

## **Guarantees: some recent pointers on enforceability**

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### **Holme v Brunskill**

In *Holme v Brunskill* (1877) 3 Q.B.D. 495, the question was whether an agreement between landlord and tenant for the surrender, during the term of a lease of one field (the so-called “Bog Field”) had had the potential to reduce the capacity of the lease land to support a flock of sheep whose condition had been guaranteed by the guarantor. The condition of the sheep on return had led to an attempt to claim under the guarantee. Had the landlord and tenant, in agreeing to the return of the Bog Field, effectively placed the guarantor at greater risk under his guarantee?

It was in this context that Cotton LJ set down the formulation which has become the classic expression of the test (See 505 and 506 for the full passage:

*“if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not [...] go into an inquiry [...] 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.”*

A guaranteed landlord (or any other guaranteed party) is therefore effectively put to his election. Unless the guarantor will consent (or has already validly consented) to the variation, the landlord must choose whether to stick with the entitlements which the guarantor has guaranteed or to agree to enjoy some other entitlements as against the tenant, but without the ongoing benefit of the guarantee.

It is worth noting that it was apparently not a foregone conclusion that the rule in *Holme v Brunskill* would develop as it did. The opinion of Cotton LJ prevailed 2:1 in the Court of Appeal and has come to define the legal position on the discharge of a guarantor by variation. Brett LJ, however, favoured a different test and a different outcome. He would have preferred to focus upon the question of whether or not the return of the Bog Field could be said to be material. He was disinclined to interfere with the view of a jury at first instance that it was not. He clearly thought little of the Bog Field as pasture land!

### **Topland Portfolio No. 1 Limited v Smiths News Trading Limited [2014] EWCA Civ 18; [2014] 1 P & CR 290**

The argument in *Topland* centred around two areas:

- (a) was it clear that there had been no increase in the tenant’s obligations to the prejudice of Smiths as surety; and
- (b) was this actually a case of forbearance or the giving of time?

### **Prejudice**

Admittedly with hindsight, it might be thought, from the report, that *Topland* was always facing an uphill struggle arguing that the rule in *Holme v Brunskill* didn’t apply because there was clearly no prejudice. It has to be remembered that a court will not embark upon an extensive enquiry into the possibility of any extension of the obligations of the principal under the guarantee prejudicing the guarantor when applying the rule. Either it is a “self-evident” case that an alteration is insubstantial or does not prejudice the guarantor, or else a non-consenting guarantor will be held to have been discharged from liability.

In *Topland* there was some discussion as to the burden of proof. Was it for *Topland* to show that the alteration was self-evidently insubstantial/non-prejudicial, or for Smiths to show that it wasn’t? The judge at first instance placed the burden on *Topland*. The Court of Appeal did not find itself required formally to decide the point, but paragraph 21 of the judgment of Arnold J (who gave the leading judgment) tends to hint that he would have agreed.

Either way, the hurdle for the party seeking to enforce against a guarantor, once the fact of some sort of amendment or alteration has been raised, must be a relatively high one. Precisely how it compares to, for example, the requirement that a party seeking summary judgment satisfy a court that the other

side's case has "no real prospect" of success, obviously, something will not be self-evident if there is any sensible doubt in the mind of the court. The reality is, therefore, that regardless of exactly where the burden of proof technically lies on the point, a landlord is likely to be in difficulty unless the lack of impact of an alteration/variation really is plain to see.

In this case, works had been authorised by the licence which appear to have centred upon the creation of a garden centre area on one side of what was probably a fairly typical large DIY retail premises, encompassing making a hole in one wall of the building, putting in a garden centre facility, installing fencing, and making alterations to a car park. By virtue of the lease the tenants covenants applied to the premises as altered. Whilst the licence also provided for this, the judge stressed that it was in any event a provision of the original lease itself (see paragraph 14 iv)). That was important because it operated to marry any alterations with an automatic extension of the covenants guaranteed by Smiths, so as to leave the restrictions on such alterations as the only effective protection for Smiths. This protection had now been removed by way of the variation under the licence, if the guarantee survived. The tenants covenants, with their potential to impact on Smiths, now applied to a premises which differed substantially from that in respect of which the original guarantee had been provided. Suppose, for instance, that extensive repairs had been required in respect of one of the added parts of the premises, and Smiths had been called upon to foot the bill.

There was an attempt to argue that the surety ought to be taken to have recognised that the landlord might agree to further alterations, but this was rejected. The terms of the lease were restrictive as to alterations by the tenant, and if the landlord was going to allow the tenant to make additional alterations which could impact on the effect of the guarantee, then the guarantor was entitled to expect to be allowed to give its consent to the variation.

#### Forbearance – an interesting side-study

It was argued that what had actually taken place was a forbearance or a giving of time by the landlord – in effect, that it had decided not to exercise, or not immediately to exercise, its entitlement to enforce the terms of the lease as originally entered into (which prohibited the alterations in question). This would have opened a path for Topland to seek to rely on a clause within the original lease, which Arnold J tells us said this (at [7]):

*"The Lessee shall at all times pay the rent hereinbefore reserved at the times and in manner hereinbefore contained and shall duly observe and perform all the covenants and conditions on the Lessee's part hereinbefore contained to be observed and performed and that if the Lessee shall make default in the payment of the rent herein reserved or any part thereof or in observing and performing the said covenants and conditions or any of them the Surety will pay and make good to the Lessor on demand all loss damage costs and expenses thereby arising or incurred by the Lessor PROVIDED ALWAYS and it is agreed that notwithstanding any neglect or forbearance on the part of the Lessor to obtain payment of the rent herein reserved or any part thereof when the same shall become payable or to enforce observance or performance of any of the covenants or conditions on the Lessee's part to be observed and performed or any time which may be given by the Lessor to the Lessee or that the Lessee may have ceased to exist shall not release or exonerate or in any way affect the liability of the Surety under this covenant".*

This, Topland contended, was an anti-*Holme v Brunskill* provision, and would prevent the discharge of the guarantor in a case such as this.

This line of argument was also rejected.

Arnold J considered a number of authorities on the point, and concluded that an agreement to vary the lease by permitting something which was (a) otherwise prohibited and (b) had not yet happened could not be brought within the definition of forbearance or giving time. The reasoning is set out succinctly at [35] and [36]:

*"[...]Having regard to the context and purpose of the proviso, I consider that "forbearance" connotes a decision by the landlord not immediately to enforce the observance or*

*performance of a covenant against a tenant who is in breach of that covenant, but rather to tolerate the breach for the time being.*

36. *Counsel for Topland argued that it made no difference whether the Lessee agreed not to enforce a covenant in advance or after the event. I disagree, for two reasons. First, as I have explained, the context, purpose and wording of the proviso make it clear that it is concerned with failure to enforce in the event of breach, not with prior authorisation. Secondly, the distinction is a perfectly rational one to draw. If asked for authorisation, the Lessor can decide whether or not to consent and can negotiate over terms. After a breach, the Lessor is presented with a fait accompli and must decide whether or not to enforce.”*

As to the suggestion that the forbearance clause should be widely construed as ousting the rule in *Holme v Brunskill*, Arnold J simply could not see (at [37]) why such a construction should be adopted when the clause had been perfectly capable of being clearly worded to have the effect for which Topland contended, but was not so worded:

*“Counsel for Topland also argued that the proviso was an anti-Holme v Brunskill measure. I agree that, as is common ground, where the proviso applies, the rule in Holme v Brunskill will not apply. I do not accept that the proviso goes any further than that. If it had been the draftsman’s intention to stipulate that the rule in Holme v Brunskill did not apply at all, it would have been perfectly easy for him to say so in a variety of ways. The wording of the proviso discloses no such intention.”*

In the view of this author, he had a point.

#### The effect of *Topland*

Topland serves as a reminder of the ongoing applicability of the rule in *Holme v Brunskill*, and of the need to oust it clearly if desired. A landlord must otherwise be alive to taking steps which jeopardise its guarantee.

#### ***CIMC Raffles Offshore (Singapore) Ltd and anr v Schahin Holding SA [2013] 2 All ER (Comm) 760; [2013] EWCA Civ 644***

An interesting case. Ultimately, as a decision against the summary disposal of a claim, it asks questions as to the application of the rule in *Holme v Brunskill*, rather than answering them. Again, a contract varied and an attempt to rely upon an anti-*Holme v Brunskill* provision. In this case, the variation was as to the payment schedule for oil rigs whose delivery had been delayed.

The Court of Appeal has left two questions unanswered, by allowing them to continue to trial, and has thereby (in this author’s view) sent one resounding warning:

First the questions:

- (1) Does a provision that a guarantee “shall extend to any variation” actually mean anything more than that it “shall survive any variation”?
- (2) How readily is the purview doctrine – that an anti-*Holme v Brunskill* provision will only be effective if the variation remains within the ‘purview’ of the guarantee – be applied in a case such as this? Sir Bernard Rix (giving the leading judgement) reviewed the authorities on the doctrine ([41] onwards), beginning with *Trade Indemnity Co. Ltd. V The Workington Harbour and Dock Board* [1937] AC 1. At first instance, the judge rejected a defence based on the purview test, but the Court of Appeal identified enough potential reasons for the variation to have gone beyond the purview of the guarantee to allow the point to go to trial.

Now the warning:

Avoiding the rule in *Holme v Brunskill* is difficult, and leaves no room for even the slightest uncertainty in the wording of an anti-*Holme v Brunskill* clause.

**Harvey v Dunbar Assets plc [2013] EWCA Civ 952**

This case is somewhat simpler in concept and very different, but again sounds a note of caution. A guarantee provided for “the Guarantor” to be several signatories. When the creditor sought to issue a statutory demand against one of the signatories, he sought to have it set aside on the basis that the authenticity of the signature of one of the other signatories was under challenge.

Was the signature of every guarantor needed to give effect to the guarantee of one party who *had* signed?

The Court of Appeal identified the principle that, prima facie, a single composite document suggested it was, and failed to find any reason to depart from this starting point.

Again, the creditor sought to rely on protective provision within the terms of the guarantee. Again, the wording was not clear enough to have the desired effect. The Court of Appeal saw a clear distinction between provision to prevent a guarantor being discharged in a multi-guarantor situation and the position where an implied condition that the guarantee only take effect on all intended guarantors signing. This was the latter case and, if the signature under dispute was not genuine, the other signatories had simply not become guarantors. Anti-discharge clauses could not change that.

The lessons from this case do not need to be set out in writing.

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