

Mrs. Sheppard was a double amputee and spent most of her time in a wheelchair. She could also get around by using two prosthetic feet and canes or by crawling on the floor. The new home they wanted to build for themselves would have to accommodate for that.

A lot of land was bought in Holyrood. The Sheppards engaged an excavator to prepare the land for construction. Since part of the land was a bog, it was necessary to remove it and replace it with more stable fill. Once that was completed, they looked for a contractor and were referred to Hickey's Building Supplies Limited. The Sheppards entered into a contract with Hickey's and made it clear to Hickey's from the outset that the home needed to accommodate Mrs. Sheppard's special circumstances—in particular, her mobility challenges.

While Hickey's substantially completed the building, the Sheppards refused to make the final payment because of two alleged deficiencies: The main issue was with the flooring, which ended up not being level and created an obstacle for Mrs. Sheppard. The second issue was that the Sheppards thought they had contracted for 9' ceilings and got 8' ceilings instead.

The Breaches of Contract

The flooring issue was critical; it was the main reason the Sheppards refused to pay the final amount due on the contract. The floor was made up of two parts. In most of the house, it was hardwood attached to the concrete sub-floor with adhesive glue. In the kitchen, bathrooms, and entranceways, it was ceramic tile also attached to the concrete sub-floor with an appropriate adhesive. There were two problems with the floor: The hardwood portion was not properly attached to the concrete sub-floor. In many places it had lifted, moved, and made noises when walked upon. The second issue was the transition between the ceramic and hardwood portions, which were not at the same level.

CASE SUMMARY



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PEACE OF MIND AS PART OF A HOME BUILDING CONTRACT

Hickey's Building Supplies Ltd. v. Sheppard

After working in Labrador City for years, Harvey and Patricia Sheppard were ready to retire and decided to move back to Newfoundland.

The resulting ridges presented an obstacle to Mrs. Sheppard's wheelchair.

Hickey's argued that transition strips that it had placed in appropriate places were sufficient to alleviate the problem. It argued that the contract did not specifically require a level floor, that the contract contained an entire agreement clause so that verbal communications about level floors did not affect Hickey's obligations under the contract, and that in any event the transition strips were compliant with the *Building Code* and therefore adequate.

The trial judge did not accept those arguments:

[57] The Sheppards were adamant that they had emphasized to Jay Hickey that they wanted a smooth, flat floor, with no obstacles for a wheelchair. They maintain that the floor ought to have been installed so that there was no difference between the heights of the two types of flooring. [The Contractor] on the other hand, felt that the problem was only a minor one, and could be solved by the addition of tapered "transition strips" which would mask the difference in height.

[58] It is not credible that [the Contractor] could have misunderstood the need for a flat floor with no obstacles. Jay Hickey knew from the beginning that Mrs. Sheppard required a floor that was appropriate for a wheelchair. Jim Hickey, who took over management of the job from Jay Hickey in May 2009, also knew these requirements. This issue could have been addressed in the late fall of 2009, when the ceramic floor was installed.

[61] I believe it is disingenuous for [the Contractor] to refer to the terms of the written contract. It is true there is nothing written in the contract about the two types of flooring being even where they came together. However, many aspects of good construction techniques are not mentioned in the contract. There is an expectation that the construction will proceed using the available techniques, within the costs permitted in the contract. According to several of the witnesses, it would have been a minor adjustment during construction to have had the flooring that satisfied the Sheppards.

The Court of Appeal did not interfere with that finding. It held that the contractor should have told the Sheppards about the possibility of using transition strips and the possibility of having a perfectly level floor at a slightly higher cost. The Court of Appeal also agreed that compliance with the *Building Code* was no answer to using the strips without authorization from the Sheppards.

With respect to the second alleged deficiency—the ceiling height—the drawings of the proposed

house showed nine-foot ceilings, but the specifications were for "2x6 Pre-cut spruce studs", indicating an eight-foot ceiling. Mr. Hickey testified for the Contractor that he had discussed the height of the ceiling with Mr. Sheppard and that Mr. Sheppard "told him to go with the lower priced option", that is, eight-foot ceilings. Mr. Sheppard testified that he had no idea that pre-cut meant 8' height and that when he realized that he was getting 8' ceilings, he agreed under duress, since the carpenter was ready to commence work on the walls, and he wanted to avoid further delay. Despite a contract clause to the effect that "in the event of a conflict, the specifications shall control the drawings", the court found that the contract called for 9' ceilings:

[33] Since the meaning of "p/cut" and "pre-cuts" set out in the specifications is not obvious, a layperson reading the contract would normally come to the conclusion that the requirement for nine foot walls in the drawings was not contradicted by the specifications. In the absence of an explanation for the technical term "precuts", there was no expectation that the Sheppards would understand that the contract provided for eight foot walls. As a consequence I find that the contract called for walls of nine feet.

To this point, the case was a relatively straightforward and typical home builder's case. What sets the case apart is the court's discussion of damages.

The Damages—Peace of Mind

The Supreme Court of Canada in *Fidler v. Sun Life Assurance Co. of Canada* held that while breaches of commercial contracts can, in some circumstances, result in an award of damages for mental distress, such awards are definitely not the norm, since the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties to commercial contracts:

[45] It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within

the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.

Having regard to these principles, the trial judge in *Hickey's Building Supplies Ltd. v. Sheppard* held that an important part of the house contract was to provide the Sheppards with the peace of mind that Mrs. Sheppard's circumstances would be appropriately reflected in both the final product and the execution of the construction itself. The Sheppards' circumstances made it foreseeable that delay and failure to live up to the terms of the contract would cause distress. The court held that Hickey's failed to provide that peace of mind. Being fully aware of Mrs. Sheppard's medical and disability issues, Hickey's failed to meet the Sheppard's reasonable expectations. With respect to delay, it was foreseeable that failure to meet the contract completion date would present serious difficulties for the Sheppards. Because of the requirement for wheelchair accessibility, alternate accommodations would not be readily available. The problems with the floor presented even greater distress.

Therefore, the trial judge awarded the Sheppards \$15,000 in general damages.

The Court of Appeal was divided on this issue. The dissenting judge, Madam Justice Welsh, held that the trial judge was wrong in awarding general damages for mental distress in these circumstances. Justice Welsh argued that regardless of the Sheppards' special circumstances with respect to wheelchair accessibility, the contract to build their house did not engage the "peace of mind" component. While it was true that the hardwood flooring was not properly installed and that Hickey's chose to comply with the *Building Code* standards rather than the agreement in using transition strips, these deficiencies could be corrected, and damages could compensate for the required remediation. Since this was not a situation in which the house was rendered uninhabitable, Her Honour would have allowed the appeal on this point.

Madam Justice Hoegg, for the majority of the court, dismissed the appeal and upheld the damages award. The majority held that Hickey's fully understood the psychological benefit for which the Sheppards had contracted. In fact, Hickey's had conceded in its testimony that the contract could be characterized as a "peace of mind" contract. Justice Hoegg held that it was foreseeable to Hickey's that the breaches of the contract with respect to flooring and delay were likely to result in mental distress of a compensable nature to both Mr. Sheppard and Mrs. Sheppard. The requirements set out by the Supreme Court of Canada in *Fidler* were therefore met.

Newfoundland and Labrador Court of Appeal

November 24, 2014

Welsh, Harrington and Hoegg JJ.A.