

THE PROBLEMS WITH AMANN: WOULD AN AGREEMENT-CENTRED APPROACH TO REMOTENESS BENEFIT AUSTRALIAN JURISPRUDENCE?

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The agreement-centred approach to assessing damages for breach of contract formulated by Lord Hoffmann in The Achilles dovetails neatly with the modern approach to contractual interpretation. In this paper, I will seek to analyse and expose what I respectfully submit are shortcomings in the joint judgment of Mason and Dawson JJ in Amann and how it contrasts with Lord Hoffmann's reasons in The Achilles. Further, I will attempt to conflate the agreement-centred approach applied in The Achilles with the broader task of contractual interpretation and, given the shortcomings in Amann, demonstrate how Australian jurisprudence would benefit from a consolidated, consistent approach to contractual claims, whether it be a claim for damages for breach of contract, the existence of an unexpressed term or the broader task of contractual interpretation.

CONTENTS

I	Introduction.....	2
II	Damages for Breach of Contract: The Orthodox Rules	4
III	The Difficulties with the Orthodox Rule of Remoteness.....	5
IV	What Are Expectation and Reliance Damages?.....	7
V	<i>Amann</i> : The Facts and a Summary of the Leading Judgment.....	8
VI	The Problems with <i>Amann</i>	9
VII	The <i>Achilleas</i> to the Rescue.....	11
VIII	Does <i>Amann</i> Lend Itself to the Agreement-Centred Approach?.....	14
IX	Contractual Interpretation and Unexpressed Terms in Australia and the United Kingdom	16
X	Contractual Interpretation	17
XI	Unexpressed Terms.....	18
XII	Opposition to the <i>Belize</i> Test for Unexpressed Terms.....	21
XIII	Conflating an Agreement-Centred Approach to Remoteness with the Broader Task of Contractual Interpretation	24
XIV	Would Australian Jurisprudence Benefit from an Agreement-Centred Approach?.....	25
XV	Conclusion.....	27

I INTRODUCTION

In recent times, particularly in the United Kingdom, rather than observing a rigid application of the orthodox rules for claims relating to breach of contract and unexpressed terms,¹ common law courts have been anxious to uphold the bargain struck between parties. This approach is in lock step with the modern contextual approach to contractual interpretation which necessarily involves careful consideration of both the text contained in the express terms of the contract and the context or surrounding circumstances in which the parties contracted. In other words, with respect to such claims, the court 'is concerned only to discover what the instrument means'.² Australian jurisprudence appears to be moving in the direction of the UK approach, but the rules that have traditionally governed three important areas of the law of contract still represent orthodoxy in Australia. For the reasons that follow, I respectfully submit that the modern UK approach should apply for any claim relating to contracts, whether it be a claim for, inter alia, damages for breach of contract, the existence of an unexpressed term or the task of interpreting contracts generally. As Lord Hoffmann observed in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*:³

the 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 (my emphasis).

In Australia, *Commonwealth of Australia v Amann Aviation Pty Ltd*⁴ is considered the leading authority for damages awards, assessed on a reliance basis, for breach of contract. The judgments pay very little attention to the terms of the contract between the parties. Further, the leading judgment in *Amann* appears to suffer from two distinct issues with respect to, first, its application of the 'ruling principle'⁵ for measuring damages for breach of contract set out in *Robinson v*

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¹ In this essay, I refer to 'unexpressed terms' to address the point made by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 447 that 'the expression 'implied term' suggests imposition in the way in which statutes ... imply conditions or warranties in contracts of a particular description, which may not be excluded or modified. The sense of the matter would have been better served by general adoption of the expression - apparently coined by Sir John Salmond and used by Dixon J - 'tacit term' to identify the latent unexpressed intention of the parties'.

² *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [16].

³ [2009] 1 AC 61 at [25].

⁴ (1991) 174 CLR 64.

⁵ So described by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13].

Harman,⁶ and secondly the *Hadley v Baxendale*⁷ rule for determining the remoteness of those damages.

On the other hand, in the UK, the recent authority on remoteness of damages for breach of contract, *The Achilleas*, ushered in an ‘agreement-centred’ approach to the task of determining remoteness of such damages that has shaken the orthodox approach to its core. It is not surprising that this approach has also been the subject of some debate,⁸ but it is consistent with the modern constructional approach to implied terms and contextual approach to the broader task of contractual interpretation.

Under the modern contextual or ‘commercial’⁹ approach to contractual interpretation adopted by courts in the UK, ‘we are not afraid to find parts of the agreement outside the express words by looking to the factual matrix, the surrounding norms and the reasonable expectations’.¹⁰ Australia is yet to fully embrace the modern UK approach, but recent cases do indicate a gradual shift in that direction.¹¹ For example, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,¹² the High Court found that:

[t]he meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

This view aligns with Lord Hoffmann’s famous restatement of the fundamental principles of interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society (ICS)*.¹³ Lord Hoffmann’s reasoning in *The Achilleas* demonstrates how his constructional approach to unexpressed terms in *Attorney General of Belize v Belize Telecom Ltd*,¹⁴ which is consistent with his contextual

⁶ *Robinson v Harman* (1848) 154 ER 363.

⁷ *Hadley v Baxendale* (1854) 156 ER 145 at 151.

⁸ See, for example: David McLauchlan, ‘Remoteness Re-invented?’ (2009) 9 *Oxford University Commonwealth Law Journal* 109 at 137-138; and Andrew Tettenborn, ‘*Hadley v Baxendale* Foreseeability: A Principle Beyond Its Sell-by Date?’ (2007) 23 *JCL* 120 at 131-132.

⁹ See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 770 where Lord Steyn said ‘[i]t is better to speak of a shift towards commercial interpretation’.

¹⁰ Adam Kramer, ‘An Agreement-Centred Approach to Remoteness and Contract Damages’ in Nili Cohen & Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford and Portland 2005) 249 at 250.

¹¹ Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (2012) at 9.

¹² (2004) 219 CLR 165 at [40].

¹³ [1998] 1 WLR 896 at 912–913.

¹⁴ [2009] 1 WLR 1988.

approach to contractual interpretation in *ICS*, can also be applied to cases involving damages for breach of contract and, by extension, to the operation of contracts as commercial instruments generally.

In cases where the express terms of the contract clearly establish the extent of the defendant's liability, such as awards for defective building work, an uncontroversial, orthodox application of the 'ruling principle' in *Robinson v Harman* will dictate the measure of damages.¹⁵ However, for the task of assessing general consequential damages for breach of contract in which complex questions of remoteness arise, *Amann*, which is not a recent case, presents a real challenge for Australian legal practitioners and courts alike when attempting to either frame or determine a claim for such damages. I will submit that, in such cases, an agreement-centred approach to assessing damages for breach of contract which, as I will seek to demonstrate, is a subsidiary of the modern UK approach to the broader task of contractual interpretation, may be just the remedy Australian jurisprudence needs to address the deficiencies in *Amann*.

II DAMAGES FOR BREACH OF CONTRACT: THE ORTHODOX RULES

Australia and the UK both have substantial bodies of jurisprudence surrounding damages awards for breach of contract, the development of which have their roots in Parke B's seminal statement in *Robinson v Harman* that:¹⁶

where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

It follows that damages for breach of contract are compensatory. The general rule is that only actual loss can be compensated for in damages and that, in assessing appropriate compensation, the court must attempt to place the injured party in the same position had the contract been performed. Further, it has been generally accepted¹⁷ by the courts of the two jurisdictions that *Hadley v Baxendale* prescribes

¹⁵ See, for example, *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, the current leading Australian authority on damages for breach of contract. Also see *Clark v Macourt* (2013) 253 CLR 1 where the Court placed great emphasis on the performance of the contract and enforcing the bargain between the parties.

¹⁶ *Robinson v Harman* (1848) 154 ER 363 at 365.

¹⁷ Notwithstanding mounting criticism to the contrary: see, for example Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: A Principle Beyond Its Sell-by Date?' (2007) 23 *JCL* 120. Further, in 1978 writing extra judicially, Sir Robin Cooke described *Hadley v Baxendale* as 'a decision scarcely of real authority nowadays'. Also see below under the heading 'The difficulties with the orthodox rule of remoteness'.

the basis on which damages can be awarded in respect of a loss sustained by reason of a breach of contract:¹⁸

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, i.e., 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.

The ‘rule of remoteness’ has subsequently been refined and reformulated in later cases *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*¹⁹ and *Koufos v C Czarnikow Ltd (The Heron II)*,²⁰ as follows: a loss will not be too remote if it is of the *type* or *kind* that, at the time of the contract, was reasonably foreseeable as *not unlikely* to result from the breach.²¹ In *Baltic Shipping v Dillon*,²² Brennan J summarised the rule of remoteness in the following terms:

The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss followed naturally from the breach or that loss of that kind should have been within his contemplation.

Thus, in the absence of any express contractual provision to the contrary and subject to the rule of remoteness and mitigation of damage, a plaintiff is entitled to recover its expectation or performance interest. The traditional rule of remoteness is an external rule of law,²³ that is, external to the subject contract.

III THE DIFFICULTIES WITH THE ORTHODOX RULE OF REMOTENESS

Prima facie, these rules for measure of damages and remoteness seem conceptually simple; however, the divergent approaches in applying them taken by the High Court of Australia in *Amann* and the UK House of Lords in *The Achilles* highlights the practical challenges associated with assessing damages for breach of contract, particularly with respect to remoteness.

¹⁸ *Hadley v Baxendale* (1854) 156 ER 145 at 151.

¹⁹ [1949] 2 KB 528.

²⁰ [1969] 1 AC 350; [1967] 3 WLR 1491.

²¹ David McLauchlan, ‘Remoteness Re-invented?’ (2009) 9 *Oxford University Commonwealth Law Journal* 109 at 112-113.

²² (1993) 176 CLR 344.

²³ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [9].

The difficulties in the area of remoteness have been the subject of a broad range of differing views in recent learned articles.²⁴ The initial problem faced by courts and legal practitioners when applying the traditional rule of remoteness is that there is no real guidance with respect to how ‘likely’ or ‘usual’ a loss must be for it to be recoverable. Without ascertaining what the contract actually means, the question of remoteness is reduced to arbitrary debate over the actual probability of a certain event occurring. As observed by Lord Walker in *The Achilles*,²⁵ their Lordships fell victim to this dilemma in *The Heron II*.

Even if we accept the orthodox view, there are a number of exceptions to the rule of remoteness where a contract-breaker is frequently found to be liable for consequences it could not have foreseen and vice versa.²⁶ As observed by McHugh J in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*:²⁷

Many kinds of loss or damage that are reasonably foreseeable in a general way are outside the area of recoverability in the law of torts and the law of contract. Thus, it is reasonably foreseeable and within the reasonable contemplation of the parties that a property, the subject of a negligent valuation, may be damaged by fire or other natural disaster. Yet unless there is something which indicates that this property is subject to the risk of fire or natural disaster over and above that of properties generally, no one would suggest that the buyer can recover the loss from the valuer on the ground that but for the negligent valuation the property would not have been purchased.

And, of course, there is the stock example of a taxi’s late arrival causing a passenger to miss a profitable engagement where the taxi company actually knew of the special circumstances. Notwithstanding *Hadley v Baxendale*, there is ample authority to support the proposition that such specific foreseeability is not sufficient to allow the passenger to recover their lost profits.²⁸

²⁴ See, for example: Adam Kramer, ‘An Agreement-Centred Approach to Remoteness and Contract Damages’ in Nili Cohen & Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford and Portland 2005) 249; Andrew Tettenborn, ‘*Hadley v Baxendale* Foreseeability: A Principle Beyond Its Sell-by Date?’ (2007) 23 *JCL* 120; Andrew Robertson, ‘The Basis of the Remoteness Rule in Contract’ (2008) 28 *Legal Studies* 17; and Francis Dawson, ‘Reflections on Certain Aspects of the Law of Damages for Breach of Contract’ (1995) 9 *JCL* 125.

²⁵ At [78].

²⁶ Andrew Tettenborn, ‘*Hadley v Baxendale* Foreseeability: A Principle Beyond Its Sell-by Date?’ (2007) 23 *JCL* 120 at 122. Also see *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377, where the defendants were explicitly made liable for lost profits which they could not reasonably have foreseen.

²⁷ (1999) 199 CLR 413 at [55].

²⁸ In *The Achilles* at [13] and [20], Lord Hoffmann considered the issue of the price paid to the promisor relative to the size of potential losses, the risk of which the promisor is said to have assumed. Also see: *Stuart Property v Condor Commercial Property* [2006] NSWCA 334 at [97]; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 538 per Asquith LJ; *Koufos v Czarnecki Ltd* [1966] 2 QB 695 at 728 per Diplock LJ; *British Columbia Sawmills v Nettleship* (1868) LR 3 CP 499 at 510 (Willes J); and *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112 at [24]–[26] per Waller LJ.

Contractual liability is inherently optional and avoidable; a party can either decline to deal or contract out of liability that may arise in the event of certain situations. Unlike damages for breach of a duty of care in negligence, where there is an element of balancing the rights of the claimant and the defendant, the law of contract does not take into account such considerations. Contract is essentially claimant-based; its purpose is to enable a party contracting for the provision of goods or services to protect its interests, or in other words, to obtain a guarantee against losses caused by non-receipt or defective performance on the part of the defendant which the claimant would otherwise have to bear itself.²⁹ The law of contract seeks to uphold such guarantees, which is why courts are anxious to find out what the instrument means when assessing damages for breach of contract. It seems inconsistent with this claimant-based foundation to limit recovery by reference to defendant-based criteria such as what the defendant could have foreseen as likely to occur, or whether the loss was one it could have avoided. In *The Achilles*, Lord Rodger of Earlsferry's judgment highlights the difficulties with the orthodox rule of remoteness, which I discuss below.

IV WHAT ARE EXPECTATION AND RELIANCE DAMAGES?

The 'ruling principle' set out in *Robinson v Harman* for measuring the quantum of damages protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as 'expectation damages'.³⁰ However, 'where the plaintiff has incurred expenditure which has been wasted because of the defendant's breach and it is impossible to determine the financial outcome of the contract or the value of the defendant's promise, it will usually be the case that the plaintiff's loss is commensurate with the expenditure thrown away as the result of the breach'.³¹ In such cases, damages will be assessed by reference to the wasted expenditure the plaintiff incurred in reliance on the defendant's promise to perform its obligations under the contract (reliance damages),³² the object being to restore the plaintiff to the position it would have occupied if it had not entered into the contract.³³ In Australia, reliance damages may only apply where damages are not calculable on an expectation basis.³⁴ The appropriate

²⁹ Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: A Principle Beyond Its Sell-by Date?' (2007) 23 *JCL* 120 at 130.

³⁰ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80.

³¹ *Ibid*, per McHugh J at 163.

³² *Ibid*.

³³ David McLauchlan, 'Reliance Damages for Breach of Contract' (2007) *NZL Rev* 417 at 419.

³⁴ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 85. *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 was such a case where reliance damages were held to apply.

method of measurement is at the discretion of the court. A party cannot elect which method it prefers.³⁵ In his article, David McLauchlan argues it is time to jettison the use of the term 'reliance damages' from the lexicon of the law relating to damages for breach of contract because it places 'irrelevant conceptual difficulties in the way of heads of damage that ought in principle to be recoverable and they can bamboozle lawyers and judges alike, leading to unnecessarily complicated or confused reasoning in reaching decisions on damages awards'.³⁶ These difficulties were felt keenly by the Court in *Amann*.

V AMANN: THE FACTS AND A SUMMARY OF THE LEADING JUDGMENT

In *Amann*, the Commonwealth contracted with Amann Aviation to provide aerial surveillance of parts of the northern coast of Australia for a period of three years. The Commonwealth wrongfully repudiated the contract on the very first day of operations. Amann accepted the repudiation and sued for damages for the costs it had incurred in preparing for performance. Amann's damages claim faced two important obstacles. First, pursuant to clause 2.24 of the contract,³⁷ there was a chance the Commonwealth would have validly terminated in any event. Secondly, and perhaps most importantly, the contract contained no express right of renewal.

The facts and the judgments of *Amann* are highly complex (the decision runs to 114 single-spaced A4 pages). In deciding the case, the High Court was divided by four votes to three. Further, there are significant differences in the reasons expressed in the majority judgments and each of the minority judgments propose a different solution. This all serves to highlight the challenges faced by the Court. Mason CJ and Dawson J together delivered the leading judgment. A summary of their relevant findings is as follows:³⁸

1. Amann was entitled to claim damages for breach of contract in respect of the expenses that were incurred in reasonable reliance on the Commonwealth's promise and wasted as a result of the breach. Their Honours reasoned that such recovery was consistent with *Robinson v Harman* because the law assumed Amann would at least have recovered its expenditure if the contract had been fully performed.³⁹

³⁵ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 85.

³⁶ David McLauchlan, 'Reliance Damages for Breach of Contract' (2007) *NZL Rev* 417 at 418-419.

³⁷ Clause 2.24 of the contract entitled the Secretary of Transport to terminate the contract if Amann (who was in serious breach at the time of the repudiation) failed, after due notice, to show cause why it should not be so terminated.

³⁸ David McLauchlan, 'Reliance Damages for Breach of Contract' (2007) *NZL Rev* 417 at 431.

³⁹ In *Amann* at 165, McHugh J in dissent rejected the assumption that business people never make bad bargains. Further, in his article 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 *LQR* 226 at 229, Sir Guenter Treitel also criticised this assumption in the following terms: '[w]hile one may admire the ingenuity of this argument, one cannot help suspecting a kind of verbal trick. To weld

2. The burden of displacing this assumption was on the defendant, who had to establish Amann's expenditure would have been wasted even if the contract had been performed.
3. This burden had not been discharged even though gross receipts under the contract were some \$3.9 million less than the expenses to be incurred by Amann in carrying out its contractual obligations. In the Court's view, this was the case because there was a strong prospect of contract renewal, the loss of which the Court found was within the parties' contemplation as a probable consequence of the breach. The Commonwealth was unable to establish that the value of the prospect of renewal plus the payments that Amann would receive (\$17.1 million) was less than the total expenses to be incurred by Amann (\$21 million).

VI THE PROBLEMS WITH AMANN

In *Amann*, Mason CJ and Dawson J applied *Robinson v Harman* in arriving at their measure of damages on a reliance basis, giving rise to a theoretical anomaly ('**First Issue**'); the award of reliance damages is inconsistent with the principle in *Robinson v Harman*. Reliance damages do not necessarily put the plaintiff into the position in which he would have been if the contract had been performed, but rather restore it to its pre-contract position.⁴⁰ However, Mason CJ and Dawson J held that awards of damages for lost profits and awards for wasted expenditure are 'simply two manifestations of the general principle enunciated in *Robinson v Harman*',⁴¹ they are not 'discrete and truly alternative measures of damages'⁴² the plaintiff may choose between. With respect, this blurs what should be a clear delineation between measuring damages on either an expectation or reliance basis.

A further issue arises in the leading judgment in *Amann* ('**Second Issue**') with respect to whether the loss associated with renewal of the contract incurred by Amann was too remote. The rule of remoteness in *Hadley v Baxendale* limits damages to losses which are not too remote. It is an exclusionary rule. Further, the Commonwealth had made no representation to Amann that it would renew the contract. However, in their joint judgment, Mason CJ and Dawson J applied the rule in reverse to extend rather than limit the scope of damages, attracting considerable criticism in academic spheres.⁴³ Prior to *The Achilleas*, which I discuss below, some commentators advocated an agreement-centred approach to

two principles into one with the aid of a presumption can scarcely conceal the fact that two different methods of compensating the plaintiff are involved'.

⁴⁰ Sir Guenter Treitel, 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 *LQR* 226 at 229.

⁴¹ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 85.

⁴² *Ibid* at 82.

⁴³ See footnotes 22 and 24.

remoteness, for ‘if a given result of a breach is foreseeable but outside the scope of the defendant’s promise, or unforeseeable but within it, it seems perverse to apply foreseeability as a criterion of recovery’.⁴⁴ *Amann* is a prime example of one issue that may arise with an ‘inflexible’,⁴⁵ traditional application of the rule in *Hadley v Baxendale*. In *Amann*, the Court found that the defendant, having repudiated the contract, was liable for the loss suffered by Amann based on the possibility the contract might otherwise have been renewed, despite being under no obligation to renew it, on the grounds that those losses were foreseeable. With respect, this finding (that a party to a contract can be liable for the consequences of its not doing what it was not required to do, merely because they are not otherwise unforeseeable) cuts right across the contractual risk allocation and seems difficult to defend on any basis.⁴⁶ As observed by Sir Guenter Treitel, ‘this is, to say the least, a curious use of *Hadley v Baxendale*’.⁴⁷

On this issue, the leading judgment in *Amann* also appears to clash with older, highly persuasive, UK authority. In *Victoria Laundry*, the plaintiff laundry company contracted to buy a boiler to use in its business. The boiler was delivered five months late. The plaintiff sued for the normal profits it would have made had the boiler been delivered on time. It also sought to recover profits it would have made on other, highly lucrative, contracts it intended to enter into had the boiler been available. The Court held the plaintiff was entitled to recover the profits it would have made on the ordinary work, but not on the additional lucrative contracts on the grounds that such losses were too remote. The lost profits associated with additional contracts in *Victoria Laundry* are analogous to the issue faced by the Court in *Amann*; whether the renewal of the future contract was relevant. In fact, under the circumstances, the loss associated with renewal of the contract in *Amann* is arguably more remote than the lost profits associated with the additional contracts in *Victoria Laundry*. This notwithstanding and as noted, in *Amann* the Court found ‘the prospect of securing a renewal of the contract was within the contemplation of the parties as a probable result of the breach’.⁴⁸

In *Amann*, McHugh J argued in dissent that damages for breach of the contract were calculable on an expectation basis and there were consequently no grounds on which to consider assessing loss on a reliance basis. Further, reliance loss relates

⁴⁴ Andrew Tettenborn, ‘*Hadley v Baxendale* Foreseeability: A Principle Beyond Its Sell-by Date?’ (2007) 23 *JCL* 120 at 136.

⁴⁵ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [24].

⁴⁶ Andrew Tettenborn, ‘*Hadley v Baxendale* Foreseeability: A Principle Beyond Its Sell-by Date?’ (2007) 23 *JCL* 120 at fn 84.

⁴⁷ Sir Guenter Treitel, ‘Damages for Breach of Contract in the High Court of Australia’ (1992) 108 *LQR* 226 at 231.

⁴⁸ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 133.

to wasted expenditure and takes no account of the possibility of claiming in respect of lost opportunities for gain under alternative contracts.⁴⁹ I respectfully submit Mason CJ and Dawson J appear to have wrongly manipulated the rules in *Robinson v Harman* and *Hadley v Baxendale* to suit their award of reliance damages and to overcome issues of remoteness and causation associated with the possible renewal of the contract. In my view, bearing in mind *Amann* was decided long before the agreement-centred approach emerged in its modern form, it is arguable McHugh J correctly applied the traditional, orthodox approach to damages awards for breach of contract set out by the ‘ruling principle’ in *Robinson v Harman* and the *Hadley v Baxendale* rule for remoteness.

VII THE *ACHILLEAS* TO THE RESCUE

In *The Achilleas*, the material facts were relatively straightforward. Mercator Shipping Inc entered into a time charter of their vessel, the *Achilleas*, to Transfield Shipping Inc for a period of five to seven months. The latest date for redelivery of the *Achilleas* was 2 May 2004. On 20 April, Transfield gave notice it would redeliver the vessel between 30 April and 2 May. On 21 April, Mercator entered into a follow-on time charter agreement for a period of four to six months with another company, Cargill, who had the option to cancel the charter if the vessel was not delivered by 8 May. At the time the second contract was entered into, market rates had risen dramatically to US\$39,500 per day, in contrast to the US\$16,750 in the first contract with Transfield. Through no fault of its own but in breach of the first contract, Transfield did not redeliver the *Achilleas* until 11 May. It was delayed in port during the last voyage of the charter. Meanwhile, on 5 May, when it had become obvious to Mercator that the vessel would not be available to Cargill before the cancellation date of 8 May, it negotiated an extension of the date for delivery to 11 May. However, because of a sudden drop in the charter market, Mercator was forced to accept a reduction in the hire rate from US\$39,500 to US\$31,500. Mercator claimed from Transfield damages amounting to nearly US\$1.4 million; the difference between the original rate and the reduced rate for the period of the Cargill charter. A dispute arose and the matter was referred to arbitration. The arbitrators, by a majority, found for the owners.

As in *Amann*, the judgments of the Law Lords in *The Achilleas* suffered from a diversity of approach. At first instance and in the Court of Appeal, the original arbitration award of damages for breach of contract was upheld, in comprehensive

⁴⁹ David McLauchlan, ‘Reliance Damages for Breach of Contract’ (2007) *NZL Rev* 417 at 420.

judgments by ‘judges of great commercial experience’.⁵⁰ The judges carefully adhered to the orthodox rules set out for the measure of damages in *Robinson v Harman* and for remoteness in *Hadley v Baxendale*. The House of Lords overturned the Court of Appeal, preferring an agreement-centred approach to remoteness. As noted, this approach places much more emphasis on the bargain struck between the parties than the traditional approach adopted in *Amann* and the dissenting judgments in *The Achilles*. Lord Hoffmann found the case raised ‘a fundamental point of principle in the law of contractual damages,’ prompting him to pose the following question:⁵¹

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?

His Lordship went on to establish the latter represents the proper application of the rules of remoteness in *Hadley v Baxendale* on the basis they are ‘not so inflexible; they are intended to give effect to the presumed intentions of the parties and not to contradict them’.⁵² At paragraph 11, his Lordship cited various learned articles which show there is a ‘good deal of support...for the proposition that the *extent of a party’s liability* for damages is founded upon the interpretation of the particular contract; not upon the interpretation of any particular language in the contract, but (*as in the case of an implied term*)⁵³ upon the interpretation of the contract as a whole, construed in its commercial setting (my emphasis)’. One such article argues that:⁵⁴

the allocation of responsibility for the consequences of breach is one of the matters that is determined by contractual agreement, even when it is not covered by the express terms of the agreement. According to this view, *the central rule restricting awards of damages, the foreseeability requirement, is not a strict rule originating outside the contract for reasons of efficiency, fairness or proportionality, but is a rule of thumb that is justified when and to the extent that it indicates what the parties*

⁵⁰ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [65].

⁵¹ *Ibid* at [9].

⁵² *Ibid* at [24].

⁵³ This is a reference to *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, also decided by Lord Hoffmann where, his Lordship adopted a ‘constructional approach’ to the implication of an unexpressed term that is conceptually very similar to the agreement-centred approach he applied in *The Achilles*.

⁵⁴ Adam Kramer, ‘An Agreement-Centred Approach to Remoteness and Contract Damages’ in Nili Cohen & Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing, Oxford and Portland 2005) 249 at 250.

wanted. The foreseeability rule, and many of the other rules governing damages, should thus be understood as a framework for discovering what was agreed, not a default rule to operate when nothing was agreed (my emphasis).

On this basis, his Lordship disagreed when Mercator submitted that the ‘ruling principle’ in *Robinson v Harman* was the ‘starting point’ for assessing damages, citing a passage from his earlier decision in *South Australia Asset Management Corp v York Montague Ltd*⁵⁵ in support of his position:⁵⁶

I think that this was the wrong place to begin. Before 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. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages.

His Lordship went on to find, ‘[i]n other words, 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’.⁵⁷ However, under this approach, *Robinson v Harman* must still apply to 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.⁵⁸

In essence, the majority found the law of remoteness of damages in contract to be based on agreement, derived from an interpretation of the contract. In the wake of *The Achilleas*, UK appellate courts are required to look at the objectively determined ‘presumed intentions’, ‘common intention’ and ‘shared understanding’ of the parties.⁵⁹ It is not an external rule of law imposed upon the parties.⁶⁰ 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’,⁶¹ and thus identify the ‘common expectation, objectively assessed, on the basis of which the parties are entering into their contract’,⁶² (i.e. what the parties would ‘reasonably have considered the extent of the liability they were undertaking’⁶³). In the UK, *The Achilleas* has reduced the

⁵⁵ [1997] AC 191 at 211.

⁵⁶ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [14].

⁵⁷ *Ibid* at [15].

⁵⁸ Adam Kramer, ‘The New Test of Remoteness in Contract’ (2009) 125 *LQR* 408 at 412.

⁵⁹ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [12], [24], [36], [69] and [84].

⁶⁰ *Ibid*, per Lord Hoffmann at [9].

⁶¹ *Ibid*, per Lord Hope of Craighead at [30].

⁶² *Ibid*, per Lord Walker of Gestingthorpe at [78].

⁶³ *Ibid*, per Lord Hoffmann at [23].

orthodox rule of remoteness to a rule of thumb of broad application; foreseeability of a loss as a ‘not unlikely’ consequence of breach, although still relevant, is no longer necessary or sufficient for a finding that the loss claimed is not too remote and therefore recoverable.⁶⁴

On the other hand, while Lord Rodger of Earlsferry agreed with the result of the majority, his application of the orthodox rule of remoteness demonstrates the difficulties with this approach. It is hard to argue against the proposition that, under a time charter agreement, losses in relation to the cancellation or renegotiation of a subsequent fixture flow naturally from delayed redelivery if the market drops between the engagement of the subsequent fixture and the date of forced cancellation or renegotiation of the original fixture.⁶⁵ As was held by the Court of Appeal, such losses are in the ‘usual course of things’. Yet Lord Rodger found that the loss claimed by Mercator in *The Achilles* was too remote on the unconvincing basis that the sheer ‘extent’⁶⁶ of the movement in market prices rendered the loss claimed unusual. It is clear from Lord Hoffmann’s leading judgment in *The Achilles* that an agreement-centred approach to remoteness of damages for breach of contract provides parties with more certainty of outcome than the traditional tests.

VIII DOES AMANN LEND ITSELF TO THE AGREEMENT-CENTRED APPROACH?

It goes without saying that an agreement-centred approach to remoteness would not be appropriate in cases where reliance damages are properly found to apply.⁶⁷ Damages in such cases are calculated so as to restore the plaintiff to its pre-contract position. However, as I have sought to demonstrate, in *Amann* the Court wrongly held that *Amann* was entitled to reliance damages and misapplied the rule of remoteness in *Hadley v Baxendale* in reverse to support its finding that renewal of the contract was relevant. As noted, the judgments pay very little attention to the contract between the parties. Now consider a scenario where *Amann* is decided using an agreement-centred approach. In this scenario, the Court would seek to determine what the contract actually means. In doing so it would consider whether the contract for aerial surveillance could fit within a particular category of contract that would limit the extent of the Commonwealth’s liability arising naturally from the general expectations in that market. The Court would

⁶⁴ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [9], [17], [21], [32], [36] and [84].

⁶⁵ Adam Kramer, ‘The New Test of Remoteness in Contract’ (2009) 125 *LQR* 408 at 409.

⁶⁶ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [53].

⁶⁷ See, for example, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

construe the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for. In his learned article,⁶⁸ Adam Kramer identifies some of the key factors that have emerged from *The Achilles* which should be weighed when applying the agreement-centred test, which I consider below.

With respect to the First Issue, under an agreement-centred approach it is likely the Court would have found the express words and the commercial background of the agreement were sufficient to make it clear the Commonwealth could reasonably be seen to have assumed the risk of the loss suffered by Amann as a consequence of the breach that occurred.⁶⁹ Prima facie, this does not add much to *Amann* as it stands; however, in this scenario, having determined the Commonwealth's liability I consider it likely the Court would subsequently apply the orthodox rules set out for the measure of damages in *Robinson v Harman* and for remoteness in *Hadley v Baxendale* to arrive at quantum of damages calculated on an expectation basis, which accords with McHugh J's dissenting judgment.

With respect to the Second Issue, under an agreement-centred approach, for the loss associated with the prospect of renewal of the contract in the future to be sufficiently foreseeable at the time of contracting, it must reasonably be said to have been 'within the horizon of the parties' contemplation'.⁷⁰ It is likely the Court would find the Commonwealth did not assume liability for any loss of profits from the renewal of the contract, because at the time of contracting such losses were too unpredictable for the parties to consider the Commonwealth should have had them in mind as something for which it was liable (however small or large the loss may turn out to be).⁷¹ As noted, the Commonwealth made no representation to Amann it would renew the contract, nor did Amann communicate to the Commonwealth it was relying on a renewal of the contract. This would further militate against a damages award associated with the renewal of the contract in favour of Amann. Other factors the Court would consider are:

- The purpose and scope of the implied contractual duty and which interests it was intended to protect, or in other words the extent of liability. For example, a lightning conductor is intended to protect against lightning damage, however unlikely,⁷² and a

⁶⁸ Adam Kramer, 'The New Test of Remoteness in Contract' (2009) 125 *LQR* 408 at 412.

⁶⁹ By the time the matter had reached the High Court, it was no longer in dispute that the Commonwealth was in breach and that Amann's termination of the contract was justified.

⁷⁰ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 6 at [78], per Lord Walker.

⁷¹ *Ibid* at [23] and [34], per Lord Hoffmann and Lord Hope.

⁷² *Ibid* at [78], per Lord Walker.

property valuation is not intended to protect against transactional losses through entering the property market, however likely.⁷³

- Whether there is any general market understanding or expectation with respect to certain liability. For example, an exclusion clause could be implied in fact or by custom, with no need to consider remoteness, if such a market understanding was sufficiently clear.
- The price paid to Amann relative to the size of potential losses, the risk of which the Commonwealth is said to have assumed.⁷⁴

As McHugh J correctly found,⁷⁵ nothing in the breach prevented Amann from re-tendering for the future contract. The possibility of a renewal had no bearing on the assessment of damages for the Commonwealth's breach of the existing contract. As I have sought to demonstrate in the scenario above, an agreement-centred approach has considerable utility when considering issues such as those which arose in *Amann*.

IX CONTRACTUAL INTERPRETATION AND UNEXPRESSED TERMS IN AUSTRALIA AND THE UNITED KINGDOM

In order to determine whether it is appropriate to conflate an agreement-centred approach to remoteness of damages for breach of contract with unexpressed terms and the broader task of contractual interpretation in the Australian context, I must first consider the current state of the law in these important areas of contract, both in Australia and the UK.

Before embarking upon any exercise in contractual interpretation, one must first remind oneself what a contract actually is. A contract is a legal agreement between two or more parties which transcends any material form it may take. The signed, hardcopy contract or oral contract is merely evidence of the bargain struck by the parties. This may sound simplistic, but the concept is critical to understanding how all contracts operate. In some cases, terms not expressly stated in a written instrument still form part of the contract. From the day the contract is formed, unexpressed terms are just as efficacious as terms expressly stated. The less formal and complete the express agreement, the more room for implication of terms.⁷⁶

⁷³ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191.

⁷⁴ *Ibid* at [13] and [20], per Lord Hoffmann. Also see *Stuart Property v Condor Commercial Property* [2006] NSWCA 334 at [97].

⁷⁵ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 176.

⁷⁶ See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 442, per McHugh and Gummow JJ.

The question whether an agreement contains an unexpressed term arises when the agreement does not expressly provide for ‘what is to happen when some event occurs’.⁷⁷ The common law has struggled to reconcile the competing approaches to contractual interpretation in this context, principally whether evidence of surrounding circumstances is admissible in the absence of ambiguity in the interpretation of express terms and what test should be applied to determine whether an unexpressed term is implied. Consequently, Australian courts have been unable to light the way for contracting parties with a consistent approach to contractual interpretation and the implication of unexpressed terms. For reasons I will explore, I submit Lord Hoffmann’s modern constructional approach to determining the existence of unexpressed terms has clear advantages over the traditional approach that represents orthodoxy in Australia and that an agreement-centred approach to remoteness in contract dovetails neatly with such an approach.

X CONTRACTUAL INTERPRETATION

In *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,⁷⁸ Sir Anthony Mason enunciated his now famous ‘true rule’ governing the admission of evidence of surrounding circumstances as an aid to contractual interpretation of a written instrument, as follows:⁷⁹

The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.

On the other hand, in UK courts, evidence of surrounding circumstances is always admissible as an aid to construction. There is no ambiguity threshold to overcome. In *ICS*,⁸⁰ which is the UK’s leading authority on contractual interpretation, Lord Hoffmann sets out the five principles of contractual interpretation to be followed by intermediate appellate courts.

The approach to contractual interpretation by Australian courts subsequent to the formulation of Sir Anthony’s ‘true rule’ has endured a rocky ride. Relevantly, in *Mineralogy Pty Ltd v Sino Iron Pty Ltd*,⁸¹ Justice James Edelman quotes an address by Sir Anthony in 2009 (25 JCL 1 at page 3):

⁷⁷ See *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [17].

⁷⁸ (1982) 149 CLR 337 at 352.

⁷⁹ Justice Kenneth Martin, ‘Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway’ (paper prepared for the Thomsons Contract Law Seminar, Perth, 20 June 2013) at [1].

⁸⁰ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-3.

⁸¹ [2013] WASC 194 at [121].

Although the meaning of the words used by Mason J in *Codelfa* is a matter for posterity, it is noteworthy that Sir Anthony Mason subsequently said that the ‘idea I was endeavouring to express in *Codelfa*, albeit imperfectly’ was that ‘the extrinsic materials are receivable as an aid to construction, even if, as may well be the case, the extrinsic materials are not enough to displace the clear and strong words of the contract’. Sir Anthony considered that subsequent decisions of the High Court of Australia, including the decision of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, 179 [40], had taken this broad approach.

This broad or ‘contextual’ approach, which has also been referred to in the UK as ‘commercial interpretation’⁸² or ‘commonsense interpretation’,⁸³ advocated by Sir Anthony in his 2009 speech suggests the High Court’s narrow interpretation of the ‘true rule’ in *Western Export Services Inc v Jireh International Pty Ltd*⁸⁴ may be taking the ‘true rule’ out of context. In any event, there is considerable tension surrounding the interpretation of the ‘true rule’ in Australia, which has been spurred on by the contextual approach favoured by UK courts.

Recent High Court decisions in *Electricity Generation Corporation v Woodside Energy Ltd*⁸⁵ and *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*⁸⁶ do not squarely address the inconsistency between the competing approaches but both cases do suggest a subtle shift towards the UK view, notwithstanding *Jireh*. On this basis, it is reasonable to infer that it may only be a matter of time before the High Court formally adopts an agreement-centred approach to damages awards for breach of contract.

XI UNEXPRESSED TERMS

In Australia, the High Court has repeatedly tested the question of the implication of terms in fact by reference to the five conditions set out by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*⁸⁷ where Lord

⁸² *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 770 and 771 per Lord Steyn. See also his Lordship’s observation in *Society of Lloyd’s v Robinson* [1999] 1 WLR 756 at 763: ‘Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language’.

⁸³ *Mannai Investment* at 780 per Lord Hoffmann.

⁸⁴ [2011] HCA 45. *Jireh*, a case of refusal of special leave to appeal, does not have precedential value; however, it is persuasive.

⁸⁵ (2014) 251 CLR 640 at [35].

⁸⁶ [2015] HCA 37.

⁸⁷ (1977) 180 CLR 266.

Simon of Glaisdale, giving the advice of the majority of the Board, asserted that for a term to be implied in fact into a contract, it must:

1. be reasonable and equitable;
2. be necessary to give business efficacy to the contract, so no term will be implied if the contract is effective without it;
3. be so obvious that it 'goes without saying';
4. be capable of clear expression;
5. not contradict any express term of the contract.

The five conditions ('which may overlap')⁸⁸ have their roots in a series of important prior cases, most notably *The Moorcock*,⁸⁹ which was the basis for the second condition and *Shirlaw v Southern Foundries (1926) Ltd*⁹⁰ which gave life to the third. The old test in *Shirlaw* relies on an imaginary 'officious bystander' who suggests the unexpressed term, leading the parties to the contract to respond testily, 'of course'.⁹¹ The five conditions in *BP Refinery* offer a regimented approach to the implication of terms, which is inconsistent with the modern contextual approach to contractual interpretation.

On the other hand, the constructional approach to implication of terms adopted by Lord Hoffmann in *Belize*,⁹² which supports Dixon J's 'much over-looked' judgment in *Gullet v Gardner*,⁹³ is consistent with the vital recognition that a contract exists only as a private creation between the parties. *Gullet* stands for the proposition that implications must arise as an inference from the expressed terms (of the contract) and their surrounding circumstances, which is reflected in the following important passage:⁹⁴

Implications are made because they appear almost inevitably to spring from the situation the parties have expressly created. They are the logical inference from the stipulations contained in an agreement or from the terms in which it is expressed. The inference that the parties must have intended to bind themselves in the manner sought to be implied should arise from the circumstances and from the contract as a rational deduction of such cogency that another intention can hardly be supposed. *The intention is to be gathered from what they have said and done, and concerns what each party to the contract had the right to expect*, but it does not necessarily mean an

⁸⁸ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.

⁸⁹ (1889) 14 PD 64.

⁹⁰ [1939] 2 KB 206.

⁹¹ See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 441 and *Commonwealth Bank of Australia Ltd v Barker* [2014] HCA 32 at [21] for recent High Court statements on the application of the five conditions. Also see the recent case *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 507, where the Victorian Court of Appeal rigorously applied the five conditions, demonstrating the currency of *BP Refinery* in Australia.

⁹² At [26].

⁹³ (1948) 22 ALJ 151.

⁹⁴ *Ibid.*

enquiry into their actual mental state. *The question is one of interpretation in the sense of ascertaining the full scope and bearing of their contractual intent. In such a question it is not only permissible, it is requisite, to consider the circumstances in which the parties contracted* (my emphasis).

In *Belize*, Lord Hoffmann supports the constructional approach advocated by Dixon J in *Gullet*. See, for example, [16] where he conflates implication and interpretation:

The court ... *is concerned only to discover what the instrument means*. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed (my emphasis).

At [21], Lord Hoffmann reiterates this finding:

There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

Belize sets out an objective approach to the exercise of implication and exposes some of the deficiencies in the five conditions in *BP Refinery*, for example, at [25]:

it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander 'Could you please explain that again?' does not matter.

Further, at [27], Lord Hoffman confirmed:

[t]he Board considers that this list (the five conditions in *BP Refinery*) is best regarded, not as [a] series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that *the proposed implied term must spell out what the contract actually means*, or in which they have explained why they did not think that it did so (my emphasis).

His Lordship's judgment has had the effect of recasting the business efficacy and officious bystander tests as useful pointers or rules of thumb.⁹⁵

⁹⁵ Adam Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' [2004] *CLJ* 384 at 404. See also *Watts v Aldington* [1999] L & TR 578 at 596, where Steyn LJ stated '[t]he two traditional approaches are practical tests developed by courts in order to assess whether the proposed implication is

XII OPPOSITION TO THE *BELIZE* TEST FOR UNEXPRESSED TERMS

Lord Hoffman's recasting of the law on unexpressed terms has been the subject of considerable controversy. His relatively brief judgment has catalyzed the publication of numerous academic commentaries debating the ramifications of his Lordship's speech.⁹⁶ In some of these articles the authors advocate a return to the traditional tests contained in the five conditions in *BP Refinery* which offer a regimented approach and set a high bar for the implication of terms in fact. However, despite having the advantage of providing parties with a degree of certainty of outcome, as Lord Hoffmann exposed in *Belize* the five conditions may introduce some subjective elements to the process. On the other hand, the *Belize* approach guarantees an objective analysis of whether a contract contains an unexpressed term. Further and as noted, the constructional approach, by definition, caters for the fact that 'the functions of finding what is implied in a contract and what its express words mean are almost always inseparably intertwined'.⁹⁷

Notwithstanding the above, there are two issues that may hamper the adoption of the constructional approach by Australian courts. First, and most important, *BP Refinery* is the orthodox authority in Australia and although, as noted, *Byrne*⁹⁸ and *Barker*⁹⁹ signal a subtle shift towards the constructional approach, the High Court has not taken any decisive steps to overrule *BP Refinery*. Secondly, in the recent UK case *Marks & Spencer Plc v BNP Paribas Securities Services*,¹⁰⁰ Lord Neuberger challenged the notion that the processes of interpretation and implication are 'inseparably intertwined', advocating a more siloed approach to the respective exercises of implication and interpretation.¹⁰¹ Lord Neuberger did not follow *Belize*, preferring the traditional 'business efficacy' and 'officious bystander' tests

strictly necessary if the reasonable expectations of the parties are not to be defeated'. His Lordship repeated this view in *Society of Lloyd's v Clementson* [1995] 1 CMLR 693 at [49].

⁹⁶ See, for example: J.W. Carter, 'The Implication of Contractual Terms: Problems with *Belize Telecom*' (2013) 27 *CLQ* 3; J.W. Carter and W. Courtney, '*Belize Telecom*: a Reply to Professor McLauchlan' [2015] *LMCLQ* 245; W. Courtney and J.W. Carter, 'Implied Terms: What Is the Role of Construction' (2014) 31 *JCL* 151; and P. S. Davies, 'Recent Developments in the Law of Implied Terms' [2010] *LMCLQ* 140.

⁹⁷ *Brooks v NSW Grains Board* (2002) NSWSC 1049 at [42].

⁹⁸ In *Byrne*, Gummow and McHugh JJ found that in the case of an informal contract the key test to determine the existence of an unexpressed term is if it is necessary and *reasonable*. This represents a step away from *BP Refinery*. At the time *Byrne* was handed down, it received very little attention; however, it has recently surfaced in some High Court judgments and appears to be gathering momentum in Australian jurisprudence.

⁹⁹ At [22].

¹⁰⁰ [2015] 3 WLR 1843 at [22] – [31].

¹⁰¹ *Marks & Spencer Plc v BNP Paribas Securities* [2015] 3 WLR 1843 at [26] – [27].

(both of which are premised on the concept of necessity) set out in *BP Refinery* as central to determining the existence of an unexpressed term. The substance of the debate in *Marks & Spencer* concerned the meaning of the *Belize* test. Since *Belize* was decided, it has been unclear whether Lord Hoffmann intended to relax the test for implication or whether His Lordship simply recast the test differently while retaining its traditional strictness.¹⁰² Despite ambivalent language, it appeared Lord Neuberger considered the *Belize* test has the effect of changing the law by reducing the test for implication from ‘necessity’ to ‘reasonableness’ founded on a process of interpretation.¹⁰³ On this point, his Lordship found:

It is true that the *Belize Telecom* case ... was a *unanimous decision* of the Judicial Committee of the Privy Council and that the judgment was given by Lord Hoffmann, whose contributions in so many areas of law have been outstanding. However, it is apparent that Lord Hoffmann’s observations in the *Belize Telecom* case, paras 17-27 are open to more than one interpretation ... and that some of those interpretations are wrong in law. In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms (my emphasis).¹⁰⁴

Notwithstanding its criticisms of *Belize*, the majority’s decision in *Marks & Spencer* has an inconsistency of its own. The majority raised two concerns it had with the *Belize* test: first, that it departed from the traditional tests and, secondly, that it conflated implication and interpretation, which the majority viewed as two distinct issues. In reality, at least in Australia, these two issues are inextricably linked.¹⁰⁵ This notwithstanding, the majority was ambivalent on whether the *Belize* test wrongly departed from the traditional tests yet agreed that implication and interpretation should not be conflated. As one commentator explains,¹⁰⁶ in *Belize* the test of ‘interpretation’ broadens the traditional requirement of ‘necessity’ for implication to one of ‘reasonableness’. *Belize* necessarily departs from the traditional tests because of the conflation of interpretation and the implication. Consequently, considering Lord Neuberger disagreed with Lord Hoffmann’s view that implication is a process of interpretation, he should also have disagreed with

¹⁰² Yihan Goh, ‘Lost but found again: the traditional tests for implied terms in fact: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*’ (2016) 3 *JBL* 231 at 233.

¹⁰³ *Ibid.*

¹⁰⁴ *Marks & Spencer Plc v BNP Paribas Securities* [2015] 3 *WLR* 1843 at [31].

¹⁰⁵ See, for example: *Codelfa* at 345, per Mason J; *Commonwealth Bank of Australia Ltd v Barker* [2014] HCA 32 at [22] in which French CJ cited *Belize* with approval; and *Brooks v NSW Grains Board* (2002) NSWSC 1049 at [42], per Palmer J. See also: Yihan Goh, ‘Lost but found again: the traditional tests for implied terms in fact: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*’ (2016) 3 *JBL* 231 at 234.

¹⁰⁶ E. MacDonald, ‘Casting Aside ‘Officious Bystanders’ and ‘Business Efficacy’?’ (2009) 26 *JCL* 97 at 99.

the introduction of reasonableness without expressing any uncertainty about whether *Belize* departed from the traditional tests.¹⁰⁷

It must be remembered that cases are not decided from the comfort of university lecture theatres. Courts and legal practitioners require clear tests to help them reach practical outcomes. The esoteric, abstract debate in *Marks & Spencer* over the meaning of ‘interpretation’ and ‘construction’¹⁰⁸ detracts from the substance of the Belize test and, more importantly, the requirement for a practical approach to real life cases. In the UK, *Marks & Spencer* signals a backward step in Lord Hoffmann’s quest to develop and implement a common approach to claims relating to contracts, whether it is a claim for, inter alia, damages for breach of contract, the existence of an unexpressed term or the task of interpreting the contract generally. However, notwithstanding this statement, the majority’s reluctance to clearly declare that Lord Hoffman was wrong in *Belize* indicates that over time such a regression may not actually be realised.¹⁰⁹

In *Marks & Spencer*, Lord Carnwath found ‘[i]n the present case, there has been no dispute as to the authority of the *Belize* judgment, only as to its interpretation’.¹¹⁰ The fact that *Belize* was a unanimous decision of the Judicial Committee of the Privy Council lends further weight to its authority. Further, in *Marks & Spencer* the court was divided on the question of whether the *Belize* test should apply: Lord Neuberger, Lord Sumption and Lord Hodge held that it should not apply, while Lord Carnwath and Lord Clarke in dissent argued it should. Further yet, Lord Carnwath’s dissenting judgment suggests Lord Neuberger may have misconstrued Lord Hoffmann’s observations in *Belize*:¹¹¹

In conclusion, while I accept that Lord Hoffmann’s judgment has stimulated more than usual academic controversy, I would not myself regard that as a sufficient reason to question its continuing authority. On the contrary, *properly understood, I regard it as a valuable and illuminating synthesis of the factors which should guide the court.*

It follows that Lord Hoffmann’s recasting of the law on unexpressed terms in *Belize* still represents good law. In his recent article, Hooley submitted that *Belize* ‘has brought doctrinal coherence to interpretation and implication’ which ‘is to be welcomed’.¹¹² *Belize* is not binding on Australian courts; however, the fact that

¹⁰⁷ Yihan Goh, ‘Lost but found again: the traditional tests for implied terms in fact: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*’ (2016) 3 *JBL* 231 at 235.

¹⁰⁸ *Marks & Spencer Plc v BNP Paribas Securities* [2015] 3 WLR 1843 [25]-[29].

¹⁰⁹ Yihan Goh, ‘Lost but found again: the traditional tests for implied terms in fact: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*’ (2016) 3 *JBL* 231 at 240.

¹¹⁰ *Marks & Spencer Plc v BNP Paribas Securities* [2015] 3 WLR 1843 at [59].

¹¹¹ *Marks & Spencer Plc v BNP Paribas Securities* [2015] 3 WLR 1843 at [74].

¹¹² Hooley, ‘Implied Terms after *Belize Telecom*’ (2014) 73 *CLJ* 315 at 347.

Australian courts have accepted the notion that ‘the functions of finding what is implied in a contract and what its express words mean are almost always inseparably intertwined’¹¹³ suggests that the *Belize* test will continue to be relevant in Australia and may one day usurp *BP Refinery* as the orthodox authority on unexpressed terms.

XIII CONFLATING AN AGREEMENT-CENTRED APPROACH TO REMOTENESS WITH THE BROADER TASK OF CONTRACTUAL INTERPRETATION

The agreement-centred approach adopted by Lord Hoffmann in *The Achilleas* ‘involves the interpretation of the contract as a whole against its commercial background’.¹¹⁴ It is a progressive, commonsense method of assessing damages for breach of contract consistent with the direction in which other, related areas of contract law are headed in the UK¹¹⁵ and, to a lesser extent, in Australia.¹¹⁶ This is evinced in the closing paragraph of his Lordship’s judgment:¹¹⁷

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. In both cases, the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for. It cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language (my emphasis).

There is a long line of authority in Australia and the UK which supports the proposition that ‘the functions of finding what is implied in a contract and what its express words mean are almost always inseparably intertwined’.¹¹⁸ This is because a court’s primary objective is to determine what the instrument means as a whole. In *South Australia*, Lord Hoffmann found (with the concurrence of the other members of the House):¹¹⁹

¹¹³ See, for example: *Codelfa* at 345, per Mason J; *Commonwealth Bank of Australia Ltd v Barker* [2014] HCA 32 at [22] in which French CJ cited *Belize* with approval; and *Brooks v NSW Grains Board* (2002) NSWSC 1049 at [42], per Palmer J.

¹¹⁴ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [25].

¹¹⁵ See, for example, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988.

¹¹⁶ See Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (2012) at 11.

¹¹⁷ *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61 at [26].

¹¹⁸ See, for example: *Codelfa* at 345, per Mason J; *Commonwealth Bank of Australia Ltd v Barker* [2014] HCA 32 at [22] in which French CJ cited *Belize* with approval; and *Brooks v NSW Grains Board* (2002) NSWSC 1049 at [42], per Palmer J.

¹¹⁹ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 212.

In the case of an implied contractual duty, *the nature and extent of the liability* is defined by the term which the law implies. *As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting* (my emphasis).

Subsequently in *Belize*, Lord Hoffmann found '[t]he proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority'.¹²⁰ Five years later in *Commonwealth Bank of Australia Ltd v Barker*,¹²¹ French CJ cited *Belize* with approval.

As noted, under Lord Hoffmann's modern approach to determining the existence of unexpressed terms in *Belize* and assessing damages for breach of contract in *The Achilles*, the orthodox rules relevant to those cases should not be seen as rigid rules to which the court must adhere, but should rather be used to guide the court to help it determine 'what the contract actually means'.¹²²

For the reasons outlined above, I submit that under an agreement-centred approach to assessing damages for breach of contract the function of determining the nature and extent of the liability which flows from an implied contractual duty is also inseparably intertwined with the functions of finding what terms are implied in a contract and what its words mean.

XIV WOULD AUSTRALIAN JURISPRUDENCE BENEFIT FROM AN AGREEMENT-CENTRED APPROACH?

As I have shown, remoteness in contract, unexpressed terms and the broader task of contractual interpretation are three important, 'inseparably intertwined' areas of contract law. It follows that courts could usefully adopt a common, overarching approach when determining cases relating to these areas of contract. As noted, the traditional rules for remoteness and unexpressed terms in contract still represent orthodoxy in Australia. This inflexible, siloed approach has led to uncertainty and inconsistency of outcome, a result which is anathema to commercial contracting parties. On the other hand, in UK courts the emphasis is on ascertaining the meaning of the contract and the traditional rules are used as a 'rule of thumb' to guide the court on questions of remoteness and the existence of unexpressed terms.

¹²⁰ *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [19].

¹²¹ [2014] HCA 32 at [22].

¹²² *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [27].

Contractual interpretation is a challenging and uncertain area of Australian jurisprudence and will remain so until the High Court provides clear, unambiguous guidance on the application of Mason J's 'true rule' and its preferred approach to unexpressed terms. As noted, in Australia and the UK a clear tension exists between the different approaches set out in *BP Refinery* and *Belize* for determining the existence of unexpressed terms, which has been spurred on by *Marks & Spencer*. Although the decisions in *Marks & Spencer* and *Belize* are persuasive, they do not create precedent in Australia. They are not binding. In *Barker*, the High Court had an opportunity to reconsider the Australian approach to unexpressed terms in the light of *Belize* but unfortunately did not take it.¹²³ As noted, *Marks & Spencer* signals a controversial shift away from the constructional approach set out in *Belize*. The High Court's response to this important case, in light of the numerous conflicting authorities discussed above, will be illuminating. For the reasons above and to maintain consistency and predictability across these three important areas of the law of contract, I respectfully submit Australian courts should adopt the *Belize* test.

On the question of damages for breach of contract, the *Robinson v Harman* 'ruling principle' and the *Hadley v Baxendale* rule for remoteness still represent orthodoxy in Australia and dictate how courts are to assess such damages. On the other hand, in the UK, *The Achilleas* has effectively 're-invented'¹²⁴ the approach taken by UK courts with respect to remoteness of damages and stands for the proposition that 'the nature and extent of the liability is defined by the term which the law implies'.¹²⁵ Notwithstanding the diversity of approach taken by the Court in *The Achilleas*, it has generally been accepted in academic spheres as representing good law.¹²⁶ As is the case with *Belize*, although *The Achilleas* is persuasive, it does not create a precedent in Australia. However, as noted, the modern contextual approach to contractual interpretation adopted in *Toll* was arguably recently affirmed in *Woodside* and *Mount Bruce Mining*, so it is reasonable to infer that it may only be a matter of time before Australia embraces the constructional *Belize* test for determining the existence of an unexpressed term and an agreement-centred approach to remoteness in contract. If adopted in Australia, this uniform approach developed by Lord Hoffmann would provide courts and legal practitioners with a

¹²³ D M Bennett QC and Wayne Jovic, *Terms: Expressed and Not Expressed*, at [63].

¹²⁴ David McLauchlan, 'Remoteness Re-invented?' (2009) 9 *Oxford University Commonwealth Law Journal* 109.

¹²⁵ *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 212.

¹²⁶ See, inter alia, Adam Kramer, 'The New Test of Remoteness in Contract' (2009) 125 *LQR* 408 and David McLauchlan, 'Remoteness Re-invented?' (2009) 9 *Oxford University Commonwealth Law Journal* 109.

consistent, flexible method of framing and assessing claims relating to these three important areas of contract. An agreement-centred approach allows courts the flexibility to take into account the ‘limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets’ by interpreting the contract rather than blindly applying the orthodox remoteness rule in *Hadley v Baxendale* without regard for the nature and extent of a party’s true liability. It follows that such an approach would clearly benefit Australian jurisprudence. As Lord Hoffmann stressed in *The Achilles*:¹²⁷

cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual, but limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets, such as banking and shipping, are likely to be more common. There is, I think, an analogy with the distinction which Lord Cross of Chelsea drew in *Liverpool City Council v Irwin* [1977] AC 239, 257-258 between terms implied into all contracts of a certain type and the implication of a term into a particular contract.

Thus, as noted, in cases where the express terms of the contract clearly establish the extent of the liability on the part of a defendant, such as awards for defective building work, an uncontroversial, orthodox application of the ‘ruling principle’ in *Robinson v Harman* will dictate the measure of damages. However, for the task of assessing general consequential damages for breach of contract in which complex questions of remoteness arise, in order to arrive at the correct commercial decision, it is submitted that Australian courts should welcome the flexibility inherent in an agreement-centred approach, rather than having to manipulate the traditional rules to reach a just and proper outcome.

XV CONCLUSION

As I have sought to demonstrate above, an agreement-centred approach to assessing damages for breach of contract neatly dovetails with the modern approach adopted in the UK and, to a lesser extent, Australia for determining the existence of unexpressed terms and thus the broader task of contractual interpretation. I have also demonstrated the advantages of the agreement-centred approach to remoteness in contract and some of the difficulties with the traditional tests.

Whether the purpose of the common law is to impose arbitrary rules on parties, such as the orthodox approach taken in *Amann*, in the dissenting judgments in *The Achilles* and in *BP Refinery*, or to seek to determine the content of the bargain struck between the parties, is a question that has plagued legal minds since the

¹²⁷ At [11].

approaches to assessing damages for the breach of contract and indeed the broader task of contractual interpretation began to diverge. I respectfully submit this is a question the High Court should consider at the first opportunity to provide parties to commercial contracts with more certainty when determining the true extent of their contractual risk exposure. Clearly, Australian jurisprudence would benefit from a consistent approach across these three important areas of the law of contract.