[2012] JMSC Civ. 182

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010 HCV 01215

BETWEEN	**ARC SYSTEMS LIMITED**	**CLAIMANT**
AND	**CAJAROX INVESTMENTS LIMITED T/A ALL ISLAND HARDWARE**	**FIRST DEFENDANT**
AND	**HARRY SHIELDS**	**SECOND DEFENDANT**

Jacqueline Cummings instructed by Archer, Cummings & Co for the claimant

Jeffrey Daley for the second defendant

May 28, May 29, July 13, 27 and December 20, 2012

WHETHER AGREEMENT MADE – WHAT WERE TERMS OF AGREEMENT - WHETHER THERE WAS GUARANTEE OF DEBT OR JOINT PRIMARY LIABILITY – WHETHER AGREEMENT WITHIN SECTION 4 OF THE STATUTE OF FRAUDS

SYKES J

[1] In the hills of the parish of Manchester is a company named Cajarox Investments Limited (Cajarox). Despite the name, the company trades as a hardware business called All Island Hardware. Mr Harry Shields is one of the principals in Cajarox. He is the major shareholder. ARC Systems Limited (ARC) is a supplier of hardware products. ARC had a business relationship with Cajarox whereby hardware products were sold to Cajarox. At some point Cajarox began experiencing liquidity problems and this affected its ability to pay for the goods in a timely way. In other words, the early signs of collapse were manifesting themselves. The situation degenerated to such an extent that, at one point, ARC had stopped supplying goods to Cajarox. The trading relationship only resumed after negotiations between the parties.

[2] Cajarox's ability to pay after negotiations proved to be short lived. It soon ran into difficulties and eventually a receiver was appointed by First Caribbean International Bank. The receiver took control on March 10, 2010.

[3] ARC has brought this claim against both Cajarox and Mr Shields seeking to recover money for goods supplied. ARC says that Mr Shields is jointly liable with Cajarox because it was agreed that goods would only be supplied to Cajarox if Mr Shields assumed primary liability jointly with Cajarox. On the other hand, Mr Shields is contending that no such agreement was made with him personally. His position is that if any agreement was made, it was between ARC and Cajarox and he (Shields) was acting as a representative of Cajarox and not in his personal capacity.

[4] Mr Daley, counsel for Mr Shields, while denying any agreement of any kind, submitted that if there were an agreement then it was a guarantee which is governed by section 4 of the Statute of Frauds. That is to say, Mr Shields agreed to be liable only if the primary debtor (Cajarox) failed to meet its obligations. Section 4, according to Mr Daley, requires that guarantees must be in writing and signed by the Mr Shields or by his authorised agent. None of the statutory requirements have been met, therefore the guarantee is unenforceable.

[5] The saga does not end there. Mr Shields has brought a counter claim against ARC seeking that the claim be struck out on the grounds of being frivolous and vexatious. He denies, in the counter claim, that he had any personal contractual arrangement with ARC.

[6] From what has been said there are three issues to be decided. First, whether there was an agreement between ARC and Mr Shields. Second, if there was an agreement between them, what were its terms? Third, if the agreement and its terms are established, whether the agreement is a guarantee within the meaning of section 4 of the Statute of Frauds or one of joint primary liability, which would be outside the statute and therefore enforceable against Mr Shields.

Was there an agreement between ARC and Mr Harry Shields?

[7] Three witnesses testified in this matter; two for ARC, and Mr Shields in his own behalf. The two witnesses for ARC were Mr Norman Horne and Miss Shane Taylor, chairman and credit manager of ARC respectively. The first defendant did not testify.

[8] Mr Horne testified that Cajarox was one of his company's customers for at least fourteen years. There was also evidence that a social relationship developed between Mr Horne and Mr Shields. They would visit each other's homes for business and social reasons.

[9] At some point, Cajarox's account with ARC had been placed on hold because of the frequency of late payments. Mr Horne in his witness statement stated that he met with Mr Shields in December 2007 to discuss the account and the resumption of trading between the two entities. It was made clear to Mr Shields that ARC would be willing to sell goods to Cajarox on a prepayment or COD basis. Mr Horne stated that Mr Shields indicated how important credit was to Cajarox and in order to have credit extended to it he (Shields) would accept personal liability and purchase good for Cajarox.

[10] Mr Shields' attempt to persuade Mr Horne of his personal credit worthiness knew no bounds. According to Mr Horne, Mr Shields indicated that he was one of the

wealthiest persons in Jamaica with properties in several parishes in Jamaica as well as overseas. It was Mr Horne's evidence that Mr Shields told him (Horne) that he (Shields) was the owner of many expensive vehicles, trucks, forklifts, boats and beach cottages. Mr Horne stated that Mr Shields rounded off his presentation these immortal words, 'Mi caan bruk fi ten times mi lifetime.' Subsequent events have proved how incorrect Mr Shields was. He was declared a bankrupt earlier this year. If these words were not enough to convince Mr Horne, Mr Shields added these reassuring words for good measure, 'As a matter of fact I, Rocky [Shields] will give you a cheque with each order covering the amount of goods supplied post dated for thirty days.'

[11] Mr Shields' passionate and fervent presentation brought forth the desired result. Mr Horne indicated that he accepted Mr Shields' word and acted on it. It was Mr Horne's position that a number of things were done to reflect this understanding. First, the invoices of the goods supplied were now addressed to Cajarox and to Mr Harry Shields at his personal address instead of the business address. Second, all sales would be on a thirty-day post-dated cheque basis.

[12] Mr Horne continued by testifying that it was in this context that trading with Cajarox was resumed. However, within a few months the problems arose again and Cajarox failed to pay for the goods supplied. The post-dated cheques from Cajarox were not honoured by the bank. Mr Shields was informed of the dishonouring of the cheques but no money was forthcoming from him or Cajarox. The debt is said to be over JA$11m.

[13] A significant part of the problem in this case is the lack of documentation and the use of language by the parties. There was no documentary evidence outlining the precise arrangements made between the parties. One of the sub-issues in this case is to resolve the meaning of the word 'guarantee' in this context as used by the parties. To give a flavour of the problem: in cross examination, Mr Horne is recorded as saying that ARC would not have been prepared to sell goods if Mr Shields had not guaranteed payment. Mr Horne went further to say that the written guarantee of Mr Shields is the invoice or as he put it, the invoice confirmed the guarantee. He continued by saying that the

convention in the industry was that whoever was responsible for payment is shown on the invoice. What does Mr Horne mean by guarantee in this context?

[14] ARC's next witness was Miss Shane Taylor, the credit manager of ARC. Understandably, she had more details about the account than Mr Horne who dealt largely with policy and managerial decisions regarding the account. She began working at ARC in 2000 and when she came there Cajarox was already a customer. She stated that Cajarox had a credit limit of JA$12m (Mr Horne said JA$15m). Her understanding of the arrangement was that Cajarox would send post-dated cheques for thirty days to cover goods supplied.

[15] Now comes an important part of Miss Taylor's examination in chief. She stated at paragraph five of her witness statement that she knew 'that as part of the credit arrangement Mr Shields was personally liable for all payments not made by his company … as all the invoices had his name on it to indicate his joint liability with his company.' What does Miss Taylor mean by 'Mr Shields was personally liable'? Is it that she was saying that he assumed primary joint liability for the goods supplied or was she saying that his liability arose only after a default by Cajarox? If her evidence is accepted then in both instances, Mr Shields would indeed be personally liable but the consequences of the difference between each circumstance could hardly be sharper. This will be shown later.

[16] In the first part of the sentence, Miss Taylor is saying that Mr Shields would be liable for payments not made. This, on one reading, suggests that a guarantee in the Statute-of-Frauds sense was meant, that is, that Cajarox had primary liability for the goods supplied and in the event that no payment is made, then Mr Shields would be liable. At first reading, this part of the sentence does not give the impression that Mr Shields and Cajarox were both liable the instant the goods were supplied and a credit situation arose. The second part of the sentence then goes on to use the words 'joint liability.' What does this mean?

[17] The cross examination of Miss Taylor removed from the court the problem of trying to find out what she meant. It was revealed, during cross examination, that her witness statement was based on latent hearsay. It turned out that she

was not personally involved in the actual negotiations of the credit arrangements with Mr Shields. She became aware of the terms at board meetings. This means that her testimony is hearsay and cannot be used for the truth of what the words convey. Miss Taylor's testimony cannot be used to determine what were actual words used between Mr Horne and Mr Shields. She was not present at the negotiations and at best was receiving second hand, or third hand or even forth hand evidence of what was agreed. There is no evidence from her regarding the specific source of information. It might have been Mr Horne; it might have been from someone else or some other source. The result of this is that the court need not concern itself with analysing further Miss Taylor's evidence on the issue. Added to this is the absence of documentary evidence setting forth the agreement. This being so, the remaining evidence is that of Mr Horne and Mr Shields.

[18] Regarding the absence of documentation this is the evidence. Miss Taylor stated that there was a credit application by Cajarox. This was supposed to be a formal document. It was said that the credit application form requires to provide a personal guarantee. The credit application would be signed by owner of the company. In this particular case, the credit application allegedly signed by Mr Shields was destroyed (along with twenty others) by Hurricane Dean in August 2007. Like the discussion between Mr Shields and Mr Horne, there is no documentary evidence showing the terms of any guarantee given by Mr Shields.

[19] Here again is the problem of language. Miss Taylor speaks of a personal guarantee being given on the credit application. Is this joint liability or secondary liability? The absence of the actual document and the words of what is described as a personal guarantee means that the court is unable to determine what type of document Mr Shields would have signed, assuming that he did sign such a document. In the way that the evidence has been given, Miss Taylor has really stated a conclusion. This paucity of evidence has important consequences. It is for the court to decide the true meaning and effect of any document signed by the parties. It is not for the parties to call the agreement a

guarantee thereby determining whether it is a guarantee in law. The obligation of the parties is to adduce evidence of what the terms of the agreement were and then the court decides whether it is a guarantee. Unfortunately, Miss Taylor did not give any evidence of the terms of what she called the personal guarantee. Indeed, the terms of the credit application were not placed before the court. No proto type or exemplar of the document that Mr Shields was alleged to have signed was placed before the court. Neither was any effort made to adduce secondary evidence of the content of the document allegedly destroyed. Thus, at the end of the testimony for ARC, the court did not know the content of the credit application allegedly made by Cajarox and neither did the court know the terms of what has been called a personal guarantee. What this court had was Miss Taylor's belief of what the document said but as stated before, it is the contents of the documents that must be placed before the court and not the witness' understanding. Miss Taylor did not give any secondary evidence of content of the credit application.

[20] Against the evidence for ARC was Mr Shields' testimony. During the cross examination his character was assailed and he was accused of all sorts of deception – all in an effort to undermine his testimony. Stripped of all the emotion and damning accusations, Mr Shields' defence was that at no time did he agree to accept personal liability for Cajarox's debt. He did not agree to become a guarantor of Cajarox's debts and neither did he agree to joint primary liability with Cajarox for its debts for goods supplied by ARC. He has accepted that Cajarox is indeed indebted to ARC for goods sold and delivered but he cannot say what the exact amount is. Mr Shields said that all material times during the discussion with Mr Horne he was acting as an officer of Cajarox and was not undertaking any personal liability.

[21] In addition to the oral testimony of the witnesses there were documents tendered in an agreed bundle. None of these documents spoke to the terms of any agreement but were said by ARC to be consistent with the understanding reached between Mr Horne and Mr Shields. The main documentary evidence in the case comprised invoices, cheques and letters. The invoices are all dated in

the year 2009. There are eighteen invoices. Sixteen of them bore the names Cajarox Investment or Cajarox Investment Ltd as well as Harry Shields. The other two had only the name of Cajarox Investment Ltd. There were fourteen cheques, each stamped with words 'refer to drawer.' These cheques were made payable to ARC Systems Limited. In each case the drawer was Cajarox Investments Limited. The letters were dated between June 30, 2009 and November 26, 2009. They represent communication between Cajarox and ARC which spoke to (a) the indebtedness of Cajarox to ARC; (b) a request from Cajarox to ARC not to lodge thirteen post-dated cheques all dated from November 9, 2009 to November 30, 2009; (c) Cajarox opening a new trading account; (d) further communication about the post- dated cheques and (f) discussion about payment on a specific invoice.

[22] None of the cheques was signed by Mr Shields and neither was any of the invoices signed by him. Of all the letters only one dated November 6, 2009 was signed by him. It is to be noted that all these letters and cheques came into existence before the receiver was appointed in March 2010.

[23] The court does not accept Mr Shields' version of events in its entirety. The court needs to say why Mr Shields' account was not accepted. Mr Shields sought to say that he could not have made the arrangements attributed to him by Mr Horne because the company was taken over by the creditors. The problem with this explanation is that the uncontradicted evidence is that the receiver took over in March 2010 and all the communication put before the court predated that receiver. Until the receiver took over, Mr Shields was in fact the managing director and acted as such.

[24] There was another point in the evidence when Mr Shields even went as far as saying that he was effectively removed from his managerial position by some or one of his creditors (apparently before the receiver was appointed in March 2010) but there was no other evidence adduced in support of this assertion. The court is far from saying that oral evidence is inherently incapable of establishing this point but if such a serious allegation is being made in order to show that others had de facto responsibility for the company, the court would

expect to see some kind of documentation consistent with this evidence or some evidence showing what kinds of decisions were made and who made them in what circumstances so that an inference could be drawn that Mr Shields was not in charge of the company. The removal of the management of a company is such a serious step that a court should be cautious to accept that that in fact occurred in the absence of supporting evidence. Surely there would be board minutes consistent with this assertion. It is extremely unlikely that a managing director would simply accept his removal without any protest in writing to the person who has unseated him.

[25] The evidence put forward by Mr Shields did not make clear by what legal means or even unlawful means his effective removal from office was secured. There was no evidence that the board of directors or a meeting of the shareholders brought about his removal. There was no evidence of minutes of the organs of management of Cajarox consistent with Mr Shields' assertion. It is almost inconceivable that a shareholder and managing director of a company could be removed in the manner suggested by Mr Shields without some documented evidence of this. There was not even a letter from the company to its bankers, customers or suppliers indicating a change in management. For all these reasons, this court is unable to rely on Mr Shields' evidence on this point.

[26] What is clear is that an agreement of some kind was arrived at. It is common ground that ARC resumed sales to Cajarox after the hiatus. It is common ground that Mr Shields' name appears on the later invoices. All this is consistent with an agreement being struck between the parties. In the context of a business transaction where the seller is facing mounting unpaid invoices from the purchaser, it is only natural that the seller would wish some kind of assurance that outstanding and future bills would be paid before more goods were supplied.

[27] The evidence relating to the time when the parties met is not entirely satisfactory but there is sufficient for this court to say that the parties must have met and come to some understanding in order for the supply of goods to Cajarox to resume. This was before the receiver took over in 2010. The supply

of goods did in fact resume. Mr Horne in his witness statement said the meeting took place in December 2007. There was some issue with the precise date but again the court is satisfied that the balance of probabilities favours the conclusion that an agreement was arrived between ARC and Mr Shields concerning payment of outstanding and future invoices. The precise date does not matter so long as there is clear evidence that it took place before the receiver took over. There is no doubt that the discussion took place well before the receiver was appointed. This is the finding on this issue by this court. This leads to the next issue of what the terms of the agreement were.

The terms of the agreement

[28] At the meeting with Mr Shields, Mr Horne said that he and Miss Dahlia Cole, an employee of ARC, made it clear to Mr Shields that credit would not be extended any further to Cajarox because of its poor payment history. This court accepts that Mr Shields was told that his company would not receive further credit because of its poor payment record.

[29] Here, Cajarox was between a rock and hard place. It was in serious financial difficulty with severe cash flow problems. It was not generating enough revenue or able to secure credit from financial institutions to pay for its supply of goods. It was well and truly in the firm grip of an internal financial crisis. When a company has problems paying for the very supplies that keep it going then that is a company that will collapse unless strong and successful remedial measures are taken.

[30] ARC had ceased supply and wanted an arrangement that would avoid non-payment for future supplies. Mr Shields was the major shareholder and managing director of Cajarox. He who was desperate for ARC to continue the business relationship. There was also a personal dimension to this: both men had developed a relationship which saw them visiting each other on social occasions. Mr Shields was anxious to reassure Mr Horne that payment would not be a problem.

[31] This court accepts Mr Horne's version of the conversation. It makes more sense, in the context of this case, for Mr Shields to have given his personal word on the question of liability. Cajarox was having severe difficulty paying for goods delivered. A promise by Cajarox to pay in the future, without more, was clearly not acceptable to Mr Horne. When Mr Horne set out his condition for resumption of trading which was either prepayment or cash on delivery, clearly, this was going to prove problematic for Cajarox. If the company was having a cash flow problem then these conditions were onerous. This would mean that it would have to have the cash 'up front' to pay for the good. The fact that Mr Shields agreed to this method of payment strongly suggests that Cajarox had difficulty raising working capital from any source to meet its current obligations. It was in this setting that Mr Shields relied on his personal wealth to convince ARC to extend credit to Cajarox. This circumstance, to this court, makes Mr Horne's account the more compelling one. It is more coherent, more internally consistent, more consistent with the documentation that exists and consequently has greater explanatory power than Mr Shields' version. It is the desperate circumstance of Cajarox that drove Mr Shields to put his assets on the line to save the business if he could. When he told Mr Horne that '[him] caan bruck fi ten times' his lifetime (the court finds that these words were used), Mr Shields was putting forward his personal wealth in support of the extension of credit to Cajarox. This was a family owned business and Mr Shields was the largest single shareholder. It makes sense that he would do just about anything to keep 'his' company afloat. Cajarox was not simply a business being run by a professional manager with not stake in the business; it was in effect, Mr Shields' company. This court accepts Mr Shields said to Mr Horne at their meeting that 'I Rocky will give you a cheque with each order covering the amount of goods supplied post dated for thirty days.' The words are crucial: Mr Shields agreed to give a cheque with each order.

[32] The court concludes that the words used by Mr Shields provide the reasonable explanation for Mr Shields' name being placed on the invoices. This was the way that ARC chose to reflect the agreement. The addition of the name was not

a term of the contract but rather an event that occurred after the agreement which reflected what had been discussed and agreed.

[33] This leads to the third and final issue, whether the agreement was a guarantee or one of joint liability. The resolution of this depends on the meaning to be attributed to the words.

Was the agreement a guarantee or one of joint liability?

[34] When it comes to the interpretation of contractual arrangements, Anglo-Jamaican law follows the objective contract theory despite the misleading phraseology found in the judgments which say that the court is looking for the intention of the parties. Many law students, including myself, when meeting contract law for the first time have difficulty reconciling the misleading statement ('courts look for the intention of the parties') with what courts actually do which is look to see what the reasonable person would understand. By objective theory, it is meant that the courts in Jamaica are never ever concerned with what the parties to the agreement subjectively thought they had agreed. What the courts do is look at how a reasonable person (a) possessing the information the parties actually had and (b) standing in the same legal, cultural and factual circumstances would have understood the agreement. The reasonable person in this context is product of the culture in which the agreement was made and not an import from another country or culture. In short, the person is a reasonable Jamaican. The court has gone out of its way to explain this so that it is made clear that no aspersions are being cast on the integrity or intelligence of any of the witnesses in this case. The approach is objective.

[35] Mr Daley has submitted, quite strongly, that in the unlikely event that this court accepted Mr Horne's account, the agreement arrived at was in fact a guarantee in the strict legal sense of the word and therefore is governed by section 4 of the Statute of Frauds. He submitted that the agreement is unenforceable because it was not in writing and was not signed by Mr Shields or anyone authorised by him. Of course, Mr Daley's primary submission is that there was no such agreement with Mr Shields in his personal capacity. This court has not

accepted this primary submission for the reasons given already. The court has also stated that it accepts as the form of words used by Mr Shields. The remaining issue now is whether the agreement was a guarantee in law or something else.

[36] The fact that the court finds that Mr Shields used the words attributed to him does not necessarily mean that he was saying that he would assume joint primary liability along with Cajarox. The context still has to be examined in order to see on which side of the line this case falls. The fact that the court accepts Mr Horne's version should not prevent the court from examining his account to see if he has made good his case.

[37] The court now exams the statute and case law to determine whether Mr Daley is correct. Anyone reading the numerous cases under section 4 stretching back over some decades cannot help but be struck by the valiant efforts of some trial and some appellate court to veer away from finding that the agreement was a guarantee. The judges, no doubt, incensed by what they considered to be the unreasonable conduct of the defendant strove mightily to hold him accountable. It is hoped that this court has not fallen into that error.

[38] Section 4 of the Statute of Frauds reads in its modern rendition:

> *… no action shall be brought whereby (i) to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby (ii) to* ***charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person****; or (iii) to charge any person upon any agreement made upon consideration of marriage; or (iv) upon any contract or sale of lands, tenements, or hereditaments, or any interest or concerning them; or (v) upon any agreement which is not to be performed within the space of one year from the making thereof;* ***unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party***

> ***to be charged therewith, or some other person thereunto by him lawfully authorized.*** (Roman numerals and emphasis added)

[39] As can be seen, the statute applies to five types of contracts but the one in view in this case is the '**special promise to answer for the debt, default or miscarriage of another person**.' Each word (debt, default or miscarriage) has its own meaning and are not synonyms for each other. This present case is concerned with debt.

[40] In 1677 when the Statute of Frauds was enacted, the legislature at the time felt that there were too many cases which were coming before the courts in which it was alleged that contracts were entered into. The contracts were largely oral. The opportunity for perjury and subornation of perjury (inducing someone to give false testimony in judicial proceedings) was not lost on the legislature.

[41] The preamble to the statute captures what was at the heart of the problem with oral contracts (which still exists with all oral contracts even today) at the time. It reads:

> *FOR prevention of many Fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury …*

[42] Whatever the reason, the legislature chose five types of contract and specified that those contracts must be in writing if they are to be enforced. The contract of guarantee was one of them; in the language of the day, it was called '*special promise to answer for the debt … of another person*' (***Actionstrength Ltd v International Glass Engineering and Another*** [2003] 2 AC 541, [1], Lord Bingham; [15], [20] and [21] Lord Hoffman).

[43] To be within the statute, the agreement must be for C to answer for the debt of A to B, that is to say, for the agreement to be a guarantee it must be that the alleged guarantor agreed to become liable for the debtor's debt in the event he fails to meet his obligation. He must not agree to be joint primary liability. There

must be either an existing circumstance or one that is come about where the debtor is primarily liable to the creditor and then the guarantor agrees to become liable in the event that the primary debtor defaults. The alleged guarantor's liability must be secondary. If it is primary then it is outside the section and therefore need not be in writing with the result that it is enforceable. The court must not strive to find that it is not a guarantee merely because the court may disapprove of the defendant's conduct.

[44] This area of law has seen some 'hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public' in order to decide on which side of the line to place the case to be decided (**Yeoman v Latter** [1961] 2 All ER 294, 299, Harman LJ). It is hoped that this case does not contribute to this less-than-complimentary view of this corner of the law.

[45] The consequences of the classification are enormous. If it is classified as a guarantee but not evidenced in writing and signed by the person said to be liable, or his authorised agent, as required by section 4 of the Statute of Frauds, the creditor fails and the debtor goes his way rejoicing. On the other hand, if it is classified as one of joint primary liability, then the creditor's songs of praise will be heard for miles (or in this metric age, kilometres) around.

[46] It is no secret that very senior members of the judiciary in some jurisdictions have expressed undisguised hostility to section 4 of the Statute of Frauds. In the case of ***Actionstrength*** the claimant agreed to supply labour to International Glass Engineering which was building a factory for St. Gobain Glass UK Limited. From the outset, the claimant did not receive payments on time. The result, like the case at bar, was that a substantial sum was owed to the claimant. In order to avert a labour withdrawal, St. Gobain told the claimant that it would have dialogue with International Glass and urge it to meet its obligations with the claimant. If that failed, St. Gobain promised that it would withhold monies from International Glass and pay them over to the claimant. Unwisely, as it turned out, the claimant accepted the solution and proceeded in good faith. The construction continued. Eventually, the claimant sued. St. Gobain, like Mr Shields here, disputed the factual allegations made by the

claimant but submitted that in the event that it was wrong and the claimant was right, the agreement was a guarantee and therefore enforceable by virtue of non-compliance with section 4 of the Statute of Frauds. St. Gobain brought a striking out application against the claimant. This failed at first instance but succeeded in the Court of Appeal and the House of Lords on the ground that the agreement was in fact a guarantee and not one of joint primary liability. None of their Lordships in the House pretended that the conduct of St Gobain was worthy of praise but all held that the contract was a guarantee in law and therefore subject to the Statute of Frauds and so was unenforceable.

[47] If a West Indian example is needed, it can be found in the case of **Spencer v Francis** (1970) 14 WIR 518. A young man broke the windscreen of the claimant's car. His mother promised to pay for the damage if he did not bring the matter to court. She failed to keep her promise because she had lost her job and the claimant sued her. The claim failed for want of writing. Thus, whether the context is a large commercial contract or an agreement between ordinary citizens, whether rich or poor, goose or gander, the same principles apply.

[48] The upshot of the legislature's decision to require some types of contracts to be in writing before they are enforceable is that persons who make promises which fall within section 4 which are not in writing and signed by the person to be held liable or someone authorised by him can break them with impunity (**Actionstrength** [15] Lord Hoffman). It was often the case that the claimant had acted to his detriment by relying on the promise made by the defendant. This meant that commercial expectations could be frustrated and hopes dashed for the want of writing (**Actionstrength** [2] Lord Bingham). As Lord Hoffman pointed out, the policy decision the legislature faced was whether greater injustice would be caused by permitting enforcement of oral agreements which might have been 'ill-considered, ambiguous or completely fictitious' than by making unenforceable some contracts because they were not in writing. The legislature decided, even at the risk of permitting persons to break their promises, that some contracts would simply not be enforceable unless they

were in writing or evidenced by writing signed by the person to be held liable or his authorised agent (**Actionstrength** [15] Lord Hoffman).

[49] From that has been said on the facts already, this court finds that Mr Shields made a personal promise to ARC. The court also concludes that the personal promise was to be jointly liable that is original liability for goods supplied to Cajarox. As stated earlier, Mr Shields went as far as saying that he would give a cheque (which could only mean a personal cheque in all the circumstances of this case) post-dated for thirty days. The words used were 'I … will give you a cheque with each order covering the amount of goods supplied post dated for thirty days.' This was part of the agreement for the resumption of supplies. This cheque, if given, would be given as primary payment for the goods supplied and not as secondary payment in the event that Cajarox failed to pay. Mr Shields was promising to ARC to be jointly primarily liable with Cajarox. On this understanding, the agreement is not within the statute and is therefore enforceable.

The question of interest

[50] ARC is claiming that it is entitled to interest on any bill which remains unpaid for sixty days. Mr Shields disputes this. Mr Horne in his witness statement said that ARC has a finance charge of 1.5% per month on all invoices overdue by more than sixty days. This may well be a practice of the company but the evidence does not make it clear that Mr Shields agreed to this. This being so, the court cannot conclude that ARC is entitled to claim 1.5% per month on all overdue invoices.

[51] The way that the court proposes to deal with the interest is by the exercise of its discretion under the Law Reform (Miscellaneous Provisions) Act.

[52] The sum proved to be owed for goods supplied which Mr Shields agreed to be jointly primarily liable was JA$11,021,754.51. Despite the fact that this was a commercial agreement ARC did not seek to prove the commercial rate of interest and so interest will be awarded on the same basis as the practice of the Supreme Court in personal injury cases.

The claim against Cajarox

[53] Learned counsel for ARC did not address the claim against Cajarox in final submissions. Mr Daley could not address the matter because he no longer represented Cajarox. Mr Daley's name was removed from the record as counsel for Cajarox by an order made by Master Lindo on March 14, 2011. There is no satisfactory proof at this time that Cajarox was informed of the various dates after Mr Daley stopped representing the company. However, before Mr Daley's name was removed, a defence was filed admitting receiving the goods. The dispute was over the amount owed. In these circumstances, the court enters judgment in favour of ARC against Cajarox. It is really a judgment on admission.

Disposition

[54] Judgment entered for ARC against Mr Shields on the claim and counterclaim. Mr Shields is liable to ARC in the sum of JA$11,021,754.51 at 3% from the date the sum became due to the date of judgment. Judgment in the same sum is also entered against Cajarox. It also attracts the same rate of interest for the same period. Costs to ARC to be agreed or taxed.