Neutral Citation [2012] IEHC 236

**THE HIGH COURT**

**[2010 No.1294S]**

**BETWEEN/**

**ACC BANK PLC**

**PLAINTIFF**

**AND**

**SEAN McCANN AND MICHAEL GRIFFIN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Hogan delivered on 20th June, 2012**

1. With this application the plaintiff bank ("ACC") seeks judgment as against the first defendant, Sean McCann, for the sum (including interest) of €7,842,284.34 in his capacity of guarantor of that loan. It is not in dispute but that on October 6, 2006 the plaintiff bank sanctioned a loan facility in the sum of €5,555,000 to a company entitled Killorglin Ventures Ltd. ("Killorglin"). The loan was expressed to be for a two year period and its purpose was to assist in the purchase of a development site in Co. Kerry and the subsequent development of that site, with a view to the possibility of a further sale should the general circumstances prove propitious for this purpose..

2. Proposals of that kind were not uncommon during this period when house prices continued on an upward spiral. Many developers and investors sought to identify sites for potential housing development and for this purpose borrowed from financial institutions. Securing planning permission was a vital step in this process, but as Mr. McCann explained in evidence, during this remarkable period of intense activity in the construction sector, even the fact of applying for permission was thought to be enough to increase the value of the property.

3. So far as the guarantee is concerned, it should be pointed out that Mr. McCann is an experienced businessman and his own solicitors wrote to the plaintiffs solicitors at the time of the execution of the guarantee on two occasions in December, 2006 confirming that his client did not require independent legal advice as he "fully understood what [he was] signing".

4. So far as this development is concerned, at first all went well and the land duly was acquired for the sum of €5m, together with stamp duty in the same of €450,000. The loan agreement envisaged that planning permission would be acquired in a relatively short space of time, since it stipulated that if planning permission had not been received by 1st February, 2007, extra security was to be given sufficient to bring the loan to value ratio to 65% or lower. That date was ultimately extended to June 2007.

5. Planning permission for this development was originally granted by Kerry County Council in June, 2007. Following an appeal by local residents, this decision was, as we shall see, overturned on appeal by An Bord Pleanála in February, 2008. The refusal of planning permission naturally was disastrous so far as this project and its promoters were concerned. Once the inspector's report subsequently came to hand, it became clear that An Bord Pleanála must have had serious concerns regarding whether the proposed development would have presented a traffic hazard and would also have materially contravened the development plan with regard to the provision of a by-pass between two national secondary routes.

6. While the company made efforts to consider re-submitting an application in the wake of this refusal - to the point, indeed, where Mr. Fitzgerald was informing ACC in late April 2008 "that the issues raised by the inspector and a revised application will be submitted shortly" - in the end these proved desultory and the endeavour petered out. It is only fair to record that the issue of making a revised application was discussed by all parties in a meeting between the Bank and the developers (including Mr. McCann) in May 2008. The topic was also raised by Killorglin's financial adviser, Mr. Goold, when he had what proved to be abortive discussions with ACC in January, 2009.

7. There seems little doubt but that during the period in the lead-up to what proved to be adverse planning decisions, Mr. McCann became quite apprehensive regarding the future direction of the market. Those with an eye for prevailing market conditions could sense that the property market was beginning to deteriorate quite sharply. He was anxious that the company should simply sell its assets at the best possible price and negotiate the best deal possible from the bank.

8. The grant of the loan from ACC was subject to a number of conditions, including a requirement that the sum in question would be guaranteed by the three directors of the company, namely, the two defendants and Brian Fitzgerald. The three directors executed a guarantee on 11th December, 2006. As we have just noted, there was a further condition to the effect that if planning permission had not been received by 1st February, 2007, extra security would be required to bring the loan to value ratio to 65%. In Mr. McCann's case, he was also required to offer a charge over a site which he owns at Firies, Co. Kerry.

9. This loan facility was varied by letters dated 13th February, 2007, and 1st February, 2008. Under the terms of the loan facility as thus varied the loan was to be repaid by 11th December, 2008. The company defaulted on the repayment and the loan remains undischarged in its entirety.

10. In September, 2009 ACC made a demand for payment on the three guarantors on foot of the guarantees in respect of the principal and interest. It is this demand which has given rise to the present proceedings. In a judgment delivered on 11th May, 2011, I refused ACC's application for summary judgment and directed that the case proceed to full hearing. This is now my judgment following this full hearing so far as the claim on the guarantee as against Mr. McCann is concerned.

**The response of Mr. McCann**

11. While Mr. McCann does not really dispute ACC's principal contentions regarding the loan advanced, he nonetheless now seeks to defend the proceedings on the three principal grounds. First, it is said that as the February 2007 variation was effected without notice to him, it is invalid and ineffective on that account. Second, it is contended that the February, 2008 variation was not truly a variation, but that in effect it amounted to a new agreement between the parties so as to take it outside the reach ofthe guarantee. Third, the defendant objects to the February, 2008 variation on the ground that it was procured by forgery. If, however, this amendment was ineffective, it will not be necessary to consider the second question.

12. The February 2008 amendment was prompted by the decision of An Bord Pleamila to overturn the original decision to grant planning permission for house construction on the site owned by Killorglin. In the wake of this refusal, ACC requested that new loan documents be executed which provided for a higher interest rate of 3% (rather than the pre-existing interest rate of 2%) on the loan. The three guarantors purportedly signed this document on 11th February, 2008, but Mr. McCann gave evidence - which was not challenged - that his signature to the two loan variations has been forged.

13. So far as the February, 2008 agreement is concerned, Mr. McCann gave evidence that he had lengthy discussions and disagreements with his fellow directors in early 2008 in relation to whether the loan should be varied/extended or whether Killorglin should repay whatever it could and sell its assets. Specifically, Mr. McCann spoke to Mr. Fitzgerald by telephone at the end of February, 2008 at time when they had just become aware of the fact that An Bord Pleanála had refused permission. Mr. McCann made it clear to Mr. Fitzgerald that while he (*i.e.*, Mr. Fitzgerald) and Mr. Griffin had the controlling majority, they had no authority from him to vary or extend the loan.

14. There seems little doubt but that on 25th February, 2008, a meeting of Killorglin did take place as a result of which the variation (along with the additional 1% interest) was agreed to. It is equally clear, however, that Mr. McCann was not present at the meeting and that, insofar as the minutes of the company meeting record the contrary, they are false. It is also plain that Mr. McCann's name was affixed to the acceptance of the variation without his authority or knowledge and that in this respect the document is a forgery.

15. In response, ACC maintain that in the wake of the refusal of the planning permission, Killorglin was now obliged to provide additional security to reduce the loan to value to a 65% ratio. It says that as the borrower was not in a position to advance the additional security, it was agreed that the interest rate would be raised by 1 percentage point to a level of 3% over the EURIBOR rate. So far as the forgery allegations are concerned, ACC state that they are effectively strangers so far as these contentions are concerned, although they do not dispute tis fact.

16. Counsel for ACC, Mr. McDonald SC, maintains that the February, 2008 variation is nonetheless valid so far as his client was concerned because (a) the signatures of the other co-directors were properly affixed to the company resolution and (b) by virtue of the operation of the rule in *Royal British Bank v. Turquand* (1856) E. & B. 327. We can now turn to a consideration of all of these issues.

**Was the first variation of June 2007 valid?**

17. As we have already noted, the loan agreement envisaged that planning permission would be acquired in a relatively short space of time, since it stipulated that if planning permission had not been received by 1st February, 2007, extra security was to be given sufficient to bring the loan to value ratio to 65% or lower. That date was ultimately extended to June 2007. While I fully accept Mr. McCann's evidence that was not made aware of this fact - principally because he left all of his dealings with the Bank to his fellow director, Brian Fitzgerald- he also accepted in evidence that it was unlikely that he would have objected to this extension had he been aware of this at the time, not least given that the original time frame for the grant of planning permission was entirely unrealistic.

18. While this was not a particularly significant amendment or variation of the original agreement, it is clear from the decision of the English Court of Appeal in *Holme v. Brunskill* (1878) 3 Q.B.D. 495 (an authority which I will presently consider in more detail) that the law will not force such an amendment on the surety absent a contractual agreement to the contrary. In the present case, however, ACC shrewdly provided in Clause 4.2.2.3 (which is reproduced below) in the loan agreement for a clause which negatived the operation of *Holme v. Brunskill* in that the guarantor is bound by an amendment to the facility document and the general terms of lending between the parties. As this was a relatively straightforward variation of the agreement, it clearly comes within the purview of Clause 4.2.2.3.

19. Nor can I accept that the Bank was obliged to give Mr. McCann notice of the change. While there was slightly conflicting evidence as to the practice of the ACC with regarding to notifying the surety of proposed changes to the loan agreement, it was common case that the Bank was under no express contractual obligation to give such notice. Moreover, given that Clause 4.2.2.3 expressly provided that the guarantor was not relieved of his suretyship by reason of any amendments or variations to the loan contract and does not expressly provide for the giving of notice, this necessarily presupposes that such amendments may be made without notice to the guarantor and negatives the suggestion that there should be an implied term to the effect. All of this means that Mr. McCann is not released from the guarantee by reason of the extension of time from February 2007 to June 2007, even though this contractual change was made without notice to him.

**Whether the February, 2008 amendment was effective to bind Mr. McCann?**

20. The essence of ACC's contention here is that the February 2008 variation was effective in that the variation was ostensibly accepted by Killorglin by an acceptance letter dated 11th February, 2008, which contained the three signatures of the directors (including Mr. McCann's purported signature), along with minutes of a board meeting of 11th February, 2008, which (falsely) record Mr. McCann's presence at that meeting.

21. The rule in *Turquand* reflects the principle that, generally speaking, a third party is entitled to rely as against the company on the validity of acts done or resolutions passed or documents executed by or on behalf of the company without the necessity of inquiring whether the company complied with its own memorandum and articles of association or other associated procedural rules, such as the presence of a quorum or the appointment of officers.

22. Absent actual knowledge on the part of the third party, it is largely immaterial to that third party whether the irregularity in question meant, for example, that a purported resolution was signed by irregularly appointed directors on the one hand or whether the signatures of regularly appointed directors were forged on the other.

23. It is true that there is a long standing *dictum* of Lord Loreburn L.C. in *Ruben v. Great Fingall Consolidated* [1906] A.C. 439 which suggests the contrary. Here a company secretary forged share certificates which were then presented to the stockbroker plaintiffs

and executed in their names. On the strength of this the plaintiffs arranged for the sum of £20,000 to be transferred to the company secretary. When the fraud was discovered, the plaintiffs then sued the company for the sums in question.

24. This action was unceremoniously dismissed by the House of Lords. Even though the members of the House expressed sympathy for the innocent victims of what Lord Macnaghten described as a "wicked fraud", Lord Davey nonetheless thought that the action was "as full of holes as a colander". It was against that background that the following comments of Lord Loreburn L.C. ([1906] A.C . 439 at 443) must be understood:-

> "The forged certificates are a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had not notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."

25. As Keane C.J. has noted - albeit extra-judicially - this was a case to which the rule in *Turquand* could never have applied "since a secretary would not normally be empowered to enter into such a transaction and the case could have been decided on that basis without regard to the forgery": see *Company Law* (4th ed.) at 12.41. To that extent, the comments are pure *dictum*. Even if it were otherwise, this court is not strictly bound by the observations of pre-1922 British appellate judges, save where, in the words of Davitt P. in *The State (Quinn) v. Ryan* [1965] I.R. 70, 88, these comments:-

> "represents a principle so well settled, or pronounced by so weighty a juristic authority, that it became part of the law under the combined operation of Article 73 of the Constitution of 1922 and Article 50 of the present Constitution. I would [otherwise] take the view that this Court was free to accept, reject, modify or ignore that principle as we see fit."

26. In my judgment, the rule in *Turquand* obviously satisfies the former criteria, as it was so embedded in the fabric of the common law in 1922 that it became part of the "law" that was carried over by Article 50.1 of the Constitution. The same cannot be said of Lord Lorebum's judgment in *Ruben*, for irrespective of the technical status of these comments (*i.e.*, regardless of whether they are pure *dicta* or, alternatively, form part of the *ratio*), it could not possibly be said that the decision had achieved the unquestioned status and importance which had attached to *Turquand*, a decision which still remains to this day as a central feature of the entire edifice of company law.

27. Freed thus of any precedential constraints, I would not be disposed to follow the decision in *Ruben* insofar as it suggests fraud automatically destroys the operation of the rule in *Turquand*, since, in my view, it is inconsistent with the underlying rationale ofthat rule. Indeed, in his concurring judgment, Lord Davey suggested ([1906] A.C. 434 at 447) that the person dealing with the shares "could always apply" to the shareholders to inquire whether the signatures appearing on the share certificates were genuine. This suggestion is, with respect, so unrealistic - certainly in modem conditions - that in its own way it graphically demonstrates just how far the House in *Ruben* had failed to grasp the underlying principle in *Turquand*. On that view, Jervis C.J. might just as well have said in *Turquand* that any third party was put on inquiry to see that the resolution authorising the company's borrowings had been duly passed.

28. Instead, I would rather follow and approve the analysis offered by Keane who suggested that:-

> "...even in the case of a forged document, the rule [in *Turquand*] should still apply where
>
> (a) the transaction was within the ostensible authority of the company's agent and was not *patently* irregular;
>
> (b) the outside was unaware of the forgery;
>
> (c) there were no circumstances to excite suspicion."

29. In the present case, the company plainly had the capacity to enter into a loan arrangement of this kind (thus satisfying the first limb of *Turquand*) and unless ACC can be shown to have had actual knowledge of that forgery, Killorglin would be bound by the resolution and the company minutes which were tendered to the bank on its behalf. Nor was the transaction *patently* irregular and there were no circumstances to excite suspicion.

30. The fact, however, that the company would be so bound for the purposes of *Turquand* does not in any way dispose of the question as to whether Mr. McCann should also be bound by a forged document of this nature. Although Mr.McCann is a director of Killorglin, he is not sued in that capacity in these proceedings, but rather qua guarantor. While I naturally accept that Mr. McCann gave a guarantee in order to assist the ventures of a company from which he stood to make a personal profit, nevertheless inasmuch as he is sued qua guarantor, he is as much a third party to the fraud as, indeed, is the Bank.

31. If the February, 2008 amendment can bind Mr. McCann, then it means that he is fixed with an additional exposure as surety as a result of the fraud. Conversely, if Mr. McCann is not so bound, then the Bank will find that it agreed to a variation of the loan arrangement in circumstances where, contrary to its understanding at the time, the agreement as so varied is unguaranteed. Put thus, the question then becomes which of two innocent parties - namely, ACC and Mr. McCann - should bear the loss which is the consequence of the fraud.

32. To my mind, in these circumstances, the lender - and not the surety - should bear this loss. There are several reasons for this conclusion. First, the whole tenor and language of the rule in *Turquand* is that it protects the third party in its dealing against the *company* and persons holding themselves out as agents of the company. In the present case we know that the February, 2008 resolution was handed to Ms. Catriona O'Driscoll (who a senior banking manager within a specialised business unit of ACC based in Cork) by Brian Fitzgerald, another director of the company in early March, 2008.

33. That in itself is sufficient to bind Killorglin as against ACC for the purposes of the rule in *Turquand* and the persons who acted as agents of the company for that purpose would be estopped vis-à-vis the bank from asserting the invalidity of the resolution. But the rule in *Turquand* only operates in favour of the third party as *against the company*. The invalid resolution would, of course, bind the directors qua directors so far as the general law of agency and estoppel is concerned. While Mr. McCann might - perhaps - be bound as against a third party in his capacity as a director of Killorglin in the circumstances just described, he is not sued in that capacity, but, to repeat, he is rather sued as guarantor. Neither the operation of the rule in *Turquand* or the doctrines of estoppel or agency have any application to him in that capacity.

34. Second, if the law were otherwise, it would add a new hazard to suretyship. It would mean, for example, that any guarantor

would stand exposed not simply to the sum for which he agreed to guarantee or even to variations and amendments to the loan contract in the manner stipulated by clause 4.2.2.3, but also to any variation of that agreement which was procured by fraud and of which the bank had no *actual* notice. Moreover, such a conclusion would be inconsistent with the underlying rationale for the entire law of suretyship as reflected in the rule in *Holme v. Brunskill* (1878) 3 Q.B.D. 495. Here Cotton L.J. stated ((1878) 3 Q,B.D. 495, 505):-

> "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an enquiry as to the subject of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case, the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged".

35. The rule in *Holme v. Brunskill* was re-stated more recently in the following terms by Kelly J. in *Anglo Irish Bank Corporation plc v. McGrath* [2006] IEHC 78:-

> "I believe that rule can be reduced to the following: if there is a contract of surety guaranteeing a principal agreement, there may not be an alteration of the contract guaranteed, without the consent of the surety. In this case, the contract which is guaranteed is not the management agreement but the contract under which the monies were advanced. Furthermore, if there is to be a variation of the type which attracts the rule in *Holme v. Brunskill*, it has to be of a type which was not contemplated by the parties."

36. In *McGrath* monies had been advanced by the bank to a partnership whose function was to purchase and equip a particular fishing vessel. The facility letter envisaged not only that a company controlled by the defendant would manage the vessel, but also that the defendant would guarantee the loan. The management agreement was, however, terminated and the defendant maintained that this had "disastrous" implications for him since he was ousted from participation in the transaction.

37. Kelly J., however, rejected the argument that the rule in *Holme v. Brunskill* applied, precisely because the termination was expressly provided for under the guarantee:-

> "Termination was contemplated by the management agreement here. Not only that - there was no complaint made prior to this year by the defendant. But apart from all of those considerations, it is clear from paragraph 4 of the guarantee that the bank was entitled to make changes. There is therefore no doubt that termination was something which was contemplated by the parties. It therefore can't amount to a variation. Nor can it give rise to a complaint of an illegal act or of an act of a type that would entitle the surety to be relieved of the obligations."

38. If we now endeavour to apply these principles to the present case, it will be seen first that the guarantee at issue here is quite far-reaching. Thus, clause 4.1 of the guarantee provides that:-

> "The Guarantor acknowledges and agrees that this Guarantee is and at all times shall be a continuing security and shall extend to cover the ultimate balance due at any time from the Principal Debtor to the Bank under or in respect of the Facility Documents and any of the transactions contemplated thereby."

39. Clause 4.2.2 provides that:-

> "The Guarantor acknowledges and agrees that none of its liabilities under this Guarantee shall be reduced, discharged or otherwise adversely affected by -
>
> ...3. Any termination, amendment, variation, novation or supplement of or to any of the Facility Documents...."

40. The term "facility documents" is defined by clause 1.2 as meaning the facility letter of 2nd October, 2006, and "any amendment or supplement thereto" between ACC and Killorgin and "any other document relating to the obligations" of Killorgin to the bank. In effect, therefore, clause 4.2.2.3 operates to negative the rule in *Holme v. Brunskill* in that the guarantor has signed up to a guarantee that expressly envisages or contemplates amendments to the loan contract between the lender and the borrower, so that the guarantor is bound by any such amendments.

41. The reference to "any amendment or supplement thereto" must, however, be understood as a reference to an amendment or a supplement which was effected in a regular and lawful manner and as not embracing one which was procured by fraud, as the parties can scarcely be taken to have contemplated that the scope of the guarantee could be varied by the fraudulent conduct of another. Applying the test articulated by Kelly J. in McGrath, one can say the parties never contemplated that the scope of the guarantee could be amended by fraud. It is rather, in the words of Kelly J., an "illegal act or of an act of a type that would entitle the surety to be relieved of the obligations".

42. For these reasons, therefore, I am of the view that the purported amendment effected by the (fraudulent) resolution and (the equally fraudulent) minutes in February, 2008 are ineffective as against Mr. McCann in his capacity qua guarantor. Before considering, however, whether this has any wider implications, it is necessary now to address the most fundamental question of all, namely, whether the general circumstances of the February, 2008 amendments in question are sufficient to discharge Mr. McCann from his suretyship.

43. The whole objection of the guarantee was to guarantee the loans of some €5.5m in the underlying facility letter. The term of the loan was to be two years and the purpose of the loan was expressed to be for the purchase of the lands at Killorglin for the sum of €5m., together with associated stamp duty, legal fees and other sundry costs. One may nevertheless accept the submission of Mr. Maguire S.C., counsel for Mr. McCann, that the purpose of the loan had essentially failed once the planning permission had been rejected by An Bord Pleanála. While the prospect of successfully making a fresh application for planning permission- whether then or even now - could not be excluded- in view of the comprehensive analysis of the issue contained in the inspector's report, one would have to acknowledge that the prospects of success were by that stage slender. Indeed, a credit memorandum prepared by ACC on 15th April, 2008, recommended that the bank pay for an up-dated valuation of the lands "as the clients have already accepted an additional 1% margin on borrowings and [we do] not feel [that] we are in a position to insist [that the] clients pay on this basis".

44. While Mr. Maguire SC accepts that ACC was entitled to call in the loan at that stage (i.e., in February, 2008), he says that the fact that the Bank elected to continue the credit arrangements on a "wait and see" approach amounted to such a fundamental change in the loan arrangements as to undermine the whole purpose of the loan so that in truth a new loan arrangement came into being, thus releasing Mr. McCann from his suretyship.

45. It must be recalled, however, that I have already held that the February, 2008 amendment was void as against Mr. McCann. If that is the case, then the parties' contractual position remains as it was immediately before the ineffective amendment. In these circumstances the obligation to repay the principal remains unaffected, since all that had happened was that there had been an ineffective attempt to vary the terms of mthe loan. In these circumstances, it is unnecessary, therefore, to examine whether the amendment in question came within the scope of clause 4.2.2.3, since the parties' respective positions remains as if the amendment had never been accepted or even suggested. The sums in question had, in any event, been advanced by ACC in 2006 before any question of the failure of the purpose of the loan ever arose, even assuming

46. While all of this would seem to follow as a matter of first principle, support for this proposition may also be found in the judgment of the Privy Council in *Egbert v. Northern Crown Bank* [1918] A.C. 903, a case where the purported alteration of the principal contract providing for a interest rate higher than that permitted by statute was held to be illegal. While this meant that the proposed variation was invalid and ineffective, this did not affect the validity or effectiveness of the original guarantee.

47. As Lord Dunedin observed ([1918] A.C. 903, 906):-

> "But the difficulty in the appellants' argument lies in this, that the so-called agreement to charge 8 percent is statutorily invalid and of no effect. Though, of no effect to legalise the interest, it does not invalidate the contract to repay the principal.. ..Accordingly, the indebtedness in respect of the principal has not been interfered with."

48. In these circumstances, I am coerced to conclude that the agreement remains as originally agreed, subject to the minor variation of June, 2007. This means, for example, that the purported interest rate increase of 2% to 3% contemplated in February, 2008 was quite ineffective. If, however, the original agreement remains in place than it follows that the respective positions of the parties remains unaffected. In these circumstances, I see no basis on which it can be said that Mr. McCann should be released from his contract of guarantee.

**Conclusions**

49. In conclusion, therefore, I am of the view:-

> A. The February, 2007 variation was effective and valid, even though Mr. McCann was given no notice of this change;
>
> B. The February, 2008 amendment was ineffective and void as against Mr. McCann in his capacity as guarantor by reason of the fraudulent manner in which it was procured;
>
> C. In those circumstances, the original agreement remains unaffected - save for the minor variation of June 2007 - and Mr. McCann remains liable on the guarantee, albeit only at the original interest rate.

50. I will hear counsel as to the form of order sought in the light of this judgment.