

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D785/2002

**CATCHWORDS**

*MBAV SC-6 Sub-Contract – whether entire contract – whether any ambiguity – assessing delay in project – apportionment of liability for delay between sub-contractors – final submissions - difficulties in reconciling parties' submissions in relation to the Respondent's claims.*

[2005] VCAT 2604

<b>APPLICANT</b>	Allscope Interiors Pty Ltd (ACN 094 620 121)
<b>RESPONDENT</b>	Danvale Constructions Pty Ltd (ACN 088 940 845)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	4-14 April, 27 June – 1 July, 12-20 July and 21 September 2005
<b>DATE OF ORDER</b>	13 December 2005

**ORDER**

1. On the Application order the Respondent to pay to the Applicant the sum of \$131,212.10.
2. On the Counterclaim order the Applicant to pay to the Respondent the sum of \$42,833.00.
3. Costs reserved. Liberty to apply.
4. The proceeding is referred to a directions hearing before Deputy President Aird on 13 February 2006 at 10 a.m. (allow half a day) at which time the parties will be heard as to the appropriate method of calculation of interest. Any application for costs will also be heard. At least 2 days prior to any further hearing the parties must file and serve their calculations as to interest.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Allscope

Mr R Squirrell of Counsel

For Danvale

Mr B Reid of Counsel

## REASONS

1. The parties entered into a MBAV SC-6 Subcontract on 29 March 2001 whereby the Applicant ('Allscope') was to perform carpentry and plastering works for the Respondent ('Danvale'). The contract price was \$545,493.00 plus GST.
2. Allscope commenced proceedings on 22 November 2002 and seeks:
  - (i) the sum of \$70,280.19 for unpaid variations of which the sum of \$54,929.64 has been agreed by the parties. I accept that Allscope agreed to compromise \$5,158.95 of its variation claim during the hearing thereby reducing the claim to \$65,121.24. Variations in the sum of \$10,191.60 are in dispute;
  - (ii) the balance of the contract price - \$38,588.00,
  - (iii) Return of Retention - \$30,002.12,
  - (iv) interest and consequential matters.
3. By amended Points of Counterclaim ('Counterclaim') dated 26 November 2004 (the third version of the Counterclaim) Danvale sought:
  - (i) An order that the MBAV document signed by the parties be rectified to provide that time for completion of the works as set out in the second scheduled to the MBAV document in accordance with the exchange of documents prior to the signing of that document.
  - (ii) Damages (which I understand to be a claim for payment of the sum of \$177,090.00 after its claim is set-off against the amount it calculates is owed to Allscope).
  - (iii) Interest.
4. In Danvale's final submissions certain claims are abandoned, and as I understand it, Danvale now claims by way of counterclaim, by reference

to the annexure to its final submissions headed ‘Danvale summary of counterclaim quantum’ (‘the Summary’):

- (i) materials - \$9,040.76;
- (ii) timber excess - \$5,500.00;
- (iii) rectification costs for works carried out by Lepat - \$27,536.63;
- (iv) back charged on costs - \$7,200.00 or \$4,455.00;
- (v) defects and equipment - \$15,537.65;
- (vi) Labour costs: \$59,306.27 or \$22,715.20;
- (vii) prolongation costs - \$77,760.00 or \$59,850.00;
- (viii) interest.

5. Although the proceeding was initially set down for hearing for 10 days, it ultimately ran for some 21 days. Taking into account the availability of Counsel and the tribunal, the hearing was fragmented over a long period – it commenced on 4 April 2005 and the hearing of final submissions took place on 21 September 2005. Allscope was represented by Mr Reid of Counsel and Danvale by Mr Squirrell of Counsel.

## **PRELIMINARY COMMENTS AND OBSERVATIONS**

### **Preparation**

6. Preparation for this case was less than ideal. For instance, Allscope was ordered to prepare joint court books. On the Friday before the hearing Danvale’s solicitors forwarded an additional volume (Volume 6) to Allscope’s solicitors necessitating a short adjournment, on day 1 of the hearing, to enable Allscope’s legal advisors to consider the additional material.

7. It seems that insufficient care was taken when preparing the Court Books resulting in a number of duplicate pages appearing in different volumes. Many documents were then duplicated, triplicated and in some cases quadruplicated in the copy documents referred to in Witness Statements.
8. It was apparent during the hearing that the discovery process had been less than satisfactory. Although ordered to file and serve Lists of Documents it seems that 'folders of documents' rather than individual documents were discovered. Further documents were also apparently 'found' during the course of the hearing.
9. The hearing was adjourned on day 9 when Mr Reid advised that Mr Faifer (quantity surveyor) would not be able to give evidence as and when intended. He said that he had requested his instructing solicitor to make the Volume 6 documents available to Mr Faifer who had indicated he required more time to consider them. The hearing was adjourned with orders for costs.

### **Final Submissions**

10. Final submissions are intended to summarise a party's case and to assist a court or tribunal in identifying what a party considers to be the matters to be determined, with reference, as appropriate, to supporting authorities.
11. Unfortunately, the submissions filed on behalf of Allscope were of limited assistance. They are some 136 pages long with a heavy reliance on lengthy extracts from various texts. At times this made it difficult to identify what were often helpful points. The substantive submission is some 96 pages long, with a further 40 or so pages of attachments where

many comments are simply duplicated for successive items. Although Danvale's submissions were filed first, and Allscope's submissions were not filed until some three weeks later, Allscope's submissions do not address Danvale's claim as set out in the Summary. The failure of Allscope to file responsive submissions has made a reconciliation of the respective submissions difficult. Further, Allscope's submissions do not include a summation of the amounts it believes it has proved it is entitled to, nor the amounts it concedes Danvale is entitled to on its counterclaim.

12. Similarly, although on initially considering Danvale's final submissions it appeared the methodology adopted would be of assistance, it has been of limited assistance only. Not only are there a number of incorrect references to the Court Book, the loss and damage claimed by Danvale shifted throughout the hearing, to the point where it is now difficult to reconcile the Summary with Danvale's claim for damages as set out in its Counterclaim.
  
13. I had expected that the 'sum' I requested counsel for Allscope to provide after the hearing of final submissions would assist. Unfortunately he has done no more than file a document headed 'Summary of Danvale's Counterclaim'. Whilst Allscope has commented on what it calls 'the headings in Respondent's summary' it has then set out its position in relation to quantum by reference to the amount originally claimed, seemingly calculated by reference to the Counterclaim dated 26 November 2004, but without reference to the Summary. This is of little assistance as is demonstrated by the following table, in which I have not included Danvale's itemised claims as set out in its 'Current Particulars of Loss and Damage' dated 5 April 2005 as, to do so, would only serve to confuse the issue further.

<b>Item</b>	<b>Allscope's Summary of Danvale's claim</b>	<b>Danvale's current claim</b>
Materials	\$32,630.58	\$9,040.76
Timber	\$10,000.00	\$5,500.00
Lepat Back Charge	\$25,033.30	\$27,536.63 (\$25,033.30 plus 10% overhead)
Back Charges	\$7,200.00	\$7,200.00 (no overhead) or \$4,455.00 (includes 10% overhead)
Defects & Equipment	<p>\$28,387.83 – calculated as:</p> <p>Crane Hire: \$1,754.00  Site facilities: \$991.00  Cleaning: \$3,576.00  Fowles &amp; Masbolt: \$558.14  Scaffold: \$7,289.94 )  Scaffold: \$6,655.00 )  Danvale Labour: \$750.00  Cavity sliding door: \$3,576.60  Pelmet: \$715.20  Finish/fit off bathroom: \$469.35  Finish eaves: \$2,052.60</p>	<p>\$15,537.65 (\$14,126.55 plus 10% overhead). In the Summary this is calculated as:</p> <p>Crane Hire: \$1,770.00  Site facilities: \$138.00  Not included  Not included  Scaffold: \$5,405.00</p> <p>Not included  Cavity sliding door: \$3,576.60  Pelmet: \$715.00  Finish bathroom accessories \$469.35  Finish eaves: \$2,052.60</p>
LABOUR Harding A	\$11,602.71	\$11,201.82 or \$6,919.00
Harding B	\$36,475.30	\$23,244.00 or \$3,800.00
Heinley A	\$7,666.05	\$7,666.05 or \$4,716.20
Heinley B	\$6,794.40	\$6,794.40 or \$4,180.00
Gates	\$10,400.00	\$10,400.00 or \$7,280.00
Delay	\$132,000.00	Not included
Prolongation	\$109,349.00	\$77,760.00 or \$59,850.00

14. In relation to the above table I make the following additional comments:

(i) Allscope's summary of Danvale's claim

Allscope's Summary is not entirely accurate, which further limits its assistance. It seems that Allscope has included some items twice – for instance, it includes the claim for scaffolding of \$7,289.94 in its calculation of Danvale's original claim for Defects and Equipment although it is clearly included in Danvale's original claim for materials of \$32,630.58 set out at paragraph 16 of its counterclaim.

(ii) Danvale's summary of its claim

There are a number of items previously claimed that are apparently no longer included in Danvale's claim. Further, Danvale's claim for supply of fixings - the Masbolt and Fowles claim of \$558.14 - is not included in the Summary although it is referred to in its Final Submissions and in its Submissions in Reply.

(iii) Labour claim

There are some significant differences between Danvale's original claims for labour and those set out in the Summary. The total labour claim was initially \$72,938.46 (by reference to the amounts set out in paragraph 27 of the Counterclaim). The claim as set out on page one of the Summary is now either \$59,306.27 or \$26,895.20 depending on which hourly rate is applied. However, when those figures are compared to the calculations set out on page 5 of the same attachment which is headed 'Labour costs' it is clear that the Harding B calculations are incorrect, and that different figures have been included in the page 1 calculations. There also seems to be some double-dipping with a failure to deduct from the labour claim any amount relating to claims for specific items.

(iv) Delay/prolongation claim

It is not clear from the Counterclaim whether Danvale was initially pursuing a delay claim and/or a prolongation claim. Paragraph 8 sets out a claim for recovery of the prolongation costs paid to the proprietor in the sum of \$109,340.00. Paragraph 9 sets out two claims for liquidated damages both \$66,000.00 – a total of \$132,000.00. Both these claims are included in the particulars of loss and damage set out in paragraph 30 where they are described as prolongation costs. The prolongation costs of \$109,340.00 set out in paragraph 8 are not included in the Summary. The claim for prolongation costs is now \$77,760.00 or \$59,850.00 – a substantial reduction.

- (v) A further claim for \$26,180.00 for the provision of additional plant and equipment as set out in paragraph 12 of the Counterclaim was abandoned at the commencement of the hearing.

## **WITNESSES**

15. Allscope called the following witnesses and also seeks to rely on a letter from Nathan Shemlowski dated 1 March 2003:

Timothy Kraskov – director of Allscope  
Nick Volkoff – site foreman (the original site supervisor)  
Tony Chau – Danvale’s contract administrator  
John Stranic –site supervisor towards the end of the project  
Christopher Winduss – carpenter

Expert Witnesses: Norman Faifer – quantity surveyor  
William Degenhardt – construction programmer

16. Danvale called the following witnesses

Kevin Britton – director of Danvale  
Karl Flemming – site supervisor  
Robert Heinley – carpenter

Aaron Gates – carpenter  
John Larkins - plasterer  
William Thompson – director of Princes View Pty Ltd (Owner)  
Ross Greer – engineer  
William Schacher – architect employed by Ascuii Edwards  
Leo Tabak – director of Lepat Pty Ltd  
Adrian Burgess – quantity surveyor employed by Danvale

17. Mr Squirrel indicated that Danvale had been unable to locate Mr Harding. However, there was no evidence as to the steps taken to locate him.
18. On 7 February 2003 Allscope wrote to Nathan Shemlowski (Danvale's former contract administrator for this project), who is now deceased, seeking information as to its scope of works. He responded by letter dated 1 March 2003. I accept the submission on behalf of Danvale that it would be a denial of natural justice if I were to take this letter into consideration and have not done so.
19. I do not propose to consider the evidence of each witness in detail, but make the following observations about the evidence of those who I consider to be the primary witnesses:

**Timothy Kraskov**

20. It became apparent during cross examination that whilst Mr Kraskov had a significant involvement with the project there were others associated with Allscope who, although involved in the project, were not called to give evidence. For example, he gave evidence that Nick Volkoff and John Stranic reported to him or David Chudasko about issues on site. He confirmed that he, David Chudasko and Harry Chudasko were all directors of Allscope at the relevant time. David Chudasko also inspected the 'expansion joint issue' in the townhouse stairwells, and prepared the quotation for rectification works. Mr

Kraskov said that he and David Chudasko attended site on 15 February 2002, in response to Danvale's facsimile of 13 February 2002 relating to the cleaning of the ground lobby floor, and that Mr Chudasko took a photograph. Inexplicably, despite his involvement with a number of the issues in dispute, David Chudasko was not called as a witness.

21. It is apparent that Harry Chudasko is closely involved in the affairs of Allscope but he was not called as a witness. Interestingly, he was also the director in control of Chad Plaster when the original invitations to quote for plaster and carpentry works were sent to Chad Plaster and then passed on to Allscope. He was present in the Tribunal throughout most of the hearing whereas Mr Kraskov attended infrequently, and on at least one occasion Mr Reid referred to Harry Chudasko as his client. I accept that I am entitled to draw a negative inference from the failure of Allscope to call either of the Chudaskos as witnesses (*Jones v Dunkel* (1959) 101 CLR 298).
22. Mr Kraskov gave evidence that his initial negotiations with Danvale were with Tony Chau (who left Danvale's employ in late February 2001). After the contract was signed most of his discussions were with Kevin Britton. He said Allscope was last on site in early February 2002 at which time he believed the works were complete except for some minor defects, the area in the main stairwell, which could not be completed pending installation of the stainless steel stringers, and one bulkhead.

### **Kevin Britton**

23. Mr Britton's evidence was very general and non-specific. His witness statements contain a number of assertions in the absence of any supporting material. There were a number of inconsistencies between his evidence and that of Mr Flemming with whom there seemed to be

considerable tension. Whilst Mr Britton was adamant that Mr Flemming was responsible for all labour on site, Mr Flemming was equally adamant that Heinley and Harding were engaged directly by, and worked under, the supervision of Mr Britton. Mr Flemming was also adamant that Mr Gates reported directly to Mr Britton.

24. I found Mr Britton's evidence to be somewhat unreliable. Whilst he maintained that he personally prepared his witness statements his evidence as to whether he did so with the assistance of the site meeting minutes was inconsistent and contradictory. In answer to many questions put to him in cross-examination, he replied he could not recall what had happened because it was a long time ago. Yet much of his witness statements contains a surprising degree of specificity as to the date of a particular site meeting and what was discussed, even where such matters have not been recorded in the minutes. In relation to these he said they were prepared "from his recollection" which would appear to be selective.
25. Mr Britton confirms delays to the project were caused by the sub-contractor engaged to supply and install handrails and balustrades. Whilst he said he does not believe this prevented Allscope from carrying out its works, his evidence as to the impact of such delay was lacking in details. Although able to recall these matters with such specificity he was unable to recall the names of Danvale's carpenters who were on site in January or Allscope's representatives who attended the site meetings.

### **Karl Flemming**

26. Mr Flemming gave evidence he was the site supervisor for Danvale on this project. He confirmed he does not have any formal qualifications. It was apparent that, from his perspective, there was considerable tension between him and Mr Britton particularly in relation to what he

described as the second carpentry team which he said was supervised by Aaron Gates.

27. He said that he had prepared works schedules in the form of gant or bar charts using MS Project as a way of 'building the job in his own mind' on an old computer that he had used on site. The computer had since been damaged and all the information lost.
28. Mr Flemming appeared to have little independent recollection of the matters set out in his witness statement, although he continually gave evidence that he agreed with what was written in it. He said that after he prepared the 'works schedule' he was told by Mr Britton he had allowed too much time and this would have to be reduced to "fit into the contract" although he said he was never made aware of the building periods for stages one and two as set out in the Head Contract.
29. He gave evidence that:
  - a commencement notice was not issued.
  - he was unable to say when the stage one works were complete, although he said there were substantial delays in the completion of those works arising from some significant re-design issues.
  - he denied that copies of the head contract were on site. (This directly contradicted Mr Britton's evidence).
  - he had never seen the Harding and Henley timesheets prior to them being shown to him during cross examination.
  - Tim Kraskov was on site a number of times each week for different periods of time.

### **Anthony Burgess**

30. Mr Burgess gave evidence that he was employed by Danvale as a quantity surveyor. He prepared the Evaluation Reports before payment

was made, on progress claims, to various sub-contractors including Allscope. He was also responsible for the preparation and claiming of backcharges. However, it was clear from his evidence that many of the source documents that may have been available to him when he prepared the Evaluation Reports, and when he provided instructions to Danvale's solicitors and Counsel have since been misplaced. It was also apparent that although one might reasonably expected him to have independently assessed claims for payment, at times he simply relied on Mr Britton's instructions.

31. As will be discussed elsewhere in these Reasons there seem to have been a number of instances of 'double dipping' which I suspect arose because of Mr Burgess' failure to carry out independent assessments. For instance, in relation to the labour claim he said he counted working days, and referred to payroll records for Mr Harding and Mr Heinley, rather than to their individual timesheets. He was therefore not aware that some of those timesheets reveal that work was actually being undertaken at another site.

### **Norman Faifer**

32. Mr Faifer's first report of 15 November 2004 was little more than a recitation of the various elements of Danvale's claims with the qualification, in each instance, that more information was required. In relation to claims for rectification costs he simply states he has 'not sighted any of these invoices and cannot comment'. As noted above, the hearing was adjourned on day 9 to enable Mr Faifer to prepare a further report. Unfortunately, Mr Faifer's further report added little if anything to his original. He simply reiterated that in the absence of additional information he was unable to provide a definitive report. It is a further indication of the lack of adequate preparation that Allscope, (or its solicitors) upon receipt of Mr Faifer's first report, apparently failed to

take any steps to ascertain the exact nature of the additional information which he said was required, and provide it to him, together with copies of the relevant invoices. Surprisingly, Mr Faifer did not attend site at any time, although one might reasonably expect that a prudent expert would inspect the site to at least familiarise himself with it, even if the works were complete. In my view, considerable time was spent in cross examination which might have otherwise been avoided if Mr Faifer had been properly briefed.

### **William Degenhardt**

33. Mr Degenhardt, a programming expert, was most insistent that it was impossible to determine the extent of any delay in the absence of a critical path programme. He rejected the suggestion that the 'bar' or 'gant' chart works schedules, prepared for Danvale by Mr Flemming, were of assistance in determining the critical path or assessing the cause or extent of any delay caused by Allscope.
34. Once again, it was apparent that he had been provided with insufficient material/documents by Allscope, and he does not appear to have requested copies of anything other than works programmes. Surprisingly, he did not request copies of the building contract or the project specifications.

### **THE CONTRACT**

35. There is a fundamental issue to be determined – the terms of the contract between the parties. Allscope contends the contract is comprised of:
  - MBAV SC-6 Subcontract ('the SC-6') dated 29 March 2001.
  - Special Conditions to the SC-6.
  - Allscope's Conditions of Contract annexed to the SC-6.
  - Allscope's letter to Danvale dated 2 April 2001 which sets out the inclusions for the carpentry/plastering works.

36. Allscope relies on Clause 41 of the SC-6, which was initialled by Mr Shemlowski on behalf of Danvale and which provides:

***'SUPERSEDES PREVIOUS OFFER***

*The Sub Contract supersedes and or cancels all previous letters, offers, quotations and negotiations sent or received, except as are agreed and included in or appended to this document'.*

37. Danvale contends the contract is comprised of:
- Danvale's invitation to quote for plaster works dated 29 August 2000 which sets out 50 working days addressed to Chad Plaster (which I accept was passed on to Allscope by Chad Plaster).
  - Danvale's invitation to quote for carpentry works dated 29 August 2000 which sets out 70 working days to perform the framing work and 60 working days for the carpentry fix works (which I accept was passed on to Allscope by Chad Plaster).
  - Allscope's faxes of 1, 14, 21 and 26 February 2001.
  - Danvale's letter of 1 March 2001 setting out a scope of works for plaster and carpentry works respectively.
  - Danvale's letter of 9 March 2001.
  - The SC-6 Contract dated 29 March 2001.
  - Allscope's quotation of 2 April 2001 (although Danvale suggests the date should be 2 March 2001 nothing turns on this).
  - Documents referred to in the SC-6.
38. Although it is Danvale which submits that the SC-6 is not reflective of the agreement between the parties, Danvale prepared the contract. Item 5 – SCHEDULE OF PERFORMANCE of the Second Schedule has not been completed, although this page has been initialled by Nathan Shemlowski who was Danvale's contract administrator at the time.

39. It is submitted on behalf of Danvale that, in the absence of completion of the Second Schedule by the inclusion of commencement and completion dates and a construction period, the construction periods set out in Danvale's invitations to quote are incorporated into the SC-6. It submits that otherwise the contract is ambiguous as it provides for liquidated damages and prolongation costs. Allscope submits that the failure to specify these dates means there was no time frame for the carrying out of the works.
40. It is acknowledged on behalf of Danvale that the contract should not be amended purely because the parties 'simply overlooked the matter'. I accept it seems inconsistent to include provisions for liquidated damages yet not to include commencement and completion dates which form the basis of any claim for liquidated damages. However, in my view, Danvale must accept the consequences of its failure to complete all the provisions of the contract it prepared, particularly where its employee, Mr Shemlowski, has initiated the contentious clauses.
41. The inclusion of the notation '+ GST' next to the Contract Price in clause 1 (b) of the SC-6, initialled by Mr Shemlowski, indicates Danvale's preparedness to make necessary amendments to the contract where it was not reflective of the agreement between the parties. It seems that Danvale's primary concern in seeking rectification of the contract is to enable it to make and sustain its claim for prolongation costs. However, I cannot be satisfied on the evidence before me that the failure to complete Item 5 of the Second Schedule was due to anything other than it simply being overlooked by Danvale. I am therefore satisfied that the contract is as contended by Allscope.
42. It is submitted Allscope was otherwise obliged to complete the works in a timely manner to enable Danvale to comply with its obligations under

the Head Contract and this is therefore an implied term of their contract. However, I am satisfied information as to Danvale's obligations under the Head Contract, particularly in relation to the completion date and the construction period, were not provided to Allscope before execution of the SC-6. Mr Burgess gave evidence that Schedule 2 was not completed in the SC-6 contracts entered into with other sub-contractors on this project. It is difficult to conclude the failure to complete the Schedule 2 in a number of SC-6 contract was merely an oversight. Rather it seems indicative that for whatever reason Danvale did not consider it necessary to stipulate commencement and completion dates or a construction period. I therefore find the contract between the parties is as contended by Allscope.

#### **TERMINATION OF THE CONTRACT**

43. It is alleged by Allscope that Danvale repudiated the contract by failing to make payments due under the contract, and refusing to allow Allscope access to the site to complete the works.
44. It is alleged by Danvale that Allscope repudiated the contract by suspending the works without just cause, and then refusing to return to site to complete the works.
45. The question of termination is only relevant in determining any entitlement to damages the parties may have. For reasons that will become apparent I am satisfied that the works were substantially complete, albeit defective, when Allscope was last on site in early February 2002.
46. It is helpful to set out a chronology (with comments) leading up to termination of the contract:

- January 2002 Allscope had one plasterer on site during January 2002 – Chris Winduss, who gave evidence he was carrying out rectification of the works identified in Danvale’s defects list dated 17 December 2001.
- 30 January 2002 Danvale wrote to Allscope advising that unless arrangements were made to carry out rectification and completion works within 7 days alternative arrangements would be made at Allscope’s cost. Mr Kraskov said Allscope did not respond to this facsimile because it was not worth doing so in the absence of the stainless steel stringers.
- 4 February 2002 Allscope advised Danvale by facsimile that it would return to site to complete the works once the stainless steel stringers had been installed. Danvale submits that this work did not of itself prevent Allscope from completing other works.
- 6 February 2002 Danvale faxed to Allscope 21 pages of defects lists prepared by Aaron Gates on 5 February 2002 under cover of the following:

*Here are the defects produced by Danvale excluding townhouses 1 to 4. Over all, there is not anything major but please attend to these items.*

*Thanks Aaron*

*If you wish to discuss, please call the site phone.*

Mr Kraskov said that he had been advised by Chris Winduss that all defects had been attended to when he left the site on 5 February 2002. Mr Gates said he had walked around the site with Chris Winduss when preparing the defects lists.

- 15 February 2002 Allscope advised Danvale by facsimile that it had not suspended its works and was awaiting a response to its facsimile of 4

February 2002.

20 February 2002 Allscope sent a facsimile to Danvale requesting a meeting to *'resolve other issues in relation to finishing the stairs, which we need to know when it can be done'* (sic).

22 February 2002 Danvale sent a further facsimile to Allscope referring to Allscope's failure to respond to the earlier one of 30 January 2002, or to attend to any rectification or completion works, and giving Allscope notice that it had until 27 February 2002 to complete the works. There is no mention in this letter of alternative arrangements being made.

47. Allscope alleges that Danvale's failure to make payment of Progress Claim 9 of \$12,902.00 was repudiatory. In my view, failure to make a payment under a contract is not of itself repudiatory, especially where the contract, such as the SC-6, contemplates and provides a remedy such as interest, should payments not be made.

48. I am not satisfied Allscope's failure to respond to or even acknowledge correspondence from Danvale, in particular, the letters of 6 and 22 February 2002 was repudiatory. Allscope made it quite clear by facsimile dated 4 February 2002 that it was prepared to return to site when the stainless steel stringers were available. There is simply no evidence to support Danvale's assertion that Allscope had suspended the works.

49. Allscope asserts that Danvale evinced a clear intention not to be bound by the contract when it engaged Lepat to carry out rectification works. On 6 February 2002 Danvale sent the carpentry defects lists to Allscope, but did not commence compiling lists of plastering defects until 26

February 2002, shortly after Lepat commenced on site. The plastering defects list for the last apartment is dated 1 March 2002. No time frame for completion of any necessary rectification works was stipulated in the facsimile of 6 February 2002 although on 22 February 2002 Danvale gave Allscope five days in which to complete the works.

50. Danvale asserts that it gave written notice of default to Allscope on 30 January and 22 February 2002. Neither of these so-called notices complies with the provisions of the SC-6. Clause 8(b) provides:

*If the Sub-Contractor is in default then (without prejudice to any rights of the Builder to rescind this Sub Contract at common law) the Builder may give the Sub Contractor written notice of the nature of the default and of his intention to exercise his rights pursuant to this Clause within 7 days (or such lesser time as may be stipulated in the notice if the default is incapable of remedy or if shorter notice is necessary to prevent serious disruption of the work of the Builder and other Sub Contractors in which latter case the period of notice shall be a reasonable time in the circumstances and the reasons for shortening of time shall be stated in the notice) and stating which right the Builder intended to exercise.*

51. Although both ‘notices’ refer to Allscope’s failure to complete and rectify its works no details of the alleged incomplete or defective works are set out. The ‘notice’ of 30 January 2002 was sent to Allscope 7 days prior to the list of carpentry defects, and when that list was sent on 6 February 2002 – the day on which the notice for remedying the default expired, no mention was made of the default. Further, the ‘notice’ of 22 February 2002 similarly does not set out any details of the incomplete or defective works. It requires Allscope to remedy the non particularised defaults within 5 days – less than the time required by clause 8(b) of the SC-6 without explanation as to the reasons for shortening the time from the required 7 day period. As noted above, Mr Gates did not commence compiling the plastering defects lists until 26 February 2002. I am satisfied that Danvale acted in clear disregard of its obligations under the contract, and clearly evinced an intention not to be bound by its terms.

52. Whilst Danvale asserts Lepat was employed initially to carry out the rectification works to the townhouse stairwells, following rejection of Allscope's quotation as being excessive, Lepat's timesheets indicate otherwise. They reveal Lepat commenced rectification works on 19 February 2002 and 49 hours are claimed for the period 19 to 22 February 2002 for patching and sanding. Whether these works are properly completion or rectification works, although they would seem to be rectification works, is immaterial. Danvale had engaged Lepat before it sent the facsimile of 22 February 2002 giving Allscope until 27 February 2002 to carry out all necessary completion and rectification works. By engaging Lepat to carry out the works prior to 27 February 2002 Danvale clearly evinced an intention not to be bound by the terms of the SC-6, and effectively excluded Allscope from site. Although Allscope did not formally communicate its acceptance of Danvale's repudiation it is clear that both parties treated the contract as being at an end. Danvale made no further demands on Allscope to return to site, and Allscope made no attempt to do so. This is somewhat analogous to the proposition considered in *Vitol SA v Norelf Ltd* (1996) 1 WLR 65 at 113 where Lord Steyn said:

*Postulate the case where an employer at the end of a day tells a contractor that he, the employer, is repudiating the contract and that the contractor need not return the next day. The contractor does not return the next day or at all. It seems to me that the contractor's failure to return may, in the absence of any other explanation, convey a decision to treat the contract as at an end*

### **Is the sub-contract a domestic building contract?**

53. The relevance of Danvale's submission that s8 of the *Domestic Building Contracts Act* 1995 (the *DBC Act*) applies to the SC-6 is unclear. I accept that s8 sets out the warranties which are implied to be part of

every domestic building contract but am not persuaded that the SC-6 is a domestic building contract.

54. Domestic building contract' is defined in s3 as '*a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a subcontractor*'. The contract between the parties is a contract between a builder and a sub-contractor. It is not a domestic building contract as defined in s3 of the *DBC Act*, and the implied warranties in s8 do not apply to Allscope (although they do apply to Danvale under the head contract). Despite a common misapprehension that the *DBC Act* only applies to domestic building contracts which are defined to exclude contracts between builders and sub-contractors, the Tribunal clearly has jurisdiction to consider disputes between a builder and a sub-contractor which falls within the definition of 'domestic building dispute' in s54(1) (b) of the Act:

(1) A "domestic building dispute" is a dispute or claim arising—

...

(b) between a builder and—

(i) another builder; or

(ii) a building practitioner (as defined in the Building Act 1993); or

(iii) a sub-contractor; or

(iv) an insurer—

in relation to a domestic building contract or the carrying out of domestic building work; or

...

55. Although s8 does not apply, this does not absolve Allscope from its contractual obligations to carry out the works '*to the reasonable satisfaction of the Builder*' (SC-6 Clause 3(a) (iii)).

## THE CLAIMS

56. I refer to my earlier comments regarding the difficulties in reconciling the parties' respective claims and, in particular, their calculations of Danvale's counterclaim. Where there is any uncertainty I propose to adopt the calculations as set out in the Summary as the basis of my determination, without reference to the amounts set out in the pleadings, even where those calculations are not always directly referable to particular claims by the parties e.g. Danvale's defects claim. Unless otherwise indicated all amounts are exclusive of GST, although I accept GST must be added to any award of damages as a taxable supply.
57. In considering the parties' respective claims I am mindful of the Tribunal's obligations as set out in s97 of the VCAT Act – to '*...act fairly and according to the substantial merits of the case...*' and to afford natural justice to the parties (s98). The Tribunal is not bound by the rules of evidence and further '*...may inform itself on any matter as it sees fit...*' (s98).

## ALLSCOPE'S CLAIM

58. It is convenient to first consider each of Allscope's claims.

### Variations - \$70,280.19

59. A number of the variations totalling \$54,929.64 have been agreed between the parties and variations totalling \$5,185.95 were compromised during the hearing. The following variations totalling \$10,191.60 remain in dispute:

(i)	variation 26 – hang wardrobe doors	\$ 447.00
(ii)	variation 31 – pack out plasterboard	\$ 715.20
(iii)	variation 41 – site closure	\$ 625.80
	(\$6,883.80 claimed - \$6,258.00 conceded by Danvale)	
(iv)	variation 78 – install MDF doors	\$8,403.60

Variation 26 – hang wardrobe doors - \$447 and variation 78 – install MDF doors - \$8,403.60

60. Allscope contends that these works were part of the joinery package and were not included in its original scope of works. The ‘Scope of Works’ attached to the contract and headed ‘ALLSCOPE CONDITIONS OF CONTRACT’ on Danvale’s letterhead and initialled by Mr Shemlowski, provides:

“Allscope to stand, hang doors and install door jambs, skirtings, architraves, install door furniture, eaves, harditex to inside of balconies, fixing of pelmets” ... and ... “no cutting of MDF on-site without proper safety procedures being followed”.

61. Allscope seeks to rely on its joinery quotation, and submits that I should draw a negative inference from Danvale’s failure to provide me with a copy of the joinery sub-contract with Alucraft. However, Allscope “cannot’ have its cake and eat it too”. It cannot argue on one hand that the SC-6 is an entire contract, and on the other, that regard should be had to ancillary documentation in interpreting it.

62. I am satisfied that MDF doors are included in Allscope’s scope of works. The Allscope conditions of contract clearly refer to all doors. The reference to the safety considerations for the cutting of MDF on-site, in my view, confirms MDF components were part of the carpentry works to be performed by Allscope. My conclusion is further reinforced by Allscope’s letter of 2 April 2001 where it is clear that the hanging of doors is included. In the absence of any specific exclusion of MDF doors, I am satisfied they were part of Allscope’s works. The claim is therefore disallowed.

Variation 31 – pack out plasterboard \$715.20

63. I accept this relates to the work required in the main stairwell as set out in the facsimile from Ascuii Edwards dated 22 January 2002, and not to

the work required in the townhouse stairwells. It is clear from that facsimile that the works are necessitated through a misalignment of the wall finish to level 3. I accept this is rectification work and must therefore be Allscope's responsibility. It is not a variation. The claim is disallowed.

#### Variation 41 – site closure \$625.80

64. The total claimed for this variation is \$6,883.30 of which \$6,258.00 is conceded by Danvale. In its final submissions Allscope concedes it did not provide any evidence to support the claim for an additional 8 hours. The claim for the additional \$625.80 is therefore disallowed.
65. As I have disallowed all the claims for variations it is not necessary to consider the alternative claim for restitution. I am satisfied that the scope of works is as set out in the SC-6 and any entitlement to be paid for any additional works can only arise as a variation.

#### **Retention**

66. Danvale concedes that Allscope is entitled to recover the retention of \$30,002.12 although there seems to be no allowance for this in the calculations set out in Danvale's Final Submissions.

#### **THE COUNTERCLAIM**

67. It is helpful to set out Danvale's claims again by reference to the Summary:

- (i) materials - \$9,040.76;
- (ii) timber excess - \$5,500.00;
- (iii) rectification costs for works carried out by Lepat - \$27,536.63;
- (iv) back charged on costs - \$7,200.00 or alternatively \$4,455.00;
- (v) defects and equipment - \$15,537.65;

- (vi) Labour costs: \$59,306.27 or \$26,895.20;
- (vii) prolongation costs - \$77,760.00 or \$59,850.00;

### **Administration Overheads**

68. Danvale seeks to add 10% to all claims for administrative overheads ('overheads'). Mr Faifer conceded it was appropriate to apply administrative overheads to claims such as Danvale's and that 10% was fair and reasonable.
69. However, a consideration of those copies of Danvale's Evaluation Reports included in the Court books, reveals that the overheads have not been added to previous claims for provision of materials. Accordingly, it is inappropriate to seek to apply it now. I accept overheads were not added to labour back charges as the hourly rate of \$44.70 included an allowance for overheads. However I consider the application of overheads to an actual hourly labour rate to be appropriate and will apply it accordingly.

### **Labour Rate**

70. The labour component of all claims is calculated at the hourly rate of \$45.00 although the evidence was that Mr Heinley was paid \$22.00 per hour and Mr Harding was paid \$25.00 per hour. Mr Burgess gave evidence that Danvale applied the same hourly rate for its labour back charges as that which Allscope charges for additional works, as provided for in its Conditions of Employment - \$44.70 per hour plus GST. In my view Danvale would be unjustly enriched if I were to allow \$44.70 per hour. In the Summary Danvale calculates its claims with a labour component of \$44.70 per hour (inclusive of overheads) or \$25.00 per hour plus 10% overheads. Any award of damages must be calculated on the basis of the actual cost only plus overheads which I have found to be fair and reasonable.

### **Provision of Materials - \$9,040.76**

71. This claim was originally for \$32,630.58. Danvale now concedes that much of its original claim is unsustainable and has reduced its claim to \$8,218.87 plus overheads (\$9,040.76). Danvale's claim is based on calculations made by Mr Burgess. It became apparent during the hearing that the claim as set out in paragraph 16 of the Counterclaim was inaccurate. Although Counsel indicated that he took responsibility for this, and that it was primarily due to transcription errors, I am satisfied that his instructions must have lacked clarity particularly in light of the significant reduction in the amount claimed.
72. Allscope submits it is difficult to be satisfied that the materials were used in or for its works, and relies on Mr Flemming's evidence that there were other carpenters on site.
73. Danvale relies on the 'Allscope Conditions of Contract' annexed to the SC-6 under which Allscope was required to provide certain materials. The materials to be provided include *'timber framing materials'* and *'All insulation to walls, wall fixings included in All Scope price i.e. nuts, bolts, washers, nails, screws, fixing adhesives etc.'* I accept it was intended that all 'fixing materials', including the materials the subject of this claim, would be supplied by Allscope and am satisfied, on balance, that the materials which are the subject of this revised claim were materials that should have been provided by Allscope. I will allow the claim exclusive of overheads - \$8,218.87.

### **Timber Wastage - \$5,500.00**

74. Danvale claims \$5,000.00 plus overheads for what it alleges was significant timber wastage on site. The carpentry component of the SC-6 was for labour only. As required by the terms of the SC-6 Allscope

provided an estimate of the timber requirements to Danvale on 22 March 2001. This estimate was \$88,000.00 inclusive of GST. On 21 December 2001 Danvale wrote to Allscope expressing concern, that although the timber estimate was \$80,000.00, \$94,300.00 had been spent and requested Allscope to review the invoices. It is submitted on behalf of Danvale that as the \$80,000.00 figure is exclusive of GST the \$94,300.00 must be similarly so. However it is unclear what invoices were provided to Allscope under cover of the letter of 21 December 2001. The only invoices that are now locatable by Danvale total \$84,787.56 and are inclusive of GST. I note, in passing, that if the sum of \$84,787.56 was exclusive of GST, the total inclusive of GST would be \$93,266.32.

75. This claim seems to be based on Mr Burgess' observations of, what he described as, waste timber in the bins although there was no measurement of the alleged wastage. He was seemingly unaware that additional timber had been required because of some issues with the roof design about which Mr Greer gave evidence. Mr Burgess said that the back charge for additional timber was based on his understanding that the timber allowance was \$80,000.00 inclusive of GST and that he considered plus or minus 5% to 10% from any original estimate to be fair and reasonable. On the evidence before me, and in the absence of all relevant invoices, I cannot be satisfied what, if any, additional timber was used, or even that the sum of \$94,300.00 was exclusive of GST. Any excess timber is well within Mr Burgess' allowance of plus or minus 5% to 10%. This claim therefore fails.

**Work carried out by Lepat - \$27,536.63 (\$25,033.30 exclusive of GST plus overheads)**

76. The expansion joint issue in the townhouse stairwells was identified by Ascui Edwards in their facsimile on 23 January 2002 wherein they advised:

*Following the inspection of the control joints installed in the apartment stair wells it would appear the joints are inadequate and have failed to accommodate the movement in the stud frames causing the wall linings to bow.*

*To alleviate this problem we recommend the constructed control joints be removed and reconstructed in accordance with the recommend Gyprock details as highlighted on the attached documents.*

*Joints constructed on apartment party walls shall include the appropriate acoustic sealant.*

77. Danvale asserts it initially employed Lepat to carry out the necessary rectification works. Allscope provided a quotation dated 31 January 2002 for \$11,260.00 plus GST with an estimated time to carry out the works of three weeks. This was rejected by Danvale and Lepat was then engaged to carry out the works. However, the evidence given by Mr Tabak, a director of Lepat, and Lepat's invoices do not support Danvale's assertion that they were initially engaged to carry out these works and, it was only later that Lepat was engaged to carry out the other plastering rectification works.
78. As noted above, Lepat's initial timesheets for the period 19 to 22 February 2002 relate to patching and sanding works, not to rectification works to the stairwells. Timesheets for the period 25 February to 7 March 2003 indicate works to the stairwells including the removal and replacement of plaster and installation of control joints, and some additional minor works. These total 120 hours which, at Lepat's hourly rate of \$44.00, is \$5,280.00 exclusive of GST. Lepat's invoice dated 16 April 2002 includes \$94.20 for 6/P32 angle which seems to refer to the control joints and its invoice dated 25 March 2002 includes \$2,270.39 for materials. However it is unclear which materials were required, and

used, for which tasks. In the absence of itemised particulars of the material cost for these works I consider \$6,000.00 inclusive of labour and materials, but exclusive of GST, to be a reasonable estimate of the cost of the stairwell rectification works.

79. By facsimile dated 27 February 2002 Danvale advised Allscope:

*We wish to advise you that the defect in the stair walls is not a result of incorrect placement of an expansion joint (per Architect's instruction).*

*It has been found that the stud wall behind has been built (sic) incorrectly, the one below not in line with the one above.*

*Lepat are presently correcting your defect and you have the opportunity to inspect and confirm the defect this day the 27 Feb 2002.*

80. I accept that Allscope was not given a reasonable opportunity to inspect before the rectification works were carried out. However, it is difficult, on the evidence before me, to conclude, on balance that Allscope's stud wall construction was the sole cause of the defect. The architect's initial advice was that the bowing of the walls was caused by inadequate control joints. Lepat's timesheets confirm that control joints were installed. I am not persuaded that there should be any departure from the initial conclusion of the architect that inadequate control joints were the primary cause of the defect.

81. Danvale relies on the Lepat timesheets in support of its claims for reimbursement of payment made to Lepat for what it alleged were rectification and completion works. It is difficult from the evidence before me to distinguish between rectification and completion works. However categorised, it is similarly difficult to determine the exact scope of works carried out by Lepat. Further, I note that in Danvale's Progress Claim under the Head Contract it records the "wall and ceiling finishes" which I am satisfied include plastering works as being 99% complete as at 31 December 2002.

82. The first of the defects lists for the plastering works (relied on in this proceeding) completed by Aaron Gates is dated 20 February 2002 shortly after Lepat commenced on site. The defects list for the last apartment inspected is dated 1 March 2002. There is also an undated typed list setting out defects for some of the apartments. These lists identify the need for extensive rectification of the plastering works.
83. After deduction of the amount assessed for rectifying the townhouse stairwells of \$6,000.00 the balance of the claim is \$19,033.30. Having regard to the defects lists prepared by Aaron Gates, and the works set out on Lepat's timesheets, I am satisfied that Danvale should recover the cost of carrying out rectification of, what I am satisfied are, Allscope's defects. As it is difficult on the evidence before me to determine the actual cost of carrying out those works I consider a 10% reduction in the claim to be fair and reasonable and will allow \$17,129.97. I am not satisfied that overheads should be applied in circumstances where Allscope was denied the opportunity to rectify by Danvale having repudiated the contract

#### **Defects and Equipment Supplied - \$15,537.65**

84. Danvale alleges the following works required rectification – I have taken these items and amounts from the Summary.
85. **Defects**
- (i) Cavity Sliding doors –\$3,576.60

This claim and its calculation is set out in Danvale's letter to Allscope dated 19 September 2002. Danvale alleges Allscope incorrectly installed the sliding door guides - some were installed with the flat edge under the door, others with it visible on the

vertical face. Allscope contends that it was unclear from the instruction leaflet as to which way they should be installed and that in any event it was of no consequence. I am not persuaded the installation instructions lack clarity and am satisfied that for aesthetic and practical reasons the guides should have been installed with the 'flat side' under the door. I accept that the incorrect method of installation was brought to Allscope's attention before all the guides were installed, but they refused to accept responsibility or reinstall them. Danvale should have, and could have, taken steps to mitigate its loss by removing and reinstalling the guides before the doors were painted. I will therefore allow the labour (at \$25.00 per hour plus overheads) and materials for removal and replacement of the doors and guides but make no allowance for painting.

4 hours per door @ \$25.00 per hour \$100.00

13 doors @ \$100.00 per door	\$1,300.00
Overheads	<u>\$ 130.00</u>
	\$1,430.00
New guides	<u>\$ 38.00</u>
	\$1,468.00

(ii) Pelmets – \$715.00

Danvale claims a credit for the deletion of certain pelmets. I accept this was not challenged by Allscope – neither as to liability or quantum and I therefore allow the amount claimed. I reject Allscope's submission that any allowance should be the cost to Danvale of carrying out the work. These are contract works which should have been carried out by Allscope. Danvale is entitled to a credit for those works which must be calculated at Allscope's hourly rate which I accept is \$44.70. I therefore allow the amount claimed of \$715.00.

86. Items (iii) to (v) are all completion items. As I have found Danvale repudiated the contract these claims are disallowed. However, if one considers the total claimed for these three items (\$2,521.95), the allowance by Allscope for completion costs of \$3,000.00 seems fair and reasonable.

87. **Equipment Hire**

(i) Crane Hire - \$1,760.00

Although the claim as set out in the counterclaim is for \$1,854.50 the Summary indicates \$1,770.00 is now claimed, although the invoice total is \$1,760.00 inclusive of GST. The claim exclusive of GST must therefore be \$1,600.00. The invoice has a handwritten notation indicating that 80% only was to be charged to Allscope with 20% to be paid by Danvale. Allscope concedes that it is liable for 80% of this amount which I consider to be fair and reasonable. I will therefore allow \$1,280.00.

(ii) Site Facilities - \$138.00

Although the original claim was for \$991.00, Danvale concedes this was a miscalculation and now claims the amount of \$138.00. Although Allscope concedes \$141.57 I will allow the amount claimed by Danvale. I do not consider the overheads should be applied to this sum. It is clear that at the time the contract was entered into the parties agreed that 'one dollar per man per week' would be payable by Allscope. There was no provision for the application of overheads.

(iii) Scaffold - \$5,405.00

Although Danvale originally claimed \$7,289.00 and \$6,655.00 and there appeared to be some duplication in the amounts

claimed, the amount now claimed is \$5,405.00 plus overheads. Mr Kraskov gave evidence that Allscope was prepared to contribute to the cost of scaffold provided by Danvale for Allscope to do the ceiling works in the main stairwell. I note that many of the invoices for scaffold relate to the period after Allscope left the site. Although the evidence to support this claim is somewhat lacking, in view of Allscope's concession, I will allow 25% of this claim - \$1,351.25.

**88. Back-charged on costs**

The following claims for labour rate back charges are in the alternative with calculations based on \$45.00 per hour and \$25.00 per hour plus overheads:

(i) Cleaning up by tilers - \$2,160.00 or \$1,200.00

Danvale relies on a facsimile dated 7 February 2002 from Black and White Tiling Contractors advising that '*the foyer floor where the tiling works are to be carried out is considerably contaminated...*' There are no details as to the contamination other than some handwritten notes on that facsimile seemingly of a conversation (between unidentified persons) on 20 February 2002 which indicate there was '*concretors ardit, paint, clay residue and plaster*' (sic). Mr Kraskov gave evidence that there was no material on the floor when he and David Chudasko attended the site on 15 February 2002. The tiler was not called to give evidence. As I cannot be satisfied on the evidence before me as to the extent of plaster to be removed this claim must fail.

(ii) Repair tiling damaged by Allscope - \$720.00 or \$400.00

I repeat my comments in relation to the claim for cleaning up by tilers and disallow this claim.

- (iii) Cleaning up after plasterers - \$3,600.00 or \$2,000.00

Whilst I have some reservations about the lack of supporting documentation in relation to this claim, I note that Allscope's objections appear based on the lack of details about who carried out the work and when. There is no denial that the work was necessary. In such circumstances I will allow the claim at the reduced hourly rate of \$25.00 per hour - \$2,000.00 plus overheads – a total of \$2,200.00.

- (iv) Rehang ground floor doors - \$720.00 or \$400.00

I cannot be satisfied on the evidence before me as to the basis of this claim. There is no supporting documentation and the person/s who carried out the work have not been identified. The claim is not proved and is disallowed.

**Miscellaneous claims:**

89. Although these claims are not included in the Summary, they are mentioned in Danvale's Final Submissions and its Submissions in Reply. I will therefore consider them.

- (i) Supply of fixings: Fowles - \$504.90 and Masbolt - \$53.24

and

- (ii) Fowles invoice for additional timber - \$1,100.35 which Danvale now concedes was included in the claim for excess timber.

90. I reject the claim for supply of fixings – the invoices were not discovered nor made available during the course of the hearing, nor was there any alternative evidence such as proof of payment to support the claim. Irrespective of Mr Burgess' evidence that he had them available when preparing the Evaluation Reports I am not prepared to allow these

claims in the absence of the relevant invoices, particularly as it is clear there have been other instances of duplication of claims, including the miscellaneous claim for additional timber which it is now conceded falls within the specific claim for excess timber.

### **Back charged labour cost**

91. Danvale alleges that it provided Allscope with two carpenters to carry out certain of its works. One of the difficulties with this claim is determining the extent and nature of the works the subject of the claims. Danvale relies on the timesheets for Peter Harding, Bob Heinley and Aaron Gates, which, although they set out the hours worked, do not provide any details of the work undertaken.
92. Mr Flemming gave evidence that Mr Britton had organised a second group of carpenters to attend to items that were not covered by the original contract and that Aaron Gates was the leading hand in charge of those carpenters. He said the second group of carpenters included Peter Harding and Bob Heinley.
93. There is reference in the Site Minutes of 23 October 2001 to Danvale providing two carpenters to assist Allscope with its works. Although there is no evidence that Allscope took issue with those Minutes, Mr Kraskov gave evidence that Danvale's many offers to provide additional labour to assist Allscope in carrying out its contract works were refused. Allscope relies on various facsimiles to Danvale rejecting its offers of labour. However, if I am satisfied that Danvale's carpenter carried out any of Allscope's work, then this claim must succeed (even if only in part) as otherwise Allscope will have been paid for work it did not undertake.

94. From Danvale's final submissions it seems that this claim includes the labour for the installation of the MDF stairs in the townhouses, and the carrying out of rectification works. Unfortunately, no attempt has been made to indicate the proportion of the total claim applicable to either of these. The only evidence I have before me, to assist in assessing the value of the works involved in and associated with the installation of the stairs, is to be found in Danvale's Back Charge Advices of 19 December 2001 which provide:

*'to install MDF Stairs to townhouses to assist Allscope Interiors'.  
Total time 80 hours.*

95. Mr Flemming confirms that Peter Harding and Bob Heinley worked on the stairs. He said they had also carried out various works which at paragraph 15 of his Witness Statement he says included '*...fixing cavity sliding doors, fitting bathroom accessories, fixing wardrobe accessories, fixing wardrobe doors, fixing bifold doors, affixing door furniture and hanging internal doors*'. However, separate claims have been made for most of the items and are considered elsewhere in these Reasons. Once again there seems to be a duplication of claims.

96. In my view this claim for labour costs should be read in conjunction with Danvale's letter to Allscope dated 19 September 2002 wherein it sets out details of the works it says it has carried out on Allscope's behalf. Without including the calculations the claims are as follows:

- (i) Rectification of cavity sliding doors - \$3,576.00
- (ii) Pelmet credit - \$715.20
- (iii) Finishing off bathroom accessories - \$469.35
- (iv) Install eaves - \$1,050.00
- (v) Jointing eaves - \$1,002.60
- (vi) Danvale labour costs on behalf of Allscope:

Bob Heinley from 22 November 2001 to 30 January 2002 &  
Peter Harding from 22 November 2002 to May 2002

19 + 102 working days @ 8 hours x \$44.70 = \$43,269.60

97. This confirms my concerns that there has been some double dipping in the labour claim. The letter of 19 September 2002 makes it clear that the claim for labour is only for the period from 22 November 2002 – in other words the Harding and Heinley ‘B’ claims, not the period prior to that date, during which I am satisfied the primary work carried out by Danvale’s carpenters would have been the installation of the stairs (1 October – 22 November 2001) and the other work set out in the letter of 19 September 2002. There is no explanation from Danvale as to why it now seeks reimbursement of the labour costs prior to 22 November 2002 and there is no evidence to support the claim.

Was installation of the MDF stairs included in Allscope’s scope of works?

98. Although Danvale’s letter of 1 March 2001 requests Allscope to allow for the supply and installation of the stairs in its quote there is no evidence that it was included. The scope of works set out in the SC-6 provides: *‘Allscope has agreed to install prefab stairs as ‘supplied by Danvale if required’*. Mr Kraskov gave evidence that Allscope agreed to install the stairs only if Danvale could not arrange for any alternative contractor to do so. He said that was no allowance in the quotation or the contract price for the cost of doing so. I cannot be satisfied, on balance, that the installation of the MDF stairs was included in Allscope’s scope of works and therefore Danvale has not proved this part of its claim.

99. Rectification Costs (post 5 February 2002)

Aaron Gates gave evidence that he inspected the apartments with Chris Winduss on 5 February 2002, compiled the defects lists for the apartments and faxed a copy to Allscope on 6 February 2002 noting

there was nothing major, and requesting Allscope attend to them. He said he thought the 100 hours claimed for rectification of those defects to be a bargain. There are 24 apartments and this equates to two and a half weeks for one man.

100 hours @\$25.00 per hour	\$2,500.00
overheads	<u>\$ 250.00</u>
	\$2,750.00

100. As Danvale is unable to verify the work carried out by Mr Harding after 22 November 2002, the only claim to be considered is the 'Heinley B' claim for 19 days. For the reasons set out above, I am not prepared to allow the claim based on the hourly rate of \$44.70. Mr Heinley gave evidence that he was paid \$22.00 per hour. I am satisfied, on balance, that he was engaged in rectification of Allscope's works during the period from 22 November 2001 to 30 January 2002 and will allow the hours claimed but at the rate of \$22.00 per hour - \$3,344.00 - plus overheads - \$3,688.00.
101. Although Mr Harding did not give evidence, I am also prepared to allow an additional sum of \$2,750.00 for rectification of carpentry works (as calculated above) which I accept were carried out after Allscope left the site. I will allow this amount against Harding 'B'.
102. There is also a claim for Mr Gates's time for compilation of defects lists and supervision of rectification works. Mr Gates was employed by Danvale as a supervisor. Mr Flemming gave evidence that Mr Gates supervised the second carpentry team engaged by Danvale to carry out works which had not otherwise been included in any sub-contract. There is no contractual obligation under the SC-6 for Allscope to prepare defects lists. These were prepared by Mr Gates. His notation on the facsimile of 6 February 2002 accompanying the lists when sent to

Allscope was that there was nothing major. He confirmed this when giving evidence. He also confirmed under cross-examination that approximately 90% of his time was spent supervising “*our own group and/or contractors and 10% of the time may have been actually touching the tools*”. I am not persuaded that Allscope should be responsible for contributing to the salary of an employee who was simply engaged in carrying out the duties associated with his role. This claim is therefore disallowed.

### **Prolongation claims**

103. As discussed, when considering the terms of the contract, there is a dispute between the parties as to whether Allscope was required to complete the works within a particular time-frame. Danvale’s prolongation claim, as I understand it, is for a period of 20 weeks from 19 December 2001 to 10 May 2002 - the date the Certificate of Occupancy was issued. Danvale has apparently allowed the owner \$66,500.00 by way of liquidated damages which I accept have been paid by being offset against the balance owing to Danvale under the Head Contract.
104. Danvale now suggests three different bases for the calculation of its prologation claims, all of which result in a claim which is significantly less than that set out in its Counterclaim or in the Particulars of Loss and Damage dated 5 April 2005. Further it concedes that the SC-6 requires an apportionment of the prolongation claim between relevant sub-contractors and asserts that the evidence indicates that 3D Engineering was responsible for approximately 10% of the delay. Danvale therefore claims 90% of the delay costs on one of the following bases:
- (i) \$77,600 (\$70,790 plus GST) – 90% of the liquidated damages amount if clause 13 applies, or

- (ii) \$77,760 plus GST – the total claim for liquidated damages if clause 13 applies, or
- (iii) \$59,850 plus GST if clause 13 does not apply being 90% of the payment made to Princes View Pty Ltd.

105. The evidence as to the Completion Date under the Head Contract was inconsistent: Mr Britton alleges it was 19 December 2001, Mr Flemming that it was 29 January 2002 and Mr Thompson, director of the owner, gave evidence that it was 18 February 2002. The project architects, Ascuii Edwards, in a facsimile dated 9 September 2002 to Mr Thompson, calculated the adjusted Completion Date as 14 January 2002 and the period for which liquidated damages should apply under the Head Contract as 101 days.

106. I preferred Mr Thompson's evidence that the completion date had been agreed in discussions with Mr Britton. I am not persuaded, as submitted by Danvale, that Mr Thompson's evidence as to the completion date must be wrong simply because it is inconsistent with the correspondence received from Ascuii Edwards at the time. Mr Thompson's interests are not affected by the determination of the Completion Date in this proceeding, the owner having resolved its liquidated damages claim with Allscope

107. It is clear from the copies of relevant correspondence before me that Danvale has sought to recover prolongation costs, for the total period of delay, from at least two other sub-contractors – Auscraft and 3D Engineering. In correspondence to each of Auscraft and 3D Engineering similar comments and accusations as those being levelled at Allscope are made, including lack of labour and lack of appropriate or any supervision. Although Danvale submits that 3D Engineering was

responsible for 10% of the delay, these submissions are made in the absence of any supporting evidence.

108. It was submitted on behalf of Danvale that its claim against Auscraft was resolved at mediation and that there was no payment of any liquidated damages or prolongation costs. Although Danvale now submits there is no evidence that Auscraft was responsible for any of the delay, the making of the claim against Auscraft reinforces my view that Danvale is unable to determine which sub-contractors caused or contributed to the delays under the Head Contract. In any event, the negotiation of a commercial settlement does not, of itself, mean that Auscraft had no case to answer in relation to delay.
  
109. Considerable time was spent during the hearing as the parties sought to persuade me as to the appropriate method of assessing the period of delay attributable to Allscope. Danvale asserted that the works schedules prepared by Mr Flemming using Ms Project flow charts were sufficient. Allscope asserts that in the absence of critical path analysis it is impossible to determine the critical path (although on day 15 of the hearing Danvale filed a supplementary Witness Statement of Kevin Britton asserting, for the first time, the existence of a master works programme). I am satisfied there was no master works programme and that there was no 'critical path' linking of the trades in the works schedules prepared by Mr Flemming.
  
110. When the work schedules are considered in conjunction with the Site Minutes it is clear that time was a pressing issue. The completion date for the project was extended on a number of occasions. However, irrespective of the preferred method of assessing the period of delay I cannot be satisfied on the evidence before me that Allscope was solely

or even partially responsible for the delays in the project up until 5 February 2002 – the last date it was on-site.

111. There is no evidence to support any conclusion that Allscope was responsible for the delays in the project after the agreed adjusted completion date, which I have found to be 18 February 2002. They were not on site after 5 February 2002 and although I have found that rectification of their works was required, there is no evidence that such works otherwise caused any delay in the progress of the works. The claim for prolongation costs must therefore fail.

## **DETERMINATION**

### **Allscope's claim**

112. I find that Allscope is entitled to payment of the balance of the contract price as claimed. Even if I am wrong in determining that Danvale repudiated the contract it is clear from Danvale's progress claim 18 under the Head Contract that it assessed (or at least claimed payment for) the plastering works as being 99% complete and the carpentry works as being 100% complete as at 31 December 2001. As I have disallowed four contested variations and taking into account the retention of \$30,002.12, which Danvale concedes is payable to Allscope, I calculate the balance payable by Danvale to Allscope as:

Contract Price	\$545,493.00
Less payments made	<u>\$478,411.45</u>
	\$ 67,081.55
Less retention	<u>\$ 30,002.12</u>
	\$ 37,079.43
Add agreed variations	<u>\$ 54,929.64</u>
	\$ 92,009.07
Plus GST	<u>\$ 9,200.91</u>
	\$101,209.98
Plus retention	<u>\$ 30,002.12</u>
	\$131,212.10

### Danvale's claim

113. I have noted the submission, on behalf of Allscope, that where Danvale has failed to produce evidence of payment in relation to any of its claims, the claim should be disallowed. I reject this. I note that it was not put in cross examination of any of Danvale's witnesses that relevant payments had not been made. I am satisfied on the balance of probabilities that payments have been made, and will therefore include the allowances, I have found applicable to each claim, in my determination of Danvale's entitlements under the counterclaim.

114. In relation to each of Danvale's claims, I allow:

Item	Amount	Allow
(i) materials	\$ 9,040.76	\$ 8,218.87
(ii) timber excess	\$ 5,500.00	Nil
(iii) rectification costs for works carried out by Lepat	\$27,536.63	\$17,129.97
(iv) back charged on costs		
cleaning up by tilers	\$2,160.00/\$1,200.00	Nil
repair tiling damaged by Applicant	\$ 720.00/\$450.00	Nil
cleaning up by plasterers	\$3,600.00/\$2,000.00	
rehang ground floor doors	<u>\$ 720.00/\$400.00</u> \$7,200.00/\$4,455.00	<u>\$2,200.00</u> \$2,200.00
(v) defects and equipment		
Crane Hire:	\$ 1,760.00	\$1,280.00
Site facilities:	\$ 138.00	\$ 138.00
Scaffold:	\$ 5,405.00	\$1,351.25
Cavity sliding door:	\$ 3,576.60	\$1,468.00
Pelmet:	\$ 715.00	\$ 715.00
Finish bathroom accessories	\$ 469.35	Nil
Finish eaves:	<u>\$ 2,052.60</u>	<u>Nil</u>
	\$14,126.55	\$4,952.25
Overheads	<u>\$ 1,411.10</u>	
	\$15,537.65	

(vi) Labour costs: (from page 1 of Danvale's Calculations)	\$59,306.27/\$26,895.29	
Harding A	\$11,201.82/\$6,919.00	Nil
Harding B	\$23,244.00/\$3,800.00	\$2,750.00
Heinley A	\$7,666.05/\$4,716.20	Nil
Heinley B	\$6,794.40/\$4,180.00	\$3,688.00
Gates	<u>\$10,400.00/\$ 7,280.00</u> \$59,306.27/\$26,895.20	<u>Nil</u> \$6,438.00
(vii) prolongation costs -	\$77,760.00/\$59,850.00	Nil
		\$38,939.09
		<u>\$ 3,893.91</u>
		\$42,833.00
	Plus GST	

115. Both parties have claimed interest. Mr Squirrell has provided some interest calculations in the Summary. Although Mr Reid has indicated in his facsimile dated 23 September 2005 that "*The Applicant takes no issue with the accuracy of the methodology used to calculate interest but does take issue with the amounts used to calculate said interest*" on the page headed 'INTEREST CALCULATION' he submits that the interest is to be applied at the rate of 10% compounding annually. Mr Squirrel in his interest calculations has applied simple interest of 10%.

116. I will therefore hear Counsel further as to whether compound or simple interest should be applied. Counsel should also provide their calculations. As I have not heard from the parties on the question of costs I will reserve costs.

**DEPUTY PRESIDENT C. AIRD**