

Claim No. 379942

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Cape Breton Flooring Ltd. v. MacLeod*, 2012 NSSM 25

BETWEEN:

CAPE BRETON FLOORING LIMITED

CLAIMANT

-and-

IAN MACLEOD and HELEN MACLEOD

DEFENDANTS

REASONS FOR DECISION

BEFORE

Ralph W. Ripley - Adjudicator

Hearings held at Sydney, Nova Scotia, on April 2, 2012 and May 7, 2012

Decision rendered on May 14, 2012

APPEARANCES

Claimant - Lawrence Burke of Cape Breton Flooring Limited
Defendants - James R. C. Snow

The Defendants, MacLeods, began building a new home in 2011. Construction began in May 2011, and Elmer Boutilier acted as a General Contractor with respect to the exterior of the home.

The MacLeods dealt directly with contractors in regard to the interior work of the home, including flooring.

In particular, Ian MacLeod dealt directly with various flooring companies and contractors. In that regard, in November 2011, Ian MacLeod dealt with Lawrence Burke on behalf of Cape Breton Flooring Limited.

The MacLeods were heating their newly constructed home with in-floor radiant heat.

Mr. Burke testified, and I accept, that when he met with the MacLeods, he informed them that engineered hardwood was preferable for use in flooring with in-floor radiant heat. Mr. Burke testified, and I accept, that he told Mr. MacLeod that solid wood hardwood was not recommended for use with in-floor radiant heat.

Mr. MacLeod and Elmer Boutilier, testified that Mr. MacLeod furthermore enquired of Elmer Boutilier, after receiving that recommendation from Mr. Burke, about hardwood flooring and in-floor radiant heat.

Mr. Boutilier confirmed that he informed Mr. MacLeod that solid wood hardwood was not recommended for use with in-floor radiant heat.

Mr. Boutilier however, testified that he had installed solid hardwood over in floor radiant heat in 8 different homes, including his own, and had no problems in any of those homes (albeit the planks used were narrower than those that the Defendants eventually purchased from the Claimant).

It appears clear as a result, that the Defendants were advised that the use of such hardwood was not recommended for use with in-floor radiant heat.

Despite that fact, the Claimant accepted the engagement to supply and install 3 ¼” “Mercier Select Maple Hardwood”.

Exhibit “1” is an estimate and was introduced by the Claimant, and it states in Mr. Burke’s handwriting “35 yr warr.”, which specifically referred to a 35 year warranty.

Exhibit “14” is a “Mercier Wood Flooring” warranty pamphlet, and it would appear to conform with Exhibit “1”.

Mr. Burke testified that placing that notation on the estimate (Exhibit "1"), was a mistake. That notation however, conforms with the normal "Mercier" warranty. I would think that if the Claimant was committing matters to writing, he could have noted any limitations on the supply of product and labor as a result of the Claimant's selection of the use of solid wood hardwood in a dwelling, and that he could have done that as easily as making a notation of "35 yr warr.", including making a notation of the specific reservation that Mr. Burke made to Ian MacLeod with respect to the supply and installation of unfinished hardwood and the use of that product with in-floor radiant heat could have been written on the estimate. The Claimant did not do so.

Even if the Claimant had done so, there would be the difficulty of whether such could or would appropriately limit their liability in light of s. 26(5) of the Consumer Protection Act, RSNS 1989, c. 92, as amended.

The evidence was that:

1. The hardwood was delivered on November 29, 2011. It was unloaded and stacked in the home in its boxes (with a few exceptions of where Mr. Burke opened the boxes for a brief inspection).
2. Installation began the following day (November 30, 2011) with a few rows of hardwood laid. The installation of the floor continued through the following 3 days, finishing before noon on Saturday, December 3, 2011.
3. Very shortly after, in fact, the following day, while installing baseboards, Mr. MacLeod noticed a problem with the hardwood floor. Mr. MacLeod went to see Mr. Burke about same within 2 days.
4. The problem has been accepted and explained by both sides as "cupping". Cupping has been described as a problem by which the exterior edges of the hardwood floor raise, and are raised higher than the middle of the floor (creating a concave affect).
5. Both sides agree and my review of the material, supports the suggestion that a cupping affect is created when the moisture level below the hardwood is significantly greater than the moisture level above.
6. A number of documents were entered with respect to installation maintenance, including a "Mercier Wood Flooring Installation Guide" (Exhibit "2") , a "Mercier Wood Flooring Maintenance Guide" (Exhibit "3"), a "National Wood Flooring Association (NWFA) Solid Strip & Plank Installation Methods" (Exhibit "4"), and a "National Wood Flooring Association (NWFA) Installation Guidelines" (Exhibit "6").

As noted above, it was suggested that solid wood flooring, as was sold to the MacLeods by

the Claimant, is not recommended to be installed with in-floor radiant heat. The Claimant has suggested that the cupping was caused by the installation of the product over in-floor radiant heat.

Ronald Peverill, was called as an expert on behalf of the Claimant. In cross-examination, he agreed that the NWFA Installation Guidelines and the NWFA particulars are the “Bible” with respect to wood floor installation.

In cross-examination, Mr. Peverill was referred to the NWFA Installation Guidelines (Exhibit “6”). Appendix H to that document, deals with installation of hardwood floor with in-floor radiant heat. Page 23 to Appendix H, specifically refers to the installation with solid wood flooring.

I take that as denoting that, though there are some risks with installation of solid wood floor with in-floor radiant heat, and greater care must be taken with it, that it is still an accepted practice.

The Claimant, through the expert witness, Mr. Peverill, introduced a printout from the “Mercier” website (Exhibit “9”), which indicates that in response to frequently asked questions, that it does not recommend installation of solid wood flooring over in-floor radiant heat.

As part of that same Exhibit “9”, Mr. Peverill introduced a web page from “Healthy Heating”. That particular source indicates that:

It isn't recommended to use radiant floor heating under plank flooring wider than 3". Despite all your precautions, there is a high probability the user will not be satisfied.

That assumption runs contrary to the excerpt from the “Mercier” website that installing solid wood flooring over radiant heat is not recommended at all.

There is no evidence that Mr. Burke when having his discussions with Mr. MacLeod, indicated that he should consider having solid wood flooring that was less than 3" (that which was installed was 3 ¼") as the “Healthy Heating” web page that Mr. Peverill referred to suggests.

As noted above, Mr. Boutilier testified that though it is not recommended he has installed solid wood flooring above radiant heat in 8 homes, including his own home, with no adverse repercussions or complaints.

The 2nd last page in Exhibit “9” (4th page of the Healthy Heating web page), states that:

Climate Controls

...

Once the subfloor, tubing and climate controls have been installed, the heating system should run for at least 72 hours to bring the house to the desired relative humidity.

In the instant case, the evidence was that the system had run for 2 weeks, which should have provided sufficient tests of the desired relative humidity when Mr. Burke performed the test prior to installation.

The undisputed and unchallenged evidence of Mr. MacLeod was that he had the in-floor radiant heat operating at a constant temperature of 18° for 2 weeks prior to installation (which would as a result, have created a constant temperature in advance of installation as the Guidelines suggest).

Given my review of the Hourly Data Reports for November 29, November 30, December 1, December 2, and December 3, 2011 - Environment Canada (collectively Exhibit "13"), it would appear clear that the temperature was such that if the in-floor radiant heat was set at 18° Celsius, that the in-floor radiant heat would have been engaged and providing heat through the in-floor pipes at the time that Mr. Burke would have been doing this tests on the sub-floor.

Mr. Burke, on behalf of the Claimant, indicated that he tested both the moisture levels of the sub-floor and the flooring prior to installation. He indicated that both were within acceptable limits. If, as the Claimant suggests, the cause of the cupping was due to installing over the in-floor radiant heat (as a result of an excessive level of moisture below the flooring), one would have thought that his testing of the sub-floor would have found an excessive moisture level and/or an unacceptable moisture level in a sub-floor before the installation.

In fact, Mr. Peverill who was called on behalf of the Claimant, indicated that when he attended at the home and did his testing, he found that the moisture level within the sub-floor was within the acceptable and/or suggested range.

That satisfies me on a balance of probabilities that the cause of the problem was not the installation of solid wood over in-floor radiant heat. As I noted above, the NWFA does not, in its Guidelines, indicate that solid wood flooring should not be installed above in-floor radiant heat.

The NWFA Guidelines which Mr. Peverill referred to as "the Bible" as it relates to wood

flooring, in fact, does suggest a process and manner in which wood flooring should be installed above in-floor radiant heat.

Solid wood flooring, in particular, however, must be acclimated to the normal living conditions and humidity in the home before installation. That is referenced in a number of occasions in the NWFA Installation Guidelines (Exhibit "6"), including in the Appendix H, which deals with installation with in-floor radiant heat.

At page 23 of the NWFA Installation Guidelines (Exhibit "6"), it states that:

Solid wood must be properly acclimated to normal living conditions.

Page 24, it states that:

Solid wood must be properly acclimated.

The "Mercier Wood Flooring Installation Guide" (Exhibit "2") states at page 5 that:

Once the conditions are right ...

Bring the boxed floorboards to the installation site. Open a box to check product species, grade, color, size, and quality. If everything is fine, open the boxes, set them aside, and leave the wood to acclimatize for 72 hours.

It is clear from the evidence that after Mr. Burke's inspection of a few of the boxes, they were simply stacked (with the boxes closed), and were not left to acclimatize for 72 hours. His evidence at its best, was that they began laying the floor the following day.

The "National Wood Flooring Association (NWFA) Solid Strip & Plank Installation Methods" (Exhibit "4") was introduced by Mr. Peverill, who was called on behalf of the Claimant. The 3rd page in that Exhibit discussing "cupping". It states the following:

Cause:

*A moisture differential within individual pieces of flooring, usually excessive moisture on the underside of the flooring. **More subtle cupping can be caused by lack of proper acclimation (this is generally permanent cupping).***

That also lists potential sources of excessive moisture that could cause cupping, which include:

1. Building leaks;
2. Poor drainage;
3. Plumbing leaks or overflows;
4. Leaks from dishwashers or refrigerator ice-making units;
5. Wet or damp basements/crawlspaces;
6. Concrete sub-floors that have not cured;
7. Plywood sub-floors with excessive moisture;
8. Poor or no ventilation; and
9. HVAC system not operating.

The evidence does not support those as potential causes of the cupping in the instant case.

Both the “Mercier Wood Flooring Installation Guide” (Exhibit “2”), and the “National Wood Flooring Association (NWFA) Installation Guidelines “ (Exhibit “6”), suggest that proper acclimation is important. Mercier in fact, suggests at least 72 hours. The cupping in the instant case, occurred and was evident almost immediately after installation. Mr. Boutilier, when asked on cross-examination by Mr. Burke, about the degree of cupping, suggested on a scale of 1 to 10, that it was about a 3.

With agreement of both Parties, I myself, attended at the home, in the presence of both the Parties, to look at the flooring. I would not disagree with Mr. Boutilier’s estimate.

I would certainly refer to it as “subtle cupping”.

The “National Wood Flooring Association (NWFA) Solid Strip & Plank Installation Methods” (Exhibit “4”), as noted above, specifically states that:

More subtle cupping can be caused by lack of proper acclimation (this is generally permanent cupping).

The “Mercier Wood Flooring Maintenance Guide” (Exhibit “3”) states at page 6 that:

Recommendations

Maintain relative humidity between 40% and 55% and a temperature of approximately 20 ° Celsius (68 ° F) in your home in order to preserve the internal humidity of the wood and thus its dimensional stability.

Mr. MacLeod testified that the installer had the windows, doors and patio doors open during

the installation of the floors. Even to a layman, that would appear to have created a greater degree of humidity than one would normally find in a home. That would be especially so during the dates in question when the local humidity outdoors (which would certainly affect the internal environment of the home if the windows and doors were open), was extremely high.

Notably, if the Claimant disputed the evidence of Mr. MacLeod on that issue, the Claimant could have called the installer, who was present in the courtroom on the first evening of the hearing, to counter that evidence. He was not called but not for lack of opportunity. I thus accept that evidence of Ian MacLeod.

Mr. Boutilier, who though related to Ms. MacLeod and was familiar with Mr. Burke, appeared to testify in an unbiased and dispassionate fashion. He said that he was familiar with the Claimant's work and that they had a good reputation. Mr. Boutilier is a carpenter with approximately 40 years of experience. He testified that in laying or installing flooring, he does his moisture checks, leaves the flooring for 3-4 days, and then comes back and does a further moisture check. Even to the layman reviewing the literature with respect to wood flooring, that appears to be a sound and preferred practice. However, this practice was not followed by the Claimant in the instant case.

The Claimant began laying the floor the next day after it was delivered. The flooring was not removed from the boxes to allow it to acclimate. The windows and doors were open at the time of installation of the flooring.

Literature introduced through the Claimant's expert witness (Ron Peverill), suggests that subtle cupping is more related to problems with proper acclimation. The subtle cupping in the instant case, would appear as a result, on a balance of probabilities, to be related to that cause.

The Defendant referred me to the case of *Woodpecker Hardwood Floors (1987) Ltd v. Bill Wishinski and Roselyn Wishinski*, BCPC OO42 (with which I was familiar and had reviewed previously). In that case, it was determined that limitations on warranty however, cannot diminish or supplant the warranties under the *Sale of Goods Act*. The contract in that particular case (as in the instant case), was with respect to the supply and installation of flooring. The problem in that case, similar to the instant case, related to "cupping" in the floor itself.

The Claimant rests its claim on the fact that it did not recommend that plank flooring be used over in-floor radiant heat. Mr. Burke however, went to the home and took moisture levels, including from the sub-floor.

If there was a problem with the in-floor radiant heat, and if that was a direct cause of the cupping, I would have thought the moisture readings that he took when doing his

examination, would have indicated a high degree of moisture in the sub-floor. The readings did not.

If his readings had illustrated a high (unacceptable) degree of moisture in the sub-floor, I would have thought that Mr. Burke would have advised Mr. MacLeod about that and reiterated as a result, that the flooring should not be installed in those circumstances. The fact that neither Mr. Burke nor Mr. Peverill found unacceptable levels of moisture in the sub-floor, suggests to me that the problem was acclimation and not in installing the product above the in-floor radiant heat itself.

In the case of *Girroir v. Cameron* (unreported) 1998 SAT 2159, Justice Davison reviewed a case in which an installer did not follow the particular instructions of the manufacturer of installing the floor. Justice Davison stated at page 11 that:

There was duty on the defendant to inquire about any particular instructions the manufacturer recommended with respect to the application of the product, and he failed to do so. In my view, this constitutes negligence on the part of the defendant.

As noted above, the “Mercier Wood Flooring Installation Guide” (Exhibit “2”) states that the wood should be removed from the boxes and acclimatized for 72 hours. That was not done in the instant case.

The importance of proper acclimation and the failure to properly acclimate the wood and that such can amount to negligence, was also discussed in the case of *Hanoski v. Cornerstone Homes Ltd*, 2011 SKPC 75. The discussion in that case, as in the literature that was presented in the instant case, suggests that cupping can cause cracking in the wood, and though it can subside over time, if it is severe enough, the chance of it returning to its original state, is “slim to none”.

The attempts at correcting the problem, as suggested by the Claimant, were undertaken by the Defendants (dehumidifying in the basement and humidifying on the first floor). They did not result in a reversal of the cupping.

I observed the floor at the home on May 7, 2012, which would be well over 5 months after the installation. The cupping was still evident at that time. The Parties both agree the cupping is still present.

The “National Wood Flooring Association (NWFA) Solid Strip & Plank Installation Methods” (Exhibit “4”), as noted above states that cupping from improper acclimation is

generally permanent. I find that as a result, that the flooring will not return to its original state. The damage is permanent.

It appears that the Parties agree that if the cupping is not reversed, the only means to rectify the problem is replacing the flooring.

The Parties however, differ on whether there is liability, but do not appear to disagree that there is (a) cupping, and (b) that the floor needs to be replaced. As noted above I find on a balance of probabilities that the cupping is as a result of improper acclimation. Based upon the above case law, and the case *Floors Plus v. Homeland Builders Inc*, 2009 NSSM 62, I find that as the flooring does not meet appropriate standards, and the only means to rectify is replacement of the floor, that the Defendants have received no benefit from the work completed.

The Claimant's claim as a result is dismissed.

The Cost of the Installation

The Defendants, in their counterclaim, have claimed for the cost of the removal of the flooring and the replacement flooring.

I queried the Defendants' counsel with respect to the claim and put forward the position that if they were successful in their defence of the Claimant's claim, that if they did not pay for the flooring, it similarly should not be awarded the cost of the replacement flooring, for that which it was not ordered to pay. The Defendants' counsel agreed with that postulation.

I find as a result, the only amount awarded on the Defendants' counterclaim is the cost for the removal of the existing flooring, which with HST, amounts to \$1,444.00 (Exhibit "11").

I also award the Defendants their costs in the amount of \$60.60 (filing fee) and \$9.30 (cost of registered mail to serve the documents), for a total of \$69.90.

I award the Defendants/ Plaintiffs by Counterclaim the Total of \$1,513.90.

RALPH W. RIPLEY
ADJUDICATOR