

- [2] It is the Plaintiff's case that it purchased equipment, transported materials and rendered services to the Defendant under the contract in the sums of US\$85,765.00, €63,000, GB £29,694, and SR 323,432 at the latter's request.
- [3] The Plaintiff further claims that the agreement was terminated in 2010 and that the Defendant owes it the sum of SR 3,075,914 together with interest at the commercial rate and costs.
- [4] The Defendant in an amended defence admits that there was an agreement between the parties but disputes that it was terminated and that it owes the Plaintiff.

The Commissioner's Report

- [5] The matter came before two separate judges of the Supreme Court who left before the case was completed. In June 2017, the Court issued a commission pursuant to section 311 of the Seychelles Code of Civil Procedure to one Peter Roselie to examine the accounts in issue and to report to the Court. The latter duly reported on its findings on 12 October 2017 but the report was objected to by the Plaintiff on the grounds that the Commissioner had made findings outside his terms of reference and that certain payments were disallowed as no supporting documentation was made available.
- [6] This documentation was then made available to the Commissioner but the latter recused himself. He was, for reasons that are unclear to this Court, subsequently reappointed to revise his report based on documentation provided.
- [7] On 4 February 2018, the Commissioner again reported and stated that he had to base his recommendations on whether a contract had been agreed between the parties and if he was not permitted to do so he would rather recuse himself. That report was also objected to and the parties moved for a different commissioner to be appointed to examine the accounts. The findings in these reports appear to have been abandoned by the parties and for the purposes of this decision those reports have been disregarded.
- [8] It would appear from the proceedings that the parties at that stage agreed that the Plaintiff was owed money from the Defendant for goods supplied but that the amount had not been quantified.

[9] On 24 July 2019, the Court duly appointed Messrs Pool & Patel, Chartered Accountants “to examine the accounts presented to him by the parties in respect of the claims therein and to report to the court as to whether any sums are due and payable to/by the Plaintiff and/or Defendant, if so, in what sum and in respect of which claim(s).”

[10] The Commissioner duly reported on 23 October 2019 and made the following findings:

1. The amount for labour provided for the works by the Defendant is SR 431,250 and is to be deducted from the Plaintiff’s claim.
2. The claim of SR 100,000 for extra labour allegedly supplied by the Plaintiff to the Defendant was not made at the time the works were carried out and was an extra claim that could not be entertained after the event and therefore disallowed.
3. It is undisputed that materials in the sum of SR 1,991,697 were supplied by the Plaintiff and that sum is therefore owed to it by the Defendant.
4. The rate of interest to be charged on the amount outstanding from the Defendant to the Plaintiff is disputed and ought to be decided by the court but should be charged from 29 May 2016 when the claim was made.
5. In total, the sum owed by the Defendant is SR 1,991,697 (for materials supplied by the Plaintiff) less SR 431,250 (labour supplied by Defendant) amounting to SR 1,560,447 with interest from 29 May 2016 to the date of judgment at a rate to be set by the court.

Objection to the Commissioners Report

[11] The Defendant has objected to this report on the grounds that the sum of SR1,560,447 arrived at by the Commissioner is not based on accounting evidence but rather on the third report of the former Commissioner and has not taken into account the fact that the Defendant had denied all the Plaintiff’s claims.

- [12] The Commissioner was therefore called for examination by the parties. He testified that the Plaintiff's claims were based on exchanges of emails which he examined (Appendix 2 of his Report) and that the Plaintiff's claims of about SR4.3 million were negotiated downwards to about SR 3.1 million by the parties. There was an admission by the Defendant that SR 1,991,697 worth of materials were supplied by the Plaintiff, less the amount for labour of SR 431, 250 supplied by the Defendant. It was pointless retallying the figures when the Defendant itself had agreed the sum for materials supplied less the sum for labour. These figures were contained in the documentation provided by the Defendant itself to the Commissioner.
- [13] With respect to the rate of commercial interest in 2016, learned counsel for the Plaintiff called a witness, one Philip Pierre, Head of Advances at Nouvobanq. The witness testified that generally interest was charged to a client on loans and when overdrawing their accounts. A schedule of average annual interest from 2011 to date charged to the Plaintiff, their client, amounted to 12% per annum.

Submissions of the Parties

- [14] Learned counsel for the Plaintiff, Mr. Georges, has submitted that the Court has no power to make adverse findings to that of the Commissioner. With regard to the Defendant's objection to the Commissioner's workings, Counsel submits that there was no manifest error in the Commissioner's reasoning that the Defendant had admitted to owing the sums claimed and that there was therefore no need to tally the figures submitted.
- [15] With respect to the rate of interest to be applied to the claim, the Plaintiff submits that in terms of Article 1153 of the Civil Code, the rate of interest for a delayed payment is limited to one fixed by law or by commercial practice. There is evidence that the normal commercial rate on overdrafts would be 12%. Relying on the case of *Seychelles National Commodity Co Ltd v Faure* (1981) SLR 160, the Plaintiff submits that the inferred acceptance by the Defendant of the lower claim of 10% interest claimed by the Plaintiff coupled with the type of transaction involved would indicate that that was the rate charged in such commercial practices.

- [16] In response to these submissions, learned counsel for the Defendant, Mr. Chinnasamy, has stated that a number of extraneous items amounting to GB£10,500 for projects other than the ones contracted by the parties were overlooked by the Commissioner in compiling his report.
- [17] Counsel also submits that no factual or legal foundation was established by the Commissioner for computing the amount of SR 1,560,447 payable by the Defendant to the Plaintiff.
- [18] With respect to the interest rate chargeable, the Defendant submits that the provisions of section 2 of the Interest Act would apply to the instant case, that is, as the contract had not established the rate of interest payable, a rate of 4% would be applicable.

The law

- [19] With regard to the powers of the Court and that of the Commissioner of Accounts, the following provisions of law are relevant to the instant proceedings:

“Power of Court to appoint Commissioners to examine accounts

Section 311. In any suit or cause in which an account has to be rendered or in which an examination or adjustment of accounts is necessary, the court may at any stage of the proceedings issue a commission to some fit person, chosen by the parties or in default of agreement by the court, directing him to make an examination or adjustment of such accounts, within such time as may be fixed by the court...

Court to give Commissioner necessary instructions

312. The court shall furnish the commissioner with such part of the proceedings and such detailed instructions as may appear necessary and the instructions shall specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the points referred for his examination.

...

Powers of commissioner

315(1) *The commissioner may unless otherwise directed in the order of appointment -*

(a) examine the parties and their witnesses, if any, on oath concerning the account and any other person whom the commissioner thinks proper to call upon to give evidence in the matter;

(b) call for and examine documents and other things relevant to the subject of the inquiry.

(2) The commissioner may hear verbal evidence in all cases in which verbal evidence is admissible under the Civil Code.

...

Proceedings to be filed in court

316. *Within the time fixed in the order of appointment or within such further time as may appear necessary to the court, the commissioner shall file in court the proceedings held by him, and his report if any.*

Proceedings in court after inquiry

317. *Within seven days from the date of the filing of the proceedings and report the parties may file their objections, and the court after hearing argument thereon on either side may either accept the report or direct that further evidence be heard in court on any point in dispute or refer the matter back to the commissioner for further inquiry and report.*” (Emphasis added)

The accounts

[20] The combination of the Court’s order of 24 July 2019 and the above provisions lead the Commissioner appointed to examine accounts and give his expert opinion on the matter at issue.

[21] In regard, to expert evidence section 17 (1) the Evidence Act provides:

“In any trial a statement, whether of fact or opinion or both, contained in an expert report made by a person, whether called as a witness or not, shall, subject to this section, be admissible as evidence of the matter stated in the report of which direct oral evidence by the person at the trial would be admissible.”

- [22] It is clear from this provision that both the report and the evidence of the Commissioner at the trial were admissible. It has been the submission of the Defendant all along that the Commissioner has relied on correspondence between the parties establishing the contract and not the actual accounts and supporting documents. The inference is that his findings are therefore unreliable – both because he cannot opine on contractual matters and because he relies on findings from correspondence between the parties rather than from documents establishing the figures.
- [23] In the instant case, clear instructions of the Court were given to the Commissioner to examine the accounts and to report as to whether any sums are due and payable. In his evidence in Court, the Commissioner has explained that he relied on Appendix II of his report. The appended document is a letter from the Plaintiff to the Defendant effectively minuting a meeting between the parties held on 17 May 2016 and what was agreed as the outstanding sum for materials amounting to SR 1,195,018 provided by the Plaintiff.
- [24] In *Proton Energy Group SA v Orlen Lietuva* [2013] All ER (D) 206, the Court found that although experts cannot deal with issues of law, which remain the province of the judge, they can carry out contractual construction by placing emphasis on all the background facts and, where appropriate, can opine on the relevant background and the context of the issues.
- [25] In the instant case, the Court cannot see any reason not to rely on the Commissioner's report. The Defendant has not provided any evidence disputing the agreement at the meeting of 17 May 2016 as minuted in the letter appended to the Commissioner's report. Indeed, as the Commissioner has pointed out, it was the Defendant who produced the correspondence on which he has relied for his findings. I therefore find that the sum of SR 1,195,018 is the amount paid for materials by the Plaintiff remaining outstanding. Similarly, neither party disputes the amount for labour put in by the Defendant at SR431,250 which I find ought to be deducted from the sum owed to the Plaintiff. Hence, the Defendant is to pay the Plaintiff the sum of SR 1,560,447.

Interest due on the amount outstanding.

[26] The Plaintiff has claimed that interest on the debt owed by the Defendant should run from the date the claim was filed.

[27] In *Eden Island Development Company (Sey) LTD v Hibberd* (CC 48/2014) [2016] SCSC 823 (26 October 2016), the Court relying on settled authority found that the word “demand” in Article 1153 plays the part of the *mise en demeure* and therefore interest is payable from the date the principal is claimed. I am of the same view. The interest on the amount owed should therefore run from 28 May 2016.

[28] With regard to the rate of interest to be paid on the outstanding sum, the parties have relied on what appears to be contradictory provisions of Article 1153 of the Civil Code and section 3 of the Interest Act to submit on the one hand that the commercial rate of 12% (although the Plaintiff would accept 10%) should be applied to the principal and on the other hand that it is the legal rate of 4% that should apply. It is appropriate at this stage to bring the statutory provisions to light:

“Article 1153- With regard to the obligations which merely involve the payment of a certain sum, the damages arising from delayed performance shall only amount to the payment of interest fixed by law or by commercial practice; however, if the parties have their own rate of interest, that agreement shall be binding.

These damages shall be recoverable without any proof of loss by the creditor. They are due from the day of the demand, except in cases in which they become due by the operation of the law.”

Section 3 - Whenever the rate of interest shall not be fixed by contract, the legal rate of interest shall be four per centum per annum in civil or commercial matter

[29] In *Seychelles National Commodity Co Ltd* (supra), Sauzier J, in a case involving the delayed performance of an obligation – the payment for goods as in this case – found that such cases fell within the ambit of Article 1153 of the Civil Code of Seychelles. He added that the Interest Act must be read subject to Article 1153 of the Civil Code.

[30] The distinction between the applicability of Article 1153 and section 2 of the Interest Act lies in the nature of the claim. When the claim consists purely of a delayed payment, then it is Article 1153 of the Civil Code that applies and the damages for the delayed performance of the obligation is the interest payable on the late payment. When the claim arises from a breach of contract and damages are claimed, it is section 2 of the Interest Act that applies to the interest on the award.

[31] As for the meaning of “interest fixed by commercial practice”, Sauzier J opined that one had to look at the particular transaction involved and apply the rate of interest, which is charged in normal commercial practice in such transactions.

[32] I find that the nature of the transaction involved in the instant case was the supply of goods by a contactor to a government agency. I take judicial knowledge of the existing policy in such circumstances, viz *the Financial Planning & Control Division Ministry of Finance, in Trade and Economic Planning of November 2017 - expenditure and payment policy* applicable to all Government ministries, departments and agencies (MDAs) (Government of Seychelles expenditure and payment policy - see [http://www.finance.gov.sc/uploads/resources/Government%20of%20Seychelles%20Expenditure%20and%20Payment%20policy%20\(2\).pdf](http://www.finance.gov.sc/uploads/resources/Government%20of%20Seychelles%20Expenditure%20and%20Payment%20policy%20(2).pdf)).

[33] The policy provides in the relevant part:

“8. Any payment that is not effected within the payment timeframe will be subjected to an interest charge. The interest charge shall be borne by the respective MDAs through its allocated budget and will become payable for payments exceeding 30 calendar days. A payment begins to accrue interest on the date the payment becomes overdue.

(a) The rate of interest that accrues on an overdue payment is 0.05 percent per day of the total invoice amount”.

...

9. EXCEPTIONS

(a) Except as provided the interest does not apply to a payment made by a governmental entity, vendor, or subcontractor if:

(1) there is a bona fide dispute between the MDAs and a vendor, contractor, subcontractor, or supplier about the goods delivered or the service performed that causes the payment to be late; ...”

[34] It would seem therefore that the interest payable would have been 0.05% daily had it not been for the fact that the instant case falls within the exception specified in 9(1) above. In the circumstances, the interest payable would be the one “which is charged in normal commercial practice in such transactions” which would have been 12% as usually charged by the banks. As the Plaintiff has indicated that he is willing to accept a rate of 10% I find that this is the rate of interest to be applied.

Order

[35] In the circumstances, I order that the Defendant pay the Plaintiff the sum of SR1, 560,447 with interest at the rate of 10% from the filing of the plaint.

[36] The whole with costs.

Signed, dated and delivered at Ile du Port on 8 May 2020.

Twomey CJ