VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D151/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Termination of contract – unreasonable termination – defects of a minor nature – builder removing fixtures – compensation for fixtures – provisional sum for rock removal inadequate – whether provisional sum reasonable calculation – claim for additional rock removal not proved.

APPLICANT	JG King Pty Ltd (ACN 006 627 210)
FIRST RESPONDENT	Steven Sansome
SECOND RESPONDENT	Cara Horner
WHERE HELD	Melbourne
BEFORE	Member L. Rowland
HEARING TYPE	Hearing
DATE OF HEARING	31 August, 1& 2 September 2009
DATE OF ORDER	21 October 2009
CITATION	JG King Pty Ltd v Sansome & Anor (Domestic Building) [2009] VCAT 2226

ORDERS

1. The applicant pay to the respondents $4,844 forthwith.
2. The applicant to provide to the respondents by 7 November:
   a. Two automatic irrigation timers;
   b. A ducted vacuum unit and attachments (but not ducting):
   c. The Harvey Norman Voucher as per Variation dated 28 September 2006.
3. Costs are reserved. The parties may apply for costs by 30 November 2009.
4. The parties have liberty to apply to Member Rowland in relation to orders 2 and 3.
5. The claim and counterclaim are otherwise dismissed.

MEMBER L. ROWLAND

APPEARANCES:

For the Applicant	Ms S. Kirton of Counsel
For the Respondents	Mr S. Sansome and Ms C. Horner in person

REASONS

BACKGROUND

1 The applicant, the builder in this case, is a large building company of residential homes. In 2006 the respondents, the owners, decided to purchase a 6 star rated JG King Pty Ltd home known as the Belgrave with executive inclusions. The respondents purchased Lot 224 Earlybird Way in the Aurora Estate located in Epping. The owners signed a domestic building contract with the builder on 15 November 2006. The works commenced on 15 January 2007 with a completion date of 26 September 2007, following which liquidated damages become payable to the owners.

TERMINATION OF THE CONTRACT

2 The works progressed in the first half of 2007 with the owners being regularly billed as stages of the work reached completion. The owners received a final account in June 2007 for completion of the works, but this was withdrawn as the house had not reached completion. A further final account was sent on 27 August 2007 in anticipation of completion. The builder agrees that the account was not payable at that time.

3 Throughout August and September 2007 the parties exchanged correspondence over the cost of excavation of rock, venting of exhaust fans, aggregate finish on porch, fencing, irrigation and other matters.

4 A final inspection was organized for 11 October 2007. This was cancelled as both parties agreed the house was not ready for a final inspection.

5 On 7 November 2007 the owners received a letter from the builder advising that the home will be complete and ready for handover on 13 November 2007. A final inspection was scheduled for 20 November 2007.

6 An occupancy permit was issued on 9 November 2007 but the builder did not make the owners aware of this fact until January 2008.

7 A final inspection was held on 20 November 2007. Mr Joe Ryan, building supervisor, the owners and Mr Paul Phillips from BSS Design Group, building consultant for the owners were present. All parties made notes of defects. The owners sent the builder a defect list on 20 November 2007. The owners provided the builder with the BSS Report detailing the list of defects on 29 November 2007. It appears that the parties decided that the house was not complete at this time. The builder agreed to rectify the defects. On 18 December 2007, Mr Joe Ryan telephoned the owners and advised them that the house was complete. The owners heard nothing further. At about this time, Mr Ryan ceased employment with the builder.

8 On 17 January 2008, the owners wrote to the builder requesting an estimated completion and handover date and a response to the rectification list.

9 On 18 January 2008, the builder wrote to the owners confirming all the works had been completed save for four items which the builder advised it would not change. Those items are as follows:

- Change family room sliding door lock and handle from left to right hand
- Replace vanity splashback wall tile to the west end
- Provide and install IXL Tastic lights
- Finish surface of porch slab in exposed aggregate.

The letter advised "Your home will be complete and ready for handover on Thursday 24 January 2008. Please make contact with Grant Munro in order to confirm an appropriate handover time for settlement to occur. Please find enclosed a copy of your occupancy permit to keep for your records."

10 The evidence is that this was the first time the owners had been told that an occupancy permit had been granted.

11 The owners had a walk through the property on 21 January 2008 and again on 23 January 2008. At this time they were not prepared to settle on the property due to outstanding defects. The owners complained that many of the defect items stated to have been completed in the letter of 18 January were not completed.

12 On 1 February 2008, the builder listed 14 items that it agreed to rectify on the condition that the owners pay their final account on handover day and any minor defects found on the day would not affect handover but would be completed, if agreed to, within 14 working days. These 14 items were items on the BSS report and were said to have been completed by the builder on 18 January 2008.

13 On 8 February 2008 the owner served upon the builder a Notice of Intention to Terminate the Contract. The owners said they served the notice as a bit of a hurry up. They were, by this time, getting frustrated with the process. The grounds for serving the notice were:

- The builder has failed to proceed with the works with due diligence or in a competent manner;
- The builder has refused or persistently neglected to remove or remedy defective work or improper materials, so that by the refusal or persistent neglect the works have been adversely affected;
- The builder has refused or persistently refused to comply with the contract;
- The builder is in substantial breach of the contract in that the builder has failed to carry out the works in a proper and workman like manner and failed to carry out the works in accordance with the plans and specifications.

14 The particulars relied upon for each of the four grounds above were;

(i) Kitchen tiles have not been laid correctly with full tile next to right hand side of stainless steel splashback – alter vertical sharpened edge

to splashback wall tiles and lay tiles in accordance with plans (Internal Elevation A);

(ii) Family room sliding door lock and handle is on the incorrect side – change position from left to right hand;

(iii) Back entry door (laundry) has single glazing only – install new double glazing to the external entry door as specified;

(iv) Vanity splashback wall tile to the west end of ensuite is faulty – replace vanity splashback wall tile;

(v) Battens for ceiling fans are not installed – provide battens for future ceiling fans to Family, Meals, Beds 1,2,3 and 4 in accordance with the notation on the plans (Electrical Plan);

(vi) Surface of porch slab is finished in concrete and not exposed aggregate as per the landscaping site plan – finish in exposed aggregate as provided in the plans;

(vii) Exposed data entry conduit has not been installed in accordance with the contract requirements – install Optical Fibre as per Aurora residential services Structured Cabling Specification and Requirements;

(viii) Exhaust fans have not been vented to the atmosphere in accordance with the plans, including venting for the rangehood – ensure venting is to the atmosphere in accordance with the plans (Electrical Plan);

(ix) IXL tastic venting has not been installed correctly in accordance with the contract – install tastics including venting correctly.

15 The notice gave 14 days to remedy the defects. The builder remedied items (i), (iv), (v), (vii) and (ix). The owner discontinued the claim on (iii). Subsequently, it became evident that the works to (i) resulted in minor damage to the backing plaster and the works to (v) caused minor damage to the ceilings.

16 On 22 February 2008 the builder's solicitors wrote to the owners' solicitor in the following terms:

> As you know, the contract between our clients provides (in clause 20.3) that your client may not terminate the contract unreasonably or vexatiously.
>
> Our client is prepared to:-
>
> (a) alter the vertical sharpened edge to the kitchen splashback wall tiles and lay tiles in accordance with internal elevation kitchen A;
>
> (b) replace the vanity splashback wall tile at the west end of the en suite;

(c) provide battens for ceiling fans to family meals, beds 1, 2, 3 and 4 if this has not already been done;

(d) install ixl tastic venting in accordance with the contract.

Our client contacted yours directly to make arrangements for those works to be done.

Our client does not accept that the remaining works nominated in your notice of intention to terminate contract are required pursuant to the building contract. In particular:-

(a) the family room sliding door lock and handle is installed in accordance with manufacturer's instructions;

(b) the notes to the contract drawings (sheet 3 of 11) indicate that only single glazing to the external entry door is required;

(c) the porch slab is not part of landscaping and it is not appropriate to refer to a landscaping plan to identify the work required for the porch slab. As the executive inclusions schedule which forms part of the contract as well as the slab design (drawing 2062311/1) makes clear, the porch slab is to be finished in concrete not exposed aggregate.

If your client wishes to dispute whether our client's interpretation of its contractual requirements is accurate, our client is prepared to have that dispute determined and comply with the terms of any such determination. In those circumstances it would clearly be unreasonable and vexatious for your clients to purport to terminate the building contract.

17 The builder's solicitor's letter did not respond to the alleged defect relating to the conduit for the fibre optic cable. The works as per the builder's solicitor's letter were carried out. However, at this point, the owners were concerned they would be pushed into making final payment when the cost of removing the rock had not been resolved and the builder had not agreed to rectify the porch, the conduit for the fibre optic cable and changing over the family room door.

18 Under cover of letter dated 27 February 2008 the owners served a notice to terminate the building contract upon the builder. The covering letter relevantly provided as follows;

We are instructed that you have failed, refused or neglected to rectify all works in accordance with the Notice of Intention to Terminate Contract, and that you have failed to proceed with the works with due diligence or in a competent manner.

On that basis we hereby enclose by way of service, pursuant to Clause 20.2 of the contract a Notice of Termination due to your substantial breaches of the contract, bringing the contract to an end. We hereby put you on notice that you and your subcontractors are no longer permitted access to our clients' property and should you do so, it will be considered a trespass and our clients will summons the assistance of the Victorian Police."

19 By the date of service of Notice of Termination, the following items referred to in the notice had not been rectified by the builder;

A. Family room sliding door lock and handle is on the incorrect side – change position from left to right hand;

B. Surface of porch slab is finished in concrete and not exposed aggregate as per the landscaping site plan – finish in exposed aggregate as provided in the plans;

C. Exposed data entry conduit has not been installed in accordance with the contract requirements – install Optical Fibre as per Aurora residential services Structured Cabling Specifications and Requirements;

D. The works undertaken to correct kitchen splashback and the fitting of battens to the ceilings resulted in further defects.

These are the particulars that the owners rely upon to justify terminating the building contract. I will consider each of the alleged defects separately.

A Family room sliding door

20 The owners contend that the door handle on the family room sliding doors should be on the right sliding door and not on the left sliding door. The handle cannot be shifted to the right sliding door. The sliding doors need to be re-manufactured to accommodate the owners' request. The display home shows the door handle on the left sliding door, but because the owners' home is a mirror image of the display home, they contend the door handle should be on the right sliding door.

21 The builder contends that there is no specification or drawing showing that the door handle should be on the right hand sliding door as opposed to the left hand sliding door. The architectural drawings show a 3 panel window unit consisting of 2 fixed panels and a central sliding door with the handle on the left hand side of the sliding door. The window unit was originally installed in 3 panels as per the architectural drawings. The owners complained and said that the 3 panel doors were not as displayed and they demanded that the window unit be installed as a 4 panel unit or quad doors to use the terminology of the owners. The owners had ordered 4 roman blinds to go over the window unit in anticipation of 4 panels being installed.

22 The builder complied with this request and installed quad doors. The agreement was part of a resolution of a number of items in contention whereby the owners gave up some claims on other aspects of the work in exchange for a changeover of the sliding door panel. The owners now demand that the two central sliding doors be replaced to accommodate their requirement for the handle to be installed on the right hand sliding door as opposed to the left hand sliding door.

23 There is no specification or drawing requiring that the handle be located on the right hand or left hand side. The fitting of the handle to the left hand sliding door is not a defect. To the extent there is any variation to the display house it is a very minor matter. The claim is unreasonable and even more so, in this instance where the builder has already replaced the entire sliding door unit. The owners did not stipulate on which side they required the door handle. I find that the builder has complied with the building contract. The claim is not proven and therefore is not a defect upon which the owners can rely in terminating the contract.

B. Surface of Porch Slab

24 The owners contend that the porch was to have an exposed aggregate finish. The builder contends that it was to have a concrete finish. The exposed aggregate finish cannot now be applied to the porch because the slab height does not permit it without the slab being ground back. The owners contend that the builder was in error in pouring the slab for the porch at the wrong height. The builder contends that the garage and porch slabs were to be poured at the same level as per the engineering and architectural drawings.

25 The owners rely on the following documents:

- Clause 5.5 of the external modifications of the building contract which provides that the builder will "Provide exposed aggregate driveway and path as per developer's guidelines $2,000." The owners contend that path means porch because they do not have a path.
- Drawing Section Y-Y on page 6 of 11 shows the finished floor level of the porch slab at a lower level than the garage floor level. The owners argue that had the builder complied with this drawing an aggregate topping could be applied to the porch.
- The display home had an aggregate driveway and porch. Two other Belgrave houses shown to the owners by the builder had an aggregate porch.
- The landscape drawings show an aggregate porch.
- The 27.44 square metres referred to on the site plan, drawing 2 of 11, would according to Mr Sansome's calculations include the porch. Mr Sansome calculated the area of the driveway and the porch at 27.15 square metres. The porch is approximately 7 square metres.
- An email from Mr Scott Wilson, project manager for the builder, on 6 August 2007 is as follows "Just a quick note regarding your house, on your plans it shows exposed agg concrete to your front porch but due to the design of your slab we needed to pour the porch with the rest of the slab. What we have been doing is tiling the porch with no cost to you with a tile that matches as close as we can with the concrete on your driveway, let me know your thoughts on this."
- The owners were not offered any choice of finish for the porch and were not told it was to be concrete.

26 The builder relies on the following documents:

- 5.5 of the contract which provides that the builder will "Provide exposed aggregate driveway and path as per developers guidelines - $2,000." The builder contends that porch is not a path and not included. Vic Urban's guidelines do not mention porches.
- The Executive Inclusions provide for External Concrete as follows:

  > "Concrete paving to Porches, Verandahs, Portico's and Alfresco area."

- The engineering drawings show a lower floor level (compared with the main house slab) for both the porch and the garage. Enrik Engineering drawing 1 of 3 showd that the porch and garage are set down from the main slab. Enrik Engineering drawing 2 of 3 refers to the architectural drawing for step down floor levels for the porch and garage. The architectural drawings show on the site plan at page 2 of 11 that the garage floor level is to be at 100.215 and the Proposed Residence floor level is to be at 100.385, giving the garage area a step down of 170mm. The floor level for the porch is not noted. By reference to both the architectural and the engineering drawings it is to be inferred that the porch was to have a step down at the same level as the garage.
- Diagram Y-Y relied upon by the Applicant is an unfigured drawing. Consequently, the figured plans are to take precedence.
- The landscape drawings were drawn after the contract was entered into.
- The amount of $2,000 did not allow for the porch to be finished in exposed aggregate.
- The 27 square metres referred to on the site plan is a rough estimate obtained by multiplying 5.500mm being the garage setback x 4930mm the width of the garage to arrive at 27.1 square metres.
- It is contended that the figured engineering drawings and architectural drawings take precedence over the landscape drawings. The contract provides as follows:

  > Clause 3.2 Subject to clause 3.1 any discrepancy or ambiguity in or between the document comprising the contract shall be resolved by adopting the following order of precedence:
  >
  > - Special conditions (if any)
  > - This document including the Appendix (excluding any special conditions);
  > - The plans;
  > - Any other documents
  >
  > Clause 3.3Where any discrepancy exists between figured and scaled dimensions in the plans, the figured dimensions shall prevail. All dimensions are approximate to the extent that they are based on dimensions estimated from any Existing Building.

27 The evidence is finely balanced. The builder has followed the architectural and engineering drawings. It is now not possible to apply the aggregate finish to the porch without first grinding down the porch slab. The documents are not clear as to the porch finish. Each party contends that the specifications support their case. The landscape drawings show the porch as being an exposed aggregate finish. The landscape document is in conflict with the engineering and architectural plans. The contract documents prepared by the builder are ambiguous. The owners are entitled to have the conflict resolved in their favour. I find that the contract provided for the porch to have an aggregate finish.

28 However, the exposed aggregate finish cannot be applied to the porch without undertaking significant works to the porch. In order to achieve an exposed aggregate finish the slab will need to be ground back. That process carries significant risks. The owners in a letter to the builder on 13 September 2007 have identified the following issues with now attempting to install the exposed aggregate concrete finish to the porch as follows:

- Structural integrity of the concrete;
- Proposed method of jointing;
- Colour consistency as multiple pours of exposed aggregate concrete often result in different colours;
- Consistency of finish, as above different pours may result in different levels of exposure;
- Levels, ensure that there is an even transition;
- Ensure that the entry into the house complies with building requirements for steps;
- Amount of the existing driveway to be removed (all or amount deemed required), to ensure a patchwork effect is not evident and the above items are satisfied.

29 I find that the failure of the builder to install an aggregate topping to the porch was a breach of the building contract. I also find that it is not possible to install the aggregate topping without significant risk of further damage or unsatisfactory result. The application of the aggregate topping is unreasonable and an unnecessary method of rectification. The builder has offered to tile the porch, but this method of rectification was rejected by the owners. The owners are entitled to compensation for the failure to install the aggregate topping. I allow $1762.

C. Conduit for the Fibre Optic Cable.

30 The owners contend that the builder has failed to install the conduit for the fibre optic cable in accordance with the specifications of VicUrban. VicUrban is a residential land developer established by the Victorian

Government under the Victorian Urban Development Authority Act and the developer of the Aurora Estate. VicUrban requires all houses on the Aurora Estate to connect to the Fibre Optic Network. The building contract requires the builder to install conduit for the fibre optic cable in accordance with the developer's guidelines. VicUrban stipulates the following installation requirements:

- The conduit is to be a minimum of 32mm in diameter;
- The conduit is in addition to any items that Telstra may request from its pit;
- The conduit shall only have long radius bends, minimum 90mm radius;
- The conduit shall be installed with a single draw string suitable for drawing fibre from the pit in the street to the dwelling.

31 VicUrban has brought fibre optic cable from the street via a lead in cable onto the owners' property. The builder is required to install a conduit from the lead in pipe to the Carrier Entry Point in the garage.

32 The builder acknowledges that a conduit was intended to run underground from the lead in pipe under the driveway through to the Carrier Entry Point in the garage. However, a mistake occurred whereby the conduit under the slab was not laid correctly.

33 It is VicUrban's responsibility to arrange for the installation and connection of the fibre optic cable. In the absence of the conduit, Vic Urban has installed the fibre optic cable by bringing the cable in conduit from the lead in point to the base of the porch storm water pipe. From there, the cable is chased into the wall behind the storm water pipe and from there brought into the ceiling. It appears that the fibre optic cable is not in conduit from the base of the storm water pipe and into the roof.

34 The owners are concerned that the fibre optic cable is at risk of being damaged because it does not have long radius bends and is not protected by conduit.

35 The owners' concerns have some validity, but at the same time, there is presently no defect. The fibre optic cable is working. VicUrban has agreed to re-install the fibre optic cable if there is a problem, but it is not clear who would pay for the re-installation if this were to occur. It is also not clear what rectification is required, if any. It may be the case that conduit need only be installed from the carrier entry point back to the roof entry and it is possible that this could be done without re-installing the fibre optic cable.

36 The requirement of the builder was to comply with VicUrban's requirements. The builder asserts that VicUrban has approved the re-routing of the cable. The owners assert that the cable is not in conduit and therefore does not comply with VicUrban requirements. VicUrban installed the fibre optic cable. No party has produced any written evidence from Vic Urban.

37 At this point, I am not satisfied that there is any defect which requires rectification, and if there is a defect, I am not satisfied as to the method of rectification. This issue cannot be resolved without the input of VicUrban. I find the claim neither proved nor disproved. I therefore find that it is not a defect upon which the owners can rely in serving the Notice of Termination.

D The works undertaken to correct kitchen splashback and the fitting of battens to the ceilings resulted in further defects.

38 The owners agree that the builder did rectify the kitchen splashback tiles, but in rectifying the splashback tiles has caused damage to the paintwork and loosened the plasterboard on which the tiles are fixed. The cost of the rectification of the paintwork is assessed at $57 and is agreed by the builder. The loose plasterboard has not been priced because this is a recently notified defect. The builder has installed the battens to enable ceiling fans to be installed but in doing so has damaged the plaster to the ceiling. This is an agreed defect and priced at $458. The priced defects total $515. These are relatively small defects. The builder has not been given the opportunity to rectify these defects. The builder's expert report has agreed that these defects require rectification.

FINDING ON TERMINATION NOTICE

39 The only defects in the Notice of Intention to terminate which the builder was liable to remedy and has not remedied are the subsequent damage to the splashback and ceilings and the failure to install an aggregate finish to the porch. I find that these remaining defects are not sufficiently serious to entitle the owners to terminate the building contract. See *Serong v Dependable Developments* (Domestic Building [2009] VCAT 760 (30 April 2009) where Deputy President Macnamara said at paragraph 79;

> Experience sitting in the Domestic Building List and a reading of judgments in building disputes demonstrates that building is a complex process and this complexity and human frailty mean that defects in a structure are common and sometimes, at least on a temporary basis, unavoidable….Given that it is difficult to avoid some defects and that the process of rectification may take some time it seems inherently unlikely that a standard form building contract prepared by a builders' association would intend to leave a builder at risk of contract cancellation for failure to rectify within 14 days of a notice any defect which was more than ephemeral or de minimus.

40 By reason of Clause 20.3 of the Building Contract, the owners may not terminate the building contract unreasonably or vexatiously. Prior to serving the Notice of Termination, the owners did not request the builder to remedy the subsequent defects to the splashback and ceilings. I find that the defects which formed the basis of the Notice of Termination were of a minor nature and on that basis the owners were not entitled to serve the

Notice of Termination. I find that the owners were not entitled to terminate the contract.

Damages to builder

41 The builder is entitled to the balance owing of $11,068.60 under the building contract subject to the owners' claim for defective works.

Damages for defects to owner

42 Following termination of the building contract the owners claim further defects and these defects form part of the owners' claim. Mostly, the claims for defects are not in dispute. I have dealt with the disputed items below. The builder remains willing to rectify the defects and contends that it would have rectified the defects in the defects period had the owners not terminated the building contract. In the interests of concluding the litigation, the Tribunal declines to make an order requiring the builder to rectify the defects.

43 As the owners were not entitled to terminate the building contract they are entitled to the cost to the builder to rectify the defects. They are not entitled to their cost of rectification of the defects. The builder submits that as there is no evidence of the cost to the builder, the builder consents to the lower of each expert's estimate without an allowance for contingency, profit or margin. I have allowed the builder's estimate for rectification costs excluding 30% margin.

44 The Tribunal allows:

1.	Damage to cross over	$1,051
2.	Replace letter box	$ 728
3.	Builder to supply sprinkler timer	
4.	Concrete porch	$1,762
5.	Rehang gate	$ 132
6 & 7	Repair fencing -allowing replacement of some of the capping	$ 860
8.	Hairline wall cracks	nil
9.	Seal articulation joint	$ 32
10, 11 & 12.	Clean mortar and weep holes	$ 286
13.	Line cupboard divider	$ 135
14.	Repair ceiling damage	$ 320
15.	Re-align ceiling in bed 1	$ 651
16.	Adjust rollers to doors	$ 30
17.	Exterior sliding door latch	nil
18.	Replace sliding door handle	nil
19.	Garage quad trim	$ 59
20.	Replace defective locks	$ 280
21.	Repair flexing window sills	$ 126
22 & 23.	Repainting eaves	$ 245

24.	Repaint laundry door	$ 65
25. & 26.	Internal painting - allow	$ 800
27.	Conduit for fibre optic cable	nil
28.	Bracket for Gas meter	$ 58
29, 30, & 31.	Minor repairs	$ 72
	Repair to splashback – allow	$ 250
	Total allowed for defects	$7,942

Other claims for incomplete and defective work

Joinery unit for refrigerator

45 This defect was sought to be added to the owners' claim by the addendum to the owners' expert report dated 7 April 2009. The owners contend that the kitchen joinery units on the south wall should be 700mm deep and not 600mm deep to accommodate a side by side refrigerator. The owners claim rectification costs of $1,061.78. The internal elevation sheet no. 9 of 11 at Kitchen C shows a depth for the refrigerator space at 700mm. Kitchen D on Drawing 9 of 11, the floor plan Drawing 3 of 11, electrical plan 7 of 11 and the landscape plan Drawing 11 of 11 all show the cupboard at 600mm deep with the refrigerator sitting proud of the joinery unit. I find that the weight of the evidence is that the joinery unit depicted at Kitchen C on sheet no. 9 of 11 should have been at 600 and not 700mm. The claim is disallowed.

Tiles to kitchen splashback

46 This defect was sought to be added to the owners' claim at the site inspection. It was not properly costed. There is an obvious defect to the substrate upon which the tiles are laid. The cost of repair has not been costed. I allow $250.

Irrigation system

47 The owners contend that the builder is required to install an irrigation pipe under the driveway to connect the garden on the eastern side of the driveway with the garden on the western side of the driveway so that both sides of the garden may be controlled by the same irrigation controller.

48 VicUrban provided the builder an allowance of $5,000 to install a front garden including an irrigation system. VicUrban's requirements for the irrigation system are relevantly "Each dwelling must install an automatic irrigation system to their front garden." The builder is yet to supply the owners with their irrigation controller.

49 The owners seek rectification by boring a hole under the driveway to connect the east garden with the west garden at a cost of $1,942. The proposed method of rectification carries significant risk of damage. The

proposed rectification is unreasonable and un-necessary. The builder's obligation to supply an automatic irrigation system can be remedied by supplying a second irrigation controller. The claim for rectification works is not proved. The builder shall supply the owners with a second irrigation controller.

Ducted vacuum unit

50 The owners contend that the ducted vacuum unit was not installed and seek a partial credit for the ducted vacuum cleaner. A sum of $1,365 was allowed in the building contract for a ducted vacuum unit. The ducting for the unit has been installed. The owners seek a $780 set off for the vacuum unit and attachments, which were not supplied.

51 The builder contends that the owners; wrongfully served the Notice of Termination; prohibited the builder from returning to the property; did not request supply of the vacuum unit and state that the builder remains ready and willing to supply the vacuum unit which is in storage.

52 The Tribunal finds that as the owners were not entitled to terminate the contract, the owners are not entitled to damages. The builder must supply the owners with the vacuum unit and attachments or, alternatively pay the owners $780.

Compensation for items removed from house

53 On 29 February 2008, following service the Notice of Termination, the builder removed the gas hot water service, the removable parts of the stove and disconnected the gas. Mr Joe Cannatelli, area manager for the builder, said that the items were removed as a precaution against theft. I do not accept this evidence. The stove and gas hot water service had been installed in the house for nearly 2 months. If the precaution against theft was the motive for removing the goods then the goods ought to have been removed prior to Christmas.

54 Further, at no time did the builder advise the owners that the stove parts and gas hot water service had been removed for safe keeping. The owners reported the theft to the police. The builder still did not advise the owners that the builder was holding the goods. It was only after the owners had made a Freedom of Information request in July 2008 that they learnt that the builder had removed the items. The owners had no choice but to replace the goods because they thought they had been stolen.

55 I find that the items were removed for reasons and purposes outside the proper performance of the building contract by the builder. Accordingly, I find that the builder must credit the owners with the cost of the items as allowed in the building contract. The builder did not submit any evidence as to the cost of these items. The owners have estimated the cost of the items as follows:

Stove	$2,600

Gas Hot Water Service	$3,300
Reconnection and repair of gas meter	$110
Total allowed to owners:	$6,010

56 I allow the owners $6,010.

Promotional items

57 The owners contend that upon signing the building contract the owners were entitled to a home theatre package to be supplied by Harvey Norman on 28 September 2006. A variation to the contract was raised whereby the builder agreed to supply the owners with a home theatre/audio pack. Mr Pyrohiw, on behalf of the builder, said that the Harvey Norman voucher is normally given to the owners upon settlement of the property. In this case the owners terminated the contract before settlement and therefore, the voucher has not been handed to the owners. The builder remains ready and able to provide the owners with the Harvey Norman voucher. There may now be some problems with the availability of the items in the Harvey Norman package. If there is any unavailability of items due to the time delay in redeeming the voucher, then I would allow the builder to substitute with a similar product. It is a matter for the parties if they wish to negotiate some variation to the Harvey Norman package or different package now that the owners have purchased a home theatre system. There will be an order that the builder is to provide the owners with a voucher for the Harvey Norman package.

Liquidated damages

58 The owners contend that they are entitled to liquidated damages from 26 September 2007 until 27 February 2008. Clause 18.1 of the building contract provides that the owners are entitled to damages from the completion date until the works reach completion or until the owners take possession, whichever is the earlier.

59 The builder concedes that it is liable to allow the owners liquidated damages from 26 September 2007. The builder contends that the completion date was 19 November 2007 or at the latest 18 January 2008.

60 The question which arises is whether the works reached completion within the meaning of the building contract prior to the owners taking possession.

61 The owners provided the builder a defect list following the final inspection in November 2007. The items from the November defect list, which remain outstanding and are admitted by the builder, are as follows:

- Defective painting in a number of areas throughout the house
- Relocate vertical dividing panel in linen cupboard
- Repair and repaint splayed timber moulding above garage door

- Paint touch up to eaves
- Reposition bolt to side gate
- Readjust spa pump access door

62 These items remain on the defect list and according to clause 17 of the building contract the owners were not required to pay the final claim until the defects were rectified. The owners' claim for liquidated damages is proved in the sum of $3,060 because the house had not reached completion at the time the owners took possession of the house.

Builder's claim for rock removal

63 The builder claims $6,700 for rock removal in addition to the provisional sum of $1,000 allowed in the building contract. The owners dispute the claim for rock removal on the grounds that the builder has not made a reasonable provision for rock removal and they dispute 41 cubic metres of rock was removed from the site. The owners contend only 28 cubic metres of loose rock was removed from site.

64 According to the evidence of the owners it is common knowledge that the Aurora Estate is built on a basalt rock plain. The owners said that the presence of rock was the reason this area had not been developed earlier. There is a rock quarry some 4 kilometres away. Prior to signing the building contract the owners had email correspondence with the builders concerning the $1,000 provision for rock removal (*builder's response in italics*)

- Rock removal – the $1000 provisional sum quoted is very vague and we would like to clarify some points about it-
  (a) we believe that the fair rate for solid rock removal is $130/m3 plus builder's margin of 15% - the amount of $220/m3 quoted on page 11/16 is unfair and overpriced.

  That is our price……will stockpile all the rocks to one side for inspection and then it is rated on that rock on site.

  (b) we would like to state in the contract that the rock removed is "solid" measured in the ground with no allowance for over excavation, with the option to inspect the trench prior and after rock removal" (there is no point digging out rock unnecessarily just to pour concrete on it).

  If we strike rock and it is in the way then we will remove it and stock pile for inspection?

  (c) we would also like to have stated in the contract a definition for rock "rock is material that cannot be removed with a ripper on a 20T excavator"

  No……we are using our equipment that is used every day by the construction dept contractors all the time.

65 In February, 2007 five cubic metres of loose rock was removed from site during the site scrape in preparation for the slab being laid and a further 36 cubic metres of loose rock was removed when the trenches were dug for the sewer and the storm water. Building variations for $7,700 were issued for the rock excavation. The owners refused to sign the building variations.

66 The owners contend that the builder is not entitled to claim the additional cost of rock excavation by reason of clauses 9 and 14 of the building contract.

67 Clause 9 mirrors section 20 of the *Domestic Building Act* 1995 provides as follows:

> The builder warrants that any provisional sum included by the builder in the contract has been calculated with reasonable care and skill taking account of all the information reasonably available at the date the contract is made, including the nature and location of the building site.

68 The claim falls to be determined pursuant to Clause 14 of the building contract which provides as follows:

> **Builder generally not entitled to extra amounts for excavations or footings**
>
> After entering into this Contract the Builder cannot seek from the Owner an amount of money not already provided for in the Original Contract Price if the additional amount could reasonably have been ascertained had the Builder obtained all the Foundations Data required under the Act.
>
> **Builder's entitlement to extra amounts for excavations and footings**
>
> The Builder will be entitled to claim an amount of money not already provided for in the Original Contract Price if the need for the additional amount could not have been ascertained from the Foundations Data.
>
> **14.3 Owner to pay additional cost if builder entitled to extra amount**
>
> If the Builder is entitled to any additional amounts which could not reasonably have been ascertained for excavations or footings under this Contract or the Act, the owner will pay to the Builder in the Builder's next Progress Claim, the agreed cost of the additional work or, if the cost is not agreed, the cost incurred by the Builder plus 15% for the Builder's margin.

69 The builder has obtained all the foundations data required by the Act. The builder submits that the issue for determination is whether the need for the additional amount claimed could not reasonably have been ascertained from the foundations data.

70 In summary, the foundations data shows a level site, with the sewer connection at the north end of the block. The site investigation report encountered rock at the north end of the site at 400mm, at the middle of the block at 700mm and at the south end of the block at 1300mm.

71 I accept the submission of the builder that no allowance for excavation of rock was required for the slab. The engineering drawings required the slab to be founded on natural soil with the edge beams founded at least 100mm into natural soil, but could be founded directly onto weathered rock if this was encountered shallower than the required depth. According to the builder, the bottom of the house slab was to be constructed at least 300mm and probably 400mm above any point at which the site investigation report had located any rock at the site and 700-800mm above the average of the depths at which the rock had been encountered in the site investigation report.

72 The evidence was that five cubic metres of loose rock was removed from site during the site scrape. The owners photographed the rock removed following the site scrape. I find that the builder could not have reasonably ascertained from the foundations data the need for the rock removal at the site scrape stage. There was no evidence that rock was visible before the site scrape. I will allow the builder an additional sum for the removal of five cubic metres of loose rock during the site scrape because that amount could not be reasonably determined from the foundations data. The contract provides an allowance of $220 per cubic metre. I allow the builder $1,100.

73 The builder submits it allowed $1,000 for the removal of rock to connect the services at the north end of the site. This allowed for just over 4 loose cubic metres of rock to be removed. On the builder's evidence, the builder removed 36 loose cubic metres of rock. The owners contend that the builder did not undertake a calculation with reasonable care and skill taking into account all the relevant information. Mr Pyrohiw, construction manager, for the builder said that a calculation would have been made and he would have seen it.

74 The owners called Mr Shaun Skiba, a civil engineer and friend of the owners to give evidence. Mr Skiba removed the dug up rock from the site to the quarry. To the extent that Mr Skiba sought to give expert evidence the builder objected to that evidence. Mr Skiba is currently employed by Akron Roads as a project manager and was formerly employed by JA Dodd as an engineer and project manager.

75 Mr Skiba's evidence was that rock, according to the Australian Standard on the measurement of civil engineering works should be measured solid in the ground and not loose, after it is dug up. The owners did query whether they would be charged for solid or loose rock and the response by the builder was such that I am satisfied that the builder indicated the measurement would be made on loose rock.

76 Mr Skiba removed the recovered rock from the site for the owners. He said that he removed 24 – 28 cubic metres of loose rock which translates to approximately 10 cubic metres of solid rock. This evidence was supported by calculations he had made taking into account the weight of the rock and the capacity of his truck. Mr Skiba removed a further 18 cubic metres of loose dirt which translates to approximately 11 cubic metres of solid dirt. Mr Skiba said that visually the pile of rock did look like about 35 cubic metres of rock, but having shifted the rock it was only 28 cubic metres of loose rock.

77 The builder has been charged $5,400 (excluding GST) for the removal from the ground of 36 cubic metres of rock. It appears that there is a further charge of $220 hire charge relating to the removal of the rock. The builder seeks to pass these charges onto the owners.

78 Mr Skiba produced some calculations whereby he showed it was possible to calculate the amount of rock required to be removed from the site. He came up with a rough figure of 10 cubic metres which converts to 28 cubic metres of loose rock, which is the amount of rock he removed from the site. He calculated this by estimating the width of the trenches that needed to be dug for the storm water and the sewerage, he then estimated the depth of the trenches using the minimum fall required for the sewer and storm water lines and then he took into account the site survey results showing the depth where rock was encountered. He was able to make a calculation that 10 cubic metres of solid rock required removal. Whether or not Mr Skiba's calculations are valid is in my view irrelevant. The strength of his evidence lies in the fact that he attempted a calculation based on the site information and investigations and could come up with a figure from which a reasonable estimate of the cost of removal of rock could be made.

79 The builder on the other hand did not produce any calculation and did not give any evidence on how the $1,000 provisional sum was calculated, other than to say it was reasonable. The $1,000 provisional sum in this case looks like a nominal sum rather than a true calculation or estimation of what the real cost would be to remove the rock. I am not satisfied on the evidence that the builder undertook any calculation.

80 The builder has the burden of proving that the additional amount for the excavations for the services could not reasonably have been ascertained from the foundations data. I find that the builder has not discharged the onus of proof. The builder has not proved its claim for the additional amount over the $1,000 allowed in the building contract.

Summary of findings

81 The owners pay the builder:

- balance of contract sum: $11,068

- Rock removal $ 1,100

Total to builder $12,168

82 The builder to pay the owners:

- Cost of replacing white goods $6,010
- Cost of rectifying defects $7,942
- Liquidated damages $3,060

Total to owners $17,012

83 Net sum due to owners $4,844

84 The builder provide to the owners:

- 2 automatic irrigation timers
- the ducted vacuum unit and attachments (but not ducting)
- the Harvey Norman voucher

MEMBER L. ROWLAND