2001

The buyer's measure of damages for a seller's breach: Reese v Wong, 2001

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Buyer's measure of damages for seller's breach of contract to sell real property is the difference between contract price and fair market value at time of breach, not time of trial.
Reese v Wong (2001) 93 CA4th 51, 112 CR2d 669

Buyer and seller entered a contract for sale of a commercial building for $1,085,000. Seller terminated the contract two weeks later after accepting another offer for $35,000 more. In buyer's suit for breach of contract, the trial court rejected buyer's argument that the appropriate measure of damages was the difference between the contract price and the property's fair market value at the time of trial. The court instructed the jury that, under CC §3306, the measure of damages for a seller's breach is "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach." The court of appeal affirmed.

▶***THE EDITOR'S TAKE:*** Out East, where lawyers start negotiating and drafting real estate sales contracts after the brokers have gotten the two parties to agree to a price, it is common for a seller to repudiate an offer she has already accepted because she has since received an even better one and the existing oral contract has not yet been reduced to an enforceable writing. (It's called "gazumping.") That is harder to do out West, where brokers get everything in writing from the very start, so that a seller's withdrawal would be an actionable breach.

In a rising market, however, the temptation may be too great for the seller to resist. She may hope, as here, that her buyer will default in some particular, thereby allowing her to extricate herself from the deal. Even if that does not work, the risk of being forced to specifically perform the contract is not great, since commercial property is no longer regarded as unique, per se, and paying damages is usually regarded as a legally sufficient alternative. See CC §3387.

Furthermore, even the measure of damages is not especially terrifying to the prospectively defaulting seller. While we have entirely eliminated the old out-of-pocket measure (the "English" rule), even for innocent breaches (such as being unable to convey because title was not marketable), the benefit-of-the-bargain alternative markedly suffers from the fact that the measurement is taken at breach date, rather than later. Thus, the worst that will happen is that the profit generated by the new and better offer will go to the disappointed buyer, but the seller will still end up with as much as she would have received under the original deal (except for attorney fees, if there is a clause to that effect in the contract).

The buyer in *Reese* had a really ingenious argument for increasing his recovery by trying to treat his loss as a lis pendens expungement violation rather than as a breach of contract. It's unfortunate that we don't have some additional disincentive for sellers who repudiate in order to take better offers. England has a concept of damages in lieu of specific performance (or "equitable damages") when the former remedy has become unavailable, under which damages are measured at the trial date rather than the breach date. (Thanks to Jeffrey W. Lem, a Toronto attorney, for teaching me this.) No California case has ever mentioned such a concept, however, so it's probably going to take a statutory amendment for that to happen here. —*Roger Bernhardt*