

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

Civil Case No.156 of 2006

BETWEEN: KRAMER GROUP

Claimant

AND: BILLCHAM AND TANA CHAM

Defendant

Coram: Vincent Lunabek Chief Justice

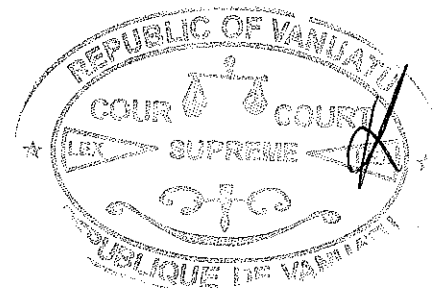
Counsel: Mr Nigel Morrison for the Claimants

Mr John Malcolm for the Defendants

JUDGMENT

Introduction

1. The Kramer Group is a company which provides architectural, engineering, and project management skills. They say they were asked by Mr. and Mrs. Cham to design them a substantial house at Devil's Point Road. Kramer says that a fee based on the estimate of cost to build the house that Cham's specified was agreed. The fee was payable in installments as each phase of the project was completed.
2. In the alternative Kramer submits if the Court finds that a fee was never agreed between the parties then the Kramer should be paid on a quantum meriut basis for the work that Cham's agreed should be done.



3. The Cham's case is that there was never an agreement as to the quantum of fees payable to Kramer for the design of the house. They say they have paid Kramer for all the work that they authorized Kramer to undertake. Kramer says that the outstanding fees are VT 8.488.810 and that on a quantum meruit the amount of the fee payable by the Chams would be the same.

Background

4. In 2004, Kramer and the Chams met to discuss the Cham's desire to build a house on Devils Point Road. As a result of the discussions Kramer wrote to the Chams on 17th December 2004 confirming that what had been discussed was the construction of a single storey house with a swimming pool for the Chams. The total floor area was to be 1.440 square meters. The cost was estimated at VT 124.000.000. The letter noted that the fees payable to Kramer were divided into the design and documentation fee and the contract administration fee. The total fee was to be a percentage of the estimated house cost adjusted for the actual cost of building the house when completed. The fees were estimated at approximately VT10.000.000.
5. By April 2005, the house design had significantly changed. A larger house was involved with two storeys. In an email of 27th April 2005, from Kramer to the Chams, Kramer asked if the fee proposals previously advised could be confirmed by the Chams. Subsequently, the parties discussed the fee proposals. Kramer had suggested a fee based on a total of 12.5% calculated initially on the estimated cost of the house and finally adjusted for the actual cost of the house as built. Further discussion followed about the house and the proposed fee. Kramer noted



that the scope of the works now proposed by the Chams had substantially increased and that the house was nearly twice the original size.

6. Kramer advised the Chams by letter of 12th May 2005 that the estimate of the cost of the house had now risen to between VT 220 million – VT 260 million. Further discussion and negotiation occurred between Kramer and the Chams about the basis on which Kramer would charge its fees. Eventually Kramer agreed to reduce their fees to 5.24% for the design phase and 2.76% for the construction phase making a total fee of 8% of the actual cost of the building.
7. The Chams say that while they accepted the adjustment to the fee percentage by Kramer, they did not sign any contract with Kramer committing themselves to any fees because they did not accept the estimate of the house construction cost at between VT220 and VT260 million .
8. The Cham's case at trial was that they only had VT96.000.000 to spend on the house so the construction cost of the house had therefore to be brought back to within that figure.
9. However Kramer believed that the Chams had authorized them to proceed with the concept design phase of the house based on the estimate of VT 220 – VT 260 million with an 8% total fee, Kramer therefore settled on an estimate of the house construction cost at VT 240.000.000 as a middle figure in the estimates.
10. There were regular meetings (often weekly) at this time between the parties about the concept design. Preliminary drawings were made. These drawings seem to have been provided to the Chams as they were



completed. By September 2005, the detailed project drawings were on their way and 50% of these drawings had been completed.

11. During mid 2005 a series of accounts were sent to the Chams by Kramer. The first was on 4th July 2005. That account was for the concept design phase. The account said it was calculated as follows:

“5.24% of VT240.000.000 = VT12.576.000.”

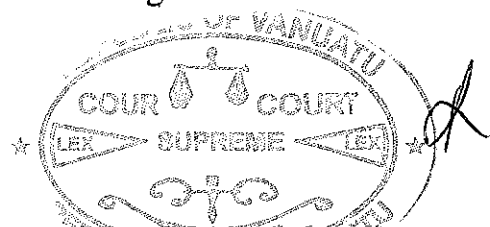
This was the total design fee.

The concept design plans which had been finished by July and was being charged in the 4th July 2005 account was for a 20% of the VT 12.576.000 total design fee. The concept design fee was therefore VT 2.515.200 plus VAT a total of VT2,829,600.

12. The Chams did not respond in writing to the receipt of this account. Subsequently they paid the account.

13. There were further accounts from Kramer in August and November 2005. By the November account, Kramer say 80% of the design work had been completed. The Chams were therefore due to pay fees of 80% of the 5.24% for the design stage of the estimate of the cost of building the house (VT 240.000.000) being a fee of VT 8,488,810.

14. The Chams have refused to pay August and November further invoices. They say they did not agree to build a house costing VT240.000.000 and Kramer's always knew their budget was VT 94.000.000. They say they did not agree to drawings being drafted through to the full design stage nor did they ever agree to pay for any drawings to this stage. The Chams



say that there is no value to them in the drawings completed by Kramer. They should not therefore have to pay anything further for the work done by Kramer.

The Issues

13 The parties agree the issues in this litigation are narrow and are as

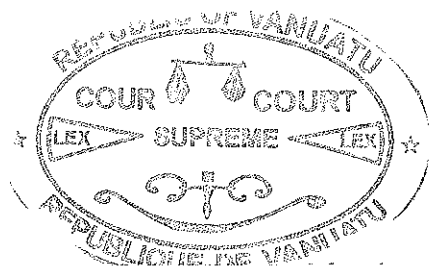
Follows:

- a) Was there a contract between Kramer and the Chams, for Kramer to undertake the full design work plans and specifications on the Chams house? If the answer is no there was no such contract then the Chams were entitled to judgment.
- b) If there was such a contract for the full design work, was the basis of payment 5.24% of the estimated building contract cost of VT 240 million or some other assessment of the contract price?
- c) If there was a contract between Kramer and the Chams for the full design work in (a) but no agreement as to the fee to be charged (as per (b)) what is a fair fee for that work (a quantum meriut)

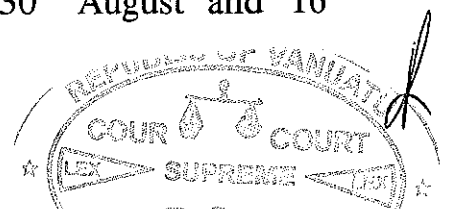
14.I consider each of issues in turn.

Was there a contract for the Detailed Design work

15.I have no doubt that the Chams authorized Kramer to undertake the professional work actually undertaken by Kramer. I am satisfied that Kramer did undertake 80% of the detailed design work required with respect to the house and that the Chams contracted with Kramer for Kramer to do the work.



16. The various reports provided by Kramer subsequent to and for the various meetings with the Chams during the concept design and detailed design phases illustrate that Chams were well aware of the progressing detail of the design of the house undertaken by Kramer. The meetings were held weekly between the parties to discuss the detail of the design aspects of the house.
17. The Chams were well aware what progress was being made by Kramer. For example in their report of August 2005 to the Chams, Kramer noted that they would have completed 50% of the detailed design work by the early September meeting. By September they said the architectural documentation was only a week away. Considerable detail with respect to the design of the house had been discussed and agreed upon between the parties.
18. There can be no doubt therefore that the Chams knew this detailed design work was being undertaken by Kramer. I am satisfied that it was being undertaken at the Chams' request. I am satisfied therefore that there was a contract between Kramer and the Chams for Kramer to provide architectural drafting services and detailed designs services to the Chams.
19. I am satisfied that the parties understood and agreed that the Chams would pay Kramer for these services. I reject the claim by the Chams that all they asked for from Kramer were concept plans. I reject the claim that when these concept plans were provided the Chams paid the July invoice for those plans and no further work by Kramer was authorized. The correspondence from Mr Ananaki the principal of Kramer group, to the Chams after the July 2005 account and the presentation of the completed concept plans make it clear that the Kramer group had moved to the detailed design stage. The correspondence of 30th August and 16th



September from Kramer to the Chams make it clear that the purpose of weekly meetings between the parties was for Kramer to obtain instructions from the Chams and continue to draft detailed designed plans. This correspondence was interspersed with meetings between the parties to better refine these detailed plans.

20. The Chams fully participated in this process knowing it informed of the development of the detailed design plans. I am satisfied that the Chams agreed to the work that was actually undertaken by Kramer that is all of the concept design work and 80% of the detailed design work with respect to the house.

Terms of Payment

21. The next question is therefore whether the parties agreed upon the terms of payment and whether those agreed terms of payment were sufficiently clear. If I am not satisfied that parties agreed upon the terms of payment of Kramer's fee or that any agreement as to the fee was insufficiently certain to be enforceable then given my conclusion the parties agreed that the Chams would pay for all of the work completed by Kramer, then the Chams must pay a fee calculated on a quantum meruit or a reasonable fee for the work done by Kramer.

22. Kramer's case is that the parties agreed that the fee for the work done would be based on a percentage of the project budget and finally adjusted for the construction cost of the house. The fee would be a percentage of each stage of the design and supervision work done by Kramer. It is common ground that Kramer presented various fee contracts to the Chams which the Chams did not sign. Each of the contracts have the same basic premise. Each had a fee based on a percentage of the budget cost with the fee finally determined on the percentage of the actual



construction cost. The initial percentage suggested was a total of 12.5% for both the design and contract and supervision fee. The Chams did not accept this percentage as reasonable and renegotiated a percentage fee of 8% for both the design and supervision of the contract. The design part of the contract was to be 5.24% and the supervision of the construction 2.76%. Given the Chams actively participated in negotiating Kramer's initial fee from 12.5% down to 8% , it is clear that the Chams agreed on the 8% figure. It was their suggested fee, accepted by Kramer.

23. The next question is if 8% is the right figure, what was the agreed construction cost on which the 8% could be calculated? In Kramer's letter of 13th May 2005, which confirmed the new lower percentage of 8%, Kramer said "for monthly invoicing purposes the fee is to be initially based on the project budget and to be adjusted to the final construction cost once it is confirmed".

24. I am satisfied that the Chams did not agree that the house construction could commence with a budget of VT 240 million. Kramer and the Chams proceeded to develop the detailed design phase of the building. I accept that throughout this process the Chams were concerned about the estimated cost for the house. However it was on their instructions the house was substantially increased in size. They must have known that the house they were discussing, amending and approving design plans for was a vastly bigger house than the original single storey property that had an estimated build cost of VT124.000.000.

25. I reject the Chams claim that they repeatedly told Kramer they only had VT 94.000.000 to spend. There would have been no reason nor logic if that was the spending limit for Kramer to have proceeded to commit

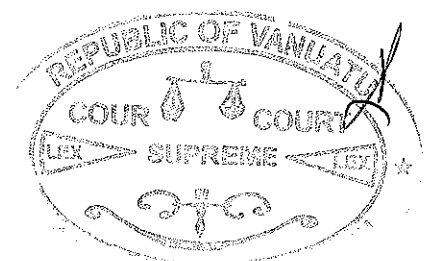


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significant time and resources to the design of a house approved by the Chams which Kramer knew and the Chams had repeatedly said was more than twice their limited budget. It made no sense for the Chams to continue to discuss the design of a house they had been told in writing had an estimated construction cost of VT 240.000.000 if they only had VT 94.000.000 to spend.

26.I note the evidence given on behalf of the Chams that the house that they eventually built cost approximately US\$2.000.000. This is well in excess of their claim that their budget with Kramer was no more than AUS\$1.2,000,000 (or VT 94,000,000).

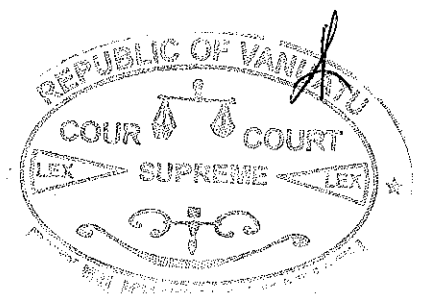
27.I accept however that the essence of the Kramer's proposed fee was a percentage of the actual building cost. Kramer illustrated that this was a common basis for charging for the drawings and supervision of construction management in Australia and New Zealand. In this case however there was no more than an estimate by Kramer of the cost of the completed house. The house has not been built and so the actual construction cost cannot be known. It cannot be said that the Chams agreed with Kramer's estimate of the cost of the house at VT 240 million. The Chams clearly knew that the cost of the house as designed by Kramer would be significantly greater than the original VT124.000.000. But it is apparent that the VT 240.000.000 estimate was no more than a middle figure of Kramer's broad estimate of cost, of the house at the concept design stage at between VT220.000.000 and VT 260.000.000. It is evident that Kramer even by the time most of the design drawings were completed only had a vague estimate of actual cost. There was no evidence to establish that an accurate estimate of the actual cost of the house had been undertaken.



28. Kramer's total design fee was to be based on an estimate of construction cost to be adjusted to the final actual building cost. Even by the time Kramer had completed 80% of the detailed design further significant design, construction and finishing decisions had to be made by the Chams. These decisions could have significantly influenced the final actual cost of the building, either up or down.

29. There is nothing in the Kramer's case or in any of the documentation which identifies any agreement between the parties as to how Kramer's fee would be charged if the building was not commenced and the actual final building cost unknown. While the design fees were based on an estimate cost this was not to be the basis for the final fees as Kramer specifically acknowledged (their letters of 13th May 2005). The actual design fees would be based on the actual cost of the building.

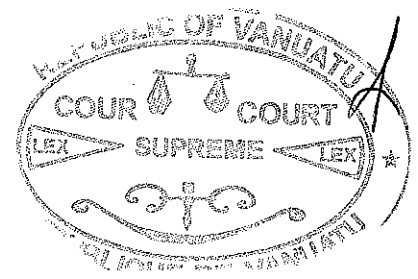
30. In those circumstances I am not satisfied on the balance of probabilities that there was a build cost finally agreed between Kramer and Mr. and Mrs. Cham on which the 8% could be calculated. The parties in discussing Kramer's fee did not provide for the contingency that the house would not in fact be constructed. While the fee of 8% was agreed the parties did not reach an agreement as to the basis on which they would calculate an actual fee based on the 8% if the house was not built. Given that conclusion I must assess a fee for Kramer for the work done based on a quantum meruit.



Quantum Meruit Claim

31. I note with regard to an assessment of quantum meruit that the Chams say the work done by Kramer is of no value to them because they did not use the detailed design work. I have already concluded that the Chams authorized Kramer to proceed with the detailed design work on the house. That work, therefore must be paid for by the Chams. It was the Chams decisions not to proceed with the Kramer design. Kramer as I have noted undertook the design work at Cham's request. They are entitled to be paid for the work. The fact that Chams did not make use of the design work does not affect the quantum meruit claim. The Chams receive the benefits of this work. It was a matter for them how if at all they used that design work.

32. A quantum meruit award is intended to be fair pay for the work done. As I have noted architect project management will ordinarily be paid at a percentage of the construction work as completed or of a confirmed budget. Neither exist in this case. The alternative basis to charge for work done is on a time / cost basis. Kramer undertook and presented in evidence a time / cost analysis of the work actually done by them on the detailed design work of the Cham's house. An assessment of the time spent multiplied by an appropriate hourly rate for each employee who worked on the plans is, Kramer says, substantially more than 5.24% of Kramer's budget of VT 240 million for the house for the 80% of the detailed design work completed by Kramer. And so Kramer points out if their work is charged out on a time / cost basis the fee would be considerably more than the fee claimed of VT 8,488,810.



33.I acknowledge the Cham's criticism of this time / cost evidence from Kramer. However I am satisfied that even if some legitimate criticism can be made of Kramer's assessment of the time spent multiplied by the appropriate hourly rate the fee based on a time / cost analysis would substantially exceed a claim based on 8.24% of 80% of the detailed design assessed on a budget of VT 240 million for the construction of the house.

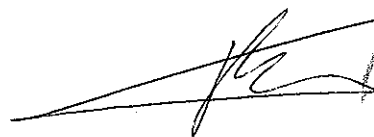
34. In those circumstances based on a fair quantum meruit, I am satisfied that Kramer's claim for the further sum of VT8.488.810 based on the 5.24% figure for the detailed design work is a fair claim for the work Kramer had done for the Chams .

35. There will therefore be judgment for Kramer against the Chams for the sum of VT 8,488,810 together with interest at 5% from the date of filing of this proceeding together with costs.

36. As to costs Counsel for the claimant should file a memorandum within 14 days from today's date detailing its claim and the defendant has a further 14 days after that in which to respond.

Dated in Port-Vila, this 11th day of December 2014.

BY THE COURT


Vincent Lunabek
Chief Justice

