

Paragraph 3.1.1 of the *Code of Ethics*

Estate agents and salespersons shall refrain from activities during their practice which may infringe the law.

Illustration (1)

Procuring Illegal Letting

A licensee arranged for a landlord and a tenant to enter into a tenancy agreement for a property under the Home Ownership Scheme (“HOS”), despite the existence of alienation restrictions in respect of the property. The licensee only told the landlord and the tenant that the property was subject to alienation restrictions. However, he did not tell the parties that it was illegal to proceed with the proposed letting. As a result of the letting, the landlord was convicted under section 27A of the Housing Ordinance and was ordered to pay a heavy fine. The licensee was penalised by the Disciplinary Committee as he had failed to refrain from activities during his practice which may infringe the law.

Commentary and Suggestion:

According to sections 17B and 27A of the Housing Ordinance, for a flat currently subject to restriction on alienation, any agreement or other instrument purporting to sell, let or otherwise alienate the flat shall be void, and any person entering into such agreement or other instrument commits an offence. The person who commits the offence is liable to a fine of \$500,000 and to imprisonment for one year. A licensee who aids or abets the commission of the offence may be guilty of the same offence.

The licensee knew that the letting would amount to illegal alienation under the Housing Ordinance. However, he thought that it would be sufficient just to remind his clients that the property was subject to alienation restrictions and he did not know that by arranging for his clients to enter into a tenancy

agreement of the HOS flat still subject to alienation restriction would lead to serious consequences. The licensee thus failed to comply with paragraph 3.1.1 of the *Code of Ethics*. To avoid the aforesaid activities which may infringe the law, licensees should, before arranging for clients to enter into a tenancy agreement, ensure that the alienation restriction on the property had been discharged.

Under the Practice Circular in relation to disposition of HOS flats in the open market (Circular No. 04-03 (CR)), the Authority has reminded licensees to refrain from any illegal act in the handling of flats subject to restriction on alienation under the Housing Ordinance. Licensees are further reminded that according to the Housing Ordinance, flats under the Home Ownership Scheme, the Private Sector Participation Scheme and the Tenants Purchase Scheme of the Hong Kong Housing Authority are subject to restriction on alienation (including sale, lease or re-mortgage) unless and until such restriction is lifted. The conditions for the lifting of restriction are provided for in the Schedule to the Housing Ordinance.

While a flat is subject to restriction on alienation, the owner shall not alienate, convey, charge or part with possession of the flat, nor enter into any agreement purporting to do so. However, in the case of a sale, the parties may enter into an agreement for sale and purchase (including provisional agreement for sale and purchase), provided that such agreement contains a special condition providing for the premium as assessed by the Director of Housing to be paid to the Hong Kong Housing Authority prior to the assignment and within 28 days of the date of the agreement or within such period as may be otherwise stipulated by the Director.

Furthermore, in cases where it is intended to modify a provisional agreement for sale and purchase standard-form by incorporating the special condition mentioned above, given that such modification involves the parties' rights and liabilities and may also affect other terms and conditions in the agreement (such as those relating to the completion date, etc), the matter should therefore be handled by a lawyer.

Illustration (2)

Infringing the Law regarding Road Traffic

A senior police inspector saw a licensee approaching vehicles waiting at a red traffic light and canvassing drivers and passengers by showing them promotional leaflets for a residential development. The licensee first approached a vehicle waiting in the slow lane. He then moved onto another vehicle in the fast lane. When the traffic light turned green, the drivers in those vehicles drove off but the licensee remained wandering on the carriageway. As a result, a vehicle approaching in the slow lane had to move to the fast lane to avoid running him down.

The senior inspector asked the licensee to return to the pavement and told him that his behaviour amounted to an offence under the Road Traffic Ordinance.

Commentary and Suggestion:

In this case, the licensee soliciting business on the carriageway would undoubtedly endanger himself and other road users. The licensee failed to avoid infringing section 48 of the Road Traffic Ordinance which says: "A pedestrian who in using any road, or a person who by driving a rickshaw on any road, negligently endangers his own safety or that of any other person commits an offence and is liable to a fine of \$500". The licensee thus failed to comply with paragraph 3.1.1 of the *Code of Ethics*.

Licensees shall refrain from activities during their practice which may infringe the law. Licensees shall also abide by the law and avoid doing any acts which may endanger their own safety or that of any other person.

The employer and management of an estate agency must establish proper procedures or systems to supervise and manage estate agency work. If a frontline practitioner commits a breach of conduct in respect of the matters abovementioned, the employer and estate agency management may be seen as not having established a proper system to manage their business. They would therefore be in breach of section 15 of the Practice Regulation.

Hence, it is the responsibility of the management of estate agency companies to maintain effective control of their staff deployed to locations for the promotion of the first sale of units in a residential development, including the site of the development, and the sales office and its vicinity (hereinafter collectively referred to as "the first sale sites").

According to the guidelines in the Practice Circular regarding the maintenance of order at first sale sites (Circular No. 10-02 (CR)), estate agency companies must:

- Appoint a controller to oversee staff deployed to first sale sites.
- Compile a list of the staff deployed and keep a daily register.

- Ensure that all staff who are deployed to the first sale sites must wear an estate agent card and staff card.
- Ensure their staff not to solicit business at railway stations.
- Ensure their staff not to solicit business at shopping malls or housing estates without the requisite permission.
- Ensure their staff not to intercept vehicles or distract drivers.
- Ensure their staff not to place any items such as advertising hoardings, banners, etc which may obstruct public places.
- Ensure their staff not to be over-aggressive: e.g. stalking or persistent solicitation.
- Ensure their staff not to quarrel or fight with others.

Illustration (3)

Protection of Personal Data

After the completion of a sale and purchase transaction, a licensee demanded his purchaser client to pay the outstanding commission. Dissatisfied with the services, the purchaser refused to pay any commission to him. The licensee therefore issued a demand letter to the purchaser for the outstanding commission. The licensee also sent a copy of the demand letter to the principal of the school where the purchaser worked in order to press the purchaser to pay the commission. The letter contained the address, the purchase price of the property concerned, and the amount of the outstanding commission payable by the purchaser.

Commentary and Suggestion:

In this case, the licensee used personal data for other purposes without the prior consent of the purchaser. He was therefore in breach of the Data Protection Principles under the Personal Data (Privacy) Ordinance (“PDPO”) and failed to comply with paragraph 3.1.1 of the *Code of Ethics*.

Licensees should observe the following when using a client’s personal data:

- Use the personal data collected from a client only for purposes relating to the discharge of estate agency work for that client.

- Unless clients expressly and voluntarily consent, no personal data of clients should be disclosed to another estate agency or used for their own private purposes.
- Should not sell or transfer personal data of clients to a third party for monetary or in-kind gain or otherwise, unless they have informed the clients in writing of the kinds of personal data to be sold or transferred and to whom their personal data will be sold or transferred, obtained their prior written and voluntary consent for such sale or transfer and complied with the relevant requirements in the PDPO.
- When introducing other services to clients, e.g. legal or mortgage services, obtain their express and voluntary consent before transferring their personal data to the service suppliers, such as legal firms or financial institutions.
- When collecting an individual's personal data from a source other than the individual himself, e.g. the personal data of the registered owners of properties obtained through the Land Registry, the source of the information may specify the purpose for which the personal data may be used and the use of personal data beyond the specified purpose may breach the PDPO.
- Provide clients with a written privacy policy statement ("PPS") stating the kinds of personal data held, the main purposes of using the personal data, and practices related to the personal data, such as the retention period and security measures in place.

- The PPS and privacy practices should generally be made available to clients by, for example, displaying them on the company's website.
- The employer and management of an estate agency should provide training to staff on the company's policies and practices on personal data privacy and protection, and updates of requirements and guidelines issued by the relevant authorities.