

Circular

Circular No. 07-01 (CR)

- **Soliciting or accepting an advantage without a client’s permission may contravene the Prevention of Bribery Ordinance**
- **Offering an advantage to any person who does not have their employer’s permission may contravene the Prevention of Bribery Ordinance**
- **Using false documents to deceive an employer may contravene the Prevention of Bribery Ordinance**

Section 9 of the Prevention of Bribery Ordinance

Estate agency practitioners should comply with the provisions of Section 9 of the Prevention of Bribery Ordinance (PBO) (see **Annex**) if they accept or offer any “advantage”⁽¹⁾ to their clients. In particular, they should pay attention to the following points: –

- Generally, if A (an agent) has obtained the authority of B (a principal) to act on B’s behalf, a relationship of agency will then exist between A and B. Hence, an agent may be a person employed by another or a representative acting for another.
- Where an estate agency practitioner acts for a vendor client in a property transaction, the vendor client is his principal. The same applies for a purchaser client.
- In the case of dual agency, i.e. where a practitioner acts for both a vendor client and a purchaser client, both the vendor client and purchaser client are his principals.
- If Practitioner A without the permission of his client, solicits or accepts an “advantage” from Person B on account of A’s doing or forbearing to do any act in relation to his client, A may commit an

⁽¹⁾ “Advantage” has a very wide meaning under the PBO and includes anything that is of value such as money, fee, commission, gift, employment, service or favour, etc., but does not include entertainment, which is defined as food or drink provided for immediate consumption on the occasion.

offence under Section 9(1) of the PBO. B may commit an offence under Section 9(2) of the PBO.

- If Practitioner A offers an “advantage” to Employee B on account of B’s doing or forbearing to do any act in relation to B’s employer who does not consent to B receiving such an “advantage”, A may commit an offence under Section 9(2) of the PBO. B may commit an offence under Section 9(1) of the PBO.
- If a practitioner uses any false receipt, account or other document to deceive his client or employer, he may commit an offence under Section 9(3) of the PBO.
- According to Section 11 of the PBO, it is not a defence for the giver and acceptor of bribe that the act is not actually carried out, that he does not have the power, right or opportunity to do so.
- According to Section 19 of the PBO, it shall not be a defence to show that any “advantage” is customary in any profession, trade, vocation or calling.

Examples of contraventions of section 9(1) of the PBO by estate agents: –

- An estate agent acts for both a vendor and a purchaser. Without permission from his vendor client, the estate agent solicits and/or accepts additional commission from his purchaser client as a reward for persuading the vendor client to lower the sale price offer.
- An estate agent acts for both a vendor and a purchaser. Without permission from his purchaser client, the estate agent solicits and/or accepts additional commission from his vendor client as a reward for persuading the purchaser client to raise the purchase price offer.

Examples of contraventions of section 9(2) of the PBO by estate agents: –

- Estate agent A offers “*laisee*” to Employee B who does not have permission from his employer to accept it, as a reward for B procuring B’s employer to sell its property to a client of A.

- Estate agent A offers a “commission rebate” to Employee B as a reward for B persuading B’s employer to appoint A as the agent. B does not have permission from his employer to receive such a “commission rebate”.
- Estate agent A offers “tea-money” to Employee B for obtaining insider information on the property investment plans of B’s employer. B does not have permission from his employer to receive such “tea money”.

Examples of contraventions of Section 9(3) of the PBO by estate agents: –

- An estate agent uses a false document to deceive his employer, making it appear that a deal has been concluded by another estate agency so that no commission is payable to his employer.

Given the complexity and seriousness of Section 9 of the PBO, practitioners are advised to seek legal advice if they are contemplating offering or soliciting or accepting any payments/“advantages” to or from their clients and/or employees of clients.

The maximum penalty for section 9 offences is a fine of \$500,000 and imprisonment for 7 years. In addition, the court shall order the convicted person to pay to such person the amount or value of any advantage received by him.

Practitioners are also reminded that under Paragraph 3.1.1 of the Estate Agents Authority’s Code of Ethics, they should refrain from activities which may infringe the law and that under Paragraph 3.7.2 of the Code of Ethics, they should avoid any practice which may bring discredit and/or disrepute to the estate agency trade. Practitioners who commit offences involving corruption/bribery may, in addition to committing offences under the law, be subject to disciplinary action by the Estate Agents Authority.

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Acknowledgement: The above examples of contraventions of Sections 9(1), (2) and (3) of the PBO were based on information supplied by the Independent Commission Against Corruption.

Section 9 of the Prevention of Bribery Ordinance

(1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his-

- (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
- (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.

(2) Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's-

- (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
- (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.

(3) Any agent who, with intent to deceive his principal, uses any receipt, account or other document-

- (a) in respect of which the principal is interested; and
- (b) which contains any statement which is false or erroneous or defective in any material particular; and
- (c) which to his knowledge is intended to mislead the principal,

shall be guilty of an offence.

(4) If an agent solicits or accepts an advantage with the permission of his principal, being permission which complies with subsection (5), neither he nor the person who offered the advantage shall be guilty of an offence under subsection (1) or (2).

(5) For the purposes of subsection (4) permission shall-

- (a) be given before the advantage is offered, solicited or accepted; or
- (b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance,

and for such permission to be effective for the purposes of subsection (4), the principal shall, before giving such permission, have regard to the circumstances in which it is sought.