

Paragraph 3.4.1 of the *Code of Ethics*

Estate agents and salespersons, in engaging and accepting an appointment as an agent, should protect and promote the interests of their clients, carry out the instructions of their clients in accordance with the estate agency agreement and act in an impartial and just manner to all parties involved in the transaction.

Illustration (1)

Providing Misleading Information on a Mortgage Loan

A licensee acted for both the vendor and the purchaser in a residential property transaction and the property concerned was subject to a tenancy. Before the signing of the provisional agreement for sale and purchase, the licensee assured the purchaser that he could definitely obtain a 70% mortgage loan.

The purchaser later enquired with three banks for a 70% mortgage loan but was rejected by all of them. Finally, the purchaser was only granted a mortgage loan equivalent to 50% of the purchase price.

The licensee told the purchaser that he could definitely obtain a 70% mortgage loan from a bank. But in fact, the Government had already announced that mortgage loans of properties subject to a tenancy were capped at 50% of the purchase price.

Commentary and Suggestion:

In this case, the licensee made a representation about a mortgage loan without a proper basis. The licensee failed to protect and promote the interests of his client and thus failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

Licensees should not hastily provide mortgage information to clients, assure a prospective purchaser that he will be able to obtain a mortgage loan, or make any guarantees on the terms of mortgage loans.

Licenseses who provide information to prospective purchasers concerning payment methods or mortgage plans must ensure that such information is accurate and that they have taken all reasonable steps and exercised all due diligence to verify such information.

Besides, as there is a great variety of mortgage payment schemes, licenseses should remind prospective purchasers to seek information directly from the bank or the developer concerned if they have any questions.

In fact, the Hong Kong Monetary Authority, which aims at ensuring the stability and smooth operation of the banking system, has from time to time issued guidelines to banks on the property mortgage lending services and credit assessment. A professional licensee must be aware and keep abreast of the relevant policies on mortgages.

Generally, different banks have different policies and considerations for different types of properties. The purpose of the mortgaged property, that is, whether the property is being self-occupied or has been brought for investment, will also affect the terms on which the loan is granted.

Illustration (2)

Failing to Carry Out a Land Search for a Non-self-contained Unit

A licensee acted for both the landlord and the tenant in a leasing transaction. The property was not a self-contained unit (i.e. not an independent dwelling with separate cooking facilities and bathroom).

The licensee did not carry out a land search for the property at the Land Registry. Without the land search documents, the licensee failed to spot the several notices and closure orders issued under the Crimes Ordinance and registered at the Land Registry. The tenant was eventually forced to leave the property.

Commentary and Suggestion:

Under section 13(4) of the Practice Regulation, as the agent acting for the landlord, the licensee should have carried out a land search in respect of the property and supplied the same to the tenant immediately before the signing of the tenancy agreement. Licensees shall carry out a land search of the property concerned so as to ascertain whether there are any subsisting encumbrances such as court orders or mortgage etc. on the property so as to give appropriate advice to client(s).

In this case, the licensee mistakenly thought that section 13(4) of the Practice Regulation was not applicable to non-self-contained units, and did not carry out a land search for the property at the Land Registry. Hence, the licensee failed to ascertain before the

landlord and the tenant entered into the tenancy agreement that a closure order to close the property had already been made by the court. The licensee thus failed to protect and promote the interest of his client and was in breach of paragraph 3.4.1 of the *Code of Ethics*.

Where a person is convicted of an offence under section 139, 143, 144 or 145 of the Crimes Ordinance, the court has the power to make a closure order on the property affected under section 153B of the Crimes Ordinance. Section 153B provides that any property subject to a closure order will be closed for six months, and that it will be an offence for anyone to enter the property or to interfere with anything used to close the property without lawful authority or reasonable excuse.

Illustration (3)

Failing to Deal with Building Orders in PASP

A licensee acted for both the vendor and the purchaser in the sale and purchase of a residential flat. The land search records showed that the property was subject to two orders issued by the Building Authority relating to an earth-retaining structure. The vendor told the licensee that he had paid his share of expenses for the remedial work to the Incorporated Owners. Before the signing of the provisional agreement for sale and purchase ("PASP"), the vendor instructed the licensee to specify in the PASP that the sale was on an "as is" basis, which the licensee did. However, the licensee did not mention the two orders in the PASP.

Thereafter, the vendor and the purchaser had serious disagreement over, among other things, whether any money (and if so, how much) should be set aside for the compliance of the two orders. As no agreement could be reached on this issue, the sale and purchase fell through with the vendor paying a hefty compensation to the purchaser.

Commentary and Suggestion:

The fact that the licensee had not advised the vendor on the effects of the two orders and provided for the compliance of the same in the PASP had prejudiced the vendor's interest in that the vendor was bound to give something which he could not possibly give, namely, a good title to the property. The licensee failed to advise or cause the parties to ascertain or apportion their

respective liabilities towards the discharge of the two orders in the PASP; the licensee thus failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

According to the guidelines in the Practice Circular regarding the proper steps to take when dealing with properties which might have authorised building works (UBW) or building order (Circular No. 07-05 (CR)), licensees should do the following to protect their clients' interests when dealing with properties:

Land Search

Licensees should carry out land searches against the properties concerned and the land search records should be carefully checked to see if any order issued by the Building Authority requiring demolition/alteration of UBW has been registered and, if so, whether the order has been complied with. Licensees should also specify the particulars of such an order in Part 1 of the Property Information Form (Form 1) used in the sale and purchase of residential properties in Hong Kong. Clients, vendors and purchasers alike, should be informed of the results of the land search accordingly.

Vendor's Statement in Form 1

The vendor's statement (Form 1, Part 2) makes provision for the vendor of a residential property to supply particulars of any structural additions or alterations to the property. As a first step to ascertain whether a property contains any UBW, licensees should try their best to urge their vendor clients to provide the information requested in Form 1, Part 2.

Remind Clients of Risks Involved

If a licensee has actual knowledge of the existence of UBW or building order in or against a property to be sold and purchased by his client, the licensee should remind his client of the risks involved in the purchase of such property. Such risks would include the risk of the Government exercising its right of re-entry hence rendering the title of the property defective; the risk of the Government issuing an order requiring the owner to remove the UBW within a specified period and, on the owner's failure to do so, carrying out the demolition/alteration works required and forcing a sale of the property to recover the cost of works; and the risk of not being able to obtain any or sufficient bank mortgage loan to complete the purchase of the property.

On the other hand, the licensee should remind his vendor client that unless otherwise agreed in the agreement for sale and purchase of the property, the purchaser is entitled to rescind the purchase and claim damages for breach of contract on the ground that UBW or the building order may render the title defective.

In view of the risks involved, licensees should remind their vendor and purchaser clients to seek legal advice before proceeding with the transaction to sign the PASP.

Illustration (4)

Arranging the Signing of a PASP with the Property Price Left Blank

A licensee asked a prospective purchaser to sign a provisional agreement for sale and purchase and to write a cheque for the deposit, so as to facilitate the negotiation with the vendor. The licensee prepared a provisional agreement for sale and purchase ("PASP"), on which the space for the property price and the dates of payment were left blank when the prospective purchaser signed it. The prospective purchaser requested the licensee to let him know as soon as the vendor reverted with an offer, and explained that he needed to understand all the details of the transaction before deciding whether to purchase the property or not.

A few days later, the prospective purchaser, upon calling the licensee, found out that the vendor had already signed the PASP. The prospective purchaser did not know the transaction details beforehand, nor did the licensee contact him to obtain his confirmation in advance. The prospective purchaser asked immediately for the PASP and the deposit cheque to be returned to him. Eventually, the transaction fell through.

Commentary and Suggestion:

Some licensees may think that arranging for purchaser clients to unilaterally sign a provisional agreement with spaces of essential terms (e.g. price, deposits, completion date, etc) left blank would facilitate them to negotiate with the vendor, and some

purchasers also consent to such an arrangement. However, this would not be regarded as a reasonable excuse as such an arrangement would put the purchaser at risk.

In this case, by arranging for the purchaser client to sign a PASP with the important terms such as the property price and dates of payment left blank and failing to ascertain whether the purchaser client agreed with all the terms of the PASP before concluding the deal with the vendor for the purchaser client, the licensee failed to protect her client's interests, and thereby failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

According to the guideline in the Practice Circular (No. 03-02 (CR)): "Practitioners should refrain from asking their clients to unilaterally sign any provisional agreement with many spaces left blank where the essential terms of the transaction (e.g. price, deposits, completion date, other conditions) have not been agreed on". A PASP is a binding document and, if not handled properly, would give rise to disputes and complaints and may even affect the transaction. Licensees should abide by the guidelines set out in the aforesaid Circular.

Illustration (5)

Proof of Proper Authorisation

A licensee acted both for the vendors and the purchaser in a residential property transaction. The vendors were a couple. The licensee arranged for the purchaser to sign a provisional agreement for sale and purchase (“PASP”) first. Later, when the purchaser received the PASP, he noticed that one of the vendors had signed the agreement in her own capacity as well as on behalf of the other vendor. The purchaser was not shown or given any document showing proper authorisation for the signing of the PASP. The purchaser later noted that the vendors’ solicitors did not cash his cheque for the deposit. The vendors neither proceeded with the signing of the formal agreement for sale and purchase nor paid any compensation to the purchaser. They argued that the PASP was ineffective as it was not properly signed by all of them.

Commentary and Suggestion:

In this case, the licensee explained that in arranging for the signing of the PASP, he did not expect that only one of the vendors had actually shown up for the signing of the PASP. However, the licensee did not ask the vendor attending the signing of the PASP to produce any authorisation from the absentee vendor. Hence, the licensee failed to protect his client’s interest for he failed to ensure that the signatory had been properly authorised to sign on behalf of the absent vendor in the transaction; the licensee thus failed to comply with paragraph 3.4.1 of the *Code of Ethics*.

According to the Practice Circular on proper authorisation by absent contracting party (No. 06-02 (CR)), before the licensee accepts any appointment of agency and/or deals with any person claiming to be the authorised representative of the absent contracting party (“the representative”) in a sale or purchase transaction, the representative must be able to produce a power of attorney duly executed by the absent contracting party authorising the representative to enter into the transaction concerned and to execute the relevant document, including but not limited to the estate agency agreement, for and on his behalf. It is insufficient and highly risky simply to request the representative (whether a co-owner or otherwise) to sign a declaration to the effect that he has or will have proper authorisation from the absent contracting party and that he will be personally responsible for all consequences.

According to section 12(7)(b) of the Practice Regulation, a licensed estate agent shall ensure that the identity of the vendor and of the owner of the residential property concerned are the same or, if they are different, that the vendor has authority to sell the property before releasing any deposit money to the vendor.