$5,000 for each of the three competing offers and an additional \$1,000. The vendors counter offered on the subjects of possession date, date of inspection and state of property title in Addendum II; these were accepted by the plaintiffs. The completion and possession date was February 28, 2014.
- [24] With respect to any oil tank the disclosure statement in the contract of purchase and sale had the question: "Are you aware of any past or present underground oil storage tank(s) on the Premises?" The sellers did not answer yes or no and instead answered "Do Not Know" or "Does Not Apply." The contract also stated that any inspection could include "verification of existence of underground oil storage tanks." The plaintiffs signed this contract and have to be taken as knowing of this information.
- [25] The copy of the contract provided by Mr. Bola in his evidence included a copy of the listing with the following:
- Call LS. Listing Contract altered. Clauses 5(a)(iii) & 10(b) deleted. Interior measurements by Realfoto. Lot size from BC Assessment. Buyer to verify any & [sic]
- [26] Compared with the listing information provided under "Realtor Notes" set out above, the end of this statement appears to be cut off. Significantly, unlike the above listing, it did not include "...and all information. Dec. 2013 Oil Tank rendered inert. See Oak Bay Fire Dept. Inspection." This is the document that Mr. Tran says he saw and relied upon. For that reason he says he did not know about the oil tank.
- [27] Mr. Tran and Mr. Bola met at the Oak Bay municipal office on February 13 or 14, 2014, possibly on both dates. Mr. Bola testified that he gave Mr. Tran a copy of the Oak Bay Fire Department inspection report about the inert oil tank on the subject property. Mr. Tran says

he was not given this document. Mr. Bola testified that he told Mr. Tran words to the effect of they should leave the tank where it is and not to worry about it. His reasoning was that if they came across the tank they would remove it after paying for a \$100 permit. Otherwise they would not "need to touch it." As will be seen, in 2014-2015 there was no legal requirement to remove an underground oil tank although a permit was required if it was moved or rendered inert in place. There was no discussion about contaminated soil.

- [28] The contract of purchase and sale was signed and initialled by Mr. Bola on behalf of Mr. Tran who received a copy by email. This was with the approval of Mr. Tran who testified that he and Mr. Bola discussed price, location size and other matters before deciding to buy it.
- [29] The parties proceeded with their plan to demolish the existing dwelling and construct a new one. It is not clear when it was agreed but there was an oral contract between the parties in which the plaintiffs hired Mr. Bola to be the general contractor for construction of the new house. This was a different agreement than the previous one retaining Mr. Bola as a realtor for the plaintiffs. The records of Oak Bay included an "Authorized Agent's Letter", dated June 24, 2014, which appointed Mr. Bola as the authorized agent of Mr. Tran for building or development permits so presumably Mr. Bola provided some contracting advice before the sale was completed.
- [30] Mr. Tran testified that the parties agreed that the house would be completed in nine to 12 months. A couple of months longer would not have been a "big deal", according to Mr. Tran. Also, Mr. Bola was to be paid a \$35,000 fee for his work, payable in draws. Mr. Bola agrees his fee would be \$35,000 (although his counterclaim seeks payment for work he did beyond his responsibilities as contractor).
- [31] The apparently friendly relationship between the parties at the beginning of the project is long gone and they now do not agree about very much else. Ultimately, the existing house was demolished in October/November 2015 and construction of the new house took about two years to complete with each party blaming the other for the delay.
- [32] A neighbour testified that, early in the morning on February 3, 2015 when it was dark, she observed an excavator dig out an oil tank from the back of the property at 3015 Eastdowne Road, load it on the back of a flat bed truck with another above ground tank and take them away. The location of the oil tank, whether it was removed and who removed it are significant factual issues that are discussed below in some detail.
- [33] Mr. Tran testified that he had very little to do with the project and he relied on Mr. Bola for most things. Mr. Tran would visit about once a month to discuss any significant costs with Mr. Bola before agreeing to them. Mr. Bola provided him with the invoices for the sub-contractors and Mr. Tran paid them directly. Mr. Tran found a flooring contractor and Mr. Bola agreed to use them. There was a problem with kitchen cabinets coming from the manufacturer with the wrong colour but Mr. Tran testified that Mr. Bola took care of that and paid for the replacement cabinets. According to the plaintiffs, the exterior stain was not done properly. These items and others are disputed by the defendant.

- [34] Mr. Bola testified that he generally does not like customers getting their own sub-trades because he has established relationships with people who are reliable and do good work. He allowed Mr. Tran to choose his own contractors "out of friendship."
- [35] However, the participation of Mr. Tran added considerable time to the project, according to Mr. Bola. This would happen when Mr. Bola would give Mr. Tran an estimate for some work and Mr. Tran would then proceed to find a different, cheaper estimate. For example, Mr. Bola's stucco sub-contractor provided an estimate and had set up his scaffolding. However, Mr. Tran found another plasterer and the scaffolding in place had to come down. Another example was flooring where, according to Mr. Bola, Mr. Tran obtained a different estimate. Other examples cited by Mr. Bola are interior painting, tiling, drywall, rock face and the kitchen. With respect to the exterior stain, Mr. Bola testified that his crew put on three coats of clear-coat without stain to protect the natural cedar finish. However, Mr. Tran put stain over the clear-coat, that should not have been done and that is what caused the problems.
- [36] The records of Oak Bay describe the following inspections at various stages:
- Installation of underground fuel oil tank: July 6, 1953
- Oil tank made inert: December 27, 2013
- [Sale of 3015 Eastdowne Road to plaintiffs: February 6, 2014]
- Application for permit: June 24, 2014
- First permit: October 9, 2014
- Demolition permit: October 9, 2014
- Site inspection notice (accepted): October 20, 2014
- Sanitary Lateral Inspection (accepted): March 5, 2015
- Rough in plumbing inspection (accepted): April 9, 2015
- [Contract of sale of 3015 Eastdowne Road by plaintiffs: April 1, 2016]
- Final plumbing inspection (accepted): April 5, 2016
- Final building inspection (accepted): June 6, 2016
- Occupancy permit: June 7, 2016
- Framing inspection (accepted): May 3, 2019
- Final building inspection (accepted): April 30, 2019
- [37] Mr. Tran testified that he and Mr. Bola had a falling out in November 2015.

- [38] Mr. Bola wrote a long email on November 20, 2015 saying, among other things, "[i]ts time you found another contractor to finish you[r] house." The immediate reason was that a toilet flange had been covered by some flooring and there is a dispute about who did it. Mr. Bola blamed the flooring contractor chosen by Mr. Tran. The plaintiffs also say that the floor installed by Mr. Bola was not level and they had to pay for leveling. The email set out a number of other reasons. The defendant claims these problems amounted to repudiation of the contract between the parties.
- [39] The records of Oak Bay record that Mr. Bola was "no longer involved" as of December 24, 2015. In his evidence Mr. Tran estimated that the house was about 70% complete at this point. Mr. Bola says it was 90% complete. Mr. Tran says he had paid Mr. Bola his \$35,000 fee in \$5,000 payments and Mr. Tran testified that the payments were up to date when Mr. Bola left. Mr. Bola says two payments of \$5,000 each are outstanding.
- [40] In December 2015, after Mr. Bola left, Mr. Tran visited the Oak Bay municipal office to arrange for some permits. He testified that was when he learned about the underground oil tank for the first time. Mr. Tran also obtained information from the Oak Bay Fire Department and he says that he learned for the first time about the December 2013 inspection of the inert tank. He immediately tried to contact Mr. Bola but his calls were not returned.
- [41] Mr. Tran arranged for a search for the oil tank to be done, including electronic searches and digging about sample holes on the property. He dug in the crawl space of the house as part of the searches. No tank was found but contaminated soil was found, removed and replaced. A report from an environmental consultant dated April 1, 2016 was obtained at a cost of \$9,757.28. It confirmed some soil was contaminated and also confirmed that it had been remediated. No further investigations were recommended. The cost for the remediation (not the testing or environmental report) was \$44,698.75 and it took about six weeks to complete.
- [42] The plaintiffs sold the property at 3015 Eastdowne Road with a completion date of June 16, 2016. The selling price was \$1,500,000.

C. EXPERT EVIDENCE

- [43] The plaintiffs have tendered expert reports and evidence on the remediation of the soil contamination at the subject property and on how the value of the property has been affected by the contamination.
- [44] With respect to remediation there is the expert report dated April 4, 2019, from Brad Harrold, WES Environmental. He worked on the property from January to March 2016 and there were six test pits for analysis.
- [45] Excerpts from Mr. Harrold's report are as follows:¹

7.0 OPINION

7.5 The Nature of Contamination

Analytical results indicated that EPHs10-19 were elevated in soil samples collected at three locations, including TP1, TP3, and TP4, at depths ranging from 1.1 to 1.8 m below ground surface as follows:

Sample ID

Depth (m)

Parameter

Concentration

µg/g

Nearest

Equivalent CSR Standard µg/g

TP1-3.5

1.1

EPHs10-19

1,750

1,000

EPHs19-32

290

1,000

TP3-4

1.2

EPHs10-19

2,450

1,000

EPHs19-32

580

1,000

TP3-5

1.5

EPHs10-19

3,230

1,000

EPHs19-32

660

1,000

TP5-6

1.8

EPHs10-19

<20

1,000

EPHS19-32

<20

1,000

TP6-6

1.8

EPHs10-19

<20

1,000

EPHs19-32

<20

1,000

TP4-6

1.8

EPHs10-19

1,720

1,000

EPHs19-32

300

1,000

Laboratory chromatograms indicated that hydrocarbon contamination at these elevated locations ranged from C8 to C24, typical of heating oil (Environmental, n.d.).

One water sample was collected from TP3, which indicated elevated concentrations of EPHwI0-19 (37,000 µg/L) and EPHw19-32 (2,300 µg/L). The sample result for EPHw10-19 greatly exceeds the CSR standard of 5,000 µg/L. The sample result provides a gross indication that hydrocarbon contamination is present.

It should be noted that the method of groundwater collection for the groundwater sample analyzed, a grab sample from standing water that had seeped in during test pit excavation, renders the reliability of this sample to be suspect as it was not collected according to BC ENVs technical guidance for sampling of groundwater and the sample may have contained fine sediment that could have biased the sample result high. Given the gross magnitude of the EPHw10-19 analytical result, it is likely that any specific fine sediment within the water sample would not have contributed overly much to the result.

The inferred area of contamination (see Required Remediation Area, Appendix B) extended beneath the southeast footprint of the new residence and was thought to likely extend as far as the southern property line.

7.6 Necessity for Soil Removal

Under the CSR, contaminated soil may remain in-situ on-Site. A property owner may choose not to investigate and remediate their property of contamination; however, there are triggers that may force investigation and remediation.

For instance, lenders typically require that the nature of contamination is well understood as it negatively affects the property value. Hence, to obtain financing, property owners may be forced to investigate and remediate known contamination.

Insurers may force cleanup as they may not insure a property that has been contaminated due to a heating oil tank spill or leak.

Owners of a contaminated site may wish to remove the contamination to reduce potential health impacts that may arise from its presence on the Site. In addition, leaving contamination in place creates a liability which can decrease the value of the property and a property owner may wish to maintain the saleability of their land.

If contamination is identified and likely extends off-Site, then a notification of offsite migration (NOM) must be filed with the BC ENV. A remediation order may then be issued by the BC ENV in cases where the contamination may represent a high risk to human health and the environment.

Under certain circumstances, soil may be excavated and retained on-Site. However, the soil may not be excavated, consolidated, and stored on-Site without applying first for a waste discharge permit (BC Ministry, 2019). If soil is excavated and determined to be Hazardous Waste, then the soil must be removed and disposed of at an appropriate waste treatment facility (i.e. it cannot be reburied) (BC ENV, 2017).

Delineation and some source removal of hydrocarbon contaminated materials is usually necessary to facilitate other secondary remedial techniques such as monitored natural attenuation or risk assessment.

7.7 Remedial Options

Remedial options to address contamination arising from a residential heating oil underground storage tank spill or leak are varied; however, ex-situ remediation (i.e. dig and dump) is typically selected due to the certainty that it provides in rapidly reducing source concentrations at the Site and addressing stakeholder concerns.

Petroleum hydrocarbon contamination may be remediated using numerous other approaches; however, when factors such as cost, effectiveness, timelines, available space, and stakeholder concerns are considered, these other options do not often tend to be the primary remedial option selected. Other remedial options may include in-Situ (chemical oxidation, vapour extraction, pump and treat, in-situ bioremediation, monitored natural attenuation, etc.) or ex-situ bioremediation.

[46] On the issue of property values there is the expert report dated November 28, 2019 by Gordon Cavanaugh a professional appraiser. Relevant excerpts from his report are:

CONCLUSIONS:

Each analysis presented a sample of three recent sales that the I judged to be similar in most physical and locational aspects to that of the subject property. Market Value assumes that the Property has hypothetically been offered for sale along with these comparable properties. And this judgement sample of sold listings would have been alternative properties that a prospective purchaser may have purchased instead of the subject.

1) Market value as at February 6, 2014 assuming no contamination

These economic indices, supported by a price per square foot of \$325, were concluded to provide a reliable and reasonable indication of the subject's market value. The subject's market value would therefore lay between \$538,000 to \$607,000. Any offer within this range would be considered at fair market value. Buyer and sellers motivation would determine the eventual sale/market price. In the appraiser's opinion, the subject's offer to purchase at \$566,000 was at fair market value assuming no contamination from a buried oil tank.

2) Market Value as at February 16, 2016 under the hypothetical assumption that a buried oil tank was discovered but the cost of remediation was unknown.

At 1.4 Months of Inventory (MOI), and a New Listings to Sales ratio (NL5) of 1.2:1 and a Days-on-Market (DoM) of 52, the market for detached housing in the subject's price range was strongly in favor of sellers. Prospective purchasers had a limited selection of homes to choose from and few homes were coming onto the market. This caused the market to be strongly in favor of sellers with prospective purchasers having little bargaining power and in some instances prospective purchasers were paying over the asking price to ensure a purchase. In consideration of the bullish market conditions it is my opinion that a prospective purchaser would have had limited success to negotiate on price knowing that there was a buried oil tank with a possibility of contamination. And that limited negotiation power would only be reflected in an accepted offer at the lower end of the market value range at \$538,000 or +/- 5%.

- 3) Determine the discount, if any, in the market place for the uncertainty of purchasing a property with a buried oil tank and possible contamination.

The discount derived from the marketplace would be calculated as the difference between Market Value assuming no contamination and the value of the property under the condition of a known oil tank with the possibility of soil contamination. I determined this uncertainty to be \$28,000 which is a 5% discount from the Market Value of \$566,000. In my opinion this discount is reasonable and reliable given the market conditions at the time.

- 4) To determine the Market Value of the property on June 16, 2016 assuming no contamination.

This judgment sample of three economic indices, supported by a price per square foot of \$500, provided a reliable and reasonable indication of the subject's market value. The subject's market value would therefore lay between \$1,325,000 to \$1,645,000 and most likely be centered around the mid-point of the range of \$1,475,000. In the appraiser's opinion, the reported offer to purchase at \$1,500,000 including GST represented fair market value of the Property assuming no oil contamination.

- 5) To determine the most probable value of the property on March 1, 2016 assuming no contamination.

A review of the Victoria Real Estate Board's Historic Sale Price Trend for 2016 for single family detached homes in the areas of Victoria City, Oak Bay and Saanich East showed that the three month running average for house prices bracketing these two dates were stable at \$925,000 and \$936,000 respectively. The difference in market prices between these two dates was insignificant. In my opinion the subject property would have achieved the same market value as it achieved on June 16, 2016 at \$1,500,000 including GST.

- 6) To determine the impact, if any, on the Property's value as at June 16, 2016 with the oil tank removed and the soil around the tank remediated but the possibility of oil contamination remaining under the area of the home that could not be tested.

At 1.03 MOI, and NLS of 1.1:1 and a DoM of 29, the market for detached housing in the subject's price range was extremely strongly in favor of sellers. Prospective purchasers had little or no negotiation room on prices with the Sale Price to Listing ratio at 100%. This bull market was to continue for the next two years.

Prospective purchasers had a limited selection of homes to choose from and few homes were coming onto the market. This caused the market to be strongly in favor of sellers with prospective purchasers having little or no bargaining power and in some instances prospective purchasers were paying over the asking price to ensure a purchase. In consideration of the bullish market conditions it is my opinion that a prospective purchaser would have had limited success to negotiate on price knowing that there was a possibility of oil contamination. And that limited negotiation power would be reflected in a sale price at the slightly lower end of the market value range at \$1,425,000 or +/- 5% of its \$1,500,000 Market Value.

- 7) Determine the discount, if any, in the market place for the uncertainty of purchasing a property with possible oil contamination assuming the cost to remediate the area under the home was unknown as at June 16, 2016 and March 1, 2016.

The discount derived from the marketplace would be calculated as the difference between Market Value assuming no contamination and the value of the property under the condition of a possibility of oil contamination. I determined this uncertainty to be \$75,000 which is a 5% discount from the Market Value of \$1,500,000. In my opinion this discount is reasonable and reliable given the market conditions at the time.

C. ANALYSIS

[47] As important context for all the issues in these claims, there is a serious and complicated dispute between the parties about the underground oil tank and the soil that was contaminated on the property at 3015 Eastdowne Road. I will be reviewing this in some detail below.

[48] As well, the plaintiffs raise a number of legal issues in their claim including allegations that the defendant breached the EMA, negligently misrepresented the presence of the underground oil tank and contaminated soil, breached the oral contract between the parties with respect to the time taken to complete the project, and that there were a number of deficiencies in Mr. Bola's work as general contractor. There is some overlap between these issues.

[49] In the defendant's counterclaim, he alleges that the plaintiffs have not paid for time he spent on the project over and above the time covered by his fee of \$35,000, that they did not pay for kitchen cabinets and other matters.

[50] Therefore, I will consider the following issues in turn:

- (a) the evidence about the oil tank and soil contamination;

- (b) liability under the EMA;
- (c) negligent misrepresentation; and
- (d) breach of contract.

[51] The defendant pled repudiation of the contract but there is no mention of that in the defendant's written argument.

- (a) The oil tank and soil contamination

[52] A number of questions arise with respect to the oil tank. As above, no one has been able to locate the tank since it was rendered inert and inspected in December 2013. However, soil contaminated with furnace oil was found and then remediated in February 2016.

[53] The primary questions are whether there was an oil tank on the property at the material times, was it removed, and, if so, who removed it. Also, what did Mr. Tran and Mr. Bola know about the inert underground tank and when did they know it?

[54] I will attempt to answer these questions. As will be seen, there is at least one significant question that cannot be answered except by a process of elimination.

[55] As general context and at the risk of some repetition, it may be recalled that the plaintiffs purchased the property at 3015 Eastdowne Road in February 2014. No inspection was done (except a visual inspection for asbestos by Mr. Bola) because the house was going to be demolished. As a broad description of the chronology, the defendant demolished the house in October/November 2014, construction on the new house began in early 2015, an occupancy permit for the new house was issued by Oak Bay in June 2016, and Mr. Tran sold the property that month.

- (i) Was there an underground oil tank?

[56] As a first factual issue, no one has found or seen an underground tank since 2013 and there is no permit for its removal. Nonetheless there is clear evidence that there was an oil tank on the property. This begins with the permit issued by Oak Bay on December 27, 2013 and completed by the Deputy Fire Chief. It described "render inert a 300 gal UST [underground storage tank]." It authorized filling the tank with "clear sand" and ensuring that the vent and fill hole was filled and capped. It also said "Tank located under concrete deck at rear of structure."

[57] The person who rendered the tank inert, Mr. Hughes of Victoria Tank, testified. He actually was inside the tank and explained it was mostly above ground under a concrete deck, with about two feet below ground. He pulled back some green Astro turf from the top of the tank. There was a lot of ground water. As the permit states, the underground tank was inert as of December 2013. At that time there was no regulatory problem with leaving an inert oil tank in the ground (assuming the appropriate permit was obtained). Mr. Hughes did not remember a second above ground tank but, as discussed below, there appears to have been

one at the back of the existing dwelling.

[58] As further evidence as to the existence of a tank, as discussed below, there was also the reference in the real estate listing to an inert underground oil tank for the subject property.

(ii) Mr. Tran's knowledge of the oil tank

[59] Mr. Tran says he did not know anything about an underground oil tank until he and Mr. Bola parted ways in December 2015 and Mr. Tran was told about the tank by someone in the Oak Bay municipal office. In my view that is unlikely.

[60] Firstly, Mr. Tran had taken on as something of a project searching the Interface Express website as part of his ambition to be a property developer. At that point he and Mr. Bola were friends and Mr. Bola was seen by Mr. Tran as something of a mentor. As a realtor Mr. Bola had access to the Interface and Interface Express programs and he permitted Mr. Tran to use the latter to search for properties. The information on each is primarily the same although the form of some information is different. In cross-examination Mr. Bola agreed that the Oak Bay Fire Department inspection report from 2013 for the inert underground oil tank could only be accessed from Interface, not Interface Express. Mr. Bola said he only saw this report on February 7, 2015 and he agreed that Mr. Tran would not have been able to access the report on Interface Express. However, the listing that made reference to the inert oil tank and the permit was on both sites.

[61] As to who first identified the 3015 Eastdowne Road listing as a prospective development property, I conclude it was Mr. Tran. He was the more active researcher for property to develop and brought properties to Mr. Bola to discuss. As well, the cost of the Eastbourne Road listing was significantly more than the range Mr. Tran had originally given Mr. Bola. As well, Oak Bay was not part of the original discussions because it was too expensive an area. Mr. Bola would not have been looking for that type of property in that location. In addition there is Mr. Tran's discovery evidence. When asked if he read anything about the property before making an offer he said "I might have on Interface" [presumably meaning Interface Express, the site he had access to]. When pressed on this point he said he did not remember.

[62] Overall, I conclude that Mr. Tran had the opportunity to read the complete listing when he was searching on the Interface Express site, he did read it and he would have seen, or he should have seen, the reference to the inert underground oil tank before an offer was made. He could not have seen the 2013 fire department permit itself, but it was referenced in the listing.

[63] The two men discussed the Eastdowne Road property and Mr. Tran authorized Mr. Bola to make an offer (as agent for Mr. Tran and Ms. Nguyen). The plaintiffs say that Ms. Nguyen did not authorize Mr. Bola to make any offer and then accepted a counter offer on her behalf. Ms. Nguyen testified to that effect. Be that as it may, I conclude that Mr. Tran represented to Mr. Bola that Ms. Nguyen was also authorizing him to make an offer on her behalf and ultimately to accept the counter offer on her behalf. With the benefit of hindsight, Mr. Bola

perhaps should have confirmed, preferably in writing, the instructions of both his principals. But at that time the relationship between the parties was an amicable one and I conclude that Mr. Bola was entitled to accept Mr. Tran's representation that he was speaking for his wife.

- [64] As to what information was exchanged between Mr. Bola and Mr. Tran as part of the discussions over purchasing 3015 Eastdowne Road, again, there is no dispute that the listing that was sent by Mr. Bola as part of the package to consider somehow did not include the reference to the inert oil tank. Mr. Bola had no interest in keeping that information from Mr. Tran and I conclude that was an inadvertent (and unexplained) omission by someone, perhaps Mr. Bola. In any event, I conclude that Mr. Tran saw the complete listing when he was researching on Interface Express.
- [65] Mr. Bola says he gave another copy of the complete listing as part of a conversation with Mr. Tran at the Oak Bay municipal office just before the completion of the sale of the subject property and they discussed the oil tank. Mr. Tran denies any knowledge of the oil tank at that time. However, as above, he had to have known about it as part of his research of the property before this conversation.

(iii) When was the oil tank removed?

- [66] As above, there was an oil tank on the property but the evidence is that it is not there now. The next question arising is when was the oil tank removed. The evidence is not conclusive on this point (or who removed it).
- [67] The sub-contractor who did the demolition of the existing dwelling, Brian Baker, testified and his invoices demonstrate that his work was done in October 2014 (as above, the demolition permit is dated October 9, 2014). He had previous experience with underground oil tanks including leaking tanks and contamination of the soil from leaking. He testified that Mr. Bola told him to look for an oil tank.
- [68] As part of demolishing the house, Mr. Baker took out the back deck and he did not see "anything unusual." In questioning it was put to him that the 2013 permit and Mr. Hughes' evidence described the tank as partly above ground. Mr. Baker thought that was unusual and he said he did not see that or anything else unusual. His recollection was also that there was nothing under the slab of concrete such as the oil tank described in the permit and as described by Mr. Hughes. He did not have the permit at the time but, if he had it, he would have looked under the slab. His evidence is that there was no underground oil tank in the ground where he excavated which would have been near or on top of where Mr. Hughes described the tank. He said there was no underground tank anywhere.
- [69] Mr. Baker did remove an above ground tank from the subject property beside the house in the back yard, including crushing it and loading it on a truck to be taken for scrap metal. As below, there is other evidence that the above ground tank was removed in early February 2015.

- [70] Mr. Baker also did the excavation for the footings of the new building. These would have been two to three feet wider than the actual foundation and about two to three feet deep. He described it as a "shallow crawl space dig" and he was digging mostly in clay. Mr. Baker has experience with removing oil tanks including leaking ones and he testified that, when he was excavating for the foundation, there was no odour of furnace oil and no sheen in the ground water. Dave Nelson, who constructed the forms, poured the footings and foundation walls and was in the excavated ground, testified and he also said that he did not smell any furnace oil or otherwise notice any oil.
- [71] The site inspection was accepted by Oak Bay on October 20, 2014 and the construction of the new house proceeded.
- [72] The next event of significance to the history of the removal of the underground oil tank is a description from a neighbour of the subject property. Diane Clement was staying in her daughter's house next door to the subject property (at 3025 Eastdowne Road, on the north side of the subject property). She was helping her daughter with renovations of what was a recently purchased house for the daughter. Ms. Clement testified that, on February 3, 2015, she was woken up about 6:00 to 6:30 a.m. by machinery working next door, at 3015 Eastdowne Road. It was dark outside but she and her husband observed an excavator with bright lights working with a flat deck truck. The excavator and the truck were the colour of a robin's egg, turquoise blue. There were two men who Ms. Clement described as "South Asian."
- [73] She observed the excavator dig a hole in the back yard of the subject property and then remove a tank. The excavator crushed the tank and loaded it onto the flat deck truck. It also loaded another tank that was above ground (as above, Mr. Baker says he removed the above ground tank in October 2014). The excavator and truck finished working and left about 8:00 a.m.
- [74] Mr. Bola questions the account of Ms. Clement. He testified that in February 2015 the ground had been excavated for the new house, the footings and foundation had been poured, it had been framed and the roof was on. The windows and doors were not in. This is broadly consistent with the report of an inspector for Oak Bay who wrote a memo on February 4, 2015 in which he reported that the concrete foundation of the new house was poured and it looked like the framing stage had been nearly completed. The significance of this evidence is that, according to Mr. Bola and other witnesses, there was no room for a flat bed truck or excavator to pass by the side of the new foundation and structure to get into the back yard. Mr. Baker testified that his machine could not have passed by the new house. A smaller machine could perhaps have passed the side of the new house.

- [75] As part of the renovation of the house of Ms. Clement's daughter, an inspector from Oak Bay, Rene Buser, came to the daughter's house the same day, February 3, 2015. Ms. Clement reported the removal of the tanks to Mr. Buser. He asked Ms. Clement if she wanted to make a formal complaint but she declined. She explained in her evidence that she did not want to cause any problems between her daughter and the daughter's new neighbours.
- [76] Mr. Buser also testified in this trial and a number of documents from Oak Bay were tendered through him with respect to the construction of the house at the subject property and some documents about 3025 Eastdowne Road. Mr. Buser confirmed his conversation with Ms. Clement and his recollection about what was said was consistent with hers including that she declined to make a formal complaint. He explained that a formal complaint is taken more seriously than verbal complaints because the latter can arise from disagreements between neighbours without any substance.
- [77] The same day that Mr. Buser spoke with Ms. Clement he also talked with Captain Rob Kivell of the Oak Bay Fire Department. Captain Kivell created a file memo on February 3, 2015:

A complaint was made to Building Inspector Rene Buser by Terry Clement. Mr. Buser informed me (Capt. Rob Kivell) of the incident which took place early in the morning on February 3, 2015 at approximately 06:30 hours. I stopped by the residence of 3025 Eastdowne where I interviewed the complainant. He - was awakened by heavy equipment and a flat bed truck removing an abandon underground oil storage tank from the property next door to his daughter's house 3015 Eastdowne Road.

- [78] Mr. Buser remembered speaking to Mr. Bola about the oil tank but he could not remember the conversation and he did not put anything in writing. There is an email from Mr. Buser that says "I do not recall when I mentioned the oil tank to Jerry Bola, but I did comment."
- [79] Captain Kivell testified as well. He explained that it was not necessary to remove an underground oil tank but, if there was a removal, then a permit is required (this may have changed since the events in this case). According to Captain Kivell, most people in Oak Bay remove tanks rather than rendering them inert. Oftentimes, removal is a condition of sale for a property. A permit was required if a tank was made inert, as was issued in December 2013 for the subject property. Captain Kivell spoke to Ms. Clement and he wrote an email to Mr. Buser on February 4, 2015:

Just want to keep you in the loop on the happenings surrounding the above address. I talked to the complainant's wife and she definitely witnessed the contractor remove two oil storage tanks from the property. One of the tanks was in good condition (aboveground tank) and the other one was completely demolished (underground). This is consistent with the permits we have on file. I discussed the matter with the Chief and we decided to approach cautiously.

I discussed the issue with Jerry Bola yesterday from a perspective of inquiring about the UST still on record for his property. I asked the question based on the fact that in most new residential construction builds it is most common for the owner to have his contractor proceed with the removal of the UST to avoid any potential future liability and issues when it comes time to sell the home. I queried him to the fact of him being a realtor and owner of the property that I assumed he was aware of the potential risks.

Mr. Bola explained to me that during the excavation of the site that no UST was located on the property. He went onto say that he would get the property scanned to confirm these results. I cautioned him if that no tank is located that I would have to report this to Ministry of Environment and the property would have to have be examined and tested by an environmental consultant.

I'll keep you posted on further developments. The reason for not posting the Stop Work order is that the owner of the property is allowed to have a rendered inert UST on his property.

[80] Captain Kivell testified that Mr. Bola did not tell him the results of any scan.

[81] Captain Kivell discussed the situation with the Fire Chief. Without a formal written complaint on file, they decided to give the benefit of the doubt to the contractor and take a "wait and see" approach. He wrote a memo as follows and it describes the requirements for oil tanks at that time:

Note to file: February 4, 2015

3015 Eastdowne Road

300 gallon UST installed on July 6,1953 and subsequently rendered inert on December 27, 2013.

Capt. Rob Kivell contacted the owner and contractor of the property mentioned above. The Owner is Jerry Bola - [phone numbers omitted].

This property has been under construction since November 2014. On July 3, 2015 at approximately 16:00 hours I was driving by the property to check on its progress. The concrete foundation was poured and the house looked like it had nearly completed the framing stage. There was a roof on the building however, the house had no windows and was not secure.

The reason Jerry Bola was contacted by the Prevention Division was to inquire on the status of UST located on the property. The UST was rendered inert in December 2013 however fire department records show no permitted removal of the tank was carried out.

It is common practice that most contractors and homeowners will remove the UST during the building phase of a new home. Most insurers and realtors will advise property and homeowners of the inherent risk and/or liability surrounding potential contamination from a UST rendered inert or not.

Mr. Jerry Bola being a realtor and contractor would be aware of these significant risks.

Mr. Bola explained to me on the phone that when the property was excavated that he did not come across an UST on the property. It is his belief that the tank must still be located on the property.

Mr. Bola went on to say that he would be contacting Victoria Tank Service to scan the property to search for the UST and he will report back to the Prevention Division.

According to the Oak Bay Fire Department permit records the last known activity of this UST was in December of 2013 when it was rendered inert and inspected by the department.

If the UST cannot be located on the property this site will have to be turned over the Ministry of Environment for further investigation of possible contaminants on the property.

[82] As can be seen the memo is dated February 4, 2015 but there is reference to an event on July 3, 2015. Captain Kivell explained in his evidence that he started the memo in February 2015 and kept adding to it including the July 3, 2015 event. The latter is not relevant to the events in this litigation. That is, the paragraph beginning with "This property has been " was written in July 2015 and the rest of the memo was written in February 2015, according to Captain Kivell.

[83] In his evidence Mr. Bola described receiving a telephone call from an upset Captain Kivell on February 4, 2015. Captain Kivell described a buried oil tank and the need to get a permit to remove it. Mr. Bola told Captain Kivell that he never moved the tank and it was already gone. However, Mr. Bola also testified that he called Mr. Tran after the call from Captain and Mr. Bola told Mr. Tran that the tank had not been removed and it was still on the property.

[84] A memo on the Oak Bay file, dated February 25, 2016, records that a "contaminated oil tank site was noted and reported to MOE [Ministry of Environment]" on the same date. Captain Kivell testified it would have been more accurate for the memo to say that a "potential" site was reported. I take from this that, up to this point, there was no confirmation of contaminated soil. And there is a note on file, dated December 24, 2015, that "owner informed oil tank in ground by F.D. [fire department] records (new contractor) Dec 24, 2015." The "new contractor" is a reference to Mr. Tran taking over from Mr. Bola, as below.

[85] Overall, Captain Kivell testified that he believed that the oil tank had been removed because it would not have been possible to do the excavation for the house with the tank in place. As will be seen, I reach the same conclusion.

[86] Sometime in November 2015 Mr. Tran and Mr. Bola had a falling out. The records of Oak Bay indicate that Mr. Bola was no longer involved with the project as of December 24, 2015. For the purposes of reviewing the history of the oil tank it is not necessary to decide here who was at fault for this development. In his evidence Mr. Tran estimated that, at that time, the construction of the house was about 70% complete; in his evidence Mr. Bola estimated it was 90% complete. Either estimate confirms that the structure was blocking most of the access to the backyard.

(iv) The remediation

- [87] Mr. Tran took over the contracting for completion of the house. He testified that on a trip to Oak Bay for permits in December 2015, he learned of the December 2013 permit that described rendering the oil tank inert. He testified that he did not know about the tank until that time. As above, Mr. Bola says he told Mr. Tran about the inert tank before the purchase of the subject property was complete. I have found above that the information about the underground oil tank was available on the listing Mr. Tran found on the Interface Express website before the property was purchased.
- [88] At this point there may have been pressure from the Ministry of the Environment or the Oak Bay Fire Department or both to actually search for a tank. In any event, Mr. Tran hired Victoria Tanks and Mr. Hughes (the company and person who had rendered the oil tank inert in December 2013) to search for the tank. They had the benefit of the December 2013 permit and the fact that Mr. Hughes had been on site before, so they spent some time in the area that was beneath the back deck of the demolished house. They also had the benefit of Captain Kivell relating the description by Ms. Clement of the tank being removed. They looked beyond those sites and used a metal detector and probes, they searched under the new foundation walls and they broke up parts of the new concrete basement floor. This led Mr. Hughes to the conclusion that there was no oil tank in place.
- [89] However, they did find contaminated soil. Mr. Hughes testified that it was "pretty stinky" about two feet deep in places and the underground hard pan sloped away from the house. With the help of WES Environmental about twelve test holes were dug to identify the extent of the contamination. Ultimately extensive remediation was required and Mr. Hughes estimated in his evidence that about 20 truck loads, or 200 tons of soil, was removed and remediated. The plaintiffs seek the cost for this as damages. A map of the test holes demonstrates that two of them were near the location of the underground tank but not directly on top.

(v) Summary

- [90] The obvious question that arises from the above (among others) is what happened to the underground oil tank?
- [91] I have concluded above that there was an inert oil tank in the ground in December 2013. That is what the December 2013 permit says and we have the benefit of Mr. Hughes testifying that he was actually inside it as part of the process to make it inert. Both the permit and Mr. Hughes identify the tank as being under the back deck and, as Mr. Hughes put it, "mostly above ground" with at most two feet underground. He put about three feet of fill on top of the tank. Mr. Hughes has considerable experience in removing oil tanks and remediating contaminated soil but he did note any leakage from the tank or contaminated soil at that time. Mr. Hughes and the official from the fire department were looking for leakage and contamination but the permit did not say anything about contaminated soil. I think it is a fair inference that a permit would not have been issued unless there was no

contamination (or it had been remediated).

- [92] The next event of importance, chronologically, is the demolition of the old house and the excavation for the foundation. Mr. Baker, who did most of this work in October 2014 and who has experience with underground tanks, testified that he found no oil tank or contamination. He also commented on the location of the tank under the deck as described in the December 2013 permit (and by Mr. Hughes). He thought having a tank partly above ground was unusual.
- [93] I am inclined to accept Mr. Hughes' account of at least what happened in December 2013: there was a tank that was covered over and/or partly underground, it was made inert and it remained in place. There was no requirement to remove an inert oil tank at that time but there was a requirement to obtain a permit if it was removed.
- [94] It is possible that Mr. Baker got it wrong and there was a tank when he did the excavation. However, that seems quite unlikely since he cleared the entire sight, the tank was partly above ground and, in any event, he dug below grade in a number of places. Leaving the inert tank in place is also unlikely (although it was permitted at the time) because it would have been obvious and in the way.
- [95] The explanation that is most consistent with Mr. Baker's evidence is that the tank was not there when he prepared the site. The obvious complication is that there is no evidence at all about removing it between the time it was rendered inert in December 2013 and the demolition/excavation work in fall 2014. For example, there is no permit on record for any removal. I add that, in light of the extensive inspection by knowledgeable people including in 2015 (when Mr. Tran took over the contracting from Mr. Bola), the suggestion by Mr. Bola in his evidence that the tank might still be there must be rejected.
- [96] Then there is the evidence of Ms. Clement that in February 2015 she observed two south Asian men remove an underground tank in the early morning hours from 3015 Eastdowne using robin's egg blue equipment.
- [97] Ms. Clement was an uninterested observer and her observations were recorded contemporaneously by another uninterested (and professional) person so her observations are worthy of careful attention. Nonetheless there are some problems with them. Firstly, the evidence is that the construction of the house on February 3, 2015 had advanced to the point where, although it was not complete and the windows were not in, it occupied a large area of the property. This was confirmed by the Captain Kivell. The significance of this is that there probably was not enough room on either side to bring a flat bed truck and excavator from the front of the property to the back and then return (no one is saying there was access from the rear). As well, if the February 2015 observations of Ms. Clement are correct then the tank had to have been in the ground (partly above ground, actually) when Mr. Baker excavated the site in October 2014 and to have remained there until February 3, 2015. That is unlikely.

- [98] Finally, the plaintiffs suggest that Mr. Baker, in his loyalty to Mr. Bola, buried the tank somewhere on the property. But the site was searched extensively in February 2015 and there is no evidence of any buried tank. In addition, it is quite unclear why Mr. Bola would be part of what appears to have been a clandestine operation in the dark of the early morning when an underground oil tank was not his risk or cost (he was being paid a flat fee for his contracting services for construction of the house). The risk of a tank on the property was entirely the plaintiffs.
- [99] In his evidence Mr. Bola replied to these complications by saying that perhaps Ms. Clement got the day wrong. That also seems unlikely since her report was recorded virtually contemporaneously by the inspector, Mr. Buser. Apparently Mr. Bola does not deny that it could have taken place on a different day but he says it was not him.
- [100] I also note that Ms. Clement's evidence about what she observed in February 2015 about the above ground tank is not consistent with that of Mr. Baker. What happened to the above ground tank is not significant itself but it may make one account of what happened to the underground tank more likely than another account. Mr. Baker testified that he removed the above ground tank in October 2014, he crushed it and he sent it to a specific scrap metal facility. Presumably, removing the above ground tank during the original demolition would have made more sense since there would have been no reason to keep it around for two or three months waiting to remove it at a time when it would have been more difficult to access the backyard. It is not conclusive but I conclude that Mr. Baker's description of removing the above ground tank in October 2014 is more plausible.
- [101] A more significant difficulty with Ms. Clement's evidence is one of identification. Mr. Baker's equipment is not turquoise blue, it is yellow and orange (Mr. Bola thought it was red and white). No one has been able to identify an excavation company with equipment of that colour and there is no connection between equipment of this colour and Mr. Bola's business. Of more significance, is that Ms. Clement did not identify the two men who removed the tanks except to say she observed (in the dark with lights from the equipment) that they were south Asian. Specifically, there was no identification of Mr. Bola being there, or Mr. Baker or Mr. Tran or anyone else associated with the parties. If it needs to be said, a description of "South Asian" is not sufficient identification.
- [102] In the result, I cannot find that Ms. Clement's evidence proves on a balance of probabilities that Mr. Bola himself removed, or ordered the removal of, the oil tanks from 3015 Eastdowne in February 2015 as she described it.
- [103] The plaintiffs assert that the duty of care owed to them by Mr. Bola means that he was responsible for the site and everything that happened on it. However, while I accept that Mr. Bola had a duty of care over the construction site as general contractor, I also conclude that some evidence tying Mr. Bola to the clandestine removal of the oil tanks is required. The duty of care owed by a general contractor cannot, in my view, mean he is liable for everything that happens on the site including matters to which he has no evidentiary

connection.

- [104] Finally, there is the fact that no underground oil tank was found on the property. I can accept from the evidence of contaminated soil that there was a tank there at some point. However, that too must be qualified by the evidence that there was no soil contamination around the tank as reflected in the fire department inspection in December 2013 as well as the evidence of Mr. Hughes (who was there in 2013) and Mr. Baker (who did the excavation in 2014). The former was corroborated by the Oak Bay permit and Mr. Hughes had no connection with the defendant (or the plaintiffs).
- [105] It seems improbable that all of these experienced people would miss contaminated soil that Mr. Hughes said was "pretty stinky" in 2015. There is a suggestion that the test holes that found the contamination were not dug at the site of the tank or close to it. That might mean there was contamination away from the tank and not near it, but it does not explain the source of the contamination.
- [106] Having said that, it is clear from expert evidence and the evidence of Mr. Hughes about conditions in 2015 that the soil was contaminated. Mr. Bola challenges the expert consultant's measurement of the contamination by suggesting the incorrect units were used. However, the evidence is that the units used are industry standards and, in any event, there is no contrary expert evidence from the defendant.
- [107] The oil came from somewhere and I conclude that it is probable that it came from the tank inspected and rendered inert in 2013. I can only conclude that somehow the contamination found in 2015 was missed during the inspection in 2013 even though the inspectors were experienced and looking for contamination.
- [108] The plaintiffs say that the defendant caused the soil contamination, perhaps even inadvertently (I am at a loss to understand why they would do it deliberately). However, the only probable source was the underground tank rendered inert in 2013. I say this is the "probable" source because of the absence of any observations of contamination by experienced people in either 2013 or 2014.
- [109] As a result, I conclude that there is little if any connection between Mr. Bola, the underground oil tank or the soil contamination. The evidence does not support the plaintiffs' claim that the defendant removed the inert underground oil tank, or that Mr. Bola caused or contributed to the soil contamination.
- [110] While these factual conclusions may be sufficient to dispose of much of the plaintiffs' claim, I will consider the other issues they raise nonetheless.
- (b) Liability under the Environmental Management Act

[111] The plaintiffs rely on the provisions of the EMA for their claim that the respondent was responsible for the remediation of the contaminated soil on the subject property. I will set out the applicable provisions of that legislation and discuss them here in the context of the above conclusions about the underground oil tank and soil contamination.

[112] General principles of liability for remediation to be applied by the court are set out in s. 47(9) of the EMA:

General principles of liability for remediation

47

- (9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:
- (a) whether a person is responsible for remediation of a contaminated site;
 - (b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;
 - (c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;
 - (d) such other determinations as are necessary to a fair and just disposition of these matters.

[113] Section 39(1) of the EMA defines "operator" as follows:

"operator" means, subject to subsection (2), a person who is or was in control of or responsible for any operation located at a site, but does not include a secured creditor unless the secured creditor is described in section 45 (3) [persons responsible for remediation of contaminated sites];

[114] The defendant accepts that he falls within this definition. I agree.

[115] Section 45(1) is titled "Persons responsible for remediation of contaminated sites" and the plaintiffs rely on sub (d):

45 (1) Subject to section 46 [persons not responsible for remediation], the following persons are responsible for remediation of a contaminated site:

- (a) a current owner or operator of the site;
- (b) a previous owner or operator of the site;
- (c) a person who
 - (i) produced a substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

- (d) a person who
 - (i) transported or arranged for transport of a substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (e) a person who is in a class designated in the regulations as responsible for remediation.

[Emphasis added].

[116] The plaintiffs do not rely on s. 45(1)(b) but I conclude that the defendant is a previous operator.

[117] The plaintiffs say that, under s. 45(1)(d), Mr. Bola was responsible for remediation of the contaminated soil on the subject property. The defendant disagrees. It is not disputed that a "substance" includes furnace oil but I do not think the term substance can be interpreted to include an inert underground oil tank. As well, there is no evidence that Mr. Bola was a person who transported or arranged for transport of furnace oil for the purposes of s. 45(1)(d)(i).

[118] Under s. 45(1)(d)(ii), I take the plaintiffs to say that the defendant is responsible for the remediation at 3015 Eastdowne Road because, by contract, agreement or otherwise, he caused furnace oil to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site." There was no contract or agreement in the subject case about the disposition of the oil that caused the contamination so the focus is on "otherwise."

[119] As above, there was contaminated soil on site and it is probable that it came from the underground oil tank that was rendered inert in December 2013. That is, it was empty of furnace oil after that date (and filled with sand) and it is at least probable that the contamination occurred before that date. It is also probable that there was no contamination when the tank was observed and inspected in December 2013. This was before the purchase of the property by the plaintiffs in October 2014 and before any of the parties including Mr. Bola had any connection to or control over the property. I conclude that there is no evidence that the defendant disposed of the oil (or caused it to be disposed of) in a manner that caused the property to be contaminated. Nor is there any evidence that the defendant otherwise handled or treated the furnace oil in a way that contaminated the site.

[120] It is not stated directly but the position of the plaintiffs may be that the defendant moved the oil tank and that caused the contamination of the soil, presumably by carelessly or negligently handling the tank. It is clear that someone moved the tank but there is no proof that it was the defendant. For example, the account of Ms. Clement does not identify the defendant or provide circumstantial evidence to implicate him. And, again, the tank was made inert in December 2013 so it is probable that the contamination occurred before the

defendant (or the plaintiffs) was connected to the property.

[121] In summary I conclude that the defendant is a previous operator under s. 45(1)(b) of the EMA. However, under s. 45(1)(d) of the EMA, the defendant did not transport furnace oil in a manner that caused soil contamination. Nor did he otherwise cause the furnace oil to be disposed of or handled in a manner that caused the site to be contaminated.

[122] In light of my decision under s. 45(1)(b), it is necessary to consider s. 46 of the EMA because the latter describes a number of exceptions to persons who may be responsible for remediation under s. 45. Despite being a previous operator, do any of the exceptions in s. 46 apply to the defendant? The exceptions include Acts of God and other exceptions clearly not applicable here.

[123] However, s. 46(1)(d) and (e) need to be considered:

Persons not responsible for remediation

46 (1) The following persons are not responsible for remediation of a contaminated site:

(d) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

(e) an owner or operator who

(i) owned or occupied a site that at the time of acquisition was not a contaminated site, and

(ii) during the ownership or operation, did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;

[Emphasis added].

[124] Under s. 46(1)(d), the time that the defendant became an operator under the EMA would have been about the time Mr. Bola moved from being the plaintiffs' realtor to being their contractor, sometime between about February 2014 to October 2014. Mr. Bola gave some contracting advice prior to the date of completion but I do not think he was in control of or responsible for any operation located at the site under s. 39(1) of the EMA at those times. Looking at s. 46(1)(d)(A) of the EMA I conclude that the site was a contaminated one when the defendant became an operator.

- [125] Section 46(1)(d) continues and subsection (B) states that a person is also not responsible for remediation of a contaminated site if the person had no knowledge or reason to know or suspect that the site was a contaminated site. As context, in the subject claims, Mr. Bola knew in February 2014 that there was an inert underground oil tank on the property from the information on the real estate listing. The permit and designation of inert means, among other things, that any oil in the tank was removed and, as stated in the permit, the tank was filled with sand. Mr. Bola knew this because he saw it in the listing and he had a copy of the permit. And, while the permit does not state expressly that there was no contaminated soil, it seems to me that if contamination of the soil had been observed, the permit would not have been issued (perhaps until it was remediated).
- [126] Overall, I conclude that it was reasonable for the defendant to proceed on the basis of the information in the 2013 permit and, for the purposes of s. 46(1)(d)(i)(B), they had no knowledge or reason to believe the site was contaminated.
- [127] Looking at s. 46(1)(d)(i)(C), the question is whether the defendant undertook all appropriate inquiries into previous ownership and use of the site and undertook investigations consistent with good commercial or customary practice at the time to minimize potential liability. The plaintiffs rely on the Contaminated Sites Regulation, B.C. Reg. 375/96, O.C. 1480/96 as representing commercial or customary practice. It was in force in 2014 to 2015.
- [128] Section 28 of the Regulation states:

Persons not responsible -- clarification of innocent acquisition exemption

28 When judging whether an owner or operator has, under section 46(1)(d)(i) (C) of the Act, undertaken all appropriate inquiries into the previous ownership and uses of a site and undertaken other investigations consistent with good commercial or customary practice at the time of acquisition of the property, consideration must be given to all of the following:

- (a) any personal knowledge or experience of the owner or operator respecting contamination at the time of the acquisition;
- (b) the relationship of the actual purchase price to the value of the property if it was uncontaminated;
- (c) commonly known or reasonably ascertainable information about the property at the time of the acquisition;
- (d) any obvious presence of contamination or indicators of contamination or the feasibility of detecting such contamination by appropriate inspection at the time of the acquisition.

- [129] The plaintiffs say that the defendant breached one or more of these requirements.

- [130] It may be recalled that at the material times an inert oil tank could be left in place. Although Captain Kivell's evidence suggests it was common practice to remove such tanks, I conclude that intending to leave the tank in place does not preclude Mr. Bola from relying on the exception to liability in s. 46(1)(d)(i). The defendant had no personal knowledge or experience respecting contamination at the time of the acquisition. It was reasonable for the permit to be treated as evidence that the tank was no longer a risk of contamination.
- [131] With respect to s. 28(b), the relationship of the actual purchase price to the value of the property if it was uncontaminated, this is not a dispute between a seller and buyer over the subject property. The plaintiffs do have expert evidence about a loss of value in the property from the contamination but they do not claim here anything against the seller. The reference to "acquisition" in s. 28(c) also suggests it is intended to apply between a seller and a buyer. In any event, for the reasons discussed under s. 28(a) above, I conclude that what was commonly known or reasonably ascertainable information about the property was that there was an underground tank, it was inert and there was no report of any contamination.
- [132] Section 28(d) relates to any obvious presence of contamination or indicators of contamination or the feasibility of detecting such contamination by appropriate inspection at the time of the acquisition. Again, the information available did not indicate any obvious contamination. It may have been prudent for Mr. Bola to have the ground scanned for a tank as an appropriate inspection, as he told the Oak Bay inspector he would do. However, we have the benefit of the extensive investigations by Mr. Tran and his contractors in February 2016 who found no tank. Further, it was the test holes that revealed the contamination so it is not clear if a scan for the tank would have revealed anything besides the absence of a tank.
- [133] Taken over all, the defendant is an operator or previous operator under s. 39(1) and s. 45(1)(b) of the EMA. However, he is not responsible for remediation of the contaminated soil on the subject property under s. 45(1)(d) because there is no evidence that he transported or disposed of the furnace oil. In addition, the exceptions in s. 46(1)(d) and (e) apply and the defendant is not responsible for remediation. It is not necessary to consider and apply the expert evidence about remediation.
- (c) Negligent misrepresentation and negligence
- [134] On April 29, 2021, in an oral ruling during this trial, I permitted the plaintiffs to amend their claim to include an allegation of negligent misrepresentation.
- [135] Negligent misrepresentation has been described as lying between innocent misrepresentation and active concealment (*Nixon v. MacIver*, 2016 BCCA 8, at para. 36). In a previous judgment, Justice Pitfield usefully describes negligent misrepresentation in the following terms (*Alfred v. Colbeck*, 2010 BCSC 57):
18. The elements of the tort of negligent misrepresentation were described in *Queen v. Cognos*, [1993] 1 S.C.R. 87 (S.C.C.) at para. 33:

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.

[136] Here, with respect to the first requirement, Mr. Bola accepts that he owed a duty of care to the plaintiffs. While it is not agreed, I do not consider the fourth requirement, whether the plaintiffs relied on the representations of Mr. Bola (assuming they can be identified), to be controversial. If the first four requirements are met in this case, under requirement five, damages for remediation of the contaminated soil might well follow. It is requirement two and three that are controversial.

[137] With respect to the contents of the duty of care in this case the plaintiffs submit that it included a requirement to make full and fair disclosure of all the material circumstances applicable to them. This is a duty that can be characterized as part of Mr. Bola's fiduciary duty to the plaintiffs or as a matter of sub-agency (*Cuttell v. Bentz* (1986), 70 B.C.L.R. 85, at para. 21). In his evidence Mr. Bola agreed that the professional standards for real estate agents applied to him and this included responsibility for checking all information that he knew or ought to have known was important to the buyer. These standards do not, by definition, apply to Mr. Bola in his role as a contractor and the general law of negligence applies to that role.

[138] Specifically, the plaintiffs say that the presence of an underground oil tank and the related contamination was a latent defect that, but for the negligent misrepresentation of Mr. Bola, would have been discoverable by the plaintiffs. At that point the plaintiffs could have made an informed decision about whether to purchase the property including offering a lesser amount than what they paid because of the oil tank. The plaintiffs rely on decisions like *Cuttell* where a realtor withheld information from his client/seller that a person associated with the purchaser had the right to veto any sale (at para. 25). They say they suffered a loss and are entitled to damages.

[139] According to the defendant, it is not clear from the plaintiffs' submission what representation was made by Mr. Bola and whether it was incorrect or negligent. Mr. Tran testified that he did not know there was an oil tank on the property and then he contradicted himself in cross-examination. Mr. Bola advised Mr. Tran of the option of obtaining further inspections and Mr. Tran acknowledged this in his evidence, although it is accepted that whether an underground oil tank was discussed is unclear. In any event the contract of purchase and sale is clear that there was a risk of an underground tank.

[140] The defendant says that the professional standards relied on by the plaintiffs are dated 2017, after the material times in this case. In any case, they make no mention of the obligation to investigate matters outside the scope of a buyer's interest such, as in this case,

the development of land. The plaintiffs in this case had no particular interest in the dwelling. According to the defendant, Mr. Bola undertook various research and inspections related to the land including storm sewers, setbacks and other matters. Finally, in order to advance a claim of a breach of care, according to the defendant, the plaintiffs must lead expert evidence about the standard applicable to the specific circumstances of the claim, citing a case of medical malpractice (*Branco v. Sunnybrook & Women's College Health Sciences Centre*, [2003] O.J. No. 3287, at para. 8). However, the plaintiffs have no expert evidence on this issue. As will be seen, it is not necessary to consider this last issue.

- [141] I begin with consideration of the representation that is alleged to have been made by the defendant. I note there is no evidence that Mr. Bola said to the plaintiffs that there was no underground oil tank. Indeed, when Mr. Baker was excavating the property in October 2014 Mr. Bola asked him to watch for a tank.
- [142] Instead the plaintiffs' claim appears to be that Mr. Bola failed to alert Mr. Tran to the existence of the underground oil tank. It is true that there is one copy of the listing for the property that did not have the reference to the inert oil tank and 2013 inspection. What interest Mr. Bola would have in deleting that information has not been explained. In any event, I have found above that Mr. Tran knew about the tank early on (sometime before the completion of the sale of the property in February 2014) when he was researching properties to buy and he found the listing for the 3015 Eastdowne Road property. The listing he saw through Interface Express described the inert oil tank and referenced the fire department inspection.
- [143] In light of the discussion above about the history of the oil tank, it seems to me that the real issue here is not so much the presence
- [144] or not of the oil tank (although that is a perplexing issue). At the material times there could be no legal objection to having an inert oil tank in the ground (and it was inert in this case). The difficulty here became the contaminated soil.
- [145] The plaintiffs say that Mr. Bola misrepresented the presence of the oil tank, and that is causally linked to the soil contamination. I accept the two are related in the sense that the oil came from somewhere and it is probable that it came from the tank that was rendered inert in 2013. But what Mr. Bola represented was no more or less than what was in the listing, that there was an inspected and inert oil tank on the property. He told Mr. Baker to watch for a tank but it was not found. There is no evidence that somehow somebody was hiding the fact of contaminated soil and, specifically, no evidence that Mr. Bola said anything about contaminated soil and certainly nothing misleading. Nobody, including Mr. Bola, knew about the contaminated soil until February 2015 when the construction of the house was at least 70-90% complete. He could not make a representation about contaminated soil because he had no knowledge of it at the material times.

- [146] As for what was known about the contaminated soil in late 2014 and into 2015 (when the old house was demolished, the ground was excavated and the foundation for the new house was put in place) there is very little and only indirect evidence. Everyone knew that the tank had been rendered inert and inspected in 2013. We also now have the independent evidence of Mr. Hughes who was inside the tank in 2013 (Mr. Bola could not know that in 2014-2015) and there cannot be any dispute that the tank was rendered inert. There is no evidence anyone said anything or that they even thought about contaminated soil in 2014-2015.
- [147] But, if anyone had said something, it would have been a reasonable and logical conclusion that rendering the tank inert would not have been approved if there had been contaminated soil. That is the purpose and value of inspections. It is possible, but quite unlikely, that Mr. Hughes and the Assistant Fire Chief got it wrong in 2013 and there was contaminated soil near the tank. Unfortunately, we do not know how the contaminated soil was missed in 2013 and the plaintiffs have the burden of proving that the defendant knew about the contamination or actually contributed to it. The evidence falls short on both counts.
- [148] As above, I accept on a balance of probabilities, that the soil contamination was a result of leakage from the oil tank that was inspected in 2013. There is some doubt because of the 2013 inspection of an apparently clean site but, on the evidence here, there is no other explanation. The significant point is that, again, it was not untrue, inaccurate, or misleading for Mr. Bola to say nothing about oil contamination that he knew nothing about. Mr. Tran knew about the oil tank at the material times and he had as much information as Mr. Bola.
- [149] It is true that Mr. Tran had little or no experience with underground oil tanks but there is no evidence he asked Mr. Bola about the tank and Mr. Bola gave misleading information or that Mr. Tran asked anybody else when he knew about the tank in 2014. The information about the tank was in the listing for anyone, including Mr. Tran, to research or inquire about further. As it turned out, Mr. Bola would have been prescient verging on clairvoyant if he had said then that there was contaminated soil. In my view the protection afforded real estate purchasers by negligent misrepresentations from realtors does not extend to requiring realtors to speculate beyond the available evidence into quite unlikely scenarios. Unfortunately, in the subject case a quite unlikely risk materialized, perhaps demonstrating the risks of the business of property development.
- [150] In summary, with respect to negligent misrepresentation, I can find no representations by the defendant that were untrue, inaccurate, or misleading, nor does the evidence support the conclusion that the defendant acted negligently in making any misrepresentations. It is not necessary to consider and apply the expert evidence about remediation.

- [151] The plaintiffs also raise an issue they describe as "Negligence - Realtor" and they rely on *Murray v. Tilley*, 2005 NLTD 2 (TD). In that case the purchasers brought an action against their realtor because of water in the furnace room of the house they purchased. The plaintiffs were not successful on the issues of fraud, misrepresentation and an agent's duty to a principal. They were successful on the issue of the duty to inquire and disclose (which is separate from the issue of negligent misrepresentation). The realtor was held to have a duty to pass on information she learned about the frequency and circumstances of water leakage (at paras. 82-90).
- [152] I think *Murray* can be readily distinguished by the fact, as I have found above, that in the subject claims there is no evidence that Mr. Bola had information that the plaintiffs did not also have (they had the information from the 2013 inspection but not the actual permit before the property was purchased). The plaintiffs knew about the inert oil tank from the original listing and they learned about the contaminated soil about the same time as Mr. Bola.
- [153] I disagree with the plaintiffs that Mr. Bola failed in his duty to inquire and disclose.
- [154] Finally, the plaintiffs argue that Mr. Bola was in a position of disproportionate trust and power with Mr. Tran compared to a typical realtor given his age, professional experience, and concurrent role as Mr. Tran's martial arts instructor and friend. The evidence does show that Mr. Bola is a very experienced realtor, general contractor and property developer. However, these factors, even given Mr. Tran's inexperience, do not impact the above conclusions. Mr. Bola made no negligent misrepresentations to Mr. Tran with respect to the underground oil tank, and did not fail to inquire or disclose information about it.
- (d) Breach of contract and deficiencies
- [155] There is no dispute that there was a contract between the parties to construct the house at 3015 Eastdowne Road, including the demolition of the existing structure. It was an oral contract and it was separate from the contract retaining Mr. Bola as a real estate agent for the plaintiffs. The basis of the contract at the beginning was the friendship between Mr. Bola and Mr. Tran. Over time their relationship broke down, ultimately resulting in Mr. Bola telling Mr. Tran in November 2015 that he should complete the project without him.
- [156] As a matter of law, an oral contract is as enforceable as a written contract. However, there are often problems proving the terms of an oral contract. That is the case here.
- [157] The broad outline of the oral contract between the parties is clear: the plaintiffs agreed to pay the defendant a fee to act as a general contractor to demolish the old house and construct a new one. The plaintiffs also agreed to pay the invoices of sub-contractors. A number of those invoices were paid by the plaintiffs and they are not in dispute.

[158] However, some invoices were not paid by the plaintiffs and some of the amounts are controversial. The time the project took is also controversial. These are the subjects of the plaintiffs' claim and the defendant's counterclaim.

[159] The plaintiffs claim the following in damages.

(i) Remediation of the contaminated soil

[160] The plaintiffs claim \$60,026.56 as the cost for remediating the contaminated soil at the subject property. The defendant says he is not liable for that cost.

[161] There is not much doubt that the soil at 3015 Eastdowne Road was contaminated and that it required remediation. The defendant challenges some parts of the expert evidence (for example, the units used for measuring contamination) but I accept that the cost of \$60,026.56 was appropriate.

[162] The question here is who is liable to pay that cost.

[163] I have concluded above that the plaintiffs' claim under the EMA, of negligent misrepresentation and negligence must fail. While the defendant owed a duty of care to the plaintiffs he did not breach that duty by removing the underground oil tank without a permit and without telling the plaintiffs. There is no evidence the defendant removed the oil tank at all. Nor is there any evidence that the defendant was responsible for the contamination of the soil. We know the tank was in place in 2013 when it was rendered inert and permitted and it was removed some time after that. We do not know who removed it and when. There is evidence it was not on site in October 2014 when the property was excavated. But there is also evidence from a neighbour that it was removed in February 2015. Apart from the difficulty with squaring the account in 2015 with the evidence from October 2014, there is no evidence connecting the defendant with that removal.

[164] In these circumstances I am unable to find the defendant is liable for the cost of remediating the contaminated soil. This claim is dismissed.

(ii) Depreciated property value

[165] The plaintiffs claim that the value of the property at 3015 Eastdowne Road was reduced as a result of the contaminated soil. The expert evidence of Mr. Cavanaugh is relied on.

[166] There are some problems with the evidence of Mr. Cavanaugh. He had not been advised the tank in question had been rendered inert meaning it had been emptied, cleaned, and filled with sand. He accepted that the concerns of a potential buyer about the site being contaminated would be alleviated by the information that the tank was inert. And Mr. Cavanaugh had not been advised there were competing offers for the property and that the purchase price was in excess of the asking price. Nor was he aware of the assessed value of the property.

[167] In any event, assuming the value of the property was reduced by the discovery of contaminated soil, I have found that the liability for that does not lie with the defendant. Once again, we do not who removed the oil tank and the soil was likely contaminated before the defendant was involved with the property.

[168] The plaintiffs claim for damages for any reduced value of the subject property from contamination of the soil is dismissed.

(iii) Cedar siding

[169] The plaintiffs claim \$1,200 as the cost for remediating the finishing of cedar siding. The defendant says he is not liable for that cost.

[170] The evidence is that the defendant installed cedar siding and put a clear coat on it. After Mr. Bola left the project the plaintiffs, or people under their direction, then applied a stain to the siding. Photographs in evidence demonstrate this was the wrong thing to do and it caused peeling, which then required sanding and refinishing.

[171] It was clearly a mistake to apply the stain over the clear coat and it was the plaintiffs who were responsible for that, not the defendant. The plaintiffs' claim for the cost of re-finishing the cedar siding is dismissed.

(iv) Leveling of floor

[172] In their notice of civil claim the plaintiffs say that Mr. Bola was negligent when he improperly managed the framing contractor for the new house. This resulted in cost of \$1,200 to level the floor in the family room (and some delay).

[173] Mr. Bola says he repaired this before he left the project under his warranty program. The framing contractor testified that, if there was a leveling problem, it could have been easily fixed with shims. I can see no damages for the plaintiffs here and their claim is dismissed.

[174] The defendant says that the plaintiffs have refused to pay \$7,000 to the framing contractor, apparently because of the plaintiffs' complaints about the floor leveling. The defendant has not counterclaimed to pay the framing contractor and he is not a party here so I cannot make any order about that matter. I note however, that it was a term of the oral contract between the plaintiffs and the defendant that the former would pay the invoices of the sub-contractors.

(v) Completion of painting

[175] The plaintiffs claim \$1,000 for painting the new house as the work was not done by the time Mr. Bola left the project.

[176] The defendant does not challenge this claim and it is allowed.

(vi) Delay

- [177] The plaintiffs say that the defendant was responsible for significant delay in the project. They acknowledge that an additional "couple of months" would not have been a problem. However, they say Mr. Bola represented that it would take about a year but it started in October 2014 and was not completed until June 2016. The plaintiffs have not identified specific delays to specific parts of the project.
- [178] There was, as Mr. Bola testified, significant second-guessing by Mr. Tran of the hiring of sub-contractors. In a number of cases Mr. Bola would present a quote from one of his usual sub-contractors to Mr. Tran for approval but Mr. Tran would try to find a cheaper quote. This occurred with stucco, floors and other contracts. By November 2015 Mr. Bola believed this was significant enough of a problem that he had to leave the project as set out in his email of November 30, 2015.
- [179] Another cause of some delay was the investigation and remediation of the soil in early 2016. The plaintiffs attribute that delay to the defendant because they allege he was responsible for removing the oil tank and for the contamination of the soil. As above, I do not agree with those assertions and it seems to me that the delay caused by the remediation cannot be attributed to either party.
- [180] Another dispute is when the original time estimate for construction of the new house began. The plaintiffs say it began when construction of the new house commenced. The defendant says it began from the demolition of the existing house or before the demolition began. There is no evidence the parties agreed as part of their contract or even talked about when construction for the purposes of the contract was to start.
- [181] Taken overall, it is certainly the case that this project expanded in terms of time as well as cost from the original idea. However, I am unable to attribute the responsibility for the delay to the defendant. The plaintiffs' claim on this issue is dismissed.
- (e) Defendant's counterclaim
- [182] The defendant counterclaims for the following in damages.
- (i) Additional hours worked by Mr. Bola
- [183] Mr. Bola says that he worked an additional 450 hours separate from his work as a contractor and he now claims damages to pay for that work.
- [184] The oral agreement between the parties was that Mr. Bola would be paid a fee of \$35,000 for his work as a contractor. There is no evidence of any agreement to pay him for additional work (or the amount to be paid) and there is no evidence it was discussed while Mr. Bola was on the job. Nor is it explained how the work done for the agreed fee is different from the work now claimed. The first time the claim appears to have been made is in the August 2016 counterclaim although only the hourly rate is referenced (\$50.00) and there is no reference to the number of hours.

[185] The defendant's claim for additional work is not supported by the contract of the parties and is dismissed.

(ii) Kitchen fixtures

[186] The new house required new kitchen cabinets. Working with a designer associated with the defendant (who testified), there was agreement about a first set of cabinets, including the colour. I also find that the cabinets were ordered in the agreed colour but the plaintiffs changed their mind about the colour. Mr. Bola ordered new cabinets and paid \$21,577.50 for them. The first cabinets could not be used for anything else, being custom made.

[187] The plaintiffs say that Mr. Bola agreed that the second cabinets would be his cost and not theirs. Mr. Bola disagrees and says he is owed the full amount of the cabinets.

[188] No reason is given by the plaintiffs for their assertion that Mr. Bola would absorb the significant cost of the second set of cabinets. On its face it is unlikely. As well, the reason for the new cabinets had nothing to do with anything the defendant did as it was the plaintiffs who changed their minds about the desired colour. Finally, the oral contract was unclear in many areas but it was clear that the plaintiffs would pay the cost of the sub-contractors.

[189] The defendant's counterclaim for the cost of kitchen cabinets in the amount of \$21,577.50 is allowed.

(iii) Draws

[190] As above, in an oral contract the parties agreed that Mr. Bola would be paid a fee of \$35,000 by the plaintiffs to be the general contractor for the demolition of the old dwelling on the subject property and for overseeing the construction of the new house.

[191] Mr. Bola left the project in November 2015 and there are two draws of \$5,000 each unpaid. He now claims the plaintiffs breached the contract between the parties and he seeks damages in the amount of \$10,000. There is no issue with respect to the \$25,000 already paid.

[192] Other than the original oral agreement of a fee of \$35,000 there is no evidence about the details of that arrangement. It was a fixed amount but we do not know if it was tied to completion of stages in the project. Also, the parties apparently did not talk in late 2014 about how either party could terminate the contract.

[193] I am unable to find that the contract between the parties was for the payment of the full amount of the \$35,000 fee regardless of what stage the construction was at. The defendant's counterclaim for the balance of the \$35,000 fee is dismissed.

D. SUMMARY

[194] The plaintiffs' claim of negligent misrepresentation, negligence, violations of the EMA and breach of contract against the defendant is dismissed except with respect to \$1,000 payable by the defendant to the plaintiffs for painting that was not completed.

[195] The defendant's counterclaim for \$21,577.50 for the costs of unused kitchen cabinets is allowed. The rest of the defendant's counterclaim is dismissed.

[196] The defendant has been substantially successful and is entitled to his costs from the plaintiffs at scale B, subject to any application received within 45 days of this judgment (or appeal judgment).

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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