

Part I

Introduction

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Introduction

Overview

Contractual Indemnities

[1–1] **Subject of book.** This is a book about contractual promises of indemnity. The expression ‘contract of indemnity’ is sometimes used to describe a contract in which the only, or only substantial, executory promise of one party is to indemnify another. For the purposes of this book, it is for the most part unnecessary to distinguish between a ‘contract’ of indemnity and a promise of indemnity that is merely one of many terms in a contract dealing with a larger subject-matter. The principal subject of analysis is a promise of indemnity in a contract rather than a contract of indemnity.

[1–2] **What is a contractual indemnity?** A promise of indemnity is a promise to protect another against loss from an event or events, or set of circumstances. It is often expressed in terms of a promise to ‘save and keep harmless from loss’,¹ or to ‘secure’ against loss.² The term ‘indemnity’ is, however, elastic and may be used more generally to describe any arrangement under which a party is not to suffer loss. A distinction must be drawn between two kinds of ‘indemnity’ arrangements: first, those in which the essential concern of the undertaking is to protect the promisee exactly against loss; secondly, those in which the essential concern of the undertaking is not of that nature, though the promisee is incidentally or effectively indemnified against a loss.

This book focuses on the former arrangements; these are promises of indemnity in the strict sense. Usage of ‘indemnity’ in the latter sense is, nonetheless, quite common. It might be said, for example, that A’s payment of damages for breach of a contract with B, of an amount equal to B’s loss or B’s liability to another, indemnifies B;³ or that A’s guarantee to B provides an indemnity to B against default by a third party, C;⁴ or that A’s promise to B to pay C, a creditor of B, effects an indemnity against B’s liability to C.⁵

¹ *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53; (2001) 207 CLR 520, [16] (Gleeson CJ, Gummow, Hayne and Callinan JJ). See also *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 254 (Mason CJ); *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti) (No 2)* [1991] 2 AC 1 (HL), 35 (Lord Goff).

² *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828 (CA), 834 (Holroyd Pearce LJ); *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228, 253 (Walsh J); *Turner v Leda Commercial Properties Pty Ltd* [2002] ACTCA 8; (2002) 171 FLR 245, [34].

³ *cf Birmingham and District Land Co v London and North Western Railway Co* (1886) 34 Ch D 261 (CA), 276 (Fry LJ); *Addis v Gramophone Co Ltd* [1909] AC 488 (HL), 491 (Lord Loreburn LC); *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 (PC), 307; *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225 (HL), 273 (Lord Diplock); *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 194 (Mason and Wilson JJ).

⁴ *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 (CA), 784 (Vaughan Williams LJ); *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269, [7].

⁵ *cf Wren v Mahony* (1972) 126 CLR 212, 227 (Barwick CJ).

[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 QJL 70 (SC); *Official Assignee v Jarvis* [1923] NZLR 1009 (CA).

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 Hammersley 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].

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.

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.

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 assumpsit⁴³ on simple contracts, or in covenant⁴⁴ 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-off⁵³ 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 (indem-

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).

nifying) 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 paid⁵⁸ 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.

These points are illustrated by *Crompton 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 Martinant* (1787) 2 TR 100; 100 ER 55.

⁵⁹ See further [1–23].

⁶⁰ *Crompton 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.

Lewis v Campbell,⁶⁹ the claimant was indebted to a third party. Rather than pay the third party directly, the claimant reached an arrangement under which the amount of the debt was credited towards an alleged liability of the third party to the defendant. The defendant promised to indemnify the claimant against claims by the third party. The third party sued the claimant; the defendant assumed responsibility for the defence of the action and lost; the claimant then paid the amount of the judgment against him. Wilde CJ rejected the argument that the action for money paid could only be brought where the claimant's payment had relieved the defendant of a liability to the third party. In the circumstances, the claimant could even succeed independently of the contract of indemnity. The indemnity aside, the request could be inferred from the claimant's conduct in permitting the defendant to defend the action and from the defendant's conduct in so doing.

The point was raised more recently in relation to contracts of reinsurance in *New Cap Reinsurance Corp Ltd (in liq) v AE Grant*.⁷⁰ The reinsurance contracts provided indemnity against losses paid by the reinsured. It was held that the reinsured could have recovered such amounts from the reinsurer by analogy with the common count for money paid.⁷¹ If that conclusion is correct, it appears to extend the reasoning in the authorities above. It is not clear that the reinsurer would be liable at all to the original insured, so as to be exonerated by the reinsured's payment. Nor is it clear that there is a request by the reinsurer that the reinsured make the payments, unless that request is to be inferred from the express statement of the scope of the indemnity.⁷²

⁶⁹ *Lewis v Campbell* (1849) 8 CB 541; 137 ER 620.

⁷⁰ *New Cap Reinsurance Corp Ltd (in liq) v AE Grant* [2008] NSWSC 1015; (2008) 221 FLR 164.

⁷¹ *New Cap Reinsurance Corp Ltd (in liq) v AE Grant* [2008] NSWSC 1015; (2008) 221 FLR 164, [107]–[108].

⁷² *cf New Cap Reinsurance Corp Ltd (in liq) v AE Grant* [2008] NSWSC 1015; (2008) 221 FLR 164, [99].