

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-02150

BETWEEN

CAI TRADING LLC

Claimant

AND

KIOWA RICE LIMITED

First Defendant

REPUBLIC GRAINS INVESTMENT LIMITED

Second Defendant

Claim No. CV2017-02151

BETWEEN

CAI TRADING LLC

Claimant

AND

KIOWA RICE LIMITED

First Defendant

REPUBLIC GRAINS INVESTMENT LIMITED

Second Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 31st October, 2018

Appearances:

Mr. Stephen Singh instructed by Ms. Tracey Rojas Attorneys at Law for the Claimant

Mr. Ronald Simon Attorney at law for the Second Defendant

JUDGMENT

1. In these two separate actions¹ the Claimant, Cai Trading LLC (Cai) seeks to recover the sums of US\$847,885.89 and US\$351,107.95 together with interest due to it under two guarantees/promissory notes dated 30th and 31st July 2013 from the Second Defendant, Republic Grains Investment Limited (Republic). Those guarantees/promissory notes were signed by Mr. Jai Benie, the director of Republic. Among the issues raised in this trial is the one significant question to be determined: Whether Mr. Benie had the ostensible or actual authority to bind Republic to the terms of those guarantees/promissory notes. A secondary but equally important question for determination is a simple factual dispute: Whether the contracts of guarantees/promissory notes made between the parties are evidenced by (a) the documents in the possession of Cai which exhibit all signatures of the contracting parties (the Cai documents) or (b) the documents which were amended by Mr. Benie (the amended documents) which he said were sent to Cai. There is no contest that Mr. Benie's signature appears in both the Cai documents and the amended documents. Republic's main contention is that Mr. Benie at all times acted in his personal capacity and could not sensibly have been acting for Republic.
2. In these actions the Court must give full effect to the bargain struck by the parties whether there were personal guarantees or guarantees made on behalf of Republic. To unravel such an issue involves an examination of the contractual documents, the contractual history, the commercial relationship of the parties and the credibility of the parties' respective versions of the execution of the relevant documents.
3. Three witnesses provided their testimony: Mr. Julien Jung for Cai as its Financial Planning and Analysis Lead; Mr. Jai Benie for Republic as its Commercial and Trade Manager and Director and Ms. Sherry Phagu for Republic as its Director and Accountant. An agreed bundle of documents was tendered into evidence in both matters² and Attorneys made both written and oral submissions. In my view, upon a proper assessment of all the evidence, the

¹ Both actions **CV2017-02150** and **CV2017-02151** came on for hearing together but were not consolidated. As a matter of convenience and with the consent of the parties, the judgment is intituled in both matters and the evidence which is in the most part common to both are set out in this judgment.

² Agreed list of documents filed 5th April 2018

main legal and factual issue is to be resolved in favour of Cai. The Cai documents are the contractual documents made by the parties. Mr. Benie had executed those documents as director on behalf of Republic, based on the course of dealings of the parties, the matters clearly communicated between themselves and the proper interpretation of the contract. He had the ostensible authority to act for Republic. Republic cannot now escape their contractual obligation to pay the said sums claimed by Cai.

Brief factual background and issues

4. The two guarantees/promissory notes were issued during the course of a commercial arrangement between three parties Cai, Kiowa Rice Limited (Kiowa) and Republic. Cai is a supplier of grains³ on the international market and pursuant to a contract dated 11th August 2007 periodically shipped meal and grain to Kiowa in Trinidad and Tobago. Kiowa and Republic have their own commercial relationships with one another for the storage and re-sale of the grains. Kiowa is the main user supplying grain to Republic which simply controls storage facilities at Point Lisas. Kiowa then repurchases the grains from Republic for export. In 2013 Mr. Benie and Ms. Sherry Phagu were both directors of Kiowa and Republic. Mr. Benie is also the Commercial and Trade Manager of Republic and its Secretary⁴ and Ms. Phagu its accountant. Mr. Benie was one of the persons negotiating contracts with Cai on behalf of the local companies.
5. During the course of the parties' commercial relationship, Republic periodically executed guarantees/promissory notes to secure the payment for the shipments of grain made to Kiowa by Cai. It was a commercial arrangement which benefitted both Kiowa and Republic until sometime in 2013 when, as Ms. Phagu and Mr. Benie describes⁵, Kiowa was unable to settle its debts in a timely manner on a shipment made to it in October 2012 by Cai. This jeopardised Republic's credit rating. According to Ms. Phagu, she advised Mr. Benie that Republic was not to continue to act in the capacity as guarantor for Kiowa's shipments from Cai unless an alternate arrangement was put in place and Republic removed itself from the business transaction. There is no evidence however, that this change in position was

³ Cai Trading Ltd, is a provider of food, agricultural, financial and industrial products. Two types of grains which it provided to Kiowa in this case were US Northern/Dark Northern Spring Wheat and US Soyabean Meal.

⁴ See Republic's 2013 Annual Return

⁵ See Witness Statements of Ms. Phagu and Mr. Benie filed 28th June 2018

communicated to Cai nor was there an agreement or common understanding between the three (3) parties that Republic would cease its dealings in this “tri-partite” arrangement.

6. The present dispute arose out of a shipment of grain made by Cai in July 2013 to Kiowa by C&F method with Republic as the notifying agent as detailed in a Bill of Lading dated 13th July 2013. This shipment was subject to three separate sales agreement and guarantees/promissory notes, two of which are the subject of these proceedings.
7. The first was Kiowa’s sales agreement CTS 18413-1 to purchase from Cai 2,199.764MT US Soyabean Meal (Soyabean Meal) at a cost of US\$1,365,129.54. Cai also prepared a Notice of Appropriation and issued Invoice no 00024695 to Kiowa dated 16th July 2013. This shipment was subject to a promissory note/guarantee effective 30th July 2013 and made to mature on 9th January 2014 where Republic guaranteed the payment of the said US\$1,365,129.53 by Kiowa in consideration of Cai entering the said agreement for the Soyabean meal. This sales agreement and guarantee/promissory note is the subject of CV2017-02150.
8. The second was Kiowa’s sale agreement CTS19881-1 for the purchase of 775.985MT of US Northern/Dark Northern Spring Wheat (Spring Wheat) from Cai for the price of USD\$351,107.96. Cai prepared a Notice of Appropriation Invoice No 00024709 to Kiowa dated 16th July 2013. This shipment was subject to a guarantee/promissory note effective 31st July 2013 and made to mature on 9th January 2014 where Republic guaranteed the payment of USD\$351,107.95 by Kiowa for the Spring Wheat. This sales agreement and guarantee/promissory note is the subject of CV2017-02151.
9. Mr. Benie claims that he first learnt about this shipment when it was being discharged at the port of Point Lisas. Mr. Benie executed the guarantees/promissory notes pursuant to the instructions of Cai. He contended that he did so in his personal capacity and not on behalf of Republic. As evidence of this, he explained that when he reviewed the documents, while he was in Guyana, he realised that the guarantees/promissory notes referred to Republic as the “Guarantor”. In keeping with his own arrangement with Ms. Phagu, he deleted and amended all references in those documents to Republic, signed the documents and sent them via express mail (Jet Pack) to Ms. Phagu for onward transmission to Cai. Cai claims that it never received those amended documents and the only documents which bears the signatures of

Cai together with Mr. Benie are the “unamended” documents which refer to Cai, Kiowa and Republic as the contracting parties.

10. The said sums were not paid by Kiowa. Cai issued demand letters and pre-action protocol letters to both Kiowa and Republic for the payment of the said sums. The entire debt was not liquidated. Only four payments were made during the period 2015-2016 which were applied to Kiowa’s account pursuant to the sale agreement CTS 18413-1 for the Soyabean meal. However, no payments were made under sale agreement CTS19881-1 for the Spring Wheat. Default Judgment has already been entered against Kiowa in both actions in default of defence.⁶
11. The Defence of Republic sets out the following material pleas (a) it denies that it made or entered into any agreement of guarantee with Cai (b) it alleges that Mr. Benie entered into negotiations with Cai in his personal capacity and without the authority of Republic (c) it contends that Mr. Benie in his personal capacity received the draft guarantees/promissory notes from Cai’s representative, Mr. Philip Archer for execution (d) upon receipt of the documents, Mr. Benie in his personal capacity and without the ostensible authority of Republic amended the documents, returned it to Cai and the transaction was confirmed between him and Cai via a series of email correspondence between Ms. Sherry Phagu and Mr. Phillip Archer (d) that the documents were executed contrary to the bye laws of Republic which requires the signatures of two directors.
12. In its Reply⁷, Cai contends that at all times Mr. Benie represented himself to be the director and duly authorised representative of the said companies. Cai had no knowledge that Mr. Benie was negotiating or even executing the guarantees/promissory notes in his personal capacity or that he was doing so without the knowledge and authority of Republic.
13. Against this brief backdrop the following main issues arise for determination:
 - **The battle of forms:** Whether the validly executed guarantees/promissory notes made by the parties are represented by the Cai documents or the amended documents?;

⁶ On 18th June 2018, a Judgment in Default of Appearance was entered against the First Defendant in the sum of US\$1,164,508.85

⁷ Replies of the Claimant filed 29th January, 2018

- **Ostensible Authority:** Whether the parties’ contractual documents created a binding legal obligation for Republic or Mr. Jai Benie personally;
- **Breach:** Whether there has been a breach of the terms of the guarantees/promissory notes and which party is responsible for said breach.

I examine each issue in turn below.

The battle of forms

14. There is no dispute that Mr. Benie signed the guarantees/promissory notes on behalf of Kiowa as borrower and that Kiowa owes a contractual obligation to Cai to pay the sums due on those guarantees/promissory notes. In contrast, Republic contends that while Mr. Benie may have held himself out as acting for Kiowa, Republic never intended to enter into a contractual relationship with Cai as the guarantor for this debt. Mr. Benie has steadfastly asserted in these proceedings that he took it upon himself to execute the guarantees/promissory notes in his private capacity. To that extent he had amended the guarantees/promissory notes as described above. The difficulty in this case is that Cai alleges that it never received those amended documents and the only guarantees/promissory notes bearing the signature of all the parties are the Cai documents in which Mr. Benie as director signs for both Kiowa and Republic.
15. To the extent as they are relevant the material terms of the promissory notes/guarantees provided for the payment of interest at the rate of 7.50% + 0.40350% to mature on January 9th 2014. In default of payment of the monies in full on the date of maturity, an interest rate of 10% would be applied on the outstanding amount for the number of days during which the obligation remained outstanding and past due.
16. By Clause 13 the Guarantor’s liability and obligations were not to be “impaired, affected or terminated by any act, omission, transaction, limitation, matter, thing or circumstance whatsoever which, but for this provision, might operate to release, discharge or exonerate the Guarantor from all or any part of their liabilities or obligations hereunder or reduce, impair or affect such liabilities or obligations or cause all or any part of such liabilities or obligations to become irrecoverable from or unenforceable against the Guarantor or to discharge, reduce, affect or impair any or such liabilities or obligations.....”

17. Finally Clause 15 stipulated that the Guarantor shall make payment to the Lender of the amount of his liability to the Lender forthwith after demand is made in writing.
18. As Counsel for Republic submitted it is the task of this Court to determine which are the parties' contractual documents: The Cai documents or the amended documents.
19. In Mr. Julien Jung's witness statements he exhibited the guarantees/promissory notes at "JJ2" of his witness statements. He explained that in both the guarantees/promissory notes of 30th July 2013 and 31st July 2013 a signature and the words "Jai Bene" are affixed to the guarantees/promissory notes documents under the signature heading for both the "Borrower"/Kiowa and "Guarantor"/Republic. He personally did not conduct an investigation to search for the amended documents but he asserted that the Cai documents are the only documents in Cai's possession relative to the guarantees/promissory notes for this shipment.
20. In Mr. Jai Benie's witness statements he explained that he corrected the documents which he received from Cai by running a line through Republic's name on every page on the document and inserted his name "Jai Benie." He also ran a line through "A company organized under the laws of Trinidad and Tobago" and a line through paragraph two entirely of each promissory note. He then signed each document as "Borrower" on behalf of Kiowa and "Guarantor" in his personal capacity. These documents he exhibited at "J.B.1." of his witness statement.
21. Mr. Benie in cross examination acknowledged that the signature on the Cai's documents are in fact his. However, having done so, he has not given any account as to how those documents arrived in Cai's possession.
22. Ms. Phagu claims under cross examination that the amended documents were also sent by email but she proffered no evidence of this. Indeed the email thread exhibited to Ms Phagu's witness statement do not reveal any attachment of the guarantees/promissory notes being sent by her to Cai.
23. On the day of the trial, Mr. Benie indicated to the Court that the word "received" in paragraph 21 of his witness statement should be replaced with the word "sent" so that his testimony read that he "**sent**" the promissory notes on 6th August 2013 when he was in

Guyana. With this change, it is no longer apparent when Mr. Benie actually received the documents. Was it on 6th August or prior to 6th August 2013? This is significant because Cai sent the unsigned Cai documents by email to Ms. Phagu on 31st July 2013 with instructions for “Jai” to sign as Borrower and Guarantor. When Cai by email from Mr. Archer reminded Ms. Phagu of not having received the executed documents, Ms. Phagu sent an email to Mr. Archer on 5th August 2013 attaching “signed copies” with the words:

“Dear Mr. Archer,

Please see attached signed copy. Also send me complete mailing address for the original. Will revert with tracking number. Sorry for this late response in this matter.”

24. Mr. Benie’s amendment to the documents according to his testimony would then have occurred on 6th August 2013 after Ms. Phagu already sent the signed Cai documents to Mr. Archer by email. The Cai documents were already executed. Furthermore, there is no email by Ms. Phagu on or after 6th August 2013 bringing the amended documents to Cai’s attention. On 7th August 2013, she sent an email to Mr. Archer that the “the original P-Notes sent today via DHL#106 007 630 66...” There is no mention of any amendment.
25. It is more probable that Ms. Phagu would have sent the unamended documents executed by Mr. Benie. In my view, the documents exhibited to Mr. Jung’s witness statement represent the contract of the parties. It contains the signature of Lender, Borrower and Guarantor and represents a valid offer and acceptance resulting in a binding contract. Conversely, Republic does not have in its possession a complete agreement based on the purported amendment. At best, its failed attempt to issue the amended documents constitutes a counter offer which was not accepted or a proposal which was not communicated to Cai and therefore incomplete.⁸
26. Republic’s assertions in these proceedings that the Cai documents are not authentic are, in my view, without merit for the following reasons.
27. First, there is no allegation of fraud properly articulated by Republic in these proceedings. In its Defence in these actions, Republic pleaded the following “That reference to the said guarantee/promissory note dated 31st July 2013 confirms the Second Defendant’s position that the guarantee/promissory note dated the 31st July 2013 relied upon by the Claimant was

⁸ See Chitty on Contract 27th Edition paragraph 2-027

fraudulently procured due to the fact that date and the amount of \$1,365,129.54 are not the same”. There is no plea that the Cai documents were fraudulently obtained or “created” by Cai. There is no evidence nor testimony of Ms. Phagu or Mr. Benie pointing to any fraud committed by Cai. To the contrary, Mr. Benie openly and calmly admitted in cross examination that the signatures in the Cai documents are his. There is no explanation by him as to how the unamended documents got to Cai’s possession. Without a properly articulated case of fraud or wrongdoing, it is inherently probable that at best two sets of documents may have been sent by Republic. The first where Mr. Benie signed for Republic and Kiowa which was accepted by Cai and the second, the amended documents which were either not sent or not accepted by Cai. Further, no case of fraud was suggested by Counsel in his cross examination of Cai’s witness, Mr. Jung. There was no suggestion in his cross examination that the amended documents were the only set of documents relating to this transaction. In these circumstances, Mr. Jung’s testimony that the Cai documents formed part of its records is sufficient to establish the contract made by the parties.

28. Second, the evidential burden lies on Republic to demonstrate that the amended documents were the only documents signed and sent to Cai. This is discredited by the account by Ms. Phagu who appears to accept that one set of documents were sent by email and another was sent by mail. Further, Mr. Benie in his witness statement stated that due to his business travels, it is difficult for him to follow up with particular transactions and the documentations for same.
29. Third, contrary to the submissions of Counsel for the Defendant there was no need for Mr. Philip Archer to attend Court to resolve this issue. The Cai documents were properly admitted into evidence through a hearsay notice to which there was no counter notice. I deal with Mr. Archer later in this judgment.
30. Finally, there is absolutely no email chain by Ms. Phagu or Mr. Benie seeking confirmation that the amended documents were received by Cai.
31. On a balance of probabilities the only plausible conclusion is that the Cai documents represent the contracts between the parties and not the amended documents. The only issue to be determined therefore is whether Mr. Benie had the ostensible authority to act for Republic when he executed those documents.

Ostensible authority of Mr. Benie to act for Republic

32. It is common ground that a director acts on behalf of a company unless it is made quite clear to the contracting parties that he is acting in his personal capacity. Directors act as agents of the company. See Halsbury's Laws of England/Companies⁹.

33. A managing director will have implied actual authority to do all such things as fall within the usual scope of that office See **LNOC Limited v Watford Association Football Club Limited** [2013] EWHC 3615 (Comm) Judge Mackie S.C explains:

“[62] There need not be any formal appointment process for a director to be clothed with implied authority. If the board permits or authorises a director to act as a “de facto” managing director, that director will have the authority which he would have had had he been formally appointed: see, for example, *Hely-Hutchinson* at 584.”

34. In **Freeman and Lockyer v Buckherst Park Properties (Magnal) Ltd** [1964] 2 QB 480 at 502-503 Lord Diplock in distinguishing actual authority from ostensible authority explained:

“An “apparent” or “ostensible” authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the “apparent” authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

⁹ Volume 14 2016 paras 1-645; Volume 15 (2016) Paras 646-1230; Volume 15A (2016) Paras 1231-2030

“270. A company’s directors are agents of the company. Wherever an agent is liable, they are liable; and, where the liability would attach to the principal, and the principal only, the liability is the company’s liability.”

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.”¹⁰

35. Counsel for Republic sensibly abandoned the defence that the contracts were not made by the parties for want of two signatures as required by the bye laws of Republic. Such a submission fails in the face of section 25(a) of the Companies Act¹¹. Further, based on the course of dealings between the parties on viewing the past records of guarantees/promissory notes and from Republic’s own witnesses, it is accepted that only one signature of the director, notwithstanding its bye laws, was sufficient for the companies, both Kiowa and Republic to enter into contracts with Cai.

36. Republic also relies on **Miles v Zukerman** [1931] 1 D.L.R. In that case a company fell into arrears in its contract for the installation of heating equipment. The Defendant who was the president of the company undertook to give the plaintiff an order on the mortgagees with

¹⁰ See also **Bowstead on Agency 18th Edition** at pages 335-336 at paragraph 8-13 “where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority.”

¹¹ To that extent Section 25 of the **Companies Act Chap 81:01** importantly provides that:

“25. A company or a guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company—

(a) that any of the articles or Bye-laws of the company or any unanimous shareholder agreement has not been complied with; [emphasis mine]

.....

(d) that a person held out by a company as a director, an officer or an agent of the company has not been duly appointed or had no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such a director, officer or agent;

(e) that a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or not genuine; or

.....

except where that person has, or ought to have by virtue of his position with or relationship to the company, knowledge to the contrary.”

respect to the unpaid monies. Thereafter, the president requested that the plaintiff refrain from notifying the mortgagees and in consideration of same he gave the plaintiff his personal guarantee on the plaintiff's account. This was done by letter dated April 11th 1929. The guarantee stated:

“Re Rusholme Drive Job. Confirming out television conversation of yesterday, I beg to state that I shall personally see to it that you get your payments regularly as per contract.

Trusting that this is entirely to your satisfaction.

City Builders Ltd, per Charles Zuckerman.”

37. One of the objections which was raised was that the document being signed “City Builders Ltd per” in type writing and “Charles Zuckerman” in the handwriting of the Defendant did not constitute a personal guarantee but was a guarantee by the company.

38. Logie J commented:

“With regard to the first objection, I am of the opinion that the signature is sufficient to charge the defendant personally and not City Builders Ltd. The document is couched in language which admits no other construction. If it were to be considered as a guaranty by the company of the company's own debt, the guarantee would be meaningless and would add nothing to the plaintiff's security of his debt, because the company was already liable under its contract to pay the plaintiff's account and the construction most favourable to the validity of the instrument should be adopted.”

39. **Miles** does not assist Republic. Firstly, the amended documents never came to the attention of Cai. Second, unlike **Miles**, Republic is a separate entity from Kiowa giving effect to its guarantees/promissory notes.

40. In the instant case, the relationship between these parties have always been Cai, Kiowa and Republic and not Mr. Benie in his personal capacity. In fact, Mr. Benie was the face of both Kiowa and Republic. The nature of the instant transaction is clear as to who was intended to be the guarantor and the circumstances point towards the documents being signed on behalf of Republic.

41. Republic made a number of further submissions: that the commercial relationship between the parties suggest that Mr. Benie did not sign on behalf of the Republic; that Mr. Phillip

Archer should have given evidence on the validity of the Cai documents since he was the one who received them; that Mr. Benie voluntarily undertook to be the guarantor for Kiowa in order to save the transaction and preserve his relationship with Cai and he is contractually and personally responsible under the guarantees for the sum of monies owed.

42. The inherent fallacy of these submissions is that there is merit in the submission that there is a contract in writing between Cai, Kiowa and Mr. Benie in his personal capacity. No such evidence has been produced. The only document, the only contract in writing bearing the signatures of Cai, Kiowa and Republic are the Cai documents which Republic apparently disavows in favour of the amended documents. The only question that therefore arises is whether Mr. Benie's signature on those documents bind Republic in the scope of the Director's ostensible authority.
43. Cai's evidence is unremarkable as Mr. Jung did not have any personal knowledge of these transactions but merely produced the documentary records of Cai.
44. There were several concessions made by Republic's witnesses. In cross examination, Mr. Benie confirmed that both he and Ms. Phagu executed all legal documents on behalf of Republic. He further agreed that in none of the documents he disclosed to the Court in this matter are there two signatories on behalf of the companies. He agreed in this case there was only one signatory on behalf of Kiowa and one signatory on behalf of Republic. He also agreed that it was not true that with regard to documents relating to Republic, both he and Ms. Phagu executed them in keeping with the bye laws.
45. In Ms. Sherry Phagu's cross examination she agreed that in none of the documents in these cases in which she signed on behalf of Republic did it contain two signatories, but rather they contained one signatory. She also agreed that when there is a signatory for Republic, there was only one signatory, herself.
46. From the evidence of Ms. Phagu and Mr. Benie the following important concessions have been made:
 - a) Only one person signed on behalf of the company, either Kiowa or Republic.
 - b) Mr. Benie was for the most part the negotiator and the face of both companies.
 - c) Republic always acted as the Guarantor for Kiowa.

- d) The contractual relationship of the parties demonstrate that to facilitate the shipment of grains to Kiowa, Republic had to be a party to the contractual agreements as guarantor evidenced in several of the earlier promissory notes.
- e) No documents were signed prior to this incident in either Ms. Phagu's or Mr. Benie's personal capacity.
- f) Republic was still a notifying agent on the 2013 shipment of grain.
- g) Although Mr. Benie never signed for Republic before, he is in fact a director, Commercial and Trade Manager and secretary for Republic. There is no evidence that he communicated clearly to Cai either before executing the document or in the immediate aftermath of sending the documents, that he was either negotiating or executing the documents in his personal capacity.

47. Finally, in assessing the relative plausibility of the parties' versions, it is significant that it is implausible that Cai will accept a personal guarantee which would have been at all odds with the disclosed commercial practice and relationship. The only reason suggested by Mr. Benie for this change in position was an internal arrangement between himself and Ms. Phagu which was neither documented nor communicated to Cai. This is surely a risk Republic will have to take and regardless of Republic's submissions that Mr. Benie took up the personal guarantee to preserve the transaction and maintain his relationship with Cai, it seems implausible that Cai would accept such a risk. I agree with Mr. Jung that had that been the case the company would have been in ligation much sooner.

The spectre of Mr. Archer

48. I conclude by dealing with the Counsel for Republic's submission that the Court should draw adverse inferences by the Cai's failure to produce Mr. Philip Archer and to a lesser extent Ms. Isabel Sanchez, on the negotiations and background to the execution of these documents. However, no adverse inferences could be drawn by the failure of Cai to produce these witnesses to the Court as on the pleadings, it was not suggested that Cai either through Mr. Archer or another officer was imbued with some knowledge of Mr. Benie's personal responsibility in the matter. In its pleadings, Republic has only contended that Mr. Benie signed in his personal capacity evidenced by him amending the documents.

49. The only ambiguity in Cai's case is the email by Mr. Archer on 31st July 2013 at 2:22pm that Mr. Benie should sign the documents as "Guarantor" and "Borrower". However, from an assessment of the evidence and on a balance of probabilities that could only mean that Mr. Benie was to sign the Cai documents on behalf of both companies. Indeed it is inconsistent for Mr. Benie to sign for Kiowa only and not for Republic. Additionally, no agreement was ever communicated to Mr. Archer from Ms. Phagu that Republic did not want to be a part of these transactions anymore and that Mr. Benie was acting in his personal capacity. In my view, Mr. Archer was not necessary for the determination of this case.

Breach of the promissory notes/guarantees

50. There is no dispute that the sums due to Cai in both actions remain unpaid. Republic had in fact made some payments towards the debt under CTS 18413-1. Indeed if Republic had not signed these documents there was no obligation to pay these sums far less to negotiate terms with Cai. Pursuant to the terms of the contract, examined above, Republic as the guarantor of Kiowa's debt must pay the full sums claimed by Cai in its Statement of Case.

Conclusion

51. For the reasons set out above, the Cai documents represent the parties' contract, Mr. Benie executed the contract on behalf of Republic and Republic is in breach of the said contract. There will be judgment for the Claimant against Republic for the following sums on the two promissory notes/guarantees:

(a) In CV2017-02150-Promissory note/guarantee dated 30th July 2013 in the sum of US\$847,885.89 with interest at the agreed rate of 7.50% + 0.40350% September 24th, 2014 until Judgment.

(b) In CV2017-02151-Promissory note/guarantee dated 31st July 2013 in the sum of US\$351,107.95 with interest at the agreed rate of 7.50% + 0.40350% September 24th, 2014 until Judgment.

52. The Claimant is awarded prescribed costs in the sum of **\$241,650.30 in CV2017-2150 and \$168,683.98 in CV2017-2151.**

Vasheist Kokaram

Judge