disposition of its own, then to give it priority would have upheld the policy of the Land Registration Act 2002. Without either, there is no reason why s.29 should come to its aid.

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THE NEW TEST OF REMOTENESS IN CONTRACT

THIS note contains a brief investigation of the new approach to remoteness in contract laid down by the majority of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2009] 1 A.C. 61 (noted by Peel (2009) 125 L.Q.R. 6).

Before such investigation, it may be useful to set out how the majority themselves described that approach. It is not an external rule of law imposed upon the parties (Lord Hoffmann at [9]), instead being agreement-centred and so requiring the court to look at the "presumed intentions", "common intention" and "shared understanding" of the parties (see [12], [24], [36], [69] and [84]). The court must ask "whether the parties must be assumed to have contracted with each other on the basis that the [defendants] were assuming responsibility for the consequences of that event" (Lord Hope of Craighead at [30]), and thus identify the "common expectation, objectively assessed, on the basis of which the parties are entering into their contract" (Lord Walker of Gestingthorpe at [78]), i.e. what the parties would "reasonably have considered the extent of the liability they were undertaking" (Lord Hoffmann at [23]). Accordingly, although still relevant, foreseeability of a loss as a not unlikely consequence of breach is now neither necessary nor sufficient for a finding that the loss is not too remote and therefore recoverable (see especially [9], [17], [21], [32], [36] and [84]).

Why the old approach was unsatisfactory

The immediate problem a court or advisor was faced with under the old "external rule of policy" approach to remoteness was that there was no guidance as to how likely or usual a loss must be for it to be recoverable. Without knowing the purpose of the rule (i.e. that, as we now know, it is about working out what a contractor would have sufficiently in mind at the time of contracting as something for which he would be held liable), one is reduced to empty semantic discussions as to the correct probability, of the type in which their Lordships engaged in *The Heron II* [1969] 1 A.C. 350 HL. Lord Walker pointed out the fruitlessness of this at [78].

The old approach also gets its adherents into difficulties when working out how broadly to draw the general type of loss that must be foreseeable,

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LT Land registration; Mortgage fraud; Priorities; Proprietary rights and thus deciding whether the particular loss is within that type. As Lord Hoffmann observed (at [22]), the agreement-centred approach at least allows the court to find that two losses are of different types if they differ in any respect that "would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking", rather than treating the question of whether a loss is of a different type as one of "Platonist metaphysics".

Lord Rodger of Earlsferry's reliance in *The Achilleas* on the old approach is a useful illustration of these difficulties, his reasoning being a little opaque and not satisfactorily justifying the result in the case. It is difficult to deny that a loss in relation to a follow-on fixture cancellation or renegotiation can be expected to follow a delayed redelivery under a time charter whenever the market falls between the engagement of the follow-on fixture and the date of forced cancellation or renegotiation of that fixture (a couple of weeks in *The Achilleas*). All of the necessary requirements of such a result (a follow-on charter fixed in advance, downward market movement, and cancellation or renegotiation) are perfectly normal and usual. Lord Rodger nevertheless declared that the main loss in *The Achilleas* was too remote, the sheer "extent" (at [53]) of the market movements in that case rendering this loss unusual.

This is, with respect, unconvincing. Unlike the particularly lucrative dyeing contracts with the Ministry of Supply at above market rates, which were lost as a result of the late delivery in *Victoria Laundry (Windsor) v Newman Industries Ltd* [1949] 2 K.B. 528 CA yet held to be too remote, the follow-on fixture with Cargill was an ordinary time charter made for a not unusual length of time at, and not above, the then prevailing market rates. What makes the loss of that fixture a different type of loss to the ordinary loss of profits?

More importantly, where the remoteness is due to a particularly extensive loss of profit, the rule from *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1868) L.R. 3 Q.B. 181 QB and the *Victoria Laundry* case allow the claimant still to recover the normal amount of a loss of profits. In such cases the ordinary and expected loss of profits acts as a cap on recovery, with the loss only unrecoverable to the extent that it exceeds that cap. Given Lord Rodger's reliance upon the particular volatility of the market and *extent* of the loss in the case of *The Achilleas*, one would expect the shipowners nevertheless to receive an award of ordinary business profits under the *Victoria Laundry* approach. Lord Rodger acknowledged this without clearly accepting it (at [58]: see also Rix L.J. in the Court of Appeal, [2007] EWCA Civ 901; [2008] 1 All E.R. (Comm.) 685 at [112]), relying upon its not being at issue on appeal, and therefore seems to leave the door open to future shipowners claiming the same measure as was disallowed in *The Achilleas* but by a different route, as a general loss of business profits under *Victoria Laundry* (although it is far from clear what cap Lord Rodger would apply).

SAAMCO and *The Achilleas*

Since *South Australia Asset Management Corp v York Montague Ltd* [1997] 1 A.C. 191 HL (*SAAMCO*) we have known that:

1. Even if foreseeable and natural, a loss (in that case the market and other losses resulting from the lenders lending at all) may be unrecoverable.
2. The House of Lords preferred to explain such cases by the agreement-centred approach of an impliedly restricted assumption of responsibility, rather than by the vaguer reasoning of a break in the chain of causation between the breach and the loss.
3. This principle applies not only (as was coming to be the orthodox understanding) in second-limb cases of losses foreseeable in the light of specially communicated information, but also to first-limb cases. (We know this because *SAAMCO* was a first limb case.)

We can now see that the *SAAMCO* scope of duty principle is a particular application of the *Achilleas* remoteness rule (see Lord Hoffmann at [15]–[21]). (Indeed, since *SAAMCO* Lord Hoffmann has said that he should have called the scope of duty principle the "extent of liability" principle: (2005) 121 L.Q.R. 592 at 596, and in *The Achilleas* (at [23]) he used that very phrase to describe the new remoteness test.) All *The Achilleas* has done is logically reform remoteness to take on board the insights from *SAAMCO* and integrate the *SAAMCO* rule into remoteness. (Remoteness and *SAAMCO* remain distinct rules in the tort of negligence, but see the comments at the end of this note.)

Construction and orientation

This is not the place for a full discussion of the theory of the new approach (see further the articles cited by Lord Hoffmann at [11]). It is worth, however, touching on some of the main criticisms of the new approach, namely that the approach is a fiction because parties do not (even tacitly) have intentions as to the scope of responsibility, and that it is unworkable because there is little evidence as to the parties' intentions in this regard.

It can no longer be seriously disputed that something can be intended or meant even if not said expressly or even not having crossed the minds of the parties. The law recognises this when applying the process of construction to determine the meaning of words and to imply terms (see especially the Privy Council's recent judgment on implied terms in *Attorney General of (Belize) v Belize Telecom Ltd* [2009] UKPC 10 PC

(Bze), which was delivered by Lord Hoffmann). Even accepting this, however, critics argue that such processes make no sense when applied to what the parties intended as to the extent of liability in the event of breach, i.e. when applied to remoteness.

First, we should remember that, in practice, interpretation and implication of terms cases are often by no means easy, and only loosely about the meaning of words expressly used (i.e. they are often about whether a certain obligation, power or immunity was intended to apply in a particular circumstance, or how a particular clause's operation fits with that of another clause).

Moreover, we should not forget that the law already accepts that an agreement goes beyond the spelling out of obligations and also looks at their shape and scope. Thus to decide whether a breach of an intermediate term is repudiatory, or a common mistake or supervening impossibility bring a contract to an end, it is necessary to determine, by construction, whether the breach or other event deprives the other party "of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain" (Diplock L.J. in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 CA at 66), and the law of common mistake also requires a determination, again by construction, of whether there is a common assumption as to the fundamental fact and whether one party impliedly undertook the "risk" of or "responsibility for" the assumption being mistaken (*Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2002] EWCA Civ 1407; [2003] Q.B. 679 CA at [73]–[85]). While the law of mistake and frustration does not require an implied condition precedent or condition subsequent, it gives effect to the implied boundaries of the obligations by not enforcing them once events take the parties outside those boundaries.

Similarly, it is not argued by proponents of the new approach to remoteness that there is an implied in fact obligation to pay damages or an implied in fact exclusion clause. Rather the new approach to remoteness is to discern, through construction, what the unspoken shape and orientation (or "common basis") of the particular obligation was. I shall not try to put it better than Professor Leon Green did over 80 years ago in his excellent *Rationale of Proximate Cause* (1927), at p.51:

> "Parties, in making contracts, rarely contemplate *the losses* which would result from its breach. But they do count the advantages they will gain from its performance. *What interests does the contract promote or serve?* These are actually considered in the most part, and those which are shown to have been considered or reasonably falling within the terms in view of the language used and background of the transaction, mark its boundaries—the limits of protection under it. Did the parties intend (using intention in the sense indicated above)

> that the injured interest was to be protected? Did this agreement fairly comprehend the advantage now claimed to have been lost?" (emphasis in original).

Another way of putting it would be that we must qualify the idea that contract damages must place the claimant "in the same situation . . . as if the contract had been performed" (Parke B. in *Robinson v Harman* (1848) 1 Exch. 850 Ex Ct). In fact they must place the claimant in the same situation *in all respects protected by the contract (but not others)* as if the contract had been performed. Unprotected consequences are at the promisee's own risk, protection for them has not been paid for, and so damages reversing such consequences would overcompensate the promisee.

Applying the new remoteness approach

The *Achilleas* agreement-centred test "involves the interpretation of the contract as a whole against its commercial background" (Lord Hoffmann at [25]–[26]). The following are a few of the key factors to be weighed in the construction process by which the "common basis" is to be discerned, in the light of the express and implied terms and the matrix of fact:

1. Whether a loss was sufficiently foreseeable at the time of contracting that it can sensibly be said to have been "within the horizon of the parties' contemplation" (Lord Walker at [78]). In particular, whether the likelihood and quantum of the loss were sufficiently foreseeable at the time of contracting that the promisor could have realistically taken it into account in pricing the contract, taking out insurance, drafting any exclusions, and later deciding what effort to take in trying not to breach. This purposive foreseeability approach replaces the old approach's blind application of a label such as "not unlikely" or "real danger". It was of some importance in *SAAMCO* (at 211E–F), and *Hadley v Baxendale* (1854) 9 Exch. 341 Ex Ct might have been decided differently if the defendant had been a vendor of mill shafts and not a carrier (see further Lord Walker at [67]).
   (Foreseeability (reconceived) was the most important factor in *The Achilleas* for Lord Hoffmann, Lord Hope and Lord Walker: see [23], [34], [36] and [86]. For at least Lord Hoffmann and Lord Hope (at [23] and [34]), the charterers did not accept liability for any loss of profits from follow-on fixtures, because at the time of contracting such losses were too unpredictable for the parties to have thought the charterer should have had them in mind as something it would be liable for (however small or large the loss in fact turns out to be). For these two judges it

was not the extent of the losses in the particular case that was too remote (which should lead to a *Victoria Laundry* award of the ordinary losses, an approach that can still apply under the new approach: per Lord Hoffmann at [22]), but the entire type of losses of profits in relation to follow-on fixtures (although Lord Walker leans towards the *Victoria Laundry* approach at [82]–[86]). The difficulty with this reasoning, however, is that delays or other breaches can often lead to unpredictable follow-on losses (often partly related to market movements), and that such losses are often recoverable (subject to capping under *Victoria Laundry*): for example the contract of carriage in *The Heron II* and the sale of goods in *Victoria Laundry*. One possible explanation for the result in *The Achilleas* is that in long-term time charters there is not only a potentially volatile market but also a long period (months or longer) between contracting and breach, although one wonders whether this is enough to justify the conclusion in *The Achilleas*, and there are plenty of other long-term contract types, including fixed-term leases of real property (as to which see *Bramley v Chesterton* (1857) 2 C.B. (N.S.) 592 Ct of Common Pleas). Certainly an expectation of a long period between contracting and breach cannot be enough on its own to render a type of loss unrecoverable.)

2. In cases where relevant information was specially communicated to the promisor prior to contracting (i.e. second limb cases), whether that information was communicated in circumstances (i.e. timing, casualness, to which employee, etc.) in which it could be reasonably be understood to have been taken on board by the promisor as something that the parties would treat as affecting the extent of his liability.
3. The purpose of the duty, i.e. which interests it was intended to protect. Thus a lightning conductor is intended to protect against lightning damage, however unlikely (Lord Walker at [78]), and a property valuation is not intended to protect against transactional losses through entering the property market, however likely (*SAAMCO*).

   (In *The Achilleas* the right to refuse to obey an illegitimate last voyage order can be argued to be significant both ways: either it emphasises the importance under the contract of ensuring that the shipowner has the vessel on the redelivery date, so as to protect follow-on charters; or it shows that the shipowner has enough protection and does not expect to recover damages for the loss of profits where the order is a legitimate one: see Lord Hoffmann at [23].)

4. The absence of an express term (especially exclusion clause) covering the risk. This may or may not indicate anything about the intended allocation of risk.
   (In *The Achilleas*, Lord Hoffmann thought it was of no significance (at [26]), whereas Baroness Hale thought it pointed towards an assumption of responsibility (at [90]), while at the same time arguing for the old approach to remoteness under which such an argument was irrelevant.)
5. Any general market understanding or expectation. Indeed, an exclusion clause could be implied in fact by custom, with no need to discuss remoteness, if such a market understanding were sufficiently clear.
   (Lord Hoffmann did place some reliance upon a market understanding in *The Achilleas*, although none of the other judges in the House ascribed any real significance to it.)
6. The price paid to the promisor, as compared with the size of potential losses for which the promisor is said to have taken the risk, per Lord Hoffmann at [13] and [20] (see also the Australian decision of *Stuart Property v Condor Commercial Property* [2006] NSWCA 334 at [97]).
   (This cannot have been important in *The Achilleas*. Although large, the loss claimed was still less than 25 per cent of the amount of charter costs paid by Transfield during their charter, i.e. not entirely disproportionate.)

Other impact

The Achilleas also opens the way for the following two further changes to the law.

First, absorption within remoteness of the rule by which damages for mental distress are only recoverable when enjoyment was an "important object" of the contract (*Farley v Skinner* [2001] UKHL 49; [2002] 2 A.C. 732). This is just a question of the orientation of the contract under the first limb of the remoteness rule as now understood, i.e. whether amenity or freedom from mental distress are impliedly protected interests in relation to the breached obligation.

Secondly, application of the *Achilleas* test of remoteness to cases of tort liability for negligent misstatements or services under the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ([1964] A.C. 465 HL) principle (whether concurrent to contractual liability or stand-alone). *Hedley Byrne* liability is, like contract liability and unlike most tort liability, founded upon a pre-existing voluntary assumption of responsibility, and the scope of that responsibility must be fixed at the time of its assumption in the same way as in contract cases. (On this point see further A. Kramer, "Remoteness:

New Problems with the Old Test" in R. Cunnington and D. Saidov (eds), *Contract Damages: Domestic and International Perspectives* (2008), at p.290, and the commentaries and authorities cited therein.)

Adam Kramer.*

Sir Neil MacCormick

The Editor and the members of the Editorial Advisory Comittee much regret to note the death of one of the members of the Committee, Professor Sir Neil MacCormick, Q.C., LL.D., F.B.A., F.R.S.E., M.E.P.

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Contracts; Loss; Remoteness