IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 244 of 2014

BETWEEN: SUPERCOOL VILA Ltd
Claimant

AND: TIDEWATER HOLDINGS Ltd
Defendant

AND: KRAMER AUSENCO (VANUATU) Ltd
Cross Defendant

Hearing: ***1st and 2nd February 2018***
Before: ***Justice Chetwynd***
Counsel: ***Mr Fleming for the Claimant***
Mr Morrison for the Defendant
Mr Yawha for the Cross Defendant

JUDGMENT

1. This case involves a dispute about the air conditioning installed in a new build apartment complex at Port Vila harbour. It involves very little law and its resolution can be achieved by reference mainly to the facts. The Claimant ("Supercool") is a company specialising in the sale, installation and service of air conditioning systems. The Defendant ("Tidewater") is the owner of the new build apartment complex. The Cross Defendant ("Kramer") is a company providing building consultancy services.

2. In 2011 Kramer submitted a quotation to Tidewater for the design and documentation of all aspects of the new build apartments. The quotation is dated 23rd March 2011 and a copy can be found at annexure "A" of the sworn statement of Shane Harris filed on 24th August 2016. Also part of that annexure "A" is a copy of Kramer's fee proposal dated 25th March 2011. From those two documents we can ascertain exactly what Kramer agreed to provide.

3. Sometime in September 2011 there were discussions between Tidewater and Supercool about the installation of air conditioning at the apartment complex. On 21st September Supercool wrote to Tidewater with a quotation. That document should have been annexure "D" to the sworn statement of Avinesh Narayan filed in April 2016. Unfortunately some copies of the sworn statement do not have the quotation at "D". Some have a copy of annexure "F" there instead. Annexure "F" is a letter dated 28th October 2011 which details a variation on the quotation. From these two annexures we can ascertain what Supercool agreed to provide.

4. The building work proceeded and Supercool installed the air conditioning. There was a problem with the air conditioning in part of the apartment complex. In simple terms the air conditioning did not cool the affected areas to the satisfaction of Tidewater. Tidewater refused to pay the balance owing on Supercool's invoices.

Tidewater say they employed Supercool to supply and install an air conditioning system which was compliant with Kramer's drawings, layouts and design and appropriate to meet Kramer's specifications and which provided satisfactory levels of air conditioning to the premises. Supercool says that is exactly what it did.

5. Tidewater also says that if Supercool's claim is successful against it; it should be entitled recover any damages it is ordered to pay from Kramer. In reply Kramer says neither Tidewater nor Supercool complied with the drawings and specifications it provided. Had they done so, the air conditioning would have worked satisfactorily. Kramer denies any liability to anyone.

6. It is first necessary to establish what Supercool agreed to do. As mentioned above that can be ascertained from the letters dated 21st September 2011 and 28th October 2011. The 21st September letter says that as per discussions and, *"based on the layout and design provided"* and, *"based upon the schematic layout"* given to Supercool, it would install the air conditioning equipment for a price of VT 12,645,043. The letter provided details of the units it proposed to install. On October 3rd 2011 the project manager for Tidewater (Mr Philip Neill) replied by letter. The letter said, *"We are pleased to accept your quote to supply and install air-conditioning on our new apartments. We accept your price of 12,645,043 vatu plus vat for the work outlined in our drawings and specifications."*

7. There is no dispute the drawings provided to Supercool and upon which it based the quotation are drawings provided to Tidewater by Kramer. There were 5 drawings produced in evidence numbered MO1 to MO5. MO1 is entitled Mechanical Services Schedule of Equipment & Legend Sheet; MO2 Mechanical Services Ground Floor Plan; MO3 Mechanical Services First Floor Plan; MO4 Mechanical Services Air Conditioning Control & Refrigeration Schematic and MO5 Mechanical Services Typical Details.

8. The letter of 28th October 2011 is headed, *Variation on Air conditioning equipments.* The letter refers to discussions having taken place and provides a re-quote taking into account the use of a cassette ducted system instead of high wall mounted units. There is no written evidence the re-quote was accepted but at the same time Tidewater do not deny they did accept the new quotation.

9. I accept the evidence from Supercool that the quote it prepared was based on only on the drawings from Kramer. It was never given a copy of a document entitled Tender Specifications. There has been no explanation as to why the document was not provided. I accept the evidence that Supercool only became aware of the document when it was produced as an exhibit in these proceedings. I cannot be sure that the document was sent to Tidewater but Mr Philip Neill's evidence suggests that it more than likely was as he received an envelope containing paperwork including the 5 drawings MO1 to MO5

10. At this time it is prudent to look at the pleadings. The claim is that Supercool has done the work it was contracted to do but has not been paid. The defence filed in August 2014 contains many admissions. It also says Tidewater relied on the *"skill and expertise"* of Supercool to supply and install a system which *"was compliant with*

Kramer Ausenco drawings and the layouts and design provided" and was *"appropriate to meet the Kramer Ausenco specifications and provide satisfactory levels of air conditioning".* The defence does not say in what respect the system installed by Supercool was not compliant with the drawings etc and in which way it failed to meet the specifications. Nor does the defence expand upon failure to provide satisfactory levels of air conditioning.

11. The cross claim filed asserts that Kramer was engaged to provide and prepare *"drawings and specifications"* for an air conditioning system. It further asserts there was an implied condition that the drawings and specifications would result in an air conditioning system which would *"satisfactorily air condition the premises".* Tidewater says Kramer failed to meet the terms of that implied condition.

12. In the defence to the cross claim by Kramer there is both an admission and a denial that there was such an implied condition. I do not think there is any doubt that in contracting to design a system Kramer would be bound to design a system that would be effective. What Kramer says in addition is that if there was such an implied condition as set out by Tidewater the drawings and specifications would have provided a system which would satisfactorily air condition the premises. The reason why there is a problem is that neither Tidewater nor Supercool complied with the drawings and specifications.

13. The evidence in Court from Mr Phillip Neill was that to the best of his knowledge the air conditioning units installed by Supercool were in accordance with the plans provided and the quotation given and accepted. As project manager for Tidewater one would have to accept that evidence as compelling.

14. There is no doubt that in my mind that Supercool fulfilled its part of the bargain by installing air conditioning units in accordance with the plans provided to it. Tidewater says that despite Supercool completing the installation in accordance with its contractual obligations the air conditioning was/is unsatisfactory. The complaint relates to part of the building only, the upper area and master bedroom. As has already been mentioned it was/is because the air conditioning was unsatisfactory in that regard Tidewater refused to pay Supercool the balance owing.

15. The questions to be asked and answered are; is the air conditioning unsatisfactory and if so why ? There does seem to be broad agreement the upper area cannot be sufficiently cooled by the units installed. Evidence from Tidewater referred to a sauna ! Both Supercool and Tidewater argue the design provided by Kramer was flawed and that is why the air conditioning is unsatisfactory.

16. There clearly was a problem and there is some evidence to suggest that at some stage Kramer miscalculated what was needed to keep to upper area and master bedroom at a *"sensible"* temperature. There is a chain of emails passing between someone called Bernie from a firm or company called Vila Refrigeration and Danny Amanaki, an employee of Kramer. It was confirmed in evidence that Bernie was a Mr Bernie Craine The evidence also suggests that Vila Refrigeration were interested in quoting for the work and the Emails date from July 2011 before Supercool's involvement. On July 12th 2011 Bernie Emails Mr Amanaki. He has a query about the air conditioning designed for the living/kitchen area of Unit 1, (this is accepted as the problem area by everyone involved). On the floor below Bernie points out there are

two rooms and the calculation produced by Kramer requires a load of 12.2 kW for each room. For the same area covered by the two rooms on the floor above the schedule of air conditioning units shows a load of 10.7kW. Bernie quite logically asks if the same area on the upper floor should have a load 24 kW instead of the 10.7 kW in the design schematics.

17. The queries relate to units in the schedule (this appears on drawing MO1) with references FCU G.2 and FCU G.10 (for the ground floor) and FCU 1.2 (on the first or upper floor. The areas can be seen on drawings MO2 and MO3.

18. Mr Amanaki refers the query to the air condition designer. In short the answer given by the designer says that his design is correct and that the load required on the upper floor is less because there will be fewer people using the area 6 as opposed to 15. He does this by counting the number of seats shown on the plan. He also states, *"In our design criteria the no. of people (occupancy) play a vital role in determining the heat load for a specified area".* The designer concludes that he has double checked his design and he re-confirms that, *"...there should not be any issue with the 10.7kW catering for the living area on Level 1".*

19. During cross examination Mr Shane Harris for Kramer accepted the explanation from the air conditioning designer was wrong and that the calculations were flawed. However, Mr Harris maintained that the units installed by Supercool did not meet the specifications set out by Kramer in the Tender Specifications and drawings. His somewhat confusing evidence was that despite the kW ratings of all the units installed by Supercool exceeding that required in the design plans the installation was defective. He agreed that the design requirement for the upper floor of 53 w/M^2 was inadequate. He agreed that a requirement of 150 to 170 w/M^2 was appropriate. According to Mr Harris the main problem was the capacity specified by Kramer of entering air temperature 24° C dry bulb and 17° C wet bulb for the units was not met. This, he said, could have been avoided if the quotation by Supercool had been given to Kramer to consider and it would have been able to advise on the planned installation.

20. Mr Harris was critical of the report provided by Supercool from a New Zealand company (the Temperzone report). He did however appear to accept the main conclusion of Mr Baker in the report that the installed equipment exceeded the scheduled capacities as per the Kramer drawings. He was ambivalent as to the finding that the Kramer specified *"sensible capacity figures were below the required ratings to maintain cooling setpoints".* In simple terms the design was flawed and probably based on incorrect values.

21. I find that the Temperzone report accurately and fairly set out the problem. The air conditioning units installed by Supercool met, and in most cases exceeded, the scheduled capacities required by the Kramer design. It was the design that was at fault.

22. There are other reports referred to in Mr Harris's sworn evidence (see annexures D and E) but they were of no real assistance. That at D was a report which was said to show the inadequacies of the air conditioning but which carry comments to the effect that wet bulb temperatures are unreliable and dismissed. The report by

Tradeair at annexure E was short on detail as to how tests were carried out and have no explanations. For these reasons I much prefer the Temperzone report.

23. That is not an end to the matter though. There is a suggestion in the defence by Tidewater that Supercool should have done something more than simply install the air conditioning units as per the Kramer drawings. This is the implication in paragraph 4 of the defence when Tidewater avers it *"relied on the skill and expertise of the Claimant"*. In his sworn statement in support of the defence and cross claim (filed 14th June 2017) Mr Neill repeats that averment and adds he denies Supercool was told not to apply its expertise to the project. He denies that Supercool was "*ever told it should not offer any advice as to the capabilities of the subject units.*" Mr Hobbs in his sworn statement states he was unaware of any express request the Claimant not advise as to the capabilities of the units as in the mechanical drawings. The implication is Supercool should have realised the inadequacies of the design and advised alternatives. However, all that Supercool was asked to do was to quote for the installation of the units as per the plans, not to quote for designing and installing a system. As referred to earlier (paragraph 13 above), Mr Neill confirmed in his evidence Supercool had installed the units in accordance with the plans and the schedule provided by Kramer. There was no obligation on Supercool to do anything else.

24. I do not accept the submissions of the Cross Defendant Kramer that Mr Neill was lying in any part of his evidence. Nor do I accept the evidence of Mr Harris and the submission based on that evidence. However, he raises the issue of the entering air temperature capacity (see paragraph 19 above) and says in effect that had Tidewater given the tender specifications to Supercool it could have installed units which would have been adequate. He complains that Mr Neill could not possible say the installation was in accordance with the design specifications if Supercool were not given the tender specifications to refer to.

25. There is possibly some merit in that point especially as there is no specific explanation from Tidewater as to why the document was not part of the documentation given to Supercool. The proposal and fee proposal from Kramer (i.e. what work it was going to do for Tidewater) has already been identified (annexure "A" to Mr Harris's sworn statement, see paragraph 2 above) and that does refer to both conceptual and development design documentation and to detailed design and tender specifications.

26. There is no explanation as to why the Supercool quotation was not passed to Kramer to vet but the reason is self-explanatory. Kramer was not employed to do anything other than provide designs. Kramer was not employed to supervise the tendering process. Indeed, when Tidewater wrote and accepted Supercool's quotation it referred to "*our drawings*" (see paragraph 6 above).

27. Applying the little law that is required in this case to the facts it is plain to see that Supercool has fulfilled its side of the bargain it made with Tidewater. It has supplied and installed air conditioning units "*based on the layout and design provided*" and, *"based upon the schematic layout"* provided to it by Tidewater. There is no complaint the units were or are defective in themselves; that they do not work. There is no complaint about the installation process except that Tidewater produce a report some 5 years after installation which refers to a lack of insulation on pipes in some places, incorrectly fitted filters and installation of some units in inappropriate inefficient

places. I disregard the report completely and point out that so far as inappropriate and inefficient placement is concerned, it contradicts other evidence from Tidewater. The complaint is the units installed, although meeting or exceeding the specifications in the drawings, do not provide satisfactory air conditioning.

28. Supercool was obliged to use reasonable care and skill in carrying out the work but that obligation did not require it to comment on the design it had contracted to install unless the design was palpably defective. In its quotation Supercool provided detailed information about the equipment it proposed to install and subsequent reports have determined the equipment exceeded the capacities specified in the design. In the circumstance Tidewater must pay the agreed price for the work done. The Claimant, Supercool, succeeds in its Claim against the Defendant, Tidewater.

29. So far as the cross claim is concerned, there is no doubt Kramer was obliged to exercise reasonable care and skill in designing the air conditioning system. Kramer was not engaged to supervise the work of Supercool and was under no continuing obligation to check the design actually worked in practice or correct any errors [1]. However ,as was said in the more recent case of *New Islington and Hackney Housing Association v Pollard Thomas and Edwards Ltd* [2] per Dyson J;

> *In my judgment, the duty does not require the architect to review any particular aspect of the design that he has already completed unless he has good reason for so doing. What is a good reason must be determined objectively, and the standard is set by reference to what a reasonably competent architect would do in the circumstances".*

The adequacy of the air conditioning in relation to the living area on level 1 was raised by a third party in July 2011. The designer "*double checked*" his design and confirmed, "*...there should not be any issue with the 10.7kW catering for the living area on Level 1".* It is agreed that in fact the designer had applied a wrong value and the design would not provide satisfactory air conditioning in certain areas of the complex (see paragraph 19 above).

30. In my opinion Kramer both failed to exercise reasonable skill and care in designing the system and reviewing that design when a possible flaw in it was pointed out to it.

31. The difficulty for Tidewater is it is not claiming damages for remedying the defects in the design. What Tidewater says is that it can recover what it is obliged to pay Supercool because the design did not provide satisfactory air conditioning. Tidewater limits its claim for loss and damages to the amount it paid to Kramer and any sum it is now required to pay Supercool. I do not follow the logic of that argument. Tidewater has not provided any details about the cost of remedying the defective design. Kramer has proposed removal of the existing units and replacement by upsized units but Tidewater does not say that is what must happen. Tidewater does

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[1] *Brickfield Properties Ltd v Newton* [1971] 1WLR 862 and *London Borough of Merton v Lowe* (1981) 18 BLR 130
[2] *New Islington and Hackney Housing Association v Pollard Thomas and Edwards Ltd* [2000] EWHC TCC 43

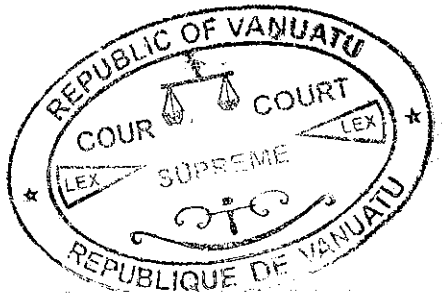
not even suggest that is what is to happen let alone provide details of the costs involved. No evidence has been led or introduced about any remedial work that may have been carried out. In fact, the implication from the evidence that has been introduced suggests nothing has been done to improve the satisfaction level of the air conditioning. It is impossible to see what "*further or other relief*" can be ordered at this time.

32. There is no option but to order Tidewater to pay what it owes Supercool. Supercool has provided invoices showing that 16,259,062 vatu was owed. These invoices can be found at annexure "K" of Mr Narayan's sworn statement. Tidewater does not dispute the amount owed in respect of the main contract or the amounts owed for extra work carried out. Tidewater admits to paying 12,000,000 vatu. Supercool accept 12,000,000 has been paid. What is owed is 16,295,062 less 12,000,000 or 4,259,062 vatu. Supercool is also entitled to recover interest on that sum. There is a modest claim for interest at the rate of 12.5% per annum. Recent Court of Appeal cases suggest that a commercial rate of interest is payable when the parties are in dispute about a commercial venture or contract. Tidewater will pay interest at a daily rate of 1,750 vatu from the date of the last invoice issued (which appears to be 6th September 2012) continuing to the date of payment. I will leave it to the parties to calculate the number of days involved.

33. As indicated, Tidewater is entitled to recover damages from Kramer but the amount is unknown at present because Tidewater have provided no details of what it would cost to put right the faults in the design Kramer provided. This might be limited to remedying the problem affecting the first floor area but I cannot say that at the moment having heard no evidence. It appears to me that so far as the cross claim is concerned I must adjourn for cross claim damages to be assessed. There will need to be further directions given in respect of the assessment of damages.

34. I will adjourn the cross claim proceedings generally in order to give Tidewater and Kramer an opportunity to consider their respective positions. The Cross Claimant and Cross Defendant are granted liberty to restore proceedings on 2 days written notice. If they cannot agree on damages or other resolution of the matter they might like to consider mediation. Hopefully the parties might take some guidance from this judgment.

35. That leaves the question of costs. The main action has come to an end. The Claimant has succeeded as against the Defendant. I see no reason why the usual rule as to costs should not apply. The usual rule is set out in part 15 of the Civil Procedure Rules. The Court has a discretion in awarding costs but as a general rule the cost of a proceeding are payable by the party who is not successful in the proceeding (see rule 15.1(1) and (2)).



36. The parties are entitled to agree costs if they so wish. If there is no agreement the costs will have to be taxed. The basis of the taxation is a discretionary issue for the Court as well. This case has been going on since 2014. There has been some delay but I do not believe this is attributable to any one party. It may be that the original claim caused some difficulties with the amount of interest involved but that has not been put forward by anyone. In all the circumstances the Claimant Supercool's costs will be taxed on a standard basis and paid by the Defendant Tidewater.

37. I am unable to deal with the costs in the cross claim at the moment. I have not heard argument about costs as between Tidewater and Kramer but my initial view is that Kramer will end up paying Tidewaters costs of the cross claim. Again that is likely to be on a standard basis. A final decision will have to wait until the assessment of damages has been completed.

DATED at Port Vila this 22nd day of February 2018.

BY THE COURT

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU

D. CHETWYND
Judge