Rethinking the Law of Contract Damages. By VICTOR P. GOLDBERG. [Cheltenham, UK: Edward Elgar Publishing, 2019. xvi + 262 pp. Hardback £90.00. ISBN 978-1-78990-250-1.]

I tell my students that to get a complete view of the law of contract damages, they should look at it through several different lenses. Goldberg is an economist (as he admits at p. xiv) and hence his view of damages for breach of contract is avowedly economic. The unusual aspect of this collection of essays is that he turns his economic lens not only upon US contract law (a well-worn path) but also upon English law. While the English courts emphasise their commercial approach to contract law, most English scholars do not take a law and economics approach to contracting, and it is fascinating to see how English contract law is viewed through the eyes of an "outsider". Moreover, while many US scholars write primarily for US audiences, Goldberg's consideration of English contract law gives his work increased relevance for scholars from a Commonwealth background (like me) who are required to understand both English law and the law in their home jurisdiction.

Goldberg's book is divided into two parts: Part I contains essays dealing with "direct damages", and Part II contains essays dealing with "consequential damages". My first thought was that the distinction between direct and consequential losses is slippery, and at times contested (as Goldberg later discusses in detail in Chapters 11 and 12). Goldberg has a tendency to state principles in simple formulae at the outset of his pieces—perhaps reflecting his background as an economist—which made a more sceptical reader like me want to quibble over definitions, and observe that, while his formulae looked beguiling, the reality is more complex than this. He then describes the reality of how his formulae apply to different scenarios by giving detailed descriptions of numerous cases, outlining how they fit (or do not fit) his theory. I found this method of exposition hard going at times (particularly in relation to the six chapters dealing with US case law, with which I am not so familiar). However, it is worth persisting for the insights and challenges to orthodoxy found therein.

In Part I, Chapter 1, Goldberg argues that the general principle guiding assessment of contract damages is that "the contract is an asset and the problem is one of valuation of that asset at the time of the breach" (p. 2). He considers US law on the seller's remedy for breach of a contract for sale of goods, the calculation of damages for anticipatory repudiation, and the calculation of damages for breach and repudiation of long term contracts such as instalment contracts, take-or-pay contracts and minimum quantity contracts. Goldberg's assertion that long term contracts should be valued as an asset, rather than on the price of the product on breach (p. 16) makes sense, and I agree that courts should look at a set of forward prices as at the date of breach in an instalment contract, not a single price. He observes that a German audience listening to an earlier version of the chapter suggested specific performance (p. 31); in fact, I am aware of an American case where the difficulty in calculating the damages led to that outcome (*Eastern Rolling Mill v Michlovitz*, 157 Md. 51; 145 A. 378 (1929) (C.A., Maryland)). Goldberg gives some suggestions as to how difficulties in valuation might be overcome.

Chapter 2 is of interest to English and Commonwealth readers, as Goldberg offers pertinent criticisms of the House of Lords decision in *Golden Strait Corp. v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 A.C. 353 in light of his theory that the contract should be viewed as an asset, and suggests that much of the confusion in that case could have been avoided by looking at the change in value of that asset at the moment of breach (pp. 44–45). My own view accords broadly with Goldberg's. The court should have calculated the value of

the remainder of the charter as at the date of breach, and as Goldberg suggests, it should have been discounted by the possibility that the war clause would have been exercised, *prima facie* calculated as at the date of breach. However, I would have considered if it was possible for the ship owner to have mitigated by chartering out to someone else, and calculated the difference in value accordingly. In the event that mitigation was not possible until later, I would have assessed damages at that later date. I read Goldberg as perhaps also open to this argument, as he criticises Lord Toulson's discussion of *The Golden Victory* in *Bunge S.A. v Nidera BV* [2015] UKSC 43, [2015] 1 W.L.R. (D) 283, as it fails to take into account the fact that the charterer could not have mitigated by re-chartering on identical terms because the market had collapsed.

Chapters 3 and 4 deal with the "lost volume seller" who complains that the buyer's breach of contract deprived her of the chance to make a profitable sale. I was not previously aware that § 2-708 of the Uniform Commercial Code allowed for recovery of such an amount, nor that there were certain strands of law in England and Wales which also contemplated recovery of such an amount (primarily older cases). Chapter 6 deals with the question of whether a middleman seller's damages should be calculated as the contract differential or the lost profit under the Uniform Commercial Code, raising the tantalising question of disgorgement at the end of the chapter.

Chapter 5 deals with mitigation and *British Westinghouse Electric & Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673 and *Globalia Business Travel SAU v Fulton Shipping Inc. (The New Flamenco)* [2017] UKSC 43, [2017] 1 W.L.R 2581 and provides suggestions as to how these cases should be reconceived. Goldberg argues that neither case should be regarded as mitigation of damages. Of *British Westinghouse*, he says (at p. 99): "The former was simply the routine replacement of machines that would have been obsolescent had the contractual specifications been met. Once the nature of technical change in the turbine business and the distinction between the physical life and the economic life of the machines is recognized, the irrelevance of mitigation becomes clear."

While I have questioned the result in *The New Flamenco*, I had not considered the economic life of the turbines in *British Westinghouse*, or the changing nature of technology at that time, and Goldberg's arguments are intriguing. It is observations like this which make a collection like this valuable: an outsider with a different perspective makes you view a case in a different light.

Chapter 7 deals with the English cases on sub-sales and whether a subcontract should be taken into account in calculating damages. Goldberg rightly criticises *Wertheim v Chicoutimi Pulp Co.* [1911] A.C. 301, an exception in relation to sub-sales, as making "little sense" (p. 149). Unlike cases involving non-delivery, failure to accept and defective goods, *Wertheim* provides that in delay cases, courts may take into account the price that the buyer actually received in a subcontract. He goes on to consider the position of "string contracts" and *R & H Hall Ltd. v WH Pim Junior and Co. Ltd.* [1928] All E.R. 763, in which sub-sales *were* taken into account because they were in the contemplation of the parties (pp. 127–34). Goldberg argues to the contrary that sub-sales should not be taken into account, because if the parties to the initial contract contemplated the sub-sales, they could (and should) have made this explicit in their contract (p. 135). He also deals with the vexed case of *Bence Graphics International Ltd. v Fasson UK Ltd.* [1998] Q.B. 87, and looks at the standard term contract of Fasson UK Ltd.'s parent company, and the exclusion clause therein, which excludes any liability for consequential losses (p. 138). If the exclusion clause in *Bence Graphics* was in similar terms (and it is unclear on the facts) it seems that the losses resulting from settlement with third-party

purchasers should not have been recoverable. Again, this is where Goldberg's status as an outsider and an economist comes to the fore.

Chapter 8 considers *Jacob & Youngs, Inc. v Kent*, 230 N.Y. 239; 129 N.E. 889 (1921) (C.A., New York), a famous US case involving damages for defective construction. I love contrasting *Jacob & Youngs* against Australian cases such as *Bellgrove v Eldridge* (1954) 90 C.L.R. 613 and *Bowen Investments Pty Ltd. v Tabcorp Ltd.* (2009) 236 C.L.R. 272, to prompt students to consider what is at the base of these awards. Goldberg's discussion of the detail of *Jacob & Youngs* and the American historical background to the decision is fascinating (pp. 142–58). Interestingly, from an Australian perspective, while *Bellgrove* and *Tabcorp* stipulate that cost-of-cure should be the default measure subject to a reasonableness qualification, a subsequent line of decisions of the Full Court of the South Australian Supreme Court (*Stone v Chappel* [2017] SASCFC 72; *Tincknell v Duthy Homes Pty Ltd.* [2020] SASCFC 24) tend more towards the US approach.

In Part II, Chapter 9, turning to consequential damages, Goldberg conducts a detailed historical autopsy of the English decision in *Victoria Laundry v Newman* [1949] 2 K.B. 529, arguing that Asquith L.J. removed the notion that the defendant would only be liable for damages for which he had tacitly agreed (pp. 166–69). It follows that Goldberg believes that *Transfield Shipping Inc. v Mercator Shipping Inc. (The Achilleas)* [2009] 1 A.C. 61 represents a return to the true path of *Hadley v Baxendale* (1854) 9 Exch. 341 with the adoption of the assumption of responsibility test (p. 170).

Chapters 10 and 11 deal with clauses excluding liability for consequential damages in the US and England respectively, and here, Goldberg outlines how his distinction between direct damages and consequential losses works. In Chapter 10, in a detailed survey of US case law, he posits that concepts such as foreseeability and naturalness are not useful in distinguishing between direct and consequential losses. Instead, he argues that the approach depends upon whether the loss arose out of wrongful termination, delay or breach of warranty (pp. 197–98). In Chapter 11, he turns to English law, and notes that English courts have tended to characterise direct losses as equivalent to the first limb of *Hadley v Baxendale* and consequential losses as equivalent to the second limb of *Hadley v Baxendale*. (As an Australian, I appreciated Goldberg's observation at p. 226 that Australia questioned this characterisation earlier than England.) English courts are generally more likely to read exclusion clauses narrowly than US courts.

In Chapter 12, Goldberg discusses the application of the "new business" rule in the US, namely that if a business did not have a history of profitable operations, it should not be able to claim a loss of opportunity. The pendulum has apparently swung against this rule, but he argues that it should not have swung so far, and that there are situations where it might apply.

In conclusion, there is much to recommend this book, particularly if you enjoy having long-held assumptions about a case challenged (which I do). I learned much about US law of contract damages and was piqued to wonder where my home jurisdiction of Australia fell on some of the issues Goldberg raised. Goldberg is to be warmly commended for speaking to an audience beyond the US. I also enjoyed his detailed historical and practical sleuth work in the chapters on *The Golden Victory*, *British Westinghouse*, *Jacob & Youngs* and *Victoria Laundry*. I hope that he continues to turn his gaze to English case law (and perhaps beyond) and causes us all to rethink some of the assumptions we operate under.

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