

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Jackson and another (Original Appellants and Cross-respondents)
v.
Royal Bank of Scotland (Original Respondents and Cross-appellants)

ON
THURSDAY 27 JANUARY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood

HOUSE OF LORDS

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[2005] UKHL 3

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead and Lord Walker of Gestingthorpe. For the reasons they give, with which I agree, I would allow the plaintiffs' appeal and dismiss the bank's cross-appeal.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I would allow the appeal and dismiss the cross-appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

3. This is an appeal about the damages to be awarded to the former partners of a business partnership for a breach of contract as a result of which the relationship of that business with its principal customer was

terminated. The claim is for the loss of the opportunity to earn further profits from that relationship. It raises issues about the proper approach to remoteness where damages are claimed for breach of contract and about the quantum of the damages.

4. The claimants are James Jackson and the late Barrie Stewart Davies, who carried on business in partnership. They traded under the name of Samson Lancastrian (“Samson”). Samson imported goods from the Far East, including Thailand, and sold them to customers in the United Kingdom. Its principal customer in this country was another business partnership which traded under the name Economy Bag. The partners in this business were Mr Taylor and Mr Holt. The products which Economy Bag sold to its wholesale and retail customers included dog chews. By coincidence the bankers to both Samson and Economy Bag were the Royal Bank of Scotland Plc (“the Bank”). The Bank is the respondent in this appeal.

The facts

5. Economy Bag had previously purchased various varieties of dog chews in bulk and packed them itself for supply to its customers. By 1990 it had decided to eliminate the packing operation and obtain pre-packed dog chews in packaging bearing its trade name. It was introduced to Samson, who found a potential supplier of dog chews in Thailand. Mr Jackson showed samples of these dog chews to Mr Taylor and quoted prices for their supply cif Manchester which were acceptable to Economy Bag. Mr Jackson and Mr Taylor agreed to do business with each other by means of transferable letters of credit. The letters of credit were to be issued by the Bank to Economy Bag, and Samson was to be named as the beneficiary. The intention was to provide Samson with security in the event of a default by Economy Bag. The bags of dog chews were to be labelled specifically for Economy Bag. They would have been difficult to dispose of in the open market to other customers.

6. Economy Bag placed an order for dog chews with Samson in September 1990. At its request the Bank issued a transferable letter of credit in favour of Samson which provided for payment of the agreed sum on production of a commercial invoice, evidence of insurance and a packing list. Economy Bag was relatively inexperienced in these matters. So it agreed with Samson that Samson would deal with the import formalities and arrange carriage from Manchester to Economy Bag’s premises in Preston. For this service Samson was to make an

inclusive handling charge of 5% of the cif price, exclusive of customs clearance and carriage. Samson placed an order for the dog chews ordered by Economy Bag with the supplier in Thailand who had provided the samples. The supplier failed to fulfil the contract, so Samson placed an order with an alternative Thai supplier named Pet Products Ltd. Its transaction with Economy Bag was completed successfully on this basis. Samson retained part of the price paid by Economy Bag for itself as a mark-up. It transferred the remainder of the credit which had been provided to it by the Bank under the letter of credit to Pet Products as the second beneficiary.

7. A substantial number of transactions according to the same pattern for the supply by Samson of pre-packed dog chews to Economy Bag followed thereafter on an increasing scale until March 1993. During this period there were 33 such contracts. Payment was almost invariably made by transferable letters of credit issued by the Bank. Samson charged a different percentage mark-up on each transaction depending on the variety of the items sold. It did not disclose the amount of the mark up to Economy Bag. Samson kept this information to itself. The insurance policy identified Pet Products as the insured, but the amount insured was the amount shown on Samson's invoice to Economy Bag plus 10%. The packing list was typed on Pet Products' stationery. This showed its address and its telephone and fax numbers in Thailand. It did not show the price on Pet Products' invoice to Samson or the unit price charged by Pet Products for each item.

8. The effect of these arrangements was that Economy Bag knew the identity of the supplier in Thailand and its contact details. These facts were known by its partners from the outset. But it did not know the extent of Samson's mark-up on the first or any of the subsequent transactions. Economy Bag left the administration of all the documentation for these transactions to Samson. It instructed the Bank in March 1991 to ask its International Division to send all documents submitted under the letters of credit to Samson as soon as they were received from Thailand. In May 1991 Economy Bag gave authority to Samson to deal with the Bank as its de facto agent on all matters concerning these imports. The Bank followed these instructions. In October 1991 Economy Bag authorised Samson to waive discrepancies in the documents on its behalf when seeking payment for the imports. Economy Bag did not ask Samson for copies of any of the documents that were sent to it by the Bank. Samson was content with these arrangements. One of the advantages of the transferable credit arrangements from its point of view was that they concealed the amount of its mark-up on its transactions with Pet Products.

9. The relationship came to an end unexpectedly as a result of a breakdown in these arrangements for which the Bank were responsible. In January 1993 Economy Bag asked the Bank to open a transferable letter of credit in favour of Samson in the sum of US\$50,976 for a consignment of dog chews that it had ordered on 7 January 1993. The Bank complied with this request. They issued the letter of credit to Samson on 22 January 1993. On 1 February 1993 Samson instructed the Bank to transfer the credit to Pet Products in the sum of US\$43,932.50 and to debit its account with the Bank with the transfer charges. The transaction proceeded normally until 15 March 1993, when the Bank in error sent a completion statement and other documents including Pet Products' invoice to Economy Bag instead of to Samson. The effect of the Bank's error was to reveal to Economy Bag the substantial profit that Samson was making on these transactions. On this occasion it amounted to a mark-up of 19% on the amount payable to Pet Products by Samson, excluding the 5% handling charge. This was as much, if not more than, the amount of the profit that Economy Bag was making on its transactions with its own distributors.

10. Mr Taylor was angry when he discovered the size of the mark-up. He decided to cut Samson out of Economy Bag's system for importing the dog chews from Thailand. He terminated their relationship. Four contracts that were already on foot were performed. But thereafter Economy Bag bought its dog chews from Pet Products direct. In the year ending March 1994 it purchased 15 shipments from Pet Products worth US\$257,944. Between March 1994 and March 1995 it purchased 28 shipments worth US\$468,296. Between March 1995 and March 1996 it purchased 23 shipments worth US\$462,467. Between March 1996 and March 1997 it purchased 25 shipments worth US\$645,429. Mr Taylor's evidence at the trial in 1998 was that its business was still continuing on that scale, and that it also did business with other suppliers in the Far East which would have been done through Samson if their relationship had continued.

11. As for Samson, the loss of its business with Economy Bag had disastrous consequences. It deprived it of its principal source of income. It had to cease trading. The partnership was dissolved.

The issues

12. The judge, HH Judge Kershaw QC, held that the Bank was in breach of an obligation of confidence under its contract with Samson not

to disclose to Economy Bag any of the documents relating to its purchase of goods from Pet Products. These documents included the invoice by Pet Products to Samson. It was the disclosure of this document to Economy Bag that revealed the amount of the profit that Samson was making on the transaction. There was no appeal against that part of his judgment. It was common ground in the Court of Appeal that the Bank was in breach of its contract with Samson when it disclosed the invoice to Economy Bag.

13. The judge then found that Samson was entitled to damages for loss of the opportunity to earn profits from its trading relationship. He held that there was a significant chance that Samson's trading relationship with Economy Bag would have continued for a further four years. But in view of the uncertainties he reduced the profit which had been projected by Samson for each of these years for the purposes of his award, and he increased the amount of the reduction year by year. The implication of his judgment was that after the end of the fourth year Samson's chance of obtaining repeat business was so speculative as not to sound in damages.

14. Three points were in issue in the Court of Appeal. The first was whether the relationship between Samson and Economy Bag was that of buyer and seller, as Samson contended and the judge found, or was that of agent and principal. Mr Taylor's evidence was that he regarded Samson, not Pet Products, as Economy Bag's supplier. The expert witnesses were agreed that, while transferable letters of credit may be used where the relationship between the applicant and the first beneficiary is that of agent and principal, they are also in practice used for the benefit of middle-men. The Court of Appeal held that there was no justifiable basis for interfering with the findings of the trial judge on this point, and it is no longer in issue. The third point related to the rate of interest ordered by the judge on his award of damages. The rate of interest which he awarded was found to be excessive, and it was reduced by the Court of Appeal. There is no challenge to its decision on this point.

15. The second point however remains in issue. It is whether the judge was correct in his findings on causation, remoteness and quantum. The Court of Appeal rejected the Bank's submissions that the claim for the loss of repeat business was too remote and that in any event the relationship between Samson and Economy Bag was so unstable that, if any award were to be made, it should be simply one of general damages. But it held that the judge was in error in his approach to quantum.

16. Potter LJ, with whom Nourse LJ and Ferris J agreed, said in para 33 of his judgment that there was no sufficient basis on which the judges could have awarded damages for a period anything like as long as four years. He said that the judge should have focused on the Bank's limited knowledge of the facts at the date of the breach. Had he done so he would have concluded that the Bank could reasonably foresee a substantial loss of business in relation to orders likely to be placed by Economy Bag in the near future but with a cut-off point far shorter than the four year period. In para 34 he said that the award of damages should be limited to a period of one year from the date of the breach, all other loss being regarded as too remote.

17. For the appellants Miss Andrews QC submitted that the decision of the Court of Appeal to limit the award to a period of one year was based on an error of principle and that it should be set aside. But she said that the judge too was in error, as there was no real justification for his finding that Samson's trading relationship with Economy Bag would have lasted for only four years. The Bank's liability, she said, was open-ended. It ought not to have been subjected to an arbitrary cut-off point. Figures had been submitted which would have justified an award extending over a period of six years, and the judge ought to have made an award for loss of repeat orders over that entire period. Mr Hapgood QC, presenting the Bank's cross-appeal, said that the proper conclusion from the facts was that there was no foreseeable loss at all. In any event any attempt to assess Samson's actual loss was so speculative that any award should be confined to one of general damages.

The breach of contract

18. The fact that the Bank was in breach of contract is no longer in issue. But the circumstances of that breach require some explanation. They provide the context for an examination of the points that are still in issue about the award of damages.

19. The relationship between the Bank and Samson which gave rise to the breach of contract arose from the issue of the transferable letter of credit in favour of Samson on 22 January 1993. The letter was issued on the application of Economy Bag. But it created a relationship between the Bank and Samson too which was based on contract. It contained an undertaking by the Bank in favour of Samson as the beneficiary that drafts drawn in conformity with its terms would be duly accepted on presentation and duly honoured at maturity. It also stated

that it was subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision) International Chamber of Commerce Publication No 400 (“UCP 400”). Article 54 of UCP 400 contained the machinery for credits to be transferred at the request of the first beneficiary. Article 48 of UCP 500, which came into force on 1 January 1994, introduced changes in the machinery, but none of them are relevant to the issues in this appeal. The system enabled the first beneficiary to substitute his own invoice for that of the second beneficiary and to draw on the credit according to its pre-transfer terms for the difference between the two invoices: Paget’s Law of Banking, 12th ed (2003), p 752, para 35.27, rule (6); Goode, Commercial Law, 2nd ed (1995), p 1019.

20. The letter of credit did not contain an undertaking in terms that the Bank would treat the documents provided to it by the beneficiary as confidential. But the judge’s finding that the Bank owed a duty of confidence to Samson was not challenged in the Court of Appeal. As Potter LJ said in para 27 of his judgment, the duty of confidence arises from the acknowledged need for the issuing bank to protect its customer from disclosure of his level of profit and from the danger that if that level of profit is disclosed his purchaser will go instead direct to the customer’s own supplier. As Paget’s Law of Banking observes in the passage mentioned above, the right of the first beneficiary to substitute his own invoice for that of the second beneficiary and draw on the credit according to its pre-transfer terms is an important part of the transfer regime. It enables the first beneficiary to keep confidential from the applicant the amount of his profit from the transaction. For sound commercial reasons he is entitled to keep the amount of that profit secret. The information is confidential to the first beneficiary. It is the duty of the issuing bank to protect that confidentiality.

21. Mr Hapgood submitted that a transferable letter of credit had three functions. These were (1) to provide a secure source of payment, not only for the seller of the goods but also for the first beneficiary as the middleman; (2) to enable the first beneficiary to conceal the identity of the seller of the goods from the applicant; and (3) to enable the first beneficiary to keep confidential from the applicant the profit which he is making on the transaction. He said that the second and third purposes went hand in hand, because disclosure of the identity of the seller of the goods would enable the applicant to invite the seller to issue a quotation for the supply to him direct. The door thus having been opened, there was no reason to suppose that the seller would decline to cut out the middleman by selling the goods direct to the applicant.

22. The situation in this case was that Economy Bag knew the identity of the seller of the goods from the outset. This was because Pet Products was named, and its contact details given, in the packing lists which it had to present to the Bank when it was drawing on the transferred portions of the credits and because Samson in its turn had to present the same packing lists when it was drawing on the portion of the credit which it had retained. The seller's identity was also disclosed by the bills of lading and various other documents. Furthermore towards the end of 1991 Mr Davies introduced Mr Veerachai of Pet Products in person to Mr Taylor. There is no doubt that Mr Taylor was in a position from the outset, or at least well before January 1993, to ask Pet Products for a direct quotation for the dog chews which were being sent to Samson from Thailand if it had occurred to him to do so.

23. The fact is however that Mr Taylor did not take this step until the amount of Samson's mark-up on the transaction was disclosed to him. It appears that he was not interested in the means by which the dog chews were reaching him from Thailand, or in the cost involved, so long as he could find a good market for them in this country. He left all the details to Samson, and was content to pay the 5% handling charge as well because it saved him the trouble of collecting the goods on their arrival in Manchester. He told the judge that he knew that Samson was making a profit on the transaction. But it was the amount of it that was hurtful, and this was what caused him to terminate the relationship. No doubt he could have discovered this earlier, and done something about it, if he had been more streetwise and more energetic. But this did not happen.

24. I would hold that Mr Hapgood's submission that the second and third functions of the transferable letter of credit go hand in hand does not fit the facts. They may go hand in hand in some cases, but in this case they did not. The documents which Samson had to produce to draw on its portion of the credit revealed the identity of the supplier. But this did not release the Bank from their duty to preserve the confidentiality which attached to Pet Products' invoice to Samson. The nature and extent of that duty was not lessened in any way by the fact that Economy Bag could have discovered the amount of the mark-up because it knew the seller's identity. As it happens, there was no evidence that the Bank was aware that Mr Taylor in fact knew the name of the supplier or that he had been introduced to Mr Veerachai. But even if it had been aware of these facts, the Bank was not entitled to assume that it was inevitable that the prices which Pet Products were charging to Samson would have been revealed also. This information

remained confidential to Samson, and it was the duty of the Bank not to disclose it.

The issues relating to damages

25. The way in which the Court of Appeal dealt with the case suggests it misunderstood the effect of the rules that were identified in *Hadley v Baxendale* (1854) 9 Exch 341, 354. They are very familiar to every student of contract law. Most would claim to be able to recite them by heart. But it may be helpful, as background to the discussion that follows, if I were to set out the rules again here:

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

The first rule, prefaced by the word “either”, is the rule that applies in this case. It is the ordinary rule. Everyone is taken to know the usual course of things and consequently to know what loss is liable to result from a breach of the contract if things take their usual course. But the way the second rule is expressed, prefaced by the word “or”, shows the principle that underlies both limbs. It refers to what was in the contemplation of the parties at the time they made their contract.

26. As Asquith LJ said in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539 in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as likely to result from the breach. In tort, the question whether loss was reasonably foreseeable is addressed to the time when the tort was committed. In contract, the question is addressed to the time when the parties made their contract. Where knowledge of special circumstances is relied on, the assumption is that the defendant undertook to bear any special loss which was referable to those special circumstances. It is assumed too that he had the opportunity to seek to limit his liability

under the contract for ordinary losses in the event that he was in breach of it.

27. The Bank's primary argument on damages was that the loss of the repeat business on which Samson based its claim was too remote. This was because it was not in the Bank's reasonable contemplation that the disclosure of the profit that Samson was making would lead to the termination by Economy Bag of its trading relationship with Samson. Their relationship, it was said, was based on mutual trust and confidence. There was no reason for the Bank to think that breach of its duty of confidence to Samson would result in any loss at all. The real reason for the loss of repeat business was Mr Taylor's anger when he detected the amount of the mark-up. This was something that could not have been predicted.

28. The trial judge rejected that argument, and the Court of Appeal did so too for the reasons explained by Potter LJ in paras 25 and 26 of his judgment. The judge proceeded to examine the figures for the profit which Samson projected on the basis of the figures relating to Economy Bag's trade in dog chews for the four years from March 1993 to March 1997 which I have set out in para 10 above. Holding that there was a significant chance that Samson's business relationship with Economy Bag would have continued for some time, but that the likelihood of its coming to an end would have increased as time passed, he attributed what he said was an appropriate sum by way of each year in which the claimants had shown that damages should be awarded as follows: 1993-1994 \$27, 000; 1994-1995 \$42,000; 1995-1996 \$29,000; 1996-1997 \$26,500. His total award, prior to the addition of interest, was \$124,500.

29. The Court of Appeal applied the first rule in *Hadley v Baxendale* 9 Exch 341 as explained by Asquith LJ in *Victoria Laundry* [1949] 2 KB 528. Potter LJ said that loss of the chance or opportunity of repeat business should in principle be available, and that the issue in this case was for how long it was or should have been in the reasonable contemplation of the parties that the trading relationship would continue. In para 29 he referred to the statement by Evans LJ in *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, 127J-128A that the starting point for any application of *Hadley v Baxendale* is the extent of the shared knowledge of both parties when the contract was made. In para 31 he observed that the claim, as presented at the trial, was one for loss of business profits made up of specific transactions none of which had yet been concluded at the time of the Bank's breach. It depended on the chance or contingency that Economy Bag would act so as to enable

Samson to make that profit as explained in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 where, at p 1614C, Stuart-Smith LJ said that the plaintiff must prove as a matter of causation that he had a real substantial chance as opposed to a speculative one. Thus far the judgment proceeded on orthodox lines, and there are no grounds for criticism.

30. But at the end of para 31 and the beginning of para 32, in a passage where he identified the approach that he then took to this issue, Potter LJ said:

“31.....That principle however, properly regarded is a principle or method of *quantification*, and not a rule as to *remoteness*, of damage. It is thus subject to, and may be constrained by, the rules as to remoteness laid down in *Hadley v Baxendale*, so that, whatever the judge’s view of the percentage chance that, but for the Bank’s breach, Samson would *in fact* have been Economy Bag’s supplier in the respect of the transactions in the following years, the cut-off point for the Bank’s liability was the end of such period as was within the reasonable contemplation of the Bank at the time of breach. [emphasis in the original]

32. As to that, the Bank’s knowledge of the background and details of Samson’s trading relationship was limited to the period of time and the individual transactions conducted *prior to breach*.” [emphasis added]

31. In para 33 Potter LJ said that it seemed to him that there was no sufficient basis on which the judge could or should have predicated his award covering a period anything like as long as four years. In para 34 he said that the judge could and should have approached the case on the broad basis that, while it could reasonably be contemplated that the established relationship of Samson and Economy Bag would have continued for a time, and thus that some award of damages for future business fell to be made, that time should in all the circumstances be limited to a period of one year from the date of the breach, all loss thereafter being regarded as too remote. In para 35 he said:

“On the assumption that the evidence (as I read it) showed that, but for the Bank’s error, Samson was virtually certain to have retained Economy Bag’s business in dog chews for the year 1993/94, the loss of profit on the figures adopted

by the judge would have been \$38,831, to which should be added 5% commission, less overheads, giving a total of \$47,278.15. I would round down that figure to \$45,000 to reflect the small degree of uncertainty inherent in even the closest of trading relationships and would award that sum together with interest by way of general damages for loss of profit.”

32. Miss Andrews submitted that the Court of Appeal fell into error at this point. All that the claimant had to show was that at the time of the contract the contract-breaker should have contemplated that damage of the kind suffered would have occurred as a result of his breach. Once it had decided, correctly, that it was a natural and probable consequence of the Bank’s breach that Samson would suffer a loss of repeat business, there was no cut-off point. The Bank’s liability was open-ended, as it had not limited its liability by the contract to any particular period. The restriction which the Court of Appeal had imposed ex post facto on the Bank’s liability cut across the rules in *Hadley v Baxendale* 9 Exch 341, which allocated risk between the parties at the time of the contract when they were still in a position to make provision for it in their bargain if they wished to do so.

Was the loss of repeat business too remote?

33. Mr Hapgood accepted that the proper time to which to look on the question of remoteness was the time when the parties entered into the contract. But he said that it would have been quite impossible at that stage to say what it would have taken to get Economy Bag to take action to dispose of the mark-up which was being charged by Samson. The parties’ reasonable contemplation would have been that, as Economy Bag knew the identity of the supplier and where it could be contacted, no loss would flow from the disclosure to it of the amount of Samson’s mark-up. The courts below, when dealing with the issue of remoteness, had fallen into the error of treating use of transferable letters of credit as a means of concealing the supplier’s identity. That was not so in this case, as the seller’s identity was known all along. He conceded that there had been a breach of contract. But he said that the information which was released when they provided Economy Bag with Pet Products prices could not reasonably be regarded as confidential, and that on the facts of this case there was no loss that was foreseeable.

34. I am unable to accept this argument. It is closely linked to the issue about the Bank's breach of contract which I dealt with earlier. There was no evidence that the parties contemplated at the time of the contract that knowledge of the supplier's identity and its contact details would lead inevitably to knowledge of the prices which were being charged by it. The fact that Economy Bag had the means of obtaining the information if it chose to do is beside the point. The effect of the contract that the Bank entered into was that it was obliged not to pass this information on, and Samson had an obvious and legitimate commercial interest in maintaining its confidentiality. There is no reason at all to suppose that, if it had been asked at the time of the contract, Samson would have agreed to the release of this information by the Bank to Economy Bag. I would hold in agreement both with the trial judge and the Court of Appeal, whose concurrent findings on the relevant facts I would regard as conclusive on this issue, that the loss of repeat orders from Economy Bag was not too remote. As soon as the confidential information was released there was no repeat business. The claimants are entitled to an award of damages to put them in the same position as they would have been if there had been no breach of contract. The question that remains is one of assessment. I would reject Mr Hapgood's contention that the matter is so speculative that the award should be confined to one of general damages.

How is that loss to be quantified?

35. The first question is whether the Court of Appeal was wrong to limit the period for which damages were recoverable by reference to what was within the reasonable contemplation of the Bank at the time of the breach. Potter LJ said in para 31 that, whatever the judge's view was of the percentage chance that Samson would in fact in the following years have been Economy Bag's supplier of dog chews, the Bank's reasonable contemplation at the date of the breach introduced a cut-off point beyond which the Bank was not liable. He said that this was the effect of the rule as to remoteness in *Hadley v Baxendale* 9 Exch 341.

36. In my opinion there are two errors in this approach to the assessment of damages. This first may appear to be the somewhat technical point, that it is the date of the making of the contract, not the date of the breach, that was identified as the relevant date in *Hadley v Baxendale*. I say that it may appear to be somewhat technical because in this case the date of the making of the contract and the date of the breach were only about two months apart. There is no evidence that the facts that were relevant to what the Bank had in reasonable

contemplation changed to any significant extent between 22 January 1993 when the letter of credit was issued and 15 March 1993 when the Bank sent Pet Products' invoice to Economy Bag. But the error was an error of principle. The choice of dates is more important than the differences, if any, in those facts. The parties have the opportunity to limit their liability in damages when they are making their contract. They have the opportunity at that stage to draw attention to any special circumstances outside the ordinary course of things which they ought to have in contemplation when entering into the contract. If no cut-off point is provided by the contract, there is no arbitrary limit that can be set to the amount of the damages once the test of remoteness according to one or other of the rules in *Hadley v Baxendale* has been satisfied.

37. The second error flows from the first. The Bank did not include any provision in the letter of credit limiting its liability for the loss of repeat business to any particular period. So the only limit on the period of its liability is that which the trial judge identified. This is when, on the facts, the question whether any loss has been sustained has become too speculative to permit the making of any award. He held that as time passed it was increasing likely that Economy Bag would have acquired the motive and the means to squeeze Samson's profit margins and would ultimately have ended their business relationship. Miss Andrews did not challenge this approach, although she contended that the judge should have extended his award over a longer period. It seems to me that it is amply supported by the facts of the case. Samson were in a precarious position. Mr Taylor knew who the suppliers were and he had met Mr Veerachai. He knew where he could be contacted. It was only a matter of time before the harsh reality of doing business persuaded him that he should take a closer interest in what his arrangements with Samson were costing him and ask himself whether those costs could be cut down and perhaps eliminated.

38. These errors lie at the heart of the Court of Appeal's decision to limit the Bank's liability to a period of one year. For this reason I would hold that its decision cannot stand. I would allow the appeal and set aside its assessment of the amount to be awarded to the appellants as damages.

39. Miss Andrews said that the judge's decision to award only four years' loss of repeat business was the product of mistakes on his part when he was analysing the evidence. He was said to have attached particular weight to the fact that shortly before Pet Products' invoice was revealed to Economy Bag Samson had started to sell pet food to

another organisation named M6 Cash and Carry and that it was planning to open a retail outlet in Wigan. In his view these activities might have caused Mr Taylor to regard Samson as a competitor and consequently to reduce his loyalty to it as one of Samson's customers. Miss Andrews said that this was a misunderstanding of the evidence. Mr Davies' evidence was that the product that was being sold in Wigan was a totally different product from that which they had been selling to Economy Bag. There was no challenge to this evidence, and Mr Taylor said that he knew about the plans to open in Wigan and that they would have been all right with him so long as Economy Bag was able to make a profit on its sales. As for M6 Cash and Carry, it was in the West Midlands, which was over 100 miles away from the Preston area where Economy Bag was trading. There was no evidence that Mr Taylor regarded that organisation as a competitor. But for these mistakes, said Miss Andrews, the judge would have found for a longer period than he did or would have found the opportunity of repeat business for the four years covered by his award to be more valuable.

40. In the Court of Appeal, where additional evidence was admitted to correct the position, Potter LJ said in para 20 of his judgment that it did seem to him that that the judge had misunderstood the position. Mr Hapgood for his part did not dispute the fact that the judge made these mistakes. But he said that if the appeal was allowed your Lordships should refrain from altering the figures that had been arrived at by the trial judge as he had not sufficiently explained his reasoning and the effect of the mistakes on these figures was so speculative. Mr Keith drew attention in his short address to various respects in which the judge's findings were not sufficiently transparent to enable the effect of the two errors to be identified. He said that there would have to be an entire re-assessment, and that there were various other errors in the claimant's favour which the Bank had identified which would have to be corrected if the exercise was to be done properly.

41. It is plain that your Lordships are not in a position to undertake the detailed exercise that would be needed to identify the effect on the judge's award of the various errors that have been mentioned, let alone to conduct a fresh re-assessment. In this situation your Lordships are faced with two alternatives. These are either to remit the case to the judge for a re-assessment or, taking a broad view of the matter, to regard the various errors as self-cancelling and accept the figures that were arrived at by the judge.

42. In my opinion the cost and delay that would be involved in sending the matter back to the judge are so out of proportion to the amounts involved as to make that course unacceptable. There is on the other hand, much to be said for the broad view. Mr Keith said that the calculations ought to be done properly and that it was desirable to achieve mathematical accuracy. But this expects too much of a calculation that had inevitably to proceed on various broad assumptions. As the judge put it, he had to assess damages on the basis of many possibilities which could not be individually evaluated, some of which might, if they became realities, increase the likelihood of others. I am not persuaded that, if he had appreciated he was making the various mistakes that have now been identified, he would have arrived at a result which was materially different from that which he reached when he made his award.

43. In this situation the second alternative seems to me to be the best way of doing justice between the parties in the disposal of this appeal. I would hold that the award which the judge made, on a reducing basis extending over a four year period, is as good an estimate as can now be made of the effect on Samson's profits of the Bank's breach of contract.

Conclusion

44. For these reasons, and those given by my noble and learned friend Lord Walker of Gestingthorpe, I would allow the appeal and dismiss the cross-appeal. I would restore the order which the trial judge made as to the principal sum to be awarded to the claimants as damages. At Miss Andrews' suggestion, with which Mr Hapgood did not disagree, I would leave it to the parties to agree the rate of interest to be applied to that award in the light of the findings that the Court of Appeal made on this point. I would also leave it to the parties to agree the exchange rate to be applied to convert the award from US Dollars into Pounds Sterling once the final figure has been identified.

LORD WALKER OF GESTINGTHORPE

My Lords,

45. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. For the reasons which Lord Hope gives I too would allow this appeal and make the order which he proposes. I wish to add a few brief observations about the so-called rule (or rules) in *Hadley v Baxendale* (1854) 9 Exch 341, 354.

46. In my opinion the familiar passage from the judgment of Baron Alderson, which Lord Hope sets out in his opinion, cannot be construed and applied as if it were a statutory text, nor are its two limbs mutually exclusive. The first limb, that is that the damages should be

“ . . . such as may fairly and reasonably be considered [as]
 . . . arising naturally, ie according to the usual course of
 things, from such breach of contract itself”,

tends to beg the question, since it makes the damages recoverable under the first limb depend on how the breach of contract is characterised. If for instance (by reference to the facts of *Hadley v Baxendale* itself) the breach is described simply as a carrier’s failure to convey goods from Gloucester and deliver them to Greenwich within two days as promised, it is a matter of speculation what damages would arise naturally and in the ordinary course. If on the other hand the breach is described as a delay in delivering to the manufacturer at Greenwich a broken crankshaft to serve as a model for a new crankshaft urgently required for the only steam engine at a busy flour mill at Gloucester (which was standing idle until the new crankshaft arrived) then loss of business profits is seen to be an entirely natural consequence. The appropriate characterisation of the breach depends on the terms of the contract, its business context, and the reasonable contemplation of the parties (although Baron Alderson used the latter expression in relation to the second limb). He referred, at p 356, to the plaintiffs’ failure to make known to the defendants:

“. . . the special circumstances, which perhaps, would have made it a reasonable and natural consequence of such breach of contract.”

47. This point was very clearly explained by Lord Reid in *Czarnikow Ltd v Koufos* [1969] 1 AC 350, 383-5. He said at page 385A:

“I do not think that it was intended that there were to be two rules or that two different standards or tests were to be applied.”

At page 385F he continued:

“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 flowed naturally from the breach or that loss of that kind should have been within his contemplation.”

48. The common ground of the two limbs is what the contract-breaker knew or must be taken to have known, so as to bring the loss within the reasonable contemplation of the parties: see para (4) in the summary by Asquith LJ (giving the judgment of the Court of Appeal) in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539. (That judgment received a mixed reception from this House in *Czarnikow v Koufos* [1969] 1 AC 350: Lord Morris of Borth-y-Gest, at p 399, found it “a most valuable analysis” but Lord Upjohn, at p 423, described it as a “colourful interpretation” of *Hadley v Baxendale* and Lord Reid, at pp 388-90, criticised some aspects of it, but not para (4) of Asquith LJ’s summary.)

49. The common ground between the two limbs of the rule has also been noted by Evans LJ (with whom Waite LJ and Sir John May agreed) in *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119. Evans LJ said (at pp 127-128):

“I would prefer to hold that the starting point of any application of *Hadley v Baxendale* is the extent of the shared knowledge of both parties when the contract was made (see generally *Chitty on Contracts*, 27th ed (1994), Vol 1, para 26-023, including the possibility that knowledge of the defendant alone is enough). When that is established, it may often be the case that the first and second parts of the rule overlap, or at least that it seems unnecessary to draw a clear line of demarcation between them. This seems to me to be consistent with the commonsense approach suggested by Scarman LJ in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] 1 All ER 525 at 541, [1978] QB 791 at 813, and to be applicable here.”

50. I go on to consider how these principles were applied in the present case. It took some time for the issues to be defined. Samson’s pleadings were amended a good deal, and were supplemented by lengthy particulars. This was partly because of complications which arose when the defence raised points on agency and breach of fiduciary duty. It was only in the penultimate paragraph of the reply that Samson pleaded that the Bank knew or should have known:

- “(a) Economy Bag did not know of the plaintiffs’ profit margin;
- (b) that upon the information being disclosed to Economy Bag the trade between the plaintiffs and Economy Bag would be liable to cease;
- (c) accordingly it was or ought to have been within the reasonable contemplation of the defendant that by reason of the wrongful communication of the information to Economy Bag the plaintiffs would suffer the loss complained of.”

51. In the event the judge did not make any express findings about the Bank’s state of knowledge of these matters. He did make some detailed findings about a meeting attended by (among others) Mr Davies of Samson and Mr Pearce, the Chief Clerk at the Bank’s Bolton Deane branch, at which the trading relationship between Samson and Economy Bag was discussed. But the judge explored these facts only in the context of the agency issue. (Two separate offices of the Bank were involved in the matter: the Bolton Deane branch and the International Business Division in Manchester; there seems to have been no argument

about whether what was known at the two offices should be aggregated.) Instead the judge cited the passage from *Kpohraror v Woolwich Building Society* which I have already set out. He concluded that “loss of the type which [Samson] claims arises in the normal course of things,” and went on to the quantification of that loss. That may have cut a few corners but it has not been the subject of serious complaint.

52. The judge’s quantification of the loss was open to criticism on some points, as my noble and learned friend Lord Hope has explained. I think that the judge probably overestimated, and certainly did not underestimate, Samson’s recoverable loss. But the Court of Appeal erred in principle in reaching its decision, and after all the time that has elapsed it would not be acceptable to remit the matter for a fresh assessment of damages, especially as it would on any view involve so many imponderables. The least unsatisfactory course is to make the order which Lord Hope proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

53. For the reasons given in the speeches of my noble and learned friends Lord Hope of Craighead and Lord Walker of Gestingthorpe I too would allow the plaintiffs’ appeal and dismiss the bank’s cross-appeal.