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CASE COMMENT

ROBERTSON QUAY INVESTMENT PTE LTD V STEEN CONSULTANTS PTE LTD

GOH YIHAN*

A INTRODUCTION

In recent times, the venerable principles relating to remoteness of damage in contract have undergone a period of sustained re-evaluation.¹ Key amongst this exercise is the House of Lords' decision in *Transfield Shipping Inc v Mercator Shipping Inc*—referred to as '*The Achilleas*',² which represents a fundamental shift in the understanding of remoteness principles. Caught in the winds of *The Achilleas* is the considered judgment of the Singapore Court of Appeal in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd*.³ In direct contrast with some of the speeches in *The Achilleas*, the judgment delivered by Andrew Phang JA in *Robertson Quay* stands as a beacon of stability anchored to the orthodox understanding of remoteness principles. Yet, apparent as its adherence to tradition might seem, *Robertson Quay* possibly represents a more patient revival of the hitherto discredited implied promise theory of remoteness found in *British Columbia Saw Mill Co v Nettleship*,⁴ arguably the precursor to the assumption of responsibility analysis in *The Achilleas*. Whilst *Robertson Quay* was decided prior to *The Achilleas*, the judicial reasoning in the former offers a valuable point of comparison with the latter, which undoubtedly (and understandably) has received far wider reception.

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¹ See Adam Kramer, 'An Agreement-Centred Approach to Remoteness and Contract Damages' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford 2005); Andrew Tettenborn, '*Hadley v Baxendale* Foreseeability: A Principle Beyond its Sell-by Date' (2007) 23 J of Contract L 120; Andrew Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28 Legal Studies 172.

² [2008] UKHL 48, [2008] 3 WLR 345 ('*The Achilleas*'), noted by Edwin Peel, 'Remoteness Re-visited' (2009) 125 LQ Rev 6.

³ [2008] SGCA 8, [2008] 2 SLR 623 (Singapore Court of Appeal) ('*Robertson Quay*').

⁴ (1868) LR 3 CP 499.

B THE FACTS AND THE COURT OF APPEAL'S DECISION

In *Robertson Quay*, the appellant ('RQI') was the owner and developer of a hotel. The first respondent was the company engaged by RQI to provide engineering support for the construction of a hotel. The second respondent ('Shahbaz') was the engineer responsible for the hotel's structural works. In 1996, Shahbaz provided structural drawings that were found to be under-designed, thereby necessitating redrafting. New plans were completed in 1997, but never reached the building contractor. Instead, the respondents mistakenly provided the uncorrected 1996 blueprints. As a result, the completed hotel suffered from structural deficiencies and required significant repair work, the result being a delay in completion of 101 days, from 1 September 1999 to 10 December 1999.

RQI sued the respondents for losses suffered as a result of the delay. Following the respondents' admission of liability, an assessment of damages hearing was commenced. RQI claimed damages falling under several heads, the most significant of which comprised additional interest incurred on certain loans and the loss of rental income.⁵ The background to the interest claim was that RQI had taken out loans from both its shareholders and a bank to finance construction of the hotel. Whilst there was no repayment date for the shareholder loans, the bank loan consisted of a term loan and an overdraft facility. The term loan was to be repaid by 9 May 2002 while the overdraft facility was repayable on demand. Essentially, RQI argued that the delayed completion caused it to incur additional interest payments.⁶ This argument was accepted at first instance before the registrar. RQI was awarded damages for its additional interest claim but not for loss of rental income. While the Singapore High Court upheld the registrar's decision not to award damages for loss of rental income, the decision to award damages for the additional interest claim was overturned. The total damages awarded to RQI were thus significantly reduced and it appealed to the Court of Appeal, by which time it had decided to drop its claim for loss of rental income.

Despite the great attention given to the question of remoteness by the Court of Appeal, the issue was not determinative; the appeal turned instead on 'proof of damage'.⁷ The Court reasoned that whilst RQI had produced proof of the additional interest paid, it did not prove that it was incurred as a result of the delay caused by the respondents.⁸ More specifically, the evidence did not show that the shareholder loan was taken out for the purpose of financing the construction of the hotel. On the contrary, the overdraft facility was used to pay the interest incurred on the shareholder loan, not the hotel construction. The result being that the interest incurred from these two loans could not be recovered because it had

⁵ *Robertson Quay* (n 3) 631–2.

⁶ *Robertson Quay* (n 3) 638.

⁷ *Robertson Quay* (n 3) 638.

⁸ *Robertson Quay* (n 3) 641–2.

nothing to do with the respondents' mistake vis-à-vis the hotel.⁹ In so far as the term loan was concerned, the Court of Appeal attached much importance to the fact that the repayment date was only in 2002. Because of this, RQI had to adduce evidence showing that it intended to use the income generated from the hotel (had it been completed on time) to repay the term loan in full or in part. RQI failed to persuade the Court of Appeal that this was in fact the case, and as such the Court found that even if the hotel had been completed on time, the term loan would have remained unpaid as at the original completion date such that RQI would still have incurred the additional interest.¹⁰ As a consequence, the additional interest incurred from the term loan could not be recovered.

Since the Court of Appeal held that there was no proper causal link between the additional interest incurred by RQI and the respondents' breach of contract, it is perhaps preferable to view the case as being decided on an issue of causation rather than what the Court characterised as 'proof of damage'.¹¹ However, semantics need not distract from the substantive point of interest arising in the case.¹² While, strictly speaking, not necessary to dispose of the matter, the Court of Appeal went on to consider the applicable principles of remoteness of damage in contract, 'both parties [having] made substantial arguments' on the issue.¹³

The arguments raised by the parties concerned whether the additional interest incurred by RQI was too remote. In addressing these arguments, the Court of Appeal reiterated that the rule in *Hadley v Baxendale*¹⁴ on the scope of damage recoverable (as explained in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*¹⁵) continued to be good law in Singapore. The rule in *Hadley v Baxendale*, as is well known, consists of two limbs, each describing a type of damage recoverable as not being too remote—first, damage flowing naturally from the breach of contract and, second, 'unusual' damage that, by its very definition, does not flow naturally from the breach of contract but, rather, as a result of special circumstances. Two different kinds of knowledge—imputed for the first limb and actual for the second—must be brought home to the defendant in order to avoid a claim of remoteness and permit recovery. While acknowledging the difficulty associated with defining the degree of probability necessary to satisfy the requirement of 'reasonable contemplation', the Court of Appeal shied away from judicial exegesis on the precise degree necessary, content instead to rely on the 'ideas and factors conveyed by the words'.¹⁶

⁹ *Robertson Quay* (n 3) 643–5.

¹⁰ *Robertson Quay* (n 3) 645–6.

¹¹ *Robertson Quay* (n 3) 650.

¹² It can most definitely be said that on either analysis, whether causation or proof of actual loss, RQI would not have succeeded, and so the substantive result is not in doubt.

¹³ *Robertson Quay* (n 3) 651.

¹⁴ (1854) 9 Exch 341.

¹⁵ [1949] 2 KB 528 (CA).

¹⁶ *Robertson Quay* (n 3) 658, relying on the words of Sellers LJ in *Czarnikow v Koufos* [1966] 2 QB 695 (CA) 722.

Having stated the rule, the Court of Appeal set out to defend its application and retention in Singapore. Notwithstanding the criticisms of the rule in *Hadley v Baxendale*, the Court stated that there was a ‘strong rational basis’ for its existence and that retention was defensible, reasoning from first principles.¹⁷ The Court identified several of such principles. First, the rule is important in distinguishing between the principles relating to remoteness in the law of contract and those in that of tort.¹⁸ In this regard, the Court was keen to avoid a ‘confusing conflation’ between the two areas,¹⁹ for the very clear reasons given in *Koufos v C Czarnikow Ltd (The Heron II)*.²⁰ Second, the rule in *Hadley v Baxendale* most appropriately describes the rules relating to remoteness in the particular context of the law of contract.²¹ Mindful of the fact that contracting parties have had the opportunity to communicate in advance, but that there will nonetheless be circumstances in which they have not agreed upon the type and amount of damage recoverable, the Court of Appeal emphasised the role of courts to formulate general and universal rules limiting recovery. At the same time, the Court emphasised that the contract must not be rewritten.²² Consonant with such concerns, the first limb of the rule in *Hadley v Baxendale* respects the sanctity of contract because the parties, as reasonable persons, must be taken to have foreseen damage that flows ‘naturally’ from a breach of contract.²³ Likewise, the second limb of the rule is fair as it only subjects the contract breaker to liability for extraordinary damage where he had actual knowledge of the likelihood of its occurrence.²⁴ In essence, the two limbs of the rule in *Hadley v Baxendale* are ‘just and fair’ because they lay down a sensible and coherent rule of recovery, in the absence of express contractual provision.²⁵

The Court also considered and dismissed several criticisms of the rule in *Hadley v Baxendale*. It rejected the multi-factorial approach advocated by Cooke P in the New Zealand Court of Appeal decision of *McElroy Milne v Commercial Electronics Ltd*,²⁶ which allows for the consideration of several factors apart from reasonable contemplation in assessing whether damage is too remote. It did so because of the potential uncertainty generated by an indeterminate number of novel considerations of uncertain weight.²⁷ It also rejected several recent academic

¹⁷ *Robertson Quay* (n 3) 666.

¹⁸ *Robertson Quay* (n 3) 667.

¹⁹ *Robertson Quay* (n 3) 667.

²⁰ [1969] 1 AC 350 (HL) 385–6, 413–14 and 422–3.

²¹ *Robertson Quay* (n 3) 670.

²² *Robertson Quay* (n 3) 671.

²³ *Robertson Quay* (n 3) 672.

²⁴ *Robertson Quay* (n 3) 672.

²⁵ *Robertson Quay* (n 3) 672–3.

²⁶ [1993] 1 NZLR 39 (New Zealand Court of Appeal). Sir Robin Cooke also advocated this approach extra-judicially in Robin Cooke, ‘Remoteness of Damages and Judicial Discretion’ [1978] Cambridge LJ 288.

²⁷ *Robertson Quay* (n 3) 661, citing with approval the views of Rex Ahdar, ‘Remoteness, “Ritual Incantation” and the Future of *Hadley v Baxendale*: Reflections from New Zealand’ (1994) 7 J of Contract L 53.

criticisms, characterising them as being ‘not dissimilar’ in general methodology and approach to that of Cooke P and hence open to the same criticisms.²⁸ Moreover, it was said that since these approaches fail to make much of a difference in individual cases, it might not be ‘prudent for a court to sacrifice certainty for a supposedly more principled regime’.²⁹

After vigorously defending the rule in *Hadley v Baxendale*, the Court found that the additional interest allegedly incurred by RQI was not too remote. It based this finding on the observation that third-party financing for the construction of large commercial projects, such as RQI’s hotel, is an inescapable modern reality. That being so, the facts of the present case fell to be considered under the first limb of the rule, such that the contracting parties as reasonable persons are imputed with the knowledge that a delay in completion would give rise to additional financing costs.³⁰ The claim for additional interest would have been allowed had RQI proved its loss.

C COMMENTARY

A fundamental difference between the decision in *Robertson Quay* and *The Achilles* seems at first blush to be what the Court of Appeal and some members of the House of Lords viewed as the conceptual basis of the remoteness principles. Yet, on closer examination, the Court of Appeal’s approach, while couched in orthodoxy, may in fact be similar to that taken by Lord Hoffmann and Lord Hope in *The Achilles*. If this is correct, one possible advantage of the Court of Appeal’s approach might be the potential it represents for fostering legal certainty.

The Court of Appeal’s approach in *Robertson Quay* seems to reflect the law of contract’s concern to recognise the parties’ intentions where they can be accurately and objectively ascertained in the light of the available evidence. However, where such a task is not possible, the law, duty-bound to resolve contractual disputes, retreats to certain default rules which resolve the case at hand by considering what a reasonable person in the position of the parties would have thought had he turned his mind to the question. This appears to be precisely what Robertson meant when he said that at the margins of contract, it is ‘necessary for judges to fill gaps in the contractual allocation of risk and to determine the limits of the parties’ contractual obligations’.³¹ This suggests that the Court of Appeal saw the rule in *Hadley v Baxendale* as a default rule applicable in the absence of agreement, accompanied by an implicit allocation of risk and responsibility

²⁸ *Robertson Quay* (n 3) 664–6, referring to, inter alia, the views of Melvin Aron Eisenberg, ‘The Principle of *Hadley v. Baxendale*’ (1992) 80 California L Rev 563 and of Tettenborn (n 1).

²⁹ *Robertson Quay* (n 3) 665.

³⁰ *Robertson Quay* (n 3) 677.

³¹ Robertson (n 1) 196.

analysis.³² The first limb respects the sanctity of contract because the parties, as reasonable persons, would in all likelihood ‘have agreed that the contract breaker should be liable . . . for all . . . “ordinary” damage’.³³ Likewise, the second limb only subjects the contract breaker to liability for extraordinary damage in the presence of actual knowledge: in such circumstances, the parties ‘*must be taken to have agreed* that should such damage occur, the contract-breaker would be liable . . .’.³⁴ The justification for both limbs, on agreement between the parties (express or implied), seems to be an extension of the traditional understanding of the justification for the second limb.³⁵ This approach may not go as far as the hitherto discredited requirement of an express or implied term as articulated in *British Columbia Saw Mill Co v Nettleship*,³⁶ but it does restate that requirement as a justification for the rule in *Hadley v Baxendale*. Another departure from the traditional rule is the dispensation with something more than special knowledge for the second limb. Usually mere knowledge of special circumstances is insufficient—‘something more’ is required, such as an ‘acceptance of risk’.³⁷ The approach taken in *Robertson Quay* departs from this by implying that it is an irrefutable conclusion (‘the parties must be taken to have agreed’)³⁸ that special knowledge would suffice on its own and equate to an acceptance of risk.

The adoption of an allocation of risk and responsibility analysis is more obvious in some of the speeches in *The Achilles*. Lord Hoffmann’s speech suggested that he was of the view that it is logical to found liability for damage upon the intention of the parties, with liability depending on the type or kind of damage for which the contract breaker can be considered as having assumed responsibility.³⁹ Similarly, Lord Hope of Craighead said that assumption of responsibility ‘forms the basis of the law of remoteness of damage in contract’.⁴⁰ Whilst Lord Rodger of Earlsferry and Baroness Hale of Richmond were both disinclined to express any firm views on the relationship between the assumption of responsibility and remoteness of damage in contract (with Baroness Hale rather dismissive of any such relationship),⁴¹ Lord Walker of Gestingthorpe was more equivocal in his response. On balance, it seems fair to speculate that he was in favour of applying the notion of assumption of responsibility to the remoteness analysis.⁴²

³² See also *Chee Peng Kwan and Another v S Karthikeyan and Others* [2009] SGHC 141 (Singapore High Court) (‘*Chee Peng Kwan*’) [40].

³³ *Robertson Quay* (n 3) 671–2 (emphasis added).

³⁴ *Robertson Quay* (n 3) 672 (emphasis added).

³⁵ Peel (n 2) 10.

³⁶ (n 5).

³⁷ HG Beale (ed), *Chitty on Contracts* (29th edn Sweet & Maxwell, London 2004) 1455; Harvey McGregor, *McGregor on Damages* (17th edn Sweet & Maxwell, London 2003) 209. However see now HG Beale (ed), *Chitty on Contracts* (30th edn Sweet & Maxwell, London 2008) 1636 and 1661–3.

³⁸ *Robertson Quay* (n 3) 672.

³⁹ *The Achilles* (n 2) 352–3.

⁴⁰ *The Achilles* (n 2) 355.

⁴¹ *The Achilles* (n 2) 364, 373–4.

⁴² *The Achilles* (n 2) 366, compare with 371.

Thus we see from the two cases that there are similarities in the conceptual understanding of remoteness principles, and yet some practical differences in how this conceptual understanding is to be given effect. While the Court of Appeal uses allocation of risk and responsibility as a justification for the rule in *Hadley v Baxendale*, it is not imported as a requirement. Indeed, the mere requirement of knowledge (actual or imputed), and the equation of knowledge with liability, would mean that the justificatory reason of agreement is imputed instead of actual. There is no need for actual agreement, even implied, to bear such loss.⁴³ On the other hand, the approach of Lord Hoffmann and Lord Hope in *The Achilles* is to bring the justification to bear in terms of the requirement; what needs to be objectively ascertained is whether there is really assumption of responsibility for the type of loss in question by the contracting parties. Explained in this way, is it possible then to say that one approach is more correct than the other?

One possible view is that the Court of Appeal's approach, while seemingly grounded in orthodoxy, is actually a step towards a more coherent understanding of the remoteness principles. On the face of it, the rule in *Hadley v Baxendale* is not concerned with what damage the parties impliedly or reasonably agreed to be liable for, but what damage the parties might contemplate. Contemplation of the damage is not an implied agreement to be liable for it. The traditional understanding of the rule in *Hadley v Baxendale* bridges this gap between contemplation and implied assent to liability by equating the two: a reasonable contemplation of damage materialising upon breach carries with it the obligation to actually pay the damage so materialised. The Court of Appeal in *Robertson Quay* has now explained the equation of the two by way of an implicit (and possibly imputed) agreement as to risk and responsibility inherent in the two limbs of the rule in *Hadley v Baxendale*. While it might have gone further, as did some members of the House of Lords in *The Achilles*—by asking more directly whether the contract breaker assumed responsibility for the loss in question—the Court of Appeal's more conservative approach, in the form of a justification for the existing rule rather than a new approach derived from such a justification, might be said to be preferable for two reasons. First, it retains the familiar criterion of reasonable contemplation in ascertaining the remoteness of damage without undertaking what has been described as an artificial exercise of searching for actual intention as to allocation of risk.⁴⁴ This avoids the potential uncertainty generated by *The Achilles*.⁴⁵ Second, it does not sacrifice conceptual coherency for convenience, insofar as the court relates remoteness with implicit agreement as to risk and responsibility. This achieves Lord Hoffmann's and Lord Hope's objective in *The Achilles*, but with much less fanfare. In truth, the Court of Appeal's approach, grounded in the application of default rules, but explained in terms of the

⁴³ Edwin Peel, *Treitel on the Law of Contract* (12th edn Sweet & Maxwell, London 2007) 1051.

⁴⁴ Robertson (n 1) and Peel (n 2) 11. Compare with Adam Kramer, 'The New Test of Remoteness in Contract' (2009) 125 LQ Rev 408, 410–411.

⁴⁵ Peel (n 2) 11.

contracting parties' intentions, is closer to the former than the latter, remaining a palatable explanation for the default rules.

Admittedly, difficulties remain. For one, the Court of Appeal failed to settle on a concrete definition of the degree of probability still required under the rule in *Hadley v Baxendale*, preferring instead to find refuge in the 'idea and factors' in the words of the rule.⁴⁶ This could lead to uncertainty in the future, and it might have been better had the Court of Appeal chosen a particular phrase to describe the degree of probability required.⁴⁷ Also, the Court of Appeal's equation of special knowledge with liability in respect of the second limb might be over-inclusive in some instances, rendering defendants liable in circumstances of mere knowledge, which would distinguish Singaporean law from that of other jurisdictions. Finally, there may still be conceptual untidiness in the Court's retention of *Hadley v Baxendale* as a 'default rule', whereas a true assumption of responsibility approach would not operate 'in default' since it rests on the presupposition of tacit agreement, whether express or implicit. Nevertheless, given that the assumption of responsibility approach was not entirely what the Court of Appeal had in mind, perhaps this is an acceptable conceptual difficulty.

In the end, the need for certainty as facilitated by a gradual and incremental refinement of the common law suggests that such difficulties are a worthwhile compromise. In finely balancing innovation and orthodoxy, the Court of Appeal's approach in *Robertson Quay* may well be preferable to the radical approach taken by some members of the House of Lords in *The Achilles*.

⁴⁶ *Robertson Quay* (n 3) 658.

⁴⁷ Compare with *Chee Peng Kwan* (n 32) [42].