MFM Restaurants Pte Ltd and another *v* Fish & Co Restaurants Pte Ltd and another appeal [2010] SGCA 36

Case Number	: Civil Appeals Nos 169 and 171 of 2009
Decision Date	: 18 October 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lau Kok Keng and Wendy Low Wei Ling (Rajah & Tann LLP) for the appellants; Tony Yeo Soo Mong and Rozalynne Asmali (Drew & Napier LLC) for the respondent.
Parties	: MFM Restaurants Pte Ltd and another — Fish & Co Restaurants Pte Ltd

Contract

Damages

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 1 SLR 1104.]

18 October 2010 Judgment reserved.

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

Introduction

1 The assessment of damages is almost always of the first importance to plaintiffs (including the plaintiff in the present proceedings). This is only natural given that a plaintiff who has been legally wronged would surely want to know how the wrong (or wrongs) is (or are) to be redressed (often, as is the case here, in monetary terms). It has also commonly been said – quite correctly, in our view – that the assessment of damages is not a mechanistic process. To be sure, there are legal rules and principles which guide the court. However, their *application* is often not an easy process. As we shall see, this is in fact precisely the situation in the present proceedings. There have been clear – and continuing – breaches on the part of the defendants (who are the appellants in both the appeals before us ("the Appellants")). However, the Appellants have sought – most vigorously, in fact – to convince us that, notwithstanding their blatant breaches of contract (and see below at [13]–[17]), the plaintiff's (who is the respondent in both appeals ("the Respondent")) loss is unconnected with such breaches. Indeed, much of the argument before this court was spent on the issue of causation – or, rather, the absence of causation, in so far as the Appellants are concerned.

2 The Appellants also had a fallback argument: if, indeed, their breaches had caused loss to the Respondent, the Respondent (so the argument ran) was nevertheless the main author of its loss. In essence, the thrust of the Appellants' argument is that the Respondent was already suffering from a decline in sales in any event and, hence, is not entitled to seek substantial monetary compensation (in the form of damages) from the Appellants. The Appellants say that the Respondent can (at best) claim only a relatively small amount of damages.

3 There is yet another – albeit more subsidiary – issue. However, even this issue sees the Appellants attempting to argue that damages should be denied to the Respondent. This relates to loss or damage that was allegedly caused to the Respondent *after* the breaches of contract, *viz*, the

post-breach situation. In particular, the Appellants have sought to argue that the loss in *this* particular situation is *too remote*. Although, as just mentioned, this is not one of the main issues in the present appeal, it certainly raises the spectre of a recent House of Lords decision, at least part of which differs (quite radically) in legal orientation from a decision of this court. As the *legal principles* involved are of the first importance for future cases, and the legal conundrum emanates from the highest appellate court in England, we must deal with it in the present appeals – not least because if, in particular, one of the legal propositions made in the House of Lords decision is correct, then the law which has stood for a century and a half (and which has been endorsed by this court) will change (and rather radically at that).

4 The result of all this is a curious compendium of both difficult issues of application as well as a difficult issue of law. In short, both particulars and universals have raised rather thorny questions that we must resolve. What began as a deceptively simple set of legal proceedings has metamorphosed into a rather complex mixture of factual and legal conundrums impacting on the issue of justice and fairness not only for the parties to the present appeals but also (in relation to the legal rules and principles centring on remoteness of damage) for future litigants as well.

5 It is best, in the circumstances, to begin from the beginning – in particular, with the basic factual matrix which constitutes the backdrop against which the various legal issues have arisen.

The factual background

General

6 The present appeals are against the decision made by the High Court Judge ("the Judge") with regard to the assessment of damages in *Fish & Co Restaurants Pte Ltd v MFM Restaurants Pte Ltd and another* [2010] 1 SLR 1104 ("the Judgment").

7 The Respondent is Fish & Co Restaurants Pte Ltd, the owner of a chain of seafood restaurants called "Fish & Co". The original assessment hearing had, in fact, taken place before an Assistant Registrar ("the AR"), whose decision was appealed against by the Respondent and cross-appealed by the Appellants. As we shall see, the Judge allowed the Respondent's appeal and dismissed the cross-appeal by the Appellants. The first appellant is MFM Restaurants Pte Ltd ("the First Appellant"), the owner of another chain of seafood restaurants called "The Manhattan Fish Market" ("MFM") and the second appellant is Dickson Low ("Dickson"), a former employee of the Respondent.

8 As part of his employment contract with the Respondent, Dickson agreed that all confidential information derived during his employment would not be wilfully divulged to outside parties and competitors, and that he would not help to set up restaurants other than for the Respondent during his employment or two years after resigning from the company. Sometime after resigning from the Respondent (around 21 August 2001), Dickson was involved in and helped to set up the First Appellant's business. The first MFM restaurant was opened in Malaysia in 2002 and subsequently more restaurants were opened in Malaysia. Following these events, on 30 March 2004, the Respondent brought proceedings against Dickson for breaching the non-competition obligations in the contract of employment by using and divulging confidential information. The Respondent alleged that Dickson copied Fish & Co's concepts for use in the MFM restaurants. Dickson denied the allegations. However, during the course of the trial, the parties settled and recorded a settlement deed on 27 April 2005 ("the Settlement Deed"). The First Appellant and its Malaysian counterparts were also added as parties to the Settlement Deed, although they were not parties to the suit. The Respondent claimed that it required the First Appellant's inclusion to ensure that both Dickson and the First Appellant were prevented from employing Fish & Co's concepts. This was especially important as it was found out

during the course of trial that the First Appellant was planning to open the first MFM restaurant in Singapore. The relevant sub-clauses in the Settlement Deed for our purposes read as follows: [note: 1]

> **3 Obligations**
>
> The Parties hereby undertake to fulfill the following obligations:
>
> (i) [The Appellants] undertake not to use, in the Manhattan Fish Market Restaurants around the world, within a period of four (4) months from the date of this Deed, serving pans identical and/or similar to those serving pans used in Fish & Co Restaurants.
>
> (ii) [The Appellants] undertake not to use any slogans and/or jingles identical to or confusingly similar to that used by [the Respondent] …
>
> (iii) ...
>
> (iv) [The Appellants] undertake not to use the words and/or phrases more particularly described in Schedule 3 …
>
> (v) [The Appellants] undertake, within a period of three (3) months from this Deed, to use a completely different garlic lemon butter sauce, sauce used in the dish known as "Garlic Lemon Mussels" … (collectively known as "the MFM Sauces") … from the Garlic Lemon Butter Sauce and Lemon Butter Sauces used in Fish & Co Restaurants ("the O.B. Sauces").
>
> ...

The four obligations will be referred to herein as "the Pans undertaking", "the Slogans undertaking", "the Phrases undertaking" and "the Sauces undertaking", respectively. The Respondent claimed that the four undertakings were crucial as they reflected the essence of the Fish & Co concept. The Slogans and Phrases undertakings were to take effect from 27 April 2005, while the Sauces undertaking was to take effect from 27 July 2005, with the Pans undertaking taking effect from 27 August 2005.

9 Subsequently, on 20 May 2005, the First Appellant began operations at Plaza Singapura, which was just 0.28 km away from the Respondent's Fish & Co Glass House outlet situated at Penang Road. The Respondent alleged that despite the undertakings in the Settlement Deed, the Appellants had almost immediately breached cl 3 of the Settlement Deed by:

(a) using the slogan "*One bite and you're hooked*" on its menus (this was one out of the 31 slogans/jingles which the Appellants agreed to refrain from using);

(b) using the phrases "*Garlic Lemon Butter*", "*Lemon Butter*" and "*Creamy Garlic Lemon*" on its website;

(c) failing to use completely different sauces; and

(d) using serving pans which were similar to the serving pans used by Fish & Co. The Respondent alleged that the black pans used by MFM were similar to the pans used by Fish & Co.

10 On 20 September 2005, the Respondent brought proceedings against the Appellants for the above breaches. The Respondent claimed an injunction as well as damages pursuant to the alleged

breaches of the Settlement Deed. The claim was (as mentioned) premised on the breaches of the Settlement Deed, and not for passing off or breach of confidentiality.

11 Around 8 November 2005, MFM discontinued the use of the disputed slogan and phrases.

12 On the first day of trial, *viz*, 27 November 2006, the Appellants agreed to enter into a consent judgment, with damages to be assessed ("the Consent Judgment"). The Appellants also agreed to the terms of an injunction. The relevant portions of the Consent Judgment read as follows: [note: 2]

> 1. By consent, an injunction restraining [the Appellants] … from doing any of the following acts:-
>
> (a) In relation to Clause 3(i) of the Deed, from using in the Manhattan Fish Market Restaurants serving pans identical and/or similar to those serving pans used in the Fish & Co Restaurants with effect from 1 January 2007.
>
> (b) In relation to Clause 3(ii) of the Deed, forthwith from using any slogans and/or jingles which are identical to or confusingly similar to that used by [the Respondent] …
>
> (c) In relation to Clause 3(iv) of the Deed, forthwith from using any of the words and/or phrases more particularly described in **Annex B**…
>
> 2. By consent, in relation to Clause 3(v) of the Deed, an injunction, with effect from 11 January 2007, restraining the [the Appellants] … from using … "the MFM Sauces" …
>
> 3. [The Appellants] have 45 days from the date of this Judgment (i.e. up to Wednesday 10 January 2007) to effect the change in the MFM Sauces under Clause 3(v) of the Deed.
>
> 4. By consent, damages to be assessed … The costs of the assessment are also reserved to the Registrar with liberty for [the Respondent] to rely on Clause 12 of the Deed to ask for costs on an indemnity basis for the assessment.
>
> ...
>
> [emphasis in bold in original]

As may be observed, the terms of the injunction were based on the undertakings in the Settlement Deed, and as prayed for by the Respondent in its statement of claim. Pursuant to the Consent Judgment, MFM stopped using the pans on 28 December 2006. There were some disputes as to whether the Appellants had complied with the Sauces undertaking by January 2007. However, for the purposes of this suit and the assessment of damages, the Respondent has not claimed damages for any breaches which allegedly occurred after January 2007.

The Appellants' conduct

13 Before we proceed further, we would like to note the Appellants' conduct throughout the breach period. We agree with the Judge's view that the breaches were "deliberate" and constituted "flagrant contravention of the [Appellants'] undertakings with a view to their own financial gain or reward" (see the Judgment at [37]).

14 The Respondent alleged that despite the fact that it had sent numerous reminders to the

Appellants to remind them of their legal obligations pursuant to the Settlement Deed, the Appellants did not act on the matter. This left it with little choice but to commence legal proceedings against the Appellants on 20 September 2005. Before us, the Appellants took pains to emphasise that the breaches of the undertakings were not deliberate. The Appellants contended that, having been notified by the Respondent through its solicitor's letter dated 5 July 2005 of the breaches of the Slogans and Phrases undertakings, the Appellants promptly responded and stopped the breaches by the first week of November 2005. We question, however, if it was necessary to take four months for this to be done.

15 Even if we accept that the Appellants acted promptly with regard to the Slogans and Phrases undertakings, the breaches of the Sauces and Pans undertakings presented quite a different situation. In particular, we find that there was a deliberate attempt by the Appellants to disregard the Settlement Deed. The Appellants contended that, to comply with the Sauces undertaking, MFM varied its sauce, for example, by using margarine instead of butter, and by using freshly squeezed bottled lemon instead of lemon concentrate, as well as by varying the quantities of the various ingredients. The Appellants further contended that the reason for the delay in compliance with the relevant terms of the Settlement Deed was due to the parties' inability to agree on who to appoint as a neutral third party taste expert. The Respondent claimed that, as a neutral third party could not be agreed upon, this option was no longer pursued upon the commencement of the suit. It is noted that, pursuant to cl 3(xiii) of the Settlement Deed, parties were at liberty to commence legal proceedings in the event that the identity of the neutral third party was not agreed upon. The Respondent also stated that joint attempts to appoint a court expert after the suit commenced likewise failed. In our view, the inability to jointly appoint a neutral third party (and subsequently a court expert) which both parties could agree upon is hardly a satisfactory reason for breaching the Sauces undertaking given that the Appellants could, if they were minded to do so, have easily lengthened the process by not agreeing to any of the experts proposed by the Respondent.

16 In so far as the Pans undertaking was concerned, the Appellants explained that the Respondent's Fish & Co outlets in Singapore have ceased to use black pans and had changed to stainless steel pans. Therefore, the Appellants were under the impression that it would be able to retain the use of black pans in its restaurants. In fact, even in their submissions before this court, the Appellants sought to assert that, despite entering into the Consent Judgment, they were not admitting to liability for breaching the Pans undertaking, which we found to be odd given that they had agreed for damages to be assessed and did not refute their liabilities for breaching the other three undertakings. In any case, we find the Appellants' explanations to be unconvincing. The issue of the pans had already been raised in the earlier proceedings taken out by the Respondent against Dickson for the alleged breach of his employment contract. Part of the reason for the grace period factored into the Settlement Deed was precisely to accord the Appellants adequate time to comply with the agreement. Further, we find that it was not sufficient that the Appellants used different coloured pans, given that what was more significant (and, indeed, that was what the undertakings in the Settlement Deed were targeted at) was the concept of serving food out of a pan. Indeed, it was not necessary for the Appellants to use identical serving pans before they could be in breach of cl 3(i) of the Settlement Deed, so long as the pans themselves were similar.

17 Further, we note that the Appellants waited till the *first day of trial* before consenting to judgment (and admitting liability). Considering the totality of the evidence, we find that the Appellants had deliberately ignored their undertakings in the Settlement Deed with the intention of profiteering from the breaches. The Appellants also sought to downplay the significance of the undertakings by contending that they were minor, and did not impact on the minds of the consumers. However, if this was so, we question the Appellants' decision to contest the suit so vigorously only to concede liability on the first day of trial.

The assessment of damages before the AR

Introduction

18 Before the AR, the Respondent claimed damages for two time periods. The first was the period between August 2005 and January 2007 ("the Breach Period"), *ie*, when the breaches occurred. The second was the period thereafter ("the Post-Breach Period"), *ie*, when the breaches had ceased but its effects continued to result in losses to the Respondent. However, as noted above, the Slogans and Phrases undertakings were complied with by the first week of November 2005 (*ie*, before January 2007). In the circumstances, therefore, the terms "the Breach Period" and "the Post-Breach Period" are not, strictly speaking, accurate. However, given the way in which the arguments were made as well as for convenience of exposition, we will make reference to these two time periods.

The issue of causation

19 The Respondent alleged that, as a result of the non-compliances with the Settlement Deed, there was no differentiation between MFM and Fish & Co restaurants, resulting in misrepresentation and confusion in the market. Therefore, Fish & Co's sales were affected by the Appellants' breaches. Further, as a result of the non-compliances, MFM had gained an accelerated entry into the market and could therefore gain market share quickly by stealing Fish & Co's market share and sales, thereby diluting the Respondent's goodwill in the Fish & Co concept. Essentially, the Respondent relied on empirical evidence that its profits had been reduced since the inception of MFM to demonstrate that the Appellants' breaches had caused its losses. The Respondent further relied on the English decision of *Draper v Trist and Tristbestos Brake Linings, Ld* (1939) 56 RPC 429, a case involving passing-off, to argue that the innocent party need not adduce evidence of confusion in order to recover substantial damages.

20 The Appellants argued that consenting to judgment did not amount to an admission that any damages were payable upon an assessment, and that, therefore, the burden of proof remained on the Respondent to prove its losses. The Appellants alleged that the Respondent had not discharged its burden of proof. First, the Respondent's Fish & Co restaurants were already making losses before the Breach Period. Second, the Respondent had not adduced evidence, through (for example) a market survey to demonstrate the alleged effects of the Appellants' breaches. Third, the losses suffered by the Respondent subsequent to the Breach Period (*ie*, during the Post-Breach Period) were too remote.

The methodologies employed to estimate the Respondent's loss of profits

21 Each party also appointed its own expert witness to calculate the damages owed by the Appellants to the Respondent. The expert witness for the Respondent, Mr Tony Samuel ("Mr Samuel"), proposed two measures of calculations, which he termed as Methods A and B, respectively. Before describing the basis of both calculations, it must be noted that Mr Samuel's quantification of damages was premised on the assumption that the Respondent did in fact suffer losses during the Breach and Post-Breach Periods as a result of the Appellants' breaches of the Settlement Deed. Mr Samuel's calculations cannot therefore be employed to determine the causation issue, although, to the extent that a trend of loss in profits can be observed, that would be part of the empirical evidence and therefore add credence to the allegation that the Respondent's profits were affected by the Appellants' breaches. For convenience of exposition, the explanation below of Methods A and B will assume that all of the Respondent's lost profits may be attributed to the Appellants' breaches. The actual extent of the Respondent's loss of profits attributable to the Appellants' breaches will be discussed further later.

(1) Method A

22 Method A involved a comparison of the sales figures for Fish & Co restaurants affected by the Appellants' actions with the sales figures of Fish & Co restaurants which were *not* affected by the same actions. Method A assumed that, but for the Appellants' actions, the relative performance of both sets of restaurants would have been consistent during the pre-breach period from February 2004 to August 2005 ("the Pre-Breach Period"), as well as the Breach and Post-Breach Periods. First, Mr Samuel assumed that four of the Respondent's city-based Fish & Co outlets, *viz*, the outlets at Glass House, Bugis Junction, Centrepoint Shopping Centre ("Centrepoint") and Suntec City Mall ("the Affected Restaurants") were affected by the Appellants' actions and that four of its suburban outlets, *viz*, Novena Square, Jurong Point Shopping Centre, Tampines Mall and Parkway Parade ("the Unaffected Restaurants") were not affected. A fifth city outlet at Wheelock Place was not included in the calculations as it only commenced business during the Breach Period. The distances of the Affected Restaurants and Wheelock Place from the First Appellant's MFM restaurant at Plaza Singapura are as follows: [note: 3]

Outlet	**Distance from Plaza Singapura (kilometres)**
Glass House	0.28
Centrepoint	0.62
Bugis Junction	1.16
Suntec City Mall	1.67
Wheelock Place	1.69

23 Mr Samuel then compared the average monthly sales of the Affected Restaurants with the average monthly sales of the Unaffected Restaurants for a period before, and a period after, the MFM restaurant opened. Based on this data, he found that, during the Pre-Breach Period, the sales of the Affected Restaurant exceeded the sales of the Unaffected Restaurants by an average percentage difference of 14.9 per cent. He undertook the same exercise for the Breach Period and derived an average percentage of 3.8 per cent. Based on the assumptions made, Mr Samuel concluded that, but for the Appellants' actions, the average sales of the Affected Restaurants would have continued to exceed the average sales of the Unaffected Restaurants by 14.9 per cent. He then deducted an estimate of the additional costs and expenses that Fish & Co would have had to incur to earn the additional revenue in order to determine lost profits.

24 Employing this methodology, Mr Samuel found that Fish & Co's loss of profits during the Breach Period amounted to $553,100.12. As for the quantification of *post*-breach losses, Method A was utilised by multiplying an estimated average loss per month by half the number of months it was assumed that MFM would have benefitted. The reason half the number of months were used in this last mentioned regard was to factor in a tapering decrease in influence of the breaches, *ie*, that the further removed from the time the breaches occurred, the less their influence on Fish & Co's sales.

(2) Method B

25 Method B assumed that part of the revenue earned by MFM was a result of the Appellants' breaches and sought to calculate Fish & Co's loss of profits by multiplying the revenue earned by MFM

as a result of the breaches by the profit margin that Fish & Co would have made on that revenue. Mr Samuel first calculated the variable profit margin of Fish & Co, that is, the proportion of its revenue which Fish & Co earns as profits (taking into account the cost of food and other variable expenses). He then made another assumption that a certain proportion of the revenue earned by MFM was attributable to the breaches. However, he was unable to determine the exact proportion of MFM's revenue that was attributable to the breaches, and thus he assumed and utilised a range of 10–50 per cent. The profit margin was then applied to this range of percentages (of MFM's revenue attributable to the breaches) to derive a range of loss of profits for Fish & Co.

26 Employing this methodology, Mr Samuel found that the variable profit margin was 52.38 per cent, excluding rent adjustments. In other words, if, as found by Mr Samuel, MFM's actual sales during the Breach Period amounted to $3,007,500, this would have translated to $697,400 of lost profits for Fish & Co (with rent adjustments), assuming that 50 per cent of MFM's revenue was attributable to the breaches and that all the revenue earned by MFM would have been earned by Fish & Co. [note: 4] In so far as the Post-Breach Period was concerned, this was again calculated by multiplying an estimated average loss per month by half the effective number of months it was assumed that MFM would benefit, and Fish & Co would (correspondingly) suffer from the breaches.

(3) Mr Sajjad Ahmad Akhtar's report

27 The Appellants' expert report was presented by Mr Sajjad Ahmad Akhtar ("Mr Akhtar"). He compared the sales for the month for each of the Respondent's Fish & Co outlets with the corresponding sales for the month in the previous year. He opined that, if the Appellants' breaches had affected Fish & Co's sales, a pattern showing a steady growth trend in sales during the Pre-Breach Period, a decline during the Breach Period, followed by a rise after the Breach Period would have been seen. As this was not present, Mr Akhtar concluded that the breaches had no significant financial impact on Fish & Co's sales performance.

(4) The AR's decision on methodology

28 With respect to the issue of causation, the AR found, firstly, that the type of damages sought by the Respondent were not too remote, and were in the reasonable contemplation of the parties as constituting the result of the breaches at the time the Settlement Deed was entered into. Secondly, he found that the only outlet affected by the Appellants' breaches was the Glass House outlet. This was based on the Respondent's witnesses' own evidence that cannibalisation was minimal as each outlet occupied a different market segment and that such factors were considered before the decision was taken to open a new outlet. Thus, the First Appellant's MFM outlet at Plaza Singapura would only have affected the Respondent's Fish & Co outlet within the same market segment, *viz*, the Glass House outlet.

29 In so far as the question of quantification of damages was concerned, the AR also found that it would be more appropriate to adopt *Method A* as it centred on the losses to Fish & Co, as opposed to *Method B* which centred on the profits of MFM. Secondly, taking a commonsense approach, and emphasising, in particular, the significance of Fish & Co's "Seafood in a Pan" concept but taking into account MFM as genuine competition independent of the breaches, the AR held that it would be just to attribute 60 per cent of the losses caused to the Respondent by the breaches of the Appellants. Thirdly, the Respondent would also be entitled to damages based on a period of 12 months after the breaches had stopped as 12 months was a reasonable time for the public to realise that the breaches had ceased and that MFM restaurants were distinct from Fish & Co restaurants.

30 In the circumstances, the AR ordered that Method A be utilised, *albeit using new parameters*

(this will be referred to as *Method C* in this judgment). In other words, Method C employed the methodology in Method A, but changed its assumptions. Under Method C, Glass House would be the only outlet affected, and its sales were to be compared with the other three city-based outlets, *viz*, the outlets at Bugis Junction, Centrepoint and Suntec City Mall, which were unaffected by the breaches ("the New Unaffected Restaurants").

(5) Method C

31 Mr Samuel was of the view that Method C was unsafe. This was because, whereas in his earlier calculations (under Method A), the performance of the (original four) Unaffected Restaurants was fairly consistent, with the new parameters, the performance of one outlet (Centrepoint) was clearly not aligned with that of the (other) New Unaffected Restaurants. He was therefore of the view that the Centrepoint outlet appeared to be affected by events which did not affect the other two outlets and, therefore, its inclusion in the equation would distort the calculation of loss, unless it could be determined whether the unexplained event or events were equally relevant to Glass House. He also observed that the decline in the performances of the Suntec City Mall and Bugis Junction outlets in the five months up to January 2007 needed to be explained, as they contributed substantially to the overall average results of the restaurants during the Breach Period. Therefore, he was of the view that it would be unsafe to use Method C.

32 Based on Mr Akhtar's calculations, in eight of the 18 months during the Breach Period, Glass House in fact derived more revenue than the revenue it estimated that it would obtain had there been no breach. Offsetting the gains from the losses, Mr Akhtar was of the opinion that, on the basis that 60 per cent of Fish & Co's loss of revenue was attributable to MFM, the Respondent should be awarded $14,060.

33 Mr Samuel, on the other hand, was of the view that Mr Akhtar's calculations demonstrated precisely why Method C was unsafe, since it would be illogical that in eight of the 18 months, Glass House performed better than it was predicted to have performed without MFM's presence, given the finding that the Appellants' breaches had caused loss to Fish & Co.

The AR's final decision

34 The AR relied on Mr Akhtar's calculations in arriving at his final decision in respect of the application of Method C to the fact situation before him. However, he was of the view that it was not necessary to set off the gains made from the losses, as, under contract law, the plaintiff was entitled to damages arising from a breach but need not pay over its profits. Therefore, the AR awarded a total sum of $72,688 to the Respondent. The AR further awarded costs on an indemnity basis based on the agreement between the parties under the Settlement Deed. As the Respondent reasonably supposed that damages awarded would be within the High Court's jurisdiction, the AR awarded such costs based on the High Court scale.

The appeals against the AR's decision

35 The Appellants appealed against the whole of the AR's decision. Just as they had earlier contended before the AR, the Appellants argued that there was no evidence of loss suffered by the Respondent as a result of their breaches. They further submitted that the Respondent (and the AR) wrongly applied passing-off arguments to the present claim, which was based, instead, on a breach of contract.

36 The Respondent cross-appealed on the ground that the damages awarded by the AR were too

low. It contended that the AR should have applied Method A with the original parameters unchanged; that the proportion of the Respondent's loss of profits attributable to the Appellants' breaches should be at least 80 per cent (as opposed to 60 per cent); and that the Post-Breach Period should be increased to between 18 and 24 months (as opposed to 12 months as held by the AR).

The Judge's decision

37 The Judge agreed that passing-off principles should not be employed in a breach of contract case. Nevertheless, on the issue of causation, the Judge held that actual loss as a result of the Appellants' breaches could properly be inferred from the evidence. First, the undertakings in the Settlement Deed were closely related to the business operations of Fish & Co, and, hence, the loss of business was the best evidence of loss. Secondly, the breaches continued for 18 months despite the Respondent's demands that the Appellants desist. Thirdly, MFM's performance as a new entrant in the market was exceedingly good. Fourthly, there had been no cannibalisation of Fish & Co's profits by the opening of its outlets in close proximity to each other. Fifthly, Glass House was the only affected outlet. Sixthly, MFM's arrival had a negative impact on the Glass House outlet. During the Breach Period, Fish & Co's average monthly sales were 6.6 per cent below those during the prior 18 month period. Further, Glass House's sales statistics were significantly underperforming in relation to the industry average, based on the Department of Statistics Catering Trade Index. Seventhly, losses during the Breach and Post-Breach Periods were reasonably contemplated to be the likely consequences of the breaches.

38 On the issue of quantum, the Judge agreed with Mr Samuel that Method C distorted the methodology of Method A. Therefore, she chose to base her quantification of damages on *Method B*. She found that the most crucial and relevant information were the sales figures. She agreed that it would be unsafe to award Fish & Co's loss of profits based on all of MFM's sales during the Breach Period, but that it would be logical to infer that if the Appellants had not committed the breaches, Fish & Co's sales would at least be in line with industry's trend (which was 12 per cent based on the monthly sales percentage year on year change at current prices during that period according to the Department of Statistics Press Releases (see below at [44])). In fact, Glass House's monthly sales percentage during the Breach Period was -4 per cent. Therefore, there was a 16 per cent gap between Glass House's sales and the industry average and, for Glass House's sales to be in line with that industry, its sales would have to be increased by 16 per cent. In the circumstances, she awarded damages based on 16 per cent of MFM's sales during the Breach Period. As for the Post-Breach Period loss of profits, the Judge held that it was within the reasonable contemplation of the parties that the effect of the Appellants' breaches would continue after the breaches had stopped. However, the Judge reduced the Post-Breach Period from 12 to 6 months.

39 Based on the above reasoning, the Judge awarded a total of $269,000 damages to the Respondent. The Appellants appealed against the Judge's decision in both the Registrar's Appeals.

The parties' arguments in the present appeals

General

40 We now come to the present appeals. The Appellants appealed on the ground that the Judge erred in establishing causation by inferences from the relevant evidence. First, they contended that the fact that Fish & Co was already making losses before the Breach Period shows that its alleged losses during the Breach Period were not caused by MFM. For this proposition, the Appellants highlighted the fact that, although the restaurant trade had improved by 4.6 per cent in 2004 relative to 2003, Glass House's performance was worse by 5.76 per cent (see [44] below for the

2008 statistics published by the Department of Statistics for the restaurant industry in Singapore ("the 2008 Statistics")). Therefore, Fish & Co had already been underperforming in relation to the industry average before the breaches, and, in fact, performed better during the Breach Period when its percentage of sales improved from -5.76 per cent to -4 per cent. Secondly, they contended that the fact that losses continued to be experienced by Fish & Co after the breaches had ceased indicated the lack of causation, since there had to be causes other than the Appellants' breaches that were generating those losses. Thirdly, they contended that the Respondent had not proven its losses during the Breach Period. In particular, there was no independent survey or witnesses called by the Respondent to prove its claim for damages. Therefore, they contended that the Respondent had not discharged its burden of proof.

41 The Respondent, on the other hand, contended that assessment of damages is not an exact science and that the courts adopt a common sense approach. Therefore, there was no need for market surveys and the Judge had correctly inferred that Fish & Co had suffered losses due to the Appellants' breaches based on the factors which she had set out. In so far as the allegation that Fish & Co was already making losses before the Breach Period was concerned, the Respondent contended that the Appellants had misread the statistics, and that, in fact, Fish & Co's management accounts showed that Glass House was reducing its losses during the Pre-Breach Period by 2.69 per cent annually. Thus, if this upward trend continued, Glass House would have performed with almost no losses by January 2006. However, this was derailed with the opening of MFM in May 2005.

42 In the alternative, the Appellants contended that the Judge had erred in her quantification of damages. The Appellants argued that the AR was correct to use the revised Method A (*ie*, Method C); that Method B was akin to an account of profits; and that even if Method B was correct, the Judge failed to take into account the fact that, prior to the Breach Period, Fish & Co was already performing below the industry average.

43 In response to the (alternative) arguments made by the Appellants in the preceding paragraph, the Respondent contended that the Judge had correctly rejected Method C on the basis that the new parameters distorted the calculations; that the Judge correctly applied the percentage of 16 per cent to Method B, which was a loss-based approach and not an account of profits; and that the 2008 Statistics ought not to be admitted into evidence, and, in any event, had been misapplied by the Appellants.

The 2008 Statistics

44 In so far as the background to the 2008 Statistics was concerned, the Department of Statistics Press Releases for the months from October 2004 to January 2007 were admitted into evidence before the AR during the assessment of damages hearing. These Monthly Press Releases provided information on the monthly average sales performance of the restaurant industry in Singapore, relative to those during the same month in the year before.

45 Another trade index was published in August 2008, *ie*, the 2008 Statistics, during the course of the appeals before the High Court which took place over a number of hearings between 15 July 2008 and 18 February 2009. This recorded the performance of the restaurant industry in Singapore based on average sales. For the period prior to August 2007, the percentages were calculated based on changes in annual sales. On 24 February 2009, the Appellants sought to admit this as evidence. The Appellants attempted to rely on it to demonstrate that for the year 2004 relative to 2003 (*ie*, before the breaches), although the restaurant trade had improved by 4.6 per cent, the performance of Glass House was worse (by -5.76 per cent). The Appellants contended that the reason for the late submission of the 2008 Statistics was because the Respondent's counsel had informed the Judge

(during the hearing on 19 February 2009) that such statistics were not available. What actually transpired, however, is unclear as it was not recorded in the relevant notes of evidence.

46 The Respondent contended that grave prejudice would be caused to it if the evidence was allowed to be adduced at that late stage. It argued that, as a consequence of the late submission, it did not have the opportunity to respond to it during the trial itself. Further, the Appellants did not file a summons and apply for leave to adduce fresh evidence. Even if they did, the Respondent would have argued that the Appellants had failed to prove that the evidence could not have been obtained with reasonable diligence. The Respondent contended that the onus fell on the Appellants to check if the 2008 Statistics were available if they had wanted to rely on it.

47 The Judge found that, in order to have an acceptable and meaningful comparison to demonstrate a real decline during the Pre-Breach Period, regard must be given to comparing like periods. However, the Judge felt that this was not possible because Fish & Co's sales performances were measured in 18 month tranches whereas the 2008 Statistics were based on calendar years. The Judge also took on board the Respondent's objections to the late submission of fresh evidence. She thus disregarded the 2008 Statistics.

48 We find that the industry averages provided limited assistance to either party, given the wide disparity in the types of restaurants which were accounted for in these trade statistics. We therefore find that it is not necessary to rely on either the 2008 Statistics or the Monthly Press Releases.

The issue of causation

49 The difficulty we faced in the present proceedings was establishing the extent to which the Appellants' breaches caused loss to the Respondent, given the many factors, for example, legitimate competition from Fish & Co's rivals such as MFM, cannibalisation of sales by other Fish & Co outlets (although this particular factor is somewhat negated by the finding that Glass House served a different market segment from the other Fish & Co outlets), and the quality of food and service – all of which could have affected Fish & Co's sales apart from the Appellants' breaches. Further, we agree with the Appellants that, for the purposes of establishing a link between the breaches and the damage, the Appellants' conduct, the fact that loss of profits was a reasonably foreseeable consequence of the breaches, as well as the fact that MFM made financial gains were not relevant. As noted earlier, we also did not find it safe to rely on industry-wide statistics.

50 Nevertheless, we accept that MFM's entrance in the market (which was aided by the Appellants' breaches) would have caused *some* loss to Fish & Co. We disagree with the Appellants' submissions regarding the significance of Fish & Co's performance during the Pre-Breach Period on the ground that, even if Fish & Co's performance during the Pre-Breach Period was not optimal, this did not mean that it could not have done better during the Breach Period but for the Appellants' failure to observe the terms of the Settlement Deed.

51 Further, given the close proximity between Glass House and the MFM outlet in Plaza Singapura, as well as the similarities between MFM and Fish & Co, it was reasonable that the business attracted by MFM was partly drawn from Fish & Co's potential clientele. Indeed, before us, counsel for the Appellants accepted that some loss was caused to Fish & Co as a result of the opening of MFM. Although he qualified his opinion by stating that the loss of sales by Fish & Co had nothing to do with the breaches of the Settlement Deed, we find it difficult to distinguish strictly between the Appellants' breaches of the Settlement Deed and MFM's entrance in the market as a legitimate competitor, given the fact that the former aided the latter. If the Appellants did not think that it stood to gain from the breaches, it would not have infringed the terms of the Settlement Deed in the

first place. Clearly, the inference to be made is that the breaches resulted in a financial benefit to the Appellants. Although the fact that the Appellants made financial gains was irrelevant to establishing the issue of causation, in the context of the present proceedings, where there are two similar rivals in the same market, we find that the financial gains made by one could reasonably be translated as losses to the other. In the circumstances therefore, we find that the Respondent had discharged its burden of proving that the breaches of the Settlement Deed resulted in its losses. The more pertinent legal issue, in our view, is the quantum of damages that ought to be awarded to the Respondent – an issue to which our attention now turns.

The issue of quantification

Some preliminary observations

52 It should be noted that the present appeals centre on the issue of damages to be awarded in a purely contractual context. No arguments were made in relation to the award of punitive damages or the award of damages pursuant to the principles laid down in the seminal House of Lords decision in *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 ("*Blake*"). This is perhaps understandable in light of the fact that both these areas of the law of damages are still – to put it mildly – in a state of flux.

53 The first, in particular, is especially controversial. Although there is an arguable case, in principle, for the award of punitive damages in contract law (see, for example, Ralph Cunnington, "Should punitive damages be part of the judicial arsenal in contract cases?" (2006) 26 Legal Studies 369 ("*Cunnington*") and Pey-Woan Lee, "Contract Damages, Corrective Justice and Punishment" (2007) 70 MLR 887; though *cf* Solène Rowan, "Reflections on the Introduction of Punitive Damages for Breach of Contract" (2010) 30 OJLS 495), the case law is itself inconclusive (see, for example, Andrew Phang and Pey-Woan Lee, "Restitutionary and Exemplary Damages Revisited" (2003) 19 JCL 1 at pp 21–31 and *Cunnington* at pp 389–393). This is not surprising in view of the radical as well as draconian nature of punitive damages themselves. The position in Singapore is, not surprisingly, still an open one. In the Singapore High Court decision of *CHS CPO GmbH (in bankruptcy) and another v Vikas Goel and others* [2005] 3 SLR(R) 202, it was observed thus (at [65]–[66]):

> 65 ... Indeed, the rather limited circumstances under which exemplary damages will be granted under English (and, presumably, Singapore) law appears to be in a state of transition, even flux (compare, for example, the House of Lords decisions of *Rookes v Barnard* [1964] AC 1129 and *Cassell & Co Ltd v Broome* [1972] AC 1027 on the one hand with both the House of Lords decision of *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 and the New Zealand Privy Council decision of *A v Bottrill* [2003] 1 AC 449 on the other; further reference may be made to the English Law Commission's *Report on Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997)).
>
> 66 There is the yet further issue as to whether or not exemplary damages could be awarded for cynical breaches of contract (see generally, for example, the Canadian Supreme Court decision of *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257). All these issues raise important questions of great import but fall outside the purview of the present decision.

54 The second is less controversial, but no less problematic. Indeed, *Blake* itself generated – not surprisingly, perhaps – a learned body of legal literature of a magnitude that has been witnessed only occasionally (in this regard, the account by Prof Graham Virgo in his book, *The Principles of the Law of Restitution* (Oxford University Press, 2nd Ed, 2006) ("*Virgo*"), ch 17 furnishes an exceptionally clear and succinct overview of both the relevant case law as well as legal literature). Put very simply, the

principles set out in *Blake* permit the court to award damages to the plaintiff (in a situation relating to the breach of a contract) on the basis of the gains or profits made by the defendant even though the plaintiff could not otherwise be awarded any damages based on traditional contractual principles (for example, because there has been no difference in value of the contractual subject matter and, hence, no justification for the award of expectation loss). Such damages would, however, be awarded only in *exceptional* cases. This category of damages has sometimes been termed as "restitutionary damages", although the House in *Blake* preferred to classify such an award on the basis of an account of profits.

55 Apart from the various conceptual as well as (as referred to at the end of the preceding paragraph) terminological difficulties, there are (concurrent) practical difficulties as well in so far as the award of damages under the principles set out in *Blake* are concerned. In *Blake*, for example, in the leading judgment of Lord Nicholls of Birkenhead, the statement of principle (at 284–285) does not really furnish concrete guidance as to when the power to award such damages will arise. That the award of such damages is (as already noted in the preceding paragraph) exceptional still leaves the (very practical) issue as to *the criteria* which will enable the court to ascertain whether or not a given fact situation is indeed exceptional. Case law developments since *Blake* (see, for example the English Court of Appeal decision of *Experience Hendrix LLC v PPX Enterprises Inc and another* [2003] 1 All ER (Comm) 830 (noted in Pey-Woan Lee, "Responses to A Breach of Contract" [2003] LMCLQ 301 ("*Lee*"); Martin Graham, "Restitutionary Damages: The Anvil Struck" (2004) 120 LQR 26 ("*Graham*"); and David Campbell and Philip Wylie, "Ain't No Telling (Which Circumstances are Exceptional)" (2003) 62 CLJ 605 ("*Campbell and Wylie*")) have also suggested a *possible alternative* approach that is premised not on a restitutionary basis as such but, rather, on a compensatory one (centring on the much discussed decision by Brightman J in the English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and Others* [1974] 1 WLR 798 ("*Wrotham Park*") (see also Robert J Sharpe and S M Waddams, "Damages for lost opportunity to bargain" (1982) 2 OJLS 290); reference may also be made to the recent Privy Council decision (on appeal from the Court of Appeal of Jersey) of *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* [2010] BLR 73 (especially at [46]–[54])). However, it would appear that the precise contours of this particular head of compensatory loss (as well as its relationship with the established head of expectation loss) have yet to be worked out fully (see, for example, *Virgo* (at pp 490–492) as well as *Lee*; *Graham*; and *Campbell and Wylie*). It might well be a difference of degree rather than kind, at least in so far as the former consists in an attempt to quantify compensatory damages by reference to the defendant's gain (see *Lee* (at pp 302–303) and, by the same author, "A New Model of Contractual Compensation" [2006] LMCLQ 452 at p 453; *cf* also Samuel Stoljar, "Restitutionary Relief for Breach of Contract" (1989) 2 JCL 1 at pp 3–4). To the extent, of course, that both heads are coincident, the head of damages will, in substance, be based on orthodox principles of the common law of contract (which centre on expectation loss).

56 It was probably the case that, in view of the flux demonstrably present in the alternative approaches briefly summarised above, these approaches were not (as already alluded to above at [52]) canvassed by the parties to the present appeals. In the circumstances, we therefore turn, now, to consider the arguments which were in fact canvassed before this court, and which centre on the specific issues relating to both the correct methodology to apply as well as the actual application of that methodology to the facts of the present appeals themselves. We pause to note – parenthetically, however – that the head of compensatory loss mentioned towards the end of the preceding paragraph (centring on *Wrotham Park*) does bear some affinity to the established head of expectation loss under the law of contract inasmuch as both are compensatory in nature. However, as also noted in the preceding paragraph, the precise contours of the former are still in a state of flux. We also pause to note that even if we proceed on the premise that the quantum of damages to be awarded in the present proceedings is related to a breach of confidence, that breach would, in our view, be founded in an action for breach of *contract* (see also *Virgo* (at p 526)). The traditional

remedies would take one of two forms, *viz*, an account of profits or restitutionary damages (see generally *Virgo* (at pp 527–529)). That having been said, it has also been observed that "[s]ometimes compensatory damages may be awarded for breach of the equitable duty of confidence" (see *Virgo* (at p 527)). Indeed, the parties proceeded very much – in substance at least – along these (compensatory) lines. This would therefore be an appropriate juncture to turn to the various methodologies concerned (in the context of the award of damages under orthodox principles of the common law of contract). However, before proceeding to do so, we pause to consider briefly a simple – yet fundamental – principle.

The law on certainty of damages

57 It will be apparent that the principal difficulty which we are faced with in the present appeals is the difficulty of quantifying the Respondent's losses as a result of the Appellants' breaches. This is because of the numerous factors which could potentially affect the reasons for MFM's success, or the reasons for Fish & Co's decline in sales. Given the difficulties in ascertaining with certainty the extent of the Respondent's losses, this court can, as we observe below, only do the best that we can (based on the relevant evidence before us). In this regard, the following observations in the decision of this court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay*") (at [27]–[28] and [30]–[31]) are instructive:

> 27 ... [I]t is fundamental and trite that a plaintiff claiming damages must prove his damage. ... The process of proving damage is an intensely factual one. ... 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.
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> 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]
>
> …
>
> 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. … 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.

…

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. …

[emphasis in original]

58 With these principles in mind, we will now proceed to assess the appropriate quantum of damages awardable to the Respondent as a result of the Appellants' breaches.

Our decision

59 Since the finding that Glass House was the only affected Fish & Co outlet was not disputed by the Respondent in the present proceedings, we will not be revisiting that issue; neither will we be revisiting the issue as to whether Method A ought to be utilised as it is clearly inapplicable to the situation that results from this particular finding.

60 We also agree with the Judge that Method C (which, it will be recalled, was a modified version of Method A) ought not to be utilised. In this regard, we accept the Respondent's expert evidence that the parameters as set out by the AR give rise to illogical results. In particular, the projected revenue of Glass House was below its actual revenue in eight out of the 18 months, which is inconsistent with the finding that the breaches of the Settlement Deed caused losses to the Respondent. This suggests that the New Unaffected Restaurants are affected by external factors and therefore cannot be relied upon to project the estimated profits of the Glass House outlet. Therefore, based on the figures derived from Method C, we would not know how Glass House would have performed if the Appellants had not breached the Settlement Deed.

61 In so far as Method B is concerned, we agree with the Respondent that Method B did not entail a claim for an account of profits. Method B starts with the premise that, had MFM not breached the Settlement Deed, part of MFM's profits would have gone to Fish & Co. Method B translates MFM's sales into what Fish & Co would have earned, taking into account its profits and cost structure. Hence, an application of Method B does not purport to transfer MFM's profits to Fish & Co, but, instead, utilises MFM's sales to estimate Fish & Co's loss of profits. This is essentially still a loss-based approach, and does not relate to an account of profits.

62 Turning to consider Method B itself, unlike Methods A and C, Method B does not involve predicting the Glass House outlet's sales based on the performance of other Fish & Co outlets, thereby eliminating the problem of external factors affecting the performance of the other Fish & Co outlets. On the other hand, we acknowledge that Method B shares similar difficulties as Methods A and C because it also involves an educated guess as to the impact of other factors affecting the performance of both Fish & Co and MFM, for example, the relative quality of food and services. Further, Method B does not consider to what extent Fish & Co had the capacity to absorb MFM's sales. Mr Samuel himself was also unable to determine what proportion of MFM's revenue was attributable to the breaches and simply utilised a range of percentages to calculate a range of loss of profits suffered by Fish & Co (see above at [25]). Therefore, such factors must be taken into account if Method B is employed in the context of the facts of the present appeals. That having been said, and bearing in mind the fact that damages are not ascertained in an abstract vacuum but must *necessarily* involve considering many other factors that ought *not* to be taken into account for the purposes of the assessment of damages but *are simultaneously* present in the context of the entire

factual matrix before the court, *some* educated guesses *have* to be made – *regardless* of the precise methodology ultimately adopted by the court. To state this is merely to acknowledge the very real fact that life is far more complex than simple law school hypotheticals and even textbooks would have us believe. However, that has never prevented the courts from awarding what, in their view, were just and fair sums to plaintiffs if the legal rules and principles justified them. Indeed, as we have acknowledged (realistically) above (at [57]), the court will simply do the best that it can, having regard to all the circumstances before it. This is therefore precisely what we will attempt to do in the context of the present proceedings. However (and running slightly ahead of the story), it will be demonstrated that Method B need *not* be utilised in the context of the present proceedings for reasons which we will now elaborate upon.

63 In our view, the logical starting-point is to examine the *basic premises* upon which the Judge made her award. This is of the first importance simply because a correct set of premises will, *ceteris paribus*, lead to a just and fair assessment of the damages to be awarded. The contrary (and, we would add, undesirable) result would follow from an incorrect set of premises. Returning to the facts of the present proceedings, it is clear, in our view, that the Judge had regard to the following premises. In particular, she was acutely aware of the fact that, of all the Fish & Co outlets, Glass House was the worst in terms of business performance. However, the Judge was *equally* aware of the fact that *sweeping generalisations had to be eschewed*. To this end, she examined closely the *particular* facts surrounding Glass House's performance during the material periods (*viz*, the Post-Breach Period and (especially) the Breach Period). In this regard, the Appellants' argument that Glass House had been facing a situation of declining gross sales during the latter period, whilst *literally* correct, was, with respect, rather misleading. What the Judge was concerned with were not the absolute figures as such but, rather, the *general trend* of these gross sales. Looked at in this light, she must have been of the view (at least implicitly) that *Glass House had reversed the general trend* of declining gross sales prior to the Breach Period. In particular, we note that the Respondent had submitted evidence of such a reversal during the Pre-Breach Period. Instead, during the period between February 2006 and January 2007 (which constituted much of the (actual) Breach Period itself), Fish & Co had suffered further declines.

64 Having established that Fish & Co had arrested the general trend of declining gross sales, the Judge then proceeded to hold that, in so far as the quantum of positive gross sales which Fish & Co would have made (but for the Appellants' breaches) were concerned, it was "logical to infer that if the [Appellants] had not committed the breach, [Fish & Co's] sales would be, *at least*, in line with *the industry's trend of 12 per cent during the [Breach Period]*" [emphasis added] (see the Judgment at [56]). In the circumstances, the Judge held thus (see *id*):

> As the Glass House outlet's monthly sales percentage year on year change at current prices during the breach period is -4%, there is a 16% gap between the former and the industry index. For [Fish & Co] to be in line with the industry, Glass House outlet's sales would have to increase by 16%. Using the methodology of Method B, loss of profits calculation ought to be based on 16% of MFM's sales during the period. In my view, the approach adopted is a rational basis for assessing los[t] profits for it will in some way alleviate the speculative element in the exercise. To award a percentage of sales higher than 16% of MFM's sales would introduce the influence of factors other than the breach that has a bearing on the loss of profits.

65 Although there is great attraction, at first blush, in the approach adopted by the Judge (as briefly described above), we are of the view that there are, with the greatest respect, difficulties with the premises upon which that particular approach rested. This is not surprising for, as we shall see, the available evidence on which to base an award of damages in the present proceedings is far from satisfactory. Not surprisingly, therefore, the Judge could only do the best she could. However,

after reflecting carefully on the entire evidence as viewed in its context, we are of the view that the inclusion of the industry's trend of 12 per cent by the Judge could not be justified on the available evidence. In point of fact, on the Respondent's own evidence as well as statistics, whilst there was a reversal of the general trend of declining gross sales for Glass House, there is no evidence – one way or the other – that demonstrates (on a balance of probabilities) that Glass House would in fact have achieved that level of monthly sales. As noted above, it is axiomatic that any given award of damages must be based on the requisite evidence (which satisfies, *inter alia*, the elements of causation as well).

66 We are also of the view that, whilst it is conceptually possible to base an award of (compensatory) damages in contract law on the profits that have been made by the defendant, this should only be done in exceptional situations. Ideally, though, such an award ought to be based on *the plaintiff's own loss* rather than (as the Judge did in adopting Method B) by *measuring* it by reference to *the defendant's gains or profits*. The specific issue that arises immediately from this is whether or not there exists sufficient evidence for this court to ascertain – as best as it can – *the plaintiff's own loss*. Only in a situation where this was not possible should the court then have recourse to an award of damages by reference to the defendant's gains or profits.

67 Looked at in this light, we are of the view, with respect, that the use of Method B was *not* necessary as there was, in our view, sufficient evidence that would provide this court with an adequate (and reasoned) basis for ascertaining *the plaintiff's (ie, the Respondent's) own loss*. Let us elaborate.

68 Based on the Respondent's own evidence, Glass House had reversed the general trend of declining gross sales (having regard essentially to three data points, *viz*, the gross sales for the period between February 2003 and January 2004, the period between February 2004 and January 2005, and the period between February 2005 and January 2006 [note: 5]), even prior to the Breach Period. More importantly for the purposes of the present appeals, the Respondent submitted that for the period *between February 2006 and January 2007, its predicted or projected percentage change in expected gross sales was -0.38 per cent*. [note: 6] Whilst it is true that three data points are, from a strict statistical perspective, inadequate for predicting a *precise* trend, given the relative dearth of information but accepting (as the Judge did) the fact that there was an upward trend in so far as the actual gross sales by Glass House were concerned (an increase of 2.69 percentage points in the annual rate of change in gross sales [note: 7]), we are prepared to accept this predicted or projected percentage change in expected gross sales (which is nevertheless lower than what the Judge accepted (which included the industry's trend of 12 per cent)). We pause to emphasise, once again, that this court will attempt the best it can, bearing in mind the fact that the assessment of damages is not (in most instances) a precise scientific exercise (see above at [57]). Turning, then, to the period between February 2006 and January 2007, we note that this particular period covers, in fact, much of the Breach Period (two thirds of it, to be precise). The *remaining* period *not* covered would comprise the period *between August 2005 and January 2006* (a total of *six months*) . Returning, however, to the period between February 2006 and January 2007, it is clear that – based on a predicted or projected percentage change of -0.38 per cent – the *predicted or projected gross sales would have totalled $2,803,911.82* (this is based on applying the relevant predicted or projected percentage change (of -0.38 per cent) to the actual gross sales during the *preceding period (between February 2005 and January 2006), which totalled $2,814,607.33* [note: 8]). Given the fact that the *actual* gross sales of Glass House for that same period were *$2,682,173.27*, [note: 9] there is *a difference (in gross sales) of $121,738.55* (*ie*, $2,803,911.82 – $2,682,173.27). However, – and this is a *crucial* question – *what percentage* of this difference would have represented *Glass House's profits*? In this particular regard, we note that although before us the Appellants challenged the

relevance of Method B, they did not challenge Mr Samuel's calculation that the variable profit margin was 52.38 per cent (see above at [26]). In our view, it would not be inappropriate to apply this same profit margin to arrive at *Glass House's predicted or projected profits which were lost as a result of the Appellants' breaches*. Applying, therefore, a profit margin of 52.38 per cent to the sum of $121,738.55, this would give a figure of *$63,766.65 in so far as Glass House's loss of profits were concerned during this particular period* (*viz*, between February 2006 and January 2007) (*ie*, $121,738.55 × 52.38 per cent).

69 However, the period between February 2006 and January 2007 does *not* represent the *entire* Breach Period. What, then, about Glass House's predicted or projected loss of profits during the *remaining period (between August 2005 and January 2006, a total of six months)*? It is not unreasonable, in our view, to assume *the same rate of profits during this last mentioned period as well*. In the circumstances, therefore, the predicted or projected loss of profits between August 2005 and January 2006 (a total period of *six months*) could be estimated to be *half* of the predicted or projected loss of profits for the period between February 2006 and January 2007 (a total period of *twelve months*). This would give us a total of *$31,883.33* (*ie*, $63,766.65 ÷ 2).

7 0 *To summarise, during the Breach Period, the total loss of predicted or expected profits experienced by Glass House would be $95,649.98* (*ie*, $63,766.65 + $31,883.33). This amount would, in our view, represent *the amount of damages the Respondent would be entitled to in respect of the breaches by the Appellants during the Breach Period*.

71 We turn now to consider the issue of the loss suffered by the Respondent during the *Post*-Breach Period in general and whether or not such loss was too *remote* in particular. If, in fact, the loss was not too remote, we would then need to ascertain the requisite *quantum* of damages to be awarded.

The issue of remoteness

The law on remoteness of damage

Introduction

72 The law relating to remoteness of damage in the law of contract was hitherto unique inasmuch as it had – with a few refinements over the years – remained as it was for approximately 150 years in both England as well as in Singapore. Indeed, such a situation of relative stability is rarely to be found, especially given the nature and development of the common law in general and the law of contract in particular. The principles of remoteness of damage, which find their seminal formulation in the statement of principle by Alderson B in the celebrated English decision of *Hadley v Baxendale* (1854) 9 Exch 341; 165 ER 145 ("*Hadley*") (at 354–355 and 151, respectively), were (as just mentioned) refined (albeit without any radical changes) over the next 150 years (see generally the decision of this court in *Robertson Quay* (at [52]–[61]), which also confirmed the applicability of the principles in *Hadley* in so far as Singapore is concerned). For the purposes of this judgment, all subsequent references to *Hadley* (and, in particular, the two limbs set out by Alderson B in that decision) will be taken to include all later refinements as explained in *Robertson Quay* (see generally *id*).

The Achilleas

73 However, a mere four months after the decision of this court in *Robertson Quay* was handed down, the House of Lords handed down its decision in *Transfield Shipping Inc v Mercator Shipping Inc*

[2009] 1 AC 61 ("*The Achilleas*"). As we shall see, Lord Hoffmann introduced, in the latter case, an apparently new legal criterion to the existing law, *viz*, whether or not the defendant concerned had *assumed responsibility* for the loss which had occurred as a result of its breach (and see the important essay (to the same effect) by Adam Kramer, "An Agreement-Centred Approach to Remoteness and Contract Damages" in *Comparative Remedies for Breach of Contract* (Hart Publishing, 2005) (Nili Cohen & Ewan McKendrick eds) ch 12 at p 249 ("*Kramer*"); reference may also be made to the case note on *The Achilleas* by the same author, "The New Test of Remoteness in Contract" (2009) 125 LQR 408 which, not surprisingly perhaps, endorses the approach advocated by Lord Hoffmann in *The Achilleas*).

74 This is the first occasion that this court has had to consider the approach advocated by Lord Hoffmann in *The Achilleas*, although there have been two learned judgments in the Singapore High Court in *Chee Peng Kwan and Another v Toh Swee Hwee Thomas and Others* [2009] SGHC 141 ("*Chee Peng Kwan*") and *Thode Gerd Walter v Mintwell Industry Pte Ltd and others* [2010] SGHC 33 ("*Thode Gerd Walter*"), which have, in fact, considered *The Achilleas*, and which we will have occasion to refer to at appropriate points later in this judgment. Indeed, both these aforementioned judgments noted that this court had not hitherto had the opportunity to consider the approach advocated by Lord Hoffmann in *The Achilleas* (see *Chee Peng Kwan* (at [35]) and *Thode Gerd Walter* (at [71])), and it is therefore appropriate, in our view, to consider this approach in the present proceedings to clarify what the legal position is precisely in the Singapore context. Let us turn now to the facts and holdings in *The Achilleas* itself.

75 In *The Achilleas*, the plaintiff shipowners ("the shipowners") had chartered their vessel to the defendant charterers ("the charterers") at a rate of US$16,750 per day. Redelivery of the vessel was scheduled for 2 May 2004. In April 2004, as the market hire rates had risen dramatically, the shipowners fixed a follow-on time charter with another company ("C") at a rate of US$39,500 per day (with C having the right to cancel the charter if the vessel was not made available by 8 May 2004). As it turned out, the charterer's final voyage was in fact delayed. By 5 May 2004, the shipowners realised that their vessel would not be returned by 8 May 2004. Unfortunately, the market hire rate at that particular point in time had fallen sharply. In order to persuade C to extend the latest delivery date from 8 May 2004 to 11 May 2004, the shipowners had to agree to a reduced rate of hire of $31,500 per day. Significantly, the charterers had not been put on notice of the existence of the shipowners' follow-on charter with C at any time prior to delivery of the vessel.

76 The shipowners claimed damages for breach of contract from the charterers for loss of the difference between the original rate agreed upon between the shipowners and C (of US$39,500 per day) and the reduced rate (of US$31,500 per day) *over the period of the follow-on time charter itself* (which period comprised 191 days). The total amount of damages claimed, therefore, amounted to US$1,364,584.37.

77 In contrast, the charterers argued that the shipowners were entitled only to the difference between the market rate and the charter rate for the period during which the latter were deprived of the use of the vessel (which period comprised 9 days). This amounted to only US$158,301.17.

78 The arbitrators held (by a majority) in favour of the shipowners, finding that the loss fell within the first limb in *Hadley*. They arrived at this decision *notwithstanding* the fact that the understanding of *the shipping industry or market* did *not* consider such loss (*ie*, loss based on the difference between the original and reduced rates as argued by the shipowners) to be recoverable, with liability restricted (as the charterers had argued) to the difference between the market rate and the charter rate for the overrun period. The English Court of Appeal affirmed that decision. However, on appeal, the House of Lords held, instead, in favour of the charterers and allowed the appeal. Nonetheless, the

specific reasons given by the various law lords differed. It is nevertheless clear that the most significant – and radical – part of the decision lay (as already alluded to above) in the judgment of Lord Hoffmann. The learned law lord was not content with the traditional approach in *Hadley*. He added (relying on his views in the House of Lords decision of *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 ("*South Australia*"), which did not, however, deal directly with the issue of remoteness of damage in contract as such) a *new legal criterion* based on the concept of *assumption of responsibility* by the defendant. Put simply, if this additional criterion was not satisfied, the loss concerned would be considered to be too remote and, hence, not recoverable by the plaintiff. In Lord Hoffmann's words (at [12]):

> It seems to me logical to found liability for damages upon the intention of the parties (*objectively ascertained*) because all contractual liability is *voluntarily undertaken*. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not *reasonably* be considered to have undertaken. [emphasis added]

79 Earlier on in his judgment, though, Lord Hoffmann did frame the issue facing him, as follows (at [9]):

> The case therefore raises a fundamental point of principle in the law of contractual damages: is the rule that a party may recover losses which were foreseeable ("not unlikely") ***an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary*** , ***or*** *is* ***it a prima facie assumption*** *about what the parties may be taken to have intended*, no doubt ***applicable*** *in the* ***great majority*** of cases ***but capable of rebuttal*** *in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would* ***not reasonably*** *have been regarded as* ***assuming responsibility*** *for such losses?* [emphasis added in italics and bold italics]

As we shall see below, the above framing of the issue is significant inasmuch as it raises, *inter alia*, the question as to what constitutes an external rule of law (see below at [108]) and (perhaps more importantly) whether or not, by phrasing his proposed legal proposition as only "a prima facie assumption", Lord Hoffmann may well have adopted a "soft version" of his suggested principle which may turn out, in the final analysis, to be no different (in substance, at least) from the traditional rules as embodied in *Hadley* – a point which we will consider below (at [101]).

80 One final point of note may be made with regard to Lord Hoffmann's judgment. The learned law lord drew an analogy (at [11] and [26]) between his proposed principle of assumption of responsibility with *the implication of terms* (both of which, in his view, are centred on the *interpretation or construction* of the contract concerned). This is also an important point which we will deal with in more detail below (at [97]–[100]).

81 The other judgments in *The Achilleas* are also interesting because, as alluded to above, they demonstrate a variety of other approaches.

82 Lord Hope of Craighead appears to have endorsed the approach advocated by Lord Hoffmann; in his view (at [30]–[31]):

> 30 ... The critical question however is whether the parties must be assumed to have contracted with each other on the basis that the charterers were *assuming responsibility* for the consequences of that event. ...
>
> 31 *Assumption of responsibility*, which *forms the basis* of the law of remoteness of damage in

contract, is determined by *more than* what at the time of the contract was reasonably foreseeable.

[emphasis added]

83 The learned law lord also observed thus (at [32]):

> The fact that the loss was foreseeable – the kind of result that the parties would have had in mind, as the majority arbitrators put it – is *not* the test. *Greater precision is needed than that*. The question is whether the loss was a type of loss for which the party can *reasonably* be assumed to have *assumed responsibility*. [emphasis added]

84 *However*, Lord Rodger of Earlsferry adopted a *quite different* approach. Put simply, the learned law lord endorsed and applied the *traditional* principles as embodied in *Hadley* (see especially at [47]–[48] and [52]), and did "not [find] it necessary to explore the issues concerning [*South Australia*] ... and assumption of responsibility, which ... Lord Hoffmann ... has raised" (see at [63]). In the context of that case, the learned law lord was of the view (at [53]) that "the extent of the relevant rise and fall in the market within a short time was actually *unusual*" [emphasis added] and that "[t]he owners' loss stemmed from that *unusual occurrence*" [emphasis added]. In the circumstances, the loss was, in his view, too remote to fall within the *first limb* of *Hadley*. However, Lord Rodger did point out (at [59]) that, if there had been the requisite knowledge pursuant to the *second limb* of *Hadley*, the result might well have been different:

> [T]he position on damages might also be different, if, for example – when a charterparty was entered into – the owners drew the charterers' attention to the existence of a forward charter of many months' duration for which the vessel had to be delivered on a particular date. The charterers would know that a failure to redeliver the vessel in time to allow the owners to deliver it under that charter would be liable to result in the loss of that fixture. Then the *second rule or limb* in *Hadley v Baxendale might well come into play. But the point does not arise in this case*. [emphasis added]

Hindsight is, of course, "twenty-twenty vision", bearing in mind the requirement that the requisite knowledge under the second limb of *Hadley* must be communicated *at or prior to the formation of the contract* itself. However, that means – on a *practical* level – that, if the parties (in particular, the plaintiff) desire such an eventuality to be covered, then they ought to do so *via* the *express terms* of the contract itself (see also below at [119]). We also note that commentators have expressed the view that Lord Rodger's approach, whilst taking into account the distinction that has hitherto been drawn by the courts (indeed, in *The Achilleas* itself) between the type of loss and the extent of loss, ought to have arrived at the *opposite* result as what was not reasonably contemplated was the *extent* of the loss and *not* (as Lord Rodger thought (at [60])) the *type* of loss (see below at [114]).

85 Lord Walker of Gestingthorpe referred to the principles laid down in *Hadley*. However, it is not altogether clear whether the learned law lord based his decision (to allow the appeal, as did the rest of the House) on these principles *only or also* on Lord Hoffmann's principle of assumption of responsibility. Indeed, Lord Walker concluded his judgment (with respect, somewhat *ambiguously*) thus (at [87]):

> For these reasons, *and for the further reasons given by my noble and learned friends, Lord Hoffmann, Lord Hope of Craighead* and Lord Rodger of Earlsferry, whose opinions I have had the advantage of reading in draft, I would allow this appeal. [emphasis added]

86 Finally, Baroness Hale of Richmond preferred to base her decision on the (traditional) principles laid down in *Hadley*. Indeed, in her view (at [90]), "[n]o one has suggested that it was at all unusual or unlikely for the owners to commit their ship to a new fixture to begin as soon as possible after the ship was free from the first" and that "[i]t was conceded before the arbitrators that missing dates for a subsequent fixture was a "not unlikely" result of late redelivery"; indeed, "[b]oth parties would have been well aware of that at the time when the contract was made" and that "[t]hey would also have been well aware that a new charter was likely to commit that particular ship rather than to allow the ship-owner to go into the market and find a substitute to fulfil his next commitment if his ship was late back". Baroness Hale then proceeded to observe thus (see *id*):

> Above all, if the parties wish to exclude liability for consequential loss of this kind then it will be very simple to insert such a clause into future charterparties. ... To rule out a whole class of loss, simply because the parties had not previously thought about it, risks as much uncertainty and injustice as letting it in.

87 In light of the views expressed in the preceding paragraph, the decision by Baroness Hale to allow the appeal as she did must have been taken with no small measure of reluctance. What *is* clear is that she thought (at [93]) that the approach advocated by Lord Hoffmann added "an interesting *but novel* dimension to the way in which the question of remoteness of damage in contract is to be answered, a dimension *which does not clearly emerge from the classic authorities*" [emphasis added]. Baroness Hale was clearly not in favour of it and premised her decision (like Lord Rodger) on the more traditional approach; in her words, in so far as the principle of assumption of responsibility was concerned, it depended on a wider range of factors and value judgments and could thus introduce much room for argument in other contractual contexts (see *id*):

> In an examination, this might well make the difference between a congratulatory and an ordinary first class answer to the question. But despite the excellence of counsels' arguments it was not explored before us, although it is explored in academic textbooks and other writings, including those cited by Lord Hoffmann in para 11 of his opinion. I note, however, that the most recent of these, Professor Robertson's article on "The basis of the remoteness rule in contract" (2008) 28 Legal Studies 172 argues strongly to the contrary. *I am not immediately attracted to the idea of introducing into the law of contract the concept of the scope of duty which has perforce had to be developed in the law of negligence*. The rule in *Hadley v Baxendale* asks what the parties must be taken to have had in their contemplation, rather than what they actually had in their contemplation, but the criterion by which this is judged is a factual one. *Questions of assumption of risk depend upon a wider range of factors and value judgments*. This type of reasoning is, as Lord Steyn put it in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2002] 1 Lloyd's Rep 157, 186, a "deus ex machina". *Although its result in this case may be to bring about certainty and clarity in this particular market, such an imposed limit on liability could easily be at the expense of justice in some future case. It could also introduce much room for argument in other contractual contexts. Therefore, if this appeal is to be allowed, as to which I continue to have doubts, I would prefer it to be allowed on the narrower ground identified by Lord Rodger, leaving the wider ground to be fully explored in another case and another context*. [emphasis added]

88 So much by way of a summary of the various judgments in *The Achilleas* itself. We turn now to the very important issue as to whether or not the approach advocated by Lord Hoffmann in that case ought to be adopted in the *Singapore* context.

The Achilleas *considered (with special reference to Singapore)*

89 With respect, we do *not* think that the approach advocated by Lord Hoffmann in *The Achilleas* ought to be followed and that its appearance after *Robertson Quay* therefore has no effect on the latter decision. Put simply, the two limbs set out in *Hadley* (as elaborated upon and explained in *Robertson Quay* itself) continue to be the governing principles in relation to the doctrine of remoteness of damage in contract law in the Singapore context. There are a number of reasons for adopting this position which we now proceed to elaborate upon.

(1) *The Achilleas* – some difficulties

(a) Problems with the ratio decidendi of *The Achilleas*

90 First, and from the most basic perspective, the approach advocated by Lord Hoffmann was – arguably, at least –*not* adopted (either unanimously or by a majority) by the House *and* hence did not constitute the *ratio decidendi* of the case itself (and see Harvey McGregor QC, in his leading textbook, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) ("*McGregor*") at para 6-173, who also cites Lord Walker's view in the (*subsequent*) Privy Council decision (on appeal from the Court of Appeal of Bahamas) of *Sentinel International Ltd v Cordes* [2008] UKPC 60, where the learned law lord observed (at [50]) that "a contractual claim for damages for loss of a bargain is *not* of course subject to the … principle [in *South Australia*]" [emphasis added]). This last-mentioned point is significant because it is, on one reading at least, unclear whether Lord Walker was, in *The Achilleas*, adopting Lord Hoffmann's approach or the more traditional approach as embodied in the principles in *Hadley* itself (see also above at [85] as well as *Thode Gerd Walter* (at [70])). That having been said, the precise effect of Lord Walker's (with respect) ambiguous statements in *The Achilleas* on the precise *ratio decidendi* in that particular case remain controversial, with some commentators being of the (contrary) view that, on balance, those statements are in line with Lord Hoffmann's approach (see, for example, Paul C K Wee, "Contractual interpretation and remoteness" [2010] LMCLQ 150 ("*Wee*") at pp 156–157, which, in our view, is one of the more perceptive of the (not surprisingly) many articles analysing *The Achilleas*). Indeed, the only clear proposition that can be proffered in this particular regard is that there is probably *no clear ratio decidendi* as such that can be deduced from a perusal of the written judgments handed down by the various law lords in *The Achilleas* (see also generally Greg Gordon, "*Hadley v Baxendale* Revisited: *Transfield Shipping Inc v Mercator Shipping Inc*" (2009) 13 Edinburgh L Rev 125).

91 In a related vein, it is also worth pointing to the fact that there is some (weighty) authority to the *contrary* in an earlier (and leading) House of Lords decision of *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 ("*The Heron II*") (at 422, *per* Lord Upjohn (a point also noted by AR Teo Guan Siew ("AR Teo") in *Chee Peng Kwan* (at [36]) as well as by AR Peh Aik Hin ("AR Peh") in *Thode Gerd Walter* (at [70]); reference may also be made to the observation of Rix LJ at the Court of Appeal stage of *The Achilleas* (see *Transfield Shipping Inc v Mercator Shipping Inc (The "Achilleas")* [2007] 2 Lloyd's Rep 555 at [115]) as well as M G Bridge, *The Sale of Goods* (Oxford University Press, 2nd Ed, 2009) ("*Bridge*") at p 762)). However, leaving aside for the moment issues centring on what the precise *ratio decidendi* in *The Achilleas* is (as well as the related issue as to the relevant prior (especially House of Lords) authority to the contrary), let us consider the approach advocated by Lord Hoffmann in *The Achilleas* on its own terms. Even here, there are, with the greatest of respect, a number of both theoretical as well as practical difficulties with his suggested approach. Let us elaborate.

(B) Theoretical and conceptual difficulties

92 There are, first, very fundamental *theoretical or conceptual* difficulties with the approach advocated by Lord Hoffmann. As a learned author perceptively observes (see *Wee* at p 158):

> The view preferred here is that the agreement-centred approach as accepted in *The Achilleas* is best understood not as an approach to remoteness, but as embodying an approach to interpretation. Remoteness is traditionally regarded as a doctrine which limits and cuts back *prima facie* liability. However, under the agreement-centred approach, *prima facie* liability is never cut back. If limits on the scope of contractual duties can be distilled through the ordinary process of interpretation, as Lord Hoffmann contends ... , then the claimant is always "to be placed in the same situation, with respect to damages, as if the contract had been performed", where the meaning of "the contract" is properly construed. There are no limits on the fulfilment of the claimant's (properly construed) expectation interest. Consequently, under the agreement-centred approach, there is no independent role for remoteness.

93 Put simply, the approach advocated by Lord Hoffmann is not only conceptually distinct from – but also appears to exclude the operation of – the very doctrine of remoteness of damage in contract law itself. In this regard, the observation made in the preceding paragraph is a perceptive one, although, as we will point out below (at [101]–[107]), it might in fact be possible to achieve a *balance* between both approaches inasmuch as the concept of assumption of responsibility by the defendant (which is the basis of Lord Hoffmann's approach) might be considered as *having already been embodied or incorporated within the existing doctrine of remoteness of damage in contract law (which, of course, comprises, in essence, the two limbs in* Hadley*)*.

(C) Uncertainty in application

94 The approach advocated by Lord Hoffmann is also, with respect, unconvincing when viewed from a *practical* perspective. As was perceptively (as well as succinctly) observed in *McGregor* (at para 6-171):

> What Lord Hoffmann and Lord Hope propose is full of difficulty, uncertainty and impracticality. How are we to tell what subjectively the contracting parties were thinking about assumption of responsibility? When contracting, assumption of responsibility was probably not in their minds at all, for it is well known that parties entering a contract are thinking of its performance rather than of its breach. Apart from this uncertainty there is the impracticality of allowing defendants to raise the issue, as they will surely do, in case after case as an extra argument, thereby taking up the time of the courts unnecessarily and making the arriving at settlements more difficult.

95 Prof Andrew Robertson also points, pertinently in our view, to the fact that "typically there is no factual basis for judging the intentions of the parties" (see Andrew Robertson, "The basis of the remoteness rule in contract" (2008) 28 Legal Studies 172 ("*Robertson*") at p 185; reference may also be made to Edwin Peel, "Remoteness Revisited" (2009) 125 LQR 6 ("*Peel*") at p 11 and *Bridge* at pp 761–762) – a point which was also emphasised (in a judicial context) in *Chee Peng Kwan* (at [36]). Indeed, in another perceptive observation, Steve McAuley observed thus (see "Transfield Shipping Inc v Mercator Shipping Inc" (2010) 38 ABLR 65 ("*McAuley*") at p 66):

> While, in the *Transfield* decision, Lords Hoffman[n] and Hope seemingly applied the "assumed responsibility test" with relative ease in finding that the charterers did not assume responsibility for the owners' loss relating to the new charter, the reasons given as to why the charterers did not assume responsibility are *somewhat arbitrary*. In this regard, Lord Hoffman[n] cites, first, the "unquantifiable" nature of the loss claimed and, secondly, the capacity of the owners to decide whether or not to enter into a new charter prior to the vessel being returned. Both reasons given by Lord Hoffman[n] do *not* involve a detailed examination of the parties' assumed responsibilities at the time of entering the contract, *but instead involve a degree of arbitrariness on the part of the fact-finder in determining what were the assumed responsibilities of the parties*.

> This is not to say that the decision in *Transfield* was the wrong decision. What is being argued is that *the "assumed responsibility test" could be a mechanism used by the courts to achieve what the courts consider a just outcome, rather than requiring the courts to engage in an analysis of what types of losses the parties actually assumed responsibility for*.
>
> [emphasis added]

96 Indeed, in so far as Lord Hoffmann's reason centring on the unquantifiable nature of the loss claimed is concerned, a learned author pertinently observes (see *Wee* at p 165), "the courts have never before denied recovery for losses on the basis that they are unquantifiable or unpredictable" and that "[o]n the contrary, unpredictability or unquantifiability has repeatedly been no bar to recovery whatsoever". In point of fact, the very nature of the concept of damages itself is premised on the fact that the monetary loss is, *ex hypothesi*, unliquidated to begin with.

97 Returning to the passage quoted from *McGregor* (above at [94]), as that particular passage pithily emphasises, the "assumption of responsibility" (*ie*, Lord Hoffmann's phraseology in *The Achilleas*) is *not* something which the parties have, *ex hypothesi*, had the opportunity to think about, let alone discuss at the time they entered into the contract (see also *Thode Gerd Walter* (at [68])). Hence, Lord Hoffmann's analogy (in *The Achilleas*) to the doctrine of *the implied term* (see above at [80]) is – looked at in this particular light – not inapposite. However, it should be emphasised that the doctrine of the implied term is itself one of *last resort*. As was aptly and pithily observed by the late R E Megarry, an implied term is "so often the last desperate resort of counsel in distress" (see R E Megarry, *Miscellany-at-Law* (Stevens & Sons Limited, 1955) at p 210; and cited by this court in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [8]). Herein, in fact, lies the difficulty with the adoption of the approach advocated by Lord Hoffmann in *The Achilleas*: The formulation of legal rules and principles governing remoteness of damage in contract law is (as we elaborate upon below at [107]) intended to furnish lawyers, courts and students alike with *general guidance*. Put simply, these rules and principles are *not* intended as mere ad hoc, gap-filling measures.

98 It is interesting to note, at this juncture, that the broad underlying thread of *interpretation* which Lord Hoffmann utilises in advocating his approach centring on assumption of responsibility by the defendant (a point perceptively made by *Wee* (above at [92])) has *also* been utilised by the learned law lord in the area of implied terms as well (in particular, to terms implied *in fact*) – hence, the analogy drawn by Lord Hoffmann between both these aforementioned areas. However, and with the greatest of respect, the uncertainty generated in the latter area would, in our view, apply equally to the former area. In the recent Privy Council decision (on appeal from the Court of Appeal of Belize) of *Attorney General of Belize and others v Belize Telecom Limited and another* [2009] 1 WLR 1988, for example, Lord Hoffmann, delivering the judgment of the Board, adopted an extremely broad approach towards the implication of terms in fact, effectively *effacing* the distinction between the time-honoured "business efficacy" and "officious bystander" tests (for a general account of these two tests (as well as their possible relationship), see the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* [2006] 1 SLR(R) 927 at [29]–[40]). This results, however, in a lack of concrete rules (and consequent normative guidance) as well as uncertainty in the practical sphere (a point which is also emphasised by *Wee* at pp 162–166; reference may also be made to Elizabeth Macdonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 JCL 97). One should not, in fact, be surprised at such a result as the lack of guidance as well as uncertainty is likely to be the result when the *umbrella* concept of *interpretation*, which is pitched at a *necessarily high level of abstraction*, is utilised (in substance, if not form) as the legal basis for *different and disparate areas of law* (*cf* also the collected essays in Brian Coote, *Contract as Assumption – Essays on a Theme* (Hart Publishing, 2010) (Rick Bigwood ed);

in so far as *The Achilleas* itself is concerned, see the very recent comment by Brian Coote, "Contract as Assumption and Remoteness of Damage" (2010) 26 JCL 211 ("*Coote*")). The lack of guidance stems from the absence of a sufficiently specific set of *concrete* rules and principles whilst the resultant uncertainty is the natural consequence when legal rules and principles lacking specific and concrete guidance are sought to be applied to the various sets of facts (which are themselves necessarily myriad in nature) (in this regard, see also generally this court's observations in *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 ("*Mühlbauer*") (at [40]–[43]) about the danger of over-generalisation and over-abstraction in making legal arguments). Put simply, whilst it is desirable from a conceptual perspective to have umbrella doctrines that make for *theoretical* "neatness", there is a limit to which one can have "one-size-fits-all" *doctrines* that will not ultimately become legal procrustean beds (see also *Wee* at pp 166 and 175–176). Indeed, the necessity for *specific* rules and principles has always been the hallmark of the development of the common law. Such specificity has, in fact, been (perhaps paradoxically) one of the key strengths of the common law itself, which is why Prof S F C Milsom perceptively observed that the common law system developed in a strikingly systematic fashion, notwithstanding the apparent absence of a clear blueprint as such (see generally S F C Milsom, "Reason in the Development of the Common Law" (1965) 81 LQR 496; see also *Mühlbauer* (at [42]) where it is observed that there is an *interactive* process between the *universal* and the *particular* or the *general* and the *specific* in law and decision-making).

99 Whilst on the topic of implied terms, there is some commentary on *The Achilleas* which suggests that the approach advocated by Lord Hoffmann in that decision is actually based, instead, on the concept of terms implied *in law* rather than terms implied in fact (see, for example, John Halladay, "Remoteness of Contractual Damages" (2009) 21 Denning LJ 173 at p 178). This does not, however, appear to be the tenor of Lord Hoffmann's judgment in *The Achilleas* (which appears, instead, to adopt the analogy of terms implied in *fact* (see *Peel* at p 11)). However, even assuming that it is, this would merely serve to underscore the weakness in the analogy itself. In particular, as this court has pointed out in *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 (at [90]–[91]):

> 90 The category of "terms implied in law" is not without its disadvantages. A certain measure of uncertainty will always be an integral part of the judicial process and, hence, of the law itself. This is inevitable because of the very nature of life itself, which is – often to a very large extent – unpredictable. Such unpredictability and consequent uncertainty is of course a double-edged sword. It engenders both the wonder and awe as well as the dangers and pitfalls in life. Given this reality, however, one of the key functions of the courts is not to add unnecessarily to the uncertainty that already exists. Looked at in this light, the category of "terms implied in law" does tend to generate some uncertainty – not least because of the broadness of the criteria utilised to imply such terms, which are grounded (in the final analysis) on reasons of public policy.
>
> 91 However, the category of "terms implied in law" has now been firmly woven into the tapestry of our local contract law. It also aids, on occasion at least, in achieving a just and fair result. Most importantly, perhaps, it has formed both the theoretical as well as practical basis for *statutory* implied terms, such as those found in the UK Sale of Goods Act 1979 (c 54) (applicable in Singapore *via* the application of English Law Act (Cap 7A, 1994 Rev Ed) and reprinted as Cap 393, 1999 Rev Ed).
>
> [emphasis in original]

100 As the issue of implied terms is only indirectly before us, we do not wish to make any further observations, save to note that (in addition to the difficulties arising from utilising an analogy with

terms implied in fact as noted above) treating the analogy utilised by Lord Hoffmann in *The Achilleas* as one referring to terms implied in law (as opposed to terms implied in fact) does not meet the problems of a lack of guidance as well as the generation of uncertainty and may, on one view at least, in fact exacerbate them.

(2) The merits of the existing approach in *Hadley*

(A) Existing approach already embodies and encompasses the concept of assumption of responsibility

101 More importantly, even if we accept Lord Hoffmann's premise that the focus ought to be on the agreement between the parties, any solution (*as in the case of implied terms*) will *necessarily* be one that is *imposed by the court* (albeit based on the objective evidence). Looked at in *this* light, it is our view that, *even if* (again) we accept Lord Hoffmann's approach in *The Achilleas*, *both the limbs* in *Hadley* would *necessarily embody and encompass the necessary criteria for ascertaining (on an objective basis) whether or not there had been an assumption of responsibility or an implied undertaking on the part of the defendant* (a similar point was also perceptively made by a learned author in his commentary on *Robertson Quay* (see Goh Yihan, "*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*" (2009) 9 OUCLJ 101 ("*Goh*") at p 107), though the author did not appear to go so far as to suggest that Lord Hoffmann's assumption of responsibility could be *subsumed* under the two limbs in *Hadley*). *If so, then, with the greatest of respect, Lord Hoffmann has not really added anything new to the existing law, which continues to operate based on the legal rules and principles laid down in the seminal decision of* Hadley. Let us elaborate upon as well as explain the proposition just made by considering *both* of the limbs in *Hadley seriatim*. However, before proceeding to do so, it is interesting to note that at least one commentator has characterised a part of Lord Hoffmann's judgment in *The Achilleas* (see above at [79]) as adopting what he terms "a "soft" version" of the agreement-centred approach" (see *Wee* at p 168). We agree with him, however, that (see *Wee* at pp 168–169):

> ... [t]he soft version of the agreement-centred approach is ... *identical in substance and theory* to the traditional approach to remoteness [in *Hadley*], though dressed up in different terminology: where the contract would be understood by a reasonable person in all the circumstances not to contain any terms, express or implied, limiting recovery for breach, recoverable losses are those which are foreseeable as a not unlikely consequence of breach. [emphasis added]

(B) The first limb of *Hadley* and the concept of assumption of responsibility

102 Turning, then, to the *first limb* in *Hadley*, this court had described it (*together with* the *second limb*) in *Robertson Quay*, as follows (at [55] and [59]–[60]):

> 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(R) 202 ("*CHS CPO GmbH*"), for example, a summary of the law in this particular area was furnished, as follows (at [81]–[83] and [85]):
>
> > ***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.

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.

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. ...

...

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* [1992] 2 SLR(R) 834 and *City Securities Pte Ltd v Associated Management Services Pte Ltd* [1996] 1 SLR(R) 410.

[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(R) 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."

…

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 [use] and gain little advantage from the paraphrases or substitutes. The ideas and factors conveyed by the words are clear enough.

[emphasis in original]

103 It is therefore clear – and this *also* appears to be the view taken pursuant to the integrated approach (which is discussed below (at [121]–[125])) – that the *first limb* in *Hadley necessarily embodies an implied undertaking or assumption of responsibility* on the part of the defendant (albeit on an *imputed* basis). This *imputation* is *justified* on the ground that, in so far as *natural or ordinary* loss is concerned, any reasonable person in the shoes of the defendant should (with the (*imputed*)

knowledge that such loss would ensue) be *taken to have assumed responsibility for such loss should it breach the contract concerned*. Hence, even if we adopt Lord Hoffmann's approach in *The Achilleas*, the reasoning just referred to would provide the court with *an objective basis* for finding that the defendant had (in the absence of an express undertaking to the contrary) *assumed responsibility* for the (*natural or ordinary*) loss which has occurred. *Put simply, even if we accept Lord Hoffmann's approach, it is, in fact, already an intrinsic part of the first limb in* Hadley.

(C) The second limb of *Hadley* and the concept of assumption of responsibility

104 Turning now to the *second limb* in *Hadley*, this court had, in fact, described it in *Robertson Quay* in the passages already quoted above (at [102]).

105 It is clear that it will be the case that Lord Hoffmann's approach in *The Achilleas* will be an *additional* element with respect to the *second limb* in *Hadley only if* the *actual* knowledge of the defendant under this particular limb of *Hadley* is thought to be *insufficient* from a legal point of view – in so far as the establishment of an implied obligation or an assumption of responsibility on the part of the defendant is concerned. There is, in fact, some (older) authority (stretching back *almost five decades*) to the effect that the *second* limb in *Hadley is* based on *an implied undertaking* on the part of the defendant to the plaintiff that it would bear the (enhanced) loss. This is to be found in the judgment of Diplock LJ in the English Court of Appeal decision of *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 ("*Robophone Facilities*") at 1448. However, the learned judge did observe that the defendant's "actual knowledge of the special circumstances is relevant as *one* of the factors from which [its] undertaking can be implied" [emphasis in original] (*id*). Diplock LJ then proceeded to observe thus (*id*):

> The second factor is also necessary, *viz*., that he should have acquired this knowledge from the plaintiff, or at least that [it] should know that the plaintiff knew that [it] was possessed of it at the time the contract was entered into and so could reasonably foresee at that time that an enhanced loss was liable to result from a breach. Where both these factors are present, the defendant's conduct in entering into the contract without disclaiming liability for the enhanced loss which he can foresee *gives rise to the implication that he undertakes to bear it. But such an undertaking need not be left to implication; it can be express*. If the contract contained an express undertaking by the defendant to be responsible for all actual loss to the plaintiff occasioned by the defendant's breach, whatever that loss might turn out to be, it would not affect the defendant's liability for the loss actually sustained by the plaintiff that the defendant did not know of the special circumstances which were likely to cause any enhancement of the plaintiff's loss. [emphasis added]

106 The key issue that arises at this juncture, in our view, centres on the *role* of the *actual* knowledge of the defendant. Is it, as the *second limb* in *Hadley* assumes, *sufficient – in and of itself – to be the basis for an implied obligation on the part of the defendant that it would assume responsibility for the (extraordinary) loss flowing from its breach? Or* is *actual* knowledge merely *a factor (and no more)* in ascertaining whether or not there was such an obligation (a point which is implicit in Lord Hoffmann's approach in *The Achilleas* (especially given his classification of his approach as a "prima facie assumption" which is rebuttable if the context and surrounding circumstances so justify (see [79] above) but which is brought clearly to the fore by Diplock LJ in *Robophone Facilities*)? Notwithstanding the legendary abilities of both Lord Hoffmann and Lord Diplock (as he later became) in general and their considerable scholarship in the law of contract in particular (see, for example, Brice Dickson, "The Contribution of Lord Diplock to the General Law of Contract" (1989) 9 OJLS 441), it is our view, with the greatest of respect, that the *former* proposition reflects the correct state of the law. Let us elaborate. Before proceeding to do so, however, we note that

Prof Coote (despite his (not surprising) endorsement of the concept of assumption of responsibility (see also above at [98])) perceptively points out that Lord Diplock, whilst also adopting a similar approach to that in *Robophone Facilities* at the English Court of Appeal stage of the *Heron II* (see *C Czarnikow Ltd v Koufos* [1966] 2 QB 695 at 727–728), might well have *modified his views* in the (subsequent) House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (at 848–849) (see *Coote* at p 219).

107 It will be recalled that the obligation or assumption of responsibility with regard to the *loss* flowing as a result of a *breach of contract* is (in the absence of a relevant *express* term) *necessarily* an *implied* one (see also above at [97]). This proposition would, of course, apply to *both limbs* in *Hadley* and is, in fact, also a premise underlying Lord Hoffmann's approach in *The Achilleas* as well (although it is significant to note that Lord Hope appeared, also in *The Achilleas* (at [36]), to suggest *otherwise*). If so, then it is *the court* which *imputes* such an obligation on the defendant, albeit on an *objective* basis. Looked at in this light, it is our view that *the criterion of knowledge furnishes a sufficiently objective basis on which to premise the existence (or otherwise) of an implied obligation or assumption of responsibility on the defendant*. To leave the situation open to other factors would lead to unnecessary speculation as well as uncertainty. At this particular juncture, it is helpful to note that, *unlike* a situation relating to a term implied *in fact* (which, it will be recalled, was an analogy which was utilised by Lord Hoffmann in *The Achilleas*), the court is *not* concerned with embarking on a *gap-filling* exercise. Put simply, the rules relating to remoteness of damage in contract law are (contrary to Lord Hoffmann's view) *universal and external rules of law* applicable to *all* situations where a breach of contract has occurred (what Kramer refers to as involving "the default rule theory" (see *Kramer* at p 251); though *cf* the characterisation by Prof Robertson who refers to the remoteness rule as a "gap-filling device" (see *Robertson* at pp 172 and 196), although the difference in view might be one of degree rather than kind, depending on the extent to which parties *expressly* allocate risks for the loss resulting from a breach of contract). This is only just and fair to *all* parties to *all* contracts. Indeed, as AR Teo points out in *Chee Peng Kwan* (at [40]), "the law on remoteness can be said to be concerned not merely with protecting the contractual bargain *but also with the wider policy consideration* of placing suitable limitations on contractual liabilities" [emphasis added]. Whilst all this is true, we pause to observe that the necessity of relying upon universal and external rules of law is one that cannot, *in the nature of things*, be avoided in any event since (as explained below at [111]), we are dealing with a situation where the parties, *ex hypothesi*, never had the issue of the breach of the contract (and the ensuing loss) in mind and, if they had, ought to have provided expressly for them. Indeed, and in this last-mentioned regard, AR Peh also points out, in *Thode Gerd Walter* (at [69]; and see also [68]), that this is, in fact, *yet another policy* consideration that must also be taken into account:

> From a policy perspective, it may be questionable why the courts should provide additional protection to defendants in *all* cases by imposing a higher threshold in insisting that a defendant should only be liable for losses that he could be said to have reasonable assumed responsibility ... As noted by Lord Reid in *The Heron II* ... (at 385–386) and Andrew Phang JA in *Robertson Quay* (at [71] and [75]–[76]), parties in a contract case, unlike those in tort, have the opportunity to direct each others' attention to the unusual risks and either can take extra precautions to safeguard his position. [emphasis in original]

(D) The principles in *Hadley* and their consistency with both logic and the idea of agreement

108 We would also reiterate the following observations made by this court in *Robertson Quay* (at [77]–[83]), which elaborate on why the principles laid down in *Hadley* not only constitute a set of universal and external rules of law (which are undergirded by sound logic) but are also consistent with the very essence of the law of contract itself (which gives effect to the idea of the contract as an

agreement):

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.

[emphasis in original]

109 In the circumstances, therefore, the universal and external rules of law (as embodied in *both* limbs in *Hadley*) are, in substance, the *best possible reflection* of what the parties *would have agreed to had they thought about a situation in which the contract was breached*. To *that (practical)* extent, the "intentions of the parties" *are*, in fact, being given effect to (*cf* also *per* AR Peh in *Thode Gerd Walter* (at [67]), where it is observed, *inter alia*, that "it would not be wrong to say that at the heart of both approaches [*viz*, the traditional approach and the approach advocated by Lord Hoffmann in *The Achilleas*] is still the ultimate desire to provide for the recoverability of damages for breach of contract in a way that gives the *best* effect to the concept of a contract as an *agreement*" [emphasis in original]).

(E) *Hadley* avoids the problems in *The Achilleas*

110 The approach we have suggested also harks back to the theoretical difficulties referred to above (at [92]–[93]), where it had been pointed out that, although the approach from interpretation (embodied in the approach advocated by Lord Hoffmann in *The Achilleas*) appeared to furnish an ostensible external rule of guidance, it was clearly distinct from the doctrine of remoteness of damage

and, instead, generated (in substance) much *uncertainty* (as we have explained above). Neither can the approach from interpretation be justified on the basis of an analogy with terms implied *in law* (a point which we have also dealt with above (at [99]–[100])). Whilst it might be argued that the principles of remoteness of damage embodied in the two limbs in *Hadley* might also give rise to different results (depending on the precise facts before the court), this is *inevitable* as every (even) universal and external rule of law must be *applied* to the *facts* at hand. However, what ought to be *avoided*, in our view, are approaches (such as that advocated by Lord Hoffmann in *The Achilleas*) which engender *excessive and unnecessary* uncertainty.

(f) *Hadley* provides the necessary framework

111 Indeed, at this juncture, we would note that it is *not*, generally speaking, possible to *avoid* laying down a universal and external rule of law. *Any* approach is *necessarily* a *claim* to *universal* applicability. Looked at in this light, *even* the approach advocated by Lord Hoffmann in *The Achilleas* is, notwithstanding its focus on the actual intentions of the parties themselves, *necessarily itself* a universal and external rule of law – albeit one (which we have explained above) that engenders excessive and unnecessary uncertainty.

112 If the rules relating to remoteness of damage in contract law are (as we have just explained) universal and external rules of law applicable to all situations and which (*prima facie* at least) ensure justice and fairness for all parties to all contracts, then, in the spirit of justice and fairness, the *existing distinction* drawn between *imputed* knowledge (under the *first limb* in *Hadley*) and *actual* knowledge (under the *second limb* in *Hadley*) suffices, in our view, to provide the court with a sufficiently nuanced approach towards dealing (in a *practical* manner) with whether or not the defendant concerned has assumed responsibility with respect to *natural or ordinary loss* and *extraordinary loss*, respectively. In particular, where the defendant is sought to be held liable for *extraordinary loss*, then merely *imputing* knowledge on it is unfair. *However*, if the defendant *did* possess *actual* knowledge, then it is fair, in our view, that it be taken to have assumed the responsibility for that (extraordinary) loss.

113 As a matter of practical import, it might be observed, at this juncture, that, in so far as extraordinary loss under the *second* limb in *Hadley* is concerned, *much* will depend on the *precise facts* of the case before the court. This furnishes *sufficient flexibility*, in our view, to deal with difficult situations in so far as the *characterisation* of the *actual knowledge* which the defendant ought to possess is concerned. However, it bears noting that the concept of characterisation is not an unbridled licence to lawyers or the courts to do as they please. Indeed, the very factual matrix itself – coupled with logic and commonsense – serve as natural constraints on all concerned. In any event, contrary to the rather fanciful theories of radical theorists, this is not what, in fact, takes place in practice. Indeed, the *interaction* of law and fact (which necessarily takes place as the law cannot operate in an abstract vacuum) is not only a hallmark of the common law system but the flexibility contained therein is also one of the considerable strengths of that system as well. Such interaction also ensures that the *qualitative as well as contextual contents* of the circumstances which the defendant must have actual knowledge of ensures a more nuanced approach that avoids the possible injustice that might result (*cf*, though, a learned author's apprehension that this court's "equation of special knowledge with liability in respect of the second limb [in *Hadley*] might be over-inclusive in some instances, rendering defendants liable in circumstances of mere knowledge" (see *Goh* at p 108)). On one view at least, such flexibility is, simultaneously, a demonstration of how justice and fairness are achieved in a practical (and, by its very nature, imperfect) context. However, all this is not to state that different courts cannot come to the opposite conclusions based on the same facts (bearing in mind that there are also other factors that have to be considered, including the precise degree of probability required pursuant to the principles laid down in *Hadley* (as to which, see

Robertson Quay (at [57])). The fact situation in *The Achilleas* itself furnishes an excellent illustration in this regard. As we will show shortly (see [115] below), it might have been *possible* to argue that the loss claimed by the (plaintiff) shipowners in *The Achilleas* fell within the *second limb* of *Hadley* and that, in the circumstances, the charterers did *not* have *actual* knowledge of the relevant circumstances.

(3) Alternative analyses of *The Achilleas* based on the principles in *Hadley*

114 As we have seen, in *The Achilleas*, the House of Lords unanimously held in favour of the (defendant) charterers (albeit on somewhat different grounds in so far as the individual law lords were concerned). At this juncture, we would observe that a further *alternative* analysis based on the principles in *Hadley* could *also possibly* be applied to the facts of *The Achilleas* – to achieve the *same* result that was arrived at by the House itself. In particular, it is possible that in light of the evidence from *the shipping industry* (at least as it existed at that particular point in time) to the effect that the *type of loss* suffered by the shipowners in *The Achilleas* was not recoverable (the (*then*) *established* understanding being that shipowners were entitled to only the difference between the market rate and the charter rate for the overrun period), the shipowners' loss in *The Achilleas* was not natural or ordinary loss which fell within the first limb of *Hadley* (*cf* also the approach by Lord Rodger (see above at [84]) and Baroness Hale (see above at [87]) in *The Achilleas* who both decided the case based on the first limb in *Hadley*, albeit for different reasons). And, as already explained above, the concept of assumption of responsibility would be an *integral part of* the *first limb* in *Hadley*. However, this is a mere *hypothetical* analysis (bearing in mind the fact that the House did *not* accept the evidence just mentioned in arriving at its decision, as well as the fact that it was conceded right from the start by the charterers in *The Achilleas* that missing dates for a subsequent fixture was a not unlikely result of late redelivery (see *The Achilleas* at [53] and [90])).

115 It might have also been possible to argue (as we alluded to briefly above (at [113])) that applying the principles laid down in *Hadley*, the loss claimed by the shipowners fell within the *second limb* of *Hadley* and that, in the circumstances, the charterers did *not* have *actual* knowledge of the relevant circumstances. This would have entailed the *same* result as that which was arrived at by the House of Lords, albeit *without* having to utilise the additional criterion (advocated by Lord Hoffmann) centring on the assumption of responsibility by the defendant (*cf* also *Bridge* (at p 762)). Indeed, consistent with the analysis proffered above, an assumption of responsibility would already have been an integral part of not only the first limb in *Hadley* but also the second limb as well. However, this is, again, *only* a *hypothetical* example (or, rather, analysis) as the same issues which arose in *The Achilleas* have not, to the best of our knowledge, arisen for decision before the Singapore courts (or at least before this court). When, however, a situation akin to *The Achilleas* comes before the Singapore courts, what is clear is that the principles in *Hadley* will have to be fully argued before this court as they apply to the fact situation itself. We pause – parenthetically – to note that some commentators would in fact *disagree* with the argument (just considered) to the effect that the loss claimed in *The Achilleas* falls within the *second limb* of *Hadley*, arguing that the *type* of loss was reasonably contemplated under the *first* limb in *Hadley* although the *extent* was not (*cf* also our alternative analysis based on the *first* limb in *Hadley* in the preceding paragraph), distinguishing *The Achilleas* from the fact situation as well as the holding (with respect to the issue of extraordinary loss pursuant to the *second limb* of *Hadley*) in the English Court of Appeal decision of *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 ("*Victoria Laundry*") (see, for example, *Peel* at p 8; Janet O'Sullivan, "Damages for Lost Profits for Late Redelivery: How Remote is Too Remote?" [2009] CLJ 34 ("*O'Sullivan*") at p 37; Gary Richard Coveney, "Damages for Late Delivery Under Time Charters: Certainty at Last?" (2009) 23 Austl & NZ Mar LJ 205 ("*Coveney*") at pp 208–209; and *Halladay* at p 177 (see also above at [84])). However, as already observed in the preceding paragraph, we think it is possible to find that the *type* of loss was not contemplated by the parties

based on the first limb in *Hadley*. Even on the facts of *The Achilleas*, it is clear that at least two law lords (*viz*, Lord Rodger and Baroness Hale) arrived at that particular conclusion.

116 Notwithstanding that our alternative analysis here on *The Achilleas* based on the principles in *Hadley* is a mere *hypothetical* analysis, it does demonstrate that *the principles in* Hadley *may well be sufficient to achieve justice in the case at hand without the need for a further (and artificial) construct of an assumption of responsibility. And*, as we have also argued above, the element of assumption of responsibility would, looked at in this light, *also be embodied or subsumed within the two limbs in* Hadley *in any event*. This view also derives some support from the many views expressed to the effect that the *same* result is quite likely to result *regardless* of which approach is used (see, for example, *Thode Gerd Walter* (at [67]) as well as *Peel* (at p 12)). We should perhaps also note in passing here that it would always be open to parties, placed in a similar situation such as that in *The Achilleas*, to exclude liability for consequential loss of this kind by inserting a suitable clause in their contract (as also pointed out by Baroness Hale in *The Achilleas* (see above at [86])).

117 It is also significant, in our view, that the approach advocated by Lord Hoffmann in *The Achilleas* has been subject to much criticism in the academic literature. This is, in itself, not necessarily conclusive by any means. However, the *extent* of the criticism is unusual. More importantly, the *content* of many of the various criticisms is, in many instances, very persuasive. Indeed, we have already referred to a number of the more significant criticisms during the course of our analysis in the preceding paragraphs of this judgment and will therefore not rehearse them again (reference may also be made, in this regard, to *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) vol 1 at para 26-100G). Suffice it to state that few decisions – particularly of the highest appellate court in England – have been subject to so much criticism in both leading textbooks as well as articles and comments in a variety of international journals. In addition to the specific criticisms already canvassed above, it has also been argued that the actual decision in *The Achilleas* is due, rather, to "wider policy considerations" which ought to be "openly explored" in "future decisions" (see *O'Sullivan* at p 37; reference may also be made to *Coveney* at p 209). In point of fact, however, we have in fact demonstrated above (at [107]) that the *traditional* rules of remoteness (as embodied in *Hadley*) have *already* taken into account the key *policy* considerations.

(4) An extreme hypothetical example explained

118 Before turning to English case law decided *after* the decision in *The Achilleas* was handed down, it might be appropriate to consider briefly an oft-cited hypothetical example which has been utilised to demonstrate the utility as well as persuasiveness of Lord Hoffmann's approach in *The Achilleas* (see, for example, *Kramer* at pp 269–270). This is the example of a taxi driver who, before he or she accepts the fare, is informed by the passenger about a crucial meeting to which that passenger must get to on time. If the taxi driver fails, in breach of contract, to get the passenger to that meeting in a timely manner and, as a result, the passenger suffers an enormous business loss, is the taxi driver liable for that loss? Advocates of Lord Hoffmann's approach would suggest not because the taxi driver had not assumed responsibility for such loss. Although this suggestion is attractive at first blush, having regard to the various weaknesses inherent in that particular approach, we would suggest that the *same* result could be arrived at by utilising the traditional principles embodied in *Hadley*. A learned author put it well when he reasoned as follows (see *Peel* at p 10):

> The language of "accepting risk" is not entirely apt since it can convey the idea that liability for the losses which flow from one party's breach is simply a question of discerning the intention of the parties, but that is a view that has hitherto been rejected (see, e.g. *The Heron II* at 422, per Lord Upjohn). *It is preferable to say of examples such as the taxi driver ... that it is not "reasonable" to impose liability (*The Heron II *at 422), or that it is not "proper" to do so (*The

> Heron II *at 385, per Lord Reid), for, contrary to Lord Hoffmann, it is respectfully submitted that the rule of remoteness is an external rule of law*. It is not, however, a completely inflexible rule. Without suggesting that the circumstances in which it might be appropriate to depart from the test of reasonable contemplation of the type of loss are closed ... , *one explanation for the likely result in the hypothetical [example] considered above is that the defendant was given no reasonable opportunity to limit his liability*. [emphasis added]

The above reasoning is consistent with many of the points we have canvassed above (including the presence of prior (and contrary) views from the House of Lords as well as the fact that the two limbs in *Hadley* constitute external and independent rules of law). We would add that, in an extreme situation such as the present hypothetical, much would depend on the precise facts in question. This would also include, for example, how the alleged special circumstances were communicated by the customer to the taxi driver and what precisely was in fact communicated. All this would, of course, have to be assessed on an objective basis. One would imagine that, in an extreme situation such as this, there would have to be a clear and unequivocal communication. It would probably have taken the following form:

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

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

120 However, assume for the moment that the taxi driver *did* undertake liability in an *express* manner. As already explained above, this would *not* detract from (and is, on the contrary, entirely consistent with) the proposition (made above) to the effect that any assumption of responsibility on the part of the defendant would hinge on his or her knowledge of the special circumstances pursuant to the *second limb* in *Hadley* and that that assumption of responsibility would have *already been embodied or incorporated within* that particular limb itself. In any event, this situation would (as we have already noted) be consistent with Lord Hoffmann's approach as well. We also pointed out in the preceding paragraph that it might also be argued that there was an *implied term* that the taxi driver would be excused for delays that were not the result of a deliberate act intended to ensure that the

passenger in fact lost his business opportunity. If there was such a deliberate act, – and it would be bizarre in the extreme – the imposition of liability on the taxi driver might in fact be justified from both legal as well as extralegal points of view. However, as we have mentioned, such extreme hypothetical situations are likely to be rare and that, even if they do occur, the common law of contract itself contains the necessary doctrines to avoid an unjust and unfair result.

Subsequent developments

(1) Subsequent English case law and the attempt at integration

121 However, English case law following *The Achilleas* has sought to *integrate* the two limbs in *Hadley* with the approach advocated by Lord Hoffmann in *The Achilleas* itself. It is obvious – perhaps for one or more of the reasons set out above – that the English courts were uncomfortable with endorsing, unconditionally, the approach advocated by Lord Hoffmann, especially since *Hadley* had stood as the established law for 150 years (see, for example, the English High Court decisions of *ASM Shipping Ltd of India v TTMI Ltd of England (The "Amer Energy")* [2009] 1 Lloyd's Rep 293 at [19] and *Classic Maritime Inc v Lion Diversified Holdings Berhad and Another* [2010] 1 Lloyd's Rep 59 at [71]). The approach from integration (hereafter "the integrated approach") is a rather ingenious one. An early hint at such an approach may be found in the judgment of Toulson LJ (with whom Richards and Mummery LJJ agreed) in the English Court of Appeal decision of *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep 349, where the learned judge observed thus (at [43]):

> *Hadley v Baxendale* remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, ie that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, *South Australia* and *Transfield Shipping* are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties. In those two instances the effect was exclusionary; the contract breaker was held not to be liable for loss which resulted from its breach although some loss of the kind was not unlikely. But logically the same principle may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.

122 However, the clearest statement of the integrated approach is perhaps best exemplified in the judgment of Hamblen J in the recent English High Court decision of *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The "Sylvia")* [2010] 2 Lloyd's Rep 81 ("*Sylvia Shipping*"), who referred (at [40]) to the effect of *The Achilleas* as resulting "in *an amalgam* of the orthodox and the broader approach" [emphasis added]. The "orthodox approach", in the learned judge's view (at [27]), "reflects the generally accepted remoteness test based on [*Hadley*] and subsequent cases (what Lord Hoffmann described [in *The Achilleas*] as "the ordinary foreseeabilty rule")". The "broader approach", on the other hand is, in the view of Hamblen J, embodied in that proffered by Lord Hoffmann in *The Achilleas*, and which is described (at [30]) as follows:

> Lord Hoffmann, whilst recognising that the orthodox approach will be applicable in the "great majority of cases", nevertheless considered that it may not be sufficient in cases "in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses" (para 9 [of *The Achilleas*]).

123 At this juncture, it is apposite to set out Hamblen J's statement of the integrated approach in full (in order to capture both the relevant statement of principle as well as its context), as follows (at [40]–[51]):

> 40. In my judgment, the decision in *The Achilleas* results in an amalgam of the orthodox and the broader approach. The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be "unusual" cases, such as *The Achilleas* itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.
>
> 41. In the great majority of cases it will not be necessary specifically to address the issue of assumption of responsibility. Usually the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility.
>
> 42. This is consistent with the judgment of Lord Hoffmann in which he makes it clear that the orthodox approach is the "*prima facie*" rule which will apply in the "great majority of cases" (para 9 [of *The Achilleas*]) and that "cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual" (para 11 [of *The Achilleas*]).
>
> 43. It is also consistent with the judgment of Lord Hope in which he recognised that where the loss claimed reflects what happens in ordinary circumstances (ie is within the first limb of the so-called rule in *Hadley v Baxendale*) then an assumption of responsibility can be presumed: "That is why the damages that are recoverable for breach of contract are limited to what happens in ordinary circumstances—in the great multitude of cases, as Alderson B put it in *Hadley v Baxendale* —where an assumption of responsibility can be presumed" (para 36 [of *The Achilleas*]).
>
> 44. It is also consistent with subsequent authorities which have considered the effect of *The Achilleas*.
>
> 45. In *ASM Shipping Ltd of India v TTMI Ltd of England (The Amer Energy)* [2009] 1 Lloyd's Rep 293, page 295, paras 17 – 19 Flaux J summarised the effect of *The Achilleas* as follows:
>
> > "17. ... First, I do not consider that the House of Lords (at least the majority of their Lordships) were intending to lay down some completely new test as to recoverability of damages in contract and remoteness different from the so-called rule in *Hadley v Baxendale* (1854) 9 Exch 341 as refined in subsequent cases, above all the decision of the House of Lords itself in *C Czarnikow Ltd v Koufos (The Heron II)* [1967] 2 Lloyd's Rep 457; [1969] 1 AC 350. See Lord Hope at paras 31 to 34, Lord Rodger at paras 47 to 52, Lord Walker at paras 66 to 78 and Baroness Hale at paras 89 to 93…
> >
> > 18. … Lord Hoffmann acknowledges in paras 9 and 11 of his opinion that departure from the normal principles of foreseeability would be unusual. Although he refers to shipping as a market where limitations on the extent of liability arising out of general expectations in that market might be more common, I do not consider that he was intending to say that in all shipping cases (as opposed to the type of time charter case then under consideration) the rule in *Hadley v Baxendale* as subsequently refined, will no longer apply. If he was saying

that, it was not a view shared by the majority and it would be heterodox to say the least."

46. In *Classic Maritime v Lion Diversified Holdings Berhad* [2010] 1 Lloyd's Rep 59 Cooke J stated (at page 71) that he would be "highly surprised" if *The Achilleas* established a new test for the recoverability of damages for breach of contract, and noted that Flaux J had been "wholly unpersuaded" that they had done so.

47. Most importantly, in *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] 1 Lloyd's Rep349, the Court of Appeal summarised the position as follows:

> 43. *Hadley v Baxendale* remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, ie that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, *South Australia* and *Transfield Shipping* are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties.

48. The orthodox approach therefore remains the "standard rule" and it is only in relatively unusual cases, such as *The Achilleas* itself, where a consideration of assumption of responsibility may be required.

49. In my judgment, it is important that it be made clear that there is no new generally applicable legal test of remoteness in damages. It appears that in a number of cases this is being argued and that decisions are being challenged for failing to recognize or apply the assumption of responsibility test. This results in confusion and uncertainty.

50. In the vast majority of cases tribunals of fact can and should be able to apply the well established remoteness test with which they are familiar and which, in the vast majority of cases, works perfectly well.

51. In this connection I note the conclusions of *Chitty* at para 26-100G:

> Contractual liability is of course based on express or implied agreement, and it is argued that the reason a party who has broken the contract should be held liable for losses that were not unusual, or which he had brought home to him might occur, is that (unless it is agreed otherwise) he can be taken to have agreed to compensate them. But it does not follow that liability for likely losses should be limited by a vague criterion such as "assumption of responsibility". Rather it is submitted that it is better to have a simple rule that the party in breach is be liable for all losses that are sufficiently likely to occur in the usual case, or whose likelihood has been brought home to him when the contract was made, unless he has validly excluded or restricted his liability. It has been cogently argued that there are limits to the extent that it is feasible to determine all issues by reference to an assumption of responsibility. In relation to the extent of liability for losses suffered by the innocent party as the result of a breach, there will seldom be any "factual foundation for making a determination as to whether the defendant implicitly assumed responsibility for the risk in question". It is thus to be hoped that the approach adopted by the majority in *The Achilleas* will be applied by the courts only in exceptional circumstances, such as those emphasised by Lord Hoffmann in that case.

124 As already mentioned, the integrated approach is an ingenious one in so far as it attempts to reconcile the approach in *Hadley* on the one hand and the new approach advocated by Lord Hoffmann in *The Achilleas* (centring on the assumption of responsibility by the defendant) on the other. With the greatest respect, however, the result, whilst attractive at first blush, is – in *substance* at least – less than satisfactory.

125 Put simply, the integrated approach is, at bottom, an acceptance and endorsement of the approach advocated by Lord Hoffmann in *The Achilleas*. If so, this approach ought not to be followed for the various reasons already set out in detail above.

126 We pause to observe that one other possible method of "integration" (not hitherto considered) is, first, to "preserve" the *first limb* in *Hadley* in its *original form* by *excluding* the assumption of responsibility test advocated by Lord Hoffmann (in so far as it is *presumed* that where the loss falls within the first limb in *Hadley*, there would be an assumption of responsibility, and, accordingly, there would be no need to apply the assumption of responsibility test) and by applying it to *only* the *second limb* in *Hadley*. In other words, *actual* knowledge is a necessary but not sufficient condition to satisfy what was hitherto the *second limb* in *Hadley*; *in addition*, it must now be demonstrated that the defendant concerned had *assumed responsibility* for the (extraordinary) loss which has occurred. *However*, for the detailed reasons set out earlier in this judgment (above at [101] and [104]–[107]), we are of the view that the *second limb* in *Hadley already incorporates or embodies* the concept of assumption of responsibility, *albeit in a more objective and limited fashion* than that advocated by Lord Hoffmann in *The Achilleas*.

127 We would observe further that the approach just mentioned is, in fact, *consistent* with the approach which we have adopted (which is to endorse the principles laid down in *Hadley*) *to the extent that* it views (as we have seen) the *first limb* in *Hadley* as incorporating or embodying the concept of assumption of responsibility. *However*, it does not, with respect, take the logic inherent in its application to the first limb in *Hadley* to its logical conclusion. If it had, then it is (as explained above at [107]) clear that the *second limb* in *Hadley* ought *also* to be treated as having incorporated or embodied the concept of assumption of responsibility as well and that there is therefore no need to introduce an additional criterion or test of assumption of responsibility which would not only be otiose but would also merely serve (as we have also sought to explain above) to introduce (in effect) unnecessary subjectivity as well as uncertainty into a situation which, *ex hypothesi*, does not relate to the actual intentions of the parties as such (except by way of an imputation by the court itself by way of a *universal* principle, which is contained within the *second limb* in *Hadley* itself).

128 Further, the view that there ought not to be a sharp distinction drawn between the two limbs in *Hadley* (which is by no means a recent development (see, for example, the House of Lords decision of *R and H Hall, Limited v W H Pim (Junior) and Company, Limited* (1928) 33 Com Cas 324 at 334, *per* Lord Shaw of Dunfermline (observing that the two limbs "need not be antithetically treated: they may run into each other and, indeed, be one"); reference may also be made to *Robertson Quay* (and the decisions cited therein at [59]) as well as the English Court of Appeal decision of *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119 at 127–128 and the English High Court decision of *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The "Pegase")* [1981] 1 Lloyd's Rep 175 at 182) actually serves – if we accept the argument made above to the effect that the *first limb* in *Hadley necessarily imputes* an assumption of responsibility or an implied obligation on the part of the defendant – to buttress the related argument to the effect that *the second limb in Hadley ought not to be interpreted in a manner different from the first limb of the same*.

(2) Some Australian authorities

129 It is, admittedly, relatively soon for *The Achilleas* to have been considered by courts across the Commonwealth. However, there have, to the best of our knowledge, been (in addition to the English decisions discussed in the preceding section of this judgment) a few Australian decisions which have referred to *The Achilleas* (albeit without shedding much light on the issues canvassed above).

130 In the New South Wales Court of Appeal decision of *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Another* (2008) 72 NSWLR 559 ("*Russell*"), Basten JA (with whose reasons both Giles and Campbell JAA agreed) referred to *both* the traditional approach in *Hadley* as well as Lord Hoffmann's reference to the concept of assumption of responsibility in *The Achilleas*. However, there was no detailed analysis of the relationship between both approaches.

131 The same court, in *Dome Resources NL and Another v Silver and Another* (2008) 72 NSWLR 693, referred (at 711) only in passing to *The Achilleas* – and in the context of the doctrine of consideration only.

132 In the (also) New South Wales Court of Appeal decision of *Evans & Associates v European Bank Ltd* (2009) 255 ALR 171 ("*Evans & Associates*"), Campbell JA referred (at [58], and as was the case in *Russell* (see above at [130])) to *both* the traditional approach in *Hadley* as well as the concept of assumption of responsibility which (significantly, perhaps) the learned judge states as having "recently been *reiterated* in" *The Achilleas*. This observation is, with respect, ambiguous and, if at all, appears to support the proposition endorsed above to the effect that the traditional approach in *Hadley already embodies as well as incorporates the concept of assumption of responsibility in any event*. Further, as in *Russell*, there was no detailed analysis of the various issues raised as a result of *The Achilleas* (in particular, the approach advocated by Lord Hoffmann in that decision).

133 It should also be noted that Gyles AJA did also observe in *Evans & Associates* (at [125]) that "[t]he complications of changing circumstances in relation to contractual damages are apparent from the recent decision of the House of Lords in [*The Achilleas*]". Again, however, this is, at best, a neutral observation only.

(3) A short coda

134 A short coda is in order. In a very recent paper (which originated in a lecture given to the Edinburgh Centre for Commercial Law on 12 May 2009), Lord Hoffmann in fact revisited as well as explained further the decision in *The Achilleas* (see Lord Hoffmann, "The *Achilleas*: Custom and Practice or Foreseeability?" (2010) 14 Edin LR 47 ("*Hoffmann*")). The decision in *The Achilleas* in general and Lord Hoffmann's views in particular ought, strictly speaking, to be interpreted on their own terms. Nevertheless, this paper sheds some interesting light on the decision itself. However, it does not, with the greatest of respect, meet the difficulties raised above, particularly in respect of Lord Hoffmann's own approach centring on the concept of assumption of responsibility by the defendant.

135 We do not propose to deal with the paper in any detail and, in any event, this would not be the correct venue to do so. Hence, a very brief summary of the main points and even briefer observations (which relate to points already raised earlier in this judgment) will have to suffice for present purposes.

136 Lord Hoffmann's principal objection to reliance on the principles laid down in *Hadley* (which he terms (in *Hoffmann* at p 50) "the orthodox approach") have to do with what he observes "is the high degree of indeterminacy which a pure foreseeability test creates" (*id* at p 51; see also at p 52). The

learned author is also concerned about a related point (or consequence) that "the cases show that [the concepts of kind of loss and degree of probability under "the orthodox approach"] are open to very considerable manipulation to achieve what the court considers to be a fair result" (*id* at p 52). Indeed, he refers to such "manipulation" as an "intellectual sleight of hand" (*id* at p 54). Lord Hoffmann is also of the view (*id* at p 52) that the fact situation in *The Achilleas* did not allow the reliance on *Victoria Laundry* in order to achieve the same result, albeit by reference to "the orthodox approach" (a point with which some commentators agree). He also refers (*id* at pp 53 and 56) to the hypothetical of the taxi driver referred to above (at [118]).

137 In Lord Hoffmann's view, the concept of assumption of responsibility (which he advocated in *The Achilleas*) is more effective; in the learned author's words (*id* at p 55):

> The question is: what obligation to make compensation for breach of contract would *a reasonable observer* understand the contracting party to have *undertaken*? [emphasis added]

138 We have already considered the treatment of *Victoria Laundry* (above at [115]) as well as the hypothetical of the taxi driver (above at [118]–[120]). More importantly, perhaps, the critiques from indeterminacy as well as manipulation levelled by the learned author against the traditional principles embodied in *Hadley* are, with the greatest of respect, misconceived. As already noted above (at [110]), there will always be a measure of uncertainty when any rule or principle of law (even an extremely established one) is applied to the facts, simply because the possible fact situations are innumerable. However, this is not, as we understand it, the kind of indeterminacy referred to by Lord Hoffmann since such an understanding would apply equally to the application of *every* rule or principle of law *(including the application of rules and principles based on the concept of assumption of responsibility)*. If so, then it is respectfully suggested that the traditional rules and principles of remoteness of damage which find their origins in the two limbs in *Hadley* are *no more* indeterminate than those based on the concept of assumption of responsibility. Indeed, as we have sought to demonstrate above, the former are, in fact, more stable and objective – in part because they are *external rules* having *universal* application. Indeed, as we have also sought to demonstrate, it is *the concept of assumption of responsibility* that engenders uncertainty. And, in so far as the critique of manipulation is concerned, we would prefer – as we have pointed out above (at [113]) – the *quite different term, "flexibility"*. We hasten to add that the "flexibility" we are referring to is no euphemism; it is a desirable quality in its own right which does not rely on any manipulation or intellectual sleight of hand by the court to arrive at a pre-determined result. As we have explained, the flexibility lies in how the facts are characterised and how the law is applied to those facts. It is, in fact, a truism to state that the law does not operate in an abstract vacuum, but to individual fact situations (see also above at [113]). If, as a result, the court arrives at a substantively fair result, that is, in fact, the ultimate aim and purpose of the enterprise of the law itself (see also generally the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [4]–[9]). However, the desire to arrive at a substantively fair result does not mean that the rules and principles of the law can be manipulated. As observed in a recent lecture delivered at the University of Hong Kong (see Andrew Phang, "Doctrine and Fairness in the Law of Contract" in *The Common Law Lecture Series 2008–2009* (The University of Hong Kong, 2010) (Jessica Young and Rebecca Lee gen eds), pp 17–100 at pp 18–24):

> Put simply, the central thesis of the present lecture is this: The rules and principles which constitute the *doctrine* of the law are not ends in themselves but are, rather, the means through which the courts arrive at *substantively fair* outcomes in the cases before them in *every* area of the law.
>
> [It should be added] that neither is more important than the other. In other words, the desire to

arrive at a fair outcome does not mean that the courts can manipulate legal doctrine in an arbitrary fashion. Indeed, part of [the] task in the present lecture is to demonstrate – through illustrations from the law of contract – that legal doctrine is a coherent body of rules and principles which contain many common threads or linkages. Hence, any attempt to manipulate them in order to arrive at a predetermined result would be both artificial as well as unacceptable, and would instead lead to a loss of legitimacy in the law in the eyes of both the legal profession as well as the public alike. [It should also be mentioned], at this juncture, that academic literature is also important in the analysis as well as formulation of legal doctrine, especially with regard to the consideration of nascent and/or controversial areas of the law. However, [one pauses] to mention (parenthetically) that, whilst there is the need for the consideration as well as citation of academic writings, there is also the need for such writings to be *relevant* inasmuch as, *inter alia*, esoteric and/or highly abstract discourse ought to be avoided. In other words, whilst academic writings must always maintain their intellectual rigour, it must never be forgotten that their *highest* calling (and achievement) consists, in the final analysis, in their contribution to the legal *profession* as a whole.

On the other hand, legal doctrine is not an end itself. Its primary function is to guide the court, in a reasoned fashion, to arrive at *a fair result* in the case before it. Here, too, academic literature has a potentially significant (perhaps even pivotal) role to play. This is because, in some quarters, there has – particularly with the advent of postmodern legal thought – been an increased (and, unfortunately, increasingly) skeptical view taken of the law in general and legal objectivity in particular. Such an approach is, on any view, both corrosive as well as destructive. Whilst one cannot deny that the *application* of objective rules and principles is a *dynamic process* which may therefore give rise (on occasion at least) to some unpredictability as well as uncertainty (particularly in an imperfect world), it is certainly the *very antithesis* of the law to argue that the law is wholly subjective and that (putting it crudely) "anything goes". Indeed, as [was] observed in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd*:

> [I]t is important to stress that notwithstanding many academic critiques to the effect that commercial certainty and predictability are chimerical, it cannot be gainsaid that the *perception* of their importance is deeply entrenched within the commercial legal landscape in general and in the individual psyches of commercial parties (and even non-commercial parties, for that matter) in particular. It may be worth observing that most of these critiques stem from a radical view of the law. To put it bluntly, many of such views stem from the premise that objectivity of the law is not merely elusive but positively illusory. In particular, such a sceptical approach is based on the idea that everything is subjective. This is, of course, the very antithesis of the very enterprise of the law itself. Such an approach also conveniently misses its own absolute cast. Unfortunately, though, it is an absolute view that dispirits and disempowers. It is profoundly negative and ought to be avoided at all costs.

Indeed, the view that the law is subjective (and, consequently, arbitrary) would cause an irreparable loss in the *legitimacy* of the law in the eyes of *the public*. And, as just mentioned, it would also dispirit as well as disempower lawyers, judges and students alike. And, from just a logical perspective (as also pointed out in the judgment just mentioned), the very view that all law is subjective is *itself* an "absolute" proposition that thus involves circularity and (more importantly) self-contradiction.

...

[S]implistic reductionism must, [it should be added], be assiduously avoided by all concerned

(including the courts) – if nothing else, because life is too complex. [The preferred approach is] viewing doctrine and fairness as an *interactive* process, although the attainment of a fair result in each case is the ultimate aim of the court.

[emphasis in original]

139 Indeed, as we have sought to demonstrate above, it is (on the *contrary*) the concept of *assumption of responsibility* which engenders excessive uncertainty (see generally above at [94]–[100]) – not least because it is premised on a very broad and vague concept of interpretation, when what is in fact required are clear and specific rules and principles of law (which criterion is fulfilled, in our view, by the traditional rules and principles of law relating to remoteness of damage in contract law).

Conclusion

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

141 Let us turn now to apply the relevant legal principles to the facts of the present proceedings – specifically, the damages to be awarded in the *post*-breach context.

Our decision

142 The Appellants contended that the post-breach losses (if at all) suffered by the Respondent were not recoverable at law. They contended that the issue of recovery of post-breach losses was not just about remoteness (which the Judge based her decision upon). Instead, they contended that the Respondent was claiming for damages arising from alleged continuing effects of their breaches and that there was no legal authority for such a claim.

143 In our view, the losses that the Respondent is claiming in this particular context are nothing more than losses incurred based on the effect of the Appellants' breaches and it is quite illogical as well as unrealistic to expect losses to cease immediately after the breaches had stopped. We therefore agree with the Judge that the Appellants are liable for the post-breach losses, and that she correctly took into account the trailing-off effect when assessing damages to account for the fact that with the passage of time, more and more consumers would become aware of the changes, and that the after-effects of the breaches would (as a consequence) decrease accordingly. As for the period of six months which the Judge decided as constituting the duration for the Post-Breach Period, we are respectfully of the view (like the AR) that (given the nature of the breaches themselves) a period of 12 months would constitute a reasonable period of time given that it would take some time for the consumer to become aware of the changes. However, like the Judge, we are also of the view that the damages awardable for that particular period should be halved in order to reflect the fact that there ought to be some allowance made for a gradual decrease in the effect of the Appellants' breaches.

144 We also note that the Judge applied the principles in the first limb of *Hadley*, with the result that the Respondent should receive damages as may be fairly and reasonably be considered to arise naturally according to the usual course of things as a result of the Appellants' breaches of contract.

145 As already explained above, we are of the view that the applicable legal principles are those which have their source in *Hadley* (and which were confirmed by this court in *Robertson Quay*). We also agree with the Judge (for the reasons set out above at [37]) that, having regard to the nature of the loss claimed by the Respondent during the Post-Breach Period, the damages which would be awardable would fall within the *first limb* in *Hadley*. It now remains to ascertain the *quantum* of damages to be awarded.

146 Adopting the same methodology as that applied in ascertaining the quantum of damages which ought to be awarded to the Respondent during the Breach Period (see above at [68]–[70]), we note, first, that the predicted or projected percentage change in actual gross sales during the period between February 2007 and January 2008 can be estimated to be 2.31 per cent (-0.38 per cent + 2.69 per cent) – a figure which we find to be not unreasonable, having regard to the overall circumstances (including Fish & Co's projections during *the Breach Period* itself (see above at [41])) and which reflects (in this *higher* projected percentage change in actual gross sales compared to that with respect to the Breach Period) the *continuation* of the upward trend noted above (at [68]). We also note that the predicted or projected gross sales during the preceding period (*viz*, between February 2006 and January 2007), as calculated above, was $2,803,911.82 (see above at [68]). In the circumstances, therefore (and having regard to the predicted or projected percentage change of 2.31 per cent), the *predicted or projected* gross sales during the period between February 2007 and January 2008 would be $2,868,682.18. Having regard to the fact that the *actual* gross sales was $2,493,281.65, [note: 10] the difference between the predicted or projected gross sales and the actual gross sales is $375,400.53 (*ie*, $2,868,682.18 – $2,493,281.65). Taking into account the profit margin of 52.38 per cent (see above at [26] and [68]) *as well as* the fact that the damages to be awarded during the Post-Breach Period are for a duration of *12 months* (which amount should, in our view, be adjusted by half in order to take into account (as did the Judge) the fact that there ought to be some allowance made for a gradual decrease in the effect of the Appellants' breaches (see above at [143])), the amount of damages that ought to be awarded to the Respondent during this particular period is *$98,317.40* (*ie*, $375,400.53 ÷ 2 × 52.38 per cent).

Conclusion

147 For the reasons set out above, we allow the appeal in part inasmuch as the total amount of damages to be awarded to the Respondent is *$193,967.38* (comprising $95,649.98 for damages to be awarded during the Breach Period (see above at [70]) *and* $98,317.40 for damages to be awarded during the Post-Breach Period (see above at [146])).

148 In so far as the costs of the present appeals are concerned, each party is to bear its own costs. As for the costs of the proceedings below, both the costs orders before the AR as well as the Judge are to remain. The usual consequential orders will apply.

[note: 1] Appellants' Core Bundle ("ACB") (Vol II) at pp 47–48.

[note: 2] Respondent's Core Bundle at pp 3–5.

[note: 3] Record of Appeal ("RA") (Vol III Part H) at p 2298.

[note: 4] See RA (Vol III Part E) at pp 1429, 1438–1440 and 1463.

[note: 5] See ACB (Vol II) at p 149 and the Respondent's Case at para 275.

[note: 6] See the Respondent’s Case at para 278.

[note: 7] See the Respondent’s Case at paras 276–278.

[note: 8] See ACB (Vol II) at p 149 and the Respondent’s Case at para 275.

[note: 9] See ACB (Vol II) at p 149.

[note: 10] See ACB (Vol II) at p 149.