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NMLS

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.C. - 324 of 1999

BETWEEN	CROWN CORKE DE GUATEMALA S.A.	CLAIMANT
AND	CARLO PRODUCTS LIMITED	1st DEFENDANT
AND	CARLYS DAHLIA HUGHES	2nd DEFENDANT
	(Executrix of the Estate of David Henry Hughes, deceased)	

Mr. John Graham and Ms. Khara East instructed by John G. Graham & Co. for the Claimant.

Mr. Lowell Smith & Mr. John Givans instructed by Givans & Co. for the 1st Defendant.

Mr. Stuart Stimpson instructed by Ramsey & Stimpson for the 2nd Defendant.

Heard: 27, 28 April 2009, July 31 2009.

Open Court

Mangatal J:

**CONTRACT – SALE OF GOODS – AGENCY – ACTUAL OR OSTENSIBLE
AUTHORITY – BREACH OF WARRANTY OF AUTHORITY –
COMMERCIAL INTEREST ON FOREIGN DEBTS.**

1. This is a claim by the Claimant “Crown Corke” against the 1st Defendant “Carlo Products” and alternatively against the 2nd

Defendant in her capacity as Executrix of the Estate of David Henry Hughes, deceased.

2. Crown Corke is a company incorporated under the laws of Guatemala and is a part of an international group of companies operating in various countries. It carries on the business of manufacturing and selling assorted containers and crown caps in Guatemala and overseas.
3. Carlo Products is a limited liability company duly incorporated under the laws of Jamaica and has its registered office at 691 Spanish Town Road, Kingston 11, in the Parish of Saint Andrew. The primary business of Carlo Products is the filling of aerosol cans with various products such as insecticides and deodorant.
4. The claim against Carlo Products according to the Further Amended Statement of Claim dated 28th April 2009, and incorporating amendments granted at trial, is for the sum of U.S. \$418, 215.23 for goods sold and delivered by Crown Corke to Carlo Products at the request of David Henry Hughes "Mr. Hughes", the managing director of Carlo Products while acting in his capacity as the agent of Carlo products. The claim is also for interest accrued on outstanding invoices unsettled for 60 days at a rate of 2.5 % per month which Crown Corke allege totals U.S.\$ 1, 226,029.96.
5. Originally, Crown Corke's claim was against solely Carlo Products. However, sometime after the Defence of Carlo Products was filed, Crown Corke amended its claim to add an alternative claim against the 2nd Defendant on the basis that Mr. Hughes fraudulently represented that he was acting on behalf of Carlo Products when he ordered the goods in question and claims for breach of warranty of authority on the part of Mr. Hughes.
6. Carlo Products' Defence is that it did not purchase or order the goods from Crown Corke. If any of the goods were delivered by Crowne Corke to Carlo Products, which Carlo Products do not

admit in their pleadings, then they were delivered upon the order of O.G. Smith and Company Limited "O.G. Smith". O.G. Smith is said to be a limited liability company incorporated in the Cayman Islands, from which Carlo Products obtained supplies of goods manufactured by Crown Corke. Carlo Products admits that it did pay to Crown Corke the amount of U.S. \$69,234.96 in respect of invoices mentioned in paragraph 4 of the Amended Statement of Claim. However, Carlo Products states that it made the payment of U.S.\$ 69,234.96 directly to Crown Corke for goods which it did not order from Crown Corke but which it agreed to accept from Crown Corke after Crown Corke had already shipped them to Jamaica. Carlo Products denies that it is indebted to Crown Corke as claimed and denies that there was any agreement between Crown Corke and Carlo Products whereby Carlo Products was to pay interest on unsettled invoices.

7. In her Defence, the 2nd Defendant in her representative capacity states that Mr. Hughes at all material times up to his death was managing director of Carlo Products and carried out his duties within the scope of his authority. The 2nd Defendant denies that Mr. Hughes was guilty of the alleged breaches of warranty of authority or fraud.

THE EVIDENCE

8. Mr. Mario Alberta Rodas Urizar "Mr. Rodas", gave evidence on behalf of Crown Corke. Expert Interpreter Glen Jackman was sworn prior to Mr. Rodas as Counsel Mr. Graham, who appeared for Crown Corke, indicated that Mr. Rodas' facility with the English language was limited to some extent. Mr. Rodas is Crown Corke's Financial Officer. He states that during the period from December 17 1997 to June 4 1999 Crown Corke was the main supplier of aerosol containers to Carlo Products. During that

period, Mr. Hughes was the Managing Director of Carlo Products and represented himself as such, and was responsible for Carlo Products day-to-day operations. Mr. Hughes died on the 27th of May 1999. Up to the time of his death Crown Corke had business dealings with Carlo Products and dealt exclusively with Mr. Hughes.

9. The goods were shipped to Carlo Products by Crown Corke and Carlo Products accepted all of the goods which were supplied to it by Crown Corke. Copies of the bills of lading in respect of each shipment of goods which were shipped have already been supplied to Carlo Products. During the period December 17, 1997 to June 4, 1999, Crown Corke supplied to Carlo Products aerosol containers valued at US \$1,130,449.09.

Mr. Rodas says that at no time did Crown Corke ever receive or accept an order from O.G. Smith or from any other person except Carlo Products through its Managing Director Mr. Hughes to supply goods to Carlo Products.

Attached to Mr. Rodas' Witness Statement were a number of documents which the parties agreed should be treated as exhibits.

10. Mr. Rodas was cross-examined and he stated that when these orders involved in the proceedings were made, they were received either by Mr. Rodas himself or the general manager of the factory, Mr. Santiago del Pino. In response to a suggestion denying that the orders claimed by Crown Corke were made, Mr. Rodas states that Crown Corke delivered to Carlo Products for all of two years based on orders that Mr. Hughes sent to them. He also indicated that all of the payments which Crown Corke received prior to the Invoices the subject of the present claim, were based on orders from Mr. Hughes on behalf of Carlos Products.
11. Mr. Rodas denied that Crown Cork received payment at its Bank account in New York from O.G. Smith and he indicated that Crown

Corke could not have received any payment in the New York bank account that he would not know about because he handled the account in New York 100 percent. He stated that Crown Corke's reference numbers were the numbers of its Invoices to Carlo Products. He indicated that he did not know anything about any O.G.Smith.

12. Mr. Trevor Armstrong, who is a director of Latin American Exporters Limited, gave evidence on behalf of Carlo Products. Mr. Armstrong says that he was at all material times a director of Carlo Products and he became a director of Carlo Products about 15-20 years ago. The primary business of Carlo Products is the filling of aerosol cans with various products such as insecticides and deodorant. Carlo Products is not now actively trading.
13. According to Mr. Armstrong, Carlo Products had no account with Crown Corke for the supply of any goods to Carlo Products and Crown Corke has never sold any goods to Carlo Products. At all material times Carlo Products would place orders with O.G. Smith for the supply of goods to Carlo Products. O.G. Smith would source the goods on behalf of Carlo Products and these goods would be supplied to Carlo Products. O.G. Smith would then render invoices to Carlo Products for these goods, charging Carlo Products a price which included a mark-up component. In relation to these goods, part of the course of dealing between Crown Corke and O.G. Smith was that O.G. Smith would make payment for these goods to Crown Corke through Crown Corke's bank account numbered 36162801, maintained at Citibank, New York, U.S.A.
14. As regards the role of Mr. Hughes, Mr. Armstrong indicated that both himself and Mr. Hughes were involved in the day to day operation of Carlo Products. Mr. Armstrong does concede however that Mr. Hughes was more involved in matters relating to Crown Corke than he was (paragraph 6 of his Witness Statement).

Attached to Mr. Armstrong's Affidavit were copies of a number of Invoices from O.G. Smith and Customs Entry forms in respect of the goods which the parties agreed should be treated as exhibits and which were also included in the agreed bundle.

15. In cross-examination, Mr. Armstrong said that Mr. Hughes' responsibility as Managing Director meant that he was overall in charge. Mr. Hughes it was who concentrated mostly on purchasing and packaging of materials, metal cans into which Carlo Products put their products. Armstrong reported to Hughes as to what he was doing and they had meetings in the mornings at which they discussed what Hughes was doing. There was no board decision that Carlo Products would start to do business with O.G. Smith. Mr. Hughes made the decision, said he would handle everything with O.G. Smith and that he could get more leverage with payment.
16. Mr. Armstrong confirmed that the reason he is saying that Carlo Products does not owe Crown Corke is because they paid O.G. Smith for the goods. Mr. Armstrong said he never had any discussion or any correspondence with anyone at O.G. Smith in order to clear up this matter even though he had an address for O.G. Smith. He states that he did not make contact because he did not know who to connect with. He knew Daryl Myers of Myers & Alberga and Mr. Armstrong has been to Cayman. He did not know that the address of O.G. Smith was the same as that of the law firm Myers & Alberga. In reference to letter dated August 20 1996 (page 30 of the agreed bundle), he did not know of any loan by O.G. Smith to Carlo Products of U.S. \$40,600.00. O.G. Smith did not play any part in clearing the goods off the wharf in Jamaica.
17. Mr. Armstrong admitted that there were some invoices that Carlo Products paid to Crown Corke and he was the officer who was instrumental in paying those monies. None of those goods were

sent to Jamaica for the attention of O.G. Smith. When the goods came in Carlo Products' name and they were goods which Carlo Products did not order, Mr. Armstrong claims that he did not contact O.G. Smith because the Invoices were in Spanish. He says that he contacted Crown Corke and told them that if and when the goods arrive, if they don't have invoices acceptable by Customs in English, he would not be able to clear those goods and they would have to clear them themselves. According to Mr. Armstrong Carlo Products never bought goods from Crown Corke directly and all goods bought from Guatemala, Carlo Products bought through O.G. Smith. He later got the Invoices from Crown Corke in English as a result of a phone call he made to Crown Corke. Since the documents came from Crown Corke, Mr. Armstrong says he dealt with Crown Corke and did not contact O.G. Smith. Other than these invoices Mr. Armstrong says he never received, saw or found any other invoices from Crown Corke.

No evidence was called on behalf of the 2nd Defendant and Mr. Stimpson, who represented her, indicated that the 2nd Defendant intended to rely upon her pleaded case.

The Issues to be Resolved

The Contractual Situation

(a) Was there a contract between Crown Corke and Carlo Products directly with regard to goods manufactured by and sent from Crown Corke to Jamaica or were the contractual arrangements comprised of a contract with respect to these goods as (i) a sale of the goods from Crown Corke to O.G. Smith and then (ii), a contract for the supply of those goods by O.G. Smith to Carlo Products?

The Issue of Mr. Hughes' authority

- (b) If the Court finds that the contract was between Crown Corke and Carlo Products, what part did Mr. Hughes play in it? Was he in fact acting within the scope of his authority, whether actual authority, or ostensible authority, as an agent for Carlo Products, or was he acting in breach of warranty of authority?
18. The consequence of the court finding that Mr. Hughes acted within the scope of his authority would be that Carlo Products would be liable to Crown Corke and there would be no liability on the part of the Second Defendant. If the Court finds that Mr. Hughes acted outside the scope of his authority and in breach of warranty of authority, this would mean that the Second Defendant would be liable in respect of Crown Corke's claim and Carlo Products would not.

The Law

19. The general rule is that when an agent acts within the scope of his actual authority, the principal is bound by contracts made by the agent on his behalf. –See **Chitty on Contracts, Specific Contracts, Volume II, 27TH Edition, paragraph 31-053.**
20. Actual authority can either be express or implied. Express authority is that which arises from the express words used. Implied authority is inferred from the conduct of the parties and the circumstances of a case. In **Hely-Hutchinson v. Brayhead** [1967] 3 All E.R. 98, a decision of the English Court of Appeal, Lord Denning M.R. defines express and implied authority at page 102, paragraph A as follows:

It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the

parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office.

21. Implied authority may itself be broken down into four types: incidental authority, usual authority, customary authority and authority derived from the circumstances of the case.-See paragraph 31-039 of **Chitty**.

At paragraph 31-042 of **Chitty**, usual authority is discussed as follows:

Agents authorised to conduct particular trades or businesses normally have implied authority to do whatever is usually done by persons occupying such positions...

22. In the **Hely-Hutchinson** decision at page 102, paragraphs C-E, Lord Denning gives a clear exposition on the subject of ostensible authority. He states:

Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth

more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation of the £500. He may himself do the "holding out". Thus if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation...

23. In the leading decision of **Freeman & Lockyer (A firm) v. Buckhurst Park Properties (Mangal) Limited** [1964] 2 Q.B. 480 , it was held that although the agent in question had no actual authority to employ agents and take other steps to find a purchaser, he had ostensible authority because he had, to the knowledge of the board of the company in question, acted as managing director. At page 505 Diplock L.J. states:

The commonest form of representation by a principal creating an apparent authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of

such business. The making of such a representation is itself an act of management of the company's business.....

24. Our own Court of Appeal's decision, in which Forte P. gave the leading judgment, S.C.C.A No. 129/99 **Dr. P. Samuels v. Lakeland Farms Limited** unreported, delivered 31st July 2003, is quite instructive. The principles discussed in the **Freeman and Lockyer** case were applied and it was held that a farm manager of the Respondent Company's stud farm had neither actual nor ostensible authority to enter into a special agreement with the Appellant for reduced fees in respect of his mare. In that case, at page 4, the learned President noted that the question in relation to actual authority had to be resolved without the benefit of the evidence of the farm manager, which is not unlike the situation in this case with regard to the deceased Mr. Hughes.
25. This case falls to be decided on a balance of probabilities and in approaching the assessment of the evidence and the respective cases of each party, I found it useful to examine exactly what is the extent and nature of the supporting evidence in respect of the positions taken by the respective parties.

MATTERS THAT SUPPORT CROWN CORKE'S CASE THAT IT CONTRACTED WITH CARLO PRODUCTS THROUGH ITS AGENT MR. HUGHES

26. (a) The matters listed in paragraph 9 of Mr. Rodas' Witness Statement:
(i) the placing of written orders for the supply of aerosol containers. See for example, several letters passing between Crown Corke and Carlo Products in the agreed bundle, and in particular letter from Crown Corke to Carlo Products asking for authorization

from Mr. Hughes as to a colour key for certain Pyro cans and on which Mr. Hughes wrote the words “ approved. OK”,(page 61 Agreed Bundle), letter dated April 15 1998 from Mr. Hughes on Carlo Products letterhead to Crown Corke where at paragraph 2 Mr. Hughes states “ Please advise your planned shipping date Pyro 350 ml and 600 ml. We need both for May production.” The note dated January 17 1999 (page 162 of Agreed Bundle).In that note Mr. Hughes writes to Crown Corke and states, amongst other things, “... we need more cans in February. Can you produce 2 containers, about 6,000 boxes, and ship one in the first week of February, and one in the last week of February?”. See also the letter dated 31st October 1998 from Carlo Products to Crown Corke in which in the last paragraph Mr. Hughes writes “ Pyro . We placed orders for one container of each size in November. My warehouse is overloaded, and I cannot take those goods until December. Please hold shipment until December. Thanks” –exhibit in Witness Statement.

.....(ii) communication directly with Crown Corke from Mr. Hughes in which the amount and description of the goods to be supplied to Carlo Products were described;

.....(iii) detailed communication with Crown Corke’s representatives as to the art work, graphics and information to appear on the aerosol cans to be supplied, including their colours, the size, shape and details of the writing, the logos and other markings which should appear;

- (b) Mr. Hughes, acting purportedly on behalf of Carlo Products visited Crowne Corke’s offices/factory in Guatemala on a number of occasions between December 17, 1997 to May 27 1999 to conduct

negotiations/discussions with Crown Corke in respect of the business relationship between them, see paragraph 13 of Mr. Rodas' Witness Statement and letter on Carlo Products' letter head signed by Mr. Hughes to Crown Corke dated January 5 1998 (page 9 Agreed Bundle of Documents) and letter from Crown Corke to Mr. Hughes dated January 6 1998 confirming hotel reservations in Guatemala for Mr. Hughes and his wife at Mr. Hughes' request (page 10 Agreed Bundle) Mr. Hughes also made reservations for Crown Corke's Sales Manager, Alejandro Gallindo to stay at Le Meridien Pegasus Hotel here in Jamaica- see letter dated March 19, 1999 on Carlo Products letterhead attached to the Witness statement of Mr. Rodas. So the contents of this letter, if true, suggest that Crown Corke's representatives, with whom Carlo Products claim they had no direct dealings, came to Jamaica, the country in which Carlo Products' business operation is located.

- (c) The goods which were on all accounts manufactured by Crown Corke, went directly from Crown Corke in Guatemala to Jamaica. At no time did the goods go through Cayman to O.G. Smith and then for onward transmission to Carlo Products.

(d) Crown Corke carried out credit checks in respect of Carlo Products. See page 2 of the Agreed Bundle-Credit Request by Crown Corke of Carlo Products and the letters at pages 24 to 28 of the Agreed Bundle.

- (e) There was no mention whatsoever of O.G.Smith, whether as intermediary, or at all, in any of the correspondence passing between Crown Corke and Carlo Products.

- (f) There are no copies of cheques, or receipts showing payment of Invoices for O.G. Smith by Carlos Products.

None of these matters listed and categorized by me as supportive of Crown Corke's case, have been challenged by Carlo Products, save of course for Carlo Products' position that Mr. Hughes was not acting within the scope of his authority.

**MATTERS THAT SUPPORT CROWN CORKE'S CASE AGAINST THE
2ND DEFENDANT IN RESPECT OF FRAUDULENT
MISREPRESENTATION AND BREACH OF WARRANTY OF
AUTHORITY BY MR. HUGHES**

27. The only aspect of the evidence that could possibly qualify under this head is the combination of facts that the only dealings Crown Corke had were with David Hughes and that Mr. Armstrong, who was a director of Carlo Products, and who was the only person who gave evidence on behalf of Carlo Products, claims that there was no contractual agreement between Crown Corke and Carlo Products, that the arrangement was between Carlo Products and O.G. Smith and that Mr. Hughes had no authority to contract with Crown Corke.

MATTERS THAT SUPPORT CARLO PRODUCTS' CASE

28. There are a number of invoices attached to the Witness Statement of Mr. Armstrong and located in the agreed bundle at item 24, page 178 onwards. These invoices are invoices from O.G. Smith to Carlo Products in respect of goods manufactured by Crown Corke and shipped from Guatemala. There are also C78 forms matching these invoices. Carlo Products relies on these documents to say that it was O.G. Smith with whom they contracted and that they paid O.G. Smith and not Crown Corke, albeit the goods were sourced from Crown Corke in Guatemala.

29. Carlo Products also relies on certain documents located in the Agreed Bundle at page 300 to 307 in proof of payments to O.G. Smith.

RESOLUTION OF ISSUES

The Contractual Situation

30. I find that on a balance of probabilities, there is a preponderance of evidence that the goods were provided to Carlo Products as a result of orders and requests made by Mr. David Hughes, Managing Director of Carlo Products, directly to Crown Corke, and not as a result of any contract between O.G. Smith and Carlo Products. There was no effective denial by Mr. Armstrong that the goods in respect of which Crown Corke is claiming that outstanding sums are due were received by Carlo Products. Indeed, Mr. Armstrong in cross-examination indicated that the reason that he says that Carlo Products does not owe any of the monies claimed is that Carlo Products paid O.G. Smith in respect of the same goods. In the closing submissions on behalf of Carlo Products, at paragraph 15, Counsel make the point that some of the goods mentioned in the claim are the same goods mentioned in some of the Invoices from O.G. Smith and corresponding Bills of Lading. It is difficult to accept that Carlo Products in settling some of Crown Corke's Invoices dated May to June 1999, and totalling the not inconsiderable sum of \$69,234.98, would have paid the sum not only for goods it did not order, but also to a party with whom they had no contractual relations. I find as a fact that Carlo Products did receive from Crown Corke the goods in respect of the invoices set out at Paragraph 7 of the Further Amended Statement of Claim. I found Mr. Rodas to be a credible and straight-forward witness and I accept his evidence that these invoices, as was the case with earlier invoices which were delivered routinely in the

ordinary course of business, and in respect of which there is no evidence of complaint by Mr. Hughes of not receiving them, and which were paid by Carlo Products, were delivered to Carlo Products.

31. I find it strange that, in the face of Crown Corke's unrelenting position that they at no time contracted with O.G. Smith, and faced with a substantial claim against them for over US\$400,000.00 together with interest, Carlo Products has not seen it fit to join or seek to join this Caymanian Company in the law suit, claiming some sort of indemnity. This is the company which Mr. Armstrong said in evidence that Mr. Hughes dealt with directly because Mr. Hughes said that he could get "more leverage with payment". There is no mention anywhere in the correspondence between Mr. Hughes and Crown Corke of this alleged intermediate role of O.G. Smith. A number of the points of evidence make the proposition that O.G. Smith was the party who contracted directly with Crown Corke difficult to believe and accept. Firstly, there does not seem to me that there would have been any ground or basis for Carlo Products' Managing Director Mr. Hughes to have been communicating in such great detail with Crown Corke as to the requirements and design necessary for Carlo Products' use. If indeed it was O.G. Smith that was the real party with whom Carlo Products contracted, it would seem more plausible that the purchaser of the goods would have communicated such details directly to the party with whom it was contracting. It is also hard to see why Mr. Hughes would have been visiting Crown Corke's business operations in Guatemala if indeed Carlo Products only acquired the goods through O.G. Smith as a supplier of goods manufactured by Crown Corke. It is even more perplexing that Mr. Hughes should have been making hotel reservations here in Jamaica for personnel from Crown Corke, if indeed the real

contracting parties were Crown Corke and O.G. Smith, and O.G. Smith and Carlo Products respectively.

32. Further, I agree with Mr. Graham's submissions on behalf of Crown Corke that if the real dealings with Crown Corke were with O.G. Smith, and that O.G. Smith was responsible for making payments to Crown Corke, it is difficult to comprehend why Crown Corke would be requesting financial references from Carlo Products, which request the written documentation demonstrates. The credit request form is filled out by Mr. Hughes and has "CABC Jamaica Ltd" which I draw the inference that the "CABC" is really a spelling error, and is really a reference to CIBC Jamaica Ltd. At page 24 of the Agreed Bundle is a letter from Crown Cork to "CABC Jamaica Ltd." asking for credit references in respect of Carlo Products and at page 302 of the agreed bundle is a letter in relation to other matters, which confirms that CIBC Jamaica Ltd. is Carlo Products' Banker.
33. Mr. Armstrong made a bare statement as to O.G. Smith charging Carlo Products with a mark-up on prices which O.G. Smith obtained from Crown Corke. That would, I think, have been an important point, since it would support Carlo Products' position that although the goods were sourced from Crown Corke, Carlo Products really and genuinely transacted arms'-length business through O.G. Smith. However, this assertion is barren of proof, orally, or by means of any of the documentation produced. Nor did any representative of O.G. Smith give evidence at this trial.

I note a few matters about the documents put forward in proof of Carlo Products' Defence. Firstly, none of them are receipts from O.G. Smith. Nor are there any orders from Carlo Products to O.G. Smith. The other issue is that, whereas the claim by Crown Corke is in respect of 23 invoices dated November 27, 1998 through to May 19, 1999, all of the documents upon which Carlo

Products relies in proof of payment to O.G. Smith in respect of the goods the subject of this claim, bear dates before the earliest of the Crown Corke invoices, i.e. before the invoice dated November 27, 1998. All of this must be viewed against the backdrop of Crown Corke's staunch and whole scale denial of having any dealings with the Caymanian Company O.G. Smith and the admitted fact that the goods which Carlo Products claims were the subject of agreement with O.G. Smith came directly from Crown Corke in Guatemala to Customs here in Jamaica for Carlo Products.

34. I find that the documentation produced by Carlo Products in support of its claim does not substantiate Carlo Products claim of the intermediate relationship with O.G. Smith. It may be that for some reason, Carlo Products did order its business in such a way, or its internal records reflect that, there was some involvement with this Caymanian Company O. G. Smith. For example, that there may have been some Caymanian interplay by Carlo Products is suggested in letter dated January 27 1998 written by Mr. Hughes on Carlo Products' letterhead to Crown Corke, Mr. Hughes closes with the words: "We have instructed our bank in Cayman Islands to pay your first invoice. You should receive...payment this week." Further, in his letter dated March 12 1998, Mr. Hughes pens the following words: "We instructed our bank in Cayman on March 5th to send \$38,840.04 to your Citibank NY account number 36162801. We forgot to ask them to mark the payment with our name, but the money should be on your account now.(my emphasis). Both letters are exhibited to Mr. Rodas' Witness Statement. At their highest, these letters may suggest that Carlo Products had some banking or financial transaction arrangement in Cayman. They do not at all suggest that there was any contractual arrangement between Crown Corke and a company called O.G.Smith. I find that even if Carlo Products had some kind

of connection to O.G.Smith, Crown Corke did not know of any such arrangement, and could not thereby be bound. In any event these arrangements could not have affected or impacted Crown Corke's contractual arrangements with Carlo Products without Crown Corke's consent.

The Issue of Mr. Hughes' Authority

35. It is common ground that Mr. Hughes was the managing director of Carlo Products. Thus it does appear to me that although Mr. Hughes is not here to state anything about his actual authority, the evidence when looked at overall, supports Crown Corke's position that they did not contract with O.G. Smith regarding the goods, and in so doing, on a balance of probabilities, demonstrates that Mr. Hughes had actual authority by means of implied authority. I say this because, Carlo Products is not only denying that Mr. Hughes had any authority to contract with Crown Corke, but it is also being denied that Carlo Products did in fact contract with Crown Corke as opposed to O.G.Smith in respect of the subject goods. If therefore, it is found, as I have done, that the real contractual arrangement was between Crown Corke and Carlo Products, and not between Carlo Products and O.G.Smith, that is a pointer in the direction that Mr. Hughes actual authority was to contract with, or included contracting with Crown Corke. In my judgment, it appears that Mr. Hughes had implied authority in the form of usual authority as managing director to enter into the contract with Crown Corke for the supply of the subject goods.
36. I find some support for my reasoning in the judgment of Lord Pearson in **Hely-Hutchinson** at page 107 I to 108 B where, although the judge at first instance had found that there was ostensible authority, Lord Pearson indicated that the Court of Appeal was not precluded, and indeed went on to find, that there was also actual authority. He referred to, and concurred with

Diplock L.J.'s comment in the **Freeman** case that actual authority and ostensible authority are not only not mutually exclusive, they generally co-exist and coincide. Lord Pearson states:

On the first question I agree that on the learned judge's findings of fact, which are not disputed, there is proof that Mr. Richards had actual authority to make the contracts on behalf of Brayhead. The points to which I attach most importance in coming to this conclusion are these. First, Mr. Richards, while acting as de facto managing director and chief executive and entering into large transactions on behalf of the company, would sometimes merely report the transactions and not seek prior authority or subsequent confirmation by the board, and the board acquiesced in this course of dealing. Secondly, these two contracts, though they seem large and hazardous, were within the scope of Brayhead's business.

37. In the present case, it is Mr. Armstrong's unchallenged evidence, and I so find, that the responsibility of Mr. Hughes as managing director meant that he was in charge overall, and that it was Mr. Hughes who concentrated mostly on the purchasing and packaging of materials, specifically of metal cans into which Carlo Products put its products. Mr. Armstrong indicated that Mr. Hughes was more involved with matters relating to Crown Corke than he was. In my judgment, it was plainly within the ordinary and usual powers of a managing director in transacting the company's affairs for him to enter into the contracts which he did on behalf of Carlo Products in respect of Carlo Products main business which involved obtaining aerosol cans, to fill with Carlo Products' products.

38. Even firmer and more fertile ground lies in the area of apparent or ostensible authority. As Lord Pearson comments at page 108 H of **Hely-Hutchinson**, “if the contractor is claiming against the principal on a contract made by the agent professedly on behalf of the principal, the contractor can succeed by proving actual or ostensible authority, but usually it is easier for him to prove ostensible authority and that is what he chooses to do”.
39. I find that in addition to having actual authority, Mr. Hughes was clearly clothed with ostensible authority. As Managing Director of Carlo Products, even if his authority was expressly limited to entering into transactions with O.G. Smith with regard to Crown Corke’s aerosol cans, which I have already said I have a hard time accepting on the weight of the evidence, even if his authority was so limited as Mr. Armstrong indicates, Carlo Products would be bound by Mr. Hughes’ authority as it appeared to be in the view of Crown Corke, there being no evidence that Crown Corke knew of any such limitation. This is because by permitting Mr. Hughes to occupy and perform in the role of managing director, he was represented to Crown Corke as being authorised to enter on behalf of Carlo Products into contracts of a kind which a managing director would usually enter into on behalf of the company in the ordinary course of business. Mr. Hughes himself may be said to have done “the holding out” ... as discussed in Hely-Hutchinson, page 102. In my judgment, Carlo Products is therefore bound by the contracts which its agent Mr. Hughes, acting within the scope of his authority, entered into on its behalf with Crown Corke.
40. It is clear to me that the claim against the principal Carlo Products and the claim against the 2nd Defendant for breach of warranty of authority are alternative claims, and indeed, I refused a late application by Crown Corke’s Attorneys during the course of closing submissions to make the claims not only alternative

claims, but additional to each other. I find support on the basis of logic, since a person cannot at one and the same time be acting within the scope of his authority and also be in breach of warranty of authority. In the one case it will be found that he has the authority and in the other that he does not in fact have the authority which he said he had, quite contrary propositions. However, see also Lord Denning's judgment in **Hely-Hutchinson** at page 104B, and **Bullen and Leake and Jacob's Precedents of Pleadings**, 12th edition, pages 207-208 in Part II, Statements of Claim, under the heading "Agency".

41. In the circumstances, it is my judgment that Crown Corke is entitled to judgement against Carlo Products and the alternative claim against the Second Defendant, as representative of the Estate of Mr. Hughes, fails, since Mr. Hughes was acting within the scope of his authority, both actual and ostensible.

Claim for Interest

42. In essence, Crown Corke is claiming interest at the rate of 2.5% per month because it is stated on their invoices that such a rate of interest becomes due on invoices outstanding in excess of 60 days.
43. In relation to this aspect of the claim, I have found it useful to refer, **Chitty on Specific Contracts**, 27th edition Volume II, 36-224, 225:

"36-224-General Rule at Common Law

At common law, the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect.

....

36-225.

Interest is, of course, payable wherever there is an express agreement to that effect. Such an agreement may also be inferred from a course of dealing between the parties eg. If it has been frequently charged and paid without objection in similar accounts. Similarly, an obligation to pay interest may arise from the custom or usages of a particular trade or business."

44. There is no evidence that Carlo Products ever paid interest at the rate specified in Crown Corke's seemingly standard form invoice, and in relation to the invoices which Mr Armstrong admits were paid by Carlo Products, the payments do not appear to have included any interest. Nor does Crown Corke appear to have insisted on payment of interest at the time. There is no evidence of custom or practices in the trade that would entitle Crown Corke to interest.
45. Crown Corke may therefore have to rely upon section 3 of the **Law Reform Miscellaneous Provisions Act**, by virtue of which the court has power to award interest on debt between the date of the cause of action and the date of judgment.

British Caribbean Insurance Company Limited v. Delbert Perrier 33 J.L.R.119, is a decision of our Court of Appeal, applying **Tate & Lyle** [1981] 3 All E.R. 716. In **Perrier**, see in particular the judgment of Carey J.A., it was held that in commercial cases, the appropriate rate of interest should be the rate at which the plaintiff could borrow money at the relevant time. It was also held that evidence as to the rates of interest should be led but that it was not objectionable for documentary material such as the statistical digest published by the Bank of Jamaica to be properly placed before the judge.

46. However, in this case we are concerned not only with the question of interest in commercial cases, but we have here the question of commercial interest on a foreign debt. In **Jamaica Carpet Mills Limited v. First Valley Bank**, reported at 23 J.L.R., 338, the Court of Appeal, following the House of Lords decision in **Milliangos v. George Frank (Textiles) Limited** [1975] 3 All E.R. 801, held that where a Claimant is entitled to judgment in a foreign currency, the judgment should be for the foreign currency or the Jamaican equivalent at the date of payment.
47. In **Milliangos v. George Frank (Textiles) Limited (No 2)** [1977] 1 Q.B.489, it was held that interest in that commercial case could be recovered according to the proper law of the contract and was awarded at a rate at which the Claimant could reasonably have borrowed in the foreign currency in the foreign country. At page 497 it was stated that the amount of the award of interest is a matter of procedural law and falls to be determined by the lex fori, or the law of the forum where the proceedings are brought. In that case the Swiss Claimant sold goods to the English Defendant for which the price of goods was payable in Swiss francs under the contract. The Claimant claimed for the price of goods (in English Court) in Swiss francs. It was held that he was entitled to interest in Swiss francs at the rate Swiss francs could have been borrowed in Switzerland in the relevant period.
48. Having reflected on the issue, I have come to the view that the question of interest on foreign debts is not a straight forward one. No doubt it is because Claimants' Attorneys-at-law were content to rely upon the interest rate as stated in the invoices from Crown Corke to Carlo Products, that no other evidence or submissions as to interest have been advanced before me. The question may actually involve complicated principles of private international law, or conflict of laws. In **Helmsing Schiffahote v. Malta Drydocks**

Corp [1977] 2 Lloyd's Report 444, the view was expressed by Kerr, J. sitting in the Commercial Court of the Queen's Bench Division and probing the approach taken in **Milliangos (No. 2)**, that it is not only entitlement to interest, but also the amount of interest, that should be determined by the proper law of the contract(as opposed to the law of the forum).

49. As to the importance of evidence being led in relation to cases involving commercial interest to be awarded on foreign debts, it is to be noted that in **Helmsing** the judgment as to the appropriate rate of interest was given after the parties had placed evidence before the court, in fact, evidence that may be described as expert evidence (p. 449). Further, in **Milliangos (No. 2)**, Bristol J. made the following pertinent comment at pages 496-497:-

However familiar English judges may be with the incidents of borrowing from banks in England, most of them, I suspect, have no knowledge, judicial or otherwise, about the cost of borrowing Swiss francs in Zurich. So in this action, whichever system of law has to be applied, there will have to be a reference so that evidence can be led in order to arrive at the right answer. In future, no doubt, where a plaintiff seeks his judgment in foreign currency, both parties will be prepared at the trial with the necessary evidence to deal with the question of interest. In view of the unusual course which this case has followed throughout it is not surprising that it has only recently become clear that what interest the court can award cannot be ascertained without evidence being given ... Since this court is not in a position to take judicial notice of what [the foreign rate] should be, that question has to be the subject of further inquiry(my emphasis).

50. In this case no evidence was led as to the proper law of the contract or as to the rate at which one could borrow U.S. dollars, whether in Guatemala or in Jamaica. The Court also cannot take judicial notice as to what foreign rates of interest should be.

Our Civil Procedure Rules 2002 require the Court to deal with cases justly as the overriding objective. Part of fulfilling that objective involves dealing with claims expeditiously, and with as many issues as can be conveniently disposed of at the same time. The Court must also be conscious of the need to allocate an appropriate share of the Court's resources to any given case. The Court's task invariably involves a delicate balancing exercise. It is therefore with great reluctance that I come to the view that the questions of Crown Corke's entitlement to interest and the appropriate rate, if any, should be the subject of further inquiry so that the court can attempt to arrive at the right answer. Bearing in mind the magnitude of this claim, including the potential interest element, it is in Crown Corke's interest that such further inquiry be made, and it seems to me that it would be only fair for the Claimant Crown Corke to bear the costs of the additional hearing, since such evidence really ought to have been provided at trial.

51. (a) There will therefore be Judgment for the Claimant Crown Corke against the First Defendant Carlo Products in the sum of US \$418,215.23 or the Jamaican equivalent at the date of payment.
- (b) The question of Crown Corke's entitlement to interest on the said sum of \$418,215.23, and the appropriate rate of interest if so entitled, are referred for further inquiry at a date to be fixed by the Registrar in consultation with the lawyers

for the Claimant Crown Corke and for the 1st Defendant Carlo Products.

- (c) There will be Judgment for the Second Defendant Carlys Dahlia Hughes, as Executrix of the Estate of David Hughes, against the Claimant Crown Corke, with costs to be taxed if not agreed.

52. I will now wish to hear submissions from the parties in relation to costs as my understanding is that although the Claimant must fail against one of the parties, in a proper case the Claimant can be allowed to recover the costs which he must pay to the party against whom he fails, from the party against whom he succeeds - See **Bullen and Leake**, page 208 and the cases there referred to.
53. I also need to hear from the parties, in particular Crown Corke and the Second Defendant on the question of any consequential orders which will arise in relation to an interim injunction granted on the 31st January 2006 until trial restraining the Second Defendant with regard to dealings with certain properties.