Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and Another [2008] SGCA 8

Case Number : CA 36/2007

Decision Date : 29 February 2008

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Chou Sean Yu and Chua Sui Tong (WongPartnership) for the appellant; Morris John (Drew & Napier LLC) for the respondents

Parties : Robertson Quay Investment Pte Ltd — Steen Consultants Pte Ltd; Shahbaz Ahmad

Building and Construction Law – Damages – Delay in completion – Interest incurred on construction loans during period of delay – Whether such interest recoverable in law as damages

Civil Procedure – Damages – Interest – Date of commencement of interest for damages awarded by court – General rule that interest should run from date of accrual of loss – Whether interest should run from date of accrual of loss or from later date where there is unjustifiable delay on part of claimant in bringing action to trial – Section 12(1) Civil Law Act (Cap 43, 1999 Rev Ed)

Contract – Remedies – Remoteness of damage – Applicable test for remoteness of damage in contract – Rule in Hadley v Baxendale – Criticisms of rule in Hadley v Baxendale – Rationality and functionality of the rule in Hadley v Baxendale – Distinction between test of remoteness in contract and test of remoteness in tort – Whether interest incurred on construction loans due to delay in completion of construction project recoverable under first limb of rule in Hadley v Baxendale

Damages – Rules in awarding – Proof of damage – Applicable guidelines to proof of damage – Process of proving damage intensely factual – Flexible approach to proof of damage – Claimant must adduce before court most cogent evidence of loss in given circumstances – Whether hotel developer adduced sufficient evidence to prove that it had incurred additional interest as damage

Tort – Negligence – Remedies – Remoteness of damage – Distinction between test of remoteness in contract and test of remoteness in tort – Liability of construction professionals for additional interest incurred on construction loans due to delay in completion of construction project caused by their negligence – Whether allowing such loss to be recovered as damages in law would open floodgates for claims against construction professionals

29 February 2008 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal by Robertson Quay Investment Pte Ltd ("RQI"), the plaintiff in Suit No 324 of 2005 in the court below ("the originating suit"), against the decision of the trial judge ("the Judge") in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2007] SGHC 30 ("*Robertson Quay*"). Essentially, *Robertson Quay* concerned cross-appeals by the respective parties to this appeal against the award of damages made by the learned assistant registrar ("the AR") in her oral judgment delivered on 7 December 2006 following an assessment of damages hearing ("the AD hearing").

The facts

2 The facts of this case are largely undisputed. RQI is the owner and developer of the Gallery

Hotel ("the Hotel"), a commercial development located at 76 Robertson Quay, Singapore 238254, consisting of a ten-storey hotel, basement car parks and adjourning commercial units in the form of restaurants and entertainment outlets.

3 The first respondent, Steen Consultants Private Limited ("Steen Consultants"), which was the first defendant in the originating suit, is the company that was engaged by RQI to provide civil and structural engineering services for the construction of the Hotel ("the Project"). The second respondent, Mr Shahbaz Ahmad ("Shahbaz"), who was the third defendant in the originating suit, was at all material times a director of Steen Consultants as well as the civil and structural engineer who was responsible for the design, planning and supervision of the Hotel's structural works. (We will refer to Steen Consultants and Shahbaz collectively as "the respondents" in this judgment.)

4 The structural drawings of the Hotel were done in 1996 by Shahbaz, but the accredited checker employed by RQI, Mr Goh Joon Yap ("Goh"), the second defendant in the originating suit (although the action against him was discontinued prior to the AD hearing), found the drawings to be underdesigned. The drawings were therefore corrected and submitted to the relevant building authorities in 1997. Unfortunately, the respondents gave the building contractor the uncorrected 1996 version of the drawings instead (see *Robertson Quay* at [1]).

5 As a result of the above mistake ("the respondents' mistake"), there were structural deficiencies in the Hotel, which required additional remedial and strengthening works ("the repairs"). The repairs delayed the completion of the Project by 101 days from 1 September 1999 to 10 December 1999 ("the period of delay"). The temporary occupation permit for the Hotel, which was originally to be issued at the end of December 1999, was eventually issued only in March 2000 instead.

6 It was undisputed both in the proceedings below and in this appeal that: (a) the period of delay was 101 days; and (b) the structural deficiencies in question existed and were caused by the respondents' mistake. In respect of the latter, Steen Consultants had, before the commencement of the originating suit, admitted to RQI in writing on various occasions that there were structural deficiencies in the Hotel and had, in a letter dated 10 September 1999 to RQI, undertaken to pay for the costs of the repairs. Between February 2000 and November 2000, Steen Consultants certified payment of a total sum of $597,893.35 and paid that amount to the contractor carrying out the repairs.

7 On 10 May 2005, RQI filed its writ of summons ("the original writ") and commenced the originating suit against Steen Consultants and Goh for loss and damage suffered and expenses incurred during the period of delay. RQI subsequently filed an amended writ of summons ("the amended writ") on 4 July 2005 which added Shahbaz as a defendant. The statement of claim ("the SOC") was filed and served on 19 September 2005.

8 For the purposes of this appeal, it would be helpful to set out in full RQI's various heads of claim in the originating suit (as reflected in the SOC). They are as follows:

No	**Item**	**Figure**
i.	Main contractors' preliminaries	$117,915.22

ii.	Management fee and remuneration for the executive directors overseeing the Project	$49,612.77
iii.	Consultant's charges	$19,935.48
iv.	Salaries of management staff of the Hotel	$88,147.37
v.	Clerk of works' salary	$29,386.61
vi.	Interest on loans from RQI's shareholders and other related parties ("the Shareholder Loans")	$279,363.82
vii.	Interest on a term loan and an overdraft facility (collectively referred to as "the Bank Loans")	$215,859.84
viii.	Loss of profits and/or loss of rental in respect of the Hotel (including the adjoining commercial units)	To be assessed

9 Subsequently, the respondents admitted liability and interlocutory judgment was entered by consent against them on 9 November 2005 for item (i) (*ie*, main contractors' preliminaries), item (v) (*ie*, clerk of works' salary) and other damages to be assessed.

10 At the AD hearing, RQI claimed the remaining items set out in [8] above (*ie*, items (ii), (iii), (iv), (vi), (vii) and (viii)), but, in respect of item (viii), it did not pursue its original claim for loss of profits. RQI submitted that these items constituted the proximate and natural damages arising from the respondents' breach, and were thus within the first limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 ("*Hadley*") (see [52] below for an elucidation of the first limb of this rule ("the first limb of *Hadley*")). After considering the arguments of both parties, the AR awarded RQI a total sum of $699,429.41, comprising the following items:

No	**Item**	**Figure**
i.	Management fee and remuneration for the executive directors overseeing the Project	$49,612.77

ii.	Consultant's charges	$19,935.48
iii.	Salaries of management staff of the Hotel	$88,147.37
iv.	Interest on the Shareholder Loans	$279,363.82
v.	Interest on the Bank Loans	$215,859.84
vi.	Loss of rental income in respect of the Hotel's adjoining commercial units	$46,516.13

Interest was also awarded on these damages at the rate of 6% per annum from the date of the original writ to the date of judgment.

11 It would appear clear from the preceding paragraph that the AR allowed most of RQI's claims, save the claim for loss of rental income in respect of the Hotel itself. Dissatisfied with the AR's assessment, the respondents appealed against her decision, while RQI cross-appealed against the dismissal of its claim for $276,882.00 for loss of rental income in relation to the Hotel. At the hearing of these registrar's appeals, counsel for RQI, Mr Chua Sui Tong ("Mr Chua"), informed the Judge that RQI would proceed with its cross-appeal only if the respondents succeeded in their appeal (see *Robertson Quay* ([1] *supra*) at [3]).

12 The Judge affirmed the AR's award of damages for most of the heads of claim, but set aside (at [8] of *Robertson Quay*) her award of $495,223.66 (*viz*, the sum of $279,363.82 and $215,859.84 (see [10] above)) for the interest which RQI had allegedly incurred on the Shareholder Loans and the Bank Loans (collectively referred to as "the Loans"). Given that the respondents succeeded on these two items, the Judge proceeded to consider RQI's cross-appeal on the loss of rental income in respect of the Hotel. He eventually dismissed that cross-appeal on the ground that the loss claimed was too remote (see *Robertson Quay* at [9]). The Judge further ordered that the interest of 6% per annum was to run from the date of service of the SOC (*ie*, 19 September 2005) instead of from the date of the original writ (*ie*, 10 May 2005): see *Robertson Quay* at [10]. As a result of the Judge's decision, the total monetary amount recovered by RQI was significantly reduced.

13 RQI thus appealed to this court against the following aspects of the Judge's decision:

(a) the setting aside of the AR's award of $495,223.66 for the interest incurred by RQI on the Loans;

(b) in the event of the appeal on item (a) failing, the Judge's affirmation of the AR's dismissal of RQI's claim for $276,882.00 for loss of rental income in respect of the Hotel; and

(c) the Judge's order that interest on damages was to run from 19 September 2005, instead of from 10 May 2005.

The respondents, on the other hand, did not file a cross-appeal against the Judge's decision to affirm the AR's award of damages for the other heads of claim (as set out at [10] above).

The issues on appeal

14 At the hearing of the present appeal, counsel for RQI, Mr Chou Sean Yu ("Mr Chou"), informed us that RQI was no longer proceeding with its claim for loss of rental income in relation to the Hotel (we should add that, in any event, we find the decisions by the AR and the Judge on this particular issue to be unimpeachable). The appeal by RQI is thus limited to two aspects of the Judge's judgment, and since there has been no cross-appeal by the respondents, the two issues for the court's decision in this appeal (which we will refer to hereafter as "the first issue" and "the second issue", respectively) are:

(a) whether RQI is entitled to damages for the interest which it incurred on the Loans during the period of delay; and

(b) whether the interest on the damages awarded to RQI should run from the date of the original writ (*ie*, 10 May 2005), as ordered by the AR, or only from the date of service of the SOC (*ie*, 19 September 2005), as ordered by the Judge.

The claim for additional interest

Background

(1) The Loans

15 Since the claim for interest comes up to a substantial sum of $495,223.66, the first issue forms the crux of this appeal. Before addressing the issue, it is necessary to explain briefly how the Loans arose.

16 In a nutshell, RQI averred that it had borrowed money from its shareholders and United Overseas Bank Limited ("UOB") to finance the Project. Under a facility agreement dated 18 September 1997 ("the Facility Agreement"), UOB agreed to extend to RQI the Bank Loans, consisting of a principal term loan facility ("the Term Loan") and an overdraft facility ("the Overdraft"), for that purpose. The Term Loan was to be repaid by 9 May 2002, while the Overdraft was repayable on demand. In addition to the Bank Loans, RQI also obtained the Shareholder Loans for the apparent purpose of financing the Project. For the Shareholder Loans, there was no specified repayment date.

(2) Capitalisation of the interest on the Loans

17 RQI's claim for interest incurred on the Loans is premised on the ground (according to the affidavit of evidence-in-chief ("AEIC") of Mr Ngo Soo Hiong ("Ngo"), a director of RQI) that:[note: 1]

> ... as the completion of the [P]roject was delayed, [RQI] had to incur *additional* interest payments … which [it] would not otherwise have had to pay had the [Project] … been completed

on time. This added to the overall ... costs of the [Project]. [emphasis added]

18 To demonstrate that it had incurred additional interest and that, consequently, the overall costs of the Project had increased, RQI made use of the accounting convention of capitalising certain of the costs incurred in connection with the borrowing of funds ("borrowing costs") as provided for under Financial Reporting Standard 23 ("FRS 23") issued by the Council on Corporate Disclosure and Governance in Singapore. FRS 23 essentially provides that borrowing costs that are directly attributable to, *inter alia*, the construction of a "qualifying asset" should be capitalised as part of the cost of the asset. The material clauses of FRS 23 are as follows:

Definitions

4. The following terms are used in this Standard with the meanings specified:

Borrowing costs are interest and other costs incurred by an enterprise in connection with the borrowing of funds.

A qualifying asset is an asset that necessarily takes a substantial period of time to get ready for its intended use or sale.

5. Borrowing costs may include:

(a) interest on bank overdrafts and short-term and long-term borrowings;

…

6. Examples of qualifying assets are inventories that require a substantial period of time to bring … to a saleable condition, manufacturing plants, power generation facilities and investment properties. Other investments, and those inventories that are routinely manufactured or otherwise produced in large quantities on a repetitive basis over a short period of time, are not qualifying assets. Assets that are ready for their intended use or sale when acquired also are not qualifying assets.

Borrowing Costs – Benchmark Treatment

Recognition

7 . ***Borrowing costs should be recognised as an expense in the period in which they are incurred.***

…

Borrowing Costs – Allowed Alternative Treatment

Recognition

1 0 . *Borrowing costs should be recognised as an expense in the period in which they are incurred, except to the extent that they are capitalised in accordance with paragraph 11.*

1 1 . ***Borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset should be capitalised as part of the cost of that asset.*** *The amount of borrowing costs eligible for capitalisation should be determined in accordance with*

this Standard.

12. Under the allowed alternative treatment, borrowing costs that are directly attributable to the acquisition, construction or production of an asset are included in the cost of that asset. Such borrowing costs are capitalised as part of the cost of the asset when it is probable that they will result in future economic benefits to the enterprise and the costs can be measured reliably. Other borrowing costs are recognised as an expense in the period in which they are incurred.

[underlining and emphasis in original; emphasis added in bold italics]

19 In accordance with FRS 23, the interest paid on the Loans during the period of delay was capitalised as part of the costs of constructing the Hotel, and this was reflected in RQI's audited accounts for the year ended 30 June 2000. Thus, RQI's claim here is for the interest paid during the period of delay which has been capitalised.

The decision below

20 At the AD hearing, the AR placed much weight on the fact that Mr Peter Jacob ("Jacob"), the respondents' expert witness and a chartered accountant of more than 20 years' experience, had accepted that the interest on the Loans (if directly attributable to the Project) had been correctly capitalised as part of the costs of constructing the Hotel. She thus held (see [11] of the grounds of decision appended to the AR's oral judgment):

I was satisfied that RQI had proven its loss on this head of claim [*ie*, the claim for the interest incurred on the Shareholder Loans during the period of delay]. It went without saying that a smaller sum of interest on the loans would have to be paid if the construction of the [Hotel] had been completed on time. To this end, RQI suffered damage and loss. There was a clear causal link between the additional interest payments which RQI had to cough up as a result of the delay. *It was also noteworthy that the argument raised by [the respondents] that the interest payments had no link whatsoever to the delay was contradicted by their own expert witness*. *[Jacob] accepted that the interest on the shareholder loans attributable* [*sic*] *to the construction of the [Hotel]*. *By his own admission, the period of delay had indeed increased the costs of construction because additional interest had to be capitalised*.

The above findings on RQI's claim for interest on [the Shareholder Loans] were similarly relevant and applicable to this head of claim [*ie*, the claim for the interest incurred on the Bank Loans during the period of delay]. Accordingly, I also allowed this head of claim as pleaded.

[emphasis added]

21 On appeal, the Judge reversed the AR's award of damages in respect of the interest incurred on the Loans. The Judge was of the view that the mere capitalisation of interest did not change its nature from interest to capital, and capitalisation alone could not prove that RQI had suffered an actual loss. Before commenting further on the Judge's decision on this particular issue, it would be helpful to set out his decision on this point in full, as follows (see *Robertson Quay* ([1] *supra*) at [7]–[8]):

7 *I now consider items (iv) and (v) of the [respondents'] appeal. These two items were claims for loss by reason of interest payments that [RQI] had to make on shareholder loans and bank loans respectively*. Ostensibly calculated to cover the period of delay, these payments were

a little more complicated, but once the concept was properly explained the issue was not as troublesome as it might have been argued below. Essentially, [RQI] had borrowed money from the two sources [*ie*, RQI's shareholders and other related parties as well as UOB] to finance the construction of the [H]otel. The cost of financing, as Mr John [counsel for the respondents] submitted, was something that had been planned from the beginning and was thus unrelated to the damage caused by the [respondents]. It was analogous, he submitted, to a plaintiff car owner making a claim from a tortfeasor for the payment of hire purchase on account of damage to the car by the tortfeasor. Such a claim was unsustainable because the cost of the hire purchase had to be paid by the plaintiff in any event. Mr Chua [counsel for RQI], however, argued that the situation here was different because the financing costs had to be "capitalised, and had to form part of the construction costs". While this might be an accounting procedure, it would mean that it was a factor that had to be taken into account should [RQI] sell the [Hotel] subsequently, hence, theoretically, actualising a lower capital gain.

8 At this point, it should be noted that the accounting procedure was not in issue, nor were the calculations of the capitalised sums. *The question was whether capitalising the interest payments in this manner entitled [RQI] to claim it as a loss within the meaning of loss contemplated in* Hadley ... I accept that the analogy of the hire purchase payment is an attractive illustration. The problem with analogies is that they are often not the same as the thing or situation they are being compared with. *But, in this case, it is clear that the capitalisation of interest, through an accounting procedure, does not change its nature from interest to capital. To succeed, [RQI] had to show actual loss because I think that the loss contemplated in* Hadley … *could only be an actual loss (which might include imminent loss) and not a notional loss*. *Since a loss of profit in the event that the [H]otel was sold in the future would be a future loss, clear evidence would be required to prove such loss*. Since that was not possible, there was no loss [under] this head to be recovered.

[emphasis added]

22 We note that the Judge commenced his analysis in the extract quoted above by stating that the claim before him was a claim for "interest payments that [RQI] had to make on shareholder loans and bank loans respectively" (see *Robertson Quay* at [7]). However, his conclusion, after discussing the concept of capitalisation, was (*id* at [8]):

Since a *loss of profit* in the event that the [H]otel was sold in the future would be a future loss, clear evidence would be required to prove such loss. Since that was not possible, there was no loss [under] this head to be recovered. [emphasis added].

23 It appears from the last part of the passage just quoted that the Judge somewhat *equated* additional interest incurred on the Loans with "loss of profit in the event that the [H]otel was sold in the future" (*Robertson Quay* at [8]). Perhaps, the Judge was of the view that the loss suffered by RQI in respect of additional interest incurred would take the form of a loss of profit if the Hotel were eventually sold, given that capitalising the interest incurred meant that the overall costs of constructing the Hotel had increased. However, it is clear from the SOC, Ngo's AEIC and Mr Chua's submissions in the court below that RQI's claim was a claim for *additional interest* and *not* a claim for *loss of profit*, whether arising from a future sale of the Hotel or the late commencement of the Hotel's operations. We are of the view, with respect, that the Judge had mischaracterised the issue before him and had in fact decided the wrong question – *ie*, he had decided the question of whether RQI could recover for "loss of profit in the event that the [H]otel was sold in the future", instead of whether RQI could recover damages for the alleged additional interest it had incurred as a result of the delay.

24 Interestingly, RQI did not raise this point in the present appeal, although it did take issue with the Judge's apparent classification of the additional interest as a notional and future loss (as shown above, however, the Judge was actually referring to "loss of profit in the event that the hotel was sold in the future"). Essentially, RQI's argument in this appeal was that the loss suffered by RQI, which took the form of additional interest incurred, was not a future or notional loss, but an actual loss that was not too remote to be recovered as damages in law based on the principles laid down in *Hadley* ([10] *supra*). The respondents, on the other hand, raised a host of arguments centring on the basic argument that RQI had not shown that it had in fact incurred any additional financing costs in respect of the Project due to the late completion of the construction of the Hotel *and* that the alleged additional interest incurred was too remote to be recovered as damages in law.

25 Given the parties' arguments as set out briefly above, the first issue raises two further questions for our consideration, namely:

(a) whether RQI could prove that it had indeed incurred additional interest as a result of the delay in the completion of the Project; and

(b) whether such additional interest was recoverable as damages in law.

The question of proof of damage

26 One of the main arguments raised by the respondents in their written submissions in relation to RQI's claim for additional interest incurred was that RQI had not, in the first place, incurred any additional financing costs. In essence, the respondents argued that in the light of the fact that the Term Loan was repayable only on 9 May 2002 while the Overdraft and the Shareholder Loans had no specific repayment dates, the interest incurred on these loans over the period of delay would still have had to be paid by RQI even if there had been no delay in the completion of the Project. The respondents further argued that the capitalisation of such interest as part of the construction costs of the Hotel was only an accounting convention and did not go towards the proof of such interest as the loss suffered by RQI.

(1) The applicable law

27 In most claims for damages in contract or tort, the issue of proof of damage either rarely poses problems for the parties or is generally taken for granted by the parties. If liability and causation are established, the legal battle usually turns on issues such as remoteness of damage, mitigation of damage or even special topics such as recovery of damages for mental distress at the stage of assessment of damages. That said, it is fundamental and trite that a plaintiff claiming damages must prove his damage. The learned author of *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) provides (at para 8001) a succinct explanation of this requirement, as follows:

> *A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount.* If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v Deveridge* [(1825) 2 Car & P 109; 172 ER 50] and *Twyman v Knowles* [(1853) 13 CB 222; 138 ER 1183]. [emphasis added]

Put simply, until damage is proved, there is no need to even discuss topics such as remoteness of damage and mitigation because they are potentially relevant only *after* there is proof of damage to

begin with. That this particular issue – *viz*, *proof of damage* – usually receives only very brief consideration is not surprising in the least. The process of proving damage is an intensely factual one. The same may be said, to some extent at least, where proving mitigation of loss (or a failure in that regard) is concerned, but, even so, the proof of damage depends *wholly* on the *factual matrix* concerned. In the circumstances, it is impossible to lay down any *general* rules or principles as to what constitutes adequate proof of damage since the *particular* factual circumstances can take, literally, a myriad of forms.

28 The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* continues as follows (at para 8|002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks* [[1911] 2 KB 786], the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss*. [emphasis added]

29 In this regard, we find that the following observations by Fletcher Moulton LJ in the English Court of Appeal decision of *Chaplin v Hicks* [1911] 2 KB 786 ("*Chaplin*") (at 793–795) are also instructive:

> Mr. McCardie [counsel for the defendant] does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with *mathematical accuracy*. …
>
> … I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.
>
> [emphasis added]

30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is possible, for example, where the plaintiff's claim is for loss of earnings or expenses already incurred (*ie*, expenses incurred between the time of accrual of the cause of action and the time of trial), or for the difference between the contract price and a clearly established market price. On the other hand, there will be instances where such certainty is impossible, for example, where the loss suffered by the plaintiff is non-pecuniary in nature, or is prospective pecuniary loss such as loss of prospective earnings or loss of profits (see generally *McGregor on Damages* at paras 8|003–8|064). The correct approach that a court should adopt is perhaps best

summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:

> [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

This is in fact the approach that this court has adopted (see *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR 351 at [17]–[19], where both *Chaplin* and *Biggin* were cited with approval and the above observation by Devlin J emphasised by this court).

31 To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed. Reverting to the facts of the present case, the issue of proof boils down essentially to this: On the facts of this case, has RQI adduced sufficient evidence to prove that it had suffered damage inasmuch as it had incurred additional interest?

(2) Has RQI proved its loss?

32 It bears repeating here that the damage that RQI claimed that it had suffered as a result of the delay in the completion of the Project consisted of additional interest incurred – *ie*, interest that it had become liable to pay in respect of the Loans for the period of delay, which interest it would not have had to pay (so RQI contended) had the Project been completed on schedule (see above at [17]). The claim for such additional interest was in fact a claim for the *actual interest incurred and paid* by RQI during the period of delay. In this regard, RQI adduced copies of statements from UOB, payment vouchers and receipts evidencing the interest that it had incurred and paid during the period of delay *vis-à-vis* the Loans. Evidence was also given by Mr Chieng Leong Kwong, a certified public accountant tasked by RQI to conduct an audit of a statement of costs prepared by RQI in relation to the Project for the period of delay, that the statement of costs (which included the figures of $279,363.82 and $215,859.84 for the interest incurred on the Shareholder Loans and the Bank Loans, respectively, during the period of delay) "presented fairly, in all material respects, the costs incurred by [RQI] for the period 1 September 1999 to 10 December 1999 [*viz*, the period of delay]".[note: 2]

33 However, all this evidence merely established the *quantum* of the alleged damage, but not the fact that the alleged damage was indeed (and *in fact*) suffered by RQI *as a result of the delay caused by the respondents*. To prove the latter, RQI argued, in the proceedings below, that as the Loans had been obtained to finance the Project, the interest incurred on the Loans during the period of delay had to be capitalised as part of the costs of constructing the Hotel, and that RQI had therefore suffered a loss as the overall costs of the Project had gone up. RQI repeatedly emphasised that Jacob, the chartered accountant who was the respondents' expert witness, had accepted in cross-examination that the interest incurred on the Loans had been rightly capitalised. Much weight was in fact placed by the AR on this aspect of Jacob's evidence in arriving at her decision that the interest paid on the Loans during the period of delay was recoverable (see above at [20]). With respect, however, like the Judge, we are unable to see how the *accounting practice* of *interest capitalisation per se* can prove that RQI had indeed incurred the additional interest and had, as a result, suffered damage. We note that if the Project had been completed on time but interest on the Loans had remained payable (assuming that the Loans or part thereof still remained unpaid at that particular point in time), the interest incurred on the Loans after the Project's completion would have been treated as an *expense* during the period in which it was incurred and would not have been capitalised as part of the costs of constructing the Hotel (see FRS 23 at [18] *supra*); in other words,

such interest *would not* have been treated as increasing RQI's construction *costs*. The change in label of the interest incurred from "expense" to "cost" does not change the fact or the substance that that same amount of interest might still have been incurred by RQI even if the Project had been completed on time.

34 Before this court, RQI clarified that capitalisation was merely a way of illustrating or presenting the loss which it had suffered as a result of the additional interest paid over a period of delay. The real basis of its claim for the additional interest was that if the Project had been completed on time, RQI would have generated income from the operations of the Hotel and the resultant income would have been utilised to make early repayment of the Loans, such that RQI would not have become liable to pay the additional interest in question ("RQI's analysis"). Therefore, RQI submitted that the 101 days of delay caused by the respondents' mistake had a direct effect on its ability to repay the Loans. This point was stated in the written case which RQI had filed for this appeal[note: 3] as follows:

> All things being equal, the [L]oans would be paid 101 days later, and incur 101 days [of] additional interest. The loan interest incurred over the 101 days of delay represents the best quantifiable proxy for the actual loss suffered by [RQI].

35 We see the attractiveness of RQI's analysis as set out in the preceding paragraph, and it does, at first blush, appear to be technically sound. Indeed, that analysis appears to be buttressed by the fact that RQI produced bank statements, payment vouchers and receipts, all of which evidenced the interest incurred and paid over the period of delay. However, to accept RQI's analysis in its entirety would be tantamount to saying that in every project to construct property to be used for income generation (referred to hereafter as a "construction project" for ease of exposition), where a delay in completion has been caused by, for example, the architect and/or the engineer, the owner of the property ("the owner") would necessarily be able to recover interest paid for the period of the delay ("the extended construction period") on loans taken out to finance the construction project ("construction loans") so long as the owner can adduce evidence of the *quantum* (*only*) of the interest paid during such period, *without having to do anything more*. This would literally mean that whenever a delay in completion has occurred in a construction project, the responsible party would have to bear the *full* interest incurred during the extended construction period on construction loans, *regardless of the circumstances*. Most commercial construction projects today are inevitably financed by third party construction loans, and, for highly costly construction projects, it is not difficult to imagine that the periodic interest payments for such loans could be substantial. To adopt RQI's analysis (*without more*) would inevitably have grave ramifications for the liability of construction professionals in Singapore and, in the circumstances, therefore, such an analysis would have to be legally justified before it can be endorsed judicially.

36 We are of the view, in fact, that in a case such as the present, *more* has to be done by the owner to *prove* the loss suffered in terms of the interest incurred on construction loans during the extended construction period. What would amount to sufficient proof would depend on the circumstances of each case and it is not possible to lay down a general rule (see also [27] above). The only guideline, as noted above (at [30]–[31]), is that the owner must adduce before the court *the most cogent evidence of loss available in the given circumstances*. Unfortunately, we do not think that RQI adduced the most cogent evidence of loss in the present case, and we are of the view that it could have done *more* in the given circumstances. Let us elaborate.

37 Firstly, we note that the evidence before this court showed *only* that the *Bank* Loans were taken out for the purpose of financing the Project; this was *not*, however, the case in so far as the *Shareholder* Loans were concerned. Clause 3 of the Facility Agreement stated clearly that the

purpose of the Bank Loans was to finance the Project:

> **3. PURPOSE OF FACILITIES**
>
> Subject to the terms and conditions of this Agreement and the Securities, and unless [UOB] agrees to otherwise upon the request of [RQI], *[RQI] shall utilise the Facilities towards financing the Project Cost for the construction of the Project* [defined in cl 1.1 of the Facility Agreement as the development of the Hotel].
>
> [emphasis added]

In contrast, the loan agreements for the Shareholder Loans were not produced by RQI. Mr Chou also admitted at the hearing before this court that there was no evidence to show that those loans (or part thereof) had been utilised to finance the Project. Without any such evidence, we cannot see how RQI's claim for the interest incurred on the Shareholder Loans during the period of delay can possibly succeed, given that those loans may very well have been utilised for other purposes that had no relationship whatsoever with the Project. We note that the AR found that "[Jacob had] *accepted that the interest on the shareholder loans attributable* [*sic*] *to the construction of the [Hotel]*" [emphasis added] (see [11] of the AR's grounds of decision reproduced at [20] above). This would seem to suggest that there was, at least, evidence from Jacob that the Shareholder Loans had been utilised for the Project, such that the interest incurred on those loans was directly attributable to the Project. With respect, we are afraid that we are unable to agree with this view. In his expert report on, *inter alia*, RQI's capitalisation of the interest incurred during the period of delay as part of the costs of constructing the Hotel, Jacob had commented on the Shareholder Loans as follows:[note: 4]

> From the documents made available, *we are unable to determine if the interest on the loans from shareholders and related parties are directly attributable to the construction of the [Hotel]*. [emphasis added]

The same view was expressed by Jacob during his cross-examination by Mr Chua at the AD hearing, as follows:[note: 5]

Q: Page 8 affidavit first paragraph – you have no issue as far as the [B]ank [L]oans are concerned, you are satisfied that the [B]ank [L]oans are directly attributable?

A: From the documents, it would appear that the [B]ank [L]oans and [the] [O]verdraft were used in the construction of the [H]otel.

Q: You are satisfied that they are properly capitalized?

A: Yes.

Q: *As far as the [S]hareholder [L]oans are concerned, you are saying that you cannot tell for sure*.

A: *Yes*.

[emphasis added]

Given the lack of evidence as to what the Shareholder Loans were utilised for, it is not possible for this court to attribute the interest incurred on the Shareholder Loans during the period of delay as a loss suffered by RQI as a result of the delay caused by the respondents' mistake. On this point alone,

RQI's claim for such interest cannot succeed.

38 Where the Bank Loans are concerned, although those loans were taken out for the purpose of financing the Project, it appears that the Overdraft was also utilised to *pay the interest incurred on the Shareholder Loans*. In particular, Jacob, in his expert report, made the following observation:[note: 6]

> *We note [that] the interest payments to the shareholders and related parties have been made from [RQI's] bank overdraft account* [*ie*, the Overdraft] … *The payment of interest to shareholders and related parties from this bank overdraft account has the effect of increasing the bank overdraft balance*. The interest payable on the bank overdraft account is 6% (prime rate of 5.5% plus 0.5% in accordance with [the Facility Agreement]). *Accordingly, there will be an increase in the overdraft interest that has to be paid by [RQI]*. [emphasis added]

Given (as we have demonstrated above) that the Shareholder Loans were not taken out for the purpose of financing the Project, it would naturally follow that the interest incurred on the Overdraft as a result of using that credit facility to service the Shareholder Loans cannot be recovered as well, as such interest is, strictly speaking, not a loss suffered by RQI as a result of the delay caused by the respondents' mistake.

39 Secondly, the main difficulty with RQI's case both in the court below and before this court, in so far as proof of actual damage was concerned, is this: RQI's case was based on an *automatic shift* from the *premise* that the respondents were *responsible for* the *delay* in the completion of *the Project* to the *necessary conclusion* that the respondents were *therefore also responsible for the additional interest incurred as a result of the delay*. *However*, this shift is *not* a *necessary or an automatic* one. In particular, such a conclusion could *only* be arrived at *if* it is proved, to the satisfaction of this court, that there is a *factual link* between the delay in the Project's completion on the one hand and the additional interest in question on the other. As noted briefly at [33] above, the *mere fact* of payment by RQI of the amount of additional interest *without more* is *insufficient*, *in and of itself*, to fix liability on the respondents. There are, in fact, *other* scenarios in which RQI might have had to pay additional interest *even in the absence of any contractual breach* on the part of the respondents in the first instance. For example, as mentioned earlier (at [33]), the respondents could have completed the Project on time (in which case there would, of course, have been *no* breach of contract by the respondents), but, *for whatever reason*, RQI might have had to continue paying interest on the Loans even after the scheduled completion date. In the circumstances of the present appeal, therefore, a plaintiff in RQI's shoes would need to *go further* and prove that, had the Project been completed on time, full (or, more likely, partial) repayment of the Loans would have been made *using the income generated from the Hotel's operations*. Such proof would establish the *necessary link* between the breach of contract (as evidenced by the *late* completion of the Project) and the loss alleged by RQI (*ie*, additional interest incurred during the period of delay). This, *in turn*, entails RQI adducing (concrete) evidence of *how* repayment of the Loans was to have been made upon the timely completion of the Project. In other words, RQI *cannot* simply *assert* that the Loans would have been repaid upon the completion of the Project using income generated from the Hotel's operations and that the late completion of the Project thus resulted in it incurring additional interest. Instead, RQI must prove the existence of *an actual system* of repaying the Loans using income generated from the Hotel that would lead the court to the logical conclusion that such repayment would, *in fact*, have been made upon the completion of the Project.

40 Alternatively, RQI could recover additional interest if it could demonstrate that, as a result of the delay, the interest rates on the Loans had increased, and/or it had to borrow *further* sums of money to finance the Project or extend the existing period of the Loans (which would, in turn, entail

additional interest payments by RQI; see also [44] below). However, none of these situations was in fact present on the facts of the instant appeal.

41 Returning to the specific issue *vis-à-vis evidence* of the method of repaying the Loans in the present case, we note, *right at the outset*, that Ngo did not, in his AEIC, mention that RQI had intended to repay the Loans using income generated from the operations of the Hotel subsequent to its completion; he merely averred that RQI had suffered a loss as the interest incurred during the period of delay had to be capitalised as part of the construction costs of the Hotel, thus increasing the overall costs of the Project. Further (as mentioned above at [16]) , we note that, in respect of the Term Loan, the repayment date was 9 May 2002, which was more than two years down the road from the original (and scheduled) date of completion of the Project (which was 1 September 1999). As for the Shareholder Loans and the Overdraft, there were no specific repayment dates (although the Overdraft was repayable on demand). Since none of these loans was contractually repayable upon the timely completion of the Project, it did not appear likely that RQI would have repaid the Loans in full by that point. In other words, even if the Project had been completed on time, the Loans (or part thereof, at least) would still have remained unpaid as at the original completion date, such that RQI would still have incurred interest on the Loans for the period after 1 September 1999.

42 The only evidence that RQI intended to use income from the Hotel's operations to repay the Loans, if any, would be cl 9.2(b) of the Facility Agreement, which stated that RQI could prepay the principal amounts owing under the Term Loan without having to pay the contractual prepayment fee of 0.25% of the amount prepaid "if the prepayment [was] effected with moneys generated from the operations of the [H]otel and/or the Rental Proceeds of [the commercial units adjoining the Hotel]". However, this clause merely demonstrated RQI's intention to repay *the Term Loan (but not the rest of the Loans) using income generated from the Hotel's operations*, and, even in so far as the Term Loan is concerned, the above evidence does not in any way indicate that RQI had intended to make repayment *immediately* upon the completion of the Project (*ie*, RQI might still have incurred interest on the Term Loan after the original completion date even if the Project had been completed on time). Accordingly, no damage can in fact be said to have been suffered by RQI.

43 Even if we were to accept that RQI had indeed intended to repay the Loans (and the interest thereon) upon the timely completion of the Project, RQI has not satisfied us as to the quantum of its actual loss arising from the delay in the Project's completion. Logically, RQI's assertion that the best quantifiable proxy for its loss consisted of the actual interest incurred during the period of delay (see [34] above) would only hold true if RQI would have made *full* repayment of the Loans upon the commencement of the Hotel's operations. It is important, at this juncture to reiterate the *link* that needs to be established between the delay in the completion of the Project on the one hand and the alleged loss suffered by RQI on the other. Hence, on the assumption that RQI had intended to repay the Loans (and the interest thereon) upon the timely completion of the Project, this would entail that RQI must *correspondingly demonstrate* that, *on its timely completion, the Hotel would have instantaneously generated the necessary sums required to repay the Loans in their entirety and the corresponding interest.* Needless to say, to even hope for a successful demonstration to this effect would be highly unrealistic, given that the Loans involved rather large sums, such that it would have been impossible for RQI to generate sufficient income right at the start of the Hotel's operations to repay the Loans in full. In *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, the plaintiff was denied recovery of damages for breach of contractual warranties as it failed to prove the relevance of the quantum of damages which it was claiming. The facts of the case were complex, but, in essence, the defendant sold to the plaintiff a business which turned out to be less profitable than what the former had warranted. The amount claimed as damages by the plaintiff was calculated by applying a profits/earnings ratio to the difference between the warranted profit and the actual profit. The English Court of Appeal rejected this quantification on the ground,

inter alia, that such a method of assessing the loss would result in an "absurd conclusion" (at [35]) and observed as follows (*ibid*):

> [I]n the context of a sale where the assets were valued at £70 m. and the goodwill at £20 m. *[the plaintiff's] method of assessing the loss would result in an absurd conclusion*. The reduction in the 1990 profit was 17 per cent.; the Business was still profitable and there is no question of the value of the assets being affected because the Business was not viable as a going concern. It would be extraordinary if a reduction in profit for one year of 17 per cent. could produce a reduction of 80 per cent. in the value of the goodwill. [emphasis added]

Likewise, in the present case, the method of quantification put forward by RQI would lead to the absurd conclusion that RQI could magically generate sufficient income to repay the Loans in full right at the outset of the Hotel's operations (see also [48] below).

(3) Scenarios in which additional interest might be recoverable

44 We pause to observe (leaving aside the question of remoteness for the time being (see [84]–[93] below for the discussion of remoteness in respect of additional interest)) that the situation in the present appeal is *quite different* from that in cases where as a result of a delay in the construction project concerned, there is a clear extension of an existing construction loan that results in additional interest charges which are *equally clearly stated* to be the "price" of such an extension.

45 One such case is the Supreme Court of Virginia decision of *Roanoke Hospital Association v Doyle and Russell, Inc* 214 SE 2d 155 (1975) ("*Roanoke Hospital Association*"), which RQI relied on heavily in its claim for additional interest. In *Roanoke Hospital Association*, the owner brought a claim against its contractor for three types of interest that it had allegedly incurred (under its own fairly complex financial arrangements) as a result of the delay in the completion of a hospital project. One of the types of interest claimed was "added interest costs … during the construction period arising from the *longer term of borrowing* necessitated by the contractor's unexcused delay" [emphasis added] (at 160). The court allowed this particular claim, and the owner recovered that part of the overall interest paid on the construction loan during the extended construction period which was *in excess* of the interest that it would have paid had there been timely completion of the hospital project.

46 A similar case is the Missouri Court of Appeals decision of *Herbert & Brooner Construction Co v Golden* 499 SW 2d 541 (1973) ("*Herbert & Brooner*"). There, the construction loan had matured on 1 November 1969 and the owner had to obtain an extension of the loan to 15 December 1969 as a result of the delay caused by the contractor. The court allowed the owner to recover the extension fee and the interest paid for the extended construction period, given that the precise amounts paid by way of such extension fee and interest were clearly established. The owner was not, however, awarded the full amount of the extension fee and the interest paid. Instead, a sum was deducted from each of these components to reflect the fact that part of the construction loan had been utilised on projects unrelated to the construction project concerned. Thus, the court held at 550–551:

> Golden's [The owner's] interim construction loan for $325,000.00 from General Savings & Loan Association matured on November 1, 1969. On October 30, 1969, because construction was not yet substantially complete Golden obtained a forty-five day extension of the loan to December 15, 1969. General charged a one per-cent fee of $3,250.00 for the extension. …
>
> The extension of the $325,000.00 construction loan on October 30, 1969 ... after [the] plaintiff

> [*ie*, the contractor] had been in default [by] some forty-five days, clearly was made necessary by [the] plaintiff's breach of contract. Golden claims as damages the expense of extension of the loan, $3,250.00 or one per cent of the loan, and $2,883.16 paid in interest on the loan from November 1, 1969 until completion of construction on December 11, 1969. The trial court allowed the full extension fee and $2,549.40 (a sum we are unable to derive from the evidence) as reimbursement for interest paid during that period. *The evidence conclusively shows, however, that $13,000.00 of the loan amount was spent by Golden on projects unrelated to the construction under contract with [the] plaintiff. Golden's damage claim, otherwise proved, must be reduced ratably. Golden is awarded as elements of his recoupment damage $3,120.00 for the extension fee ($3,250.00 less $130.00, or 1% of $13,000.00) and $2,767.83 for interest paid (the $2,883.16 interest payable on the whole loan for that period reduced by $115.33, the amount of interest payable on $13,000.00 for that period)*.
>
> [emphasis added]

The above cited passage also emphasises and buttresses our earlier point (see [37]–[38] above) that only interest incurred on loans *directly related* to the delayed construction project can be recovered as damages.

47 We note that the facts of the present case are quite different from those in *Roanoke Hospital Association* and *Herbert & Brooner* in that RQI did not extend the period of either the Bank Loans or the Shareholder Loans (at least, no evidence was adduced in this respect).

48 As a matter of principle, it seems to us that where there is a delay in a construction project which is financed by bank loans, a loss would be suffered by the owner in the form of additional interest payable on the loans during the extended construction period. Other losses may also occur. The practical issue is one of proof of such loss. For example, if the owner had contracted to sell the property at the date of completion and completion is delayed, there would be no reason why he could not recover the loss arising from, say, the loss of the sale of the property and also the additional interest paid on the loans during the extended construction period. In the present case, RQI developed 76 Robertson Quay for use as a hotel and in fact did use those premises as a hotel. Hence, if RQI had adduced evidence that it would have made a profit from the Hotel's operations had the Project been completed on the original contractual date, there would be no reason why RQI could not recover the loss of profits as well as the additional interest incurred during the period of delay. These would all be direct costs arising from the breach of contract by the respondents and would be recoverable by RQI, subject, as mentioned, to the practical issue of proof.

(4) Our conclusion on the question of proof

49 As emphasised by Fletcher Moulton LJ in *Chaplin* ([29] *supra*), perfect mathematical accuracy for proof of damage is not possible in all cases, and the law does not impose an absolute or impossible standard either. However, in the present appeal, the burden of proof was clearly on RQI to establish the necessary link between the breach by the respondents (in not completing the Project in a timely manner) and its alleged loss in the manner set out above. Mere assertion, without more, that such a link existed is insufficient. Evidence should have been adduced by RQI to show how the Shareholder Loans were attributable to the Project (if this was possible in the first place). Ideally, like the owner in *Roanoke Hospital Association*, RQI should also have calculated the interest which it paid *in excess* of the interest that it would have paid if completion of the Project had taken place on time and if at least partial repayment of the Loans had been made. If this was not possible, RQI should have, at the very least, furnished some evidence as to any plausible repayment plans for the Loans, as well as the estimated proceeds from the Hotel's operations (or other income or funds) that were available for

such repayment, so that it would perhaps then be possible for this court to arrive at some form of quantification of the interest incurred by RQI during the period of delay (but only with respect to the Term Loan and that part of the Overdraft used to finance the Hotel's construction (see [37]–[38] above)). Unfortunately, no such evidence was forthcoming from RQI. On the *contrary*, what evidence there was demonstrated, in fact, that the Hotel was not profitable during its first nine months of operation (*cf* also [43] above). We are therefore of the view that RQI has not proved its damage. We cannot help but feel that RQI's analysis was an afterthought which was put forward after the fallacy of relying upon the concept of capitalisation was exposed by the Judge in the court below. Perhaps, the misplaced reliance on this concept lured RQI into the (erroneous) belief that as long as it could adduce bank statements, payment vouchers and receipts showing the actual amount of interest paid on the Loans during the period of delay, it would have satisfied the requirement of proof. This, however, as we have demonstrated, was insufficient in the present circumstances. These documents show, at most, the *quantum* that had been paid as interest, but *not* the fact that such payment had been made *as a result of the delay in the completion of the Project*.

The issue of remoteness of damage

50 Given our conclusion on the question of proof, it follows that RQI's claim for additional interest must fail, and we do not, strictly speaking, need to consider the next legal hurdle that RQI would have had to cross, *viz*, to demonstrate that its claim under this head is not too remote. However, for completeness, and in the light of the fact that both parties have made substantial arguments on the issue of remoteness as well as the fact that the question of whether interest incurred on construction loans is recoverable in law as damages is before the local courts for the first time, we thought it would be appropriate to consider the question of remoteness as well. There is another reason why clarification of the law relating to remoteness of damage in contract law is appropriate here: There has been a relatively recent New Zealand decision as well as some academic literature which have sought to cast doubt upon – and even advocate the abrogation of – one of the most well-established decisions in the history of the common law of contract in general and of remoteness of damages in contract in particular, *viz*, *Hadley* ([10] *supra*). We therefore take this opportunity to clarify the position in the Singapore context.

51 To prove that the interest RQI incurred was not too remote to be recoverable as damages, Mr Chou cited various textbooks and cases to support RQI's contention that such loss was recoverable under the first limb of *Hadley*. Before this court, Mr Chou admitted that there appeared to be little case law concerning the assessment of the owner's loss arising from delay in construction projects where the rule of remoteness laid down in *Hadley* applied, as most construction contracts contained liquidated damages clauses to cover the contingency of delay. However, Mr Chou submitted that the loss of the nature suffered by RQI in this case (*viz*, additional interest) had been recognised as legally recoverable in various building and construction textbooks. Before we examine the authorities cited by RQI, we turn, first, to consider the applicable law governing remoteness of damages in contract.

(1) The applicable law

52 In many common law jurisdictions, the rule governing remoteness of damage in contract continues to be that laid down by Alderson B in the much celebrated (and seminal) decision of *Hadley* ([10] *supra*), the material part of which reads as followsat 354–355; 151) (hereafter referred to as "the rule in *Hadley*"):

> 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]

53 Indeed, the leading Commonwealth textbooks bear testimony to the fact that *Hadley* is still very much a part of the legal landscape in so far as the law relating to remoteness in contract is concerned: see, for example, M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) at pp 751–763; Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at pp 965–974; *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) in vol 1 at paras 26‖045–26‖056; J W Carter & D J Harland, *Contract Law in Australia* (Butterworths, 4th Ed, 2002) at paras 2123–2128; N C Seddon & M P Ellinghaus, *Cheshire and Fifoot's Law of Contract – Eighth Australian Edition* (LexisNexis Butterworths, 2002) at para 23.36; John Burrows, Jeremy Finn & Stephen Todd, *Law of Contract in New Zealand* (LexisNexis, 3rd Ed, 2007) ("*Burrows, Finn & Todd*") at pp 687–692; and G H L Fridman, *The Law of Contract in Canada* (Carswell, 4th Ed, 1999) ("*Fridman*") at pp 752–757. Indeed, in the last-mentioned work, Prof Fridman observed (at p 753) that "[t]he principles stated in this case [*viz*, *Hadley*] have long been accepted by the courts in Canada". It is true that there have been suggestions that *Hadley* may need to be revisited (see, for example, S M Waddams, *The Law of Contracts* (Canada Law Book Inc, 5th Ed, 2005) at paras 731–739), but there has been no suggestion (with the exception of one particular decision and, not surprisingly, some academic literature (considered at [62]–[66] and [67]–[69] *infra*, respectively)) that it no longer represents the prevailing law. Indeed, even the noted *American* legal scholar, Prof Grant Gilmore, has, in his classic study, *The Death of Contract* (Ohio State University Press, reprint, 1995), observed (at p 92) that "*Hadley v. Baxendale* is still, and presumably always will be, a fixed star in the jurisprudential firmament". To be sure, there may be at least one aspect of the rule in *Hadley* which may engender some difficulty, but the fact that a legal rule or principle is not perfect is not something which is unexpected. The larger issue is whether or not that particular legal rule or principle continues, *on balance*, to be both theoretically coherent *as well as* practically functional.

54 The rule in *Hadley* was laid down more than 150 years ago. In the circumstances, some elaboration and refinement are not unexpected. Indeed, the rule was reformulated, most notably, by Asquith LJ in the leading English Court of Appeal decision of *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 ("*Victoria Laundry*"), where, delivering the decision of the court, the learned lord justice observed, as follows (at 539–540):

(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 … 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,

(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.

(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.

(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.

(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. …

(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 … 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.

[emphasis added]

The learned lord justice's restatement, as quoted above, is widely regarded as the classic modern exposition of the rule in *Hadley*. Indeed, Prof Fridman observed thus (see *Fridman* at p 753):

Almost a hundred years later [after the decision in *Hadley*], in a judgment *that was, and still is accepted by courts in England and Canada as authoritative (despite some comments that were made later by the House of Lords* [in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350] *Asquith L.J. in* Victoria Laundry ... *restated, in a more expanded form, having regard to the decisions in the intervening years, the* Hadley v. Baxendale *principle*. [emphasis added]

55 Turning to the *Singapore* context, there is no doubt that the rule in *Hadley*, as restated by Asquith LJ in *Victoria Laundry* (as set out in the preceding paragraph), represents the law in relation to remoteness of damage in contract. In the Singapore High Court decision of *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202 ("*CHS CPO GmbH*"), for example, a summary of the law in this particular area was furnished, as follows (at [81]–[85]):

8 1 ***It is established law that remoteness of damage under contract law comprises two limbs*** – first, damage flowing "naturally" from the breach of contract and, secondly, "unusual" damage which (by its very definition) does not flow naturally from the breach of contract but, rather, is due to special circumstances. ***These two limbs are in fact to be found in the seminal decision of the (English) Court of Exchequer in*** **Hadley** ***… as helpfully elaborated upon in the English Court of Appeal decision of*** **Victoria Laundry ...** Indeed, in

the latter decision, Asquith LJ (who delivered the judgment of the court) perceptively and helpfully distinguished between *two kinds* of knowledge that must be brought home to the defendant in order that the damage might not be considered to be too remote.

82 The first is *imputed* knowledge. Knowledge is imputed when it is the kind or type of knowledge that everyone, as reasonable people, must be taken to know. Everyone must, as reasonable people, be taken to know of damage which flows "naturally" from a breach of contract. In other words, this category of (imputed) knowledge is linked to the *first* limb referred to in [81] above. What is of vital legal significance is that in so far as such "natural" or "ordinary" damage is concerned, there is *no need* for the plaintiff to prove *actual* knowledge on the part of the defendant: the defendant (in this particular case, the plaintiffs) must be *taken to know* (under the concept of imputed knowledge) that such damage would *ordinarily* ensue as a result of the breach of contract concerned.

83 The second type of knowledge is *actual* knowledge. Not surprisingly, this particular category of knowledge relates to the *second* limb referred to in [81] above. It concerns "special" or "non-natural" damage that results from a breach of contract. A relatively more stringent criterion of knowledge is here required in order that the damage will not be found to be too remote in law. Put simply, the defendant must have had *actual* knowledge of the special circumstances which are outside the usual course of things. These circumstances must be such that, in the event of a breach of contract occurring, loss or damage going *beyond* what would ordinarily result under the first limb (referred to in [81], above, and which, *ex hypothesi*, [is] within the usual course of things) would ensue. In fairness to the defendant, in order for him or her to be fixed with liability for such "special" or "non-natural" damage, he or she must have had *actual* knowledge of the aforementioned special circumstances. In order for such actual knowledge to be brought home, as it were, to the defendant, an objective test is utilised. …

…

85 That the abovementioned principles are part of Singapore law can be seen, for example, from a local decision decided as far back as 1880: see *Yeo Leng Tow & Co v Rautenberg, Schmidt & Co* (1880) 1 Ky 491. There are of course more recent decisions, including the Singapore Court of Appeal decisions of *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1993] 1 SLR 73 and *City Securities Pte Ltd v Associated Management Services Pte Ltd* [1996] 1 SLR 727.

[emphasis added in bold italics]

The above statement of principle was, in fact, endorsed by this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769, where it was held (at [106]) that "the Singapore High Court decision of *CHS CPO GmbH* … reaffirms the fact that the principles established in *Hadley* … continue to be the law in the Singapore context".

56 However, as alluded to above, the rule in *Hadley* (like most common law rules) is not perfect inasmuch as it is not free of all difficulties whatsoever (indeed, this is rarely the case for common law rules). In this regard, the leading House of Lords decision of *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 ("*The Heron II*") is both relevant and instructive.

57 The principal difficulty encountered in *The Heron II* centred on the precise degree of probability required pursuant to the rule in *Hadley*. Put simply, the learned law lords were unable to reach a general consensus on the requisite degree of probability, although they were unanimous in

rejecting the phrase "on the cards" which was utilised by Asquith LJ in *Victoria Laundry* ([54] *supra*). If anything, it would appear that the phrase "liable to result" (see *The Heron II* at, *inter alia*, 399–400 and 410–411) seemed to be most acceptable to their Lordships as describing the degree of probability required. A helpful summary of the various phrases considered by the House can, in fact, be found in the Singapore High Court decision of *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 ("*Tang Kin Hwa*"), as follows (at [44]):

> The dangers and confusion that are engendered by focusing on the form of words as opposed to their substance is nowhere better illustrated than in the search for a proper formulation in so far as the degree of probability with respect to the test for remoteness of damage in contract law is concerned. In particular, the leading House of Lords decision in *Koufos v C Czarnikow Ltd, TheHeron II* [1969] 1 AC 352 ("*TheHeron II*") ought to be referred to. In brief, the law lords utilised a very wide variety of expressions or phrases in their respective attempts to capture what seemed to them to be a proper formulation. Lord Reid preferred the term "not unlikely", whilst rejecting terms such as "liable to result", "a serious possibility" and "a real danger" (see especially at 383 and 388). Lord Morris of Borth-Y-Gest preferred the term "likely or was liable to result" (see at 397). In a similar vein, Lord Hodson preferred the term "liable to result" (see at 410–411), whilst Lord Pearce preferred the terms "a serious possibility" and "a real danger" (see at 414–415). Lord Upjohn, on the other hand, preferred the terms "a real danger" or "a serious possibility" (see at 425). The term "on the cards" was, however, emphatically rejected by the House. There is here a more than passing analogy with the difficulties experienced in the attempt to arrive at a formulation in so far as the test for apparent bias is concerned. However, the semantical complexity as well as at least possible confusion in *The Heron II* itself prompted Lord Denning MR, in the English Court of Appeal decision of *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 to state (at 802) that "I cannot swim in this sea of semantic exercises". At this juncture, one can see the dangers of "semantic hairsplitting" for what they (unfortunately) are.

58 As mentioned in the preceding paragraph, the House in *The Heron II* was critical of the terminology used by Asquith LJ in *Victoria Laundry* (a point which we deal with in more detail later (at [72] below)). Notwithstanding this, however, the House was generally of the view that the learned lord justice's restatement of the rule in *Hadley* was a sound pronouncement of the law. Lord Morris of Borth-y-Gest, for instance, regarded "the illuminating judgment of the Court of Appeal in *Victoria Laundry ...* as a most valuable analysis of the rule [in *Hadley*]" (see *The Heron II* at 399). Lord Pearce was of the view (*id* at 417) that "[t]he language of the judgment in the *Victoria Laundry* case was a justifiable and valuable clarification of the principles which *Hadley …* was intending to express". We are of the view that the overall effect of the decision of the House in *The Heron II* is that expressed by Donaldson J in the English High Court decision of *Aruna Mills Ltd v Dhanrajmal Gobindram* [1968] 1 QB 655 (at 668):

> In the course of the speeches in the *Czarnikow* case [*ie*, *The Heron II*] their Lordships expressed varying degrees of enthusiasm for the *Victoria Laundry* case; but, *subject to two possible qualifications, it seems to me to remain unimpaired as the classic authority on the topic*. These two qualifications are as follows. First, reference in the judgment in the *Victoria Laundry* case to a loss being "reasonably foreseeable" should perhaps be taken as referring to the loss having been within "actual or assumed contemplation" (see the speech of Lord Reid). Second, the phrase "liable to result" is not correctly paraphrased by the use of the expression "on the cards," but conveys the relevant shade of likelihood by its own wording (Lord Hodson) or when defined (as it was in proposition (6) in the *Victoria Laundry* case) as indicating that a loss is a "serious possibility" or "real danger" (see Lord Pearce and Lord Upjohn), words which amongst others had the approval of Lord Morris of Borth-y-Gest. [emphasis added]

Reference may, in this regard, also be made to the observations of Prof Fridman (as reproduced at [54] above).

59 We wish to add here that the criterion of "reasonable contemplation" applies to both limbs of the rule in *Hadley*, although a difference exists between its application with respect to each of the two limbs. For the first limb of *Hadley*, the horizon of contemplation is confined to loss which arises naturally in the usual course of things and which is therefore presumed to have been within the contemplation of the parties. For the second limb of the rule in *Hadley* ("the second limb of *Hadley*"), by reason of the special knowledge possessed by the party who breaches the contract ("the contract-breaker"), the horizon of contemplation is extended to loss that does not arise in the usual course of things (see *The Heron II* at 415–416). We pause to observe, parenthetically, at this juncture, that there might, on occasion at least, be some haziness between these two limbs – a point which, however, does not arise for analysis or decision in the present appeal (for a discussion of this particular point, see the recent House of Lords decision of *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] 3 WLR 354 ("*Sempra Metals*") at [215] (*per* Lord Mance) as well as the (also) House of Lords decision of *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377 ("*Jackson*") at [46]–[49] (*per* Lord Walker of Gestingthorpe)). In relation to this point, there have also been some cases that have commented that the rule in *Hadley* should be treated as a composite whole and viewed as stating a single principle (see, for instance, *per* Christopher Clarke J in *The Achilleas* [2007] 1 Lloyd's Rep 19 at [49] (whose decision was affirmed, but without any apparent discussion of this particular issue, by the English Court of Appeal (see [2007] 2 Lloyd's Rep 555)), as well as *per* Robert Goff J in *The Pegase* [1981] 1 Lloyd's Rep 175 at 182). These cases, however, recognise that the application of the rule in *Hadley depends* on the *degree of knowledge* held by the contract-breaker at the time of the contract (see *The Achilleas* at [51] and *The Pegase* at 182). In the circumstances, it is clear, in our view, that these cases are not suggesting, in any way, anything that is different, in *substance*, from our interpretation of the rule in *Hadley* (as set out at [55] above). On a separate note, there is also the possible ramification of distinguishing between the type and the extent of loss arising from a breach of contract (see, in this regard, the perceptive case note by Demetrios H Hadjihambis, "Remoteness of Damage in Contract" (1978) 41 MLR 483 at 484–485, commenting on one of several issues raised by the somewhat controversial English Court of Appeal decision of *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, where Lord Denning MR also sought to apply the *tortious* rules on remoteness to a *contractual* claim for physical injury or damage (see also the Ontario Court of Appeal decision of *Kienzle v Stringer* (1981) 130 DLR (3d) 272 at 276 (*per* Zuber JA) as well as the English Court of Appeal decision of *Brown v KMR Services Ltd* [1995] 4 All ER 598)).

60 What is significant, however, is that the rule in *Hadley* continues to be endorsed (in, *inter alia*, *Sempra Metals* as well as *Jackson*) as good law. We also wish to state that we do not see the point in embarking on an exegesis of the precise degree of probability required to satisfy the threshold of "reasonable contemplation" as to do so would be to engage in the "semantic hairsplitting" referred to in *Tang Kin Hwa* (([57] *supra*) at [44]). Indeed, the assessment of damages is "not an exact science" to begin with (*per* Lord Upjohn in *The Heron II* at 425). We agree with Sellers LJ's comments in the English Court of Appeal decision of *C Czarnikow v Koufos* [1966] 2 QB 695 (which was the immediate precursor to *The Heron II*) at 722 that:

> The phrases and words of *Hadley* v. *Baxendale* have been hallowed by long user and gain little advantage from the paraphrases or substitutes. The ideas and factors conveyed by the words are clear enough.

61 However, notwithstanding the lengthy and established pedigree of the rule in *Hadley* across Commonwealth jurisdictions in general and in Singapore in particular, it has, as alluded to above, come

under some criticism in recent times. We will briefly consider the various critiques of this rule, if only to demonstrate why they are, in the final analysis, unfounded. We will next proceed to explain why, based on *first principles*, the rule in *Hadley* is undergirded by a firm foundation in logic as well as by justice and fairness. This would, in fact, go a long way in explaining why it has been an established part of the legal landscape for over 150 years.

(2) Criticisms of Hadley

62 Turning, first, to judicial decisions, there has, to the best of our knowledge, been only one major precedent in which the rule in *Hadley* has been subject to significant criticism. We refer, in particular, to the New Zealand Court of Appeal decision of *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 ("*McElroy Milne*"), where the majority of the court expressed serious doubts about the viability of the rule in *Hadley*. We pause here to observe that the decision in *McElroy Milne*, emanating from the jurisdiction as well as the level of court which it did, carries very strong *prima facie* weight. However, as we shall explain below, this particular decision, as it turns out, is an *isolated* one, even in the New Zealand context; but, more of that later. It is appropriate to first examine briefly the various views expressed in *McElroy Milne* itself.

63 In *McElroy Milne*, Hardie Boys J was of the view that the rule in *Hadley* did not deal adequately with the question of remoteness in all situations. The learned judge observed (at 45) as follows:

Alderson B's judgment in *Hadley …* has become *hallowed by age and quotation but must not be regarded as either Holy Writ or statute*. … Reasonable contemplation or reasonable *foresight* will provide a proper and sufficient test in the majority of cases, but there will be those in which that test is *not sufficient, for it does not answer the further question, how likely must the occurrence of the foreseeable eventuality be*. That their Lordships in [*The Heron II*] were unable to agree about that is a sufficient deterrent against my attempting my own exegesis. It is I think better to concentrate on achieving a result that is *just to both plaintiff and defendant, for that is always the ultimate objective.* [emphasis added]

Even more scathing criticisms were made by Cooke P, who went as far as to describe (*McElroy Milne* at 42) the rule in *Hadley* as a mere "ritual incantation". Because of their significance, the learned judge's observations (*id* at 42–43) are now set out in full, as follows:

> ***With regard to contemplation, I must respectfully continue to demur to suggestions that* Hadley *... is a classic authority on remoteness of damages, except in the sense of being a ritual incantation in discussions of the subject.*** … The judgment of Alderson B in that case does draw a distinction that has proved viable between the usual course of things and communicated special circumstances. But beyond that it is contrary to modern law in all jurisdictions of which I have any knowledge, in that it insists that the contract breaker is liable only for "the amount of injury which would ordinarily follow", "which would arise generally, and in the great majority of cases not affected by any special circumstances" …
>
> It seems clear beyond argument that in modern law, whether the case is one of ordinary circumstances or special circumstances of which the defendant had notice, it is rarely if ever necessary for the plaintiff to prove that the damages were such as *would* arise in *most* cases of that kind. Something less, reasonably to be contemplated ***or foreseen***, is commonly enough. ***Precisely how the test in contract should be formulated, and whether there is any true difference in this respect between negligence in breach of contract and negligence in breach of a tort duty, remains obscure. As is well known, the House of Lords in [*The**

Heron II*] was not able to achieve precision in English law. In this field it [*ie*, the answer to the questions just posed] has never been certain. Even [though] the suggestion that liability is less extensive in contract than in tort carries the authority of Lord Reid* ([*The Heron II* at] pp 385-386)***it is not unquestionably convincing*.** No reason is apparent why a party who has undertaken by contract a duty of care to another should ipso facto be less at risk as to damages than one on whom a duty is imposed by the general law.

[emphasis added in bold italics]

64 According to Cooke P, a better approach to remoteness of damage in contract would be a *discretionary* approach based on a consideration of several *factors* (depending on the facts of each case), in which reasonable foresight and/or contemplation would be an important consideration ("the alternative discretionary approach"). The learned judge observed, in this regard, thus (*McElroy Milne* at 43):

> The field [*ie*, the test for remoteness of damage] is a difficult one … and as to principle I do no more than express the opinion, with diffidence, that whatever position, if ascertainable, may for the time being represent English law after the vagaries of nearly a century and a half since *Hadley v Baxendale should not automatically be adopted in New Zealand.* In the result in the [*The Heron II*] speeches the test "not unlikely" perhaps represents the nearest approach to a consensus, although it would apparently mean that *Hadley v Baxendale* was wrongly decided. *It is clear at least that reasonable foresight or contemplation, which appear to be interchangeable terms, [is] always an important consideration. I doubt whether [it is] the only consideration. Factors including directness, "naturalness" as distinct from freak combinations of foreseeable circumstances, even perhaps the magnitude of the claim and the degree of the defendant's culpability, are not necessarily to be ignored in seeking to establish a just balance between the parties*. There have been wide fluctuations in English law, as illustrated not only by *Hadley v Baxendale* and [*The Heron II*] but also by other leading cases such as *Re Polemis and Furness, Withy & Co* [1921] 3 KB 560 and *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, as to which latter case the analysis by Professor Treitel in his *The Law of Contract* (8th ed, 1991) at pp 857-858 repays reading.
>
> There seems to be no reason to suppose either that movement in this matter has ceased in England or that *different jurisdictions* would act usefully by simply trying to replicate the movements as they occur. *In the end it may be best, and may achieve more practical certainty in the New Zealand jurisdiction, to accept that remoteness is a question of fact to be answered after taking into account the range of relevant considerations, among which the degree of foreseeability is usually the most important*.
>
> [emphasis added]

The alternative discretionary approach was in fact advanced, in an extrajudicial context, in an article written by Cooke P some 15 years earlier: see Sir Robin Cooke, "Remoteness of Damages and Judicial Discretion" [1978] CLJ 288 ("Cooke"). In that article, he explained (at 300) the rationale underlying the alternative discretionary approach, as follows:

> An avowed discretionary approach would not necessarily make the law any more certain, in the sense of making the results of cases more predictable. But perhaps it would do something in that direction by reducing distraction and bringing into a more direct light the kind of considerations which tend to sway decisions. It should have the definite advantage of making it easier for a court to do justice without straining to fit the facts into old or new formulae.

65 However, the alternative discretionary approach is, with respect, not without difficulties, and it has been questioned if matters would indeed be improved if, instead of a single familiar criterion, the courts are faced with the task of balancing an indeterminate number of novel considerations of uncertain weight: see Rex Ahdar, "Remoteness, 'Ritual Incantation' and the Future of *Hadley v Baxendale*: Reflections from New Zealand" (1994) 7 JCL 53 ("Ahdar"). In his article, Prof Ahdar points pertinently to the resultant *uncertainty* that would be engendered by the alternative discretionary approach as well as to various difficulties with the specific factors themselves. In this last-mentioned regard, the learned author raised the following important questions of both principle as well as application (at 68):

> Sir Robin has outlined a number of relevant factors both in *McElroy Milne* and his *Cambridge Law Journal* article [*ie*, the article mentioned at [64] *supra*]. How did he arrive at these particular factors? Is there any sort of priority between them? Or are all of equal weight? Should all be canvassed in every case? Do the factors articulated by Sir Robin represent an exhaustive list? The last question is actually answered in *McElroy [Milne]* since the President refers to factors (other than reasonable foresight) as 'including' such and such. Given this we might then ask, what other factors, yet unarticulated, are relevant? Are there perhaps some which ought never to be taken into account?

In a similar vein, it was also observed, a little later in the same article, thus (at 73):

> With respect, it is difficult to see how a discretionary multi-factor test does promote predictability. Precisely how many factors are relevant? Foreseeability plus the other four suggested in *McElroy* [*ie*, the factors in the passage from *McElroy Milne* set out at [64] *supra*]? Those plus the factors mentioned in Sir Robin's article? All the 13 factors examined in the previous section? Even if an exhaustive list was settled upon, there is the formidable issue of priority between them and the weight to be attached to each. Is some sort of 'balance sheet' approach … the correct methodology?
>
> Quite apart from predictability, is judicial decision-making improved in the sense of being more rational? As Bok once argued in a different context [Derek C Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics" (1960) 74 Harv L Rev 266], increasing the complexity of the task by considering all relevant factors may actually detract from the rationality of decisions. Some psychological studies suggest a complicated, multifaceted inquiry may augment the danger of bias or prejudice or decisions being reached on some impressionistic basis.

Finally, Prof Ahdar observed as follows (at 74):

> Strangely, Sir Robin spurned the opportunity to apply his multi-factor test to the facts before him [in *McElroy Milne*]. Ironically, foreseeability alone could be relied upon to dispose of the issue of remoteness, there being 'no factors countervailing against that result' [see *McElroy Milne* at 43]. With respect, the concluding statement seems incorrect. Three of the four factors expressly alluded to in *McElroy Milne* (naturalness, culpability and proportionality) would appear to strongly favour the defendants and outweigh the result, predicated upon foreseeability, given in the plaintiff's favour. Indeed, if one undertakes a thoroughgoing analysis involving the full range of relevant considerations, the correct result looks far from clear.

We find the above reasoning of the learned author to be both logical as well as persuasive. Further, Prof Ahdar also observed (at 60) that "[t]he origins of Sir Robin's multi-criteria discretionary approach might well have something to do with New Zealand's ad hoc codification of contract law in the last couple of decades". If this is so, we are of the view that this is a further reason for Singapore *not* to

adopt the alternative discretionary approach, given that we do not have a similar programme of codification and given that our contract law remains (instead) very much grounded in the common law. We also do not, with respect, share Hardie Boys J's and Cooke P's view in *McElroy Milne* that the test of remoteness in contract and that in tort should be the same and that the existing distinction between the two is unjustified. In fact, we find the reasons proposed for the distinction by Lord Reid, Lord Upjohn and Lord Pearce in *The Heron II* ([56] *supra*), which are reproduced below at [71], persuasive. Briefly put, the learned law lords explained that the test of remoteness in tort is different from that in contract because the *relationship* between the parties to a tort is different from that between the parties to a contract. This is an important – indeed, a fundamental – point, which we will therefore elaborate upon in more detail in the next section of this judgment.

66 Finally, and very significantly, we note that *McElroy Milne* itself has not found favour in New Zealand. As was observed in *CHS CPO GmbH* ([55] *supra*) at [87]:

> It might be noted in passing at this juncture, however, that there is a New Zealand Court of Appeal decision that actually *questions*the viability of *Hadley v Baxendale*itself: see *McElroy Milne* … Nevertheless, the situation in so far as Singapore is concerned is, as we have seen, too well established in so far as the adoption of the rule in *Hadley v Baxendale* is concerned. In any event, *McElroy Milne*has not in fact found favour in New Zealand itself: see, for example, Rex Ahdar, "Remoteness, 'Ritual Incantation' and the Future of *Hadley v Baxendale*: Reflections from New Zealand" (1994) 7 JCL 53 as well as Stephen Todd, "Remedies for breach of contract" in ch 21 of John Burrows, Jeremy Finn & Stephen Todd, *Law of Contract in New Zealand – A Successor to Cheshire & Fifoot's Law of Contract, 8th New Zealand Edition* (LexisNexis, 2nd Ed, 2002) at pp 767–768. The very relevant call to legal autochthony (which has its source in the rich scholarship of the late Prof G W Bartholomew) is nevertheless not a call to departure from the received English law merely for its own sake. Indeed, this is one such situation where departure is not, in my view, justified.

In particular, in the leading New Zealand contract textbook (referred to in the preceding quotation), it has, in fact, been observed thus (*Burrows, Finn & Todd* ([53] *supra*) at p 692):

> [W]e should ask whether it is desirable to replace the reasonable contemplation test of *Hadley v Baxendale* with the kind of *broad and open-ended discretion favoured by Cooke P [*ie*, the alternative discretionary approach]. On this question there are good reasons for proceeding cautiously. The rule [in* Hadley*] is well accepted and applies widely throughout the common law world. It also is a simple yet flexible rule, whereas Cooke P's multi-factor discretionary approach raises a number of questions. These include how the particular factors mentioned were arrived at, whether they differ in weight, whether all factors are to be canvassed in each case, whether other factors should be taken into account and, if so, what they are. In the view of one commentator* [*viz*, Ahdar ([65] *supra*)]*,* Hadley v Baxendale *should not be dismissed as "ritual incantation". On the contrary it represents a rational, efficient and flexible standard on where to draw the line*.
>
> For the time being *Hadley v Baxendale* certainly remains influential with the New Zealand Courts. It clearly is the primary point of reference in any consideration of remoteness issues. However, the application of the principle undoubtedly requires judgment and evaluation. It is not in any sense a mechanical process. Cooke P's views perhaps do not go very much beyond recognising this truth.
>
> [emphasis added]

The position in New Zealand is therefore still premised on the rule in *Hadley*. As such, we do not think it is appropriate for Singapore to depart from the prevailing English law and adopt the alternative discretionary approach advanced by the majority, in particular, by Cooke P in *McElroy Milne*.

67 In addition to the (lone) critique of the rule in *Hadley* in *case law* (*viz*, the decision of the majority in *McElroy Milne*), there has *also* been sporadic *academic* criticism of this rule. Prof Melvin Aron Eisenberg, for example, has argued that neither the "least-cost" theory, the theory of "efficient breach", nor "information-forcing" incentives justify the rule in *Hadley*: see Melvin Aron Eisenberg, "The Principle of *Hadley v. Baxendale*" (1992) 80 Cal L Rev 563 ("Eisenberg") at 581–598. He thus proposed (at 598–611) that the rule in *Hadley* be replaced by a regime of proximate cause, contractual allocation of loss and fair disclosure, which would adjust the standard of foreseeability according to the nature of the interest and the wrong concerned and which would apply that standard at the time of breach. According to Prof Eisenberg, such a new regime would be more in line with present business and economic conditions, and, unlike *Hadley*, would not impose an artificial limit on expectation damages and would not lead to lost profits for plaintiffs. More recently, Prof Andrew Tettenborn has also argued that the traditional approach of the rule in *Hadley*, which pegs remoteness of damage to foreseeability, is difficult to defend on principle: see Andrew Tettenborn, "*Hadley v Baxendale* Foreseeability: a Principle Beyond Its Sell-by Date?" (2007) 23 JCL 120 ("Tettenborn"). Like Cooke P, Prof Tettenborn takes the view that, in practice, liability more often than not depends on something other than foreseeability. However, although this view is not dissimilar in general methodology and approach to that of Cooke P, Prof Tettenborn adopts a somewhat narrower approach compared to the latter. According to him, a better approach would be an "instrumental promises" approach (Tettenborn at 134) based on the parties' agreement and the object of the broken promise whereby (at 135):

> … the availability of so-called consequential damages reflects, not some abstract open-ended commitment to compensate for losses resulting from the fact of breach of contract, but instead the need to allow the plaintiff to capture the particular instrumental benefit or benefits encapsulated in the promise concerned.

68 A closer inspection of the approach adopted by Prof Eisenberg would appear to suggest, at first blush, that it is, in fact, essentially based on the *same criterion* as the rule in *Hadley*, *ie*, foreseeability, although the time to apply the criterion of foreseeability is different. In Prof Eisenberg's own words (see Eisenberg at 598–599), "proximate cause is based on the scope of the risks that were *foreseeable* at the *time of the wrong*" [emphasis added] (*cf* the rule in *Hadley*, where it is the point at which the contract is made) and "the principle of proximate cause … would be a default rule" (*id* at 600). However, it is admitted that his principle of proximate cause is, on closer examination, quite different from the principles enunciated in *Hadley* (the standard of foreseeability required varying according to the nature of the interest invaded and the wrong involved) and is (whilst adhering to the concept of foreseeability) not, in *substance*, dissimilar to the (discretionary) approaches adopted by both Cooke P and Prof Tettenborn. It will thus be seen that Prof Eisenberg's approach is also subject to the difficulties canvassed above (at [65]–[66]). Further, his suggested principle of proximate cause, whilst being a default rule, also allows for contractual allocation of loss, although such contractual allocations are enforceable only if they have been fairly disclosed to the affected party. He also concludes thus ([67] *supra* at 613):

> If adoption of a proximate-cause regime seems too radical to the courts, they should at least follow the trend of the case law and the teaching of *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co*. and reinterpret the principles of *Hadley v. Baxendale* so that it requires only that a loss be *reasonably foreseeable*, not that it be the probable result of the breach. [emphasis added]

His conclusion (as quoted above), especially his suggestion that a loss need only be "reasonably foreseeable" in order to be recoverable, seems to suggest that the rules and principles relating to remoteness in contract should be the same as those in tort, and fails to recognise and give effect to the distinction between contract and tort, which is elaborated upon below (at [71]–[75]).

69 In so far as the approaches advocated by Cooke P and by Prof Tettenborn are concerned, in addition to the difficulties already canvassed above (at [65]–[66]), we note that both authors have admitted that their approaches would probably not make much of a difference to the decision in individual cases, but would have the advantage of making the law on remoteness more principled and would also allow judges to articulate clearly the reasons for allowing the recovery of certain types of damages: see Cooke ([64] *supra*) at 300 and Tettenborn (at 147). We are not certain if it would be prudent for a court to sacrifice certainty for a supposedly more principled regime. The present legal regime based on *Hadley* has served common law jurisdictions well for more than 150 years; a court should therefore think twice before departing from it. In this respect, the following observations by Prof Ahdar are pertinent (see Ahdar ([65] *supra*) at 64):

> Familiarity per se is of course hardly an overwhelming justification for anything. Nevertheless, a rule which has survived [in New Zealand] as long as *Hadley*, relatively unscathed, and which has commended itself to so many judges in different eras, suggests something about its utility. Sir Robin Cooke in *McElroy [Milne]* spoke disparagingly of *Hadley* as being not much more than 'a ritual incantation' on questions of remoteness. But, who is to say that incantation does not have just as useful a role to play in law as it does in religion[?] Perhaps some measure of ritual is inescapable in a legal system which places such emphasis upon tradition, precedent and continuity with the past.
>
> …
>
> In common law jurisdictions other than New Zealand, *Hadley* seems as firmly entrenched as ever. It is regularly applied by overseas courts with hardly a murmur.

Further, the present regime based on *Hadley* is not indefensible in principle. In fact, there is a strong rational basis for its existence. As Prof Atiyah pointed out in his textbook (P S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th Ed, 1995)) at pp 465–466:

> The rule in *Hadley* v. *Baxendale* is not just an arbitrary, if convenient, formula. On the contrary, there is a strong rational basis for holding a defendant liable on the basis of the normal or foreseeable, and not the abnormal and unforeseeable. Indeed, the distinction between the normal and the abnormal, the foreseeable and the unforeseeable, is one which runs right through the law of contract and … underlies the doctrine of frustration, as well as the principles of remoteness of damage. Generally speaking, it is the function of insurance contracts to take care of abnormal and unforeseeable risks, while it is the function of other contracts to take care of normal and foreseeable risks. To justify the principle as simply as possible, the price which the parties have agreed upon as representing the value of the goods or services being bought is calculated in the expectation of things turning out normally and not abnormally, or at all events in accordance with the foreseeable and not the unforeseeable.

Indeed, so important is the argument (in favour of retaining the rule in *Hadley*) from *first principles* that we will deal with it separately in the next section of this judgment.

70 The rule in *Hadley* is not entirely problem-free, as we noted earlier at [54] and [56] above and as the House of Lords decision of *The Heron II* ([56] *supra*) has demonstrated (see above at

[56]–[58]), but it has served as a useful guiding principle for many courts for many years. As we recognised in a recent decision of this court in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at [56], the concept of remoteness of damages 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 (*ibid*):

> … 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* consequences of his default. [emphasis in original]

The nature of such an inquiry necessarily entails an element of discretion, and it may not be wise (or even possible) for a court to pronounce on the precise degree of probability required for "reasonable contemplation" or the exact reasons and/or factors in arriving at a decision on the issue of remoteness. The rule in *Hadley*, as reformulated by Asquith LJ in *Victoria Laundry* ([54] *supra*), is a "flexible policy tool for judges" (*per* Katherine Swinton, "Foreseeability: Where Should the Award of Contract Damages Cease?" in *Studies in Contract Law* (Barry J Reiter and John Swan eds) (Butterworths, 1980), Study 3 at p 63), and we continue to affirm it as good law in Singapore, especially given the argument from first principles (which is set out below at [71]–[83]). Indeed, whilst there have been attempts to locate the origins of the rule in *Hadley* in both the civil law (see A W B Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 LQR 247 at 273–276) as well as in the broader social and economic context prevailing at the time *Hadley* was decided (see Richard Danzig, "Hadley v. Baxendale: A Study in the Industrialization of the Law" (1975) 4 JLS 249 (Prof Danzig, incidentally, disagrees (*ibid* at 257–259) with Simpson's thesis, at least as a *complete* explanation of the origins of the rule in *Hadley*)), these attempts are, with respect, somewhat speculative (see, especially, the admission by Prof Danzig (*id* at 284)) and, more importantly, do not address the more *general* point relating to the rationality and functionality of the rule itself – an important point to which our attention, therefore, now turns.

(3) The rationality and functionality of the rule in Hadley

71 As we have already alluded to earlier (at [65]), the rule in *Hadley* is also important in *distinguishing* between the rules and principles relating to remoteness in the law of contract and those in the law of tort, respectively (see also, generally, John Cartwright, "Remoteness of Damage in Contract and Tort: A Reconsideration" [1996] CLJ 488). This is the *first* main reason (and function) of the rule in *Hadley*. Indeed, if the rule on remoteness in *contract* were reduced to one of reasonable foreseeability (which is the test in tort) only, there would be a confusing conflation between contract and tort. In this regard, the following observations by Lord Reid in *The Heron II* (at 385–386) might be usefully noted:

> *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, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it. *And there is good reason for the difference [between the rule on remoteness in contract and that in tort]. 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, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. 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. [emphasis added]

In a similar vein, Lord Pearce observed thus (*id* at 413–414):

> In the present case … it was suggested in argument that there was or should be one principle of damages for both contract and tort and that guidance for one could be obtained from the other. I do not find such a comparison helpful. *In the case of contract two parties, usually with some knowledge of one another, deliberately undertake mutual duties. They have the opportunity to define clearly in respect of what they shall and shall not be liable.* The law has to say what shall be the boundaries of their liability where this is not expressed, defining that boundary in relation to what has been expressed and implied. *In tort two persons, usually unknown to one another, find that the acts or utterances of one have collided with the rights of the other, and the court has to define what is the liability for the ensuing damage, whether it shall be shared, and how far it extends. If one tries to find a concept of damages which will fit both these different problems there is a danger of distorting the rules to accommodate one or the other and of producing a rule that is satisfactory for neither*. [emphasis added]

Lord Upjohn also observed thus (*id* at 422–423):

> So the claim for damages [in contract] must be the natural consequence of the breach or in the contemplation of both parties. *But in tort a different test has been adopted in expanding the basic law of damages and I cannot accept the argument addressed to your Lordships that they remain the same. The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched.* …
>
> *This difference is very reasonable.* Once an examination of the facts establishes a breach of duty on the part of the tortfeasor, the acts and omissions of the innocent party are irrelevant until the question of contributory negligence comes to be considered. *A tortfeasor may and frequently is a complete stranger to the innocent party* but he is, however fleetingly in many cases, his neighbour for the purposes of the law and bound to act with due regard to his neighbour's rights whomever he may be. If he fails in such duty the law has rightly laid down a more stringent test for the assessment of damages. *But in contract the parties have only to consider the consequences of a breach to the other; it is fair that the assessment of damages should depend on their assumed common knowledge and contemplation and not on a foreseeable but most unlikely consequence.* The parties may moreover agree to limit or exclude liability for damage, or agree on a liquidated sum, or one party can disclose to the other special circumstances which will render a breach especially serious to him. *So the rules as to the assessment of damages have diverged in the two cases, and nowadays the concept[s] of "foreseeability" and "contemplation of the parties" are different concepts in the law.* It is true that as a matter of language there will in many cases be no great difference between foreseeing the possibility of an event happening and contemplating the possibility of that event happening and in some of the cases, from Blackburn J. in *Cory* v. *Thames Ironworks Co.* [(1868) LR 3 QB 181] onwards the word foresee or foreseeable is used in connection with contract *but it is clear that it has really been used in the sense of reasonable contemplation and in my view it is better to use contemplate or contemplation in the case of contract, leaving foresee or foreseeability to the realm of torts.*
>
> [emphasis added]

And, in the recent House of Lords decision of *Sempra Metals* ([59] *supra*), Lord Mance observed, in a similar vein thus (at [216]):

> The *distinction* emphasised by the House in [*The Heron II*] between, on the one hand, what is to be taken as within *contracting parties' reasonable contemplation* and, on the other hand, what may be said to be *reasonably foreseeable for the purpose of a claim for purely tortious damages remains good*. [emphasis added]

72 Indeed, the term "reasonable foreseeability" has long been utilised in the law of *tort*, as evidenced by case law (and, in particular, by the classic Privy Council decision of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388). It was for this reason that the House of Lords in *The Heron II* criticised (at least in a generic fashion (see, for instance, *The Heron II* at 389 *per* Lord Reid)) the use of this term by the English Court of Appeal in *Victoria Laundry* ([54] *supra*) as the latter case was concerned with issues of remoteness of damage in *contract*, and not in tort. That is why, in *The Heron II*, the additional requirement centring on probability was emphasised, although (as we have seen above at [57]), this requirement in turn engendered other difficulties centring on the degree of probability required. Returning to the term "reasonable foreseeability", it is also clear, in the circumstances, that any argument that relies on *different notions* of the concept of "reasonable foreseeability" (in tort and in contract) would merely lead to more confusion, especially from a semantic perspective.

73 Indeed, the terminology adopted in *Hadley* ([10] *supra*) itself is that of "reasonable *contemplation*", as opposed to "reasonable *foreseeability*" (see the passage from *Hadley* reproduced above at [52], as well as *The Heron II* at 422–423 (*per* Lord Upjohn in the extract quoted above at [71])). However, this is only a starting point simply because if the *substance* of "reasonable contemplation" is treated by the courts and lawyers as being *identical* with that of "reasonable foreseeability", we will return to the very legal conflation which the adaptation of the "reasonable contemplation" test sought to avoid in the first instance.

74 Turning, therefore, to the *substance* of the distinction between the above two terms (*viz*, "reasonable contemplation" and "reasonable foreseeability"), it is clear, in our view, that for there to be a meaningful as well as a functional distinction between the rules and principles relating to remoteness in contract and those in tort, respectively, the term or concept of "reasonable contemplation" must reflect clearly both the nature as well as the functions of the law of contract. This brings us to the *second* main (and closely related) reason (and function) for the rule in *Hadley* – that it most appropriately describes the rules relating to remoteness in the *context* of the law of *contract*.

75 The law of contract, put simply, is about *agreement*. It is true that there can be concurrent liability in contract and in tort, but, where there is no such concurrent liability, the law of tort clearly relates to civil wrongs that occur *not* as a result of a *contractual relationship* between the party that has suffered damage and the party that committed the tort(s) in question as such but, rather, *despite* the fact that both have hitherto been strangers to each other. This is a simple – yet profoundly important – starting point, which is also captured by the observations of both Lord Reid and Lord Upjohn in *The Heron II* at 386 and 422, respectively (reproduced above at [71]).

76 If there has, *ex hypothesi*, been agreement between the parties to a contract, it follows that they have already been afforded the opportunity to consider various matters thought to be relevant to their contractual relationship itself. This would, of course, include any matters relating to remedies in general and damages in particular. Indeed, the quintessential illustration of contractual *provision* in this regard is the *liquidated damages clause*, which purports to constitute a genuine pre-estimate of loss that might result from a breach of contract (see also the passage from *The Heron II* at 422 (*per* Lord Upjohn) reproduced above at [71]). In this regard, whether or not a clause which purports to be a liquidated damages clause is truly a clause of that nature or is, instead, unenforceable because it

actually constitutes a penalty is not a topic that concerns us in the present appeal (but, for the classic statement of the applicable principles in this particular area of contractual remedies, see the judgment of Lord Dunedin in the House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 at 86–88).

77 In this appeal, we are concerned with a claim for an *unliquidated* amount of monetary loss. This is the pith and marrow of the concept of *damages*. In such a situation, given that the contracting parties have not fixed in advance in the contract itself the type as well as the amount of monetary loss recoverable (*contra* cases involving liquidated damages clauses), the courts have to formulate rules as to, *inter alia*, what is recoverable and what is too remote to be recoverable.

78 Two important principles feature in this process. First, the courts have to formulate *general rules and principles premised on justice and fairness* which would *apply universally to all contracting parties* (such rules and principles are commonly referred to as "default rules"). In this regard, a *crucial factor* to bear in mind is the fact that the parties concerned, as *contracting* parties, would have *had an opportunity to communicate with each other in advance* (see also *The Heron II* at 386 *per* Lord Reid (reproduced above at [71])). This factor is significant because, although the contracting parties may not have decided to fix in advance the type as well as the quantum of monetary loss recoverable should a breach of contract occur, the fact remains (as just mentioned) *that they had an opportunity to communicate with each other in advance* on, *inter alia*, this particular issue. Second, whatever general rules and principles the court formulates *must not have the result of rewriting the contract for the parties*, as *that* contract constitutes the original bargain entered into by the parties and ought (from the perspective of *sanctity of contract*) to be honoured as far as is possible. All this sets the legal backdrop against which we ought to view the two limbs of the rule in *Hadley* and, as importantly, furnishes us with the rationale as to why these two limbs are not arbitrary formulations, but are, rather, considered statements of law which take into account precisely the legal backdrop as well as the concomitant considerations delineated in this paragraph.

79 It is important to reiterate, by way of *summary*, the points made in the preceding paragraph: *The task of the courts, in the context of remoteness of damage in contract, is to formulate rules and principles that would apply universally to all contracting parties in situations where the contracting parties have not expressly provided, in advance, for what is to happen in the event of a breach of their respective contracts. In doing so, the courts will bear in mind the fact that the contracting parties did have the opportunity to communicate with each other in advance*. *The courts must, however, also be careful to ensure that the rules and principles formulated do not result in a rewriting of the contract in question, which, being the original bargain entered into by the contracting parties, should be honoured so as to ensure that there is sanctity of contract.*

80 Bearing these important considerations in mind, it is now clear why the two limbs set out in *Hadley* are *consistent with* the points set out in the preceding two paragraphs.

81 To elaborate, damage which falls under the *first limb* of *Hadley* (which may be termed *"ordinary" damage* (see *CHS CPO GmbH* ([55] *supra*) at [82]) ought to be *well within* the reasonable contemplation of all of the contracting parties concerned. Since everyone (*including the contracting parties*) must, *as reasonable people*, be taken to know of damage which flows "naturally" (*ibid*) from a breach of contract, the first limb of *Hadley* does *no* violence to the original bargain between the contracting parties who, *ex hypothesi*, have not expressly provided for what is to happen in the event of a breach of their contract. *However*, *if* the contracting parties had thought about this issue, they *would, in all likelihood, have agreed* that the contract-breaker should be liable in damages for all such "*ordinary*" damage. It is therefore neither unjust nor unfair to *impute* knowledge of such damage to them (see above at [55]). Indeed, to argue otherwise would be unjust and absurd as the logical

conclusion of such an argument would be that the contract-breaker would not be liable for any loss at all.

82 Damage which falls under the *second limb* of *Hadley* (*ie*, *"extraordinary" or "non-natural" damage* (*CHS CPO GmbH* at [83])) is *not*, by its *very nature*, within the reasonable contemplation of the contracting parties. In the circumstances, it would be both *unjust and unfair* to *impute* to them knowledge that such damage or loss would arise upon a breach of contract. *However*, *if* the contracting parties, *having had the opportunity to communicate with each other in advance*, had *actual* (as opposed to imputed) knowledge of *the special circumstances* which resulted in the "extraordinary" or "non-natural" damage, then it is *neither* unjust *nor* unfair to hold the contract-breaker liable in damages for such damage. If, *armed with* such *actual* knowledge, the contracting parties do not make express provision in their contract for what is to happen in the event of a breach of that contract resulting in "extraordinary" or "non-natural" damage, *then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage*. As Lord Hope of Craighead put it in *Jackson* ([59] *supra*) at [26]:

> Where knowledge of special circumstances is relied on, the assumption is that the defendant [*ie*, the contract-breaker] undertook to bear any special loss which was referable to those special circumstances. It is assumed too that he had the opportunity to seek to limit his liability under the contract for ordinary losses in the event that he was in breach of it.

83 It will be seen, therefore, that the two limbs of the rule in *Hadley* are wholly consistent with – and, in fact, give effect to – the concept of contract as an *agreement*. And, in doing so, they *simultaneously distinguish* the rules and principles on remoteness in contract from those in tort. Above all, as we have seen, they are just and fair, and constitute the best legal regime available, given the fact that the contracting parties have not, *ex hypothesi*, expressly provided for what is to happen should a breach of their contract occur. It is also important to note, at this juncture, that in the absence of such express contractual provision, the only alternative the courts have is to formulate *universal* rules and principles; the other alternative – that of doing nothing – is clearly untenable and wholly impractical. This is, therefore, yet another – and *fundamental* – reason why the rules and principles enunciated in *Hadley* ought to continue as the applicable law governing remoteness of damage in the law of contract in Singapore.

(4) Whether the additional interest is recoverable as damages in law

84 We now proceed to apply the rule in *Hadley* to the facts of the present case. As mentioned earlier (at [51] above), RQI cited various authorities to show that additional interest incurred as a result of delay in completion of construction works ought to be recoverable by it as damages under the first limb of *Hadley*.

85 RQI referred us to I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 11th Ed, 1995), where the learned author suggests (in vol 1 at para 8-162), in the context of a construction project as set out in the hypothetical scenario in [35] above, that additional "holding" or financial charges incurred due to a delay in the completion of the construction project in question may, in some circumstances, be recoverable as damages by the owner under the first limb of *Hadley*, just like loss of profits:

> In many construction contracts damages resulting from delay in completion will be expressly regulated by liquidated damages provisions. … In the absence of such clauses, the normal *Hadley* v. *Baxendale* rules of remoteness will apply in the assessment of the owner's loss caused by delay in completion.

> The measure of the damage in the event of such delay will be largely governed by the type of project undertaken. … In the case of a development for resale or for disposal on long leases, it will be likely that [the owner's] receipts on his investment will be postponed and, conversely, virtually certain that his financing charges will be extended and increased. It has recently been suggested in New South Wales that loss of profits or rent will not necessarily be recoverable under the first branch of the rule [in *Hadley*] in all commercial projects, and that *increased cost in the form of the additional "holding" or financial charges of the owner during the period of delay are to be preferred as the measure of damage under the first branch of the rule*. By analogy, depending on the payment terms of the construction contract, it will be necessary for the owner to give credit for any reduction in his costs as a result of postponement of the draw-down of his bank or other financing facilities due to the construction delays as against his loss due to postponed receipts on completion, it is submitted. In the case of an ordinary dwelling-house it may not, on the other hand, be evident that it will be let by the owner, and if he wishes to recover loss of profits from letting or from taking in lodgers, for example, he may have to satisfy the requirements of the second branch of the rule in *Hadley* v. *Baxendale* by showing that these prospective earnings had been within the contemplation of the contractor at the time of contracting. However, in the case of factories, shops, flats and other obviously profit-earning projects, the damages for loss of profit are likely to arise under the first branch of the rule, as occurring naturally and in the usual course of things from the breach …
>
> [emphasis added]

RQI also referred us to Keith Pickavance, *Delay and Disruption in Construction Contracts* (LLP, 3rd Ed, 2005), where the learned author similarly takes the view (at para 18.10) that "extended financing costs" are *prima facie* recoverable as damages as follows:

> This section considers those elements of a party's cost make-up which may properly form a head of claim. ***In the event of reimbursable delay to progress, prolongation or disruption, provided the costs can be proved to have been incurred as a result of a developer's cost risk event,*** **prima facie** ***they will be recoverable***. A disrupted, delayed or prolonged construction project can and often does incur excessive costs in four areas, two of which apply to [the contractor] and two to [the developer]:
>
> …
>
> 3. *Direct costs incurred by [the developer]*, including:
>
> (i) loss of the investment value or rent;
>
> (ii) ***extended financing costs***;
>
> (iii) salaries and wages of unproductive staff;
>
> (iv) increased professional fees;
>
> …
>
> [emphasis added in bold italics]

86 In addition, RQI placed reliance on two cases, *viz*, the Supreme Court of Virginia decision of *Roanoke Hospital Association* ([45] *supra*) and the New South Wales decision of *Multiplex*

Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504 ("*Multiplex Constructions*") (the latter decision was referred to by the learned author of *Hudson's Building and Engineering Contracts* as a footnote to the passage (from vol 1 at para 8.162) quoted in the preceding paragraph). As mentioned earlier at [45], in *Roanoke Hospital Association*, the owner claimed, *inter alia*, the additional interest charges incurred over the extended construction period, which charges arose from the longer term of borrowing necessitated by the contractor's delay. Poff J, who delivered the judgment of the court, held that those extended financing costs were direct, and not consequential, damages. His Honour's reasons were as follows (at 160–161):

> We agree with the owner and the trial court that the extended financing costs are direct damages. *Customarily, construction contracts, particularly large contracts, require third-party financing. Ordinarily, delay in completion requires an extension of the term of construction financing. The interest costs incurred and the interest revenue lost during such an extended term are predictable results of the delay and are, therefore, compensable direct damages*. [emphasis added]

87 We note that *Roanoke Hospital Association* has been followed in a number of subsequent cases (in different states) in the United States: see, for example, the Supreme Court of Virginia decision of *Fidelity and Guaranty Insurance Underwriters, Inc v Allied Realty Company, Ltd*384 SE 2d 613 (1989); the Circuit Court of Virginia (Loudoun County) decision of *W M Foley Construction Corp v Bono* 2006 WL 3604785 (Unreported, 12 December 2006; Transcript available on Westlaw) and the Court of Appeals of Arizona decision of *Elar Investments, Inc v Southwest Culvert Co, Inc*676 P 2d 659 (1983). And, substantively the same approach has been adopted in other cases as well: see, for example, *Herbert & Brooner* ([46] *supra*).It is clear to us that in the United States, additional interest incurred as a result of a delay in a construction project is recoverable as *direct* damages (*viz*, damages under the *first* limb of *Hadley*). Reference may also be made, in this particular regard, to Robert F Cushman, Craig M Jacobsen & P J Trimble, *Proving and Pricing Construction Claims* (John Wiley & Sons Inc, 2nd Ed, 1996), where the learned authors opined (at § 12.35) that, in claims by the owner against construction managers, *design professionals*, general contractors and design-builders in respect of construction problems, "[f]inancing-[r]elated [d]amages" are, in principle, recoverable. Significantly, in the same work (at § 13.13), when dealing with the specific topic of the owner's claim for interest incurred due to the late completion of a construction project, the learned authors, in stating that "*added* interest costs that arise from the owner's extended period of borrowing as a result of the delay are [recoverable, and] considered *direct* damages because these interest costs are predictable results of the delay" [emphasis added], cited *Roanoke Hospital Association*. The term "direct" damages in this context refers (as just explained) to "ordinary" loss within the *first* limb of *Hadley*, as opposed to "[i]nterest costs that are attributable to *higher* interest rates during the delay period [which] are generally considered to be *consequential* damages" [emphasis added] (*Proving and Pricing Construction Claims* at § 13.13), "consequential" damages being "extraordinary" loss within the *second* limb of *Hadley*. Yet another work (this time, a local one) expresses a similar view (see Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) at pp 482–483).

88 The second case relied upon by RQI, *Multiplex Constructions*, concerned a project to construct a major city office building at 1 Market Street, Sydney. There was a delay in the completion of the project, and the owner sought to impose liquidated damages on the builder pursuant to a liquidated damages clause in the construction contract. The clause basically required the builder to pay the owner holding costs during the extended construction period and prescribed a certain rate of interest for the determination of the amount of the holding costs. The builder argued that the loss suffered by the owner as a result of the delay was the deprivation of the revenue stream from either the sale or the lease of the building, and not the holding charges incurred, and,

thus, the clause, by focusing upon a completely inappropriate aspect for the measurement or the making of a genuine pre-estimate of damage suffered by the owner, was in effect a penalty clause.

89 In dismissing this argument and upholding the clause, Cole J took the view that for large commercial construction contracts, loss of profits or rental would not necessarily be recoverable under the first limb of *Hadley*. The learned judge was, however, of the opinion that, in respect of the case before him, the particular additional holding costs claimed by the owner did fall within the *first* limb of *Hadley*. He explained that this was because (at 521 of *Multiplex Constructions*):

> In a large modern commercial development, as a result of the uncertainties relating to the timing of any sale or lease, the quantum of any sale price or rental, the extent to which a large modern development comprising multiple tenancies for varying uses can be let, and the uncertainty regarding final terms and conditions of all or any of such leases – all judged or considered at the date of the construction contract some years earlier – it cannot be said, in my view, that at the date of contract mere knowledge of the intended use of such a building results in it being able to be said that the delayed performance by a contractor in achieving practical completion results in delayed receipt of rentals or sale price (neither in concept nor in specific quantum) being damages flowing from such a breach of contract as being "such as may fairly and reasonably be considered either arising naturally, ie, 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 it [*sic*]": *Hadley v Baxendale* (at 354; 151).
>
> Nor do I think that, without more, knowledge of the proposed use of such development satisfies the second rule in *Hadley v Baxendale*. It will be a question for determination in each case whether special circumstances relating to prospective loss were sufficiently drawn to attention to satisfy that rule.
>
> *The parties to the construction contract do, however, know at the date of contract that delay in achieving practical completion will necessarily result in additional holding costs. Such damages in my view fall within the first rule in* Hadley v Baxendale.
>
> [emphasis added]

90 We agree with counsel for the respondents, Mr Morris John, that *Multiplex Constructions* essentially concerned the validity of a liquidated damages clause and does not stand as direct authority that additional interest incurred on construction loans as a result of delays in construction projects is recoverable as direct damages under the first limb of *Hadley*. Nonetheless, this does not mean that we cannot give consideration to Cole J's *dicta*, as cited in the preceding paragraph.

91 In the light of all the authorities cited above, we are of the view that third-party financing of the costs of construction in large, commercial construction projects is inevitable in this day and age, and, accordingly, the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs. Consequently, we do not see why we should not adopt a similar position as that in the United States to reflect this commercial reality, and (consequently) why additional interest incurred in large commercial construction projects as a result of late completion should not, in principle, be recoverable under the *first* limb of *Hadley*. We would add that where decisions from other common law jurisdictions embody reasons and principles that are of *universal* application, they ought to be seriously considered and, where applicable (as in the instant appeal), even followed.

92 In the present case, it is clear beyond peradventure that the Project was a commercial one. RQI did not provide a figure as to the costs of constructing the Hotel, but the fact that the whole development comprised a ten-storey hotel, with basement car parks and adjourning commercial units, indicates that the scale of the Project was anything but small. In these circumstances, the respondents must be imputed with the knowledge that a delay in the completion of the Project would result in RQI incurring additional interest on the Loans, and such additional interest (if proved by RQI in the first place) would be recoverable as damages under the first limb of *Hadley*.

93 Some comments, perhaps, should be made at this juncture to address the concern about opening the floodgates, which was raised at the hearing before this court. We are of the view that the risk of opening the floodgates to claims against construction professionals for additional interest incurred during the extended construction period, although real, is not so substantial as to justify loss of that nature being adjudged as irrecoverable as damages in law. As the decision in *Herbert & Brooner* ([46] *supra*) demonstrates, recovery for such additional interest should be confined strictly to interest incurred on construction loans *directly related* to the construction project in question, and the owner must prove this to the satisfaction of the court. As also demonstrated above (at [46] and [49]), the court will not allow the owner to claim the additional interest concerned if such a claim is not properly quantified to reflect the actual loss in the circumstances. Further, in most instances (especially in claims for negligence), the need to establish a duty of care in the first place or to prove the breach of such a duty would provide a sufficient check against any possible opening of the floodgates. In this respect, we note the following observations by J R Cooke, *Architects, Engineers & The Law* (The Federation Press, 2nd Ed, 1997) at pp 83–84:

> The remedies for breach of contract include, but are not limited to, damages. In tort an award of damages is the only remedy available to an injured party. In the absence of an effective disclaimer … or contractual limitation of liability … there is no limit to the measure of damages which may be applicable, provided the defendant is responsible in tort for the alleged damage …
>
> Such a statement does little to help architects and engineers to assess their potential liability in money terms. Defining the boundaries of responsibility in tort continues to be one of the most difficult tasks for the courts. There are certainly limits on claims that can be brought to recover damages for consequential loss, and economic loss flowing from a negligent act. … *What can be said is that, within the limits in tort and contract as currently defined by the courts, professional advisers are potentially liable for ruinous amounts of damages. … There is at least some recognition by the law that it is in society's interests to maintain a balance between the risks of professional practice and the protection of clients from the consequences of negligence.* …
>
> However, the policy has been to restrict the field of liability, *not to place arbitrary limits on the quantum of damages recoverable within allowable categories*.
>
> [emphasis added]

(5) Our conclusion on the question of remoteness of damage

94 In conclusion, we find that additional interest incurred on construction loans as a result of a delay in the completion of a construction project is not too remote to be recoverable under the *first* limb of *Hadley*. On that basis, in respect of the first issue, we would have allowed the claim by RQI for additional interest *if not for* its failure to prove its loss with regard to the alleged additional interest incurred (see our conclusion on the question of proof at [49] above). Before proceeding to consider the second issue (as set out at [14] above), we would like to make an observation. We note that, in its submissions in the court below and before us, RQI had focused more on the rule in *Hadley* rather

than on the issue of proof of damage. However, we take the opportunity to emphasise that the latter is a prerequisite that must be satisfied before the former can be considered.

The date of commencement of interest on damages

95 The second issue (and also the final one to be dealt with in this appeal) is the date on which interest on the damages awarded to RQI should run.

The decision below

96 At the end of the AD hearing, the AR awarded RQI interest at 6% per annum from the date of issue of the original writ, *ie*, 10 May 2005 (see [10] above). On appeal to the Judge, his Honour ordered the interest to run from the date of service of the SOC, *ie*, 19 September 2005, for the following reasons (see *Robertson Quay* ([1] *supra*) at [10]):

> Finally, in respect of the award of interest at 6%, interest was awarded by the [AR] from the date of the [original] writ to the date of payment. The [original] writ was issued on 10 May 2005, but it was not served until 19 September 2005 by reason of amendments having to be made to it. I am of the view that the [respondents], who were not responsible for the delay in service of the writ [meaning, in this context, the SOC], would thus be ordered to pay the interests [*sic*] only from 19 September 2005.

In the passage cited above, the Judge mentioned that "[t]he [original] writ was issued on 10 May 2005, but it was not served until 19 September 2005". In so far as the latter date is concerned, the Judge was probably referring to the SOC and not the amended writ. RQI has itself confirmed in its written submissions for this appeal that the amended writ was filed on 4 July 2005 and was served on 1 August 2005 and 3 August 2005 on Steen Consultants and Shahbaz respectively, while the SOC was both filed and served on 19 September 2005.

97 RQI submitted to us that the general practice of the Singapore courts was to award interest on damages from the date of the accrual of the loss in question ("the date of accrual of loss"). RQI argued that as the Judge's order focused on the date of the service of the SOC, it was an "unusual order and [ran] counter to the accepted general practices of the Singapore courts".[note: 7] RQI further argued that it was "not even asking for an award of interest from the date of accrual of loss, but merely from the date of the Writ of Summons [*ie*, the original writ]",[note: 8] and that the Judge's order would, in view of the concession which it had made, only prejudice it further. RQI thus submitted that even if this court was not minded to interfere with the Judge's exercise of discretion as to the period for which interest on damages should be awarded, his order should be varied, with the interest to run from 1 August 2005 and 3 August 2005 onwards as against Steen Consultants and Shahbaz respectively (those being the dates on which the amended writ was served on those two parties) rather than from 19 September 2005, which was the date of service of the SOC. The respondents' counter-argument was that the amended writ which was served on them in August 2005 was only a generally indorsed writ, and thus, according to the respondents' written case for this appeal, the respondents:[note: 9]

> … only had full knowledge of [RQI's] claims against them upon service of the [SOC] in [*sic*] 19 September 2005. Only then were they in a position to be said to have kept [RQI] out of pocket of any quantum which this Court may find for [RQI].

The applicable law

98 The starting point of the discussion here is s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the Act"), which provides as follows:

> In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period *between the date when the cause of action arose and the date of the judgment*. [emphasis added]

On a plain reading of the provision, the court has a wide discretion to grant interest for any part of the period between the date when the cause of action arose and the date of judgment.

99 As noted in *MCST No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 at [54], s 12(1) of the Act is *in pari materia* with s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (c 41) (UK) ("the 1934 UK Act"), which has now been superseded by s 15 of the Administration of Justice Act 1982 (c 53) (UK) ("the 1982 UK Act"). In place of s 3(1) of the 1934 UK Act, s 15 of the 1982 UK Act inserted s 35A into the Supreme Court Act 1981 (c 54) (UK) ("the SCA"). Section 35A(1) of the SCA is substantially similar to s 12(1) of the Act, although it is wider in that it provides for interest on sums paid after the commencement of proceedings but before judgment. It reads as follows:

> Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period *between the date when the cause of action arose* and —
>
> (a) in the case of any sum paid before judgment, the date of the payment; and
>
> (b) *in the case of the sum for which judgment is given, the date of the judgment*.
>
> [emphasis added]

In respect of interest on sums for which judgment is given, the provision in s 35A(1) of the SCA is substantially the same as that in s 12(1) of the Act.

100 The learned author of *McGregor on Damages* ([27] *supra*), commenting on the time frame for which interest on damages can be awarded under s 35A of the SCA, observed (at para 15-058):

> Section 35A of the [SCA] allows the High Court … to award interest as damages for *any* part of the period between the date when the cause of action arose and the date of judgment. That this is the *maximum* period for which interest awarded as damages may be given is consonant with general principle, and this period should also govern in any case in which interest may be awarded as damages apart from these Acts. [emphasis added]

The learned author continued (at para 15-063) to elaborate on the time from which interest should run, as follows:

> It is incontrovertible, in the first place, that interest cannot run for any period of time which is anterior to the accrual of the claimant's cause of action. In the second place, it would seem that … in principle interest should commence to run from the moment the cause of action does accrue

in respect of loss which also then accrues, and, *in respect of loss which accrues at a later date falling before the date of judgment, then from such later date*. In very many cases loss and cause of action will accrue simultaneously. [emphasis added]

101 The rationale for the principle (emphasised in the above passage) is illustrated by the decision of the English Court of Appeal in *Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellshaft Austrowaren Gesellschaft mbH* [1993] 2 Lloyd's Rep 1. In that case, the sellers of certain goods were in anticipatory breach of contract. The buyers accepted this breach and subsequently procured substitute goods at a price higher than the contract price. The court held that interest was to run, not from the time when the breach occurred (and, hence, the cause of action accrued), but rather from the (later) time when the buyers were required to make payment for the substitute goods (which took place after the buyers had issued the writ). The court adopted this approach as it was only at the latter point in time that the buyers could be said to be out of pocket, inasmuch as they had paid out more than what they would have paid had the sellers performed the contract.

102 However, it is not necessarily the case that the interest awarded on damages must always run from the date of accrual of loss. The learned author of *McGregor on Damages* commented (at para 15‖067) on the circumstances in which the court may order interest to run from a date later than the date of accrual of loss in the following terms:

> It should not … be forgotten that the period between cause of action and judgment for which interest under statute is awarded lies in the discretion of the court, and *the court may choose to award interest from a date later than that at which the claimant's loss accrued*. The obvious case for such treatment is where there has been *an unjustifiable delay on the part of the claimant in bringing his action to trial* … [emphasis added]

103 All the above-mentioned principles were in fact endorsed by this court in *Friis v Casetech Trading Pte Ltd* [2000] 3 SLR 590 ("*Friis*") at [48]–[49], as follows:

> The trial judge awarded interest on the sum of $929,712.92 and any sum found due under the account of profits from the date of writ [*ie*, 7 July 1998]. *The plaintiffs challenge this exercise of discretion under s 12 of the [Act] on the ground that it is a departure from the general practice of awarding interest from the date of accrual of loss*, that is 31 December 1992, when HSBC called on the DDB's guarantee.
>
> *Although the general rule as contended for by the plaintiffs is indeed established, the principal exception of this rule is unwarranted delay by the plaintiff: McGregor on Damages*, para 658, 668-669. This factor was expressly considered by the learned judge in his judgment (at ¶ 29), where he noted that Friis was content to sit on his claim for five years before taking any action. The plaintiffs have not offered any other reasonable explanation for the delay. Further, an award of interest covering the period from date of writ to date of judgment is not without precedent in such a context, although other methods are more common: see *Metal Box v Currys* [1988] 1 All ER 341.
>
> [emphasis added]

104 With these principles in mind, we turn now to consider the facts of the present appeal.

Whether interest should run from the date of the original writ

105 Essentially, the Judge ordered that the interest on the damages awarded to RQI was to run

from the later date of 19 September 2005 because RQI had delayed the service of the SOC by about two months from the filing of the amended writ on 4 July 2005, and the respondents were not in any way responsible for the delay in the service of the SOC (see *Robertson Quay* ([1] *supra*) at [10]).

106 We note that RQI commenced the originating suit only on 10 May 2005 when it filed the original writ. This was more than five years after its loss accrued (such loss having accrued over the period of delay, *ie*, from 1 September 1999 to 10 December 1999). No reasons were furnished by RQI for this delay. As noted above (at [102]), one scenario in which the courts may depart from the general rule that interest on damages should commence from the date of accrual of loss is where there has been an *unjustifiable delay* on the part of the claimant in bringing his action to trial. Thus, in *Friis*, this court did not disturb the trial judge's order that interest was to run from the date of the writ, given that the claimant "was content to sit on his claim for five years before taking any action" (at [49]) and offered no "reasonable explanation for the delay" (*ibid*). Likewise, in the present case, the general rule can be departed from, given that there was an unwarranted delay by RQI in commencing this action. (In any event, as we noted earlier at [97] above, in the present appeal, RQI is not asking for interest to run from the date of accrual of loss, but for interest to run either from the date of the original writ (*ie*, 10 May 2005), as ordered by the AR, or, alternatively, from 1 August 2005 and 3 August 2005 as against Steen Consultants and Shahbaz respectively, those being the dates on which the amended writ was served on each of these parties.)

107 Indeed, we see no reason to disturb the Judge's decision below. RQI filed the original writ on 10 May 2005, and the amended writ (which added Shahbaz as a defendant) was filed approximately two months later on 4 July 2005. The amended writ was served on Steen Consultants and Shahbaz only on 1 August 2005 and 3 August 2005 respectively. The SOC was then filed and served a further two months (approximately) later on 19 September 2005. RQI did not furnish any reasons to explain or justify all these delays.

108 In these circumstances, we are of the view that, like the trial judge in *Friis*, it was open to the Judge in the present case to exercise his discretion under s 12(1) of the Act (which, as mentioned at [98] above, is a wide one) to order that the interest on the damages awarded to RQI should run only from the date of service of the SOC, *ie*, 19 September 2005. In any event, we note that there is a difference of only slightly more than one month between 1 August 2005 and/or 3 August 2005 on the one hand and 19 September 2005 on the other. Accordingly, we dismiss RQI's appeal on the second issue as well.

Conclusion

109 For the above reasons, we dismiss RQI's appeal with costs, and with the usual consequential orders.

[note: 1]At para 43 of Ngo's AEIC.

[note: 2]See para 5 of Chieng Leong Kwong's AEIC.

[note: 3]The Appellant's Case, at para 4.6.16.

[note: 4]At p 5.

[note: 5]See pp 12–13 of the certified transcript of the notes of evidence of the AD hearing on 14 September 2006.

[note: 6]At p 3.

[note: 7]See the Appellant's Case at para 6.6.

[note: 8]At para 6.5 of the Appellant's Case.

[note: 9]At para 197 of the Respondents' Case.