IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE No. 06 OF 2015

BETWEEN: **BILL CHAM AND TANIA CHAM**
Appellants

AND **KRAMER VANUATU LTD**
Respondent

Coram: *Hon. Justice John von Doussa*
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Stephen Harrop
Hon. Justice Mary Sey
Hon. Justice Dudley Aru

Counsel: *Mr J Malcolm for the Appellants*
Mr N Morrison for Respondent

Date of Hearing: *Tuesday 5 May 2015*
Date of Judgment: *Friday 8 May 2015*

JUDGMENT

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1. This is an appeal from a judgment of the Chief Justice which awarded the Respondent Vt 8,488,810 for professional services carried out for the Appellants. The Respondent carries on business in Vanuatu as a provider of project management, engineering, surveying, consultancy and supervision services in the construction industry. The Appellants sought concept and design services for a large dwellinghouse to be constructed on their land.

The Case at Trial

2. In the Supreme Court the Respondent alleged that its services were rendered pursuant to an agreement that its fees would be based on a specified percentage of the estimated costs to build the house, to be paid in instalments and to be adjusted finally to the actual costs of construction. In the alternative the Respondent claimed it should be paid on a quantum meruit basis for the work that the Appellants authorised to be performed. The Respondent said it prepared first concept drawings and then proceeded with the Appellants' authority to prepare design plans.

3. The Appellants defended the claim on the ground that there never was an agreement as to the fees to be paid or for the design work. They said that they had paid for all the concept work that they had authorised and nothing more was due. On the alternative quantum meruit claim they said that they never agreed to design plans being prepared; the house as designed would far exceed their budget that was made known to the Respondent; the house designed was never built; and the design plans were of no use or value to them. Therefore they should pay nothing further.

4. The trial Judge held that the work for which the Respondent claimed fees actually had been performed as the Respondent alleged and that the design work had been authorised. The Judge rejected the Appellants' claim that they only authorised concept work and found that they had authorised full design work and plans which were 80% complete when a breakdown in the relationship between the parties led to the termination of the work.

5. In 2004, the parties had first met to discuss the Appellant's desire to build a house at Devil's Point Road. As a result, on 17 December 2004, the Respondent wrote to the

Appellants confirming that what had been discussed was the construction of a single storey house with a swimming pool. The total floor area was to be approximately 1,440 m2 and a cost estimate of Vt 124 million was given.

6. By April 2005, the proposed house concept had significantly changed. The house was now to be two storeys.

7. Fees had been discussed during initial meetings and were raised again by the Respondent in April 2005. The Respondent noted in correspondence that the scope of the work now proposed by the Appellants had substantially increased and the house was nearly twice the original size.

8. By letter of 11th May 2005, the Respondent advised the Appellants that:

"At this stage, with the changes to two storey and others we would not be able to provide a budget estimate for the Residential until the concept design phase is finalised".

9. Further discussion then occurred between the parties about fees. The Respondent agreed to reduce its fees below those originally proposed. On 16th May 2005, the Respondent hand delivered to the Appellants a letter saying:

> *"**1.0 Scope of Works***
>
> *Generally, the scope of works is as outlined in the attached Brief Minutes dated 10th May '05.*
>
> *As per our discussion it is believed that an appropriate budget would be in the order of Vuv 220 to 260 Mil.*
>
> ***2.0 Professional Fees***

Kramer Group proposes a total percentage fee of 8.0% exclusive of VAT for the complete design documentation and contract administration during construction. The fee is broken down as follows:

- *5.24% Design Phase;*
- *2.77% (sic) Construction Phase.*

For monthly invoicing purposes, the fee is to be initially based on the project budget and to be adjusted to the final construction costs once it is confirmed."

10. For the purpose of invoicing the Appellants thereafter a project budget of Vt 240 million was adopted, being a midpoint between Vt 220 and Vt 260 million.

11. The trial Judge held that as the Appellants had actively participated in negotiating down the Respondent's initially proposed fee it was clear that they had agreed to the 8% fee and its breakdown into two parts. However the trial Judge found that the Appellants did not agree that the house construction could commence with a budget of Vt 240 million. The Judge accepted that the Appellants were concerned about the estimated cost of the house. However, as it was on their instruction that the house was increased to two storeys they must have known that the house they were discussing was a vastly bigger house than the original single storey one with an estimated cost of Vt 124 million.

12. At trial the Appellants gave evidence that they had repeatedly told the Respondent that they had only Vt 94 million to spend. The Judge rejected this evidence, observing that there would be no reason or logic if that was their spending limit for the Respondent to proceed and commit significant time and resources to the design of the house approved by the Appellants where the estimated cost of construction was more than twice their

limited budget. The Judge noted that the Appellants eventually built a house that cost well in excess of their claim that they had no more than Vt 94 million to spend.

13. The Judge noted that the house under design by the Respondents was never constructed and actual costs therefore cannot be known to enable the fees due to the Respondent to be adjusted to actual cost. The Judge held that the Appellants did not agree to an estimated cost of Vt 240 million. That figure was simply a middle figure of the Respondents' broad estimate of costs of the house at the concept stage. The Judge held that it was evident that the Respondent even by the time most of the design drawings were complete, only had a vague estimate of actual cost.

14. The claim made by the Respondent at trial was for 80% of 5.24% of the estimated costs of Vt 240 million. However, the Judge found that there was nothing in the Respondent's case, or in the documents prepared by it, which identified how the fees would be charged if the house was not built.

15. The trial Judge was not satisfied that a notional building cost had been agreed between the parties. As the parties in their discussions had not provided for the contingency that the house would not be constructed, the Judge concluded that the Respondent's fee entitlement must be assessed on a quantum meruit.

16. The Appellant's assertion that the design work was of no value to them was rejected. They had authorised the work, and what use they made of it was up to them.

17. The trial Judge noted that architectural project management would ordinarily be paid at a percentage of construction cost or an agreed budget but neither existed in this case. The

alternative basis to charge for work would be on a time/cost basis. Some evidence has been presented by the Respondent as to the work done and appropriate rates for that work, but the Judge acknowledged criticism made by the Appellants about this evidence. The evidence was of a very general nature. The Respondent said an assessment of the time spent multiplied by the appropriate hourly rates for each employee engaged would be substantially more than 5.24% of the assumed project budget, and therefore more than the claimed amount calculated on that basis.

18. The Judge seems to have accepted this assertion. He said he was satisfied that even if some legitimate criticism could be made of the Respondent's time/cost evidence, the fee based on a time/cost analysis would substantially exceed the claim based on a percentage of the project budget. The Judge held that based on a quantum meruit – intended to be fair pay for the work done – the claim for Vt 8,488,810 was a fair claim. He awarded judgment for that sum together with interest at 5% from the date of filing of the proceedings, and costs.

Grounds of Appeal

19. The grounds of appeal are short:

> *"1. The delay of 4 ½ years between trial and decision renders the decision unsafe.*
>
> *2. There was insufficient evidence on quantum to rule in respect of a quantum meruit.*
>
> *3. The quantum Vt 240,000,000 was estimated on a plan said to be double in area to the estimate. The actual plans show (a much smaller area)……"*

Discussion

20. The trial of the action took place in the Supreme Court in July 2010. The judgment was delivered on 11 December 2014, some 4 ½ years later. The delay is most regrettable, but to make out the allegation that the delay renders the decision unsafe requires the appellant to demonstrate how the delay could render the findings of the trial Court unsafe. Where findings of disputed fact critical to the reasoning of the Court are based on findings of credit, which in turn are influenced by the Court's assessment of witnesses and their oral evidence, delay may well affect the Judge's memory of those matters, and the fact-finding process. However, even then the risks associated with delay may be overcome, or largely so, by a transcript of evidence or notes made by the Judge during the trial. Where the decision is based on undisputed questions of fact, or issues of law, delay is most unlikely to impact on the quality of the decision making process. The question of delay between trial and judgment was discussed by this Court in Societe de Services Petroliers SA v. Valerie Raynaud and Station Centre Ville Ltd [2014] VUCA 4; Civil Appeal No. 2 of 2014 at [42] – [46].

21. In the present case, whilst delay is said to render the judgment unsafe, the grounds of appeal do not identify any particular finding of fact that could be impugned on the ground of delay.

22. At trial there was a dispute canvassed in oral evidence over whether the Appellants authorised the design work, and whether they had specified a budget limit of Vt 94 million. Those issues were decided against the Appellants, but not on grounds based on the presentation of the witnesses and their oral evidence. The findings were based on the overwhelming probabilities arising from the undisputed conduct of the parties during meetings that extended throughout the process of settling on concepts and working on the

design plans. There was dispute whether the project budget was agreed for the purposes of interim billing. The resolution of that dispute may have turned partly on the Court's assessment of the oral evidence and partly on documentary evidence, but it was in the end resolved in the Appellants' favour.

23. Importantly, for the purpose of this appeal no finding of fact is challenged that is not supported either by the probabilities of the matter or the undisputed documentary evidence in letters and minutes of meetings. The second and third grounds of appeal challenge the sufficiency and quality of the evidence on the quantum of the claim, but that challenge is based almost entirely on inferences and conclusions to be drawn from documents. There is a challenge to the value of the very general evidence given by the Respondent about its time/cost analysis, but apart from noting the Appellant's criticism of that evidence it was not the subject of specific analysis in the findings by the Judge that could be rendered unsafe by the delay in giving judgment.

24. The first ground of appeal is not made out.

25. The second and third grounds of appeal attack the amount of the judgment. The finding that the claim was to be resolved by a quantum meruit assessment is not challenged. The general complaint is that there was insufficient evidence to make a quantum meruit award.

26. We do not agree. The documentary evidence unequivocally detailed how the proposed fees were to be determined. Even though the construction was not carried out so as to enable final adjustment, the estimates made by the Respondent and clearly recorded in letters and minutes provide a guide that the Court was entitled to utilise either as a check

against other evidence or as the basis for an assessment in the absence of other better evidence. There was also evidence from the Respondent on the topic of time costing. As noted, that evidence was of a very general nature but nevertheless it was evidence before the Court. In the absence of further evidence, the Court was entitled to take this into account, discounting it if appropriate for the lack of precision in its presentation. The combined evidence on both the percentage fee estimate and the time/cost analysis provided a basis for an assessment. The Court would have fallen into serious error if it had simply dismissed the claim as unsubstantiated. The evidence was there, and the Court had to do the best it could to arrive at a fair assessment.

27. At trial no issue was raised about the accuracy of the Respondent's statement that the decision to move from a one-level to a two-level dwelling approximately doubled the size, or about the estimated initial floor area of 1,440 m2, or about the increase in estimated cost from Vt 124 million to Vt 220-Vt 260 million in consequence of the change. It seems to have been assumed at trial that there had been an approximate doubling of the size of the house which meant that the floor area had become approximately 2,880 m2 with a consequent doubling of approximate cost; hence the proposed budget cost of Vt 240 million. Nothing in the submissions of counsel at trial, and nothing in the judgment, challenged this assumption.

28. A challenge is for the first time made in ground 3 of the notice of appeal. A written submission filed by the Appellants analyses the floor areas depicted on the two storey plans. Using the measurements stated on the plans, the floor areas ascertainable from them are said to show 773.6 m2 on the ground floor and 568 m2 on the first floor – in all 1341.6 m2. If the pool area is added (and there is an issue whether the pool should be included) an area just under the original estimate of 1440 m2 is arrived at. The

Appellants support the conclusion that the floor area has been grossly inflated in the presentation of the Respondent's case by reference to Minutes of a project meeting between the parties held on 17th June 2005 which was well after the decision to move to a two-storey house was made. The Minutes record that plans for both levels were discussed at the meeting. Then under the heading "**OTHER**" the minutes record:

> *"4.2 Cost – Floor area estimated:*
>
> - *Garaging/service courtyard 200m2*
> - *Ground Floor 500m2*
> - *First Floor 300 m2*
>
> *(The appellants) approve continue to develop concept design in accordance with the proposed area. (Respondent) to revise project cost estimates at the end of the concept design stage. (Respondent) to invoice monthly for percentage of stage completed."*

29. The Appellants point out that these estimates do not include floor area of a guest house which adds another 192 m2 to give a total of 1,192 m2 floor area. If the pool is to be added, the area becomes close to 1,300 m2.

30. Notwithstanding the information recorded in the above minute, monthly invoices, the first of which was rendered on 4th July 2005, were based on a project budget of Vt 240 million. The Appellants now argue that the budget estimate was grossly inflated and, based on the original cost estimate of Vt 124 million for an area of 1,440 m2, an appropriate project budget should have been Vt 120 million not Vt 240 million. On this reasoning the Appellants contend that the fees for which they were invoiced should have been halved. They were invoiced in all for fees of:

80% of 5.24% of Vt 240 m - Vt 10,060,800.

The Respondent's fees are subject to 12.5% VAT, so the total invoiced to the Appellants was:

Vt 10,060,800 + 12 1/2 %	=	Vt 11,318,400
Less one payment		Vt 2,829,600
Net claim	=	**Vt 8,488,800**

This was the figure for which judgment was given. On the Appellants' present argument, raised for the first time in this Court, the correct position would be:

Fee claim Vt 11,318,400 ÷ 2	Vt 5,659,200
Less one payment	Vt 2,829,600
Adjusted fee claim	Vt 2,829,600

31. As the Appellants' present argument based on the proposed revision of the floor area and the consequence revision of the estimated project budget was not considered at all in the Court below, it was not the subject of direct evidence or cross-examination.

32. This Court must be very cautious how it treats the extraction by counsel of conclusions from documentary evidence which have not been examined in the Court below, especially where the extraction of the floor areas from plans is an exercise that should ideally be done by a person skilled in doing so. However, in this case whilst we must recognise the need for caution, no criticism of the floor area recalculation has been made by the Respondent in its submissions, and an examination of the plans appears to support the Appellants' submissions as to the floor area.

33. The Respondent's response to the introduction of this new approach to the claim by the Appellants is to stress that even if the floor area was not increased significantly by the concept change from one storey to two storey, the change in design work and anticipated construction costs would not be a simple projection of the area cost for a single floor concept on a square metre basis. Additional costs were likely to be involved because of new complexities in having two storeys. Absent the benefit of evidence from witnesses with appropriate skills in measurement of floor areas and construction costs, this Court must exercise particular care not to draw conclusions that give the Appellants' submissions more weight than the quality of the actual evidence before the Court warrants.

34. The Respondent acknowledges the lack of precision in its time/cost evidence, but relies nonetheless on the Judge's finding of satisfaction that even if legitimate criticism can be made of that evidence, a time costing would substantially exceed the claim as made based on a percentage of the project budget.

35. It seems to us that the Judge's understanding of the case, as it was presented to the Court, is that the two-storey building was about double the size of the initial concept. For that reason it justified a project budget approximately twice the amount which inferentially involved much more work.

36. Whilst we must proceed cautiously in acting on the Appellants' floor area submissions, we are satisfied that the difference in areas between those assumed by the parties and the Judge at trial and those now apparent from a close consideration of the plans warrants a reassessment of the Respondent's claim. To this extent we consider the appeal should be

allowed as the floor area issue which now seems to be of considerable relevance was not an issue considered by the Judge.

37. If the floor area in the design plans is in the order of, or close to, the floor area of the concept on which the original project budget was estimated, the monthly invoices which informed the judgment amount would have been much closer to the figure now advanced by the Appellants. As set out above that figure is in the order of Vt 5.7 million. But as we have stressed, care must be taken not to give too much weight to this submission as it has not been the subject of examination in the Court below.

38. In written submissions in the Supreme Court counsel for the Respondent noted that in cross-examination the Respondent conceded that its time/cost analysis showed that the real cost of the work done, on the scales used by the Respondents, was between Vt 7-10 million. As the Judge noted, some criticism of the Respondent's evidence was made at the trial and the vagueness of that evidence was the subject of criticism before this Court. Nevertheless the Judge took it into account as a check against the amount awarded finding that the time/cost analysis would substantially exceed the amount he awarded. This finding seems to overlook the Respondent's concession in cross-examination that the *"real cost"* could have been as low as Vt 7 million.

39. Given the vagueness of the time/cost evidence, and the fact that the floor area issue was not the subject of examination in the Court below, a reassessment of the claim, if made by this Court, must necessarily be on a broad-base approach. The alternative would be for this Court to remit the matter to the Supreme Court to reassess the quantum meruit claim. Neither party is attracted to this course which would subject both sides to considerable costs, more delay until the assessment could take place, and then give rise to

the possibility of another appeal if there was dissatisfaction with the new award. Moreover, it seems that an important witness for the Respondent may in the meantime have left the jurisdiction.

40. In these circumstances we have decided that we should proceed to make an assessment so that the matter is resolved. We consider that the quantum meruit entitlement of the Respondent should be fixed at Vt 6 million. This is somewhat above the figure for which the Appellants argue but takes into account the matters of concern about it which we have identified. The figure is somewhat below the range of the time/cost estimate of the Respondents but takes into account the criticism made of that evidence by the claimants.

41. To the figure of Vt 6 million must be added VAT to give an overall fee claim of Vt 6,750,000. From this must be deducted the one payment of Vt 2,829,600. Judgment will therefore be entered in favour of the Respondent for Vt 3,920,400.

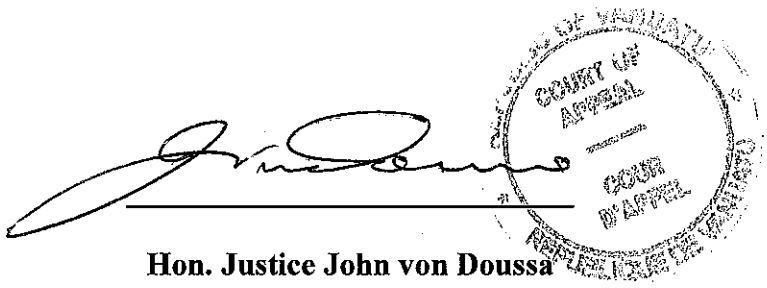
42. The judgment will carry simple interest at 5% from the date of the issue of proceedings in the Supreme Court.

43. The Respondent is entitled to its costs on the standard scale in the Supreme Court.

44. In this Court, the Appellants have been partly successful, and in the ordinary course costs would follow the event of success. However the success is based entirely upon an argument that was not developed by the Appellants in the Court below. In these circumstances we consider there should be no order as to costs between the parties in this Court.

DATED at Port-Vila this 8th day of May, 2015

BY THE COURT



Hon. Justice John von Doussa

Justice of the Court of Appeal