1992 CarswellOnt 602
Ontario Court of Justice (General Division)

John Levy Holdings Inc. v. Cameron & Johnstone Ltd.

1992 CarswellOnt 602, 26 R.P.R. (2d) 130, 35 A.C.W.S. (3d) 134

JOHN LEVY HOLDINGS INC. and WESTERN CO-AXIAL LTD. v. CAMERON & JOHNSTONE LTD.

Philp J.

Heard: June 15-19, 1992
Judgment: July 22, 1992
Docket: Doc. 9819/90

Counsel: *Francis A. DeSantis* and *Charles Criminisi*, for plaintiff.
Michael V. Cohen, for defendant.

Subject: Property; Contracts; Civil Practice and Procedure

Headnote

Sale of Land --- Remedies — Rescission — Grounds for rescission — Default of contractual term

Agreements of purchase and sale — Terms — Vendor covenanting that to best of its knowledge and belief, soil not containing contaminated waste materials — Covenant not warranting absolute truth of statement or imposing duty on vendor to ascertain truth of statement — Covenant not eliminating doctrine of caveat emptor.

Sale of land — Vendor's obligations — Vendor covenanting that to best of its knowledge and belief, soil not containing contaminated waste materials — Vendor not having duty to ascertain absolute truth of statement.

Sale of land — Rescission — Agreement containing qualified vendor's covenant that soil not contaminated — Breach of covenant not justifying purchaser's refusal to complete transaction.

Misrepresentation — Covenants — Vendor covenanting that to best of its knowledge and belief, soil not containing contaminated waste materials — Covenant not warranting absolute truth of statement or imposing duty on vendor to ascertain truth of statement — Vendor not misrepresenting condition of lands.

The vendor JLH Inc. entered into an agreement of purchase and sale respecting its vacant land. The agreement contained a covenant which provided that to the best of the vendor's knowledge, the lands contained no contaminated waste material. The purchaser carried out its requisite searches, and had testing done to ascertain whether the lands contained any contaminated waste materials. The testing disclosed the presence of six surface contaminants, all of which were within Ontario Ministry of the Environment guidelines. None of the contaminants would prohibit the purchaser from utilizing the lands for its intended purposes. Nevertheless, the purchaser refused to close the transaction. The vendor sued for specific performance, and the purchaser counterclaimed for damages for fraudulent or negligent misrepresentation arising from the vendor's covenant and for rescission of the contractby virtue of the vendor's breach of covenant.

Held:

The action was allowed and the counterclaim was dismissed.

The covenant contained in the agreement of purchase and sale was reasonably fair and truthful to the best of the knowledge and belief of the vendor's president. The vendor's breach of the covenant did not justify the purchaser's refusal to close the transaction.

What the parties intended by the covenant was that the contaminated waste materials had to be of such quality, quantity and level that they would prevent purchasers from using the land as they had intended. It was the purchaser's responsibility to determine whether or not there were contaminants in the soil that would affect its use of the lands. The covenant inserted in the agreement did not serve to eliminate the doctrine of caveat emptor from applying to the transaction. The covenant imposed a duty on the vendor to disclose any contaminant waste material of which it had knowledge; it did not impose a duty on the vendor to make

inquiries to determine the actual existence or absence of contaminants. The vendor's president had no duty to take active steps to discover whether in fact the soil contained contaminants.
The words "to the best of my knowledge and belief" did not warrant the absolute truth of the statement that there were no contaminants in the soil, but qualified the statement by their use. The vendor was entitled to an order for specific performance and to damages caused by the delay in obtaining performance of the agreement.

Action for specific performance of agreement of purchase and sale; counterclaim for damages for misrepresentation and for rescissionof agreement.

***Philp J.*:**

1 This is an action for specific performance brought by the vendor of an agreement of purchase and sale dated January 12, 1990, between the plaintiff, John Levy Holdings Inc., and the defendant of vacant land known municipally as 145 McNab Street N. in the city of Hamilton. The plaintiff vendor also claims damages suffered as a result of the defendant purchaser's wrongful refusal to close. The defendant counterclaims for damages for fraudulent or negligent misrepresentation, alleging that the contract ended on the dates set for closing because the vendor was not ready, willing and able to complete the transaction, and for rescission of the contract by reason of the breach of a covenant by the vendor.

2 The plaintiff had completed the purchase of the lands on February 28, 1989. During its negotiations for the purchase and continuing after the completion of the purchase, a three-storey building on the land was being demolished by the previous owner. The building was known as the Robinson Cone Factory, and had been used for the manufacture of ice cream cones for at least 50 years.

3 The demolition was completed in May 1989 to the satisfaction of the plaintiff and the city of Hamilton, who had previously issued an order to conform requiring the completion of the demolition. The plaintiff was satisfied by May 23, 1989, that the vendor's warrant to remove all buildings and rubble and leave a "level and clean lot" had been completed, and it allowed the release of the holdback it had requiredwhen the purchase was completed in February.

4 The agreement of purchase and sale between the plaintiff and the defendant contained the following clause:

> The vendor herein covenants that, to the best of his knowledge, there are not now, nor shall be at time of closing, any contaminatedwaste material in or on the said lands.

5 The agreement also contained a clause that the purchaser was to satisfy himself "that its present use, vacant land zoned H Commercial, may be lawfully continued."

6 John Levy, who is the principal shareholder and president of the plaintiff company, testified that to the best of his knowledge, no such material was in or on the lands before or at the time of closing.

7 The defendant, on the other hand, alleges that sometime prior to or during the purchase by the plaintiff, when the building was being demolished, John Levy knew there was buried contaminated materials from the building and from materials brought to the lands by the contractor, arranged by the plaintiff. The defendant submits that the evidence discloses that there were contaminants in or on the land that exceeded the guidelines set by the Ministry of the Environment ("M.O.E."), and that the plaintiff knew of their existence prior to signing the offer. The defendant counsel submits that the plaintiff "deliberately, fraudulently misrepresented, or in the alternative, negligently misrepresented to the defendant that it had no knowledge of contaminants."

8 The expert evidence discloses the presence of some contaminants found in six surface samples, but all within the M.O.E. guidelines.

9 The issues, therefore, to be determined at this trial are:

> 1. The interpretation of the plaintiff's covenant quoted above.

2. Was there a fraudulent or negligent misrepresentation by the plaintiff?

3. Was the defendant's refusal to close the purchase justified in the circumstances? In other words, did he have the right to rescind the agreement?

4. Was the vendor ready, able and willing to complete the transaction on the closing date?

5. Did the land contain contaminants, and if so, did they render the property not suitable for its intended use?

The Facts

10 Mr. John Levy is the president of John Levy Holdings Ltd. and Western Co-axial Limited (the "plaintiff"). By articles of amalgamation dated September 1, 1991, John Levy Holdings Inc. and several other cable TV companies and holding companies were amalgamated under the name Western Co-axial Limited. Shortly before trial, the style of cause was amended by adding Western Co-axial Ltd. as a plaintiff. The reference to the "plaintiff" throughout this judgment shall continue to mean the plaintiff John Levy Holdings Inc.

11 In February 1989, the plaintiff purchased 145 McNab St. North from the Fortino Group for $1.55 million. The vendor warranted vacant possession of the property with all buildings and rubble removed and a level, clean lot remaining. The purchase closed on February 28, 1989, as provided in the agreement, but the plaintiff held back $40,000 since the rubble had not been completely removed and there was not yet a level, clean lot remaining. A new demolition contractor was hired to complete the demolition contract at an additional cost to the Fortino Group of $45,000. By May 23, the new contractor had completed the level lot and had hauled rubble away by truck, according to the evidence of Mr. Levy. The holdback of $40,000 was released mostly on May 12 and the balance on May 24, after the rubble had been removed and the lot levelled.

12 Mr. Levy testified that the lands were purchased in order to move his Co-axial Cable offices from Jackson Square, where his lease was expiring. He intended to set up the new premises as a complete headquarters, including a parking area for his trucks.

13 On March 3, 1989, just three days after completing the purchase, Mr. Levy received an offer to purchase the lands for $2.5 million. This offer, he testified, came as a complete surprise to him. It indicated to him that the property was very popular. Because of the almost $1 million increase in the price, he accepted the offer, which was a cash offer. Unfortunately, the offer was conditional upon the purchaser completing a feasibility study by May 5. The purchaser apparently decided that it was not feasible, and its offer expired. This offer, however, suggested to Mr. Levy that the land may be too expensive for him to build on, and indicated to him that maybe he could turn it over for a handsome profit quickly. He therefore listed the property for sale with Remax on May 15, 1989, for $2.7 million cash, dropping the listing price on August 3 to $2.35 million cash. In the meantime, he continued with his plans to move the cable business from Jackson Square, and did not dismiss completely the possibility of relocating on this newly purchased property.

14 On July 13, 1989, the plaintiff received the first of five offers to purchase the McNab Street property from the defendant company. The offer was for $1.7 million with a mortgage-back to the vendor. The plaintiff countersigned the offer back to the purchaser at $2.4 million,and no mortgage-back.

15 A second offer received a month later provided for a purchase price of $2 million, a higher deposit and more cash, but still included a purchase mortgage-back to the vendor. Again, the plaintiff signed this offer back at $2 million, and all cash.

16 A month later, a third offer was received from the defendant. This offer was for $1.6 million cash. The vendor signed this offer back to the purchaser at $2.1 million, which was not acceptable to the defendant purchaser.

17 On November 14, 1989, the plaintiff listed the lands again, this time with Chambers Realty, at $1.97 million, and on December 20, 1989, received a fourth offer from the defendant of $1.6 million cash. This offer was signed back by the plaintiff at an increased price of $1.75 million cash, and a covenant concerning contaminated waste material was struck out by the plaintiff. The covenant read as follows:

> The vendor herein covenants that there are not now, nor shall be at time of closing, any contaminated waste material in or on the said lands, and that a M.O.E. certificate to that effect will be supplied on closing to the purchaser.

18 This clause first appeared in the third offer from the defendant and, through inadvertence by the plaintiff, was left in when he signed the offer back at $2.1 million cash. Mr. Levy testified that he had not noticed the clause in the third offer, and had signed it without first reviewing it with his solicitor. He realized, therefore, that he was stuck with the clause. His lawyer advised him he should not have left it in the agreement because it was something outside his control and knowledge, and it put a duty on him to obtain an M.O.E. certificate.

19 The fifth and last offer dated December 22, 1989, was for $1.65 million, and this offer was accepted by the plaintiff on January 12, 1990, with a closing date of April 25, 1990. The compromise covenant contained in this agreement reads as follows:

> The vendor herein covenants that, to the best of his knowledge, there are not now, nor shall be at time of closing, any contaminated waste material in or on the said lands.

20 Mr. Levy testified that he was able to make this covenant because he had no knowledge of any contaminants in the soil at that time, nor subsequently at the time of closing. In fact, he testified, it wasn't until May 14, 1990, that he was informed of the presence of some contaminants in the soil. His lawyer received a letter from the defendant's lawyer, enclosing a copy of a report completed by a consulting engineer of a preliminary environmental assessment together with a copy of a letter dated May 3, 1990, from M.O.E. These two documents indicated the presence of some contaminants in the soil of the property. This came as a complete surprise to both Mr. Levy and his lawyer because there had been no mention of any problem with the soil until receipt of the May 14 letter, nor was it used as a reason by the defendant for not closing the purchase on April 30, the agreed-upon closing date.

21 Mr. Scholes, the solicitor for the plaintiff, testified that he had been advised by Mr. Cohen, the solicitor for the defendant, that his client had expected to close a sale of some Barrie property, the proceeds of which were to be used to close the McNab Street purchase. The Barrie transaction could not close as planned, and the closing date was extended to May 2. Mr. Cohen therefore requested of Mr. Scholes an extension of the McNab Street closing to May 3. Mr. Scholes advised Mr. Cohen, after receiving instructions, that the plaintiff was prepared to extend the closing to May 3, provided the purchaser increased its deposit by a further $50,000, and that if the transaction did not close, both deposits would be paid out to the vendor. In addition, the purchaser would have to pay interest from April 25 until May 3 on the moneys to be paid on closing. These conditions were not satisfactory to the defendant, and Mr. Scholes had some misgivings as to whether the transaction would close as agreed upon on April 25.

22 On April 23, 1990, Mr. Scholes received a telephone call from Mr. Cohen in which Mr. Cohen advised him that he would not be in Hamilton on April 25 and not available to close the transaction, but that his client would be available. He reiterated the need for the extension, since the Barrie sale was not closing until May 2. Mr. Scholes's reaction to these requests was that the purchaser had no intention of closing. In that same telephone conversation, Mr. Cohen asked for a representation and warranty document to be given on closing to include a clause that it would survive the closing. Mr. Scholes arranged for Mr. Levy to attend at his office on the morning of April 25 to execute the required documents so that they would be ready to close and to arrange to tender the documents if possible. If he could not find the purchaser, he would send a letter. About 11 o'clock that morning, he received a telephone call from Mr. Cohen, who said that he would attend at Mr. Scholes's office after noon to discuss the matter and facilitate the tender. Mr. Cohen did attend shortly after noon as promised. Mr. Levy was still present, and kept asking Mr. Cohen if they were closing and whether he had the money. Mr. Cohen replied that he had no instructions. Mr. Scholes then tendered the required documents to Mr. Cohen, who examined them, but refused to sign an acknowledgment of tender presented to him by Mr. Scholes. Immediately after Mr. Cohen left, Mr. Scholes dictated a memo for the file, setting out details of the tender, including the documents that were presented to Mr. Cohen.

23 The only reason given for not closing was that he, Mr. Cohen, did not have the proceeds of the Barrie sale available to him in order to complete the McNab Street purchase. No mention was made that there was a concern or problem with soil contamination.

24 Unknown to Mr. Levy, Mr. John Cameron, the president and co-manager of the defendant company, had approached M.O.E. in January or February 1990 with a view to determining whether or not the soil was free of contaminated waste materials. He retained the assistance of Mr. Michael Cino, who had been the demolition contractor and had brought down the Robinson Cone Factory under contract with the previous owners, the Fortino Group. As mentioned earlier, when the plaintiff's closing of its purchase of the lands occurred on February 28, 1989, the demolition clearing and levelling of the land had not been completed. Mr. Cino and his company were released from the job, and another contractor, L.M. Enterprises, was retained to complete the job at an additional cost to the Fortino Group of $45,000. Its job was to clean, clear and level the complete property according to the specifications set by the Hamilton building department. During the course of the demolition by Mr. Cino, several orders to comply had been issued by the city of Hamilton because of the continued delay, making the lands and partially demolished building hazardous to persons in the vicinity.

25 Mr. Cino was retained by Mr. Cameron to take steps to have the property inspected for contaminants. The M.O.E. was approached and the consultant engineers, Trow Ontario Limited, were retained by Mr. Cino on behalf of Cameron & Johnstone Limited to collect surface soil samples for analysis. On February 13, Mr. Peter A. Fortuna of Trow Ontario Limited and Mr. A.G. Lewis of M.O.E. attended on the site with Mr. Cino, and proceeded to collect six soil samples at locations recommended by Mr. Lewis. The samples were then tested by Trow for conformance with the "Guidelines for the Decommissioning and Clean-up of Sites in Ontario," and their report dated March 23, 1990, was sent to the defendant company to the attention of Mr. Mike Cino. It is clear from the evidence that Mr. Cino was not an employee of the defendant company, but rather its agent in the carrying out of the inspections. As mentioned earlier, the inspection and taking of samples was done without the knowledge of the plaintiff, and in fact without having obtained its consent for the defendant and its agents to go onto the plaintiff's lands for the purpose of taking the samples. This lack of consent may be academic since Mr. Scholes, on April 9, told the purchaser's solicitor to satisfy himself in answer to Mr. Cohen's request for evidence that no material was present on the land that would contravene the *Environmental Protection Act*, R.S.O. 1980, c. 141 (now R.S.O. 1990, c. E.19).

26 The March 23, 1990 report of Trow Ontario Limited, according to the evidence of Mr. Cameron, did not come to his attention until about April 7 or 8 because it went to his bookkeeper's address in Burlington, and for inexplicable reasons was not brought to his attention immediately in spite of the importance of this document to the agreement of purchase and sale between the two parties. The results of the soil testing showed the presence of several contaminants, most of which satisfied the guideline criteria of M.O.E. The report indicated that one of the six samples showed electrical conduct ("E.C.") activity slightly in excess of the acceptable level of the guidelines for agricultural/residential/parkland use, but satisfied the criteria for commercial/industrial land use. It also noted that the pH showed a slightly alkaline soil condition at three of the six sample sites; however, these values were within the regional background for pH in the Hamilton area, and therefore were considered acceptable by M.O.E. guideline criteria. The report also indicated that the molybdenum levels for all six samples exceeded the acceptable level for agricultural/residential/parkland use, but satisfied the criteria for commercial/industrial land use. The report therefore concluded that the soil conditions satisfied the criteria established by M.O.E. for commercial/industrial land use, but some remediation/cleanup would be required in their opinion should the land use be agricultural/residential/parkland.

27 Instead of taking this March 23 Trow report to the plaintiff or his own solicitor, Mr. Cameron chose instead to deliver it to Mr. Lewis at M.O.E. in Hamilton for what he described as a verification or second opinion. Mr. Cameron did not advise Mr. Lewis that his purchase of this land was to have been completed on April 25, nor, in fact, had he told him that he was only the purchaser of the land and not the owner.

28 The report of Mr. Lewis, requested by Mr. Cameron, was sent to Mr. Cameron under date May 3, 1990. It stated that the results submitted by the Trow report met the clean-up criteria for industrial/commercial development as outlined in the "Guidelines for Decommissioning and Clean-up of Sites in Ontario," but the results showed that the molybdenum and the sodium absorption ratio ("S.A.R.") levels exceeded the criteria for residential/agricultural development contained in the guidelines. He

reported, therefore, that some remediation/cleanup would be required if the site was to be used for residential/agricultural or parkland purposes. It wasn't until May 14, 1990, that Mr. Scholes, solicitor for the plaintiff, received a copy of the Trow report dated March 23 and the M.O.E. letter of May 3. In the meantime, on May 4, the plaintiff had commenced its action for specific performance.

29 Based on the Trow report at the May 3 stage, the lands were perfectly acceptable for the given purpose of the purchaser's intended use of the lands, namely as a parking lot, since that use came within the industrial/commercial use allowed by the guidelines. Mr. Cameron testified that it was his intention to use the lands temporarily as a parking lot but later to have them rezoned for their highest and best use, which he stated would probably be high density residential buildings. He knew, of course, when he offered to purchase the lands that it was zoned H-commercial. He had, in fact, made an offer to purchase the lands back in 1987, but lost out to the Fortino Group. He subsequently made two or three offers to the Fortino Group to purchase the lands. Unfortunately, he did not tell anyone of his intention to attempt to rezone to the highest and best use and then to sell the lands. In fact, apparently his solicitor, Mr. Cohen, did not know of his intention to apply for rezoning at a later date. Mr. Cohen, with Mr. Cameron's authority, inquired of the city zoning department, and received a clearance for the operation of a parking lot, the proposed use set out in his inquiry. When questioned on Mr. Cohen's authority to obtain a clearance for the use of the lands as a parking lot, Mr. Cameron stated that he may or may not have told him of his eventual intentions, and since Mr. Cameron's company did operate two or three downtown parking lots, Mr. Cohen may have presumed that that was the purpose of this purchase as well. He admitted, in fact, that he did not tell anyone what he intended eventually to do with the land.

30 At the time of making his offer to the plaintiff to purchase, he testified, his main concern was the contaminants. He understood that construction materials had been filled into the basement of the building when it was demolished. He testified that there were two reasons for not closing the purchase on April 25. One was the postponement of the Barrie real estate closing, the funds from which he had hoped to use for his McNab Street purchase, and secondly, he was waiting for the report from M.O.E.

31 Mr. Cameron's excuse for not telling his own solicitor about the Trow report or the ultimate proposed use of the property until May 14 was that he didn't want to spend too much money.

32 It is interesting to note that a little more than a year before his final offer of December 1989 to the plaintiff, he had offered to purchase the same lands from the Fortino Group. He had been introduced to Mr. Fazari, one of the Fortino Group, by Mr. Cino, who was in the process of demolishing the Robinson Cone Factory. A written contract had been entered into between Mr. Cino and Fortino, Fazari and Albanese in July 1988 for the demolition. As a result of this introduction,on October 12, 1988, Mr. Cameron offered to purchase the property from the Fortino Group for $1.25 million for cash to the existing first mortgage of approximately $750,000, bearing interest at one-half per cent over prime at the C.I.B.C. One of the terms of the offer was that "demolition to be completed as per contract." No term or condition concerning the existence of contaminant waste materials was added to the offer.

33 The evidence is somewhat conflicting as to whether or not Mr. Cino was in the process of demolishing the factory at the time that Mr. Cameron talked with Mr. Fazari and made his offer. Mr. Cameron said he could not recall whether Mr. Cino was in the process of demolishing the building at that time. He subsequently recalled that there was no demolition proceeding when he met with Mr. Fazari. Mr. Fazari, on the other hand, testified that when he met Mr. Cameron, Mr. Cino was in the process of demolishing the building. Mr. Cino had started the demolition in mid-July officially, although it wasn't until late August or early September that he started to bring down the building because of a problem with Bell Canada.

34 Mr. Cino testified that he did enter into the July 1988 contract with Mr. Fazari. This contract was marked Exhibit 70 in the trial and was signed by Mr. Cino and Mr. Fazari. Paragraph 2 of the contract reads as follows:

> 2. The contractor will demolish all of the buildings to ground level, break concrete floors, remove and cart away all wood and other debris, fill the basement, without breaking the same, with fill to ground level properly compacted *to permit use of the lands as a parking lot* and to leave the site in a condition satisfactory to the owners.

(Emphasis added.)

35 Mr. Cino admitted in cross-examination that he had demolished the building, some of which went into the basement which was to be left. When he was relieved of his job and another contractor brought in, everything was sitting on the site and in the basement, he testified.

36 On all the evidence I am satisfied, and so find, that when Mr. Cameron made the October 12, 1988 offer to purchase the property from the Fortino Group, he was aware and knew of the ongoing demolition of the buildings, and that they were being demolished in accordance with the July 1988 contract between Cino and the Fortino Group. Mr. Cameron acknowledged that he had used Mr. Cino before to knock down buildings and level the land for the purpose of its use as a parking lot. He conceded that it was not unusual to fill the basement with the debris left after the building was demolished. I find that he was perfectly aware of the contract and the way in which the lot was to be left following completion of the demolition.

37 Mr. Lewis of M.O.E. testified that at the time of the February 1990 testing he was the product engineer for M.O.E. in Hamilton. He was a graduate chemical engineer from Queens University. He explained that the decommissioning and clean-up guidelines of M.O.E. were to be considered when there was a potential change in land use. They are not legal requirements, but merely guidelines used to determine soil conditions if a change in land use is suggested. When first contacted by Mr. Cino in late January or early February, he suggested that they retain a consultant to do the inspection and testing. Mr. Lewis attended on the site with the consultant to make sure that the soil samples that were taken complied with the ministry. If he concludes that the consultant's report is satisfactory in terms of contaminant content in the soil, he will issue a sign-off letter or a clearance letter to the owner of the land. If it does not meet the criteria contained in the guidelines, then he will request further work to be done.

38 He noted when he attended at the site that it was surrounded by commercial and residential properties, that there was a concrete pad at the northeast end of the site which was not considered a waste by him since there was no visible staining on it. Aside from a small pile of asphalt in the middle of the lot which had obviously been deposited from outside by someone, the lands were level throughout with broken brick and glass. In his opinion, from his visual inspection, there was no environmental impact. He noted from the March 23 Trow report that the pH level was slightly higher, but that this was not a concern in the Hamilton area because Hamilton has a higher alkaline soil. This slightly higher level would not have any effect on the use of the land for residential purposes, in his opinion. He noted that while the E.C. activity showed one sample slightly exceeded the acceptable levels for agricultural/residential/parkland use, the rest of the analysis was well below the guidelines, and he was satisfied that the E.C. one sample was not a concern.

39 The molybdenum levels exceeded the acceptable level for agricultural/residential/parkland use, but this was basically only a concernif the lands are to be used for the grazing of animals. He said there was no known effect on human health from molybdenum, a metalthat was naturally in the soil.

40 His May 3 letter was mostly concerned with the Trow report statement that the S.A.R. sample was higher than the criteria required for residential/agricultural development. Having since looked more closely at the report, he noted that this conclusion in the report was in error and that it should have referred to the E.C. sample rather than the S.A.R. sample. Having noted this error, he was able to conclude that in his opinion, the results of the tests were within the guidelines for residential/agricultural criteria. He therefore wrote, at the request of Mr. Levy, a correction to his May 3 letter on November 30, 1990. This letter was received in evidence as Exhibit 33. In the November 30 letter, he concludes that "this property is acceptable for use as residential land or park land, as well as commercial or industrial land" based on the analysis results submitted by Trow Ontario Limited, in their March 23, 1990 report. He found that the analysis results of molybdenum and pH on the six samples analyzed in the March Trow report fall within the range of background levels within the Hamilton area. Mr. Lewis considered his November 30 letter as the clearance or sign-off which would allow the owner to proceed with land use in the areas of residential/parkland/ commercial or industrial, all of which were within acceptable levels in accordance with the M.O.E. guidelines criteria.

41 The defence alleges that they were concerned with contaminants buried with the debris of the demolished building well below the surface. Mr. Cameron testified that when he attempted to sell a vacant lot in downtown Hamilton two years before, the purchaser confronted him with evidence of asbestos in the ground, and he was required to remove it before he could complete

the sale. He had purchased the land and office building some time before, and had demolished the building and made a parking lot which he then sold to Canada Trust.

42 While the evidence discloses that there was no mention to Mr. Levy of the existence of underground asbestos, Mr. Cameron testified that he had heard rumours. Mr. Cino was called by the defence as a witness at trial. He testified that he had removed asbestos from the linings of pipes and placed it in plastic bags, and he suspected that it may still be there. The evidence of Mr. Fazari, who had the responsibility of arranging for the demolition of the factory for the purpose of a parking lot, was that Mr. Cino had advised him that he had removed five plastic bags of asbestos from the property, thereby saving Mr. Fazari $25,000. Mr. Fazari believed this was some time in August or September, before the actual demolition started and while Mr. Cino was emptying the interior of the factory. Mr. Fazari stated that Mr. Cino never mentioned to him anything about the existence of P.C.B.s or any other asbestos.

43 I found Mr. Fazari to be a very credible witness who gave his evidence in a straightforward manner, and I have no hesitation in accepting his evidence. On the other hand, I found Mr. Cino a most unreliable witness who was very argumentative and wouldn't answer questions directly. His obvious purpose in testifying was to fight against Mr. Fazari and Mr. Levy, both of whom had been responsible for the removal of his company from the demolition job. I found his evidence very much exaggerated, unintelligent and unreliable. Where his evidence conflicts with any of the other witnesses, I would accept their evidence over the evidence of Mr. Cino. I therefore find that Mr. Cino had removed five plastic bags of asbestos from the property which he had taken from pipes in the building.

44 The evidence of Mr. Peter Fortuna, the environmental engineer with Trow Engineering Co. Ltd., was that the standard practice concerning asbestos was to remove it, bag it and take it to a landfill site. He testified that P.C.B.s were found in fluorescent lights, and if in excess of "twenty," would have to be destroyed at a special site. Both he and Mr. Lewis, who took the soil samples from within 10 inches of the surface, testified that no one told them that there was any contaminants in the debris that came from the demolished building. Specifically, Mr. Fortuna stated that Mr. Cino had said nothing to him about asbestos or P.C.B.s being buried on site, contrary to the evidence given by Mr. Cino. Mr. Cino had testified that he had dug holes down six to eight feet, and expected Mr. Fortuno and Mr. Lewis to examine the debris down there after he told them of the possibility of some asbestos, wood and P.C.B.s being buried. Both Mr. Fortuno and Mr. Lewis testified that Mr. Cino did not dig any holes or tell them that he had dug holes, nor did he at any time mention to them the possibility of underground contaminants. Had they been so warned, Mr. Lewis testified they would have wanted it noted and would have required digging to look at it. Mr. Lewis was satisfied from his visible inspection and the lack of any suggestion of underground debris being contaminated that the surface samples of the soil were perfectly adequate to test for the purpose of comparing the levels of contaminants with the guidelines of M.O.E.

45 Mr. Lewis testified that there was clearly a concrete slab present, but that it was inert and showed no visible staining, so that there was no concern of contamination. Brick, likewise, is inert, and is not of a concern to him. Wood is considered a waste material, although not considered toxic. The concern with wood is that if it breaks down and rots, it could create methane gas. He said, however, that it would take a large concentration of wood to create methane gas. The mere placing of left-over debris of brick and wood in a concrete basement under the surface intended to be used as a parking lot was not of concern to him.

46 The defence called as a witness Mr. Morris Leibtag, a parking lot operator in downtown Hamilton for some 40-odd years. He knew both parties and was familiar with downtown properties. At one time he operated three parking lots for the defendant company. He testified that when he passed the Robinson Cone property sometime during the last five years, he saw the wreckers start to demolish the building. He noted that the salvage was removed by people who attended at the site and bought the bricks and timbers and other materials from the building. It was done in the usual way and after the salvageable material was sold and taken away, the rest of the debris, which he described as brick, wood and plaster, was either hauled away or put in the basement. This was the manner in which such debris from demolished buildings was handled by the construction business when creating parking lots. He was unable to say when he saw it, except that it was about three years ago. He recalled that he saw them start to push rubbleinto the basement towards the end of the job. He saw large timbersand brick being taken away in flat trucks. He admitted he wasn't there all the time so he didn't see everything, and he couldn't rememberwhether there were dump trucks on site, although it was usual after the rubble was bulldozed into the basement.

47 On all the evidence heard at this trial, I am satisfied that there is no reliable evidence of the existence of asbestos, P.C.B.s or a large quantity of wood buried in the basement. I find, on the evidence, that the rubble and debris bulldozed into the basement in the usual manner while levelling the ground for a parking lot did not contain contaminated waste materials that would affect the known intended use of the land.

48 The use of the words "not any contaminated waste material" must be examined. They were used in the covenant made by the vendor in the January 12, 1990 agreement of purchase and sale, as well as the representation and warranty prepared by Scholes at the request of Mr. Cohen. "Not any" can be interpreted literally as meaning "none."

49 In attempting to interpret a clause in a contract, the courts attempt to apply the plain meaning of the words contained in the clause. Sometimes, however, the plain meaning may not describe the intention of the parties, and the courts will depart from the literal meaning if it results in an absurdity. To me, it would be unreasonable to suggest that such a covenant contained in an agreement of purchase and sale should mean that there can be *no* contaminants in the soil in the sense of metals or elements that are naturally there. Such a literal interpretation would be unrealistic and miss the true intent of the parties. The court must look at the whole contract to determine what was in the contemplation of the parties in terms of the subject-matter of the agreement. Mr. Justice Estey put it this way in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176, at p. 58 [D.L.R.]:

> Even apart from the doctrine of *contra preferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

50 It makes more sense in the case before me that the parties intended that the contaminated waste materials had to be of such a quality, quantity and level that it would prevent the purchaser from using the lands as he intended to use them. The present use of the lands was described in para. 6 of the agreement as "vacant land Zoned H Commercial." It is clear from the evidence that it was the purchaser's intention to use the land as zoned for a parking lot. He did not require the zoning to be changed as a condition of his purchase.

51 In any event, the soil tests revealed a modest amount of contaminants, but all below the level that would prevent the use for which he intended. It is significant to note in considering the interpretation of the covenant that Mr. Cameron, shortly after March 23, 1990, and well before the date set for closing, became aware of the existence of contaminants in the soil. Instead of informing the vendor of the Trow report, he chose to obtain an M.O.E. verification or second opinion to be satisfied that the contaminants present in the soil would not affect his use of the lands. As well, the presence of some contaminants did not cause him to refuse to close the purchase. The only reason given for not closing was the lack of funds expected from the sale of the Barrie property.

52 I might also add that the definition of "contaminant" found in the *Environmental Protection Act*, s. 1(1)(*c*), reads as follows:

> (*c*) 'contaminant' means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities *that may cause an adverse effect*.

(Emphasis added.)

53 I agree with the reasoning of Then J. in *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 73 O.R. (2d) 627 (H.C.), at p. 634, where he states under the heading "The literal meaning of the words":

> The general rule is that the words in a contract are to be given their plain, literal and ordinary meaning. In the absence of ambiguity,it is the plain meaning that is to be adopted in interpreting the contract. In a commercial contract the words must be construed in a business fashion and in accordance with business common sense so as to avoid any interpretation that would result in a commercial absurdity.

54 The purpose of the attendance of Mr. Lewis from the M.O.E. and Mr. Fortuna from Trow Engineering was to test the soil for the level of contaminants and to compare with the guidelines of the M.O.E. at the request of Mr. Cino, who was acting as an agent for the defendant company. I find that the results of this testing was within the acceptable levels set out in the Guidelines for the Decommissioning and Clean-up of Sites in Ontario, and the levels met the criteria for residential, parklands, industrial and commercial sites.

55 The clause in the fifth and final offer received by the defendant and drawn by the vendor's agent was a compromise between the defendant's insistence in including a clause concerning any contaminated waste material and the plaintiff's solicitor's advice not to make any covenant concerning this subject. As stated earlier, the covenant of the vendor was that "to the best of his knowledge, there are not now, nor shall be at time of closing, any contaminated waste material in or on the said lands." The evidence of Mr. Levy was that he had no knowledge of any such contamination, nor did he suspect that any existed, and I accept his evidence in this regard. He was basically an operator of coaxial cable companies, and not experienced in the development of land nor the demolition of buildings, as were the two principals of the defendant company, Mr. Cameron and Mr. Johnstone.

56 In his letter of requisitions, Mr. Cohen required "evidence satisfactory to the writer that the property contains no substances or material which are improperly present, stored, or contained which contravene any provisions of any statute, by-law or ordinance, including the *Environmental Protection Act*." Mr. Scholes testified that Mr. Cohen then talked to him on the telephone about the possibility of the presence of polluting material, including asbestos, being on the lands, and he then wrote to Mr. Scholes as follows:

> You further indicated that you would try to obtain material from the wrecker that all polluting material including asbestos, have been removed according to law from the lands.

57 Mr. Scholes replied to the letter of requisitions and specifically stated, concerning the requisition requiring evidence of no substance or material improperly present, to "kindly satisfy yourself." It suggests that the defendant could take steps to satisfy itself on this subject. As mentioned earlier, this reply implies that the defendant could go onto the land and make tests, as it had already done in February. In the final paragraph of his reply, Mr. Scholes advised that "we are attempting to obtain from the wrecker confirmation that all polluting material was removed from the lands and shall hopefully have same available for closing." His reply to the requisitions is by letter dated April 9, 1990. Mr. Scholes testified that he had attempted to obtain this information by telephone on several occasions, and finally, on April 17, wrote to L.M. Enterprises, requiring written confirmation as soon as possible that all polluting material including asbestos was removed from the land. He did not have any reply to this letter by the time the date for closing had arrived.

58 In my view, it was the responsibility of the purchaser to determine whether or not there were, in fact, contaminant waste materials in the soil that would affect his use of the lands. The covenant inserted does not eliminate the doctrine of caveat emptor as it pertains to purchasers of land. It would appear from the evidence, in any event, that Mr. Cameron did take it upon himself to be satisfied as to the soil conditions prior to the date for closing.

59 On closing, Mr. Scholes also produced a document entitled representation and warranty requested by Mr. Cohen and signed by Mr. Levy. It stated that "the undersigned John Levy Holdings Inc. hereby represents and warrants to the best of its knowledge and belief that there is not any contaminated waste material in or on the above noted property, which representation and warranty shall survive the closing of the sale of this property." This warranty, which would give rise to an action for damages if false, added the word "belief" to the best of its knowledge. The evidence discloses, of course, that as of the date of closing, Mr. Levy had no knowledge or information as to the existence of contaminants.

60 I am satisfied, and so find, that the contaminants found in the soil did not affect the intended use of the lands by the purchaser. Nor, in fact, did they affect the use of the lands, as found by Trow Engineering and Mr. Lewis, for residential or parklands.

61 The covenant in the agreement of purchase and sale and the representation and warranty signed on April 25, 1990, placed a duty upon the vendor to disclose any contaminant waste material of which it knew. It did not place a duty upon the plaintiff to make inquiries or tests to determine the actual existence of contaminants. In my view, the covenant and the subsequent warranty warranted that certain facts exist not absolutely, but "to the best of its knowledge."

62 Since Mr. John Levy, the president and principal shareholder of the plaintiff, did not know of any such contaminants and I so find, there was no duty on it or him to take active steps to discover whether in fact there were contaminants in the soil. Its only duty, because of its covenant, was to disclose contaminants of which he knew.

63 In any event, the purchaser, without notifying the vendor, took it upon himself to investigate the lands to determine whether or not contaminants did exist and, in effect, satisfied himself that the existence of contaminants in the soil was not of sufficient level to affect either his known proposed use of the lands nor his unstated intention of attempting to rezone the lands for residential purposes.

64 In my view, the use of the words "to the best of my knowledge and belief" did not warrant the absolute truth of the statement that there were no contaminant waste materials, but qualified the statement by the use of those words. I find that the warranty and representation made by Mr. Levy was reasonably fair and truthful to the best of his knowledge and belief, and therefore not a breach that would justify the defendant to refuse to close the transaction or to rescind the contract.

65 A computer search of Quick Law revealed the Supreme Court of Canada decision in *Confederation Life Assn. v. Miller* (1887), 14 S.C.R. 330. In that action, the beneficiaries of a life insurance policy on the life of the late George Miller sued the life insurance company who had resisted payment on the ground that part of the contract contained untrue statements and suppressed material facts. The answers to questions in the application form were followed by a declaration by George Miller in which he warranted and guaranteed that "the answers given to the above questions ... are true, to the best of my knowledge and belief." The issue involved the question, "Have you had any serious illness, local disease, or personal injury?", to which the applicant answered, "Broken leg in childhood — confined to bed three days from a cold." The evidence disclosed apparently that George Miller had fallen from a load of hay and seriously injured himself, for which he had successfully sued the township of Scarborough for damages. The defendant life insurance company alleged that Miller's answer had been wilfully false, with intent to deceive the defendants. That allegation, however, had been put to the jury by the trial judge, in what was considered by the Supreme Court a proper form, and the jury found in favour of the plaintiffs. At p. 344, Gwynne J. stated as follows:

> Now this statement being qualified by the words 'to the best of my knowledge and belief' can only be untrue, if the contrary to what is stated be the truth — namely, that to his knowledge and belief he had received some other serious personal injury than that stated. Whether that was so or not was for the jury to say, and the learned judge left to them all the evidence from which they might infer what was the knowledge and belief of the applicant upon the point in question. The rule of construction is that the language of the warranty being framed by the defendants themselves the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it.

66 Like the jury in the *Confederation Life v. Miller* case, I find that Mr. Levy did not have any knowledge or belief of the existence of contaminant waste materials in the soil of the lands which were the subject-matter of the sale to the defendants. The subsequent finding of some contaminants, but below a level that would cause any restriction in the purchaser's intended use of the land, did not make the representation or warranty a false or negligent statement. It was true to the best of his knowledge and belief.

67 The covenant and representation or warranty cannot be considered to be a condition precedent that would enable the defendant to rescind the contract. It could only give rise to a claim for damages if false, and no damages have been proven to

have been suffered by the defendant as a result of the existence of some contaminants. On the evidence, I am satisfied that the level of contaminants found in the soil will not affect the purchaser's use of the lands, and hence no damages were suffered.

68 As mentioned earlier, Mr. John Cameron testified that there were two reasons for not closing. One was the inability to close the Barrie sale so that its proceeds would be available for his McNab Street purchase, and secondly, because of his concern for contaminants that may have been in the soil. The first reason was given by his solicitor on closing, but the second reason was never disclosed by the defendant nor its solicitor to the vendor or its solicitor until May 14, well after the closing date. This is so, even though by the time the closing date had arrived, Mr. Cameron was in possession of the Trow report and had, in fact, delivered a copy to Mr. Lewis at M.O.E. for their verification and second opinion, yet he had not revealed its existence to Mr. Levy or his solicitor.

69 Another motive has been suggested by the plaintiff's counsel for the defendant's decision to rescind the contract and refuse to close. The plaintiff's counsel called as a witness Barry Humphries, an expert in the field of real estate appraisals. He has had some 32 years of experience in the Hamilton area in this field. He was retained by the plaintiff to prepare a report on the appraised value of the subject property as of April 25, 1990, the date for closing of the transaction, and as of May 4, 1992, a month before trial. His report and evidence indicated that the estimated market value of the property as of the date of closing, April 25, 1990, was $1.2 million, and as of May 4, 1992, was $1 million. He noted that its existing use at both times was vacant land, and that its highest and best use was development of the lands with medium density non-profit housing. The land is currently still zoned as commercial, but such properties are not being developed as such because of the economy, Mr. Humphries testified.

70 He testified from his experience and observation of values of properties that in the years of 1987 and 1988 and early 1989, the values of properties escalated very rapidly. In the middle of 1989, the escalation slowed down and came to almost a stop by December 1989. In January to April 1990, the prices levelled off and started to fall. They have continued to fall until recently. Commercial and industrial properties have been the most severely hit, he stated. In his opinion, Mr. Levy had purchased the property for $1.55 million in February 1989, when the market was levelling off and just before it started to fall. By December 1989, when Mr. Cameron offered to buy the lands for $1.6 million to close on April 25, 1990, value of the commercial and industrial properties was falling. By April 1990 they were continuing to decline in market value. While Mr. Cameron, in his evidence, denied that such a decline was occurring, I accept the opinion of Mr. Humphries as an expert in the real estate appraisal field.

71 Counsel for the defendant submitted that the plaintiff did not take active steps to mitigate its damages following the collapse of the transaction. While the plaintiffs issued their statement of claim for specific performance on May 4, 1990, they did, in fact, list the property for sale with Effort Trust on July 3, 1990, for $1.97 million. No offers were received during the existence of this listing agreement, which expired on September 30, 1990. No further formal listings were made. Several real estate agents were aware of this property from previous experience, and on February 25, 1991, Lounsbury presented an offer from Hamco in trust for $1.7 million, provided the property could be used for non-profit housing for 100 units. A total of five offers were received from Hamco in trust, the last one dated December 3, 1991, which was accepted by the plaintiffs on December 10. Unfortunately, the conditions attached to the offer concerning non-profit housing units was not met, and the deal could not be completed. An offer was received on February 3, 1992, of $30,000 for a 50 x 50 foot lot. This would require severance, and was therefore not acceptable. On February 6, an offer was received from Victoria Park Community Homes in the amount of $740,000, again for the erection of non-profit housing. It contained three pages of conditions and accordinglywas not accepted. I am satisfied on the evidence that the plaintiffs have taken reasonable steps to mitigate its damages.

72 I must therefore allow the plaintiffs' claim and dismiss the counterclaim.

73 The plaintiffs are entitled to specific performance of the agreementof purchase and sale dated January 12, 1990, and damages sufferedby it to date as a result of the defendant's wrongful act of refusingto close the transaction which caused the delay in obtaining performanceof the contract.

74 The damages to which the plaintiffs are entitled are for compensation for the interest carrying charges the plaintiffs had to continue to pay to their bank. The amount of those charges totalled $395,697 to June 11, 1992, plus a per diem rate of $339.72

to date, or the additionalsum of $7,473. The total carrying charges to date are therefore$403,170. The plaintiffs have had to pay realty taxes that, but for the defendant's refusal to perform, would have been paid by the purchaser.These taxes total $54,034.23. There were sundry expenses paid out by the vendor, such as solicitor's fees on the aborted sale, landscaping consulting fees, clean-up costs and Ontario capital tax, totalling $7,058. These expenses were not challenged by the defendant.

75 The total damages, therefore, awarded to the plaintiffs, in additionto specific performance, are $464,262.

76 There will therefore be judgment for the plaintiffs for specific performance by the defendant of the agreement of purchase and sale, dated January 12, 1990, and damages against the defendant in the amount of $464,262.

77 The plaintiffs shall also be entitled to their costs of this action to be paid by the defendant on a party and party scale after assessment, unless there is reason for a different disposition of costs. If so, I would request counsel to advise me within a week.

Action allowed; counterclaim dismissed.