

**BETWEEN: Tidewater Holdings Limited**

*Claimant*

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

*Defendant*

**Date of Hearing:** 25<sup>th</sup> August 2022  
**Date of Judgment:** 9<sup>th</sup> September 2022  
**Before:** Justice Oliver Saksak  
**In Attendance:** Mr Nigel Morrison for the Claimant  
Mr Mark Hurley for the Defendant

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**JUDGMENT**

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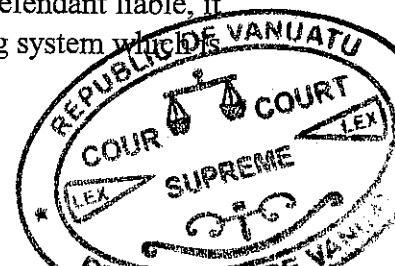
**Introduction**

1. This is a claim of damages by Tidewater Holdings Limited (Claimant) against Kramer Ausenco (Vanuatu) Ltd (the defendant) as the designer of an air conditioning system.
2. The claim is for the total sum of VT 8,546,072 made up as follows-

Total payment by Claimant to defendant -	VT 6,879,075
Interest of 5% per annum- 486 days-	VT 570,072
Costs taxed and agreed-	VT3,497,447
Part A2 (iii) – Rint Report – to replace air-conditioning	VT 2,850,000
3. The claimant's unquantified claim was not pursued by the claimant.
4. The overall total claim against the defendant was VT 30,651,34.

**Defence**

5. The defendant denies liability for damages for the total amount claimed by the claimant on ground that the claim is time-barred by clause 7 of their contract.
6. In the alternative, the defendant says if the Court finds the defendant liable, it should be liable for the cost of rectifying the air-conditioning system which



no more than VT 2, 653,531, or the sum of AUD\$ 100,000 under clause 6 of the contract which is approximately VT 8,171,317.12.

### **Background**

7. On 23<sup>rd</sup> March 2011 the defendant submitted a quotation to the claimant for an air conditioning system design in a new building in Port Vila.
8. On 25<sup>th</sup> March 2011 the defendant subsequently submitted an updated proposal to the claimant in addition to the services the subject of the proposal, the engineering consultancy and architectural, structural and civil design services for the building.
9. The updated proposal relevantly stated:
 

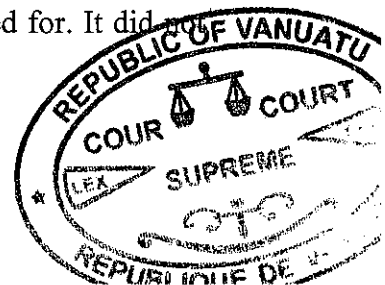
*"Fees and Commercial Terms:*

  - (i) *"Conditions of Engagement of Professional Engineering and/or Alleged Technical Services...."*
  - (ii) *"Conditions of Engagement of Professional Engineering and/or Alleged Technical services.*
    - a) *"Clause 4:*

*The client shall pay to Kramer Ausenco the Fee and Reimbursable Expenses as set out in the accompanying letter."*
    - b) *"Clause 6:*

*The liability of Kramer Ausenco to the client in respect of the project shall be limited to the cost to rectify the works the subject of the commission, or the sum of AUD4100,000,00 ( or its equivalent as at the date of appointment) whichever is lower."*
    - c) *"Clause 7:*

*No action shall lie against Kramer Ausenco at the suit of the client after the expiration of one (1) year form the date of invoice in respect of the final amount claimed by Kramer Ausenco pursuant to Clause 4"*
10. In late March 2011 the claimant accepted the updated proposal contract.
11. In or about October 2011 the claimant contracted Supercool Vila Limited to install the air-conditioning units in accordance with the design produced by the defendant.
12. The claimant paid Supercool Vila Limited VT 8,562,805.
13. After Supercool had installed in or about November 2012, it was discovered that the air-condition did not perform the task it was designed for. It did not provide cooling to the premises.



14. In order to avoid Court proceedings the representatives of the parties met on site to view the problem to try and determine a resolve, however neither the defendant nor Supercool Limited accepted responsibility for the failure.
15. Both the defendant and Supercool Limited then engaged experts to assist to determine and resolved the problem and associated tests to were carried out over a period of time.
16. No resolution was reached. The defendant and Supercool Limited bolstered their beliefs that they were not the cause of the problem, resulting in the clamant ceasing to make further payments to either of them until the problem was determined and it was known who was entitled to payment.

### **Supreme Court Proceedings**

17. This gave rise to Supercool Limited instituting a claim on 15<sup>th</sup> July 2014 against the claimant in Civil Case No.244 of 2014.
18. Tidewater Holdings Limited issued a cross-claim against Kramer Ausenco Limited.
19. On 1<sup>st</sup> February 2018 the Supreme Court heard the claims and decided on 22<sup>nd</sup> February 2018 that Kramer Ausenco limited was the “ at fault” party. The Supreme Court said at [33] of its judgment:

*“ Tidewater is entitled to recover damages from kramers”.*

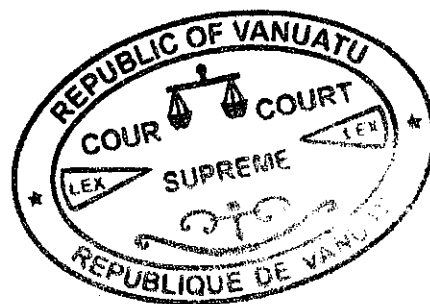
### **Court of Appeal Proceeding**

20. The defendant appealed to the Court of Appeal in July 2018. The Court of Appeal upheld the Supreme Court decision and found the claimant liable to Supercool Limited and reaffirmed Kramer’s responsibility for the failed air condition system. At [13] the Court of Appeal said:

*“ The appeal is dismissed. It was a hopeless case with absolutely no prospect of success.”*

### **Evidence**

21. The claimant relied on the evidence by sworn statements of John Hayden filed on 30<sup>th</sup> June 2016, of Andrew Hobbs filed on 1<sup>st</sup> July 2016, of Carina Rint filed on 31<sup>st</sup> August 2020 in Civil Case 244/14 and a further sworn statement of Andrew Hobbs in response to the statement of Jay Jameson filed on 27<sup>th</sup> April 2021 in Civil Case 1661/19. These statements were agreed into evidence by Counsel without cross-examination, save for Ms Rint who was cross-examined on her sworn statement. The statements were tendered into evidence as Exhibit C1, C2, C3, and C4 for the claimant.
22. The defendant relied on the evidence by sworn statement of Jay Jameson filed on 30<sup>th</sup> September 2020 in Civil Case 1661/19.

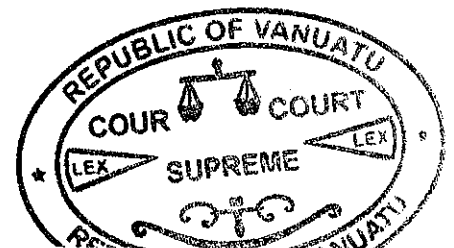


### The Issues

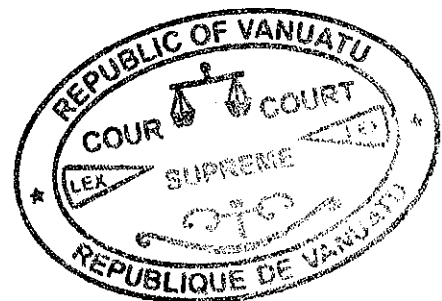
23. From the submissions of both the claimant and the defendant I identify the following issues-
- a) Is the claimant entitled to damages.
  - b) If so, how much?
  - c) Is the claim for damages time-barred?

### Discussion

24. The facts are not in dispute. The issues are legal issues founded on contract and the law of contract.
25. I determine first the issue of whether or not the claimant is entitled to damages?
26. It is common ground the Supreme Court judgment of 22<sup>nd</sup> February 2018 at [33] said:
- " 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...."*
- The claimant is therefore entitled to damages.
27. Before determining the second issue of how much, I deal first with the third issue of time limitation.
28. The defendant argued and submitted the claim for damages is time-barred by clause 7 of the contract.
29. Mr Morrison on the other hand submitted that Clause 7 of the contract does not apply to the damages claim of the claimant because it is founded in contract and pursuant to section 3 of the Limitation Act, therefore the period is 6 years. Furthermore Mr Morrison submitted it would be unconscionable to enforce a one year time-bar when the design by Kramer was never used but infact found to be faulty.
30. I accept the submission by Mr Morrison. From the evidence, the fault was known to Kramers in November 2012 after installation by Supercool Limited. However Kramers and Supercool Limited could not accept responsibility until 22<sup>nd</sup> February 2018 when the Supreme Court found Kramers were at fault. Even then that was after some 7 years had lapsed. Had they accepted responsibility in November 2012 and resolved to remedy the fault, it would have done so within the one year time period and it is likely this litigation would have been avoided.
31. I accept the submission by Mr Morrison that the claim for damages is found in contract and the period of limitation is 6 years. Clause 7 of the contract is therefore not applicable and is not of assistance to the defendant's defence.




32. Mr Hurley relied on the case authorities of **Trustees International Limited v Potts** [2018] VUCA 45. This case is distinguished on its facts and circumstances. It was a case involving allegations of breach of trust and a failure to exercise sufficient care in protecting the interest of Robert Potts in a leasehold property. There was no time limitation in Clause 4.2 referred in paragraphs 52 and 54 of the judgment.
33. Further the defendant relied on the Australia case of **Bellgrove v Eldridge** [1954] HCA 36. This case too is distinguished on its facts and circumstances. It does have some resemblance to this case in that it involved contract law for the erection of a house. There was a breach by the builder laying faulty foundations, resulting in instability of structure and demolition and reconstruction.
34. The measure of damages had to be determined as a question of fact as to remedial work that would be seen as "*necessary and reasonable*".
35. The claimant is claiming VT 2,850,000 as remedial or rectification costs.
36. The defendant in its defence pleaded in the alternative that pursuant to clause 6 of the contract any liability to Kramers should be limited to the costs of rectifying the air conditioning system in the sum of VT 2, 653,531.
37. By implication the defendant has accepted that VT 2, 265,531 is a necessary and reasonable costs to be awarded to the claimant. Therefore the **Bellgrove** case actually assists the claimant's position.
38. Furthermore the defendant has pleaded an alternative defence that should Kramers be found to be liable, liability should be limited to AUD\$100,000,00 which is VT 8,171,317.12 approximately. That is VT 374,755 short of the amount being claimed by the claimant.
39. The amount of VT 8, 171,317 almost basically covers the claimant's cross-claims in paragraph 9 (i), (ii), (iii), and (v) same for a shortfall of VT 374,755. But it is a necessary and reasonable amount taking into account total claim is for VT 30,651,340. The claimant's uncompensated losses would be VT 22,480,023.
40. The claimant and the defendant are bound contractually by clause 6 of their contract and the Court must apply that clause in the circumstances of the claimant's cross-claim against Kramers.
41. Accordingly I grant judgment in favour of the claimant and award damages in the sum of VT 8,171,317.
42. To cater for the shortfall of the claimant's claim, I allow interest of 5% per annum from 22<sup>nd</sup> February 2018 until the judgment is fully settled.

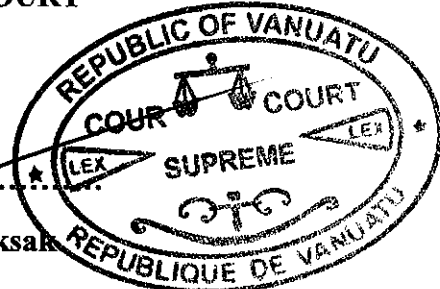


43. I will hear Counsel further in relation to costs.

**DATED at Port Vila this 9<sup>th</sup> day of September 2022.**

**BY THE COURT**

  
.....  
Oliver Saksak  
Judge



The seal of the Supreme Court of Vanuatu is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. Inside the ring, the words "COUR" and "COURT" are positioned on either side of a central scale of justice. Below the scales, the word "SUPREME" is written in a larger font. Two banners, one on each side, contain the word "LEX". The seal is stamped over the signature and name of the judge.