

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP436/2016

### CATCHWORDS

Procedure: refusal to accept submission and evidence sent to Tribunal by a party after end of hearing without leave *Eastman v Director of Public Prosecutions (ACT)*; Contract: meaning of terms, objective determination according to text, internal context and surrounding circumstances *Maggbury Pty Ltd v Hafele Australia Pty Ltd, Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd.*; Major domestic building contract *Domestic Building Contracts Act 1995*.

**APPLICANT:** April Construction Group Pty Ltd (ACN: 058 832 652)

**RESPONDENT:** Philip Stahle

**WHERE HELD:** Melbourne

**BEFORE:** Member MJF Sweeney

**HEARING TYPE:** Hearing

**DATE OF HEARING:** 24 August 2016

**DATE OF ORDER:** 6 October 2016

**DATE OF REASONS:** 6 October 2016

**CITATION:** April Construction Group Pty Ltd v Stahle (Building and Property) [2016] VCAT 1635

### ORDER

1. On the claim, the respondent, Philip Stahle, must pay the applicant April Construction Group Pty Ltd the sum of \$7,140.00.
2. On the counterclaim, the claim of the applicant, Philip Stahle, is dismissed.
3. Pursuant to s 115B(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, the respondent, Philip Stahle, must reimburse the applicant April Construction Group Pty Ltd the application fee paid by it of \$174.10.

**MEMBER MJF SWEENEY**

**APPEARANCES:**

For the Applicant

Ms Zel Vonidis

For the Respondent

In person

## REASONS

### INTRODUCTION

- 1 April Construction Group provided a quotation headed 'Reblocking & Underpinning', 'quotation/contract'. It was dated 28 July 2015 for a price of \$8,140, including GST, to undertake certain reblocking works at Philip Stahle's Victorian era house in Camberwell. The house was approximately 130 years old. Mr Stahle accepted the quotation/contract by signing the agreement on 3 September 2015. He paid a deposit of \$1,000.
- 2 The agreement consisted of a printed list of activities, a number of these activities were marked with a cross or word or other indicator so as to describe the scope of the works to be undertaken for the particular job. Relevantly, the agreement stated 'House to be Reblocked', against which was hand written 'Yes'. Against 'Computer Levelling' was hand written 'Yes'.
- 3 The agreement described the replacement of all stumps with concrete stumps and provision of ant caps to the existing house. Sundry matters described were use of a concrete pump and inspection of sub-floor timber. A number of tick boxes were checked with a 'No', with other parts left blank, indicating activities or supply of materials that were not to be part of the scope of works.
- 4 The works were undertaken over several days and completed on or about 17 September 2015. On the same day, an invoice was sent by April Construction to Mr Stahle for the balance of \$7,140. Mr Stahle has refused to pay monies said to be owing under the agreement.
- 5 April Construction seeks damages for breach of contract in the amount of \$7,140, being the balance remaining outstanding. Mr Stahle's defence is that the works are defective in that the floors of the house were not made level in breach of the agreement.
- 6 Mr Stahle has counterclaimed for breach of contract for defective works for the cost of rectification, being the removal of all stumps, their replacement and the levelling of all floors in the house.
- 7 The counterclaim is expressed in the alternative, in a general way, for a failure to carry out works in a proper and workmanlike manner. For the reasons stated below, the agreement is a contract governed by the *Domestic Building Contracts Act 1995* (DBC Act). The alternate claim can be considered as a claim for breach of the statutory warranty under s 8(a) of the DBC Act.
- 8 The agreement is domestic building contract under s 54(1)(a) of the Act as a contract for the conduct of domestic building works (s 5(1)(b)). Under s 3 of the Act, the contract is defined as being a major domestic building contract given the contract price is greater than \$5,000. The statutory warranties provided for under s 8 of the DBC Act have application. Section

8(a) provides that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.

- 9 At the hearing, Mr Stahle sought and was granted an order amending the quantum of his counterclaim for damages for breach of contract of \$18,098.
- 10 The first issue in this dispute is whether the expression in the agreement 'House to be Reblocked: Yes', together with the expression 'Computer Levelling: Yes' in the context of the agreement means that the agreement required the levelling of the floors throughout the house. This is asserted by Mr Stahle. April Construction asserts that the agreement required them to undertake reblocking with the use of computer levelling to achieve level stumps/underside of bearers interface, but not levelling of floors.
- 11 The second issue in this dispute is whether floors, alleged to be level prior to commencement of the works, became out of level due to conduct of the works not being undertaken in a proper and workmanlike manner.

## **PROCEDURAL**

- 12 At the hearing, Mr Stahle was granted an order amending his counterclaim to \$18,098. The amendment was arrived at as follows. Costs of rectification of reblocking works and undertaking levelling of all floors of \$23,980 reduced by the applicant's contract price of \$8,140 leaving a claim of \$15,840. Further claim for reimbursement of cost of consultant's report of \$1,800 and Tribunal filing fee of \$458, leaving the amended total claim of \$18,098. The amendment was not opposed by April Construction.
- 13 At the conclusion of the hearing, I reserved my decision.
- 14 A day following the hearing, the Tribunal's registrar received an electronic communication from Mr Stahle enclosing a document of several pages relating to evidence in the case, with a request for me to take this further material into account in making my decision. On its face, the material did not appear to have been copied to April Construction.
- 15 The material was brought to my attention. I directed the registrar to respond to Mr Stahle and advise that, as the hearing had been concluded and as I was in the process of making my decision, no further evidence would be received. I directed the registrar to immediately advise Mr Stahle of this and to not retain a copy of the material on the Tribunal file.
- 16 I have not read the material. The material and the request for me to consider it have formed no part of my consideration in arriving at my decision.
- 17 Mr Stahle was afforded every reasonable opportunity to present his defence and counterclaim. The hearing was set down for one full day. It went for the day and concluded after all parties had presented their cases and closing submissions.

- 18 In addition to the above, on the day of the hearing and shortly before the close of Mr Stahle's case, I advised the parties that I would stand the matter down so as to enquire of the listings registrar about allocating a further hearing date for the continuation of the hearing, if that was sought by the parties. I adopted this course as I was unsure whether there would be adequate time for April Construction to conduct any cross-examination, once Mr Stahle had concluded his evidence.
- 19 On reconvening the hearing, I advised the parties that the registrar had now reserved an additional hearing day. A date for the further hearing was reserved for 5 September 2016. Both parties confirmed their availability for that date.
- 20 However, Mr Stahle said that he did not wish to come back for another hearing day and that he had in fact almost finished his evidence. I asked him if he felt that he had had a full opportunity of presenting his case, because, if extra time was needed, the hearing would be adjourned to 5 September. He confirmed that he had sufficient time. He said that he wished to make a closing summary or submission. Shortly thereafter, Mr Stahle completed his evidence. In the event, April Construction conducted only a brief cross-examination.
- 21 April Construction made a very brief oral summary of its main points. Mr Stahle tabled a written paper of three pages headed 'In Conclusion' and spoke to that written paper as his closing summary or submission. When he had finished this, I again enquired if the parties felt further time was necessary. Each confirmed that they did not require further time and that they did not wish to come back.
- 22 At all material times, the further hearing date remained available to the parties. Only after the conclusion of the hearing and adjournment of the Tribunal for decision was the listings registrar advised by me to vacate the additional date that had been reserved.
- 23 The above circumstances are sufficient in themselves to clearly demonstrate that the parties, and Mr Stahle in particular, had been afforded the opportunity of a fair hearing consistent with the principles of natural justice and the requirements of s 97 and s 98 of the *Victorian Civil and Administrative Tribunal Act 1998*. Both parties to a proceeding are entitled to be accorded natural justice. The circumstances are a proper basis for disallowing the admission of Mr Stahle's additional material after the conclusion of the hearing.
- 24 The Court of Appeal of the Supreme Court of Victoria in relatively recent times considered the principle and authorities applicable when a party sends in additional material to the court after the hearing has been concluded. Whilst the decision is concerned with the conduct of an appeal, there is no reason why the principle enunciated should be so confined.

- 25 In *Frugniet v Law Institute of Victoria Ltd* [2012] VSCA 178 (13 August 2012) per Warren CJ, Nettle JA and Beach AJA, a week after the hearing of the appeal and after the Court had prepared its reasons, the appellant sent an email to the Registry in which he stated that he had withdrawn his instructions to the senior counsel and solicitors who had represented him on the appeal, and enclosed 18 typed pages of ‘Further Submissions’.
- 26 The Court refused to have regard to the ‘further submissions’, stating:
- ... they should not have been forwarded to the Registry. Neither the Rules of Court nor the applicable Practice Statements gave any authority for them to be forwarded without leave, and the court has not been asked to give or given leave for them to be filed. Moreover, if leave had been sought, we would have refused it, because, if we were to give leave, we would then have to give leave to the respondents to file replies, with consequent delay in the business of the court.
- As has been said repeatedly in the High Court and in this court, the idea that parties may, without leave, file supplementary written submissions after the conclusion of oral argument is misconceived. The time and place to present argument, whether wholly oral or as supplemented by written submissions, is the hearing of the appeal. Once the hearing of an appeal has concluded it is only in very exceptional circumstances, if at all, that the court will later give leave to a party to supplement submissions.
- 27 The Court of Appeal referred to the High Court decision of McHugh J in *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28:
- Efficiency requires that the despatch of the court’s business not be delayed by further submissions reflecting the afterthoughts of a party ...
- 28 I repeat, that *Frugniet* was concerned with an appeal does not take away from more general application of the principle to a first instance hearing, such as the present proceeding before the Victorian Civil and Administrative Tribunal.

#### **DOES REBLOCKED AND COMPUTER LEVELLING REQUIRE ALL FLOORS TO BE MADE LEVEL?**

- 29 In the first place, the answer to this question depends upon the meaning of the expressions in the agreement, ‘House to be Reblocked: Yes’ and ‘Computer levelling: Yes’. Mr Stahle says, yes, it means that the floors are to be made level. But April Construction says, no, it means only that the stumps are to be level where they meet the bearers.
- 30 However, when courts and tribunals have to ascertain the meaning of the parties’ expression in their agreement, the task is approached from an objective point of view.
- 31 This means, where there is disagreement as to what an expression in a written document means, the interpretation of the expression involves determining the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have

been available to the parties in the situation in which they were, at the time of entering into the contract: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 185 ALR 152 at paragraph 11, citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1981] 1 WLR 896 at 912 per Lord Hoffmann.

- 32 The High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, affirmed the principle of objective determination of a meaning as stated in *Pacific Carriers Ltd V BNP Paribas* [2004] HCA 35. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party, by words and conduct, would have led a reasonable person in the position of the other party to believe. Determining this normally requires consideration, not only of the text of any agreement, but also of the surrounding circumstances known to the parties and the purpose and object of the transaction.
- 33 Courts and tribunals must also consider the internal context (other words in the agreement) and external context (surrounding circumstances) in which the expression is used to see what light may be thrown on the meaning which the parties must be taken to have used it. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 per Brennan J.
- 34 So, determining the objective meaning turns on the meaning of the text of the agreement ‘House to be Reblocked: Yes’ and ‘Computer levelling: Yes’ and the context of those expressions within the agreement itself. If such analysis is insufficient to determine the objective intent of the parties at the time they entered into the agreement, then an examination of the external context of the surrounding circumstances known to the parties and object of the transaction is required.
- 35 Before proceeding to examine the agreement and its context in respect of the first issue, an important comment on a significant part of the evidence put at the hearing needs to be made. The relevance of quite extensive evidence related to internal floor levels and associated computations rests upon the question of whether the agreement required April Construction to undertake reblocking works to make the floors all level, or, undertake reblocking works to make the stumps all level where they meet the bearers.
- 36 If I find that the objective meaning to be ascribed to the agreement between the parties, at the time of contracting, is that the parties intended that April Construction was required to make all floors level, then the detailed evidence as to levels being at variance is important and relevant.
- 37 If on the other hand, I find that this is not the case, and that the objective meaning to be ascribed is that April Construction was not required to make the floors level but to make the stumps all level where they meet the bearers, then the evidence about internal floor levels and computations will not be relevant to determining the first issue. That evidence may be

relevant to the second issue of whether the floors were out of level, due to works not being undertaken in a proper and workmanlike manner. That issue is addressed later in this decision.

### **Text and internal context of the agreement**

- 38 April Construction's witness, Ms Vonidis, explained in evidence in chief that reblocking is also known as restumping. The task involves the replacement of rotted timber blocks or stumps with more durable concrete stumps. She stated that when replacing blocks or stumps, the work is done using jacks and levelling so as to achieve a levelling of the bearers. She said that this was all that was required in the process of reblocking or restumping under the present agreement.
- 39 According to Ms Vonidis, the process of reblocking involves removal of old and rotted wooden blocks or stumps and wooden sole plates and excavation of holes for new stumps. New concrete stumps are hung vertically from the bearers leaving a space of approximately 150mm under the stump at the bottom of the hole to be later filled with concrete. Through use of jacks and adjusting levels with the aid of a computer level, the bearers are made level. At this point, concrete is poured into each hole filling the bottom and up around the stump to a point below ground surface. Any final adjustments to jacks to correct levels are then made.
- 40 The following day, when the concrete is set, the jacks are removed and the remaining holes are backfilled with soil. Ms Vonidis said that regulations and good practice do not permit using concrete to the top of the hole but that backfilling of the remaining hole must be done using soil.
- 41 Ms Vonidis said that April Construction did not agree in its agreement to undertake levelling of floors and packing between joist and bearers. She said the house is of solid brick construction with bearers and floor joists built into the brickwork. She said that if levelling of floor boards was agreed, then that would be stated in the agreement and in the building permit issued for the job. The building permit, she said, makes no reference to floor levelling. The building surveyor conducted interim and final inspections, issuing final certificate of approval on 18 September 2015.
- 42 In cross-examination, Ms Vonidis was questioned about the company's website which describes various services offered by it. She was asked about the service provided for floor levelling and packing. She replied that a level and pack service was only provided for adjusting existing satisfactory concrete stumps and that this limitation was clear from the website description. It was not permitted to level and pack wooden stumps. She said that level and pack did not apply to Mr Stahle's job which was for total wooden stump removal.
- 43 The expert report of Mr Peter Mackie dated 19 February 2016 was tendered by April Construction. Mr Mackie attended the hearing, gave evidence and was cross-examined.



- 44 Mr Mackie's evidence in chief included that the stumps are backfilled with soil, not concrete and that this is required in part to provide for future pest treatment. Mr Mackie also said that, in his experience, restumping a house does not include levelling of floors, but that the bearers must be made level.
- 45 In cross-examination Mr Mackie said that correcting a slope in floors is not part of the restumping process. When asked if it was common to mention or include in a restumping contract, the levelling of floors, he responded by saying that restumping and floor levelling are totally different things.
- 46 When asked what he would think if a contract for restumping included a reference to computer levelling, he said that he would expect the bearers to be made level, not the floors.
- 47 Mr Stahle gave detailed evidence which included a selected number of photos from a batch of photos numbered 1 to 93. The photos depicted, amongst other things, the sub-floor area showing the new concrete stumps, stumps/bearers interface, joists/bearers interface, bearers' fixed point connections at perimeter brick walls, wooden packing wedges and metal caps to stumps. Mr Stahle also tendered a number of actual wooden packing wedges taken from the sub-floor area, a number of which were depicted in the abovementioned photos.
- 48 Mr Stahle's evidence also included detailed measurements and computations, made by him after completion of the works, from the perimeter of the floors in each room, running across each room. From this, detailed calculations were made, which he said demonstrated the degree to which each room was out of level.
- 49 Mr Stahle's evidence in chief also concerned his understanding of the agreement that 'computer levelling' meant that the floors should be made level as part of the job. He tendered several quotations he obtained in more recent times for reblocking, including levelling of floors, which he described as equivalent contracts for floor levelling.
- 50 His evidence included tendering an extract from the website of April Construction which is referred to below.
- 51 Mr Stahle's evidence included reliance on expert evidence contained in a written report of Mr Peter Limburg of Finalinspect (unsigned), dated 21 December 2015. This report included detailed observations of floor levels derived from measurement through the use of a laser level. Mr Limburg was not called to give evidence.
- 52 His report is based on instructions received from Mr Stahle and on a number of stated assumptions. These included:
- (a) the job required 'return all internal floors to level' and 'returning the floors to level';
  - (b) the building permit required 'all internal floors are level';

- (c) page 2 of the building permit under ‘Specifications’ stated ‘Levelling of House’;
  - (d) the agreement made with April Construction had the word ‘Yes’ written next to ‘Computer Levelling’.
- 53 Mr Limburg, at page 8 of his report under ‘Comment’, states ‘as Levelling of the House was clearly documented in the reblocking and underpinning contract as well as the building permit, all floors within each room should be level and all floors throughout the house should be level in the same plane.’
- 54 Apart from relying on his instructions and making assumptions based on those instructions, Mr Limburg did not state an opinion based on his industry experience on whether the task of reblocking or restumping generally includes levelling of floors.
- 55 Whilst the meaning of the expression ‘computer levelling’ itself may be obvious enough, that is, something needs to be levelled through the aid of a computer, the dispute is one of scope, namely, whether that expression means, in the context of ‘House to be Reblocked’, computer levelling of stumps/bearers or includes computer levelling of the floors.
- 56 The expressions used in the agreement must be considered in context. This context includes that the agreement provides for ‘House to be Reblocked: Yes’. It includes the specification of concrete stumps and works, such as use of a concrete pump associated with reblocking.
- 57 The context includes that nothing was specified in the boxes provided under ‘Timber Replacement’ for supply of bearers, joists or other materials. Under the heading ‘Additional Services/Variations’, only the supply of a steel lintel and a single bearer is mentioned.
- 58 Further, the operative agreement does not include anywhere a reference to ‘floor’ or ‘floors’. The only instances that the word is used or incorporated in the agreement is ‘removal of floorboards’, ‘re-fitting of floorboards’, ‘removal of floor coverings’, all of which are ticked as being excluded from the scope of works. Under ‘Timber Replacement’ the expressions ‘floor joist’ and ‘supply and fit floorboards’ appear as part of the standard printed form, but no materials were specified as being required.
- 59 In my opinion, if reblocking the house with computer levelling was intended to include the levelling of all the floors of the house, a reasonable person would expect that some relevant reference, at least one, would be made in the agreement to the floors. But that is not the case.
- 60 The agreement makes provision for inserting ‘Additional Services/Variations’. Yet the agreement does not specify anything related to floor levelling in the space provided. Also, no materials are specified under the ‘Timber Replacement’ section where, if floor levelling was to be done, additional timber materials might reasonably be expected to be needed.

61 Taken together, based on the text and internal context of the agreement, I find that the text and internal context demonstrate that floor levelling was not contemplated as part of the scope of works.

### **Surrounding circumstances and object of the transaction**

62 However, if I am wrong about my finding above, which relies on an understanding of the text and internal context, I now consider the additional task of determining the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were, at the time of entering into the contract.

63 Mr Stahle tendered an extract of a page from the website of April Construction. The website promotes the services provided by April Constructions. The extract describes in the second half of the page under the heading ‘Services’, ‘Services include reblocking/restumping, underpinning, excavation, beam installations, computer floor levelling and packing, weatherboard damage, and general building work.’

64 Under the heading ‘Services’ and following the description quoted above, there are two sub-headings, which further describe the Services. The first sub-heading states, ‘Reblocking & Restumping’. The second sub-heading states, ‘Floor Levelling & Packing’.

65 Under the first sub-heading is described the works for removal of old stumps replacing with more durable concrete ones. The description states ‘This process also involves resetting floor levels and is more common in older weatherboard homes as well as brick veneer.’

66 Under the second sub-heading, ‘Floor Levelling & Packing’ is described the provision of a service ‘Lifting and packing is a process of reinstating the original levels of a floor or wall, which has changed due to timber shrinkage, brick movement or soil shrinkage, in homes that already have sufficient foundations. The process involves the use of hydraulic jacks to lift the floor and walls and then use structural packers to fill the gaps between the bearer and the stump.’

67 In cross-examination, Ms Vonidis agreed that April Construction only used one form of agreement and that it was the quotation/contract form used in this case. Mr Stahle suggested to Ms Vonidis that if there is only one form of agreement, then when April Construction agrees to undertake reblocking works, it necessarily includes providing both the Services described under the sub-headings, namely, Reblocking & Restumping, as well as Floor Levelling & Packing.

68 Ms Vonidis responded that irrespective of whether the job is to undertake reblocking using computer levelling for levelling of the bearers only or the job is to also use computer levelling to achieve the levelling of internal floors, the same form of agreement is used. She explained that if the job was to include the levelling of internal floors, then an additional description

of such works and services would be made in the space provided towards the bottom of the quotation/contract under the heading ‘Additional Services/Variations’.

- 69 The only additional services noted in the space provided in the agreement were the installation of one steel lintel and one 2 metre long bearer to replace one that had suffered damage from ants. Ms Vonidis said that, without anything else specified, there was no agreement to undertake the levelling of internal floors.
- 70 Ms Vonidis further explained in cross-examination that, aside from other floor levelling, the service under the second sub-heading in any event could not and did not apply to Mr Stahle’s job. This is because the service, as described on the website under the second sub-heading does not involve the removal of existing stumps but was a service provided for clients for floor levelling in cases where the existing stumps are concrete and where both the stumps and the wall foundations already formed a sufficient foundation to enable floor levelling. As Mr Stahle’s job required the removal and replacement of all timber stumps, the service under the second sub-heading was not ever relevant or applicable. She further added that it is not permitted to pack existing timber stumps.
- 71 Mr Stahle did not give evidence that he had looked at the website or relied on its contents at any time prior to entry into the agreement or the conduct of the works.
- 72 The information on a website can be regarded as information that a reasonable person may be taken to be aware of at the time of entering into an agreement. The website has been interpreted by each of the parties in a way that seeks to support their respective arguments.
- 73 I am of the opinion that the service described under the second sub-heading refers to works that could not reasonably be regarded as applicable to Mr Stahle’s job. Mr Stahle’s job was done for the very reason that the foundations, as provided by the rotted stumps, had deteriorated so as to be inadequate. The floor levelling service under the second sub-heading does not encompass levelling in the circumstances of total replacement of stumps with concrete stumps. It is predicated on the foundations being ‘sufficient’.
- 74 That said, the service under the first sub-heading describing the process of reblocking states that, ‘This process also involves resetting floor levels and is more common in older weatherboard homes as well as brick veneer homes.’ Mr Stahle’s house is not weatherboard or brick veneer but is a solid brick house of approximately 130 years of age. Even if ‘resetting’ is taken as being synonymous with levelling of floors, but on which there was little evidence provided, the main reference is to the ability to achieve such resetting in the context of weatherboard and brick veneer houses, not solid brick houses containing fixed points.

- 75 Expert evidence was given by Mr Mackie and reference made to the *Guide to Standards Tolerances, Victorian Building Authority, March 2105* (Guide). The report of Mr Limburg also referred to his reliance on the Guide. Article 17.01 (a) and (b) of the Guide states that owners should understand the limitations imposed on re-levelling of existing structures by such factors including (a) existing structural conditions, and (b) fixed points.
- 76 Mr Stahle's solid brick house contained fixed points. This was referred to in Mr Mackie's report and his oral evidence. Mr Mackie stated, at page 5 of 9 and using photo numbered 3, that timbers built into the brickwork, including joists were fixed points and could not be altered. Mr Mackie also found that the stumps were in a straight line and the bearers were all straight between two fixed points in the brickwork (page 5 of 9 in the report). In oral evidence he said the bearers were all level. He thought it was a good job.
- 77 Save as to whether a fixed point could or could not be altered, this evidence was not contested. That a fixed point may be altered was put forward by Mr Stahle, but there was little technical evidence in support of this proposition or why the admonition stated in the Guide may not be relevant to his house. I do not accept Mr Stahle's proposition.
- 78 Further evidence was given by Mr Mackie that the joists have suffered material shrinkage and that for each room the shrinkage of the joists was such that the floors were out of level by an average of approximately 18mm. These findings are not inconsistent with the measurements and calculations made by Mr Limburg whose assessments were not dissimilar, albeit showing greater slopes.
- 79 In the circumstances of the Guide and its admonition to owners concerning the difficulties presented by fixed points as well as structural issues, the existence of fixed points and shrinkage in Mr Stahle's house and in the context of an old solid brick house, it is unlikely that April Construction would agree to undertake reblocking works including the levelling of all internal floors without making at least some express reference to it in the description of the services to be provided. Equally, if the object of the reblocking in the eyes of Mr Stahle was to achieve level floors, it is strange that there is no express reference to a requirement for the floors to be made level in the agreement.
- 80 In my opinion, a reasonable person, having knowledge of the circumstances summarised above, would not regard the single reference to 'Computer Levelling: Yes' as conveying the meaning that all internal floors in the house would be made level. A reasonable person with such background knowledge would not conclude that the object of the agreement described as 'House to be Reblocked: Yes' was one of levelling of the floors.
- 81 There is additional background context in support of this conclusion which arises from the Building Permit.

- 82 The Building Permit was issued by the independent surveyor, Metro Building Surveying, numbered BS 1113/2016 0262/0 dated 9 September 2015. The Permit was for works provided: 'Restump of Dwelling'. 'Stages of Work Permitted', 'As shown on project plans'. According to April Construction, the project plan is a hand drawn sketch simply showing a rough outline of the house indicating rooms and hallway. The sketch is not drawn to scale. The sketch also includes a sketch of an example stump hole with stump to bearer and some dimensions.
- 83 Mr Stahle tendered a single page document purporting to be the said project plans attached to the Building Permit. The document had a hand written notation at the top 'The specifications page of the permit'. Printed in capitals and in bold type and positioned oddly at an angle between the two sketches described above, are typed notations.
- 84 The notations state, in brief half lines, details of the concrete stump and hole dimensions. Also stated is 'Levelling of house'. This is part of the instruction that Mr Limburg states he received from Mr Stahle and on which he relied in forming his conclusion as to what was required under the agreement for levelling of the house. A copy of this page was attached to Mr Limburg's report.
- 85 April Construction contested this evidence. Ms Vonidis said that this page, as tendered, was not the one attached to the Building Permit. It appeared that the page proffered by Mr Stahle, or parts of it, may have been attached to the application for the Building Permit but not attached to the Building Permit itself. It was not clear who wrote in hand at the top of the page 'The specifications page of the permit'. It does appear however, that it was not made by MBS, the independent surveyor.
- 86 On the balance of probabilities, I do not accept the evidence of Mr Stahle that the one page plans purportedly attached to the building permit was an accurate representation of the one page that was actually attached to the building permit. I do not accept that the one page plans attached to the building permit contained the description 'Levelling of house'. The Building permit itself did not have a notation referring to levelling of floors.
- 87 My view in this respect is strengthened by the uncontested evidence (referred to below) that MBS Surveying did not see it necessary to conduct interim or final inspections of the internal floors for the purposes approving the works. If levelling of internal floors was required, it would follow that the necessary inspections by an independent surveyor would be conducted.
- 88 In my opinion, the surrounding background circumstances of the website, the cautions contained in the Guide, the circumstances of the solid brick house containing fixed points and relevant structural shrinkage and an industry view of the commonly understood limits to what is meant by reblocking would lead a reasonable person to believe that the building works to be undertaken did not include levelling of the internal floors. I

find that this must be taken to have been the intent of the parties at the time of entering into their agreement.

- 89 For the above reasons, I find that the Quotation/Contract for reblocking signed by Mr Stahle on 3 September 2015 did not include a requirement that April Construction must also level the floors of the house.

**DID FLOORS BECOME OUT OF LEVEL DUE TO CONDUCT OF WORKS NOT IN A PROPER AND WORKMANLIKE MANNER?**

- 90 In respect of the second issue, whether the conduct of the works put the floors out of level, the evidence as to sloping internal floor levels will be relevant, provided it is demonstrated that the internal floors were level before the works were conducted. That is, if the floors were sloping prior to April Construction undertaking the works, then the floors did not become out of level or sloping due to its poor workmanship in undertaking the restumping. (No case was advanced by Mr Stahle that the floors were made level by April Construction but that they subsided in the following few days).
- 91 No evidence was given to show the status of the floors before any works were conducted. Mr Limburg and Mr Stahle made their detailed assessments of sloping floors from measurements and analysis conducted by them after the works had been undertaken and completed.
- 92 There is some inconsistency in the evidence given by Mr Stahle on this issue. In his written statement submitted during the hearing and in his closing submission, on the first page, is a sentence underlined which states: ‘There are three major factors at play that have led to this situation of our floors dropping resultant [sic] of the works that were carried out by April Constructions: [sic]’. On the last page he states: ‘With the walls of the house – (with only one exception) remaining level, true and straight – there was no reason that the floors couldn’t have been returned to their original level status to which they had originally been built.’
- 93 The statements appear to be in conflict with each other as to whether the floors were level or out of level before the conduct of the works.
- 94 Further, Mr Stahle in evidence in chief said that, in his estimation, the bearers are now supported on the brickwork because of subsidence. He also said that space existed where the bearers and joists were at fixed points with the brickwork to lift the bearers up to where they were when originally built. Again, there is some inconsistency in the evidence.
- 95 It is reasonable to observe that the reblocking works for replacement of all the wooden stumps were requested by Mr Stahle due to the wooden stumps having become rotted or damaged by ants, causing the bearers to already be out of level prior to any work being undertaken.
- 96 In the absence of evidence that the floors were level in the first place and that it was therefore the works that caused subsidence of bearers and floors,

Mr Stahle is unable to prove that the work of April Construction was conducted not in a proper and workmanlike manner. Some evidence was put as to Mr Limburg's observation that the bearers were hard up against the new concrete stumps. According to Mr Limburg, this was evidence that the bearers had sunk due to subsidence in the bottom of the stump holes because of loose filling.

- 97 However, being hard up against the bearers was also commented upon by Mr Mackie as demonstrating that the stumps had been properly installed with no need of packers and all level at the bearer/stump interface. It was not disputed that the bearers were level at the stump bearer interface. Mr Mackie said that he thought the reblocking was a good job.
- 98 If there be any remaining question about subsidence, the existence of subsidence, due to stumps sinking or otherwise, is inconsistent with the interim inspections and final certificate of the independent surveyor.
- 99 Mr Stahle has failed to prove, on the balance of probabilities, that the floors in the house were level before conduct of reblocking works and that they became out of level due to the poor workmanship of April Construction.

## **CONCLUSION**

- 100 Given my findings, the claim of April Construction has been proved.
- 101 The counterclaim of Mr Stahle, based on the agreement requiring that the floors be made level, or that the floors became out of level due to poor workmanship, has not been proved and must be dismissed.

**MEMBER MJF SWEENEY**