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THE ACHILLEAS: STRUGGLING TO STAY AFLOAT

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Remoteness in contract is an area which has faced much scrutiny across the common law world following *The Achilleas*. This article explores two contrasting approaches to the doctrine: a knowledge-based model premised on fairness, or respect for the defendant as an autonomous agent, and an agreement-centred approach based on the parties' implicit, rather than express intention. The status of the agreement-centred model in two jurisdictions—England and Singapore—shall then be explored. It shall be shown that the model has received a lukewarm, if not overtly hostile, reception which reflects its substantial theoretical and practical flaws.

I. INTRODUCTION

Two parties enter into a contractual agreement which is subsequently breached. The innocent party suffers a loss as a consequence which is not expressly dealt with in the parties' agreement. How should a court approach such a loss, and in which circumstances will it be judged to be 'too remote' and hence irrecoverable? This was the broad question which arose before the House of Lords in *Transfield Shipping Inc v. Mercator Shipping Inc*,[1] and which is the focus of this article. It shall be shown that there are two distinct approaches which can be taken: an orthodox knowledge-based approach which hinges on the defendant's reasonable contemplation or foresight of a loss at the time when he enters into contract, and a broader agreement-centred model derived from *The Achilleas*, which turns on what the parties would reasonably have agreed if they had applied their minds to the issue. Contrary to the view furthered by some commentators and judges, it shall be argued that the former model is based, not on the parties' assumption of responsibility, but on fairness, and in particular, respect for the defendant as an autonomous agent capable of making rational choices. The latter model, by contrast, is based on the parties' actual, though implicit intention, as determined by adopting a broad and purposive approach to the interpretation of the parties' agreement.

In the second part of this article, the current law on the doctrine of remoteness in two jurisdictions—England and Singapore—will be explored. It shall be shown that the agreement-centred approach has not been received with firm favour in either jurisdiction. In England, an attempt has been made to integrate both models via a

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1 [2009] 1 A.C. 61 (H.L.) [*The Achilleas*].

two-staged approach, which has resulted in what can only be described as a half-hearted embrace of the agreement-centred model. In Singapore, the model has been decisively rejected, not once, but twice by the Singapore Court of Appeal, in *MFM Restaurants Pte Ltd v. Fish & Co Restaurants Pte Ltd*[2] and *Out of the Box Pte Ltd v. Wanin Industries Pte Ltd*.[3] The substantial theoretical and practical flaws with the agreement-centred model, which led to its rejection in Singapore, will then be outlined in the third and final part of this piece.

In sum, it shall be demonstrated that the agreement-centred model derived from *The Achilleas* is struggling to stay relevant and that the orthodox knowledge-based model remains the dominant approach towards the doctrine of remoteness in both jurisdictions.

II. Remoteness: Allocating Losses not Expressly Dealt with in the Contract

The Achilleas is a bulk carrier which was chartered to Transfield Shipping Inc with redelivery due on 2 May 2004. In breach of contract, it was returned nine days late on 11 May 2004. As a consequence, the owners of the ship were forced to renegotiate a follow-on fixture which they had earlier entered into at a rate of US$39,500 per day down to a rate of US$31,500 per day, reflecting a sharp fall in the market in May 2004. It was agreed by both parties that the defendant charterers were liable for the difference between the charter rate and the market hire rate for the nine days of delay. The question was whether the losses flowing from the renegotiation of the follow-on fixture were recoverable as well. This, in turn, raised the broader remoteness question of how a court should approach losses arising from a breach of contract which *the parties have not expressly dealt with*.

As a matter of first principles, a party in breach of contract is liable for the amount of damages which would place the innocent party in the position he would be in if the contract had been performed.[4] This is the compensation principle, which underpins the calculation of damages in both England and Singapore.[5] Logically, this principle implies that a defendant is liable for all pecuniary losses suffered by the claimant as a consequence of a breach of contract. It is, however, not unqualified and we find that the compensation principle is curtailed by at least two categories of limitations.

The first of these consists of any limit on recovery which the parties have expressly agreed to in the contract. This may take the form of express limitation or exclusion clauses which deal with certain types of losses, or liquidated damages provisions which determine the extent of the defendant's liability for a breach of contract. Properly understood, these limitations have nothing to do with the doctrine of remoteness and are best understood as part of the exercise of contractual interpretation.

Next, there are limitations arising from the doctrine of remoteness. In *OOTB v. Wanin*, the Singapore Court of Appeal defined remoteness as a limit on the extent of a contract breaker's liability for damages which is distinct from the limits which

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2 [2011] 1 S.L.R. 150 (C.A.) [*MFM v. Fish & Co*].

3 [2013] 2 S.L.R. 363 (C.A.) [*OOTB v. Wanin*].

4 *Robinson v. Harman* (1848) 1 Exch. 850 at 855, 154 E.R. 363 (Parke B.).

5 *Ang Sin Hock v. Khoo Eng Lim* [2010] 3 S.L.R. 179 at para. 72 (C.A.).

the parties themselves have expressly provided for.[6] This negative definition of the doctrine of remoteness is broad, but a useful starting point in enabling us to realise that we are dealing with cases where the contract has *prima facie* 'run out', and the court has to allocate a loss which the express terms of the contract do not deal with. There are two approaches which the court may adopt when faced with such a loss.

A. *The Orthodox Knowledge-based Approach*

The first approach a court may take when faced with a loss which parties have not expressly dealt with, such as the loss of the follow-on fixture in *The Achilleas*, turns on the knowledge of the defendant at the time when he enters into the contract. It is derived from Alderson B.'s famous judgment in *Hadley v. Baxendale*[7] as developed in later cases such as *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*[8] and *Koufos v. C. Czarnikow Ltd*.[9]

First, the defendant is liable for all losses which, at the time of agreement, he should have been aware are likely to follow a breach of contract because they arise naturally in the great multitude of cases:[10]

> Where two parties have made a contract which one of them has broken, the *damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself*, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

The emphasised passage makes it clear that under this "first limb" we are dealing with ordinary losses, the probability of which all reasonable parties would be aware of. Thus the knowledge that such a loss is likely to eventuate from a breach of contract is *imputed* to the defendant.[11]

Second, and in addition to ordinary losses, the defendant is also liable for unusual or extraordinary losses which he was *actually aware* are likely to follow a breach because he had knowledge of the circumstances which made them probable:[12]

> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

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6 *OOTB v. Wanin*, *supra* note 3 at para. 12.

7 (1854) 9 Exch. 341, 156 E.R. 145.

8 [1949] 2 K.B. 528 (C.A.) [*Victoria Laundry*].

9 [1969] 1 A.C. 350 (H.L.) [*The Heron II*].

10 *Hadley v. Baxendale*, *supra* note 7 at 355 [emphasis added].

11 The distinction between actual and imputed knowledge was first made by Asquith L.J. in *Victoria Laundry*, *supra* note 8 and approved by the Singapore Court of Appeal in, *inter alia*, *Robertson Quay Investment Pte Ltd v. Steen Consultants Pte Ltd* [2008] 2 S.L.R.(R.) 623 at para. 55 (C.A.) [*Robertson Quay*].

12 *Hadley v. Baxendale*, *supra* note 7 at 355, 356.

By contrast with the first limb, we are concerned here with the actual knowledge of the defendant of the special circumstances or facts which make an extraordinary loss likely. If the defendant lacks such knowledge, then he cannot be held liable. This is why the knowledge-based approach may be best described as laying down an *exclusionary principle*; it limits the extent of a defendant's liability to losses which were within his knowledge or reasonable contemplation at the time the contract was made, either because (i) they were ordinary losses (the "first limb") or (ii) the defendant was aware of the special circumstances which made the loss likely to result from a breach (the "second limb"). For example, on the facts of *Hadley v. Baxendale*, the defendant carrier had contracted to carry the claimant mill owner's broken crank shaft, but failed to carry out the delivery within a reasonable time. Nonetheless, it was not held liable for the loss of profits the mill had incurred during this period of delay as it had not been communicated to the defendant that the claimant, unusually, did not have a spare shaft at hand and that it was hence reliant on the timely delivery of the broken shaft. The loss was neither ordinary nor one which the defendant had actual knowledge of and hence fell outside both limbs of the test laid down by Alderson B.

1. *How Likely Must the Loss Be?*

Under the *Hadley v. Baxendale* approach, a question arises as to the degree of probability that is required before a loss is deemed to fall within the reasonable contemplation of the defendant. In other words, the question is how likely a loss must be before it is judged to be not too remote and hence recoverable. This issue was dealt with, albeit somewhat unsatisfactorily, by the House of Lords in *The Heron II* where various expressions were used, including "serious possibility",[13] "real danger"[14] and "not unlikely".[15] In this article, the view is taken that nothing of substance turns on the precise language used as long as one is mindful that a higher degree of probability is required to satisfy the test of remoteness in contract than in tort. The balance of authority, both in England and Singapore, suggests that a loss must be contemplated as a "serious possibility" or "real danger" before it can satisfy the orthodox *Hadley v. Baxendale* test.[16]

2. Sciens *Does Not Equate to* Volens

Why does knowledge matter? One possible answer is that knowledge is a proxy for consent—a defendant who is aware that a particular type of loss is likely to result if he fails to perform his side of the bargain should be taken to have assumed responsibility for it. This is the view which Lord Walker appears to favour in *The Achilleas* where he held that that assumption of responsibility was the "underlying idea… essential to the rule in *Hadley v. Baxendale* as a whole".[17] It is also a line of reasoning which the Singapore Court of Appeal furthered in *MFM v. Fish & Co*.

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[13] *The Heron II*, *supra* note 9 at 414, 415 (Lord Pearce), at 425 (Lord Upjohn).
[14] *Ibid.*
[15] *Ibid.* at 388 (Lord Reid).
[16] *Robertson Quay*, *supra* note 11 at para. 58.
[17] *The Achilleas*, *supra* note 1 at para. 69.

The claimant owner of a chain of seafood restaurants sued the defendant, which was a competitor in the same industry, for the breach of several undertakings which the defendants had given the claimants as a result of which the claimant had suffered a loss of profit both when the breaches were ongoing (the "Breach Period") and thereafter (the "Post-Breach Period"). The question was whether the loss of profits suffered during the Post-Breach Period was too remote, which in turn led the court to discuss the jurisprudential basis of the doctrine of remoteness and the impact of *The Achilleas* in Singapore. In discussing the knowledge-based approach, the court held that:[18]

> [T]he universal and external rules of law (as embodied in *both* limbs in *Hadley*) are, in substance, the *best possible reflection* of what the parties *would have agreed to had they thought about a situation in which the contract was breached*.

In other words, the knowledge-based approach is seen as indirectly giving effect to the agreement of the parties by providing the risk allocation which the parties themselves would have arrived at if they had applied their minds to the question. The difficulty with this analysis is that it comes precariously close to a *non sequitur* by equating knowledge of a specific risk, or *sciens*, with voluntary assumption of that risk, or *volens*. The two are radically different frames of mind, and to reason deductively from the first to the second seems too far a leap, particularly when the court is faced with open-ended and significant financial losses of the kind at issue in *The Achilleas* and *MFM v. Fish & Co*. In these cases it is simply not clear that the claim that the test of reasonable contemplation laid down in *Hadley v. Baxendale* provides an accurate reflection of what the parties would have agreed is a sound one given the nature of financial and market risks. Take the facts of *The Heron II* for instance. Under a charterparty, the defendant shipowners had contracted to deliver sugar to Basrah but failed to do so on time. Within the period of delay, the price of sugar at Basrah fell and it was held that the claimant charterers could recover their market losses as the shipowners knew that charterers were sugar merchants and that there was a sugar market in Basrah. These factors rendered the loss an ordinary one under the orthodox knowledge-based approach. To argue further that the shipowners could also fairly be taken to have consented, at the time of agreement, to have borne this open-ended and potentially significant market risk simply because they knew of their counterparty's business and that there was a sugar market in Basrah, however, strikes us as illogical and commercially unrealistic. Such financial risks are subject to macroeconomic conditions well beyond the control of any defendant and a reasonable commercial agent in the shipowner's shoes would have been extremely reluctant to accept responsibility for the relevant risk regardless of how much knowledge it possessed, at least not without a considerable increase in the price. This is not to assert *The Heron II* was decided wrongly. Rather, we have to be cautious in taking the defendant's *knowledge* that a particular loss is likely to eventuate if there is a breach of contract as *conclusive* evidence that he would have *agreed* to bear responsibility for that loss.

Furthermore, we have to remember that this knowledge would have been common to both parties and that both of them would have had the opportunity to deal with the

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[18] *MFM v. Fish & Co*, *supra* note 2 at para. 109 [emphasis in original].

relevant risk by bargaining for a greater or lesser price, or the insertion of an express limitation or exclusion provision, or by finding some other way to insure themselves against the possibility that the loss may materialise. This is the reason why, even if knowledge can serve as a proxy for consent, it is difficult to see why the defendant, rather than the claimant, should be taken to have assumed responsibility for a loss which was within the reasonable contemplation of *both* parties. Hence, the *Hadley v. Baxendale* knowledge-based approach is difficult to conceive in terms of consent despite Lord Walker and the Singapore Court of Appeal's attempt to assimilate the notion of assumption of responsibility within orthodox principles.

3. *Fairness—Respect for the Defendant and Balance Between the Parties*

In *The Achilleas*, Lord Hoffmann emphatically held that all contractual liability is voluntarily undertaken.[19] However, if the above analysis is right—if the Latin maxim *sciens non est volens* does hold true for remoteness—then what, if not the parties' consent, is the knowledge-based approach derived from *Hadley v. Baxendale* based on? It is submitted that the orthodox approach towards remoteness is best understood as reflecting the principle of fairness, or more precisely, respect for the defendant as an autonomous agent with the capacity to make rational choices based on which legal and moral responsibility ought to be attributed. It is a counterweight to the claimant-sided compensation principle and ensures that a defendant is only held liable in circumstances where he had a fair opportunity to protect himself against the imposition of liability.

Going back to Alderson B.'s famous judgment in *Hadley v. Baxendale*, the learned judge recognised that this is the importance of knowledge: it provides the defendant the opportunity to protect himself by bargaining for special terms as to damages.[20] The key normative question is whether it is fair to hold the defendant liable for a loss caused by his breach of contract. This question is answered in the affirmative when the loss is within the defendant's reasonable contemplation at the time of agreement. In such cases, he has the opportunity to vary the terms of the agreement, take additional measures to avoid a breach or refuse to contract altogether. Conversely, when the defendant reasonably fails to contemplate the type of loss which is at issue, it is judged that it is unfair to impose the burden of the loss on him. Respect for the defendant as a rational agent necessitates that he only be held responsible for consequences which he is aware or reasonably should have been aware are likely to follow from his actions. The relevant action is a breach of contract, and although the imposition of liability itself is strict, the *extent* of a defendant's liability is curtailed by the moral judgment that it would be "unfair to a defendant, and impose too great a burden, to hold [him] responsible for losses that [he] could not have reasonably contemplated".[21] Understood as such, it becomes clear that under the knowledge-based approach remoteness is an *external limitation on damages imposed by the*

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[19] *The Achilleas*, *supra* note 1 at para. 12.

[20] *Hadley v. Baxendale*, *supra* note 7 at 356.

[21] Andrew Burrows, *Remedies for Torts and Breach of Contract*, 3rd ed. (Oxford: Oxford University Press, 2004) at 76.

law[22] in order to achieve a just balance between the parties before the court. As Hart and Honoré put it:[23]

> The rules in *Hadley v. Baxendale* are rules of legal policy intended to promote a fair balance between the contracting parties. They try to ensure that a contracting party is not held liable for items of loss of a sort that would not enter into his calculations when deciding whether to make the contract or on what terms to make it.

This too was how the Singapore Court of Appeal conceived the test of reasonable contemplation in *Sunny Metal & Engineering Pte Ltd v. Ng Khim Ming Eric*,[24] as reflecting a pre-determined balance between "the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were to be held to answer for all the consequences of his default". The parties may, of course, contract out of the test through agreement, but the content of the test itself is an enunciation of the principle of fairness rather than consent.

B. *The Agreement-centred Approach*

Following *The Achilleas*, there is now another novel approach which may be taken to allocate a loss which the parties have not expressly dealt with. Rather than focusing on the test of reasonable contemplation laid down in *Hadley v. Baxendale* as an end in itself, the court's task under this approach is to examine all the circumstances surrounding the particular case to determine the allocation which the parties themselves would have reasonably arrived at.[25] This is the agreement-centred approach,[26] so labelled because it ostensibly gives effect to the parties' actual but *implicit* agreement even though we are dealing with a category of cases where their *express* intention has run out.

1. *The Orthodox Allocation As a Presumption As to What the Parties Would Have Agreed*

The first point to be made is that the agreement-centred approach is not completely detached from the test of reasonable contemplation outlined above. The *Hadley v. Baxendale* allocation provides an important starting point for the analysis, although it is not conclusive: it has to be ascertained if a risk within the defendant's reasonable contemplation is also one which he would have assumed responsibility for. While it has to be once again emphasised that knowledge cannot *conclusively* be equated with

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[22] *OOTB v. Wanin*, *supra* note 3 at para. 13; Edwin Peel, "Remoteness Revisited" (2009) 125 Law Q. Rev. 6; Andrew Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 L.S. 172.

[23] H.L.A. Hart & Tony Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon Press, 1985) at 320.

[24] [2007] 3 S.L.R.(R.) 782 at para. 56 (C.A.), aff'd *Robertson Quay*, *supra* note 11 at para. 70 and *OOTB v. Wanin*, *supra* note 3 at para. 22.

[25] *The Achilleas*, *supra* note 1 at para. 26 (Lord Hoffmann), at para. 31 (Lord Hope).

[26] See Adam Kramer, "An Agreement-Centred Approach to Remoteness and Contract Damages" in Nili Cohen & Ewan McKendrick, eds., *Comparative Remedies for Breach of Contract* (Oxford and Oregon: Hart Publishing, 2005) 249.

consent, there is no reason why there cannot be a *presumption* or rule of thumb[27] that the losses the defendant reasonably contemplated are those for which he would have agreed to bear responsibility. As Lord Hoffmann put it the test of reasonable contemplation can be reconceptualised as:[28]

> [A] prima facie assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but *capable of rebuttal* in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses[.]

On the facts of *The Achilleas* itself, the loss of the follow-on fixture was one which was conceded to fall within the first limb of *Hadley v. Baxendale* as a "not unlikely" consequence of the charterers' failure to return the vessel on time.[29] Applying the orthodox approach laid out above, this loss should have been automatically recoverable by the owners. Nevertheless, it was held by the House of Lords that it was not, as, according to Lord Hoffmann and Lord Hope, the orthodox allocation was out of line with the parties' implicit intention.

2. *Rebutting the Presumption*

The presumption supplied by *Hadley v. Baxendale* was rebutted in *The Achilleas* because of two principal factors: a general understanding in the shipping market that liability for delayed delivery of a vessel under a charterparty was restricted to the difference between the market rate and the charter rate for the overrun period,[30] and the nature of the loss which was large and unquantifiable[31] and judged to be a consequence of arrangements entered between the owners and the new charterers which were outside the control of the defendants.[32] These factors meant that Transfield Shipping Inc could not reasonably be taken to have accepted responsibility for the loss of the follow-on fixture.

There are several other factors which are also relevant when the court is asked to depart from the allocation provided by the orthodox approach.

One of these is the contract price. In *The Achilleas*, Lord Hoffmann pointed out that "the view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price paid".[33] Indeed commercial common sense suggests that the price will often be a crucial indicator of how the parties would have allocated a particular risk if they had applied their minds to it—a substantial disparity between the quantum of the relevant loss and the contract price may be evidence that the loss is not one that the defendant can reasonably be taken to have assumed responsibility for.[34]

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[27] *Ibid.* at 249.
[28] *The Achilleas*, *supra* note 1 at para. 9 [emphasis added].
[29] *Ibid.* at para. 6.
[30] *Ibid.*
[31] *Ibid.* at para. 13 (Lord Hoffmann), at para. 36 (Lord Hope).
[32] *Ibid.* at para. 34 (Lord Hope).
[33] *Ibid.* at para. 13.
[34] See *Restatement (Second) of Contracts*, § 351(3) (1981).

The next factor which the court has to take into account is the nature or purpose of the duty undertaken by the defendant.[35] Thus, in *Rubenstein v. HSBC Bank plc*,[36] the defendant bank was found liable for the claimant's investment losses, even though they had been exacerbated by the 2008 financial crisis, as it had contracted to protect the claimant from the very kind of misfortune—market losses—which had come about. Similarly, Lord Walker in *The Achilleas* provided the example of a manufacturer of lightning conductors who would be held liable if a house burned down as a result of a defective conductor regardless of how slight the probability of such an accident might be.[37] Lastly, perhaps most famously, there is the case of *South Australia Asset Management Corporation v. York Montague Ltd*[38] in which the claimant made secured loans on property based on the defendant valuer's negligent valuation of property. It was held that the valuer was only liable to the extent of the overvaluation and not for any subsequent fall in the market value of the property as the duty of the defendant was to provide information about the value of the property and not advice as to whether the claimants should enter into the mortgage agreement. Hence, unlike in *Rubenstein v. HSBC* and Lord Walker's example of the manufacturer of lightning conductors, the purpose of the duty undertaken by the defendant served to limit rather than extend the range of his liability.

Presumably any other background circumstance which sheds light on the question of what the parties would have agreed if they had turned their minds to the relevant loss is also relevant, though it has to be remembered that evidence arising from pre-contractual negotiations is inadmissible.[39] Ultimately, the key point which emerges from this analysis is that the agreement-centred approach is one that allows a "wider range of factors and value judgements"[40] to be taken into account when a court is asked to allocate a loss which the parties' have not expressly dealt with. The test of reasonable contemplation no longer plays a determinative role as it does under the knowledge-based approach.

3. *A Contextual Approach to Interpretation*

The reason why such a broad range of factors is relevant under the agreement-centred approach is because it is inextricably linked to and theoretically derived from a contextual approach to the interpretation of the parties' agreement.[41] This approach, championed by Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*[42] and *A.G. of Belize v. Belize Telecom Limited*,[43] requires the court to take into account the full matrix of facts surrounding the agreement when determining both the meaning of any ambiguous terms and the content of any implied terms within the contract.

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[35] This is sometimes referred to as the "scope of duty" principle but the language of nature or purpose is less ambiguous and to be preferred. See Lord Hoffmann, "Causation" (2005) 121 Law Q. Rev. 592 at 596.

[36] [2012] EWCA Civ 1184 [*Rubenstein v. HSBC*].

[37] *The Achilleas*, *supra* note 1 at para. 78.

[38] [1997] A.C. 191 (H.L.).

[39] *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38.

[40] *The Achilleas*, *supra* note 1 at para. 93 (Baroness Hale).

[41] *MFM v. Fish & Co*, *supra* note 2 at para. 98.

[42] [1997] UKHL 28.

[43] [2009] 1 W.L.R. 1988 (P.C.).

The hypothesis is that the shape or orientation of the parties' agreement,[44] and a proper examination of all the circumstances surrounding it will allow the court to determine the risk allocation which the parties themselves, acting reasonably, would have arrived at if they had considered the relevant loss at the time of contract. As Lord Hoffmann put it in *The Achilleas*:[45]

> [T]he implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of *essentially the same techniques of interpretation*. In both cases, the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for.

Assuming this hypothesis is sound, we find that one obvious difficulty with the agreement-centred approach is that it risks conflating the doctrine of remoteness—which is concerned with the allocation of losses which the parties themselves have not expressly provided for—with the law on contractual interpretation and the doctrine of implied terms, which allows the court to insert terms into a contract in order to give effect to the parties' actual, but unstated intention. But perhaps this is a good thing. If all allocation of risk questions can be answered by construing the parties' agreement in a broad and purposive manner, then it is difficult to see why the law should recognise an independent doctrine of remoteness which would undermine the intention of the parties. On the other hand, if the hypothesis is conceptually unsound, or practically unworkable, then we find that there is a strong reason to be wary of the agreement-centred approach. This brings us to the current law in both England and Singapore.

III. The Law Post-*Achilleas*

A. *England*

In England, the Court of Appeal in *Supershield Ltd v. Siemens Building Technologies FE Ltd*[46] and *John Grimes Partnership Ltd v. Gubbins*[47] has laid down a two-staged approach to remoteness under which *Hadley v. Baxendale* remains the "standard rule" which will only be departed from in cases "where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties".[48] On one view, this "amalgam of the orthodox and the broader approach"[49] can be rationalised as mirroring the agreement-centred model with the test of reasonable contemplation placed at the first stage as a rebuttable presumption as to what the parties may be taken to have agreed. This analysis though does not accurately reflect the cases and, in reality, the post-*Achilleas* English position appears to be an attempt

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[44] Kramer, *supra* note 26.
[45] *The Achilleas*, *supra* note 1 at para. 26 [emphasis added].
[46] [2010] EWCA Civ 7 [*Supershield v. Siemens*].
[47] [2013] EWCA Civ 37 [*Grimes v. Gubbins*].
[48] *Supershield v. Siemens*, *supra* note 46 at para. 43, approved in *Grimes v. Gubbins*, *ibid.* at para. 22.
[49] *Sylvia Shipping Co Ltd v. Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm) at para. 40.

by the judges to have it both ways—to preserve the stability and certainty promoted by the well-established knowledge-based approach while at the same time benefiting from the discretion offered by having an "escape clause" of uncertain scope derived from *The Achilleas*. It is an approach which has led to considerable confusion and uncertainty, principally due to the lack of guidance given by the court on when the first *Hadley v. Baxendale* stage will be departed from.

In *Supershield v. Siemens* the defendant subcontractor defectively installed a float valve which was designed to prevent flooding from the water storage tank of a sprinkler system. There was a secondary means of protection against flooding, namely drains in the tank room floor, which also failed as these had been blocked by packaging and other material. The water overflowed, causing substantial damage to electrical equipment, and the defendant was held liable even though a valve failure was very unlikely to result in a flood: this was the very type of misfortune which the subcontractor had assumed contractual responsibility to prevent and the loss was hence judged to be not too remote. In the words of Toulson L.J.:[50]

> [L]ogically the… principle [laid down by *The Achilleas*] may have an inclusionary effect… If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.

The court's reluctance to engage with the question of how likely a consequence must be before it can meet the test of reasonable contemplation and its willingness to extend liability on the basis of the purpose or nature of the contractual duty undertaken by the defendant were both indications that the agreement-centred approach, centred around the parties' implicit intention, was preferred over an strict adherence to the *Hadley v. Baxendale* test of reasonable contemplation. It looked, after *Supershield v. Siemens*, like *The Achilleas* was sailing strong.

However, in *Grimes v. Gubbins,* the Court of Appeal shifted back in substance though not form to the knowledge-based approach. The claimant farmer, who wished to develop a piece of land he owned in Cornwall, hired the defendants, John Grimes Partnership ("JGP"), to design a road which was to be included within the development. The defendants failed to complete the work on time and the farmer then claimed damages for the diminution in the value of the land over the period of delay. This was held to be recoverable as it was a first limb loss under the standard approach and it was judged that there were no background circumstances to take the case outside of the standard rule.

Crucially, Sir David Keene, delivering the leading judgment, rejected a number of arguments raised by counsel, suggesting that the position of *The Achilleas* in English law as a general authority for a broad, agreement-centred approach to remoteness is somewhat precarious.

The first of these is the argument that recovery may be denied if the loss suffered by the claimant is disproportionate to the consideration provided under the contract. This argument was rejected out of hand[51] despite the huge discrepancy between the

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[50] *Supershield v. Siemens*, *supra* note 46 at para. 43.

[51] *Grimes v. Gubbins*, *supra* note 47 at para. 30.

initial contract price of £15,000 paid by Mr. Gubbins and the substantial market loss of £398,000. As noted above, commercial common sense tells us that the contract price was a crucial indicator of the parties' implicit intention, as to how they would have allocated the relevant market risk if they had applied their minds to the question. The Court of Appeal's cursory rejection of this factor was a blow to the agreement-centred model.

Next, the nature of the loss, which was caused by the eventuation of an unquantifiable and open-ended market risk, was not deemed to be a relevant factor in judging the parties' implicit intentions either. Sir David Keene rightly pointed out that the defendant's lack of control over the property market could not by itself excuse it from liability.[52] This is the case with all markets and the argument, if accepted, would logically imply that market losses could never be recovered. Nevertheless, if one adopts the broad agreement-centred model, then to hold that a reasonable commercial agent in the position of JGP would have accepted responsibility for Mr. Gubbins' large and unpredictable market risk simply because it was aware of Mr. Gubbins' plans and knew that "the property market could go up or down"[53] does strike us as harsh. As Lord Hoffmann put it in *The Achilleas*, no reasonable commercial party in the defendant's shoes would have accepted responsibility for such a risk without accepting some premium in exchange[54] of which there was no evidence.

Third, and most importantly, *The Achilleas* was construed narrowly as turning on a general understanding or expectation in the *particular* market in which the case took place.[55] Thus, *Grimes v. Gubbins* was judged to be "patently not an *Achilleas* type case" as there had been no evidence that "there was some general understanding or expectation in the property world that a party in this engineer's position would not be taken to have assumed responsibility for losses arising from movement in the property market".[56] This reasoning suggests that the standard rule will only be departed from, if ever, on facts which closely mirror that of *The Achilleas* rather than on a principled basis as dictated by the agreement-centred model.

This tilt towards the orthodox *Hadley v. Baxendale* approach was further bolstered by Sir David Keene's reasoning that the test of reasonable contemplation could be reconceptualised as a default term which "the law in effect implies" where "there is no express term dealing with what types of losses a party is accepting potential liability for".[57] This novel analysis suggests that the doctrine of remoteness is a limitation which is externally imposed rather than one that arises from a proper construction of the parties' implicit agreement; it is clearly reminiscent of the knowledge-based approach albeit with an exception, of uncertain scope, for "special circumstances".[58]

Taken together, these dicta have heavily curtailed the impact of *The Achilleas* in English law. The broad multi-factorial reasoning required under the agreement-centred model was largely absent and little direction was given as to when the standard approach will be departed from apart from in a vaguely defined set of 'special' cases.

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[52] *Ibid.* at para. 27.
[53] *Ibid.* at para. 25.
[54] *The Achilleas*, *supra* note 1 at para. 13.
[55] *Grimes v. Gubbins*, *supra* note 47 at para. 19.
[56] *Ibid.* at para. 26.
[57] *Ibid.* at para. 24.
[58] *Ibid*. See Senthil Sabapathy, "Falling Markets and Remoteness" [2013] L.M.C.L.Q. 284 at 288.

On paper, the agreement-centred model trumps the standard approach when the circumstances of the case reveal that the allocation of risk offered by the standard approach is not in line with the parties' implicit intention. In reality, however, the narrow reading given to *The Achilleas*, and the court's reluctance to examine and apply the agreement-centred model in a principled manner are likely to result in the knowledge-based approach being applied as a matter of course in most cases. This half-hearted embrace of *The Achilleas* reflects the lukewarm, if not overtly hostile, reception which the agreement-centred model has gotten from the leading commentators in the jurisdiction.[59] In England, *The Achilleas* may still be afloat, but it is certainly facing rough seas.

B. *Singapore*

In Singapore, the status of *The Achilleas* is much clearer. It has been rejected by the Singapore Court of Appeal in two leading cases which have already been referenced—*MFM v. Fish & Co* and *OOTB v. Wanin*—and the knowledge-based approach has been expressly approved in a number of cases, the most prominent of which is *Robertson Quay*.[60]

In *Robertson Quay*, the Singapore Court of Appeal discussed criticisms of *Hadley v. Baxendale* made by Cooke P. in the New Zealand Court of Appeal in *McElroy Milne v. Commercial Electronics Ltd*.[61] He suggested that a discretionary approach be adopted instead, based on a consideration of several factors including "directness, 'naturalness' as distinct from freak combination of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability… in seeking to establish a just balance between the parties".[62] The court, with the judgment delivered by Andrew Phang J.A., rejected this broad multi-factorial approach and expressly approved the *Hadley v. Baxendale* knowledge-based approach as one founded on "a strong rational basis".[63] The learned judge distinguished between first limb or ordinary losses, which he posited the contracting parties would have agreed that the contract-breaker should be held liable for if they had thought about the issue,[64] and second limb losses which it is "neither unjust nor unfair" to impose on the defendant in cases where the contracting parties have had the opportunity to communicate with each other in advance.[65] He hence concluded that the doctrine is consistent with the concept of contract as agreement, but was careful to point out that the court was concerned with a category of cases where the contracting parties have not, *ex hypothesi*, expressly provided for what is to happen should a breach of their contract occur. As such, "the only alternative the courts have is to formulate

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[59] See, for instance, Hugh Beale, ed., *Chitty on Contracts*, 31st ed. (London: Sweet & Maxwell, 2012) at paras. 26-130, and Edwin Peel, *Treitel: The Law of Contract*, 13th ed. (London: Sweet & Maxwell, 2013) at 1059.

[60] *Supra* note 11.

[61] [1993] 1 N.Z.L.R. 39 (C.A.).

[62] *Ibid.* at 43.

[63] *Robertson Quay*, *supra* note 11 at para. 69.

[64] *Ibid.* at para. 81.

[65] *Ibid.* at para. 82.

universal rules and principles"[66] premised on justice and fairness which would apply to all contracting parties[67] such as those derived from *Hadley v. Baxendale*.

In *MFM v. Fish & Co*, Andrew Phang J.A. once again explored the foundations of the doctrine of remoteness. Two separate points emerge from the case. First, the learned judge was clear that knowledge is a *sufficient* basis—in and of itself[68]—for holding the defendant liable under both the first and second limbs of *Hadley v. Baxendale*, thereby rejecting the broader agreement-centred model furthered by Lord Hoffmann and Lord Hope in *The Achilleas* under which knowledge is just one factor to be taken into account when judging the parties' implicit intention. As the learned judge put it:[69]

> It is our view that *the criterion of knowledge furnishes a sufficiently objective basis on which to premise the existence (or otherwise) of an implied obligation or assumption of responsibility on the defendant*. To leave the situation open to other factors would lead to unnecessary speculation as well as uncertainty.

Second, as the above quote suggests, the theoretical reasoning in *The Achilleas* was not rejected entirely. Instead, the orthodox *Hadley v. Baxendale* rule was construed as one which already embodies the concept of consent or assumption of responsibility.[70] This, as argued above, was not necessarily a positive jurisprudential development as the *Hadley v. Baxendale* approach is better seen as based on fairness, and respect for the defendant as an autonomous agent, rather than on the broad notion of consent. Nevertheless, and notwithstanding this aspect of the court's reasoning, what is clear is that assumption of responsibility as a *test* for remoteness was rejected in *MFM v. Fish & Co*[71] as was the agreement-centred model's claim that the process of interpretation can provide the answer to all questions of remoteness. In the Court of Appeal's view:[72]

> [T]he rules relating to remoteness of damage in contract law are (contrary to Lord Hoffmann's view) *universal and external rules of law* applicable to *all* situations where a breach of contract has occurred[.]

This decisive rejection of the agreement-centred model's central claim was followed up most recently in *OOTB v. Wanin*. The claimant, Out of the Box Pte Ltd, engaged Wanin Industries Pte Ltd for the production of a sports drink. Contaminated goods were supplied and Out of the Box sought recovery of the substantial expenses it had incurred in advertising the drink. This claim was denied as it was found by the Court of Appeal that the claimant's "grandiose plans and ambitions" for what was in essence a generic sports drink were not communicated to the defendant.[73] In other words, the advertising expense was a type of loss which outside of the first limb of *Hadley v. Baxendale* and was judged to be too remote because the "special

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[66] *Ibid.* at para. 83 [emphasis in original].
[67] *Ibid.* at para. 78.
[68] *MFM v. Fish & Co*, *supra* note 2 at para. 106.
[69] *Ibid.* at para. 107 [emphasis in original].
[70] *Ibid.* at paras. 101-109.
[71] See Goh Yihan, "Explaining Contractual Remoteness in Singapore" [2011] J. Bus. L. 282.
[72] *MFM v. Fish & Co*, *supra* note 2 at para. 107 [emphasis in original].
[73] *OOTB v. Wanin*, *supra* note 3 at para. 52.

circumstance" in the case—the grand plans which Out of the Box hoped to realise through its advertising campaign—was not communicated to Wanin.

The court touched again on the need to maintain a distinction between the process of interpretation and the doctrine of remoteness. Sundaresh Menon C.J. held that:[74]

> [T]here must be conceptual clarity in differentiating between interpreting a contract to establish the nature of the specific obligation that has been imposed on a party, and the altogether separate question of what damages the breaker of that obligation will be liable for.

Unsurprisingly, hence, the *Hadley v. Baxendale* knowledge-based approach was approved. It was pointed out that it is an approach which "has a very respectable vintage and has entered the stream of consciousness of most common lawyers".[75]

Interestingly, it was also suggested that the application of the knowledge-based test itself was not one that was completely detached from the surrounding matrix of facts as it is "also important to have regard to the circumstances in which [the] knowledge had been acquired"[76] when a court asks the question whether the defendant was reasonably aware that the loss was a likely consequence of a breach. This, however, should not be taken to be support for the agreement-centred model as the court was clear that knowledge remains the key element that determines the horizon that will limit the contract breaker's liability.[77]

Taken together, these three authorities make it clear that agreement-centred model derived from *The Achilleas* is not welcome on the shores of Singapore.

IV. Problems with the Agreement-centred Model

This brings us to the reasons why the agreement-centred model has struggled to establish a firm footing in either England or Singapore.

A. *Theoretical Difficulties*

The principal difficulty with *The Achilleas*, which has been pointed out by commentators such as Robertson[78] and Stiggelbout,[79] is that the hypothesis that the court is able to construe the parties' implicit agreement in order to determine the answer which they themselves would have arrived at is flawed. While it is undoubtedly true that the parties' intentions, objectively construed, are not confined to the express terms of the contract, and that the shape or orientation of the parties' agreement often allows us to judge what their implied or implicit intentions are, it is a fallacy to reason from this to the proposition that *all* allocation of risk questions can be answered through the process of contractual interpretation. Take the facts of *OOTB v. Wanin*,

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[74] *Ibid.* at para. 35.
[75] *Ibid.* at para. 23.
[76] *Ibid.* at paras. 21, 47.
[77] *Ibid.* at paras. 17, 21, 47.
[78] Robertson, *supra* note 22 at 179.
[79] Mark Stiggelbout, "Contractual Remoteness, 'Scope of Duty' and Intention" [2012] L.M.C.L.Q. 97 at 118.

where the contract for the drink itself was "a remarkably simple document" which was "little more than a page in length".[80] The possibility of the drinks being contaminated and causing the claimant substantial advertising losses was one which was not considered by the parties; this was a classic case where the parties' agreement had simply run out. To reason then that the parties' implicit intention was for this loss to be borne by the claimant rather than the defendant seems fictional at best.

If the parties' implicit intention is a fiction, then the agreement-centred model risks conflating the doctrine of remoteness—which is concerned with the allocation of losses which the parties themselves have not expressly provided for—with the law on contractual interpretation and the doctrine of implied terms. This was a point picked up in both *MFM v. Fish & Co*, where it was pointed out that the agreement-centred model appears to exclude the operation of the very doctrine of remoteness,[81] and in *OOTB v. Wanin*, where the need for conceptual clarity to be maintained between the process of interpretation and the doctrine of remoteness was emphasised.[82]

Here it could be argued, as Lord Hoffmann has extra-judicially,[83] that the objective approach to the construction of the contracts has to be taken into account when assessing the validity of the agreement-centred model. The argument is that by focusing objectively on what reasonable commercial agents in the shoes of the parties would have agreed, the parties' implicit intention can be reliably determined by the court. There are, however, two difficulties with this argument. First, it is unclear how the parties' objective intention can be determined when the loss is one which the parties never contemplated. This was the case in *OOTB v. Wanin* and is often true of remoteness cases where the parties, at the time of agreement, are likely to contemplate performance and not breach. Next, if this 'gap' in the parties' implicit intention is filled solely by reference to the reasonable man test, then we find that the court is imputing an intention which is derived, not from the process of contractual interpretation or the parties themselves in any meaningful sense, but from the court's creative assessment of what is reasonable in the particular case. The central justification for the agreement-centred model, that it gives effect to the parties' actual, though unstated, intention, is thus undermined.

B. *Practical and Evidential Difficulties*

Even if the parties' implicit intention is not fictional and there is no conceptual space between the process of interpretation and the doctrine of remoteness which needs to be demarcated, it is still not clear how the parties would adduce evidence of this intention.[84] Going back to *OOTB v. Wanin*, assuming that the parties did implicitly allocate the risk of the relevant advertising loss, it is unclear what evidence they could have produced to manifest this intention. This is the reason why the agreement-centred approach was rejected in *MFM v. Fish & Co* as one full of difficulty, uncertainty

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[80] *OOTB v. Wanin*, *supra* note 3 at para. 2.

[81] *MFM v. Fish & Co*, *supra* note 2 at para. 93.

[82] See text accompanying note 74.

[83] Lord Hoffmann, "*The Achilleas*: Custom and Practice or Foreseeability?" (2010) 14 Ed. L. Rev. 47 at 60.

[84] See Robertson, *supra* note 22; Stiggelbout, *supra* note 79.

and impracticality.[85] It invites the court to supply an intention to the parties where there is at best sketchy evidence on the matter as we are dealing with cases where, *ex hypothesi*, the express agreement has run out. It thereby increases the space for judicial discretion at the expense of clarity and commercial certainty. This, in turn, makes it difficult for the parties to determine their relative positions after a breach, which encourages them to litigate rather than reach settlements. The uncertainty which the agreement-centred model engenders also lends itself to longer and more expensive trials.

C. *Failure to Deal With the Shortcomings of the Knowledge-based Approach*

Finally, the agreement-centred model does not seem to represent a significant improvement over the knowledge-based approach. The principal flaws with the agreement-centred model are twofold. First, as noted above, there is the uncertainty surrounding the question of how likely or usual a loss must be for it to be recoverable.[86] Second, there is the uncertainty in the case law arising from the degree of specificity with which the relevant "type of loss" is defined by a court.[87] This categorisation matters due to the well-established principle that when the defendant did contemplate or should have reasonably contemplated that a certain type of loss is likely to result from a breach of contract, the scale or extent of the eventual loss is generally irrelevant.[88] These difficulties were noted, by Lord Hoffmann, to result in a "high degree of indeterminacy"[89] in his extra-judicial critique of the orthodox knowledge-based approach.

The problem with his solution, the agreement-centred model, is that it is unclear if it is any more determinate than the knowledge-based approach. First, the distinction between the type and extent of a loss is one that is expressly preserved under the new model as the key question facing the court is whether the defendant can be reasonably taken to have accepted responsibility for the particular *type* of loss. Second, the theoretical and practical difficulties outlined above with the central hypothesis which underpins the agreement-centred model—the proposition that all allocation of risk questions can be answered through the process of contractual interpretation—means that the agreement-centred model itself is highly uncertain, and more so than the knowledge-based approach, which is both well established and provides the necessary external rubric through the mechanism of the two limbs of *Hadley v. Baxendale*, allowing for a relatively predictable allocation of losses which the parties themselves have not expressly dealt with. So while the orthodox knowledge-based approach does have its own difficulties, these are not solved but merely exacerbated by the agreement-centred model.

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[85] *MFM v. Fish & Co*, *supra* note 2 at para. 94.
[86] See text accompanying notes 13-16.
[87] Lord Hoffmann, *supra* note 83 at 51.
[88] See *Rubenstein v. HSBC, supra* note 36 at para. 117.
[89] Lord Hoffmann, *supra* note 83 at 51-54.

V. Conclusion

Thus it is no surprise that we find that the agreement-centred model derived from *The Achilleas* has struggled to gain a firm foothold in both England and Singapore. In England, the courts have neutered the full impact of the model by adopting a two-staged approach which has retained orthodox rule for the majority of cases. On paper, the agreement-centred model has been integrated with the orthodox approach. In reality, however, we find confusion and uncertainty as it is simply not clear when, if ever, the standard rule will be departed from. In Singapore, by contrast, the model has been rejected out of hand due to the substantial theoretical and practical flaws with assumption of responsibility as a test for liability. In sum, as things currently stand in both jurisdictions, *The Achilleas* is struggling to stay afloat.