The limits of foreseeability and The Achilleas

Article

Accepted Version

The Limits of Foreseeability and *The Achilleas*

Derek Whayman[*]

The test for remoteness of damage in contract came under renewed scrutiny in *The Achilleas*. I examine the development of the orthodox rules of remoteness from *Hadley v Baxendale* et al in detail and describe precisely how they cannot truly be extended to yield the result in *The Achilleas*. Accordingly, the use of a novel approach is necessary. Lord Hoffmann's 'common intention' approach is best characterised as a convenient legal fiction that exists to justify the adoption of policy arguments into the test for remoteness; one must be careful not to confuse this gloss with the substance.

Introduction

> *This is one of those cases dealing with damages which in my experience I have found to be a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider.*
>
> *– Atkin LJ, The Susquehanna (1925)*[1]

In 2004, a perfectly ordinary event occurred in the world of merchant shipping. A time-chartered cargo vessel, *The Achilleas*, was late for redelivery by nine days. Entirely foreseeably, the follow-on fixture (the 'Cargill fixture') was missed. Owing to a sharp fall in the shipping market, the owners were forced to accept a greatly reduced rate with Cargill. At 191 days, the Cargill fixture was not especially long but multiplied by the 20% fall in the market,[2] the owners suffered an expectation loss of $1,364,584. The measure of damages widely thought to apply – the market rate less the contract rate multiplied by the nine-day delay plus ancillary costs – was only $158,301.

In the litigation that followed in *Transfield Shipping Inc v Mercator Shipping Inc* (hereafter *The Achilleas*),[3] the arbitrators, the High Court and the Court of Appeal decided that the charterers were liable for the entire expectation loss. This was a result of the application of the rule of remoteness in contract from *Hadley v Baxendale*[4] as explained in *Koufos v Czarnikow Ltd (The Heron II)*[5] ('the orthodox approach') – such losses were foreseeable as a not unlikely result of late redelivery.[6]

---

* MA (Cantab), LLM (Distinction). This article is a shortened version of my LLM dissertation, for which I am indebted to Dr David Pearce of the University of Leeds for his assistance.

[1] *Admiralty Commissioners v Owners of the SS Susquehanna (The Susquehanna)* [1925] P 196 (CA) 210, quoted in Richard Lawson, '*Hadley v Baxendale* – a French plot revealed' (1998) SJ 142(48) 1152, 1153.

[2] The original Cargill charter was for $39,500 per day; the renegotiated charter was for (near) market rates at $31,500 per day.

[3] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61.

[4] *Hadley v Baxendale* (1854) 9 Exch 341, 354; 156 ER 145, 152.

[5] [1969] 1 AC 350 (HL).

[6] *The Achilleas* [2006] EWHC 3030, [2006] 2 CLC 1069; [2007] EWCA Civ 901, [2007] 2 CLC 400.

The House of Lords unanimously,[7] albeit for different reasons, restricted the damages to the smaller sum. Lord Hoffmann and Lord Hope of Craighead held that the party in breach could not be taken to have assumed responsibility for these losses even if they were foreseeable as not unlikely.[8] Lord Rodger of Earlsferry allowed the appeal for different reasons, finding that the orthodox approach disclosed that the expectation losses *were* too remote. Baroness Hale of Richmond agreed with Lord Rodger, and Lord Walker of Gestingthorpe adopted a hybrid approach and also agreed with the reasons given by Lord Hoffmann and Lord Hope. This majority suggests that foreseeability alone is not the only test and there are one or more 'unorthodox approaches' which may be applied to novel situations.

In this article, I analyse the orthodox approach in detail and argue that Lord Rodger misapplied it due to significant gaps in his reasoning and conclude that he did not leave the orthodox approach a coherent and consistent test. Accordingly, no generally applicable principles can be derived from his speech. Consequently an altogether different approach is required and is justified in certain circumstances. Lord Hoffmann's and Lord Hope's reasoning diverges and it is not possible to read a precisely unified approach from their speeches. However, although on the face of it their approaches are conceptually different, an analysis of their methods' respective underpinnings shows that the facts considered and the results of both approaches are very similar.

Lord Hope justifies the departure from the norm on the basis of good commercial policy. Lord Hoffmann's use of 'the objectively ascertained common intention of the parties' as the foundation of the rule of remoteness is a convenient legal fiction that allows one to characterise the underlying arguments as something that may be ascribed to the will of the parties, and is primarily an act of justification. Accordingly, actual common intention is not the primary factor and in the absence of overriding actual intentions it will bow to these policy issues. To focus exclusively on the linguistic exchanges or matters intrinsic to the contract is to ignore the reality behind the fiction. This is the nature of a legal fiction; fictions have been likened to scaffolding which enables the construction of a new rule, but tends to obscure what is behind it.

The uncertainty inherent in the unorthodox approaches is such that straying from the norm will be unusual; hence the unenthusiastic judicial reception of *The Achilleas* and the adoption of a gateway test for its use by the Court of Appeal.[9] Still, when a departure is absolutely necessary, *The Achilleas* is the tool we have, and when a meritorious case arises that demands it, we should expect to see it used again.

[7] Albeit with Baroness Hale of Richmond 'dubitante'.
[8] *The Achilleas* para [21] (Lord Hoffmann); para [32] (Lord Hope).
[9] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 CLC 241 para [43].

The Basis of the Remoteness Rule – The Debate

It is trite law that upon breach of contract the defaulting party must pay some measure of damages to the innocent party, and that remoteness is one way of limiting those damages.[10]

An introduction to the competing theoretical bases of the remoteness rule is essential to understand the nature of the legal fiction Lord Hoffmann introduced. His Lordship phrased the question thus:[11]

> *[I]s the rule that a party may recover losses which were foreseeable ("not unlikely") an external rule of law, imposed upon the parties[,] … or is it a prima facie assumption about what the parties may be taken to have intended, … 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?*

Imposed by Law

The position that contractual liability is something imposed by law *ab extra* is reckoned to be 'very widely held' by Brian Coote (a supporter of the other view.)[12] Fuller and Perdue argue that, if the will theory – that the parties assume their obligations voluntarily – is correct, the rule of damages would be limited to the (smaller) reliance interest. Then the expectation interest is constructed by the courts.[13] Andrew Robertson argues that liability is imposed *ab extra* in the doctrine of remoteness because to ask what the parties contemplated as to what they would be liable for is to pose a counterfactual question; Oliver Wendell Holmes famously stated that 'people when contracting contemplate performance, not breach[;] they commonly say little or nothing as to what shall happen in the latter event'.[14] The parties could not possibly have contemplated the multiplicity of 'not unlikely' situations that could foreseeably arise and the allocation of responsibility each one should entail.[15] The court has no reliable proxy to determine any tacit shared intention[16] and any derivation of this intention is artificial.[17] Therefore the rule is imposed by law.

Peel too submits that the rule of remoteness is an external rule of law, citing the earlier authorities that rejected the intention approach.[18] He suspects that this rejection occurred because of the intention approach's lack of utility and certainty and *The*

---

[10] Regarding the other doctrines, Ogus describes a path from the 'factual benefits' (actual losses) down to 'lost profits' (monies actually recoverable at law) diminshed by the doctrines of certainty, non-payment of debts, non-pecuniary losses, discretionary benefits and remoteness (he also lists the rule in *Bain v Fothergill* (1874–75) LR 7 HL 158 (HL) which was abolished by statute): Anthony I Ogus, *The Law of Damages* (Butterworths, London 1973) 291.

[11] *The Achilleas* para [9].

[12] Brian Coote, 'Contract as Assumption and Remoteness of Damage' (2010) 26 JCL 211, 216.

[13] Lon L Fuller and William R Perdue, 'The reliance interest in contract damages: 1' (1936) 46 Yale LJ 52, 58–59; see also Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 Melb U L Rev 179, 209.

[14] *Globe Refining Co v Landa Cotton Oil Co* (1903) 190 US 540 (US Supreme Court) 543.

[15] Andrew Robertson, 'The basis of the remoteness rule in contract' (2008) 28 LS 172.

[16] Ibid 179.

[17] Robertson's opinion as interpreted by Lord Hoffmann – *The Achilleas* para [11].

[18] Edwin Peel, 'Remoteness re-visited' (2009) 125 LQR 6, 10, discussing *The Heron II* (n 5) 383 and *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 (CA). See also *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555 (CA).

Achilleas is a case in point. The owners did not regard the expected allocation of risk in *The Achilleas* to be 'so well embedded that, when a lost fixture did convert into a financial loss, they should not claim for it.'[19] McGregor also points out that arriving at settlements will be more difficult.[20]

The Objectively Ascertained Common Intention of the Parties

Consider now the intentions of the parties – because contractual liability is voluntary liability. So each party implicitly agrees to compensate the other in the event of his breach. What of the problem of the determination of that counterfactual question?

The solution adopted by English law is 'contextual interpretation' or the 'objective theory' of construing meaning. Unlike, say, French law, English law does not concern itself with the subjective intention of the parties;[21] instead it interprets what the parties *appear* to intend. 'Our law is generally based on an objective theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man.'[22] The process of identifying obligations 'not only interprets [the parties'] language objectively but implies terms about questions to which the parties never directed their minds.'[23] Accordingly, the parties' subjective intentions are filtered out and these artificial objective intentions can be derived with 'reasonable certainty'[24] by what was apparent to this reasonable man.

Contextual interpretation was not novel at the time of *The Achilleas*. Ten years prior, the leading authority and a clear milestone in this approach was laid down as the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*[25] (hereafter *'ICS'*), and the principles stated therein were ostensibly just a consolidation of decades-long existing practice.[26] To interpret the meaning of the contract, one adopts the 'matrix of fact'[27] – the commercial background and other information extrinsic to the contract (the 'contract' in the sense of the instrument containing the express terms) as context used to determine its true meaning.

In *ICS* the agreement was construed so that it made commercial sense in its context as a compensation scheme. A literal interpretation would have frustrated its purpose. The logical next step is to extend this method to the rule of remoteness. Lord Hoffmann took this in his stride:[28]

---

[19] Peel (n 18) 11. See also below, on page 7.
[20] Harvey McGregor, *McGregor on Damages* (18th edn Sweet & Maxwell, London 2009) [6–171].
[21] Lord Hoffmann, 'The Achilleas: custom and practice or foreseeability?' (2010) 14 Edin LR 47, 60.
[22] Johan Steyn, 'Contract law: fulfilling the reasonable expectations of honest men' (1997) 113 LQR 433, 433 (Lord Steyn).
[23] Lord Hoffmann (n 21) 60.
[24] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) 913, 904 (Lord Hoffmann).
[25] Ibid.
[26] Ibid 912 – 'I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384–1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989' (Lord Hoffmann). See also Lord Bingham of Cornhill, 'A new thing under the sun? The interpretation of contract and the ICS decision' (2008) 12 Edin LR 374.
[27] Used in *ICS* (n 24) but probably originating in Lord Wilberforce's speech in *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1383.
[28] *The Achilleas* para [26].

> *[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.*

Lord Hoffmann cited two authors in support of his argument, Adam Kramer and Andrew Tettenborn, nothing that a third, Andrew Robertson, was opposed.[29]

To the charge that to refer to the intentions of the parties is a counterfactual question, Kramer would argue that one can intend something without it crossing one's mind. 'If I book a hotel room I have said nothing about wanting a bed to be in it, and yet the hotel clerk can infer [that] from my apparent purpose'.[30] Even thinking of the bed is unnecessary. 'A communicator intends the background of social norms and his goals and principles within which he (non-consciously) formulated his utterance. These norms and goals and principles are thus intended to be used to determine issues that are undetermined by the express utterance.'[31] To Robertson, '[t]he role of public policy and independent standards of reasonableness and fairness … is indisputable. Kramer's claim is essentially that these standards, which are commonly considered to be external, are in fact internal'.[32]

Fried would draw a line of demarcation should this reasoning go too far and draw conclusions too distant:[33]

> *[T]here is 'a vaguely marked boundary ... between* ***interpreting*** *what was agreed to and interpolating terms to which the parties in all probability would have agreed but did not.' ... The further the courts stray form this boundary into the realm of interpolation, 'the more palpably they are imposing an agreement.'*

If that is so, then once that boundary is passed there is little difference between obligations derived from contextual interpretation and obligations imposed by law. Intention becomes a subordinate factor rather than the predominant one.

Instrumental Promises – The Purpose of the Obligation

Tettenborn acknowledges that the intention approach leads to uncertainty. 'Apart from intuition or "gut feeling", there is simply nothing to indicate that this is what parties actually intend when contracting with one another'.[34] Instead, he infers intent on the basis of the 'instrumental promise' of the contract; liability arises if the breach impairs the outcome the promisee contracted for.[35] This is a subtly different approach to Kramer in that there is a narrower focus still on the matters intrinsic to the contract rather than extrinsic factors.

---

[29] Ibid [11]. Lord Hoffmann refers to Adam Kramer, 'An agreement-centred approach to remoteness and contract damages', in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart, Oxford 2005) 249; Andrew Tettenborn, 'Hadley v Baxendale foreseeability: a principle beyond its sell-by date' (2007) 23 JCL 120; and Andrew Robertson, 'The basis of the remoteness rule in contract' (2008) 28 LS 172.

[30] Adam Kramer, 'Implication in fact as an instance of contractual interpretation' (2004) 63 CLJ 384, 390.

[31] Ibid 385.

[32] Robertson (n 13) 208–209. Robertson writes in the context of implied terms, for which the implication thereof is considered by the pro-intentionists to be an expression of the intention theory.

[33] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, Boston USA 1981) 60–61 (emphasis added by Robertson), cited in Robertson (n 13) 210.

[34] Andrew Tettenborn, 'Hadley v Baxendale foreseeability: a principle beyond its sell-by date' (2007) 23 JCL 120, 131.

[35] Ibid 135.

External Norms

However, Tettenborn's approach is still susceptible to external norms. The purpose of the charterparty in *The Achilleas* as a whole was to let a ship for profit. The purpose of the term requiring redelivery before a certain date was to allow for future scheduling. If one takes the instrumental promise of the contract as a whole, there ought not to have been damages for consequential expectation losses because timely redelivery is not the point of the contract. But if one takes the promise of timely redelivery as an ulterior purpose of the contract, then these damages ought to have been recoverable. Tettenborn admits that his theory would have produced the opposite result in *Hadley v Baxendale* because the delivery contract had an ulterior purpose of having the goods delivered on time;[36] yet there, the claimants only recovered foreseeable losses, not their full expectation losses.[37]

Paul Wee applies common intention reasoning to the leading cases of remoteness and concludes that it 'will encounter insurmountable theoretical and pragmatic problems'.[38] He demonstrates that it is unable to provide reasoned solutions to the issues determined in these cases. For instance, in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*,[39] distinguishing between ordinary profits and exceptional profits on the basis of an assumption of responsibility would involve arbitrarily taking sides. And if common intentions objectively ascertained from community contracting norms and expectations had been applied to decide *The Heron II*, the case would have gone the other way. This is because, like *The Achilleas*, it concerned a mistake as to law.

Moreover, many cases concerning 'pure' interpretation lead to many judges having differences of opinion. In *ICS* itself, the outcome flip-flopped from judgment for Investors in the High Court to against in the Court of Appeal and for Investors again in the House of Lords (Lord Lloyd dissenting).[40] Aptly, Lord Hoffmann's last judgment concerned a case of interpretation. In *Chartbrook Ltd v Persimmon Homes Ltd*,[41] the matter was the interpretation of what, when read literally, was a linguistic mistake. The House of Lords found unanimously for Persimmon, but the Court of Appeal was split. Lawrence Collins LJ found for Persimmon, but Rimer and Tuckey LJJ found for Chartbrook.[42] In the High Court, Briggs J found for Chartbrook.[43] *Chartbrook* had to go all the way to the court of last resort on a question of 'business common sense.'[44]

---

[36] Ibid 143.

[37] *Hadley v Baxendale* (n 4). For a suggestion that policy issues were at play regarding the defendants' status as a common carrier who had no right to decline to enter into a contract, see Richard Danzig, 'Hadley v. Baxendale: A Study in the Industrialization of the Law' (1975) 4 JLS 249, 264.

[38] Paul CK Wee, 'Contractual Interpretation and Remoteness' [2010] LMCLQ 150, 170–175, referring to *Hadley v Baxendale* (n 4); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA); *The Heron II* (n 5); *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 (CA); and also *Brown v KMR Services Ltd (formerly H G Poland (Agencies) Ltd)* [1995] CLC 1418 (CA).

[39] [1949] 2 KB 528 (CA).

[40] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] CLC 348 (Ch); [1997] CLC 348 (CA); [1998] 1 WLR 896 (HL).

[41] [2009] UKHL 38, [2009] 1 AC 1101.

[42] [2008] EWCA Civ 183, [2008] 2 All ER (Comm) 387.

[43] [2007] EWHC 409, [2007] 1 All ER (Comm) 1083.

[44] *Chartbrook v Persimmon* (n 42) para [86].

One case – also an allocation of risk issue – that illustrates starkly the external policy factors affecting interpretation is *Bank of Credit and Commerce International SA v Ali*.[45] The issue was whether a release the claimant signed 'in full and final settlement of all or any claims whether under statute, common law or in equity of whatsoever nature that exist or may exist'[46] should be interpreted to exclude claims of a kind which the parties were unaware of at the time of contracting. The House of Lords held that it could not. This time, Lord Hoffmann dissented. He argued that the ordinary and natural meaning of the words of release in their context meant that they would include uncontemplated claims such as the stigma damages contended for.[47] But, for the rest of the House, the words were not wide enough to exclude uncontemplated claims. One can conclude that the words of the parties even in context are not enough to determine the allocation of risk without more. Accordingly, applying common intention theories to *The Achilleas* and the other leading cases on remoteness is impossible without making a value judgement and importing external policy factors.[48]

Judicial Discretion

Some systems of contract law explicitly adopt a 'fairness rider'. The American Restatement (Second) of Contracts does just that: 'A court may limit damages for foreseeable loss by excluding recovery … if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.'[49] Sir Robin Cooke argued that English law was unsettled and the courts simply hid their real considerations by straining the facts to fit the formulae.[50] He suggested policy issues such as the degree of culpability of the contract-breaker operate behind the scenes.[51] O'Sullivan suggests that the outcome of *The Achilleas* is better viewed as the product of wider policy considerations rather than intention. 'The charterer's breach was accidental not deliberate … [and] it produced loss disproportionate to the benefit the charterer obtained from the charter'.[52] McLauchlan suggests that the presence of these factors means that 'it may be fair to say that *in practice* the common law of

[45] [2001] UKHL 8, [2002] 1 AC 251.
[46] Ibid [3].
[47] Ibid [38]–[48].
[48] See also *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 CLC 358 where the dispute was whether the non-assumption of responsibility for fraud could be ascribed to the intentions of the parties or if it was an external rule of law.
[49] Restatement 2d of Contracts §351(3) and comment f – 'A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.'; 'It is not always in the interest of justice to require the party in breach to pay damages for all of the foreseeable loss that he has caused. There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability.'
[50] Sir Robin Cooke, 'Remoteness of damages and judicial discretion' (1978) 37 CLJ 288, 300.
[51] Ibid 298.
[52] Janet O'Sullivan, 'Damages for lost profits for late redelivery: how remote is too remote?' 2009 (60) CLJ 34, 37. In principle it *could* have involved disproportionate loss, but arguably 25% of the contract price is not disproportionate – Adam Kramer, 'The new test of remoteness in contract' (2009) 125 LQR 408, 414.

remoteness in contract covertly imposes limits on the recoverability of damages of the kind overtly recognised in §351(3) of the *Restatement (Second) of contracts*'.[53]

With this in mind, we turn to the orthodox approach to see how much flexibility it allows. Lord Rodger relied entirely upon the orthodox approach in order to find for the charterers in *The Achilleas*.

The Orthodox Approach

The orthodox approach to the rule of remoteness is often characterised as a blend of foreseeability and likelihood (or probability)[54] – and not culpability – as described in *Hadley v Baxendale* and re-interpreted in *The Heron II*: is the kind of damage foreseeable as a not unlikely consequence of the breach?

Hadley v Baxendale

But describing the test in such stark terms is crude; too crude.[55] This reduction to a two-dimensional function fails to describe the true nature of the test. In describing the orthodox approach accurately it is necessary to go back and trace the development of the remoteness doctrine, starting with the passage of Alderson B in *Hadley v Baxendale*:[56]

> *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. 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.*

Foreseeability is thus divided into two limbs. The first is the knowledge everyone in the position of the defendant is taken to have because it concerns events that arise naturally in the usual course of things ('objective knowledge'), and the second additional knowledge actually communicated before the contract is formed ('subjective knowledge').

Then, knowledge of the consequences of breach 'contemplated' by the parties becomes shorthand for when the injury is not too remote; injury the defendant would be answerable for. But the key phrases in Alderson B's speech are 'arising naturally'

---

[53] David McLauchlan, 'Remoteness re-invented?' (2009) 9 OUCLJ 109, 139 (emphasis supplied).
[54] Hugh G Beale, *Chitty on Contracts* (30th edn Sweet & Maxwell, London 2010) para [26–059]; *The Heron II* (n 5) 383 – 'I use the words "not unlikely" as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable' (Lord Reid). So likelihood as a term of art is not merely a synonym for probability, but imports with it a greater prospect of occurrence.
[55] E.g. Lord Walker in *The Achilleas* para [84].
[56] (1854) 9 Exch 341, 354; 156 ER 145, 152.

and 'probable result' which are rather vague and imprecise.[57] This led to further discussion and restatement.

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd

Robert Goff J said that 'the Courts have not been over-ready to pigeonhole the cases under one or other of the so-called rules in *Hadley v Baxendale*, but rather to decide each case on the basis of the relevant knowledge of the defendant'.[58] This principle finds its simplest expression in the case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.[59] Space constraints preclude a full quotation, but bear in mind the following excepts from Asquith LJ's rationalisation of the rule:[60]

> *(2) … [T]he aggrieved party is only entitled to recover such* ***part*** *of the loss actually resulting as was at the time of the contract* ***reasonably foreseeable*** as ***liable to result*** *from the breach.*
>
> *…*
>
> *(4) For this purpose, knowledge "possessed" is of two kinds; one* ***imputed****, the other actual.*

The facts were as follows. The claimants were launderers and dyers. They placed an order with the defendants, who were engineers, for a larger and more powerful boiler in view of performing 'highly lucrative dyeing contracts for the Ministry of Supply.'[61] The defendants knew the lines of business the claimants were in. The boiler was delivered late, with the consequence that the claimants failed to obtain said lucrative contracts.

The Court of Appeal said that the defendants did not know of the 'prospect and terms of such contracts'.[62] However, rather than dismiss the claim as requiring, and not having, limb two subjective knowledge and awarding nothing in respect of these losses, the Court held that the claimants were not 'precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected'.[63] These were not damages rooted in actual losses; they were derived from hypothetical contracts that were foreseeable and knowledge of these hypothetical contracts was imputed to the defendants even though the actual contracts did not exist in the form so imputed.

Note that the limitation is not simply based on foreseeable monetary losses. The monetary award is grounded in the foreseeable profit-making activities –the onward

---

[57] McGregor (n 20) [6–158], citing *Weld-Blundell v Stephens* [1920] AC 956 (HL) 983 – 'What are "natural, probable and necessary" consequences? Everything that happens, happens in the order of nature and is therefore "natural." … To speak of "probable" consequence is to throw everything upon the jury.'

[58] *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175 (QB) 182.

[59] [1949] 2 KB 528 (CA).

[60] Ibid 539–540 (emphasis added).

[61] Ibid 535.

[62] Ibid 543.

[63] Ibid. The result of awarding nothing in such circumstances had been already rejected in *Cory v The Thames Ironworks and Shipbuilding Company, Ltd* (1868) LR 3 QB 181 (QB) where there was only one type of contract.

contracts – of the claimant. Treitel considers these circumstances as ones of 'partial knowledge' where:[64]

> *[T]here is no rigid separation between the two rules in Hadley v Baxendale and the defendant's liability increases with his degree of knowledge. Thus one reason why* ***some*** *loss of profits was recovered in the* Victoria Laundry *case but none in* Hadley v Baxendale, *was that in the former the defendants knew that the boiler was wanted for immediate use, while in the latter case they did not know that the want of the shaft would keep the mill idle.*

One sees a blurring between the two limbs of *Hadley v Baxendale* as some unforeseen 'limb two' knowledge is imputed as foreseeable 'limb one' knowledge.

Koufos v Czarnikow Ltd (The Heron II)

The likelihood requirement would come under scrutiny in the next leading case. In *Koufos v Czarnikow Ltd (The Heron II)*,[65] Lord Reid argued for a less claimant-friendly test in contract than in tort, requiring the eventuality to be '"not unlikely" as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.'[66]

> *The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case[.] … And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made[.] … But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing.*

Lord Reid's analysis ought to be read in conjunction with Lord Pearce's qualification of the likelihood test.[67] Suppose a contractor were employed to repair the ceiling of one of the law courts, yet did so negligently so that it collapsed, injuring those present. Damages would be recoverable, because these circumstances would disclose injury, in the words of Alderson B in *Hadley v Baxendale*, as 'arising naturally … as the probable result'[68] of breach. This is notwithstanding the fact that the occupancy rate of the courtroom was around 10%; a low probability and not particularly likely. The likelihood test is clearly not a purely mathematical one. Owing to the purpose of the contract, the contractor has had his attention implicitly drawn to the kind damage and declined the opportunity to exclude liability for it.

Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)

Before coming to the case of *The Achilleas* itself, we must examine how the orthodox approach was applied further. *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)*[69] is not a leading case, but it was relied on in *The Achilleas* and helps to illustrate how the approach in *Victoria Laundry* works. The

---

[64] Edwin Peel, *Günter Treitel, The Law of Contract* (12th edn Sweet & Maxwell, London 2007) [20–089] (emphasis added).
[65] *The Heron II* (n 5).
[66] Ibid 383, 385–386.
[67] Ibid 417.
[68] (1854) 9 Exch 341, 354; 156 ER 145, 152.
[69] [1981] 1 Lloyd's Rep 175 (QB).

approach taken by Robert Goff J in *The Pegase* was utterly orthodox, yet *The Pegase* was relied on by Lord Hoffmann and Lord Hope in arguing their unorthodox approaches in *The Achilleas*.[70] It will be seen that *The Pegase* cannot be used to extend the orthodox approach to achieve the result in *The Achilleas*.

In *The Pegase*, the claimants were one of two importers of chromite sand into Italy. Due to their limited storage capacity, they would contract to purchase bulk loads of sand from overseas to coincide with the running down of their stocks. The sellers had arranged a charter under which the sand was part cargo. They breached this contract by deviating from the agreed route and delaying delivery. During this time, the claimants' stocks ran out. They had to purchase sand at great expense from their competitor (the other importer) in order to fulfil existing orders, and they lost business owing to insufficient stock. It was prohibitively expensive to import chromite sand by road. Therefore there was no market for the sand in wholesale quantities and no further mitigation was possible. One question was whether the entirety of the claimants' expectation losses could be recovered.

Robert Goff J's approach was to take the orthodox rules, as just described, and apply the defendant's level of knowledge of the facts to them as explained by Treitel. The defendants had no idea of the claimants' limited storage space, their just-in-time restocking strategy, or the extent of their stocks.[71] It wasn't within the defendants' contemplation that there was an immediate need for bulk restocking in order to satisfy orders for the claimants' multitude of customers. Accordingly, the level of damages recoverable would be capped at what could be expected by the defendants that the claimants would lose. The reasoning is just like that in *Victoria Laundry*, but with many different onward contracts instead of just two broad kinds. So, like in *Victoria Laundry*, the claimants would be entitled to a smaller sum than their full expectation losses, based on what the defendants ought fairly to have foreseen. Likewise, this cap could well be arbitrary. But again, foreseeability refers to the foreseeability of the underlying profit-making devices and not directly to a continuum of foreseeable profit values. It just so happens that if the claimants have such a large number of onward contracts, it provides the occasion for a nearly continuous scale of foreseeable profit values that can be selected from. In terms of result, i.e. the amount awarded, it seems like the judge may choose a sum which is reasonably foreseeable, but the ingredient which permits this is this multitude of underlying profit-making devices. In *The Pegase*, the commodity nature of the sand made this possible.

On a strict application of the rule there would be no discretion in it. One finds some contracts that cannot be fulfilled foreseeable and some unforeseeable, and a monetary value is calculated from the former. But in practice, this allows for quite some flexibility. The practical discretion this affords is quite unfair on the defendant where the claimant has one large contract that is vitiated by the breach, *The Achilleas* having circumstances which fall neatly into this category. The charterers in *The Achilleas* could foresee the claimants' single profit-making device – the Cargill charter – in its entirety and so there was no underlying divisibility that could facilitate a reduction in damages.

[70] Para [18] (Lord Hoffmann); para [33] (Lord Hope); para [69] (Lord Walker).
[71] *The Pegase* (n 69) 184, 186.

Jackson v Royal Bank of Scotland plc – the Type, not the Extent

Of course, this reasoning relies on the veracity of the proposition that only the type of damage, and not its extent needs to be foreseeable. The foregoing cases would have a much simpler theoretical basis if the extent of the damage must have been foreseeable as well as the type; one could simply set the figure awarded based on a industry norms for a given type and size of firm. The painstaking reasoning would not be necessary; after all, the language in *Hadley v Baxendale* speaks simply of things 'arising naturally'.[72] And if the issue is the unfairness on the defendant, why should such justice not be available in all cases rather than only in cases with multiple onward contracts? Moreover, it would avoid accusations of engineering discretion by the back door where it is not permitted by the front.

However, there is authority for the proposition that the extent of the loss needs not be foreseeable, although not a great deal of it. The most recent leading case is *Jackson v Royal Bank of Scotland plc*.[73] There, the claimants were importers of dog chews from Thailand. They sold their produce on at a handsome mark-up. Unfortunately, on one occasion, the defendant bank mistakenly sent the invoice from their Thai supplier to their customer instead of them. The customer, discovering this mark-up, was spurred on to cut out the middleman, and henceforth bought direct from Thailand. The bank had no answer to its breach of contract. It was clearly foreseeable that profits arising from sales to this customer would be lost; the question was how much of this loss sounded in damages?

The Court of Appeal found that only one year's profits were foreseeable and thus recoverable.[74] However, the House of Lords held that this was not the correct application of the rule in *Hadley v Baxendale*. Liability would only be limited by what was provable with sufficient certainty: four years' profits.[75] The question of foreseeability applied only to the kind of damage, and not to its extent.

One might apply the principle derived from *Victoria Laundry* and *The Pegase* to these facts. There was only one onward customer for these products. However, that customer would presumably have ordered in multiple lots by way of multiple contracts. The court found that only one year's worth of contracts were foreseeable. Given the *Pegase*-like multitude of onward contracts, the necessary divisibility was present. If applied strictly there would be no discretion. Only one year's worth of contracts were foreseeable, so the damages should have been limited to one year's lost profits. Unfortunately, neither the Court of Appeal nor the House of Lords engaged with these principles and came no closer to them than to remark that the bank had not limited its 'liability for the loss of repeat business to any particular period.'[76] *Jackson v RBS* is in conflict with *Victoria Laundry* because of the finding of fact that only one year's worth of contracts were foreseeable and yet the damages were not reduced accordingly.

---

[72] (n 56).
[73] [2005] UKHL 3, [2005] 1 WLR 377.
[74] *Jackson v RBS* [2000] CLC 1457 (CA) paras [31]–[33].
[75] *Jackson v RBS* (n 73) paras [37]–[38].
[76] Ibid [35]–[43], particularly [37].

An authority for the proposition that the extent needs not be foreseeable where the facts did not disclose a multitude of onward contracts is *Wroth v Tyler*.[77] This case concerned the vendor of a bungalow who was unable to complete the sale due to his wife's ongoing interest. During the difficulties there had been a rise in house prices of an unparalleled and uncontemplated magnitude. Megarry J did not seek to distinguish ordinary and extraordinary market movements, but instead justified allowing full recovery on the basis that it would be to 'require evidence of the calculation in advance of what is often incalculable until after the event.'[78] Instead, the case was an expression of the principle in *Robinson v Harman*, to put the claimant 'so far as money can do it … in the same situation … as if the contract had been performed.'[79] *Wroth v Tyler* is better authority for the proposition that the extent needs not be foreseeable from a technical perspective (i.e. it is compatible with *Victoria Laundry*), but it is only High Court rather than House of Lords authority.

In *Brown v KMR Services*[80] the Lloyd's Name claimant sued his advisor over poor advice. The scale and the magnitude of the financial disaster was unprecedented and therefore unforeseeable.[81] Still, the loss was not too remote for the Court of Appeal.[82]

The remaining authorities concern physical damage. In *Vacwell Engineering Co v BDH Chemicals Ltd*[83] the claimant was killed by an unexpectedly large chemical explosion. The damage (death) was not too remote. Finally there is *Parsons v Uttley Ingham*[84] where Scarman LJ (with whom Orr LJ agreed) endorsed the contention that recovery for physical injury ought not to be limited where the extent of the injury was unforeseeable, extending that to economic loss such as loss of market.[85] Lord Denning expressly adopted the tort test for cases of physical damage but was in the minority.[86]

The issue of foreseeability of extent was settled earlier in the law of tort (it needs not be foreseeable)[87] and aside from wrangling about the breadth of 'type'[88] it seems stable there. But the rules in contract and tort are different. If the rule in contract is less generous to the claimant because it has the likelihood test, why should it not also be less generous by applying the foreseeability test to the extent, as well as the type of damage? This is the case in Australia.[89] The reason for the difference between the tort

---

[77] [1974] Ch 30 (Ch).
[78] Ibid 61.
[79] (1848) 1 Ex 850, 855; 154 ER 363, 366; see *Wroth v Tyler* (n 77) 56.
[80] *Brown v KMR Services Ltd (formerly H G Poland (Agencies) Ltd)* [1995] CLC 1418 (CA).
[81] Ibid 1437.
[82] Ibid 1438.
[83] *Vacwell Engineering Co v BDH Chemicals Ltd* [1971] 1 QB 88 (QB); appealed on other grounds: [1971] 1 QB 111 (CA).
[84] *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 (CA).
[85] Ibid 813.
[86] Ibid 804.
[87] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388 (PC); *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617 (PC); the principle was accepted by the House of Lords in *Hughes v Lord Advocate* [1963] AC 837 (HL Sc).
[88] Compare *Hughes v Lord Advocate* [1963] AC 837 (HL Sc) with *Doughty v Turner Manufacturing Co* [1964] 1 QB 518 (CA).
[89] *Burns v Man Automotive (Aust) Pty Ltd* [1986] HCA 81, (1986) 161 CLR 653 (High Court of Australia).

test and the test in contract is ostensibly because a contracting party chooses to contract, where the victim of a tort makes no such choice.[90] On this basis, the Australian approach is *prima facie* logical.

It is regrettable that these issues were not dealt with in greater detail in *Jackson v RBS*. In the House of Lords the earlier authorities were cited in argument[91] but they do not appear in the judgment. Moreover, no argument was advanced on the underlying principles of remoteness, and the applicability of foreseeability to them. The words 'type' and 'extent' are notable by their absence. One does wonder if, as Cooke suggests,[92] the culpability of the defendant was indeed a tacit issue.

The Achilleas – Lord Rodger of Earlsferry

Finally we are ready to analyse the application of the orthodox approach in *The Achilleas* by Lord Rodger, with whom Baroness Hale reluctantly agreed.[93] Lord Rodger began with a conventional review of the authorities for the orthodox approach.[94] He then adopted the court below's observation that an extremely volatile market was required to create the situation.[95] The market may go up, and the market may go down, '[b]ut the parties would reasonably contemplate that, for the most part, the availability of the market would protect the owners if they lost a fixture.'[96] This justified the *dicta* in earlier cases that the measure of damages was the difference between the charter rate and the market date for the overrun period. The exceptions would be if special circumstances were pointed out, bringing the case within limb two of *Hadley v Baxendale*,[97] or the market was known to be poor for structural or cyclical reasons; ordinary and predictable eventualities rather than unpredictable eventualities owing to market instability. One example would be losses owing to being forced to accept distressed rates in order to let the vessel due to poor location or similar.[98] Then, 'some general sum'[99] could be recovered as envisaged in *Victoria Laundry*.

Lord Rodger's conclusion was that the unexpected and violent market movement meant that the claimants' loss was not the '"ordinary consequence" of a breach of that kind.'[100] In other words, the type of the loss differed so it was irrelevant that the extent of it was unforeseeable. While it is arguable that past some point where the market movement becomes extraordinary it is of a different kind, this proposition sits ill with Lord Hope's judgment in *Jackson v RBS*[101] where extent was given a broad scope and its natural meaning. Likewise it sits ill with *Wroth v Tyler* where extraordinary market movements were not of a different type.[102] The one escape route

---

[90] Above, on page 11.
[91] *Jackson v RBS* (n 73) 378.
[92] (n 50) 298.
[93] *The Achilleas* para [93].
[94] Ibid [47]–[52].
[95] Ibid [53].
[96] Ibid [54].
[97] Ibid [59].
[98] This proposition is found in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep 81 para [66].
[99] *The Achilleas* para [58].
[100] Ibid [60].
[101] *Jackson v RBS* (n 73) paras [37]–[38].
[102] (n 77).

from this conclusion, that the parties would have contemplated the market as protecting them against a lost fixture is unconvincing because the market was known to be volatile.[103]

Perhaps there is a way out via *Victoria Laundry* and *The Pegase*. Suppose that the market movements could be divided into ordinary and extraordinary movements for the purposes of knowledge known by or imputed to the defendant. Then, the defendant could have only foreseen the ordinary market movements. Even if there were extraordinary market movements, damages would be limited to losses that had flowed from ordinary market movements. But this division is unreal; market prices are a genuine continuum of values and are not apt to the application of the partial knowledge approach which applies to discrete units of knowledge. This accords with the proposition that knowledge about markets is general knowledge under the first limb of *Hadley v Baxendale*;[104] there are no business practices that the defendant lacks specific knowledge of. The partial knowledge doctrine cannot be sensibly applied. What Lord Rodger implicitly did was to accept the counter-proposition that the extent of the damage must too be foreseeable without expressly saying so in a case where the partial knowledge doctrine did not apply.

Furthermore, Lord Rodger did not discuss the issues that *Jackson v RBS*[105] should have discussed either. Neither did he characterise the case as an exception. He didn't even mention it. It seems inevitable that this lack of attention to detail weakens what is already a minority opinion.

It is therefore submitted that Lord Rodger misapplied the orthodox approach and failed to alter it coherently in *The Achilleas*. Accordingly, it is not safe to draw conclusions about it from his speech. *The Achilleas* needed a different, coherent, principle in order to be decided for the charterers.

The Unorthodox Approaches – The Achilleas

That brings us to the approaches Lord Hoffmann and Lord Hope used. They took different routes, so each will be analysed in turn.

The Achilleas – Lord Hoffmann

Lord Hoffmann helped justify the departure from the orthodox approach with the academic support of Kramer and Tettenborn.[106] He then said that '[i]t seems logical to found liability for damages upon the intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken.'[107] His emphasis is therefore closer to Kramer's theory than Tettenborn's. He found *Mulvenna v Royal Bank of Scotland plc*[108] to be an expression of a principle of excluding liability even when the damage was foreseeable. There, the bank could not possibly be liable for its customer's consequential losses as a result of a single failed transaction. Lord

[103] *The Achilleas* [2007] EWCA Civ 901, [2007] 2 CLC 400 para [84].
[104] The veracity of that proposition is a logical result of the decision in *The Heron II* (n 5).
[105] (n 73).
[106] Above, near (n 29).
[107] *The Achilleas* para [12].
[108] [2003] EWCA Civ 1112, [2004] CP Rep 8.

Hoffmann also relied on *The Pegase*, quoting Robert Goff J's summary that the defendant's responsibility for loss would be decided on the basis of the facts known by him when the contract was made.[109] Reliance on *The Pegase* is curious because of its careful adherence to the orthodoxy; those facts in question were what the defendant could see into the claimant's business practices. As previously argued, *The Pegase* could not be applied to *The Achilleas*. The charterers knew perfectly well *all* the relevant facts – that there was likely to be a follow-on charter and at 191 days the length of the Cargill charter was not very unusual and therefore foreseeable.[110] Moreover, *Mulvenna* was a case that concerned *Hadley v Baxendale* 'limb two', not 'limb one' knowledge,[111] where other theories abound. For instance, McGregor suggests that often limb two knowledge must be 'brought home to [the defendant] in such a way as to show that he has accepted, or is taken to have accepted, the risk'.[112]

Most apposite was the analogy with the *South Australia Asset Management Corporation v York Montague Ltd* (hereafter *SAAMCO*)[113] professional negligence case.[114] There, the valuers were only liable for damage caused within the scope of duty; that scope being the purpose of the contract which was to protect against creditor default, not market falls. Losses flowing from market falls could not be recovered.

The Achilleas was not, of course, a professional negligence case, where liability is concurrent in both tort and contract and there exists the well developed concept of the duty of care in the tort of negligence. Moreover the contractual duty in *SAAMCO* was one to use reasonable care and skill, but the obligation in *The Achilleas* was a strict one to redeliver the vessel by a certain date. Therefore Lord Hoffmann extended the concept of a 'scope of duty' in contract quite considerably – to a new field, to 'limb one' knowledge, to a strict obligation, and to where there is no concurrent duty in tort.

Lord Hoffmann then turned to determine whether the loss is of a different 'type' that is outside the scope of duty. He said that 'the only rational basis for the distinction is that it reflects what would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking.' Market custom and practice ('expectations') and the understanding of shipping lawyers, and the textbooks, was the first factor. The second was that the risk would be 'completely unquantifiable'. It could not be said that the parties common intentions were that charterers had assumed this risk.[115] Accordingly, the risk lay where it fell – on the owners.

The Achilleas – Lord Hope of Craighead

Lord Hope noted too that the orthodox approach, and any broader approach, both start from 'what should fairly and reasonably be regarded as having been in the

[109] *The Achilleas* paras [18]–[19].
[110] E.g. in *Hyundai Merchant Marine Co v Gesuri Chartering Co (The Peonia)* [1991] 1 Lloyd's Rep 100 (CA) the charterparty was for 10–12 months.
[111] As pointed out by Baroness Hale – *The Achilleas* para [93].
[112] McGregor (n 20) [6–199].
[113] *South Australia Asset Management Corporation v York Montague Ltd (SAAMCO) sub nom Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 (HL).
[114] *The Achilleas* paras [14]–[15].
[115] Ibid [22]–[23].

contemplation of the parties'.[116] Like Lord Hoffmann, he departs from the orthodox approach: responsibility 'is determined by more than what at the time of the contract was reasonably foreseeable.'[117]

Thereafter, Lord Hope departed from Lord Hoffmann's approach. While Lord Hoffmann relied on the objectively ascertained common intention of the parties to determine the assumption of responsibility, Lord Hope adopted a more policy-based argument. He began with the exposition of Lord Reid in *The Heron II*.[118] The more unusual the consequence, the more likely express provision must be made in the contract if it is to sound in damages.[119]

> *But the charterers could not be expected to know how, if – as was not unlikely – there was a subsequent fixture, the owners would deal with any new charterers. This was something over which they had no control and, at the time of entering into the contract, was completely unpredictable. … So it can be presumed that the party in breach has assumed responsibility for any loss caused by delay which can be measured by comparing the charter rate with the market rate during that period. There can be no such presumption where the loss claimed is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the owners and the new charterers, which cannot.*

But, to reiterate, the entirety of the arrangements between the owners and the new charterers were foreseeable as not unlikely to occur. The only factor the charterers would have been in ignorance of was the length of the follow-on fixture, which in any event was not unusually long. The difference here must be the owners' subsequent detailed *arrangements*; there is a whiff of second-order 'super-foreseeability' where Lord Hope refers to unpredictability (and where Lord Hoffmann refers to the onward business arrangements as something between others).[120] This unpredictability is apparently different from conventional foreseeability because it involves an element of the other party's private business, but the distinction is a fine one.

Lord Hope then took the position, as Rix LJ did, that 'the doctrine of remoteness is ultimately designed to reflect the public policy of the law'.[121] But unlike Rix LJ in the Court of Appeal, Lord Hope's opinion was that commercial considerations pointed to the risk remaining with the owners, rather than the other way around.[122] The factors of unquantifiability and uncontrollability trumped the issue of the charterers putting the owners at the 'mercy of their charterers at time of raised market rates.'[123] Lord Hope raised these issues, where Lord Hoffmann was silent on the matter.

Lord Hope went on to say that '[t]he policy of the law is that effect should be given to the *presumed* intention of the parties.'[124] This is not Lord Hoffmann's 'objectively ascertained' intention. Nor did Lord Hope discuss the issues of custom and practice that Lord Hoffmann did. The emphasis was on the policy elements and imposition.

---

[116] Ibid [30].
[117] Ibid [31].
[118] (n 67).
[119] *The Achilleas* paras [32], [34].
[120] Ibid [23].
[121] Ibid [35], citing *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] EWCA Civ 901, [2007] 2 CLC 400 para [117].
[122] *The Achilleas* para [35].
[123] Ibid [35].
[124] Ibid [36] (emphasis added).

The distinction is fine, but it acknowledges more explicitly that the factors under consideration are external ones.[125]

In essence, Lord Hoffmann *did* consider issues of policy when he weighed up what the parties would reasonably be taken to have assumed the risk of. Since the parties are presumed to be reasonable businessmen,[126] they therefore make rational decisions about the allocation of risk, just as good commercial policy would require. Lord Hoffmann simply analyses the issues from the point of view of the parties rather than that of the judge.

The other judgments in *The Achilleas* disclose no new principles; if required detailed analyses may be found elsewhere.[127]

Reception of The Achilleas

After, a little prevarication by the courts, the proposition the *ratio* of *The Achilleas* had disclosed a new test in remoteness was broadly accepted.[128] Soon afterwards, the Court of Appeal made the first attempt to lay down directions for the application of *The Achilleas* in *Supershield Ltd v Siemens Building Technologies FE Ltd*:[129]

> Hadley v Baxendale *remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case … However,* South Australia *and* Transfield Shipping *are authority that there may be 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.*

That passage was later used as the gateway test by the High Court cases of *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)*[130] and *Pindell v Airasia Berhad*.[131] Unfortunately *Supershield* did not address the thorny issue of precisely *when* the standard (i.e. orthodox) approach would not apply.

In *Supershield* the claim concerned damage due to flooding. Supershield had installed a valve defectively, which led to the influx of water that caused the flood. However, there was a backup system – drains – but they too, were defective. The chance of a faulty valve causing a flood was extremely low owing to the existence of the drains – it certainly wasn't as probable as the demand of 'not unlikely'. Likewise the chance of faulty drainage causing a flood was extremely low owing to the existence of the valve. It was therefore unlikely that the result of the defendant's breach of contract would have been flooding, and accordingly the likelihood part of the remoteness test as explained in *The Heron II* would not have been satisfied.

---

[125] See above, near (n 32) and (n 33).
[126] See above, near (n 22).
[127] See particularly McLauchlan (n 53) 124–126.
[128] *ENE Kos v Petroleo Brasileiro SA (Petrobas) (The Kos)* [2009] EWHC 1843 (Comm), [2010] 1 Lloyd's Rep 87 para [38]; Chitty (n 54) para [26–100E]. Against (and older), *ASM Shipping Ltd of India v TTMI Ltd of England (The Amer Energy)* [2009] 1 Lloyd's Rep 293 (QB) para [18]; McGregor (n 20) [6–173].
[129] *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 CLC 241 para [43].
[130] *The Sylvia* (n 98) para [47].
[131] *Pindell Ltd v Airasia Berhad (formerly Airasia SDN BHD)* [2010] EWHC 2516 (Comm) para [84].

The Court observed that the intention principle from *The Achilleas* was also inclusionary. On this basis, the defendants *had* assumed responsibility and therefore the loss was not too remote.[132] But the conventional purposive approach (viz. Lord Pearce's court ceiling example) would have sufficed. *Supershield* simply disclosed a extended version of that principle, and as counsel for the claimants argued, 'the reason for having a number of precautionary measures is for them to serve as a mutual back up, and it would be a perverse result if the greater the number of precautionary measures, the less the legal remedy available to the victim in the case of multiple failures.'[133] I.e. *Supershield* was an ideal case for the court ceiling principle.

It is thus possible to see this quite unnecessary application of *The Achilleas* as sending a message to dissuade it being used as the last resort of a desperate defence counsel, just as Baroness Hale feared.[134] If so, then it does not seem to have worked. There are many new cases where *The Achilleas* is cited in argument, but is not mentioned at all in the judgment or is dismissed out of hand.[135] The direction in *Supershield* lacks external factors and this may be why counsel are trying to claim their case falls within its remit.

If *The Achilleas* did disclose an inclusive principle, then it would be quite impossible to see it as a separate rule, as Chitty does. Chitty suggests that an *Achilleas* assumption of responsibility is separate from questions of remoteness; therefore both assumption of responsibility and foreseeability as not unlikely must be present if damages are to be recoverable.[136] Clearly this division would only work conceptually if *The Achilleas* disclosed only an exclusive principle.

The discussion in *The Sylvia*[137] is the first judicial attempt to discuss the external factors that would or would not permit the use of an unorthodox approach from *The Achilleas*. In *The Sylvia*, the breach of contract was not late redelivery at the end of a time-charter, but a delay during a time-charter caused by poor maintenance at the fault of the owners which led to a missed *sub-charter*. The charterers suffered expectation losses accordingly. Hamblen J gave two reasons for why *The Achilleas* did not apply.

---

[132] *Supershield v Siemens* (n 129) para [43].
[133] Ibid [44].
[134] *The Achilleas* para [93].
[135] *Ispat Indurstries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm); *How Engineering Services Ltd v Southern Insulation (Medway) Ltd* [2010] EWHC 1878 (TCC), [2010] BLR 537; *Tom Hoskins Plc v EMW Law (A Firm)* [2010] EWHC 479 (Ch), [2010] ECC 20; *Peacock Group Plc v Railston Ltd* [2010] CSOH 173; *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm); *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2010] 3 WLR 1424; *Jones v Environcom Ltd* [2010] EWHC 759 (Comm), [2010] Lloyd's Rep IR 676; *Scottish Widows Services Ltd v Harmon/CRM Facades Ltd* [2010] CSOH 42, 2010 SLT 1102; *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm), [2010] Bus LR 974; *Strategic Property Limited v Daragh O'Se Thomas Moriaty* [2009] EWHC 3512 (Ch); *Mayhaven Healthcare Limited v David Bothma, Teresa Bothma (Trading as Dab Builders)* [2009] EWHC 2634 (TCC), [2010] BLR 154; *Beaghmor Property Limited v Station Properties Ltd* [2009] CSOH 133; *Lansat Shipping Co Ltd v Glencore Grain BV* [2009] EWCA Civ 855, [2009] 2 CLC 465; *Ryan v Islington LBC* [2009] EWCA Civ 578, [2009] 2 P & CR DG19.
[136] Chitty (n 54) para [26–100F]. One may draw a parallel with the approach in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) to the measure of damages which while not labelled as remoteness in the judgments could well be construed to be; Chitty includes it in the chapter headed 'remoteness': Chitty (n 54) [26–084].
[137] *The Sylvia* (n 98).

Firstly, there was not an industry or market understanding that costs would be limited;[138] and secondly it was 'not a case in which it can be said that the resulting liability is likely to be unquantifiable, unpredictable, uncontrollable or disproportionate.'[139] A follow-on fixture can be of any length whereas a sub-charter is necessarily constrained by the duration of the head charter. Accordingly, the orthodox rules applied and the full sum was recoverable as damage foreseeable as not unlikely to occur.[140]

There are two cases that did apply *The Achilleas,* both first instance judgments of the Lord Ordinary. However, neither actually *required* the adoption of the principle in *The Achilleas* in order to achieve the desired result.

Tettenborn complained about the strained reasoning used in the 'otherwise unremarkable' case of *Berryman v Hounslow LBC*.[141] There, the lifts were out of order in a block of flats. The claimant, laden with shopping, took the stairs, and suffered a back injury. Her action in contract failed, ostensibly because the kind of injury was unforeseeable.[142] Tettenborn criticises this reasoning because physical injury (in a representative selection of society, one presumes) is 'pretty obviously … foreseeable'.[143] This ignores the fact that the Court made use of the 'not unlikely' test from *The Heron II*; such a consequence, although foreseeable, was unlikely to occur.[144] One might counter that it was unlikely merely in a person of ordinary fortitude and persons of lesser fortitude were more than foreseeable, indeed not unlikely, to live on the estate. It does seem a straightforward application of *The Heron II* however; particularly when one considers that there is no good reason to relax the likelihood test because the purpose of providing lifts is to provide a safe lift service, not to indemnify the claimant against the ordinary activities of life (assuming of course that the accommodation was not specifically designed for the physically infirm). The 'court ceiling exception' does not apply because the purpose of the contract had not been defeated.

But, as Tettenborn says, adopting the purpose of the contract as the test for remoteness does simplify the reasoning significantly.[145] And this is how Lord Uist argued his judgment in the first instance case of *Donoghue v Greater Glasgow Health Board*,[146] relying on *The Achilleas*. The facts are materially similar to *Berryman*.

In *Donoghue*, a claim was brought against the defendant occupier of a hospital grounds. The defendant joined the builders in the action, the builders having mistakenly installed a gravel area instead of asphalt near some stairs in breach of contract. Gravel had migrated onto the stairs causing the claimant to slip and fall, sustaining injury. Like *Berryman*, the claim failed (from the builders, at any rate). And the reasoning based on assumption of responsibility[147] was straightforward. The

[138] Ibid [72].
[139] Ibid [73].
[140] Ibid [82]–[83].
[141] *Berryman v Hounslow LBC* (1998) 30 HLR 567 (CA); See Tettenborn (n 34) 140.
[142] Ibid 573.
[143] Tettenborn (n 34) 140.
[144] *Berryman* (n 141) 573.
[145] Tettenborn (n 34) 141.
[146] [2009] CSOH 115.
[147] Ibid [14].

builders had assumed responsibility merely to do a good job safely, not for overarching occupiers' duties. But it seems unjust that the builders would have escaped liability had they installed a gravel area next to some stairs in breach of contract, for at least for a short period before the occupier had had the chance to call them back in. Without more, this is what Lord Uist's reasoning would result in. An over-simplified assumption of responsibility approach ignores these factors, and an assumption of responsibility but only for a short time (or until the occupier has effective knowledge of the defect) is highly artificial. It is submitted that an approach using causation, where the effective knowledge of the occupier breaks the chain of causation is a better one.[148]

Lord Uist next applied an assumption of responsibility approach in another first instance case, *Upton Park Homes Ltd v MacDonalds Solicitors*.[149] There, a solicitor negligently failed to spot overriding interests in the land the claimant sold on for development. The claimant could not recover 'hypothetical development profits' (i.e. rent) because there was no assumption of responsibility for the risk of loss of consequential business profits; *The Achilleas* and *SAAMCO* applied.[150] But again, the orthodox approach would have been sufficient; a test of foreseeability would have done, as in *Diamond v Campbell-Jones*.[151] There, a property developer who contracted to buy a house could recover the difference between the contract price and the market price, but not the loss of development profits, from the repudiating seller. The seller could not be taken to have foreseen the buyer's onward business plans.[152] Admittedly, like 'assumption of responsibility', *Diamond v Campbell-Jones* is also something of a value judgement. In both cases, authority, rather than principle, is required to settle the answer to the question of whether the loss is recoverable. However, the factor upon which this assumption of responsibility rests is probably whether the onward business plans can fairly be foreseen; in which case, the authority is better grounded on a particular principle. Using the orthodox approach is actually more certain and less indeterminate. Rather than bubbling below the surface unexpressed, the relevant factor – foreseeability – is expressly in the discussion.[153]

Notwithstanding *Donoghue* and *Berryman*, the normative force of the message is clear. *The Achilleas* is not to be used unless the circumstances are exceptional. Foreseeability is still the test in the vast majority of cases.

The Underlying Norms and Principles; Justifying The Achilleas

In order to determine when foreseeability is not to be the test, it helps to understand the justifications underpinning it.

---

[148] *Baxall Securities Ltd v Sheard Walshaw Partnership* [2002] EWCA Civ 9, [2002] TCLR 18, [2002] PNLR 24; cf *Pearson Education Ltd v Charter Partnership Ltd* [2007] EWCA Civ 130, [2007] BLR 324.
[149] [2009] CSOH 159, [2010] PNLR 12.
[150] Ibid [H7], [15].
[151] [1961] Ch 22 (Ch).
[152] Ibid 36.
[153] Cf Lord Hoffmann (n 21) 53 – 'Such a degree of indeterminacy in the rule is usually a symptom of other unexpressed factors operating beneath the surface. In real life the single concept of foreseeability is an inadequate instrument for explaining all the cases.'

Why Foreseeability; Justification

Notwithstanding oddities such as an account of profits[154] and elective options such as the recovery of reliance damages,[155] the purpose of damages in contract is to protect the expectation interest of the claimant; to put the claimant 'so far as money can do it … in the same situation …as if the contract had been performed.'[156] But this would result in 'complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This … is recognized as too harsh a rule.'[157] Therefore various devices and doctrines operate to reduce damages, of which remoteness is one.[158]

There are two broad justifications to the foreseeability rule as a limiting device. The first is as something certain enough to permit efficient planning – particularly for business,[159] and the second is morality[160] or 'natural equity'.[161]

The fact that foreseeability does not apply to the extent of the damage can be criticised on both grounds. Suppose breach is permissible provided the contract-breaker makes good the damage. If the kind of damage is unforeseeable or unlikely, the claimant should have made this known to the defendant so as to bring the case within limb two of *Hadley v Baxendale*. But the same applies to the extent – if a defendant is afforded the latitude that she is not liable for unforeseeable or unlikely damages, it should logically be extended to where their extent is unforeseeable or unlikely. If the justification is morality, the liability may be out of proportion with the culpability of the breach where the contract-breaker has no idea of the true consequences of her actions.[162]

The counter-argument is found in the facts of *Wroth v Tyler*.[163] It is perhaps fair that the claimant was awarded his full expectation losses given the defendant tried to sell his house while avoiding his wife's matrimonial interests, causing real losses to the would-be buyer when the sale could not be completed. As Tettenborn points out, the foreseeability test does not say *why* there is liability.[164] If the rule of remoteness is based on external factors and is to be justified by its morality, it may need to import further external factors, such as culpability. Another element might be considering knowledge at the time of the breach as well as knowledge when the contract is formed.[165] But there is no sign of these factors being accepted by the courts.[166]

---

[154] *AG v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 (HL).
[155] *Anglia Television Ltd v Reed* [1972] 1 QB 60 (CA).
[156] *Robinson v Harman* (n 79) (Parke B).
[157] *Victoria Laundry* (n 39) 539.
[158] (n 10).
[159] Florian Faust, '*Hadley v Baxendale* – an Understandable Miscarriage of Justice' (1994) 15 J Leg Hist 41, 42.
[160] Robertson (n 15) 128.
[161] Faust (n 159) 42; and indeed in *Hadley v Baxendale* (1854) 9 Exch 341, 355; 156 ER 145, 152.
[162] See also Robertson (n 15) 128–130.
[163] (n 77).
[164] Tettenborn (n 34) 128.
[165] Danzig (n 37) 283.
[166] Regarding the time of breach, see *Jackson v RBS* (n 73) [36]. Culpability only seems to come up as a general justification, not a step in the argument – see, e.g. *The Achilleas* para [41].

And further, if one accepts that a rule based on foreseeability facilitates a hard-nosed economic application of the law of contract – namely the doctrine of efficient breach – one must look more closely to the purpose of that doctrine. Here, the defendant finds it more profitable to breach the contract he has with the claimant in order to use his resources to fulfil a more profitable contract with a third party. By paying adequate compensation to the claimant, the claimant is not disadvantaged and the defendant makes a greater profit. The payment of the claimant's full expectation damages encourages reliance on the contract; this is pro-business and pro-trade.[167] This regime encourages the efficient allocation of resources because the defendant is not held to contracts that are inefficient.

But if the prospect of crushing liability results in a diminution in efficiency, a different rule would be needed. The parties may begin planning defensively and their assets will become under-utilised (e.g. by having over-cautiously long laycan periods). One might argue that the 'real profit-making activities' of a working ship are worth more than the 'paper profits' from a high market that leaves expensive cargo ships sitting idle just to avoid the off-chance of late redelivery. Just as forcing the performance of inefficient contracts would be detrimental to the wider economy, so would encouraging excessive caution. The solution would be to insist that the extent of the damage needs not be foreseeable, or to admit a reasoned exception. This exception would be on policy grounds, namely a utilitarian allocation of risk for the overall benefit of the contracting community and not to benefit any one party, or any one type of party; to maximise *overall* wealth and profitability. This is achieved by scheduling with tight margins. Utilitarianism does not help select winners and losers and to use common intention is artificial; it would impute a notion of self-sacrifice to one party and such a notion is not found in the law of contract. So the reallocation of risk would be a value judgement imposed upon the parties.

For the most part, foreseeability as the test for remoteness is justified because it ensures that the contracting parties can make such calculations based on information that is readily available (it may be expensive and therefore inefficient to gather further information).[168] Even the partial knowledge doctrine is broadly just, awarding greater damages where there is greater knowledge. Accordingly, the economic calculations of the parties contribute to greater efficiency throughout the wider economy. If the test does not facilitate this in certain circumstances, a reasoned exception ought to be admitted, or the test itself ought to be modified.

Common Intention: A Convenient Legal Fiction

All of these countervailing factors are easily applied to an argument based on policy to reallocate the risk. However, English law lacks express authorisation to do this, unlike, say §351(3) of the Restatement (Second) of Contracts. Enter Lord Hoffmann's theory of objectively ascertained common intention. If one can characterise the outcome as an expression of will, then any objections on the grounds of judicial meddling fall away – because contractual liability is voluntary liability.

---

[167] Fuller & Perdue (n 13) 61–62.

[168] Anthony Ogus, 'The Economic Basis of Damages for Breach of Contract: Inducement and Expectation' in Ralph Cunnington and Djakhongir Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart, Oxford 2008) 133.

It seems clear that the taxi-driver whose negligence results in a businessman missing his meeting and losing a £1m deal[169] will not be liable for this loss despite knowing about it (i.e. it is *Hadley v Baxendale* limb two knowledge and the driver is liable for the damage under the orthodox rules). Here, objectively ascertained intention not to assume responsibility for the loss is obvious. Yet it has been shown that common intention is often artificial; fictitious even. The disputes over what how to interpret the plain words of an agreement as in *BCCI v Ali* illustrates the artificial nature of the doctrine of contextual interpretation.[170]

Legal fictions have a long history in the common law. For example, in cases of occupiers' liability, the implied licence and the allurement enabled the courts to found liability where ordinarily there was none.[171] It is unlikely that the occupier had a subjective intention to invite persons onto her land, and much less that she allured them to do so. In his comprehensive book, Lon Fuller discusses the nature of legal fictions. A fiction is either:[172]

> *(1) a statement propounded with a complete or partial consciousness of its falsity, or*
>
> *(2) a false statement recognised as having utility.*

Fictions have long been controversial. To Bentham, a legal fiction is subterfuge for legislation and 'usurpation of the legislative function'.[173] Judges were 'pulling the wool over the eyes of the public'.[174] One might adapt Piška's analysis of common intention and say that to adopt such an artifice is to confront the underlying ideology,[175] i.e. that the English law of contract is certain and therefore attractive to contracting parties. To introduce policy masquerading as the parties' will is undermine this ideology and accordingly it is unattractive to judges and contracting parties alike.

Yet, as Blackstone said, legal fictions could be 'highly beneficial and useful',[176] And as Fuller said, no-one was really fooled.[177] Assuming one accepts the utility of this

---

[169] Roger Halson, 'Remoteness', in Donald Harris, David Campbell and Roger Halson, *Remedies in contract and tort* (2nd edn Butterworths, London 2002) 97.
[170] See above, near (n 48).
[171] E.g. *Phipps v Rochester Corpn* [1955] 1 QB 450 (QB).
[172] Lon Fuller, *Legal Fictions* (Stanford University Press, Stanford 1967) 7.
[173] Jeremy Bentham, *Preface For The Second Edition* to *A Comment on the Commentaries and A Fragment on Government* (Athlone Press, Oxford 1977) 511. Bentham goes further: 'A fiction of law may be defined – a wilful falsehood, having for its object the stealing legislative power, by and for hands, which could not, or durst not, openly claim it, – and, but for the delusion thus produced, could not exercise it.' … 'Thus it was that, by means of mendacity, usurpation was, on each occasion, set up, exercised, and established.' (p 509) … 'But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near.' (p 411).
[174] Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' (1990) 100 YLJ 1, 5.
[175] Nick Piška, 'Constructive Trusts and Constructing Intention' in Martin Dixon (ed), *Modern Studies in Property Law Volume 5* (Hart, Oxford 2009) 222 – 'But why, then, is imputation regarded with more hostility than actual and inferred intentions? … Whereas reference to actual and inferred intentions hide the role of the court, and with it its constructed nature, imputed intention directly and explicitly recognised its constructed nature, and with it its falsity.' Piška discusses common intention, but in the context of the common intention constructive trust as applied to the acquisition and quantification of equitable interests in the family home. I am indebited to Piška for drawing together the strands of thought in this line of argument, which he discusses in considerably more detail.
[176] William Blackstone, *Commentaries on the laws of England III* (Clarendon Press, Oxford 1768) 43.
[177] Fuller (n 172) 57.

fiction, one can accept that such a (potential) falsehood is safe because of one's consciousness of its falsity and purpose.[178] The advantage of adopting a fiction is threefold: (i) to escape a rule and legislate in all but name;[179] (ii) to be exploratory, to enable the law to be extended tentatively;[180] and (iii) to persuade.[181] Starting with the uncontroversial taxi-driver example, it is clear to see the persuasive force of a common intention-based approach to escape the absurd outcome of liability for the taxi-driver. *The Achilleas* provided the occasion for Lord Hoffmann to explore his doctrine in a specialised area of law, where the outcome, if not the reasoning, was widely thought to apply anyway.

Fuller's generalisation that 'fictions are to be strictly construed'[182] explains Lord Hoffmann's caution that exceptions to the standard rule will be rare,[183] the reiteration by the Court of Appeal that *Hadley v Baxendale* remains the standard test,[184] and the long list of cases were *The Achilleas* was argued in vain.[185]

Yet fictions, whose motive is policy,[186] rest upon an expressed or assumed premise;[187] accordingly they must be justified by the social or economic policy that underlies them.[188] So Lord Hoffmann's approach requires the adoption and justification of that policy, as well as an analysis of the utterances or written words of the parties – for it must be *constrained* by what may reasonably be characterised as common intention.

In this sense, 'common intention' is a tighter approach than one based purely on policy. Where an unorthodox allocation of risk *cannot* be construed as something reasonable parties *might* have intended, Lord Hoffmann's approach cannot apply. However, this additional constraint does not appear to be a particularly intrusive one in the context of remoteness because we are dealing with allocations of risk that have not been expressly stated. Even if we found the decision upon the industry's understanding of the law, we would have *The Heron II* ignoring that understanding and *The Achilleas* upholding it. There appears to be little priority afforded to belief.

So the real danger is to not look past the fiction and to dwell too much on the matters intrinsic to the contract – or the fiction itself. 'A fiction taken seriously, i.e. "believed", becomes dangerous and loses its utility.'[189] The persuasive force of the common intention approach when applied to uncontroversial cases such as the taxi-driver is undeniable. But, as Gray says, '[s]uch fictions are scaffolding – useful, almost necessary, in construction – but, after the building is erected, serving only to obscure it.'[190] 'That original sin of human reasoning – hypostatization – is a failure to

[178] That Fuller's defintion relies on these premises is argued by Piška (n 175) 214.
[179] Ibid 53, 57.
[180] Ibid 69.
[181] Ibid 54.
[182] Ibid 50, quoting René Demogue, *Les notions fondamentales du droit privé* (1911) 246.
[183] *The Achilleas* para [11].
[184] *Supershield* (n 129) para [43].
[185] See (n 135).
[186] Fuller (n 172) 57.
[187] Ibid 51.
[188] Ibid 71.
[189] Ibid 9.
[190] John Chipman Gray, *The Nature and Sources of the Law* (2nd edn Beacon, Boston 1921) 35.

drop the fiction out of the final reckoning'.[191] While Tettenborn's theory of 'instrumental promises' is beautifully argued, its reliance on matters intrinsic to the contract means it overlooks the real premise of the determination of 'common intention', and accordingly what actually drives the court's determination of the issues at hand. Likewise, the exemplary exposition of the linguistic approach to contextual interpretation advanced by Kramer is unlikely to be sufficient without more.[192] The real premise behind the fiction of common intention is that uncertain cauldron of competing interests, commercial policy.

Conclusion

All of which brings us around full circle to Atkin LJ's aside that this branch of the law is not guided by definite principles. Adopting the 'fairness rider' of the Restatement (Second) of Contracts – calling off the search for principle – would be no dishonour. However, English law has gone about admitting an exception in its own unique way.[193]

The Achilleas provided quite the occasion for this, being the end of the road of the convoluted developments of the orthodox to remoteness that began in *Hadley v Baxendale*; notwithstanding Lord Rodger's attempt it was not possible to bend them further in order to find for the charterers. Lord Hoffmann's thus created his unorthodox approach, relying on the familiar doctrines of the legal fiction and contextual interpretation. However, while on the surface his basis of the objective ascertainment of common intention discloses an approach based on actual intention, it is merely a conduit and a constraint for the underlying policy issues and we must look to broader factors in order to determine when an alternative to foreseeability should apply in a remoteness problem. Sir Robin Cooke was right; judges looked at other factors. Lord Hoffmann merely formalised this process and placed them within these doctrines. His Lordship's approach opened the door to the construction of exceptions to the orthodox rule of remoteness.

Clearly, an appreciation of the underlying issues is vital in order to be able to apply *The Achilleas* successfully. The present list of attempts suggests that this has been lacking; But surely, eventually another difficult and meritorious case will emerge; one that cannot be decided satisfactorily with the orthodox approach. It is submitted that when it becomes necessary to apply this legal fiction to escape the orthodox rules, the underlying policy issues fairly point the other way, and these issues can be reasonably construed as common intention, then *The Achilleas* will apply again.

---

[191] Fuller (n 177) 118.

[192] Adam Kramer, 'Common Sense Principles of Contract Interpretation (and how we've been using them all along)' (2003) 23 OJLS 173; also Adam Kramer, 'Implication in fact as an instance of contractual interpretation' (2004) 63 CLJ 384.

[193] 'English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into … slots' – *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 (PC) 167 (Lord Wilberforce).