



Judgment

IN THE SUPREME OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. C.L. 2002/K07

BETWEEN                      KAMAL'S VARIETY LIMITED                      CLAIMANT

AND                              WISYNCO TRADING LIMITED                      DEFENDANT

Mr. Garth McBean instructed by Garth McBean & Co. for the Claimant.

Mr. Andre Earle and Miss Anna Gracie instructed by Rattray Patterson,  
Rattray for the defendant.

Heard: July 2, 3, 4, 2007 and May 15, 2008

McDonald J

Between January 1998 and July 2000 Kamal's Variety Store ordered goods (food stuffs) from Wisynco Trading Limited to sell and deliver same to its various business outlets for prices specified in various invoices. Invoices show delivery to various locations.

The claimant carried on business under the following business names; Kamal's Supermarket & Wholesale; G & L Wholesale; Kamal's Suprette & Cambio; Kamal's Shoppers Fair and Kamal's Super Centre.

Mr. Sinclair, the Managing Director of Kamal's Variety Limited testified that Kamal's Shoppers Fair replaced Kamal's Supermarket and Wholesale; and

Kamal's Shoppers Fair has ceased business and he now has Kamal's Variety Limited.

The claimant's case is that Kamal's Variety Limited has paid \$5,443,744.71 to Wisynco for the value of goods it did not receive. In breach of the said agreement the Defendant has failed, refused or neglected to deliver these goods. Consideration for the payment of \$5,443,744.71 by the claimant to the Defendant has wholly failed and the Defendant has received the said sum to the use of the claimant.

The claimant seeks restitution recovery of the money paid out with interest.

The claimant contends that the Defendant's servants/agents acting in the course of his or their employment forged or caused to be forged the signatures of Kamal's agent/servant who were responsible for receiving goods from Wisynco in order to falsely represent that the said goods sold to Kamal's by Wisynco were delivered, when in fact no such goods were delivered to Kamal's its servants or agents.

The said forgery by agents or servants of Wisynco came to the knowledge of Wisynco, its servants/agents and as a consequence Wisynco terminated the employment of one of its servants or agents.

### **Kamal's Variety Limited System**

There is no dispute that Kamal's contracted with Wisynco for Wisynco to sell and deliver goods to Kamal's. The delivery of goods was to be to Kamal's various business locations. This can be inferred from the course of dealing between the

parties because Wisynco loaded trucks with goods and sent them to the claimant's various business locations.

Mr. Sinclair testified that there was a special young lady employed to the claimant who did the ordering of goods from Wisynco but who no longer works there.

He said that during the period January 1998 – July 2001 Nola McKenzie was the only person assigned to receive goods. She was the one who would sign on a regular basis for goods for Kamal's Variety Limited.

The Attorneys agreed that Noline McKenzie who gave a witness statement and testified at the trial is one and the same person as Nola McKenzie.

Mr. Sinclair said that the system in place between 1998 and 2001 was that the claimant employed persons to check the invoices. They would check back invoices on a daily basis to see which company they had received goods from to see if goods were really in stock, and they would normally check back the warehouse to see "what and what we receive."

Kamal's would get statements on a monthly basis from Wisynco showing outstanding balances from Wisynco. Mr. Sinclair said if they did not get a statement they would call the office to find out why and request them to send it.

He said once they had received the statement they would go for the file for Wisynco where they keep all invoices for Wisynco, and then they would check to see exactly whatever the statement says, if they had invoices to match whatever amount of money was in the statement.

He said they would use the invoice to match it back to see if it came back to the amount. They would also look at write off of bad goods. They would put that together with the invoice to see how they came to that amount.

Credit notes would be given where for example there were bad goods or something returned.

Wisynco would send back credit notes.

The basis upon which payments were made to Wisynco was the presentation of a statement from them showing an amount of money.

Payment was made by cheque to Wisynco after the claimant had investigated each statement and having done necessary queries were satisfied as to the amount due.

If the claimant did not get a statement they would request one from Wisynco.

He said that over the period Kamal's received monthly statements from Wisynco, and they did not complain to Wisynco about goods not being received. They did however complain to Mr. Mahfood after receipt of the Auditors findings.

The claimant's case is that goods reflected in 77 invoices were not delivered to them by Wisynco.

Mr. Sinclair said that he did not personally check any of the 77 invoices prior to payment. Mrs. Sinclair his wife and other members of staff would be the ones to check these 77 invoices. He does not know which of the 77 invoices Mrs. Sinclair checked or if she checked all 77.

She is still employed at Kamal's and gave no witness statement.

Mr. Sinclair's evidence is that each time a payment was made out of 77 payments to Wisynco, the payment was made based on Wisynco's statement showing the amount due and after they had done investigation of each statement.

When asked in cross-examination why the claimant made payments if the goods were not delivered, he said 'because of what is on the statement and that is what we use to pay out the money'.

At paragraph 13 of his witness statement, Mr. Sinclair gave the background to the claimant's discovery of non delivery of goods and fraud on the part of Wisynco's servants and/or agents.

He said that in June 2000, the claimant was unable to locate 4 invoices which were listed on the May statement.

Mr. Ryan Wilson, the Sales Representative for the Defendant was asked by Mrs. Sinclair to provide copies. He only brought 3 copies.

It was then that the claimant discovered the signatures on the copies were irregular. They did not match the signatures of the persons responsible for receiving goods.

Mr. Sinclair said that his investigations revealed that those signatures were forged.

After the discovery of the forged signatures Mr. Sinclair called Mr. Wilson and enquired about the irregularities. Mr. Wilson asserted that he knew nothing about the situation and would have a talk with his driver about it. He also wrote

down the missing invoice numbers and said he would get back to him with information. He has not been seen since.

Subsequently, Mr. Sinclair said that he called the internal auditors and asked that the Defendant's statements be audited from January to June 2000.

He asked the Auditors to check back on the 1999 statements as well because he discovered missing invoices some of which had irregular signatures.

The Defendant's agents or servants informed them that the statements for July 2000 were given to Mr. Wilson who had delivered them to the claimant.

Mr. Sinclair asked the Defendant to send copies. When they were received 2 invoices on that statement could not be located and those invoices had irregular and forged signatures and the goods were never delivered.

Mr. Sinclair said the management of the Defendant Company including Mr. Andrew Mahfood were notified of the irregularities and asked to assist in the investigations. Mr. Wilson is no longer in their employment.

The fraud squad was called in by the Defendant's Company to investigate the case, and police came to the claimant's office several times making enquires in the matter. Mr. Wilson was arrested and later released on bail. There is no evidence before the court as to what he was charged for.

Mr. Sinclair said that by looking at the signatures on the invoices and looking at the signatures of the person who was employed to receive the goods he knew the signature on the invoice was forged.

Miss Noline McKenzie gave evidence for the claimant. She told the court that between 2000 and 2003 she was employed to Kamal's Variety Limited in the

capacity of receipt clerk at its outlet at Kamal's Supermarket. She ceased working with Defendant in mid 2003.

When receiving goods she would sign a copy of the invoice as receiving the goods itemized on the invoice and affix the date.

Miss McKenzie stated that the signatures which appear on the 9 invoices listed on her witness statement were not made by her. Eight (8) invoices indicate goods shipped to Kamal's Shoppers Fair and one (1) invoice to Kamal's Supermarket.

Mr. Sinclair's evidence is that Miss McKenzie was employed to Kamal's Supermarket. She did not work at Kamal's Shoppers Fair.

Miss McKenzie said that she cannot say who signed the invoices and she knows of no other McKenzie working at Kamal's Variety Limited.

Miss Stephanie Minnott testified that she had never received any goods from the Defendant while working at Kamal's Super Centre.

She worked at G & L Wholesale from 1995 – 1999 and at Kamal's Supermarket until she left in April 2000. She stated that the signatures appearing on the 11 invoices listed at paragraph 5 of her witness statement and contained in the agreed bundle were not made by her.

All the invoices indicate shipment/delivery to G & L Wholesale.

She did not recognize any of the signatures on the invoices and during her working life at Kamal's Super Centre there was no other Minott working there.

### **Defendant's Case**

The Defendant avers that the goods were delivered to the claimant.

They deny that consideration has failed and that they hold monies (although not admitting \$5,443,744.71 as the total price for goods sold and delivered) for the use of Kamal's Variety Limited or under any circumstances such as would entitle Kamal's to recover it from them.

They say that any sums received were received as payment for goods sold to Kamal's and delivered by Wisynco to Kamal's at Kamal's request between January 1998 and July 2000.

Further that no employee or agent of Wisynco forged any signature of an employee or agent of Kamal's Variety Limited.

It is also their case that invoices were left with Kamal's by Wisynco's servant or agent.

Mr. Andrew Mahfood, Group Finance Director of the Defendant stated that around August 2000, Mr. Sinclair requested the Defendant to supply him with copies of invoices for a three year period – January 1998 to July 2000.

This request was complied with, and Mr. Sinclair subsequently generated a sheet of the invoices which he wished to question.

Mr. Mahfood said that from their records all the goods pertaining to the said invoices had been duly delivered, and the invoices signed acknowledging receipt of the goods. The invoices were fully paid.

He said that either himself or Mr. Patrick Barrett the security chief made a report to the Fraud Squad. The report had something to do with the queries raised by Kamal's Variety Limited in relation to the invoices.

Statements were taken by the Fraud Squad from personnel at Wisynco.



He said Mr. Wilson was employed as a Salesman to Wisynco for a number of years. He had a good record. Between 1998 – 2000 he owned a truck which he used to deliver goods from Wisynco's warehouse to its customers. He used the truck to deliver goods from Wisynco to Kamal's Variety Limited in Port Antonio and to other people.

Mr. Mahfood said that in August 2000, Mr. Sinclair made request for invoices and this was before Mr. Wilson was fired. Mr. Wilson was fired in a meeting, but he was unable to say if it was on 15<sup>th</sup> August 2000.

Mr. Mahfood said that Mr. Wilson was fired for a specific reason. He said that the queries received eventually led up to a report by Mr. Sinclair to Wisynco that Mr. Wilson was never to return to Kamal's and that is why they fired him.

Mr. Mahfood said that they were not satisfied that the queries were genuine, they did not have any proof. He was not sure if the chief of security ever interviewed or caused to be interviewed any of the truck drivers involved in respect of Mr. Sinclair's complaint that their employees forged invoices.

Pertaining to the Defendant's system of delivery, Mr. Mahfood testified that the truck driver would leave with stamped invoices he is not sure whether in duplicate or triplicate of which carbon copies would be made. The original would be the white copy.

No Wisynco employee would be on the truck. The original invoice would be left with the customers upon delivery of goods.

The truck driver would return to Wisynco present the pink copy with signatures purportedly made by the customer. These truck drivers were not employees of Wisynco.

Mr. Mahfood said that the Defendant had no way, apart from relying on the truck driver of knowing whether the customer or their agent actually signed.

The truck driver would get paid based on that signature. He also said that if after 30 days Wisynco did not receive payment, the customer would be called and payment of the invoice requested.

The customer had the right to say they did not receive the invoice. If the customer said nothing, and paid for the goods, then the Defendant would know that they had received the white invoice.

He disagreed that there was a weakness in the system because it had no independent means of verifying if the customer had in fact signed and which could allow dishonesty on the part of the truck driver.

Mr. Mahfood said he was unable to rebut the evidence of Miss McKenzie and Miss Minott that their signatures have been forged.

Mr. Everton Campbell in his witness statement Exhibit 7, outlined the system concerning the loading, delivery and receiving of goods.

As Operation Manager his duties included overseeing, 'picking' and deliveries, loading the trucks and receiving goods.

He has been Operations Manager from 1995 to the present. He said that once approved the Customer Service Representative enter each order on the computer with a code.

Once the order has been entered, a 'pick list' is attached to the invoice and same are sent to the warehouse where operations take over.

The invoice is generated in quadruplicate. There is a white copy which goes to the Customer as proof of delivery, a pink copy which the truck driver must return as proof of receipt of the delivery, a blue copy which is sent to the accounts department to update the customer's account and a yellow copy which is given to the Sales Representative to ensure collection.

Mr. Campbell said that various batches of orders are combined based on proximity and written up on the trucking sheet. The trucking sheet states the customers name, the order number, the invoice number, invoice total, the name of the driver and comments.

Based on the size of the batches, Mr. Campbell said he would determine the size truck to be used to make the various deliveries.

There was no regular truck driver for any particular route as the truck to be used is determined by the size of the batch.

Once the truck has been loaded, the truck driver is given the white and pink copies of the invoice, and the blue and yellow copies are forwarded to the intended recipients. The trucking sheets remain in the delivery area.

The truck driver then makes the relevant deliveries and are aware that they must have the customer sign the pink copy of the invoice as the driver will not be paid without a signature affixed to the pink copy of the invoice.

The truck driver and his sideman usually attend to the customers' receival area where they are joined by the customers' employees.

The customer is responsible for ensuring that there are authorized personnel on hand to receive the deliveries and as such any person who is present in that area and receiving goods is deemed to be an authorized representative of the customer.

He said that although the truck driver is responsible for making all deliveries, it is the customer who is responsible for checking the deliveries and ensuring that it has received all the goods stated in the invoice.

The driver then returns the pink copy to the warehouse and the trucking sheet is then filled out stating whether or not delivery was made and any peculiarities with the delivery.

Any discrepancy with a delivery or non acceptance of a delivery would be recorded on the trucking sheet. He said that there are no recorded discrepancies on any of the invoices, the subject matter of this claim.

He has not stated what the position was in respect of the relevant trucking sheets.

Mr. Campbell said that at the time one of Mr. Wilson's main responsibilities was to attend the various customer locations to receive the order and then call and/or fax in same. Once delivery had been made he would then need to call the customer in relation to payment for the goods delivered.

He was not involved in any aspect of the Defendant's delivery operations. Mr. Campbell said he was not certain if Mr. Wilson owned a truck.

It is for the court to determine:-

(1) whether or not the goods were actually delivered to and received by the Claimant.

(2) if the goods were not delivered to and received by the Claimant, was the non-delivery of these goods due to the criminal and/or wrongful acts of the Defendant's agents or servants.

(3) Whether in the circumstances the Defendant is liable to repay to the Claimant the amount which the Claimant paid to the Defendant for the said goods along with interest.

It is the Claimant's duty to satisfy the court on a balance of probabilities that the goods were not delivered.

There is no dispute that Kamal's received monthly statements of account during the relevant period from Wisynco indicating the status of their account with Wisynco. The question of receiving goods would be apparent each month to Kamals.

As Mr. Sinclair testified, on receipt of the statement, checks would be made to see if they had invoices to match whatever amount of money was in the statement. They would look at right off of bad goods and they would put that together with the invoice to see how they came to the amount in the statement.

In sum he said that before payment they would query all the various things they had to query and be satisfied as to the amount due.

It is undisputed that during the relevant period January 1998 to July 2000 Kamal's never notified Wisynco or complained of non-delivery of goods. The inescapable inference is that they were accepting receipt of the goods.

Further during the relevant period Kamal's paid Wisynco for all 77 invoices referred to in paragraph 8 of Mr. Sinclair's witness statement.

The number of invoices which were not queried at anytime by Kamal's exceeded the 77 invoice which were queried after payment.

Mr. Sinclair said that payment was made in respect of the 77 invoices because of what was on the statement, and that was what they used to pay out the money.

Mr. Andrew Mahfood told the court that Mr. Sinclair alleged that Mr. Wilson would go to Mrs. Sinclair to collect payment for the goods invoiced by the Defendant. He alleged that Mrs. Sinclair would pay the invoice based on the representation made by Mr. Wilson without looking at the statement of account or the invoice.

There is no evidence from Mr. Wilson or Mrs. Sinclair to this effect. He is merely recording an allegation made by Mr. Sinclair. It is hearsay, there is no proof and Mr. Sinclair cannot rely on that statement as to the activity of Mrs. Sinclair. The best evidence would have come from Mrs. Sinclair and she was not called as a witness.

Wisynco's method of delivery indicated that the goods were left in the possession of the truck driver who was not an employee of Wisynco.

Wisynco placed goods in the possession of the truck driver for his delivery. I find that he was an agent for that purpose. No employee of Wisynco was on the truck to ensure that the goods were actually delivered at the said locations and given to a person who had apparent authority to receive them on behalf of the claimant.

In my view this was a weakness in Wisynco's system which could have been capitalized on between the time that the goods left from the warehouse and the purported delivery to Kamal's.

The signing of the invoice was a requirement for Wisynco to verify whether or not the goods which it had batched out for delivery were in fact received. The invoices in question bear signatures.

The invoices reveal that the goods ordered by the Claimant from the Defendant were for delivery to its different business locations.

It therefore follows that the Claimant would have had employees assigned to receive goods delivered at its various businesses.

Surprisingly, Mr. Sinclair's evidence is that during the period January 1998 to July 2000 only one person had authority to receive goods, this being Miss McKenzie.

I do not accept this evidence as being truthful. Further his evidence was contradicted by Miss McKenzie who said in chief that she started working at Kamal's in the year 2000.

The majority of the invoices now being questioned by Kamal's were for the period prior to the year 2000, in fact 54 in all.

Kamal's must have had some other authorized person or persons to receive goods in relation to the period prior to the year 2000 as its various locations.

Miss McKenzie stated that signatures appearing on the 9 invoices signed in 2000 and listed in her witness statement were not made by her. Eight (8) were listed

for delivery at Kamal's Shoppers Fair and one (1) at Kamal's Supermarket. At the material time she was working at Kamal's Supermarket.

Eight (8) of these invoices were signed from locations where she did not work and could not have been her bona fide signature, and the court can draw the inference that they were forged.

The court is satisfied that Miss McKenzie is speaking the truth when she stated that she did not sign the 9 invoices.

Miss Minott testified that the signature on the eleven (11) invoices listed in her witness statement were not made by her.

Ten (10) of the invoices indicate goods delivered to G & L Wholesales; 9 of which cover the time when she was working there. The other invoice indicates delivery in 2000 to Kamlyn's Super Centre, a place where she never worked. She was unable to say who signed these invoices.

I am satisfied that she is speaking the truth. The person who signs is the best person to identify whether or not it is her signature or not. The absence of evidence from a handwriting expert is not fatal.

Miss Minott also testified that some of the invoices were purportedly signed by her when she was on leave, but she was unable to identify the said invoices.

She also said that some of the invoices were purportedly signed by her after she ceased working at Kamals, however she did not identify which of the eleven (11) she was referring to.

However in respect of those, that could not be the case as all eleven invoices pre-date the time of her departure.



She was unable to say who signed the invoices.

The Claimant is saying that the signatures on these 20 invoices cannot be attributed to any of Kamals employees as Wisynco claims.

On the evidence, copies of these invoices were returned to Wisynco. At this stage the invoice would be out of Kamal's reach or possession. The inference which the court draws is that it must be the person who did the delivery who would try to get Wisynco to believe that these goods were delivered to Kamals and it was done by an agent of Wisynco.

Wisyncos system as explained by its witnesses is that the truck drivers would be paid on that signature.

Mr. Sinclair's evidence is that he looked at the signatures on the 77 invoices and looked at the signatures of the person who was employed to receive the goods and that is how he knew the signature on the invoice was forged. Mr. Sinclair cannot be relied on to give evidence of comparison of signatures.

Assuming that Mr. Sinclair is referring to Miss McKenzie as the person employed to receive; 54 of the invoices were purported to be signed at the time when she was not working with the company. Mr. Sinclair's evidence on this point cannot therefore be relied on.

I find that Mr. Sinclair's evidence of the examination of the 77 invoices is not sufficient to prove forgery. It is not evidence the court can rely on. Apart from the 20 invoices which Miss McKenzie and Miss Minott referred to, Mr. Sinclair has not said whose signature on the 57 is forged or who is purported to have signed these invoices. There is no evidence from Mr. Sinclair on this.

The court finds that there is no evidence to prove that the signatures were in fact forged on these 57 remaining invoices.

I find that the 20 invoices:-

ie. #359262 in the sum of	\$68,000.00
#364257 in the sum of	\$64,210.92
#390738 in the sum of	\$80,000.00
#39326 in the sum of	\$102,500.00
#406702 in the sum of	\$ 86,000.00
#411069 in the sum of	\$ 40,000.00
#404354 in the sum of	\$ 98,400.00
#416779 in the sum of	\$101,523.00
#426979 in the sum of	\$ 93,077.28
#452947 in the sum of	\$ 80,625.59
#452948 in the sum of	\$ 65,000.00
#449663 in the sum of	\$123,060.46
#457025 in the sum of	\$ 49,425.49
#457024 in the sum of	\$ 81,018.41
#458003 in the sum of	\$104,000.00
#460158 in the sum of	\$135,000.00
#461210 in the sum of	\$124,951.96
#465354 in the sum of	\$133,274.13
#468622 in the sum of	\$121,789.98
#470585 in the sum of	<u>\$106,975.19</u>
	\$1,857,932.30

alleged as coming from Kamal's and as allegedly signed by employees of the claimant were in fact forged and that Kamal's claim that these goods were not delivered succeeds. They are entitled to refund from Wisynco in respect of the monies contained in these 20 invoices.

The claimant's claim in respect of the remaining 57 invoices fail.

At the end of the case there was no proof of the commercial rate of interest being sought by the claimant as claimed in the specially endorsed statement of claim.

Counsel indicated to the court that they were to discuss whether the Bank of Jamaica publication an average interest rate was to be used to determine the commercial interest rate in the event that there was judgment against the Defendant.

The court has not since heard from Counsel for the claimant on this issue, notwithstanding the passage of time.

The applicable rate of interest is the rate at which a claimant would have had to borrow money to supply the place of that which was withheld.

It is apparent from the evidence that the parties were in dialogue about the delivery/non delivery of goods and payment for same before the claim was filed.

Counsel now indicates to the Court that they have agreed interest as the commercial rate of 20% per annum.

Judgment for the claimant in the sum of \$1,857,932.30 with interest at the commercial rate of interest of 20% per annum from the 6<sup>th</sup> November 2002 to date of judgment.

Costs to the claimant to be taxed if not agreed.

*Chambers*