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

Civil Appeal
Case No. 22/2839 COA/CIVA

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

AND: **Tidewater Holdings Limited**
Respondent

Coram:	***Hon Justice J Hansen*** ***Hon Justice D Aru*** ***Hon Justice R White*** ***Hon Justice E Goldsbrough***
Counsel:	***M Hurley for the Appellant*** ***N Morrison for the Respondent***
Date of Hearing:	*13 February 2023*
Date of Decision:	*17 February 2023*

JUDGMENT OF THE COURT

---

1. This is an appeal against the Supreme Court judgment dated 9 September 2022 which granted judgment in favour of the respondent in the sum of VT 8,171,317 plus interest at 5% cent awarded from 22 February 2018 until the judgment was fully settled. This litigation has had a somewhat tortured history, and highlights, yet again, the difficulties that arise from splitting the hearings of liability from damages. This Court has previously highlighted this danger, but the practice seems to continue.[1] It is to be discouraged.

2. The original proceedings were between Supercool Limited (Supercool) and Tidewater Holdings Limited (Tidewater). Kramer Ausenco (Vanuatu) Limited (Kramer) was subject to a cross-claim filed on 14 August 2014.

Background

3. Tidewater was a developer, and at the relevant time was proceeding with a high-end residential complex known as Onyx Apartments. Kramer was a designer of mechanical services for such apartments, and Supercool was an installer of air conditioning plants. In March 2011 Kramer submitted a fee proposal to Tidewater to provide the design services and documentation which included a mechanical air conditioning design. On 25 March 2011 Kramer submitted an updated

---

1 E.g. *Ranbul v ROV* [2018] VUCA 2.

proposal to Tidewater for services including engineering and architectural consultancy, structural and civil design services. That was on Kramer's standard fees and commercial terms, which included Conditions of Engagement for such proposed services. The relevant correspondence commences at page 115 of Appeal Book B, and concludes at page 122. There is no dispute that in late March, Tidewater accepted the updated proposal which created the contractual relationship between these two parties. Clauses 6 and 7 of the Conditions of Engagement limited the financial obligations on Kramer and imposed a time limit for any claim.

4. Kramer proceeded to design the air conditioning plant as part of their overall mechanical services work and was paid by Tidewater for that work. Supercool was instructed to install the air conditioning in accordance with those plans, and invoice Tidewater as per its quote. Those invoices were paid, until the last one.

5. The reason given for that was it had been discovered and discussed that the air conditioning installed was inadequate to cool a relatively small part of the building. Apparently, there was a meeting convened in November 2012 to discuss air conditioning problems. There is no evidence before us as to the matters discussed at that meeting.

6. There were various efforts to negotiate a settlement between the parties that proved unsuccessful. Supercool issued proceedings against Tidewater in Civil Proceedings 244 of 2014. As already noted, Kramer was joined as a cross-defendant.

7. That matter came on for hearing in front of Chetwynd J on 1 and 2 February 2018. He delivered his decision on 22 February 2018. He found for Supercool in the sum of VT 4,259,062. There was also an award of interest. He continued:[2]

> *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.*

8. Kramer appealed, unsuccessfully, and was ordered to pay indemnity costs to Supercool and Tidewater on the cross appeal.[3] We note that counsel then appearing was not Mr Hurley. In that

---

2 *Supercool Vila Ltd v Tidewater Holdings Ltd* [2018] VUSC 14; Civil Case 244 of 2014 (22 February 2018).

3 *Kramer Ausenco (Vanuatu) Ltd v Supercool Vila Ltd* [2018] VUCA 29; Civil Appeal Case 857 of 2018 (20 July 2018).

same appeal this Court was critical of the actions of Tidewater and it was ordered to pay indemnity costs to Supercool.

9. The dismissal of the appeal meant that the Supreme Court order for damages on the cross-claim to be assessed was still alive. Despite efforts, the parties could not settle, but there was still a considerable delay before the matter was finally heard, as indicated above.

The Supreme Court decision

10. Because of the conclusions we have reached on this appeal it is not necessary to deal with all of the matters that arise in the judgment.

11. In relation to the limitation clause Tidewater submitted, and the Judge accepted, that the matter was governed by the Limitation Act, Cap 212 and the relevant limitation period was six years. He ruled that the clause was "unconscionable".

12. The Judge, without a consideration of authority, also rejected the submission that rectification damages were only payable for actual work carried out that was met by Tidewater. He accepted Tidewater's evidence including that contained in the report of Mrs Rint.

13. Under paragraph 6 of the Conditions of Engagement, the Judge accepted that the liability of Kramer was limited to AUD100,000.

14. Having found such a limitation for an amount the Judge, somewhat surprisingly, continued:[4]
42. To cater for the shortfall of the claimant's claim, I allow interest of 5% per annum from 22nd February 2018 until judgment is fully settled.

Grounds of appeal

15. Again, with the conclusions we have reached, it is not necessary to address all Grounds of Appeal. We need only will address those relating to the contractual time limitation, rectification damages, and the award reimbursing Tidewater on the costs they paid Supercool and the interest on that award.

16. Ground 1 is that clause 7, which we set out later, means no action can lie against Kramer after the expiration of one year from the date of the invoice in respect of the final amount claimed by Kramer. The second ground is that rectification damages were not payable because there was no evidence Tidewater had incurred any sum by way of rectification costs. Further, it was argued that as the building had been sold, Tidewater was not in a position to carry out rectification.

---

4 *Tidewater Holdings Limited v Kramer Ausenco Vanuatu Limited* [2022] VUSC 157; Civil Case 1661 of 2019 (9 September 2022).

Ground 5 took issue with the judge's finding that Kramer should pay the indemnity costs awarded against Tidewater. Ground 4 related to the interest on those costs.

Submissions

17. On ground 1, Mr Hurley submitted that clause 7 of the conditions was a complete answer to the claim. The claim was more than three years after Kramer's final invoice. He submitted that there was clear authority that it is permissible to fix a shorter time period by contract than would be provided for in any relevant Limitation Act. In support of that submission he referred to *Firstmac Fiduciary Services Pty Limited & Anor v HSBC Bank of Australia Limited* [2012] NSWSC 1122 (18 September 2012) at 39; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* [1978] HCA 8; (1977) 139 CLR 231 (3 April 1978) at 238; and *Santos Coffee Company Pty Ltd v Direct Freight Express Pty Ltd* [2010] NSWCA 14 (18 February 2010). He further submitted that, while the exact point is not subject to authority in Vanuatu, the decision of this Court in *Trustees International Ltd v Potts* [2018] VUCA 45; Civil Appeal Case 888 of 2018 (16 November 2018) at 52–62 applied limitations of liability arising from contractual terms.

18. He said the Judge erred when he submitted "it would be unconscionable to enforce a one year time bar when the design by Kramer was never used but in fact found to be faulty." His submission was that the question of unconscionability is a principle of equity and does not arise when the matter is covered by the contract between the parties.

19. In relation to rectification costs, Mr Hurley submitted at paragraph 35 of his written submissions:

> *"The general principle on which damages are recovered by an owner for breach of a contract for the design of constructions of works is the cost of making the works conform to the contract, subject to the qualification that not only must the work be necessary to produce conformity, but it also must be a reasonable course to adopt: Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36 at para 6."*

20. He submitted that because of the sale of the building, Tidewater cannot undertake rectification because it does not own the building. So rectification of the air conditioning building is not reasonable. He further submitted that there was no evidence of loss on the sale of the building noting that Tidewater abandoned this claim.

21. He pointed to the fact that the Tidewater's claim was based on a quotation given by Vila Refrigeration and Air Conditioning dated September 2019. Although addressed to Kramer it is clearly a Tidewater document. It is clear from the evidence on behalf of Tidewater that it was simply a quotation, the work has never been carried out and no payment has ever been made.

22. Under ground 5, Mr Hurley submitted the Judge erred in awarding the sum of VT 3,497,447, being the sum of Supercool's costs both at first instance and on appeal that Tidewater was ordered to pay. Mr Hurley submits it is clear from the Court of Appeal judgment that the order for indemnity costs in favour of Supercool was against the respondent and was clearly based on

the respondent's own actions, in particular in regard to the conduct of the proceedings. He submitted from this it followed that Tidewater had no basis to claim this sum from Kramer and nor could it entitled to interest for that sum.

23. Mr Morrison submitted that the contractual time limit could not apply. He said the design flaw could not be discovered until after the expiration of the one year period. He relied on a portion of the wording of the judgment above of Barwick CJ in *Port Jackson Stevedoring* and submitted the terms of the contract would lead to an absurdity or would have defeated the main objects of the contract. He said it would have been an absurdity, and unconscionable, because it was not until July 2018 that the faults were recognised and this would defeat the main object of the contract. He submitted that it was only the facts of this case that rendered Clause 7 inoperable.

24. He also submitted that the judge accepted his submission below accepting the evidence that Kramer's knew of the fault from November 2012 but this was not accepted until the Supreme Court judgment on 22nd February 2018.

25. In relation to rectification costs, he pointed to the fact that the Judge accepted Tidewater's evidence and awarded them rectification damages as he was entitled to. In that regard he relied on the evidence of Tidewater's witness, Mrs Rint, at pages 8 and 9 of her report.

Discussion

The time limit

26. It is accepted that the Condition of Engagement for professional engineering attached to the Kramer letter formed part of the contract between the parties. The relevant clause reads:

> *"Clause 7*
> *No action shall lie against Kramer Ausenco at the suit of the client after the expiration of one (1) year from the date of invoice in respect of the final amount claimed by Kramer Ausenco pursuant to clause 4."*

27. The judge's finding that this was unconscionable cannot stand. Unconscionability applies in equity, not in the circumstances of this contract. It is also important to note that the relevant time to consider Clause 7 is at the date the contract was entered into.

28. It is clear from the authorities cited by Mr Hurley that other jurisdictions have recognised the right to contract out of limitation periods set down by legislation. In the first case he cited, *Firstmac Fiduciary Services*, it was stated at 39:

> *"39. There is authority that it is permissible by contract to fix a shorter period of time than provided by in the relevant Limitation Act: Limitation of Actions - the Laws of Australia, (3rd ed., 2011) by Professor Peter Hanford, [5.10.490]."*

29. Further, in the case cited by both counsel, Barwick CJ noted in *Port Jackson Stevedoring* at 238.

> *"12. The relevant law as to the enforceability of a time limitation clause, in my opinion, is not in doubt and needs no detailed exploration. The decision in Suisse Atlantique Societe d'Armement Maritime S.A. v. N. V. Rotterdamsche Kolen Centrale (1967) 1 AC 361 indicates, in my opinion, that whilst exemption clauses which, for present purposes, can be assumed to include a time limitation such as cl. 17, should be construed strictly, they are of course enforceable according to their terms unless their application according to those terms should lead to an absurdity or defeat the main object of the contract or, for some other reason, justify the cutting down of their scope."*

30. The academic article referred to in the citation from *Firstmac Fiduciary Services*, above, sets out further authorities to this effect.

31. In *Santos Coffee Company*, a further case cited by Mr Hurley, the Court was confronted with a three-month limitation period for the issue of suit. The Court of Appeal of New South Wales stated at 17:

> *"... The reality is that the parties agreed that after 90 days no claim could be made for so-called "pallets owing". Such a clause bars the claim altogether: Smeaton Hanscombe & Co Ltd v Sassoon I Serty, Son & Co [1953] 1 WLR 1468 at 1472, and can be seen to have a substantive operation: destroying or extinguishing liability: B G Coote Exception Clauses (1964 Sweet & Maxwell) at 11 and 154-155; Atlantic Shipping & Trading Co Ltd v Louis Dreyfus & Co [1922] 2 AC 250 at 258 (Lord Dunedin), 259 and 261-262 (Lord Sumner); The 'Auditor' (1924) 18 Lloyd's List Law Rep 402 and 464 at 465."*

32. This was a contract entered into by commercial parties. There is no suggestion of any inequality of bargaining power, nor of any of the other grounds that might lead to the setting aside of a contract. There was nothing at all to prevent Tidewater, after the receipt of the letter of 25 March 2011, objecting to any of the provisions contained in the conditions of engagement which formed part of the contract. Rather than raise any issues, being fully appraised of the conditions, Tidewater accepted them. Tidewater led no evidence to establish that the consequence of enforcing clause 7 would amount to an absurdity or defeat the terms of the contract. Tidewater had ample opportunity, as an equal contracting party, to ask for that clause to be changed, but freely entered into a contract. In the absence of any such evidence, it cannot be said that the clause is "an absurdity" or would "defeat the main purpose of the contract" in terms of the language used by Barwick CJ in *Port Jackson Stevedoring*. As Mr Hurley submitted Tidewater could have called evidence as to the intention of the parties at the time the contract was formed. They did not. There is no evidence of the matters that would be inherent in a project of this size and that ought to be known to both contacting parties. No evidence was called as to the construction time, when the air conditioning equipment was to be installed, supply chain expectations or when it was commissioned. There is not even evidence as to the precise date

the problem was first realised or the details of the matters discussed at the November 2012 meeting.

33. We note the Judge appears to have thought it appropriate to apply clause 6 of the contract, which limited the amount of any damages Kramer could be liable for. It is unclear to us why that clause should be applied but Clause 7 should not.

34. One question that remains is: - Should contractual limitation periods be applied in this jurisdiction? Mr Morrison accepted it should although there are no authorities exactly on point.

35. It is unnecessary to cite from *Trustees International*. But it is clear in that case that this Court enforced clauses that limited liability, albeit not a time limitation clause. In *Swanson v Public Prosecutor* [1998] VUCA 9; Criminal Appeal Case 06 & 11 of 1997 (26 June 1998) this Court stated:

> Vanuatu is a common law country which has benefit of drawing on the wisdom and jurisprudence from a whole range of common law countries in the search for precedent appropriate to Vanuatu conditions.

36. There is nothing in the Limitation Act to suggest that its terms cannot be varied by contractual terms freely entered into by the parties. We see no reason why authority well established in most jurisdictions should not apply in Vanuatu. The limitation period is a term of the contract, and as we have noted, Tidewater has not established any grounds to describe it as an absurdity. Tidewater has adduced no evidence to suggest the term was absurd at the time of formation of the contract.

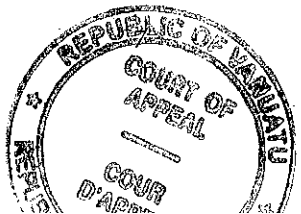
37. We see that clause as a complete bar to Tidewater's claim, which means the appeal must be allowed on Ground 1 alone.

Rectification damages

38. In the judgment below, the Judge stated:

> *"36. The defendant in its defence pleaded in the alternative that pursuant to clause 6 of the contract any liability to Kramer's 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."*

39. This is a clear misstatement of the situation because, as the Judge accepted in 36, that acceptance is pleaded as an alternative and is a challenge to quantum. The real point of the rectification argument is that all that is before the Court is a quote for the cost of rectification work that was never carried out. It does not help Tidewater to say that the Judge accepted this figure



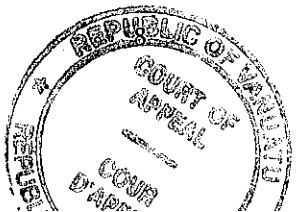
and it was based on Mrs Rint's evidence. Mrs Rint clearly accepted that the sum came from a Vila Refrigeration and Air Conditioning quotation and that the work had never been carried out, nor paid for. As well, the building has since been sold and there is no evidence to suggest that Tidewater has any remaining legal obligation to carry out any rectification. The sale of the building means that the consent of the new building owner would be necessary for any quoted works to be carried out and, again, there is no evidence that such consent is forthcoming.

40. We agree and accept Mr Hurley's submission at his paragraph 35, set out at para 19 above. That correctly sets out the measure of damages in cases of this sort. Mr Morrison submitted that some other measure based on a proportion of the contractual price may apply. He was unable to cite any authority to support this proposition and we know of none.

41. We also accept the submission that, in view of the sale, Tidewater cannot undertake any rectification work and, therefore, it is not a reasonable course to adopt as per *Bellgrove*. But the question of rectification damages does not end there.

42. It is useful in this context to repeat the lengthy citation contained in Kramer's written submissions at 38. In *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 (21 June 2012), Bathurst CJ on behalf of the Court held at 229–230:

> *"229. Whilst I accept that a possibility that rectification work will not be carried out does not preclude a claim for damages: Bellgrove v Eldridge supra at 620, and that unreasonableness will only be established in exceptional circumstances: Tabcorp Holdings Ltd supra at [17], in the present case the carrying out of the work would be unreasonable in the sense described by Giles JA in Westpoint Management Ltd v Chocolate Factory Apartments Ltd supra (McColl and Campbell JJA agreeing). His Honour dealt with the issue in the following manner (at [59]-[61]):*
>
> > *[59] Relevance of the plaintiff's intention to carry out the rectification work to reasonableness is accepted in, for example, Chitty on Contracts, 29th ed, at 20-016, and Hudson's Building and Engineering Contracts, 11th ed at 8-138. It appears to have been accepted in De Cesare v Deluxe Motors Pty Ltd - indeed, sale of the building may have relevance through whether or not the rectification work will be carried out. If truly going to reasonableness, I do not think consideration of whether or not the plaintiff will carry out the rectification work is inconsistent with Bellgrove v Eldridge, since the regard to it is part of arriving at the plaintiff's compensable loss. Once there is compensable loss, the court is not concerned with the plaintiff's use of the compensation.*
> >
> > *[60] But the plaintiff's intention to carry out the rectification work, it seems to me, is not of significance in itself. The plaintiff may intend to carry out rectification work which is not necessary and reasonable, or may intend not to carry out rectification work which is necessary and reasonable. The significance will lie in why the plaintiff intends or does not intend to carry out the rectification work, for the light it sheds on whether the rectification is necessary and reasonable. Putting the same*



point not in terms of intention, but of whether or not the plaintiff will carry out the rectification work, whether the plaintiff will do so has significance for the same reason, and not through the bald question of whether or not the plaintiff will carry out the rectification work. That question is immaterial, see Bellgrove v Eldridge.

[61] ***So if supervening events mean that the rectification work can not be carried out, it can hardly be found that the rectification work is reasonable in order to achieve the contractual objective: achievement of the contractual objective is no longer relevant.*** *If sale of the property to a contented purchaser means that the plaintiff did not think and the purchaser does not think the rectification work needs to be carried out, it may well be found to be unreasonable to carry out, the rectification work. An intention not to carry out the rectification work will not of itself make carrying out the work unreasonable, but it may be evidentiary of unreasonableness; if the reason for the intention is that the property is perfectly functional and aesthetically pleasing despite the non-complying work, for example, it may well be found that rectification is out of all proportion to achievement of the contractual objective or to the benefit to be thereby obtained.*

230. **The combination of the lack of intention to carry out the rectification work, the transfer of the property from Lesdor to the owners corporation and the absence of any evidence that the defects were affecting the use and occupation of the building or the common property leads, in my opinion, to the conclusion that it would be unreasonable to carry out the work and that damages for the cost of rectification should therefore not be awarded.**

[Our emphasis]

43. Further, in *Cobanov v Josifovski* (No 2) [2021] ACTSC 111 (4 June 2021), Loukas-Karlsson J stated at 799:

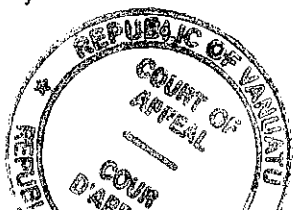
> *"799. In my view the defendant is not entitled to damages for the losses caused by the second plaintiff's breaches as the defendant has sold the property."*

44. And at 801:

> *"801. I am satisfied on the evidence that the value realised by the defendant on the sale of the property is the same as if the defects had been rectified. Consequently, the defendant failed to prove loss and the negligence claim fails. I note the plaintiffs conceded that the defendant would be entitled to nominal damages only for breach of the HIA Contract."*

45. We agree with both the citations above, and endorse them as the appropriate statement of the law in relation to rectification damages in this jurisdiction in the context of the facts of this case.

46. We do not say that the sale of the property will automatically mean rectification will be unreasonable and unnecessary. But the facts of this case align with para 230 of *Cordon* above.



To the Cordon facts may be added that there is no evidence the purchaser knew of the problem, offered a lesser price because of it or was dissatisfied with the property as a result of the problem. The evidence in that case and this do not create some rule of law. Rather they give a strong factual basis for the conclusion that rectification is neither necessary nor reasonable.

47. In the course of submissions we understood Mr Morrison to confirm that the rectification damages Tidewater sought was the loss of value on sale. We understood both counsel to confirm such a claim was withdrawn at trial. In any event the only evidence of that is found in Mrs Rint's report. Her expertise is in accountancy and bookkeeping. There is nothing to suggest she had the expertise to give evidence as to loss of value on sale.

48. There is a further point to be made about that evidence. At "C" of her report there is a section headed "Loss of Income on Sale of Property. We have already commented on her claimed area of expertise. The whole of section "C" in Appeal Book B has a line through it. We were told from the bar table that was because that head of claim was withdrawn. It follows the evidence should have been withdrawn but it did feature in submissions. The evidence also suffers from admissibility issues as most of it is clearly hearsay.

49. This ground of appeal must also succeed.

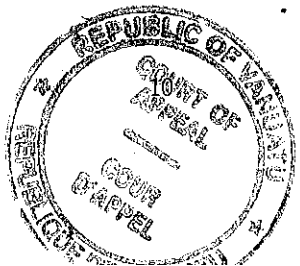
Grounds 4 and 5

50. It is only necessary to deal with two other matters that arise from the grounds of appeal. This is the award of VT 3,497,447, being the indemnity costs awarded against Tidewater both at first instance and on appeal. The Court of Appeal, in its decision of 20 July 2018, when dealing with costs stated:

> *"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."*

51. It is clear from that passage that the indemnity costs were awarded against Tidewater to reflect the fact that they could not successfully defend Supercool's claim and to reflect their behaviour and conduct of the litigation both in making admissions and in relation to the various offers of settlement of their claim against Tidewater.

52. In those circumstances, there is no possible basis for Tidewater to claim those costs from Kramer. The award in that regard was incorrect and the appeal on this ground must be allowed. It follows Tidewater cannot be entitled to interest on that award and that appeal must also be allowed.



53. In view of the finding that those 4 grounds of appeal succeed we see no need to address other matters raised in the grounds of appeal and the submissions of counsel.

54. We order:

(1) The appeal is allowed and the award below set aside.

(2) (i) Kramer file and serve, by 4:00 pm on 24th February 2023, its written submissions (not exceeding 5 pages) concerning the costs of both the appeal in the Court of Appeal and below, together with any evidence it relies on in relation to the issue of costs;

(ii) Tidewater file and serve, by 4:00 pm on 3rd March 2023, its written submissions (not exceeding 5 pages) concerning the costs of both the appeal and below, together with any evidence it relies on in relation to the issue of costs.

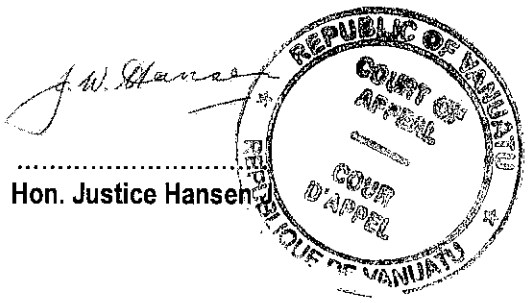
(iii) Any submissions in reply by Kramer (not exceeding 3 pages) be filed and served by 4:00 on 10th March 2023;

(iv) the parties should prepare their submissions on the basis that the Court will, subject to its consideration of the written submissions, determine the costs issues without a further oral hearing and make orders for the payment of lump sum costs.

(3) Independently of the above, the Court encourages the parties to confer with a view to resolving the issues of costs consensually.

Dated at Port Vila this 17th day of February 2023

BY THE COURT



.....
Hon. Justice Hansen J