IN THE HIGH COURT OF JUSTICE **Claim No HQ 17A00144**

QUEENS BENCH DIVISION

BETWEEN

RSA INSURANCE PLC **Claimant**

and

ASSICURAZONI GENERALI SpA **Defendant**

APPROVED JUDGMENT FOR HANDING DOWN

Handed down at Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham on 15 May 2018

Representatives

Claimant-Mr Kent QC and Mr Houghton

Defendant-Mr Feeny

BACKGROUND

1. Mr Merritt was employed by Alick Whittle Limited ("the Company"), a painting and decorating company, between the tax year 1975/1976 and the tax year 1985/1986 ("the Relevant Employment Period").

2. The Company was dissolved in 1996.

3. Royal & Sun Alliance ("RSA") provided employers' liability insurance ("EL insurance") to the Company for the last 6 months of the Relevant Employment Period.

4. On 17 March 2010, Mr Merritt's solicitors sent a letter of claim to RSA ("the Letter of Claim").

5. The Letter of Claim asserted that Mr Merritt had been exposed to asbestos dust and fibres throughout the Relevant Employment Period, in breach of the common law and statutory duties owed to him by the Company, and that as a result of such exposure he had contracted malignant mesothelioma.

6. Mr Merritt obtained medical reports which in brief concluded that: (a) Mr Merritt had contracted malignant Mesothelioma; (b) the asbestos exposure during his employment by the Company was causative of the Mesothelioma; (c) on the basis of Mr Merritt's evidence, his exposure to asbestos during the Relevant Employment Period was sufficient to have caused his Mesothelioma; and (d) all occupational exposure of Mr Merritt to asbestos contributed to the risk of Mr Merritt developing Mesothelioma.

7. For present purposes, it is sufficient to note that, in accordance with the "Fairchild exception" (set out originally in the House of Lords case of **Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22)** , Mr Merritt was entitled to recover from the Company the whole of his losses caused by his contracting Mesothelioma, if he could show that: (a) the Company owed him a duty to prevent him from inhaling asbestos dust because of a known risk, during the Relevant Employment Period, that asbestos dust (if inhaled) might cause Mesothelioma; (b) he was exposed to excessive asbestos dust during the Relevant Employment Period; (c) he had contracted Mesothelioma; and (d) any cause of Mr Merritt's Mesothelioma , other than inhalation of asbestos dust could be effectively discounted (even if Mr Merritt was exposed to asbestos dust by other employers). Under the Compensation Act 2006 ("the 2006 Act") where the insured employer is liable pursuant to the Fairchild principle for 100% of the mesothelioma victim's damages, insurers providing EL Insurance are liable to the same extent.

8. A schedule of loss dated 13 December 2010 was served on RSA, on Mr Merritt's behalf, claiming special damages of £109,998.85 and general damages.

9. RSA made an offer to settle Mr Merritt's claim in the sum of £140,500 gross of certain recoverable Social Security benefits and that offer was accepted, on behalf of Mr Merritt, on 17 January 2011. The net figure payable to Mr Merritt was subsequently agreed at £124,255.40 plus legal costs, to be assessed in default of agreement.

10. RSA subsequently paid:
(a) £124,255.40 to Mr Merritt;
(b) £23,660.60 to the Compensation Recovery Unit (for Social Security benefits paid to Mr Merritt); and
(c) £25,825.85 in respect of Mr Merritt's legal costs ("the Settlement")

11. RSA subsequently carried out searches which revealed that, during the Relevant Employment Period, the following insurers provided EL insurance to the Company:
(a) 1 October 1975 – 15 June 1979 – Aviva;
(b) 16 June 1979 – 31 March 1981 – no insurer traced;
(c) 1 April 1981 – 31 March 1983 – the defendant (which I will refer to as Generali);
(d) 1 April 1983 – 31 March 1985 – no insurer traced; and
(e) 1 April 1985 – 30 September 1985 – RSA

12. RSA says that it was obliged to indemnify the Company in respect of the whole of Mr Merritt's claim (under the 2006 Act) notwithstanding that there were other EL insurers in place during the Relevant Employment Period, and that is why it settled the whole of Mr Merritt's claim, notwithstanding that it only insured the Company for six months of the Relevant Employment Period.

13. RSA also says that at the time that Mr Merritt's claim was settled the present system for tracing former EL insurers (known as the EL tracing office or "the ELTO") was not in place and it could not trace details of former EL insurers of the Company during the Relevant Employment Period. Subsequently, after the Settlement of Mr Merritt's claim, the ELTO system came into operation and RSA was able to discover, on 15 July 2015, that the Company had been provided with EL Insurance by Aviva and Generali, for the periods that I have already indicated in paragraph 11 above.

14. RSA sought what it refers to as an equitable contribution from both Aviva and Generali, towards the total sum of £173,741 that RSA paid out to Mr Merritt in damages and costs under the Settlement.

15. Contributions are more commonly sought by one insurer against another in circumstances where the two insurers have provided cover for the same insured, for the same relevant risk and for the same period (I will refer to these circumstances as "Double Insurance" as that phrase is commonly used to describe these circumstances). In cases of Double Insurance, insurers seeking a contribution would be entitled to recover an equal contribution towards what they have paid out from the other insurer (subject to any limit on the liability of the insurer from whom a contribution is sought). Such rights of contribution do not affect the right of the insured to pursue either or both of the insurers, the rights of contribution simply adjust the liability as between insurers.

16. In this case, the circumstances are different because: (a) the claim of Mr Merritt was made under the "Fairchild exception" which allows Mr Merritt to claim the whole of his loss from developing Mesothelioma for the Relevant Employment Period from the Company; (b) the 1930 Act allows Mr Merritt to bring a direct claim against RSA as insurer of the Company; and (c) insurers such as RSA are now liable to the same extent as the employer for Mesothelioma. All of this means that, notwithstanding that RSA only insured the Company against the risk of its employees developing Mesothelioma for six months of the Relevant Employment Period of ten years, RSA is liable for the whole of Mr Merritt's loss. RSA says that because its liability is based upon it having insured the Company against the risk of Mesothelioma for only six months of the total period of 10 years for which Mr Merritt was exposed to asbestos dust (and therefore the risk of developing Mesothelioma) rather than a case of Double Insurance, where insurers provide insurance against the same risk for the same period, its right to an equitable contribution should be calculated in accordance with the proportion of the total Relevant Employment Period for which each of the three insurers provided EL insurance to the Company (excluding the periods for which no EL insurer has been identified). RSA says that that gives rise to the following liabilities to contribute towards the total sum of £173,741 paid out to Mr Merritt by RSA:

(a) Aviva 59.74% – £103,792.87;
(b) Generali 32.24% – £56,014.10; and
(c) RSA 8.02% – £13,934.03

17. In the alternative RSA say that they have a right to an equitable contribution to the extent the court considers just.

18. RSA says that Aviva has agreed to make and has made the contribution sought by RSA but Generali has refused to make any contribution towards the monies paid by RSA to Mr Merritt, and by these proceedings RSA bring a claim against Generali, claiming an equitable contribution from Generali towards the sum it has paid to Mr Merritt either in the sum of £56,014.10, or such other sum as the court considers just and equitable.

19. Generali says that RSA's claim against it for a contribution towards the monies that it paid to Mr Merritt is statute barred under Section 10 (1) of the Limitation Act 1980 ("1980 Act") and, if it is not, then RSA is put to proof as to the reasonableness of the settlement sum that it paid to Mr Merritt.

REPRESENTATION

20. RSA was represented before me by Mr Kent QC and Mr Houghton.

21. Generali was represented by Mr Feeny.

STRUCTURE OF THIS JUDGMENT

22. In this judgment I will deal with the following points in the following order:

    (a) I will explain, briefly, the basis on which Generali says that RSA's claim is statute barred and the basis on which RSA says that it is not;
    (b) I will deal with the question of whether RSA's claim for a contribution from Generali falls within Section 1 (1) of the Civil Liability (Contribution) Act 1978 ("the 1978 Act") (which, both parties agree, determines the question of whether RSA's claim against Generali is statute barred). In doing so I will:
        (i) refer to the parties' submissions as to the purpose of the 1978 Act;
        (ii) set out the parties' submissions on the question of whether an indemnity in an insurance contract sounds in debt or in damages (Mr Kent QC and Mr Feeny having, as I shall confirm shortly, agreed that the question of whether RSA's claim for a contribution from Generali falls within section 1 (1) of the 1978 Act, depends upon whether the indemnity provided by RSA to the Company sounded in debt or damages);
        (iii) provide my summary of the parties' submissions on the question of whether insurance indemnities sound in debt or damages; and
        (iv) decide the question of whether the indemnity provided by RSA to the Company sounded in debt or damages and give my reasons for that decision;
    (c) I will set out my conclusions as to whether RSA's settlement with Mr Merritt was "reasonable" and the basis on which Generali's contribution should be calculated.

(a) THE CLAIM IS STATUTE BARRED-THE PARTIES CASES IN SUMMARY

23. Generali says, in their defence and in Mr Feeny's skeleton argument, that:

(a) Section 10 (1) of the 1980 Act provides that where under section 1 of the 1978 Act "any person becomes entitled to a right to recover a contribution in respect of any damage from any other person, no action to recover a contribution by virtue of that right shall be brought after the expiration of 2 years from the date on which that right accrued"

(b) Section 1 of the 1978 Act provides "Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover a contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).";

(c) Section 6 (1) of the 1978 Act provides "A person is liable in respect of any damage for the purposes of this Act if the person who suffers it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether in tort, breach of contract, breach of trust or otherwise)". Generali says that the 1978 Act does not create new rights of contribution but simply regulates existing rights of contribution as is made clear by Section 6 (1) and that it is also clear from Section 6 (1) that all claims to contribution, including equitable rights of contribution, which RSA says it has, fall within the 1978 Act;

(d) Generali refers to Section 7(3) of the 1978 Act which provides "The right to recover a contribution in accordance with Section 1 above supersedes any right, other than an express contractual right, to recover a contribution (as distinct from an indemnity) otherwise than under this Act in corresponding circumstances…". Generali says that, if there was an equitable right to recover a contribution prior to the 1978 Act coming into force, then such a right is a right to recover a contribution "in corresponding circumstances" and in consequence any such right is replaced by the right to pursue a claim under Section 1 (1) the 1978 Act; and

(e) the settlement between RSA and Mr Merritt was concluded on 17 January 2011 and the present proceedings were not issued until 13 January 2017. Generali says therefore that the claim is brought well outside the limitation period of 2 years for which Section 10 of the 1980 Act provides.

24. RSA says in their Particulars of Claim, Reply and in Mr Kent QC's skeleton argument:

(a) If the RSA claim for an equitable contribution does fall under Section 1 (1) of the 1978 Act and the 1978 Act excludes RSA from being able to pursue what it says is its equitable right of contribution, then it accepts that RSA's claim against Generali is subject to the two-year limitation period prescribed by Section 10 (1) of the 1980 Act and the claim is statute barred, but RSA says that its claim to a contribution from Generali does not fall within Section 1 (1) of the 1978 Act;

(b) Section 6 (1) of the 1978 Act which defines persons who are liable to make contributions under the 1978 Act, refers to the liability to the original "victim" or "sufferer of damage" which must be a liability owed both by the person seeking a contribution and the person from whom a contribution is sought, under Section 1 (1). What Section 6 (1) confirms is that, for the purposes of Section 1 (1) the target of a statutory contribution claim can be

a person who is, or would be obliged to compensate the original victim. RSA however do not contend that Generali is or would be directly liable to compensate the victim (Mr Merritt) but rather that Generali is liable to contribute in equity towards the sum that RSA has paid to Mr Merritt, pursuant to the indemnity that RSA gave to the Company. RSA says therefore that Section 1 (1) of the 1978 Act does not encompass RSA's equitable contribution claim against Generali;

(c) Section 7 (3) of the 1978 Act does not have the effect of bringing all contribution claims within the ambit of Section 1 (1) of the 1978 Act. Section 7 (3) only applies to the "right to recover a contribution, in accordance with Section 1" and to claims for contribution in "corresponding circumstances" to those envisaged in Section 1 (1). RSA says first that its equitable contribution claim against Generali falls outside the scope of Section 1 (1) and second that the circumstances of that claim do not "correspond" to those set out in Section 1 (1) because the basis on which the equitable contribution is assessed is different from the way in which Section 1 (1) provides for contributions to be assessed;

(d) If Section 1 (1) of the 1978 Act applied to RSA's equitable contribution claim against Generali this would lead to anomalies and injustice;

(b) DOES RSA'S CLAIM AGAINST GENERALI FALL WITHIN SECTION 1(1) OF THE 1978 ACT?

THE PURPOSE OF THE 1978 ACT

25. Mr Kent QC says that, for present purposes, the purpose of the 1978 Act is revealed by paragraphs 28 and 29 of the Law Commission Report which gave rise to the passing of that act.

26. Paragraph 28 says "We said in our working paper that the equitable rules seemed to work reasonably well where the persons concerned were liable in *debt* to the same demand. Not everyone agreed with us and we return to the point of disagreement in the next paragraph. However, we criticised the equitable rules for being insufficiently flexible where the persons concerned were jointly liable in *damages*. Our point, and it won almost unanimous support, was that the 1935 Act improved on the common law not only by allowing contribution proceedings between tortfeasors but also by requiring the court to allow D2 to pay such contribution "as may be just and equitable having regard to that person's responsibility for the damage". The significance of this requirement is that where D2 is more to blame for the damage than D1 he may, under the 1935 Act, be ordered to pay more by way of contribution. Equitable rules on the other hand provide that the loss is to be shared equally between D1 and D2 even where D2 is more to blame than D1, unless the balance of responsibility is so heavily tipped against D2 that complete indemnity is justified. Later in this report we recommend that, provided the substantive claim is for damages, the statutory jurisdiction to award a contribution should be available for and against contractors as well as tortfeasors. This would mean that, in contribution proceedings between persons jointly liable in damages for breach of contract, the court's power to divide the damages justly and equitably, having regard to the responsibility of each for the damage, would no longer be fettered by the existing rules. We bring this point out now because of the division of opinion,

which it is convenient to consider at this stage, over the desirability of limiting the recommendations to contribution proceedings between persons jointly liable in damages."

27. Paragraph 29 says "It has been said that the existing rules can work unfairly in contribution proceedings between persons jointly liable for the same debt, for example between persons liable as partners, joint tenants or joint guarantors. The existing rules generally result in persons who are equally liable having to bear an equal share, without regard to the part they played in incurring the debt or the benefit, if any, that they derived under the agreement. It has been argued that this can lead to injustice and that the court should therefore be given an overriding discretion in contribution proceedings to redistribute the burden of debt in whatever way the justice of the case may require. Although the argument has its attractions there are substantial points to be considered on the other side. First, although no doubt hardship can result from the existing rules, it is not apparent from reported cases or from comments received on consultation that hardship results in practice to an appreciable extent. Second, it is always open to those jointly liable for a debt to agree between themselves how the burden of the debt should be distributed between them; the court will then enforce their agreement. Third, a discretion in the court to reallocate the burden of debts between those jointly liable for them would introduce an element of uncertainty which would in many cases be extremely undesirable; it would, for example, make the preparation of partnership accounts very difficult, particularly once the partnership was dissolved; litigation would be almost inevitable. Our conclusion, so far as joint debts are concerned, is that it is more important that the rule should be reasonably certain than that the court should have a wide discretion to redistribute the burden of each and every joint debt according to the general merits of the particular case. We accordingly make no recommendation for changing the existing law of contribution as it applies to joint debts".

28. Mr Kent QC draws a number of conclusions from paragraphs 28 and 29 of the Law Commission Report:

    (a) the Law Commission wanted to ensure that the court would have the power to divide damages justly and equitably between tortfeasors and parties who breached contracts according to the degree of their responsibility or blame for the damage. This concept of "blame" is then incorporated into Section 2 of the 1978 Act, which provides for the court to determine rights of contribution arising under Section 1 of the 1978 Act, according to what the court finds to be just and equitable, having regard to the extent of the person's responsibility for the damage;
    (b) insurers are not responsible for causing damage, they merely provide an indemnity to a party who is responsible for causing damage and in consequence Section 2 of the 1978 Act, which directs the court's attention to the extent of the contributor's responsibility for the damage, was never designed to determine the rights of contribution as between insurers; and
    (c) paragraph 29 makes a clear distinction between a liability for the same debt and a liability for the same damage and it refers, in connection with liabilities for debt, to Partners, Joint Tenants and Joint Guarantors. The Law Commission in paragraph 29 concludes that so far as joint debts are concerned no recommendation is made for changing the existing law of contribution. There is no material difference and no

justification for dealing differently with the rights of contribution between guarantors and the rights of contribution between indemnifiers.

29. Mr Kent QC also refers to the comments of Lord Hope in **Royal Brompton Hospital NHS Trust v Hammond and others [2002] UKHL 14** where, Mr Kent QC says, Lord Hope emphasised that the purpose of the 1978 Act was to extend the rights of contribution between "wrongdoers". At paragraph 39 Lord Hope said, "the 1978 Act extended the reforms so as to provide for relief by way of contribution between wrongdoers whatever the basis of their liability." And at paragraph 40 "This further reform was designed to close the gap in the law which had been identified by the Law Commission in its report of March 1977, Law of Contract report on Contribution (Law Com No79). It affected all wrongdoers other than tortfeasors…"

30. Mr Feeny says that the purpose of 1978 Act was to bring all claims for contribution for damage under the same roof rather than leaving them subject to a confusing mixture of statutory and other rights. This purpose is, Mr Feeny says, demonstrated by:

    (a) The long title to the 1978 Act which refers to it being "An act to make new provision for contributions between persons who are jointly or severally or both jointly and severally, liable for the same damage and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage; and to amend the law relating to proceedings against persons jointly liable for the same damage or jointly or severally, or both jointly and severally liable for the same damage.";
    (b) Section 1 (1) of the 1978 Act says "Any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)." The meaning of "any person liable in respect of any damages suffered by another" is then supplied by section 6 (1) of the 1978 Act which provides "A person is liable in respect of any damages for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."; and
    (c) Section 7 (3) of the Act provides where relevant "The right to recover contribution in accordance with Section 1 above supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under this Act in corresponding circumstances…" .

31. So, Mr Feeny says, if the claim for contribution is for damages then such a claim may only be brought under the 1978 Act as it covers claims for contribution towards damage (whatever the claim for a contribution is based on, in accordance with Section 1 (1) and Section 6 (1)) and any rights to contribution that existed prior to the 1978 Act coming into force are swept away by virtue of Section 7 (3).

32. The submissions made by Mr Kent QC and Mr Feeny as to the purpose of the 1978 Act led to them agreeing that the answer to the question as to whether or not RSA's claim for a contribution against Generali is a claim covered by Section 1 (1) of 1978 Act is determined by answering the question as to whether the Company's claim against RSA, for an indemnity in respect of Mr Merritt's Mesothelioma claim, was a claim sounding in debt or a claim

sounding in damages. Mr Kent QC and Mr Feeny agree that if it is a claim sounding debt then is not covered by Section 1 (1) of the 1978 Act whereas if it is a claim sounding in damages then it is covered by Section 1(1) of the 1978 Act.

33. It is also common ground that, although Mr Merritt made his claim direct against RSA pursuant to the 1930 Act, this fact makes no difference to the analysis and it remains necessary to consider the nature of the Company's claim for an indemnity against RSA.

DOES THE COMPANY'S CLAIM FOR AN INDEMNITY IN RESPECT OF MR MERRITT'S CLAIM SOUND IN DEBT OR DAMAGES?-THE PARTIES POSITIONS

Debt or Damages-The Case Law

34. The first case that I was referred to (by Mr Kent QC) is the decision of Kevin Garnett QC in **Hampton v Minns [2002] 1 WLR 1**. In this case the claimant and defendant established a company and entered into a guarantee in favour of the company's bank "on demand to pay or discharge to the bank all monies due or owing to it" (by the company). The company went into liquidation and the claimant paid the majority of the debt owing to the bank and then issued proceedings for a contribution from the defendant for one half of what he had paid to the bank. The defendant asserted that the claim for a contribution was covered by the 1978 Act and, since the claim was brought more than two years after the claimant had paid the bank, it was statute barred under Section 10 of the 1980 Act. The judge confirmed that Section 1 of 1978 Act applies only to claims for damages and not to claims for debt. The judge acknowledged that if a guarantor promised that a third party would perform a specified obligation, then a failure of the third party to do so would make the guarantor liable in damages for breach of the guarantor's promise but, if the guarantor's promise was that in certain events he would pay a sum of money then when those events occurred the guarantor would be liable in debt to the creditor. The nature of the promise given by the claimant and defendant here was to discharge all monies due or owing to the bank by the company, on demand and the obligation therefore created a debt which did not fall within Section 1 of the 1978 Act. The two-year time limit on Section 10 of the 1980 Act therefore did not apply.

35. Mr Kent QC refers to paragraph 91 of Kevin Garnett QC's judgment, where, having considered, in particular the House of Lords case of **Lep Air Services Ltd v Rolloswin Investments Ltd [1973] AC 331** and the judgments of Lords Reid, Diplock and Kilbrandon in that case, the learned judge says "In my judgment, what follows from the above is that although on analysis a contract of guarantee will often, indeed usually, be one whereby the guarantor promises due performance by the primacy of his obligations, it is necessary in each case to construe the agreement in question. This emerges particularly clearly from the opinion of Lord Reid. Thus, if the guarantor's promise is that a third party will perform specified obligations, then any failure by the third party to do so will mean that the guarantor becomes liable in damages for breach of his promise. If on the other hand, the guarantor promises that in certain events he will pay a sum of money, he becomes liable in debt once those events have happened."

36. Here, says Mr Kent QC, RSA promises, under the EL insurance it issued to the Company, that, in accordance with the wording of its policy, it would provide an indemnity to the Company "against legal liability for damages and claimant's costs and expenses in respect of bodily injury to or death disease or illness of any Person Employed during any Period of Insurance". Only when judgment was obtained against the Company or a settlement agreed, says Mr Kent QC, did RSA become liable to indemnify the Company. There is no question of the wording of the policy suggesting that RSA in any way promises that the Company will perform any obligation in relation to Mr Merritt or prevent him from suffering Mesothelioma. So RSA's liability is in the nature of debt, not damages.

37. Mr Feeny says that, **Hampton v Minns** does not concern agreements by insurers to provide an indemnity, but rather a guarantee of a debt. Mr Feeny also refers to paragraph 99 of the judgment of Kevin Garnett QC in which he places reliance on the terms of the guarantee, by which Mr Hampton and Mr Minns agreed to "pay or discharge" to the bank all monies which would become due or owing, which he says are words appropriate to the creation of a debt.

38. Mr Kent QC next refered to the House of Lords case of **Bradley v Eagle Star insurance Co.Ltd [1989] AC page 957.** In this case Mrs Bradley was employed by a limited company (D Ltd) which ran a cotton mill. In 1970 she was certified as suffering from byssinosis, a respiratory disease caused by the inhalation of cotton dust. D Ltd was dissolved and Mrs Bradley wanted to determine whether she could pursue the defendant, Eagle Star, D Ltd's insurers, by applying for pre-action discovery, from Eagle Star, of the terms and particulars of all contracts of insurance issued by Eagle Star to D Ltd. The House of Lords concluded that, at that time, in order to sue the insurers under the 1930 Act, it was necessary for Mrs Bradley to establish by a judgment, arbitration award or agreement with D Ltd that, D Ltd was liable to compensate Mrs Bradley for the byssinosis, from which she was suffering. Mrs Bradley could not establish such liability by judgment, arbitration or agreement with D Ltd because D Ltd was dissolved, therefore Mrs Bradley could not establish a claim against Eagle Star and no purpose would be served by making the order for pre—action discovery which she sought.

39. The implications of the decision of the House of Lords in **Bradley v Eagle Star Insurance**, says Mr Kent QC, is that RSA's liability, to pay Mr Merritt only arose when RSA agreed a settlement with Mr Merritt on behalf of the Company. The settlement created a liquidated sum due and owing by the Company to Mr Merritt, which RSA discharged in satisfaction of the indemnity that it gave to the Company under its insurance policy. RSA could not therefore, on any view, be regarded as having breached its contract with the Company, to provide the Company with an indemnity in relation to Mr Merritt's claim, because it settled Mr Merritt's claim as soon as it became a sum due under the indemnity. There is no basis therefore upon which the indemnity could be said to give rise to a damages claim because, in order for there to be a damages claim, there has to be a breach of contract.

40. The next cases to which I was referred by Mr Kent QC are **Royscott Commercial Leasing Limited v Ismail (unreported) 1993** and **Codemasters Software Co Ltd v Automobile Club de L' Ouest (no2) [2009] EWHC 3194 (Comm) ("Codemasters").**

41. In **Royscott Commercial Leasing Ltd v Ismail**, Royscott provided equipment on lease to a company of which the defendant, Mr Ismail, was a director. Mr Ismail had provided Royscott with an indemnity, in respect of the lease agreement. Royscott terminated the lease agreement for breach of the company's obligations under it, repossessed the goods and sold them at auction. Royscott then pursued Mr Ismail under the indemnity for the shortfall between the amount due under the lease agreement and the value for which the goods were sold at auction. Royscott applied for summary judgment for the shortfall and a District Judge granted judgment for damages to be assessed (rather than for the sum claimed by Royscott). Mr Ismail appealed against the judgment and Royscott appealed against the refusal of the District Judge to grant it judgment for the sum claimed. Those appeals were dismissed by the County Court judge (in the case of Royscott's appeal, on the basis that it was arguable that Royscott had not taken adequate steps to mitigate their loss).

42. Royscott appealed to the Court of Appeal, inter alia, on the ground that the contract of indemnity was for sums payable as a debt and, as a matter of principle, there was no need for Royscott to mitigate its losses. Lord Justice Hirst, gave the leading judgment with which Kennedy and Glidewell LJJ agreed. Hirst LJ accepted Royscott's submission that a claim under a contract of indemnity, such as that entered into by Mr Ismail, was not a claim in damages, but instead a claim in debt for a specified sum due on the happening of an event which had occurred. As such it was not open to Mr Ismail to challenge his obligation to pay under the contract of indemnity by relying on principles relating to the assessment of damages for breach of contract (i.e. that Royscott had a duty to mitigate its loss). Hirst LJ referred with approval to the case of **Scottish Midland Guarantee Trust v Woolley [1964] 144 LJ 272** which he noted was a hire purchase agreement, where the finance company sued the defendant under a guarantee of the hirer's liability. Stephenson J held, in that case, that the plaintiff finance company was entitled to the unpaid instalments due from the hirer since the claim was one in debt and not in damages for breach of contract and the finance company was therefore under no legal obligation to mitigate its loss.

43. In **Codemasters Software Ltd v Automobile Club de L Ouest (No2) [2009] EWHC 3194** ("Codemasters"), the claimant designed and sold a computer game involving simulated car racing. The defendant organised the Le Mans 24-hour race and other races. The claimant entered into a licensing agreement with the defendant under which the defendant purported to give the claimant the right to use the names of cars in the game such as Lamborghini, Porsche and Ferrari. The agreement included an indemnity at clause 10.3 by which each party agreed to "indemnify, defend and hold harmless the other party and its affiliates, parent companies, subsidiaries, and their respective directors, officers and employees, from any and all claims, causes of action, suits, damages or demands whatsoever, arising out of any breach or alleged breach of any agreement or warranty made by the indemnified party pursuant to this agreement."

44. The defendant warranted and covenanted that it had the right to enter into the agreement and to license the claimant to use the car names in the game and that the use of those names would not infringe any intellectual property rights.

45. Ferrari, Lamborghini and Porsche asserted to the claimant that the defendant had no right to license the claimant to use their car names in the game and that therefore the claimant was breaching their intellectual property rights by doing so ("the Claims").

46. The claimant sued the defendant pursuant to the indemnity at clause 10.3, asserting that the defendant was liable to indemnify the claimant against losses it incurred as a result of the Claims being made. The claimant entered into a settlement agreement with Ferrari which gave it the right to use 3 Ferrari cars online but later withdrew those cars from the game and entered into a license agreement with Lamborghini. The claimant also entered into settlement negotiations with Porsche which were still ongoing. The defendant applied for permission to adduce expert evidence as to the claimant's likely loss of profit if it had withdrawn all the relevant cars from the game, what the payments to Lamborghini and Porsche would have been if the claimant had exercised reasonable skill and knowledge in the negotiations, whether the negotiations with Lamborghini and Porsche had been conducted with reasonable skill and knowledge and whether a reasonable company in the claimant's position would have removed the Lamborghini and Porsche cars from the game instead of negotiating retrospective licences.

47. The claimant resisted the application on the basis that its claim, under the indemnity, was not a claim for damages but instead was a claim for a specified sum due on the happening of a specified event and therefore the defendants could not raise a defence that the claimant had failed to mitigate its loss. Warren J made it clear, in paragraph 32 of his judgment, that the law, so far as he was concerned, was that questions of mitigation do not arise under contracts of indemnity so as to give the indemnifier a defence to any part of the claim for which he would otherwise be liable under his indemnity (as distinct from a claimant who seeks damages for breach of contract or in tort). In coming to that conclusion, he referred to the case of **Scottish Midland** which Hirst LJ relied upon in **Royscott**, and to **Royscott** itself.

48. In **ABN AMRO Commercial Finance plc v McGinn & Others [2014] EWHC 1674 (Comm),** the claimant factoring company sought summary judgment on a number of issues of construction in relation to a deed of indemnity given to it by the defendant director of a company, to whom ABN Amro had given invoice discounting facilities. The company went into administration in 2009 and a number of its customers, whose debts had been assigned by the company to ABN Amro, disputed the amount that the company's books said was owing by them.

49. ABN Amro employed a specialist collection agency to collect the debts, but after two years, there was still a sum outstanding to ABN Amro of nearly £9 million. ABN Amro produced a certificate certifying the outstanding debt owed to it by the company which it argued, in accordance with the terms of the invoice discounting facilities, was conclusive as to the sum due. ABN Amro then sued the director under the indemnity, who defended the claim inter alia on the basis that ABN Amro had failed to mitigate its loss by failing to collect the debts.

50. At paragraph 58 of his judgment, Flaux J said that the contention of the defendant that ABN Amro had caused its own loss by failing to collect the outstanding debts was entirely circular because it was within the complete discretion of ABN Amro whether and how it collected the outstanding debts. As such he considered the contention that, by not collecting debts, ABN Amro caused its own loss to be a contention that ABN Amro had failed to mitigate its loss "by another name". Flaux J then said "I agree with the view expressed by Warren J at [37] of **Codemasters** (albeit that he did not decide the point) that such a contention is inconsistent with the decision of the Court of Appeal in **Royscott**, where Hirst LJ, giving the

main judgment, accepted that as a matter of law, a party providing an indemnity cannot challenge his obligation to pay under the contract of indemnity which is a claim in debt, by reference to principles relating to the assessment of damages for breach of contract which have no application to debts."

51. As to the difference between contracts of guarantee and contracts of indemnity, Mr Feeny refers me to the case of **Durley House Ltd v Ferndale Hotels plc [2014] EWHC 2608 (CH)** ("**Durley House**"). In **Durley House**, the defendant agreed to pay rent owing by the claimant under a lease to a third party but failed to do so. The defendant argued that the claimant was obliged to show that it had paid the rent to the third party but the claimant contended that the defendant was in breach of contract by not paying the rent to the third party and it was entitled to damages for breach of contract, amounting to the value of the rent which the defendant had failed to pay, regardless of whether the claimant had paid the third party or not. The claimant subsequently disclosed a settlement agreement between the claimant and the third party which provided that the claimant would pay to the third party any monies recovered from the defendant in the proceedings.

52. Mr Stephen Morris QC reasoned at paragraphs 106 – 108 of his judgment that:

    (a) a contract of guarantee is to be distinguished from a contract of indemnity. In a contract of guarantee there is a direct contractual obligation between the creditor and the guarantor. In a contract of indemnity there are contractual obligations between the creditor and the party indemnified and between the party indemnified and the indemnifier, but there is no obligation between the indemnifier and the creditor. He went on to say that a contract of insurance is a type of contract of indemnity by which the insurance company has an obligation to indemnify the indemnified, on the happening of an event. He regarded the obligations of the defendant, in **Durley House** as obligations owed to the claimant under a contract of indemnity;
    (b) prior to the Judicature Acts common law and equity had different rules relating to contracts of indemnity and in particular as to whether there was a condition requiring prior payment to the creditor before the indemnified could claim against the indemnifier. Since those Acts however, the rules of equity prevailed (which did not require prior payment to the creditor by the indemnified). In this respect he referred to the comments of Lord Brandon at paragraph 28C in **Firma C**;
    (c) there was doubt as to the true underlying analysis of the position at common law, and in particular whether the requirement of prior payment was a condition precedent to the right to be indemnified or only a procedural requirement for the grant of the remedy. He said "One view is that under a contract of indemnity requiring the indemnifier to "hold harmless" the indemnified, the true obligation of the indemnifier is to prevent the indemnified sustaining a loss or expense in the first place, rather than merely to reimburse the indemnified only once the latter has paid or lost. It is certainly the case, that the English authorities are at one in taking the view that the remedy for breach of a contract of indemnity is damages, rather than one for a contractual sum due (i.e. debt)."

53. Ultimately however Stephen Morris QC concluded that because, as a result of the Judicature Acts, equity now prevailed over the common law rules and because the equitable rules did

not require the indemnified to show that they had paid the creditor before they could call on the indemnity, it was not necessary to resolve the debate as to whether a contract of indemnity required the indemnifier to prevent the indemnified from sustaining any loss or expense in the first place, or to reimburse the indemnified once they had incurred loss. It follows from the comments of Stephen Morris QC, that the English authorities are at one in taking the view that the remedy for breach of a contract of indemnity is damages, were obiter.

54. Mr Feeny says that I should follow those authorities that relate directly to indemnities given under contracts of insurance, which he says, are of one voice in saying that the liability of the insurer under a contract of insurance is an unliquidated claim in damages for failure to prevent the insured risk from eventuating, rather than the authorities to which Mr Kent QC refers which relate to either guarantees or to indemnities given, other than in insurance contracts.

55. Mr Feeny relies, in particular, on the House of Lords case of **Firma C-Trade SA v Newcastle Protection and Indemnity Association [1991] 2 AC 1.** In this case, the Appellant was a club which indemnified its members, who were owners of ships, against becoming liable for loss or damage caused to cargo carried on board their ships. There were two appeals. In one case a default judgment had been entered against a member who failed to defend the case brought by a cargo owner and in the other case judgment was obtained after the claim was litigated. In both cases the shipowners, who were members of the Appellant club, were wound up. The cargo owners sought to pursue the club, claiming an indemnity against them under the 1930 Act. The terms upon which an indemnity was offered to ship owning members of the club required that they pay the cargo owners first, before they became entitled to be reimbursed for what they had paid to the cargo owners by the club. The House of Lords found that the requirement that the ship owning members of the club should pay the cargo owners before being entitled to claim an indemnity from the club was a condition precedent to the liability of the club, and that condition precedent could not be disregarded or overridden simply because the club was being pursued by the cargo owners, pursuant to the direct rights that they had against the club under the 1930 Act (the 1930 Act gave the cargo owners no better rights than the ship owning members of the club). In his speech Lord Goff refers to the indemnity given by the club as giving rise to a claim against the club in unliquidated damages.

56. Mr Feeny says that **Goff & Jones "The Law of Unjust Enrichment"** Ninth Edition 19-34 refers to a number of cases where the courts have found that actions by insureds against indemnity insurers "sound in unliquidated damages rather than debt". I will refer to those cases in due course. Mr Feeny says that Mr Kent QC has not pointed to any case in which the court has found that an insurer's obligation under an indemnity is to be regarded as giving rise to a debt owed by the insurer to the insured rather than a damages claim by the insured against the insurer and I should therefore follow the authorities which are referred to in Goff & Jones and **Firma C**, all of which are concerned with indemnities given in contracts of insurance.

Section 80 of the Marine Insurance Act 1906

57. In further support of his case that insurance indemnities sound in debt and not in damages, Mr Kent QC refers to section 80 of the Marine Insurance Act 1906 ("1906 Act") which provides:
"(1) where the assured is over – insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateable to the loss in proportion to the amount for which he is liable under his contract.
(2) if any insurer pays more than his proportion of the loss, he is entitled to maintain action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt."

58. Mr Kent QC says that section 80 of 1906 Act reflects the practice in the insurance industry, not just in marine insurance but in insurance in general. If the 1978 Act does apply to indemnities provided by insurers then, on the face of it, the 1978 Act would, by implication, repeal section 80 of the 1906 Act, yet there was no mention that this was intended within the Law Commission report.

IEG

59. In **International Energy Group Limited v Zürich Insurance UK Branch [2015] UKSC ("IEG")**, the claimant employer was a Guernsey company. One of its employees who had worked for it for 27 years and had been exposed, during the whole of that period, to asbestos dust developed mesothelioma. The claimant had only insured against the risk of diseases such as Mesothelioma being suffered by its employees for six of the 27 years during which the risk of Mesothelioma, due to the employees' exposure to asbestos dust, existed. It was agreed that Guernsey law applied to the issue and, as a result of that, that the 2006 Act did not apply, which provides that a tortfeasor responsible for any part of a period during which the risk of developing mesothelioma exists by virtue of exposure to asbestos dust, has to indemnify the insured against the whole of the loss suffered by the employee as a result of them developing mesothelioma. The issue for determination by the Supreme Court was whether the defendant was liable to compensate the claimant for the whole of the employee's loss or only for a proportion of the loss representing the period of 6 out of the 27 years for which the insurer was on risk notwithstanding that the 2006 Act did not apply in Guernsey. The decision of the Supreme Court was that the defendant was only liable to indemnify the claimant for a proportion of the loss representing 6/27ths of the employees' loss.

60. Notwithstanding that the issue before the Supreme Court was decided on the basis that the defendant was only liable for 6/27ths of the employees' loss, Lord Mance and Lord Sumption went on to consider what the right of contribution might have been, as between insurers, if the defendant had been liable for all of the employee's loss.

61. Mr Feeny relies upon the speech of Lord Sumption and Mr Kent QC relies upon the speech of Lord Mance. They are agreed that the comments of Lord Sumption and Lord Mance on which they rely were obiter, that Lord Sumption's speech was in the minority whereas Lord Mance enjoyed majority support for his speech and that the Supreme Court did not receive

any or any detailed submissions on the question of whether a claim under an insurance indemnity sounds in damages or in debt or as to whether the 1978 Act applies to contribution claims in relation to insurance indemnities

62. Lord Mance took the view that the right of contribution arose in equity and at paragraph 64 he said, "An alternative possible avenue of recourse against a "double" insurer in respect of policy liabilities based on breach of an obligation assumed on or after 1 January 1979 is the Civil Liability (Contribution) Act 1978. The argument would be that both insurers are liable for "the same damage" within the meaning of Section 1 (1) of that Act. The possibility that the 1978 Act applies is dismissed in **Colinvaux & Merkin's Insurance Contract Law** (loose leaf ed), para C-0643, whilst **Charles Mitchell** in the **Law of Contribution and Reimbursement** (2003), paras 4.13 and 4.43-4.44, suggest that it turns on whether liability under an indemnity insurance is regarded as "the right to be indemnified by a payment of money" or is, under a view which the authors suggest that the cases favour, regarded as arising from breach of an undertaking to prevent the insured risk from materialising. It is unnecessary to resolve this difference here. It suffices to say that, if insurance contract liabilities are viewed as sounding in damages, it appears somewhat surprising if the 1978 Act could operate as an alternative statutory remedy with different effect in a case of true double insurance in respect of post – commencement liabilities."

63. Lord Sumption was of the view that a right of contribution between insurers was covered by the 1978 Act. At paragraph 181 he said "As between insurers each of whom insured only part of the period of exposure but are liable (on this hypothesis) in full, I think it clear that there is a statutory right of contribution. Section 1 (1) of the Civil Liability (Contribution) Act 1978 which came into force on 1 January 1979, and applies to damage occurring after that date: see section 7 (1). This has sometimes been questioned, for example by Daniel Friedman, "Double insurance and payment of another's debt" (1993) 109 LQR 51, 54. But I can see no principled reason for questioning it. Section 1 (1) provides that a "person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)." A contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example in a liability policy by having to pay the third party claimant: **Firma C-Trade SA v Newcastle Protection and Indemnity Association [1991] 2 AC 1, 34 (**Lord Goff of Chieveley). The class of persons "liable in respect of any damage suffered by another" may include those liable in contract, and there is no reason to limit it to those who have themselves caused the damage, as opposed to those who have assumed a contractual liability in respect of it. The question is therefore whether the damage for which successive insurers are liable is the same damage. As a matter of construction and on ordinary principles of insurance, it is not. As I have said successive insurers of liability on an occurrence basis do not insure the same liability. Each of them has contracted to indemnify the insured against an insured peril occurring in its own period on risk. In the case of an indivisible injury the liability of successive insurers is therefore alternative and not cumulative. However, on the footing that (contrary to my opinion) the law treats each insurer as liable for the whole loss in each period of insurance, then it must necessarily have been the same damage."

64. At paragraph 182 Lord Sumption says "Whether there would be a right of contribution in respect of liabilities arising before 1 January 1979 is a more difficult question. There has

always been a right of contribution at common law in cases of double insurance. But double insurance normally requires that two or more insurers should be liable in respect of the same interest on the same subject matter against the same risks. On this ground, English law has hitherto declined to recognise that double insurance can exist as between insurers liable in respect of different periods even if the losses are the same. It would require some considerable development of traditional concepts of double insurance to accommodate a situation like the present one.… Whether the law should develop in the same way in England is a question that I should prefer to leave to a case in which it is more central to the outcome and the arguments of the parties. The 1978 Act will cover the great majority of cases that seem likely now to rise."

Mr Feeny's Criticisms of Lord Mance's Opinion

65. Mr Feeny criticises the views expressed by Lord Mance in paragraph 64 (or suggests that they should not be regarded as reflecting the true position) on the bases I set out below.

66. Mr Feeny says that, Lord Mance refers to Colinvaux & Merkin's Insurance Contract dismissing the possibility that the 1978 Act would apply. Mr Feeny accepts that paragraph C -0643 of the latest edition of **Colinvaux & Merkin's Law of Insurance Contracts** describes the right of contribution as "purely equitable" (that is not covered by the 1978 Act) but in making that statement, Mr Feeny says that reliance is placed upon the judgment of David Steel J in **Bovis Construction Ltd v Commercial Union Insurance (2001) Lloyds Rep 541** ("Bovis v Commercial Union"). The latest edition then goes on to discuss the comments of Lords Mance and Sumption in **IEG** and submits that Lord Mance is correct that the 1978 Act does not apply. Mr Feeny says however that the decision of David Steel J in **Bovis v Commercial Union** does not say that the rights of contribution between insurers are purely equitable.

67. In **Bovis v Commercial Union**, Bovis contracted with the owner of the site ("R") to construct an office block on it. R obtained an insurance policy issued by Commercial Union in the joint names of Bovis and R, to cover risks associated with the construction works. Each of R and Bovis obtained separate insurance policies, in the case of R, issued by GA and in the case of Bovis, issued by ES. The policy issued by ES provided, at clause 6, that if there was in existence another insurance policy covering the same risk, then ES would not be liable to pay more than its rateable proportion of the claim.

68. A significant leak occurred in the boiler room in the roof of the building after practical completion had been achieved. GA paid out to R, under its policy and R assigned to GA its claim against Bovis, GA issued proceedings against Bovis. The proceedings were settled on the basis that Bovis made a payment of £350,000 plus costs. Commercial Union refused to indemnify Bovis on the grounds that its claim was not covered by the policy. Bovis claimed against its own insurer, ES who paid out in full, without making a deduction on the basis that the risk was also covered by the Commercial Union policy.

69. Bovis sued Commercial Union for an indemnity or contribution under Section 1 the 1978 Act and ES was joined in the claim. Bovis failed in its claim upon the basis that it had been paid out in full by ES. As for ES, the court found that it could have refused to pay out Bovis in full and it was a volunteer in paying more than 50% of the claim, it could not therefore claim a

contribution from Commercial Union, under the 1978 Act. That disposed of the claims but David Steel J went on to consider whether a claim for an indemnity by Bovis for a contribution by ES under the 1978 Act would have succeeded if there had been no clause entitling ES to pay no more than its rateable proportion of the claim (and it had paid out the whole of the claim).

70. Bovis/ES argued that they would be entitled to an indemnity and contribution, respectively under Section 1 of the 1978 Act because Bovis and Commercial Union were both liable for the loss, Bovis under the management contract that it had entered into with R and Commercial Union, under the insurance policy which had been taken out in the joint names of R and Bovis. David Steel J concluded that Bovis and Commercial Union would not be liable for the purposes of Section 1 "in the same damage" because R had a claim against Bovis for breach of contractual duty which had resulted in the damage but Commercial Union was not responsible for the damage but merely provided an indemnity in respect of it. Mr Feeny says that nowhere in the judgment of David Steel J did he say in terms that the right of contribution was purely equitable**.**

71. Mr Feeny says that Lord Mance, after briefly mentioning the view of two academic writers and briefly giving his own view on the matter, said that it was unnecessary to resolve the question of whether or not an insurer's right of contribution is caught by the 1978 Act. It was clear therefore, says Mr Feeny, that Lord Mance did not intend that paragraph 64 of his judgment should represent his fully considered and reasoned view on the issue.

72. Mr Feeny says that Lord Mance also misunderstood the effect of the 1978 Act in that he took the view that it created an alternative means by which an insurer could pursue a right of contribution, in addition to what Lord Mance took to be the pre—existing claim in equity. In fact, the effect of section 7 (3) of the 1978 Act is that all pre—existing rights of contribution that fall within Section 1 of the 1978 Act are replaced by the right of contribution under Section 1 of the 1978 Act. There would be, therefore, no alternative remedy but instead only the remedy under Section 1 of the 1978 Act.

73. Mr Kent QC says that if, which he denies, the rights of contribution between insurers are caught by Section 1 of 1978 Act, then he accepts that the effect of Section 7 (3) would be to replace the equitable right to a contribution with the right contribution under Section 1. He says however that no doubt Lord Mance would be even more surprised if the effect of the 1978 Act were to sweep away the existing equitable claim, to replace it with a claim under Section 1 of the 1978 Act, thereby leaving insurance companies' rights of contribution to be determined, in accordance with the criteria set out under Section 2 of the 1978 Act rather than the "broad equitable jurisdiction" referred to by Lord Mance. Mr Kent QC says that there is a material difference between the two means of calculating the right contribution: (a) the equitable right contribution in classic cases of Double Insurance provides for equal sharing of the liability; and (b) in the case of a "Fairchild claim", according to Lord Mance' would provide for insurers to share the liability according to the different periods for which they provided insurance (when the risk of contracting Mesothelioma from asbestos dust was present); whereas under Section 2 the court is given a much broader discretion to order contributions in accordance with what is just and equitable having regard to the extent of the contributor's responsibility for the damage. Mr Feeny says that in reality there is unlikely

to be any material difference between the two ways of calculating the right of contribution as between insurers.

Mr Kent QC's Criticisms of the Opinion of Lord Sumption

74. Mr Kent QC challenges Lord Sumption's reliance upon the speech of Lord Goff in **Firma C** as authority for the proposition that, if a risk materialises under an insurance contract, it gives rise to action for unliquidated damages claim against the insurer on two grounds:

    (a) that Lord Goff talks, inconsistently, at page 35 of his speech about the contract of indemnity giving rise to an action for unliquidated damages but later that "no debt" can arise before the loss is suffered or the expense incurred, so he uses both the term damages and debt, in his judgment in describing the liability of the indemnifier under an insurance contract; and
    (b) the previous House of Lords case of **Bradley v Eagle Star** is referred to in **Firma C** . If Lord Goff's view is taken to be that a contract of insurance gives rise to an action for unliquidated damages against the insurer, then this is inconsistent with the finding of the House of Lords in **Bradley v Eagle Star** that until a liability on the part of the indemnified is established by judgment, arbitration award, or agreement, no obligation falls on the indemnifier to pay, but Lord Goff did not suggest that **Bradley** was wrong, or not be followed, or should be overruled.

75. Mr Feeny says that Lord Goff made clear that he accepted that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage and that his later reference to "debt" instead of "damages" was simply meant to refer to when the liability arose; whilst Lord Goff could be criticised for using loose language at that point in his judgment, it is clear that Lord Goff's view as to the nature of the liability under an insurance indemnity was that it was a claim for unliquidated damages.

76. Lord Sumption also refers to Prof Friedman's paper in the Law Quarterly Review, 1993 at page 54 which deals with double insurance claims, which Lord Sumption suggests supports his view. In his article, Prof Freeman says, under the heading "the Civil Liability (Contributions) Act 1978", that- "The act applies to liability "in respect of any damage." It does not apply to other debts (e.g. those of co-sureties). The position of insurers is not altogether clear. It depends on whether the Act is limited to parties responsible for having caused the loss or whether it applies also to parties who contractually undertook to indemnify against a loss for which they are not otherwise responsible". So Mr Kent QC says that Prof Freeman does not support Lord Sumption's view, but rather leaves open the question of whether or not insurer's rights of contribution are covered by the 1978 Act.

77. Mr Kent QC also points to the very brief way in which Lord Sumption deals with the issue. Finally Mr Kent QC says that the suggestion that, by providing an indemnity, an insurer somehow undertakes an obligation to seek to prevent the indemnified person from suffering loss flies in the face of the reality that: (a) insurers are hardly ever in a position to do anything to prevent the loss occurring; and (b) all that they commonly do is provide a sum of money to compensate the indemnified person once the value of the loss has been established which, Mr Kent QC says, bears the hallmarks of a claim in debt rather than a claim in damages.

DOES THE COMPANY'S CLAIM FOR AN INDEMNITY IN RESPECT OF MR MERRITT'S CLAIM SOUND IN DEBT OR DAMAGES?-MY SUMMARY OF THE SUBMISSIONS

78. The Law Commission decided not to recommend a change to the rights of contribution where the claim giving rise to the rights of contribution sounded in debt rather than damages. The reasons given by the Law Commission were in summary that: (a) there was evidence before the Law Commission that injustice was caused where the claim giving rise to the rights of contribution was a claim in damages, but anecdotally there was little evidence of injustice being caused where the claim giving rise to the rights of contribution was a claim in debt; (b) it was open to those jointly liable in debt to agree how the debt was to be shared between them; and (c) the application of the equitable rule of equal division of a debt liability between contributors produced certainty which was important in the commercial context in which those rights often arose (for example partnerships, joint tenants and joint guarantors).

79. In the context of guarantees: (a) if the guarantee is in the nature of a performance guarantee, where the guarantor promises that a third party will perform a specific contractual obligation or obligations, then a failure by the guarantor to ensure that the third-party performs those contractual obligations gives rise to a claim in damages for breach of the guarantors promise; and (b) if, in contrast, the guarantee is a promise by the guarantor to be liable in debt to a creditor, if the debtor fails to pay then the guarantee obligation is in the nature of a debt **(Hampton v Minns and Lep Air Services Ltd v Rolloswin Investments Ltd)**, for that reason Section 1 of the 1987 Act does not apply to guarantees which are in the nature of a promise by the guarantor to be liable for a debt if the debtor fails to pay.

80. The difference between a guarantee and an indemnity is that, in the case of a guarantee the guarantor enters into a direct contractual obligation with the creditor whereas in a contract of indemnity the contractual obligations are owed by the indemnifier to the indemnified. At common law it was required that the party indemnified should pay the creditor before claiming on the indemnity from the indemnifier (equity allowed the indemnified to claim before paying, unless the contract provided otherwise). This may have given rise to the underlying analysis of the position at common law, that the contract of indemnity required the indemnifier to hold the indemnified harmless and to prevent the loss from occurring in the first place.

81. There are two competing views as to the nature of the legal liability owed by an indemnifier to the indemnified:

    (a) it is an unliquidated claim, in damages, for the failure of the indemnifier to prevent the risk against which the indemnifier agrees to hold indemnified harmless from occurring (I will hereafter refer to this as a "Damages Indemnity liability"); and

(b) it is a right vested in the indemnified to receive the payment of a sum of money, from the indemnifier, if the circumstances set out in the indemnity trigger that obligation (I will refer to this as a "Debt Indemnity Liability").

82. Mr Kent QC has referred me to a number of authorities outside of insurance contracts where indemnities have been found to give rise to a Debt Indemnity Liability (**Royscott Commercial Leasing Ltd v Ismail, Codemasters Software Co Ltd v Automobile Club d L' Ouest and ABN Amro Commercial Finance plc v McGinn & others**).

83. There is no obvious reason (and Mr Feeny did not suggest any) as to why indemnities given in contracts of insurance should be treated differently from other contracts of indemnity.

84. Mr Feeny refers me to **Goff & Jones The Law of Unjust Enrichment** 9th Edition edited by Prof Charles Mitchell which at paragraph 19 – 34 refers to a number of English cases in which it has been said that actions by insureds against indemnity insurers sound in unliquidated damages rather than debt. Those cases include **Forney v Dominion Insurance Co Ltd [1969] 1 Lloyd's report page 502 (and [1969] 1 WLR 928); Irving v Manning (1847) 1 HLC page 287; Lloyds; Edmunds v Lloyds Italico & L'Ancora Compagnia di Assicuazione e Riassicurazione S.P.A [1986] 1 WLR 492;** and **Firma C Trade SA v Newcastle Protection and indemnity Association [1992] 2 AC 1).**

85. In **IEG**, the question of whether the liability under an indemnity contained in an insurance contract was a Debt Indemnity Liability or a Damages Indemnity Liability was not an issue which the Supreme Court needed to decide in order to determine the appeal. The appeal was determined on the basis that the insurer's liability to indemnify the insured, under Guernsey law, was restricted to the period for which the insurer had provided insurance, as a proportion of the whole of the period for which the employee was at risk of contracting mesothelioma by virtue of his exposure to asbestos dust by the insured employer. Mr Kent QC and Mr Feeny agree, for that reason, that the comments of Lord Mance and Lord Sumption on the question of whether an insurer's indemnity is a Debt Indemnity Liability or Damages Indemnity Liability are obiter and they further accepted that the Supreme Court did not have the benefit of legal submissions on the issue.

86. Lord Mance (paragraph 64) provides no explanation for his opinion that the liability is a Debt Indemnity liability, other than by referring to the possibility of the 1978 Act applying to rights of contribution between insurers being dismissed in **Colinvaux & Merkin's Insurance Contract Law**, although Lord Mance concedes that Charles Mitchell in the **Law of Contribution and Reimbursement** suggests that cases favour the view that the nature of the insurer's liability is a Damages Indemnity Liability. Finally, Lord Mance said that it was unnecessary, in **IEG**, to decide the issue of the nature of the insurer's liability (and whether the 1978 Act applies) but expressed the view that it would be somewhat surprising if the 1978 Act was an alternative statutory remedy in cases of double insurance to the equitable right of contribution that he considered existed (Mr Feeny asserts (and Mr Kent QC does not contest the point) that, on the premise that the rights of contribution in insurance contracts are covered by the 1978 Act, then the equitable right of contribution to which Lord Mance

refers would be replaced by the right to a contribution under the 1978 Act rather than standing alongside it);

87. Lord Sumption (paragraph 181) addresses the question of whether, if the insurer had been liable for the whole of the claim in spite of only insuring part of the period during which the employee was at risk (contrary to the finding in **IEG** under Guernsey law), the right of contribution as between insurers who had insured only part of the period, would be caught by the 1978 Act. Lord Sumption says that a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage (i.e. it is a Damages Indemnity Liability, as I term it). He then refers to the speech of Lord Goff **in Firma C-Trade SA v Newcastle Protection and Indemnity Association** in support of that proposition. Lord Sumption then goes on to ask whether the damage for which successive insurers are liable is the same damage for the purposes of 1978 Act, on the premise that each insurer is liable for the whole of the damage (contrary to the finding in IEG). He concludes that they would be liable for the same damage and that therefore the rights of contribution would be determined by the 1978 Act.

DOES THE COMPANY'S CLAIM FOR AN INDEMNITY IN RESPECT OF MR MERRITT'S CLAIM SOUND IN DEBT OR DAMAGES?- MY CONCLUSIONS

88. On the face of it, there are good reasons for concluding that the factors that determine whether the liability of an insurer under an indemnity given in a contract of insurance is a Debt Indemnity Liability or a Damages Indemnity Liability should be the same as those that apply in the case of guarantees and for indemnities given in other types of contracts. Mr Feeny does not suggest any reason why there should be a difference in treatment. Whilst paragraphs 106 – 108 of the judgment of Stephen Morris QC in **Durley House Ltd** may explain why historically the underlying analysis of the position at common law in a contract of indemnity given in an insurance contract is that the indemnifier's obligation is to prevent the indemnified from sustaining loss or expense in the first place, this does not appear to be an obvious justification as to why there should be a difference as between different types of contracts of indemnity and may no longer be a good reason to treat insurance indemnities differently from guarantees and other indemnities.

89. Based on the authorities to which I have been referred by Mr Kent QC it appears that, in the case of guarantees and types of indemnity other than indemnities under insurance contracts, there is no rule that the liability will be always a Debt Indemnity Liability or a Damages Indemnity Liability but rather a distinction is drawn depending on the type of guarantee/indemnity. The distinction is drawn on the basis that where, in reality what the guarantor/ indemnifier is agreeing to do is to ensure that the contract is performed, the liability is a Damages Indemnity Liability, but where in reality what the guarantor/indemnifier is agreeing to do is to provide a sum of money to the beneficiary of the guarantee/indemnity in certain events, the liability is deemed to be a Debt Indemnity Liability.

90. Treating rights of contribution in relation to liabilities arising under indemnities given in insurance contracts in the same way as guarantees and other contracts of indemnity on the face of it is consistent with the Law Commission Report, which did not recommend a change to the rights of contribution where the liability to which the rights of contribution relate, is in the nature of a debt liability. The reasons given by the Law Commission for not recommending a change to the rights of contribution where the liability towards which contribution is sought is in the nature debt liability were: (a) that there was no evidence of the existing rules causing injustice; (b) the parties liable to contribute could agree how to divide the liability between them; and (c) it was important (particularly in the commercial context where rights of contribution towards liability sounding in debt would often arise) to have certainty. Those factors appear to apply to rights of contribution between insurers because, on the face of it, in the case of Double Insurance dividing rights of contribution equally (subject to any limit on the indemnity) appears to be a fair way of dividing a loss which was not directly caused by any of the insurers, insurers can limit their liability to contribute by placing a limit on the indemnity that they provide, and it is important in the insurance industry to have certainty because the vast majority of contribution rights between insurers are settled in accordance with industry agreements (which saves time and cost and on the face of it will reduce the number of disputes coming to court).

91. In his skeleton argument, Mr Feeny says that I face the unenviable task of choosing between the speeches of Lord Mance and Lord Sumption in IEG. I do not consider that, for my purposes, the answers to the questions of whether RSA's liability to indemnify the Company is a Debt Indemnity Liability or a Damage Indemnity Liability and whether RSA's rights of contribution, as against Generali, fall within Section 1 of the 1978 Act is to be found within the speeches of Lord Mance or Lord Sumption. This is because, as I have already noted, the comments of both Lord Mance and Lord Sumption were obiter, each of them specifically acknowledging that the question of whether the rights of contributions as between insurers fell within Section 1 of the 1978 Act was not an issue that arose for determination in that case, they made their comments without the benefit of legal submissions on the point and their comments provide little detail as to the reasons why they held the views that they did

92. Mr Feeny says that the question of whether the liability falling on an insurer to provide an indemnity, under an insurance contract is a Debt Indemnity Liability or a Damages Indemnity Liability has been decided, in favour of the latter view, in a number of cases which are referred to in **Goff & Jones- The law of Unjust Enrichment** 9th edition paragraph 19 – 34 (see paragraph 84 above). He also says that, the speech of Lord Goff in **Firma C** makes it clear that the liability is a Damages Indemnity Liability. If Mr Feeny is right, then I may be bound to find that the liability of RSA, to indemnify the Company is a Damages Indemnity Liability. To determine if he is right I need to consider the cases referred to in Goff & Jones "**The Law of Unjust Enrichment".**

93. Paragraph 19 – 34 of Goff & Jones deals with the question of whether or not the liability of insurers to indemnify the insured falls within Section 1 of the 1978 Act. The paragraph says, as follows "… It is often said that actions by insureds against indemnity insurers "sound in unliquidated damages rather than debt". However, one line of English authority considers that in this context "the word "damages" is used in a somewhat unusual sense" and should not be taken literally because the primary contractual promise made by an indemnity insurer is that the insured shall enjoy "the right to be indemnified by payment of money".

This suggests that the insurer's liability is closer to a primary liability in debt than to a secondary liability to pay damages for breach of a primary contractual obligation. However, a second line of cases maintains that an indemnity insurer's primary contractual promise is to prevent the insured's risk from materialising, with the result that: "… as soon as the loss has occurred… the primary obligation is broken, giving rise to the secondary obligation to pay damages."…"Whether contribution claims between indemnity insurers fall within the scope of the Act must depend upon which of these views is preferred, and, as in the case of co-sureties, it is likely that the answer will usually turn on the wording of the relevant policies."

94. The earliest case in time referred to in Goff & Jones is the House of Lords case of **John Irving v Charles Manning (1847) H.L.C 287.** In that case, an insurance policy was issued for a ship. The insurance policy specified that the value of the ship for insurance purposes, in the event of a total loss, was £17,500. The ship was damaged in a storm and it was estimated that the cost of repairing the ship was £10,500 but also that the ship's value, once repaired would be only around £9,000. The owner of the ship claimed that the ship should be regarded as a total loss and that he was entitled to receive from the insurance company the agreed value of £17,500. The House of Lords noted that in an open policy where the value of the item insured was not specified, the court would need to decide the value of the ship in the event that there was a total loss but as in this case the parties had agreed the value of the ship, in the event of total loss, at £17,500 that task did not fall for the court to decide. The question of whether the ship was a total loss however was a separate question and that question was decided by answering the question of whether the ship was beyond economic repair. To answer that question the court needed to look at the open market value of the ship and the cost of repair and if the cost of repair exceeded the open market value of the ship, then the ship should be regarded as beyond economic repair. In the present case, the ship should be regarded as a total loss because the costs of repair did exceed the post repair value of the ship and the owner was entitled to the agreed value of £17,500 even though that did not represent the open market value of the ship.

95. In dealing with the argument that an insurance contract was a contract of indemnity, under which the insured should not recover more than the value of their loss, the House of Lords said that the parties were free to agree the value of the loss by way of liquidated damages. The House of Lords did not specifically say that the liability under an indemnity is, as I have termed it, a Damages Indemnity Liability, nor did it suggest that the obligation of the insurers was to prevent the damage to the ship from occurring and that the breach of that obligation gave rise to the shipowners claim in damages. However, whilst accepting that the parties were free to specify the value of the ship by way of a "liquidated damages clause" the House of Lords appears to have proceeded on the basis that, absent the liquidated damages clause, the claim for damages would have been for unliquidated damages, requiring the court to assess the market value of the ship.

96. In **Farnley v Dominion Insurance Co Limited [1969] 1 Lloyds Rep page 502**, a solicitor entered into an indemnity policy which covered his firm for negligent advice. The limit on the policy was £3,000 arising out of the same occurrence with an overall limit of £15,000. A

road traffic accident occurred in which the driver was killed and members of his family, including his widow, were injured. The accident was determined to have been caused by the negligence of the deceased driver. An assistant within the firm of solicitors advised that the passengers in the car may have a claim against the estate of the deceased, however she advised that the widow (who had been a passenger in the car and had been injured) should be appointed Administrator of the intestate estate of the deceased and she failed to bring any proceedings, on behalf of the passengers against the estate, within six months of the granting of letters of administration, in consequence of which the claims of the passengers were statute barred.

97. The solicitor reported the matter to his insurers who took the view that their total liability under the policy limit was the sum of £3,000 and they agreed that the solicitor should settle the claim of the widow at a figure up to that sum. The solicitor defended the matter and at trial sums of money were awarded to all four of the passengers, the solicitor then sued the insurers claiming that there were 4 occurrences of breach of duty, one to each passenger. Mr Justice Donaldson found that there were two "occurrences" namely (a) advising the widow that she should become Administrator which prevented her from bringing a claim nominally against herself; and (b) the failure to advise the family members that they had to bring their claim within 6 months of the grant of the letters of administration. The next question was whether the solicitor's costs incurred in defending the claims were covered by the policy. In order to enable these to be recovered, in addition to the £6,000 limit of the insurer's contribution towards the damages claimed, the solicitor needed to show that those costs fell within an extension clause to the policy or that the insurer had wrongly repudiated liability under the policy for the claim over and above the £3,000 that they accepted they were liable for.

98. Donaldson J at page 936 said "The approach to the problem as damages for repudiation requires a little more explanation. All actions against insurers under an indemnity policy sound in unliquidated damages rather than debt (see **Jabbour v Custodians of Israeli Absentee Property [1954] 1 WLR page 139**, 143 seq. and the cases cited). The measure of damage is the loss actually suffered by the plaintiff in so far as it is not too remote. In the majority of cases, the only loss suffered is that the underwriter failed to pay the sum due and the result is the same as if the claim had been in debt. The present case is however exceptional. The defendants did not require the claims to be contested because they took the view that they must exceed £3,000 which they thought was the limit of their liability. Had they been right, it is not illogical that Mr Forney should bear all the costs of contesting the claims since he was in effect the second tier insurer and only he could benefit by incurring of these costs. It would have been otherwise if there had been an issue on liability since then the defendants would also have stood to benefit by the claims being contested and this is no doubt one of the contingencies contemplated by the special clauses. However, I have held that the defendants were wrong and that their liability was limited to £3,000 in respect of Mrs Bailey's claim and a further £3,000 in respect of the claims of Mrs Perry and Ian Bailey. The loss which Mr Forney has suffered, by reason of the defendant's refusal to contemplate that they were liable to this extent is not only the difference between £3,000 and £6,000 but also the loss of any rights which would accrue to him under the special clauses if the defendants had appreciated the true position….". Donaldson J went on to decide that those rights included a right, on the facts of the case, to receive a contribution towards his costs of contesting the claims.

99. It follows from the above not only that Donaldson J confirmed that "all actions against insurers under indemnity policies sound in unliquidated damages rather than debt" but also that this formed part of the ratio of his decision, because he found that the right to recover damages for the insurer's repudiation of liability beyond the sum of £3,000 was a breach of contract, entitling the solicitor to recover all loss suffered as a result of that breach (which on his findings included a contribution towards the cost of contesting the claims).

100. In **Edmonds Lloyds italica & L' Aancora Compagnia di Assicurazione e Riassicurazione S.P.A [1986] 1 WLR 402,** Mr Edmonds, on behalf of himself and a Lloyds syndicate, made a claim against the defendant reinsurers. Proceedings were issued and the insurers then paid the sum of money claimed but without any interest. Mr Edmonds accepted the sum paid, on account of his claim, but then proceeded with the claim in relation to interest. Lord Donaldson MR, at page 494 said "One might well think that a sum due under an insurance policy constituted debt. On this assumption, the plaintiff's solicitors were entitled to appropriate the drafts to the principal sums due, since otherwise they would have been deemed to have been appropriated to the payment of interest, the balance only being appropriated to the payment of the principal amounts: see **Chitty on Contracts**, 25th edition (1993), paragraph 1424. However, as a matter of law, a claim under a contract of insurance is a claim for damages for breach of contract: **Luckie v Bushby (1853) 13 C.B 864**, 879 per Jervis CJ; and **Chandris v Argo Insurance Limited [1963] 2 Lloyds Rep 65**. The purported appropriation accordingly was unnecessary as such however, it did make it clear that the drafts were not being accepted in full settlement."

101. Donaldson MR's conclusion that the claim against the reinsurers was a claim in damages and not debt (even if the end result would have been the same, if he had found that the liability was a liability in debt) still formed part of the ratio of his decision because that finding was essential to the route he took to determine the question of whether or not the plaintiff could claim interest on top of the principal sum claimed.

102. **F &K Jabbour v Custodians of Israeli Absentee Property [1954] 1 WLR page 139**, is the authority that was referred to in Donaldson J's judgment in **Farney v Dominion Insurance Co Ltd** as authority for the proposition that an insurer's indemnity sounds in damages. It is also one of the authorities referred to in Goff & Jones, The Law of Unjust Enrichment" at paragraph 19 – 34 as suggesting that the word "damages" is used in an unusual sense that should not be taken literally because the primary contractual promise is that the insured shall enjoy "the right to indemnify by payment of money".

103. In **F & K Jabbour** an English insurance company agreed to indemnify the plaintiff against loss in relation to a garage owned by the plaintiff in Haifa. The garage was blown up in a riot and the plaintiff left Palestine and went to Egypt. Under emergency regulations passed in December 1948, a custodian was appointed to all property belonging to "absentees" who had gone inter alia to Egypt, requiring that such property be delivered up to the custodian. The question was whether the plaintiff or the custodian was entitled to a payment from the insurance company.

104. At page 143 Pearson J said "it is established by many decided cases that such a claim is a claim for unliquidated damages…… Such a claim is unliquidated because the plaintiff has

to prove the amount, and even after an adjustment of the amount the plaintiff (unless he chooses to sue on account stated) must still prove the amount, using the adjustment as evidence because it involves an admission by the insurer, but such evidence might be rebutted, for instance by proof of a mistake – Luckie v Bushby. But the word "Damages" is puzzling and seems to be used in a rather unusual sense, because the right to indemnity arises, not by reason of any wrongful act or omission on the part of the insurer (who did not promise that the loss would not happen or that he would prevent it) but only under his promise to indemnify the insured in the event of a loss.… The explanation of the use of the expression "unliquidated damages" to describe a claim for an indemnity under an insurance policy may be wholly or partly afforded by the old form of pleading in assumpsit, alleging a breach by non—payment, as in Castelli 's v Boddington. But as the only wrong admitted by the insurer is his failure to pay a sum due under a contract, the amount of which has to be ascertained, he seems to be in much the same position as the person who owes and has failed to pay a reasonable price for goods sold and delivered or a reasonable remuneration for work done or services rendered. The claim is for unliquidated damages, but the word "damages" is used in a somewhat unusual sense". Pearson J went on to note that the claim for an indemnity under an "insurance policy cannot be" the subject matter of a garnishee order but was a chose an action that could be assigned. Thereafter Pearson J proceeded upon the basis that the claim under the insurance policy was a chose in action and not a debt in determining the case.

105. Whilst Pearson J did describe the use of the word "damages" in connection with an insurer's indemnity as being used, in an unusual sense in that the indemnity did not, in his view, involve a promise by the insurer that the loss would not happen or that the insurer would prevent it, he nonetheless proceeded upon the basis, following the authorities to which he referred, that the claim was one in damages (a chose in action) and not in debt. Pearson J also puts forward another explanation as to why a claim for an indemnity under an insurance policy is described as a claim for "unliquidated damages" As paragraph 19 – 34 of Goff & Jones acknowledges, the analysis of Pearson J is that the indemnity did not involve a promise by the insurer that the loss would not happen or that the insurer would prevent it happening which is inconsistent with the cases which maintained that an indemnity insurer's primary contractual promise is to prevent the insured risk from materialising which result in the claim being one in damages. However, in spite of that difference, in the analysis of the insurers promise, Pearson J's judgment confirms that, based on the authorities to which he refers, the indemnity under an insurance contract is a Damages Indemnity Liability and not a Debt Indemnity Liability.

106. Finally, there is the House of Lords case of **Firma C** to which I have already referred (see paragraph 55 above). In that case the House of Lords decided that the condition that ship-owning members of the club should pay cargo owners before becoming entitled to claim an indemnity from the club was a condition precedent to the liability of the club to pay the shipowner and that although the cargo owners had direct rights under the 1930 Act to pursue the club, they had no better rights than the ship-owning members of the club and therefore until the ship-owner paid the cargo owner the club would have no liability.

107. Lord Goff noted that two arguments had been advanced before the Court of Appeal as to why the cargo owners should be entitled to recover against the club, notwithstanding

that payment of the cargo owner by the ship owning member of the club was a condition precedent to the club's liability under the terms of the indemnity:

(a) the member's right to an indemnity in relation to a claim by a cargo owner was conditional upon the member first having paid the claim of the cargo owner. The statutory transfer of that right of indemnity to the cargo owner carried with it the requirement that the member pay the cargo owner, but the term following transfer was of no effect because it had become impossible to perform or was futile in that the cargo owner could not pay himself or because there was a merger of interests between the cargo owner and the member; and
(b) that at common law an indemnity did no more than protect the indemnified person against loss, but equity was prepared to require the indemnifier to pay either the creditor direct or to pay the indemnified person before he had paid the creditor. The cargo owners argued that that principle of equity should be used as an aid to interpretation of the club's rules, so that the condition of prior payment no longer applied to the claim once it was transferred to the cargo owners and as a principal denying the effect of the condition of prior payment.

108. Lord Goff found that each of those arguments was flawed, however he considered at more length the more elaborate equitable argument advanced by Mr Sumption QC (as he then was) before the House of Lords. That argument was:

(a) the purpose of requiring prior payment was to prevent a member profiting by receiving payment under the insurance but failing to pay the third party cargo owner. That problem does not arise if the member is being wound up because then its assets are held for the benefit of its creditors, or if the club makes payment direct to the cargo owner;
(b) the club was entitled to make payment direct to the cargo owner and if it did so, it would discharge the member's liability and thereby fulfil the condition that the member must pay the cargo owner's claim first. As payment direct to the cargo owner would satisfy the condition of prior payment, it follows that the club was contractually bound either to pay the member who had already paid the cargo owner or simply to pay the cargo owner direct;
(c) if the club was not bound to pay either the member who has paid the cargo owner or the cargo owner direct, because of the condition precedent of payment by the member to the cargo owner, equity would resolve the deadlock by requiring the club to pay the cargo owner direct or pay the member for the purpose of it paying the cargo owner. Equity would intervene because, (i) at common law, a contract of indemnity gave rise to an action for unliquidated damages for failing to prevent the indemnified person from suffering the damage, a condition of prior payment was implicit in such a contract; (ii) equity would not allow the existence of the condition of prior payment to defeat the indemnity because equity looks to the substance rather than the form of the transaction; (iii) the mere fact that the contract contained a condition of prior payment could not displace the equity, but instead gave rise to the equitable doctrine; and (iv) equity could be displaced by language showing the parties intended the result which in fact occurred but here the result intended was to prevent a member of the club making a profit by receiving payment but not paying the cargo owner, that purpose could be achieved by requiring the club to pay the cargo owner direct.

109. Lord Goff rejected Mr Sumption QC's argument that a condition of prior payment at common law was implicit in a contract of indemnity. At page 35, he said "I accept that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party. I also accept that at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss: see Collinge v Heywood (1839) 9 AD & E 633. This is, as I understand it, because a promise of an indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract by having failed to hold the indemnified person harmless against the relevant loss or expense. There is no condition of prior payment; but the remedies available at law (assumpsit for damages, or possibly in certain circumstances the common count for money paid) were not efficacious to give full effect to the contract of indemnity. It is for this reason that equity felt that it could, and should, intervene. If there had been a clear implied condition of prior payment, operable in the relevant circumstances, equity would not have intervened to enforce the contract in a manner inconsistent with that term. Equity does not mend men's bargains; but it may grant specific performance of the contract, consistent with its terms, where the remedies at law are inadequate".

110. Mr Kent QC says that Lord Goff confuses the question of whether the liability is a Damages Indemnity Liability or a Debt Indemnity Liability by referring, inconsistently in his judgment, to both an unliquidated damages claim and to a debt. Having considered what Mr Sumption QC's argument was, that at common law the contract of indemnity gave rise to an action for unliquidated damages, and Lord Goff's acceptance of that submission, it is clear to me that, notwithstanding the use of the word "debt" later in the same paragraph, Lord Goff was confirming, at page 35, that at common law the contract of indemnity gave rise to an action for unliquidated damages and that the basis of that claim was the failure of the indemnifier to prevent the indemnified person from suffering damage.

111. Lord Goff may well have rejected Mr Sumption QC's argument even if he had concluded that at common law the liability is a Debt Indemnity Liability. Nonetheless, Lord Goff's acceptance of Mr Sumption QCs submission that at common law a contract of indemnity gives rise to a Damages Indemnity Liability formed part of his reasoning for rejecting Mr Sumption QC's argument that equity would intervene to prevent the club from relying on the condition precedent to the club's liability, that the ship-owning member must first have paid the cargo owner.

112. I will deal briefly with Mr Kent QC's point that the decision of the House of Lords in **Firma C** is inconsistent with the previous House of Lords decision in **Bradley v Eagle Star**. In **Bradley**, Mrs Bradley was unable to persuade the House of Lords to allow her appeal against a refusal to order Eagle Star to disclose any contracts of insurance that it had issued to the company that had employed her, to enable her to see if she could pursue direct rights against Eagle Star under the 1930 Act. The House of Lords rejected Mrs Bradley's appeal because it considered that she would be unable to establish a claim against Eagle Star because in order to do so she had to obtain a judgment or arbitration award against the

dissolved company or enter into an agreement with the dissolved company establishing the amount of its liability, which she was unable to do because of the company's dissolution.

113. Mr Kent QC says that Lords Goff's view that a contract of insurance gives rise to an action for unliquidated damages against an insurer is inconsistent with the finding of the House of Lords in **Bradley v Eagle Star** that, until a liability on the part of the indemnified is established by judgment, arbitration award or agreement, no legal obligation falls on the indemnifier. The inconsistency, says Mr Kent QC, is that at the moment that the legal obligation falls on the indemnifier, the amount of the liability is ascertained and ought therefore to be properly regarded as a debt liability, and that if the insurer does pay as soon as the liability is established, it is difficult to see how the insurer could be held to be breach of contract, giving rise to an unliquidated damages claim against the insurer. I agree that anomalies are caused by the treament of insurance indemnities as unliquidated claims in damages, particularly in circumstances (such as here) where, as soon as the insurer has a liability to pay under the indemnity it pays and yet its liability is described as being a liability for unliquidated damages for breach of contract. Nonetheless there is a long line of authority that supports that approach. Also, in the House of Lords case of **John Irving v Charles Manning**, to which I have already referred, the parties agreed, when the insurance contract was entered into, the value to be paid if the ship became a total loss (by way of liquidated damages). The claim was still regarded by the House of Lords as a claim sounding in damages, the value of which had been agreed (ie a liquidated damages claim) rather than a claim in debt.

114. Having considered the cases to which I have referred, I accept Mr Feeny's submission that there is a long line of cases which have decided or confirmed that the liability arising under an insurance contract of indemnity is a Damages Indemnity Liability. I consider that I am bound by that long line of cases to conclude that the liability of RSA to the Company in this case is a Damages Indemnity Liability. Goff & Jones – The Law of Unjust Enrichment, at paragraph 19 – 34 says that one line of English authorities considers that the word "damages" should not be used literally and that the liability, on that basis, is closer to a primary liability in debt. I have however considered the case of **F & K Jabbour**, to which paragraph 19 – 34 refers as part of that line of cases and, whilst Pearson J, in that case, did describe the use of the word "damages" as being somewhat unusual, he did not resile from the conclusion, which he stated had been established by many decided cases, that a claim against an insurance company's indemnity, is a claim for unliquidated damages**.** I consider myself bound by that long line of cases to conclude that the Company's claim against RSA for an indemnity under its insurance policy, which was pursued by Mr Merritt (pursuant to 1930 Act), is a claim which sounds in damages rather than in debt.

115. Mr Kent QC and Mr Feeny agreed that, if I come to the conclusion that the liability of RSA, to the Company is a liability sounding in damages rather than debt, then RSA's right of contribution from Generali falls within the Section 1 of 1978 Act and that if RSA's right of contribution from Generali falls within Section 1 of the 1978 Act, then it is statute barred, it follows from my conclusions, that RSA's claim against Generali is statute barred.

THE REASONABLENESS OF THE SETTLEMENT/BASIS OF CALCULATING THE CONTRIBUTION

116. Generali accepts in its defence that if the claim of RSA is not statute barred then RSA is in principle entitled to a contribution from Generali. As I have found that RSA's claim

against Generali is statute barred it is, strictly speaking, unnecessary for me to deal with the question of whether RSA's settlement with Mr Merritt was reasonable (as to which Generali put RSA to proof of the basis on which Generali's contribution should be calculated). For convenience I will however deal shortly with that point. Generali put RSA to proof as to the reasonableness of the settlement, particularly having regard to:

(a) what attempts were made to investigate the allegations made by Mr Merritt;
(b) what attempts were made to seek contributions from other parties, given that Mr Merritt accepted that he had been exposed to asbestos during the course of earlier employments and the exposures during the Relevant Employment Period related, inter alia, to premises occupied by Electrolux and Phillips; and
(c) whether the information and documentation suggested that the valuation of the claim was reasonable.

117. RSA says:

(a) Generali cannot mount a defence to the claim for an equitable contribution on the basis that the settlement of Mr Merritt's claim was not reasonable, it can only be impugned by Generali on the basis that the settlement was not reached bona fide and in good faith;
(b) given that the events to which Mr Merritt referred took place some 25 – 35 years before RSA were notified of the claim and the Company was dissolved before the claim was intimated, there was no realistic prospect of RSA defending the case on liability;
(c) the claim was settled for approximately 75% of its fully pleaded value which represented a good outcome; and
(d) the possibility of seeking a contribution from other entities, that may have negligently exposed Mr Merritt to asbestos, is irrelevant to the settlement of Mr Merritt's claim.

118. At trial, Mr Feeny confirmed that Generali no longer asserted that the Settlement agreed between RSA and Mr Merritt was not a reasonable settlement but they did assert that RSA ought to have pursued previous employers and the occupiers of two factories that Mr Merritt identified that he was exposed to asbestos dust at (namely Electrolux and Phillips).

119. Mr Feeny asserted that, as part of any broad based equitable approach (as advocated by Lord Mance in **IEG**), the court ought to take into account RSA's failure to pursue a claim for a contribution against those parties who may have been obliged to contribute towards the damages that RSA paid to Mr Merritt as part of the settlement.

120. In response to questions that I asked of Mr Feeny, he confirmed that:

(a) He was not aware of any "Double Insurance" case in which his argument had been raised;
(b) the argument had been raised, to his knowledge, in claims for contribution under the 1978 Act but he was unaware of any reported cases in which the issue had been dealt with; and

(c) the proper approach that I should take in assessing what reduction should be made to RSA's claim against Generali for a contribution would be to apply a rough and ready percentage reduction to what would otherwise be the value of RSA's contribution claim.

121. Mr Kent QC said that Mr Feeny's suggestion was unworkable and that, in any event, Mr Merritt's evidence was that although he had had other employers prior to the Company, he had not been exposed to asbestos dust whilst employed by any of those previous employers and that the work carried out at the factories occupied by Electrolux and Phillips had been carried out by Mr Merritt whilst he was employed by the Company, during a period when those factories were shut. It was difficult in those circumstances, said Mr Kent QC, to see what liability the occupiers of the factory would have for Mr Merritt being exposed to asbestos dust, whilst employed by and presumably, under the supervision of the Company, even if he was exposed to asbestos dust whilst working at premises occupied by them.

122. For the following reasons, I reject Mr Feeny's argument that, if Generali did have an obligation to contribute towards the monies that RSA have paid to Mr Merritt, outside of the 1978 Act, it would be appropriate to reduce the level of that contribution to reflect the fact that RSA have not pursued previous employers of Mr Merritt or Electrolux/Philips as occupiers of factories in which Mr Merritt was exposed to asbestos dust whilst employed by the Company:

(a) In IEG, at paragraphs 60 and 63, Lord Mance referred to contribution being a principal based on "natural justice" and that the principles applied in "Fairchild" required a broad equitable approach to be taken to the issue of the extent of the contribution, to meet the anomalies to which the case gave rise. That broad equitable approach, said Lord Mance, meant that it should be possible to overcome the normal presumption in double insurance that loss should be shared equally and instead contributions between insurers should take into account the differing lengths of the exposure;
(b) Lord Sumption, at paragraph 182 of his judgment in IEG said that it would require a considerable development of traditional concepts of double insurance to accommodate claims to contributions based upon the "Fairchild" exception and that he preferred to leave the question as to whether English law should develop in that way to a case where the issue was more central to the argument of the parties;
(c) Mr Feeny suggested that it is open to the court to base contributions upon very much broader equitable principles, such as those for which section 2 of the 1978 Act provides, which would allow it to take into account the failure of the insurer to seek contributions from others;
(d) Section 2 of the 1978 Act provides that the contribution to be paid "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". In contrast to that approach, Lord Mance said in **IEG** that in true "Double Insurance" cases the insurers are covering the same insured, for the same risk , for the same period and it makes sense in those circumstances that they should bear the loss equally because they are taking an equal risk. For a "Fairchild" claim however, whilst the insurers are covering the same insured, for the same risk, they are covering that risk for different periods and are not therefore taking, an equal risk. In the case of the "Fairchild" exception, Lord Mance considered that a broad-based equitable approach would allow the normal "Double Insurance" case

where the claim would be shared equally between insurers to be changed to a division of the liability according to the period insured by each insurer for which the party suffering Mesothelioma was exposed to asbestos dust, as a percentage of the overall period for which they were exposed to asbestos dust and therefore the risk of Mesothelioma. That adaptation of the basis upon which contributions should be calculated in the case of a "Fairchild" claim does not involve a wider consideration of the contribution of each insurer based upon what is "just and equitable". I do not think that Lord Mance was contemplating such a wholesale departure from the normal rule that contribution should be made equally;

(e) Finally, the sort of approach to dividing up rights of contribution between insurers which Mr Feeny advocates (rather than a division according to, in "Fairchild cases" the period for which each insurer was on risk, as a proportion of the total period for which the employee was exposed to asbestos dust) would produce great uncertainty as to the basis upon which such contribution should be calculated. Given that I understand that contributions between employers are normally divided up in accordance with established industry practice, such uncertainty would be highly undesirable as it would likely lead to an increase in the cost and time taken to settle rights of contribution between insurers and lead to an increase in those rights of contribution being disputed in the court.