*STEP FOUR: Apply Transfield Shipping - **Assumption of Responsibility***

- Much of the time, the Hadley v Baxendale will be given you the correct answer, but it is capable of being rebutted by evidence that the party would not have assumed responsibility for that loss.
- *Whether the defendant actually assumed responsibility for the type of loss within the contract?*

i. FIRST LIMB

Example of escaping liability on the basis loss was NOT caused under the usual course of things: ***Hadley v Baxendale***

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)

Facts

- In January 2003, Transfield Shipping Inc of Panama (Transfield) chartered (borrowed) The Achilleas from the Mercator Shipping Inc of Monrovia (Mercator) and set the date of redelivery at 2 May 2004. Mercator then entered into a new agreement with a third party, Cargill.
- An unavoidable matter happened, and Transfield was not able to redeliver the vessel until 11 May 2004. Mercator renegotiated with Cargill and decided on later redelivery date.
- This late redelivery caused owner to miss the last delivery date for the next charter contract that it had already committed to perform.
- Mercator suffered a reduction in profit and sought damages calculated by the difference between the original and reduced rate under Cargill charter for the entire period of Cargill charter.
- Transfield argued that the company should only liable for lesser damages calculated for the nine days period from expected latest date of delivery in the notices until the actual date of redelivery where Mercator could not use the vessel

Held:

- Lord Roger and Baroness Hale held that the parties would not have had the particular loss of the lucrative second contract within their contemplation at the time the first contract was made
- Assumed responsibility
    - Lord Hoffmann considered whether Transfield could reasonably expect to have assumed responsibility upon the intention when the contract was created. He found that Transfield did not assume responsibility for losses due to the volatile market condition
    - Lord Hope: The question is 'whether the loss was a type of loss for which the [contract-breaker] can reasonably be [taken] to have **assumed responsibility**'.
    - Lord Rodger and Baroness Hale: Loss claimed by the owners not within the reasonable contemplation of the charterers at the time of formation because 'this loss could not have been reasonably foreseen as being likely to arise out of the delay in question'
    - Note (1) **Lord Walker** agreed with both approaches, **so what is the *ratio*???**
      (2) Subsequent UK decisions have attempted to restate the correct approach.
- The parties were not able to know about the future charter's term that would be entered into by Mercator and those rights were undeterminable.
- The late delivery was an unexpected circumstance beyond the power of Transfield. Damages for late delivery were usually calculated by the difference between markets rate and charter rate for the period of late redelivery
- Both the Lords agreed to extend the principle of Hadley v Baxendale (Hadley) and decided that the law on remoteness is not only concerned to protect the contractual bargain but to set limits of liabilities and allowed the appeal.

Most common view is that you need to look at HB case rule and the assumption of responsibility principle.

- The Hadley v Baxendale is not a fixed rule of law but effectively a guide or assumption as to the parties' intention. Merely a tool for ascertaining the parties' objective intention.
- Because it is merely a tool, it is capable of being displaced by other evidence of objective intention leading you to a different conclusion.
- The true test is whether or not, the parties were taken to have assumed responsibility for that loss within the contract.

Much of the time, the Hadley v Baxendale will give you the correct answer but it is capable of being rebutted by evidence that the party would not have assumed responsibility for that loss

II) SECOND LIMB

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528:

Facts:

- Victoria Laundry Ltd (VLL) ordered a large boiler from Newman Industries Ltd (NIL) for some lucrative dyeing contracts. NIL was aware of the nature of VLL's business, and that it was intended for the boiler to be put to use 'in the shortest possible time'. The delivery of the boiler was delayed by five months and VLL claimed for breach of contract.
- Buyer claimed for lost profits - could have done more ordinary business plus extra profits lost due to being unable to accept new particularly lucrative (post-war) contracts from government

Issue: Were these extra profits recoverable?

Judgement:

- The ordinary damages were able to be recovered in respect to the ordinary profits as it can be reasonably presumed for the defendants to foresee some loss of business if the boiler was not delivered on time [542-3], but they were unable to claim for the extra profits as the defendants had no knowledge of the prospect of such lucrative contracts
- In contract, the plaintiff is only entitled to recover the losses which were reasonably foreseeable as liable to result from the breach at the time of the contract.
  - Whether losses were reasonably foreseeable, depends on the knowledge of the parties at the time.
- In order for the plaintiffs to recover specifically for the profits on the Ministry contracts, D would have had to know, at the time of their agreements with the plaintiffs, of the prospect and terms of such contracts.
- Suggests that the parties could have suggested prior to the Newman that there may be some lucrative contracts coming
- Necessary to divide claims into heads of injuries/ losses
- In drafting a contracting, you should advert to likelihood of particular losses that may result

Acceptance of Risk

- Can the defendant's impliedly or explicit assume responsibility for the loss in question and whether mere knowledge of a risk of loss is sufficient to make a defendant liable for that loss or whether the defendant must also have indicated some willingness to assume responsibility for the risk.
- D must have **agreed to accept the risk of damage**. Parties may deal with D's acceptance of risk express. i.e. agree in advance the sum recoverable on a breach.
  - In the absence of an express agreement of the D's acceptance of risk, the court can infer that the D accepted responsibility if upon acquiring the necessary info from the P, took no effort to disclaim liability i.e. drafting a clause *Gull v Saunders*
- Sometimes may need to go further than the limbs in *Hadley v Baxendale* (1854)
- Lord Hoffman and Lord Hope in *Transfield Shipping Inc v Mercator Shipping Inc* (The Achilleas) held that the assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, "is determined by more than what at the time of the contract was reasonably foreseeable
  - Held that the market practice gave a basis for inferring that the assumption of risk implicitly assumed by the defendant was limited to that represented by the market practice.
- In *Supershield Ltd v Siemens Building Technologies FE Ltd*, the Court of Appeal combined the rule in Hadley v Baxendale with considerations to Lord Hoffmann's judgement oin Achilleas: "at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach"
- In *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd* (decided before the *Achilleas)*, the NSW Court of Appeal supported the view that an assumption of responsibility could usually be inferred from a defendant having sufficient knowledge of a particular risk of loss to be in an informed position to decide whether to accept that risk and taking no steps to exclude liability for the risk
- E.g. Catching a taxi to a meeting in CBD; the taxi driver is made aware that the meeting is important and you are required to be there in 15 mins otherwise there will be a loss of 15 million dollars. The taxi driver hears

- Where a term that is a condition of a contract has been breached, the innocent party has the right to rescind the contract as well as sue for damages. The High Court, in saying that Luna Park could rescind the contract had two options. They could either be bound or not be bound by the contract, i.e., they could elect to bring the contract to an end.

Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968) 120 CLR 516,

Facts:

- Door makers failed to properly install a burglar proof door. Burglars successful raided the premise and took stock. A contract between P (Reg Glass) and D provided for the supply and installation by D of a 'rear single door' at P's shop premises (burglar door).
- Thieves broke into the shop by forcing the door out of position and stole stock belonging to P. P sought damages for breach of contract.
- Judgment was given for P in the Supreme Court ($10,365). Reversed by Court of Appeal. P appealed to High Court.
- P has to produce evidence that the door wasn't installed to the requisite standard to provide reasonable protection. – **BUT** it remains open for the defendant to negative causation by proving regardless, the break would have occurred.

Outcome:

- D was found to be liable as the door when locked was not reasonably fit for purpose of keeping out burglars. Substantial damages were awarded. Damages included the goods inside as it was reasonably foreseeable that if a breach occurred that this was the kind of loss that would be sustained.
- Held (Barwick CJ, McTiernan and Menzies JJ): D breached contract. D's breach caused the loss claimed (damages in SC restored).
- **Once breach is established and it appears that the claimed loss flows from this beach, it will be *presumed* that it does.**
- No breach of an express term, but there was an implied term as the P contracted for a door which would be reasonable fit to keep burglars out of the shop. The door fitted and hung by D was not of this character
- 'The business of the defendant was to provide burglar-proof protection and the plaintiff unquestionable relied upon its skill and ability to supply, fit and hang a door which would provide reasonable protection against persons seeking to break in when the locking devices were in operation.'
- '[T]he work as it was done did not constitute the door a reasonable deterrent to thieves wanting to break into the shop, and it is not the point that the contract did not provide a particular means of making it such a deterrent.'
- The breach did not necessarily imply that D was liable to compensate P for the loss caused by the burglary (as the SC said). However, the court was satisfied that had the door been reasonably fit for its purpose, the burglary would not have occurred. Hence, but for Ds breach, the loss would not have occurred.

REMOTENESS IN CONTRACT

(a) What kind of loss is to be compensated?

- In order for damages to be awarded to compensate a loss, the plaintiff must show that the loss was not too remote. The test for remoteness was established by *Hadley v Baxendale* and has been affirmed by the High Court in Burns v MAN Automotive (Aust) Pty Ltd (1986) 161 CLR 653
- Damages which are too remote may also have been excluded under the commonsense test.
- The normative function of a rule of 'remoteness' allows there to be some limits of the scope of liability to the defendant is responsible
- The difference between damages in tort and contract arises due to the different nature of the relationship between the parties (*Koufos v Czarnikow*):
  - In tort, the defendant is liable for any damage which is reasonably foreseeable, even in the most unusual case, unless a reasonable man would dismiss it as far-fetched.
  - In a contract, the parties deliberately undertake mutual duties and have the opportunity to define these liabilities with one another, including by drawing attention to any unusual circumstances.

- In tort, there is no opportunity for the injured party to protect himself in some way.

- *Hadley v Baxendale* rule that even though D's breach caused P's loss, this is not recoverable unless the test of remoteness is passed.
- The test for remoteness was outlined in *Hadley v Baxendale* (1854) 9 Ex 34 where Alderson B held that losses are available if they fall within either:

STEP ONE:

1. First limb ('general damages'): arising naturally, that is, according to the usual course of things, from breach; or
   - Loss or damage must flow according to the ***usual course of things*** from D's Breach (as per **Alderson B's**) (i.e. what loss similar placed P's would suffer) *(Victoria Laundry v Newman Industries)*
   - Issue of certainty exists.
     - *Monarch* as per Lord du Parc 'serious possibility', and Lord Morton referred to 'grave risk'.
     - *Victoria Laundry (Windsor) v Newman Industries* referred to reasonably foreseeable losses or those likely to result or those which are on the cards
     - *Koufos v C Czarnikow* referred to how reasonably foreseeable is suitable for tort of negligence claim in damages, and on the cards is too imprecise. The losses needed to be not unlikely to result, being less than an even chance but nevertheless not very unusual and easily foreseeable
2. Second limb ('special damages'): Loss which the parties reasonably supposed to have contemplated at the time of making the contract *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (need knowledge of the special contracts which was lacking in this case)
   - Only arises where a claim – has **a loss that does not arise in the usual course of things** –
   - Relies on the knowledge actually possessed by the D that was *'in contemplation.. at the time they made the contract' Hadley v Baxendale* (1854) 9 Ex 34 and 'that he should have acquired this knowledge from the plaintiff' Robophone Facilities Ltd v Blank [1966]:
   - For a reasonable person the breaching party's position, the particular loss must be a **'serious possibility'** or a **'real danger'** result of the breach: *Koufos v Czarnikow*
     - 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" Lord Reid explained in C *Czarnikow Ltd v Koufos*
   - Successfully applied in *McRae v Commonwealth Disposals Commission*: P's expenditure recoverable on basis D had actual knowledge for the need of salvage operations.
   - If a shed is being built and the builder is informed that it is important to have the shed build by a certain date as there is a developer coming, as a result, of the knowledge, the builder may be liable for the damages caused if the shed is not built on time

- **The extent of damage that must be contemplated:**
  - Not necessary for the defendant reasonably to have contemplated the degree or extent of the loss that was in fact suffered or the precise details of the events giving rise to the loss. It is sufficient that the parties contemplated the kind or type of loss or damage suffered *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310; Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd
- **Degree of likelihood of damage resulting from a breach**
  - *C Czarnikow Ltd v Koufos*: the House of Lords suggested a number of formulations: the damage reasonably contemplated by the parties must be "not unlikely", "liable to result" or "a serious possibility or real danger"
  - A plaintiff must show that there is a high but not "a near certainty or an odds-on probability" of damage *Wenham v Ella* (1972) 127 CLR 454, 471-2.

STEP TWO: Apply Victoria Laundry v Newman Industries – ***Knowledge***

- 2.1 **First Limb:** The parties do not need knowledge of the loss, but rather it can be presume/imputed they had the knowledge
- 2.2 **Second Limb:** Whether the defendant had actual knowledge of the specific loss in question, or knew there would be some form of loss?

STEP THREE: Apply Parsons v Ingham – ***Severity (Type)***

- We are not concerned with the extent of loss when considering the scope of liability, provided that the type of loss is something that is liable to arise from the breach ***(Parsons v Uttley)***
- Defendant had knowledge of the loss or type of loss in question, having contemplated it, is sufficient.

3. is procured by the husband, unless the latter can show she received independent advice; and
4. without understanding its effects, unless the lendor took steps to explain the relevant matters to her and reasonably believed she understood those matters
   - In the second case, four conditions must be satisfied (*Garcia v National Australia Bank applying the Yerkey Principle*) "[W]hat makes it unconscionable to enforce [the guarantee] is the combination of circumstances that:
     e. In fact the surety [guarantor] did not understand the purport and effect of the transaction;
     f. The transaction was voluntary (in the sense that the surety obtained no net gain from the contract the performance of which was guaranteed); [Cant receive a direct benefit, but an incentital benefit is ok]
     g. The lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business; and therefore to have understood that her husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet
     h. The lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her."
        - There was no explanation by the bank to the wife of the extent of these transactions and she did not realise that the guarantees were secured by the mortgage over her home

- In *Royal Bank of Scotland plc v Etridge (No 2)* [2002] the House of Lords explained that banks are obliged to make sure that their clients (i.e. the wives as well) obtained independent legal advice, especially if, in the case of a couple transacting for security over their matrimonial home, the loan would only benefit one person.
  - The bank is "put on inquiry" to watch out for undue influence or misrepresentation in such cases.
  - The entrusted solicitor should express full satisfaction that both persons gave a fully informed consent
    - e.g. he/she should meet the wife (the surety) in private, without the husband's (the beneficiary) presence to discuss the planned loan. Once the solicitor certifies free consent, the bank's security is protected by the presumption of 'expression of … free will'.
  - The bank cannot be held liable for deficient legal advice (unless it believes the advice was incorrect). All in all, if the bank ensures independent legal advice and is assured of informed consent, it can repossess the property the loan was secured against.

- Who has the **onus of proof**?
  - If presumed, can the presumption be rebutted by the stronger party?
  - If actual, can the weaker party prove that the other party exerted undue influence?
- If **three-parties**, Where the undue influence is not a direct recipient of a benefit from the weaker party, but rather a beneficiary through a third party to a contract, rescission will still be available if the defendant *(Bank of NSW v Rogers):*
  - Had notice of the circumstances giving rise to the undue influence – actually knew of the undue influence and that the relationship was tainted (**actual knowledge**), or
  - Was sufficiently aware of circumstances that would put a reasonable person on inquiry, and the third party failed to make such inquiries (**constructive knowledge**)
  - The onus was on the bank in *Bank of NSW v Rogers* to rebut the presumption by showing the transaction was entered into freely. Had to show she had gained independent legal advice.
- **Consequence**: Contract is **voidable** and may be **rescinded**, provided that it is possible for the parties to be restored to their precontractual positions [then consider recession scaffold]

Solving an Unconscionable Conduct Problem

- Unconscionable dealings look to the reprehensible conduct of the stronger party in attempting to induce the benefit of an agreement of a person under a special disability in circumstances where it is not consistent with good conscience in a manner that it would be unjust or unfair

- Elements to establish unconscionable conduct under common law was established by Deane J, *Commercial Bank of Australia Ltd v Amadio:*
  - Was there a special disability which put the weaker party at a serious disadvantage or seriously affected his or her capacity to act in her own interests; was there an absence of any reasonable degree of equality between them?
    - Poverty; need of any kind; sickness; age; sex; infirmity of body or mind; drunkenness; illiteracy, or lack of education; lack of assistance or explanation where such was necessary (*Blomley v Ryan*, Fullagher J)
    - Intoxication (*Bloomley v Ryan*)
    - Strong emotional attachment (*Louth v Disprose*)
    - A person is not in a position of relevant disadvantage simply because of inequality of bargaining power (*ACCC v CG Berhatis Holdings*)
    - The existence of one of these disabilities would not automatically amount to unconscionability *Bloomley v Ryan*
      - It must seriously affect the ability of the party to make a judgment as to his or her own best interests against the other party
    - Habitual Gambler failed: *Kakavas* (Which failed on both knowledge and the special disability point)
  - The existence of one of these disabilities would not automatically amount to unconscionability
    - It must seriously affect the ability of the party to make a judgment as to his or her own best interests against the other party
  - Was the disability known to the stronger party?
    - After *Kakavas,* constructive knowledge is not enough, though 'wilful ignorance' is sufficient.
    - Requires actual knowledge of the other party's special disability, includes 'wilful ignorance' (*Kakavas v Crown Melbourne Ltd*)
  - Did the stronger party exploit that disability unconscientiously in order to obtain the weaker party's consent to the transaction?
    - The stronger party must exploit the weakness that he or she knows to exist in the other in order to procure consent to the transaction
    - *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 , CMCLA 24-06 The bank exploited this disability unconscientiously in order to obtain their consent to the transactions
    - *Thorne v Kennedy* (2017) 350 ALR 1, RPCM 35-20: exploited her lack of financial equality, her emotional connection to Kennedy, her reliance on Kennedy for everything in Australia; grossly unreasonable signing of prenups
    - *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, RPCM 38-50
      - Keane J identified that 'unconscionable' as identified in s 12CB of the ASIC Act relates to a level of exploitation and "victimisation of the vulnerable".
      - Furthermore, Keane J regarded unconscionable conduct to be "calculated taking advantage of a weakness or vulnerability on the part of victims of the conduct in order to obtain for the stronger party a benefit not otherwise obtainable".
    - Refer to cases: *Bridgewater v Leahy* (1998) 72 ALJR 1525, *Louth v Diprose* (1992) 175 CLR 621,

- **Onus**: Can the stronger party prove that the transaction was fair, just and reasonable?
- **Consequence**: Contract is **voidable** and may be **rescinded** [remedy at common law]
- Whether the ACL applies?

B) **STATUTORY CLAIM:** Australian Consumer Law (ACL) Part 2-2

- *Contracts Review Act 1980* (NSW) provides relief in respect of 'unjust' contracts – ie those that are 'unconscionable, harsh or oppressive' (s 4)
  - Purpose was to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with unjust contracts. No longer as important due to the ACL – some overlap between these two statutes)