Citation: *Estabrook v. Biedermann*, 2022 YKSM 2

Date: 20220425
Docket: 20-S0069
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Chisholm

BRENDA ESTABROOK

Plaintiff

v.

STEPHAN BIEDERMANN

Defendant

Appearances:
Brenda Estabrook — Appearing on her own behalf
Stephan Biedermann — Appearing on his own behalf

REASONS FOR JUDGMENT

[1] This is a dispute regarding the quality of construction work in a home addition and home renovation project. The Plaintiff homeowner, Brenda Estabrook, contends that the Defendant, Stephan Biedermann, is at fault for a deficiency in the construction of the basement suite. The Defendant denies this allegation.

[2] The Plaintiff submits that she hired the Defendant as a general contractor and builder in relation to the project. In terms of the alleged deficiency, the Plaintiff says that the Defendant did not install a sound barrier between a newly constructed basement suite and the living room above it, as required by provisions of the *National Building Code of Canada,* (the *"Code"*). The Plaintiff seeks $25,000 in damages.

[3] The Defendant contends that the Plaintiff hired him to do construction work on an hourly basis. He submits that he and his apprentice performed this work to the requisite building standards.

[4] Unfortunately, there was no written contract between the parties, who, respectively, have differing views regarding their business relationship and the scope of the construction work that the Defendant agreed to perform.

Summary of the Relevant Evidence

[5] In 2013, Ms. Estabrook commenced planning for a major renovation of, and an addition to, her home. Initially, she hired James Vautour to draft plans for her. Mr. Vautour highly recommended Mr. Biedermann to build the addition and do the renovations. In a November 26, 2013 e-mail, Mr. Vautour advised Ms. Estabrook that he had spoken to Mr. Biedermann, who was interested in the project. By early June 2014, Ms. Estabrook had hired Matt (also known as Peter) Wilkinson to do excavation and foundation work, including the framing of foundation walls. Mr. Wilkinson testified that as he only had limited availability, he committed to this limited work while Ms. Estabrook looked for a builder.

[6] Around this time, James Vautour introduced Ms. Estabrook to Mr. Biedermann, who was prepared to start work in early July 2014. In her testimony, Ms. Estabrook described a meeting with Mr. Vautour, Mr. Biedermann, and other trades people to discuss the project. Mr. Vautour testified that he did not have a specific recollection of such a meeting, but did testify that he would typically set up a meeting with the contractor, client, and himself to discuss the project, generally.

[7] On June 8, 2014, Mr. Biedermann wrote to Mr. Vautour by e-mail, and stated in part:

> ….Do you have the drawings ready yet so I could start looking at a bit of an estimate? I take it she wants an estimate or is it okay if we just work by the hour.

[8] When Mr. Vautour forwarded Ms. Estabrook the above-noted email, she replied to him by stating that she would prefer receiving an estimate from Mr. Biedermann. Despite this response, Ms. Estabrook did not pursue an estimate from Mr. Biedermann. He never provided one to her before beginning work on the project.

[9] On July 3, 2014, Mr. Biedermann wrote to Ms. Estabrook by email with respect to a start date for the siding the house. He also inquired whether she had had a chance to contact any of his former clients, and suggested that she “check out” his Biedermann construction website.

[10] Mr. Biedermann and his apprentice, Mr. Beaupré, began working for Ms. Estabrook and charging on an hourly basis. They commenced siding and roofing work in the summer of 2014. Mr. Biedermann testified that he never entered into a contract with Ms. Estabrook and did not act as the general contractor. He believed that Mr. Vautour acted as the general contractor on this project initially. Mr. Biedermann noted that at some point in time Mr. Vautour left the project, and, thereafter, Ms. Estabrook assumed the role of arranging and organizing material and trades people.

[11] Mr. Beaupré also testified that he understood that Mr. Biedermann and he were hired as carpenters to be paid biweekly. Part of their work entailed building a place in the basement for Ms. Estabrook's adult son to live.

[12] In August 25, 2014 correspondence between Ms. Estabrook and Mr. Vautour, she expressed concern with respect to the amount of one of his bills, and specifically his role in coordinating trades people. In response, Mr. Vautour suggested that she might consider having "Stephan take this lead role". However, Mr. Vautour did not recall whether Mr. Biedermann agreed to take over the entire scope of the project.

[13] Mr. Biedermann testified that if he had been retained as the general contractor, there would have been increased fees for his services. According to Mr. Biedermann, such increased costs might have been reflected in invoices as contracting fees, profit, or overhead. Also, he explained that some contractors mark up material costs. His billings did not contain such charges. He was adamant that he did not assume this role on the project.

[14] In support of his position that he was not the general contractor, Mr. Biedermann also referred to Building Permit 2014-2193, dated July 14, 2014, which lists Ms. Estabrook as the contractor.

[15] After the siding and roofing work, and as the weather became colder, Mr. Biedermann and Mr. Beaupré commenced working indoors. In the fall of 2014, they started work on the basement suite that Ms. Estabrook was having constructed for her adult son. This suite included a bedroom, bathroom, living room and a kitchen.

Mr. Biedermann indicated that he thought the suite was completed in November 2014, or by the latest, December 19, 2014.

[16] In cross-examination, Ms. Estabrook agreed that she had not wanted to spend money to make the space for her son a “legal suite”, and that she had made this clear either to Mr. Vautour, or to someone else involved in the construction. Mr. Vautour believed that Ms. Estabrook’s intention was to have a basement suite as close to “legal” as possible, but this was not completely clear to him. Mr. Vautour recalled speaking to her about whether she wanted the electrician to add a second electrical metre to “legitimize” the suite, but he was uncertain whether that ultimately occurred or not. He recalled that Ms. Estabrook viewed the addition of a suite as not only a place for her son to live, but also as an enhancement to her home for the purposes of its resale value.

[17] Ms. Estabrook testified that Mr. Biedermann was very professional and very accommodating, but that the project was costing her a lot of money. As a result, by November 11, 2014, Mr. Biedermann agreed to reduce his hourly rate from $58 to $50 an hour.

[18] Ms. Estabrook indicated that around January 2015, when Mr. Biedermann and his apprentice started work on the “blue room” in the basement, she became concerned to learn that no insulation had been put in the ceiling of the basement suite which had been completed. She asked about this because she was worried about sound transfer from the main floor to the basement suite. In an e-mail to Mr. Biedermann on January 25, 2015, Ms. Estabrook explained that the trades person installing the flooring had

provided her with the name of a company which used a “soundproofing barrier” on floors. She wrote:

> This might be something to look into before we floor upstairs. Friends also used Safe and Sound insulation (but we might be too late to use this product). I am wanting to use it upstairs if it is appropriate. Will there be more insulation going into the roof in the blue room downstairs – Safe and Sound perhaps.

Mr. Biedermann replied that he could check into that, but he doubted that such a barrier would be compatible with in-floor heating. He also wrote that they would put “Roxul safe and sound insulation” in the “blue room”, adjacent to the basement suite, after the electrician had finished work in that location.

[19] Despite this correspondence, Ms. Estabrook testified that she and Mr. Biedermann did not further discuss the addition of a sound barrier for the basement suite, the construction of which was, otherwise, already finished. Ms. Estabrook testified that she later learned that the *Code* required the installation of a sound barrier in this type of suite. Mr. Biedermann did not recall any specific discussions with Ms. Estabrook regarding a sound barrier for the basement suite. He testified that his recollection is that the plumber, who was installing an in-floor heating system, installed insulation in the ceiling of the basement suite, after which he and Mr. Beaupré drywalled the ceiling.

[20] Although it was unclear when Ms. Estabrook’s adult son, David Sheenan, moved into the basement suite, he agreed that it was prior to the completion of the house renovation. In his testimony, he described being awoken early in the morning by noises, such as coffee being ground, that he could hear in the upstairs kitchen. This led

to arguments between him and his mother. He conceded the noise issues were apparent to him as soon as he moved into the suite, but that he did not raise this issue with Mr. Biedermann. An inspection report dated February 23, 2015 indicates that occupancy was granted for the living suite (Exhibit 3, p. A11).

[21] Prior to the trial in this matter, Thomas McMahon, a witness for Ms. Estabrook, drilled holes in the ceiling drywall of the kitchen, living room and bedroom of Ms. Estabrook's basement suite. He located 3.5 inches of insulation, which is the equivalent of R12 insulation. He did not find any evidence of metal stripping for a sound bar. He also located heavy-duty strapping above the drywall.

[22] Mr. Biedermann and his apprentice continued their work on this project in February and March 2015. On March 10, 2015, Ms. Estabrook wrote to Mr. Biedermann, stating, "[o]verall I am very pleased with things. I think that the upper floor is going to be wonderful and what I want, so I know how you like to fret – DON'T. We just need to make sure things are done well and maintain communication". However, approximately one month later, she raised the issue of cost. On April 14, 2015, after having spoken to two other contractors, she wrote to Mr. Biedermann with respect to her concerns that the amount charged for the drywall, mudding, and painting of the upstairs area was "excessive".

[23] In response to these concerns, Mr. Biedermann explained to Ms. Estabrook in correspondence that the price charged for the work in question was reasonable. Notwithstanding this disagreement, Mr. Biedermann and his apprentice continued to do work on this project into September 2015.

[24] Ms. Estabrook had ongoing concerns with respect to “soundproofing” in the basement suite. In 2020, she had contractors look into that issue, at which point she learned that it did not comply with the *Code*.

[25] Peter Wilkinson is a red seal carpenter with significant training and experience in residential and commercial building construction. He was qualified to provide expert opinion evidence with respect to residential home construction and the application of the *Code*. He explained that the *Code* has been adopted in the Yukon in its entirety. He testified that a secondary suite is a self-contained dwelling unit within a house, where the house and the suite are separate dwelling units, but constitute a single real estate entity. He explained that neither the *Code* nor the City of Whitehorse by-laws employ the term “legal suite”. Whereas the *Code* refers to a “secondary suite”, the City of Whitehorse employs the term “living suite”. He stated that if a suite does not contain a kitchen, it is considered part of the main dwelling unit; however if a suite contains a kitchen, it is considered a separate dwelling unit, and is classified as a living suite.

[26] Mr. Wilkinson detailed the *Code* requirements for sound transmission attenuation in a house containing a secondary, or living, suite. The sound transmission class between the primary and secondary suite is a minimum of 43 (“STC 43”). In order to achieve the STC 43 rating, the floor joist cavities should contain six inches of sound-absorbing material; a resilient channel, or sound bar, must be placed on one side of the separation; and, one-half inch of gypsum board attached to the sound bar.

Analysis

[27] These are the issues to be addressed in this matter:

1. Does this action fall outside of the limitation period set out in the *Limitations of Actions Act*, RSY 2002, c. 139, for the filing of a Claim?

2. If the Claim is within the limitation period, was there a contract between the Plaintiff and the Defendant?

3. Was the Defendant obliged to meet the minimum sound transmission class rating of the *National Building Code* in the construction of the basement suite?

4. If he was, and there was a contract in place, did the Defendant breach the contract, or an implied term of the contract, by not meeting the minimum sound transmission class rating, thus failing to exercise the reasonable care and skill of a contractor?

5. If there was a breach of contract, what is the proper assessment of damages?

[28] As in any civil action, Ms. Estabrook has the burden of proving her case on the balance of probabilities.

Does this action fall outside of the limitation period?

[29] Section 2(1)(f) of the *Limitation of Actions Act* provides for a six-year limitation period after a cause of action arose for the recovery of money "…whether recoverable

as …damages …or on a simple contract, express or implied, … within six years after the cause of action arose."

[30] Mr. Biedermann contends that the work in question was completed, at the latest, by December 19, 2014, and since the Plaintiff's Claim was filed on December 30, 2020**,** the action exceeds the statutory limitation period.

[31] The evidence clearly establishes that the Defendant was aware of the scope of the project from the outset. I disagree with his interpretation that he and his apprentice were moving from discrete project to discrete project on this long-term home addition and home renovation project. This was a large project that took over a year to fully complete, and Mr. Biedermann and his apprentice worked on the project between July 2014 and September 2015. In my view, this was a continuing enterprise. On that basis, I find that the limitation period commenced in September 2015, when Mr. Biedermann completed his work at the site. As such, the Plaintiff was within the six-year time limitation period when she filed the Claim on December 30, 2020.

[32] In any event, I should point out that the Yukon Government declared a state of emergency in this territory on May 1, 2020 pursuant to the *Civil Emergency Measures Act*, RSY 2002, c. 34 (the *"Act"*). That state of emergency was renewed periodically, without interruption, until August 25, 2021. During that period of time, limitation periods for civil matters were suspended pursuant to s. 2 of the *Civil Emergency Measures Limitation Period and Legislated Time Periods (COVID-19) Order*, M.O. 2020/25, which was issued pursuant to the *Act*.

[33] Section 2(1) of the *Order* reads:

> No limitation period established in a provision of a Yukon law for bringing a civil or family action, appeal or proceeding in a court expires during the state of emergency or during the 30-day period immediately after the termination of the state of emergency.

[34] Pursuant to s. 2(2), a limitation period that would have expired but for s. 2(1) was extended and expired 90 days after the termination of the state of emergency. If the Plaintiff's limitation period for the filing of this Claim was between November 1 and December 19, 2020, as submitted by the Defendant, it was extended to 90 days after August 25, 2021.

[35] In the result, even if I were to agree with the Defendant's argument that this was not a continuing enterprise, but was instead a series of discrete and separate projects, based on the *Act's* suspension of time limitations as set out above, the Plaintiff would still have filed her Claim within the six-year limitation period.

Was there a contract between the Plaintiff and the Defendant?

[36] The parties hold diverging positions as to their working relationship between 2014 and 2015. The Plaintiff submits that she hired the Defendant as the general contractor, whereas the Defendant contends that he and his apprentice were working on an hourly basis without a contract.

[37] The evidence that I accept demonstrates that Ms. Estabrook did not hire Mr. Biedermann as a general contractor. I accept that Mr. Biedermann would have charged Ms. Estabrook a general contractor fee, in some form, if he had been hired for that purpose. Although Mr. Biedermann did initially assist the Plaintiff in obtaining a

plumber and electrician, as time passed, Ms. Estabrook assumed more control regarding the making of arrangements to advance the project.

[38] At the same time, although Mr. Biedermann did not act as a general contractor, he detailed in his billings that he was charging for "[c]arpenter/[f]oreman hours". His billings also reveal charges for various materials, rental equipment, and for the work of one of the trades (i.e. the spray foam company). Although Mr. Biedermann was not overseeing the project and arranging sub-trades as a general contractor, he had accepted to take on the project, from roofing and siding the house, to constructing the basement suite, to renovating other portions of the Plaintiff's home.

[39] Even though the agreement was not reduced to writing, the Plaintiff hired Mr. Biedermann to construct the addition and do the other renovation work. I accept her evidence that she met with Mr. Vautour, Mr. Biedermann and other tradespeople to review the project in 2014. Although another carpenter, Mr. Wilkinson, was initially involved, he had advised the Plaintiff that he could only complete a small part of the project. When Mr. Biedermann and his apprentice started work on this project in July 2014, I find that the Plaintiff and the Defendant had an oral contract that the Defendant and his apprentice would perform the construction work for the remainder of this project.

Was the Defendant obliged to meet the minimum sound transmission class rating of the National Building Code in the construction of the basement suite?

[40] As outlined by Peter Wilkinson, s. 9.11.2.1(2) of the *Code*, stipulates a minimum sound transmission class rating of 43 for a secondary suite. Subsection (2) reads:

> Where a house contains a *secondary suite*, each *dwelling unit* shall be separated from every other space in the house in which noise may be transmitted
>
> a) by construction
>
> i) whose joist spaces are filled with sound-absorbing material of not less than 150 mm nominal thickness,
>
> ii) whose stud spaces are filled with sound-absorbing material,
>
> iii) having a resilient channel on one side spaced 400 or 600 mm o.c., and
>
> iv) having 12.7 mm thick gypsum board on ceilings and on both sides of walls, or
>
> b) by construction providing a sound transmission class rating of at least 43 for walls and floors, measured in accordance with Subsection 9.11.1. or as listed in A-9.10.3.1. in Appendix A.

[41] City of Whitehorse zoning bylaw 2012-20, passed July 23, 2012, defines "dwelling unit", as follows:

> "DWELLING UNIT" means one or more rooms intended to be used as a residence by one household, each dwelling having independent living, sleeping, toilet facilities, and not more than one kitchen." [emphasis added]

[42] City of Whitehorse zoning bylaw 2014-17, passed May 26, 2014, defines "living suite" as "…a separate, self-contained, dwelling unit within a single detached house."

[43] City of Whitehorse Zoning Bylaw 2012-20 defines "sleeping unit", as follows:

> "SLEEPING UNIT" means one or more rooms intended for temporary sleeping and accommodation. A sleeping unit may contain a toilet and a bathroom, but shall not contain kitchen facilities or any kitchen equipment.

[44] The *Building Standards Act*, RSY 2002, c. 19 amended by SY 2013, c. 3 defines the *Code* as the "…National Building Code of Canada 2010, as amended or replaced from time to time". Section 2(2) of this *Act* stipulates:

> Except as otherwise provided in this Act or the regulations, the construction, occupancy and use of a building, and the installation and use of any component, fixture or system of a building, must conform to
>
> a) this Act, the regulations and the building code;
>
> b) any permit issued under this Act; and
>
> c) any applicable requirement imposed under any other enactment.

[45] Even though I accept that Mr. Biedermann did not have direct knowledge of the City of Whitehorse bylaw which prohibits a dwelling unit from having more than one kitchen, he, nonetheless, should have been aware. The Defendant, who had significant experience in the construction industry, constructed a suite for Ms. Estabrook that included a kitchen. Based on the evidence at trial, I find that this basement suite was a secondary suite as per the *Code*, and a living suite as per Whitehorse bylaws. The fact that the construction of the basement suite did not meet the *Code's* minimum sound transmission class rating constitutes a deficiency.

[46] The Defendant argues that it is unclear that he installed the insulation under the in-floor heating pipes. However, I understood Peter Wilkinson's evidence to be that such insulation is installed to insulate the underside of the in-floor heating lines, as opposed to reduce sound transmission. In any event, in my view, a contractor building a living suite is the professional who should have the knowledge and expertise with respect to sound transmission attenuation requirements. A contractor in that situation

must be versed in the *Code* and local requirements, and must undertake to implement a proper sound attenuation system.

[47] Also, I find that Ms. Estabrook raised the issue of a sound barrier with Mr. Biedermann. I come to this conclusion based on her testimony and the January 25, 2015 e-mail to Mr. Biedermann in which she wonders whether it is too late to use "Safe and Sound insulation". The concern about whether it would be too late to use this product is consistent with other evidence, including that of the Defendant, that the basement suite was otherwise completed by that date.

[48] I conclude that the construction of the basement suite was deficient in that it did not meet the *Code's* minimum sound transmission class rating.

Did the Defendant breach the contract, or an implied term of the contract, by not meeting the minimum sound transmission class rating, thus failing to exercise the reasonable care and skill of a contractor?

[49] In ***Banga*** v. ***Sabiston***, 2019 SKPC 29, the Court considered the law with respect to the quality of work performed on a construction project. In that case, the plaintiff sued the defendant roof installer for breach of contract, alleging that he had been either negligent in the provision of his services, or that alternatively, he breached an implied contractual warranty that the work be of workmanlike quality. The Court held that the roofer's services did not meet the standard of "good and workmanlike". In coming to this conclusion, the Court stated, at para. 45:

> In *Mack v. Stuike* (1963), 43 D.L.R. 2(2nd) 763 (Sask Q.B.) the Court recognized that:

> A contract to perform any work, in the absence of any stipulation as to the manner in which it is to be carried out, implies a condition that the work shall be done in a good and workmanlike manner, and the workmen employed on the work must be possessed of the ordinary amount of skill possessed by those exercising the particular trade ...

Goldsmith, in his text, Canadian Building Contracts (Toronto: Carswell, 1988) at pp 5-11 through 5-12 notes that:

> Work that does not meet the requirements of the specifications in the contract, or which, in the absence of such specifications, is not of a reasonable workmanlike quality, is not proper compliance with the contract and constitutes a breach. Furthermore, compliance by the contractor with the specifications will not be sufficient performance, if the specifications were prepared by him and are deficient, even if they were approved by the owner. Whether work or material supplied, is defective or not is, in each case, a question of fact, depending on the construction of the particular specifications where there are any, and on expert evidence as to what is reasonable where there are none.

[50] In ***G. Ford Homes Ltd.*** v. ***Draft Masonry (York) Co. Ltd.***, (1983), 43 O.R. (2d) 401, the Ontario Court of Appeal addressed a situation where the plaintiff installed staircases in two homes built by the defendant. The staircases did not comply with the minimum headroom height as specified by the Ontario *Building Code*. The issue on appeal was whether there was an implied term of the contract that the staircases would comply with the provincial building code. Mr. Justice Cory, speaking for the Court, stated:

> For almost a century it has been recognized that a term will be implied in a contract in order to give it business efficacy: see The "Moorcock" (1889), 14 P.D. 64. The basis upon which a term of a contract will be implied has been extended by decisions of the English Court of Appeal and the House of Lords. Hudson's Building and Engineering Contracts, 10th ed. (1970), pp. 274-5, gives us a useful summary of the law pertaining to when terms will be implied in a contract:

> It is submitted that a contractor undertaking to do work and supply materials impliedly undertakes:
>
> (a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;
>
> (b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind. (In the case of goods not described, or not described in sufficient detail, it is submitted that there will be reliance on the contractor to that extent, and the warranty in (c) below will apply);
>
> (c) that both the work and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and only becomes relevant, for practical purposes, if the contractor has fulfilled his obligations under (a) and (b)).

[51] The Court concluded:

> On the facts of this case there must of necessity be an implied term that the staircase could be and would be installed so as to comply with the Ontario Building Code. There could be no business efficacy to the contract without such a term. It is no contract to have stairs installed that must, by requirements of the law, be taken out for failure to comply with the code. To sanction the installation of such a staircase in contravention of the code would be tantamount to sanctioning an illegal contract. On the basis of the principle enunciated in the Moorcock case, supra, the term should be implied in the contract that the stairs would comply with the code.

[52] In ***Girroir*** v. ***Cameron***, [1999] 176 N.S.R. (2d) 275 (S.C.), the property owners hired the defendant to do carpentry work on their home and to install siding on the house. The cedar siding subsequently cracked and split, and resulted in leaks and dampness in the home. The Court accepted opinion evidence that the house had not

been properly flashed and cladded, and that the siding had been improperly nailed to the walls. The Court held that defendant had failed to protect the house by restricting entry of precipitation, contrary to a general prohibition in the *Code*.

[53] The Court explained, at para. 39, that "[t]he defendant performed a role and did work according to an oral contract. The court can imply work should be done in a good and workmanlike manner."

[54] In ***Parker*** v. ***Robinson***, 2014 BCPC 237, the Plaintiff engaged the defendant to replace perimeter drain tiles at her home. After installation, the plaintiff observed water entering her basement. The defendant's work was deficient, and the deficiency resulted in the entry of water into the basement. The Court held that the defendant's installation did not comply with the applicable building code. The Court explained, at para. 3:

> There was no written contract between Ms. Parker and Mr. Robinson. She simply retained Mr. Robinson to do the work, without any discussion of detailed terms of contract. In those circumstances, the law implies a term that the work will be performed with reasonable care and skill. In the case of a building contract, the minimum requisite standard of care and skill is determined by the applicable building code. Put another way, it is an implied term of such a contract that the standard of workmanship is to meet or exceed the requirements of the applicable building code…

[55] In the case at bar, I find that there was an implied term of the oral contract that the Defendant's work would comply with the *Code* and relevant City bylaws. In terms of the sound transmission attenuation requirements, the appropriate class rating was not achieved. The work in this regard did not meet the requirement of good and workmanlike quality, or, as described in ***Parker***, it was not performed with reasonable care and skill. As such, there was a breach of contract.

Assessment of Damages

[56] Ms. Estabrook bears the burden of establishing her damages. As stated in ***Viper Concrete 2000 Inc.*** v. ***Agon Developments Ltd.***, 2009 ABQB 91, at para. 53:

> The onus is on the plaintiff to prove its damages on a reasonable preponderance of credible evidence. (See: *100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (C.A.) at p. 422). The damages need not, however, be proven with mathematical accuracy. The Supreme Court of Canada emphasized this point in *Penvidic Contracting Co. Limited v. International Nickel Co. of Canada Limited*, [1976] 1 S.C.R. 267 at p. 279-280, citing its earlier pronouncement of the same principle:
>
> > When *Wood v. Grand Valley Railway Company, supra,* reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 51 S.C.R. 283, where the learned justice said at p. 289:
> >
> > > It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if *the amount of the verdict is a matter of guess work.* [emphasis in original]

[57] The basic principle in assessing damages for breach of contract is to place the party who sustained a loss in the position the party would have been if the contract had been performed according to its terms (***BG Checo International Ltd.*** v. ***British Columbia Hydro and Power Authority***, [1993] 1 S.C.R. 12, at para. 12).

[58] The jurisprudence in this area reveals two approaches to assessing damages. As explained in ***Bice & Sons Drywall Services Ltd.*** v. ***Grona***, 2019 ABPC 164, at paras. 55 and 56:

> Generally speaking there are two approaches to how the Court seeks to put the injured party back into the position he would have been in but for the breaches. In *McGarry v Richards, Ackroyd and Gall Ltd*, [1954] 2 DLR 367 (BCSC) (*McGarry*), Davey J (as he then was) stated at 389 of the report:
>
> > These cases establish that the primary measure of damages for non-performance of a contract to build on another's land is the diminution in value resulting from such a default. In the case at bar, the work was imperfectly done, but, I can see no difference in principle.
> >
> > Cases may arise where the damages for the default should be measured by the cost of making good the default. This will be so if the cost of performing the work or making good the defects is less than the diminution in the value of the property caused by the default. In such cases, it is the Plaintiff's duty to take any reasonable steps to mitigate his damage by doing what is required.
>
> Davey J went on to hold in *McGarry* that the cost of reinstatement is not the proper measure of damages when the owner does not intend to rectify the defective work, or where he would be acting unreasonably or oppressively in doing so.

[59] The Court of Appeal decision in ***514953 B.C. Ltd. (c.o.b. Gold Key Construction)*** v. ***Leung***, 2007 BCCA 114, also provides a detailed analysis of these principles. As adopted in ***514953 B.C. Ltd.***, at para. 12, the measure to be used in any given case "…depends upon the peculiarities of the case".

[60] It is clear from the evidence that the Plaintiff in the case at bar suffered damages due to this breach of contract. The lack of a sound bar, or sound attenuation system in the ceiling of the basement suite negatively affected her son's living experience in that

unit. I am satisfied that she should recover damages to remediate the deficiency. The difficulty, considering the evidence before me, is how to assess those damages. The Plaintiff has led no evidence with respect to the diminution of the value of her property due to this deficiency.

[61] On the other hand, the Plaintiff has provided the Court with two estimates to remedy the deficiency. However, since one of the estimates contains virtually no detail whatsoever, it is not probative, and I must disregard it (see ***Tokarz v. Cleave Energy Inc.***, 2022 ONCA 246, at para. 60).

[62] The second estimate is in the amount of $42,600 plus taxes. The Plaintiff seeks damages to the maximum monetary amount permissible in this Court, namely, $25,000. Although the second estimate contains some detail with respect to the type of work to be performed, it is not a detailed breakdown, and the quotation is shockingly high. It also suffers from a lack of information as to how the author arrived at the various amounts comprising the quotation. For example, without explanation, the general contractor proposes charging over $7,000 in overhead and profit. He also quotes a $9,000 amount to remove drywall, move furniture, provide floor and counter top protection, and to remove and reinstall electrical fixtures and drop boxes, yet does not specify how many hours this work would take. Additionally, he quotes an astounding figure of close to $20,000 for installing and finishing drywall, painting and cleaning. In sum, I have absolutely no confidence in this estimate.

[63] Additionally, the hiring of a general contractor to perform this work is in direct contrast to the manner in which the Plaintiff dealt with the building of the suite. At that

time, she was alive to the cost of the project, and was not afraid to raise it as an issue with the Defendant. In my view, she should not now benefit from the work of a general contractor who has provided a wholly unreasonable estimate.

[64] I should also point out that if a sound attenuation system had been installed at the time that the suite was built, the Plaintiff would have been obligated to pay that cost.

[65] Finally, the general contractor who provided this estimate has completed no cost benefit analysis in terms of how to proceed with remedying the deficiency.
Mr. Wilkinson, the expert witness, testified that to “bring the ceiling up to Code”, there was more than one manner in which to proceed. One could either remove the drywall and refinish the ceiling or have a sound control barrier designed and installed on top of the existing layer. Unfortunately, Mr. Wilkinson was not asked his opinion as to the likely costs of these two options.

[66] After much consideration, based on the above, the small size of the basement suite, and the relatively straightforward work to cure this deficiency, I assess damages in the amount of $6,000. This amount comprises 100 hours of work at $50 an hour, plus $1,000 for materials. The materials covered by this amount would be either replacement drywall, if the original is removed, or materials to cover the sound control barrier, if it is installed on top of the existing ceiling.

[67] I award the Plaintiff damages in the amount of $6,000 and costs in the amount of $200.

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CHISHOLM T.C.J.