IN THE SUPREME COURT OF SEYCHELLES

ALCAN DEUTSCHLAND GMBH — PLAINTIFF

VERSUS

RAPID ROOFING (PTY) LTD
(Herein rep by Allan Enestine) — DEFENDANT

Civil Side No 216 of 2002

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Mr. J. Hodoul for the Plaintiff
Mr. B.Georges for the Defendant

JUDGMENT

Perera J

The plaintiff company and the defendant company, were admittedly, trading partners. The plaintiff avers that the defendant imported and took delivery of sheet metal for the sum of DM. 41,210.12 equivalent to Sr.106,927.89, subject to terms set out in "G*eneral terms* and conditions of delivery and payment for exports" attached to the invoice. Condition 3(3) thereof is as follows-

> *"(3) If the buyer falls in arrears of payment, we shall be entitled to demand interest on the arrears of 3% per annum, above the Deutsche Bundesbank discount rate applicable at the time. The rate of interest shall be set higher if we can prove that we are bearing a higher interest rate burden or lower if the buyer can prove that the damage caused to us by delayed performance was lower."*

The plaintiff avers that the defendant had failed and refused to pay the said price of the goods sold and hence rendered itself liable to pay interest at 5.68% being *"..... 3% annum above the Deutsche bank discount rate ....."* as provided in condition 3(3), and alternatively, commercial interest at 12% per annum. The instant claim is therefore based on Article 1154 of the Civil Code, which provides that *"interest accrued from capital may produce interest either by starting proceedings or by a special agreement of the parties, provided that, in the case of proceedings the interest has been due for a whole year at least."*

The plaintiff also claims DM. 3000 in respect of travelling expenses incurred in sending one Mr. Dwenger from Germany to brief and engage the services of an Attorney, and professional fees in the present case.

The plaintiff acknowledges receipt of the capital sum of Rs.106,927.86 from the defendant as payment for the goods, but claims interest and the costs incurred in obtaining legal services.

The plaintiff claims a further sum of DM. 3500 in respect of estimated costs involved in bringing a representative from Germany to testify in the case. The total claim of the plaintiff is as follows-

1.	*Interest from 21/1/98 till 22/5/00*	-	*DM. 5449.00*
2.	*Interest from 22/5/00 till 7/8/02*	-	*DM. 1315.39*
3.	*Travel and other expenses*	-	*DM.20,137.88*
4.	*Professional fees*	-	*DM. 5,543.59*
		-	*DM.32,445.86*

The equivalent in Euro dollars claimed is Euro 16,589.30 or Sr. 102,024.19. In the prayer, interest at 5.68 % per annum is claimed on that sum from 24th January 2000 *(date of delivery of goods)* until date of

judgment, and commercial rate of interest from date of judgment until payment in full.

The defendant denies that there is any obligation to pay interest and costs as claimed. In fact it is denied that there ever was an agreement to pay interest. It was submitted by Learned Counsel for the defendant that the capital amount due was paid in Seychelles rupees after a delay resulting from the bank not releasing the necessary foreign currency equivalent.

The issue before the Court, therefore is whether there was an agreement between the parties as regards payment of interest, and if so, as to when it became due. On the other hand, the Court is also called upon to decide whether the defendant delayed payment in bad faith or due to circumstances beyond his control, namely, the local bank not releasing the necessary foreign currency to the plaintiff, to effect payment.

Mr Fred Pohl, the Export Sales Manager of the plaintiff company testified that the terms of supply of roofing material were discussed with Mr. Allain Ernestine, the Managing Director of the defendant company. The first three shipments effected during the period 8th May 1997 and 18th December 1997 were on an "*advance payment*" basis with a 3% discount. Payments were made by the defendant punctually in Deutsche Marks. Therefore Mr. Ernestine asked for a "*credit limit*" and was given, as earlier payments had been made without default and as the company was satisfied that he would be able to effect payments on delivery. Consequently the fourth order was received and executed, but payment was not made despite several reminders being sent. Mr Pohl further stated that the terms and conditions of the sales on credit were well known to the defendant as every pro-forma had then printed on the

reverse side. Such invoices had been sent previously to the defendant at least eight times, out of which four, as pro-forma, and four others as *"order confirmations"*. Condition 3(3) thereof related to the payment of interest on delayed payment. He also stated that Mr. Ernestine assured him as to his liquidity in foreign currency as he had other business dealing with Singapore and Australia. However as no payment was made for 2 years and 4 months despite several reminders being sent, the plaintiff company sent Mr. Dwenger to consult a lawyer and to claim the money in a legal action. By that time the plaintiff company had other business dealings in Seychelles with "*Sheet Metal International*," which required payment in Seychelles rupees. Hence it was agreed that the equivalent capital amount in rupees being Rs.106,927.86 would be accepted on 22nd May 2000 as part payment of the claim which included interest and incurred costs.

Mr. Pohl substantiated the claim as set out in the plaint. In addition he stated that the plaintiff's Attorney was paid 5,543.59 DM. He concluded that the total claim before Court was Euros 16,589.30, or Rs.102,024.19 as its equivalent, plus interest thereon at the commercial rate from date of judgment.

On being cross examined, Mr. Pohl stated that the payment for the fourth delivery was due from 24th January 1998, being the date of delivery. He admitted that Mr. Ernestine told him about the delays involved in payment in foreign currency through the banks in Seychelles but stated further that he held himself out as an international businessman who could command resources from elsewhere.

As regards the trip made by Mr. Dwenger, he stated that although he came to open a rupee account to pay "*Sheet Metal International*" from funds received from the defendant company, yet Mr. Dwenger's trip was

solely necessitated by the default of the defendant who did not respond to any of the telephone calls and fax messages claiming the monies due for a period of over two years. Questioned by Counsel as to why a lawyer could not have been retained through the German Counsel in Seychelles without sending a representative spending about a quarter of the claim, he stated that he did not know the local procedure, and that in any event he came to "*put pressure*" on the defendant. He further stated that he came to appoint someone as a local representative of the firm to look after the interests of the company.

On being questioned by Court, Mr. Pohl stated that the defendant did not expressly agree to pay interest on delayed payments, but it was understood as an implied term in business practice, and as set out in the invoice for payment.

Mr. Ernestine in his testimony stated that the plaintiff company was informed of the delays in remitting foreign currency due to the delays involved in the banking system. He stated that he imported roofing material principally from other suppliers in Australia who acknowledged the delays in payment. Payments were ultimately made when the bank released foreign currency from the "*pipeline*". He had the same arrangement with the plaintiff company. He offered them payment in rupees earlier, but they declined, but eventually when they agreed, they paid promptly.

Mr. Ernestine admitted that in respect of three consignments he agreed to pay in advance, but stated that that did not entitle the plaintiff company to believe that he had access to unlimited forex resources. He also admitted that in respect of the fourth consignment, the plaintiff company upon request by him, offered a credit limit of DM 50,000. That, he stated, was due to the aggravating forex payment situation at that

time. He denied that the reason for delaying payment was due the credit facilities he received in place of *"advance payment"*, and not for any reason attributable to the bank.

The plaintiff company created the credit limit by letter dated 13th January 1998 as follows-

> *"Our credit controller meanwhile has checked into your case and is willing to offer a credit limit of maximum 50,000 DM for open account business. This is already a very good first step. Together with your payments now received, we will check what can be shipped out as soon as possible. Mrs Hanson will look into the details and inform you.*
>
> *On top of that, it will be helpful to receive some credibility information of your home bank which may even lead to increasing this limit in a second stage somewhat later".*

The Banque Francaise Commerciale thereupon issued a certificate of good standing, respectability and financial standing in respect of the defendant company.

Analysing this agreement on credit, it is clear that the plaintiff company accepted that the defendant was no longer able to make advance payments, as he did for the first three consignments, and that hence it was agreed that goods would be shipped up to a maximum credit limit of 50,000 DM. To further ensure that payment would be received, the plaintiff sought a letter of standing from the defendant's bank in Seychelles. As P.S. Atiyah on "*sale of goods*" states – "*although in an ordinary contract of sale of goods, delivery and payment are concurrent conditions, in contracts in which the price is to be paid by*

means of a commercial credit, the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid" (Pavia & Co. S.P.A v Thurmann – Nielson (1952) 2. Q.B. 84.). This is what the plaintiff obviously did. In these circumstances, credit was limited to the time of delivery, and not open ended.

By a telefax dated 22nd December 1998, 11 months after delivery, the plaintiff company informed Mr. Ernestine that they had on several occasions failed to contact him on the telephone regarding the sum of DM. 41,21,12 due on the last consignment, and requested that payment, or even an explanation for the failure to pay for so long be given. Reminders were sent on 28th May 1999, 6th June 1999 and 28th June 1999. In another reminder dated 29th July 1999, the plaintiff stated *inter alia* .

> *"For the last invoice of DM. 43,625.40 the shipment was against open credit, but no payments were received. May we remind you that the last shipment was done in full trust in the reliability of you and your company and based on the good recommendation given by Mr. Lummel....."*

Further reminders were sent on 2nd December 1999 and 9th December 1999. Finally on 28th March 2000, the plaintiff company through its Attorney claimed DM. 54,924.7, being DM 41,210.12 for materials supplied, DM. 6,593.60 being interest at 8% continuing till date of payment, DM. 3000 being travel expenses incurred by the company representative, and DM 4,121 being professional fees. However, as stated above, the plaintiff company accepted Rs.106,927.89 being the rupee equivalent of the capital sum of DM. 41,210.12. By letter dated 31st May 2000, Attorney for the plaintiff continued to demand payment of interest, travel expenses and professional fees, the

rupee equivalent as stated in the letter dated 20th July 2000 was Rs.31,811.95. However, the defendant's Attorney, by letter dated 29th January 2001 denied the claim and stated that the plaintiff took the position that there was no agreement regarding payment of interest for delayed payment. The instant case was filed on 8th August 2002.

The claim for interest at 5.8 %

(1) *DM. 5449. is claimed as interest from 24th January 1998 (date of delivery of goods) to 22nd May 2000 (date of payment of the capital amount in Sey: rupees).*

(2) *DM. 1315.39 from 22nd May 2000 till 7th August 2002 (date of plaint).*

(3) *The whole with taxed costs and interest at the commercial rate from the date of judgment until payment in full.*

The consignment for DM. 41,210.12 was sent upon "*Open Credit*" terms to a limit of DM 50,000. What was produced as exhibit P7 was in respect of a consignment dated 9th October 1997 on "*advance payment*" terms. Although under the Common Law of England, interest became payable only if provision had been made for payment in the contract, now it is statutory. In Seychelles, the law applicable to interest, is contained in the Interest Act *(Cap 100)* and the Civil Code of Seychelles. Section 4 of the said Act provides that "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 matters. In the case of *V.V.Samy and Company v. R.K. Chetty (1984) S.L.R. 72,* the plaintiff company registered in Singapore consigned assorted merchandise to the defendant in Seychelles, to the value of Singapore dollars 11,853.50

It was agreed that no interest would be charged on that transaction for 45 days and that thereafter interest would be charged at the rate of 16% per annum until payment. The defendant failed to pay for the goods, and the plaintiff claimed the capital amount, interest from the date it became due, and interest on the whole sum from date of judgment until final payment. Seaton CJ allowed the claim of 16% interest from the date it became due until date of judgment, but disallowed any interest beyond the date of judgment.

Be that as it may, in the present case, the plaintiff company relies on condition 3(3) of the general terms and conditions set out on the reverse side of the invoice (P7) *(although not the relevant invoice)* as constituting an agreement to pay 3% interest per annum above the Deutsche Bunders bank discount rate, which for purposes of this case is determined at 5.68% per annum. The Court has already held that the defendant had agreed to pay interest on delayed payment on the basis of the commercial transaction. Article 109-2 of the Commercial Code provides that –

> *"In commercial transactions damages shall be due by operation of law from the moment that the breach occurs without the necessity of a previous notification as provided for ordinary contracts under Article 1146 of the Civil Code".*

The instant transaction being one of commercial nature payment was due upon delivery of goods. The breach commenced from that day, namely 24th January 1998, as the defendant failed to pay. Article 1153 also provides *inter alia* that damages due for delayed performance would be recoverable without any proof of loss by the creditor from the day of the demand, *except in cases in which they become due by operation of law.*

The next issue to be decided is whether the defendant delayed payment in bad faith or due to circumstances beyond his control. The correspondence produced by the plaintiff establish that Mr. Ernestine did not reply any of the fax messages sent, or offered any explanation for the delay for over two years. No evidence was adduced to show that even an application was made to any bank to remit foreign currency to the plaintiff company for the consignment of goods. The defendant was therefore in bad faith when he delayed and defaulted payment. Accordingly, in terms of paragraph 3 of Article 1153, the plaintiff would be entitled to special damages in addition to those for delayed performance.

Accordingly, judgment is entered in favour of the plaintiff as follows-

1. *DM. 5449 being interest at 5.8 % from 24th January 1998 (date of delivery of goods) to 22nd May 2000 (date of payment of capital sum in Seychelles rupees).*

2. *D.M. 1315.39 being interest at 5.8 % from 22nd May 2000 till 7th August 2002 (date of plaint).*

As regards the travel costs of Mr. Dwenger in May 2000, and of Mr. Pohl, the plaintiff company produced a letter of confirmation from the travel agent in Germany (P3) that the return fare from Germany to Seychelles was 4356.70 Euros. Mr. Pohl gave evidence in this case on 19th November 2003, and that letter had been faxed on 18th November 2003. Hence it related to Mr. Pohl's air fare. He however claimed the same fare for Mr. Dwenger. That would amount to a sum of 8713.40 Euros, or 17,041.92 DM for two persons. The plaintiff also claims as

salary for 3 days, DM 330 x 3 x 2 = 1980 DM. For the hotel expenses, he claims DM 1079.62 for both of them.

On the basis of paragraph 3 of Article 1153 of the Civil Code, as the Court has found that the defendant had acted in bad faith, it is reasonable to allow the travelling costs and the hotel charges of Mr. Dwenger which would amount to DM. 8713.40 + DM 539.81 *(½ of DM. 1079.62)* = DM. 9253.21. The claim for 3 days salary of Mr. Dwenger is disallowed as he came to Seychelles on company business. The travelling costs, hotel charges and 3 days salary or Mr. Pohl are disallowed as they were incurred after the institution of the action, and as he came to Seychelles as a witness and representative of the plaintiff company. His expenses would therefore fall within the taxed costs in the case.

As regards the professional fees, the plaintiff has produced proof of payment of DM. 5543.59 to Counsel *(exhibit P4 and P5*). Section 5 of the Courts fees *(Supreme Court)* and Costs Act *(Cap 53)* provides for four types of claims for fees and costs –

(1) Between party and party
(2) Between Attorney and client for work done in a cause or matter;
(3) Between Attorney and client for work done other than in a cause or matter; and
(4) Counsel's fees.

Section 7 recognises "*the discretionary power of the Court to grant or disallow costs in causes or matters, or to grant costs only on the amount awarded by the judgment of the Court, or to apportion the costs* as *the Court may deem fit*". Section 17(1) provides that for agreements between Attorneys and clients for the payment of Counsel's fees either by a gross

sum, a commission or percentage, or salary, "*either at the same rate as, or at a greater or less rate than, the rate at which he would otherwise be entitled to be remunerated*", shall be enforceable or upheld in taxation unless, it is in writing and signed by the Attorney and client , and unless the Attorney had lodged an authenticated copy of the agreement in the Chambers of the Chief Justice within 14 days of the authentication, in respect of work done or to be done.

Taxation of a bill of costs against an unsuccessful party is done on an indemnity basis. Hence the successful party will not normally be able to recover all the costs which he had paid or will have to pay his Counsel. In English Practice, it has been estimated that there would be a shortfall of about 20%.

The claim for Professional fees therefore cannot be maintained as there has been non-compliance with Section 17(2) of the said Act. Attorney and clients "*incurred costs,*" cannot be recovered as damages under Article 1153 even if the defendant had acted in bad faith.

The plaintiff will therefore be entitled to taxed costs.

The total sum payable by the defendant would therefore be –

1.	*Interest at 5.8 % per annum from 24th January 1998 to May 2000*	=	*DM. 5449.00*
2.	*Interest at 5.8 % per annum from 22nd May 2000 to 7th August 2002*	=	*DM. 1315.39*
3.	*Travelling expenses of Mr. Dwenger*	=	*DM. 8713.40*
4.	*Hotel charges of Mr. Dwenger*	=	*DM. 537.81*
			DM.16,015.60

Although the plaintiff has claimed interest on the judgment amount at the commercial rate, the instant case is based on Article 1154 of the Civil Code. Hence although the capital sum was due in a commercial transaction, yet as the proceedings commenced to recover interest and consequential expenses, the interest payable on the judgment amount until payment in full would be the legal rate of 4 % per annum.

Judgment is accordingly entered in favour of the plaintiff in a sum of DM. 16,015.60, (*which at the exchange rate of 1 DM at Sr. 2.5260 accepted in exhibit P2),* would be equivalent to Seychelles Rs. 40,455.40, together with interest at 4 % per annum thereon from the date hereof, and taxed costs of action.

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A.R.PERERA

JUDGE

Dated this 18th day of March 2004