

紀律處分個案分享 — 更改臨約條款前必須取得買賣雙方書面同意

Inquiry hearing case — Written consent of both purchaser and vendor needed before changing the terms of a PASP

臨時買賣合約（臨約）是具法律約束力的文件，因此倘若買方或賣方欲更改臨約的條款，從業員應取得另一方的書面同意，或安排其在有關修訂旁簡簽。

在一宗紀律研訊個案中，從業員為雙邊代理。他先安排買方單方面簽署臨約，該臨約訂明若買方未能履行合約，賣方可以沒收訂金，但不可以向買方進一步追究責任或要求賠償損失。然而，該從業員其後與賣方商討合約條款時，按賣方的建議將臨約改為「必買必賣」協議，並把買方的30萬元訂金支票交給賣方。另一方面，買方改變主意，停止兌現支票，買賣雙方因而進行法律訴訟。

該從業員按賣方要求將合約改為「必買必賣」的合約，把雙方在是次交易中須承擔的法律責任完全改變了，屬條款上的重要修訂，但該從業員未有取得買方的書面同意，就把訂金交給賣方，沒有盡量小心和盡一切應盡的努力，未有遵守《操守守則》第3.5.1段。

結果該從業員被監管局紀律委員暫時吊銷牌照14天，他的牌照亦被附加條件。

A provisional agreement for sale and purchase (PASP) is a legally binding document. If either the purchaser or the vendor would like to amend the terms of a PASP, practitioners should seek the written consent of the other party or arrange for them to initial the amendment.

In this inquiry hearing case, a practitioner acted for both the purchaser and the vendor. He first arranged for the purchaser to sign a PASP, which contained the provision that should the buyer fail to complete the transaction, the deposit shall be forfeited to the vendor but the vendor shall not sue the buyer for any liabilities or damages. However, when the practitioner later discussed the PASP with the vendor, the practitioner, at the request of the vendor, changed the PASP to a “must buy, must sell” agreement and passed the buyer’s \$300,000 cheque to the vendor. On the other hand, the purchaser changed his mind and stopped payment of the cheque. This led to litigation between the two parties.

The addition of such a term to the PASP was a significant change, as the liabilities of both the purchaser and vendor had totally changed. The practitioner did not obtain the buyer’s written consent or arrange for him to initial the amendment before passing the deposit to the vendor. He did not exercise due care and diligence, and thereby failed to comply with paragraph 3.5.1 of the Code of Ethics.

The EAA Disciplinary Committee suspended the practitioner’s licence for 14 days and attached a condition to his licence.



商會代表意見

Comments from representatives of trade associations

香港專業地產顧問商會汪敦敬會長認為，《地產代理條例》已訂明了從業員在物業交易須遵守的規定。從業員必須嚴格遵守相關法規和專業操守，才能保障買賣雙方的利益。個案中的從業員態度未夠嚴謹，以致在修訂臨約前，未取得客戶的書面同意，導致錯失。



香港專業地產顧問商會
汪敦敬會長
President of the Hong
Kong Chamber of
Professional Property
Consultants
Mr Lawrence Wong

President of the Hong Kong Chamber of Professional Property Consultants Mr Lawrence Wong commented that the EAO specifies the rules and regulations which practitioners should observe when handling property transactions. Practitioners should comply with these rules and the Code of Ethics to protect the interests of both the purchaser and the vendor. The practitioner in this case should have sought the written consent of the client prior to amending the terms of the PASP.

香港地產代理專業協會關樂平會長表示，在普通法下，代理人有責任保障客戶利益。代理安排客戶簽署臨約時不能掉以輕心，尤其是處理重要條文時，須確保買賣雙方同意條款及書面簽妥。雙邊代理須要小心保障買賣雙方的利益，倘若其中一方提出的條件對另一方不利，代理有責任向雙方解釋該要求對他們的利弊，平衡雙方利益。另外，合約條文亦要清晰表達雙方意願，並在雙方都明白和同意下才可簽署。此外，如遇到合約未有訂明的情況，代理應向雙方解釋清楚和了解雙方的意願，通過協商的方式解決問題。



香港地產代理專業協會
關樂平會長
President of the Society
of Hong Kong Real
Estate Agents
Mr Denys Kwan

President of the Society of Hong Kong Real Estate Agents Mr Denys Kwan said under common law, agents have the responsibility to protect their clients' interests. Estate agents should therefore exercise due care when arranging for clients to enter into a PASP, particularly when dealing with important terms. Agents should ascertain whether both parties agree to the terms and obtain their written consent to the agreement. In the case of dual agency, agents should exercise due care in protecting the interests of both. If either party wishes to add terms which are disadvantageous to the other, agents should act in an impartial manner and advise both parties of the pros and cons of such amendments. The terms and conditions of a PASP should clearly reflect the intent of both and the agreement should be signed only after both parties understand and agree to the terms. If agents come across situations which are not mentioned in the PASP, they should explain such matters clearly to both parties, understand their needs and resolve the matters through negotiation.

關會長指出，個案中的代理未有安排買方書面確實臨約的修改，便將訂金交給賣方，沒有盡一切應盡的努力和盡量小心，實屬疏忽。口頭協議容易造成爭拗，也難證實（尤其在沒有第三者作證的情況下），所以臨約若有修改，一定要取得雙方同意及以書面簽妥。

Mr Kwan also pointed out that the practitioner mentioned in the above case was negligent in not asking for the buyer's written consent to the amendment to the PASP before passing the deposit to the vendor, thus failing to exercise due care and due diligence. As verbal agreements may lead to disputes and are hard to prove (especially when there is no third party witness), the written consent of both parties is essential.

無牌從事地產代理工作人士被檢控 Unlicensed persons engaging in estate agency work prosecuted

無牌從事地產代理或僱用無牌人士從事地產代理工作均屬刑事罪行。暑期臨近，地產代理公司管理層切勿聘用無牌青年人從事地產代理工作，以身試法。

監管局在近期的一次執法行動中，發現一名無牌人士向顧客介紹物業及參與議價的工作。該名人士為一家地產代理公司的司機，承認有進行地產代理工作，案件最後被轉介予警方處理，而警方亦提出檢控。結果該名人士在2010年4月被法庭判處罰款\$5,000。

去年亦有一名地產代理公司董事僱用一名無牌人士，為一對夫婦提供地產代理服務。結果該名無牌人士及該名董事在2009年3月分別被法庭裁定違反《地產代理條例》第16(1)(a)條及第39(1)條，兩人均被判罰款\$2,000及監禁兩個月，緩刑兩年。監管局紀律委員會於本年2月對該名董事進行紀律研訊，紀律委員會最後決定譴責該名董事、罰款\$5,000，並在其牌照上附加條件，要求他在一年內取得12個持續專業進修計劃核心科目學分。

監管局執行總監黃維豐先生說：「地產代理工作定義廣泛，包括為業主介紹買家或租客，以及為買賣雙方進行議價工作等。無牌人士即使被聘擔任其他職位，只要參與地產代理工作，就有可能被檢控。」

Engaging in estate agency work without a licence and employing unlicensed persons to carry out such work constitute criminal offences. As summer is approaching, the EAA would like to remind the management of estate agencies not to hire unlicensed young people to engage in estate agency work.

In a recent EAA operation, an unlicensed person was found introducing properties to clients and engaging in negotiation work. Being a driver of an estate agency, he admitted carrying out estate agency work without a licence. The case was referred to the police. The person was prosecuted by police and fined \$5,000 in April 2010.

In another case last year, an estate agency director hired an unlicensed person to provide estate agency service to a couple. In the end, the unlicensed person and the director were convicted of breaching sections 16(1)(a) and 39(1) of the EAO respectively in March 2009. They were fined \$2,000 and sentenced to two months' imprisonment, which was suspended for two years. In February this year, the EAA Disciplinary Committee conducted an inquiry hearing against the director, which resulted in the director being reprimanded and fined \$5,000. The Disciplinary Committee also attached a condition to the director's licence, requiring him to obtain 12 CPD points in core subjects of the CPD Scheme within one year.

EAA Director of Operations Mr Anthony Wong said, "Estate agency work has a wide meaning, including the introduction of a purchaser or tenant to a vendor or landlord, or carrying out negotiations on behalf of a purchaser or vendor. Even though an unlicensed person might be hired to fill other posts, if he carries out estate agency work, he faces the risk of prosecution."

