

Finlay C.J.  
Griffin J.  
McCarthy J.

(194/84)

*A-T. 66N v. SUN*

THE SUPREME COURT

THE ATTORNEY GENERAL

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Plaintiff

AND

SUN ALLIANCE AND LONDON INSURANCE LIMITED

Defendant

JUDGMENT delivered on the 28th day of February 1985 by

MCCARTHY J.

*Ven. Jsr*

This is an appeal from an order of the High Court (McWilliam J.) that the plaintiff do recover against the defendant the sum of £504,416.37 together with interest, the order being made on the plaintiff's motion for liberty to enter final judgment on foot of a Summary Summons.

1. The plaintiff sues on behalf of the Minister for Finance and the Revenue Commissioners. The defendant is an insurance company. J.J. Murphy and Company Limited was in the years 1981 and 1982, as part of its business, engaged in the warehousing of spirits and beers each of which were liable to excise duty when delivered from warehouse.
2. By Deed of Bond executed under seal and dated the 2nd December 1981 the defendant held and bound itself to pay to the Minister for Finance on behalf of the Revenue Commissioners the penalty sum of £1,400,000, conditional upon the failure of

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J.J. Murphy and Company Limited to pay the duties of excise chargeable in respect of spirits delivered from bonded warehouses on which duty was not paid on delivery from such warehouses but, rather, was deferred for a period certain by agreement with the Revenue Commissioners. Excise duty in an amount of £458,909.72 became due by J.J. Murphy and Company Limited to the Revenue Commissioners on the delivery of spirits from the warehouses in the months of June and July 1982; the agreed period of deferral for the payment of all the excise duty expired on the 31st August 1982.

3. By cover note dated the 17th August 1981, the defendant agreed to undertake the suretyship to a general Bond in respect of the deferred payment of excise duty on beer imported by J.J. Murphy and Company Limited in a penalty of £90,000. It is agreed that this transaction is to be treated as if the defendant had entered into the general Bond in terms similar to those of the general Bond in respect of spirits.
4. Excise duty in an amount of £45,506.65 became due by J.J. Murphy and Company Limited to the Revenue Commissioners on the importation of beer in the months of June and July 1982. The agreed period

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of deferral for the payment of all the excise duty on the beer expired before the 15th August 1982.

5. On the 10th January 1983 the Revenue Commissioners demanded payment of the full sum of £504,416.37 being the total amount due in respect of the spirits and beer. The accuracy of the total is not in dispute nor, subject to immediate liability for the capital sum, is the liability for interest from the 10th January 1983.
6. The material portion of the Bond is:-

"Now the condition of the above written Bond is such that if the Warehouse keeper (J.J. Murphy and Company Limited) shall, on demand made by the proper Officer of Customs and Excise, at any time on or before the dates specified by the Commissioners for payment thereof duly pay the duties of excise chargeable in respect of any spirits delivered from a bonded warehouse and on which payment of duty has been deferred, THEN the above-written Bond shall be void or else shall remain in full force and effect: PROVIDED ALWAYS and it is hereby declared that if upon any breach of the condition of the above-written Bond the Commissioners shall waive such breach of the condition or if the Commissioners shall be pleased to accept payment of a sum of money in

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respect of such breach in lieu of enforcing payment of the penalties secured by the above-written Bond then the security provided by the above written Bond shall be and remain in full force and effect notwithstanding such waiver or such acceptance of a sum of money", with a further proviso as to duration of the Bond.

The trial Judge, in his considered judgment, stated that a receiver was appointed over the property of J.J. Murphy and Company Limited in the middle of July 1982 and commented "No reference is made to this circumstance in the affidavits and no significance has been attached to it in the arguments". Mr. McCann, Counsel for the appellants, has argued that there is significance in this alleged fact; in the circumstances of the case, I disagree, but I would disregard it unless it were strictly proved. In a case where a defendant admits that, subject to a special circumstance which he calls in aid, the full amount claimed is due, then the defendant must prove, in a proper manner, the facts to support his contention. The defendant further alleges that at the time of default in respect of the duty, there were goods of James J. Murphy and Company Limited in the premises of that company. Again, whilst one might assume that there must have been some goods of some kind in such premises, there is

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no positive proof to that effect; I would not decide this appeal on so narrow a point but I emphasise the requirement to prove the facts necessary to sustain the contention that there is a good defence to the action.

THE LAW

S. 24 of the Excise Collection and Management Act, 1841 (4 Vict. cap. 20):-

"And be it enacted, that all goods and commodities for or in respect of which any duty of excise is or shall be by law imposed, and all materials and preparations from which any such goods are made, and all stills, backs, vats, coppers, cisterns, tables, presses, machines and machinery, vessels, utensils, implements and articles for making or manufacturing or producing any such goods and commodities, or preparing any materials, or by which the trade or business in respect of which the duty is or shall be imposed shall have been or shall be carried on, in the custody or possession of the person carrying on such trade or business, or in the custody or possession of any factor, agent, or other person in trust for or for the use of the person carrying on such trade or business, shall be and remain subject and liable to, and the same are hereby made chargeable with, all the duties of excise which, during the time of any such custody or possession, shall be or shall have been charged or become chargeable

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on or be in arrear or owing from or by the person carrying on such trade or business; and shall also be and remain subject and liable to all penalties and forfeitures which during any such custody or possession shall be or shall have been incurred by the person carrying on such trade or business, for any offence by such person committed against any Act or Acts relating to the revenue of excise; and all such goods, materials, and preparations, stills, backs, vats, coppers, tables, presses, machines, machinery, vessels, utensils, and articles shall be and remain subject and liable to all such duties, penalties, and forfeitures, by whomsoever and by whatsoever title or conveyance the same may be claimed; and it should be lawful to levy thereon such duties, penalties, and forfeitures, and for that purpose to seize, tick, sell, remove, and dispose of the same as the goods and chattels of the debtor or offenders under any writ or writs of Extent, Execution, or other process or warrant for the recovery or enforcement of any such duties, penalties, and forfeitures: provided always, that where any goods or commodities subject to any duty of excise shall have been taken account of and duly charged with duty by the proper officer of excise, and shall, after having been so taken account of and charge with duty, be fairly and bona fide, and in the regular and ordinary course of trade, sold, disposed of and delivered into the possession of the purchaser

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thereof, for a full and valuable consideration, before the Teste or issuing of any process or warrant for the recovery of any duty or penalty, such goods and commodities in the possession of such fair and bona fide purchaser shall be discharged from such liability as aforesaid; but in all cases where any goods or commodities shall be seized in the custody or possession of any person, and shall be claimed to be discharged from such liability, as having been fairly and in the regular and ordinary course of trade purchased, proof of the fairness and bona fides of the purchase, and of the same having been in the regular and ordinary course of trade, and of the sale and delivery having been made before the Teste or issuing of the process or warrant under which such goods or commodities shall be seized, shall lie on the claimer thereof."

The defendant contends that by virtue of s. 24 the Revenue Commissioners have a statutory lien; that the defendant, as the surety, cannot enjoy or enforce such lien, but that the Revenue Commissioners should have enforced it against such goods etc. referred to in s. 24, realised such goods etc. as assets of the company and applied the sum realised in the lessening of the excise duty payable. Reliance is placed upon the decision of Cottin v. Blarney (1795) 2 ANSTR. 544, a case, in my view, correctly distinguished by

MacWilliam J. in the High Court. The defendant further relies upon  
 a cited extract from the fourth edition of Rowlatt on Sureties  
 4th Edn. (1937) <sup>Principles 1123</sup>  
 including the following observations of the author at p. 132.

"Despite the considerable authority of the views examined in the previous edition of this work, it is felt that it is arguable that a surety has an equity on the basis of Wolmershausen v. Gullick and the authorities cited therein, including the views of Lord Eldon, to stay a creditor attempting unfairly to place the whole burden of the debt upon the surety, at least in special circumstances, e.g. where there is a solvent principal debtor, or solvent co-sureties who could easily be but are not joined in the action, or a security which could easily be realised to pay the whole debt. That would be more consonant with the rights a surety possessed in late Roman law and which passed into Scots and Continental legal systems..... One situation in which the surety's equity has been held maintainable against the creditor is where the creditor has an opportunity to recover the debt from the principal debtor which will not be available to the surety."

This latter was a reference to Cottin v. Blane.

It is well settled that it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, though solvent, unless this be expressly



stipulated in the surety document. There is authority for the proposition that the creditor does not have to resort to securities received by the creditor from the principal debtor - see Ranelagh (Earl) v. Hayes (1683) 1 Vern. 189; Wilks v. Heeley (1832) 1 Cr. & M. 249; Re Howe ex parte Brett (1871) 6 Ch. App. 838, 841, cases cited in Halsbury's Laws of England, Vol. 15, p. 488/9. Again, where parties, met upon equal terms, in the ordinary course of business enter into a written contract, the law does not look to or, indeed, permit terms to be added to such contract - it applies the rule of strict construction. In the absence of a mistake or some impropriety, neither of which is suggested here, the law will not infer an additional term to the contract nor call in aid some alleged equity which would delay, if not defeat, in whole or in part, the remedy expressly provided for in the contract. The defendant here invites the Court, in effect, to hold that the Revenue Commissioners accepted the Bond on the basis that, if default were made, the Commissioners would engage upon the exercise contemplated by s. 24 with all its problems of possible priorities, retention of title and the like (incidentally, possibly, lessening other claims by the Revenue Commissioners in respect of different forms of tax) and yet

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failed to make any provision therefor in the terms of the Bond.

I do not find it necessary to determine whether or not the Revenue Commissioners had what is called "a statutory lien"; I am content to hold that the defendant has not shown any defence to this claim and that the appeal should be dismissed.

*Dismissed.*

*Ry*

*1.3.85*