

ENGLAND AND WALES / JUDGMENT

Aviva Insurance Ltd v Hackney Empire Ltd

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2012] EWCA Civ 1716 IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, TECHNOLOGY
AND CONSTRUCTION COURT MR. JUSTICE EDWARDS-STUART HT-10-360 Case No: A1/2011/2956
Royal Courts of Justice Strand, London, WC2A 2LL Date: 19/12/2012 Before : SIR JOHN THOMAS,
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION LORD JUSTICE MOSES and LORD JUSTICE
JACKSON

- ----- Between : AVIVA INSURANCE LIMITED
- and - HACKNEY EMPIRE LIMITED Appellant Respondent
- -----
- ----- Mr. Richard Wilmot-Smith QC and Ms Alexandra Bodnar (instructed
by Gateley LLP) for the Appellant Mr. David Thomas QC and Mr. Rupert Choat (instructed by
CMS Cameron McKenna LLP) for the Respondent Hearing dates : 20th and 21st November
2012
- -----

Judgment

Lord Justice Jackson: 1. This judgment is in seven parts, namely; Part 1. Introduction, Part 2. The facts, Part 3. The present proceedings, Part 4. The appeal to the Court of Appeal, Part 5. The law in relation to discharge of sureties, Part 6. Has Aviva been discharged from liability under the bond? Part 7. The quantum issues. Part 1. Introduction 2. 3. 4. 5. 6. This appeal concerns a bond given to secure the performance of a construction contract. The bondsman appeals against a decision that it remains liable under the bond, despite the fact that the employer paid to the contractor additional sums which were not due under the contract. There are also issues concerning the extent of the bondsman's liability; these issues turn upon the meaning and effect of the termination provisions in the construction contract. Hackney Empire Ltd was the employer under the construction contract. It is claimant in the litigation and respondent in the present appeal. I shall refer to it as "HEL". Sunley Turriff Construction Ltd was the building contractor concerned. It is not a party to the litigation but features significantly in the narrative of this case. I shall refer to it as "STC". Aviva Insurance Ltd is the bondsman. This insurer was formerly known as Norwich Union Insurance Ltd. Indeed that name appears on the bond. For simplicity, however, I shall refer to this insurer as "Aviva" at all stages. Nothing turns on the

change of name or on any re-structuring which may have occurred within the Aviva group of companies. Aviva is defendant in the litigation and appellant in the present appeal. Mr. Timothy Ronalds is an architect and the principal of the firm Tim Ronalds Architects. There was a period when his firm had a different name, but those matters are irrelevant to the present appeal. I shall therefore refer to his firm by its current name throughout. Boyden and Company is a firm of quantity surveyors. Mr. Cameron Smith is a partner in that firm. 7. After these introductory remarks, I must now turn to the facts. Part 2. The facts 8. 9. 10. 11. Hackney Empire Theatre was constructed in 1901. It was designed by Mr. Frank Matcham, who was a leading theatre architect in the late Victorian and Edwardian periods. For many years this theatre was highly successful, but following the Second World War the theatre fell on hard times. In the 1960s and 1970s it was used as a bingo hall. In 1976 Hackney Empire Preservation Trust purchased the building and restored it to its original function. Thereafter HEL operated the theatre on behalf of Hackney Empire Preservation Trust. After many years of fund raising HEL embarked on a project to renovate and restore the theatre. HEL employed Mr. Timothy Ronalds to do the design work. In due course HEL accepted STC's tender to carry out the construction works. On 24th April 2001 HEL sent a letter of intent to STC, requesting them to commence work pending the execution of a formal contract. STC countersigned the letter of intent and duly commenced work on 31st May 2001. On 6th August 2001 STC and Aviva executed a bond in favour of HEL in the sum of £1,106,852. This secured the due performance of STC's obligations under the proposed construction contract. The main provisions of the bond read as follows: "NOW THE CONDITIONS of the above-written Bond are such that if:-

- (a) the Contractor shall subject to Condition (c) hereof duly perform and observe all the terms provisions conditions and stipulations of the said Contract on the Contractor's part to be performed and observed according to the true purport intent and meaning thereof or if
- (b) on default by the Contractor the Surety shall satisfy and discharge the damages sustained by the Employer thereby up to the amount of the above-written Bond or if
- (c) the Architect defined in the said Contract shall pursuant to the provisions thereof issue a Certificate of Practical Completion then upon the date stated therein (hereinafter called "the Relevant Date") this obligation shall be null and void but otherwise shall remain in full force and effect but no alteration in the terms of the said Contract made by agreement between the Employer and the Contractor or in the extent or nature of the Works to be constructed and completed thereunder and no allowance of time by the Employer or the Architect under the said Contract nor any forbearance or forgiveness in or in respect of any matter or thing concerning the said Contract on the part of the Employer or the said Architect shall in any way release the Surety from any liability under the above-written Bond." 12. 13. 14. 15. The last part of this passage, beginning with the words "but no alteration ...", has been referred to by all parties as "the indulgence clause". I shall refer to that provision in the same way. On 5th March 2002 HEL and STC entered into a construction contract in relation to the works which were already under way at Hackney Empire Theatre. This contract was in the JCT Standard Form, 1998 edition, with quantities, subject to certain amendments. The contract

sum specified was £11,098,612. The architect named in article 3 of the articles of agreement was Tim Ronalds Architects. The quantity surveyor named in article 4 of the articles of agreement was Boyden and Company. The completion date stated in the appendix to the contract was 2nd September 2002. The rate of liquidated damages for delay was specified as £5,000 per week. No-one suggests that this was anything other than a genuine pre-estimate of the loss likely to be caused by delay. HEL had a major production booked for the autumn of 2002. Clause 25 of the contract conditions sets out the grounds on which the architect may grant an extension of time for completion. These grounds include compliance with certain categories of architect's instructions. Clause 26 of the contract conditions provides that the contractor may recover loss and expense caused by matters affecting the regular progress of the works. Clauses 26.1.2 and 26.1.3 require the contractor, if so requested by the architect, to provide supporting information and details in respect of his claim for loss and expense.

16. Clause 27 of the contract conditions deals with determination by the employer. It includes the following provisions: "27.3.1 If the Contractor makes a composition or arrangement with his creditors, or becomes bankrupt, or, being a company, makes a proposal for a voluntary arrangement for a composition of debts or scheme of arrangement to be approved in accordance with the Companies Act 1985 or the Insolvency Act 1986 as the case may be or any amendment or re-enactment thereof, or has a provisional liquidator appointed, or has a winding-up order made, or passes a resolution for voluntary winding-up (except for the purposes of amalgamation or reconstruction), or under the Insolvency Act 1986 or any amendment or re-enactment thereof has an administrator or an administrative receiver appointed then: 27.3.2 the Contractor shall immediately inform the Employer in writing if he has made a composition or arrangement with his creditors, or, being a company, has made a proposal for a voluntary arrangement for a composition of debts or scheme of arrangement to be approved in accordance with the Companies Act 1985 or the Insolvency Act 1986 as the case may be or any amendment or re-enactment thereof; 27.3.3 where a provisional liquidator or trustee in bankruptcy is appointed or a winding-up order is made or the Contractor passes a resolution for voluntary winding-up (except for the purposes of amalgamation or reconstruction) the employment of the Contractor under this Contract shall be forthwith automatically determined but the said employment may be reinstated if the Employer and the Contractor [kk] shall so agree; 27.3.4 where clause 27.3.3 does not apply the Employer may at any time, unless an agreement to which clause 27.5.2.1 refers has been made, by notice to the Contractor determine the employment of the Contractor under this Contract and such determination shall take effect on the date of receipt of such notice. 27.5 Clauses 27.5.1 to 27.5.4 are only applicable where clause 27.3.4 applies. 27.5.1 From the date when, under clause 27.3.4, the Employer could first give notice to determine the employment of the Contractor, the Employer, subject to clause 27.5.3, shall not be bound by any provisions of this contract to make any further payment thereunder and the Contractor shall not be bound to continue to carry out and complete the Works in compliance with clause 2.1. 27.5.2 Clause 27.5.1 shall apply until either .2.1 the Employer makes an agreement (a '27.5.2.1 agreement') with the Contractor on the continuation or novation or conditional novation of this Contract, in which case this Contract shall be

subject to the terms set out in the 27.5.2.1 agreement or .2.2 the Employer determines the employment of the Contractor under this Contract in accordance with clause 27.3.4, in which case the provisions of clause 27.6 or clause 27.7 shall apply. 27.5.4 From the date when, under clause 27.3.4, the Employer may first determine the employment of the Contractor (but subject to any agreement made pursuant to clause 27.5.2.1 or arrangement made pursuant to clause 27.5.3) the Employer may take reasonable measures to ensure that Site Materials, the site and the Works are adequately protected and that Site Materials are retained in, on the site of or adjacent to the Works as the case may be. The Contractor shall allow and shall in no way hinder or delay the taking of the aforesaid measures. The Employer may deduct the reasonable cost of taking such measures from any monies due or to become due to the Contractor under this Contract (including any amount due under an agreement to which clause 27.5.2.1, or under an interim arrangement to which clause 27.5.3, refers) or may recover the same from the Contractor as a debt. 27.6 In the event of the determination of the employment of the Contractor under clause 27.2.2, 27.2.3, 27.3.3, 27.3.4 or 27.4 and so long as that employment has not been reinstated then: 27.6.1 the Employer may employ and pay other persons to carry out and complete the Works and to make good defects of the kind referred to in clause 17 and he or they may enter upon the site and the Works and use all temporary buildings, plant, tools, equipment and Site Materials, and may purchase all materials and goods necessary for the carrying out and completion of the Works and for the making good of defects as aforesaid; provided that where the aforesaid temporary buildings, plant, tools, equipments and Site Materials are not owned by the Contractor the consent of the owner thereof to such use is obtained by the Employer; 27.6.2.1 except where an insolvency event listed in clause 27.3.1 (other than the Contractor being a company making a proposal for a voluntary arrangement for a composition of debts or scheme of arrangement to be approved in accordance with the Companies Act 1985 or the insolvency Act 1986 as the case may be or any amendment or re-enactment) has occurred the Contractor shall, if so required by the Employer or by the Architect on behalf of the Employer within 14 days of the date of determination, assign to the Employer without payment the benefit of any agreement for the supply of materials or goods and/or for the execution of any work for the purposes of this Contract to the extent that the same is assignable; except where the Contractor has a trustee in bankruptcy appointed or being a company has a provisional liquidator appointed or has a petition alleging insolvency filed against it which is subsisting or passes a resolution for voluntary winding-up (other than for the purposes of amalgamation or reconstruction) which takes effect as a creditors' voluntary liquidation, the Employer may pay any supplier or sub-contractor for any materials or goods delivered or works executed for the purposes of this Contract before or after the date of determination as far as the price thereof has not already been paid by the Contractor. Payments made under clause 27.6.2.2 may be deducted from any sum due or to become due to the Contractor or may be recoverable from the Contractor by the Employer as a debt; .2.2 27.6.4.1 Subject to clauses 27.5.3 and 27.6.4.2 the provisions of this Contract which require any further payment or any release or further release of Retention to the Contractor shall not apply; provided that clause 27.6.4.1 shall not be construed so as to prevent the

enforcement by the Contractor of any rights under this Contract in respect of amounts properly due to be paid by the Employer to the Contractor which the Employer has unreasonably not paid and which, where clause 27.3.4 applies, have accrued 28 days or more before the date when under clause 27.3.4 the Employer could first give notice to determine the employment of the Contractor or, where clause 27.3.4 does not apply, which have accrued 28 days or more before the date of determination of the employment of the Contractor. .4.2 Upon the completion of the Works and the making good of defects as referred to in clause 27.6.1 (but subject, where relevant, to the exercise of the right under clause 17.2 and/or clause 17.3 of the Architect, with the consent of the Employer, not to require defects of the kind referred to in clause 17 to be made good) then within a reasonable time thereafter an account in respect of the matters referred to in clause 27.6.5 shall be set out either in a statement prepared by the Employer or in a certificate issued by the Architect. 27.6.5.1 The amount of expenses properly incurred by the Employer including those incurred pursuant to clause 27.6.1 and of any direct loss and/or damage caused to the Employer as a result of the determination. .5.2 .5.3 27.6.6 27.8 The amount of any payment made to the Contractor; The total amount which would have been payable for the Works in accordance with this Contract. If the sum of the amounts stated under clauses 27.6.5.1 and 27.6.5.2 exceeds or is less than the amount stated under clause 27.6.5.3 the difference shall be a debt payable by the Contractor to the Employer or by the Employer to the Contractor as the case may be. The provisions of clauses 27.2 to 27.7 are without prejudice to any other rights and remedies which the Employer may possess.” 17. 18. 19. Although the construction contract postdates the bond by nine months, it is common ground that this is the contract to which the bond relates. Unfortunately the contractor fell into delay at an early stage of the works. By December 2001 STC was reporting a delay of five weeks. By early February 2002 this had doubled to ten weeks. By the beginning of May 2002 STC was predicting completion at the end of January 2003. The cause of the delay was a matter of controversy between the parties. STC maintained that the volume and content of the instructions issued by the architect were the cause of the delays. Accordingly STC claimed to be entitled to substantial extensions of time and substantial sums in respect of loss and expense. The architect disagreed. He took the view that STC was incompetent and under-resourced. He maintained that the contractor was responsible for the lion’s share of the delay. The architect also pointed out that STC had failed to provide proper particulars in support of its claims. 20. This dispute rumbled on. The delays steadily increased. The nominal value of STC’s claims also increased from one month to the next. 21. 22. 23. 24. 25. 26. 27. On 26th July 2002 the architect wrote to STC chasing particulars of eighteen claims that had been submitted by STC. On 30th July 2002 STC submitted an “on account” submission, which was said to be in respect of disruption encountered up to and including 31st July 2002. The sum claimed was £548,718. In August 2002 the quantity surveyors, in progress report number 13, reported that STC had made unsupported claims totalling about £1.3 million, including the £548,718 referred to above. At a site meeting on 5th September 2002 STC’s estimate of the completion date was put back to 14th April 2003. Shortly afterwards the architect granted an extension of time extending the completion date to 23rd

September 2002. By October 2002 STC was threatening adjudication. It was asserting that its final account would exceed the contract price by about £4 million. At this point one of HEL's benefactors, Sir Alan Sugar (now Lord Sugar), became involved. He visited the site on 22nd October 2002 during which he was briefed by both parties. At the visit he offered to arbitrate between the parties and to that end he held a meeting with the parties on 13th November 2002, which was intended as a form of mediation. Sir Alan Sugar proposed that HEL should make a payment on account to STC in respect of its claim in a number of instalments. After further discussions between the parties in November and December 2002, HEL offered to pay £1 million to STC in three instalments. On 16th December 2002 a crucial meeting was held between the parties. On this occasion it was agreed that HEL would pay £1 million on account of STC's claims pending the provision of proper particulars. This payment was to be made in three instalments. HEL agreed to make the first payment within the next few days, provided that STC produced a programme showing a completion date of 31st May 2003 and undertook to endeavour to complete by that date. The remaining £500,000 would be paid during the following year in two instalments, each of £250,000. The second of those two instalments (i.e. the final part of the £1 million) would only be paid if practical completion was achieved on 31st May. Although it was not a term of the oral agreement, there was also a mutual understanding that STC would not refer any dispute about its claims to adjudication for the time being. HEL and STC intended to enter into a formal written side agreement, embodying the terms of their oral agreement. They left this task on one side, however, until February 2003. On 18th December 2002 STC sent to HEL a revised programme showing a completion date of 31st May 2003. On 30th December 2002 HEL made the agreed payment of £500,000 plus VAT to STC. In the meantime Boyden and Company were giving consideration to the possible size of STC's final account at the end of the project. On 2nd January 2003 Mr. Cameron Smith of Boyden and Company sent the following letter to HEL: "As requested I have attached a final account projection for the work being undertaken by Sunley Turriff Construction. As mentioned to you previously based upon the current information we would expect to be able to finalise the "technical" aspects of the account on or around the original contract sum of £11.1m. Obviously we have not received all information from STC as yet. Regarding the claim aspects I have included circa £1.8m as an area where a settlement could/might be achieved. Clearly it is difficult to be precise at this stage as the claim details have not been fully substantiated." 28. By the "technical" aspects of the account, Mr. Smith meant the measured value of work done (including variations), sums due for day works and similar matters. His reference to the "claim aspects" was a reference to STC's claim for loss and expense caused by disruption and delay.

29. Mr. Thomsett provided further background to this letter in his cross-examination at trial. Apparently Mr. Thomsett asked Mr. Smith to write a letter which would help to justify the payment of £1 million on account, which HEL had already agreed to pay. Mr. Smith's letter of 2nd January 2003 was his response to this request. 30. On 26th February 2003 HEL paid £250,000 to STC pursuant to the oral agreement of 16th December 2002. Thus HEL had now paid a total of £750,000 to STC. Later that day Mr. Thomsett of HEL sent a letter to STC,

recording his understanding of the oral agreement which had been reached on 16th December 2002. The material part of this letter reads as follows: “The understanding set out in this letter relates to the JCT form agreement dated 5 March 2002 between the Employer and the Contractor (“the Agreement”). This letter sets out the basis upon which the Employer will pay a sum on account to the Contractor in respect of various claims. This sum is being paid to ensure that the Works are completed as soon as possible by the Contractor, in accordance with the Contractor’s obligations under the Agreement, without the Works being delayed prior to the resolution of certain matters arising from the Agreement. It is also intended that this will avoid the necessity for such matters to be decided upon by the appropriate third party at this stage. The Employer and the Contractor agree the following:

1. In the absence of details and substantiation against the Extension of Time notification/applications submitted by the Contractor and backup and detail regarding the loss and expense or general claims for disturbance to the regular progress or disruption made by the Contractor to date (together “the Claims”), the Employer shall pay the Contractor an “on account” sum of £1,000,000 (one million pounds) (“the Sum”) (or as reduced in accordance with paragraph 3 below in relation to the third instalment) against the Claims subject to the terms and conditions set out in this letter.

2. Subject to the conditions in this letter being met by the Contractor, the Employer shall pay the Contractor the Sum in the following instalments on account of any sums which are or become properly due to the Contractor in respect of the Claims and any further claims the Contractor may make pursuant to or in connection with the Agreement:

- First instalment of £500,000 to be paid on or before 31 December 2002.
 - Second instalment of £250,000 to be paid on or before 28 February 2003.
 - Third instalment of £250,000 to be paid on 2 June 2003 however, this third instalment shall only be paid if Practical Completion has been achieved by 31 May 2003 or by the Completion Date if, prior to 31 May 2003, the Completion Date has been formally extended in accordance with the Agreement to a date after 31 May 2003. The Contractor shall, in accordance with the Agreement, progress the works and use his best endeavours to achieve Practical Completion on or before 31 May 2003. The Contractor shall issue a target programme to completion and estimated cashflow projection before 31 December 2002. In addition to its obligations under the Agreement, the Contractor shall attend meetings arranged by mutual agreement to discuss the Claims and provide details, substantiation and information in relation to them in accordance with the Agreement. These meetings are to be attended by the Contractor, Design Team and Employer as required with respective contractual roles maintained as per the Agreement. The Contractor and the Employer shall not initiate any dispute resolution mechanism (including adjudication, arbitration and litigation) in respect of any claim related item, which arises prior to 31 May 2003 at any time before 31 May 2003. For the avoidance of doubt, any such claims may be brought but only after this date has passed.
3. 4. 5. 6. 7. 8. Payments or deductions for Liquidated and Ascertained Damages due under Clause 24 of the Agreement will not be levied before 31

May 2003 and will not exceed £100,000 (one hundred thousand pounds) in total for any entitlement due for the period up to 31 May 2003. For the avoidance of doubt, the Employer's entitlements under the Agreement in respect of Liquidated and Ascertained Damages after 31 May 2003 is not affected by the letter. In the event that the Contractor is in breach of any provision of this letter, any sum paid hereunder shall immediately be repayable and the Contractor shall have no entitlement to any further instalment of the Sum which otherwise may have fallen due. The terms of this letter are supplemental to the Agreement and, save to the extent that it has been expressly amended by this letter, the Agreement shall remain in full force and effect. In the event of a conflict between the terms of this letter and the terms of the Agreement, this letter shall prevail over the Agreement. Nothing contained in this letter or any part of it shall be considered to be either express or implied acceptance by the Employer of the legitimacy of any claim put forward by the Contractor under the Agreement or otherwise and the Contractor will be required to demonstrate the validity of any such claim in accordance with the terms of the Agreement. Nothing in this letter (including, for the avoidance of doubt, payment of the Sum) may be relied upon by either party as evidence of any such acceptance or as an instruction to vary the works or the manner in which they are to be performed." 31. 32. 33. On 6th March 2003 Mr. Clive Kent, the commercial director of STC, indicated his acceptance of the terms set out in Mr. Thomsett's letter of 26th February 2003. He requested that the proposed completion date of 31st May 2003 be put back by three weeks to allow for delays caused by a recent siege in Hackney. Thus the oral agreement of 16th December 2002 was subsumed in or replaced by the written terms set out in that exchange of letters. Those written terms were referred to in argument as the "side agreement" and I shall adopt that term. From 6th March 2003 onwards the side agreement set out the basis upon which STC held the sums totalling £750,000 that had been paid to them. Unfortunately the progress of the construction work was slow in the early months of

2003. On 11th March STC issued a further revised programme, which showed 31st July 2003 as the date for practical completion. Thereafter further amendments were made to the side agreement which are not material for present purposes. On the 30th April the architect granted an extension of time for completion to 7th October 2002. The grounds for this extension were delay caused by the Hackney siege. In May and June 2003 STC pressed HEL to make the final agreed payment of £250,000. HEL declined to do so, because that instalment had not yet fallen due. During this period STC was having difficulty paying its sub-contractors and suppliers. STC steadily reduced its resources on site. On 2nd July 2003 an administration order was made in respect of STC and all its associated companies. On 3rd July 2003 the architect issued a certificate of non-completion, recording that STC had failed to complete the works by the revised completion date of 7th October
2002. On 7th July 2003 HEL wrote to STC and demanded repayment of the £750,000 paid to STC under the side agreement. That demand was made under paragraph 7 of the side agreement. On 21st July 2003 HEL wrote two letters to STC. The first letter required STC to pay liquidated and ascertained damages in the sum of £205,000. This was based on forty weeks delay at £5,000 per week (from the revised completion date of 7th October 2002 to

21st July 2003). The second letter of 21st July 2003 determined STC's employment under the construction contract pursuant to clause 27.3.4 of the contract conditions. STC's staff duly left site. HEL engaged other contractors to complete the work. The productions that had been booked for the autumn and winter of 2003 were cancelled. The theatre eventually opened in January 2004. On 8th March 2004 HEL made a claim on Aviva under the bond. The basis of HEL's claim was that its losses resulting from STC's breaches of contract exceeded the amount of the bond. Accordingly HEL was entitled to recover the full sum of £1,106,852 secured by the bond. Aviva rejected the claim. Aviva maintained that it was discharged from any liability under the bond by reason of HEL's conduct. In those circumstances HEL commenced the present proceedings. Part 3. The present proceedings By a claim form issued on 24th February 2010 in the Technology and Construction Court HEL claimed against Aviva the sums due on the bond following STC's default. Aviva served a defence denying liability on a number of grounds. In particular, Aviva contended that its liability under the bond was discharged by reason of HEL's conduct in making extra-contractual payments of £750,000 to STC. Further, Aviva maintained that HEL had failed properly to operate the machinery under clause 27 of the contract conditions. Accordingly, if Aviva had any liability under the bond, it could only be for liquidated and ascertained damages in the sum of £205,000. The court ordered that the question of liability and certain other questions of principle should be tried as preliminary issues, with quantum to be determined later if relevant and if not agreed between the parties. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. The action came on for trial in July 2010 before Mr. Justice Edwards-Stuart. Mr. Thomsett and Mr. Ronalds gave evidence on behalf of HEL. No oral evidence was called on behalf of Aviva. The judge delivered his reserved judgment on 21st September 2011. He held that the side agreement was a separate free standing agreement, which did not vary the construction contract save in two immaterial respects. Therefore Aviva could not rely on the rule in *Holme v Brunskill* (1878) 3 QBD 495. He then considered whether HEL's conduct, in particular making the two payments totalling £750,000 to STC, was such as to discharge Aviva's liability under the bond. 47. Having reviewed the authorities, the judge held that the test which he had to apply in relation to conduct was as follows: "if an employer acts in a manner in relation to the principal contract which, whilst not amounting to an alteration of its terms, is prima facie prejudicial to the surety who has guaranteed the contractor's obligations under the principal contract, the surety will be discharged (absent any relevant indulgence clause in the guarantee)." See paragraph 124 of the judgment below. 48. 49. 50. 51. 52. 53. The judge applied the test which he had formulated and concluded that HEL had not acted in relation to the construction contract in a manner which was prejudicial to Aviva. Accordingly, he held that Aviva was not discharged from liability under the bond. Turning to quantum, the judge held that HEL's entitlement was not limited to £205,000 as Aviva contended. HEL also had a good claim for damages against STC. Aviva was liable to meet that claim for damages up to the limit of the bond. Aviva was aggrieved by the judge's decisions on the preliminary issues. Accordingly Aviva appeals to the Court of Appeal. Part 4. The appeal to the Court of Appeal By an appellant's notice filed on 17th November 2011 Aviva appealed to the Court of Appeal,

essentially on the grounds that the judge had applied the wrong legal test and that, on the basis of the correct test, Aviva should be discharged from liability under the bond. Aviva contended in the alternative that, if it had any liability under the bond, this was limited to £205,000 in respect of liquidated and ascertained damages. HEL served a respondent's notice accepting that the judge had applied the wrong legal test but contending that, by reference to the correct legal principles, HEL was still entitled to recover under the bond. HEL also sought to support the judge's conclusions on a number of other grounds. This appeal came on for hearing on 20th and 21st November 2012. Mr. Richard Wilmot-Smith QC leading Miss Alexandra Bodnar appeared for Aviva, the appellant. Mr. David Thomas QC leading Mr. Rupert Choat appeared for HEL, the respondent. I am grateful to counsel on both sides for the excellence of their written and oral

submissions.

54. In order to deal with the issues in an orderly manner, I must first review the law concerning the discharge of sureties under a guarantee. I must then consider whether the events which occurred in this case lead to the discharge of Aviva from liability under the bond. Finally, if still relevant, I must consider the extent of Aviva's financial liability under the bond. 55. Having set out the issues to be addressed, I must now turn to the law in relation to the discharge of sureties. 56. 57. 58. Part 5. The law in relation to discharge of sureties During much of the nineteenth century Britain enjoyed an economic boom. In many commercial contracts guarantees were required. The provision of such guarantees became an established form of business activity. Thus the courts were called upon to develop the law of guarantee and, in particular, to consider the circumstances in which a surety may be discharged from liability. Many of the nineteenth century cases in this area remain binding today. In *Calvert v The London Dock Company* (1838) 2 Keen 638, 48 ER 774 Mr. Streather, a builder, agreed with London Dock Company to carry out certain works of construction within a period of twelve months. The contract price was £52,500. It was agreed that three quarters of that sum would be paid in instalments as the work proceeded. The final quarter of the price was, in effect, a retention. It would be paid after full completion of the works. Two men agreed to stand as sureties for the contractor's performance. They issued a bond in the sum of £5,000 to London Dock Company, such bond to become void if the building contractor duly performed his obligations. Mr. Streather fell into financial difficulties. In order to enable him to proceed with the work, London Dock Company took the pragmatic decision to pay larger instalments of the contract price than they were required to pay under the contract. Unfortunately this strategy did not work. The building contractor defaulted and failed to complete the works. By the time that the contractor left site London Dock Company had paid him a total of £49,619. The value of work done was £36,429. Thus London Dock Company maintained that the sureties were liable to make good the loss up to the full amount of the bond, namely £5,000. The sureties, however, maintained that they were discharged from liability because they had not consented to the additional payments which were made. The Court of Chancery held that the sureties would have no liability save for

nominal damages. Lord Langdale M. R. explained the court's decision as follows at 644-645: "The argument however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety — and the answer has always been, that the surety himself was the proper judge of that — and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security. In this case the company were to pay for three-fourths of the work done every two months; the remaining one-fourth, was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties. What the company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith, but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors having in their hands, one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship." 59. This judgment is illuminating for many reasons. First, it identifies the perennial problem which employers face when a contractor is in financial difficulties. Do they stand on their legal rights and let the contractor go under? Or do they pay additional sums to keep the contractor afloat, but risk throwing good money after bad? The Master of the Rolls states that the surety must be consulted before the employer adopts the latter course. Secondly, the Master of the Rolls highlights the similarity between "giving of time" cases and "advance payment" cases. The same principle applies in both categories of case. 60. Thirdly, the Master of the Rolls explains the two separate ways in which a surety is prejudiced by advance payment of the price. They are: i) ii) The incentive on the contractor to complete is reduced because less of the contract price remains to be earned. The employer holds less retention money. If the contractor defaults, less of the fund earmarked for the project is available to be paid to other contractors who step in and complete the work. Thus in both these respects the risk that the employer will suffer a loss and seek reimbursement from the surety is increased. 61. The General Steam-Navigation Company v Rolt (1858) 6 CB (NS) 550, 141 ER 572 was a major commercial action which ran from 1855 to 1860, involving two trials at first instance, two hearings before the Court of Common Pleas and two appeals to the Court of Exchequer Chamber. The plaintiffs employed one Charles Mare to build an iron paddle-wheel steamship. The defendant agreed to stand as surety for Mare's performance of this contract, as he had done on previous occasions when Mare built ships for the plaintiffs. Unfortunately Mare fell into financial difficulties. In order to assist him the plaintiffs made advance payments of the contract price. In particular, they paid an

instalment of £3,500 on 5th July 1855. In fact that instalment was not due until the ship was launched on 12th September 1855. They subsequently made further payments totalling £3,000. Although the vessel was launched on 12th September, much work remained to be done before the ship was finished and fitted out for sea. On 25th September Mare was adjudicated bankrupt. The plaintiffs only retained £620 of the contract price. They incurred substantial further costs in completing the works to the steamship. The plaintiffs sought to recover their losses from the defendant as surety for the performance of Mare's obligations. The defendant asserted that he was discharged from liability by reason of the plaintiff's conduct in making the advance payments. The Attorney General, who appeared as counsel for the defendant, relied upon the Chancery Court's decision in *Calvert*. 62. The first trial of the action was unsatisfactory, because the defendant did not give evidence and his state of knowledge was not explored. A re-trial was held at which the relevant evidence was called. At the end of the re-trial the jury held that the defendant did not know about the advance payments. The Lord Chief Justice directed that a verdict be entered for the defendant. That verdict was upheld by the Court of Common Pleas and the Court of Exchequer Chamber. 63. Pollock CB, delivering the judgment of the Court of Exchequer Chamber said this at 604-605: "Now, certainly, prima facie, the withdrawal of a fund which is a security for the thing in respect of the not doing of which he is now called upon to pay damages, is a prejudice to the [605] surety. He is not in the same situation with regard to his principal in which he ought to be placed: he is deprived of the security of the fund out of which the company might in the first instance have indemnified themselves. ... Prima facie, the surety was prejudiced by the existing state of things. Whether there could have been any proof to show, that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guarantees. Upon these grounds, we are all of opinion that the rule cannot be granted, and that the judgment of the court of Common Pleas must be affirmed." 64. Although the Chief Baron did not expressly refer to *Calvert*, that case had been cited in argument. The ratio of *Calvert* and the ratio of *General Steam-Navigation Co* are essentially the same. 65. 66. In *Holme v Brunskill* (1878) 3 QB 495 the plaintiff let a farm with a flock of 700 sheep to GB as yearly tenant. The defendant gave a bond to secure the re-delivery of the flock in good condition at the end of the tenancy. During the course of the tenancy the plaintiff and GB agreed that one of the fields should be surrendered and the yearly rent reduced by £10. The defendant was not consulted about this variation and he did not consent to it. At the end of the tenancy GB did not deliver up the flock of sheep in good condition. The plaintiff brought an action to enforce the bond, which was tried at the Cumberland Assizes of 1877. Denman J dismissed the claim. The Court of Appeal affirmed that decision, although it did so on different grounds. Cotton L. J., with whom Thesiger L. J. agreed, stated the principle as follows at 505-506: "The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees v. Berrington*

(1): "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him." 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 inquiry 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 inquiry as to the effect 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."

67. Mr. Wilmot-Smith draws attention to the phrase "if there is any agreement between the principals with reference to the contract guaranteed". He submits that this phrase embraces not only variations to the original contract but also separate contracts which affect the performance of the original contract. Mr. Thomas, however, submits that this phrase only refers to variations to the original contract. 68. On this issue I prefer Mr. Thomas' submissions and reject the argument of Mr. Wilmot-Smith. That phrase refers only to variations made to the original contract. I reach this conclusion for two reasons. First, the subject matter of *Holme v Brunskill* was a variation to the original tenancy agreement. Cotton L. J. was addressing the issue before the court, not undertaking a broader exegesis of the law. Secondly, in a long line of subsequent authorities the narrower construction of Cotton L. J.'s judgment has been treated as the ratio of the decision. See *Taylor v Bank of New South Wales* (1886) 11 App Cases 591 at 602-603; *The Wardens and Commonality of the Mystery of Mercers of the City of London v New Hampshire Insurance Company Limited* (1992) 60 BLR 26 at 50; *Skipton Building Society v Stott* [2001] QB 261; *ST Microelectronics NV v Condor Insurance Limited* [2006] EWHC 977 (Comm), [2006] 2 Lloyd's Rep 525 at paragraphs 35-38. Other authorities could be added to this list. It should also be noted that the textbooks generally favour the narrower interpretation of Cotton L. J.'s judgment in *Holme v Brunskill*. See, for example, the discussion of the rule in *Holme v Brunskill* in Andrews & Millett, *Law of Guarantees* (6th edition,
- 2011) at paragraph 9-023. By the end of the nineteenth century a number of bases on which a surety may be discharged from liability had been established. These included three categories of case which have been debated in the present appeal. The first category comprised cases in which there had been a material variation of the original contract to which the surety had not consented. The second category comprised cases in which time for performance of the original contract had been extended without the consent of the surety. The third category comprised cases in which the employer had made advance

payments of the contract price without the consent of the surety. The common principle which underlay all three categories of case is that which Cotton L. J. referred to in *Holme v Brunskill*, namely that the creditor must not transact the surety's affairs without consulting him. Against that background the practice has grown up of including indulgence clauses in contracts of guarantee and bonds. An indulgence clause sets out what can be done without any need to consult the surety. It can be seen from the authorities that indulgence clauses come in many forms. There is no standard wording for such clauses. Each indulgence clause must be construed according to its terms and by reference to its context. The law in relation to advance payments was reconsidered in *Trade Indemnity Company Limited v Workington Harbour and Dock Board* [1937] AC 1. This litigation appears to have been a cause célèbre throughout the 1930s. There were two trials at first instance, two appeals to the Court of Appeal and two full hearings in the House of Lords. There was a galaxy of eminent and expensive counsel on both sides. The action ultimately failed because of a basic procedural error. The Workington Harbour and Dock Board engaged contractors to construct an enlarged dock at Workington. The contractors were required to provide a performance bond in the sum of £50,000, which they duly obtained from Trade Indemnity Company Limited ("TIC"). The bond included an indulgence clause which permitted "any arrangement... for any alteration in or to the said works". During the course of the works the contractors fell into financial difficulty. In order to assist the contractors the Board advanced to them two loans totalling £45,000. These loans were to be repaid with interest by means of deductions from future instalments of the contract price payable by the Board. The loan agreements also specified certain circumstances in which the whole sum outstanding would be 69. 70. 71. 72. 73. 74. immediately repayable. Unfortunately the additional funds did not save the day. The contractors went into liquidation without having finished the new dock. The Board made other arrangements for the completion of the works. There was then an accounting exercise broadly similar to that envisaged by clause 27.6 of the contract conditions in the present case. At the end of that exercise the engineer certified that £78,785 was due from the contractors to the Board. Since the contractors were unable to pay, the Board made a claim against TIC for the full amount of the bond, namely £50,000. 75. 76. TIC contended that it was discharged from liability under the bond by reason of the payments totalling £45,000 which the Board had made to the contractors without TIC's consent. Lord Atkin gave the leading speech, with which Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Roche agreed. Lord Atkin noted that the contractors' unpaid debt of £78,758 included the sum of £45,000 which the Board had loaned to the contractors. He accepted that TIC had not guaranteed those loans and could not be liable for the repayment of £45,000. However, Lord Atkin rejected the contention that the loan of £45,000 to the contractors had the broader consequence of discharging TIC from all liability under the bond. His core reasoning was set out at pages 21-22 as follows:- "In my opinion the loan contracts were not alterations of the original contract at all. The contract was for the construction of specified works at specified prices. The loans were independent borrowings to enable the contractors to perform the construction contract. The position is in my opinion just the same as if the contractors had borrowed the money

from their bank, or directly from the Trade Facilities Board, and had charged their payments under certificate with repayment by proportionate deductions. The loans were, of course, connected with the contract and were made for the purpose of performing the contract. That does not make them alterations of the contract. It is true that the terms of repayment involve an alteration in the deductions agreed in the contract the terms of which are altered in this respect; and the proviso would prevent the guarantors from relying on any such alteration. But this is a form of repayment the opportunity for which is long past; and in my opinion it has no effect in altering the primary obligation which arises out of an independent contract which the guarantors never undertook should be performed. Similarly as between the contractors and the Dock Board the contractors agreed that the ultimate balance of the loans should be included in the cost of completing the work and so in the certificate to be given on that footing by the engineer. But in my opinion the guarantors are no more affected by this than they would be if the parties had entered into another and additional construction contract elsewhere and agreed that the liabilities under both should be pooled and expressed in one certificate under the first contract. I think that the guarantors never came under any obligation in respect of the new and un contemplated burden of loans for 45,000l., and are not liable for any sum in respect of such sums or interest.” 77. 78. Lord Atkin also held that the indulgence clause in the bond was irrelevant, because it did not cover what had happened in that case. It is clear that if the Board’s case had properly been pursued, it had a good claim under the bond for a substantial sum in the region of £33,000. In the event the Board recovered nothing, but the procedural vicissitudes which led to that unhappy result are not material for present purposes. There has been some debate between Mr. Wilmot-Smith and Mr. Thomas as to how one should reconcile Trade Indemnity with Calvert and General Steam-Navigation Company. I conclude that the proper reconciliation is as follows. Where the employer pays instalments of the agreed contract price before those instalments fall due under the terms of the original contract, then absent consent or an appropriate indulgence clause, those advance payments may result in discharging the liability of the surety. On the other hand where the employer pays sums to the contractor under a separate agreement, rather than under the contract which the surety is guaranteeing, the liability of the surety is not discharged. The surety remains liable in respect of the original contract, but not of course in respect of the separate payments or loans which have been made. 79. A number of other authorities have been cited by counsel and they are, of course, most illuminating. Nevertheless the principles which must be applied in the present case emerge clearly from the authorities cited above. I would summarise those principles as follows: i) ii) iii) The rule in *Holme v Brunskill* only applies where parties to the contract guaranteed have varied the terms of that contract without the consent of the surety. Advance payments of the agreed contract price made by an employer to a contractor may have the effect of discharging the liability of the surety. On the other hand additional payments (whether by way of gift or loan) made by the employer to the contractor outside the terms of the original contract do not have that effect. A surety will not be released from liability by reason of contractual variations or advance payments if (a) he has specifically consented to what was done or

- (b) there is an indulgence clause which covers what was done. If the law as developed in the nineteenth century and early twentieth century does not accord with the needs of modern commercial life, the industry can of course amend the form of the bond. 80. Having identified the relevant principles, I must now revert to the present case and consider whether Aviva has been discharged from liability under the bond. Part 6. Has Aviva been discharged from liability under the bond? 81. 82. 83. 84. 85. 86. 87. 88. The judge has held that the parties did not vary the construction contract in the present case, save in two immaterial respects. There is no challenge to that finding. It therefore follows from my analysis of the authorities in Part 5 above that the rule in *Holme v Brunskill* does not apply in this case. I turn next to the two payments which HEL made to STC totalling £750,000. Do these payments have the effect of discharging the surety from liability as happened in *Calvert and General Steam-Navigation Company*? Alternatively, do these payments leave the surety's liability unaffected, as was the case in *Trade Indemnity Company*? In order to resolve this issue, it is necessary to examine the nature of the two payments which were made. By December 2002 STC was intimating a substantial claim for loss and expense caused by both delay and disruption. STC maintained that both the delay and the disruption were the responsibility of the employer, principally because of the large number of instructions which the architect had issued. Although STC was making ambitious claims, it had failed to substantiate those claims. The architect had only granted a three week extension of time and maintained that the rest of the delay was caused by the contractor's incompetence and failure to progress the works. Furthermore STC had failed to provide the particulars which were required under clause 26.1 of the contract conditions in order to substantiate its financial claim. In those circumstances STC had no contractual entitlement to be paid one penny in respect of loss and expense under the terms of the construction contract. The quantity surveyor made no assessment of any loss and expense due, nor was he in a position to make such an assessment. It follows that no loss and expense was payable under any interim certificate issued by the architect. In those circumstances HEL faced essentially the same dilemma that the employers faced in the cases discussed in Part 5 above. Should HEL stand on its contractual rights and leave the contractor struggling with its financial problems? Alternatively, should HEL make additional payments to the contractor in the hope that this would result in improved progress on site? HEL chose the latter course. It now becomes necessary to examine the contractual basis of the two payments made. Both payments were made pursuant to the oral agreement of 16th December 2002. That oral agreement was subsequently replaced by the written side agreement, which was more detailed but to the same effect as the oral agreement. The effect of the side agreement was that HEL loaned £750,000 to STC. If STC subsequently substantiated a loss and expense claim for £750,000 or more, then the money paid by HEL would be retained by STC as payment or part payment of that loss and expense. If STC failed to establish any loss and expense claim, then it would repay the £750,000 to HEL. If STC established a loss and expense claim for a sum less than £750,000, then STC would repay the excess to HEL. The contract price in this case was the contract sum stated in the contract (£11,098,612), subject to such adjustments as were certified by the architect or otherwise

made in accordance with the procedures set out in the contract. 89. 90. The £750,000 which HEL paid to STC in December 2002 and February 2003 was not part of the original contract sum. It was not a sum certified as due by the architect or otherwise falling due under the provisions of the contract. In my view the two payments made totalling £750,000 can only be seen as sums paid outside the contract and for extraneous reasons. They are very similar to the two payments totalling £45,000 which the Harbour Board made in Trade Indemnity Company. I therefore conclude that the two payments made by HEL to STC did not have the effect of discharging Aviva from liability under the bond. On the other hand Aviva's liability as surety only relates to the original construction contract. Aviva has no liability in respect of STC's failure to repay the sum of £750,000 which it owes to HEL under the side agreement. 91. In the result, therefore, my answer to the question posed in Part 6 of this judgment is no. 92. Having resolved the question of liability, I must now turn to the quantum issues. 93. 94. 95. 96. Part 7. The quantum issues It is common ground that, if Aviva is liable under the bond, such liability extends to £205,000 liquidated and ascertained damages which were due as at the date when STC's employment ended. The principal quantum issue between the parties is whether HEL is entitled to recover damages for STC's failure to complete the works. HEL maintains that it had an accrued right to damages as at 21st July 2003; that right to recover damages survives despite the fact that HEL determined STC's employment under clause 27.3.4 of the contract conditions. Aviva challenges that analysis. Aviva maintains that by terminating under clause 27 HEL has lost the right to recover damages. Instead HEL's only financial remedy is to operate the procedure set out in clause 27.6 of the contract and then to recover whatever debt is found to be due under clause 27.6.6. Since HEL did not operate the machinery, nothing is owed to HEL under clause 27.6. The construction contract in this case is one of the standard form contracts published by the Joint Contracts Tribunal. This particular form has now been in use for some fourteen years, subject to minor variations. I would therefore have expected this question concerning the construction and effect of clause 27 to have been considered and decided by now. I am assured, however, by both leading and junior counsel that they have conducted thorough researches and there simply is no authority on this issue. The only case which counsel have found with any bearing on the matter is *Perar BV v General Surety and Guarantee Co* (1994) 66 BLR 72. Although I am grateful to counsel for drawing *Perar* to the court's attention, I have come to the conclusion that this authority is of no assistance. The clause under consideration in *Perar* was clause 27 of the JCT Contract 1981 with contractor's design. That clause differs from clause 27 in the JCT 1998 standard form contract in two important respects. First and foremost, it does not include the provision which now appears as clause 27.8. Secondly, under the 1981 standard form contract determination was automatic in the 97. 98. 99. 100. 101. 102. 103. event of the contractor's insolvency. Under the 1998 standard form, in the event of the contractor's insolvency the employer has a choice whether or not to determine. There is a material difference between the structure of the determination provisions in the two standard form contracts. This is hardly surprising. The Joint Contracts Tribunal provides a public service by regularly updating its suite of contracts to meet the changing needs of building owners and the construction industry. This does, however, make it

dangerous to treat judicial decisions on one standard form as applicable to later editions of the contract. I therefore approach the construction issue in this case as being free from authority. The crucial issue seems to me to be how one should interpret clause 27.8 of the contract conditions in this particular standard form contract. Mr. Wilmot-Smith submits that clause 27.8 gives the employer a choice whether to operate the clause 27 machinery or, alternatively, to claim damages for breach of contract. He cannot, however, do both. He must make his election between the two alternative remedies. Mr. Thomas, on the other hand, submits that clause 27.8 does not put the employer to his election. On the contrary it simply makes clear that the employer can exercise all of his rights under clause 27; he can also pursue his general remedies, such as claiming damages for breach of contract. I have come to the conclusion that Mr. Thomas' submissions are correct. Clause 27.3 has already made it clear that the employer has a discretion as to whether or not to operate the clause 27 machinery. Clause 27.8 must be doing more than that. If clause 27 was putting the contractor to his election, I would expect it to say so in terms. The clause does not do so. It is drafted in expansive terms, which suggests that the opposite is the case. It is self-evident, but should perhaps be mentioned, that clause 27.8 does not permit double recovery. In so far as the contractor recovers his losses under clause 27, he cannot recover any of those same losses under the guise of damages. The final quantum issue between the parties concerns the payments which HEL made to sub-contractors and suppliers after STC had left site. Clause 27.6.2.2 enables the employer to make payments to sub-contractors and suppliers in respect of work done and materials delivered before the employment of the contractor was determined. Mr. Wilmot-Smith submits that this provision gives rise to an unlawful preference. I do not accept this submission. The crucial feature of this case is that STC was in administration rather than liquidation. Furthermore at the relevant time the administrator had not given notice of a proposed distribution. In those circumstances the direct payments by HEL to sub-contractors and suppliers did not give rise to an unlawful preference: see the reasoning of David Richards J in *Revenue and Customs Commissioners v Football League Limited* [2012] EWHC 1372 (Ch), [2012] Bus LR 1539. 104. Let me now draw the threads together. For the reasons set out above I do not accept Aviva's submissions in relation to quantum. HEL is entitled to recover damages against Aviva on the basis set out in the judge's judgment. In the result therefore, if my Lords agree, Aviva's appeal will be dismissed. Lord Justice Moses: 105. I agree. Sir John Thomas, The President of the Queen's Bench Division: 106. I also agree.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewca/civ/2012/1716>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/aviva-insurance-ltd-v-hackney-empire-ltd-2012>

Prepared on 28 October 2026 · Esheria