Contractual interpretation and remoteness

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In The Achilleas*, a bare majority of the House of Lords adopted a novel, agreement-centred approach to remoteness under which limits on recovery for breach are determined by the parties' agreement, not external rules of law, even in the absence of express provision for the consequences of breach. This approach risks obscuring what the general process of contractual interpretation requires in different contexts to reach different conclusions, and the uncertainty and imprecision that this invites is illustrated by* The Achilleas *itself. Further and more precise problems are faced in the remoteness context.*

I. INTRODUCTION

Alderson B famously stated in *Hadley* v. *Baxendale*:[1]

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it".

For Lord Hope of Craighead, the rules identified in *Hadley* v. *Baxendale* "are very familiar to every student of contract law. Most would claim to be able to recite them by heart".[2] For over 150 years, this dictum of Alderson B, as interpreted and restated in subsequent cases,[3] provided the starting point for the remoteness inquiry. The modern effect of these rules can be expressed in a single formulation as follows: a type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was

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1. (1854) 9 Exch 341, 354; 156 ER 145, 152.
2. *Jackson* v. *Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377, [25].
3. Most notably *Victoria Laundry (Windsor) Ltd* v. *Newman Industries Ltd* [1949] 2 KB 528 (CA) and *Koufos* v. *C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL). Cf *Parsons (Livestock)* v. *Uttley Ingham & Co Ltd* [1978] QB 791 (CA); *Brown* v. *KMR Services Ltd* [1995] 4 All ER 598 (CA) and *Jackson* v. *Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377. As Robert Goff J noted in *Satef-Huttenes Albertus SpA* v. *Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175 (Com Ct), 181, "although the principle stated in *Hadley* v. *Baxendale* remains the *fons et origo* of the modern law, the principle itself has been analysed and developed, and its application broadened, in the 20th century".

within their reasonable contemplation as a not unlikely result of that breach.[4] The state of the parties' knowledge will determine what is within reasonable contemplation, so abnormal losses may not be within reasonable contemplation unless special attention is drawn to the possibility of their occurrence.[5] While there is room for uncertainty over how broadly a "type or kind of loss" would be construed,[6] or over the degree of foreseeability required for a consequence to be within "reasonable contemplation",[7] the general structure of the inquiry remains clear. The limits on recovery imposed by the common law are additional to those expressly provided for in the contract.

However, this traditional understanding was challenged in *Transfield Shipping Inc* v. *Mercator Shipping Inc (The Achilleas)*.[8] The facts involved late redelivery of a vessel under a time charter which had forced the shipowners to accept a reduced rate under a follow-on charter that had originally been procured at a much more favourable rate due to volatile market conditions. The shipowners sued to recover the difference between the original rate and the reduced rate over the duration of the follow-on charter. The charterers sought to rely (*inter alia*) on an alleged understanding in the shipping industry, fostered by various instances of *obiter dicta*, that damages for late redelivery under a time charter were limited to the difference between the market and charter rates of hire during the overrun period. Rix LJ, delivering the judgment for a unanimous Court of Appeal,[9] held that the alleged understanding was incorrect as a matter of law, and therefore irrelevant. As the loss claimed by the shipowners was what a reasonable person in the charterer's position at the time of the first charter would have contemplated as arising naturally or in the usual course of things in the event of late redelivery,[10] Rix LJ held that the shipowners were entitled to the relief sought under a straightforward application of the rules on remoteness set out above.

The story in the House of Lords was very different. The House unanimously allowed the charterers' appeal. However, the reasons given by their Lordships disclose a fundamental division in approach. Lord Rodger of Earlsferry and Baroness Hale of Richmond allowed the charterers' appeal on the basis of the traditional approach to

4. H Beale (ed), *Chitty on Contracts*, 30th edn (Sweet & Maxwell, London, 2008) (hereafter "*Chitty*"), vol 1, [26.054]. The test is traditionally separated into its first and second "limbs". The first limb covers those losses which arise "naturally" or "in the usual course of things" from the breach in question. The second limb covers exceptional losses arising from special circumstances of which the contract breaker was aware at the time of contracting. There is House of Lords authority to the effect that the two limbs are not analytically distinct: *Jackson* v. *Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377, [46–49]. Nevertheless, the traditional terminology serves as a convenient shorthand for distinguishing the two different factual scenarios at hand.

5. This is at the heart of the traditional division of the rule in *Hadley* v. *Baxendale* into its first and second limbs.

6. Contrast *Victoria Laundry* [1949] 2 KB 528 with *Parsons* v. *Uttley Ingham* [1978] QB 791 and *Brown* v. *KMR* [1995] 4 All ER 598.

7. The notorious discussion of this issue by the House of Lords in *The Heron II* [1969] 1 AC 350 is best summarised by Burrows as follows: "while a slight possibility of the loss occurring is required in tort, a serious possibility of the loss occurring is required in contract". See AS Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (OUP, Oxford, 2004), 88.

8. [2008] UKHL 48; [2009] 1 AC 61; [2008] 2 Lloyd's Rep 275. See comments by E Peel (2005) 125 LQR 6 and A Kramer (2009) 125 LQR 408.

9. [2007] EWCA Civ 901; [2007] 2 Lloyd's Rep 555.

10. Counsel for the charterers had conceded in arbitration that the loss the owners sought to recover could be said to have been reasonably contemplated by the parties as a "not unlikely" consequence of late redelivery. Rix LJ went further, holding that a follow-on fixture was not merely "not unlikely", but in fact "highly probable".

remoteness. But Lord Hoffmann and Lord Hope allowed the appeal on more radical grounds. Drawing on the academic literature[11] and starting from the premise that all contractual liability is voluntarily undertaken,[12] their Lordships concluded that an essential requirement for contractual liability was an assumption of responsibility by the contract breaker for the type or kind of loss sustained.[13] On this approach, the circumstances indicated that the charterers had only assumed responsibility for the difference between the charter and the market rates for the duration of the overrun period. Slightly more difficult to classify is the approach of Lord Walker of Gestingthorpe. It is clear that, if adopted, the more radical approach of Lord Hoffmann and Lord Hope has the potential to effect a fundamental shift in the theoretical basis of limits on contractual liability which will affect the way cases are both argued and decided. In addressing the important issues raised by this case, this article will first examine the speeches of their Lordships in greater detail, before moving on to consider the deeper issues raised by—and, ultimately, the desirability of—the more radical approach of Lord Hoffmann and Lord Hope.

II. *THE ACHILLEAS*

A. Facts and background

The *Achilleas* is a single-decker bulk carrier of some 69,000 dwt built in 1994. By a time charter dated 22 January 2003, she was let to the charterers for about five to seven months at a daily hire rate of US$13,500; by an addendum dated 12 September 2003, the charter period was extended for a further five to seven months at a daily rate of US$16,750, the latest date for redelivery being 2 May 2004. On an unspecified date, the charterers sub-chartered the vessel to carry coals from Quingdao to Tobata and Oita. If this sub-charter would not reasonably be expected to permit redelivery by 2 May 2004, the shipowners could probably have refused to undertake it;[14] however, no objection was made. On 20 April the charterers gave a 10-day estimated notice of redelivery between 30 April and 2 May. Upon receiving this notice, the shipowners fixed a follow-on time charter for about four to six months with Cargill International SA, terminable by Cargill if delivery was not made by 8 May. On 24 April the vessel completed loading at Quingdao. Having discharged at Tobata, she was then delayed at Oita; on 27 April the charterers had given a revised notice of redelivery on 4/5 May. By 5 May, it was apparent that the vessel could not be delivered to Cargill by 8 May, and the shipowners sought to negotiate an extension of the cancelling date under the follow-on charter. Cargill agreed to extend the cancelling date to 11 May in return for the original daily hire rate of US$39,500 being reduced to

11. Most notably, A Kramer, "An Agreement-Centred Approach to Remoteness and Contract Damages", ch 12 of N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart, Oxford, 2005); *cf* AM Tettenborn, "*Hadley* v. *Baxendale* Foreseeability: a Principle Beyond its Sell-by Date" (2007) 23 JCL 120. For the contrary view, see A Robertson, "The Basis of the Remoteness Rule in Contract" (2008) 28 LS 172.

12. *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61, [12] (Lord Hoffmann).

13. *Ibid*, [15].

14. *Torvald Klaveness A/S* v. *Arni Maritime Corp (The Gregos)* [1994] 1 WLR 1465; [1995] 1 Lloyd's Rep 1 (HL).

US$31,500, the market rate for such vessels having declined drastically in the meantime. The vessel was then delivered to Cargill in accordance with the new cancelling clause on 11 May. The shipowners claimed damages totalling US$1,364,584.17 for their loss of profit over the course of the follow-on fixture as a result of having to reduce the daily hire rate by $8,000 owing to the charterers' breach of contract.

The owners succeeded before the arbitrators.[15] The majority arbitrators determined that the lost profits on the follow-on fixture fell straightforwardly within the first "limb" of the rule in *Hadley* v. *Baxendale*,[16] having arisen "naturally, ie, according to the usual course of things, from such breach of contract itself",[17] since it was damage "of a kind which the [charterer], when he made the contract, ought to have realised was not unlikely to result from a breach of contract [by delay in redelivery]".[18] The dissenting arbitrator held that, while this was true, a reasonable man in the position of the charterers would nevertheless not have understood that he was assuming liability for the risk of the type of the loss in question. The alleged understanding in the shipping market was that liability was restricted to the difference between the market and charter rates for the overrun period alone. The majority did not deny this, but considered it irrelevant and incorrect in law.

On appeal from the arbitrators under the Arbitration Act 1996, s 69, Christopher Clarke J[19] and the Court of Appeal[20] upheld the majority decision. In the Court of Appeal, Rix LJ examined the authorities relied on by the charterers and concluded that the support in the authorities for confining damages to the overrun period was weak. Not only had recoverability over the duration of a subsequent fixture not been in issue in any of the cases cited, but "[a]ny issue of damages generally arose only in a very narrow form, and had already been defined and confined in the special case stated in arbitration; and not only was compensation for loss of a fixture not in issue, it usually could not have been in issue on the facts".[21]

The case required nothing more than a simple application of the orthodox rules on remoteness, under which the owners were entitled to succeed. The charterers obtained leave to appeal to the House of Lords.

B. The Achilleas *in the House of Lords*

The speeches of their Lordships exhibited two different approaches in unanimously allowing the charterers' appeal. The conventional approach to remoteness was clearly favoured by Lord Rodger and Baroness Hale, while a novel, agreement-centred approach was adopted by Lords Hoffmann and Hope. These approaches will be set out in greater detail before an examination of the speech of Lord Walker, which will be crucial to distilling the *ratio* of the decision.

15. Mr David Farrington and Mr Bruce Buchan; Mr Christopher Moss dissenting.
16. (1854) 9 Exch 341, 156 ER 145.
17. *Ibid*, 354.
18. *The Heron II* [1969] 1 AC 350, 382–383 (Lord Reid).
19. [2006] EWHC 3030 (Comm); [2007] 1 Lloyd's Rep 19 (Com Ct).
20. [2007] 2 Lloyd's Rep 555 (CA) (Ward, Tuckey and Rix LJJ).
21. *Ibid*, [61].

1. A traditional approach to remoteness

Lord Rodger and Baroness Hale allowed the appeal on orthodox grounds by applying the conventional test outlined above. Lord Rodger held that the loss sustained by the shipowners over the duration of the entire follow-on charter "could not have been reasonably foreseen as being likely to arise out of the delay in question",[22] since it occurred "only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture".[23] Consequently, it was "too remote to give rise to a claim for damages for breach of contract".[24] Baroness Hale, doubting whether to allow the appeal, ultimately endorsed Lord Rodger's reasoning.[25]

This sits uneasily with the principle that it is the *type or kind* of loss which must be reasonably foreseeable, not its extent. It also does not fit with the rule that all market movements are taken to be foreseeable.[26] There is a superficial analogy between Lord Rodger's approach and that taken by the Court of Appeal in *Victoria Laundry (Windsor)* v. *Newman Industries Ltd*,[27] in which the claimant launderers could not recover the exceptional loss of profit incurred through its inability to perform a particularly lucrative contract with the Ministry of Supply owing to the defendants' late delivery of a boiler. Since the defendants had not been made aware of the exceptional nature of the Ministry of Supply contract, the claimant could only recover the "ordinary" lost profits of an idle laundry business. However, *The Achilleas* is readily distinguishable from *Victoria Laundry* (which in any case was not directly relied on by Lord Rodger). It is arguable that the Ministry of Supply contract in *Victoria Laundry* was of a fundamentally different *kind* to a typical launderers' contract. However, whatever the merits of such an argument on the facts of *Victoria Laundry*, it cannot be made on the facts of *The Achilleas*, where the follow-on charter was entirely normal, and according to Rix LJ in the Court of Appeal, "plainly 'not unlikely'".[28] Confirmation that the *Victoria Laundry* approach was not applied in *The Achilleas* is that recovery was not permitted for the loss which would have

22. *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61, [60].
23. *Ibid*.
24. *Ibid.*
25. *Ibid*, [93].
26. Authority for both propositions is *Brown* v. *KMR* [1995] 4 All ER 598 (CA), where a Name at Lloyd's succeeded in recovering "underwriting losses" from his agent for breach of contract, the agent having undertaken a "high risk" strategy. The Court of Appeal held that it was irrelevant that the scale of the claimant's loss had been amplified by unprecedented financial disasters, since the *type* of loss had been foreseeable. Similarly, in *Parsons* v. *Uttley Ingham* [1978] QB 791 the claimant pig farmers recovered damages for the loss of pigs that had died from eating nuts that had gone mouldy from being stored in a hopper the ventilator of which the defendants had negligently failed to open. It was sufficient that *illness* to pigs had been foreseeable. For the proposition that all market movements are foreseeable regardless of extent, see, eg, *Banque Bruxelles Lambert SA* v. *Eagle Star Insurance Co Ltd* [1995] QB 375 (CA), 420 (Sir Thomas Bingham MR) ("Any distinction between large and small market falls would lack any basis in principle") (the actual decision was subsequently varied: [1997] AC 191).
27. [1949] 2 KB 528.
28. [2007] 2 Lloyd's Rep 555, [112], where Rix LJ also suggested, without deciding, that, "as a rule of thumb, a charterer should not, without further knowledge, be held liable . . . for the loss of a new fixture of longer length than that which he himself had contracted for". This left open the possibility of arguments based on *Victoria Laundry.*

been sustained over the entire follow-on charter due to *regular*, *unexceptional* market movements.

For the above reasons, and with respect to Lord Rodger and Baroness Hale, the most faithful application of the traditional remoteness test is found in the judgment of Rix LJ in the Court of Appeal. It will be recalled that Rix LJ simply held that the decision of the majority arbitrators was entirely in accordance with principle, since the loss suffered by the shipowners over the length of the follow-on charter was foreseeable as a not-unlikely consequence of a late redelivery.

One question which remains is whether the outcome reached by the majority could in any circumstances be reconciled with the approach taken to remoteness by Rix LJ. This turns on whether an exclusion or limitation clause could be implied in fact in the ordinary way. Though the courts have never given effect to an unexpressed exclusion of liability through the doctrine of implication in fact, it is submitted that there is no reason in theory why such clauses cannot be implied where appropriate. Such an argument may well have been possible on the facts of *The Achilleas*, given the "understanding" in the shipping industry (mentioned by Lord Hoffmann) that damages for late redelivery were limited to the difference between the market and charter rates over the overrun period alone. Had it been proved that this understanding was widely held and taken for granted throughout the shipping industry, it might well have satisfied the "officious bystander" test for implication in fact.[29] However, it must be noted that Lord Hope's speech in *Jackson* v. *Royal Bank of Scotland*[30] may seem to rule out the possibility of implying a limitation clause in fact. His Lordship stated:[31]

> "The parties have the opportunity to limit their liability in damages when they are making their contract . . . If no cut-off point is provided by the contract, there is no arbitrary limit that can be set to the amount of damages once the test of remoteness according to one or other of the rules in *Hadley* v. *Baxendale* has been satisfied".

Nevertheless, it does not seem that Lord Hope intended to rule out the possibility of an implied exclusion clause. Implication in fact was not under consideration; rather, Lord Hope was criticising the Court of Appeal's use of *remoteness* to impose an arbitrary limit on recovery. Furthermore, there is no self-evident reason in principle for denying that exclusion clauses may be implied in fact under the traditional approach. Implication in fact may therefore provide a simple (if hitherto overlooked) solution in cases where recovery under *Hadley* seems disproportionate.[32] For these reasons, it is suggested that the outcome of *The Achilleas* could be reconciled with the approach to remoteness taken by

29. *Shirlaw* v. *Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA), 227 (MacKinnon LJ). See *post*, text to nn 69 and 73.

30. [2005] UKHL 3; [2005] 1 WLR 377 (HL).

31. *Ibid*, [36]; see also [37].

32. The classic example is the taxi-driver who is informed that a delay will cause his passenger to lose a significant financial gain. An "officious bystander" asking whether the taxi-driver was excluding liability for this loss would surely be testily suppressed with a common "Oh, of course!" *Cf* the US *Restatement of Contracts* (2d), § 351(3) of which allows a court to limit recovery "if it concludes that, in the circumstances, justice so requires in order to avoid disproportionate compensation". The implied term solution is internal to the parties' agreement, since it is based on what the parties *must* have actually intended; § 351 is an externally imposed default rule of law.

Rix LJ through the implication in fact of a limitation clause limiting recovery for late redelivery to the difference between the market and charter rates over the overrun period.

2. An agreement-centred approach to remoteness

Lord Hoffmann and Lord Hope adopted different starting points in their approaches. Lord Hoffmann held that "one must first decide whether the loss for which compensation is sought is of a 'kind' or 'type' for which the contract-breaker ought fairly to be taken to have accepted responsibility".[33] Similarly, for Lord Hope, "[t]he question is whether the loss was a type of loss for which the [contract breaker] can reasonably be assumed to have assumed responsibility".[34] The loss contested by the charterer—namely, the difference between the original rate and the reduced rate over the duration of the follow-on charter—was not such a loss, and was therefore irrecoverable. The primary reason for this conclusion was that a party cannot be expected to assume responsibility for an unquantifiable risk,[35] though Lord Hoffmann also adverted to the "understanding" in the shipping industry that liability for late redelivery was limited to the difference between the market and charter rates over the overrun period alone.

3. The ratio of the decision

The *ratio* of the decision therefore turns on the approach taken by Lord Walker, who expressly allowed the appeal for the reasons given by Lord Hoffmann, Lord Hope and Lord Rodger,[36] in addition to substantial reasons of his own.

At first glance, paragraphs [69] and [86] of Lord Walker's speech may be thought to indicate contradictory approaches. However, when these paragraphs are taken in context, the apparent contradiction disappears. In paragraph [86], Lord Walker stated his conclusion that:

> "it was contrary to the principles stated in the *Victoria Laundry* case, and reaffirmed in *The Heron II*, to suppose that the parties were contracting on the basis that the charterers would be liable for any loss, however large, occasioned by a delay [in the circumstances]".

While this purports to apply the principles stated in *Victoria Laundry* and *The Heron II*, and therefore the traditional approach to remoteness outlined above, this statement must be taken in the context of the preceding discussion in paragraph [84], which repays quoting in full:

33. [2008] UKHL 48; [2009] 1 AC 61, [15].
34. *Ibid*, [32]. It is remarkable to observe how far Lord Hope's approach differed from his approach in *Jackson* v. *Royal Bank of Scotland* [2005] UKHL 3; [2005] 1 WLR 377, in which his Lordship fiercely criticised the Court of Appeal's use of remoteness to impose an "arbitrary" limit on recovery beyond *Hadley*.
35. [2008] UKHL 48; [2009] 1 AC 61, [23] (Lord Hoffmann), [34] and [36] (Lord Hope).
36. *Ibid*, [87].

"Ultimately [the arbitrators] accepted and applied the owners' submission that 'what mattered was that the type of loss claimed was foreseeable': para 18 of the majority reasons. That was in my opinion too crude a test, and it was an error of law to adopt it. What mattered was whether the common intention of reasonable parties to a charterparty of this sort would have been that in the event of a relatively short delay in re-delivery an extraordinary loss, measured over the whole term of renewed fixture, was, in Lord Reid's words, 'sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within [the defaulting party's] contemplation'. Lord Mustill's *dictum* in *The Gregos*[37] indicates that that would not have been the common intention of reasonable contracting parties, and I respectfully agree."

From this, two propositions can be deduced. First, foreseeability of the type of loss claimed is too crude a test. Secondly, the determining factor is the parties' common intention. These propositions embody the approach taken by Lord Hoffmann and Lord Hope, and provide the crucial context for Lord Walker's conclusion, in paragraph [86], that it was incorrect to suppose that "the parties were contracting *on the basis that the charterers would be liable for any loss, however large,* occasioned by a delay" in the circumstances.[38] Furthermore, Lord Walker's reference to the principles stated in *Victoria Laundry* and *The Heron II* suggests that he regards this approach as being consistent with the decisions in those cases.

Another statement of Lord Walker[39] similarly places emphasis on the parties' common intention:

"But the underlying idea—what was the common basis on which the parties were contracting?—seems to me essential to the rule in *Hadley* v. *Baxendale* as a whole. Businessmen who are entering into a commercial contract generally know a fair amount about each other's business. They have a shared understanding (differing in precision from case to case) as to what each can expect from the contract . . . ".

It is clear from this passage that Lord Walker views the notions of a "common basis" and a "shared understanding" as "essential" to the rule in *Hadley* v. *Baxendale*. This observation, seen alongside the view that *Victoria Laundry* and *The Heron II* are consistent with an approach focusing on the parties' common intention, suggests that Lord Walker's speech is best explained as accepting the intention-based approach of Lord Hoffmann and Lord Hope, while considering that this is what the law has been doing all along, from *Hadley* v. *Baxendale* to the present day.

In substance, Lord Walker's approach therefore lines up with that of Lord Hoffmann and Lord Hope, despite the ambiguity of his agreement with Lord Rodger in addition to Lord Hoffmann and Lord Hope. For these reasons, the intention-based assumption of responsibility approach must be taken, albeit very narrowly, as the *ratio* of the decision in *The Achilleas*. Its operation and its merits therefore require a detailed examination.

37. [1994] 1 WLR 1465, 1477–1478; [1995] 1 Lloyd's Rep 1, 10.
38. Emphasis added.
39. [2008] UKHL 48; [2009] 1 AC 61, [69].

III. THE AGREEMENT-CENTRED APPROACH IN THEORY

A. The Achilleas *in context*

1. What is the agreement-centred approach really about?

In *The Achilleas*[40] Lord Hoffmann said:

> "[T]he question of whether a given type of loss is one for which a party assumed contractual responsibility involves the interpretation of the contract as a whole against its commercial background, and this, like all questions of interpretation, is a question of law".

Several terms can be used to describe the approach embodied in the speeches of Lords Hoffmann and Hope.[41] They include: an "agreement-centred approach";[42] an "assumption of responsibility" approach;[43] and an "intention-based approach".[44] It is suggested that nothing turns on the choice of label and that, in substance, these terms all contemplate a common approach. They ask whether it was the objectively ascertained common intention of the parties that the contract-breaker had assumed responsibility for the type of loss in question under the contract. This is determined as a matter of contractual interpretation. For convenience, this approach will henceforth be referred to as the agreement-centred approach.[45]

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 in the above quotation, then the claimant is always "to be placed in the same situation, with respect to damages, as if the contract had been performed",[46] 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.

A different view is taken by the editors of *Chitty*, who state that, pursuant to *The Achilleas*, "[t]here now appear to be two tests, the remoteness test and, in addition, whether in the particular circumstances it can be said that the defendant was implicitly

40. [2008] UKHL 48; [2009] 1 AC 61, [25].

41. And, as suggested above, by Lord Walker. However, since Lord Walker expressly accepted Lord Rodger's reasons for allowing the appeal, his speech should not be taken as unequivocally representative of this approach.

42. Kramer, *supra*, n 11.

43. *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61, [9] (Lord Hoffmann), [30] (Lord Hope).

44. *Ibid*, [12].

45. This label has been chosen since it emphasises the point that remoteness-based limitations on recoverability derive from the parties' agreement, not external rules of law. Furthermore, it is the term employed by Kramer (*supra* n 11), who advances the most sophisticated argument in favour of this approach. While the speeches of Lord Hoffmann and Lord Hope employ the language of assumption of responsibility, it is suggested that such language is ambiguous because it conceals whether the assumption is based on the intentions of the parties or imposed by law.

46. *Robinson* v. *Harman* (1854) 1 Exch 850, 855; 154 ER 363, 366 (Parke B).

undertaking responsibility".[47] This seems to misread the speeches of Lord Hoffmann, Lord Hope and Lord Walker. Lord Hoffmann's formulation of the question[48] clearly regards assumption of responsibility as being central to, not separate from, remoteness; he states[49] that it is the very rules in *Hadley* v. *Baxendale*[50] and *The Heron II*[51] that are "intended to give effect to the presumed intentions of the parties [through the agreement-centred approach] and not to contradict them". Lord Hope[52] expressly states that "[a]ssumption of responsibility . . . forms the basis of the law of remoteness of damage in contract", and Lord Walker states[53] that "the underlying idea—what was the common basis on which the parties were contracting?—seems to me essential to the rule in *Hadley* v. *Baxendale* as a whole". These statements clearly envisage the agreement-centred approach as being synonymous with, not separate from, remoteness. To say that a loss is too remote is to say that it was not within the scope of the responsibility assumed under the contract by the contract-breaker; no further test of remoteness applies.

One objection to understanding the agreement-centred approach to remoteness as an approach to interpretation is that interpretation is not mentioned in the operative parts of the speeches of Lords Hope and Walker. For Lord Hope, the question is "whether the loss was a type of loss for which the party can reasonably be assumed to have assumed responsibility".[54] This is, however, the same question as that posed by Lord Hoffmann in the quotation above. In substance, the approaches of Lords Hope and Walker require identifying the scope of the contractual duties undertaken in the parties' agreement, and it is clear—especially in light of the modern law of interpretation discussed below—that the focus, notwithstanding the language of their Lordships' speeches, is on interpretation of the parties' agreement.

So understood, *The Achilleas* can be situated within two different trends in the law. The first is a reductionist approach that seeks to resolve disputes solely by reference to scope of the defendant's duty, without recourse to other doctrines such as remoteness. The second is particular to contract law, and consists of recent speeches of Lord Hoffmann which seek to expand the sovereignty of the parties' agreement through integrating previously separate doctrines of contract law into a broadened approach to contractual interpretation. Both of these trends will be sketched in order to set *The Achilleas* in context and form a framework for the discussion which follows.

2. The resolution of disputes by reference to "scope of duty"

Under the agreement-centred approach to remoteness, disputes over the extent of recovery are resolved solely by reference to the scope of the contractual duty undertaken by the defendant, ascertained through the process of contractual interpretation. In looking solely to the scope of the defendant's duty, the agreement-centred approach resembles a recent trend in decisions concerning duties of care. This trend must now be seen in light of the

47. *Chitty*, vol 1, [26.051].
48. [2008] UKHL 48; [2009] 1 AC 61, [9].
49. *Ibid*, [24].
50. (1854) 9 Exch 341; 156 ER 145.
51. [1969] 1 AC 350.
52. [2008] UKHL 48; [2009] 1 AC 61, [31].
53. *Ibid*, [69].
54. *Ibid*, [32].

House of Lords decision in *South Australia Asset Management Corporation* v. *York Montague Ltd*,[55] hereinafter referred to as *SAAMCO*. As is well known, *SAAMCO* concerned the extent of the liability of a valuer who provides a lender with a negligent overvaluation of property offered as security for a loan.[56] Lord Hoffmann, giving judgment for a unanimous House of Lords, held that:[57]

> "[b]efore one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation".

Since the scope of the valuer's duty in *SAAMCO* had been merely to provide information for the purpose of enabling a lender to decide upon a course of action, the valuer was held liable only for the consequences of the information being wrong —namely, the difference between the value of the property as valued and the true value of the property at the time of the valuation, any subsequent fall in the property market not being taken into account. The extent of the lender's recovery was determined solely by reference to the defendant's duty; the word "remoteness" appeared nowhere in the decision of the House.[58]

However, even prior to *SAAMCO* there was a tendency to resolve disputes involving the breach of a duty of care solely by reference to the scope of the relevant duty without recourse to remoteness. In *Lamb* v. *Camden London Borough Council*,[59] Lord Denning MR recognised that "the three questions—duty, causation, and remoteness—run continually into one another",[60] and that:[61]

> "[t]he truth is that all these three—duty, remoteness and causation—are all devices by which the courts limit the range of liability for negligence or nuisance . . . [and that] ultimately it is a question of policy for the judges to decide".

However, the transposition of this approach into the law of contract is not straightforward. Reasonable foreseeability determines both remoteness in tort law and the scope of duties of care. In contract law, there is no such correspondence between the tests for remoteness and the scope of a duty, since the scope of a contractual duty is determined through the interpretation of the contract. Whether interpretation can serve the purpose of limiting recovery that was traditionally fulfilled by the doctrine of remoteness is therefore the real question posed by the agreement-centred approach. This turns on the limits of contractual interpretation, which leads into the second trend for discussion.

55. [1997] AC 191.

56. Though *SAAMCO* is often discussed in the context of negligence, it was of course a case involving the breach of a contractual duty of care, and the principles it established apply to all claims concerning compensation for breach of duty, whether contractual, tortious or statutory.

57. *SAAMCO* [1997] AC 191, 211.

58. Whether the *SAAMCO* principle was initially intended to displace the doctrine of remoteness is unclear. In *Nykredit Plc* v. *Edward Erdman Ltd* [1997] 1 WLR 1627 (HL), 1638, Lord Hoffmann stated that the *SAAMCO* principle "has nothing to do with questions of causation or any limit or 'cap' imposed upon damages which would otherwise be recoverable". If this statement was intended to include remoteness, then *The Achilleas* appears to expand *SAAMCO* even further.

59. [1981] 1 QB 625 (CA).

60. *Ibid*, 634.

61. *Ibid*, 636.

3. The expansion of the role of contractual interpretation

The seminal decision of the House of Lords in *Investors Compensation Scheme* v. *West Bromwich Building Soc*[62] is often taken as exemplifying the modern, liberalised approach to the interpretation of contracts. Yet, though Lord Hoffmann purported to describe no more than the existing state of the law in his famous "restatement",[63] the *ICS* decision is also noteworthy for marking the start of a modern trend towards assimilating hitherto separate doctrines of the law of contract under the rubric of interpretation. As Burrows notes, "[t]he famous statement of principles of construction by Lord Hoffmann in that case should not obscure the radical nature of the decision on the facts".[64] The issue in *ICS* was the scope of a clause purporting to exclude from assignment "Any claim (whether sounding in rescission for undue influence otherwise)". The majority of the House of Lords (Lord Lloyd of Berwick dissenting) held, applying the modern liberalised approach to interpretation, that the clause should be interpreted as if it had read "Any claim sounding in rescission (whether for undue influence or otherwise)". Quite apart from the fact that this interpretation denuded the clause of all effect whatsoever (since claims for rescission cannot be assigned anyway), this decision was novel in using interpretation to reach a conclusion that would previously have required rectification. While a detailed consideration of rectification is beyond the scope of this article, the decision of their Lordships in *Chartbrook* v. *Persimmon Homes*[65] illustrates the reduced importance of rectification in light of the modern approach to the interpretation of contracts. Rectification is relevant only where a document does not correctly reflect the parties' objectively manifested prior consensus; but (as the decision in *Chartbrook* itself shows) the modern, liberalised approach to interpretation means that documents *will*, more often than not, be interpreted so as to accord with the parties' objectively manifested intentions, even where this means departing from the ordinary meaning of words and syntax.[66]

While the courts have not yet taken the step of completely subsuming rectification within the process of interpretation and denying it a separate existence, the same can no longer said for the doctrine of implication in fact. In *Attorney-General for Belize* v. *Belize Telecom*,[67] Lord Hoffmann for the Privy Council held that the process of implying terms in fact is no different from the ordinary process of interpretation; the question for the court in deciding whether to imply a term into a contract is simply "whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean".[68] The former tests for implication in fact, which asked whether the term was either so obvious that an officious bystander

62. [1998] 1 WLR 896 (HL).

63. Recognising the influence of Lord Wilberforce's speeches in *Prenn* v. *Simmonds* [1971] 1 WLR 1381 (HL) and *Reardon Smith Line Ltd* v. *Yngvar Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989 (HL).

64. A Burrows, "Construction and Rectification", ch 5 of A Burrows and E Peel (eds), *Contract Terms* (OUP, Oxford, 2007) 77, 93.

65. [2009] UKHL 38; Bus LR 1200.

66. The main exception concerns pre-contractual negotiations, evidence of which being inadmissible for the purposes of contractual interpretation. So, according to *Chartbrook* v. *Persimmon*, *ibid*, where an agreement does not reflect a prior consensus which is objectively manifested in evidence of pre-contractual negotiations, the "safety nets" (*ibid*, [41], *per* Lord Hoffmann) of rectification and estoppel by convention then take centre stage: *Chartbrook*.

67. [2009] UKPC 10; [2009] Bus LR 1316; [2009] 2 All ER (Comm) 1.

68. *Ibid*, [21].

suggesting its inclusion at the time of the bargain would be testily suppressed with a common "Oh, of course!",[69] or necessary to give such business efficacy to the transaction as must have been intended by businessmen,[70] were reinterpreted as mere considerations that the court might take into account in interpreting the contractual document through the ordinary process.

In assimilating limits on contractual recovery into the process of interpretation, *The Achilleas* forms part of this same trend. Examining the merits of the agreement-centred approach to remoteness therefore involves examining the merits of this broader integrative approach to contractual interpretation.

B. Remoteness and the integrative approach to contractual interpretation

In *The Achilleas*,[71] Lord Hoffmann said: "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". The justification offered by Lord Hoffmann for the agreement-centred approach brings remoteness in line with the other doctrines brought under the integrative approach to contractual interpretation, since rectification and implication in fact have always rested on the parties' intentions. This raises two crucial questions. The first is broad in scope: what is the effect of broadening the concept of interpretation so as to bring remoteness, which was formerly determined by external rules of law, under the rubric of interpretation and the parties' intentions? The second is specific to the context of remoteness: is the agreement-centred approach capable of fulfilling the role of limiting recovery for breach of contract hitherto fulfilled by the traditional doctrine of remoteness?

1. The broader effect of the integrative approach to contractual interpretation

The significance of *The Achilleas* is not confined to remoteness, but encompasses the entire modern approach to the interpretation of contracts. Lord Hoffmann clearly contemplated that, under a broad approach to contractual interpretation, the issues of remoteness and the implication of terms were closely entwined. He stated:[72]

> "the implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of essentially the same techniques of interpretation".

So the advice of the Privy Council in *A-G for Belize* v. *Belize Telecom*, given by Lord Hoffmann, should have come as no surprise. The former tests for implication in fact, which asked whether the term was either so obvious that an officious bystander suggesting its inclusion at the time of the bargain would be testily suppressed with a common "Oh, of course!",[73] or necessary to give such business efficacy to the transaction as must have

69. *Shirlaw* v. *Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA), 227 (MacKinnon LJ).
70. *The Moorcock* (1889) LR 14 PD 64 (CA), 68 (Bowen LJ).
71. [2008] UKHL 48; [2009] 1 AC 61, [12].
72. *Ibid*, [26].
73. *Shirlaw* v. *Southern Foundries (1926) Ltd* [1939] 2 KB 206 (CA), 227 (MacKinnon LJ).

been intended by businessmen,[74] have been reinterpreted as mere illustrations used by the courts in answering the basic question whether a reasonable person in all the circumstances would consider restrictions on liability to be embodied in the contract. It is now clear that limits on recovery and the implication of terms are governed by the overriding principle of contractual interpretation post-*ICS*. The starting point "for understanding what the parties meant is their language interpreted in accordance with conventional usage".[75] But the analysis does not stop there:

"The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax".[76]

The combined effect of these recent developments in the law of interpretation, implication and remoteness can perhaps be summarised in the following proposition: a binding contract will generally have the legal effect that a reasonable person in all the circumstances would understand the parties to have agreed that it would have.

Lord Hoffmann is correct to note that interpretation in the strict sense (what did the parties mean by the words they used?) and implication in fact (did the parties mean anything they did not say?) are both part of an overarching process aimed at constructing the parties' overall agreement, or ascertaining what a reasonable person in all the circumstances would understand a document to mean. This same overarching process encompasses further techniques, such as the approach taken in common mistake cases to identify the "orientation" (*per* Kramer[77]), or broad purpose, of contractual obligations.[78] However, it is crucial to recognise that this process will involve different considerations in different contexts to reach different conclusions. Determining what the parties meant by their express words involves different considerations to determining whether the parties meant to include something in their bargain despite omitting it from their contract. Consequently, the apparent neatness with which interpretation and implication are in this way reconciled can deceive. Saying that the test in both circumstances is simply what a reasonable person in all the circumstances would have understood the document to mean does not eliminate the fact that a reasonable person in all the circumstances would approach these questions differently. It is therefore a matter for regret that the Privy Council in *A-G for Belize* has simply assimilated the tests on both these issues without acknowledging the different considerations which will go into applying the new test to each of them.

The lack of guidance on how the "reasonable person" test is to be applied in these various situations means that it is not possible to ascertain the degree to which this represents a change in substance from the old pre-*A-G of Belize* position on implied terms, under which the officious bystander and business efficacy tests held sway. It is possible that no change in substance has taken place, and that a reasonable person would understand an unexpressed term to form part of a contractual agreement only where the old tests would have been satisfied. However, it is equally possible that the "reasonable

74. *The Moorcock* (1889) LR 14 PD 64.
75. *BCCI* v. *Ali* [2001] UKHL 8; [2002] 2 AC 251, [39] (Lord Hoffmann).
76. *ICS* [1998] 1 WLR 896 (HL), 913.
77. *Supra*, n 11.
78. This made it possible in *Griffiths* v. *Brymer* (1903) 19 TLR 434 (KB) to say that the contract was for the hire of the room *to view the coronation procession*, without requiring an implied term to that effect.

person" test will in practice liberalise the approach to the implication of terms, or that it will eliminate consistency of approach altogether. The recent decision of the Court of Appeal in *Mansel Oil Ltd* v. *Troon Storage Tankers SA (The Ailsa Craig)*[79] suggests that little has changed; Longmore LJ declined to imply a term into a charterparty requiring the charterer to nominate a port for delivery prior to exercising its option under a cancelling clause, holding that this "cannot be done on any of the accepted tests for implications of terms into a contract",[80] and declining to refer to *A-G of Belize*. In contrast, Lord Hoffmann's *Belize* analysis was discussed in detail and endorsed by Sir Lord Clarke of Stone-cum-Ebony MR in the Court of Appeal in *Mediterranean Salvage and Towage* v. *Seamar Trading & Commerce Inc (The Reborn)*.[81] Nevertheless, it is too early to gauge the full impact of the *Belize* case, and the potential for difficulty is clear.

These difficulties are illustrated by *The Achilleas* itself. It will be recalled that the majority of their Lordships identified a limitation on the scope of a contractual duty. However, none of Lords Hoffmann, Hope or Walker based their conclusion on an implied term to that effect. Nor was their reasoning based on a departure from the ordinary meaning of the language of the charterparty. Though Lord Hoffmann expressly based his conclusion on the interpretation of the contract, and though this approach is implicit in the reasoning of Lord Hope and Lord Walker, their Lordships' reasoning does not disclose which aspect of the process of interpretation led to their conclusion, nor which words in the contract they were interpreting. (Their Lordships' speeches in *Chartbrook* v. *Persimmon*[82] provide a stark contrast, focused as they were on the meaning to be accorded to a specific definition.)

However, the majority's *conclusion* in *The Achilleas* sheds more light on the precise aspect of the interpretive process in play. It is difficult to see the outcome as resting on the meaning (ordinary or otherwise) of the contractual language which the parties used. The content of the charterers' relevant primary obligation was clear and unambiguous: to redeliver by 2 May. The result and reasoning seem far removed from the *ICS* and *Chartbrook* cases, which can be taken as a paradigms of interpretation in the strict sense. In those cases, discussion clearly focused on the intention behind a particular clause. In contrast, the discussions in *The Achilleas* focussed less on what the parties meant by the words they had used, but more on whether they had a common intention on an issue (namely, damages for late redelivery) about which they had chosen to say nothing. Consequently, it is suggested that the case is best explained retrospectively through the implication in fact of a term limiting recovery to the overrun period. In light of the subsequent Privy Council decision in *A-G of Belize*, which made clear that implication is merely an instance of interpretation, it can no longer be said that the majority's approach was fundamentally misguided. There are nevertheless several aspects of the majority's reasoning which warrant concern.

The relevant conclusion in *The Achilleas* was that a reasonable person in all the circumstances would have understood the charterparty to limit recovery for late redelivery to the difference between the market rate and the charter rate over the overrun period. For

79. [2009] EWCA Civ 425; [2009] 2 Lloyd's Rep 371.
80. *Ibid*, [12].
81. [2009] EWCA Civ 531.
82. [2009] UKHL 38; [2009] 3 WLR 267.

each of Lord Hoffmann,[83] Lord Hope and Lord Walker, the main reason underpinning this conclusion was that losses incurred over the full length of any subsequent charter would be "completely unquantifiable" and "completely unpredictable", since "the charterers had no knowledge of, or control over, the new fixture entered into by the new owners".[84]

The discussions of the classic authorities on remoteness and the rhetoric of interpretation in the speeches of their Lordships should not mask the startling novelty of this conclusion. Not only does it seem unlikely that a reasonable person would understand a contractual document to exclude recovery for a particular loss simply because it is unpredictable or unquantifiable, but the courts have never before denied recovery for losses on the basis that they are unquantifiable or unpredictable. On the contrary, unpredictability or unquantifiability has repeatedly been no bar to recovery whatsoever. In *Brown* v. *KMR Services Ltd*,[85] the unpredictability and unquantifiability of losses arising from unprecedented financial disasters did not prevent a Lloyd's Name from recovering for his members' agents' breach of an *implied* obligation to warn of the high risks associated with excess of loss syndicates. Similarly, in *Jackson* v. *Royal Bank of Scotland*,[86] the defendant bank was held liable for the loss of the opportunity to earn profits which the claimant company would have enjoyed had the defendant not breached its contractual duty of confidence by revealing the claimant's mark-up to its chief customer. There can surely be nothing more unpredictable or unquantifiable than the profits which might be generated from a business relationship with a third party.[87] Finally, in *The Heron II*,[88] the defendant shipowners were held liable for the profits that the claimant charterers would have made from the sugar market at Basrah had the defendant not deviated and delayed their arrival. The rise and fall of the sugar market at Basrah, and, along with it, the profits that the claimant would have made from a timely sale, were similarly unpredictable and unquantifiable. The conclusion must be that the authorities disclose no hostility to imposing liability for unpredictable or unquantifiable losses, and any suggestion that such losses are no longer recoverable because a reasonable person would not understand contracting parties to assume responsibility for them must surely be rejected.

The outcome in *The Achilleas* therefore seems questionable even from the standpoint of the agreement-centred approach to remoteness as applied by the majority. But, more importantly, the manner in which the majority relied on an extremely unconvincing basis to support their conclusion that the defendant charterers had not assumed responsibility for full loss-of-fixture damages is highly illustrative of the dangers of the integrative approach to interpretation. It is clear that a reasonable person should require compelling evidence

83. Lord Hoffmann, but notably none of the other Law Lords, also placed reliance on an "understanding" in the shipping industry that the law imposed such a limit on recovery for late redelivery. This is discussed below, p 172.

84. See [2008] UKHL 48; [2009] 1 AC 61, [23] (Lord Hoffmann), [34], [36] (Lord Hope) and [86] (Lord Walker).

85. [1995] 4 All ER 598 (CA).

86. [2005] UKHL 3; [2005] 1 WLR 377.

87. Even though on the facts the defendant bank knew the claimant's mark-up, and therefore the profit made on each sale, it would still have lacked the knowledge to determine the likely length of the claimant's business relationship with its chief customer.

88. [1969] 1 AC 350.

before either (i) departing from the ordinary meaning of contractual language (ie, interpretation in the strict sense) or (ii) assuming that the parties had a common intention on an issue about which they chose to say nothing (ie, implication). This stems from the common sense propositions that parties usually intend to mean what they say, and that, where parties agree on (particularly important) terms, they will include them in their contracts. A failure to acknowledge these propositions would signify an unprecedented increase in judicial willingness to rewrite parties' contracts. This would be anathema for the certainty so prized by English law and its litigants. Until recently, there were no indications that the post-*ICS* liberalised approach to contractual interpretation would herald a departure from these propositions. Lord Hoffmann himself reiterated the primacy accorded to the ordinary meaning of the parties' contractual language in *BCCI* v. *Ali*,[89] emphasising that "the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage".[90] However, *The Achilleas* seems to stray from the proposition that compelling evidence will be required for a conclusion that the parties had a common intention on an issue about which they chose to say nothing. On the traditional approach, neither the officious bystander nor the business efficacy test would have been satisfied by the reasons advanced by their Lordships and, as argued above, it is submitted that there was little to warrant the majority's conclusion even under the agreement-centred approach. This is especially noticeable when it is noted that the damages award upheld by the Court of Appeal was, while large, less than a quarter of the hire paid by the charterers under the charter, and could not be regarded as excessively disproportionate in context.

This illustrates the precise problem with the integrative approach to interpretation: the assimilation of these different matters under a single test (what a reasonable person in the circumstances would understand the contract to mean) obscures the different issues to be resolved and the different circumstances to be taken into account in their resolution. It invites imprecision in judicial reasoning as to what the application of the test requires in particular circumstances to reach particular conclusions. *The Achilleas* is a prime example of a case where the broad integrative approach to interpretation led to an insufficient consideration of what the conclusion reached in the circumstances actually should have required. The conclusion in question should have required much more explanation.

If the effect of *ICS*, *The Achilleas* and *A-G of Belize* is to blur the lines between what is required in the different situations posed by interpretation and implication through a tendency to reduce judicial reasoning to abstract determinations of what the court considers to be "reasonable", there is real cause for concern. The effects of such imprecise reasoning will not be confined to the law on damages, but will span the entire realm of contractual interpretation. The uncertainty that this may breed cannot be understated. A judicial willingness to imply terms or depart from the ordinary meaning of contractual language on as fragile a basis as that which prevailed in *The Achilleas* would render even the simple task of advising a client on the effect of a contract dangerously unpredictable.

89. [2001] UKHL 8; [2002] 2 AC 251.
90. *Ibid*, [39].

2. Is the agreement-centred approach capable of fulfilling the role formerly played by the doctrine of remoteness?

The agreement-centred approach to remoteness, understood as an application of the integrative approach to interpretation, faces more precise problems in the context of remoteness. External, default rules of law will always provide answers in any given situation. Since the agreement-centred approach seeks to replace an external rule of law with a rule turning on the parties' intentions, the first question must be whether the parties' intentions can similarly always provide an answer as to whether a given loss is recoverable. Clearly, where the parties have an express common intention as to recovery for a particular loss (such as an exclusion or limitation clause), the parties' intentions both provide an answer and are given effect by the law. Equally clearly, the law has always recognised (through implication in fact) that parties can have common intentions which form part of their agreement despite being unexpressed.

According to the agreement-centred approach, as argued by Kramer, "agreements have a lot to say about the allocation of responsibility, and . . . we shouldn't be fooled into thinking otherwise by what the agreement has to say not being explicit".[91] Building on earlier writings[92] (which convincingly argued that parties almost always have intentions —albeit tacit intentions—as to matters which they have not consciously considered), Kramer concludes that recovery for breach is determined not by external rules of law, but by the parties' agreement itself. This approach rests on two assumptions: that the parties' agreement *will* on any given set of facts cover responsibility for particular kinds of losses consequent on breach, and that the courts will be able to ascertain what the parties have agreed with reliability and certainty.

However, both assumptions may be doubted. As to the first, Robertson argues that parties may simply not even have a tacit intention as to the allocation of responsibility for a particular loss; at some point, the parties' intentions, tacit and expressed, run out.[93] Kramer concedes that the parties' intentions will not provide an answer where "it is not reasonable to think that the communicator intended anything on the particular issue—the case of true contractual gaps".[94] Though Kramer argues that such situations are likely to be rare, since parties would reasonably expect community norms to apply, there is good reason to believe that community norms will often provide no answer to the particular issues requiring resolution in the remoteness context,[95] especially since there is no self-evident way to resolve a clash between conflicting norms. This is especially so given that the contents of contracts are often tailored specifically to the parties' particular factual circumstances.[96] For example, even if there were a general community norm that Lloyd's members' agents should be liable to the full extent of their Names' losses in the event of

91. Kramer (*supra*, n 11), 252.

92. A Kramer, "Implication in fact as an instance of contractual interpretation" (2004) 63 CLJ 384.

93. A Robertson, "The basis of the remoteness rule in contract" (2008) 28 LS 172.

94. Kramer (2004) 63 CLJ 384, 408.

95. Kramer reasons from a general account of pragmatic inference in communicative interpretation. But the issues arising in the remoteness context require the identification of a common intention as to risk allocation in very particular circumstances. As noted by Robertson (2008) 28 LS 172, 179, "We cannot walk into the corridor without assuming the continued existence of the floor, but we can make a contract without making an assumption about the allocation of responsibility for a particular type of consequential loss in the event of breach".

96. The exceptions are of course standard form contracts.

a negligent failure to warn them of the risks inherent in their investment strategies,[97] should we automatically suppose that parties would intend this norm to govern even where the Name in question is an experienced investor taking an active role in the management of his portfolio?

As to the second assumption, even where such a tacit intention exists, Robertson notes that there will rarely be any "factual foundation for making a determination as to whether the defendant implicitly assumed responsibility for the risk in question".[98] Even where the parties *do* have a tacit intention on the allocation of responsibility for a particular kind of loss, the courts will often have no reliable mechanism for its identification.[99]

For these reasons, a strong form of the agreement-centred approach to remoteness that seeks to resolve all questions of risk allocation solely on the basis of the parties' intentions and agreement as evidenced in the circumstances seems unworkable. Where an intention or agreement as to the allocation of a particular risk simply cannot be discerned, as seems not unlikely in the remoteness context, such an approach will not only be fictional, but will also involve the courts in rewriting the parties' bargain.

However, the indeterminacy of the parties' intentions may not prove fatal to at least one version of the agreement-centred approach. The way in which Lord Hoffmann formulated the crucial question in *The Achilleas* suggests that his Lordship was aware of the limits on the parties' intentions. He presented the fundamental question as follows:[100]

> "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?"

For Lord Hoffmann, the agreement-centred approach to remoteness still encompasses a default rule capable of resolving cases where the parties' intentions do not provide an answer. This may be termed a "soft" version of the agreement-centred approach, in contrast with the "hard" version of the agreement-centred approach, which does not contain such a default rule. However, the crucial point about this default rule is that it is not an external rule of law. It is instead a presumption as to what the parties intended in the absence of evidence indicating their intentions, and seeks to address the problem of indeterminacy whilst still locating its justification in the parties' intentions and agreement.

There are nonetheless two aspects of this approach to note. First, the hard version of the agreement-centred approach locates its theoretical justification in the parties' agreement. However, a default rule which purports to identify what the parties' agreement was where it cannot be ascertained from the facts is no less an external default rule and no less external to the parties' agreement merely because it is clothed as presenting a conclusion *as to* the parties' agreement. The soft version of the agreement-centred approach is therefore identical in substance and theory to the traditional approach to remoteness,

97. Which is, of course, in itself doubtful.

98. (2008) 28 LS 172, 196.

99. Unless it was so obviously held in the circumstances that a limitation or exclusion clause could be implied in fact, as discussed above.

100. [2008] UKHL 48; [2009] 1 AC 61, [9] (emphasis added).

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.

The second point concerns the operation of the "soft" version of the agreement-centred approach, which provides no guidance on what is required to depart from the default rule as to the parties' intentions. One issue is the "standard of proof" of contrary intention required for departure. But, even once this is ascertained, the next task of determining whether this standard has been met on any given set of facts is highly uncertain. In deciding whether to depart from the default rule the courts will face the very same pragmatic difficulties encountered when applying the strong version of the agreement-centred approach, all while determining whether an undefined standard has been met. For these reasons, it is suggested that the traditional approach to remoteness is more transparent and predictable, and provides more guidance to courts, than the soft version of the agreement-centred approach.

As between the soft and hard versions of the agreement-centred approach, the reasoning of the majority in *The Achilleas* is more consistent with the latter, despite Lord Hoffmann's formulation.[101] None of their Lordships reasoned on the basis of a default rule, which cannot be taken to form part of the *ratio* of the decision. Consequently, it is the hard version of the agreement-centred approach to remoteness that must be taken as relevant for present purposes.

IV. THE AGREEMENT-CENTRED APPROACH IN PRACTICE

A. The agreement-centred approach to remoteness, the integrative approach to interpretation and the existing authorities

It has been argued above that the broader integrative approach to interpretation has the potential seriously to undermine the certainty for which English law is prized, and that the agreement-centred approach to remoteness is incapable of determining all questions on the recovery of damages without resorting to a fiction. These conclusions will be tested by considering how several leading authorities on the law of remoteness would be decided under these new approaches. Proponents of the agreement-centred approach often state that it only rarely produces a different result to the conventional approach to remoteness.[102] However, it is misleading to consider the agreement-centred approach alone without also taking account of the broader impact of the integrative approach to interpretation on legal reasoning. Examining the new approach in light of the authorities serves the dual purpose of demonstrating its impact on legal argument. The new kinds of argument that it makes available to parties and judges alike will therefore be noted where applicable.

101. *Supra*, text to n 100.
102. See, eg, Lord Hoffmann in *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61, [11]. Kramer (*supra*, n 11, at 268) argues that "[t]he paucity of explicit recognition that the test is based upon the implied assumption of risk is due to the rarity with which the tests lead to a different result".

While the integrative approach to interpretation will have an impact beyond the law of remoteness, space precludes examining a broader field of authorities. Consequently, different aspects of the remoteness cases will be used where appropriate, to illustrate the impact of the integrative approach to interpretation on issues beyond remoteness. The authorities that will be considered are *Hadley* v. *Baxendale*,[103] *Victoria Laundry (Windsor) Ltd* v. *Newman Industries Ltd*,[104] *Koufos* v. *C Czarnikow Ltd (The Heron II)*,[105] *H Parsons (Livestock) Ltd* v. *Uttley Ingham & Co Ltd*[106] and *Brown* v. *KMR Services Ltd*.[107]

1. *Hadley* v. *Baxendale*: insufficiency of parties' agreements

In *Hadley* v. *Baxendale*, the claimants' mill stopped working owing to the breakage of their only crankshaft. The defendants, common carriers, agreed to deliver the broken shaft to its manufacturer, but delayed delivery, in breach of contract, with the result that the stoppage of the claimants' mill was lengthened. The claimants sued for the profits lost through this additional delay. As is well known, the Court of Exchequer held that, since stoppage of a mill was not a natural consequence of the delay in delivery, and since the defendants were unaware of facts showing that a delay would result in the stoppage of the mill, the claim failed.

Under the agreement-centred approach, the critical question would have been: to whom would a reasonable person have understood the parties' agreement to allocate the risk of lost profits due to late delivery? The parties had not expressly considered this issue. The lack of discussion in the judgments of any common practice or understanding on this issue among common carriers suggests that no such understanding existed. The facts, as reported, disclose no clues as to what the parties were likely to have intended in the circumstances that had occurred; on the available evidence, it seems that a reasonable person would understand the parties' agreement not to have allocated the risk in question to anybody. Adopting a "soft" version of the agreement-centred approach and assuming the parties' intentions under a default rule might provide an answer, but would be simply identical in substance to the traditional doctrine of remoteness. It appears that the fountainhead of the doctrine of remoteness would itself pose a problem for the agreement-centred approach. It is simple to identify the conclusion which the new approach would need to reach (ie, that the parties' agreement allocated the risk of lost profits due to late delivery to the claimants), but the inevitable limitations of the parties' intentions make it impossible to identify a reliable and consistent route to this conclusion. *Hadley* itself therefore lends support to the conclusion that the agreement-centred approach to remoteness is simply incapable, without resorting to fiction, of providing an answer where the parties' intentions run out.

2. *Victoria Laundry*: incommensurability of community norms

The claimants bought a boiler from the defendants, who were aware that the claimants needed the boiler immediately for their laundering and dyeing business. In breach of

103. (1854) 9 Exch 341; 156 ER 145.
104. [1949] 2 KB 528 (CA).
105. [1969] 1 AC 350 (HL).
106. [1978] QB 791 (CA).
107. [1995] 4 All ER 598 (CA).

contract, the defendants delivered the boiler five months late, causing the claimants a loss of profits. Unknown to the defendants, the claimants had entered into exceptionally lucrative dyeing contracts for the Ministry of Supply. The Court of Appeal held that, while the claimants could recover "general" lost profits, they could not recover the exceptionally lucrative profits from the Ministry of Supply contracts, since the defendants had no knowledge of their existence. This case sits notoriously uneasily with the principle that it is the type or kind of loss which matters and not its extent. Since lost profits were reasonably foreseeable as a consequence of late delivery, it might be thought that the exceptionally lucrative nature of the profits from the contracts with the Ministry of Supply should have been irrelevant and that the claimants should have recovered in full. Alternatively, the contracts with the Ministry of Supply can be seen as a fundamentally different *kind* of contract from that normally entered into by launderers and dyers. The point is that, even under the traditional approach to remoteness, there is a normative process of judgment involved in determining how broadly to define the relevant type or kind of loss which can breed uncertainty in hard cases.

Reaching the corresponding outcome under the agreement-centred approach would have required concluding that the defendants had agreed to assume responsibility for any "general" loss of profits that resulted from late delivery of the boiler, but not any "exceptional" profits. In support of such a conclusion, one could argue that, since "[a]nyone asked to assume a large and unpredictable risk will require some premium in exchange",[108] it would be unrealistic to expect the defendants to have intended to guarantee the claimants' expected profits, however large. In response, however, it could equally be argued that the defendants knew from correspondence that the claimants had an urgent need of the boiler, and clearly regarded speedy delivery as being of the utmost importance. It would therefore be unlikely for the claimants nevertheless to have agreed to waive the defendant's responsibility for the exceptionally lucrative loss of profit, which was the very factor behind the importance of a speedy delivery in the first place. Just as the defendants could argue that they would have raised the price before assuming such responsibility, the claimants could argue that they would only have agreed to a lower price were such responsibility clearly not assumed. This highlights another aspect of the limits of the parties' intentions that can be called the incommensurability of norms: how can the courts balance these norms against each other to reconstruct the parties' bargain where the parties have not done this themselves? It is difficult to see how the agreement-centred approach could cut this Gordian knot without arbitrarily taking sides.[109]

3. *The Heron II*: mistaken understandings of the law

In *The Heron II*, the issue was whether a shipowner who had deviated in breach of contract and reached the charterer's destination nine days late was liable for the charterer's loss in profits attributable to a fall in the market over those nine days where the shipowner knew there was a market for the charterer's cargo of sugar but did not know that the charterer intended to sell the sugar immediately. The House of Lords held that the charterer was so

108. *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61, [13].

109. Kramer (*supra*, n 11, at 259), after identifying various norms which could be used to ascertain the scope of a contractual assumption of responsibility, rightly notes that these norms "*could not all apply as some would sometimes conflict*". However, he does not identify how a clash of norms could be resolved.

entitled, on the basis that it was foreseeable as not unlikely that the sugar would be sold on arrival at the market price.

An interesting aspect of *The Heron II* which resembles one angle to *The Achilleas* is that there had been an understanding in the shipping industry, deriving from *The Parana*,[110] that contracts for the carriage of goods by sea were governed by a different rule under which losses were too remote unless they were "reasonably certain" to result from a breach. It had been argued that *The Parana* had "stood for 90 years and that the commercial community have conducted their affairs on the basis that it is a sound decision".[111] The House of Lords in *The Heron II* swept this understanding aside on the basis that it was simply incorrect as a matter of law and therefore irrelevant. However, the approach taken by Lord Hoffmann (if not by the other Law Lords) in *The Achilleas* suggests that, under the agreement-centred approach, such an understanding could not be dismissed so lightly. Where there is a particular understanding in the parties' trade or industry, it could be argued that the understanding was the basis or background for, and therefore part of, the parties' agreement. There are two important aspects of such arguments to note. First, the broad integrative approach to interpretation may invite imprecision as to the precise requirements for importing such "understandings" into the parties' agreement. Traditionally, such requirements were set by the doctrines of implication in fact and by custom. If courts are to imply such understandings into the parties' agreements, they should clearly specify which aspect of interpretation they are using and clarify what it requires. Second, allowing industry understandings of the law to form part of parties' agreements could have novel and far-reaching consequences. Had the understanding in *The Parana* led to its incorporation into the parties' agreement, the fact that it was incorrect as a matter of law would have been irrelevant to the resolution of the dispute; it would have been given effect in *The Heron II*, despite its inaccuracy, as part of the agreement. The outcome resembles prospective overruling. Furthermore, once it is accepted that parties' understandings of the law, correct or incorrect, can form part of the background or basis for their agreement, there is no reason to require their understanding to be industry-wide, so long as it is otherwise objectively ascertainable. There is little to be gained from varying the applicable principles simply because both parties have been demonstrably mistaken as to the state of the law. This would raise serious problems where third parties have an interest in being able to predict the outcome of contractual litigation (as in insurance). An approach under which "the law is what the parties thought it was" raises very difficult questions.

4. *Parsons* v. *Uttley Ingham*: economic analysis

The defendants had built and delivered a hopper to the claimants to be used for the storage of nuts for feeding the claimants' fine herd of pigs. In breach of contract, the defendants had not unsealed the hopper's ventilator and as a result the nuts stored in the hopper became mouldy. Upon eating the mouldy nuts, many of the claimants' pigs contracted E coli and 254 of them died. The claimants sought to recover damages for the loss of the pigs. The majority of the Court of Appeal held that such damages were recoverable, since

110. (1877) LR 2 PD 118 (CA).
111. [1969] 1 AC 350, 377, *per* Anthony Lloyd QC and Julian Cooke *arguendo*.

the rules on remoteness merely required the *kind* of loss to be foreseeable, not the *actual* loss which transpired. Since it was foreseeable that food affected by bad storage conditions might well cause illness in the pigs fed on it, the conditions for recovery were satisfied. However, the claimants could not recover profits which would have been made through the rearing and selling of additional animals had the hopper not been defective.

To reach this outcome under the agreement-centred approach, the court would need to conclude that the defendants agreed to assume responsibility for physical damage to the claimants' pigs. To this end, *Parsons* can illustrate the potential for the novel use of economic analysis in legal argument. As Lord Hoffmann stated in *The Achilleas*,[112] "[t]he view which the parties take of the responsibilities and risks they are undertaking will determine the other terms of the contract and in particular the price paid". The price charged under a contract will not give any indication of implied allocations of risk, however, unless a point of comparison exists. The obvious point of comparison is the market. If the price charged for performance is comparatively low by market standards, the performer could point to the price as implying a reduction in the scope of responsibility assumed under the contract. So, if the price charged by the defendants for the hopper had been comparatively low by market standards, the defendant could argue that it indicated an assumption of a smaller scope of responsibility which did not extend to physical damage to the claimants' pigs. Likewise, had the price charged been on the higher side, the claimants could have argued that it indicated a wider assumption of responsibility which certainly included physical damage to its pigs. If such arguments are admissible and advanced, it seems likely that expert evidence on the range of options on the relevant market and the likely scope of responsibility assumed for a given price will become commonplace. This will no doubt contribute to the cost and uncertainty of litigation. A further practical problem with such economic arguments is that, even if one accepts the premise that a higher price will indicate a broader assumption of responsibility, one is still left with no indication of precisely *what* further responsibility was assumed under the contract. Consider the modified version of *Parsons*, wherein the higher price charged by the defendants was argued by the claimants to indicate an assumption of responsibility for physical damage to the pigs. It would be impossible for economic reasoning to determine that the higher price reflected an assumption of responsibility for the physical wellbeing of the pigs as opposed to, for instance, lost profits of an exceptional nature arising from exceptional contracts in the *Victoria Laundry* sense.

This example illustrates a theoretical problem with economic arguments which are based on the parties' *intentions*, rather than an externally imposed rule of law. The relevant question is not what one of the parties thought they were getting for the price, but to what (an objective observer would consider) the parties (to have) intended to agree in their contract. While it may (just) be justifiable to assume that a party who pays a higher price believes that the counterparty is accepting more responsibility under the agreement, the converse does not necessarily follow. Particularly because commercial parties are self-serving (indeed that is the whole basis of commerce), one should not assume that a party is agreeing to accept more responsibility under a contract simply by charging a higher price. It is far more likely for that party instead to have intended, through charging the

112. [2008] UKHL 48; [2009] 1 AC 61, [13].

higher price, to reap the benefit of a good bargain. The nature of commerce is that both good and bad bargains are made, and it is artificial in the extreme for the courts to rewrite the parties' bargains in an attempt to "optimise" and balance the responsibilities assumed against the price paid. A reasonable person ascertaining the meaning of a contractual document should, for these reasons, accord only a comparably minor role to arguments based on economic analysis.

This conclusion receives support from the approach taken by the House of Lords in an analogous area in *Smith* v. *Eric S Bush*.[113] The issue was the reasonableness of a clause contained in a valuation contract which excluded liability for negligence. In holding that the exclusion was unreasonable and therefore ineffective under the Unfair Contract Terms Act 1977, s 2(2), the House of Lords considered it irrelevant that the valuers offered a more expensive service which was otherwise identical save for the fact that liability was *not* excluded.[114] The implicit economic analysis argument—that the house purchaser, by opting for the cheaper service, was accepting more risk under the valuation—was rightly rejected.

5. *Brown* v. *KMR Services*: implausible agreements

The claimant, a Name at Lloyd's, brought claims in contract and tort against the defendants, his members' agents, for failure to warn of the high risks associated with excess of loss syndicates. The defendants were held liable, and the question was whether the unprecedented magnitude of the financial disasters that had occurred during the relevant years and amplified the claimant's loss rendered the loss too remote. The Court of Appeal upheld the trial judge's finding that the loss was not too remote, since it was merely the type or kind of loss which had to be foreseeable, and not its extent.

Pursuant to Lord Hoffmann's statement in *The Achilleas*,[115] that "the only rational basis for [a distinction between two kinds of loss] is that it reflects what would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking", there is a strong case for regarding "losses due to unprecedented financial disasters" as losses of a different kind from regular investment losses. Consequently, *Brown* is a case in which the relevant losses had been completely unforeseen. It seems that the parties would be unlikely to have held a *common* intention as to whom the risk of a financial disaster was on, and seeking to distil such a term through a process of interpretation would have seemed highly artificial. Certainly, a term allocating the risk of a financial disaster to either party would not have been implied under the officious bystander or business efficacy tests. The proposition that appeared to convince the majority in *The Achilleas*—that parties presumably would not assume responsibility for unpredictable or unquantifiable losses—would appear to operate at full force in these circumstances. This would naturally result in no liability for the defendants. However, we have seen that such a proposition is not reflected in the authorities.

Brown is particularly noteworthy, since the particular type loss in question—losses resulting from unprecedented financial disasters—seems so extreme that it is hard to imagine a party *impliedly* agreeing to assume responsibility for it. The words of Lord Reid

113. [1990] 1 AC 831 (HL).
114. *Ibid*, 853–854 (Lord Templeman).
115. [2008] UKHL 48; [2009] 1 AC 61, [22].

in *Wickman Machine Tools Sales Ltd* v. *L Schuler AG*[116] are particularly apposite here: "The more unreasonable the result, the more unlikely it is that the parties can have intended it and, if they do intend it, the more necessary it is that they should make that intention abundantly clear". The outcome in *Brown* would require concluding that the defendants had *impliedly* agreed to assume responsibility for all losses, no matter how large, flowing from breach of an *implied* obligation to advise the claimant of the risks in pursuing high-risk investment strategies such as investing in excess of loss syndicates —and all this where the claimant appears to have been an experienced investor who was actively involved in managing his portfolio. This is such an extraordinary assumption of responsibility that it would surely, particularly in light of Lord Reid's statement above, be spelled out expressly if assumed at all. The opposite outcome would be no more likely to have been impliedly agreed to, either; it is rare indeed that claimants will be taken to have impliedly waived liability for a defendant's negligence.

Brown therefore demonstrates that the agreement-centred approach can seem highly artificial where it is unlikely that either party would have impliedly agreed to assume responsibility for the relevant loss. This artificiality is avoided where the outcome is provided by a default rule, the externality of which recognises that disputes will sometimes require resolution in terms to which neither party would ever realistically have agreed.

V. CONCLUSION

The Achilleas must not be seen as relevant only to remoteness. Rather, its significance also extends to the heart of the modern approach to interpretation. At the same time as radically altering the basis of remoteness by relocating it in the interpretation of the parties' agreements, the decision is also integral to the recent trend of assimilating previously separate doctrines into the general process of interpretation. This article has expressed concern at both of these developments in the law. While it is certainly possible to recognise interpretation and implication in fact as part of the same overarching process, assimilating these doctrines under the same general test risks blurring what this overarching process requires in different contexts. It has been argued that the uncertainty and imprecision that this invites in judicial reasoning was illustrated by *The Achilleas* itself. And, in so far as the agreement-centred approach to remoteness seeks to resolve all questions of recovery by reference to the parties' agreement, it has been argued that it will encounter insurmountable theoretical and pragmatic problems. An attempt has been made to substantiate these arguments by reconsidering existing authorities through the lens of the agreement-centred approach.

Whether these concerns are reflected in reality turns on what direction the courts take in their application of this new approach. It is respectfully submitted that the best way forward short of reverting overtly to the traditional approach to remoteness would be to adopt the "soft" version of the agreement-centred approach, departing from the default rule it provides only in circumstances where the stringent standards of the former tests for

116. [1974] AC 235 (HL), 251.

implication in fact would have been satisfied. This would, of course, replicate the essential methodology of the conventional approach to remoteness in all but terminology.

Finally, viewing these conclusions in light of the purported justification for the agreement-centred approach to remoteness is instructive. The fundamental justification of the agreement-centred approach is offered by Lord Hoffmann in *The Achilleas*:[117] "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". But whether this proposition can support the radical developments embodied in *The Achilleas* is doubtful. The law of contract has always sought to give effect to the parties' intentions in so far as they have been sufficiently ascertained. The desire to uphold the parties' intentions has never been thought to justify conferring a broad, unstructured and unfettered discretion on judges to ascertain the parties' intentions from all the circumstances. Instead, rules exist for identifying the parties' intentions with a workable level of certainty. An analogy can be made to the rules governing the formation of a contract: the test is not simply one of intention. Rather, rules are required, such as the doctrine of consideration, which provide a workable level of certainty. So it is in relation to implication in fact. If the law is to regard implication in fact as now falling under the general approach to interpretation, the courts should be wary of eroding this certainty by failing to make clear the precise aspect of interpretation they are relying on and what it requires in any given case. This brings us back to square one. If maintaining stringent standards for the implication of terms makes it impossible to stretch the parties' agreement in order to resolve disputes over recovery, then the case for maintaining the traditional, default rule approach to remoteness goes hand in hand with the need to apply a broad approach to interpretation in a principled and coherent way.

117. [2008] UKHL 48; [2009] 1 AC 61, [12].