JUDGEMENT : Lord Justice Simon Brown: 3rd April 2003

1. This is the second defendant's appeal against Mitting J's order made on 30 July 2001 dismissing its application under CPR 24.2 for summary judgment against the claimant in the action on the grounds that the claim has no real prospect of success and there is no other reason why its disposal should await trial.

2. The trial is presently listed for five days commencing on 2 October 2001 with 10 witnesses of fact. The appeal has, therefore, been expedited: if it succeeds the inconvenience and expense of trial will be avoided. The appeal raises, I may say at once, an interesting and to my mind not entirely easy point of law under s.4 of the Statute of Frauds 1677. Arising, however, as it does on a CPR 24.2 application, the facts can be comparatively shortly stated.

3. On 26 May 1999 the appellant as employer contracted with the first defendant as main contractor to build a float glass factory at Eggborough in Yorkshire, a contract in respect of which the first defendant (Inglen) duly executed a performance bond.

4. On 2 August 1999 the respondent as sub-contractor agreed with Inglen to provide the necessary labour for the contract works.

5. From the outset the respondent suffered from late payment by Inglen and periodically it threatened to pull its workforce off site. Matters came to a head on 11 February 2000 when, notwithstanding the respondent having recently received 2 late payment certificates respectively for £100,000 on 3 February and £200,000 on 9 February, £197,000 odd still remained outstanding from its December invoice. It is the respondent's case against the appellant that on 11 February its complaints were put squarely to the appellant and agreement was reached between their respective representatives to this effect (and I now quote from paragraph 22 of the witness statement made by Mr Sutcliffe, the respondent's business development manager): *"… if the claimant agreed not to withdraw the workforce from site the second defendant would ensure that the claimant would receive any amount due to it by Inglen, under the contract for provision of labour, if necessary by re-directing to the claimant payments due by the second defendant to Inglen. Mr Watkinson [representing the second defendant] also stated that the second defendant had a performance bond in place provided by Inglen in the sum of £700,000 which could be utilised if Inglen did not honour its contract with the claimant."*

   The respondent's managing director, Mr Smith, made a statement to essentially the same effect.

   It is not alleged that Inglen were party to this agreement or ever accepted that money due to them could be paid to the respondent.

6. In reliance on the appellant's promise the respondent agreed to continue to supply labour to Inglen so that the appellant's factory could proceed towards completion. The work continued until early March 2000 by when Inglen's liability to the respondent under the sub-contract had risen to £1.3 million odd. At that stage, however, it became clear that Inglen was unable to meet its liability to the respondent and that the appellant too would not make payment. The respondent accordingly then withdrew its workforce from site.

7. On 2 May 2000 the respondent issued Particulars of Claim claiming £1,305,493 plus interest against both defendants. The claim against the first defendant, Inglen, although clearly irresistible, has proved worthless: a default judgment was obtained against it on 12 June 2000 but since then it has been put into liquidation in Italy. The respondent, therefore, seeks to effect recovery against the appellant pursuant to the agreement of 11 February 2000. Its claim against the appellant was pleaded in paragraphs 5 and 6 of the Particulars of Claim. Paragraph 5 alleges that on 11 February 2000 the appellant: *"… agreed that in consideration of the claimant not withdrawing its labour from the site as aforesaid [i.e. as it had told the second defendant it proposed to do] the second defendant would ensure that the claimant received any amount due to it from the first defendant under the supply contract if necessary by redirecting to the claimant payments due by the second defendant to the first defendant."*

8. Paragraph 6 then alleges that in breach of that agreement and despite demands made upon it, the appellant refused to pay the respondent the sum due or otherwise ensure its payment.

9. By its defence the appellant disputes the factual allegations and denies entering into any such agreement with the respondent as is alleged against it. More relevantly for present purposes, however, the appellant

contends in the alternative that in any event the alleged agreement constituted a guarantee which, in the admitted absence of any written note or memorandum, is accordingly unenforceable against it by virtue of s.4 of the Statute of Frauds 1677. S.4 provides so far as material: *"No action shall be brought … whereby to charge the defendant upon any special promise to answer for the debt default or miscarriage of another person … 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 authorised."*

10. By its reply the respondent advances two arguments. First and principally it contends that the Statute of Frauds has no application to the agreement sued upon here. Alternatively it contends that the appellant is estopped from relying on the Statute.

11. It is the appellant's case that neither of those arguments can succeed and that on the contrary the s.4 defence is sound in law. That was the basis upon which, following the close of pleadings and service of the witness statements, it issued its CPR 24.2 application for summary judgment. Such an application requires, of course, that the relevant facts should be assumed as alleged by the respondent.

12. In his short judgment dismissing the application, Mitting J concluded that, although pleaded in terms which appeared to be that of a claim on a guarantee, one possible construction of the respondent's witness statements was that the appellant in fact undertook a primary obligation to pay. There should accordingly be a trial to determine the detailed facts. It was, therefore, unnecessary to decide whether the respondent's alternative plea of estoppel itself had any real prospect of success. Having quoted (as I have done above) from paragraph 22 of Mr Sutcliffe's statement, the judge remarked that *"it reads remarkably like a guarantee"*. He then, however, continued: *"but if the comma is put after the phrase 'if necessary' so that the obligation then becomes to redirect to the claimant payments due by the second defendant to the first defendant, then it looks remarkably like a promise to enter into a primary obligation, namely, to withhold payments from the first defendant and to pay them or to make payment to the claimant."*

13. Mr Soole on appeal challenges that approach. As both parties agree, the question whether or not a guarantee is within the Statute of Frauds must be approached as a matter of substance rather than form. It is the essence of the appellant's case that, however precisely one construes the terms of this agreement, in substance it imposed only a secondary liability upon the appellant, a liability contingent upon Inglen defaulting on its primary obligation under the sub-contract with the respondent. Such a liability, submits Mr Soole, falls foul of s.4.

14. The most favourable construction of the agreement from the respondent's point of view is that formulated before the judge below: that the appellant would (1) attempt to persuade Inglen to meet its obligation to the respondent and (2), failing that, would withhold monies due from the appellant to Inglen and pay the respondent itself out of such monies (using also, if necessary, the performance bond which Inglen had provided).

15. The appellant contends first that that was not the form of agreement either pleaded by way of claim or evidenced in the witness statements, but secondly that in any event even an agreement in that form is caught by s.4.

16. For my part I would reject the first limb of that contention. True it is, as indeed Mr McGhee acknowledges, that the Particulars of Claim would need to be amended to reflect this way of putting the respondent's case: as presently drafted, it asserts in both paragraphs 5 and 6 an obligation to ***"ensure"*** payment of all monies due to the respondent irrespective of whether that could be achieved by withholding and re-directing monies due to Inglen. In my judgment, however, for CPR 24.2 purposes, such a putative amendment should be allowed and, no less importantly, the respondent's witness statements should reasonably be taken to support this more promising formulation of the agreement. Although I see the matter rather differently from the judge below and for my part would place little emphasis on where the comma is put relative to the phrase ***"if necessary"***, it does seem to me that that phrase in context meant simply "if the claimant was not in the event paid by Inglen".

17. It is the second limb of Mr Soole's argument which raises the critical question for decision on this appeal, a question which can I think be posed as follows: is an agreement by C (the building owner) with A (a sub-contractor), to induce A to continue to work for B (the main contractor), that if A is not paid by B, C will to

that extent redirect to A monies due from C to B, a guarantee within s.4 i.e. a "special promise to answer for the debt [or] default … of another person" (i.e. B's debt to A or default in its payment)?

18. In a field of law where most of the authorities are of considerable antiquity, a relatively recent authority which provides a convenient starting point for the determination of the present issue is this Court's decision in ***Motemtronic Limited v Autocar Equipment Limited*** (unreported, 20 June 1996). The court there was concerned with this exchange:

*"**Mrs Ford:** Where would money come from if M [the principal debtor] had to repay £1 million?*

***Colin Searle** [the second defendant, M's chairman]: From wherever in the group the money was at the relevant time. I'll make sure it is there. I am good for £1 million."*

19. The trial judge held that those words amounted to a collateral warranty (rather than a mere statement of comfort) and that the warranty fell outside s.4 on the narrow basis that: *"… his (Mr Searle's) promise only required him to ensure that M would have the necessary funds to enable it to repay the first instalment. It was not a promise that M would pay nor that Mr Searle would himself pay Autocar."*

20. Contrary to the judge's finding, the majority of the Court of Appeal (Aldous and Henry LJJ, Staughton LJ dissenting) held that the words were merely a statement of comfort but in any event, even assuming that the words had contractual force, they also regarded such a promise as falling within s.4. Aldous LJ concluded that *"the substance of the promise made by Mr Searle was that he would answer for the repayment of the first instalment by M"*; Henry LJ similarly concluded that the judge had adopted *"an unreal and artificial construction which should not avoid the clear intention of the Statute"*.

21. The facts of that case, of course, were very different to those of the present appeal but it is the court's approach which is instructive. Aldous LJ cited Vaughan Williams LJ's judgment in ***Harburg India Rubber Comb Co v Martin*** [1902] 1 KB 778, 784: *"I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but, whether he does so or not, it is the substance, not the form which is regarded. … the difference between those indemnities which come within the section and those which do not is very shortly thus expressed in the notes to **Forth v Stanton**: 'These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable'. That, to my mind, is an accurate definition of a guarantee or indemnity which comes within s.4 of the statute as distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the course of the argument a contract of indemnity."*

22. Henry LJ noted Lord Diplock's paraphrase of s.4 in modern terms as a promise to accept liability for another's failure to perform his legal obligations, existing and future (see ***Moshi v LEP Air Services & Others*** [1973] AC 331, 347), and continued: *"The reason for the need for such formality was set out by Lord Blackburn in **Steele v M'Kinlay** (1880) 5 App.Cas 754, 768:*

'It was thought by the English Legislature that there was danger of contracts of particular kinds being established by false evidence, or by evidence of loose talk, when it was never really meant to make such a contract; and therefore it was provided [and s.4 is set out].'

The policy behind the Statute is to seek to introduce certainty in any case where a party accepts secondary liability for another's failure to meet his promise. …I have made it clear that in my judgment the mischief aimed at by s.4 of the Statute of Frauds 1677 remains as valid as ever it did. It follows from this that in examining whether an oral contract is within or without the Statute, it is necessary to look at the substance rather than the form …

The first basic requirement of a contract of guarantee within s.4 is that there must be someone other than the surety who is primarily liable. … Mr Searle took on a secondary liability to answer for the default of a debtor who remained primarily liable."

23. Mr Soole's central argument is that the appellant here, no less than M in ***Motemtronic,*** took on a secondary liability to answer for the default of a debtor (there Autocar, here Inglen) who remained primarily liable. The fact that – by the terms of the agreement to be assumed here – the appellant's promise was to redirect to the respondent monies owed by it to Inglen does not, he submits, alter that basic fact and it is that basic fact which brings the appellant's promise squarely within the Statute.

24. Mr McGhee's argument to the contrary rests heavily upon two old cases – ***Andrews v Smith*** (1835) 2 C.M. & R. 627 and ***Steggall v Lymburner*** (1912) 14 WALR 201 – and a passage in O'Donovan and Phillips: The Modern Contract of Guarantee, 3rd edition (1996) p.68. It is his submission, which he contends is supported by O'Donovan and Phillips, that those two old cases establish that there is no guarantee within the Statute of Frauds where the promisor does not undertake to be liable generally but only in respect of specific funds or sources within his control. It is necessary, therefore, to examine those two cases in some detail.

25. In ***Andrews v Smith*** the facts were that a man named Hill was employed to undertake work on a property, the defendant being retained by the building owner as surveyor to receive and pay over to Hill such monies as were due to him. When Hill required materials for his work, these were supplied by the plaintiff on the defendant's promise to pay the plaintiff for them out of the monies which he received to pay Hill. Although Hill himself agreed with this arrangement, the defendant nevertheless failed to pay the plaintiff out of the monies available. When the plaintiff then sued him for breach of the agreement the defendant sought to invoke s.4. The short report of the case records the plaintiff's argument as follows: *"This is not a promise to answer for the debt or default of another, within the meaning of the Statute of Frauds. It is not a promise to be answerable out of the defendant's own funds, but to pay out of the funds of another, on receiving his directions for that purpose. … Such a contract is direct, and not collateral, and therefore binding without being in writing."*

26. During the course of the defendant's argument Parke B intervened: *"Even if there was an original debt from Hill the case is no more than a prospective assignment of a particular fund, with an attornment [an acknowledgment], so to speak, of the defendant to that assignment."* The defendant's counsel continued: *"The general rule is, that the undertaking is collateral, wherever there is an original debt*" to which Parke B replied: *"That is the general rule, but with exceptions …"*

27. I must cite the short judgments in full: *"**Lord Abinger, C.B**. On reading the declaration, the first thing that struck me was, that no debt necessarily appeared on the face of it to be due from Hill at all; it is quite consistent with all that is stated on the record, that he was never liable to the plaintiff. That alone is an answer to the objection raised by the defendant. But further, if the defendant contracted, not to pay Hill's debt out of his own funds, but only faithfully to apply Hill's funds for that purpose, when they should come to his hands, that contract would not be within the operation of the statute.*

***Parke, B.** I am of the same opinion. There is nothing on the face of the declaration to imply a contract by the plaintiff with Hill. If that be so, it is clear the defendant's contract was an original, not a collateral one, and so not within the statute. But even if that were otherwise, this is nothing more than a prospective assignment of funds which were to come to the defendant's hands for Hill, and an attornment, as it were, by the defendant to that assignment: and the authorities show that, in such case, the contract is not within the statute. On this ground also the plaintiff is entitled to the judgment of the court.*

***Alderson and Gurney, Bs**., concurred."*

28. The facts of ***Steggall v Lymburner*** were altogether more straightforward. As recorded in the brief headnote: *"The defendant deducted from the wages of an employee, either at his request or by his consent, the amount of a debt due by the employee to the plaintiffs, and promised the plaintiffs to pay the amount to them."*

29. McMillan J's short judgment rejecting the defendant's reliance on s.4 reads: *"The contention on the part of the defendant before the magistrate was that his promise to pay was a promise to pay a debt of another person and, therefore, was not actionable, as there was no evidence in writing. In answer to that it is said that the Statute of Frauds has nothing to do with the case, and that the promise of the defendant is not to discharge the debt of another person, but a promise to pay his own debt. In Leake on Contracts, 5th edition, p.839, it is stated '**the contract or promise of the debtor to pay according to the order or assignment of his creditor is a promise to pay his own debt, although it operates in discharge of the debt of his creditor. It is, therefore, not a promise to pay the debt of another within the Statute of Frauds, and does not require written evidence.**'"*

30. Burnside J agreed, describing it as "***a very simple case***".

31. The passage in O'Donovan and Phillips relied upon appears under the heading *"What promises are caught by the statute" … (b) The promisor must undertake a personal liability"* and reads: *"To fall within the statute, the promise must impose on the promisor and the promisor's assets generally, a personal liability for the debt. Consequently the promise of an employer to make deductions from an employee's wages with the employee's consent*

*and to pay these amounts to the plaintiffs to discharge a debt which the employee owed to them was not within the statute [**Steggall v Lymburner** footnoted]. Even an agreement to pay a creditor out of a specified sum of money which the promisor would owe to the debtor when the debtor completed certain work was beyond the statute [two cases, including **Andrews v Smith**, are referred to in the footnote, which then adds 'In both these cases it was held that the promisor's undertaking was direct and original, not collateral.']. Again a promise to pay the debt of a third party if that party would furnish the promisor with the means of liquidating the debt need not be in writing. Moreover, the formal requirements do not apply if the liability merely attaches to a particular asset belonging to the promisor rather than to the promisor's assets generally. …"*

32. The primary ratio of ***Andrews v Smith*** was, of course, that the defendant was from first to last the only debtor: Hill himself, so far from being the principal debtor, had never been liable to the plaintiff. Mr McGhee, however, relies on the alternative ratio and in particular Lord Abinger's conclusion that the agreement, not being to pay out of the defendant's own funds but rather out of Hill's funds, would not in any event be within the statute. Similarly in ***Steggall v Lymburner***, the defendant's promise was simply to pay money otherwise due to the debtor. So too in the present case, submits Mr McGhee, the promise sued on is that the appellant would simply re-direct funds otherwise payable to Inglen.

33. Not so, argues Mr Soole: it is clear that in both the old cases the original debtor (as, for the purposes of the alternative ratio in ***Andrews v Smith***, Hill was presumed to be) had at the very least consented to the defendant making payment to the plaintiff out of monies due to him (the original debtor), and this feature of the cases, so far from being (as Mr McGhee submitted) irrelevant to the court's reasoning, was central to it.

34. In my judgment Mr Soole's argument is correct. The plaintiff's submission in ***Andrews v Smith*** makes plain the (alternative) basis upon which judgment was being claimed, namely that the defendant's promise to follow Hill's "***directions***" to use his funds to pay the plaintiff gave rise to a direct, rather than merely a collateral, obligation and so fell outside s.4. Yet more plainly was that the basis of decision in ***Steggall v Lymburner***. Both cases are thus readily explicable on the footing that the debtor's instructions, or at any rate the defendant's promise given with the debtor's consent, created a primary liability to pay. The arrangement in each case was tantamount to, if not in strict law, a novation or assignment of liability. And an important consequence of those arrangements, strikingly absent from the present case, was that payment by the defendant there would *pro tanto* have extinguished his liability to the original debtor. Not so here, of course: had the appellant paid the respondent the £1.3 million due from Inglen (assuming, of course, that Inglen was owed at least that much), the appellant would still have had no answer to a claim by Inglen (or its liquidator) for a like sum.

35. Mr McGhee submitted that it can make no difference to the legal analysis that, even had the appellant's promise been met, it would have remained liable to Inglen. Whether payment under the agreement would or would not extinguish the debt due to the creditor cannot, he argues, be determinative of whether the agreement is a guarantee. I respectfully disagree. If payment to the creditor (of an assumed contingent liability) is to be made only from funds which the promisor would otherwise have to pay the debtor, that is one thing and understandably outside the statute. The payment claimed here seems to me quite another thing. It is, indeed, on analysis quite inaccurate to describe it as a payment out of funds otherwise due to Inglen. Rather it would be a payment out of the appellant's own funds since Inglen would still remain entitled to be paid.

36. Accordingly, save perhaps for the word "***generally***" to be found in the first sentence of the paragraph quoted above from O'Donovan and Phillips, I have no difficulty with that summary of the law until one reaches the last sentence. As to the main part of the summary, I readily accept that there is no guarantee within the statute unless the promisor's own funds are put at risk and that, in reality, was not the case in either ***Andrews v Smith*** or ***Steggall v Lymburner***. But what of O'Donovan and Phillips' suggestion that the statute does not apply "if the liability merely attaches to a particular asset belonging to the promisor rather than to the promisor's assets generally"?

37. The footnote to that sentence refers to ***Harvey v Edwards Dunlop & Co Ltd*** (1927) 39 CLR 302, but continues *"**Cf Bolton v Darling Downs Building Society** [1935] St RQd 237 where a member of a building*

society who advanced money to a mortgagor was held to have guaranteed repayment of the loan because he lodged shares with the society as collateral security."

38. ***Harvey v Edwards Dunlop & Co Ltd*** I have now read, although Mr McGhee did not think it necessary to put it before us. I do not propose to consider it at length. Of the five judges of the High Court of Australia who unanimously agreed with Dixon AJ at first instance that the agreement there fell outside the statute, only one, Higgins J, suggested that the statutory phrase "***answer for***": *"… must mean to answer for personally – to impose on the promisor and his assets generally a liability for the debt. It cannot mean to impose a mere liability on a particular asset, as when B pledges his shares for the payment of A's overdraft without undertaking any personal liability."*

39. Higgins J alone upheld the judgment below simply on the basis that the agreement there in question was, as Dixon AJ had described it: *"an agreement to take certain definite steps which were expected to result in the* ***debt of another*** *(for which or some part of which the promisor was already liable or thought himself liable),* ***being answered out of specific property of the promisor.***"

40. The facts of that case were somewhat unusual and, I think, go some way towards explaining Higgins J's observations. But insofar as the case is said to be authority for the bald proposition that the statute embraces only a liability imposed on the promisor's assets generally rather than on a particular asset, I for my part cannot accept it. It is not disputed that a primary debt can be guaranteed to a limited extent – that, indeed, is commonplace. How, then, can it be asserted that a promise to "answer for" the debt of another up to £100,000 out of general assets is caught by the statute but a similarly limited guarantee to be satisfied out of a particular £100,000 account (or fund or other asset) would not be? There is no good reason in principle for such a distinction and nor am I able to find any basis for it within the statutory language. In truth, Mr McGhee's approach requires that there be read into the statute, after the words "***to answer***", additional words such as "from the defendant's general assets". I would not subject the section to any such gloss. Rather I would follow the approach in the not dissimilar situation considered in the old case of ***Morley v Boothby*** (1825) 3 Bing 107, a decision of Best CJ, to my mind clearly incompatible with the respondent's argument, that a promise to pay another's debt out of money due to the promisor himself when he came to receive it fell within the statute – see Halsburys Laws 4th edition vol 20 para 152.

41. I would add finally on this part of the case that no support for Mr McGhee's argument is to be found in any of the other commentaries on the Statute – not in Halsbury's Laws, not in Chitty on Contracts, not in Rowlatt on Principal and Surety, 5th edn (1999). Higgins J's judgment in ***Harvey*** is too slender to sustain it.

42. I turn finally to Mr McGhee's alternative submission that the appellant here is estopped from relying on the statute. I can deal with this very shortly since it seems to me quite hopeless. The submission in essence is that the appellant is estopped because by its promise it encouraged the respondent to continue on site and in reliance on that promise the respondent duly did so. Comparable detriment to the debtor, however, would be found in the great majority of guarantee cases. When asked what it was about this case which makes is unconscionable for the respondent to plead the statute, Mr McGhee replied that the facts here are extreme: the respondent increased its risk from £197,000 to some £1.3 million and did so at the appellant's specific encouragement. But an estoppel cannot be created by circumstances such as these: if it was, then either the statute would be rendered nugatory or at the very least great uncertainty would be reintroduced into the law. Estoppel cannot depend merely on sympathy and an assessment of comparative hardship. Even assuming, therefore, that estoppel can in principle run to defeat a s.4 defence – as I readily envisage it might if, say, the guarantor assures the creditor that his promise will be binding whether or not put in writing – I am of the clear view that it cannot run here.

43. In the result I would reject both the respondent's arguments and hold that, whatever precisely the form of promise made by the appellant, it is unenforceable by virtue of s.4 of the Statute of Frauds. Accordingly, as indicated to counsel at the end of the argument on 31 August 2001, I would allow this appeal and strike out the claim against the appellant.

Lord Justice Peter Gibson:

44. I agree. But as we are differing from the judge, I add a few words of my own on what appears to me to be the central question raised by this appeal. That question is one of construction of s. 4 of the Statute of

Frauds 1677: is the condition for the application of the section that there should be "a special promise to answer for the debt default or miscarriage of another person" one which is only satisfied if the promise is to answer for that debt, default or miscarriage out of the general assets of the promisor (as distinct from some specific asset or source)? If the answer is in the negative, then even on the formulation of the agreement most favourable to the respondent Actionstrength, the agreement could not successfully found Actionstrength's action because of the absence of writing and that action should not be permitted to continue.

45. Mr. McGhee for Actionstrength answers that question in the affirmative. He submits that the designation in the promise of a specific fund or source out of which the promise is to be met would take the case outside s. 4. He says that the promise by the Second Defendant, Saint-Gobain, to pay Actionstrength out of monies which Saint-Gobain owed the First Defendant, Inglen, was such a designation. He acknowledges that his construction of s. 4 requires reading into the section words such as "*out of the general assets of the promisor*". But in support of that construction he relies in particular on **Andrews v Smith** (1835) 2 CM & R 627 and the views expressed in O'Donovan & Phillips: The Modern Law of Guarantee 3rd ed. (1996).

46. The judgments in **Andrews v Smith** are only briefly reported. But that of Lord Abinger C.B. contains this sentence (at p.631) as an alternative ground for his decision: *"But further, if the defendant contracted not to pay Hill's debt out of his own funds, but only faithfully to apply Hill's funds for that purpose, when they should come to his hands, that contract would not be within the operation of the statute."*

That was said in the context that it had been pleaded by the plaintiff creditor that the defendant promisor was employed by one Hesse to receive monies paid by Hesse to the promisor for the promisor to pay the debtor Hill and that the promise was to pay the creditor out of the monies due to the debtor and received by the promisor for that purpose if the debtor gave an order to the creditor. As Simon Brown L.J. has pointed out, that case is distinguishable. But in any event Lord Abinger's reasoning does not go far enough to assist Actionstrength. He was distinguishing between a promise by a promisor to pay out of his own funds and a promise by a fiduciary to pay out of another's funds entrusted to him for that purpose. He was not distinguishing between a promise by a promisor to pay out of his own general assets and a promise to pay out of a specific asset of the promisor. That question never arose.

47. In O'Donovan & Phillips at p. 68 there are two sentences which support Mr McGhee's submission: *"To fall within the statute the promise must impose on the promisor and the promisor's assets generally a personal liability for the debt .... Moreover, the formal requirements do not apply if the liability merely attaches to a particular asset belonging to the promisor, rather than to the promisor's assets generally."*

48. The only authority cited in support of these statements is **Harvey v Edwards, Dunlop & Co. Ltd.** (1927) 39 CLR 302 at p. 311. There Higgins J. was considering whether an agreement by the defendant promisor to execute a power of attorney and to instruct the attorney to sell a specific property of the promisor in time to allow the attorney to pay out of the proceeds a debt of another to the creditor of the debtor came within the wording of s. 4 of the Statute of Frauds (as re-enacted in a statute of Victoria, Australia). Higgins J. said: *"Now, the Act requires a writing for an enforceable contract when there is a special promise to answer for the debt, default or miscarriage of another person. What does "**answer for**" mean? It must mean to answer for personally – to impose on the promisor and his assets generally a liability for the debt. It cannot mean to impose a mere liability on a particular asset, as when B pledges his shares for the payment of A's overdraft without undertaking any personal liability. In the present case the liability is imposed only on the proceeds of the sale of some property in Paisley. There is nothing to bind the defendant to pay out of his assets generally any deficiency, should those proceeds be insufficient for the debt. The defendant has not promised to answer for the debt of the company, although he may have promised that his Paisley property shall, in a popular sense, answer for that debt. The case cited by the Chief Justice (**Macrory v. Scott**) [(1850) 5 Exch. 907] seems to be very relevant. There Parke B. pointed out that an agreement to the effect that property already pledged as security for one debt should remain in pledge for another was not an agreement that required a writing under the Statute of Frauds. I know of no case in which the statute has been held to apply in which an action for assumpsit (or covenant) would not lie.*

*This was substantially the view taken by the learned Judge; but so much time was taken up in the argument before us as to the sufficiency of the letters for the purpose of the Statute of Frauds, that this view has not received the attention which it deserved. I concur with the judgement of Dixon A.J. where it states [[1927] VLR at p. 57]: "**The agreement***

was not in my opinion a special promise to answer for the debt, default or miscarriage of another." *The judgment goes on to add: "It was an agreement to take certain definite steps which were expected to result in the debt of another (for which or some part of which the promisor was already liable or thought himself liable), being answered out of specific property of the promisor."*

49. As I understand his reasoning, Higgins J. was contrasting a personal contractual liability, which came within the Statute of Frauds, with the granting of security over some asset of the promisor in favour of the creditor, which was not. **Macrory v. Scott**, which Higgins J. thought very relevant, was an example of the latter. But he does not appear to have considered, and certainly did not explain, why a promise, enforceable in contract, to answer personally for the debt, default or miscarriage of another without granting any security but limited in some way, such as by reference to a particular source of funding, fell outside the section.

50. Higgins J. found support for his views in two sentences from the judgment of Dixon A.–J. in the court below. But he did not cite the following two sentences, which seem to me to put what was quoted by Higgins J. in a different light. The entire passage from Dixon A.–J.'s judgment reads thus (see [1927] VLR at p. 57): *"The agreement was not in my opinion a special promise to answer for the debt, default or miscarriage of another. It was an agreement to take certain definite steps which were expected to result in the debt of another (for which or some part of which the promisor was already liable or thought himself liable), being answered out of specific property of the promisor. The obligation of the contract was not to pay money, but to do and abstain from doing certain prescribed things. I think the implications of the agreement obliged the defendant to leave the power of attorney in full force, and not to countermand the instructions to the attorney until the debt had been paid or the sale or the application of the proceeds had become impracticable."*

51. I very much doubt whether the reasoning of Dixon A.-J. does support that of Higgins J. In any event Higgins J.'s views were not supported by any of the other judges of the High Court of Australia.

52. When Mr McGhee was asked what policy considerations would lead to construing s. 4 in the way which he advocated, he was only able to suggest that it might have been thought that there was less reason to require a limited guarantee to be within the section than an unlimited one. I am afraid that I do not find that a logically compelling reason for reading into the section words which are not there. The law relating to s. 4 is already overburdened with fine distinctions and I think it would be regrettable if another fine distinction were to be added in the way suggested by Mr McGhee's construction. We were not shown, and I am not aware of, any other authority or textbook which supports Higgins J.'s views, whereas in **Morley v. Boothby** (1825) 3 Bing. 107 the fact that the source of the monies to answer for the promisor's promise was designated did not deter Best C.J. from holding that the promise fell within s. 4. However this point was not specifically adverted to in his judgment.

53. I would add that on the facts assumed to be true Saint-Gobain's promise was not to pay Actionstrength out of an identified fund of existing assets but merely to pay to Actionstrength what Saint-Gobain would otherwise have paid Inglen, and that Saint-Gobain was free to do out of its general assets.

For these as well as the reasons given by Simon Brown L.J. I would allow this appeal

Lord Justice Tuckey:

54. For the reasons given in both judgments I agree that this appeal should be allowed and the claim against the appellant should be struck out.

ORDER: Appeal allowed. The claim against the appellant is struck out. The appellant to have the costs of the application including this appeal, the action and the Part 20 proceedings against Inglen. The sum of £1 presently in Court to be paid out to the appellant's solicitors. (Order not part of approved judgment)