

### **Paragraph 3.6.2 of the *Code of Ethics***

Estate agents and salespersons shall, in the event of possible or potential conflict of interest (such as representing both the vendor and the purchaser), disclose to their clients that they are so acting. Any pecuniary or other beneficial interests in relation to the property shall be disclosed fully to all parties concerned.

## **Illustration (1)**

### **Failing to Disclose a Relationship with a Vendor**

A licensee was the sole proprietor of an estate agency firm. A purchaser looked for a residential property through the firm. The purchaser eventually entered into a provisional agreement for sale and purchase with a vendor of a residential property through the arrangement of the licensee.

Before signing the provisional agreement for sale and purchase of the property, the licensee told the purchaser that the vendor was a company ("ABC Limited"). The licensee was in fact the director and shareholder of ABC Limited. However, she did not disclose the same to the purchaser.

### **Commentary and Suggestion:**

In this case, the licensee failed to disclose to the purchaser her relationship with the vendor. The licensee thus failed to comply with paragraph 3.6.2 of the *Code of Ethics*.

Under common law, an agent owes a fiduciary duty to his client. Since the agency relationship is one of trust and confidence, the agent must not allow any personal interest (including the interest of the agent himself or that of his close relatives) to conflict with his duties to the client. Where any potential conflict arises, the agent should make a full disclosure to the client of all the relevant facts, so as to give the latter an opportunity to decide whether to continue with the proposed transaction or with the appointment of the agent. Otherwise, he will be in breach of his

fiduciary duty and is liable to account for any profit that he has made from such transaction in addition to other remedies available to the client for the agent's breach of duty.

Generally, a licensee may not purchase or rent property from his client, and he may not sell or let his own property to his client unless he has made a full disclosure of all the relevant facts to his client before entering into any agreement with his client and has obtained his client's informed consent to such a transaction.

Sections 36(1)(a)(vi) and 36(3) of the Ordinance require the estate agent or salesperson concerned to disclose to a client full particulars of any pecuniary or other beneficial interest which such estate agent or salesperson has in the property concerned, together with particulars of any benefit, including any commission or any interest of any kind whatever in such property, whether monetary or otherwise, which will accrue to such estate agent or salesperson should the property be disposed of.

Besides, a licensee who enters into an estate agency agreement on behalf of an estate agency with his client in compliance with the Practice Regulation must disclose the pecuniary or other beneficial interest which the following party has in the property concerned:

- Him or his nominee; or
- His specified relative (meaning his spouse, parent, child, brother or sister), or any nominee of his specified relative; or

- The estate agency or any employee/substantial shareholder/partner/director of the estate agency.

Particulars of such interests (if any) must be specified in the estate agency agreement.

## **Illustration (2)**

### **Failing to Disclose Dual Agency**

A purchaser brought a residential property from the vendor through a licensee. Some disputes arose between the licensee and the purchaser during the course of the transaction and the purchaser discovered that the licensee had failed to disclose to him that the licensee also acted for the vendor in the transaction.

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

Where a licensee acts for both parties, he should disclose to his clients that he is so acting in order to enable his clients to be alerted of the same. Where the licensee and his clients have entered into Form 3, 4, 5 or 6, such disclosure should be fully made in the Forms. On such a form, the licensee has to state if the agency is single or dual or potentially dual.

Failure to disclose to a client his dual agency relationship or failure to disclose pecuniary or other beneficial interests in relation to the property is a breach of paragraph 3.6.2 of the *Code of Ethics*.

In fact, according to section 36(1)(a)(vii)(A) of the Ordinance, a licensed estate agent shall, as regards a particular property in relation to which he has entered into an estate agency agreement and acts both for the vendor and for the purchaser, inform both of such clients that he is so acting.