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Articles

Although the usual undertaking as to damages given as the price of obtaining an interlocutory injunction is well-known, there does not appear to have been any in-depth analysis of its origins. This article shows that the first reported use of the undertaking was by Vice-Chancellor James Knight Bruce on 22 December 1842, in the patent infringement case of *Muntz v Grenfell* (1842) 2 Coop temp Cott 61, 47 ER 1050. The evidence suggests that Knight Bruce did not originate the usual undertaking himself. Rather, it was probably first suggested by Edward Jacob QC on 10 December 1838 in another patent case, *Bickford v Skewes*, which is barely reported in the nominate reports. Knight Bruce was almost certainly Jacob's opponent on that occasion, and he appears to have developed Jacob's suggestion into the modern undertaking not long after he went to the Bench. It is not coincidental that both cases were patent cases. It had long been recognised that interlocutory injunctions to restrain alleged infringement of a patent acutely raised a problem of how to compensate a wrongly-restrained defendant, and the usual undertaking was invented to solve this problem. The utility of the undertaking as to damages meant that it was quickly adopted in all cases in which interlocutory injunctive relief was sought. The development of the usual undertaking is an illustration of how mid-nineteenth century practitioners and judges developed the principles of injunctive relief at a time when the jurisdictional separation of common law and equity, as well as the absence of Lord Cairns' Act, raised significant obstacles to fashioning relief in cases where common law, statutory or prerogative rights were in issue.

The trustee's indemnity, at its simplest, is the right of the trustee to have recourse to trust property for expenses properly incurred in the service of the trust. It is a proprietary right, but there is no legislation determining its priority rules between trust entities. While the rules for priority as between trustees and beneficiaries, trust creditors and personal creditors, and between trustees, have been settled by the courts, the others have not.

This article therefore considers the possible priority rules and their justifications in those cases. In doing so it sets out the settled rules for convenient reference and basis for further argument. It goes on to consider cases of contests between trust creditors of the same class, between trust creditors of different classes (bearing in mind contractual and legislative provisions limiting recourse to personal assets) and between beneficiary-investors.