

Singapore Court Of Appeal Decides On When Damages Are Too Remote To Be Recovered

Introduction

The law on remoteness of damages in contract has recently become a subject of both judicial and academic interest in light of the English House of Lords decision of *The Achilles* [2009] 1 AC 61 and the English High Court decision of *Sylvia Shipping Co Limited v Progress Bulk Carriers Limited* [2010] EWHC 542 (see: Rajah & Tann LLP's Client Update of August 2010 titled "Clarifying the Application of *The Achilles* As Limited Exception to The Rule in *Hadley v Baxendale*").

The Singapore Court of Appeal ("CA") took the opportunity to clarify the test for remoteness of damages where there has been a breach of contract in Singapore in *MFM Restaurants Pte Ltd and Another v Fish & Co Restaurants Pte Ltd* [2010] SGCA 36. What is significant about this decision is that:

- (a) The CA rejected Lord Hoffman's holding in *The Achilles* – that a party is liable for damages only where the loss is one for which the party liable assumed contractual responsibility; and
- (b) The CA affirmed its previous decision of *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 which endorsed the traditional two-stage *Hadley v Baxendale* test.

Brief Facts And Issues

The case concerned a breach of a settlement deed entered into between the Respondent, Fish & Co Restaurants Pte Ltd, and the Appellant, MFM Restaurants Pte Ltd. Parties entered a consent judgment, with damages to be assessed. Dissatisfied with the assessment by the Assistant Registrar at first instance, and by the Judge on appeal, the Appellant appealed to the Court of Appeal.

The Respondent claimed damages for losses it suffered (a) during the time the breaches occurred (the "**Breach Period**"); and (b) after the breaches had ceased (the "**Post-Breach Period**").

While the case raised issues on causation and the appropriate methodology for valuing the Respondent's losses, the main issue before the Court of Appeal was whether the Respondent was entitled to damages during the Post-Breach Period. This determination of this issue turned on the appropriate test for remoteness of damages in contract.

The Court's Position On Remoteness Of Damages

Andrew Phang JA discussed at length the law relating to remoteness of damages. We set out below a brief summary of the discussion:

- (1) The traditional test for remoteness of damages is as set out in the House of Lords decision of *Hadley v Baxendale* (1854) 9 Exch 341 and as clarified by the English Court of Appeal in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528:
 - (a) The first limb of the *Hadley* test allows for recovery of losses arising naturally, that is to say, according to the usual course of things, from breach of contract.
 - (b) The second limb allows for recovery of "unusual" losses which do not flow naturally from the breach of contract but, rather, is due to the special knowledge possessed by the party who breached the contract.
- (2) In *The Achilles*, Lord Hoffman introduced a new criterion for the determination of remoteness of damages – whether or not the party in breach had assumed responsibility for the loss which had occurred as a result of the breach. This was a criterion in addition to the traditional two limbs of *Hadley* test.
- (3) Lord Hoffman took the view that it is "logical to found liability for damages upon the intention of parties (objectively ascertained) because all contractual liability is voluntarily undertaken".
- (4) The CA rejected the introduction of this new legal criterion for the following reasons:
 - (a) First, it was not the *ratio decidendi* of the House of Lords decision in *The Achilles*. This new criterion was advocated by Lord Hoffman and endorsed only by Lord Hope of Craighead. The other Law Lords – Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Baroness Hale of Richmond based their decision on the traditional principles laid down in *Hadley*.
 - (b) Second, there are fundamental theoretical or conceptual difficulties with Lord Hoffman's approach because it appears to exclude the operation of the very doctrine of remoteness of damage in contract itself. Remoteness is traditionally understood to be a doctrine which limits liability. However, if an agreement-centred approach is adopted, liability is "never cut back".
 - (c) Third, from a practical perspective, the application of this approach is arbitrary and brings about uncertainty. The "assumption of responsibility" is "not something which parties have, *ex hypothesi*, had the opportunity to think about, let alone discuss at the time they entered into the contract". This results in a lack of concrete rules and therefore creates uncertainty.

- (5) The CA then highlighted the merits of the existing approach in *Hadley*:
- (a) The first limb of the *Hadley* rule encompasses Lord Hoffman’s approach to the extent that it necessarily embodies an implied undertaking or assumption of responsibility on the part of the defendant (albeit on an imputed basis). The imputation is justified in so far as natural or ordinary loss is concerned, any reasonable person in the shoes of the defendant should be taken to have assumed responsibility for such loss.
 - (b) With respect to the second limb, the criterion of knowledge furnishes a sufficiently objective basis on which to premise the existence (or otherwise) of an implied obligation or assumption of responsibility on the defendant. The existence of knowledge is not merely a factor in this determination; it is the basis of the determination.
 - (c) *Hadley* is consistent with the very essence of the law of contract itself. With respect to the first limb, reasonable people would be taken to know of damage which flows “naturally” from a breach of contract so knowledge should be imputed on them. With respect to the second limb, contracting parties, who have had the opportunity to communicate with each other in advance such that they had actual knowledge of special circumstances, ought to be liable for such damage.
 - (d) *Hadley* avoids the problem of uncertainty in *The Achilles* because it sets out two clear limbs of the rule.
 - (e) *Hadley* provides the necessary framework for legal analysis.

In the instant case, the CA held that the Appellants were liable for the Respondent’s Post-Breach losses. It was quite illogical and unrealistic to expect losses to cease immediately after the breaches had stopped. Having regard to the loss of business claimed by the Respondent during the Post-Breach Period, the damages awardable would fall within the first limb in *Hadley*.

Conclusion

For a while after *The Achilles*, it was unclear what the test on remoteness of damages for breach of contract encompassed. This CA decision of *Fish & Co Ltd* is timely and significant in clarifying any doubts in this regard. It can be said in no uncertain terms now that the law on remoteness of damages is settled in Singapore; the Singapore courts will apply the two-limb *Hadley* test as set out in *Robertson Quay Investments Ltd*.

Contacts



Leong Kah Wah
Partner
D (65) 6232 0504
F (65) 6428 2074

kah.wah.leong@rajahtann.com



Koh See Bin
Senior Associate
D (65) 6232 0605
F (65) 6428 2081

see.bin.koh@rajahtann.com

Please feel free to also contact the Knowledge and Risk Management Group at eOASIS@rajahtann.com

Rajah & Tann LLP is one of the largest law firms in Singapore and Asia, with representative offices in Shanghai and Vientiane, as well as an associate office (Kamilah & Chong) in Kuala Lumpur. As a full service regional law firm, our knowledge, resources and insight can be your business advantage.

Rajah & Tann LLP is firmly committed to the provision of high quality legal services. It places strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems.

The contents of this Update are owned by Rajah & Tann LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann LLP or e-mail the Knowledge & Risk Management Group at eOASIS@rajahtann.com.
