

### **Paragraph 3.2.2 of the *Code of Ethics***

Estate agents and salespersons should keep themselves informed of any laws, government regulations, essential facts and developments in the real estate market in order to be in a position to advise their clients in a responsible manner. They should strive to provide services and opinions based on knowledge, training, qualifications and experience in the real estate business.

## **Illustration (1)**

### **Failing to Verify the Legal Capacity of a Purchaser**

A licensee acted for both the vendors and the purchasers in a sale and purchase transaction. The two purchasers involved were a mother and her son.

A few days after the signing of the provisional agreement for sale and purchase ("PASP"), the licensee arranged for the parties to meet together to discuss the purchaser's request to delete the mother's name from the PASP. The vendors agreed. As a result, the son who was then under 18 became the sole purchaser of the property.

Subsequently, despite repeated requests from the vendors' solicitors, the purchaser refused to add an adult purchaser to the formal agreement for sale and purchase. Eventually the purchaser rescinded the purchase.

### **Commentary and Suggestion:**

Licensees should be aware that an agreement may be void due to a signatory being a minor. Minors are those who are under 18 years of age. The law seeks to protect them from the consequences of making contracts too lightly due to their lack of legal capacity.

In this case, the licensee did owe a duty of care towards the parties and it was a licensee's duty to take all practical steps to ascertain that the contracting parties had full legal capacity for entering into a contract. To do so, the licensee should check their identification documents, such as identity cards. That was a basic step in the conveyancing procedure. As the licensee failed to verify the legal capacity of the purchaser and arranged for the vendors to enter into a PASP with a purchaser under 18 years of age, he thus failed to comply with paragraph 3.2.2 of the *Code of Ethics*.

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## Illustration (2)

### Deed of Gift

A licensee arranged for a purchaser client to enter into a provisional agreement for sale and purchase of a residential property with the vendor. The land search of the property showed that the vendor had acquired the legal ownership of the property by way of gift three years ago. However, the licensee did not explain to his purchaser client the risks in purchasing a property involving a deed of gift. The purchaser was therefore unable to obtain sufficient mortgage loan to complete the purchase of the property and the deposit was forfeited to the vendor in the end.

### Commentary and Suggestion:

The licensee was not aware of the problems which may be caused by a deed of gift. He therefore failed to advise his client properly. Hence, he was in breach of paragraph 3.2.2 of the *Code of Ethics*.

A deed of gift is an instrument which effects the transfer of legal ownership of a property from the owner (donor) by way of gift to the donee.

Under the Bankruptcy Ordinance (Cap. 6), a deed of gift/assignment at nil consideration may be set aside by the trustee in bankruptcy in cases where the donor/assignor is adjudged bankrupt and he has, during the period of five years ending with the day of the presentation of the bankruptcy petition on which the donor/assignor is adjudged bankrupt, made a gift or entered

into a transaction receiving no consideration, unless the person, whether or not he is the person with whom the donor/assignor in question entered into the transaction, acquires the property in good faith and for value.

A purchaser's title to a property may therefore be adversely affected if the previous assignment in favour of the vendor/vendor's predecessor-in-title has involved a deed of gift/assignment at nil consideration and the deed of gift/assignment at nil consideration is made within five years from the date of the purchaser's acquisition of the property. The risks of purchasing properties involving such a deed of gift/assignment at nil consideration include the purchaser not being able to obtain any or sufficient mortgage loan to complete the purchase and to prove good title in the resale of the property.

According to the Practice Circular on deed of gift/assignment at nil consideration (Circular No.13-01 (CR)), if it is revealed from the land search of the property that a deed of gift/assignment at nil consideration has been registered against the property and the deed of gift/assignment at nil consideration was made less than five years from the date of the land search, then licensees should (i) inform their clients of the existence of the deed of gift/assignment at nil consideration; (ii) alert their clients that the title of the property may be affected by the deed of gift/assignment at nil consideration; (iii) that the purchaser may not be able to obtain sufficient mortgage loan to complete the purchase of the property; and (iv) advise their clients to seek legal advice on the effect of the deed of gift/assignment at nil consideration and the risks of selling/purchasing the property before they enter into any agreement for sale and purchase of the property.

## Illustration (3)

### Accepting a Deposit Before Issuance of Pre-sale Consent

A licensee procured the prospective purchasers to make deposit payments before the pre-sale consent in respect of a first sale development (“the Development”) was issued by the Lands Department.

#### Commentary and Suggestion:

The Lands Department Consent Scheme is a system put in place to regulate the sale and purchase of uncompleted buildings and to ensure orderly sale of the same. Before arranging for the sale and purchase of an uncompleted unit under the Scheme, licensees should check if the Lands Department has issued the relevant “Consent to Sell” as no preliminary agreement, or any other document, whether it is stated to be binding or not, shall be signed before the “Consent to Sell” has been given. Moreover, the developer or the estate agent are not allowed to receive any deposit or “reservation fee” before the developer has obtained the “Consent to Sell”.

By procuring a potential purchaser to make payment to the developer of the Development as a deposit for purchasing units in the Development, the licensee failed to keep himself informed of the requirements under the Lands Department Consent Scheme, thus he was in breach of paragraph 3.2.2 of the *Code of Ethics*.

According to the Practice Circular in relation to the conduct of promotional activities and the provision of property information for the first sale of residential properties (Circular No. 13-04 (CR)), even if the relevant consent letter has been issued, licensees must not solicit or accept any money, whether described as a deposit or not, from a prospective purchaser without the vendor's authorisation. Moreover, licensees (whether they are appointed by vendor as its sales agent or otherwise) must not solicit or accept any general expression of intent to purchase any residential property (whether or not accompanied by a payment of money) before the relevant price lists for such properties are made available to the general public or any specific expression of intent to purchase a particular residential property (whether or not accompanied by a payment of money) before the sale of the property has commenced.

## **Illustration (4)**

### **Proper Capacity of the Landlord**

A licensee arranged for the director of a company (“the Company”) to sign a provisional tenancy agreement (“PTA”) in the capacity of the landlord while the registered owner of the property was the Company. The licensee had made such an arrangement because he did not realise that a limited company and its director were separate legal entities.

#### **Commentary and Suggestion:**

The landlord of the property was the Company and so the licensee should have named the Company as the landlord in the PTA and arranged for the director to enter in the PTA as the representative of the Company. The licensee had failed to keep himself informed of the fundamental legal principle that a limited company and its director were separate legal entities and was thus in breach of paragraph 3.2.2 of the *Code of Ethics*.

According to the Practice Circular (No. 09-06 (CR)) on signing of provisional agreement for sale and purchase (“PASP”)/PTA by a limited company, an individual who purports to sign a PASP/PTA for and on behalf of a limited company shall only do so with the requisite authority. Failure on the part of the licensee to verify the proper authority of the signatory may expose the limited company and the other contracting party to risks. The risks would include the limited company’s denying the signatory’s authority to represent the company to deal with the transaction concerned, and the other contracting party may suffer a loss as a result.

The capacity of a signatory who purports to act for and on behalf of a limited company can be ascertained from:

- Searches of local companies as well as those foreign companies registered under the Companies Ordinance conducted at the Companies Registry showing the number and name(s) of directors of the limited company; and/or
- Authorisation documents issued by the limited company, such as board resolutions or powers of attorney.

In preparing the PASP/PTA when a party(ies) is/are (a) limited company(ies), licensees should take the following steps:

- Verify the identity of the signatory and ascribe his name legibly below his signature.
- Append the chop of the limited company or write the words “For and on behalf of (name of the company)” at the signature clause.
- Advise clients to make payments to the company direct, such as by drawing cheques/cashier orders in favour of the company and not to the signatory personally.