Out of the Box Pte Ltd *v* Wanin Industries Pte Ltd
[2013] SGCA 15

Case Number	: Civil Appeal No 61 of 2012
Decision Date	: 06 February 2013
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Sundaresh Menon JA (as he then was)
Counsel Name(s)	: Kesavan Nair (Genesis Law Corporation) for the appellant; Aqbal Singh (Pinnacle Law LLC) for the respondent.
Parties	: Out of the Box Pte Ltd — Wanin Industries Pte Ltd

Contract – Remedies – Remoteness of damage

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2012] 3 SLR 428.]

6 February 2013

Sundaresh Menon CJ (delivering the grounds of decision of the court):

The Facts

1 The appellant company, Out of the Box Pte Ltd ("OOTB") is in the business of marketing and distributing beverages. Sometime in early 2007, OOTB conceptualised and developed a new sports drink that it called "18 for Life" ("18"). OOTB appeared to have a particular focus on media services in the golfing industry. This might account for the choice of the name for the new drink, evoking the number of holes played in a typical game of golf. OOTB had high hopes for their new beverage and seemed to contemplate that it might emerge as a major brand. Perhaps because of its background in marketing, distribution and media, OOTB's efforts to realise its considerable ambitions for 18 were channelled into marketing and advertising the new beverage. These efforts appear not to have been matched by a similar level of industry in the formulation, design or manufacture of the beverage itself. In fact, OOTB sub-contracted that entire responsibility to the respondent company, Wanin Industries Pte Ltd ("WI").

2 The parties entered into a Contract Manufacturing Agreement ("the Contract") on 11 June 2008. For all of OOTB's ambitions for 18, the Contract was a remarkably simple document. It was a little more than a page in length. Under it, OOTB agreed:

(a) to accept the price of $10.50 per carton of 18;

(b) to pay a sum of $15,000 for the production of a mould;

(c) to pay $200 "per color for production of cylindrical drum for the labels";

(d) to pay in advance for the quantity ordered; and

(e) to order at least one trailer load of 18 and to be responsible for unloading the goods.

On its part, WI agreed to supply 18 for at least two years. WI also agreed to "[a]ccept the return of defective product but with substantiate evidence [*sic*]", and to fulfil orders in a timely manner. Lastly, WI agreed to offer OOTB a special price of $10.30 per carton for the first 4,000 cartons ordered.

3 In short, there was almost no capital investment by OOTB to speak of; nor was there any sign of OOTB establishing any manufacturing capacity in respect of the beverage. Moreover, aside from the payments to be made for the mould and the production of the cylindrical drum, the extent of OOTB's obligation under the Contract was to purchase 1,200 cartons of 18 (this being the equivalent of one trailer load) at a price of $10.30 per carton. This translated into a committed outlay on OOTB's part of $12,360.

4 There was no particular quality specification or recipe. Such was the scant nature of the Contract. There was certainly nothing in the Contract that would have given WI any indication or hint of OOTB's grandiose plans and ambitions for 18. Nonetheless, OOTB embarked on an aggressive marketing campaign to advertise 18.

5 Sometime in 2008, a shipment of 18 supplied by WI changed colour. On inspection, the bottled drink was also found to be contaminated with insects. This was a disaster for OOTB's plans. As a result, OOTB had to recall all stock of 18 from the market. The Agri-Food and Veterinary Authority of Singapore ("AVA") also issued a consumer advisory informing the public that all stock of 18 had been recalled and warning them against consuming any 18. The 18 brand was, without question, damaged beyond repair. OOTB therefore abandoned its marketing campaign and discontinued the planned venture altogether.

6 On 22 April 2009, OOTB commenced Suit No 317 of 2009 against WI for breach of the Contract. On 9 September 2009, the High Court granted summary judgment in favour of OOTB and ordered WI to pay damages to be assessed. WI appealed unsuccessfully against the High Court's decision to grant summary judgment and the matter then proceeded to the assessment of damages.

7 At the assessment of damages, OOTB claimed "reliance damages" amounting to $779,812.30. These were expenses that OOTB said it had incurred in reliance upon the Contract and which had been wasted as a consequence of WI's breach. The bulk of the expenses claimed by OOTB were advertising costs. The Assistant Registrar ("the AR") assessed OOTB's damages in the sum of $655,280.70. The AR made some adjustments to the value of the two largest components of OOTB's claims: firstly, the use of some advertising credits that belonged to OOTB and which it had used to promote 18 ("the ActMedia expenses") and secondly, the redemption of a prize it had won for an advertising campaign that it had earlier conducted for an entirely unrelated line of products ("the Clear Channel expenses").

8 WI appealed and OOTB cross appealed against the AR's decision. The High Court judge ("the Judge") who heard the two Registrar's Appeals allowed WI's appeal in part and held that OOTB had not adequately proven its loss in respect of the ActMedia expenses and the Clear Channel expenses. The Judge held in *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2012] 3 SLR 428 at [9] that:

> 9 There was no evidence that the value of the relevant services was commensurate with their "sticker" price. This was because the latter could have an element of arbitrariness depending on the balance of the advertising credits remaining at the time that they were used (which [OOTB] had to utilise fully or else allow to lapse). Notwithstanding that uncertainty, it is [OOTB's] responsibility to provide some means of gauging the extent of its loss. *[OOTB] must satisfy the court both as to the fact of damage and as to its amount, or else be awarded nominal damages at most.* Furthermore, it is for [OOTB] to prove that the expenses claimed would be recouped on

the balance of probabilities. Due to the ill-defined nature of [OOTB's] loss, the current situation is not one which justifies the imposition of the burden on [WI]. *Taking into account [OOTB's] inability to provide the necessary evidence, I disallow its claim for the Act Media and Clear Channel expenses.*

[emphasis added]

9 The Judge awarded OOTB nominal damages of $1,000 each in relation to the ActMedia expenses and the Clear Channel expenses essentially on the basis that OOTB had not sufficiently proved the quantum of the loss. However, the Judge affirmed the other components in the AR's award of damages. The net result of the appeal was a reduction of the AR's award to $329,254.30. OOTB appealed against the decision of the Judge to award only nominal damages for the ActMedia expenses and the Clear Channel expenses. This was the sole issue before us as WI did not appeal against that part of the Judge's decision affirming the other heads of OOTB's claim. After hearing the arguments, we dismissed the appeal. We now give our reasons for doing so. In essence, as it became evident in the course of the oral arguments, OOTB's claimed heads of damages were too remote in our judgment.

The applicable law

10 In *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 AC 827, Lord Diplock explained that for every breach of contract that sounds in damages, the contract breaker's primary responsibility to perform the contract is replaced by a secondary responsibility to pay damages (at 848–9):

> Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. …
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> *Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach*; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged. …
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> [emphasis added]

11 However, the secondary obligation to pay damages is not an unlimited liability. In broad terms, once the threshold of showing that the damages are causally connected to the breach has been crossed, a *prima facie* liability to pay damages arises. However, there are some limits to the extent of such *prima facie* liability. Causation alone will not suffice, since many things can be said to be "caused" by a particular event in the sense that if the event had not transpired then the ends in question might not have ensued. Therefore, in any given case causation is a necessary but not a sufficient condition for the imposition of liability on the contract breaker.

12 There are at least two limitations on the extent of a contract breaker's liability for damages. The first is where the parties have expressly agreed to allocate the risk of certain losses in their contract, for instance by way of exclusion or limitation provisions. By such clauses, the parties might agree that the contract breaker will not be liable at all for certain types of loss or that it will not be liable beyond a certain quantum of loss. But there are limits to human foresight. This, coupled with the optimism that frequently accompanies the conclusion of many a contract, means that often,

parties do not specifically address their minds to the question of damages or more generally of remedies at the time they enter into the contract.

13 It then becomes necessary to examine whether the second type of limitation applies: that is where the law imposes limits on the extent of the contract breaker's liability by rules that help a court decide whether the particular type of damages claimed is too remote and hence irrecoverable. The rules as to remoteness of damage serve to impose a horizon on the extent of the contract breaker's liability. Losses that are within this notional boundary are in principle recoverable while those beyond it are not. But although this horizon is not illusory, equally it is not a rigid or empirically precise boundary. Rather, like the horizon of human experience, its range depends on the circumstances. For this purpose, the relevant circumstances include those in which the contract was entered into and what both parties knew or must be taken to have known about the venture they were about to undertake. According to these circumstances, the horizon may sometimes extend further than at other times.

14 Those notions governing remoteness of damages in contract were encapsulated in Alderson B's famous dictum in *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley v Baxendale*") at 354:

> 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. But … if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. [emphasis added]

15 These principles have come to be referred to as the first and second limbs of "the rule in *Hadley v Baxendale*". The first limb prescribes limits for what are called general damages and the second limb for what are called special damages. The use of the descriptors "general" and "special" in this context is not particularly helpful since it is likely to be confused with an altogether different sense in which those terms may be used in conjunction with damages: see the observations of the learned authors in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 22.050-22.052. But here, they are meant to connote the nature of the knowledge of the circumstances that was possessed by the parties, and more specifically, by the contract breaker when he entered into the contract. General damages are those which may be seen as flowing naturally from the breach, once regard is had to the sort of knowledge of the relevant surrounding circumstances that the contract breaker would generally be taken to have had. On the other hand, special damages are damages the liability for which is founded on the fact that the contract breaker *had* some special or additional knowledge of particular facts and circumstances, and which knowledge has the effect of extending the horizon of recoverable damages beyond the range that would otherwise have applied.

16 A more recent restatement of the rule in *Hadley v Baxendale* can be found in the English Court of Appeal decision of *Victoria Laundry (Windsor) Ld v Newman Industries Ld; Coulson & Co Ld (Third Parties)* [1949] 2 KB 528 ("*Victoria Laundry*"), where in an influential judgment, Asquith LJ set out six propositions (at 539–40):

> …
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> (1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Company*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,
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> (2.) In cases of breach of contract the 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.
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> (3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
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> (4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley v. Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.
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> (5.) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *A/B Karlshamns Oljefabriker v. Monarch Steamship Company Limited*.)
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> (6.) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.
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> [emphasis added]

17 It is evident from the passages cited that one of the key elements that is invoked to determine the horizon that will limit the contract breaker's liability is that of knowledge. Under the first limb of

the rule in *Hadley v Baxendale*, the limit is defined in terms of the consequences that arise naturally according to the usual course of things or flowing from what may reasonably be supposed to be in the contemplation of both parties when they contracted. In *Victoria Laundry*, Asquith LJ treated this as encompassing actual knowledge of what is liable to ensue upon a breach as well as imputed knowledge, or that which a reasonable person in the contract breaker's situation is taken to know.

18 The second limb of the rule in *Hadley v Baxendale* deals with the contract breaker's actual knowledge of special or extraordinary facts and circumstances. These are circumstances that the reasonable person would not objectively be taken to know but which the contract breaker in question does actually know. The effect of this awareness is to extend the horizon of the contract breaker's liability to those consequences that are foreseeable as not unlikely given his knowledge of those special facts and circumstances. In *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 ("*The Heron II*"), Lord Reid clarified that armed with that knowledge, the losses must be "foreseeable as a likely result" (at 389) or at least as a result that was "not unlikely" (at 392).

19 As observed yet more recently by Rix LJ in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2007] 2 Lloyd's Rep 555 ("*The Achilleas (CA)*") at [88], after commenting on the facts of *Hadley v Baxendale*:

> 88 … The case demonstrates, in my judgment, as has come to be generally recognised, that there are not so much two rules, as two means by which a defendant may possess the knowledge necessary to make his liability a fair one. That knowledge may either arise from "the usual course of things", or from the communication of special circumstances …

20 In reviewing the authorities, Rix LJ in *The Achilleas (CA)* drew attention to the following passages from the judgment of Robert Goff J (as he then was) in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* (*The Pegase*) [1981] 1 Lloyd's Rep 175 ("*The Pegase*") at 182–3:

> ... the principle in *Hadley v Baxendale* is now no longer stated in terms of two rules, but rather in terms of a single principle – thought [*sic*] it is recognized that the application of the principle may depend on the degree of the relevant knowledge held by the defendant at the time of the contract in the particular case. This approach accords very much to what actually happens in practice; the Courts have not been over-ready to pigeon-hole 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.
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> ...
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> … In the light of the decided cases, the test appears to be: *have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach.* The answer to that question may vary from case to case, taking into consideration such matters as, for example, the nature of the facts in question and how far they are unusual, and the extent to which such facts are likely to make fulfilment of the contract by the due date more critical, or to render the plaintiff's loss heavier in the event of non-fulfilment.
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> The two governing principles – the principle of causation and the limiting principle of remoteness of damage – provide, in their developed form, the solution to most problems of damages. ...

[emphasis added]

21 In this dictum, Robert Goff J added a significant element to the analysis. Aside from examining what knowledge the contract breaker had or should be taken to have had at the time of the contract, Robert Goff J noted that it was also important to have regard to the circumstances in which that knowledge had been acquired. We find this a helpful statement of what the courts are trying to do when assessing whether the claimed damages are too remote. It contemplates the consideration of:

(a) the facts that bear on the question of the liability for the damages that subsequently ensue upon the defendant's breach;

(b) the circumstances in which those facts came to the defendant's knowledge;

(c) in the light of those circumstances, the extent to which such knowledge should be taken into account when assessing the defendant's liability; and

(d) having regard to the knowledge that may properly be attributed to the defendant at the time of the contract, what would have been foreseeable at that time to the reasonable person in his position to be the not unlikely consequences of his breach.

22 The rationale behind the principle of remoteness of damage in contract and the application of the rule in *Hadley v Baxendale* was discussed in some detail by this Court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*"), where we affirmed the continued applicability of the rule in *Hadley v Baxendale* (as restated in *Victoria Laundry*) in Singapore. In *Robertson Quay*, after an extensive review of the authorities, we observed (at [70]) that although the rule in *Hadley v Baxendale* was not without its difficulties, it had served well in providing a guiding set of principles for the courts. In that same case, we also affirmed our earlier observations in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") as follows:

70 … [T]he concept of remoteness is essentially a necessary limitation imposed by the law to protect the contract-breaker from infinite damages since "the consequences of an act theoretically ... can ... stretch into infinity". The question of remoteness is ultimately an inquiry in which [quoting from *Sunny Metal* at [56]]:

> ... legal policy and accepted value judgment must be the final arbiter of what balance to strike 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. [emphasis in original]

23 It is thus evident that the test for assessing the question of remoteness of damages prescribed in *Hadley v Baxendale* as it has come to be applied, clarified and understood in subsequent cases has a very respectable vintage and has entered the stream of consciousness of most common lawyers in the sense of being one of the foundational principles learnt as fledgling law students. However, the antiquity of a statement of principle does not assure that it retains its vitality in the face of changes in the environment and the context in which these principles are to be applied.

24 Four months after our judgment in *Robertson Quay* was delivered, the House of Lords handed down its decision in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61

("*The Achilleas (HL)*"), on the appeal brought against the decision of the Court of Appeal delivered by Rix LJ, to which we have already referred (see [19] above). In *The Achilleas (HL)*, Lord Hoffmann (with whom Lord Hope of Craighead concurred) departed from the rule in *Hadley v Baxendale* and proposed a new test for remoteness of damage which focuses on whether or not the defendant had assumed the risk of the sort of consequences which the plaintiff was seeking recompense for, stating at [21] that:

> 21 It is generally accepted that a contracting party will be liable for damages for losses which are unforeseeably large, if loss of that type or kind fell within one or other of the rules in *Hadley v Baxendale*: see, for example, Staughton J in *Transworld Oil Ltd v North Bay Shipping Corpn (The Rio Claro)* [1987] 2 Lloyd's Rep 173, 175 and *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377. That is generally an inclusive principle: if losses of that type are foreseeable, damages will include compensation for those losses, however large. *But the* South Australia *and* Mulvenna *cases show that it may also be an exclusive principle and that a party may not be liable for foreseeable losses because they are not of the type or kind for which he can be treated as having assumed responsibility.* [emphasis added]

25 In *The Achilleas (HL)*, Lord Hoffmann suggested that when confronting the issue of remoteness of damage, the rule is to be understood not as an external rule of law that is imposed on the parties to every contract in the absence of an express provision to the contrary (in order to limit the extent of recoverable damages); rather it is a question of the parties' intention. As such, the answer to the question whether a particular type of damages is recoverable depends not so much on the straightforward application of the rule in *Hadley v Baxendale*, but rather on whether it made sense in the context of the contract and its terms and in the light of the circumstances in which it was entered into to impose the particular liability on the defendant. To Lord Hoffmann, the question is much more about whether, on a true construction of the contract, the contract breaker had assumed responsibility for this sort of loss. Lord Hoffmann put it thus in *The Achilleas (HL)* at [25]-[26]:

> 25 … *But the question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law*.
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> 26 The owners say that the parties are entirely at liberty to insert an express term excluding consequential loss if they want to do so. Some standard forms of charter do. *I suppose it can be said of many disputes over interpretation, especially over implied terms, that the parties could have used express words or at any rate expressed themselves more clearly than they have done. But, as I have indicated, the 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 reasonable be expected to have assumed and paid for.* …
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> [emphasis added]

26 These passages leave no room for doubt that Lord Hoffmann viewed the proper approach to the question of remoteness of damage as a question of interpreting the contract. This Court had the opportunity to consider the House of Lords' decision in *The Achilleas (HL)* in its subsequent decision in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM Restaurants*"). After once again undertaking an extensive review of existing case law and academic commentaries, we rejected Lord Hoffmann's new approach towards remoteness of damage in contract, at least to the extent it deviated from the rule in *Hadley v Baxendale*, concluding

as follows at [140]:

> 140 Consistent with the analysis set out above, we take this opportunity to confirm the approach relating to remoteness of damage in the law of contract as set out in the decision of this court in *Robertson Quay* … (which affirmed the principles laid down in *Hadley [v Baxendale]*). We also take this opportunity to state that the approach advocated by Lord Hoffmann in *The Achilleas [(HL)]* is not the law in Singapore, except to the extent that the learned law lord's reliance on the concept of assumption of responsibility by the defendant is already incorporated or embodied in both limbs in *Hadley [v Baxendale]* itself.

27 Lord Hoffmann's approach has not gained currency in the English courts either. In *ASM Shipping Ltd of India v TTMI Ltd of England (The Amer Energy)* [2009] 1 Lloyd's Rep 293 at [17], Flaux J rejected the view that the House of Lords had in *The Achilleas (HL)* laid down a new test different from the rule in *Hadley v Baxendale;* in *Classic Maritime Inc v Lion Diversified Holdings Berhad and Another* [2010] 1 Lloyd's Rep 59 at [71], Cooke J stated that he would be "highly surprised" if *The Achilleas (HL)* had changed the law on remoteness of damage; and in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] 2 Lloyd's Rep 81 at [40], Hamblen J held that the rule in *Hadley v Baxendale* "remains the general test of remoteness applicable in the great majority of cases" and confined Lord Hoffmann's new approach to "relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations".

28 That being said, anything that Lord Hoffmann says in these matters calls for the most careful consideration. The present case gives us the opportunity, having once again reviewed the matter, to restate the earlier views expressed in *MFM Restaurants*. In our view, the answer ultimately lies not in abandoning the principles laid down in *Hadley v Baxendale*, but rather in drawing out and articulating some of the premises inherent in those principles.

29 In our judgment, it is important that cases which in fact concern the interpretation of a contract in order to identify the specific nature of the obligation that has been undertaken not be conflated, or for that matter confused, with cases that truly are concerned with questions of remoteness.

30 This may be illustrated using the famous example of the taxi driver who is told of his customer's need to get to a particular destination by a particular time in order to make it to a particularly important meeting. This was touched on in *MFM Restaurants* at [118]:

> 118 … [I]t might be appropriate to consider briefly an oft-cited hypothetical example which has been utilised to demonstrate the utility as well as persuasiveness of Lord Hoffmann's approach in *The Achilleas [(HL)]* … This is the example of a taxi driver who, before he or she accepts the fare, is informed by the passenger about a crucial meeting to which that passenger must get to on time. If the taxi driver fails, in breach of contract, to get the passenger to that meeting in a timely manner and, as a result, the passenger suffers an enormous business loss, is the taxi driver liable for that loss? … We would add that, in an extreme situation such as the present hypothetical, much would depend on the precise facts in question. *This would also include, for example, how the alleged special circumstances were communicated by the customer to the taxi driver and what precisely was in fact communicated. All this would, of course, have to be assessed on an objective basis.* One would imagine that, in an extreme situation such as this, there would have to be a clear and unequivocal communication. It would probably have taken the following form:

I have to arrive at the airport on time for my flight and, if I miss my flight, I will lose a business deal worth $200,000. If so, I will truly hold you responsible for this loss.

[emphasis added]

31 In *MFM Restaurants*, we went on to explain at [119] that:

119 Extreme hypothetical situations such as the one just mentioned are useful in law schools as they deliver the general legal propositions sought to be conveyed to the students concerned in no uncertain terms. However, what happens in the real world is quite different. Even allowing for the fact that truth is sometimes stranger than fiction, one can hardly imagine the taxi driver accepting responsibility on the terms set out in the preceding paragraph. *Even if he or she did, this would have—in the nature of things—to be in the form of an express assumption of responsibility which forms part of the contract between the parties in any event* . In other words, in an extreme hypothetical situation, because the communication of the special circumstances would have to be so clear and unequivocal, it would follow that any assumption of responsibility would have to be equally clear and unequivocal and that it would then simultaneously constitute an *express term* of the contract itself. *The resultant situation would be no different from the position that Lord Hoffmann is arguing in favour of* . It is, of course, *theoretically possible* for there to be an assumption of responsibility without that assumption forming part of the express terms of the contract as such. In our view, however, this would be quite unrealistic as regard must (as just mentioned) be had to the entire context of the situation itself. *Indeed, even from a legal standpoint, it would be difficult to imagine that a court would find an implied obligation that the taxi driver had undertaken to assume responsibility for the full extent of the loss* . Even if this were so, we would imagine that there would *also* be an *implied term* to the effect that, absent a deliberate act on the part of the taxi driver to ensure that the passenger did not arrive at the airport on time, the former would be excused from liability. Hence, for example, a delay that was due to a traffic jam would excuse the taxi driver from liability.

[italics in original; emphasis in italics underline added]

32 The hypothetical case of the taxi driver who has been tasked with the mission to get his customer to a particular destination by a particular time is posed to test the robustness of the conventional theory governing the remoteness of damage. The question posed is whether the taxi driver who fails to meet the time stipulated can be made liable for the loss of profit that might otherwise have availed the customer had the taxi driver made it to the required destination on time.

33 But as we have observed in *MFM Restaurants* and as we have observed here at [29] above, the question may not in the first instance be truly concerned with remoteness at all. Rather, the first question is whether as a matter of that contract, the taxi driver had agreed not only to transport his customer to the desired destination, but also to do so by a specific time and for a specific purpose. Put another way, the hypothetical throws up the significance of first analysing the question of whether the taxi driver would be liable in these exceptional circumstances as a matter of the construction of the contract because *that*, rather than the question of remoteness, is the true nature of the issue that is presented. In other words, we are concerned here with ascertaining the contractual *terms* undertaken by the taxi driver (as opposed to whether the damages sought as a result of a *breach* of those terms are too remote).

34 For instance, if a taxi driver knew that there was a time limit and even knew why the customer was constrained by the time limit, and then decided to ask for a much higher fare, then as a matter of the interpretation of the contract, it might be concluded that in seeking the enhanced fare, the

taxi driver had undertaken a contractual obligation to reach the destination by a specified time. Conversely, if the same taxi driver had charged nothing more than the metered fare, and nothing else was said between the parties, then it may well be that the opposite conclusion would be reached as a matter of interpreting that contract. But assuming that the taxi driver did undertake the extended obligation to get his customer to the specified destination by a specified time and then failed to comply with that obligation, the question of what damages he would be liable for in that scenario must nonetheless be assessed, and in our view this would fall to be done by reference to the rules as to remoteness of damage.

35 In our judgment, it bears reiterating that there 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.

36 When one turns to examine the question of remoteness, in our view, it simply does not help to frame the question as one concerning the contractual assumption of risk or the true interpretation of the contract because that is an altogether separate inquiry which generally does not bear directly on the question of remoteness (except to the extent that it might constitute a factor which is to be taken into consideration in ascertaining whether – especially pursuant to the second limb of the rule in *Hadley v Baxendale* – the damage is indeed too remote based on the relevant facts).

37 As has been alluded to in the preceding paragraph, there is a substantial degree of fact sensitivity that is necessarily embedded within the analysis of whether the claimed damages are too remote. Having identified the particular type of losses that have materialised and for which damages are being claimed, it is then necessary to assess the question of remoteness by reference to the factual matrix in which the parties were situated at the time they entered into the contract. This is the same point made by Robert Goff J in *The Pegase* to which we have referred at [20]-[21] above. Robert Goff J thought it relevant to have regard to the nature of the facts which the contract breaker had actual or imputed knowledge of as well as the circumstances in which they came to his knowledge. As we have noted above, we agree with this because both considerations are critical to shedding light on the central question of whether in all the circumstances it is just that the contract breaker should be held liable for the losses that have in fact materialised. The answer to this depends on the facts that are known to the contract breaker and that may be taken into account when assessing what ought to have been reasonably foreseeable to him at the time of the contract.

38 By focusing on the specific facts of the case, a court can take into account the concerns that have been raised by Lord Hoffmann within the conventional analysis laid down in *Hadley v Baxendale* and the subsequent line of cases we have referred to without having to embrace the approach Lord Hoffmann espoused in *The Achilleas (HL)*. In that case, the defendant charterer was nine days late in delivering the ship back to the plaintiff owner. The owner had already agreed to hire the ship to another charterer by a certain date, failing which the latter was entitled to cancel. Because of the defendant's late delivery, the owner was forced to procure an extension of the cancellation date of the subsequent charter in return for a reduced rate of hire. In the process, the owner suffered severe losses because the market rate for the hire of the vessel had fallen in an unusually rapid and drastic manner. Writing extra-judicially, Lord Hoffmann has argued that the foreseeability test in *Hadley v Baxendale* would not have permitted the court in *The Achilleas (HL)* to give due consideration to the fact that (a) the loss suffered by the owner was potentially extensive and could not be quantified by the parties at the time of contracting, and (b) the common assumption in the trade was that liability of a charterer for late delivery of a ship was limited to the difference between the market rate and the charter rate for the period of the overrun (see Lord Hoffmann, "The *Achilleas*: Custom and Practice or Foreseeability?" (2010) 14 Edin LR 47 at 59).

39 But we do not see why these facts cannot be analysed within the conventional *Hadley v Baxendale* framework. The common assumption in the trade as to a late charterer's liability is a relevant consideration in ascertaining what, in the charterer's reasonable contemplation at the time of the contract, would be the losses flowing from late delivery of the vessel in the usual course of things. It would be just to visit such consequences upon the charterer if he broke the contract. Contrariwise without any other knowledge, it would not ordinarily be just to impose other types of losses upon the contract-breaking charterer. As Lord Rodger of Earlsferry noted in *The Achilleas (HL)* (at [60]), on the facts such volatile market conditions were highly unusual and at the time of the contract the charterer could not reasonably have foreseen the consequences, which in the event befell the owner. Thus, the damages claimed were found to be too remote under a straightforward application of the rule in *Hadley v Baxendale*. Lord Rodger also observed (at [58] and [60]) that the result might conceivably have been different if the charterer had specific knowledge of particular facts that bore on the type of losses that materialised in that case.

40 It might seem somewhat disquieting that the House of Lords in *The Achilleas (HL)* were reversing the concurrent conclusions of the two arbitrators who had been in the majority and of four extremely experienced and highly respected commercial judges in the High Court and the Court of Appeal. Moreover, although it was a unanimous decision in the House, Baroness Hale of Richmond, at least, concurred only with strong reservations (see *The Achilleas (HL)* at [93]).

41 The root of the difference between the two groups of judges in fact lay in the application of the conventional principle that a contract breaker will be held liable for the full extent of the loss as long as the type or kind of loss that has occurred was reasonably foreseeable at the time the contract, even if its precise detail or extent were not: see *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at para 26-113. The owners in *The Achilleas (HL)* had claimed damages for late delivery of the vessel, and these were quantified on one of two alternative bases:

(a) The difference between the rate at which the vessel had originally been chartered to another charterer under a following fixture and the revised rate that was fixed in return for the new charterer agreeing to extend the cancellation date owing to the owner's inability to deliver the vessel on time. This was assessed for the full duration of the following fixture and was quantified at US $1,364,587.37;

(b) The difference between the charter rate under the defendant's charter and the market rate for the nine days by which the defendant had delayed redelivery of the vessel. This was quantified at just US $158,301.17.

The majority arbitrators held for the owners on the former basis on the ground that it was a not unlikely consequence of the charterer's late delivery of the vessel that the owner would suffer such a type of loss from having to renegotiate the terms of the following fixture. This was essentially the same view taken in the High Court and in the Court of Appeal. The minority arbitrator in his dissent considered that this was not correct because although it was not unlikely that the owner might have to vary the terms of the following fixture, the general understanding in the industry was that the losses for which a defaulting charterer would be liable would be limited to the difference between the charter rate and the market rate for the duration of the delay. The majority accepted that this was the market understanding but considered it irrelevant as a matter of law.

42 Although it may have appeared at first blush that the loss suffered by the owner was the same – namely, the owner's loss of revenue incurred by reason of the late delivery – in fact there were two distinct types of losses that were at play. One was the well-contained, quantifiable loss reflected in

the difference in the charter rates for the duration of the overrun; the other was the open-ended and unquantifiable loss (and indeed risk) of the owner having to vary the arrangements under a following fixture, none of the details of which the charterer had any knowledge of. Lord Rodger explained that he considered the latter was not recoverable because of extreme and volatile market conditions that were unknown and unforeseeable to the charterer at the time of the contract. He put it thus (at [60]):

> 60 Returning to the present case, I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would "in the ordinary course of things" cause the owners the kind of loss for which they claim damages. … It occurred in this case only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003, this loss could not have been reasonably foreseen as being likely to arise of the delay in question. It was accordingly, too remote to give rise to a claim for damages for breach of contract.

43 Lord Walker of Gestingthorpe came to essentially the same view though he first observed (at [84]) that it "was too crude a test … and … an error of law to adopt", as the majority arbitrators had done, the simple yardstick of whether "the type of loss claimed was foreseeable". Lord Walker's further observations at [82], [83] and [86] merit setting out at some length:

> 82 … There seems to be a gap in reasoning between the bare fact of missing a fixture (an eventuality which would not in a rising market, occasion any financial loss) and the very heavy financial loss for which the owners claimed (and recovered) damages in this case. … A much closer authority would have been the *Victoria Laundry* case … in which the Court of Appeal declined to award damages for the loss of unusually profitable dyeing contracts, but indicated that recovery of some loss of profit on such contracts would be possible … The loss of unusually profitable contracts, unknown to the vendor of specialised equipment at the time of the sale contract, will often be a "serious possibility" or "real danger"; but it was held not to be within the reasonable contemplation of the parties to the sale contract.
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> 83 So in this case, it was open to the arbitrators to conclude that for the owners to miss a fixture was a "not unlikely" result of the delay, but it did not follow from that the charterers were liable for an exceptionally large loss … when the market fell suddenly and sharply ...
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> ...
>
> 86 … [I]t was contrary to the principle stated in the *Victoria Laundry* case, and reaffirmed in *The Heron II*, to suppose that the parties were contracting on the basis that the charterers would be liable for any loss, however large, occasioned by a delay in re-delivery, in circumstances where the charterers had no knowledge of, or control over, the new fixture entered into by the new owners.

44 The foregoing analysis simply highlights that the application of these rules as to the remoteness of damage in contract depends greatly on the particular facts of each case. Different heads of loss may seem to be of the same type or nature and yet emerge on a proper analysis as being of quite different types. It would be simplistic and ultimately unhelpful to argue that a given head of loss is not too remote simply because it could semantically be packaged within a broader category of loss that was foreseeable by the contract breaker. To take the case at hand, while the type of loss here may be characterised as wasted advertising expenses, it would be wrong to ignore the special facts

that pertain to the type and scale of the advertising costs that were incurred here.

45 This very issue arose in *Victoria Laundry* as noted in the observations of Lord Walker that have just been set out. In that case, when the defendant boilermaker was late in delivering the boiler that the plaintiff had ordered, the plaintiff suffered the loss of some contracts as a result. But as observed by Lord Hoffmann in *The Achilleas (HL)* (at [22]), the Court of Appeal in *Victoria Laundry* did not "regard 'loss of profits from the laundry business' as a single type of loss. They distinguished … losses from 'particularly lucrative dyeing contracts' as a different type of loss which would only be recoverable if the defendant had sufficient knowledge of them …".

46 While we agree with this, it does not lead inevitably to Lord Hoffmann's conclusion that this is so as a matter of the interpretation of the contract, nor indeed that questions of remoteness are to be resolved in that way. In our judgment, it is important in each case to segregate the question of the interpretation of the contract from the question of remoteness. To take the facts of this case, it simply does not aid the process to characterise the issue in terms of whether, *as a matter of the interpretation of the Contract*, WI had undertaken an obligation to pay the extensive wasted advertising costs by way of damages in the event it failed to perform its primary obligation to deliver the required quantities of 18 in a suitable quality. Barring cases where the parties have agreed to liquidated damages as the remedy for a breach, the secondary obligation to pay damages upon a breach is a general one and it is a matter of applying the rules on remoteness as have been developed in the cases to ascertain whether the contract breaker should be held liable to pay the particular damages claimed. This, as we have seen, turns on whether the contract breaker had such knowledge of the facts that bore upon that risk as to render it just that he be held liable to pay such damages.

47 A straightforward analytical framework for questions of remoteness of damage would help ascertain in most cases the extent to which the defendant can fairly be held liable for losses that are causally connected to his breach. Such a framework would engender the following inquiries:

(a) First, what are the specific damages that have been claimed?

(b) Second, what are the facts that would have had a bearing on whether these damages would have been within the reasonable contemplation of the parties had they considered this at the time of the contract?

(c) Third, what are the facts that have been pleaded and proved either to have in fact been known or to be taken to have been known by the defendant at the time of the contract?

(d) Fourth, what are the circumstances in which those facts were brought home to the defendant?

(e) Finally, in the light of the defendant's knowledge and the circumstances in which that knowledge arose, would the damages in question have been considered by a reasonable person in the situation of the defendant at the time of the contract to be foreseeable as a not unlikely consequence that he should be liable for?

48 With these legal principles in mind, we now turn to the facts of the case at hand.

Application of the law to the facts

49 The specific type of damages claimed here was the wastage of the extensive advertising costs

and expenses that OOTB had incurred in its effort to promote 18 and to make it a mighty brand. It bears emphasising that virtually nothing was spent on developing the drink itself. There was no secret recipe or special ingredient. OOTB's plan was not for 18 to acquire a following because of its particular taste or quality. Rather, OOTB's plan was to take a generic drink and thrust it into popular demand through its own advertising genius.

50 As a further example of the unusual nature of OOTB's plans, we were told in the course of the oral arguments that OOTB had at one point even tried to engage the famous golfer Tiger Woods to be a brand ambassador for 18, but failed to do so because Mr Woods was not willing or available to accept the engagement. Having regard to the extremely modest nature of the investment to the manufacture of the drink, this would have been nothing short of exorbitant had the engagement in fact materialised.

51 As we have noted at [4] above, the Contract was a bare-bones document that appeared to be nothing more than a routine contract for the supply of modest quantities of a generic sports drink. There was nothing in the Contract which suggested that the parties had together applied their minds to the sort of advertising efforts or strategy that OOTB was planning to launch.

52 OOTB's unique business strategy meant that it was exposed to risks (in terms of the sort of damages it might incur) which are different from what might have been faced by the average beverage distributor. The particular facts that would bear upon the specific losses suffered in this case include the scale of OOTB's ambitions for 18 and its approach towards realising these ambitions largely through advertising and promotion. Neither of these critical facts was brought home to WI.

53 While WI would be taken to have known that the launch of any new product would likely be accompanied by some measure of advertising expenses and effort, it was not privy to OOTB's grand plans for 18 and its unusual endeavour to try to create a silk purse out of a sow's ear by means of advertising and brand promotion alone.

54 Without knowing these additional facts, WI would have approached the contract on the footing simply that it was to manufacture a generic sports drink and that OOTB had agreed to order at least 1,200 cartons of that drink at a price of $10.30 for the first 4,000 cartons (and $10.50 thereafter). This would have brought WI a modest sum of $12,360 in revenue. Yet, unbeknownst to WI, OOTB had incurred an outlay in the region of $779,812.30 on advertising and promoting 18. While the value of a contract does not limit the damages that a plaintiff can claim for the defendant's breach, it forms part of the factual matrix that a court should consider in assessing what would reasonably have been foreseeable to the defendant in all the circumstances at the time the contract was entered into.

55 These additional facts, which WI was not aware of at all, bore directly on the losses that have materialised. Without knowledge of these additional facts, WI could not possibly have foreseen these losses and there was no basis upon which WI could fairly be held liable for these losses. In short, we find that WI simply could not have contemplated that on a contract of this sort, it would be liable for such open-ended losses as were incurred by OOTB.

Conclusion

56 For these reasons, we dismissed OOTB's appeal. As no appeal was filed by WI against the others parts of the Judge's decision, we did not disturb them. In the event, we thought it fair to award WI only the disbursements it incurred for the appeal because we found for it not on the grounds that had been advanced before us.