

Circular

Circular No. 13-01 (CR)

- **Conduct a historical and current land search of the property if its current land search reveals that the vendor has been the current registered owner of the property for less than five years.**
- **Check the land search(es) to see if there was any registration of a deed of gift/assignment at nil consideration.**
- **Where the land search reveals that a deed of gift/assignment at nil consideration made within five years from the date of the land search has been registered, licensees should:**
 - (i) inform clients of the existence of the deed of gift/assignment at nil consideration;**
 - (ii) alert clients that the deed of gift/assignment at nil consideration may affect the title of the property and that there is a risk that the purchaser may not be able to obtain sufficient mortgage loan to complete the purchase of the property; and**
 - (iii) advise clients to seek legal advice on the risk of selling/purchasing the property before they enter into any agreement for sale and purchase of the property.**

Deed of Gift/Assignment at Nil Consideration

The Estate Agents Authority (“EAA”) has received complaints that licensees have not properly brought to the attention of the purchasers the risk of buying properties involving a deed of gift/assignment at nil consideration. Licensees should be alerted to the problems that may arise from the existence of a registered deed of gift/assignment at nil consideration and take appropriate steps to protect their clients’ interests.

Transfer of Property by Way of Gift

- (2) A deed of gift is an instrument which effects the transfer of legal

ownership in a property from the owner (donor) by way of gift to the donee. In some such cases, the change of ownership from the owner (donor) by way of gift to the donee may be effected by the execution of a deed of assignment at nil consideration. For example, where a flat under the Home Ownership Scheme of the Hong Kong Housing Authority (“HKHA”) is still subject to the terms, covenants and restrictions mentioned in the Schedule to the Housing Ordinance (Cap. 283), a change of ownership of the flat under the prevailing policy of the HKHA may only be effected by way of a Deed of Assignment at nil monetary consideration (except in bankruptcy cases).

The Effect of the Bankruptcy Ordinance on a Gift

- (3) 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. Therefore, the title to a property may be adversely affected if a deed of gift/assignment at nil consideration in favour of the vendor/vendor’s predecessor-in-title is so set aside by the trustee in bankruptcy. The risks of purchasing such a property include the purchaser not being able to obtain any or sufficient mortgage loan to complete the purchase and/or to prove good title in the resale of the property.

Land Search

- (4) If a deed of gift/assignment at nil consideration is registered against the current registered owner’s property, it may be revealed in a current land search of the property. However, a deed of gift/assignment at nil consideration executed in favour of the vendor’s predecessor-in-title may only be revealed in a historical and

current land search of the property.

- (5) In view of the potential problems of purchasing properties involving a deed of gift/assignment at nil consideration, licensees should take the following steps to protect their clients' interests before arranging for the parties to enter into an agreement for sale and purchase of the property:
- (a) If a current land search of the property reveals that the vendor has been the current registered owner of the property for less than five years from the date of the land search, licensees should further conduct a historical and current land search of the property concerned.
 - (b) Licensees should carefully check the land search(es) to see if there was any registration of a deed of gift/assignment at nil consideration against the property.
 - (c) If it is revealed from the current land search or the historical and current land search (as the case may be) 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 within 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 and that the purchaser may not be able to obtain sufficient mortgage loan to complete the purchase of the property; and
 - (iii) 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.

- (6) If, despite the existence of the registered deed of gift/assignment at nil consideration and the clients having been alerted to the risks as stated above, the clients still decide to proceed with the transaction and enter into an agreement for sale and purchase (with or without legal advice), the licensee concerned, in order to protect his own interests in case of dispute, is advised to obtain a written acknowledgement from his clients stating that they have been informed that (i) there was a registered deed of gift/assignment at nil consideration; (ii) the deed of gift/assignment at nil consideration may affect the title of the property; (iii) the purchaser may not be able to obtain sufficient mortgage loan to complete the purchase; and (iv) they have been advised to seek legal advice.

For the avoidance of doubt, the requirements set out in paragraph (5) above are in addition and without prejudice to the duty of licensees to alert their clients to any subsisting encumbrances such as an estate duty charge as may be registered against the property and revealed in the land search and to advise their clients to seek legal advice thereon, where appropriate.

Licensees are reminded that under paragraph 3.4.1 of the Code of Ethics issued by the EAA, they should protect and promote the interests of their clients. Licensees who fail to comply with the above guidelines may be subject to disciplinary action by the EAA.

This Circular shall take effect on 1 April 2013.

March 2013

Holders of Statements of Particulars of Business
 should bring this Circular to the attention of all staff
 engaged in estate agency work