

### **Paragraph 3.5.1 of the *Code of Ethics***

Estate agents and salespersons shall, in fulfilling their duties, exercise due care and due diligence.

## **Illustration (1)**

### **Providing an Incorrect Property Age**

A licensee acted for both the vendor and purchaser in a residential property transaction. The licensee arranged for the purchaser to inspect the property twice. The licensee informed the purchaser that the age of the property was 15 years during both inspections. In the second inspection, the licensee showed a copy of the land search of the property and pointed to the record of the Deed of Mutual Covenant ("DMC") as proof of the age of the property.

The purchaser then signed a provisional agreement for sale and purchase for the property with the vendor and also paid the vendor a deposit of \$300,000. The purchaser later discovered from the occupation permit of the property that the age of the property was 26 years.

The purchaser thus decided not to proceed with the purchase. The deposit was forfeited to the vendor.

### **Commentary and Suggestion:**

In this case, before providing information to his client regarding the age of the property, the licensee did not exercise due care and due diligence to verify the accuracy of the information, and had thus caused loss to the purchaser. The licensee therefore failed to comply with paragraph 3.5.1 of the *Code of Ethics*. The licensee had hastily inferred the age of the property by the date of the DMC of that property. However, a DMC does not have to

be entered into until there is a sale of the units of the building to different owners. A DMC may be entered into a few years or a few decades after the occupation of the building. In fact, it is not difficult for licensees to ascertain the age of a property. Generally, information concerning the age of a property can be ascertained from the occupation permit issued by the Buildings Department or through the Property Information Online service provided by the Rating and Valuation Department.

Under section 36(1)(a)(i) of the Ordinance, every licensed estate agent who acts for a vendor (or landlord) is required, for as long as he so acts, to have in his possession or control certain prescribed information as regards every property in relation to which he has entered into an estate agency agreement. The prescribed information that is required is:

- In the case of a sale and purchase of a residential property in Hong Kong, the prescribed property information to be included in Part B of Part 1 of the Property Information Form (Form 1), e.g. ownership, encumbrances, floor area, year of completion, user restriction, terms of Government lease etc.; and
- In the case of a lease of a residential property in Hong Kong, the prescribed property information to be included in Part B of the Leasing Information Form (Form 2) e.g. ownership, encumbrances, floor area, year of completion, user restriction, restrictions on leasing etc.

## **Illustration (2)**

### **Failing to Exercise Due Diligence to Verify the Information on Floor Area**

A licensee informed his purchaser client during the inspection of a two-room residential property that the floor area of the property was 815 square feet. Subsequently, the purchaser entered into a provisional agreement for sale and purchase with the property owner through the arrangement of the licensee.

Later on, the purchaser discovered from various sources that the floor area of the property she bought was smaller than what the licensee had told her. It turns out that the licensee had actually inferred the floor area of the property by the area information records of other two-room units on different floors of the same building.

However, according to the information of the Rating and Valuation Department (“RVD”), the saleable area of the property is 520 square feet whereas the saleable area of other two-room units on different floors are about 620 square feet.

### **Commentary and Suggestion:**

In this case, the licensee should have obtained the area information of the property through the Property Information Online service of the RVD or the agreement for sale and purchase of the first assignment of the property registered in the Land Registry (“first agreement”), and should have provided that information to the purchaser. Before taking reasonable steps to

verify the related information, the licensee should not have hastily inferred that the floor area of the property was the same as that of other units on different floors of the same building. The licensee thus failed to comply with paragraph 3.5.1 of the *Code of Ethics*.

Providing accurate property information to a client is one of the most important duties of licensees. Under the Practice Regulation, licensees are required to complete a Property Information Form (Form 1) in the case of a sale and purchase, or a Leasing Information Form (Form 2) in the case of a lease in accordance with the directions and instructions specified in the forms. For the purpose of completing the floor area information of the property in Part B of the forms, licensees are required to obtain the saleable area of the property provided by the RVD or as stipulated in the first agreement. If the saleable area of the property cannot be obtained from either the RVD or the first agreement, licensees should tick the relevant box in the forms stating that no such information can be obtained from either the RVD or the first agreement.

According to the guidelines in the Practice Circular regarding the provision of floor area information for second-hand residential properties (Circular No. 12-02 (CR)), licensees are required to follow the guidelines below in the provision of floor area information of a property:

- (a) If the saleable area of the property can be obtained from either the RVD or the first agreement, licensees must, before

providing any other floor area information of the property, provide the saleable area of the property and clearly state that the floor area so provided is the saleable area of the property;

- (b) Licensees may provide the gross floor area or other floor area information of the property if:
  - (i) the saleable area of the property has been provided in compliance with paragraph (a) above; or
  - (ii) the saleable area of the property (e.g. village type houses) cannot be obtained from either the RVD or the first agreement; and
- (c) In either case as mentioned in paragraph (b) above, the licensee concerned must also, upon the Authority's request, produce evidence to substantiate that the gross floor area or other floor area information of the property was obtained from a reasonable source or there was a proper basis upon which he could rely for supplying such information.

Licensees must exercise due care and due diligence to ensure that any information they provide is not false or misleading.

The management of an estate agency should establish proper procedures or systems to supervise and manage its estate agency business to ensure that its staff comply with the guidelines above.

## **Illustration (3)**

### **Misrepresentation on the Location of the Refuse-collection Point**

A couple asked a licensee to look for a rental residential property. The licensee arranged for them to view a flat twice. During the inspections, the couple repeatedly asked the licensee whether the podium of the block was being used to collect refuse. The licensee, without verification, claimed that the podium was for the temporary parking of refuse-collection vehicles only and that the refuse-collection point was in another block of the housing estate. In fact, the refuse-collection point was on the podium floor of the block in question.

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

In this case, although the tenants asked the same question repeatedly indicating that the location of the refuse-collection point was of great concern to them, the licensee did not take any steps to verify the information but gave an incorrect answer. In fact, he could have examined the Deed of Mutual Covenant in respect of the property or enquired with the management office of the building to ascertain the location of the refuse-collection point. The licensee did not exercise due care and diligence in fulfilling his duties, and he thus failed to comply with paragraph 3.5.1 of the *Code of Ethics*.

Licensees are responsible for providing accurate property information to clients. Consumers looking for a home rely heavily on the information provided by licensees. The Authority reminds

licensees that when clients raise any questions about the properties, they should exercise due care and due diligence to ascertain the requested information and if they are not sure about the answer, they should tell their clients so and they must not provide information which may be inaccurate or unclear.

## **Illustration (4)**

### **Changing the Terms of a PASP Without the Parties' Consent**

A licensee acted for both the purchaser and the vendor. He first arranged for the purchaser to sign a provisional agreement for sale and purchase ("PASP"), which contained the provision that should the purchaser fail to complete the transaction, the deposit shall be forfeited to the vendor but the vendor shall not sue the purchaser for any liabilities or damages. However, when the licensee later discussed the PASP with the vendor, the licensee, at the request of the vendor, amended the aforesaid provision to provide for specific performance in the event of a breach. The licensee arranged for the vendor to sign the amended PASP and passed the purchaser's \$300,000 deposit cheque to the vendor. Meanwhile, the purchaser changed his mind and stopped payment of the cheque. This led to litigation between the two parties.

### **Commentary and Suggestion:**

Under common law, agents have the responsibility to protect their client's interests. Licensees should therefore exercise due care when arranging for clients to enter into a PASP.

A PASP is a legally binding document. The terms and conditions of a PASP should clearly reflect the intent of both parties and the agreement should be signed only after both parties have understood and agreed to the terms. In the case of dual agency, licensees should exercise due care in protecting the interests of

both. They should therefore ascertain whether both parties have agreed to the terms and obtain their written consent to the agreement. If either the purchaser or the vendor would like to amend the terms of a PASP, licensees should act in an impartial manner and advise both parties of the pros and cons of such amendment. They should understand their client's needs and resolve the matters through negotiation.

In this case, the amendment of such a term to the PASP was a significant change, as the liabilities of both the purchaser and vendor had totally changed. The licensee should have obtained the prior consent of the purchaser before making the amendment and to avoid any unnecessary dispute in the future, he should also have arranged for the purchaser to initial against the amendment before passing the deposit to the vendor. However, the licensee failed to exercise due care and diligence in the aforesaid transaction, and thereby failed to comply with paragraph 3.5.1 of the *Code of Ethics*.

## **Illustration (5)**

### **Failing to do a Land Search**

A couple appointed a licensee to help them purchase a residential property. The licensee acted for both the vendor and the purchasers in the transaction. During the process, the wife clearly instructed the licensee twice to check whether there had ever been any deaths at the property. The licensee told her that no deaths had ever occurred at the property. In fact, a death certificate of a former owner of the property was registered in the land register of the property. The copy of that death certificate states that a few years earlier, the former owner jumped from the property and died. The purchasers could also find the relevant news in newspapers.

### **Commentary and Suggestion:**

In this case, the licensee did not conduct a land search and supply a copy of the land search to the purchasers immediately before the provisional agreement for sale and purchase ("PASP") was entered into, and thus failed to comply with section 13(4) of the Practice Regulation. In addition, he did not verify whether there had been a death at the property according to the purchasers' instruction when fulfilling his duties, and therefore failed to observe paragraph 3.5.1 of the *Code of Ethics*.

The provision of accurate and up-to-date property information to the client is an important duty of licensees. A licensee who acts for the vendor/landlord must take the following steps according to the Practice Regulation:

- Obtain the prescribed property information;
- Complete Form 1/Form 2 and provide it to clients;
- Carry out a land search immediately before entering into an agreement for sale and purchase or a tenancy agreement and supply a copy of the land search to the purchaser/tenant of the property.

Moreover, any statements provided to clients concerning a property must be accurate and based on facts. A licensee should enquire into any matter when asked by a client and report the result to the client for his consideration.

In fact, if the licensee had conducted a land search of the property, he could have found that a death certificate of the former owner was registered with a memorial number in the land registry of the property. The licensee might apply for a copy of the death certificate to find out the details of the owner's death and tell the client about it.