

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D797/2008

**CATCHWORDS**

Termination – repudiation by owner - refusal to make any further payment under the contract – claim for defective and incomplete joinery works

<b>APPLICANT</b>	Francesco Cicerale
<b>FIRST RESPONDENT</b>	Shenp Pty Ltd (ACN 115 579 078)
<b>SECOND RESPONDENT</b>	Peng Shen
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member L. Rowland
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8, 9 and 10 June 2010
<b>DATE OF ORDER</b>	19 October 2010
<b>CITATION</b>	Cicerale v Shenp Pty Ltd & Anor (Domestic Building) [2010] VCAT 1792

**ORDER**

1. The applicant Mr Francesco Cicerale must pay to the First Respondent the sum of \$6,247 forthwith.
2. The parties have liberty to apply for costs and interest. In the absence of any application by 15 December, 2010 there shall be no order as to costs.

**MEMBER L. ROWLAND**

**APPEARANCES:**

For the Applicant	Mr J. Twigg of counsel
For the Respondents	Mr R. Ma, solicitor

## REASONS

### Background

- 1 The applicant, Mr Cicerale, is the owner builder of a 1300 square metre home at Hoppers Crossing. Mr Cicerale is the principal of a structural concrete contracting business, specializing in the excavation, formwork and concreting of high-rise buildings. The first respondent, Shenp Pty Ltd (“Shenp”) is a joiner, specializing in making and installing custom-made kitchen and bathroom joinery. Mr Shen is a director and principal of Shenp.
- 2 In mid 2007 the applicant and Shenp entered into an agreement whereby Shenp would make, supply and fit joinery for Mr Cicerale for \$28,130. In December 2007, the parties fell into dispute and now Mr Cicerale claims \$58,097 for rectification works and damages. Shenp counterclaims for the balance of monies due under the varied contract in the sum of \$37,514.
- 3 The proceeding was heard over 3 days. Mr Cicerale was represented by Mr Twigg of counsel, and the respondents were represented by Mr Ma, solicitor. I was assisted by the provision of a Tribunal book, summary of parties’ positions and a written closing address meticulously prepared by Mr Twigg. On the second day of hearing a site inspection took place with the experts retained by the parties giving concurrent evidence on site. Dr Ian M Eilenberg, building consultant, gave expert evidence on behalf of Mr Cicerale. Mr P O Zaviska, architect, gave expert evidence on behalf of Mr Shen.

### Negotiations

- 4 In March 2007 Mr Cicerale asked Mr Shen to submit a quotation for part of the joinery for Mr Cicerale’s home. The scope of the joinery was substantial.
- 5 In March 2007 Shenp quoted Mr Cicerale \$37,080 (not including GST; prices stated will be exclusive of GST unless otherwise stated) for the kitchen, bar, 5 vanities and the BBQ kitchen area (“the March quotation”). Mr Cicerale rejected the quotation and asked Mr Shen for a discounted price. Mr Shen replied that Shenp could not further discount the price.
- 6 In May 2007, Mr Cicerale again contacted Mr Shen asking him to resubmit Shenp’s quotation without the BBQ kitchen joinery. Mr Cicerale offered to promote Shenp’s work amongst his building contacts if the joinery works were completed successfully. Mr Shen wished to pursue the connection. Mr Shen submitted a revised quotation for \$33,080 which he discounted to \$28,130 (“the May quotation”).

### Initial contract

7 In May 2007, the parties agreed upon the May quotation. It was signed by the parties and Mr Cicerale paid Shenp a deposit of \$8,000. The May quotation/contract reads:

Description	Costs
HMR Kitchen Cabinet by Board (being the carcass)	\$5,960
Gloss 2 pack door and panel (being the panels)	\$7,880
Granite top: cutting; make the age and install top	\$6,890
All the hardware and plumber and electrician by the order price	-
5 vanities by the plan: same material with the kitchen	\$12,350
BBQ small kitchen: same material with the kitchen granite slab? \$4,870	-
Tiles floors... 35/per sqm install	-
Robe shelves \$35/(450-600mm) per meter approx \$3,000	-
Sub-Total	\$33,080
After discount	\$28,130
GST	(left blank)
TOTAL	(left blank)

8 The May quotation allowed for stonemason costs for the kitchen in the sum of \$6,890 and an unspecified amount for the bathroom vanities, but was incorporated into the price of \$12,350. Mr Cicerale supplied the granite for the bench tops and splash backs. Shenp was to subcontract a stonemason to cut and polish the tops and splash backs. No margin for the stonemason was allowed for.

9 The May quotation provided for payment terms as follows “30% deposit in advance, 50% when delivery and 20% when finish”.

### Dispute as to terms of the initial contract

10 Mr Cicerale makes the following claims in relation to the initial contract as documented in the May quotation :

- The price of \$28,130 was inclusive of GST.
- The kitchen price included the bar, the BBQ cupboards, wardrobe shelves and the hardware for the appliance shelving (known to the parties as a silent system; which is steel shelving and hardware for two large roll out vertical drawers which store kitchen appliances );
- The vanity price included the laundry joinery.

- Mr Shen did not disclose that the joinery was to be manufactured in China.
- 11 Mr Shen agrees that the bar was included in the kitchen price but otherwise denies the claims by Mr Cicerale.

### **Findings on terms of initial contract**

12 Before I make my findings on the terms of the initial contract, it is first necessary to make some observations about Mr Cicerale and Mr Shen. English is not the first language of either, although Mr Cicerale appeared more conversant with the English language than Mr Shen. Possibly, for this reason, there is a lack of documentation evidencing the agreement, variations and payments. The parties were in dispute as to the facts in a number of areas. The task of resolving the conflicting evidence was difficult because there was a lack of contemporaneous documents and Mr Cicerale and to a lesser extent, Mr Shen gave evidence which I found was inconsistent with the weight of the evidence. Overall, I preferred Mr Shen's evidence to Mr Cicerale's evidence.

13 I make the following findings in relation to the initial contract:

- a I find that GST was not included in the price of \$28,130. A plain reading of the May quotation shows that a box specifically provided for GST has not been completed indicating that GST has not been added to the price of \$28,130. Further, by reference to the March quotation where GST has been added, it is clear that GST has not been added to the May quotation.
- b I find that the contract price of \$28,130 did not include the BBQ kitchen joinery, the silent system shelving or the wardrobe shelving. A plain reading of the May quotation shows that the BBQ kitchen joinery and wardrobe shelving, although priced at \$4,870 and \$3,000 respectively, was not carried over into the cost column or included in the total price of \$28,130. The silent system is hardware and the May quotation provides "all the hardware by the order price." I interpret these words to mean that all hardware such as sinks, taps, and other hardware including the silent system were to be paid by Mr Cicerale at cost. This is consistent with a plain reading of those words. By contrast, the silent system was specifically included in the March quotation at \$2,000. The finding that no allowance has been made for the BBQ kitchen joinery, the silent system shelving or the wardrobe shelving is supported by the cost of the joinery to Shenp. According to the importation documents the cost to manufacture and import the kitchen joinery and the vanities was just over \$A20,000. After stonemason's costs of approximately \$8,000 this left Shenp with very little labour allowance to install the joinery.
- c I find that the laundry joinery was not included in the "5 vanities by the plan" price. Mr Cicerale argued that the laundry joinery was

included in the price for the “5 vanities by the plan” price because he counted the 3 bathrooms upstairs, downstairs powder room and laundry which he says makes 5 vanity units. Mr Shen disputes this and says the main en-suite with 2 hand basins in a 4.8 metre vanity unit was counted as two vanities making 5 vanity units excluding the laundry. Mr Shen argued that laundry cupboards are never described as vanity units. I accept Mr Shen’s arguments. I find that the price charged to Mr Cicerale did not include the laundry joinery.

- d I find that Mr Shen did disclose to Mr Cicerale that the joinery units were to be manufactured in China. I accept Mr Shen’s evidence that he specifically told Mr Cicerale that he had specialized German equipment capable of producing the curved feature doors and panels and this is why his price was so reasonable. Mr Shen told Mr Cicerale that this machinery was not available in Australia. I further find that by reason of the contract price, it was apparent that the joinery was unlikely to be manufactured in Australia. The experts for both sides gave evidence that the estimated cost of the kitchen cupboards alone, if manufactured in Australia, would be in the order of \$35,000 to \$40,000 and the cost of the vanity units would be at least \$5,000 each, making a total cost \$55,000-\$60,000; work for which Mr Cicerale was charged \$28,130.

### **Summary of findings on terms of initial contract**

- 14 I find that the parties agreed to a price of \$28,130 plus GST for the provision of kitchen joinery, the bar and vanity units for the 4 bathrooms.

### **Variations to initial contract**

- 15 In July, 2007 Mr Shen measured the house for the joinery, drew up shop drawings and flew to China to arrange the manufacture of the kitchen joinery, the bar and the vanity units.
- 16 Subsequently there were a number of variations to the initial contract. In these proceedings, Mr Cicerale admits to two of the variations. In particular, he admits to an additional \$8,400 for the inclusion of a gold shadow line on the kitchen and bar panels and \$5,820 for two additional BBQ kitchen joinery units. Mr Cicerale admits to a varied contract price of \$42,350 including GST. Mr Shen contends that the variations totalled \$25,107 plus GST making the varied contract price \$53,237 plus GST. I will deal with the variations separately. Before I do that, I need to determine the colour of the joinery initially ordered by Mr Cicerale because a number of variations relate to colour changes.

### **Colour of joinery**

- 17 The colour of the joinery was a matter of dispute between the parties and has a significant impact on the variations to the contract. Mr Cicerale contended that the colour of the joinery was to be Beige. Mr Shen contended that the colour ordered was Dulux Vivid White.

- 18 On 20 July 2007 Mr Shen met with Mr Cicerale and Mr Demos, the architect (engaged by Mr Cicerale only to design the home and assist with permits for construction) to discuss the kitchen and bathroom joinery. Mr Cicerale said it was decided at the meeting that the cupboards were to be “beige” and that Mr Shen was told a colour code which he wrote down in his diary or work book.
- 19 Mr Shen said Mr Cicerale selected Dulux Vivid White after consulting with Mr Demos. Mr Shen said he was provided with a Dulux colour swatch with Vivid White ticked as the colour selected. He produced the colour swatch at the hearing.
- 20 Mr Demos was called to give evidence. Mr Demos said that he could not recall a specific colour being discussed but felt certain that it would not be beige. He said “beige is beige” and that he would not recommend that colour. He said he would have recommend starting with a shade of white and although he has no memory of any colour being selected he said it was possible Dulux Vivid White could have been selected. Mr Demos agreed that the colour swatch produced by Mr Shen was a colour swatch his office uses but could not specifically recall the colour swatch being handed to Mr Shen although he said it may have been. Mr Demos said that often a client is provided with a colour sample being a panel in the colour selected.

#### **Findings on colour ordered**

- 21 In my view, Mr Demos’ evidence supported Mr Shen’s evidence. Therefore I find that Mr Shen was instructed by Mr Cicerale that the colour of the doors and panels was to be Dulux Vivid White. Further, the initial colour selection of Vivid White is also consistent with Mr Cicerale requesting a gold shadow line to match the white walls of the interior of the house.

#### **Contact variation: Gold shadow line**

- 22 Some time in July or August 2007 Mr Cicerale sought the first of many variations to the initial contract. Mr Cicerale requested that the shadow line for the kitchen and bar panels be painted in gold. Mr Shen said that at the time of the request he was in China, and he gave Mr Cicerale an estimate of cost in the vicinity of \$3,000. He said that Mr Cicerale’s accepted the cost saying that it was a luxury home. The gold shadow line was to match the walls in the interior of the house which were white with a gold shadow line around the doors and windows. Mr Cicerale said he was quoted \$8,400 which he agreed to pay. I find that Mr Cicerale was mistaken on this amount and the amount to be charged for the gold shadow line was in the order of \$3,000.
- 23 In or about September 2007, the joinery arrived from China. Mr Shen commenced installing the carcasses.

- 24 Upon delivering the kitchen panels, Mr Shen showed Mr Cicerale a Vivid White drawer face with the gold shadow line. Mr Cicerale said that he immediately claimed that the colour should be beige. Mr Shen said that the claim that the colour should be beige only came after Mr Cicerale showed his wife the sample drawer face and she disclaimed the white colour insisting upon beige. At the hearing, after Mr Demos gave evidence, it was contended on behalf of Mr Cicerale, that the presentation of the Vivid White panel was a sample panel demonstrating colour. This was denied by Mr Shen. I find that in this instance, there was no expectation or agreement that Mr Shen would provide a colour sample and he did not do so. The panel produced was one from the whole shipment of joinery panels, which is consistent with the shipping documents.

**Contract variation: Change of colour from white to beige**

- 25 Mr Shen quoted Mr Cicerale \$8,400 to change the colour of all the cupboard doors and panels (including the vanities, bar and kitchen cupboards) from white to beige. The \$8,400 included the cost of the gold shadow line for the kitchen cupboards and the bar which had already been painted on the Vivid White panels. The gold shadow line was not to be repainted onto the beige doors (for which Mr Shen had previously quoted \$3,000). Mr Cicerale agreed to the quotation. Mr Cicerale's own evidence is that he agreed to a variation of \$8,400 although he thought that was just for the gold shadow line. I therefore find that the contract was increased by \$8,400 for the cost of the gold shadow line painted on the Vivid White panels and then to change the colour of the joinery from white to beige (without further painting the gold shadow line).

**Contract variation: Vanities changed to floor fixed units**

- 26 Mr Shen encountered problems with the installation of the bathroom vanity units. The vanity units were designed to be 500mm wall mounted units 300mm off the floor with a finished height at 800mm. Mr Shen perceived two problems, first that the waste pipes at the back of the wall would be exposed and secondly; that there would be problems with mounting the granite tops to the vanity units. Mr Shen felt that the granite tops were too heavy for the units. Mr Shen said he quoted \$2,800 to change over the vanity units from wall mounted to floor fixed units although from paragraph 13 of his witness statement, the cost of the changeover was more than the \$2,800. At the same time Mr Shen would change the colour to beige and at Mr Cicerale's request, vary the finished height of the units from 800mm to 900mm. Mr Cicerale said that he agreed to the variations on the basis that it did not cost him anything. I find that the reasons Mr Shen gave to change over the units to the floor mounted units were not credible. The waste pipes would not have been readily seen and the experts both gave evidence that the weight of the granite tops should not have presented a problem. However, I find that Mr Cicerale requested the varied finished

height level and agreed to the larger floor fixed vanities. I find that Mr Cicerale agreed to the variation and the cost of \$2,800. I allow that sum.

**Contract variation: Laundry joinery and BBQ kitchen joinery**

27 Mr Shen said that in or about August 2007 Mr Cicerale instructed Mr Shen to proceed with the laundry joinery and the BBQ kitchen joinery as an agreed variation. I have already found that the laundry and BBQ kitchen joinery were not included in the original quotation. Mr Shen said that Mr Cicerale did not initially ask Mr Shen to supply the laundry and BBQ kitchen joinery because he could have those items made elsewhere at a cheaper price. The laundry and BBQ kitchen joinery units were manufactured in Australia which reinforces my earlier finding that they were not part of the initial contract, otherwise Mr Shen would have had them manufactured in China. For the laundry joinery, I accept the price of \$3,950 as set out in Mr Shen's statement of account dated 19 December 2007 as being reasonable and I allow it as a variation to the contract price. The statement of account dated 19 December 2007 was sent to Mr Cicerale after Mr Shen's last day on site. It included the variations claimed by Mr Shen.

28 The evidence in relation to the BBQ kitchen joinery units is confusing. Only two units, the sink and the microwave unit, were on the original drawings. Ultimately 4 banks of joinery units were installed. Two side board joinery units (not originally on the plan, but one hand drawn in), a unit around a kitchen sink with overhead cupboards and a unit around a microwave oven. According to Mr Shen he quoted \$5,820 for 3 joinery units, not including the second side board unit. Mr Shen said Mr Cicerale later requested a fourth joinery unit, being the second side board joinery unit for which he quoted \$1,500. Mr Cicerale says that two BBQ joinery units were included in the initial contract price and that he agreed to pay an additional \$5,820 for the extra two sideboard units. Having found that none of the BBQ kitchen joinery units was allowed for in the initial contract, all of the BBQ kitchen joinery is extra to the initial contract. I allow \$5,820 plus \$1,500 for the BBQ joinery units as set out in Mr Shen's statement of account dated 19 December 2007, making a total variation of \$7,320.

**Contract variation: Further colour change from beige back to vivid white**

29 Sometime after September 2007 Mr Cicerale requested that the bar and the bathroom vanities be changed from beige back to white. Mr Cicerale denied making such a request. His evidence is that the bar and the bathroom vanities were delivered in white and even though the colour was not correct he accepted them in white. Mr Shen produced and tendered into evidence a beige kitchen panel which had been scratched to reveal the white colour underneath and the gold shadow line. He also produced a white panel from the bar showing the gold shadow line underneath. I accept Mr Shen's evidence. I am satisfied that the colour change was requested and the colour was in fact changed back to white. The amount claimed by Mr

Shen is \$1,740. The claim is reasonable, and I find the contract has been varied by that amount.

**Contract variation: Claim for extra stonemason costs**

30 Mr Shen claims an additional \$2,000 paid to the stonemason, but he has no records to establish the claim. Further, the claim does not appear in the statement of 19 December 2007. I find the claim for additional stonemason costs not proved.

**Contract variation: Claim for extra transport costs**

31 Mr Shen claims reimbursement of \$400 costs incurred in transporting some of the granite back to the stonemason to be reworked. It is not disputed that Mr Cicerale agreed and did pay for the transport of the granite to and from the stonemason. The claim is for additional transport and the claim is documented in Mr Shen's statement of 19 December 2007. I find the claim proved. I allow additional costs transport costs in the sum of \$400.

**Contract variation: The silent system**

32 Two silent systems have been installed into the kitchen. The silent systems, as they are known to the parties, comprise the hardware and shelving for two floor to ceiling vertical drawers which store kitchen appliances. Mr Cicerale argues that the silent systems were included in the initial contract price. Mr Shen said they were not included but are an agreed variation. I have already found that the silent systems were not included in the initial contract price. I allow \$1,420 claimed by Mr Shen in his statement of account dated 19 December 2007.

**Contract variation claims: Not substantiated**

33 In his witness statement, Mr Shen claims further variations for kickboard repairs at \$495; variations to the bathroom vanities exceeding \$2,800; change in pantry design at \$2,310; and work to ceiling cornices at \$242. None of these variations had been claimed in the statement of 19 December 2007. The evidence in relation to each of the claims was strenuously disputed. In the absence of any documentary evidence supporting the claims, I find these claims not proved.

**Summary of contract variations**

34 It was argued by Mr Twigg that the contract was a major domestic building contract within the meaning of the *Domestic Building Contracts Act 1995*. It was contended that the variations did not comply with sections 37, 38 and 39 in that, inter alia, they were not in writing and therefore Mr Shen was not entitled to recover any money in respect of the variations. Even if Mr Shen was required to comply with Sections 37, 38 and 39, I find that Sections 37(3) (b) and 38(6)(b) apply. I find that all of the variations were requested by Mr Cicerale, Mr Cicerale obtained the benefit of the variations and it would be both unfair and cause Mr Shen hardship not to allow him the

variations in circumstances where he had priced the initial contract at a reduced margin because of promises made to him by Mr Cicerale about promoting his work to others.

35 I find that the contract price was varied as follows:

Initial contract price	\$28,130
Colour variation: white to beige including gold shadow line	\$8,400
Vanities changed to floor fixed variation	\$2,800
Laundry joinery variation	\$3,950
BBQ kitchen variation	\$7,320
Additional transport costs	\$400
Silent system variation	\$1,420
Total	\$52,420
Plus GST	\$ 5,242
Varied contract price	\$57,662

#### **Works completed by December 2007**

36 By early December 2007 the relationship between Mr Shen and Mr Cicerale was breaking down. There were delays in completion and some problems with installing the ovens into the kitchen joinery. Mr Shen was asking for further payments. Mr Cicerale was refusing to make any further payments.

37 By 19 December 2007 the following works were completed:

- a. The laundry joinery comprising 8 cupboards with granite bench top and broom cupboard was completed with no defects or incomplete works claimed.
- b. The bathroom vanities comprising 4 vanities (all with cupboards and drawers and granite bench tops) including a 4.8 metre vanity for the main bedroom (which was counted as 2 units) were completed save for the installation 4 facia panels and 4 kickboards. No defects were claimed.
- c. The bar unit comprising 2 banks of drawers, 2 cupboards with granite top and feature curved front was completed save for the installation of 2 banks of drawer panels and kickboards underneath the drawer banks.
- d. The kitchen joinery for the BBQ kitchen area comprising 2 sideboard units each with 6 cupboards, a bank of drawers, and granite bench top, a unit incorporating the sink, with 4 cupboards and overhead

cupboards, and a unit incorporating a microwave oven was completed save for the installation of 4 sets of doors and 2 kickboards.

- e. The kitchen joinery comprising some 40 cupboards, a walk in pantry, two silent systems, 6 banks of drawers, island bench with curved front, approximately 8 feature curved doors with granite bench tops and splash backs was complete save for: installation of the ovens (to be performed by Mr Cicerale's contractors), installation of 6 banks of drawer panels, installation of 2 curved doors and 2 standard doors and installation of shelving to the pantry.

### **Dispute over contract price and payments**

38 As at December both Mr Shen and Mr Cicerale proceeded on the understanding that approximately \$32,800 had been paid to Shenp. This mistake was contributed by both parties not properly recording the payments made and received. Mr Shen should have provided a receipt or some record of payment to Mr Cicerale. Mr Cicerale's business was making most of the payments on his behalf, and a record of payments could and should have been made by his office staff.

39 It was not until the preparation of evidence for this case, that Mr Cicerale realized that in fact, by December 2007 he had paid \$40,900. Ultimately, it was accepted by Mr Shen that \$40,900 had been paid.

40 Having found that the varied contract price was \$57,662 and that \$40,900 has been paid under the contract, the balance owing to Shenp is \$16,762.

41 In December 2007, Mr Shen refused to complete the works in the absence of further payment. Mr Cicerale refused to make any further payment because he believed he had paid all that was required to be paid under the contract. Mr Cicerale's refusal to make any further payment was not simply a refusal to make payment until all the work was performed and defects remedied, which he was entitled to do, but an outright refusal to make any further payment. He maintained he had paid the full varied contract price and was not required to make any further payment. At paragraphs 39 to 47 of his witness statement Mr Cicerale stated:

39. Unfortunately I was not keeping proper records of the payments which I to made him or were made on my behalf. Shen was not giving me receipts for the payments I made either.

40. Now that I have reviewed what Shen says I paid to him and what additional records I have of the payment that I made to Shen or were made to him on my behalf, it is obvious to me that I paid Shen far more than the contract price, even though he did not complete the works the way he supposed to or at all.

44. I am very upset and disappointed to now realize that I have paid to Shen (and including the stonemason) the sum of \$40,900. This amount was paid to Shen in error and I wish to increase the quantum of my claim to include a refund of the monies that I paid to Shen in excess of the contract price.
47. Shen then called me some time later and said he would fix it if I paid him more. I told him I was not going to pay him any more, I had paid him already and the kitchen was a mess. At that point I told him not to come back any more.
42. On 19 December 2007 Mr Shen presented Mr Cicerale with a statement setting out all the variations and balance owing under the contract. Mr Shen said that Mr Cicerale squashed it up into a ball and threw it back at him. This ended up being Mr Shen's last day of work. On that day, he removed some of the curved doors and drawer panels from Mr Cicerale's home because he was upset over Mr Cicerale's refusal to pay the money owed.
43. On 19 December 2007 Mr Shen sent Mr Cicerale a final statement setting out the initial contract price of \$28,130 plus the variations to the contract of \$25,107, making a total of \$53,237 plus GST. In January 2008 Mr Shen tried to negotiate a resolution but was not successful. He sent Mr Cicerale terms of settlement asking Mr Cicerale to agree to a final price to be paid. Mr Cicerale did not reply. Mr Shen remained willing to perform the contract but in the face of Mr Cicerale saying that no further payment would be made, Mr Shen declined to return to complete the works. Mr Cicerale remained steadfast in his view that he had paid all that was required to be paid under the contract. In May 2008 Mr Cicerale engaged Top Edge Kitchens to complete the joinery work at a cost of \$20,000.

#### **Findings on termination of contract**

44. I find that Mr Cicerale was entitled to demand that the works be completed and any defects remedied before any further payment was to be made. However, Mr Cicerale went further than that. He made it clear to Mr Shen and maintained during the course of the hearing that he was not prepared to make any further payment under the contract at all. He denied the variations (apart from the BBQ kitchen joinery- he agreed with the gold shadow line variation but denied he had to pay for it because ultimately the gold shadow line was painted over when the panels were changed from white to beige) and refused to agree upon a varied contract sum.
45. I find that by Mr Cicerale by his words and conduct evinced a clear intention not to be bound by the terms of the contract. He refused to make any further payment under the varied contract. This refusal amounted to a repudiation of the contract. Mr Shen was entitled to elect, and did elect in early 2008 (when Mr Cicerale did not respond to his proposed terms of

settlement) not to continue the works, thereby terminating the contract in response to Mr Cicerale's repudiation of the contract.

### **Mr Cicerale's claims for defective work**

46 Mr Cicerale makes the following claims for defective and incomplete works:

- \$8,400 for gold trimming not supplied;
  - \$9,597 for the cost of Miele appliances;
  - \$19,000 paid to Top Edge Kitchens to complete the works;
  - \$22,550.50 to reconstruct the kitchen in accordance with the plans.
- Total \$59,547 (less \$1,450 agreed to be owing under contract making a net claim of \$58,097).

### **Claim for refund on gold shadow line**

47 The gold shadow line was supplied but it was painted over when Mr Cicerale ordered the colour of the joinery be changed from white to beige. Mr Cicerale cannot maintain the claim for a refund on the cost of gold shadow line. The claim is dismissed.

### **Claim for refund of Miele appliances**

48 Mr Cicerale claims a refund for a Miele microwave oven, a Miele steam oven and a Miele under bench oven, a total of three ovens in the sum of \$9597. The ovens could not be installed because the openings made in the kitchen joinery were not wide enough to accommodate them. Mr Cicerale purchased alternate ovens and installed them into the kitchen joinery. On the first day of hearing Mr Cicerale said that the Miele ovens were still sitting on his garage floor as they could not be used. On site, Mr Cicerale said that the Miele ovens were given to his niece. No invoice was produced evidencing the cost or date of purchase of the Miele ovens.

49 The architectural drawings prepared by Mr Demos showed a 660mm space for the under bench Miele oven but with the flange installed the space required was 695mm. The installation of the flange would have prevented the doors on either side from being opened. The drawings showed a 560mm wide space for the Miele microwave and steam ovens but with the flange installed required a 595mm space. In short, the Miele ovens were too large for the space allowed for in the drawings.

50 The Miele product information sheet provided to Mr Shen required him to leave an opening of 660mm to 668mm for the under bench oven and 560mm to 568mm for the microwave and steam ovens.

51 Mr Shen left an opening of 628mm and 528mm for the ovens. Mr Shen installed a double carcass around the oven openings. The double carcass could have been removed to leave an opening of 660mm and 560mm as required by the drawings. However, that space would still not have been wide enough to incorporate the flanges.

- 52 Mr Cicerale argued that had Mr Shen checked the dimensions he should have detected the errors in the drawings and the kitchen joinery could have been altered before they were built to accommodate the ovens, by allowing openings of 695mm and 595mm instead of 660mm and 560mm. Mr Cicerale said that he told Mr Shen that the ovens were in his garage and were available to be measured or taken to Mr Shen's workshop. Further, it was argued Mr Shen should and could have checked the dimensions on the internet.
- 53 Mr Shen denies that Mr Cicerale told him that the ovens were in his garage and available for Mr Shen to measure. Mr Shen said that he repeatedly asked Mr Cicerale for the dimensions of the ovens but was told simply to follow the plans.
- 54 Mr Shen admits he was provided with product information from a sales brochure, but not the installation instructions for the ovens. The product information sheet gave openings of 660mm and 560mm but did not give the finished widths of the ovens. Mr Shen could not have discovered the finished width of the ovens from the product information sheet given to him by Mr Cicerale.
- 55 Mr Cicerale did not produce a receipt or invoice for the ovens which would have evidenced the date of purchase and the cost. In the absence of that evidence, I am not satisfied that the ovens were available to Mr Shen to measure.
- 56 Mr Cicerale, as owner builder had a responsibility to properly direct Mr Shen. Mr Cicerale was required to provide Mr Shen with the installation brochures, particularly as he knew the joinery was being made in China and the Miele ovens had not been delivered to Mr Shen's factory.
- 57 Mr Shen, as joiner had a responsibility to check the dimensions of the nominated ovens if they were available for him to measure. I am not satisfied that Mr Shen's responsibility extends to checking the internet for dimensions, as suggested by Mr Cicerale. In any event, one of the model numbers was incorrectly described in the drawings. I find that Mr Shen was not in breach of the contract. He constructed the kitchen joinery in accordance with the drawings, with the dimensions having been confirmed on site by Mr Cicerale.
- 58 The claim for the cost of the Miele ovens is dismissed.

### **Incomplete works**

- 59 As at the 19 December 2007, Mr Shen's last day on site, the joinery was not fully completed. Mr Shen removed from site: two large curved doors, 2 kickboards, 6 pieces of shelving from the pantry, 2 sets of drawer faces, 4 sets of doors and 2 kickboards. There was no entitlement to remove those items and I find that the removal of the items was a breach of contract. This breach occurred before the contract was terminated entitling Mr Cicerale to damages.

- 60 The four bathroom vanities required 4 fascia panels and 4 kickboards and the bar required 2 banks of drawer faces and a kickboard. Mr Cicerale paid Top Edge Kitchens \$5,000 (including GST) to complete the works to the bathrooms and bar. Although I found that Mr Cicerale repudiated the contract I allow Mr Cicerale the sum claimed for the reason that Mr Shen removed some of the panels from site. I consider the deliberate removal of the panels should be considered as defective work rather than incomplete work. I allow Mr Cicerale \$5,000 to complete the bathroom vanities and bar.
- 61 The kitchen required kickboards, 6 banks of drawer fronts, 2 rounded doors and 2 standard doors. Mr Cicerale paid Top Edge Kitchens \$4,000 (including GST) to complete the kitchen. Mr Cicerale installed smaller ovens into the kitchen joinery in place of the Miele ovens. The sum paid to Top Edge Kitchen also included an undetermined amount to install fillers around the ovens. Because Mr Shen removed some of the panels from site I allow Mr Cicerale the \$4,000 claimed.
- 62 The BBQ joinery required 2 kickboards and 4 sets of doors. Mr Cicerale paid Top Edge Kitchens \$10,000 (including GST) to completely replace the all the panels and doors in the BBQ kitchen area. There has been a further colour change to the panels in the BBQ kitchen area by Top Edge Kitchens. The panels have been replaced in charcoal/blue colour in place of the white supplied by Shenp. The bench tops and carcasses supplied and installed by Shenp remain on site. There was no evidence that the panels supplied by Shenp were defective. The evidence was that the work was incomplete. The break down of Shenp's quotation shows that Mr Cicerale was charged \$1,840 the panels for three BBQ kitchen joinery units and I estimate a further \$500 for the fourth unit, making a total sum of \$2,340. I am not satisfied that there was any defect with the panels supplied by Shenp. I find that less than a fifth of the panels were not supplied and fitted. Shenp is not entitled to the full amount of \$2,340 charged to Mr Cicerale. Mr Cicerale is therefore entitled to a refund for the panels not supplied. I allow Mr Cicerale a refund of one fifth of the panels; \$468 plus \$47 GST making a total of \$515.

**Total allowed for incomplete works**

63 I allow Mr Cicerale as follows:

Defective works to bar and vanities	\$5,000
Defective works to kitchen	\$4,000
Refund for incomplete works to BBQ kitchen joinery	\$515
<b>Total allowed:</b>	<b>\$9,515</b>

### **Mr Cicerale's claim for defective works**

- 64 There are two claims for defective works;
1. The openings were too small for the Miele appliances nominated on the drawings.
  2. There was a failure to cover the carcass, with side panels terminating at the floor instead of at the kickboard. Three side panels require touch up painting in beige.
- 65 The first claim for the defective works relates to the openings being too small for the Miele appliances. Having found that Mr Cicerale is responsible for the mistake in the openings for the joinery units the claim is dismissed. It is noted that Mr Shen, breached the contract by leaving openings at 628mm and 528mm instead of 660mm and 560mm for which Mr Cicerale is entitled to be compensated. The openings could have been enlarged to 660mm and 560mm by removing the double carcass at relatively minimal cost. However, Mr Cicerale elected to install smaller ovens into the existing smaller openings. He did incur a cost to install the smaller ovens and he has been compensated for this cost by the allowance of the whole of the Top Edge invoice for completion of the kitchen joinery in the sum of \$4,000. The claim for further damages for defective work is dismissed.
- 66 The second claim for defective works is that the carcass was exposed and that the visible parts of the side panels terminate at the floor instead of at the top of the kickboard.
- 67 At the site inspection, it was agreed by the experts that the carcass was not exposed. The nature of the complaint is that the joinery was built with visible vertical side panels terminating at the floor giving the joinery a modular look rather than the look of expensive custom-built joinery. Dr Eilenberg said at paragraph 180 of his report "The joiner has made each section as a separate unit - thus providing an additional side wall. In this case, the correct construction method would have been to make the entire unit and make allowances to separate the sections and rejoin on site – a much more exact task (more labour intensive and expensive) than the way it has been constructed." Mr Demos said that at the meeting on 20 July 2007 he stressed the importance to Mr Shen of constructing the joinery so that it did not have a modular look.
- 68 Mr Zaviska reported at page 9 "it is common practice to use side/cover panels when there are inserts like dishwashers, refrigerators and between tall cabinets and benches, low cabinets or anywhere where there is a transition at kickboard level." The modular style construction was the method Mr Shen used to construct joinery and was a necessary consequence of the joinery being manufactured in China. Mr Shen showed Mr Cicerale photographs of samples of joinery completed by him prior to the initial contract.

- 69 The issue to determine is what is the agreement. The claim is not made in relation to the varied vanities, there being no drawings for the varied joinery. The claim is not made in relation to the laundry joinery; the drawings show the vertical side panels terminating at the floor for the laundry joinery. The drawings for the kitchen joinery do not show the vertical carcass. Given, that Mr Cicerale knew that the joinery was to be manufactured in China; that Mr Cicerale was shown photographs of Mr Shen's completed joinery; the inconsistency between the kitchen and laundry joinery drawings and the lack of detail in the kitchen joinery drawings, I am not satisfied that Shenp was required to construct the joinery so that the side panels would not be visible.
- 70 Most of the side panels abut another edge such as a dishwasher or at the end of the cupboards so where they terminate at floor level is not particularly noticeable to an untrained eye. However, two or three panels terminate in the middle of a bank of joinery, interrupting the kickboard. Their appearance is unsightly and unacceptable. I find the claim proved for adjusting three of the side panels. The claim for painting three side panels is admitted. The rectification of these items has not been priced separately. Both experts on site agreed that the job was a small one and could be done without the need to remove the joinery. In the absence of a price estimate for these works, I make an allowance of \$1,000 including GST.

**Summary of findings:**

Balance owing to Shenp:	\$16,762
Less allowance for incomplete works:	\$9,515
Less allowance for defective works:	\$1,000
Net amount payable to Shenp	\$6,247

- 71 I reserve the question of costs and interest.

**MEMBER L. ROWLAND**