地 產 代 理 監 管 局
ESTATE AGENTS AUTHORITY

Practice Circular on Letting of Subdivided Units under Part IVA of the Landlord and Tenant (Consolidation) Ordinance

Questions and Answers (Q&As)

Notes:

1. All references to:
   a. "EAA" shall mean the Estate Agents Authority.
   b. "Practice Circular" shall mean Circular No. 22-01 (CR) issued by the EAA on Letting of Subdivided Units under Part IVA of the Landlord and Tenant (Consolidation) Ordinance.
   c. "Practice Regulation" shall mean the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation.

   The words and expressions used in these Q&As shall have, unless the context otherwise requires, the same meaning as those words and expressions have in the Practice Circular.

2. These Q&As are for general reference only. The answers/solutions suggested in the Q&As are not exhaustive and they do not constitute legal or professional advice. In considering whether a licensee has breached the Practice Circular, the EAA will consider each case on its own merits. You should seek legal or professional advice as and when necessary, especially on the interpretation of relevant legal provisions and specific advice on any individual case. The EAA makes no warranty as to the completeness of the information set out in these Q&As, or the appropriateness for its use in any particular circumstances. The EAA will not accept any liability or responsibility whatsoever for any loss or damage caused to any person howsoever arising from any use, misuse of, or reliance on the contents of these Q&As.

地 產 代 理 監 管 局
ESTATE AGENTS AUTHORITY

Q&As

Q1. Must a "regulated tenancy" under Part IVA of the Ordinance be entered into in writing?

Answer: No.

Although Part IVA of the Ordinance provides that "tenancy" means a lease entered into orally or in writing, licensees should advise clients to enter into a "regulated tenancy" in writing in order to clearly reflect the contents of the parties' agreement.

If the landlord and tenant of an SDU have entered into a tenancy orally for a first term tenancy and the first term tenancy has commenced, the tenant may in writing demand the landlord to, within 30 days, serve on the tenant a written tenancy agreement reflecting the contents of the oral tenancy for signing by the parties. If the landlord fails to do so, the tenant may elect either (a) to withhold the payment of rent until the landlord has done so; or (b) to terminate the tenancy by, within 7 days after the specified period of 30 days mentioned above, giving the landlord not less than 30 days' prior notice in writing of the termination (Section 120AAZ of the Ordinance refers).

Where a written tenancy agreement has been entered into, licensees who act for the landlord in a "regulated tenancy" should (unless the landlord client has otherwise indicated in writing that he would handle the stamping directly) arrange, for the client, stamping of the tenancy agreement under the Stamp Duty Ordinance (Cap. 117).

In addition, licensees should note that although a "regulated tenancy" could be entered into orally or in writing, according to Part IVA of the Ordinance, the landlord must submit a

Notice of Tenancy (Form AR2) to the Commissioner of Rating and Valuation to notify him of the particulars of the tenancy within 60 days after the term of a "regulated tenancy" (including a first term tenancy and a second term tenancy) commences.

Please refer to paragraphs (11) and (16) of the Practice Circular.

Q2. Can the mandatory terms implied for a "regulated tenancy" be amended if both the landlord and the tenant agree?

Answer: No.

The mandatory terms implied for every "regulated tenancy" as set out in Schedule 7 to the Ordinance are binding on both parties. If any of the mandatory terms impliedly incorporated in the "regulated tenancy' is in conflict or inconsistent with other provisions in the tenancy, the implied mandatory terms shall prevail.

Q3. What should licensees do if the landlord or tenant client indicates that he does not understand any part of the licensees' explanation with respect to the mandatory terms implied for every "regulated tenancy"?

Answer: According to the requirement set out in paragraph (13)(c) of the Practice Circular, licensees are required to recommend their clients to consider seeking legal advice.

Q4. If a licensee acts only for the landlord when handling a "regulated tenancy", can he simply provide the landlord

with copy of the part contained in the Annex to the Practice Circular (i.e. Summary Mandatory Terms Implied for Every "Regulated Tenancy" under the Landlord and Tenant (Consolidation) Ordinance) in relation to <u>the landlord's obligations</u> during the term?

Answer: No.

Regardless of whether the licensee acts only for the landlord; or only for the tenant; or for both the landlord and the tenant with respect to a "regulated tenancy", the licensee must provide his client(s) with a **complete copy** of the summary.

Please refer to paragraph (13) of the Practice Circular.

Q5. If the licensee, in the handling of a "regulated tenancy", is also the landlord of such "regulated tenancy", can he request the tenant to pay commission to him?

Answer: No.

According to the Ordinance, it would constitute an offence under the Ordinance if the landlord requires the tenant to pay, or the landlord otherwise receives from the tenant, monies other than the rent, rental deposit, reimbursement of charges for any of the utilities and services specified by Part IVA of the Ordinance, and damages for the tenant's breach of the tenancy. Thus, the licensee in the above circumstances cannot require the tenant to pay or otherwise receive from the tenant any commission, remuneration or monies under other names.

Please refer to paragraphs (14) and (15) of the Practice Circular.

Q6. **Is a licensee required to enter into a prescribed estate agency agreement with his client(s) when handling a tenancy of an SDU?**

Answer: It will depend on the particular circumstances of the case. If the SDU in relation to a "regulated tenancy" is a residential property that is a self-contained unit under the Practice Regulation, the licensee is required to enter into a prescribed estate agency agreement with his client(s) in accordance with the Practice Regulation.

Q7. **Paragraph (7) of the Practice Circular requires licensees to disclose to the prospective tenant their capacity to act at the first opportunity after they have successfully established contact with a prospective tenant. What constitutes as "successfully established contact with a prospective tenant"?**

Answer: It will depend on the particular circumstances of the case. Generally, "successfully established contact with a prospective tenant" refers to the time when the estate agency agreement is entered into (if applicable) or when property viewing takes place with the prospective client (whichever is earlier).

In a case where no estate agency agreement is required to be entered into or no property viewing has taken place, "successfully established contact with a prospective tenant" refers to the time when the licensee introduces the property to the prospective tenant.

Q8. **Will the EAA provide a standard form of tenancy agreement for a "regulated tenancy" for licensees' use?**

Answer: No.

Since tenancy agreements are commercial contracts, as long as it is not inconsistent with the provisions of the Ordinance (including but not limited to the mandatory terms implied into every "regulated tenancy"), both parties to a "regulated tenancy" are free to negotiate the terms of the "regulated tenancy. As such, the EAA will not provide a standard form of tenancy agreement for a "regulated tenancy" for licensees' use.

However, the Housing Bureau has prepared a template for tenancy agreement for a "regulated tenancy" to which Part IVA of the Ordinance applies for general reference purpose and licensees can download it from the webpage of the RVD (www.rvd.gov.hk/doc/en/SDU_tenancy_agreement_template.pdf). Licensees may invite the landlord and tenant of a "regulated tenancy" to use and adapt the template with such modifications as appropriate (except mandatory terms) to suit their own circumstances and if the landlord and/or the tenant have doubts about how the provisions in the template are to be applied or interpreted in their case, licensees should recommend them to consider seeking legal or other professional advice as appropriate. For more details about the key statutory requirements with respect to a "regulated tenancy", licensees may refer to the Notes at the RVD's webpage at www.rvd.gov.hk/doc/en/Notes_to_SDU_tenancy%20agreement_template.pdf.

Q9. Paragraph (14) of the Practice Circular requires licensees to draw the clients' attention with respect to offences under Part IVA of the Ordinance, will licensees be legally liable if they assist the landlord in the commission of any

such offences (e.g. overcharging the tenant for water and electricity)?

Answer: Yes.

Any person who aids, abets, counsels or procures the commission by another person of any offence under Part IVA of the Ordinance shall be guilty of the like offence.

Accordingly, if a licensee aids, abets, counsels or procures a landlord of a "regulated tenancy" to commit an offence under Part IVA of the Ordinance, he may be tried and punished under the relevant offence.

In view of the possible legal consequence that licensees may face under Part IVA of the Ordinance, they should not assist, encourage, counsel or procure their landlord clients in the commission of an offence under Part IVA of the Ordinance.

12 September 2023