When Environmental Risk Gets Complicated: A Multidisciplinary Case Study

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The Transaction

A company is buying an older industrial property. The company commissions a Phase I ESA during pre-purchase due diligence. The Phase I ESA concludes: “The Phase I investigation did not identify obvious or high-risk evidence of contamination. Based on the results of the Phase I investigation, a Phase II site assessment may not be required, however, it would help rule out or identify the existence of impacts above the applicable regulatory criteria. An estimate for a Phase II site assessment can be provided upon request”.

The Technical Problem

The purchaser makes a substantial non-refundable deposit. Then a Phase II ESA is completed by the purchaser prior to closing on the purchase. The Phase II ESA finds petroleum hydrocarbons and chlorinated solvents. The environmental consultant says: "The concentrations exceed applicable standards, but the results do not establish that the contamination is migrating onto neighbouring properties."

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The Transaction Closes

The purchaser closes after negotiating an environmental indemnity from the seller. Six months later, contamination is discovered on neighbouring property by the owner of that property.

The Regulator Arrives

The regulator issues an order requiring on-site and off-site investigation/remediation due to a perceived risk to a nearby recent residential development.

The Consultant Gets Sued

The purchaser alleges: "If the consultant had properly interpreted the Phase II results, we never would have closed."



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