

Hong Kong Institute of Estate Agents

Keypoints Quiz Sampler

What we hope to achieve with this course?

1. The majority of our students will start the course knowing little about the English common law, estate agency work or even the Hong Kong society. On the other hand, the burden on estate agents here is very high because of the archaic land registration system (*title deed registration*) and the lack of any officially sanctioned property sale and purchase agreement. It is the usual case in Hong Kong that estate agents will prepare their own home made sale and purchase agreement and commit their client to a multi-million dollar purchase even before (s)he has a chance to talk to a lawyer. For this reason knowing the fundamentals of Hong Kong property law will enable (prospective) property owners to better protect their own interests.
2. The above problems are aggravated by the fact that most such agreements are bi-lingual and poorly translated. If the vendor is Chinese and the purchaser is non-Chinese speaking, then one can easily foresee that either client's fate is very much a game of chance. The lament of the Hong Kong Court of Appeal - '***With more and more bilingual versions being used, I hope the estate agent industry would consider promoting a standard form where the English and Chinese versions would bear the same meaning so that unnecessary problems over language would no longer arise***' - has unfortunately fallen on deaf ears. (CACV 10/2011 para 62.5, October 2012)
3. In contrast, purchasers in places like, say, Sydney are more fortunate. Estate agents there cannot start marketing a property unless they have the vendor solicitors' property information and draft agreement in hand. They have a more transparent *land title* (Torrens) registration system and a *cooling off period* for the purchaser. Further professional indemnity insurance to cover negligent practice is mandatory. (Note: these alien terms will be covered in the course.)
4. Our course aims to give student practitioners a basic grasp of these issues so that they can serve their clients with reasonable care and skill. For student (prospective) property owner, they will learn to make an informed property acquisition/disposal decision.

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How to benefit from the course?

5. The course will require substantial commitment in terms of time and effort, so before registration students should understand what it entails. After each session students have to attempt a Keypoints quiz and take part in the tutorial at the start of the following session to go over their (marked) answers.
6. This sampler attempts to give students some idea of the work required. If you find the material hard to understand or feel intimidated by the questions, that is quite normal if you learn law for the first time. Appropriate help will be given students in need.
7. Please read the Professor's case at the Annex and discuss:
 - a. Why did the court refuse to enforce the agency commission clause (para. 6+)? Which law empowered him to do what he did [Topic 1, slide #26]?
 - b. Was the court contradicting itself when it on the one hand refused to enforce the contract yet rejected Professor's plea of *non est factum* (para. 18+)?
 - c. Please read Form 4 (Schedule 3, Clause 5) and discuss whether you think clause 3 will still be considered unconscionable if the estate agent sues the Professor now? <http://www.eaa.org.hk/practice/documents/form4.pdf>

The Professor's Case (excerpts)

Background

1. By a written agreement dated 11 July 1998, Professor (of business studies of a local university) engaged Estate Agent ('EA') to provide estate agency services. EA introduced and arranged Professor to inspect the Premises in Shatin.
2. EA was unable to conclude the deal. In early September 1998, Professor purchased the Property through another estate agent. EA, having become aware of the transaction, claimed against Professor for \$52,000 being commission of 1% on a purchase price of \$5.2 million.

Was Professor bound by the agreement?

3. Clause 3 of the provisional agreement for sale and purchase ("PASP") says:

'In consideration of the above, I agree to pay an agency fee of 1% of the purchase price in the event that I, ... purchase any of these premises listed below within a period of three months from the date of this Agreement whether through your Company or otherwise.'

4. EA counsel contended that on the proper construction of clause 3, Professor was liable to pay the agency fee in the event that Professor bought the Premises within three months period counting from 11 July 1998 no matter whether the deal was concluded by EA or not.
5. Counsel for Professor contended that one should also look at clause 1 when interpreting clause 3. Clause 3 begins with the pretext: 'In consideration of the above ...'. The word 'above' must refer to the duties of EA ...

[The Professor's arguments on EA's scope of duty were rejected thus omitted.]

Is clause 3 'unconscionable and inequitable'?

6. I think it is.

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7. In a case of *Centaline Property Agency Ltd v Wong Tak Leung*, Yeung D. J. held that:
- (1) When dealing with an agent, the common understanding of an ordinary person is that a commission is payable to the estate agent if the estate agent successfully arranges a deal on terms agreeable to the parties concerned.
 - (2) If an agent seeks to depart from that ordinary and well-understood term, then he must explain its effect to him, making it clear that it goes beyond the usual understanding in these matters, and make sure he agrees to it. In the absence of such explanation, a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a term which is wholly unreasonable and totally uncertain, then the estate agent cannot enforce it against the innocent vendor.
8. I agree with EA counsel that this case has a number of features which differ from the present case. For example, the clause in question in *Centaline* was ambiguous in that it didn't say if a client was obliged to pay the commission if the purchase was concluded by another agent, and it was a perpetual one since no time limit was imposed, while in the present case, clause 3 stated clearly a period of 3 months.
9. However, it is also clear that clause 3 meant a client would be liable to pay a 1% commission to EA even if the deal was not concluded by EA. This is a departure of the common understanding as suggested by Yeung DJ in the case of *Centaline* and therefore EA did have a duty to explain clearly the effect of clause 3 to a client, in this case, Professor.
10. Even if I accept EA witness' evidence, simply reading out the whole agreement clause by clause without explanation is not enough especially when one is dealing with a clause which goes beyond the 'ordinary and well understood term'.
11. It is worth to note that the key words in this agreement which oblige Professor to pay a commission to EA even if the deal was concluded by a third party are:
"whether through your Company or otherwise."...
12. The whole agreement consists of seven clauses all printed in small print and in a compact manner. It is easy for anyone who is not familiar with this kind of

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agreement or in this trade to overlook these few words, or even if he/she is aware of these few words, he/she may not know or clear about its effect. Therefore, it is the duty of an estate agent to pin-point these words to a customer and explain its effect to him/her. This was not done in the present case.

13. Furthermore, not only that the key words in clause 3 are easily overlooked, it is not as clear as EA counsel suggested.
14. An example of what is regarded as clear and unambiguous is the case cited by Professor's counsel, i.e. *Lee Chi Hoi v Lau Yu Kin* supra.
15. The issue in *Lee Chi Hoi's* case was whether the defendant was liable to pay the full commission to the estate agent when the sale of the flat had not been completed. The agreement in question consists of the following clauses:

"No matter which party it is who rescinds the agreement, the party who rescinds the agreement still has to pay our company commission at 1% of the purchase price (HK.\$4,690.00).

After signing this provisional agreement concerning the deposit, if both parties or any of the parties rescinds the agreement, the party who rescinds the agreement shall pay the full amount of middleman fee to H W Estate Agency immediately. If both parties agree to cancel this agreement, each party shall pay half of the middleman fee. Otherwise, the party who rescinds the agreement shall be responsible to pay both the legal cost and all the amount caused by the demand of the middleman fee."

16. Therefore, one can see that Professor's obligation to pay commission is not only clearly stated but also elaborated in the agreement.
17. In the present case, however, the obligation of Professor to pay commission in the event the deal was concluded by a third party was referred to in just a few words without elaboration. It was also EA witness' own evidence that no explanation of its effect been given to Professor. Under such circumstances, I find clause 3 unconscionable. To enforce it is therefore unjust and unfair.

Non Est Factum

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18. This was not pleaded in the defence.

19. However this issue was raised when Professor gave her evidence. I therefore invited counsel for both parties to make submission on this point. Suffice to say that I agree with EA counsel's submission that Professor has a heavy burden in raising this defence and negligence or carelessness on the part of the person signing the document would exclude the defence of *non est factum*.

20. It is Professor's own evidence that she hadn't read the agreement thoroughly before she signed. Although she was given a copy of the agreement, she simply put it aside and didn't read it. This is obviously negligence on her part. Therefore, this defence doesn't avail her.

Conclusion

21. EA's claim is dismissed.

A. Yuen
District Judge

[Warning – read with caution as the decision (DCCJ 26284/1998) pre-dates the Estate Agents Ordinance which came into force only in 1999.]

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