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## English Indemnity Law—Parsing the Promise: Words Are Important, But So Are Actions

by Raymond L. Sweigart

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*A recent decision of the English Queen’s Bench Technology and Construction Court demonstrates that to be enforceable under English law, indemnities must always be clearly and precisely worded. The parties also must keep in mind the potential for estoppel arguments that would equitably prevent an indemnifier from avoiding an otherwise legally uncertain obligation to indemnify.*

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In *Rust Consulting Limited* (in creditors voluntary liquidation) v *PB Limited* (formerly Kennedy & Donkin Limited) [2010] EWHC 3243 (TCC), a shopping village had been built on a site that had been reclaimed from a former steel waste spoils area. Rust Consulting entered into engineering services contracts with the shopping village developer to provide geotechnical assistance and advice on appropriate foundations for the buildings in light of site conditions. Subsequently, the buildings were found to have suffered structural damage allegedly as a result of the shifting of unstable steel slag waste beneath the foundations.

To complicate matters, Rust had been taken over as part of a reorganization pursuant to an asset purchase agreement by Kennedy & Donkin, which subsequently became PB Ltd. The agreement contained an indemnity clause whereby PB assumed “responsibility for the satisfaction, fulfilment and discharge of all of the outstanding Liabilities and Contracts of [Rust’s] Business” and indemnified Rust “against all proceedings, claims and demands in respect thereof”. Thereafter, the site developer brought proceedings against Rust claiming breach of contract and negligence. Rust then went into creditors’ voluntary liquidation. The Rust liquidators consented to a judgment for the full £8 million amount claimed by the developer and then brought proceedings against PB under the indemnity in the asset purchase agreement, arguing that the consent judgment was covered by the indemnity. PB defended on the basis that it was not legally bound by the consent judgment and that the Rust liquidators had to prove Rust’s underlying liability to the developer. The Queen’s Bench court was called upon to decide whether the indemnity in the asset purchase agreement extended to cover the consent judgment.

### The Court’s Decision

The court examined the indemnity language and decided that Rust was only indemnified against “proceedings, claims and demands in respect of” the satisfaction, fulfilment and discharge of any **actual** liabilities which Rust had to the developer. The mere fact that the developer had issued proceedings

against Rust did not in itself mean that PB was liable to indemnify Rust against those claims. Further, even though a judgment had been entered against Rust, that did not mean that PB would be bound by that judgment unless, for example, PB had been made a party to those proceedings or had an opportunity on adequate notice to participate and defend. Therefore, in the absence of such notice to PB, before indemnity could be obtained the Rust liquidators would now have to prove that Rust was liable to the developer, subject to any estoppel or equitable bar arguments that could be raised that might prevent PB denying the legal obligation to cover the amount of the consent judgement.

The court set out the following approach to interpreting the indemnity contract and guidance as to whether equity might prevent an indemnifier from denying an obligation to indemnify:

- The first step is to determine the extent and scope of the indemnity under standard legal principles of contract construction and interpretation.
- Clear words would normally be required to make the indemnifier liable to pay any sum based on alleged rather than determined liability.
- When an indemnity is construed to cover only actual liabilities of the indemnified party, then those liabilities would have to be established before the indemnifier would be required to make payment.
- Prior notice of the claim to the indemnifier, however, might be enough to form the basis of an estoppel. Active participation by the indemnifier in the proceedings and ultimately the approval of a consent judgment might well conclusively establish as a matter of equity that the indemnifier cannot later attempt to refuse payment even if the contract would not otherwise legally have required that result.
- The court did not think it appropriate to set out a specific bright-line test for establishing such an estoppel, given the uncertainty of the facts at this point, but noted it would be necessary for the court to consider all relevant evidence and circumstances before deciding whether there was an estoppel.

The court concluded that the indemnity in this case required the Rust liquidators to establish that Rust was actually liable to the developer for the claimed damages before the indemnity would operate, and could not be summarily recovered based upon the consent judgment. It was likewise not possible, without further investigation, to determine whether PB was somehow estopped from challenging the consent judgement.

## Commentary

The Rust case suggests that English law indemnities must always be drafted with great care and an eye to what the parties really intend and the various circumstances that might later arise. In particular, unless the indemnity explicitly states that it covers all claims, whether proven or merely alleged, it may well be that a court will later restrict the indemnity to actual, proven liabilities. Indemnifying parties likewise need to be aware of the potential consequences of receiving notice and the opportunity to take over claims against the indemnified party. Seeking professional legal advice at all stages of the process can be crucial in securing the perceived benefits of the bargain, as well as avoiding missteps and unintended consequences.

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