

HOW FAR IS TOO FAR?

Recent California cases test the limits in real estate matters.

by **Bradley J. Elkin, Esq.**

August 2009

[A similar version of this article was published in the August 2009 edition of *Western Real Estate Business*, Volume 6, Issue 12]

This continent was discovered by those exploring for new worlds, new riches and new boundaries. This country grew to its western edge and beyond by those seeking new territories. That spirit of discovery is part of our nature and our culture and reaches most every aspect of our lives. So it is no surprise that the law continues to grow and expand as creative parties seek to explore the limits of their rights and to discover new legal territories.

Four recent cases decided by California courts in the first half of 2009 find parties active in their quest for new boundaries in real estate related areas. In two of the cases, the courts were willing to expand the boundaries of existing rights and law, but in the other two they were not willing to make that leap. Consider the following:

1. How Far Does Your Retail Premises Actually Go? In *Muzzi vs. Bel Air Mart* (2009) 171 Cal.App.4th 456, we find a common retail scenario. A shopping center boasts a prominent supermarket as an anchor tenant under a long-term lease and abundant common-area parking for the nonexclusive use of center tenants. The supermarket made use of parking areas behind the store to keep storage containers of seasonal merchandise, delivery racks and broken shopping carts. That sounds reasonable. Apparently the shopping center owner did not think so. While those types of uses were permitted in the common areas, the center owner claimed that the tenant was making permanent use and had effectively commandeered nonexclusive areas for exclusive use. The Court of Appeal agreed. It found that the tenant effectively took over parking areas to expand its storage capacity and made use of those areas far longer than what might be considered temporary. The mission of this explorer tenant to expand the boundaries of its premises failed. If a retail tenant wants exclusive use of outside areas for storage, shopping cart return racks or anything else, it must secure that in its lease and not try to take over common areas.

2. How Far Should Your Escrow Extend? In *Peak-Las Positas Partners v. Michael Bollag* (2009) 172 Cal.App.4th 101, we find a common escrow scenario that gets complicated. Two parties enter into a purchase and sale agreement for 4.5 acres of property. The seller owns adjacent land and the sale is contingent on obtaining an appropriate lot line adjustment. The closing is to occur within 2 years after opening escrow unless extended by the mutual consent of the parties. The lot line adjustment takes longer than expected because the property is the

HOW FAR IS TOO FAR?
Recent California cases test the limits in real estate matters.

subject of annexation by the city and the county does not act. The seller did give one nice escrow extension; we have to give them credit for that, although they demanded a substantial deposit payment. But after 7 years and still no lot line approval, the seller was done, agreed to no more extensions and refused to close, even after the lot line was approved. The seller claimed that landslide concerns prevented him from waiting any longer. The buyer, who had paid 98 percent of the purchase price in nonrefundable deposits and an extra \$5 million in project and entitlement costs, claimed that its right to an escrow extension went even further. The Court of Appeals agreed with the buyer. Every contract contains an implied covenant of good faith and fair dealing. For the seller to refuse a further escrow extension given the circumstances was deemed unreasonable and denied the buyer the benefit of his bargain. On these facts, the court awarded the buyer another escrow extension and a bit more time to close. Happy buyer-mission accomplished!

On a humorous note, the initial draft of the court's opinion begins this way: "Parties agree to act reasonably in their contractual relationships. This case demonstrates that when a party acts unreasonably, no one prospers, *except the attorneys.*" When the case went to publication, the last three words were deleted.

For more on how far an escrow can go, see *Patel vs. Liebermensch* (2008) 45 Cal.4th 344, decided by the California Supreme Court at the end of 2008. There, an option agreement entirely omitted terms regarding the length of the escrow. The seller claimed that was a fatal flaw and an essential term. The Supreme Court disagreed and held that the contract was sufficiently certain to enforce because the time and manner of payment are incidental matters that may be determined with reference to custom and reasonable practice, even if the contract is silent.

3. How Far Can An Unlicensed Broker Go And Still Collect Fees? In *Venturi & Company LLC vs. Pacific Malibu Development Corporation* (2009) 172 Cal.App.4th 1417, we find an interesting broker scenario. A broker was engaged as a financial advisor in the development of a high-end resort. Required services included arrangement of financing (which required a broker's license) and a host of other matters (which did not necessarily require a license). The contract called for a \$30,000 per month advisory fee to be paid upon closing of the financing and a success (aka finder's) fee if the financing closed. The financing closed, although not with any party sourced by the broker. The broker sought his fees. The owner refused to pay on grounds that the broker was not licensed, which was true. The broker noted that it had not placed the financing and sought its advisory fees for the work not requiring a license. The trial court held that the broker could receive no compensation since it was not licensed. The Court of Appeal reversed, holding that the broker may be entitled to receive compensation for advisory and consulting services for which no license was necessary, and remanded the case. Mission accomplished. If the broker had been licensed, there probably would have been no case. Some seeking new pecuniary worlds might find it valuable to know that an unlicensed broker can still enjoy compensation as a consultant or advisor as long as the magic line is not crossed (and the right contract is in place).

4. How Far Does That Arbitration Clause Go? In *McEvoy vs. Hilbert* (2009) 172 Cal.App.4th 707, we find an unfortunate drafting scenario. In this case, a licensed real estate agent dutifully included an arbitration clause in his open listing agreement. Conflict later ensued and the agent petitioned to compel arbitration. Unfortunately, the arbitration provision did not strictly comply with California Code of Civil Procedure Section 1298. The court found the provision invalid and

HOW FAR IS TOO FAR?
Recent California cases test the limits in real estate matters.

denied arbitration to the agent. Mission failed. Section 1298 is a very important code section that requires specific titles, wording and type size/format for arbitration provisions in any contract to convey real property or contemplated to convey real property in the future, including marketing contracts, deposit receipts, real property sales contracts, leases together with options to purchase or ground leases coupled with improvements, and in any contract or agreement between principals and agents in real property sales transactions, including listing agreements. It is a strict statute - a brick wall, and exploration of the limits beyond Section 1298 is most likely futile.

Thus we have four explorers seeking new legal territories and achieving results from the courts with varying degrees of success. In some cases it is the letter of the statute or contract that prevails. In others, fairness and reason rule the day. In any case, may the spirit of adventure and discovery live on!

— *Bradley Elkin is an attorney for Diepenbrock Harrison in Sacramento, California.*