IN THE COURT OF APPEAL

OF THE REPUBLIC OF VANUATU

Civil

Appeal Case No.18/857

**BETWEEN:** **Kramer Ausenco (Vanuatu) Limited**

Appellant

**AND:** **Supercool Vila Limited**

First Respondent

**Tidewater Holdings Limited**

Second Respondent

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| *Date of Hearing of Appeal:* | Wednesday, 18 July 2018 |
| *Before:* | Justice J. Mansfield |
| | Justice D. Fatiaki |
| | Justice G.A. Andrée Wiltens |
| *Counsel Appearing:* | Mr E. Nalyal for the Appellant |
| | Mr M. Fleming for the First Respondent |
| | Mr N. Morrison for Second Respondent |

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## JUDGMENT

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## A. Introduction

1. There are several challenges to the 22 February 2018 decision of Justice Chetwynd regarding this case, in which he held that Tidewater Holdings Limited ("Tidewater") must pay Supercool Vila Limited ("Supercool") a sum of VT 4,259,062 plus interest at 12.5%, for work done relating

to the installation of air conditioning plant. He also ordered costs against Supercool to be agreed or taxed. He further determined that Tidewater is entitled to claim against Kramer Ausenco (Vanuatu) Limited ("Kramers") for the cost of any required remediation work (yet to be quantified) due to Kramers' failure to exercise reasonable skill and care in designing the air conditioning system installed by Supercool for Tidewater.

2. Kramers seek to set aside the decision in its entirety.

3. Tidewater disputes the amount of the principal sum, and also the level of interest ordered on that sum.

4. Supercool disputes the order as to costs.

B. The Background Facts

5. Tidewater built a high-end residential complex known as Onyx Apartments. As part of the project, Kramers were instructed to design the necessary air conditioning plant for the building, and duly produced plans and drawings. Tidewater paid for that work.

6. Tidewater instructed Supercool to install the air conditioning plant as per Kramers' plans and drawings. Supercool did so, and invoiced as per their quote. There was some additional work required, which was also invoiced. Tidewater paid each of the invoices as they were received, until the very last invoice. By then, it had been discovered, and discussed and been agreed between the parties that the air conditioning installed just did not meet requirements – it was inadequate to cool a part of the building.

7. There was no agreement between the parties as to what was the cause of the air conditioning failure or, more particularly, who was at fault. Tidewater determined in those circumstances that payment of the final Supercool invoice would be withheld. Hence a claim was filed by Supercool against Tidewater for breach of contract in failing to pay. Tidewater subsequently added Kramers as a party to the action.

C. Kramers Appeal

8. Kramers submit the primary judge erred in a number of respects:

(i) an e-mail by a person not present in Court was wrongly admitted into evidence and relied on;

(ii) the primary judge accepted that there was a variation from Kramers' plans and drawings during the installation process, and therefore Kramers should not be liable;

(iii) there was no evidence to support a finding of agreed inadequate air conditioning; and

(iv) there was no evidence to support the finding of failure to exercise reasonable skill and care.

9. After Kramers had completed their plans and drawings, Tidewater called for tenders to do the work of installation. One prospective tenderer questioned one aspect of the plans, suggesting an inadequacy of air conditioning capacity in one part of the building. Mr Craine did that via e-mail. Kramers were then asked to comment on that – and they re-affirmed the correctness of their calculations in the drawn plans. Ultimately, the primary judge accepted that what was questioned by Mr Craine was in fact at the heart of the inadequate air conditioning supplied. However, the e-mail did not persuade the primary judge of that fact – he relied on a report from an independent NZ company (Temperzone) to establish that, as well as the concession by Mr Harris for Kramers that that was the correct position. The mention of Mr Craine's e-mail is part of the historical narrative set out by the primary judge, and it's relevance is not it's contents but the fact that it was given to Kramers so that Kramers could comment it. We accept also Mr Mitchell's response that there was no objection to the e-mail at trial, and that counsel for Kramers himself referred to it. There is no error on the part of the primary judge in respect of ground (i).

10. There was a variation of the contract in that instead of wall mounted units, ceiling mounted air conditioning units were installed in one part of the building with different specifications than that advised by Kramers. However, these units had greater capacity than those stipulated in Kramers' plans. It is not possible to see how increasing the air conditioning capacity varied the specifications so as to insulate Kramers from liability. That might have been the case had a diminished capacity been installed. In that scenario, Kramers could rightly have said Supercool was responsible for not following the plans. The primary judge specifically found that Supercool had correctly followed Kramers' plans, indeed provided more than required. There is no error demonstrated to support ground (ii).

11. Mr Harris, who gave evidence for Kramers, agreed when cross-examined that an error had been made in originally calculating the volume that required air conditioning in the problem part of the building. Mr Nalyal's submission to the contrary has no merit.

12. The primary judge concluded that Kramers did err when designing the air conditioning plant for the building. Given that the problem was identified by Mr Craine even before Supercool commenced the installation, and that Kramers were asked to re-evaluate their calculations, and given that Supercool installed in accordance with Kramers' plans, there really was no other conclusion available. The problem lay in the original miscalculation – which is what Kramers were employed to do. We do not think the primary judge erred

13. The appeal is dismissed. It was a hopeless case, with absolutely no prospects of success. Accordingly, the appellant is to pay reasonable indemnity costs to both Respondents equally.

D. Tidewater's cross-appeal

14. The principal sum awarded was VT 4,259,062. Mr Morrison challenged how that figure was arrived at. He took us through 6 invoices, for the principal sum and the additional later work. Those invoices add up to VT 16,259,062.50. It was accepted that Supercool paid towards those invoices two amounts of VT 9,000,000 and VT 3, 000,000. On that basis the difference was VT 4,259,062.50. However Mr Morrison then took us to a statement issued by Supercool dated 21 November 2012 which listed the various invoices, but significantly also provided for two credits of VT 98,484 and VT 210,000. If those two credits are deducted from the invoices, what remains is VT 3,950,578.50 – that, Mr Morrison submitted, was the amount owed. Mr Fleming was unable to explain the credits – and he was unable to satisfy us there was any good reason to ignore them. We are of the view that the primary judge did not receive sufficient assistance from counsel on this as the discrepancies were not highlighted – had the credits been pointed out to him, we have little doubt they would have been taken into account. Accordingly we vary the principal sum owing to VT 3,950,578.50 and substitute that figure in the decision.

15. Mr Morrison also challenged the primary judge's decision to award interest at 12.5%. He pointed out there was nothing in the contract between Tidewater and Supercool which enabled such interest to be claimed. The only place where that figure appears is at the foot of the Supercool invoices. Mr Morrison referred us to *EZ Company and Lapi v Republic of Vanuatu* Civil Appeal Case No. 17/1500 and *Remy v Jang* Civil Appeal Case No. 17/2461, as recent

examples of this Court fixing commercial rates. He distinguished those authorities from the present case, which involves the simple matter of recovery of a debt under invoice. Mr Fleming submitted that the primary judge was able to set interest at a commercial rate, but accepted that there was no evidence before the court to establish that Supercool was paying any such rate for the funds outstanding. In the circumstances, we accept Mr Morrison's submissions that the primary judge erred in this regard – accordingly, we substitute in the decision the usual Court rate of 5% interest on VT 3,950,578.50, to run from 6 December 2012 until payment.

E. Supercool's cross-appeal

16. Mr Fleming pointed out that at the conclusion of the hearing there was no discussion regarding costs. Further, the decision was handed down in writing, with the parties having no opportunity to make submissions as to costs. Had Mr Mitchell been afforded the opportunity of making submissions, he would have sought indemnity costs – and he made that application before us.

17. Mr Fleming made several points:

- the Supercool claim was uncontested, with admissions filed accepting that Tidewater owed the outstanding amounts on invoice
- Tidewater accordingly had no prospect of successfully defending the claim
- Supercool made three settlement proposals to Tidewater, each of which was reasonable - but each was rejected by Tidewater
- Supercool was wrongly dragged into a dispute between Tidewater and Kramers – that dispute was completely unrelated to them.

18. Mr Fleming relied on the authority of *Colgate Palmolive Co and Anor v Cussons Pty Ltd* (1993) 118 ALR 248, referring to, inter alia, "an imprudent refusal of an offer to compromise" to support his claim for indemnity costs. He submitted to the court a sworn statement by a Supercool principal to the effect that he would accept VT 70,000 as indemnity costs.

19. Mr Morrison resisted the claim for indemnity costs, as did Mr Nalyal. Mr Morrison pointed out that the decision is a matter of discretion under the Rules, and he maintained that Tidewater was not in a position to agree settlement without Kramers also being involved. He submitted Tidewater's case was neither exceptional nor hopeless; and that Tidewater really had to take the matter to trial absent any agreement as to liability with Kramers.

20. We accept that ideally the primary judge should have given the parties the opportunity to make submissions regarding costs. However, he was not put on notice that special submissions as to costs might be made. Again, ideally, that could have been done. In future similar circumstances, where a written judgment is given dealing with costs and special submissions as to costs were intended, the procedure to be followed is for the parties, individually or jointly, to ask the primary judge to recall the judgment in so far as it deals with costs and to afford counsel the opportunity to make submissions. That seems to us to be a far more practical way of dealing with the situation, as here, of a judgment being issued to the parties in writing. However, as that did not occur, in this instance we are prepared to re-visit the area of costs.

21. We see no prospect here of a successful defence to Supercool's claim' especially given the admissions filed as to liability. As well, the efforts aimed at settlement involved no less than three written offers to settle. In each case, the proposal by Supercool was at a figure lower than the judgment in it's favour. In those circumstances, and for those two reasons, we agree with Mr Fleming's submissions that Tidewater should pay Supercool reasonable indemnity costs are appropriate – they will have to be taxed on that basis, or agreed. Given the concessions made, we set costs at VT 175,000 for the appeal.

**Dated at Port Vila this 20th day of July 2018**

**BY THE COURT**

Justice J. Mansfield

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU