

contract was formed on the last of the quotations dated 30th October 2018. The quotation is for the *'supply and fit of Woodpecker York Antique Oak flooring, 130 X 18mm, tongue and grooved and end matched using suitable fixing method. £4845.00 plus VAT.'* Additional items also provide for *'parmenter moulding' and 'cut 8 no. thresholds'*. The area is shown as 'Hall and three bedrooms' which I note is somewhat different to earlier quotations specifying exact square meters.

The total price on the quotation is shown as £4196.00 (including a 5% discount) plus VAT which adds to £5,035.20. The consumer has supplied a copy payment receipt in the sum of £3524.64 and the trader informs me that there is an outstanding sum of £3386.04. The total contract price would therefore appear to be £6910.04. I have difficulty reconciling the quotation with the apparent sums shown paid and what I am informed is outstanding. Even if I allow for the supply of additional materials set out in the quotation dated 4th December 2018 in the sum of £882.00 the contract price does not add up to £6910.04. I believe there may be an error in quotation because it is clear £4417.00 is not the total of £4845.00 + £185 + £248.

The trader's letter dated 5th November 2018 requires from the consumer a deposit payment of 70% in the sum of £3524.64. According to this letter, only £1510.56 is due from the consumer on completion. I am going to leave this point aside for present purposes because neither party has disputed the other party's case in relation to the alleged sums paid and alleged sums outstanding.

Moving on it is not clear from the documents which I have seen on what date or dates the supply and installation occurred. I can see by 21st December 2018, the trader was already in communication with the manufacturer of the wooded flooring following complaints by the consumer and therefore I can only assume the supply and installation of the wooded flooring occurred on a date between 4th December 2018 and 21st December 2018.

The date of the installation is relevant to the extent that the time limit in which the consumer must reject the goods must be within 30 days of the installation (see below). In this case I have to decide whether the consumer is entitled in law to reject the goods and claim the price paid to the trader. I have to be sure that the consumer has not just changed his mind about the purchase. If the consumer is not entitled to reject the goods then it follows that he must pay the balance outstanding.

Any findings I make must be on the balance of probability. This means whatever findings I make on the facts of the case these are 'more likely than not'. The test is somewhat different to that applied in criminal cases. I believe I should make this point at the outset because firstly, this dispute is being decided 'on paper' and secondly, because there are significant gaps in the information I have been supplied. I should also mention that technically the burden of proof is also upon the consumer, however, I am able to take into account all of the documents provided by both parties .

The evidence

I propose to set out what I consider to be the relevant evidence in respect of each party's case. The consumer case is set out succinctly in the claim form as follows;-

"When the job was completed I noticed there were allot of gaps between the boards. I mentioned it to the installers and they said that its normal. The next day I noticed more problems, in one room they nailed the boards on the face of the board and more gaps. I called and they sent the installer back and he put wood filler in the nail holes and in some of the gaps. It was very noticeable because it was the wrong colour. I contacted the manufacture (Woodpecker) and explained the situation. They sent out their own surveyor and he said it was an installation issue. The manufacture sent a

report of their findings to McKay Flooring. After they received the report they sent their own surveyor (Stephen Fraser) up and he said it was manufacture defects not an installation issue. McKay Flooring wanted to replace the boards that were out of tolerance and inject varnish in the gaps so they weren't as noticeable. For the price we are paying for the floor and advice I had got from other floor companies, this resolution was unacceptable. It had been going on for months at this point we were just fed up and didn't want to deal with it anymore. So I informed Richard Wilson(McKay Flooring Ltd.) that it was unacceptable and we just want it removed and refund the money we have paid."

Apart from setting out the case (as above), the consumer has not provided any further evidence. I have a till receipt for payment to the trader in the sum of £3524.64 and I also have a quotation from Mathesons Furnishings for removal of the flooring in the sum of £1230.00 plus VAT. Mathesons appear to be in business as suppliers of various aspects of furnishing including Furniture, Beds, Carpets etc. I note from their website that they also supply flooring so I assume this quotation is provided to the consumer as an incidental service.

The evidence from the trader has been much more substantial and appears to cover all the dealings between the parties. I have the trader's response to the claim.

Face nailing - Face nailing is a standard element of the installation process for the first 1-2 and last 1-2 lines of the boards.

Punching and filling nail heads is again a standard element of the installation process. Stephen Fraser, Operations Director, McKay Flooring Limited viewed the wax filler and was of the opinion that it was a reasonable match to the stained face of the board.

Wood Pecker did visit and noted that there were boards outwith width tolerance (Manufacturers fault) but noted that the McKay Flooring operatives should have put those boards to the side.

Stephen Fraser then visited and suggested that the boards there were outwith tolerance should be replaced with new boards. Mr Sanchez is also unhappy because the boards that were showing gaps that are within tolerance don't look good, this is because Mr Sanchez selected a stained board so the face of the board only is stained meaning that if there are slight gaps (timber floors expand and contract as standard) then the unstained element of the board is slightly visible - this is not an installation issue. Mr Fraser suggested that we inject stain to these areas in good faith. Mr Sanchez rejected this suggestion noting only that he wants the floor uplifted and removed.

McKay Flooring have advised Mr Sanchez that because he does not wish to have the boards that are outwith tolerance replaced with new and is unhappy with the manufacturing of the remainder of the flooring that we require Woodpecker, the manufacturer to visit his property to assess his claim that the boards should be uplifted and removed under the manufacturer's warranty as per the T & C's of the contract.

The trader goes on to say that the consumer has denied access and rarely enters into meaningful discussion.

I next have a copy email from the trader to the consumer dated 20th December 2018 acknowledging receipt of photographs from the consumer and advise from the trader about face nailing. The trader states that they have ordered "*further material to effect a replacement of the boards.....*" It is not clear which boards are being selected for replacement or why. On the following date there is a further email from the trader advising the consumer that the trader as asked the manufacturer "*to inspect the reported gaps within your flooring*"

I see that there then follows communication between the trader and the manufacturer which culminates in a report from the manufacturer dated 25th January 2019. I only set out here the relevant findings;

Summary of Findings

A number of boards were of varying widths. The gaps had been filled by the fitter. A number of boards along the final run had been pinned through the surface too far out from the wall and could n't be covered with scotia.

Conclusion

Environmental conditions are within parameters. Where there are some variances in board width, these can be rectified in a straightforward plank replacement task.

Suggested

Replace the pinned board and varying width boards by one of McKay Flooring local competent fitters.

I next have a copy internal email from the trader dated 7th February 2019 which shows that the consumer thought that the report was 'vague' and did 'not cover the full extent of the issues with the gaps.'

The next relevant document is an email from the trader to the consumer dated 25th February 2019. This follows an inspection carried out by the trader's representative, Stephen Fraser. In the email, the trader states the small bedroom has an issue with 4 boards, the back bedroom has an issue with 2 boards and the hall area has an issue with 'unfinished Oak, shining through between the dark surface'. The email goes on to suggest the badly manufactured boards be replaced and the boards 'within the slight tolerance, but the T & G shining through, these should have stain applied using a syringe in order to darken the joints...'

There next follow a series of what I may term as 'chaser' emails from the trader to the consumer asking for a response. There appears to have been a telephone conversation between the trader and consumer and then on the following day an email from the trader to the consumer dated 16th April 2019 in which the trader states; "We must reiterate that the majority of reported gaps are minimal and within recommended tolerances with only a number of boards highlighted by both our Operations Director Stephen Fraser and Woodpecker Flooring being outwith these tolerances..." and that the trader "cannot accept a course of action" where evidently the consumer stated he 'just want the floor removed'.

The next relevant communication is an email from the trader to the consumer dated 26th June 2019 in which the trader "noted (the consumer) wish to claim against the manufacturers warranty for the floor to be uplifted and replaced. Woodpecker advised...their process is that a member of their technical team would visit your property to validate your warranty and claim."

Finally, there follows two letters from the consumer to the trader which are essentially setting out his claim for refund of his money and advising of intention to take further action.

The ADR

During the course of ADR the trader was requested by email dated 7th August 2019, I requested from the trader the following information;-

1. Please let me have a copy of the contract together with the full terms and conditions (T & C's).

1.1 I would like to know how the T & C's have been incorporated into the contract (if these are not printed on a document signed by the consumer).

1.2 Your comments that the consumer complains that the boards within tolerance don't look good "because (the consumer) selected a stained board so the face of the board only is stained meaning that if there are slight gaps (timber floors expand and contract as standard) then the unstained element of the board is slightly visible - this is not an installation issue" I would like to see evidence that this was brought to the attention of the consumer when (or before) the contract was executed.

1.3 Your comments that "(you) require Woodpecker, the manufacturer to visit (the consumer's property) to assess his claim that the boards should be uplifted and removed under the manufacturers warranty as per T & C's of the contract". Please can you specify which term you are referring to here by reference to the contract.

1.4 I would like to know whether the contract you have with the consumer is a contract for the materials only or for the supply and fitting of the flooring.

1.5 You state there is an outstanding balance of £3386.04. Please kindly let me know the total contract price and how much has been paid by the consumer.

2. Please kindly let me have a copy of the photographs referred to be Adrian Hopwood in his email to Richard Wilson Dated 4th January 2019.

Against this, there was a response in kind (with more documents being supplied) but no specific replies to the questions asked. I do not have the photographs.

I have a letter dated 5th November 2018 referred to above. I believe material in that letter is under the heading 'What to expect on the day';

.Our operative will complete the works to the highest standard and will ensure your property is clean and tidy on completion.

. Our operative will walk around the project with you on completion to ensure you are 100% happy with all works carried out, they will then ask you to sign the customer satisfaction form that we have also sent you today.

I have not seen evidence of the latter and I regard the former as merely confirmation of the statutory duty upon the trader. I have not been referred to specific terms of the contract which the trader relies upon but I have been supplied with a copy of the trader's terms & conditions. I also note, attached to the terms & conditions is document headed '25 year installation warranty'. I have extracted from the warranty what I consider to be relevant;-

...McKay Flooring offer a 25 year guarantee on our installation along with the Manufacturers individual guarantees on the product....

If in the unlikely event any portion of the installation of floor should fail with respect to the provisions of the installation warranty, McKay Flooring Ltd, at its sole option, will repair, refinish or replace said portion at no cost to the original purchaser with the same or equivalent product. In the unlikely event McKay Flooring Ltd is unable to correct the failure after a reasonable number of attempts, McKay Flooring Ltd will refund (if requested) the purchase price for the portion of the floor that failed.

I also believe relevant the section of the warranty I have set out below in relation to the exclusion of the warranty. This is an extensive list of warranty exclusions. What appears not to be excluded is the

gaps between boards within the alleged slight tolerance but which show the tongue and grooved shining through because of its different colour to the stained surface.

Our finish warranty excludes any scratches, indentations or damage due to improper maintenance, misuse, insects, erosion, negligence, spiked heel shoes, pets, water, moisture, pebbles, sand, other abrasives or poor protection on furniture, wet mopping. Floor care products other than those recommended by McKay Flooring Ltd may damage your floor and may void the warranty.

Colour variations in parquet flooring are a natural occurrence due to species, age or character of flooring and exposure to UV light or sunlight. Gloss reduction is not considered surface wear. McKay Flooring Ltd is not responsible for colour variation of product or samples for the consumer matching flooring to other wood products such as furniture, stair railings and moldings. Naturally occurring wood characteristics such as variations in grain, colour, mineral streaks and knots are not considered defects. Normal exposure to sunlight will bring about changes in shading of any hardwood floor as the floor ages. Area rugs should be moved occasionally because they block sunlight and may give the appearance of discolouration under the rug. This is not a product defect. Damage due to water and/or moisture, including, but not limited to broken or leaking pipes, wet mopping, weather or natural disasters, is excluded from McKay Flooring Ltd warranties. McKay Flooring Ltd warranties do not cover natural expansion and contraction resulting in separation between boards or damage caused by low or excessive humidity.

The Law

The relevant law concerning the supply of goods and services is primarily set out in the Consumer Rights Act 2015 ('the Act'). I believe it is useful to set out the salient parts of the Act which I believe relevant to the circumstances of this case;-

Section 15 -Installation as part of conformity of the goods with the contract

(1) Goods do not conform to a contract to supply goods if—

(a) installation of the goods forms part of the contract,

(b) the goods are installed by the trader or under the trader's responsibility, and

(c) the goods are installed incorrectly.

(2) See section 19 for the effect of goods not conforming to the contract.

Section 19 - Consumer's rights to enforce terms about goods

(4) If the goods do not conform to the contract under section 15 or because of a breach of requirements that are stated in the contract, the consumer's rights (and the provisions about them and when they are available) are—

(a) the right to repair or replacement (section 23); and

(b) the right to a price reduction or the final right to reject (sections 20 and 24).

Section 20 - Right to reject

(5) The right is exercised if the consumer indicates to the trader that the consumer is rejecting the goods and treating the contract as at an end.

(6) The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader.

(7) From the time when the right is exercised—

(a) the trader has a duty to give the consumer a refund, subject to subsection (18), and

(b) the consumer has a duty to make the goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed.

(8) Whether or not the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them.

(10) To the extent that the consumer paid money under the contract, the consumer is entitled to receive back the same amount of money.

(16) If the consumer paid money under the contract, the trader must give the refund using the same means of payment as the consumer used, unless the consumer expressly agrees otherwise.

Section 22- *Time limit for short-term right to reject*

(1) A consumer who has the short-term right to reject loses it if the time limit for exercising it passes without the consumer exercising it, unless the trader and the consumer agree that it may be exercised later.

(2) An agreement under which the short-term right to reject would be lost before the time limit passes is not binding on the consumer.

(3) The time limit for exercising the short-term right to reject (unless subsection (4) applies) is the end of 30 days beginning with the first day after these have all happened—

(a) ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,

(b) the goods have been delivered, and

(c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken.

Summary of findings

I am not happy in this case that I have not been supplied photographs of the flooring that has been complained about. I understand photographs were initially taken by the consumer and supplied to the trader who then forwarded the same to the manufacturer. I asked the trader to supply these photographs but I don't see any reason why the consumer could not supply these as part of the consumer's case. This would have helped to reach a better understanding.

Under the Act, however, I am not required to carry out an assessment as to how much of the installation has failed before the consumer can exercise his right to reject the goods. There is no mathematical exercise based on overall square meters or on a percentage of what has failed against the overall installation. It does not matter only 6 boards have been identified by the trader as need replacing.

Under Section 15 of the Act, *“Goods do not conform to a contract to supply goods if..... the goods are installed incorrectly”*. The manufacturers report referred to above dated 25th January 2019 says so much even though it is silent in other respects, in particular, in relation to the issue of the gaps between the boards with unstained oak shining through between the dark surfaces.

The question of the gaps between boards inside the tolerance but enough to (show unstained finish) is a difficult question. My initial thoughts are that this would not be an installation defect but I am surprised that the terms of the trader’s warranty does not specifically exclude such claims. The list of exclusions is extensive as I have noted above. I would have thought it obvious that this feature (if not an installation issue) be brought to the attention of the consumer before the contract was made. Again, I am disappointed that my specific question on this point was not answered by the trader.

It is also to be noted that the trader did not supply as part of their evidence what they inform the customer to expect on the day of the fitting;-

. Our operative will walk around the project with you on completion to ensure you are 100% happy with all works carried out, they will then ask you to sign the customer satisfaction form that we have also sent you today.

The inference to be drawn from the above two facts is that the issue of the gaps between boards inside the tolerance is not a question raised by consumers on a regular basis and that the consumer, in this case, was not 100% satisfied and therefore he was unwilling to sign the customer satisfaction form. It seems to me that these are two aspects of the traders overall service which they must get right from a legal perspective in order to avoid future problems.

I am also not happy with the line taken by the trader asking the consumer to allow a manufacturer inspection if the consumer was rejecting the goods. Firstly, the manufacturer had already inspected the boards and provided a report and secondly, it seems the trader was quite wrong to inform the consumer as they did that *“...Woodpecker require to validate your warranty, they can only do that with access to view the floor”* (see email dated 26th June 2019 at 20.53) and *“ We require Woodpecker..to visit his property to assess the claim....under the manufacturers warranty as per the T & C's of the contract”* (see the trader response to the claim).

I have had no response when I asked the trader to show the relevant terms and conditions being referred to here. The only relevant warranty I have seen is the trader’s warranty. Moreover, if the consumer was rejecting the goods, the only relevant question was whether he was legally entitled to do so. I do not think the trader sufficiently *‘grasped the nettle’* so to speak.

The consumer is entitled to point to the manufacturers report dated 25th January 2019 as evidence that the goods were not installed correctly. The consumer is therefore entitled to reject the goods. I have not seen any written document from the consumer exercising his right to reject the goods but there does not need to be one. It has to be sufficient that *“the indication may be something the consumer says or does, but it must be clear enough to be understood by the trader (Section 20(6) of the Act).*

It is reasonable to assume that this was communicated by the consumer to the trader verbally probably by telephone and I find on the balance of probability that this is what occurred. In my view, the consumer need not use the exact words he is rejecting the goods. Comments such as ‘I am not satisfied’ would mean the same thing. My finding is supported by the fact that the trader was already in communication with the manufacturer within the 30 day time limit identified above. I am satisfied that the consumer has exercised his right in accordance with Section 20 (6) of the Act and

this was within 30 days under Section 22 of the Act. It follows that I must reject the cross claim by the trader for the outstanding balance.

The only other relevant point I should make is that I do not accept the consumer evidence as to the alleged cost of removing the goods from the property. The quotation relied upon by the consumer is supplied by a supplier to whom this service would be incidental. I note, the trader quoted for the same service on 9th August 2018;-

Floor Preparation Uplift, remove and dispose of existing floor finishes (carpet, vinyl & underlay). All for the sum of £296.00 + VAT @ 20%.

The sum of £1230.00 plus VAT suggested by the consumer, is in my opinion, grossly excessive.

I am guided by the Act here. Section 20 (7)(b) states;- *the consumer has a duty to make the goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed.*

It seems to me that the correct approach must be for the consumer to remove the wooden boards and make them available for collection only. If the trader chooses not to collect the boards within a reasonable time then the consumer is entitled to have the boards collected and disposed as domestic waste by his local waste collection authority.

In conclusion, the consumer is entitled to a refund under section 20(10) of the Act and I shall make this order on the amount shown as paid by him on the copy receipt provided by him which is to be repaid in the manner set out under Section 20 (16) of the Act.

IT IS HEREBY ORDERED that the trader (re) pay the consumer the sum of £3524.64 within 14 days of the date hereof.

Date 18th September 2019



Signed

Mr Ayub Sadiq

