VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

Domestic Building Contracts Act 1995: claim by builder for damages for breach of consultancy agreement; issue of whether agreement was created.
Cross claims for painting services rendered under separate contracts with builder; issue of whether an estoppel arose to prevent painter from pursuing claims well after works were performed; further claim for payment for services previously gifted.

VCAT REFERENCE NO. BP2030/2018

APPLICANT:	Rayyanisa Pty Ltd (ACN 069 624 013)
RESPONDENT:	Mehrdad Badihi

VCAT REFERENCE NO. BP2031/2018

APPLICANT:	Mehrdad Badihi
RESPONDENT:	Rayyanisa Pty Ltd (ACN 069 624 013)
WHERE HELD:	Melbourne
BEFORE:	C. Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	8 March 2019
DATE OF ORDER:	16 April 2019
CITATION	Rayyanisa Pty Ltd v Badihi (Building and Property) [2019] VCAT 452

ORDERS

Order in BP2030/2018

1. The claim of the applicant Rayyanisa Pty Ltd is dismissed.

Orders in BP2031/2018

2. The respondent Rayyanisa Pty Ltd must pay to the applicant Mr Badihi the sum of $19,803.50.

3. Mr Badihi will be given leave to apply for interest. Any such application must be made within 60 days.

4. Mr Badihi will also be given leave to apply for costs under s 109 of the *Victorian Civil and Administered Tribunal Act 1998* (**"the Act"**), and also apply for an order for reimbursement of fees under s 115B of the Act. Any such applications must be made within 60 days.

5. The Principal Registrar is directed to refer any application for interest, costs or reimbursement of fees to Member Edquist.

C. Edquist
Member

APPEARANCES:

For the Applicant:	Mr A. Beck-Godoy, of Counsel
For the Respondent:	Mr F. Jafari, director with Mr R. Jafari, director

REASONS

INTRODUCTION

The claims

1 Mr M Badihi came to the Tribunal seeking damages wearing two hats. Firstly, he claimed in his capacity as a painter who had performed services for Rayyanisa Pty Ltd ("**the builder**"), the sum of $22,830. Secondly, he claimed from the builder reimbursement of $17,820 which he had advanced to the builder to facilitate it to acquire insurance for a major domestic building contract it had entered into with him. That building contract ultimately did not proceed, and on his instructions the builder had procured a return of the insurance premium from the insurer, less costs.

2 The builder denied all liability for the painting costs. In a nutshell, its defence was that in respect of each project in which painting charges were claimed, it had paid Mr Badihi everything he was owed.

3 The builder did not deny liability to reimburse the insurance premium (less costs) it had recovered back from the insurer, namely $16,153.50. However, it said that it is entitled to credit that refund against an invoice it had rendered to Mr Badihi for consultancy services it had rendered to him both before and during the course of the building contract.

4 The issues to be dealt with, accordingly, are Mr Badihi's claim for painting, Mr Badihi's claim for reimbursement of the insurance premium, and the builder's claim for consultancy services.

The hearing

5 The hearing began before me on 8 March 2019. Mr Badihi was represented by Mr Beck-Godoy of Counsel. Mr Badihi gave evidence, but called no other witness. The builder was represented by two directors, Mr Farhad Jafari, and Mr Ryyan Jafari, his son. Mr Jafari senior and Mr Jafari junior gave evidence, and they called no other witness on behalf of the builder.

MR BADIHI'S PAINTING CLAIM

6 It is convenient to deal first with the claim for painting. The claim was initially put at $22,830.00, based on a tax invoice issued on 27 December 2017 by Mr Badihi under the name of his painting business Sea Sun Painting. The invoice was addressed to Jafari Homes, which was the registered business name under which the builder traded at the relevant times. The invoice related to work carried out by Mr Badihi at three projects being constructed by the builder in Kenny Street in Balwyn North, Johnson Street in Hawthorn and Leeds Street in Doncaster East. A further claim was made for painting carried out at Mr Farhad Jafari's house in Balwyn North.

7 Before we turn to the individual claims, it is convenient to note two things. The first concerns estoppel. Mr Badihi's invoice was produced at the end of 2017 when the parties had fallen into dispute about the building contract. Mr Badihi readily conceded that the invoice was for variations and rectification work on projects in 2014, 2015 and 2016. He agreed under cross-examination that he would not have produced the invoice if the building contract had gone ahead. I consider that this concession does not necessarily mean that the invoice is invalid. Unless the position of the builder has been adversely affected by Mr Badihi's change of attitude other than by the simple inconvenience of having to pay for work performed by Mr Badihi, with the result that an estoppel arises, I think Mr Badihi is entitled to change his mind about charging the builder.

Has an estoppel arisen?

8 As the builder was represented by two directors, neither of whom was a lawyer, it was appropriate that the estoppel principle was explained to them. This occurred on the second day the hearing. Mr Farhad Jafari contended that the builder had been prejudiced by Mr Badihi's change of position. However, when pressed, he agreed that he had been able to give detailed evidence about each of the variations claimed by Mr Badihi, and accordingly he could not demonstrate any specific prejudice arising from the fact that there was a significant delay between the time that Mr Badihi did the relevant works and claimed for them. Mr Beck-Godoy, in response, submitted that no relevant prejudice or detriment had been identified arising from Mr Badihi's change of attitude.

9 I accept Mr Beck-Godoy's submission, and find that no estoppel arises generally to prevent Mr Badihi from pursuing claims for the works performed in 2014, 2015 and 2016 as at the end of 2017 and, accordingly, in this proceeding. However, as will become apparent below, I think there is one particular claim in respect of which an estoppel does arise.

The revised invoice

10 The second introductory point to be made is that at the hearing a second version of the tax invoice of 27 December 2017 was tendered which included a breakdown of the labour and materials claimed in relation to each item. It was made clear during the hearing that this invoice had been produced shortly before the hearing with a view to assisting in the presentation of the case. It was not suggested that the invoice had been created on 27 December 2017 at the same time as the original invoice. During the course of the hearing a number of arithmetic errors were identified in the duplicate invoice, which meant that the total amount claimed was reduced to $20,910.00. In the following analysis, the reduced claims are set out, as these are the claims now being put by Mr Badihi.

Kenny Street

11 The first claim made in relation to the project at Kenny Street (in Balwyn North) was for $6,480 in relation to an extra charge arising from the necessity to prime doors and architraves. It was asserted that the original quote was prepared on the basis that the doors and the architraves would be pre-primed. A second claim related to the painting of eaves above the entry doors and the painting of all entry doors. The amount claimed here was $3,630. A third claim was made in relation to Kenny Street in respect of labour and materials relating to the varnishing of handrails and stairs in each of three units, at a cost of $4,320.

12 Mr Badihi could not produce the original contract and accordingly I could not make an assessment of the original scope of work. Mr Farhad Jafari deposed that Mr Badihi had quoted for the job after he had inspected the site, and accordingly contended that Mr Badihi was aware of the state of the doors and the architraves, the entry doors ,and the stairs and handrails when he began work. In these circumstances, I am of the view that Mr Badihi has failed to discharge the burden of proof to establish these claims.. He thus fails in respect of each of the Kenny Street claims.

Johnson Street

13 The first claim involving the Johnson Street job in Hawthorn relates to a charge raised for the delivery and assembly of scaffolding on two occasions, firstly for the electrician and secondly for the window cleaner. On each occasion the scaffolding was said to have remained in place after Mr Badihi had himself needed it.

14 Mr Farhad Jafari deposed at the hearing that an arrangement was sometimes made on-site between different trades to borrow each other's equipment. He explained that what occurred here was that the scaffolding erected by Mr Badihi for his own work had been left in place for the electrician. Later, after removing his scaffolding from site, Mr Badihi had had to bring it back for touch up work, and it had then been left in place for the window cleaner. I accept this evidence.

15 I am not prepared to make an award in favour of Mr Badihi for two reasons. In the first place, I understand the arrangement under which Mr Badihi left the scaffolding in place, on each occasion, to have been informal. It was, in my view, not an arrangement in respect of which he could later expect to be paid, or in respect of which Mr Jafari would have later expected to have been charged.

16 The other issue is that of estoppel. Mr Farhad Jafari contended that had he known that Mr Badihi was going to charge for the scaffolding, he might have made other arrangements such as hiring scaffolding from a cheaper provider. Understandably, Mr Beck-Godoy on behalf of Mr Badihi pointed out that the was no evidence regarding alternative hiring arrangements. Nonetheless, I am satisfied, on balance, that specific prejudice to the builder

has arisen by reason of Mr Badihi's change of position in respect of this particular claim. Firstly, as Mr Jafari pointed out, Mr Badihi's change of mind meant that he had no opportunity to look for an alternative scaffolding supplier. Secondly, if it had become necessary for the builder to hire alternative scaffolding, the builder might have been able to pass some or all of the cost on to the electrician and the window cleaner. The opportunity to do so would, by now, have clearly passed.

17 The next claim made in relation to the Johnson Street job was for $570 associated with labour and materials to fix an error made by the plasterer in cutting plaster around a heater exit. Mr Farhad Jafari acknowledged that there had been such an error. However, he said it was a term of the painting contract, based on the discussion of the outset, that if there was minor damage to work performed by other trades the painter would repair it. I do not accept this evidence, on the basis that it is inherently unlikely that the painter would accept a potentially open-ended obligation to rectify the work of other trades on a job prior to carrying out his own work. On the basis of the concession made that an error in the plasterwork had been made, I allow the claim at $570.

18 The next claim related to a requirement to fix plaster in the kitchen at Johnson Street. The amount claimed was $810. Mr Farhad Jafari acknowledged that there had been damage to the plaster, but relied on the alleged term already referred to that the painter would fix up, at his own expense, damage to plaster work caused by another trade before attending to painting it. As with the previous claim, I reject the proposition that it was the painter's responsibility to fix up minor errors in the work of another trade. Accordingly, I allow recovery to Mr Badihi of $810 in respect of this item.

19 The third claim made by Mr Badihi in relation to the Johnson Street job was a charge for damage to a sliding door and a wall. Mr Jafari's defence was that he had drawn the attention of Mr Badihi to the potential for the sliding door to cause damage to the wall at the outset and told him to paint this last. Although I have some doubt that this conversation took place, I do not decide the issue on that basis. I find in favour of Mr Badihi because it was not disputed by Mr Jafari that ultimately there was damage to the wall caused by the sliding door, and Mr Badihi's work had to be redone. Mr Badihi is entitled to be paid. I allow the amount claimed of $530.

20 The penultimate amount claimed in relation to Johnson Street was $760 in respect of varnishing the full set of stairs. The final amount claimed was $150 in respect of matching the stain and then varnishing the quad placed in the kitchen and dining room at the house. I reject both these claims, on the basis that Mr Badihi could not produce the original contract and thereby allow me to assess the original scope of work. On the other hand, I accept Mr Farhad Jafari's evidence that Mr Badihi had inspected the site before carrying out the work, and accordingly should have been aware that these two items of work were required.

Mr Jafari's house

21 The tenth claim for painting related to Mr Farhad Jafari's own house in Balwyn North. Mr Jafari did not dispute that work was carried out by Mr Badihi, but his questioning of Mr Badihi during cross-examination indicated that he considered the work was being performed for him by Mr Badihi "as a friend". Mr Badihi did not dispute that initially his intention was not to charge for the work, even though it was substantial, involving as it did a large entry door. However, he changed his mind in December 2017, when it became clear that he was going to be charged for services by the builder.

22 I find against Mr Badihi in respect of this claim. This was not a situation where he was claiming to be paid for work carried out as an "extra" or variation to an existing paid job. The agreement made between the parties was that the work would be done for free. Mr Badihi may have performed the work on this basis with an ulterior motive in mind, such as to establish goodwill. That is not to the point. What is to the point is that he was performing the work for free. It was a gift. He cannot change his mind and take the gift back years later just because it now suits him.

Leeds Street

23 The first claim made in relation to Leeds Street related to the repainting of the garage walls after they had been damaged by the acid washing of bricks. I find for Mr Badihi on the basis that if his work was damaged by a later trade, and he had to redo it, he is entitled to be compensated, despite the protests of the builder. I allow the figure of $360 for labour (8 hours at $45 per hour) plus materials of $220, a total of $580 for each of three units. The total claim is accordingly allowed at $1,740.

24 The next claim made in respective to Leeds Street related to filling the doorstep in the second unit with filler, and sanding and painting it. The amount claimed was $150. The final claim relating to Leeds Street related to varnishing the stairs to the garage in each of the three units, at a cost of $150. In circumstances where the original contract was not available, and where Mr Jafari had deposed that Mr Badihi was aware of the scope of the work in each unit as he had inspected the site before quoting, I reject these claims.

Summary

25 In summary, I have rejected each of the Kenny Street claims, three of the Johnson Street claims, the claim in respect of Mr Jafari's own house, and two claims in respect of Leeds Street. On the other hand, I have allowed claims for $570, $810 and $530 in relation to the Johnson Street project, and $1,740 in relation to the Leeds Street project. The total amount allowed for painting is accordingly $3,650.

THE INSURANCE PREMIUM CLAIM

26 Mr Badihi's remaining claim is for the return by the builder of the insurance premium refunded to the builder by the insurer. Mr Badihi's case was straightforward. He said that in December 2015 he entered into a major domestic building contract with the builder for the construction of units at Zealandia Road, Croydon, for a contract sum of $1,650,000. Under clause 8 of the contract, it was the builder's responsibility to take out domestic building insurance. However, he agreed to forward to the builder, at the builder's request, $18,000 to enable the builder to take out the relevant insurance. $180 of that sum was not required, and was refunded by the builder. (This refund was reflected in the builder's tax invoice of 27 December 2017). Ultimately, the building contract did not go ahead. Mr Badihi asked the builder to obtain from the insurer a refund of the premium, and in due course the builder received a refund of $16,153.50. Mr Badihi initially sought reimbursement of the sum of $17,820, but at the hearing adjusted the claim down to the lesser sum actually refunded by the insurer.

The builder's defence

27 The builder does not dispute that it is obligated to pay to Mr Badihi the sum of $16,153.50 refunded by the insurer. It initially said that it was entitled to set off that sum against an invoice it has raised for $16,500 in respect of services provided to Mr Badihi, and argued at the hearing that Mr Badihi had actually consented to this course in late 2017. At the hearing, the builder pressed a counterclaim it had issued, based on a replacement invoice for $51,991.50, and said that the insurance premium should be set off against that amount.

28 The question to be determined is whether the builder is entitled to set off against the returned premium the amount claimed in either of its invoices.

THE BUILDER'S COUNTERCLAIM FOR CONSULTANCY SERVICES RENDERED

29 The first party to issue proceedings in the Tribunal was Mr Badihi. The builder in a separate proceeding counterclaimed, seeking $51,991.50. The application indicated that the claim was for:

> building consulting services provided over a two-year period to Mehrdad Badihi for his 6-townhouse development at 4-6 Zealandia Road, Croydon North. Services include: multiple meetings with stakeholders such as engineers, architects, city council, financial brokers, etc., building contract preparations multiple times, obtaining a building permit within 72 hours for the project, attending VCAT (sic) on Mr Badihi's behalf for permit related matters, completing application forms and finding alternate methods of construction finance for the project, preparation of insurance documentation for the project.

30 Mr Badihi disputed the claim vigorously, asserting that there was no separate contract for the provision of services by the builder, and that the

claim had been created in December 2017 after it became clear that the building contract was not going to go ahead.

The building contract

31 To make sense of the arguments raised by the parties in relation to the consultancy agreement, it is necessary to have regard to the history of the building contract. One version of the contract was put into evidence by Mr Badihi. The contract was executed on 15 October 2015. Although it was a contract for the construction of a home, with a contract value in excess of $5,000,[1] and was clearly intended to be a major domestic building contract, it ran only to about 13 pages. It certainly did not comply with all of the requirements set out in s 31(1) of the *Domestic Building Contract Act 1995*. However, it was executed by both the owner (Mr Badihi) and the builder, and neither party contended that the contract was of no effect under s 31(2) of the Act.

32 When Mr Ryyan Jafari gave evidence, he tendered a different version of the contract. This document was a complete domestic building contract in the form put forward by Consumer Affairs Victoria. Its pages were not numbered, but the index suggested that inclusive of forms, it ran to 145 pages.

33 This version of the contract had not been available on the first day of the hearing and had not been put to Mr Badihi for comment. Mr Beck-Godoy indicated that it was Mr Badihi's position that the building contract was limited to the 13 pages Mr Badihi had identified as constituting the contract.

34 A brief review of the document tendered by Mr Jafari throws some doubt on the proposition that it was the contract used by the parties. I say this because the full contract included a check list which had been completed in a blue pen, which contrasted with the black pen used to complete a number of the other pages which were included in the 13 page version contract tendered by Mr Badihi. Critically, the checklist contained the following question:

> 2 If this contract is conditional upon you receiving written approval for finance, have you obtained such written approval?

35 In the response column, a "Yes" or "No" answer was sought. This column has been completed "Y", clearly connoting a "Yes". I comment that in the light of the fact that it was common ground between the parties that at the outset Mr Badihi did not have finance, this was a surprising answer.

The finance issue

36 The contract required Mr Badihi to pay a contract sum of $1,650,000 in specified stages, beginning with a 5% deposit payment of $82,500. The

[1] At the time the contract was entered into, $5,000 was the prescribed threshold for a major domestic building contract. The current threshold of $10,000 came into effect on 1 August 2017

suggestion from the Jafaris was that because Mr Badihi could not obtain finance, he could not pay the deposit. It was not disputed by Mr Badihi that he did not pay the deposit. This no doubt explains why the builder asked Mr Badihi to forward to it $18,000 so the builder could take out the required domestic building insurance.

37 During the course of 2016 Mr Badihi was not able to obtain finance. However, the builder did not use this as a basis for rescinding the contract. The Jafaris simply made it clear that until the deposit was paid, they could not start work.

38 Mr Farhad Jafari gave extensive evidence about the history of the building contract. He said that while Mr Badihi was seeking finance, he was investigating prices with other builders. He also spoke to the Jafaris about the option for reducing the contract price of $1,650,000 by deleting elements of the works. The builder did not rely on these actions, which appear on their face to evince an intention on the part of Mr Badihi not to be bound by the terms of the contract, as a basis for bringing the contract to an end. The builder also did not exploit Mr Badihi's lack of finance to rescind the contract.

Was the builder's proposal of a new contract price a repudiatory act?

39 The impasse about finance continued into 2017. By July 2017 it was clear to the Jafaris that if the contract was to go ahead, the contract price would have to be increased because more than 20 months had passed since the contract was signed, and there had been significant increases in the cost of labour and materials. The new contract price they calculated was $1,905,205.20. A breakdown of the new contract sum was provided in the form of an email signed by Mr Ryyan Jafari dated 7 July 2017.

40 At the hearing, Mr Badihi asserted that in forwarding this email, the builder was evincing an intention not to be bound by the original contract price, and accordingly had repudiated the contract.

41 I reject this submission, for several reasons. In the first place, by July 2017, Mr Badihi was demonstrably in breach of the contract himself as he had not been able to secure finance and proceed. Secondly, in circumstances where more than 20 months had elapsed, there would no doubt have been increases in the costs of labour and materials, and if it was not possible for the builder under the terms of the contract to increase the contract price through a cost escalation clause, the builder, in my view, could have rescinded the contract. Thirdly, the builder presented an increased schedule of payments for discussion, rather than demanding that Mr Badihi execute a new contract. Finally, there was a suggestion in the evidence of Mr Farhad Jafari that the new contract price of $1,905,205.20 was produced with the knowledge and approval of Mr Badihi as a device to assist him in negotiating finance for the original contract price of $1,650,000, as that sum represented about 80% of the higher price.

Resolution of the impasse

42 Each of Farhad Jafari and Ryyan Jafari said that after July 2017 Mr Badihi wanted to be let out of the building contract as he could not obtain finance. Significantly, in my view, the builder did not rescind the building contract and seek damages for breach of contract against Mr Badihi. Likewise, at this point, Mr Badihi did not assert that the builder was in breach of the contract. This assertion was made only at the hearing. In these circumstances, I find that the contract was brought to an end by mutual agreement.

Relevance of finding that the building contract was brought to an end by agreement

43 My finding that the building contract was brought to an end by agreement is relevant to the builder's claim. The finding is consistent with the absence of any evidence that it was part of the termination arrangement that Mr Badihi was to pay any money in respect of the building contract to the builder.

44 The absence of any claim for damages under the building contract perhaps explains why the builder bases its case on the alleged existence of a consultancy agreement made between the builder and Mr Badihi.

Mr Farhad Jafari's evidence about the formation of the consultancy agreement

45 Mr Farhad Jafari's evidence was that he knew Mr Badihi through his brother. They were all in Melbourne's Persian community. Mr Jafari said that he had actually done a job with Mr Badihi on a "friendly basis", which I take to mean that no cash exchanged hands.

46 Mr Jafari said that Mr Badihi discussed with him a proposed project in Zealandia Road, Croydon. He owned the site and a planning permit was pending. Mr Jafari said that he and his son agreed to work with him to get through the "hiccups". To this end, he accompanied him to the city council. Also, as the planning permit was about to expire, and there were only 5 days left in which to obtain a building permit. Mr Jafari said he prevailed on a building surveyor he knew in Heidelberg to obtain a permit in only 3 days. At a later point he explained that Mr Badihi did not understand about building prices. "It was an education process. It was exhausting". On the second day the hearing, he made it a further comment that he had had to attend at the VCAT hearing in order to assist with the removal of a covenant. This was difficult. It was asserted that Mr Badihi did not understand how difficult it was.

47 Mr Ryyan Jafari in his evidence suggested that without their work, Mr Badihi would have lost his planning permit. He would not have been able to sell the property but for their work.

Alleged terms of the consultancy agreement

48 The alleged consultancy agreement was not in writing. However, both Mr Farhad Jafari and Mr Ryyan Jafari gave evidence that rates were discussed at an initial meeting in October 2014. Mr Farhad Jafari's evidence was that his normal rate was $150 per hour plus GST, but he told Mr Badihi that "we will look after you" and on this basis that the rate was reduced to $150 inclusive of GST.

49 Both Farhad Jafari and Ryyan Jafari gave evidence that hourly rates had been discussed at the initial meeting in October 2014 with Mr Badihi, and that he had been informed that he was to be charged for all services rendered by them in connection with his project.

Was there a consultancy agreement?

50 The builder's counterclaim is premised on the existence of a consultancy agreement. Mr Farhad Jafari explained that the agreement had not been put in writing for cultural reasons. He explained that in the Persian community, an oral agreement is regarded as binding.

51 Mr Badihi's position, as articulated in Mr Beck-Godoy's closing submissions, is that there was no "credible evidence" that a consultancy agreement had been entered into.

52 In considering the issue, I take into account the following matters. Firstly, when it was put to Mr Farhad Jefari that the nature of the services provided under the consultancy agreement was such that they constituted work within the meaning of domestic building work under the *Domestic Building Contracts Act 1995* and accordingly should have been the subject of a written major domestic building contract conforming to the requirements of s 31 of that Act, he immediately agreed. I comment that this concession sits uneasily with his insistence that an oral agreement was appropriate for cultural reasons.

53 Secondly, the attitude that the Jafaris formed about the necessity for a written consultancy agreement stands in stark contrast to the attitude they took to the need for a written building contract. In this connection, I note that Mr Jafari senior deposed that he made it clear that as the project was a large one, having been costed at $1,650,000, a formal contract was required. For this reason, the major domestic building contract had been executed in October 2015.

54 I think both these matters point strongly to the proposition that no consultancy agreement was ever entered into.

55 If the alleged consultancy agreement has been reduced to writing, there would have been no question regarding its parties. Obviously, Mr Badihi would have been one party, but there is a clear issue is to whether the other party was the builder, or Farhad Jafari together with Ryyan Jafari personally. The issue is important, as almost none of the activities charged

for under the alleged consultancy agreement are in the nature of construction activities. They are almost all consultancy services. In the circumstances, why would a building company have entered into such an agreement?

56 The builder's position is not assisted by the inconsistent evidence given by the Jafaris about rates. I have already noted that Mr Farhad Jafari's evidence was that his rate for services rendered to Mr Badihi had been reduced to $150 (inclusive of GST) from $150 (plus GST).

57 When Mr Ryyan Jafari gave evidence, he tendered a schedule of services providing a break-down of the hours worked by his father and himself in respect of a number of activities. This document made it clear that although his father's rate was $150 per hour, his rate was $120 per hour. The spreadsheet demonstrated that by multiplying the respective hours worked by each Jafari at applying the relevant hourly rate, a total amount for services rendered at $47,265 had been calculated. To this figure, GST of $4,726.50 had been added, bringing the value of the hours worked to $51,991.50. This, of course, was the amount which had been billed to Mr Badihi in the second invoice, upon which the counterclaim was based.

58 It is to be noted that there is an inconsistency between Mr Ryyan Jafari's evidence, as constituted by the spreadsheet, regarding his father's rate, and his father's own evidence. The tension lies in the fact that Mr Farhad Jafari said that his rate of $150 per hour was inclusive of GST. Because of this tension, I am sceptical about the proposition that rates were discussed and agreed with Mr Badihi at the initial meeting in October 2014.

59 Moreover, Mr Ryyan Jafari said that the hourly rates established with Mr Badihi at the outset had been $150 per hour for his father, and $120 per hour for himself. He also deposed that these rates had been cut to one third for the purposes of calculation of the first invoice of $16,500 which was issued in relation to the consultancy services in December 2017.

60 I find it hard to believe that if hourly rates of $150 and $120 per hour had been agreed that they would have been slashed to $50/$40 per hour when the first invoice was calculated. The much more likely explanation, in my view, is that rates were never agreed at $150 and $120 per hour.

61 For all these reasons, I find that no consultancy agreement was created between Mr Farhad Jafari and Mr Ryyan Jafari on behalf of the builder and Mr Badihi in October 2014, or at all. The claim based on the alleged consultancy agreement must be dismissed.

Did Mr Badihi agree to allow the builder to set the insurance premium against the invoice for consultancy services at $16,500?

62 When Mr Ryyan Jafari gave evidence, he tendered an apparent transcript of some emails allegedly exchanged between the parties on 27 and 28 December 2017. A critical communication was said to be an email sent at 3.40 p.m. on 28 December 2017 in which Mr Badihi allegedly thanked "Mr

Jafari" for the invoice and confirmed the request to obtain the insurance refund and added "if it's not cover this bill I'll pay the balance thanks".

63 It is surprising that, given the apparent importance of this communication, it was not put into evidence on the first day of the hearing. Accordingly, it was not put to Mr Badihi for comment. Mr Badihi was given no opportunity to either deny the veracity of the email, or, if he accepted this veracity, explain why he sent it. In these circumstances, I am not prepared to place significant weight on the email.

64 Moreover, even if it had been agreed that some consultancy services were to be paid for by Mr Badihi, the question of who the parties to the consultancy agreement were remains unresolved. Any claim made by the builder to set off the value of consultancy services rendered to Mr Badihi against the builder's established liability to reimburse to Mr Badihi the refunded insurance premium must fail, as the builder has not established that it was the party that contracted to provide consultancy services.

Why the builder may have assisted Mr Badihi anyway?

65 Many of the individual items charged for in the first invoice, and again in the second invoice, were items of work which might have been expected to be carried out by a builder before or after the execution of a building contract in order to facilitate the project. For instance, initial pre contract discussions with the client, and reviewing the town planning documents and meeting with the architect and the engineer, might be regarded as incidental to assessing the project for the purpose of fixing a contract price. Another activity which a builder might be expected to carry out without expressly charging for it is the preparation of the building contract itself. After signing the contract, the builder might well deal with the building permit and insurance. (In the present case, under the building contract, applying for and following up on the building permit was the builder's responsibility under clause 9, and obtaining insurance was the builder's responsibility under clause 8.) Other items charged for here, such as attending the site with the plumber, could be seen as incidental to progressing the project.

66 Only a handful of the items invoiced, such as attending at VCAT a couple of times regarding the town planning case, and assisting with loan documentation, fall outside the scope of work which ordinarily might be expected to be carried out by the builder under a building contract. But this does not mean that, in the absence of an agreement, they are attendances to be paid for by the client. They may well have been activities intended to generate goodwill, alternatively intended to accelerate the start of construction, both of which are matters in the builder's interest.

Builders evidence of the cost of activities unconvincing

67 My finding that no consultancy agreement was created is sufficient to dispose of the counterclaim. However, for reasons of completeness, I note that even if I had been satisfied there was a consultancy agreement in

existence, I was far from convinced that each of Farhad Jafari and Ryyan Jafari had worked the hours they deposed they had.

68 Under cross-examination, Mr Farhad Jafari estimated the hours he said had been directly related to each of the items claimed as consultancy work. These hours totalled, on my calculation, only 83. If these hours are correct, then an hourly rate of almost $200.00 per hour has to be applied to generate the figure initially invoiced of $16,500. This calculation underlines the fact that Mr Jafaris estimation of the hours he had worked was not precise, as he conceded under cross examination.

69 As noted already, Mr Ryyan Jafari tendered a schedule purporting to justify the second invoice of $51,991.50 on the basis of hours allegedly worked by himself and his father multiplied by their respective hourly rates. I was not impressed by Mr Ryyan Jafari's evidence. For present purposes, it is sufficient to note two telling points. The first is that when he was asked to justify some of the hours, he said that he and his father had from time to time met and discussed the activities performed. They would create records such as a reports, notes, phone messages or calculations. None of these primary source documents were produced. The second point is that Mr Jafari said that the schedule had been prepared by him in before rendering the second account and that he had had it with him on the first day of the hearing. I found this a surprising statement given that the schedule was not put into evidence on that occasion. As a result, his father did not have the benefit of the document when he was giving evidence, nor was the document put to Mr Badihi for comment.

The insurance premium claim revisited

70 It will be recalled that the builder conceded liability to pay to Mr Badihi the returned insurance premium of $16,153.50, but maintained that it was entitled to set off the consultancy fees against that sum. As I have rejected the builder's counterclaim, Mr Badihi is entitled to an order for reimbursement of the whole of the insurance premium of $16,153.50.

Summary

71 I will order that on the painting claim the builder must pay to Mr Badihi the sum of $3,650[2] together with $16,153.50 in respect of the returned insurance premium. The total of these two figures is $19,803.50.

72 It remains to deal with issues of interest, costs and reimbursement of fees.

73 At the hearing, no submissions were made about interest by either party. Mr Badihi will be given leave to apply for interest. Any such application must be made within 60 days.

74 Mr Badihi will also be given leave to apply for costs under s 109 of the *Victorian Civil and Administered Tribunal Act 1998*, and also apply for an

[2] See paragraph 25 above.

order for reimbursement of fees under s 115B of that Act. Any such applications must be made within 60 days.

C. Edquist
Member