IN THE SUPREME COURT OF BELIZE, A.D. 2002

ACTION NO: 283 of 2002

BETWEEN	(COMMERCIALIZADORA MAYORISTA (De ABARROTES S.A (((AND (1 RAMON CERVANTES (2 AMIR CARRILLO	ADDED	CLAIMANT DEFENDANT DEFENDANT

Mr. K. Musa for the claimant.
Mr. P. Zuniga S.C., for the first defendant.
Mr. M. Cardona for the second defendant. (added defendant)

AWICH J

30.4.2007. JUDGMENT

1. *Notes:* *Contract of sale of goods; whether there was agreement – consensus ad idem, between claimant and the first defendant; whether the goods were paid for in full by the second defendant. Proof to a standard of balance of probabilities; credibility. Joinder of a defendant on an application by the original defendant (third party notice), rule 19.3(1) and (2).*

2. The claimant, Comercializadora Mayorista De Abarrotes SA., (COMA), produced invoices for goods that it said it sold to the first defendant Mr. Ramon Cervantes. The total price for the goods was Mexican pesos 443,898.10, which is about Belize dollars 110,000. (one hundred and ten thousand). The invoices were made to Mr. Ramon Cervantes. The claimant said that Mr. Cervantes has failed and refused to pay for the goods. On 3.6.2002, the claimant filed a claim in this Court for the price of the goods, interest and costs.

3. Mr. Cervantes accepted that the invoices for the goods were made to him, but denied that he ever had any contract of sale or in anyway bought goods or took delivery of goods from the claimant; he denied ever dealing with the claimant. He said that it was one Amir Carrillo whom the claimant dealt with. Mr. Cervantes explained his business dealing with Carrillo that: at the request of Amir Carrillo, he, Cervantes, lent money to Carrillo, to be used for paying for goods from the claimant, Mr. Carrillo was in financial difficulty in his business at that time. Cervantes went on to say that he did not know that invoices for goods purchased by Carrillo from the claimant were

being made to him, and that he knew about it only when Mr. Luis Felipe Gongora, an attorney in Mexico for the claimant, came from Mexico to his office and demanded payment on the invoices.

4. On. 1.6.2005, in the course of the proceedings, Mr. Amir Carrillo was joined as the second defendant, on an application by Mr. Cervantes "for third party directions". The order made by the then learned Registrar, joining Carrillo was made obviously under r: 19.3(1) and (2) at case management conference. There is no part in the new Supreme Court (Civil Procedures) Rules, 2005, specifically devoted to third party proceedings as was in the old Rules. The direction order did not include leave to the claimant to claim against Carrillo or to amend his statement of claim so as to make a claim against Carrillo. Persuant to the joinder order, Mr. Cervantes rightly proceeded to have served on Mr. Carrillo, a statement of claim; and Mr. Carrillo filed a defence to it. He admitted that the goods, the subject of the claim, were sold by the claimant to him not to Mr. Cervantes or to Mr. Enrique Avilez. He stated that he had paid for the goods in full.

5. The claimant, however, maintained its claim against Cervantes and did not take advantage to make an application to join Carrillo as a defendant in the claimant's own case, and did not seek to amend its statement of claim to include a claim against Carrillo. At the hearing learned counsel Mr. K. Musa, who became attorney for the claimant, simply adopted a different approach, he vigorously crossexamined Mr. Carrillo with the aim of discrediting the testimony that the goods were not sold to Cervantes and that Carrillo has paid for the goods in full. Mr. Carrillo was of course entitled to crossexamine the claimant's witness as to the liability of Cervantes, which liability Carrillo would be liable to indemnify Cervantes for.

6. Mr. Carrillo did not produce receipts acknowledging any payment. He explained that Mr. Miguel Lope Barcelo, the only sales representative of the claimant, in Belize, that he dealt with, never gave him any receipt although Carrillo asked for receipt on each occasion of payment. Carrillo owned the invoices made to Cervantes. His explanation about the claimant making the invoices to Mr. Ramon Cervantes or to Mr. Enrique Avilez was that because of delay on some occasions to exchange currencies and then pay up on an

invoice, despatch of a new consignment of goods to Carrillo would delay; it was company policy not to despatch new consignment before the previous one had been paid for. He explained further, that to avoid the delay, Barcelo informed Carrillo that Barcelo would invoice some consignments of goods to other people's names; that way, delivery of goods would continue without delay. From that time, Carrillo explained, invoices started to come made to Cervantes and Avilez. Mr. Barcello was not called as a witness; he has been imprisoned in Mexico for fraud against the claimant.

Determination.

7. All the three learned counsel argued the case for their respective client on credibility, urging that the testimonies for their client's case be accepted. 'Real evidence' were accepted, at least not contested, by all sides. The defendants admitted that the claimant made the invoices; and the claimant accepted that Cervantes made the cheques included in the evidence. The question became: what were the cheques made for?

8. Apart from credibility, it was my view that the case in respect of the claim against Cervantes raised a question of law which might have been brought *in limine* under rule ***26.1(2)(j) of the Supreme Court (Civil Procedures) Rules 2005***. The question was whether there was ever a contract of sale between the claimant and Cervantes at all, and if not, the question that would go to trial would simply be whether there would be grounds to entitle the claimant to payment on a *quantum meruit* basis, that is, on the basis of 'so much as he deserved' for the goods if the claimant supplied them and Cervantes received them and sold or used them for his benifit – see ***Planche v Colburn 5 C & R 58 or 8 Bing 14, Craven – Ellis v Canons [1936] 3 All E.R. 1066***, and ***Powell v Braun [1954] 1 All E.R. 484.***

Determination. *(Was there a Contract of Sale?)*

9. The pleading in the statement of claim about the grounds for claiming the price of goods was that: "by a contract made between the plaintiff and the defendant and contained in or evidenced by the plaintiff's invoices, the plaintiff agreed to sell and deliver to the defendant who

agreed to purchase on credit goods as follows:…" The invoices were then set out.

10. Pleadings are written formal statements of the case of the claimant or defendant. The law does not require a particular expression to be used for a particular claim, or defence, but pleadings must be statements of facts not of the evidence and must be precise. It must contain all material facts on which the party will rely for his case. The purpose of a pleading is to inform the other party and the court of what one intends to prove in the case.

11. Where there is no formal written agreement for sale of goods, it is the practice to state simply that, "at the request of the defendant", or that, "at the instance of the defendant", the claimant sold goods to the defendant, and had the goods delivered. The goods must be named. The old practice in the historical action on *indebitatus assumpsit* was to state that, "the defendant was indebted for the price of goods sold and delivered". The emphasis was on indebtedness other than on the underlying transaction. The expression, "at the request", or "at the instance", makes it clear that the defendant ordered the goods, so

when he receives the goods there would be offer and acceptance, he would be agreeing to buy them, a contract of sale would be made. Either of the two expressions discloses offer and acceptance, and the meeting of minds of the seller and buyer, and thus a contract.

12. The pleading in the statement of claim did not aver that Mr. Cervantes ordered the goods; it placed reliance on invoices which were not signed or acknowledged by him. The invoices were one sided documents, and alone did not disclose the reason or circumstances for making them to Mr. Cervantes. When the defendant raised the issue, proof of the contract of sale was necessary.

13. The claimant's item of evidence for proof of the contract were that: (1) the invoices were made to Ramon Cervantes, and (2) Cervantes admitted to Mr. Gongora, an attorney for the claimant, that Cervantes was the purchaser of the goods, at the time he had the invoices in his hands. The items of evidence in defence were: (1) a denial by Mr. Cervantes that he admitted the invoices or had them in his hands, (2) his denial that the goods were delivered to him or that he received them, (3) the admission by Carrillo that he was the one who ordered

and received the goods and his explanation that the invoices were made to Cervantes so as to avoid delay in the despatch of consignments; an idea which he said came from Barcelo, the agent of the claimant, (4) the testimony by Mr. Avilez, the other person to whom other invoices were similarly made, that although he later learnt that invoices had been made to him, he never saw them, never received the goods and never paid for them, and the claimant has not made a court claim against him, and (5) the fact that the claimant's agent has been imprisoned for fraud in connection with his sales duty.

14. Regarding the testimony by Gongora that Cervantes admitted liability on the invoices and thereby that he was the purchaser; and the testimony by Cervantes denying, I do find that they are merely the word of one witness against the word of another witness. Much will have to depend on the court's impression of the two witnesses and the credibility of the testimony of each. There is, however, room in the state of the evidence, for the court to avoid the subjectivity that accompanies impression. It is this. I consider the fact that invoices were also made to Avilez, but he was never asked to pay on them important. He has not been asked to pay up the invoices most

probably because someone else paid them up or it was discovered since that the invoices were fraudulently made. It confirms the explanation by Carrillo about the reason invoices were made to Cervantes or Avilez, or even confirms the suggestion by the claimant's counsel that Carrillo gave the names of Cervantes and Avilez so that goods would continue to be sent in those names because at the time Carrillo's credit standing was very bad, the claimant would not send more goods to Carrillo before he paid up arrears. By either explanation, the claimant intended to contract with Cervantes, but Cervantes was unaware and could not have intended to contract with the claimant. There was no meeting of minds, no agreement. There was merely a conspiracy to deceive the claimant about the true recipient of the consignment of goods, the true purchaser, the true contracting person.

15. The evidence about a number of cheques having been made by Cervantes is open to the interpretation urged by the claimant that Cervantes was paying for goods as the purchaser or even as a partner. It was also open to the interpretation urged by Cervantes and supported by Carrillo, that Cervantes merely lent money to Carrillo so

that he could pay his debts in the business. Carrillo said that he first approached his aunt the mother of Cervantes, who referred Carrillo to Cervantes. The testimony about Cervantes being a signatory to the cheques so as to control the use of the loan for the purpose it was given is not unreasonable even if the control was not foolproof.

16. In the end it is for the claimant to prove the contract of sale between it and Mr. Cervantes. I am unable to conclude that the evidence as a whole has proved on a balance of probabilities that the claimant addressed the invoices to Cervantes at his request and not as the result of some deception, or that upon tender of the goods and invoices Cervantes accepted them and entered a contract of sale with the claimant. I find that there has been no contract of sale between Comercializadora Mayorista De Abarrotes S.A and Mr. Ramon Cervantes.

Determination: *(Did Cervantes receive the goods?)*

17. For the Court to make any order on *a quantum meruit basis,* there

must be evidence that Cervantes received the goods for himself notwithstanding that there was no contract of sale between him and the claimant. The only evidence that Cervantes received the goods, the subject of the invoices, is the verbal admission said to have been made to Mr. Gongora. It has been denied by Cervantes. Left at that, the court would be called upon to go by its gut feeling. That is not the stuff that evidence is made of nor is it the stuff that courts decide cases by. So given those two testimonies alone, the Court would not find that the claim of the claimant has been proved to the standard of a balance of probabilities. There has, of course, been another testimony, that by Mr. Carrillo. He admitted that he received the goods, he was the one who ordered them, he said. Taking that into consideration, I conclude that the claimant has not proved that Mr. Cervantes has received the goods, let alone, for his own benefit, so that I may consider an award on the basis of *quantum meruit.*

18. From this point in the judgment, I should be proceeding to consider any liability of Mr. Carrillo to the claimant, COMA. Mr. Carrillo was joined as a defendant, on the application of Mr. Cervantes, the original defendant. The statement of claim was not amended so as to

include a claim by COMA against Carrillo. No direction order was made directing that Carrillo also be regarded as a defendant in the claim of COMA. In those circumstances, it is my view that I cannot decide the question of liability of Carrillo to COMA. There may be good reason why COMA did not take advantage of the joinder by amending its statement of claim or asking for direction order that Carrillo be regarded as the second defendant in COMA'S claim. There is always the question of costs in the event the claimant is unsuccessful, and on the other hand, in the event the claimant is successful, the claimant may still face the possibility of lack of means on the part of the defendant to satisfy the judgment debt. Moreover, it is the rule and common sense that one cannot be made a claimant without his consent – see ***r: 19(3) (4) of the Supreme Court (Civil Procedure) Rules, 2005.***

19. Under the old Supreme Court (Civil Procedures) Rules, a whole *"Order"* (equivalence of a *Part* in the new Rules) was devoted to *"third party proceedings"*. The new Supreme Court (Civil Procedures) Rules, 2005, omitted those provisions in ***Order 17*** and instead made it part of the wider rules in ***Part 19***, regarding:,

"*Addition and substitution of parties",* generally. In my view, the more stringent practices such as requiring the claimant to specifically first apply to join a third party as its own defendant no longer apply; it will suffice if the claimant applies for permission to amend his claim to include a claim against the person joined. I think that the judge upon inquiring at case management will know the position of the claimant regarding a person joined as a party, and will make the appropriate direction order. The case of ***Barclays Bank Plc v Tom [1923] 1 K.B. 221,*** illustrated the strict view then, based on the general rule that third party proceedings did not involve the claimant directly and the claimant could not obtain judgment against the third party, unless he joined the third party as his own defendant.

20. The claimant relied much on Carrillo failing to produce any receipts for payments. On the other hand, it must be taken into consideration that Carrillo must have made very many more orders for goods since 1998, than those on the invoices in question and paid for them; he has not produced receipts for any of those and the claimant has not produced copies of receipts for any. It must also be taken into consideration that the claimant withdrew claims based on invoices

made to Avilez, apparently because the prices on them have been paid. No copies of receipts have been produced by the claimant in regard to the invoices in question or any other. Again in the end, it is the word of the claimant that Carrillo has not paid, against that of Carrillo that he has paid. The incidence of the burden of proof would not favour the claimant. Despite what I have said about the evidence made available in regard to liability of Carrillo to the claimant, I make no conclusive determination about it.

Court Orders Made.

21. Judgment is entered for Mr. Ramon Cervantes. The claim of Comercializadora Mayorista De Abarrotes S.A. against Ramon Cervantes is dismissed with costs to be paid by Comercializadora Mayorista De Abarrotes S.A. Costs to be agreed or taxed.

22. Judgment is entered for Mr. Amir Carrillo in the proceedings between Mr. Ramon Cervantes and Mr. Amir Carrillo since there is no award against Cervantes for which he is to be indemnified. No costs are awarded against Amir Carrillo in favour of Ramon

Cervantes because Carrillo admitted to Cervantes right away that he was the one who ordered the goods.

23. Learned counsel Mr. Musa put up a brilliant fight, but in the end a court case is only as good as the evidence available in court for it. Learned counsel Mr. Zuniga S.C. and learned counsel Mr. Cardona have adduced sufficient evidence to defeat the claim.

24. Delivered this Monday the 30th day of April, 2007
At the Supreme Court
Belize City

Sam Lungole Awich
Judge
Supreme Court of Belize