[1–3] Form and structure of contractual indemnities. Contractual promises of indemnity come in a great variety of forms, the best known of which is probably the insurer's promise of indemnity in a contract of indemnity insurance. This book is not, however, concerned with indemnity insurance.[6] Beyond insurance, an indemnity promise that is an express term of a contract is often structured in the following way:

(1) a description of the indemnifier or indemnifiers;
(2) a verb or set of verbs that describe the essential promise, for example, 'to indemnify', 'to save harmless', 'to keep harmless', or 'to make good';
(3) a description of the indemnified party or parties; and
(4) a statement of the scope of protection provided by the indemnity.

An implied indemnity can be conceptualised in a similar manner.

Promises of indemnity can be analysed along two major dimensions. One dimension is the essential method by which the indemnifier will protect the indemnified party against the defined loss. The two usual possibilities are to prevent loss and to compensate for loss.[7] The other dimension concerns the origin and nature of the loss against which protection is given. The archetypal non-insurance indemnity is an indemnity against claims by or liabilities to third parties. Other common forms include an indemnity against the consequences of a third party's non-performance of some obligation owed to the indemnified party, and an indemnity against the consequences of the indemnifier's breach of a contract with the indemnified party.

[1–4] Meaning of particular expressions. As this book focuses upon promises of indemnity, references to 'contractual indemnities' or 'indemnity clauses' or 'indemnity provisions' should be understood accordingly. The term 'contractual indemnity' is intended to include promises of indemnity in simple contracts and in deeds. To distinguish indemnities in insurance contracts from those in other contexts, the latter are described as non-insurance indemnities. The promisor under a promise of indemnity is described as the 'indemnifier' and the promisee as the 'indemnified party'.

Other Indemnities

[1–5] Sources of indemnity. The indemnities considered in this book arise from the agreement of the parties. A promise of indemnity may be an express term in a contract. The existence of a contract of indemnity may be inferred from the surrounding circumstances. A promise of indemnity may take effect as a term implied, on one of the usual bases or by statute, in a larger contract.

Indemnities also arise from sources other than the parties' agreement. Lord Wrenbury explained in *Eastern Shipping Co Ltd v Quah Beng Kee*:[8]

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There

[6] See [1–14].
[7] See [2–3].
[8] *Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177 (PC), 182–83.

> are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute

[1–6] Indemnities arising by operation of general law. Some indemnities arise by operation of the common law independently of contract. One instance is where a party requests another to perform an act of a ministerial nature, which the latter is under a duty to perform, and that act turns out to be injurious to the rights of a third party.[9] Situations in which one party discharges an obligation which properly rests upon another and then seeks recoupment have also been described as cases of indemnity. Some of the cases coincide with a genuinely contractual promise of indemnity, as where a debtor promises to indemnify a guarantor against its liability to the creditor in respect of the debtor's obligations;[10] or where the drawer of a bill of exchange promises to indemnify an accommodation party who accepts the bill against liability on it;[11] or where the assignee of a lease, who assumes possession of the premises, promises to indemnify the assignor against liabilities in relation to the lease.[12] In general, however, these recoupment cases should nowadays be understood as based on principles from the law of unjust enrichment.[13]

Indemnities of equitable origin are varied. A trustee is entitled to resort to the trust assets for reimbursement for expenses and to exonerate itself from liabilities that arise from proper performance of the trust.[14] A similar equitable right has been recognised for receivers, receivers and managers and company administrators appointed by the court,[15] agents who conduct a business for their principal,[16] and executors who carry on the business of the testator.[17] It was established in *Waring v Ward*[18] that the purchaser of the equity of redemption in a property is generally obliged to indemnify the vendor in respect of the liabilities secured by the mortgage.[19] A similar approach developed in relation to assignments of leases. In the absence of a contrary provision in the contract to assign, the assignor

[9] See, eg, *Sheffield Corp v Barclay* [1905] AC 392 (HL); *Naviera Mogor SA v Societe Metallurgique de Normandie (The Nogar Marin)* [1988] 1 Lloyd's Rep 412 (CA). See further [4–53].
[10] See [2–24].
[11] See [1–23], [6–10].
[12] *cf Moule v Garrett* (1872) LR 7 Ex 101.
[13] See generally C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell, 2011), 504–05, paras 19-16–19-18.
[14] *Worrall v Harford* (1802) 8 Ves Jun 4, 8; 32 ER 250, 252 (Lord Eldon LC); *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 371 (Stephen, Mason, Aickin and Wilson JJ). A right also exists under the Trustee Act 2000, s 31(1). As to rights directly against a beneficiary who is *sui juris* and absolutely entitled to the trust property, see, eg, *Hardoon v Belilios* [1901] AC 118 (PC).
[15] *Re British Power Traction and Lighting Co Ltd; Halifax Joint Stock Banking Co v British Power Traction and Lighting Co Ltd* [1906] 1 Ch 497 (Ch) (receiver and manager); *Lockwood v White* [2005] VSCA 30; (2005) 11 VR 402, [34] (Winneke P) (company administrator).
[16] *Davis v Hueber* (1923) 31 CLR 583, 588 (Knox CJ and Starke J). Agents also have a general right to indemnity from the principal for whom they act: see [2–23].
[17] *Dowse v Gorton* [1891] AC 190 (HL); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 (HCA), 325 (Latham CJ), 335–36 (Dixon J).
[18] *Waring v Ward* (1802) 7 Ves Jun 332; 32 ER 136. See also *Simpson v Forrester* (1973) 132 CLR 499. *cf Mills v United Counties Bank Ltd* [1912] 1 Ch 231 (CA) (no indemnity where express indemnity limited).
[19] The obligation is recognised by statute in some Commonwealth jurisdictions: see, eg, Conveyancing Act 1919 (NSW), s 79(1); Real Property Act 1900 (NSW), s 76. See generally *Re Alfred Shaw and Co Ltd, ex p Murphy* (1897) 8 QLJ 70 (SC); *Official Assignee v Jarvis* [1923] NZLR 1009 (CA).

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was usually entitled to have included in the instrument of assignment an effective indemnity from the assignee against liability under the lease.[20]

[1–7] Indemnities arising by operation of statute. Indemnities may be created by statute in several ways. An indemnity may be implied by statute as a term in certain classes of contract,[21] in which case the indemnity is properly regarded as contractual. A statute may confer a power upon a court to order a party to pay another a sum which amounts to an indemnity.[22] A right of indemnity may be established directly by statute. There are many such statutory rights of indemnity in various Commonwealth jurisdictions. A common example is the provision for indemnity in the Partnership Acts.[23] It is generally expressed in terms that the firm is to indemnify every partner in respect of payments made and personal liabilities incurred in the ordinary and proper conduct of the business of the firm, or in anything necessarily done to preserve the firm's business or property.

[1–8] Indemnities as an incident of other remedies. An order for indemnity may be included as an element in more general relief granted by a court. Where a contract is rescinded for misrepresentation, the party at fault may be required to indemnify the rescinding party against liabilities, arising out of the subject-matter of the contract, which have been incurred owing to its entry into the contract.[24] An order for indemnity may be made incidentally to an order for specific performance of a contract.[25]

The Concept of Exact Protection

[1–9] Characteristics of indemnity. Indemnity promises do not all possess the same set of characteristics. That is not surprising, given the variety in form, context and the scope of protection. It is more accurate to say that there are various species within the genus of non-insurance contractual indemnity. Particular types of indemnity share more specific characteristics that are absent from others. There should, however, be some essential quality or characteristic that defines a promise as being one of indemnity, and so draws together indemnities in different forms. The overarching theory presented in this book is that there is such an essential characteristic: a promise of indemnity is a promise of exact protection against loss.

[20] *Pember v Mathers* (1779) 1 Bro CC 52; 28 ER 979; *Staines v Morris* (1812) 1 V & B 8; 35 ER 4; *Willson v Leonard* (1840) 3 Beav 373; 49 ER 146; *McMahon v Ambrose* [1987] VR 817 (FC), 825 (McGarvie J). *cf Wilkins v Fry* (1816) 1 Mer 244; 35 ER 665; *Re Poole and Clarke's Contract* [1904] 2 Ch 173 (CA). A similar covenant has been implied by statute, see, eg, Land Registration Act 1925, s 24(1)(b); Law of Property Act 1925, s 77(1)(C) (now repealed but unaffected in relation to tenancies prior to 1 January 1996).

[21] See, eg, nn 19–20.

[22] As under contribution statutes: see, eg, Civil Liability (Contribution) Act 1978, s 2(2).

[23] See, eg, Partnership Act 1890, s 24(2); Partnership Act 1892 (NSW), s 24(2).

[24] *Newbigging v Adam* (1886) 34 Ch D 582 (CA) (affd without reference to the point: *Adam v Newbigging* (1888) 13 App Cas 308 (HL)); *Curwen v Yan Yean Land Co Ltd* (1891) 17 VLR 745 (FC); *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* [2000] WASCA 408; (2000) 23 WAR 291, [35]–[40] (Malcolm CJ). *cf Whittington v Seale-Hayne* (1900) 82 LT 49 (Ch). See also Partnership Act 1890, s 41(c) (rescission of partnership contract for fraud or misrepresentation).

[25] *Paine v Hutchinson* (1868) LR 3 Ch App 388 (transfer of shares). This aspect of the decision might be explicable on the basis of a trust, or an implied term or collateral contract of indemnity: see generally [6–11]. *cf Cruse v Paine* (1868) LR 6 Eq 641, 653.

[1–10] Concept of exact protection. The concept of exact protection against loss comprises three elements. The first element concerns the efficacy of protection. A promise of indemnity will, if properly performed, secure the indemnified party against loss. The method by which the indemnifier must protect the indemnified party depends upon the construction of the promise of indemnity. There are two general methods of protection recognised in the cases: avoidance or prevention of loss to the indemnified party, and compensation of the indemnified party for loss it has already sustained.

The second element is the exactness of protection. The indemnified party should not be under-protected nor over-protected in respect of a loss. The requirement of exactness is concerned generally with the benefits received by the indemnified party (whether through the performance of the indemnity or otherwise) in relation to a given loss. The benefit is usually a sum of money. The requirement of exactness is manifested in several respects:

(1) A promise of indemnity is concerned with loss to an indemnified party, not loss to others.[26]
(2) The indemnified party generally has no direct right to recover for a loss unless and until it has actually sustained that loss.[27]
(3) The indemnified party recovers the amount of its actual loss, no more and no less, ascertained in accordance with the terms of the contract. The better view seems to be that, at least where the loss falls within the scope of the indemnity, recovery is not affected by damages principles such as remoteness or mitigation.[28]
(4) In certain circumstances the indemnified party may obtain relief in relation to a prospective, rather than actual, loss. In considering whether to grant relief and determining the form that relief should take, it is relevant to consider:
    (a) whether a potential for loss exists; and
    (b) whether certain forms of relief create a risk that the indemnified party will be over-compensated.[29]

    Where there is no potential for loss, the indemnified party is not entitled to relief.
(5) Account must be taken of benefits obtained or obtainable by the indemnified party that diminish the loss and are not collateral.[30] If those benefits accrue before the indemnifier performs the indemnity, then the amount of the loss to be indemnified is reduced. Upon fully indemnifying the indemnified party, the indemnifier is generally entitled to be subrogated to the indemnified party's rights against others in diminution of the loss. The right of subrogation in this context derives from the nature of the contract of indemnity. It performs two functions: to ensure that ultimate responsibility for loss is transferred to the appropriate party; and to avoid double-recovery by the indemnified party, thus giving effect to the concept of exact protection.

The third element concerns loss. In theory, subject to statute and public policy, an indemnity may protect against all loss whatsoever from any cause. In practice, the indemnifier engages to protect the indemnified party against a limited range of losses. The concept of exact protection must, therefore, be understood by reference to a defined set of losses,

[26] See [5–34].

[27] See [5–40], [5–44].

[28] See [5–47]–[5–50].

[29] See [5–69], [5–71]–[5–73].

[30] See [4–37]–[4–43].

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known as the scope of the indemnity.[31] In conformity with point (3) above, the scope of the indemnity is determined by construction.

[1–11] **Operation as default rule.** The concept of exact protection is subject to an important qualification. A contractual promise of indemnity is founded on the express or implied agreement of the parties. The effect of such a promise is, therefore, ultimately one of construction. Both general and specific principles of contractual construction are relevant.[32] The concept of exact protection is thus best understood as a 'default rule' or presumption of intention which may be altered or displaced by the parties. So, in *Morris v Ford Motor Co Ltd*,[33] James LJ explained that it is 'open to the parties to a contract of indemnity to contract on the terms of their choice, and by the terms they choose they can exclude rights which would otherwise attach to the contract'.

Scope and Structure of Book

Scope

[1–12] **Aim and approach.** The principal aim is to provide a coherent account of the construction and enforcement of promises of indemnity. The treatment of the subject involves both theoretical and practical aspects. Thus, consideration is given to identifying a unifying conception of the promise of indemnity, and also to matters such as whether an indemnifier may be discharged by a variation in the subject-matter of the indemnity. The emphasis on cohesion means that the treatment of theoretical and practical aspects tends towards the general rather than the particular. Most of the analysis is structured by reference to a type or class of indemnity – for example, an indemnity against liability – rather than a specific form of indemnity as may be found in a standard form charterparty, contract for towage services or construction contract.

[1–13] **Applicable law.** The primary source of material is case law, which reflects the contractual basis of the topic. Statutory intrusions have generally occurred by way of implied terms,[34] or prohibitions or limitations on the use of contractual indemnities in particular contexts.[35] The book purports to state the law in England and Wales. Australian law also provides a rich source of material, so many decisions and statutes from that jurisdiction are considered. The law on contractual indemnities in these jurisdictions is substantially the same. Reference is occasionally made to significant decisions from other common law jurisdictions, such as Canada, New Zealand, Singapore and the United States; and also to Scottish decisions. The law as stated in this book will be relevant to some extent in those jurisdictions.

[31] See generally ch 4.
[32] See generally ch 3.
[33] *Morris v Ford Motor Co Ltd* [1973] QB 792 (CA), 812.
[34] See [1–7].
[35] See, eg, Unfair Contract Terms Act 1977, ss 2 and 4; Companies Act 2006, ss 232–35. See further [5–30].

[1–14] **Insurance and non-insurance indemnities.** This book is concerned almost exclusively with indemnities in contracts outside the field of insurance. There are several reasons for this. Insurance is the subject of far more detailed treatment in cases, textbooks and other academic writings. Non-insurance indemnities may take forms not generally encountered in insurance. Furthermore, while it is often said that indemnity insurance contracts are contracts of indemnity, not all contracts of indemnity possess identical characteristics.[36]

Differences in context affect the construction of contractual indemnities. An indemnity in a non-insurance contract is often just one of many obligations, and may be ancillary to the main object of the contract. The object of the contract generally, or of the indemnity particularly, may be quite different from the object of insurance. The indemnified party generally does not furnish discrete consideration for the promise to indemnify. There may not be the same element of fortuity as is present in insurance. That is, a non-insurance indemnity may be given in contemplation of a loss that is inevitable or likely, the object being to secure the indemnified party against that loss when it materialises. The indemnifier under a non-insurance indemnity may have greater knowledge of the risk, or the occurrence of loss may lie within its control. There is no general duty of disclosure on the part of the indemnified party as exists in insurance.[37] Finally, a non-insurance indemnity may be used as a contractual device to enhance other legal rights of the indemnified party against the indemnifier in relation to a loss.

Principles from the law of insurance can, however, be useful insofar as they offer insight or guidance on the principles that might apply to non-insurance indemnities in the absence of more direct authority. Accordingly, insurance decisions are occasionally referred to throughout this book.

[1–15] **Guarantees and indemnities.** Guarantees and many forms of contractual indemnity perform a similar function, namely, to transfer or replicate responsibility for a risk that would not otherwise fall upon the promisor according to ordinary legal principles. It is also commonplace for contracts of guarantee to include, as a separate term, an indemnity against the debtor's default or non-performance.[38] To this extent, the law relating to guarantees is considered in this book but it is not intended to be a specialist work on the topic.

[1–16] **Other limitations.** Although construction of indemnities is considered extensively, this book does not directly address drafting techniques nor does it provide sample precedents. There are several areas of law that are practically important in the enforcement of indemnities: laws relating to insolvency and bankruptcy,[39] set-off, civil procedure and costs, subrogation and contribution. A detailed treatment is unnecessary, though there is some incidental consideration of these matters to the extent that they relate to general characteristics of indemnity.

[36] *Bosma v Larsen* [1966] 1 Lloyd's Rep 22 (QB), 27.
[37] *cf Way v Hearn* (1862) 13 CBNS 292; 143 ER 117.
[38] See generally ch 9.
[39] See, eg, W Courtney and JW Carter, 'Debts, Liquidated Sums and the Enforcement of Claims under Guarantees and Indemnities' (2013) 30 *Journal of Contract Law* 70.

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Structure

[1–17] Structure of book. The book is divided into three parts and 10 chapters. Its structure reconciles two opposing considerations. As not all forms of indemnity possess identical characteristics, a thorough treatment requires consideration of distinct types of indemnity. Equally, the book is informed by the unifying theoretical perspective that the promise of indemnity is a promise of exact protection.[40] This theoretical framework is developed principally in chapter two and chapter five.

Part one contains the present chapter. Part two contains chapters two to five. The part is concerned with the construction and enforcement of promises of indemnity. Chapter two addresses the content of the promise: what is the indemnifier required to do and how may it be done? General principles of construction applicable to indemnities are considered in chapter three. Chapter four then examines the extent of protection provided by an indemnity. The most common type of dispute appearing in the cases is whether a particular loss falls within the scope of the indemnity, so that the indemnified party is entitled to be protected against it. Chapter five considers the enforcement of indemnity promises in relation to loss that has already occurred and (briefly) in relation to prospective loss. Chapter five also develops the second part of the theory of exact protection, by explaining how the indemnified party is exactly protected in the process of enforcing the indemnity.

Part three, comprising chapters six to ten, is concerned with four particular types of contractual indemnity. The chapters examine each type separately: in chapters six and seven, indemnities against claims by or liabilities to third parties; in chapter eight, indemnities against claims by or liabilities to the indemnifier; in chapter nine, indemnities against third party non-performance; and in chapter 10, indemnities against the consequences of the indemnifier's breach of contract. These types are not mutually exclusive, nor are they exhaustive of all possible forms of indemnity. They have been chosen because they arise most often in practice (and in the cases) and because each type exhibits characteristics and presents legal issues peculiar to that type.

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Influences of Legal History

[1–18] General. This book does not provide a historical account of contractual indemnities, but the influences of legal history are sufficiently clear in modern cases on enforcement to deserve some mention. It is still relevant, for example, to distinguish between loss that has already occurred and loss that is anticipated, because the point affects both the right to indemnification and the manner in which the indemnifier may be compelled to perform. Part of the controversy surrounding the application of rules of causation, remoteness or mitigation can be traced back to the forms of action.

Before the forms of action were abolished and the administration of law and equity unified, there were two significant distinctions, one of substance, one of form. For protection against a loss that was merely anticipated, the indemnified party had to seek relief in a court

[40] See [1–10].

of equity.[41] This was because the promise to indemnify was generally a promise to keep the indemnified party harmless against a loss; the contract would only be broken when the indemnified party suffered loss. The remedies provided by the common law courts were inefficacious to protect the indemnified party beforehand. Intervention in equity rested upon the power of a court of equity to compel specific performance of a contract of indemnity.

Where a loss had already been sustained, the indemnified party could bring an action at law. Here, further distinctions were made in relation to the form of action. Claims might be brought in covenant, special assumpsit, debt or indebitatus assumpsit.

[1–19] Covenant and special assumpsit.[42] Claims were often brought in special assumpsit[43] on simple contracts, or in covenant[44] on agreements under seal. The claimant's declaration usually averred the existence of the agreement, the event or events amounting to damnification, and the failure of the defendant to indemnify the claimant at that time or at any time thereafter. There could be no breach unless a loss had occurred and that loss fell within the terms of the indemnity.[45] The action was for damages. The modern law, as it applies to enforcement of indemnities in relation to actual loss, derives from these cases. The indemnified party's claim for its actual loss is nowadays generally one for unliquidated damages for breach of contract; the breach occurs because the indemnifier has failed to indemnify against loss.[46]

Claims for actual loss under contracts of indemnity insurance were also regarded as claims for unliquidated damages,[47] except where there was a total loss under a valued policy, in which case the claim was for liquidated damages.[48] In England, the nature of the insured's claim and of the insurer's promise have proven controversial in recent times. The effect of the common law approach has been to deny the insured recovery for additional loss suffered where the insurer fails to provide compensation in a timely manner.[49]

[41] See further [7–18]–[7–21].

[42] See generally E Bullen and SM Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd edn (London, Stevens and Sons, 1868), 175ff.

[43] See, eg, *Hardcastle v Netherwood* (1821) 5 B & Ald 93; 106 ER 1127; *Thomas v Cook* (1828) 8 B & C 728; 108 ER 1213; *Williamson v Henley* (1829) 6 Bing 299; 130 ER 1295; *Huntley v Sanderson* (1833) 1 Cr & M 467; 149 ER 483; *Betts v Gibbins* (1834) 2 Ad & E 57; 111 ER 22; *Collinge v Heywood* (1839) 9 Ad & E 634; 112 ER 1352; *Toplis v Grane* (1839) 5 Bing NC 636; 132 ER 1245; *Reynolds v Doyle* (1840) 1 Man & G 753; 133 ER 536; *Groom v Bluck* (1841) 2 Man & G 567; 133 ER 873.

[44] See, eg, *Carr v Roberts* (1833) 5 B & Ad 78; 110 ER 721; *Smith v Howell* (1851) 6 Ex 730; 155 ER 739.

[45] *cf Draper v Thompson* (1829) 4 Car & P 84; 172 ER 618.

[46] *Johnson v Diamond* (1855) 11 Ex 73; 156 ER 750; *Finn v Gavin* [1905] VLR 93 (SC); *Muhammad Issa El Sheikh Ahmad v Ali* [1947] AC 414 (PC), 426; *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 35–36 (Lord Goff); *Chief Commissioner of State Revenue v Reliance Financial Services Pty Ltd* [2006] NSWSC 1017, [31]–[34]. See further [5–41]–[5–43].

[47] *Grant v Royal Exchange Assurance Co* (1816) 5 M & S 439; 105 ER 1111; *Castelli v Boddington* (1852) 1 El & Bl 66; 118 ER 361; *Luckie v Bushby* (1853) 13 CB 864; 138 ER 1443; *Lewington v Scottish Union and National Insurance Co* (1901) 18 WN (NSW) 275 (SC). See generally *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139 (QB), 143–45; *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 (SC), 445–49; *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65 (QB), 74; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1987] 2 WLR 512 (QB), 528; *Penrith City Council v Government Insurance Office of NSW* (1991) 24 NSWLR 564 (SC), 568; *Odyssey Re (Bermuda) Ltd v Reinsurance Australia Corp Ltd* [2001] NSWSC 266; (2001) 19 ACLC 982; *New Cap Reinsurance Corp Ltd (in liq) v AE Grant* [2008] NSWSC 1015; (2008) 221 FLR 164, [87]–[90].

[48] *Irving v Manning* (1847) 1 HLC 287, 307; 9 ER 766, 775; *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 (SC), 445–46 (Sholl J). Contrast *Sunderland Marine Insurance Co v Kearney* (1851) 16 QB 925, 937; 117 ER 1136, 1141 (debt).

[49] See [2–31]–[2–32].

[1–20] Debt generally. Debt as a form of action was used relatively rarely for indemnities. One reason was that the promise to indemnify was generally construed as a promise to keep the indemnified party harmless against a loss. Such a promise is not a promise to pay the indemnified party directly and it may be performed by other means. Even if the promise were construed to be a promise to pay the indemnified party directly, indemnity requires payment of an amount which varies depending upon the loss actually sustained by the indemnified party. The amount payable by way of indemnity is not a sum certain as was required in the action of debt.[50]

[1–21] Debt on bond of indemnity. Debt was the appropriate form of action where the indemnity was given in the form of a conditional bond. An indemnity bond usually provided for a fixed sum stated as payable as penalty, subject to a condition of defeasance. The condition was in terms that the putative debtor would indemnify the creditor against losses, liabilities or obligations described expressly in the bond or incorporated by reference to another document.[51]

The provision for a fixed penalty is inconsistent with the principle of indemnity. It was recognised at least as early as 1771 that the creditor under the bond of indemnity could claim only the amount of loss actually sustained.[52] The claim was unliquidated in nature unless and until the amount of loss had been ascertained by some method binding upon the parties. Accordingly, an unascertained loss under a bond of indemnity was not subject to set-off[53] nor was it a 'debt' subject to garnishment;[54] and, for some time,[55] the indemnified party's right of proof in the bankruptcy of the indemnifier seems to have been more limited than it would have been for an ordinary 'debt'.[56]

[1–22] Indebitatus assumpsit. Indebitatus assumpsit was used for some claims in relation to indemnities, though none of the common counts was universally applicable. The only common count of real significance was for money paid,[57] usually described more fully as a claim for money paid by the (indemnified) claimant to the use of, or at the request of, the (indemnifying) defendant. As the name suggests, it was relevant where the indemnified party had paid expenses or discharged liabilities to third parties. The existence of an express promise of indemnity did not preclude an action for money paid[58] and so some cases could be brought in special assumpsit or in indebitatus assumpsit. The defendant's request for the claimant's payment might be found in the same circumstances that gave rise to the contractual promise of indemnity against the relevant liabilities.[59] Actual payment by the claimant was essential to the action for money paid; that same payment could constitute the actual loss which founded an action for damages in special assumpsit for failure to indemnify.

[50] See generally JB Ames, *Lectures on Legal History* (Cambridge, MA, Harvard University Press, 1913), 89–90; AWB Simpson, *A History of the Common Law of Contract* (Oxford, Clarendon Press, 1975), 61–66; WM McGovern, 'Contract in Medieval England: the Necessity for Quid Pro Quo and a Sum Certain' (1969) 13 *American Journal of Legal History* 173, 186–90. In relation to insurance see CA Keigwin, 'The Action of Debt: Part I' (1922) 11 *Georgetown Law Journal* 20, 39 and CA Keigwin, 'The Action of Debt: Part II' (1923) 12 *Georgetown Law Journal* 28, 40. The modern law applicable to sums payable under the terms of a contract is not so rigid: *Jervis v Harris* [1996] Ch 195 (CA), 202–03 (Millett LJ).

[51] See, eg, *Hodgson v Bell* (1797) 7 TR 97; 101 ER 874; *The Overseers of St-Martin-in-the-Fields v Warren* (1818) 1 B & Ald 491; 106 ER 181; *Taylor v Young* (1820) 3 B & Ald 521; 106 ER 752; *White v Ansdell* (1836) 1 M & W 348; 150 ER 467; *Smith v Day* (1837) 2 M & W 684; 150 ER 931; *Field v Robins* (1838) 8 Ad & E 90; 112 ER 770; *Hankin v Bennett* (1853) 8 Ex 107; 155 ER 1279.

[52] *Goddard v Vanderheyden* (1771) 3 Wils 262, 269–70; 95 ER 1046, 1050.

[53] *Attwooll v Attwooll* (1853) 2 E & B 23; 118 ER 677. See also *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 (CA), 273–74 (Leggatt LJ).

[54] *Johnson v Diamond* (1855) 11 Ex 73; 156 ER 750. See generally *Randall v Lithgow* (1884) 12 QBD 525 (QB); *Israelson v Dawson* [1933] 1 KB 301 (CA) (garnishee orders and contracts of insurance).

[55] The range of provable claims was gradually extended beyond 'debts' to include various forms of unliquidated claims: see, eg, Bankruptcy Act 1861, ss 153, 154; Bankruptcy Act 1869, s 31.

[56] *The Overseers of St-Martin-in-the-Fields v Warren* (1818) 1 B & Ald 491; 106 ER 181; *Taylor v Young* (1820) 3 B & Ald 521, 527; 106 ER 752, 754 (Abbott CJ), 529; 755 (Bayley J); *Hankin v Bennett* (1853) 8 Ex 107; 155 ER 1279. *cf Re Willis* (1849) 4 Ex 530, 538–39; 154 ER 1324, 1328.

[57] See generally Bullen and Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law* (n 42), 42–44. Occasionally, claims might be fitted within other counts: see, eg, *Re The Progress Assurance Co, ex p Bates* (1870) 39 LJ Ch 496 (Ch) (account stated).

These points are illustrated by *Crampton v Walker*.[60] The claimant accepted a bill of exchange for the defendant's accommodation, the defendant promising in return to indemnify the claimant against liability on the bill. The claimant was compelled to pay the amount of the bill and interest, and also incurred costs in defending an action by the holder. The claimant claimed these losses as damages for breach of the indemnity and the defendant raised a set-off to each of the heads of loss. To determine whether the claimant's claim was sufficiently liquidated to be subject to set-off, Hill J adopted the test of whether the claimant could have maintained an action for money paid. The defendant's set-off against the amount of the bill plus interest was sound, because the claimant could have sued for that sum in an action for money paid.[61] A claim by the claimant for money paid in relation to the costs would have failed on the pleadings, which stated only that the costs were incurred, not paid.

[1–23] Scope of indebitatus assumpsit. The action was available where the payment by the indemnified party had the effect of relieving the indemnifier from a liability. Examples include the cases on bills of exchange in which the indemnified acceptor was compelled to pay the holder of the bill,[62] and payments by guarantors who had provided guarantees at the express or implied request of the debtor.[63] It has been suggested more recently that an analogous claim would be available where the indemnifier and indemnified party are held liable as concurrent tortfeasors, and the indemnified party discharges the common liability to the claimant.[64]

Whether the action was available to an indemnified party in other circumstances is less clear. In *Victorian WorkCover Authority v Esso Australia Ltd*,[65] which concerned a statutory indemnity, Gleeson CJ, Gummow, Hayne and Callinan JJ referred to the 'requirement of the common money count that the payments made by the claimant have exonerated the defendant from liability'.[66] This corresponds with the usual restitutionary analysis.[67] There are, however, some decisions to the contrary that emphasise the element of request.[68] In

[58] But see *Toussaint v Martinnant* (1787) 2 TR 100; 100 ER 55.

[59] See further [1–23].

[60] *Crampton v Walker* (1860) 3 El & El 321; 121 ER 463. *cf Brown v Tibbits* (1862) 11 CBNS 854, 866–67; 142 ER 1031, 1036 (Williams J), 868–69; 1037 (Byles J).

[61] *Garrard v Cottrell* (1847) 10 QB 679; 116 ER 258; *Sleigh v Sleigh* (1850) 5 Ex 514, 517; 155 ER 224, 225.

[62] See nn 60–61.

[63] See [2–24].

[64] *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228, 245 (Kitto J).

[65] *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53; (2001) 207 CLR 520.

[66] *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53; (2001) 207 CLR 520, [16].

[67] *cf Goff and Jones: The Law of Unjust Enrichment* (n 13), 519, para 20-01; K Mason, JW Carter and GJ Tolhurst, *Mason and Carter's Restitution Law in Australia*, 2nd edn (Sydney, LexisNexis Butterworths, 2008), 249–52, para 636.

[68] *Brittain v Lloyd* (1845) 14 M & W 762; 153 ER 683; *Lewis v Campbell* (1849) 8 CB 541; 137 ER 620; *Hutchinson v Sydney* (1854) 10 Ex 438; 156 ER 508. *cf* J Gleeson and N Owens, 'Dissolving Fictions: What to Do With the Implied Indemnity?' (2009) 25 *Journal of Contract Law* 135, 155–59.

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5

Enforcement

Introduction

[5–1] Purpose of chapter. This chapter examines the enforcement of promises of indemnity in respect of an actual or potential loss to the indemnified party. The manner in which an indemnity is enforced depends on several factors including: the nature of the indemnity promise; whether the loss is within the scope of the indemnity; and whether the loss has actually occurred or is merely anticipated. The first two of those factors have already been considered in general terms,[1] but in this chapter they are considered specifically in relation to enforcement of the indemnity. The chapter also considers the third factor.

[5–2] Structure of chapter. The chapter begins by examining restrictions on enforcement. Formal requirements are considered. Other restrictions may arise because the indemnified party has not complied with another term of the contract. The term may be a condition precedent to performance or enforcement of the indemnity, or a promissory term that has been breached by the indemnified party in such a way as to entitle the indemnifier to terminate the contract. Other limitations apply where the indemnified party's conduct adversely affects the extent of the indemnifier's responsibility for loss within the scope of the indemnity. The remainder of the chapter considers the enforcement of indemnities in respect of actual and potential losses, and also the use of declaratory relief to determine the rights of the indemnifier and indemnified party.

[5–3] Summary of chapter. The main propositions advanced in this chapter can be summarised as follows.

(1) The indemnified party generally has a right to recover a sum corresponding to the amount of a loss:

- (a) where the indemnified party has actually sustained that loss;
- (b) the loss is within the scope of the indemnity; and
- (c) there is no bar to enforcement of the indemnity.

(2) The indemnified party may obtain relief in respect of a loss:

- (a) where the loss remains potential only;
- (b) the loss is within the scope of the indemnity;
- (c) the circumstances (in particular, the nature of the indemnity and the nature of the loss) justify the award of relief; and
- (d) there is no bar to enforcement of the indemnity.

[1] See ch 2 and ch 4.

(3) Whether an indemnified party can recover for a loss that is beyond the scope of the indemnity depends on the construction of the contract. If recovery is possible at all, the conditions appear to be:

- (a) that the loss has actually occurred;
- (b) that the indemnity has been activated by some other loss within the scope of the indemnity; and
- (c) that the loss that is beyond scope satisfies other legal principles applicable to a claim for damages for breach of the contract of indemnity.

Restrictions on Enforcement

Formal Requirements

The Statute of Frauds

[5–4] Statute of Frauds not applicable.[2] In contemporary language, section 4 of the Statute of Frauds 1677 provides that no action shall be brought on any 'special promise to answer for the debt, default or miscarriages of another person'. Derivative provisions exist in various jurisdictions around the Commonwealth.[3]

Where the indemnified party's loss has no connection with a third party's default then, clearly, the statute is irrelevant. A more difficult question, which has sometimes arisen, is whether section 4 applies to promises of indemnity where the relevant loss or liability of the indemnified party might be triggered by the default of a third party. The modern position can be stated shortly. Section 4 generally does not apply to promises of indemnity, even though the loss or liability may arise from a default by a third party, and even though the loss might be the indemnified party's failure to receive performance from that party.[4] This distinction between guarantees and indemnities is not entirely satisfactory as a matter of logic or policy.

[5–5] Liability associated with another's default. Some forms of indemnity are properly outside the scope of section 4 of the Statute of Frauds 1677. In one line of cases, A promised to protect B against a liability to C, the liability often being assumed by B at A's request and arising upon the default of another, D, in performing some obligation owed to C.[5] These

[2] For a thorough review of the position in the United States, see AL Corbin, 'Contracts of Indemnity and the Statute of Frauds' (1928) 41 *Harvard Law Review* 689; AL Corbin, *Corbin on Contracts*, vol 4 (St Paul's, MN, JM Perillo ed, revised edn, Lexis Law Publishing, 1997), 368–85, §§16.16–16.18.

[3] *cf* Property Law Act 1974 (Qld), s 56, which refers to a 'promise to guarantee any liability of another'.

[4] For statements in general terms, see *Re Hoyle; Hoyle v Hoyle* [1893] 1 Ch 84 (CA), 97 (Lindley LJ), 99 (Bowen LJ); *Sutton & Co v Grey* [1894] 1 QB 285 (CA), 287 (Lord Esher MR); *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep 546 (QB); *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 254 (Mason CJ); *Pitts v Jones* [2007] EWCA Civ 1301; [2008] QB 706, [21] (Smith LJ); *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189; [2009] 1 Lloyd's Rep 595, [1] (Kay LJ); *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), [151]. For more specific statements in relation to liabilities arising from a third party's default, see n 6.

[5] *Thomas v Cook* (1828) 8 B & C 728; 108 ER 1213; *Wildes v Dudlow* (1874) LR 19 Eq 198; *Re Bolton* (1892) 8 TLR 668 (Ch); *Guild & Co v Conrad* [1894] 2 QB 885 (CA).

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were regarded as 'indemnity' cases;[6] more particularly, they were instances of indemnity against liability. In one sense, it can be seen why such promises might have been thought to be within the statute. The indemnifier's obligation could be activated by another's default, and section 4 does not say to whom the promisor is to be answerable. It was, however, established that section 4 applies to promises made to the *creditor* in respect of another's obligations.[7] In these indemnity cases, B was a debtor vis-à-vis C, not a creditor of C; the distinction was critical.[8]

This is not quite a full explanation. Where B is responsible to C for D's obligations, there may be an associated obligation of D to B in respect of B's liability to C. So, for example, D as debtor may be liable to indemnify or reimburse B as guarantor in respect of sums payable or paid to C. From that perspective, A's promise to B could potentially be regarded as a promise to a creditor vis-à-vis D.[9] That view is, however, generally not adopted.[10] The subject-matter of the indemnity is characterised as a liability to C, rather than a loss due to default by D vis-à-vis B. It follows that B's right to enforce the indemnity is independent of D's performance or default. A's promise is to indemnify at all events; it is not a promise to answer for D's default, in terms of the statute.[11] It has also been suggested that the usual policy justification for the Statute of Frauds does not apply in these circumstances. There is relatively little danger of fraud. In many cases, the principal motive for B accepting responsibility for D's obligations is that B has been promised an indemnity by another person, A. Furthermore, it would be unjust to allow A, who induced B to accept that responsibility on the faith of a promise of indemnity, to escape liability on a technicality; indeed, this might encourage fraud.[12]

[5–6] **Lost benefit of performance.** The subject-matter of the indemnity may be loss suffered by the indemnified party as creditor due to the debtor's failure to perform obligations owed to the indemnified party. The analogy with guarantees is stronger here than in the liability cases. If the activating event is simply 'non-performance' by the debtor, the indemnity can be regarded as outside section 4 of the Statute of Frauds 1677 on the basis that it is, strictly, not dependent upon the debtor's default. Where the activating event is a default by the debtor, it is difficult to justify the distinction between guarantees and indemnities that is drawn for the purposes of the statute. That distinction is not obviously suggested by the language of section 4 itself, which refers only to a promise to 'answer for' a default. That expression might reasonably be understood to mean 'be responsible for the consequences of'.[13]

The fragility of the distinction is apparent when comparing *Sutton & Co v Grey*[14] and *Montagu Stanley & Co v JC Solomon Ltd*.[15] In each case, clients were introduced to brokers

[6] See, eg, *Guild & Co v Conrad* [1894] 2 QB 885 (CA), 893–94 (Lindley LJ), 895 (Lopes LJ), 896 (Davey LJ); *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 (CA), 784–85 (Vaughan Williams LJ); *Davys v Buswell* [1913] 2 KB 47 (CA), 54–55 (Vaughan Williams LJ).

[7] *Eastwood v Kenyon* (1840) 11 Ad & E 438, 446; 113 ER 482, 485; *Forth v Stanton* (1845) 1 Wms Saund 210; 85 ER 217 (notes); *Reader v Kingham* (1862) 13 CBNS 344, 353; 143 ER 137, 141 (Erle CJ).

[8] See also Restatement (2d) Contracts, §118; Restatement (3d) Suretyship and Guaranty, §11(3)(d).

[9] See Corbin, *Corbin on Contracts* (n 2), vol 4, 377, §16.17.

[10] *Mallet v Bateman* (1865) LR 1 CP 163 (Exch Ch) might be viewed as an exception. D was liable as buyer to pay for goods sold by B. B drew bills on D, which D accepted. A promised B to take the bills as indorsee without recourse to B, and to indemnify B against any liability on the bills arising due to D's default. The promise of indemnity was held to be within the statute.

[11] See [9–16].

[12] *cf Wildes v Dudlow* (1874) LR 19 Eq 198, 200; Corbin (n 2), vol 4, 378, §16.17.

[13] *cf Moschi v Lep Air Services Ltd* [1973] AC 331 (HL), 357 (Lord Simon).

[14] *Sutton & Co v Grey* [1894] 1 QB 285 (CA).

[15] *Montagu Stanley & Co v JC Solomon Ltd* [1932] 2 KB 287 (CA).

on the stock exchange. The terms of the agreements between the introduction agents and brokers were, for present purposes, the same: the agent was to share half of any commission and to indemnify the brokers against half of any losses incurred in connection with such business. In *Sutton & Co*, the latter part of the agreement was held to be outside the statute on the basis of an exception, namely, that the agent had an interest in the transaction, or that it was only an incident of a broader transaction. In *Montagu Stanley & Co*, where the requirement of writing was not in issue, the agreement was clearly regarded as including an indemnity in the strict sense.

There are also older decisions in which it was accepted that promises of indemnity might be within the statute.[16] In *Cripps v Hartnoll*,[17] Pollock CB said:

> [A] mere promise of indemnity is not within the Statute of Frauds . . . On the other hand, an undertaking to answer for the debt or default of another is within the Statute of Frauds, and no doubt some cases might be put where it is both the one and the other, that is to say where the promise to answer for the debt or default of another would involve what might, very properly and legally, be called an indemnity. Where that is the case (which it is not here), in all probability the undertaking would be considered as within the Statute of Frauds if it were to answer for the debt or default of another, notwithstanding it might also be an indemnity.

But this is not the modern law. The adherence to a distinction between guarantees and indemnities may have hardened through an over-generalisation of the cases on indemnities against liabilities.[18] It may also reflect general dissatisfaction with the policy of the statute, and a desire to limit its operation.

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Consumer Protection

[5–7] **Consumer credit legislation.** A requirement of writing may be imposed by consumer credit legislation. Under section 105(1) of the Consumer Credit Act 1974, any 'security' provided in relation to certain consumer agreements must be in writing.[19] The principal agreements are consumer credit agreements and consumer hire agreements. In very general terms, a consumer credit agreement is one in which an individual, the debtor, is provided by another person, the creditor, with credit of any amount.[20] 'Credit' is not defined exhaustively, but includes any kind of financial accommodation.[21] A consumer hire agreement is an agreement for the hire (not hire-purchase[22]) of goods to an individual, the term of which may exceed three months.[23]

'Security' is then defined to include, inter alia, any indemnity or guarantee provided at the debtor's or hirer's request, to secure the performance of the debtor's or hirer's obligations

[16] One is *Winckworth v Mills* (1796) 2 Esp 484; 170 ER 428, though it is not a convincing authority. Another, *Green v Cresswell* (1839) 10 Ad & E 453; 113 ER 172 cannot stand after *Batson v King* (1859) 4 H & N 739, 740; 157 ER 1032, 1033 (Pollock CB); *Reader v Kingham* (1862) 13 CBNS 344; 143 ER 137; *Wildes v Dudlow* (1874) LR 19 Eq 198; *Guild & Co v Conrad* [1894] 2 QB 885 (CA), 893–95 (Lindley LJ); *Davys v Buswell* [1913] 2 KB 47 (CA), 54–55 (Vaughan Williams LJ). A third is *Mallet v Bateman* (1865) LR 1 CP 163 (Exch Ch) (see n 10).

[17] *Cripps v Hartnoll* (1863) 4 B & S 414, 419; 122 ER 514, 516.

[18] See [5–5].

[19] Separate provision is made for security provided by the debtor or hirer: ss 105(6), 105(9).

[20] Consumer Credit Act 1974, s 8(1). There is, however, a monetary limit of £25,000 applicable where the credit is obtained wholly or predominantly for business purposes: s 16B(1).

[21] Consumer Credit Act 1974, s 9(1).

[22] Hire-purchase agreements are subsumed within the definition of consumer credit agreement in s 8(1) by the definition of 'credit' in s 9(3).

[23] Consumer Credit Act 1974, s 15(1).

under the principal agreement.[24] A person who provides such a guarantee or indemnity falls within the definition of 'surety'.[25]

Requirements as to the form of certain securities – guarantees and indemnities – have been prescribed by regulations.[26] The security instrument must contain a prominent heading, as the case may be: 'Guarantee subject to the Consumer Credit Act 1974'; 'Indemnity subject to the Consumer Credit Act 1974'; or 'Guarantee and Indemnity subject to the Consumer Credit Act 1974'.[27] The names and postal addresses of the creditor or owner, debtor or hirer, and surety must be given, as must a description of the subject-matter to which the security relates.[28] The instrument must also contain a statement of the surety's rights, and a signature box, in the prescribed form.[29] The instrument must be legible.[30]

If the security is not in writing, or the security instrument is improperly executed, then, insofar as it relates to the principal agreement, it can only be enforced against the surety by court order.[31] Improper execution extends to include cases where: the instrument does not comply with the requirements prescribed by the regulations;[32] the instrument does not embody all terms of the security other than implied terms;[33] the surety is not provided with a copy of the security instrument;[34] or the surety is not provided with an executed copy of the associated principal agreement at the required time.[35]

Non-Compliance with Terms of Contract Containing Indemnity

General

[5–8] Nature of restriction. Non-compliance may take effect in several ways. A condition precedent to performance of the indemnity may not have been satisfied, so that the primary obligation to indemnify is not enlivened.[36] The condition may attach to enforcement instead of performance. In that case, although the indemnifier is technically obliged to perform, the indemnified party cannot enforce the indemnity unless and until the condition is fulfilled. Alternatively, the indemnified party may have committed a breach of a promissory term of the contract that confers upon the indemnifier a right to terminate the contract. Exercise of that right discharges the indemnifier from further performance of the contract, including further performance of the promise to indemnify. The effect of breach

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[24] Consumer Credit Act 1974, s 189(1).
[25] Consumer Credit Act 1974, s 189(1).
[26] Consumer Credit (Guarantees and Indemnities) Regulations 1983, SI 1983/1556. Such regulations are contemplated by Consumer Credit Act 1974, s 105(2).
[27] Consumer Credit (Guarantees and Indemnities) Regulations 1983, reg 3(1)(a), sch pt I.
[28] Consumer Credit (Guarantees and Indemnities) Regulations 1983, reg 3(1)(b), sch pt II.
[29] Consumer Credit (Guarantees and Indemnities) Regulations 1983, regs 3(1)(c) and (d), sch pts III and IV respectively.
[30] Consumer Credit (Guarantees and Indemnities) Regulations 1983, reg 4.
[31] Consumer Credit Act 1974, s 105(7).
[32] Consumer Credit Act 1974, s 105(4)(a).
[33] Consumer Credit Act 1974, s 105(4)(b).
[34] Consumer Credit Act 1974, s 105(4)(d).
[35] Consumer Credit Act 1974, s 105(5).
[36] See, eg, *Re-Source America International Ltd v Platt Site Services Ltd* [2004] EWCA Civ 665; (2004) 95 Con LR 1, [56] (Tuckey LJ) (condition that fire blankets be used in performance of work); *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 (condition that payments be made punctually); *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The Bremen Max)* [2008] EWHC 2755 (Comm); [2009] 1 Lloyd's Rep 81, [34] (condition that cargo be delivered to named party).

by the indemnified party is clearest where the indemnity is the only substantial executory obligation of the indemnifier under the contract.

[5–9] Relationship between failure of condition precedent and breach. Discharge for breach and non-fulfilment of a condition precedent are distinct grounds for refusing to perform the indemnity.[37] So, for example, A may promise to indemnify B on the condition that B make punctual payments to C according to the terms of a contract between B and C. In relation to A's promise to indemnify, B's punctual payments are merely a condition precedent: B's promise of performance is made to C, not A.[38] B's failure to perform does not, therefore, confer upon A a right to terminate for breach by B. But A's obligation to perform the indemnity is not engaged if B does not satisfy the condition precedent. There is also, possibly, a difference in onus. The indemnified party may have to establish satisfaction of a condition precedent to performance of the indemnity,[39] whereas the indemnifier must establish the breach of contract upon which it relies as a basis for discharge.

The consequences of non-compliance can be more favourable to the indemnified party in the case of a breach of a promissory term than in the case of a failure to satisfy a condition precedent. The right to discharge the contract for breach is, in the absence of any express right, governed by common law principles. The indemnified party's failure to perform may not be so serious as to confer upon the indemnifier the right to terminate. The contract, and thus the indemnity, remains enforceable by the indemnified party, though that party is liable to pay damages to the indemnifier.

In other cases, both perspectives lead to the same result. In *Guy-Pell v Foster*,[40] the defendant promised to indemnify the claimant against any loss on an investment in certain debentures, in return for an entitlement to one-quarter of any gain upon redemption. The claimant sold the debentures before the maturity date at a great loss and sued the defendant for that loss. The House of Lords held that the loss was to be ascertained at the relevant maturity date and so the action was brought too soon. The claimant then repurchased the debentures and, upon the debtor company entering liquidation (which rendered the principal and interest immediately payable) brought another action against the defendant. That action also failed. The ground preferred by the English Court of Appeal was that the claimant had repudiated the contract or breached an essential term by failing to retain the debentures. The other ground was that retention of the debentures, although not promised by the claimant, was a condition of the defendant's obligation to perform the indemnity.

Condition Precedent

[5–10] Identification of condition precedent. Whether a term is a condition precedent is a matter of construction. A leading illustration is *Scott Lithgow Ltd v Secretary of State for Defence*.[41] In 1974, the head contractor discovered that some materials supplied by a third party were defective and had to be replaced. In October 1977, the contractor notified the Ministry of Defence of its claim under an indemnity in the contract between them. It issued

[37] *cf Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 (HL), 262–63 (Lord Goff) (nature of warranties in insurance contracts).
[38] *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570, [65]–[66] (Gummow, Hayne and Kiefel JJ).
[39] See [5–11].
[40] *Guy-Pell v Foster* [1930] 2 Ch 169 (CA).
[41] *Scott Lithgow Ltd v Secretary of State for Defence* 1989 SC (HL) 9.

an arbitration notice against the Ministry in July 1982. At issue was whether the contractor's action on the indemnity from the Ministry was beyond the five-year limitation imposed by statute. The contractor argued that clause 15.5 of the contract established a condition precedent. The clause provided that where an event might result in a claim under the indemnity, the contractor should report the incident immediately and, 'in the interests of prompt settlement, should submit his priced claim as soon as possible thereafter. An estimate . . . is to be included in the initial notification of the incident or submitted within 14 days thereafter'. The contractor's action was out of time by reference to the occurrence of the loss in 1974,[42] but just within time by reference to the claim in October 1977. It was held that clause 15.5 was not a condition precedent to performance of the indemnity. The repeated use of the word 'should' suggested that the term was administrative in character. Furthermore, if clause 15.5 were a condition precedent, it could have operated harshly to deprive the contractor of the right to indemnity where the contractor had not acted 'as soon as possible'.[43]

[5–11] Onus of proof. A particular stipulation may be a condition precedent to the indemnity or merely a limited exception or qualification to the scope of the indemnity. If the latter, the burden generally lies upon the indemnifier to establish that the exception or qualification applies.[44] The point is more difficult where the stipulation is a condition precedent in the strict sense. It may be regarded as an element essential to the existence of the right to indemnity, which suggests that the onus lies upon the indemnified party to establish satisfaction. Even so, the approach taken in the insurance context is not uniform.[45] In *Wardle v Agricultural and Rural Finance Pty Ltd*,[46] which concerned a non-insurance indemnity, it was held that the burden rested upon the indemnified party to establish satisfaction of a condition precedent. That conclusion was, however, influenced by the terms of the investment scheme in question. The indemnified party asserted an entitlement to be indemnified in order to invoke an exception to a general liability to make repayments to the lender. In that context, the onus rested upon the indemnified party as the party relying upon the exception.[47]

[5–12] Demands. In considering whether a demand is a condition precedent to performance or enforcement of the indemnity, it is necessary to distinguish the following situations. The indemnified party may make a demand upon the indemnifier, seeking indemnification. Alternatively, a demand may be made by another person, such as a creditor, upon the indemnified party. This is most relevant to indemnities against claims by or liabilities to third parties. Finally, a demand may be made by the indemnified party upon another person, for example, a debtor. This is most relevant to indemnities against non-performance by third parties.

[42] See further [5–45].
[43] *Scott Lithgow Ltd v Secretary of State for Defence* 1989 SC (HL) 9, 21 (Lord Keith).
[44] See [5–33].
[45] In England, the onus is on the insurer to show non-satisfaction: *Bond Air Services Ltd v Hill* [1955] 2 QB 417 (QB). See also *Bedford v James* [1986] 2 Qd R 300 (SC); *Cee Bee Marine Ltd v Lombard Insurance Co Ltd* [1990] 2 NZLR 1 (CA); *Australian Associated Motor Insurers Ltd v Wright* (1997) 70 SASR 110 (FC). Contrast *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* (1942) 42 SR (NSW) 231 (FC); *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 (CA); *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* [2010] HCA 9; (2010) 240 CLR 444, [25] (onus on insured to show satisfaction).
[46] *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107.
[47] *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107, [242]–[253] (Campbell JA).

[5–13] Demand by indemnified party upon indemnifier. A prior demand by the indemnified party upon the indemnifier is generally not a precondition to performance or enforcement of the indemnity.[48] An express stipulation for a demand can, however, be given effect.[49] Such a requirement may have one of the following consequences:

(1) the indemnifier's primary obligation to indemnify is not engaged unless and until the indemnified party makes a demand;
(2) the obligation to indemnify is already enlivened but the indemnified party's right to enforce the indemnity does not arise until it has made a demand;[50] or
(3) the indemnified party has a contractual right to obtain payment in advance for potential losses.[51]

The third construction is not presently relevant. The first construction may be more apt for indemnities of a compensatory, rather than preventive, nature. It is not clear that a preventive indemnity would be effective where the demand is made in respect of a loss already sustained. The second construction might have practical utility where the indemnified loss relates to non-performance by a third party, or where there is a procedure for investigating and ascertaining the amount of the loss claimed by the indemnified party. Whether the first or second construction applies, the practical result is that a demand is, at least, a precondition to enforcement of the indemnity.

[5–14] Demand by third party upon indemnified party. A demand may be required by the terms of the contract between the third party and the indemnified party. Such a requirement may be indirectly relevant to enforcement of the indemnity, insofar as it affects the existence and nature of the indemnified party's liability to the third party. In some circumstances, it appears that the indemnity can be enforced in respect of that liability even though the third party has yet not made the requisite demand.[52]

As between the indemnified party and indemnifier, a demand by a third party upon the indemnified party is generally not a condition precedent to enforcement of the indemnity.[53] The context or terms of the contract of indemnity may indicate otherwise. In *Bradford v Gammon*,[54] a partnership deed provided for the sale of a deceased partner's share of the partnership property to the remaining partners, and for an indemnity to the deceased partner's executors against future claims and liabilities in respect of the partnership property. An executor sought quia timet relief in the form of an order that the partnership procure the release of the deceased partner's estate from, inter alia, liability under the partnership's overdraft account. The bank had closed the account and ascertained the total sum owing, but had made no demand for payment. Eve J held that the indemnity could only be enforced once a demand had been made by a creditor. A significant consideration was that

[48] *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65 (QB), 74; *Scott Lithgow Ltd v Secretary of State for Defence* 1989 SC (HL) 9. *cf Re Taylor, ex p Century 21 Real Estate Corp* (1995) 130 ALR 723 (FCA), 729–30. *cf* [5–16].
[49] *Harrison v Mitford* (1792) 2 Bulst 229; 80 ER 1082; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 524 (Mason CJ, Dawson, Gaudron and McHugh JJ); *Australia and New Zealand Banking Group Ltd v Coutts* [2003] FCA 968; (2003) 201 ALR 728, [35]–[36]. *cf* generally *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 (CA), 129 (Atkin LJ). See further [9–49] (effect of principal debtor clause).
[50] *cf Stimpson v Smith* [1999] Ch 340 (CA), 354 (Tuckey LJ) (effect of requirement of demand in guarantee).
[51] But see *K/S Preston Street v Santander (UK) plc* [2012] EWHC 1633 (Ch), [29].
[52] *cf Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 (Ch) (debtor's exoneration of guarantor).
[53] *cf* [6–29], [7–29].
[54] *Bradford v Gammon* [1925] Ch 132 (Ch).

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the business of the partnership could be seriously disrupted if the partnership were required to satisfy creditors who were not pressing for payment.

[5–15] Demand by indemnified party upon third party. There may be several persons against whom an indemnified party can seek to recover for a loss. Unless the contract provides otherwise,[55] there is no general requirement that an indemnified party pursue or exhaust its rights against a third party before enforcing an indemnity.[56] If that were the case, the doctrine of subrogation would have developed differently. A demand made upon a third party that remains unsatisfied may, however, be a factor that goes to establish that the indemnified party has sustained loss by failing to recover from that party.[57]

[5–16] Notice. Notice to the indemnifier that the indemnified party has sustained a loss or been subjected to a claim is not a condition precedent to enforcement of the indemnity, unless the contract expressly so provides.[58]

[5–17] Payment by indemnified party. Generally, the indemnified party has no right to recover in respect of a liability to a third party unless and until the indemnified party pays a sum towards discharge of the liability. This does not mean that payment is to be regarded as a condition precedent to enforcement of the indemnity.[59] Rather, the limitation is a product of two substantive characteristics of indemnities: actual loss is an essential ingredient in an action to enforce the indemnity by way of common law remedy; and such loss generally arises upon payment and not merely because a liability exists.[60] Where the indemnified party claims in respect of a sum already paid, the distinction between payment as a form of loss and payment as a condition precedent is of little import.

The distinction becomes significant when specific enforcement is considered. If the indemnity is construed to be preventive in nature, then the indemnified party may be able to obtain an order for exoneration before it pays the third party. If, however, payment to the third party is made a condition precedent to enforcement, then the condition holds and relief in advance of payment is not possible.[61] The order for specific enforcement would conflict with the terms of the contract.

Discharge for Breach of Contract

[5–18] Discharge for breach by indemnified party. The common law basis for discharge for breach of contract is relatively straightforward. If the indemnified party's breach of contract is sufficiently serious,[62] the indemnifier may terminate the contract and so discharge itself from any further obligation to perform the indemnity.[63] If the breach is not

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[55] See [9–34].
[56] *cf Dane v Mortgage Insurance Corp Ltd* [1894] 1 QB 54 (CA), 61 (Lord Esher MR).
[57] *cf* [9–32].
[58] *Cutler v Southern* (1667) 1 Wms Saund 116; 85 ER 125; 1 Lev 194; 83 ER 365; *Duffield v Scott* (1789) 3 TR 374; 100 ER 628; *Scott Lithgow Ltd v Secretary of State for Defence* 1989 SC (HL) 9.
[59] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 28 (Lord Brandon), 35–36 (Lord Goff), 40 (Lord Jauncey).
[60] See [6–23].
[61] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL); *Paterson v Pongrass Group Operations Pty Ltd* [2011] NSWSC 1588, [79]. See also [2–34], [7–20].
[62] In the sense of a breach of condition or fundamental breach of an intermediate term.
[63] *Guy-Pell v Foster* [1930] 2 Ch 169 (CA). *cf Jiona Investments Pty Ltd v Medihelp General Practice Pty Ltd* [2010] QCA 99, [19]–[20] (Muir JA).

sufficiently serious, and the term breached is not a condition precedent to performance of the indemnity, then the indemnifier will remain liable to indemnify.[64] Where the indemnifier relies on an express contractual right of termination that is enlivened by breach, the central question is whether the conditions for the exercise of the right have been satisfied. Termination pursuant to an express contractual right generally produces the same result, in relation to discharge of the parties, as termination on the common law basis.

[5–19] Discharge for breach by indemnifier. Termination of a contract generally discharges both parties from further performance of all primary obligations under it. It should, therefore, follow that termination by the indemnified party will deprive it of a right to further performance of the indemnity from the indemnifier. This was not the result in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)*.[65] The owner of the vessel, which was on a time charter, exercised a contractual right to withdraw the vessel for the charterer's non-payment of hire. The owner then sustained losses in discharging cargo already aboard at the time of withdrawal. The Supreme Court of the United Kingdom held, by majority, that the owner was entitled to recover these losses under the standard form indemnity from the charterer against the consequences of the master complying with the charterer's orders. The charterer's order to load the cargo occurred before the charterparty was terminated. Even so, according to the conventional analysis, it would be the subsequent loss, and not that order, that would crystallise the right to enforce the indemnity. The indemnity would not have been engaged until after termination. It appears to have been assumed that the indemnity continued notwithstanding the termination of the charterparty, though it is not clear why the provision was exceptional.

Other Conduct Affecting the Indemnity

[5–20] General. The extent of the indemnifier's ultimate responsibility for loss may be affected by acts of other persons. Those acts may, for example, alter the nature of the risk, or increase the probability of loss occurring or its potential extent, or prejudice the indemnifier's rights against others in relation to the loss if it materialises. The question is whether certain conduct will relieve the indemnifier of its obligation to indemnify.

A parallel might be drawn between the position of an indemnifier and that of a guarantor, whose liability under a contract of guarantee may be affected by subsequent dealings by the debtor or creditor. Consideration of the point in the indemnity cases has often occurred in relation to indemnities against non-performance by third parties, where the analogy with guarantees is strongest. The principles applied to guarantees cannot be determinative because promises of indemnity and guarantee are essentially different. An indemnity promise does not, for example, necessarily share the characteristics of dependency and co-extensiveness.[66] In *Scottish & Newcastle plc v Raguz*,[67] Morritt VC remarked:

[64] *Briant v Pilcher* (1855) 16 CB 354; 139 ER 795; *Bowmaker (Commercial) Ltd v Smith* [1965] 1 WLR 855 (CA); *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504 (FC); *Australia and New Zealand Banking Group Ltd v Beneficial Finance Corp Ltd* [1983] 1 NSWLR 199 (PC), 204; *Winchester Cigarette Machinery Ltd v Payne* (CA, 4 May 1995).
[65] *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)* [2012] UKSC 17; [2012] 2 WLR 976. See also W Courtney, 'Indemnities in Time Charterparties and the Effect of the Withdrawal of the Vessel' (2013) 30 *Journal of Contract Law* 243.
[66] See [9–17].
[67] *Scottish & Newcastle plc v Raguz* [2003] EWCA Civ 1070; [2004] L & TR 11, [8].

In a contract of indemnity the indemnifier undertakes an independent obligation which does not depend on the existence of any other obligation on the part of any other person ... By contrast a contract of guarantee presupposes some principal obligation of a principal obligor to which the guarantee is secondary or ancillary . . . [T]he obligation of a guarantor may be discharged by transactions between the creditor and principal debtor, for example by giving time, the release of securities or novation of the obligation because any of those transactions may alter the mutual rights and obligations of the guarantor and the principal debtor. As there is no need for a principal obligation in the case of an indemnity its discharge depends on the usual rules of contract.

But these differences do not necessarily entail the wholesale rejection of all principles applicable to guarantees.[68] The approach for indemnities must be more general because the same issues arise for different forms of indemnity. Where an indemnity protects against the consequences of non-performance by a third party, a variation in the third party's obligations to the indemnified party may correspondingly affect the extent of the indemnifier's liability. This is also true where an indemnity protects against a liability to a third party, and there is a variation of the indemnified party's obligations to that third party.

[5–21] **Types of conduct.** Three types of conduct must be considered. Dealings involving the indemnified party and others may affect the subject-matter of the indemnity.[69] These include variations to liabilities of, or to, the indemnified party; extensions of time granted by, or to, the indemnified party; and releases given by, or to, the indemnified party. Other dealings may affect the indemnifier's ability ultimately to recoup itself in relation to the indemnified loss.[70] Finally, the indemnified party may, by acting unreasonably, incur or increase a loss that would otherwise fall within the scope of the indemnity.[71]

Dealings Affecting the Subject-Matter of the Indemnity

[5–22] **Variation of liabilities of, or to, indemnified party.** In the guarantee context, the general rule is that a guarantor is discharged where the debtor and creditor agree to vary the principal contract, unless it is clear that the variation is unsubstantial or cannot be prejudicial to the guarantor.[72] There is some discord as to whether a similar principle applies to non-insurance[73] indemnities, whether against liabilities of the indemnified party to third parties, or against loss to the indemnified party caused by a third party's non-performance. The point in substance concerns a change in the underlying circumstances which, correspondingly, affects the nature or extent of the promisor's liability. It is doubtful that the variation principle should rest entirely upon the characteristics of dependency or co-extensiveness inherent in a promise of guarantee. From a more general perspective, however, it might be queried whether it is nowadays necessary to apply a legal rule, or

[68] See, eg, *Total Oil Products (Australia) Pty Ltd v Robinson* [1970] 1 NSWR 701 (CA), 704 (Asprey JA) but contrast *Tullow Uganda Ltd v Heritage Oil and Gas Ltd* [2013] EWHC 1656 (Comm), [105].

[69] See [5–22].

[70] See [5–25].

[71] See [4–29].

[72] *Holme v Brunskill* (1878) 3 QBD 495 (CA); *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 (PC), 763–64; *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549, 558–59 (Mason CJ, Wilson, Brennan and Dawson JJ), *cf* 568–69 (Deane J).

[73] For the position in reinsurance where the original policy is varied, see, eg, *Lower Rhine and Würtemberg Insurance Association v Sedgwick* [1899] 1 QB 179 (CA); *Norwich Union Fire Insurance Society v Colonial Mutual Fire Insurance Co* [1922] 2 KB 461 (KB); *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 Lloyds Rep 161, [109]–[111] (Rix LJ).

simply to determine the extent of the indemnifier's responsibility as a matter of construction of the contract. That is, the issue is whether the altered loss or liability remains within the scope of the indemnity as originally agreed, not whether the indemnifier has been 'discharged' by certain events.

An old decision concerning an indemnity against liability is *Webster v Petre*.[74] The claimant was liable on a bond to the Crown, conditioned to be void if a certain railway were completed on time. The defendants promised to indemnify the claimant against 'all liability which he . . . might incur in giving the said bond . . . to the extent of £10,000'. The railway was abandoned and, pursuant to a statute enacted after the bond had been given, the claimant arranged for the bond to be cancelled in return for the claimant paying a sum into court. Pollock B accepted that the rule in *Holme v Brunskill*[75] could apply to discharge the defendants if these events amounted to a variation of the claimant's liability without the defendants' consent. The decision essentially turned on the construction of the scope of the indemnity.[76] The payment by the claimant answered the description of a liability which he might incur in giving the bond; it was not a variation of the indemnified liability.

More recent decisions are divided. Dicta in English cases weigh against applying the variation rule to indemnities.[77] In Canada, the variation rule has been applied.[78] The position in New Zealand is not clear.[79] In Australia, the point was touched on in *Schoenhoff v Commonwealth Bank of Australia*.[80] The argument of the guarantors/indemnifiers proceeded on the basis that the principal contract *could* be varied, subject to any express or implied term to the contrary.[81] The assertion of such an implied term failed because it was inconsistent with an express term stating that the guarantors'/indemnifiers' liability was not affected by a variation.[82] Stein AJA left open the question of whether the variation rule applied to indemnities.

[5–23] **Allowance of time.** Where there is an indemnity to a creditor against loss arising from the debtor's default or non-performance, it appears that the allowance of time by the creditor to the debtor will not necessarily discharge the indemnifier.[83] Where there is an

[74] *Webster v Petre* (1879) 4 Ex D 127.

[75] *Holme v Brunskill* (1878) 3 QBD 495 (CA).

[76] *Webster v Petre* (1879) 4 Ex D 127, 131.

[77] *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189; [2009] 1 Lloyd's Rep 595, [1] (Kay LJ); *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch); [2011] 2 All ER (Comm) 307, [26]–[27]. *cf Scottish & Newcastle plc v Raguz* [2003] EWCA Civ 1070; [2004] L & TR 11, [8] (Morritt VC) (discounting applicability of other rules for discharge but not specifically mentioning the variation rule); *Marubeni Hong Kong and South China Ltd v Ministry of Finance of Mongolia* [2005] EWCA Civ 395; [2005] 1 WLR 2497, [35] (Carnwath LJ); *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA* [2013] EWCA Civ 644; [2013] 2 All ER (Comm) 760, [30], [57] (Sir Bernard Rix).

[78] *Guinness Tower Holdings Ltd v Extranc Technologies Inc* [2004] BCSC 367; *1212763 Ontario Ltd v Bonjour Café* [2012] ONSC 823.

[79] *cf Friedlander v Rusher* [2002] NZCA 195, [25]–[29] (apparently suggesting rule may apply).

[80] *Schoenhoff v Commonwealth Bank of Australia* [2004] NSWCA 161. *cf Total Oil Products (Australia) Pty Ltd v Robinson* [1970] 1 NSWR 701 (CA), 704–05 (Asprey JA).

[81] *cf Friedlander v Rusher* [2002] NZCA 195, [30]–[33].

[82] *Schoenhoff v Commonwealth Bank of Australia* [2004] NSWCA 161, [27]–[29] (Stein AJA).

[83] *Western Credit Ltd v Alberry* [1964] 1 WLR 945 (CA), 950 (Davies LJ); *Peters v NZHB Holdings Ltd* [2004] NZCA 245, [23]; *Walker Crips Stockbrokers Ltd v Savill* [2007] EWHC 2598 (QB), [76]; *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189; [2009] 1 Lloyd's Rep 595, [1] (Kay LJ); *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch); [2011] 2 All ER (Comm) 307, [27].

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indemnity to a debtor in respect of a liability to the creditor, the indemnifier will not be discharged merely because the creditor allows more time to pay.[84]

This position has been reached in the indemnity cases without close consideration of the basis for the rule as it applies to guarantees. There, the rationale for discharge is said to be that it would otherwise lead to one of two unacceptable consequences where the guarantor makes timely payment to the creditor. Either the guarantor's position would be altered because it would be barred from exercising, by subrogation, the creditor's rights against the debtor until the extended period has elapsed; or the guarantor could sue at the original time but with the effect of undermining the agreement between the creditor and debtor.[85]

The fundamental premise seems to be that, as the guarantor's obligation corresponds to the debtor's, the guarantor is entitled to be discharged from the liability to the creditor at the time originally fixed for performance by the debtor and, if necessary, may proceed immediately against the debtor. That premise does not hold for indemnities generally. Whether the indemnity applies to a liability to a third party, or to non-performance by a third party, the essential concern is loss to the indemnified party, not timely performance of the indemnified obligation. Actual loss may not crystallise until some time after the indemnified obligation has fallen due for performance.[86]

The reluctance to extend this rule of discharge to indemnities may also reflect existing dissatisfaction with the rule as it applies to guarantees.[87]

[5–24] **Release of debtor by creditor.** Indemnities against claims by or liabilities to third parties must be distinguished from indemnities against loss from non-performance by a third party.[88]

Under an indemnity against claims or liabilities, the indemnified party is the debtor. Where the third party creditor releases the indemnified debtor without payment, the indemnifier will not thereafter be obliged to perform the indemnity. This is not because the indemnifier is 'discharged' by the release. Rather, the potential loss against which the indemnity was to protect the debtor, namely, the liability to the third party, has ceased to exist. The indemnified debtor requires no further protection and so the indemnity lacks subject-matter upon which to operate.[89]

An indemnity against non-performance by a third party is primarily concerned with a different kind of loss, namely, the indemnified creditor's failure to receive performance from the debtor. The creditor's release of the debtor before the debtor has fully performed confirms that the creditor will not receive the expected performance; a potential loss may

[84] *Way v Hearn* (1862) 11 CBNS 774; 142 ER 1000; *Way v Hearn* (1862) 13 CBNS 292; 143 ER 117. See generally *Scottish & Newcastle plc v Raguz* [2003] EWCA Civ 1070; [2004] L & TR 11, [8] (Morritt VC); *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235; (2008) Aust Contract R 90-274, [128] (Spigelman CJ) (point not pressed on appeal: *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570, [7]).

[85] *Polak v Everett* (1876) 1 QBD 669 (CA), 673–74 (Blackburn J); *Swire v Redman* (1876) 1 QBD 536 (QB), 541–42 (Cockburn CJ and Blackburn J); *Deane v City Bank of Sydney* (1905) 2 CLR 198, 210–11. *cf Moschi v Lep Air Services Ltd* [1973] AC 331 (HL), 348 (Lord Diplock).

[86] See [6–23] (liabilities), [9–32]–[9–34] (non-performance).

[87] *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235; (2008) Aust Contract R 90-274, [128] (Spigelman CJ).

[88] Falling somewhere between the two situations discussed in the text is *Total Oil Products (Australia) Pty Ltd v Robinson* [1970] 1 NSWR 701 (CA) (A indemnifying B against liability as guarantor of C's obligations to D; B releasing C from obligations under separate agreement between them).

[89] See further [7–30]. *cf Union Bank of Australia Ltd v Rudder* (1911) 13 CLR 152, 163 (Griffith CJ).

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still remain. For this reason it is not appropriate to rely on the principle, drawn from the liability cases, that a 'liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms'.[90] Nor do guarantees provide a direct analogy. The creditor's release of the debtor discharges the guarantor because the guarantor's obligation is dependent upon the debtor's.[91] That is not an inherent characteristic of a promise of indemnity.[92]

Whether the indemnity continues to operate notwithstanding the indemnified creditor's release of the debtor is ultimately a matter of construction.[93] An indemnity can remain effective after a debtor has been released on other grounds, if there is sufficiently clear language in this respect.[94] Conversely, the absence of an enforceable liability of the debtor to the indemnified creditor may lead to the result that there is no relevant loss within the scope of the indemnity.[95]

Other characterisations of events are also possible. It may be that the indemnified creditor has exacerbated the indemnified loss by acting unreasonably in releasing the debtor; alternatively, the indemnified creditor may have impaired or extinguished rights to which the indemnifier would succeed by subrogation.[96] On either basis, the indemnifier's liability could be reduced by an amount corresponding to the extent of the prejudice.

Dealings Affecting the Indemnifier

[5–25] **Rights that diminish the loss.** The indemnified party's dealings with rights against others or securities associated with the indemnified subject-matter may affect the indemnifier in two ways. First, where such rights are exercised by the indemnified party before indemnification, the loss may be diminished and the extent of the indemnifier's liability reduced accordingly. Secondly, upon payment in full, the indemnifier is by subrogation entitled to exercise rights possessed by the indemnified party in diminution of the indemnified loss. By impairing or releasing such rights, the indemnified party may reduce the extent to which the indemnifier can recoup itself and so increase the loss the indemnifier ultimately must bear. This rationale applies to promises of indemnity in all forms.

A requirement to acquire or maintain rights against third parties or to securities may be a promissory term of the contract of indemnity, or a condition precedent to the obligation to indemnify.[97]

[90] Contrast *Housing Guarantee Fund Ltd v Johnson* (1995) V Conv R 54-524 (FC), 66,223 (Ormiston J); *McIntosh v Linke Nominees Pty Ltd* [2008] QCA 275, [29] (Muir JA), [46] (Douglas J). The quoted text is from *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA), 189 (Lindley MR).

[91] *cf* JC Phillips, *The Modern Contract of Guarantee*, 2nd English edn (London, Sweet & Maxwell, 2010), 382–83, paras 6-54, 6-56.

[92] See [9–12].

[93] *McIntosh v Linke Nominees Pty Ltd* [2008] QCA 275, [29] (Muir JA), [46] (Douglas J). *cf Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch); [2011] 2 All ER (Comm) 307, [27].

[94] *Clement v Clement* (CA, 20 October 1995); *Sandtara Pty Ltd v Abigroup Ltd* (1996) 42 NSWLR 491 (CA) (disclaimer by liquidator of debtor company); *Citibank Savings Ltd v Nicholson* (1997) 70 SASR 206 (SC), 235–36 (dissolution of debtor company). See generally [9–48].

[95] *cf* [9–41].

[96] See [5–25]–[5–26].

[97] See, eg, *James v Surf Road Nominees Pty Ltd* [2004] NSWCA 475, [65]–[67], [76], [81] (implied tern in deed of guarantee and indemnity). *cf Australia and New Zealand Banking Group Ltd v Beneficial Finance Corp Ltd* [1983] 1 NSWLR 199 (PC), 203 (unsuccessful argument that obtaining security by a particular date was a condition precedent to indemnity).

There is also a more general limitation applicable to non-insurance indemnities, though it is relatively undeveloped. An analogy may be drawn with guarantees or indemnity insurance.[98] A guarantor's liability may be reduced pro tanto by certain acts of the creditor that adversely affect securities relating to the guaranteed obligations, and to the benefit of which the guarantor is or would have been entitled upon payment.[99] In indemnity insurance, it has been said that the insured 'may not release, diminish, compromise or divert the benefit of any right to which the insurer is or will be entitled to succeed and enjoy under his right of subrogation'.[100] Another formulation is that the insured must act in good faith and reasonably with regard to the insurer's interests.[101] The duty has been characterised as equitable in nature[102] or based upon an implied term.[103] A breach does not absolutely discharge the insurer, but the insurer has a countervailing claim against the insured for compensation for the resulting loss.

[5–26] **Illustrations.** *Hodgson v Hodgson*[104] is a leading example. The defendant promised to indemnify the claimant against his liability as a co-surety for the due administration of a lunatic's estate. The claimant paid sums due for maladministration, released his co-surety from any claims for contribution, and then claimed the full amount paid from the defendant. The defendant was thus deprived of the benefit of the claimant's right to contribution from the co-surety, to which she would have succeeded upon indemnifying the claimant. It was held accordingly that the defendant was relieved pro tanto from the obligation to indemnify.

Another illustration may be *Goulston Discount Co Ltd v Sims*.[105] A vehicle let on hire-purchase was rendered a total loss in an accident. The vehicle had been insured for £200 but the finance company accepted a lesser sum and used that figure to calculate its loss in its claim for indemnity under a separate recourse agreement with a motor dealer. It was held that the finance company had to account for the full insured value, as that was what it 'ought reasonably to have received'. One explanation[106] is that the finance company, as the indemnified party, had improperly exercised a right to which the indemnifier would have been subrogated. The recourse agreement provided that, upon payment, the motor dealer would become entitled to the finance company's rights 'in respect of the hirer, the goods

[98] See, eg, *Barclays Bank plc v Kingston* [2006] EWHC 533 (QB); [2006] 2 Lloyd's Rep 58, [36] (creditor owes indemnifier same duty as guarantor in relation to realisation of securities).

[99] See generally Phillips, *The Modern Contract of Guarantee* (n 91), 499–502, paras 8-49–8-54; G Andrews and R Millett, *Law of Guarantees*, 6th edn (London, Sweet & Maxwell, 2011), 428–40, paras 9-041–9-043.

[100] *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228, 241 (Barwick CJ). See also *West of England Fire Insurance Co v Isaacs* [1897] 1 QB 226 (CA); *Phoenix Assurance Co v Spooner* [1905] 2 KB 753 (KB); *Arthur Barnett Ltd v National Insurance Co of New Zealand* [1965] NZLR 874 (CA). See generally C Mitchell and S Watterson, *Subrogation Law and Practice* (Oxford, Oxford University Press, 2007), 370–73, paras 10.157–10.164.

[101] *Horwood v Land of Leather Ltd* [2010] EWHC 546 (Comm); [2010] Lloyd's Rep IR 453, [67]. *cf Globe & Rutgers Fire Insurance Co v Truedell* [1927] 2 DLR 659 (Ont CA).

[102] *Commercial Union Assurance v Lister* (1874) LR 9 Ch App 483, 487 (James LJ).

[103] *Sola Basic Australia Ltd v Morganite Ceramic Fibres Pty Ltd* (NSWCA, 11 May 1989), 32 (Meagher JA); *Horwood v Land of Leather Ltd* [2010] EWHC 546 (Comm); [2010] Lloyd's Rep IR 453, [56]–[67].

[104] *Hodgson v Hodgson* (1837) 2 Keen 704; 48 ER 800 (referred to with approval: *Hancock v Williams* (1942) 42 SR (NSW) 252 (FC), 256 (Jordan CJ)).

[105] *Goulston Discount Co Ltd v Sims* (1967) 111 SJ 682 (CA). *cf Barclays Bank plc v Kingston* [2006] EWHC 533 (QB); [2006] 2 Lloyd's Rep 58, [36].

[106] See [4–33] for another explanation.

and any other indemnifier'.[107] The dealer's liability as indemnifier was, in effect, reduced pro tanto.

It appears that the indemnified party can relinquish a right as part of a reasonable settlement within the scope of the indemnity. In *Comyn Ching & Co Ltd v Oriental Tube Co Ltd*,[108] the indemnified party was one of several parties to an agreement to settle disputes arising out of a construction project. The settlement terms required the indemnified party to pay a sum to the employer and to surrender a claim against another. The indemnifier objected that it had been prejudiced by the abandonment of the claim. Goff LJ held that the reasonableness of the settlement was to be determined as a whole. As the settlement was reasonable overall, the indemnifier's objection was dismissed.[109]

[5–27] **Release of co-indemnifier.** A threshold question is whether the arrangement between the indemnified party and a co-indemnifier releases the latter. In *Johnson v Davies*,[110] for example, one of three joint indemnifiers entered a voluntary arrangement, in which the indemnified parties participated, under the Insolvency Act 1986. A term of the arrangement stated: 'When all moneys to be made available under these proposals have been realised and distributed to creditors in accordance with the terms herein I will be released from any further liability to them'. It was held that the arrangement did not effect an absolute or immediate release of the indemnified parties' claim against the insolvent indemnifier. The other joint indemnifiers were, therefore, still bound to perform the indemnity.

Where there is a release, in the strict sense, of one co-indemnifier, other co-indemnifiers may be discharged:

(1) absolutely, by the common law rule that a release of one of joint or joint and several debtors releases all;[111]
(2) absolutely, because the indemnity is subject to an express or implied condition that other co-indemnifiers remain liable;[112] or
(3) to the extent that the right to contribution from the released co-indemnifier has been prejudiced.

In applying the common law rule concerning releases, a distinction has traditionally been drawn between a release and a mere covenant not to sue.[113] The latter arrangement does not discharge the liabilities of other co-debtors to the creditor. This distinction has been

[107] This provision might explain the departure from the usual rule that insurance recoveries are not counted as diminishing the loss for the purposes of a later claim on a contractual non-insurance indemnity: see [4–38]–[4–39], [4–74].

[108] *Comyn Ching & Co Ltd v Oriental Tube Co Ltd* (1979) 17 BLR 47 (CA).

[109] *Comyn Ching & Co Ltd v Oriental Tube Co Ltd* (1979) 17 BLR 47 (CA), 90–91.

[110] *Johnson v Davies* [1999] Ch 117 (CA). See also *Field v Robins* (1838) 8 Ad & E 90; 112 ER 770.

[111] See generally *Nicholson v Revill* (1836) 4 Ad & E 675; 111 ER 941; *Re EWA (a debtor)* [1901] 2 KB 642 (CA); *Walker v Bowry* (1924) 35 CLR 48; *Deanplan Ltd v Mahmoud* [1993] Ch 151 (Ch). But see, in New Zealand, *Robinson v Tait* [2001] NZCA 217; [2002] 2 NZLR 30, [75]–[77] (Keith, Blanchard and McGrath JJ) (joint and several liability).

[112] As to a condition that a co-indemnifier *become* liable, see: *Fitzgerald v McCowan* [1898] 2 IR 1 (QB); *Richview Investments Inc v Dynasty Social Club* (1997) 87 BCAC 223 (CA); *Capital Bank Cashflow Finance Ltd v Southall* [2004] EWCA Civ 817; [2004] 2 All ER (Comm) 675, [15]–[17] (Mance LJ).

[113] *Solly v Forbes* (1820) 2 Br & B 38; 129 ER 871; *Re EWA (a debtor)* [1901] 2 KB 642 (CA), 648–49 (Collins LJ); *Deanplan Ltd v Mahmoud* [1993] Ch 151 (Ch), 170.

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criticised in England,[114] where the appropriate perspective may now be to consider whether the releasing party has given an absolute release or a release with a reservation of its rights against others.[115]

[5–28] **Where release affects right to contribution.** A creditor's release of one co-guarantor will discharge other co-guarantors to the extent that the release impairs their right to contribution from the released co-guarantor in relation to the guaranteed obligations.[116] The question is whether co-indemnifiers ought to be protected in the same manner as co-guarantors, assuming that the right to contribution exists or would exist among the co-indemnifiers, and that the indemnified party's release of one (or more) of them has adversely affected that right.[117] Two considerations suggest an affirmative answer. First, the rule as it applies to guarantees is concerned with the share of the burden ultimately borne by a co-guarantor in respect of the guaranteed obligations. This same concern applies to co-indemnifiers in relation to the indemnified loss. Secondly, there is a close connection between this rule and the rule that a guarantor is discharged pro tanto where the creditor impairs or releases securities for the guaranteed obligations.[118] An analogous principle has been recognised for promises of indemnity.[119]

[5–29] **Other conduct that prejudices the indemnifier.** Canadian decisions aside, it is difficult to find support for the discharge of an indemnifier on the general ground of prejudicial conduct by the indemnified party.[120] Such conduct might still be challenged on another basis, for example, as unreasonable conduct that increases loss under the indemnity.[121] In Canada, principles applicable in the law of guarantees[122] have been extended to indemnities against non-performance by a third party. Thus, an indemnifier will be absolutely discharged where the indemnified party commits a breach of the principal contract which materially increases the magnitude, or likelihood of materialisation, of the risk accepted by the indemnifier under the indemnity.[123]

Unfair Contract Terms

[5–30] **Unfair Contract Terms Act 1977.** Some forms of indemnity are regulated by the Unfair Contract Terms Act 1977. Two important sets of restrictions are set out in

[114] In New Zealand, *cf Robinson v Tait* [2001] NZCA 217; [2002] 2 NZLR 30, [69]–[77] (Keith, Blanchard and McGrath JJ). The distinction continues to be observed in Australia: *Dorgal Holdings Pty Ltd v Buckley* (1996) 22 ACSR 164 (NSWSC), 167; *Murray-Oates v Jjadd Pty Ltd* [1999] SASC 537; (1999) 76 SASR 38 (FC), [83]–[87] (Wicks J); *Pollak v National Australia Bank Ltd* [2002] FCAFC 55, [14]–[17].

[115] *Watts v Aldington* (CA, 16 December 1993) (joint and several liability); *Johnson v Davies* [1999] Ch 117 (CA), 127–28 (Chadwick LJ) (joint liability). *cf Morris v Wentworth-Stanley* [1999] QB 1004 (CA), 1011–12 (Potter LJ) (joint liability).

[116] See generally Phillips (n 91), 490–91, paras 8-26–8-28; Andrews and Millett, *Law of Guarantees* (n 99), 426–28, para 9-040.

[117] *cf Gainers Inc v Edmonton Oilers Hockey Corp* (1994) 164 AR 39 (Alta QB), 45–46.

[118] See, eg, *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 (PC), 764–66; *Re Wolmershausen* (1890) 62 LT 541 (Ch), 546; *Hancock v Williams* (1942) 42 SR (NSW) 252 (FC), 256 (Jordan CJ).

[119] See [5–25], [5–26].

[120] *cf Scottish & Newcastle plc v Raguz* [2006] EWHC 821 (Ch); [2006] 4 All ER 524, [101]–[103] (affd without consideration of this point: *Scottish & Newcastle plc v Raguz* [2008] UKHL 65; [2008] 1 WLR 2494); *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2011] EWHC 2718, [46]–[47].

[121] See [4–30]–[4–33].

[122] See *Bank of Montreal v Wilder* [1986] 2 SCR 551.

[123] *Jens Hans Investments Co Ltd v Bridger* [2004] BCCA 340; (2004) 29 BCLR (4th) 1. See also [9–47].

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sections 2 and 4. Certain exceptions aside, these sections apply to contractual indemnities against business liabilities. A business liability is one that arises from conduct in the course of a business, or from the occupation of premises used for business purposes.[124] In the following discussion, assume that A has promised to indemnify B against such liabilities. The nature of the restriction then depends on the circumstances.

If the indemnity applies to B's liability to A, then the indemnity is similar to a clause that excludes or limits B's liability to A.[125] The indemnity is rendered ineffective insofar as it covers B's liability to A for death or personal injury resulting from negligence.[126] Whether the indemnity is effective to protect B against liability in negligence for other loss or damage to A depends on whether the indemnity satisfies the requirement of reasonableness.[127] These restrictions are concerned with an effective exclusion or limitation of liability between B and A, as the victim. They do not apply where B (possibly along with A) is liable to C, and seeks to enforce the indemnity from A in respect that liability.[128] The indemnity operates inter partes and does not affect C's rights against A or B. These restrictions can apply where A and B are commercial parties.[129]

Where A deals as a consumer there is another, broader restriction.[130] It applies where the indemnity covers B's liability to A or to another, C.[131] B's liability may be in negligence or for breach of contract. The indemnity is ineffective except to the extent that it satisfies the test of reasonableness. There is no express distinction between liability for personal harm and liability for other loss or damage.

Enforcement Generally

Scope

[5–31] **Requirement for loss within scope.** The fact that the indemnified party has suffered or will suffer loss is not a sufficient basis for enforcing the indemnity. There must be an actual or potential loss within the scope of the indemnity.[132] In the case of preventive indemnities, if there is no actual loss within scope, there is no breach of contract by failing to indemnify. If there is no potential loss within scope, there is no reason to order specific enforcement of the indemnity. Similarly, an indemnifier under a compensatory indemnity only promises to protect the indemnified party against losses within scope. If there is no loss within scope, the promise to indemnify is not enlivened. The indemnity cannot be enforced directly against the indemnifier, nor can the indemnifier be liable for a failure to perform the indemnity.

[124] Unfair Contract Terms Act 1977, s 1(3).

[125] See generally ch 8. *cf* Unfair Contract Terms Act 1977, s 13(1)(b).

[126] Unfair Contract Terms Act 1977, s 2(1).

[127] Unfair Contract Terms Act 1977, ss 2(2), 11. See *Phillips Products Ltd v Hyland* [1987] 1 WLR 659n (CA).

[128] *Thompson v T Lohan (Plant Hire) Ltd* [1987] 1 WLR 649 (CA); *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd (The Casper Trader)* [1991] 2 Lloyd's Rep 550 (QB).

[129] See generally R Brownsword and J Adams, 'Double Indemnity – Contractual Indemnity Clauses Revisited' [1988] *Journal of Business Law* 146.

[130] Unfair Contract Terms Act 1977, s 4.

[131] Unfair Contract Terms Act 1977, s 4(2)(b).

[132] *AMF International Ltd v Magnet Bowling Ltd* [1968] 1 WLR 1028 (QB), 1060.

[5–32] Protection against loss within scope. The indemnified party is entitled to be protected against any and all loss within the scope of the indemnity.[133] The proposition is widely accepted, but is so basic that it is often assumed rather than articulated. In *Zaccardi v Caunt*,[134] Campbell JA observed that 'the amounts that can be recovered under an indemnity depend simply upon whether a loss that the person indemnified has suffered falls within the scope of the indemnity'.[135] Lord Hoffmann made a similar observation in *Caledonia North Sea Ltd v British Telecommunications plc (The Piper Alpha)*.[136] Considering the recovery of sums paid on behalf of the indemnified party in settlements with claimants, Lord Hoffmann said:[137]

> The liability either falls within the scope of the indemnity or it does not. The kind of loss for which indemnity was claimed fell within the indemnity simply because it was loss arising out of liability for death or injury in respect of the contractor's employees.

[5–33] Onus of proof. Enforcement of an indemnity in respect of a loss generally involves two stages. The scope of the indemnity is first ascertained. The indemnity is then applied to the circumstances, to determine whether there is a loss within scope and, if so, to ascertain the amount of the loss.[138]

The onus of establishing facts that satisfy particular elements of the indemnity may be cast upon one or the other party expressly by the terms of the contract.[139] Where there is no such express provision, it is necessary to distinguish: (1) elements that define the basis of the general promise to indemnify, from (2) those elements that form a limited exception or qualification to the general promise to indemnify. The distinction is not always easy to draw and is ultimately a matter of construction. The legal onus generally rests upon the indemnified party to establish satisfaction of the former elements, and upon the party relying on the limited exception or qualification to establish satisfaction of the latter elements.[140] Thus, the onus generally rests upon the indemnified party to prove the facts that establish a loss that is, prima facie, within the affirmative definition of the scope of the indemnity, and upon an indemnifier to establish facts that bring the loss within an exception to scope.

[133] See, eg, *Furness Shipbuilding Co Ltd v London and North Eastern Railway Co* (1934) 50 TLR 257 (HL), 259 (Lord Atkin); *Scottish & Newcastle plc v Raguz* [2008] UKHL 65; [2008] 1 WLR 2494, [16] (Lord Hope), [72] (Lord Walker); *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)* [2012] UKSC 17; [2012] 2 WLR 976, [10]–[13] (Lord Sumption), [34] (Lord Phillips), [58]–[59] (Lord Clarke). See also *Australian Coastal Shipping Commission v PV 'Wyuna'* (1964) 111 CLR 303, 306 (Barwick CJ), 310 (Kitto J), 311 (Menzies J), 316–17 (Owen J); *Davis v Commissioner for Main Roads* (1967) 117 CLR 529, 536 (Menzies J), 537–38 (Kitto J).

[134] *Zaccardi v Caunt* [2008] NSWCA 202.

[135] *Zaccardi v Caunt* [2008] NSWCA 202, [33].

[136] *Caledonia North Sea Ltd v British Telecommunications plc (The Piper Alpha)* [2002] UKHL 4; [2002] 1 Lloyd's Rep 553.

[137] *Caledonia North Sea Ltd v British Telecommunications plc (The Piper Alpha)* [2002] UKHL 4; [2002] 1 Lloyd's Rep 553, [100].

[138] *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)* [2012] UKSC 17; [2012] 2 WLR 976, [58] (Lord Clarke). See also [4–5].

[139] See, eg, *J Fenwick & Co Pty Ltd v Australian Coastal Shipping Commission* [1965] NSWR 97 (SC), 104 (proof of unseaworthiness).

[140] *Federal Steam Navigation Co Ltd v J Fenwick & Co Pty Ltd* (1943) 68 CLR 553, 563 (Latham CJ); *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos) (No 2)* [2012] UKSC 17; [2012] 2 WLR 976, [59] (Lord Clarke); *Tetra Pak Manufacturing Pty Ltd v Challenger Life Nominees Pty Ltd* [2013] NSWSC 349, [47]. In insurance, see *Munro, Brice & Co v War Risks Association* [1918] 2 KB 78 (KB), 88–89; *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* (1942) 42 SR (NSW) 231 (FC), 237 (Jordan CJ); *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* [2010] HCA 9; (2010) 240 CLR 444, [25]–[28]; *Omega Proteins Ltd v Aspen Insurance UK Ltd* [2010] EWHC 2280 (Comm); [2011] 1 All ER (Comm) 313, [88]–[95]. See also [5–11] (onus and conditions precedent).

Indemnified Parties and Others

[5–34] Loss to an indemnified party. The general rule is that the loss must be to a person who, according to the terms of the contract, is to be protected by the promise of indemnity. It makes little sense to indemnify one person against a loss to another. The point has arisen in several cases concerning share sales, where there has been a promise to indemnify the purchaser in respect of a liability of the company whose shares are being sold.[141] In *Waterloo Holdings Pty Ltd v Timso*[142] the deed effecting the share sale included a draft financial statement for the company and an indemnity from the vendor to the purchaser against 'any liabilities of the company which exist at this date and which are not shown in such financial statements'. The purchaser later discovered undisclosed liabilities of the company and claimed under the indemnity. Sheller JA, with whom Powell JA agreed, described the language used in the indemnity clause as 'obscure and intractable'. Sheppard AJA considered that it was not a 'true' indemnity. The vendor, as indemnifier, was not promising to protect the company against its liabilities; nor was an undisclosed liability of the company a direct liability or loss of the purchaser as the indemnified party. The relevant loss to the purchaser was the diminution in the value of the shares purchased, but the indemnity clause was not drafted in those terms. Sheppard AJA was prepared to construe the clause as a simple promise to pay the purchaser the amount of any liabilities that were existing at the time of the sale but undisclosed in the financial statements.

A different approach was taken in *Kostka v Addison*.[143] The vendors of the shares indemnified the purchasers against 'all claims, demands or liabilities against or of the Company . . . whether contingent or actual, or which may accrue or become due at any subsequent date'. A third party obtained judgment against the company and the purchasers sought to set-off amounts payable by the vendors under the indemnity against amounts owing to the vendors under the contract of sale. McPherson J remarked that the promise was not an indemnity 'in the ordinary sense' because it was not directly concerned with a loss to the purchasers, but rather a liability of the company. Assuming that ordinary indemnity principles could still be applied, McPherson J allowed the purchasers credit for the full amount of the judgment against the company, on the basis that the purchasers could have obtained in equity an order for payment to themselves of that sum. Whether that form of relief would properly have been available in the circumstances is unclear.[144] The result is open to the criticism that this sum may not have reflected the purchasers' true loss. McPherson J himself acknowledged that the measure of damages for breach of the indemnity clause would not necessarily be the amount of the judgment against the company.[145]

[5–35] The effect of assignment.[146] Subject to any contrary terms in the contract, the benefit of a non-insurance promise of indemnity is generally regarded as non-personal and

[141] In addition to the cases referred to in the text, see *De Santo v Munduna Investments Ltd (in liq)* (1981) 12 ATR 517 (NSWCA). For a different context, see *Morgan Grenfell Development Capital Syndications Ltd v Arrows Autosports Ltd* [2004] EWHC 1015 (Ch), [58]–[59] (financing arrangement).

[142] *Waterloo Holdings Pty Ltd v Timso* (NSWCA, 28 August 1997).

[143] *Kostka v Addison* [1986] 1 Qd R 416 (SC).

[144] McPherson J was influenced by the interest rule, as to which see [7–44], [7–56], [7–62].

[145] *Kostka v Addison* [1986] 1 Qd R 416 (SC), 419.

[146] See generally GJ Tolhurst, *The Assignment of Contractual Rights* (Oxford, Hart Publishing, 2006), 395–96, para 8.13.

assignable.[147] Assignment does not alter the scope of the indemnity unless the terms of the contract indicate otherwise. The relevant loss continues to be the loss to the indemnified party/assignor and not the assignee; this is so even where the assignment is made before actual loss has occurred.[148] In *Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd*,[149] the indemnity was given to two parties, Darlings and Allied, in connection with a land reclamation project. The scope of the indemnity included claims, costs and damages 'to which Darlings or Allied shall or may be liable' by reason of the land filling being unsuitable, or the indemnifier failing to perform its obligations under the reclamation agreement. Allied sold part of the reclaimed land and assigned to the purchaser the benefit of the right to indemnity. Some time later, an environmental agency issued a contamination notice in relation to the land. It was held that the purchaser, as assignee of the indemnity, was not entitled to protection against its own losses or liabilities relating to the land. At most, the purchaser as assignee had a right to enforce the indemnity in respect of any losses suffered by Allied.[150]

There is, then, a risk of irrecoverable loss if the original indemnified party disposes of its interest in the subject-matter associated with the indemnity to the assignee for full value. The result may be different where the indemnified party is liable to the assignee and that liability is within the scope of the indemnity. Consider the following situation: A promises to indemnify B against a liability to C; B, being unable to meet a claim by C, assigns to C the benefit of the indemnity from A; C, as assignee, enforces the indemnity against A. C may obtain from A the full amount owed by B to C.[151] This is not, however, a matter of enforcing the indemnity in respect of a loss to C. The indemnity is enforced in respect of B's potential loss, namely, its liability to C. The amount of the potential loss to B corresponds to the amount owed to C. The situation is, therefore, only very loosely analogous to that where A provides to C a guarantee of B's debts.[152]

[5–36] Where indemnified person is not a party to the contract.[153] It is not uncommon for a party to seek protection for itself and others, such as its employees or agents, related companies in the same corporate group, or other contractors engaged in a common venture. Those persons may not be parties to the contract. Accordingly, consider the case where A promises to indemnify B and C, B is a party to the contract but C is not. Enforcement of the indemnity to protect C, as an intended beneficiary of the indemnity,[154] can be approached

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[147] *Maloney v Campbell* (1897) 28 SCR 228; *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA); *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA), 483–84 (Pickford LJ), 485–86 (Warrington LJ); *Taylor v Sanders* [1937] VLR 62 (FC), 65; *Geo Thompson (Aust) Pty Ltd v Vittadello* [1978] VR 199 (FC), 211 (Gillard J); *Shaw v Lighthousexpress Ltd* [2010] EWCA Civ 161, [16]–[18] (Jacob LJ). Contrast *Rendall v Morphew* (1914) 84 LJ Ch 517 (Ch). For the position in insurance, see J Birds, B Lynch and S Milnes, *MacGillivray on Insurance Law*, 12th edn (London, Sweet & Maxwell, 2012), 637–42, paras 21-001–21-010.

[148] See, eg, *Maloney v Campbell* (1897) 28 SCR 228, 233–34; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA); *Taylor v Sanders* [1937] VLR 62 (FC); *Housing Guarantee Fund Ltd v Yusef* [1991] 2 VR 17 (FC) (guarantee and indemnity); *Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd* (1996) 40 NSWLR 282 (SC).

[149] *Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd* (1996) 40 NSWLR 282 (SC).

[150] *Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd* (1996) 40 NSWLR 282 (SC), 290–92.

[151] See [7–50].

[152] *cf British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA), 484 (Pickford LJ); *Taylor v Sanders* [1937] VLR 62 (FC), 66.

[153] See generally MP Furmston and JW Carter, 'Indemnities for the Benefit of Others' (2011) 27 *Journal of Contract Law* 82.

[154] If C is not an intended beneficiary of A's promise, C may attempt to obtain the benefit of B's indemnity from A, either by a claim against A as assignee (see [5–35]) or B (see [7–63]–[7–64]).

from two perspectives: C enforces the indemnity directly against A, or B enforces the indemnity against A for C's benefit.

[5–37] Direct enforcement by non-party. The obvious obstacle is the common law doctrine of privity. In England, and in some other common law jurisdictions, the indemnified non-party may circumvent that limitation by relying upon statute.[155] There are also Australian decisions accepting that non-insurance indemnities against liabilities to third parties may fall within a limited common law exception to the privity doctrine.[156] Another possibility is that a party to the contract purported to enter as agent for the indemnified principal.[157] The device of agency may require two further doctrinal matters to be resolved: the provision of consideration by or on behalf of the principal; and, where the terms of the indemnity refer to a class of indemnified persons, the principal may have to be known or ascertainable as a member of that class at the time of contract.[158]

[5–38] Enforcement by party for benefit of non-party. It may be possible to discern an intention to create a trust of the benefit of the indemnity, to be held by the contracting party for the indemnified non-party.[159] Although the indemnity is enforced by the contracting party as trustee, the relevant loss is that of the non-party as beneficiary.[160]

The law of trusts aside, the contracting party may seek to enforce the promise of indemnity as a primary obligation for the benefit of the non-party. Two different situations must be considered. Where the subject-matter of the indemnity is a loss to the indemnified non-party, or a liability of the indemnified non-party to another, the indemnity can, in appropriate circumstances, be specifically enforced. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[161] Mason CJ and Wilson J remarked that

> [t]here is no reason to doubt that the courts will grant specific performance of a contract of indemnity or insurance, even if it involves payment of a lump sum, at least where the payment is to be made to a third party, damages being an inadequate remedy.

There is a clear analogy with the enforcement of promises to pay a third party.[162]

[155] See Contracts (Rights of Third Parties) Act 1999; *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) (No 2)* [2005] EWCA Civ 519; [2005] 1 Lloyd's Rep 688; *Far East Chartering Ltd v Great Eastern Shipping Co Ltd (The Jag Ravi)* [2012] EWCA Civ 180; [2012] 1 Lloyd's Rep 637 (shipowner enforcing letter of indemnity issued to charterer). *cf Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd* (1996) 40 NSWLR 282 (SC) (unsuccessful attempt to rely upon Conveyancing Act 1919 (NSW), s 70).

[156] *Sandtara Pty Ltd v Abigroup Ltd* (NSWSC, 25 and 29 September 1997); *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 149, [250]–[255] (extending the exception recognised in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 123–24 (Mason CJ and Wilson J), 172 (Toohey J)).

[157] See, eg, *Borkan General Trading Ltd v Monsoon Shipping Ltd (The Borvigilant and The Romina G)* [2003] EWCA Civ 935; [2003] 2 Lloyd's Rep 520.

[158] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1987) 8 NSWLR 270 (CA), 276–77 (McHugh JA); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 112–13 (Mason CJ and Wilson J). But see P Watts and FMB Reynolds, *Bowstead & Reynolds on Agency*, 19th edn (London, Sweet & Maxwell, 2010), 78–80, para 2-065. *cf* the requirement under Contracts (Rights of Third Parties) Act 1999, s 1(3).

[159] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; *Sandtara Pty Ltd v Abigroup Ltd* (NSWSC, 25 and 29 September 1997); *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 149, [256]–[262]. *cf Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451 (HL), 467–68 (Lord Reid) (insurance of goods by bailee).

[160] *cf Lloyd's v Harper* (1880) 16 Ch D 290 (CA), 321 (Lush J); *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 501 (Windeyer J); *Beswick v Beswick* [1968] AC 58 (HL), 88 (Lord Pearce), 101 (Lord Upjohn).

[161] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 120. See also *Morgan Grenfell Development Capital Syndications Ltd v Arrows Autosports Ltd* [2004] EWHC 1015 (Ch), [49]; *Affinity Health Pty Ltd v Symbion Health Ltd* [2011] VSC 210, [22].

[162] See, eg, *Beswick v Beswick* [1968] AC 58 (HL).

stated in the special case – was if Wiseman & Co had incurred costs to their own attorney prior to that date.[15]

In *Ex p Wiseman*, the indemnified party was kept harmless up to the point of the indemnifier's bankruptcy but later sustained loss by paying the amount of the judgment and costs. If, however, the indemnifier successfully defends the action against the indemnified party, there is no cause for the indemnified party to pay and so loss is avoided.

[7–9] Unsuccessful defence of action. If the defence mounted by the indemnifier is unsuccessful, the indemnified party will become liable for the judgment sum and, usually, costs. In *Ex p Wiseman; re Kelson, Tritton & Co*,[16] Mellish LJ explained how the indemnifier could have performed the indemnity in that situation:

> [I]f Kelson, Tritton, & Co had continued to defend the action through their own attorney, and then had paid the full sum recovered and the costs to [the claimant in the action] as soon as judgment was signed and before execution could be issued against Wiseman, the contract would never have been broken at all.

This is a specific instance of the more general point that the indemnifier can perform the indemnity by relieving the indemnified party from its liability to the third party.[17]

Extinction of Claim or Liability

[7–10] Payment to third party. The indemnifier can perform the indemnity by paying the third party to whom the indemnified party is, or is alleged to be, liable. The amount paid may be the amount of an undisputed liability of the indemnified party, or it may be an amount agreed in a settlement between the third party and indemnified party or indemnifier in satisfaction of the third party's claim. The purpose of the payment is to extinguish the claim or liability. If it is right to say that an unauthorised payment by a stranger to a creditor generally does not discharge the debtor's debt,[18] then some reason must be found to explain why payment by the indemnifier to the third party is accepted to be satisfactory performance of the indemnity.[19]

The most general explanation is that a promise of indemnity may carry with it, in the absence of contrary terms, an implied authority from the indemnified party to the indemnifier to discharge on its behalf liabilities that are the subject of the indemnity. In *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)*,[20] Lord Goff was prepared to accept that a P&I club's payment to a third party claimant on the insured's behalf would have been 'expressly or impliedly authorised or ratified' by the insured, and thus effective to discharge the insured's liability.

Of the more specific explanations, the first is that the indemnified party may be involved in the arrangements for the discharge of its liability such that its conduct confers the requisite authority on the indemnifier, or so that the arrangements amount to an agreement between the third party, the indemnified party and the indemnifier for the discharge of the liability.[21] A similar instance may be where the third party enforces the right to indemnity as an assignee from the indemnified party.[22]

Secondly, the indemnifier and indemnified party may both be liable to the third party in such a way that the indemnifier's payment discharges the indemnified party's obligation to the same extent. This may occur where they are joint debtors; or where the indemnifying debtor discharges the debt guaranteed by the indemnified party; or where the indemnifying party accommodated on a bill of exchange pays the bill in due course, thus discharging the bill and the indemnified party as accommodation acceptor;[23] or where the indemnifier and indemnified party are concurrent tortfeasors and the indemnifier compensates the victim for the whole of the loss.[24]

Thirdly, the exception for payments made under legal compulsion[25] might be extended to cases where the indemnifier acts pursuant to a court order to discharge the liability.[26]

Finally, even if the indemnifier's payment is unauthorised and does not, strictly, discharge the liability, it may produce a similar result. If the third party accepts the payment in satisfaction of the liability, a subsequent action against the indemnified party may be barred on the ground that it would be an abuse of process.[27]

[7–11] Other means of obtaining release or discharge. Other conduct by the indemnifier is sufficient if it discharges the indemnified party.[28] In *Betts v Gibbins*,[29] the indemnifier attempted to resolve a dispute by supplying replacement goods to the indemnified parties, to be offered to the third party. That offer was rejected by the third party and the indemnified parties then settled the action by payment. The indemnifier failed in his argument that the tender of replacement goods was sufficient performance of the indemnity.

Abandonment of Claim by Indemnifier

[7–12] Situations in which claim may arise. Assuming that A promises to indemnify B against B's liability to C, in some circumstances, A may make a claim that is connected with B's liability to C. There are two common situations:

[15] *Ex p Wiseman; re Kelson Tritton & Co* (1871) LR 7 Ch App 35, 42. Mellish LJ presumably meant that Wiseman had paid the costs and not merely incurred a liability for them: see [2–8], [6–23].

[16] *Ex p Wiseman; re Kelson Tritton & Co* (1871) LR 7 Ch App 35, 42.

[17] See [7–10].

[18] See generally C Mitchell, P Mitchell and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell, 2011), 128–33, paras 5-44–5-57. *cf Sheahan v Carrier Air Conditioning Pty Ltd* (1996) 189 CLR 407, 430–31 and fn 66 (Dawson, Gaudron and Gummow JJ).

[19] See, eg, *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 40 (Lord Jauncey).

[20] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 35.

[21] See, eg, *Ramsay v National Australia Bank Ltd* [1989] VR 59 (FC) (common director of indemnifier and indemnified companies arranging for bill to be drawn by indemnifier, discounted by creditor bank, and credited to account of indemnified party).

[22] See [7–50].

[23] Bills of Exchange Act 1882, s 59(3).

[24] *Jameson v Central Electricity Generating Board* [2000] AC 455 (HL), 466 (Lord Lloyd), 471–72 (Lord Hope); *Allison v KPMG Peat Marwick* [1999] NZCA 324; [2000] 1 NZLR 560; *Baxter v Obacelo Pty Ltd* [2001] HCA 66; (2001) 205 CLR 635, [47], [52]–[53] (Gleeson CJ and Callinan J), [62]–[67] (Gummow and Hayne JJ); *Heaton v AXA Equity and Law Life Assurance Society plc* [2002] UKHL 15; [2002] 2 AC 329, [3]–[4] (Lord Bingham).

[25] *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd* (1992) 63 P & CR 143 (CA), 148 (Fox LJ); *Ibrahim v Barclays Bank plc* [2012] EWCA Civ 640; [2013] Ch 400, [46]–[49] (Lewison LJ).

[26] Strictly, the order compels performance of an obligation owed by the indemnifier to the indemnified party, not the third party as payee. Alternatively, such cases could be rationalised as instances of authorised payments.

[27] *Hirachand Punamchand v Temple* [1911] 2 KB 330 (CA), 339–40 (Fletcher Moulton LJ), 341–42 (Farwell J); *Sheahan v Carrier Air Conditioning Pty Ltd* (1996) 189 CLR 407, 430–31 (Dawson, Gaudron and Gummow JJ).

[28] *Wilson v Lloyd* (1873) LR 16 Eq 60 (indemnified co-debtor in position of surety discharged by variation or allowance of time in compromise between indemnifying co-debtor and creditor); *Muhammad Issa El Sheikh Ahmad v Ali* [1947] AC 414 (PC), 426. See also [7–41].

[29] *Betts v Gibbins* (1834) 2 Ad & E 57; 111 ER 22.

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(1) A and B are under a common liability to C, such that A would be entitled to claim contribution from B in respect of that liability.
(2) A has a claim against C and that claim in turn forms the basis of C's claim against B.

In either situation, A may perform the indemnity by withholding or withdrawing a claim that A could otherwise advance.

Claims for Contribution

[7–13] **Abandoning claim for contribution.** It is necessary to make two assumptions. The first is that the scope of the indemnity covers the common liability to the third party. This may be controversial where, for example, the basis of the indemnified party's liability is negligence. The second assumption is that, but for the effect of the indemnity, the indemnifier would be entitled to obtain contribution from the indemnified party in respect of the common liability. Subject to contrary terms, an indemnity is generally construed to protect the indemnified party against the entire amount of a liability. There is no proportionate adjustment to reflect the indemnifier's and indemnified party's relative responsibility in bringing about the claimant's loss.[30] Accordingly, if the indemnifier were to obtain contribution from the indemnified party, then the latter would not be fully indemnified against the liability.

Abandoning a claim for contribution against the indemnified party may be a necessary, though not sufficient, act of performance. The indemnifier may also have to relieve the indemnified party of the liability to the third party.

Circular Indemnities and Similar Arrangements[31]

[7–14] **Carriage of goods.** The following situation can arise in transactions involving the carriage of goods.[32] The consignor (A) arranges transport with a carrier or freight forwarder (B) and all or part of the carriage of the goods is entrusted to some other party (C). B offers protection to C against claims for loss of or damage to the goods. The protection may take the form of an express or implied indemnity from B to C against claims generally or, perhaps, only to the extent they exceed C's liability to B under contract. A also indemnifies B against claims by other parties in relation to loss of or damage to the goods. That indemnity may be combined with: (1) a promise by A not to sue third parties, or a promise that no claims will be made against B by others; and/or (2) a *Himalaya* clause. The goods are lost or damaged owing to C's default. A sues C and perhaps also B. C seeks indemnity from B.[33] B claims against A relying, inter alia, on the indemnity from A against B's liability to C.

[30] See [4–45].
[31] See R Newell, 'Privity Fundamentalism and the Circular Indemnity Clause' [1992] *Lloyd's Maritime and Commercial Law Quarterly* 97; DA Glass, 'Bailment on Terms and Circular Indemnity' [1997] *Lloyd's Maritime and Commercial Law Quarterly* 478. See further [7–55].
[32] *cf Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd* [1974] 1 Lloyd's Rep 443 (QB); *Nippon Yusen Kaisha v International Import and Export Co Ltd (The Elbe Maru)* [1978] 1 Lloyd's Rep 206 (QB); *Broken Hill Pty Co Ltd v Hapag-Lloyd AG* [1980] 2 NSWLR 572 (SC); *Sidney Cooke Ltd v Hapag-Lloyd AG* [1980] 2 NSWLR 587 (SC); *China Ocean Shipping Co Ltd v PS Chellaram & Co Ltd* (1990) 28 NSWLR 354 (CA); *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 (FC); *Spectra International plc v Hayesoak Ltd* [1998] 1 Lloyd's Rep 162 (CA); *Chapman Marine Pty Ltd v Wilhelmsen Lines A/S* [1999] FCA 178.
[33] Contrast *PS Chellaram & Co Ltd v China Ocean Shipping Co Ltd* [1989] 1 Lloyd's Rep 413 (NSWSC), 429–30 (revd on other grounds: *China Ocean Shipping Co Ltd v PS Chellaram & Co Ltd* (1990) 28 NSWLR 354 (CA)).

If C's liability to A is within the scope of B's indemnity to C, and B's liability to indemnify C is within the scope of A's indemnity to B,[34] then A might, in effect, save B harmless by eliminating the motivation for C's claim against B. A withdraws its claim against C. Where B's indemnity to C applies only to C's excess liability, then A might save B harmless by confining its claim against C to the specified limit.

[7–15] **Other arrangements.** The same analysis can be extended by analogy to other situations. *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd*[35] arose out of a project for the construction of a methanol plant. The plant did not perform as intended and was severely damaged in an explosion. A, the employer, sued B, a contractor who supplied supervisory services, technology and know-how for the project, and also C, who had licensed the technology and know-how to B. C, in turn, claimed indemnity from B. Part of the dispute related to two indemnity provisions contained in a contract to which A and B, but not C, were parties. A promised to indemnify B against liability for loss of or damage to A's property. A separate provision stated, in effect, that references to B in the first provision would extend to include C.

The argument in relation to the first provision concerned its application to claims inter partes, rather than to claims by C against B. The indemnity as extended according to the second provision could not be enforced by C, but it was held that B could enforce the indemnity for C's benefit. The court ordered a stay of the proceedings by A against C.[36] This, in effect, eliminated B's potential liability to C.

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Payment to Indemnified Party

[7–16] **Payment to indemnified party.** The indemnifier may perform the indemnity by paying the indemnified party an amount equal to its liability to the third party. This mode of performance is appropriate whether the indemnity is (unusually) compensatory or (more commonly) preventive in nature, but the time for performance differs. In the former case, the indemnifier need only pay so much as the indemnified party has already paid to the third party. In the latter case, the indemnifier performs by paying the amount of the liability before the indemnified party pays the third party. This allows the indemnified party to meet the liability without having to draw from its own resources. The loss avoided is the diminution of the indemnified party's wealth.[37] The latter point is illustrated in the cases on accommodation bills of exchange. The drawer expressly or impliedly promises to indemnify the accommodation acceptor against liability on the bill. It is generally understood that such an indemnity is preventive in nature.[38] One of the recognised modes of performance is for the drawer to pay the amount of the bill to the acceptor in advance of maturity.[39]

[34] Such points may be disputed: see, eg, *Chas Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep 422 (QB); *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 (FC); *Spectra International plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep 153 (CLCC), 158–59 (revd in part on other grounds: *Spectra International plc v Hayesoak Ltd* [1998] 1 Lloyd's Rep 162 (CA)).
[35] *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387 (CA).
[36] See [8–17].
[37] See [6–20].
[38] See [6–10].
[39] *Chilton v Whiffin* (1768) 3 Wils 13, 17; 95 ER 906, 908–09; *Yates v Hoppe* (1850) 9 CB 542, 549–50; 137 ER 1003, 1006 (Maule J); *KD Morris & Sons Pty Ltd (in liq) v Bank of Queensland Ltd* (1980) 146 CLR 165, 202 (Aickin J); *Coles Myer Finance Ltd v Commissioner of Taxation* (1992) 176 CLR 640, 658–59 (Mason CJ, Brennan, Toohey, Dawson and Gaudron JJ).

An order for specific enforcement of an indemnity may, in appropriate cases, require the indemnifier to pay the indemnified party before the latter has paid the third party.[40]

Enforcement

[7–17] **Modes of enforcement.** An indemnity against claims by or liabilities to third parties is usually enforced in one of three ways. The indemnified party may sue for loss actually sustained in connection with the claim or liability. The most common type of loss is expenditure by the indemnified party to satisfy the claim or liability.[41] Claims for actual loss can generally be characterised as claims for damages for breach of contract.[42] Indemnities against claims by or liabilities to third parties possess no special features in this regard and it is sufficient to refer to the general treatment elsewhere.[43] Where a loss has not yet arisen but is anticipated, the indemnified party may seek specific enforcement. The object is to compel the indemnifier to act to prevent a potential loss from materialising, for example, by relieving the indemnified party of the liability before it pays.[44] The final method of enforcement is less common. The indemnified party may rely on the indemnity as having some exculpatory effect in relation to a claim made by the indemnifier.[45] That claim may be made directly against the indemnified party, or it may be made against another party such that it indirectly affects the indemnified party.

Enforcement before Loss

Nature of Enforcement

[7–18] **General.** In appropriate cases, an indemnity against claims by or liabilities to third parties may be enforced before the indemnified party sustains a loss. The general rule is that a claim or liability is not of itself a loss;[46] the loss usually occurs when the indemnified party draws upon its own resources to make payment towards it. Enforcement of the indemnity in advance of loss thus compels the indemnifier to intervene before this happens.

The focus is on orders for indemnification that will, if complied with, fully and finally protect the indemnified party against the relevant liability. Such orders can be described as a form of quia timet relief because they are sought and made in respect of an anticipated loss. An indemnified party's rights can be vindicated or protected in other ways before loss: for example, by declaratory relief,[47] or by an order to preserve assets against which the right to indemnity might later be exercised.[48]

[40] See further [7–43]–[7–44].
[41] See [6–23], [6–24].
[42] See [1–22], [1–23] for other possibilities.
[43] See generally ch 5.
[44] See [7–18].
[45] See [7–51].
[46] See [6–23].
[47] See [5–76].
[48] See [5–74].

[7–19] **Juristic basis.** Enforcement in advance of loss derives from the jurisdiction of courts of equity to decree specific performance of contracts of indemnity.[49] As Lord Brandon explained in *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)*:[50]

> There is no doubt that before the passing of the Supreme Court of Judicature Acts 1873 and 1875, there was a difference between the remedies available to enforce an ordinary contract of indemnity . . . at law on the one hand and in equity on the other. At law the party to be indemnified had to discharge the liability himself first and then sue the indemnifier for damages for breach of contract. In equity an ordinary contract of indemnity could be directed to be specifically performed by ordering that the indemnifier should pay the amount concerned directly to the third party to whom the liability was owed or in some cases to the party to be indemnified. . . . There is further no doubt that since the passing of the Supreme Court of Judicature Acts 1873 and 1875 the equitable remedy has prevailed over the remedy at law.

Such orders for indemnification are more accurately characterised as relief approximate to specific performance rather than specific performance in its strict sense.[51] The relief generally does not require the execution of some instrument or performance of some act that will thereby define the relative legal positions of the parties. Although some decisions refer to a 'contract' of indemnity, relief is available where the indemnity is a term in a larger contract,[52] and it appears that an indemnity can be enforced without an order for specific performance of the entire contract.[53] The time for specific enforcement involves considerations peculiar to the nature of an indemnity promise. For these reasons, the terms 'specific relief' or 'specific enforcement' are used in preference to 'specific performance'.

It does, however, appear that some of the usual requirements for, and defences to, an action for specific performance apply also to an action for specific enforcement of an indemnity.[54]

[7–20] **Relevance of construction.** An order for specific enforcement compels performance of the promise of indemnity according to its terms. Whether specific enforcement is available, and the form it may take, thus depends upon construction of the contract. Specific enforcement is only available where the indemnity is preventive in nature. In *McIntosh v Dalwood (No 4)*[55] Street CJ said:

> In every case the contractual obligation must first be ascertained . . . If the obligation is merely an obligation to indemnify a person, in the sense of repaying to him a sum of money after he has paid

[49] *Johnston v Salvage Association* (1887) 19 QBD 458 (CA), 460–61 (Lindley LJ); *Travers v Richardson* (1920) 20 SR (NSW) 367 (SC), 370–71; *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC), 418–19 (Street CJ); *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 28 (Lord Brandon), 36 (Lord Goff), 40–41 (Lord Jauncey); *Management Corp Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] BLR 351 (Sing CA), 356–57 (LP Thean JA). For early examples, see *Earl of Ranelaugh v Hayes* (1683) 1 Vern 189; 23 ER 405; WT Barbour, *The History of Contract in Early English Equity*, vol 4 (Oxford, P Vinogradoff ed, Clarendon Press, 1914), 135–37.
[50] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 28.
[51] R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th edn (Sydney, Butterworths LexisNexis, 2002), 661, para 20-050.
[52] *Newman v McNicol* (1938) 38 SR (NSW) 609 (SC), 626; *County and District Properties Ltd v C Jenner & Sons Ltd* [1976] 2 Lloyd's Rep 728 (QB), 734–36; *McMahon v Ambrose* [1987] VR 817 (FC), 825 (McGarvie J).
[53] *Cruse v Paine* (1868) LR 6 Eq 641, 653.
[54] *Anglo-Australian Life Assurance Co v British Provident Life and Fire Society* (1862) 3 Giff 521; 66 ER 515 (misrepresentation); *Paterson v Pongrass Group Operations Pty Ltd* [2011] NSWSC 1588, [80]–[84] (consideration).
[55] *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC), 418.

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> it, no equitable relief is needed. Damages will provide an adequate remedy. If, however, the obligation on its true construction is an obligation to relieve a debtor by preventing him from having to pay his debt, equity will in such a case give relief in the nature of *quia timet* relief, and, instead of compelling the party indemnified first to pay the debt, and perhaps to ruin himself in doing so, will specifically enforce the obligation by ordering the indemnifying party to pay the debt.

The parties may modify or limit the modes of specific enforcement, or exclude that possibility. The leading authority is an insurance case, *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)*,[56] but the reasoning applies equally to non-insurance indemnities. Insurance provided by P&I clubs afforded cover in respect of claims that the insured 'shall have become liable to pay and shall in fact have paid'. The House of Lords accepted that the usual construction of a promise of indemnity against liability was to keep the indemnified party (here, the insured) harmless from loss.[57] However, the 'pay to be paid' stipulation imposed a condition precedent to enforcement that could not be overridden by resort to equitable principles. An order specifically to enforce the indemnity could only compel performance consistently with the terms of the contract. Those terms required payment first and reimbursement later.

Street CJ's analysis in *McIntosh* reflects the general distinction between preventive and compensatory promises of indemnity in the strict sense. Specific enforcement may also be relevant for promises which, although not indemnities, are similar in effect. A's promise to B to pay a sum of money to C is not an indemnity but it may be specifically enforced.[58] In contrast, specific performance was refused in *Brough v Oddy*.[59] B relinquished possession of certain title deeds to leasehold property, which were then used as security in another transaction under which C was obliged to pay an annuity of £40. In return for B giving up the deeds, A promised B that if C were to default – so that the annuitant might resort to the property as security – then A would pay B about £30 per year. C defaulted. B brought an action for specific performance against A, seeking indemnity against any payments that B might have to make towards the annuity, in order to save the property. Leach MR held that the agreement was not an indemnity, but only a promise by A to pay B upon a certain event.

[7–21] **Inadequacy of damages.** Street CJ's judgment in *McIntosh v Dalwood (No 4)*[60] identifies another aspect of the jurisdiction to order specific enforcement, namely, the inadequacy of damages. No action could be brought at common law until the indemnified party had suffered actual loss.[61] Damages, and other common law remedies, were therefore inadequate to keep the indemnified party harmless against loss. Where the indemnity is preventive in nature, specific enforcement is necessary to ensure that the indemnified party obtains the

[56] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL). See also *Paterson v Pongrass Group Operations Pty Ltd* [2011] NSWSC 1588, [79].

[57] *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 28 (Lord Brandon), 35 (Lord Goff), 40–41 (Lord Jauncey).

[58] *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460; *Beswick v Beswick* [1968] AC 58 (HL).

[59] *Brough v Oddy* (1829) 1 Russ & M 55; 39 ER 22.

[60] *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC), 418 (Street CJ). See also *Johnston v Salvage Association* (1887) 19 QBD 458 (CA), 460–61 (Lindley LJ); *McIntosh v Dalwood (No 3)* (1930) 30 SR (NSW) 332 (SC), 334–35; *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 36 (Lord Goff), 40–41 (Lord Jauncey).

[61] See generally *Re Richardson, ex p the Governors of St Thomas's Hospital* [1911] 2 KB 705 (CA), 709 (Cozens-Hardy MR), 712 (Fletcher Moulton LJ); *Wren v Mahony* (1972) 126 CLR 212, 229–30 (Barwick CJ); *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 35–36 (Lord Goff). See further [1–18].

essential benefit of the bargain. In contrast, if the indemnity is compensatory then common law remedies – whether for damages for breach of contract or for a sum payable by the terms of the contract – are sufficient to enable the indemnified party to be compensated for its loss.

[7–22] **Time of enforcement.** An order for specific performance may be made before the time for performance of one or more contractual obligations has arrived.[62] The form of the decree is moulded to fit the circumstances, so that a party is not compelled to perform before performance is due. This perspective is not directly applicable to promises of indemnity that are preventive in nature. A striking feature of such promises is that, in general, there is no particular time fixed for performance. So long as the indemnified party suffers no loss within scope, the indemnity is not breached. The object of specific enforcement is to compel the indemnifier to act so that loss – a breach – does not occur. This does not mean that a contractual promise of indemnity is specifically enforceable at will. There are other limiting principles that account for the absence of a temporal reference point. In general terms, those principles confine relief to situations where loss to the indemnified party is sufficiently imminent.[63]

[7–23] **Analogous contexts.** Principles applicable to quia timet claims for indemnity or contribution in other contexts, particularly suretyship and trust, have been influential in the development of the principles governing specific enforcement of contractual indemnities, and vice versa.[64] The principles are the same or similar in many respects, but there remain several important differences.

The basis of a quia timet right to indemnity in other contexts is not, or at least not relevantly, contractual. Where a guarantor provides a guarantee upon the debtor's request, the implied contract of indemnity appears to operate by way of reimbursement.[65] Such an indemnity would not be susceptible to specific enforcement, yet the guarantor is entitled to quia timet relief according to equitable principles. An order for specific enforcement operates in personam and is concerned with the indemnifier's performance of its contractual obligation to the indemnified party. Not all rights of indemnity are of this nature. A trustee's right of indemnity, for example, comprises both a right to resort to trust assets for recoupment or exoneration and, in appropriate cases, a right to proceed directly against beneficiaries.[66] The relationship between the parties to a contractual indemnity can vary greatly, whereas the other contexts involve a particular type of relationship, such as guarantor and debtor, co-guarantors, or trustee and beneficiary. There may be specific considerations affecting quia timet relief in those contexts that are not relevant to all contracts of indemnity.[67]

Preconditions

[7–24] **Loss must be sufficiently imminent.** Specific enforcement is available where the indemnified party can establish a sufficiently imminent risk of loss. In relation to liabilities to third parties, this requirement can be articulated in more specific terms:

[62] *Turner v Bladin* (1951) 82 CLR 463, 472–73; *Hasham v Zenab* [1960] AC 316 (PC), 329–30.

[63] See [7–24].

[64] See, eg, *Wolmershausen v Gullick* [1893] 2 Ch 514 (Ch); *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 (Ch); *Re Richardson, ex p the Governors of St Thomas's Hospital* [1911] 2 KB 705 (CA).

[65] See [2–24]. Express indemnities to guarantors can be different: see [6–14].

[66] See [1–6].

[67] See, eg, [7–45], [7–56]–[7–57].

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(1) there is a clear and definite liability of the indemnified party;
(2) the liability is presently accrued and enforceable; and
(3) there is some prospect that the liability might be enforced against the indemnified party.

These conditions reflect the general proposition that a promise of indemnity is concerned with the avoidance of loss from claims or liabilities, and not directly with the avoidance of claims or liabilities themselves. The first two conditions are substantially similar to those that apply to quia timet orders for exoneration in favour of guarantors.[68] The third condition is sound in principle but its status as a legal rule is uncertain.[69]

[7–25] **Existence of liability.** The indemnified party is, in general, only entitled to obtain specific enforcement in respect of a definite liability to a third party. It is not sufficient, for example, that the indemnified party might be found to be liable to the third party for some amount once all relevant accounts are settled.[70] The indemnified party's liability to the third party can arise from any source: it may be a primary liability under general law or statute, or in the nature of a secondary liability to pay damages for a wrong. The requirement is expressed in terms of a 'liability' rather than an 'obligation', to indicate that the subject-matter is the payment of money by the indemnified party to the third party. Specific enforcement of indemnities in relation to non-monetary obligations has not so far been recognised.[71]

[7–26] **Ascertainment of the liability.** It is sometimes said that the indemnified party is only entitled to relief when its liability to the third party has been 'established' or 'ascertained' or 'realised'.[72] Those references contemplate some process involving the indemnified party and third party by which a liability is recognised and perhaps also quantified. That process may be, for example, an action culminating in a judgment in favour of the third party, or a compromise of the third party's claim, or a determination of liability made by a government authority.

The concept of 'ascertainment' performs several functions in relation to the enforcement of the indemnity.[73] One of these functions is to facilitate proof of actual or potential loss within scope. Ascertainment may be relevant because the indemnity protects against liabilities that have been established by certain processes.[74] Alternatively, even if the indemnity protects only against actual liabilities, the indemnified party may rely indirectly upon the process of ascertainment to demonstrate an actual liability.[75]

[68] See *Nisbet v Smith* (1789) 2 Bro CC 579, 582; 29 ER 317, 319 (note 2); *Holden v Black* (1905) 2 CLR 768, 782–83; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 (Ch); *Watt v Mortlock* [1964] Ch 84 (Ch); *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 (Ch); *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 (NSWSC); *Woolmington v Bronze Lamp Restaurant Pty Ltd* [1984] 2 NSWLR 242 (SC), 243–44; *Abigroup Ltd v Abignano* (1992) 39 FCR 74 (FC), 81–82; *Friend v Brooker* [2009] HCA 21; (2009) 239 CLR 129, [55] (French CJ, Gummow, Hayne and Bell JJ).

[69] See [7–32].

[70] *Antrobus v Davidson* (1817) 3 Mer 569; 36 ER 219. *cf Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 Ch D 561 (Ch).

[71] See [5–70].

[72] *County and District Properties Ltd v C Jenner & Sons Ltd* [1976] 2 Lloyd's Rep 728 (QB), 734, 735–36; *Telfair Shipping Corp v Inersea Carriers SA (The Caroline P)* [1985] 1 WLR 553 (QB), 567–68; *R&H Green & Silley Weir Ltd v British Railways Board* [1985] 1 WLR 570 (QB), 574; *City of London v Reeve & Co Ltd* [2000] EWHC 138 (TCC); [2000] BLR 211, [27], [34]. *cf Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957 (HL), 966 (Lord Brandon) (liability insurance).

[73] *cf Lumbermens Mutual Casualty Co v Bovis Lend Lease Ltd* [2004] EWHC 2197 (Comm); [2005] 1 Lloyd's Rep 494, [38]–[42]; *Law Society v Shah* [2007] EWHC 2841 (Ch); [2009] Ch 223, [22]–[24], [44] (function of ascertainment in liability insurance).

[74] See [6–34].

Ascertainment performs two additional functions that are directly relevant to specific enforcement. First, the process of ascertainment may produce a definite liability where none previously existed (as for a reasonable settlement of an unsound claim), or where there was, in fact, a liability, but there was dispute or uncertainty as to its existence or quantum. This is not to say that the liability produced by the ascertainment process is necessarily well founded, or within the scope of the indemnity, or even that the indemnifier is bound by the outcome of that process. Rather, the basic point is that specific enforcement is generally available for a liability that is identifiable and definite, not one that remains uncertain.

Secondly, the process of ascertainment may convert a clear but inchoate liability into one that is presently accrued and legally enforceable. So, for example, a liability in damages for a wrong may be transformed into a judgment debt; or the terms of a contract between the indemnified party and third party may require some process to be followed to determine the transaction between them and to crystallise a final sum due. A presently accrued and enforceable liability is a distinct precondition for specific enforcement and is considered later.[76]

[7–27] **No particular method of ascertainment required.** For non-insurance indemnities, the indemnified party's liability need not be ascertained by any particular method, such as a judgment, arbitral award or settlement binding on the indemnified party.[77] It is sufficient that the liability be clearly identifiable. In *Re Dixon*,[78] for example, the notices of assessment issued by the taxation authority would have been sufficient. In *McIntosh v Dalwood (No 4)*,[79] the liability arose plainly from the contract. In other cases, the indemnified party has undoubtedly been liable for calls on shares.[80] It is, therefore, not surprising that references to ascertainment by judgment, award or settlement have figured most prominently in cases where the indemnified party has been contesting its liability to pay compensation for an alleged wrong to the third party.

[7–28] **Whether amount of liability must also be ascertained.** A liability may be definite in existence though not in quantum. For some forms of order, clearly, the amount of the liability must be ascertained: an order that the indemnifier pay the third party a sum equal to the amount of the indemnified party's liability is one example. This would not necessarily present an obstacle for other forms of order, such as an order that the indemnifier procure the release or discharge of the indemnified party from an existing liability.

It is probably a general condition for specific enforcement that the amount of the liability be fixed and ascertained or readily ascertainable. Without that condition, the indemnifier might be drawn into a dispute with the third party over quantum, or have to conduct its own investigations into the circumstances from which the liability arose.

[75] See [6–31].

[76] See [7–31].

[77] *C Inc plc v L* [2001] EWHC 550 (Comm); [2001] 2 Lloyd's Rep 459, [28] fn 33; *Carillion JM Ltd v Phi Group Ltd* [2011] EWHC 1379 (TCC), [158]–[159].

[78] *Re Dixon* [1994] 1 Qd R 7 (FC). See also [6–34].

[79] *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC) (the indemnified party had been sued but there is no mention of judgment against him). See also *Lloyd v Dimmack* (1877) 7 Ch D 398 (Ch), 402; *Rankin v Palmer* (1912) 16 CLR 285; *Thanh v Hoang* (1994) 63 SASR 276 (FC).

[80] See, eg, *Evans v Wood* (1867) LR 5 Eq 9; *Cruse v Paine* (1869) LR 4 Ch App 441. *cf British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA).

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Several decisions on the point concern actions against debtors by guarantors seeking to be exonerated from liability to the creditor. In *Morrison v Barking Chemicals Co Ltd*,[81] the terms of the guarantee allowed for the guarantee to be determined by the guarantor or the bank, but the procedure had not been engaged at the time the guarantor sought an order for exoneration. Sargant J declined to make the order because the amount of the guarantor's liability was fluctuating; it would only become fixed when the guarantee was determined by that process. In contrast, in *Re Anderson-Berry*,[82] Lord Hanworth MR suggested that a clear liability of the guarantor was sufficient, even though the amount might be ascertained in subsequent proceedings at a later date. That view is, perhaps, explained by the unusual circumstances of the case. The sureties were liable on an administration bond and sought to restrain the maladministration of the deceased's estate, which would immediately have exposed them to liability.[83]

The intermediate position is that it is sufficient that the amount of the liability is fixed and can readily be ascertained. The principal relief may include incidental orders for inquiries or the taking of accounts. In *Thomas v Nottingham Incorporated Football Club Ltd*,[84] the guarantee had been determined but there was some doubt as to the precise amount of the liability at the time the guarantor sought relief. Goff J made an order for exoneration on the basis that the liability was fixed and the amount was ascertainable. This also appears to be the position for contractual indemnities.[85] Where the amount is ascertainable but not immediately known, there is some variation in the forms of order.[86] The court may be content to declare the right to indemnity and direct an inquiry into the amount due; or it may go further and also order payment of the sum once it has been determined.

[7–29] Effect of actions, claims or demands by third parties. The conditions for specific relief have been stated in terms of a definite and presently accrued liability to a third party. There appears to be no further requirement that the third party have brought an action or made a claim or demand in respect of that liability.[87] The contract may, however, provide otherwise.[88]

It is implicit in the general proposition that a claim, demand or action by a third party is not itself a sufficient basis for specific enforcement. The position might be thought to be different where the scope of the indemnity refers to 'actions', 'claims' or 'demands'. In

[81] *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325 (Ch).

[82] *Re Anderson-Berry; Harris v Griffith* [1928] Ch 290 (CA), 304.

[83] *Re Anderson-Berry; Harris v Griffith* [1928] Ch 290 (CA), 309 (Lawrence LJ).

[84] *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 (Ch). See also *Holden v Black* (1905) 2 CLR 768, 782–83; *Friend v Brooker* [2009] HCA 21; (2009) 239 CLR 129, [55] (French CJ, Gummow, Hayne and Bell JJ).

[85] Accordingly, no order for specific relief was made in *Holmes v Margolese* (1983) 27 RPR 158 (BCSC) (amount of liability dependent upon third party's choice of remedy); *Ozzy Loans Pty Ltd v New Concept Pty Ltd* [2012] NSWSC 814, [32], [84] (amount of liability not fixed). See also [5–79].

[86] See, eg, *Evans v Wood* (1867) LR 5 Eq 9; *Shepherd v Gillespie* (1867) LR 5 Eq 293 (affd *Shepherd v Gillespie* (1868) LR 3 Ch App 764); *Heritage v Paine* (1876) 2 Ch D 594 (Ch); *Travers v Richardson* (1920) 20 SR (NSW) 367 (SC), 375; *Saunders v Peet* [1936] NZLR s73 (SC), 80–81.

[87] *Earl of Ranelaugh v Hayes* (1683) 1 Vern 189, 190; 23 ER 405, 406; *Wooldridge v Norris* (1868) LR 6 Eq 410, 413–14. The position is the same for guarantors relying on an equitable right to be exonerated by the debtor: *Holden v Black* (1905) 2 CLR 768, 782–83; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 (Ch); *Tate v Crewdson* [1938] Ch 869 (Ch); *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 (Ch); *Friend v Brooker* [2009] HCA 21; (2009) 239 CLR 129, [55] (French CJ, Gummow, Hayne and Bell JJ).

[88] *Bradford v Gammon* [1925] Ch 132 (Ch). See [5–14].

McIntosh v Dalwood (No 4),[89] Street CJ referred to the following passage from *Fry on Specific Performance*:[90]

> [W]here the contract by A is to indemnify B against all claims and demands of C, there is a breach as soon as C makes the claim, and B may here usefully invoke the aid of a Court of Equity to compel A to satisfy his demand to the relief of B, and thus specifically to perform the contract: and accordingly, in such cases, the Court of Chancery entertained jurisdiction.

This may well be an accurate description of the position in equity in ancient times.[91] In *Earl of Ranelaugh v Hayes*,[92] for example, the Earl assigned to Hayes a share in the excise of Ireland. Hayes agreed in return to stand in his place concerning payments to the King and to indemnify him against all 'debts, accounts, covenants, breaches of covenants, rents and demands, whatsoever'. Upon the King bringing an action against the Earl, the Earl sought specific performance of the indemnity. Lord Keeper North made extensive orders giving effect to the indemnity. Hayes was ordered to clear the Earl from the actions against him within a year. A further order was that, upon being subject to certain suits or demands in the future, the Earl could give notice to Hayes so that Hayes could assume the defence of them. These orders suggest that the object of the indemnity was to spare the Earl from molestation, rather than to discharge definite liabilities.

Whatever may have been the position in ancient times, a distinction between 'liabilities', and 'claims', 'demands' or 'actions', is not significant for specific enforcement under the modern law. The usual construction is that references to 'claims', 'demands' or 'actions' may expand the scope of protection, but that they do not alter or accelerate the method of protection.[93] A simple promise of indemnity is not, generally, a promise that the indemnified party will not be bothered by a claim or action.[94] Nor does it incorporate a promise to defend the indemnified party against claims or actions.[95]

[7–30] Where liability ceases to exist. If the indemnified party is liable to a third party but that liability then ceases to exist, the source of potential loss has disappeared. There is, therefore, no foundation for specific enforcement.[96] The point has arisen where an indemnified company is dissolved, with the effect that its liabilities cease to exist.[97] The point also arises where the indemnified party enters a settlement with the third party on terms that the indemnified party is to be released in return for assigning (or otherwise providing) to the third party the benefit of the indemnity.[98] In *Re Perkins*,[99] the lessee, L, assigned the lease to A1. A1 promised to pay the rent, observe the covenants in the lease and indemnify

[89] *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC), 419.

[90] GR Northcote, *Fry on Specific Performance*, 6th edn (London, Stevens and Sons, Ltd 1921), 731.

[91] See also Barbour, *The History of Contract in Early English Equity* (n 49), 137.

[92] *Earl of Ranelaugh v Hayes* (1683) 1 Vern 189; 23 ER 405.

[93] See [6–29], [6–36].

[94] See [6–17]–[6–18].

[95] See [7–7].

[96] See also [5–24]. *cf Wenkart v Pitman* (1998) 46 NSWLR 502 (CA), 533–34 (Powell JA) (continued existence of liability not relevant where specific enforcement has resulted in judgment debt).

[97] *Taylor v Sanders* [1937] VLR 62 (FC), 65–66. See also *Holli Managed Investments Pty Ltd v Australian Securities Commission* [1998] FCA 1657; (1998) 90 FCR 341, 348, 352. *cf Butler Estates Co Ltd v Bean* [1942] 1 KB 1 (CA), 11 (Goddard LJ) (covenant to pay and not to indemnify).

[98] *cf Heritage v Paine* (1876) 2 Ch D 594 (Ch); *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA); *Josselson v Borst* [1938] 1 KB 723 (CA); *Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd* (1991) 53 BLR 84 (CA). *cf* also *Rendall v Morphew* (1914) 84 LJ Ch 517 (Ch) (discussed at [7–34]).

[99] *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA).

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L against claims or demands in respect thereof. A1 subsequently assigned the lease to A2, A2 similarly covenanting to pay the rent, perform the covenants in the lease and indemnify A1 against a failure to do so. A2 died. A1 was declared bankrupt. L was compelled to pay outstanding rent and insurance premiums to the lessor and then proved in A1's bankruptcy for those amounts. L and A1's trustee in bankruptcy reached a compromise, under which L released A1's estate in return for an assignment to L of A1's right to indemnity from A2.

L then brought an action as assignee against A2. A2's defence was simple: in compromising L's claim, A1 had been exonerated from liability to L. There was, therefore, nothing upon which the indemnity could operate and so L's action as assignee must fail. The ingenuity of this line of argument has been acknowledged on several occasions.[100] Delivering the judgment of the English Court of Appeal, Lindley MR accepted the argument as correct in principle and remarked: 'A liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms'.[101] The settlement deed was, however, to be construed to avoid defeating its purpose. The extent of the release was limited so as to preserve the assignment to L of A1's right to indemnity and L's claim under it.[102]

[7–31] Liability is presently accrued, not future or contingent. The liability in respect of which specific enforcement is sought must be presently accrued and enforceable.[103] This condition excludes contingent liabilities and other liabilities that are to arise in the future.

Thanh v Hoang[104] illustrates the basic principle. The indemnified parties were liable as sureties for defaults by the indemnifiers in repaying amounts owed to lending syndicates. The trial judge awarded the indemnified parties sums comprising: (1) amounts already paid by them to the creditors; (2) the amount of their liabilities to the creditors accrued up to the date of trial but not yet discharged; and (3) for one of the indemnified parties – an amount for liabilities that had not accrued by the time of trial, but which were anticipated to arise from continuing defaults. The award was upheld on appeal in relation to the first two components, but varied so as to exclude the third component.

A further reason for refusing specific enforcement is that it may not be possible to determine in advance whether a liability will fall within the scope of the indemnity. In *Newman v McNicol*,[105] the claimant was liable to pay an electricity service charge for her property for a fixed term. Before that term expired the claimant sold the property to the defendant, with title being transferred to a nominee company. The claimant claimed that she was thereafter entitled to be indemnified against the service charges, by reference to a clause in the sale contract requiring the defendant to bear all 'working expenses' of the property. Long Innes

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[100] *Heritage v Paine* (1876) 2 Ch D 594 (Ch), 601 ('parties must have wonderfully miscarried in carrying into effect what they desired to accomplish'); *Total Liban SA v Vitol Energy SA* [2001] QB 643 (QB), 655 ('a spectacular "own goal"').

[101] *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA), 189.

[102] *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA), 190. See also *Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd* (1991) 53 BLR 84 (CA); *London and Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWCA Civ 1212; [2009] BLR 20, [20] (Hughes LJ).

[103] *McIntosh v Dalwood (No 3)* (1930) 30 SR (NSW) 332 (SC), 334 ('liability must have crystallized into an actual present and enforcible demand'); *Ashby v Commissioner of Succession Duties (SA)* (1942) 67 CLR 284, 294 (Williams J) ('presently enforceable liability'); *Abigroup Ltd v Abignano* (1992) 39 FCR 74 (FC), 83 ('as soon as the [indemnified] person's liability to the third person arises'). See also *C Inc plc v L* [2001] EWHC 550 (Comm); [2001] 2 Lloyd's Rep 459, [28] fn 33.

[104] *Thanh v Hoang* (1994) 63 SASR 276 (FC).

[105] *Newman v McNicol* (1938) 38 SR (NSW) 609 (SC).

J held that the clause did not cover the service charges and, in the alternative, indicated that he would not have ordered indemnity for the charges into the future. The charges could only be a 'working expense' of the property if the owner continued to use the supplied electricity. The claimant's right to indemnity would have depended upon future acts of the nominee company.

Where the liability remains future or contingent in nature, a court may declare the right to indemnity instead of making an order for specific enforcement.[106] Thus, in *Thanh v Hoang*, where the award at first instance was varied on appeal to exclude the indemnified party's future liabilities, the court substituted a declaration of the right to be indemnified against those liabilities.

It is unclear whether references to the liability being 'enforceable' add anything to the requirement that the liability be presently accrued. A distinction could be drawn in some cases between the accrual of the indemnified party's liability and the accrual of the third party's right to enforce it. Even so, it appears that the latter is not always essential to a claim for quia timet relief. In *Thomas v Nottingham Incorporated Football Club Ltd*,[107] the debtor was ordered to exonerate the guarantor from an accrued liability even though the creditor had not made a demand as required by the terms of the guarantee. Goff J reasoned that the provision for a demand operated for the guarantor's benefit. It would have been peculiar for that provision to place the guarantor in a worse position vis-à-vis the indemnifying debtor than he would have occupied in the absence that provision.

[7–32] Whether indemnified party will sustain loss from the liability. The object of specific enforcement is to ensure that the indemnified party comes to no (further) loss. The necessary conditions for enforcement considered so far relate to the source of potential loss, namely, a liability to a third party. Assuming that such a liability exists, the further question is whether the indemnified party can or will be damnified by that liability. There are three dimensions to the question.

(1) *Capacity to pay.* The indemnified party may have insufficient means to satisfy the liability in full. This, in turn, limits the possible extent of damnification. Impecuniosity is not, however, an obstacle to specific enforcement.
(2) *Enforceability against assets.* Irrespective of the indemnified party's capacity to pay, there may be no, or insufficient, assets that can be reached by legal process. This is a relevant factor, though it is rarely an issue in practice.
(3) *Prospect of enforcement.* It seems to be relevant to consider whether enforcement by the third party is, in fact, sufficiently likely or imminent. This point is not free from doubt and it is difficult to identify the degree of probability or immediacy required. It may be quite low.

[7–33] Where indemnified party is impecunious. The indemnified party is entitled to protection even though it presently lacks the means to meet the liability in full.[108] A theoretical justification may be that some loss is possible, eventually, even if by way of the third party proving as a creditor in some form of administration in insolvency. That rationale

[106] See [5–79], [5–80].

[107] *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 (Ch). *cf Stimpson v Smith* [1999] Ch 340 (CA); *Friend v Brooker* [2009] HCA 21; (2009) 239 CLR 129, [55]–[59] (French CJ, Gummow, Hayne and Bell JJ) (claims for contribution).

[108] See [7–39].

may not explain all circumstances, such as where the indemnified party has no assets at all.[109] A more general justification is that to refuse protection to an impecunious indemnified party would deprive it of the benefit of the bargain. One of the purposes of a promise of indemnity is to save the indemnified party from ruin by having to pay first and recoup the loss later.[110] To provide less than complete relief could also, perversely, reward the indemnifier for failing to intervene: the less the indemnified party can pay, the lesser the extent of the indemnifier's obligation to indemnify.

[7–34] **Where liability cannot be enforced against indemnified party's assets.** Specific enforcement may be refused on the ground that the liability cannot be enforced against the indemnified party's assets. In *Eddowes v Argentine Loan and Mercantile Agency Co Ltd*,[111] a husband and wife in partnership were promised indemnity against certain claims or actions by third parties. A third party brought an action against the partnership in England and obtained judgment. The wife, by this time a widow, sued for indemnity against the liability arising from the judgment. The indemnifier objected that the wife had no separate estate and so could not be damnified. That objection failed but the wife was denied relief on a different ground. She resided in Argentina and there was no evidence that there were any assets in England that could be taken to satisfy the judgment.

Another decision that could be explained on a similar basis is *Rendall v Morphew*.[112] The deceased, C, had mortgaged freehold and leasehold property to R to secure the repayment of sums advanced by R to C. After C's death, his executors transferred C's interest in the property, subject to the mortgages, to M. M promised to pay the principal and interest under the mortgages and to indemnify C's estate and each of the executors. M duly paid the relevant sums for about nine years and then ceased payment. The executors assigned to R the 'full benefit' of M's indemnity. R, as assignee of the indemnity, then proceeded directly against M seeking a declaration that M was liable to pay R amounts due for principal and interest.

Eve J concluded that the indemnity was inoperative. R as assignee could only exercise the right to indemnity to protect C's estate and the executors.[113] The relevant claim against which C's estate and the executors might have required protection was the claim by R himself, as creditor. The case has been explained on the basis that there was no longer any liability to R.[114] Alternatively, it could be said that there was a potential liability but that neither C's estate nor the executors could have been damnified by R's claim. The estate had been fully administered, there were no assets remaining against which the liability could be enforced, and so the executors could properly have raised a plea of *plene administravit*.[115]

[109] *cf Re Alfred Shaw and Co Ltd, ex p Murphy* (1897) 8 QLJ 70 (SC), 74; *Silver Developments Ltd v Investors Group Trust Co Ltd* (1999) 182 Sask R 64 (QB), [38] (right of indemnity is itself an asset).
[110] *Johnston v Salvage Association* (1887) 19 QBD 458 (CA), 460–61 (Lindley LJ); *Re Richardson, ex p the Governors of St Thomas's Hospital* [1911] 2 KB 705 (CA), 709 (Cozens-Hardy MR); *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC), 418 (Street CJ).
[111] *Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364 (CA).
[112] *Rendall v Morphew* (1914) 84 LJ Ch 517 (Ch).
[113] See generally [5–35] (effect of assignment).
[114] *British Union and National Insurance Co v Rawson* [1916] 2 Ch 152, 159–60 ('attempt to revive a non-existing liability'); *Pendal Nominees Pty Ltd v Lednez Industries (Australia) Ltd* (1996) 40 NSWLR 282 (SC), 291. See [7–30].
[115] See generally *Levy v Kum Chah* (1936) 56 CLR 159, 168–70 (Dixon and Evatt JJ).

[7–35] **Where indemnified party has no separate estate.** The issue of enforcement against assets arose in a different way in *British Union and National Insurance Co v Rawson*.[116] The indemnified party had been sued to judgment for calls on shares, and then assigned her right to indemnity to the company liquidator. The indemnifier pointed to the indemnified party's status as a married woman. Without separate property, she could not be damnified by the judgment against her, and so there was no reason to enforce the indemnity to compel payment to the liquidator.

It was held that the indemnity was enforceable. Pickford LJ accepted that there was sufficient possibility of damnification because the judgment against the indemnified party operated *quando acciderint*. It could be enforced against any separate property she might acquire in the future, for example, if she were to become widowed. Warrington LJ agreed with that analysis but preferred the explanation that the measure of indemnity was determined by the amount of the liability and not the indemnified party's capacity to pay.[117] That explanation is not entirely convincing. The measure of indemnity is, strictly, distinct from the question of whether the indemnity ought to be enforced at all. Similarly, the indemnified party's capacity to pay is distinct from its susceptibility to enforcement against its assets. Those two factors are often, but are not necessarily, co-extensive. The emphasis on the former does not account for the basis for decision in *Eddowes v Argentine Loan and Mercantile Agency Co Ltd*.[118] It also seems that *Rendall v Morphew*[119] would have to be explained on the ground that there was no liability at all.

[7–36] **Prospect of enforcement by third party.** Assuming that the liability can be enforced by the third party against the indemnified party's assets, there remains the question of whether the indemnified party must also establish that such enforcement is sufficiently probable or imminent.

A claim, demand or action by the third party is generally not a precondition for specific enforcement.[120] Beyond this, the required degree of likelihood or immediacy is unclear. Pickford LJ's analysis in *British Union and National Insurance Co v Rawson*[121] suggests that enforcement may occur at some indefinite point in the future and that the likelihood of enforcement may be quite low. Even on this analysis, *Rendall v Morphew*[122] falls below the threshold. A plea of *plene administravit* by the executors would still have allowed the creditor to take judgment against assets *quando acciderint*.[123] Eve J did not advert to this possibility presumably because at that stage – some 10 years after the death of the testator – there was no prospect of further assets falling into the estate.[124]

[116] *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA).
[117] See further [7–39].
[118] *Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364 (CA).
[119] *Rendall v Morphew* (1914) 84 LJ Ch 517 (Ch).
[120] See [7–29].
[121] *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA), 482–83. *cf Re Anderson-Berry; Harris v Griffith* [1928] Ch 290 (CA), 308 (Sargant LJ) (commenting on the guarantee case *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 (Ch)).
[122] *Rendall v Morphew* (1914) 84 LJ Ch 517 (Ch).
[123] EV Williams, *A Treatise on the Law of Executors and Administrators*, 1st edn (London, Saunders and Benning, 1832), 1221–22; E Bullen and SM Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd edn (London, Stevens and Sons, 1868), 578.
[124] *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA), 483 (Pickford LJ) ('such a possibility was probably of no importance').

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Rawson is more difficult to reconcile with *Eddowes v Argentine Loan and Mercantile Agency Co Ltd.*[125] A difference between the two cases is that the indemnified party in *Eddowes*, being a widow, had separate property. It seems to have been assumed that she would not voluntarily satisfy the English judgment against her. In each case, therefore, there was no immediate prospect of enforcement by the third party against the indemnified party's assets. Bowen LJ in *Eddowes* applied a more stringent standard than that used by Pickford LJ in *Rawson*: the indemnified party had to show that the danger was imminent and not merely a future possibility.[126] Cotton LJ's view in *Eddowes*, and perhaps also Fry LJ's, seems to have been that the facts simply did not establish any prospect of loss by the judgment being enforced.[127] On that basis, the circumstances might have fallen below the threshold suggested by Pickford LJ in *Rawson*.

Orders for Indemnification

[7–37] **Form of order dependent upon circumstances.** Relief is moulded to fit the circumstances.[128] Relevant considerations include: the commercial context and the terms of the contract;[129] whether the indemnified party's liability to the third party is singular in nature or may recur in the future;[130] (possibly) the solvency of the indemnified party;[131] the relationship between the indemnifier and the third party;[132] and whether another person's rights or interests may be affected by performance of the indemnity.[133]

Under the modern law, orders for specific enforcement generally call for one of the following modes of performance: the indemnifier is to exonerate the indemnified party from the liability, the method being left open to the indemnifier;[134] the indemnifier is to pay the third party directly and so relieve the indemnified party of the liability;[135] or, the indemnifier is to pay the indemnified party in advance, so that the latter can pay the third party.[136] Such orders may be made in conjunction with declarations and other orders of an administrative nature to give effect to the indemnity.

[7–38] **Entitlement to specific enforcement not a debt.** The indemnified party's equitable right to specific enforcement of the indemnity does not, of itself, establish a 'debt' owed to it by the indemnifier.[137] Similarly, an order that the indemnifier pay the third party directly does not create a debt due by the indemnifier to the indemnified party.[138] However, an

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[125] *Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364 (CA).
[126] *Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364 (CA), 365.
[127] *cf Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364 (CA), 365 (Cotton LJ), 366 (Fry LJ). Fry LJ referred to a threat to take proceedings in Argentina.
[128] *Taylor v Sanders* [1937] VLR 62 (FC), 66.
[129] See [7–20].
[130] See [7–31], [5–79].
[131] See [7–46].
[132] See [7–56] (the interest rule).
[133] See [7–60].
[134] See [7–41].
[135] See [7–42].
[136] See [7–43].
[137] This proposition originates from the guarantee cases. See *Re Mitchell; Freelove v Mitchell* [1913] 1 Ch 201 (Ch); *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 (CA), 113–14 (Lawrence LJ); *Coles Myer Finance Ltd v Commissioner of Taxation* (1991) 28 FCR 7 (FC), 15 (revd on other grounds: *Coles Myer Finance Ltd v Commissioner of Taxation* (1992) 176 CLR 640); *Abigroup Ltd v Abignano* (1992) 39 FCR 74 (FC), 83.
[138] *Abigroup Ltd v Abignano* (1992) 39 FCR 74 (FC), 83.

order for advance payment by the indemnifier to the indemnified party may create an enforceable judgment debt.[139]

[7–39] **Extent of protection.** The indemnified party is entitled to be protected against the whole amount of the liability, even though it may be unable to pay in full.[140] This applies even where the indemnified party is dead,[141] has been declared bankrupt[142] or is in liquidation.[143] That an impecunious indemnified party may obtain protection against the full amount of its liability does not necessarily controvert the fundamental principle of exact protection against loss.[144]

Another, mathematical, perspective begins with the point that the indemnified party's exposure is determined by the amount of the liability, not its capacity to pay. Assume that the indemnified party is liable for £x and is presently able to pay only a lesser sum £y from its own resources. For simplicity, assume also that the indemnified party is not subject to any insolvency procedures.

If the indemnifier intervenes on the indemnified party's behalf and pays £y to the third party, the indemnified party remains liable for £$x - y$. It has not been fully indemnified against the liability, and so the indemnifier's initial payment is not sufficient performance of the indemnity. Whether the indemnified party could satisfy the balance would depend upon whether £y is greater than half of £x. In any event, any further amount the indemnified party itself paid, up to £$x - y$, could be recovered afterwards from the indemnifier.

Alternatively, the indemnifier could intercede and pay £y to the indemnified party before the latter pays the third party. The indemnified party now has a total of £$2y$. Whether this is adequate to discharge the liability of £x will depend upon the circumstances. But, again, the indemnifier's payment is not sufficient performance of the indemnity, because the indemnified party must draw from its own funds to make up the shortfall of £$x - y$. If the indemnified party pays more than a total of £y to the third party, it can recoup the extra amount as its own contribution, up to £$x - y$, from the indemnifier.

Now assume, in both cases, that £x is much greater than £$2y$. The indemnified party decides to pay as much as possible. The indemnifier's initial payment of £y is matched by a contribution of £y from the indemnified party's own resources. The indemnified party can then recover £y from the indemnifier as an actual loss due to its own payment. With the recovery of £y, the indemnified party now has the funds to make a second payment of £y to the third party. This, again, is an actual loss for which it can recover, and the process repeats. The 'drip feed' sequence leads eventually to payment of £x by the indemnifier. It is, therefore, correct as a general principle to order indemnification for the whole liability of £x even where the indemnified party cannot presently pay £x.

The case of insolvency is more difficult. The indemnified party may be required to divide receipts equally among the general creditors rather than pay them directly to the third party. Repetition of the cycle leads to ever-diminishing payments to the third party and

[139] *Wenkart v Pitman* (1998) 46 NSWLR 502 (CA), 530–31 (Powell JA).
[140] *Lacey v Hill; Crowley's Claim* (1874) LR 18 Eq 182, 192; *Wolmershausen v Gullick* [1893] 2 Ch 514 (Ch), 528; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA), 482 (Pickford LJ), 487 (Warrington LJ). *cf North American Accident Insurance Co v Newton* (1918) 57 SCR 577 (full reimbursement after payment using funds advanced by another).
[141] *Cruse v Paine* (1869) LR 4 Ch App 441.
[142] *Re Perkins; Poyser v Beyfus* [1898] 2 Ch 182 (CA); *Rankin v Palmer* (1912) 16 CLR 285.
[143] *Re Law Guarantee Trust and Accident Society Ltd* [1914] 2 Ch 617 (CA).
[144] See [7–41]. See further [7–46]–[7–48].

recoveries from the indemnifier. Depending on the circumstances, including the values of £*x*, £*y* and the insolvency dividend ratio, the indemnifier might eventually contribute the full amount of £*x*. But it is quite possible that, even if repeated *ad infinitum*, the series of payments and recoveries will converge to a limiting sum somewhere between £*y* and £*x*. Attempts to apply this mathematical model to an insolvent indemnified party have, however, been rejected.[145] The result is dictated by the policy of the law relating to insolvency and should not be attributed to the indemnified party. The extent of indemnity remains £*x*.

[7–40] Relief from claims, or defence of proceedings. In *Earl of Ranelaugh v Hayes*,[146] Lord Keeper North ordered the indemnifier to clear the indemnified party from the suits presently against him, and further ordered that the indemnified party might give notice of certain future suits or demands, so that the indemnifier might 'take all necessary care in the defence thereof'. Such performance of the indemnity would have kept the indemnified party harmless against loss. It seems that the Lord Keeper considered that the indemnified party was not to be molested by suits or demands, sound or otherwise.[147] The modern view is that a mere promise of indemnity does not require the indemnifier to avoid, or defend the indemnified party against, claims or actions by third parties.[148] Thus, this form of order is generally not appropriate.

[7–41] Exoneration from a definite liability. The indemnifier may be ordered to procure the release or discharge of the indemnified party from a liability to the third party.[149] In *Rankin v Palmer*,[150] an agent was liable to refund money he had collected from third parties on behalf of his principal. The agent sought a declaration that he was entitled to be indemnified by the principal and an order that the principal pay the relevant amounts to him or to the third parties. Rich J ordered the principal to pay the sum over to the agent but that order was varied on appeal to the High Court of Australia. Griffith CJ, with whose judgment Barton and Isaacs JJ concurred, ordered the principal to procure the release or discharge of the agent's estate from each claim 'either by payment or otherwise', within 14 days of being given written notice of a claim. The order left the principal free to make whatever arrangements he thought fit to obtain the release or discharge.[151]

This form of order may be preferred where the indemnifier has a legal or commercial relationship with the third party. The indemnifier may be interested in the discharge of the indemnified party's liability because it relieves the indemnifier of a common or related liability to the third party.[152] More generally, as between the indemnifier and indemnified party, the former may have ultimate responsibility for, or control of, the transaction in which the third party is involved. An order in this form allows the indemnifier flexibility in dealing with the third party. The facts in *Rankin* exemplify both aspects. Griffith CJ remarked that the indemnified agent had 'no right voluntarily to undertake the duty of see-

[145] *Re Law Guarantee Trust and Accident Society Ltd* [1914] 2 Ch 617 (CA), 635 (Buckley LJ), 639 (Kennedy LJ), 652 (Scrutton J).
[146] *Earl of Ranelaugh v Hayes* (1683) 1 Vern 189; 23 ER 405.
[147] See also [7–29].
[148] See [7–7], [6–17]–[6–19].
[149] *Cruse v Paine* (1869) LR 4 Ch App 441; *Brown v Black* (1873) LR 15 Eq 363 (order varied on appeal in a manner not presently relevant: *Brown v Black* (1873) LR 8 Ch App 939); *Rankin v Palmer* (1912) 16 CLR 285.
[150] *Rankin v Palmer* (1912) 16 CLR 285.
[151] See also *Re Alfred Shaw and Co Ltd, ex p Murphy* (1897) 8 QLJ 70 (SC), 73.
[152] See [7–45].

ing that the [principal] shall pay his own debts, even to creditors with whom he may effect a settlement on other terms, or who do not wish to be paid'.[153]

This form of order achieves full indemnification. The indemnifier never directs funds into the hands of the indemnified party, so there is no risk of under-compensation or over-compensation. This was a potential issue in *Rankin*, because the agent had been declared bankrupt and may not have been able to pass on the funds in full to the third parties.[154]

[7–42] Payment by indemnifier to third party. The indemnifier may be ordered to relieve the indemnified party by paying the amount of the liability directly to the third party.[155] An order in this form has been described as a 'leap frog' order.[156] It seems to be accepted that payment made pursuant to the order is effective to discharge the indemnified party's liability.[157] The order may be made even if the third party is not a party to the proceedings.[158]

A leading example is *McIntosh v Dalwood (No 4)*.[159] McIntosh was liable by contract to pay money by instalments to certain third parties. McIntosh and Dalwood later entered into an agreement under which Dalwood was to assume responsibility for McIntosh's contractual liability and to indemnify him against it. Dalwood defaulted and the third parties brought proceedings against McIntosh. McIntosh sought a declaration of his right to indemnity and an order that Dalwood pay the third parties the amount owing. Dalwood's objection that there was no such right to equitable relief was dismissed.

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A similar form of order can be found in cases where a guarantor seeks quia timet relief in respect of an accrued liability to the creditor. A solvent principal debtor may be ordered to exonerate the guarantor by paying the creditor the amount of the liability.[160] Such an order coincides with the debtor's existing legal obligation to the creditor. This is not generally true for claims under indemnities. In *McIntosh*, for example, there was no privity between the indemnifier and the third parties.

The choice of this form of order may depend on several factors. It is an obvious means of giving effect to the construction that the indemnifier is to relieve the indemnified party of its liability and so spare it from having to pay.[161] Another factor is that the indemnifier may be under a common or related liability to the third party, such that it has an interest in

[153] *Rankin v Palmer* (1912) 16 CLR 285, 291–92.
[154] *cf Cruse v Paine* (1869) LR 4 Ch App 441. See further [7–45], [7–46].
[155] *Heritage v Paine* (1876) 2 Ch D 594 (Ch); *Lloyd v Dimmack* (1877) 7 Ch D 398 (Ch); *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 (CA), 482 (Pickford LJ), 486 (Warrington LJ); *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC); *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 28 (Lord Brandon), 40 (Lord Jauncey); *Abigroup Ltd v Abignano* (1992) 39 FCR 74 (FC), 83; *Re Dixon* [1994] 1 Qd R 7 (FC), 20 (Shepherdson J); *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53; (2001) 207 CLR 520, [17] (Gleeson CJ, Gummow, Hayne and Callinan JJ). *cf Re National Financial Co, ex p Oriental Commercial Bank* (1868) LR 3 Ch App 791; *Shaver v Sproule* (1913) 9 DLR 641 (Ont SC) (order for payment into court, the sum to be applied to discharge third party's liability to fourth party, or indemnified party's corresponding liability to third party).
[156] *Wenkart v Pitman* (1998) 46 NSWLR 502 (CA), 529–30 (Powell JA).
[157] *cf Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 40 (Lord Jauncey); *Sheahan v Carrier Air Conditioning Pty Ltd* (1996) 189 CLR 407, 430–31 fn 66 (Dawson, Gaudron and Gummow JJ). See [7–10].
[158] See also *Abigroup Ltd v Abignano* (1992) 39 FCR 74 (FC), 81 (order made where third party not party to relevant cross-claim between indemnifier and indemnified party). *cf Lacey v Hill; Crowley's Claim* (1874) LR 18 Eq 182, 191; *Wolmershausen v Gullick* [1893] 2 Ch 514 (Ch), 529.
[159] *McIntosh v Dalwood (No 4)* (1930) 30 SR (NSW) 415 (FC).
[160] *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 (Ch); *Watt v Mortlock* [1964] Ch 84 (Ch); *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 (Ch).
[161] *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53; (2001) 207 CLR 520, [17] (Gleeson CJ, Gummow, Hayne and Callinan JJ).