

Smart Property Transaction Tips



EAA
地產代理監管局
ESTATE AGENTS AUTHORITY



Foreword

The majority of property transactions, probably the most important life-time investment decision for most people, are handled by estate agents in Hong Kong. In order to regulate the practice of estate agents in Hong Kong, the Estate Agents Authority (EAA) was established in 1997. Over the years, the EAA has strived to enhance the professional standards and ethics of estate agents, and to promote fairness and transparency in property transactions.

The EAA also considers it vital to promote consumer information related to property transactions and the appointment of estate agents. We believe that the more knowledge consumers have, the better they are able to protect their own interests.

The objective of this booklet is to explain to consumers, through simulated scenarios, the responsibilities of estate agents and the points to note in property transactions.

Estate Agents Authority
December 2012

Disclaimer

The information provided in this booklet is for reference only. There is no intention whatsoever to provide legal opinion. Readers are strongly advised to seek legal advice on matters encountered in specific situations. The EAA shall not be held liable for any loss or damage incurred or suffered in connection with, arising from, or in reliance on, the whole or any part of this booklet.



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1 Appointment period and commission

Case

Amy appointed estate agency Company A to sell her residential property. When she was about to sign the Estate Agency Agreement with Ben, the estate agent from Company A, Ben persuaded her to appoint Company A as an exclusive agent, and promised to sell her property for the best price he could. Ben also suggested a commission of 1% of the transaction price and set an open-end appointment period, which would not expire until further notice.



According to the exclusive agreement, Company A would act as Amy's sole agent and represent her in matters relating to the sale of the property, including advertising and introducing prospective buyers etc. In case of Amy's selling the property through another estate agent during the appointment period, Company A would still be entitled to the commission from her.



Two months had passed but the property was still not sold. Amy then appointed Company B and successfully sold her property. Later, she received an invoice from Company A for the commission payment. Amy claimed that she had already ceased to use the services of Company A due to its poor performance and therefore she did not need to pay the commission. Both parties later resorted to litigation.





Relevant regulations

An Estate Agency Agreement (Agreement) is a legally binding document. Once the Agreement is signed, any revisions must be mutually agreed by both parties. Generally speaking, the Agreement cannot be cancelled or amended unilaterally. In the Estate Agents Ordinance (EAO), there is no provision on the validity period of the appointment and the amount of commission. These terms should be settled by negotiation between estate agents and their clients and stated clearly in the Agreement. In this case, as Amy sold her property during the validity period of Company A's appointment, she may have to pay commission to Company A.

Useful tips:

- 1 After being appointed to handle property transactions, an estate agent has to sign an Agreement with his client. To avoid any disputes, the Agreement should state clearly the agreed validity period of the appointment, whether it is an exclusive agency and the amount or rate of commission etc.
- 2 Consumers should not use "until further notice" as the expiry date of the validity period of an appointment, but should instead clearly state the commencement and expiry dates of the appointment.
- 3 The EAO does not stipulate the amount or rate of commission. It should be negotiated between the estate agent and his client.
- 4 Consumers should carefully consider whether to appoint an estate agent as an exclusive agent, and if they decide to do so, the validity period of the appointment should not be too long.
- 5 If consumers sell their properties directly to friends or relatives instead of through an estate agent, no commission is payable to the estate agent.

2

Accurate property information

Case

Chris wanted to buy a property of less than 20 years old in urban area but he could not afford high prices. An estate agent, David, introduced an affordable flat in urban area to Chris. During two inspection visits, David told Chris that the property was only 15 years old. At the second inspection visit, in order to prove the property's age, David gave Chris a copy of land search record indicating the date of the deed of mutual covenant of the building of which the property was formed part.



Chris signed a provisional sale and purchase agreement with the seller of the property and paid \$300,000 as deposit. Later, Chris discovered from the relevant occupation permit that the property was in fact 26 years old.



Against this information, Chris decided not to proceed with the transaction. The deposit paid by him was thus forfeited by the seller. Chris lodged a complaint with the EAA and David was disciplined by the EAA after subsequent investigation.



Relevant regulations

The Estate Agents Ordinance (EAO) states that in handling a property transaction, an estate agent representing the seller should provide the seller with a duly completed Property Information Form. The agent should fill in the Form with accurate property information obtained from prescribed sources, including the saleable area of the property, the year of completion, the ownership and encumbrances registered in the Land Registry. The above information should be provided to the buyer together with a statement made by the seller about the property. The agent should also provide to the buyer the most up-to-date copy of the land search immediately prior to the signing of a sale and purchase agreement.

Useful tips:

- 1 When an estate agent is appointed by a seller to sell his property, the agent should obtain the property information from prescribed sources under the EAO, and should complete the Property Information Form.
- 2 An estate agent should urge the seller to provide any additional information about the property, including any additions or alterations made to the structure of the property. Such information should be included in the "Vendor's Statement" section on the Property Information Form in order to avoid any disputes in the future.
- 3 As clients rely heavily on the property information provided by estate agents, estate agents should ensure that the information is accurate. Otherwise, they may be in breach of the EAA's regulations.

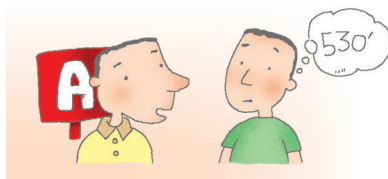
3 Knowing the saleable area of the property

Case

Edward and his girlfriend planned to buy a new flat to live together after getting married. Their target was to buy a flat of over 400-square-feet for about \$2 million. They appointed two estate agencies, Company A and Company B, to identify a flat for them. Both agencies introduced to them flats worth \$2.5 million in the same area. The flat introduced by Company A had a purported size of 530 square feet, larger than the flat introduced by Company B.



Since the prices were the same, Edward visited the larger flat with Fred, an estate agent from Company A. Edward however felt that the flat appeared smaller than 500 square feet and he asked Fred about that. Fred replied that the figure was the flat's gross floor area provided by the owner and it should be correct.



Edward and his girlfriend then went to visit the flat introduced by Company B before making their decision. Gabriel, an estate agent from Company B, showed them a flat in the same building. Though the size of that flat was purported to be 450 square feet, it appeared to be more spacious than the flat introduced by Company A. Edward thus asked Gabriel how he obtained the flat's size. Gabriel replied that the figure was the flat's saleable area and presented to Edward the search record from the Rating and Valuation Department (RVD). Edward decided to buy the flat introduced by Company B finally.



Relevant regulations

According to the practice circular on the provision of the floor area information of second-hand residential properties issued by the EAA, agents are required to provide the saleable area of a second-hand residential property to their clients in advertisements and in provision of the floor area information of the property. They should obtain the property's saleable area information from the RVD or the agreement for sale and purchase of the first assignment of the property registered in the Land Registry (First Agreement). This practice circular comes into effect on 1 January 2013. Estate agents who fail to comply with the circular may be subject to disciplinary actions by the EAA.

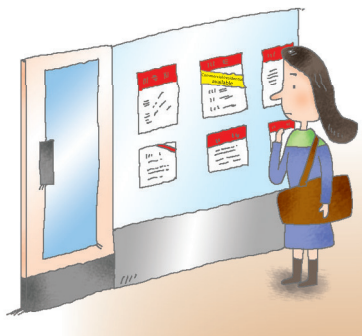
Useful tips:

- 1 The relevant regulations only require the provision of saleable area by agents in their provision of area information. The regulations, however, do not require the provision of price per square foot. If the price per square foot is provided, it should be stated whether it was calculated in terms of saleable area or gross floor area to avoid misrepresentation.
- 2 If the saleable area of the property (such as village house) cannot be obtained from either the RVD or the First Agreement, estate agents may provide the gross floor area or other floor area information of the property but they should provide evidence to prove such information is obtained from a reasonable source, such as the surveyor's report or the sales brochure provided by the developer.
- 3 The practice circular requires that the font size used in advertisement regarding the saleable area shall be no smaller than that of the gross floor area of the property.

4 Paying attention to the permitted use of a property

Case

Helen wanted to rent a flat in urban area but could not afford the high rent. She noticed a property advertisement in the shop window of an estate agency where Ivan worked. The property met her requirements in terms of location, rent and size. The advertisement stated that the flat was situated inside a commercial building but it was “suitable for commercial and residential use”.



Ivan arranged for Helen to view the property. The property was well furnished and neat. Ivan told Helen that the flat could be used for residential purpose despite it was situated in a commercial building. However, Ivan had not checked the property's occupation permit or the deed of mutual covenant of the building. The information on user restriction in the Leasing Information Form provided by Ivan was also left blank and he said he would provide it later.



Helen decided to rent the property. She signed a provisional tenancy agreement with the landlord and immediately paid the deposit. Two days later, Ivan provided Helen with the occupation permit which showed that the permitted use of the property was “office for non-residential use”. As the property was not permitted for residential use, Helen cancelled the tenancy agreement with the landlord and had to look for another flat.



Relevant regulations

The Estate Agents Ordinance stipulates that an estate agent is required to complete the Leasing Information Form after entering into an Estate Agency Agreement for Leasing of Residential Properties with his client. The information to be filled in the Form includes the user restriction of the property. In general, the information on user restriction would be prescribed in the occupation permit or the deed of mutual covenant. An estate agent is responsible for checking the permitted use of the properties that he handles and giving appropriate advice to his client.

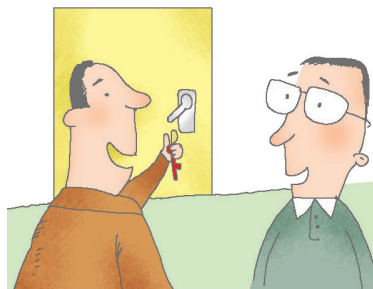
Useful tips:

- 1 The permitted use of units on the same floor and in the same building could differ.
- 2 The permitted use of a property cannot be concluded as residential even if it had been used for residential purpose by the former occupants or other units on the same floor were used for residential purposes. Its permitted use can be ascertained from the occupation permit or the deed of mutual covenant.
- 3 Violation of the permitted use of a property prescribed in the occupation permit may affect the title of the property and create problems in resale. Government departments may also issue an order or institute a prosecution.
- 4 To understand the user restriction of a property, buyers/tenants should obtain the completed Property Information Form/Leasing Information Form from the estate agent.

5 Reading the land search records carefully

Case

Joseph has been engaged in the estate agency business for many years, working mostly on the sale and purchase of properties of a large housing estate. Joseph's old classmate, Ken, wanted to move and appointed Joseph as his estate agent to sell his old flat and find another one for him in the large housing estate. Joseph identified a flat for Ken and arranged for him to inspect it. Two weeks later, Joseph arranged for Ken to sign a provisional agreement for sale and purchase (PASP) with the flat owner. Simultaneously, Joseph found a buyer for Ken's old flat so that Ken could move smoothly.



Joseph was aware that the law required an estate agent to carry out a land search and supply a copy to the buyer immediately prior to the PASP was entered into. However, he did not take it seriously as he thought he had just done the search two weeks before introducing the property to Ken, and he had made no mistake in his many years of dealings with properties of this housing estate. Joseph therefore did not carry out a land search immediately before the PASP was entered into.



Ken's lawyer later discovered that a charge has been registered against the property at the Land Registry by the property management company a week before the PASP was entered into for arrears of management fees. The lawyer was of the view that the charge might affect the title of the property and advised Ken to cancel the transaction. As Ken had already sold his old flat, he had to rent another flat hastily.



Relevant regulations

The Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation states that an estate agent should carry out a land search in respect of the property and supply a copy to the buyer or tenant immediately before the signing of the agreement for sale and purchase or tenancy agreement.

Useful tips:

- 1 Providing accurate and the most up-to-date property information to a client is an important duty of an estate agent. He should obtain the information from the prescribed sources and complete the Property Information Form.
- 2 An estate agent must carry out a land search immediately before the signing of the agreement for sale and purchase. Even if the agreement was entered into late at night, it would be considered non-compliant if the land search was carried out on the following day.
- 3 From the land search records of a property, buyers can ascertain the property owner's identity and whether the property is subject to any encumbrances, such as mortgage, demolition or alteration order or slope maintenance order.
- 4 If a demolition or alteration order is registered against a property, it implies that the property may have unauthorised structures. Buyers may face issues such as safety risks and defective title of the property. The Government may even exercise its right of re-entry or closure of the property.

6 Where to ascertain if a flat is “haunted”

Case

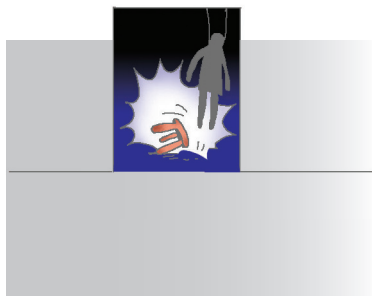
Leo and his wife wanted to buy a flat for their family and inspected a flat introduced by estate agent Mary. Since the couple was worried that the flat might be “haunted”, they asked Mary to check whether there were any deaths or “dirty things” in the flat. Mary replied that the flat had no such problem.



The couple decided to buy the flat and Mary arranged for them to enter into a provisional agreement for sale and purchase (PASP). Before signing the PASP, Leo was still not relieved and asked again if anyone died in the flat before and if the flat was “clean”. Mary reaffirmed that the flat had no such problem. The couple then signed the PASP.



After the transaction was completed, Leo accidentally discovered an old news article dated several years ago and it reported that a man with a similar name as that of the former flat owner committed suicide in his residence. The address of the deceased reported in the article was in the same building and on the same floor as Leo’s new home. Leo further found that the land search of his new home contained a registration of an entry relating to the death of the former owner. However, Mary had neither mentioned anything about the incident, nor provided the couple with the copy of the land search record.



Relevant regulations

The Estate Agents Ordinance does not require estate agents to provide clients with information on whether a property is “haunted”. There is also no legal definition for “haunted flat”. However, if a buyer asks related question to the estate agent, the estate agent should try his best to provide the buyer with related information. According to the Code of Ethics issued by the EAA, estate agents and salespersons should protect and promote the interests of their clients. They should also exercise due care and due diligence in fulfilling their duties.

Useful tips:

- 1 When asking an agent on whether the property is “haunted”, vague wordings such as “dirty things” or “unusual things” should be avoided. Instead, buyer should ask specific questions, for example, “have there been any unnatural deaths, such as suicide or homicide in the property or in other flats on the same floor?”
- 2 The buyer may also try to verify whether the property is regarded as a “haunted flat” from other sources, including land search records, the property valuation by a bank, records of the property management office, and the Internet.
- 3 If an estate agent does not carry out reasonable and practicable steps to check whether any death incident had occurred in a property after being asked by a client, he may be in breach of the Code of Ethics.

7 Beware of the risks associated with unauthorised building works

Case

Nancy appointed estate agent Richard to find a new flat for her. Richard arranged for her to inspect Patrick's flat. When Patrick appointed Richard to sell his property, he told Richard that there were alterations to his flat, which had not been approved by the Buildings Department. Patrick was uncertain whether he had received any demolition order. He instructed Richard to inform the prospective buyer accordingly.



During the inspection of the property, Nancy found the property an ideal choice as it looked larger than expected and its price was below the market price. However, Richard neither relayed to Nancy what Patrick had said nor completed the particulars of subsisting encumbrances in the Property Information Form he provided to Nancy. The alterations were not mentioned in the section of Vendor's Statement of the Form either. Moreover, Richard did not provide Nancy with a copy of the land search record of the flat.



Nancy decided to buy the property. Before signing the provisional agreement for sale and purchase (PASP), Nancy asked Richard whether the property was subject to any building order or whether there were any unauthorised building works in it. Richard told her not to worry. Yet later, Nancy learned that there were alteration works to the property and the property was also subject to a building order. Nancy was advised by her lawyer that the unauthorised building works and building order may affect the title of the property. In view of this, she cancelled the deal and claimed back the paid deposit through litigation.



Relevant regulations

If a building order has been issued by the Government in respect of any unauthorised building works of a property and the order has been registered at the Land Registry, the relevant encumbrances will be set out on the land search register of the property. An agent should state the related encumbrances on the Property Information Form and attach with it a copy of the land search. The EAA has also issued guidelines requiring estate agents to ask sellers/landlords to provide the details of any additions or alterations to the property, and to remind buyers/tenants of the risks associated with buying or renting such properties.

Useful tips:

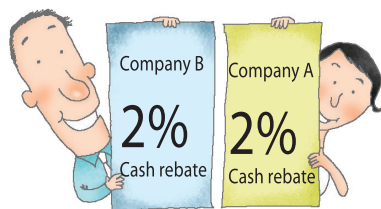
- 1 If there are unauthorised building works in a property, the Government may require the property's owner to demolish those building works. Should the owner refuse to demolish those building works, the Government may carry out the demolition for the owner and may sell the property to recover the demolition cost. Hence, there may be problems with its resale or application for mortgages.
- 2 If a buyer is willing to buy a property with unauthorised building works, the seller should clearly state so and clarify the related responsibilities of both parties in the sale and purchase agreement, including which party will be responsible for the cost of demolition and restoration, as well as other legal liabilities.



8 Setting out promises of incentives in writing

Case

After visiting a number of first-hand residential developments, Simon came to know a few estate agents. One of the agents, Tiffany from Company A, told him that a cash rebate equivalent to 2% of the property price would be offered to him upon his purchase of a flat in a first-hand development. Later, another agent Vincent from Company B also introduced a flat of the same development to Simon. When Simon told Vincent about the rebate offered by Company A, Vincent said that Company B would offer the same preferential package to him.



Simon decided to buy the flat through Vincent. While Vincent was arranging for Simon to sign a provisional agreement for sale and purchase (PASP) with the developer, Simon received a call from Tiffany, telling him that an extra \$5,000 would be offered to him on top of the 2% rebate. Vincent noticed Simon's interest in Tiffany's offer and hence promised him that the same amount of rebate would also be offered by his company. Considering that both companies offered the same preferential package, Simon decided to sign the PASP through Company B.



Simon asked Vincent to set out the amount of rebate in writing but Vincent persuaded him to sign the PASP first as it would take time for his company to issue a confirmation letter. Later, despite Simon's repeated request for a written confirmation, Vincent did not provide it to him. Simon subsequently made his request directly to Company B but the company replied that no rebate would be given without a written confirmation. Simon then filed a claim against Company B in the Small Claims Tribunal and recovered the rebate.



Relevant regulations

According to the practice circular issued by the EAA on the conduct in the promotional activities of first sales, estate agents should set out promises of incentives (including any gifts, discounts or rebates) to prospective buyers in writing. In addition, the Code of Ethics requires agents to provide their services with honesty and protect clients against any fraud or misrepresentation. Estate agents failing to honour their promises may be regarded as bringing disrepute to the trade.

Useful tips:

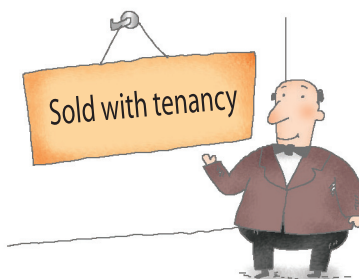


- 1 Buyers should take verbal promises of incentives made by estate agents cautiously. They should request the offers be made in writing with clear representation as to whether the package is offered by the developer or by the estate agency.
- 2 Rebates or preferential packages offered by an agent may be subject to and conditional upon a number of terms and conditions. For example, estate agent may give out the rebate only upon receipt of commission from developer. Buyers should be well informed about the terms and conditions of a rebate before making their decision on whether to accept it.
- 3 Unlike the sale of second-hand residential properties, estate agents handling the sale of first-hand residential properties usually only act for the developer instead of the buyer. Buyers are advised to study more about the developments and related preferential packages in order to safeguard their interests.

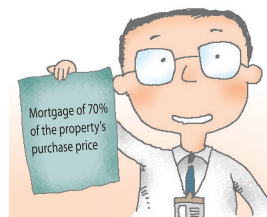
9 Valuation and mortgage information should be obtained before home buying

Case

Wilson owned a property subject to an outstanding mortgage loan. He wanted to buy another flat for investment. Through the introduction of estate agent Andy, Wilson chose a flat for sale with a lease. After Wilson and the owner agreed on the price, Andy arranged for both sides to enter into a provisional agreement for sale and purchase (PASP).



Before signing the PASP, Wilson did not have the property valued by a bank. Instead, he only asked Andy whether he could obtain a mortgage loan equivalent to 70% of the price. Andy replied that recent home buyers had been able to borrow 70% mortgage loans from banks. After signing the PASP, Wilson applied for 70% mortgage loan from three banks, but was refused by all of them.



A bank explained to Wilson that his mortgage application was rejected because only 50% mortgage loan would be granted for property with a lease. Another bank explained, since Wilson owned a flat with an outstanding mortgage loan, the bank needed to lower his debt-to-income ratio and could only grant him a loan of less than 50% of the property price. Moreover, the valuation of the property was lower than the transaction price. Due to limited financial resources, Wilson was unable to come up with more down payment to purchase the property. He had to cancel the deal and forfeit his deposit.



Relevant regulations

The Hong Kong Monetary Authority (HKMA) issues guidelines on the granting of mortgage loans for properties by banks from time to time. The debt-to-income ratio for mortgage loans and loan-to-valuation ratio also vary with the guidelines. According to the Code of Ethics, estate agents should keep themselves informed of any laws, government regulations, essential facts and developments in the real estate market in order to advise their clients in a responsible manner.

Useful tips:

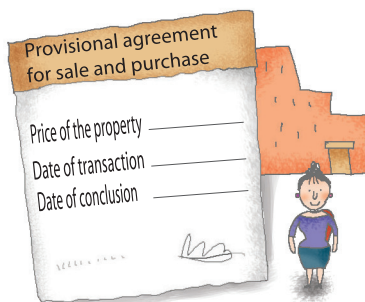
- 1 Before making property purchases, home buyers should understand their abilities to repay mortgage loans. They should also make enquiries with banks about the valuation of the property and whether they can obtain sufficient mortgage loans to finance the purchases.
- 2 Generally speaking, it may be more difficult for the self-employed, people with irregular incomes and the retired to be granted a mortgage loan. Besides, the HKMA may, in light of market conditions, tighten the debt-to-income ratio and the loan-to-valuation ratio for certain groups of people and properties.
- 3 According to the practice circular on estate agents' promotion of first-hand residential properties, estate agents must not make any representations to assure a prospective buyer that he/she will successfully obtain a mortgage loan to finance his/her property purchase or the terms of mortgage loans.

10

Never sign a provisional agreement with essential terms left blank

Case

Olivia intended to buy a flat in a large housing estate. Estate agent Chester told her that the flat she intended to buy was very much sought after, hence he persuaded Olivia to sign a provisional agreement for sale and purchase (PASP) in order to express to the owner her sincere interest in buying the flat. In the PASP, important data such as the signing date, the property price and the transaction date were left blank. But it stated that if the buyer did not abide by the agreement, the seller could forfeit the deposit without taking further actions against the buyer.



The owner agreed to sell the flat to Olivia. While Chester was negotiating the details of PASP with the owner, Olivia gave a cheque for the deposit to Chester. She instructed Chester to pay the deposit once the agreement was duly signed by the owner but the transaction period must not be less than 60 days as she would need time to apply for a mortgage loan.



Olivia later found that the completion date was set at 40 days from the signing date in the PASP. Moreover, Chester added a "must buy and must sell" clause in the PASP as per the owner's request. Olivia decided to cancel the deal as she did not have sufficient time to apply for a mortgage loan. She stopped the cheque and it resulted in litigation between the two parties.



Relevant regulations

A PASP is a legally binding document. The clauses in the agreement should be mutually discussed and agreed by both parties of transaction before the signing of the agreement. Any additional conditions such as the “must buy and must sell” clause and clauses relating to the sale of the property with unauthorised building works and related responsibilities should be clearly stated. As unauthorised building works would affect the title of the property, if there is a clause stating that property is sold on an “as is” basis in the PASP and the buyer has inspected the property, the buyer’s interests may still not be adequately protected.

Useful tips:

- 1 The buyer should not sign the PASP before a consensus is reached with the owner in respect of the transaction terms and conditions.
- 2 If either party wishes to change any terms in the PASP, the estate agent may only revise the PASP with the consent of the other party. Any revised terms and conditions should be endorsed and initialed by both parties.
- 3 Where possible, the estate agent should arrange the signing of the PASP by both parties at the same time, in order to avoid any sudden changes of mind or any changes of the property price from the originally agreed price.





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