

Report No. 1 of 2009

September 2009

The Tripartite Provisional Agreement for Sale and Purchase – R. I. P.

ABSTRACT

The sale and purchase agreement in relation to a property is an agreement made between the vendor and purchaser (and nobody else) to record their agreed terms for the transaction. The terms of engagement agreed between the estate agent and either of them should be recorded in a separate estate agency agreement which for residential properties in Hong Kong is prescribed under statute. The estate agent should have no part in the sale and purchase agreement.

Hong Kong is rather unique in allowing estate agents to serve both the vendor and the purchaser in the same transaction *as a matter of course* despite the apparent conflict of interest. A by-product of this anomaly, the tripartite *provisional* agreement for sale and purchase (which is a concluded agreement but yet may not necessarily be binding regarding the property), has for decades been adopted as the industry standard.

The tripartite agreement puts the interest of the estate agent above the interest of his principal, in clear breach of an agent's fiduciary duties. The most flagrant example being the *dual agent* obliging his principal who does not proceed with the transaction not only to pay the agency commission payable in respect of his own agent's service, but also to pay the commission payable for the service the agent rendered the other party. The law *does not* allow the latter. Had the principal been given the opportunity to make an informed decision at the time he appoints the agent, it is doubtful if he would have succumbed.

The undesirability of the tripartite agreement appears to be a rationale for introducing the present Hong Kong estate agents' regulatory regime. Yet more than a decade later the tripartite agreement still flourishes.

A 'consumer friendly' two-party sale and purchase agreement has been around for years, seemingly a ready solution to the problem but yet appears out-of-bounds to estate agents.

Unless and until the appropriate authorities act, the vision *a high standard of integrity and probity in the trade* shall remain just that – a vision.

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I. Introduction

1. An agreement for the sale and purchase of property is a document setting out the essential terms¹ agreed between the vendor and the purchaser regarding the disposition of a property. As the vendor (“V”) sells and the purchaser (“P”) buys, one would expect the agreement to involve V and P only, and this is indeed the case in most common law countries. Their V and P only have to sign one binding agreement, usually prepared by V’s lawyer and/or on the standard form of a regulator².

¹ viz. parties, property, price and other essential provisions (including completion date) – *Kwan Siu Man Joshua v Yaacov Ozer* [1999] 1 HKLRD 216, FACV 19/1998 at para 77.

In this article the court case number instead of the proper citation may be referenced to avoid naming agencies. The masculine gender includes the feminine, the singular the plural, and vice versa.

² For example the *Contract for the Sale of Land* 2005 for the state of New South Wales, Australia, is co-produced by their law society and real estate institute.

2. Hong Kong, rather unusually among common law jurisdictions, allows an estate agent (“EA”) to serve both V and P in a property transaction *as a matter of course* despite the inescapable conflict in serving two principals with opposing interests. [Please see Postscript (1).] The common form tripartite provisional agreement for sale and purchase³ (“3p-PASP”), a product of this anomaly, is a binding agreement signed by V, P and EA as soon as an agreement is reached on the disposition of a property⁴. The 3p-PASP is to be distinguished from the much neglected PASP of the Law Society of Hong Kong - a two-party agreement (“2p-PASP”) signed only by V and P, as it should be and which will be discussed later in this article.
3. There is no reason why the estate agent⁵ has to be a party to the 3p-PASP, much less for residential properties when since November 1999 there is a prescribed estate agency agreement for each of V (Form 3) and P (Form 4) setting out the terms of agency appointment and payment of agency commission etc⁶.
4. Presently each estate agent uses its own variation of the 3p-PASP, and some may be bilingual. They all provide for the signing of a formal agreement for sale and purchase (“FASP”), another non prescribed but more detailed binding agreement, at the parties’ solicitors’ office usually within 14 days of the 3p-PASP⁷.
5. As the late Hon Mr Justice Godfrey V.P. once remarked about a 3p-PASP :

Forms like these are primarily designed to ensure that the brokers obtain their commission no matter what difficulties the parties may encounter in negotiating the terms of the formal

³ Some semblance of uniformity probably emerged only after 1994 - “...*To date, standardised Inspection Forms and PSPAs widely adopted by local estate agencies have yet to emerge...*” para. 3.12 Report of the Working Group on Regulation of Estate Agents, (then) Planning, Environment and Lands Branch (August 1994).

⁴ To fulfill the requirements of s. 3(1) of the *Conveyancing and Property Ordinance* Cap. 219: “...*no action shall be brought upon any contract for the sale...of land unless the agreement upon which such action is brought...is in writing and signed by the party to be charged...*”.

⁵ Section 2 of the *Estate Agents Ordinance* Cap. 511 defines ‘estate agent’ to mean the estate agency business and ‘salesperson’ to mean an employee doing estate agency work for, or a director of, the business. In this article ‘estate agent’, ‘estate agency’, ‘agent’ or ‘EA’ is used interchangeably to refer loosely to both an estate agent and a salesperson, unless otherwise specified.

⁶ See Schedule to the *Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation* (Cap. 511C) – also referred to below as “the **Practice Regulation**”. The prescribed forms are available at http://www.eaa.org.hk/download_area.htm.

⁷ Presumably to reap the benefit of the up to 14-day time extension for payment of stamp duty – *Stamp Office Interpretation and Practice Notes No. 1 (Revised)* August 2006, para. 31.

*Sale and Purchase Agreement which these provisional forms of Agreement for Sale and Purchase always contemplate*⁸.

6. The claim in that case is not relevant for the present discussion. The estate agent concerned, now defunct, was not the instigator of the 3p-PASP. Mutants of the 3p-PASP still flourish to date unfortunately.
7. This article attempts to outline the major pitfalls of the 3p-PASP from the consumer protection viewpoint. It calls for the immediate abolition of the 3p-PASP and the adoption of the 2p-PASP of the Law Society of Hong Kong (with the necessary updating) as the standard sale and purchase agreement for estate agents in Hong Kong.

II. Misleading/unfair terms in the 3p-PASP

8. This article will focus on the 3p-PASPs used by the two major local estate agencies⁹. Though there might be slight variations between them, their contents will probably be representative of the terms one may find in the 3p-PASPs of other local estate agencies. Specifically the following issues will be discussed:

- (a) terms common to both agencies (Annex A¹⁰)

- Issue 1 – Bias against single agency
- Issue 2 – Deceptive behaviour / violation of legislative intent
- Issue 3 – Imposing unfair term on principal/the other party
- Issue 4 – Misinformed entire contract clause

- (b) terms specific to Agency B (terms not used by Agency A, until recently)

- Issue 5 – Unfair disclaimer
- Issue 6 – Bypassing data privacy laws
- Issue 7 – False language choice

II(i) Issue 1 – Bias against single agency

9. The Issue 1 clause, one of the lesser harms, reads: (Annex A Clause 8)

⁸ *Cheung Yun Ho and Another v. Wong Kwan Cheung and Another* CACV 2/1994 at para. 6

⁹ Agency A and Agency B – selected because they employed the most salespersons (about 3,000 each but shrinking under the weight of the then financial tsunami – *Ming Pao Daily News* 15.10.2008).

¹⁰ Adapted from the 3p-PASP of Agency A exhibited to HCA 5292/1998.

In consideration of the service rendered by the Agent, the Agent shall after this agreement be entitled to receive HK\$ [1%] from the Vendor and HK\$ [1%] from the Purchaser as commission such commission shall be paid not later than [date].

10. As the 3p-PASP takes dual agency for granted, it does not cater to the situation where each of V and P has his own estate agent. Experience suggests that the single agent acting only for V or P who could adequately amend the 3p-PASP into a two party PASP is a rarity, if ever could be found.¹¹ He will invariably fail to shield his client from liabilities to the other estate agent (see Issues 2 and 3), even if he is competent enough to shield his client from having to pay that agent agency commission.
11. The case of HCA 5292/1998 best illustrates this point though the claim itself (dishonoured deposit cheque) is not relevant for present purposes. It is a case of single agency - P represented by Agency A (the 3-p PASP used, with minor editing, is reproduced at Annex A) while V by V's friend who worked for another estate agency.
12. Clause 1 is clearly wrong as V did not sell through Agency A. While its Clause 8 was filled in correctly saying V owed '\$Nil' commission to Agency A, V was nevertheless wrongfully committed to liabilities to Agency A as follows :
 - a. Under Clause 9 – the correct position should be that if V defaults his \$76,000 liability is owed to his own agent, not Agency A;
 - b. Under clause 10 – in a similar vein V should not be liable to P agent in the event of mutual cancellation of the sale¹², though in this case V was not prejudiced because "HK\$ Nil" was correctly stated in Clause 8¹³.
13. These errors are all the more inexcusable because Clauses 9 and 10 are unfair terms in themselves, as to be discussed below.

II(ii) Issue 2 – Deceptive behavior / violation of legislative intent

¹¹ From the author's ten year experience serving the regulator and teaching practitioners.

¹² Clause 3, Schedule 2 to the prescribed estate agency agreement (Form 3) says : "*The commission shall become payable to the [V] Agent in the case of mutual cancellation of a binding agreement for sale and purchase of the Property not arising from any provisions of the agreement for sale and purchase*"

¹³ This is a rare case in which the correct position (i.e. \$0 for the agent of the other side) was adopted. More often than not the respective commissions payable by V and P are specified in Clause 8 as being payable to the "Agent", then V agent and P agent will sign a side co-operation agreement to split the total commission, in effect turning a single agency relationship (each of V agent for V, P agent for P) into a joint dual agency relationship (V agent and P agent jointly representing V and P as dual agents).

14. The Issue 2 clause reads: (Annex A Clause 9)

If in any case either the Vendor or the Purchaser fails to complete the sale and purchase in the manner herein contained the defaulting party shall compensate at once the Agent HK\$ [normally 2 x 1%] as liquidated damages.

15. The ostensible intention of this clause is to provide remuneration for the estate agent in the event that the sale could not go ahead due to the default of one party. A dual agent's normal practice is to write in the square box the sum total of the agency commission payable by V and P. If each of them has to pay 1% agency commission¹⁴, then 2 x 1% will be stated as default commission.

16. The validity of this clause has to be view against what the *Practice Regulation*¹⁵ has stipulated for this situation in Form 3 (V's prescribed estate agency agreement) and Form 4 (P's prescribed estate agency agreement).

17. Clause 2 of Schedule 2 to Form 3 (for V) says:

Subject to section 3 of this Schedule, the Vendor shall have no obligation to pay any commission to the Agent if completion of the property transaction falls through without fault on the part of the Vendor and, in such case, if the commission has already been paid it shall be refunded by the Agent to the Vendor as soon as is practicable and in any case not later than 5 working days from the completion date as specified in the agreement for sale and purchase with interest/without interest.

18. A similar provision for P is mirrored in Clause 2 of Schedule 3 to Form 4 (for P).

19. These clauses are terms of the estate agency agreement between V and V_EA and P and P_EA respectively. The parties to an agreement of course have freedom of contract to add extra terms, but such freedom is subject to an agent's fiduciary duty towards his principal and statutory provisions¹⁶. As this clause is particular harmful to the principal's interests it will be looked at in more depth from the following perspectives :

¹⁴ Agency commission is not prescribed by law therefore is **freely negotiable**. 1% is common and is adopted in this article for illustration only.

¹⁵ *Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation*

¹⁶ Clause 13 of Form 3 (also Clause 9 of Form 4) says "... *extra terms cannot conflict with or limit the other terms of this Agreement*".

- (a) freedom of contract;
- (b) time delay trap;
- (c) past consideration;
- (d) a spade by another name.

II(ii)(a) Freedom of contract

20. Under the default provisions of Form 3 and Form 4 mentioned above, if the transaction is aborted due to V's default then V is still to pay V agent a commission (say the usual 1%), but P has no obligation to pay P agent, much less V agent. The total income of the two agents will be 1% (V agent 1% + P agent 0%). It is also 1% if P is the defaulting party as V then does not have to pay. This is the view of the legislature when enacting the *Practice Regulation*.
21. But according to estate agents' practice, the defaulting party has to pay 2% default commission to the dual agent (both the 1% payable by himself and 1% payable by the innocent party had there been no default). Can this be right? Can the agent, under "freedom of contract", ask his principal to pay more than what the principal is legally obliged to pay?
22. The Supreme Court of Canada has recently addressed a similar issue in *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*¹⁷
23. Proprio Direct was a real estate broker in Quebec. Vendors were required to pay Proprio Direct a non-refundable "membership fee" when they signed an exclusive brokerage contract, in addition to having to pay a commission if the property sold. Two vendors whose homes were not sold during the contract period complained to the *Association des courtiers et agents immobiliers du Québec* about this practice. The discipline committee accepted the syndic's argument that Proprio Direct's fee practices violated the Association's rules, and that a non-refundable fee, payable without a sale, contravened the requirements of the *Real Estate Brokerage Act*. The case went on appeal.
24. In overturning the decision of the discipline committee, the Quebec Court of Appeal acknowledged that *REBA* was a law of public order for consumer protection, but held that since it found that the provisions dealing with compensation at the time of sale were not mandatory, the parties were free to make their own contractual arrangements. Laws and regulations, it concluded, should be interpreted consistently with the dual liberties of free competition and

¹⁷ 2008 SCC 32 <http://www.canlii.org/en/ca/scc/doc/2008/2008scc32/2008scc32.pdf>

freedom of contract. In its view, these “constitute the foundation of our society’s economic organization”. Absent an explicit prohibition, therefore, the legislature must be presumed not to have intended to interfere with either the parties’ freedom of contract or the principle of free competition.

25. The Supreme Court of Canada, however, overturned the decision of the Quebec Court of Appeal¹⁸ and restored the discipline committee’s conclusion that the provisions requiring a sale before a broker or agent becomes entitled to compensation was reasonable.
26. The court noted that the purpose of *REBA* was to protect consumers. The Court of Appeal’s interpretive error was to view the legislation through the lens of freedom of contract and competition rather than through the vision of *REBA* as protective consumer legislation¹⁹ :

The legislature had explicitly restricted the parties’ freedom of contract by making the language of the compensation clause a mandatory requirement of the contract. That language ties payment to sale. To allow easy modification of this requirement is to allow easy modification of the protection so clearly designed not to be eroded. Consumer protection trumps freedom of contract, not the other way around.

27. In a similar vein, the Hong Kong Court of Appeal has rejected the argument that solicitors here would have such ‘freedom of contract’ as to allow them to impose terms in their small house development engagement agreements requiring the putative client to treat all documentation confidential and not even to ask for a copy of it, if such ‘freedom’ would harm the client’s interests²⁰.
28. Assuming that Hong Kong consumers deserve no less protection than citizens of other common law jurisdictions like Canada, it is plain that our estate agents should not have “freedom of contract” to bind his principal to pay more default commission than is allowed by the legislature as:

¹⁸ by a 7:2 majority

¹⁹ Ibid para. 38

²⁰ ‘*The stipulation, for example, in paragraph (2) of the Acknowledgements that the client must not ask for the documents is, quite simply, something which a court could not even contemplate regarding as legitimate. It would follow, in those circumstances, that paragraph (2) would be regarded as improper. Neither does it serve to ameliorate the matter that the senior partner might be prepared to waive any restriction on obtaining any of the documents if he saw fit. By insisting that a potential client should sign and be bound by the Chinese Acknowledgement, the firm and the appellant were forcing the client into a position where its interests may well be harmed, if for no other reason the client would find it almost impossible to engage any other lawyer in relation to the matter.*’ – *A Solicitor v The Law Society of Hong Kong* CACV 149/2008 at paras. 14 and 15.

- a. the Estate Agents Ordinance and subsidiary legislation serve consumer protection purpose²¹;
- b. the prescribed estate agency agreements stipulate that (see Schedule 2/3 and *Extra Terms*):
 - only the defaulting party, not the innocent party, has to pay agency commission; and
 - any extra terms agreed between the estate agent and his principal cannot contradict the terms of the prescribed agreement.

II(ii)(b) Time delay trap

29. In serving his principal in the acquisition or disposal of a property, an estate agent owes his principal fiduciary duties. Snell's Equity²² says:

“ ... a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence ...The concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognize, that the fiduciary will not utilize his or her position in such a way which is adverse to the interests of the principal”.

30. It is an inflexible rule that a person in a fiduciary position is not allowed to put himself in a position where his interest and his duty conflicts²³.

31. *Bowstead on Agency* reiterates the same point²⁴ :

An agent may not put himself in a position or enter into a transaction in which his personal interest, or his duty to another principal, might conflict with his duty to his principal, unless the principal, with full knowledge of all the material circumstances and of the exact nature and extent of the agent's interest, consents.

²¹ The Estate Agents Authority (EAA) is a statutory body established in November 1997 under the Estate Agents Ordinance (EAO)...the mission of the EAA is to promote the standard of services of the estate agency trade, enhance protection for consumers and encourage open, fair and honest property transactions – EAA Homepage www.eaa.org.hk (visited 10 September 2009).

²² Para.7-08, 31/e

²³ *ibid* para 7-25

²⁴ Article 46, 17th edition

32. An estate agent serving as dual agent must therefore be particularly vigilant as:
- (a) dual agency is a prima facie case of conflict of interest;
 - (b) where a real of potential conflict arises (e.g. concurrent representation), disclosure is not enough; brokers must show that their client understood:
 - the nature of the conflict of interest;
 - what was being proposed by the broker; and
 - the implication of giving their consent²⁵.
33. When an estate agent in Hong Kong asks his principal for permission²⁶ to also serve the other party (i.e. as dual agent) the principal will ordinarily have no idea of the terms of any agreement (or their fairness) he will be subject to if weeks or months away a property deal is struck. The estate agent will unlikely volunteer such information at this early stage. Consequently the principal will unwittingly sign his interests away by allowing his agent to work as dual agent.
34. The principal's generosity in giving his estate agent a chance to earn an extra commission from the other side, which will not benefit the principal a jot²⁷, would only expose himself to the extra burden to pay double default commission. More often it will harm the principal's interest in other ways as well²⁸. Had the principal not allowed his agent to serve the other side in the

²⁵ The standard expected of Canadian practitioners, see "Key Points Arising from ATF Research & Meetings" (p. 14), *Report of the Agency Task Force* (June 2004), the Canadian Regulators Group. The legal foundation and primary information base for the Task Force recommendations was the analysis provided by Professor William Foster, Faculty of Law, McGill University.

²⁶ A standard choice in the prescribed estate agency agreement.

²⁷ The estate agent owes the principal the same standard duties set out at Schedule 1 of Form 3 (mirrored in Schedule 2 of Form 4), see details in Chart 1 below, whether he is a single agent or not.

²⁸ Anecdotal evidence suggests that some dual agents refuse to show V's flat to a prospective purchaser unless the purchaser also appoints that agent as P agent, turning away purchasers with their own single agent. Holding V captive in such a manner is against agency law and s. 11(f) of the Practice Regulation saying "*a licensee shall... inform a client of all offers received in the order he receives them and present them in an objective and unbiased manner*". Implicit in s. 11(f) is that the agent should not do anything that may prevent a prospective purchaser from developing into a purchaser prepared to make an offer. Contractually the agent also has to arrange prospective purchasers to inspect the property – a standard duty set out at Schedule 1 of Form 3. By not showing the property to prospective purchasers with their own single agent the dual agent nibs the prospect of an offer in the bud. This may also infringe EAA Code of Ethics 3.7.3 : '*Estate agents and salespersons should adhere to the principles of fair competition and refrain from restrictive business practices*'.

first place when he signs Form 3 or Form 4, he will only have to pay one commission in the event of default, not two, and be free from other burdens.

35. Taking advantage of the principal by such silence is a breach of fiduciary duty. Under Australian trade practices law such behavior would amount to *misleading and deceptive conduct*²⁹. It could also be categorized as “*utilization of harsh and oppressive standard term contracts in consumer transaction*” which the Hong Kong Consumer Council is campaigning against³⁰. Ingeniously the unfair terms are hidden in the 3p-PASP therefore the ‘dual agency’ choice in Form 3 / 4 would look harmlessly enough when the estate agent presents it to his client. By the time the client is to sign the 3p-PASP it would be too late for him to be extricated from this trap with a long time delay fuse – he is not offered other PASP choices.

The view of the court

36. DCCJ 4201/2005 is a good illustration of this point³¹. The vendor there reneged on a deal and, after paying off the first purchaser (Purchaser 1), sold to a higher bidder. Agency A who arranged the sale to Purchaser 1 as dual agent sued for “liquidated damages” under its standard 3p-PASP. Despite dismissing the vendor’s counter-claim against the estate agent, the court also dismissed Agency’s claim against the vendor.
37. The court’s analysis of the duties Agency A owed to both Purchaser 1 and the vendor is thought provoking³²:

(Purchaser 1)’s 1st Agency Agreement was dated 27 September 2004. In all probabilities, it is a standard form used by the Plaintiff and the same sort of form was used for (Purchaser 1)’s 2nd Agency Agreement (assuming there was one).

²⁹ e.g. s. 52 *Trade Practices Act 1974* (Commonwealth)

³⁰ Mark William, “End of the Line for Caveat Emptor” *Hong Kong Lawyer* April 2008 pp. 28 – 35, reviewing the Consumer Council report *Fairness in the Market Place for Consumers and Business* published in February 2008.

³¹ There is no better example to showcase the *dual agency* cum *3p-PASP* intrigue than this one. On 1.10.2004 Agency A arranged V to sign its 3-p PASP to sell for \$7m. Agency A secured V’s consent to pay double the agency commission (\$140,000 instead of the usual 1% - \$70,000) just before signing. The next day Agency B’s client offered V \$7.5m, and a new agreement signed with Purchaser 2 on 18.10.2004 buying at \$7.68m. V returned the deposit to Purchaser 1 and paid \$150,000 extra as compensation. Agency A sued V for the default commission for the aborted deal with Purchaser 1, while V counter-claimed for negligence etc. There was some discussion in the judgment about whether V’s extra \$70,000 commission was actually financed by Purchaser 1 who appeared duped into paying \$7m instead \$6.7m by Agency A, see : http://www.hklii.hk/hk/jud/eng/hkdc/2008/DCCJ004201_2005-59962.doc.

³² *Ibid* para. 45-46

Clause 2 in Schedule 3 of (Purchaser 1)'s 1st Agency Agreement ... provided to the effect that if the sale/purchase transaction failed to complete without the fault of the purchaser, the purchaser would not have to pay any commission.

Clause 10 of the Provisional Agreement provided to the effect that if the sale/purchase failed to complete due to the fault of either Vendor or Purchaser, the party at fault would need to pay liquidated damages to the Plaintiff in the sum of \$140,000. Under Clause 9 of the Provisional Agreement, (Purchaser 1) was bound to pay commission of \$70,000.

(Purchaser 1) can be forgiven for thinking that the sum of liquidated damages represented the total commission the Plaintiff would have received had there been completion - \$70,000 represented the commission the defaulting party had promised to pay and the other \$70,000 represented the commission the innocent party was released from paying but which the Plaintiff demanded compensation from the party at fault. In other words, purchaser and vendor were each paying the same 1% commission of \$70,000. Such considerations cause me to be intransigent and even ruthless in my insistence on being satisfied that (Purchaser 1) understood clearly the Double Commission point and consented to the Plaintiff acting as agent for both herself and the Defendants. Suffice to say that I am nowhere near being so satisfied.

One is entitled to be suspicious of why Clause 9 merely stated the Reference and the sum of liquidated damages was set at \$140,000 (not fully catering for the situation of the Defendants being the defaulting party i.e. liquidated damages in the sum of \$210,000 – the commission of \$140,000 the Defendants had contracted to pay and the commission of \$70,000 (Purchaser 1) had contracted to pay). These aspects were, however, not explored at trial. I do not think it fair to deal with them beyond the manner expressed here.

The Plaintiff has failed miserably to prove “explicit and informed consent” from (Purchaser 1). This is already reason enough to dismiss the Plaintiff's claim. I will, however, continue to look into proving such consent from the Defendants. (emphasis added)

38. The court said it was also not satisfied that the defendant vendor had given *explicit and informed consent* and therefore Agency A's claim was dismissed.
39. Earlier in another case (DCCJ 1100/2004) the court, while granting Agency A's claim for agency commission against a tenant who backed out of a tenancy, refused to accede to its claim for lost opportunity to earn a (default) commission:

I therefore hold that (provisional tenancy agreement) is a binding lease and (director of tenant company) is liable to (Agency A) in the sum of \$13,500 (being half a month's rent) under clause 5 in Schedule 3 of (prescribed estate agency agreement, i.e. Form 6).

*I agree with counsel (of tenant company and its director) that the obligation to remunerate Agency A provided in the express terms of (Form 6) should not be further widened by imposing an implied duty to not deprive Agency A of the opportunity to earn commission under a wider set of circumstances. I do not see why the implied term suggested by Agency A needs to be read into (Form 6).*³³ (emphasis added)

40. Clause 5 of Form 6 (prescribed estate agency agreement for the tenant, mirroring a similar clause in the prescribed agreement for the purchaser) reads:

Subject to sections 2, 3 and 4 of this Schedule, the Tenant is also liable to pay to the Agent as commission for services rendered with regard to the property concerned if the Tenant or the spouse, or any nominee, undisclosed principal or agent of the Tenant enters into a binding lease with the landlord of any one or more of the Properties during the Validity Period whether through the Agent or otherwise.

41. Though details are not given in the judgment and therefore difficult to ascertain³⁴, the “lost opportunity” is probably a reference to the default commission clause (i.e. [X% of] monthly rent payable by the landlord had the deal gone ahead) usually found in the tripartite tenancy agreement whose terms closely resemble that of the 3p-PASP.

II(ii)(c) Past Consideration

42. As the principal will receive no added benefit by giving the agent the opportunity to earn commission from the other side, the extra 1% default commission may be invalid as past consideration.

43. According to the *Practice Regulation*³⁵ the prescribed estate agency agreement has to be signed *prior to* the principal signing the agreement for sale and purchase. On signing the former the agent agrees to provide, inter alia, certain standard duties in return for an agency commission of

³³ DCCJ 1100/2004 para. 139-140
http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2004/DCCJ001099_2004.doc

³⁴ Ibid. The case was transferred to the District Court from the Small Claims Tribunal so the details cannot be gleaned from the pleadings which are the only material open for public inspection.

³⁵ Reg 6 *Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation*

(usually) 1% payable on completion or in default, as shown in Event (1) of Chart 1 following.

Event	V to get from EA ³⁶ :	EA to get from V:
(1) (on signing estate agency agreement but prior to signing of 3p-PASP)	Performance of standard duties : (a) market the Property on behalf of V; (b) obtain information in relation to the Property for V; (c) arrange for P to inspect the Property; (d) conduct negotiation and submit all offers in relation to the Property to V; and (e) assist V in entering into a binding agreement for sale and purchase with P	(a) 1% if complete or (b) 1% if V defaults (nothing if it is P who defaults) ³⁷
(2) after 3p-PASP signed	“service” ³⁸ – no suggestion of any additions to the above standard duties	(a) 1% if complete or (b) <u>2%</u> if V defaults

Chart 1 – the bargain before and after the 3p-PASP is signed

44. When the estate agent later asks his principal to sign the 3p-PASP, and invariably putting 2% in the default commission clause, he has not provided any consideration for the extra 1% commission in default borne by the principal, as shown in Event (2) of Chart 1 above.
45. The extra 1% default commission in Event (2) therefore may be invalid as *past consideration* under contract law³⁹.

II(ii)(d) A spade by another name

46. The term *liquidated damages* in the Issue 2 clause above is a common place term found in commercial contracts as well as in contracts for the sale and purchase of properties. The

³⁶ Standard duties set out at Schedule 1 of Form 3 (mirrored in Schedule 2 of Form 4 for P).

³⁷ Schedule 2 of Form 3; “1%” for illustration only as agency commission is freely negotiable.

³⁸ Clause 8 Annex A

³⁹ This point will not cease to be valid where no prescribed agency agreement is signed (say for non- residential properties), drawing analogy from what the Court of Appeal said in *A Solicitor v The Law Society of Hong Kong* ibid para. 16 - ‘It is, therefore, a technicality as to whether the complainant was strictly speaking a client at the time that the Acknowledgement was signed. The solicitor owed a duty to the client to explain to the client exactly what the position was and if that duty, technically, arose as the pen finished its final stroke, it nevertheless arose.’ This may be an apt illustration for *consideration* discussed in *EAA Study Guide* (July 2007) p. 48.

following passages from *Polyset Limited*⁴⁰, on the forfeiture of deposit as liquidated damages in a property deal, may be pertinent:

71. *The law generally permits the parties to fix their contractual liabilities by agreement. They can, for instance, agree that if certain breaches occur, the party in breach is to pay to the other party a definite sum by way of liquidated damages...*

72. *This is however subject to certain limits. Damages are generally compensatory and the courts, both in equity and at common law, will refuse to enforce stipulations for liquidated damages if in substance they would operate as "a penalty to be held over the other party in terrorem" ... that is, as a "punishment irrespective of the damage sustained"...*

75. *His Lordship listed ... various tests which would indicate... whether a provision was a valid liquidated damages clause or a penalty. Thus, the clause will be struck down if the sum stipulated "is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach" or if the **sanction prescribed for a failure to pay money is payment of a sum greater than that which ought to have been paid.** A clause is to be presumed (but not necessarily held) to be a penalty if "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage". (emphasis added)*

47. A 3p-PASP in effect comprises three separate agreements (**L**and, **V** and **P** – not counting the stakeholding agreement) summarized in Chart 2 below:

	Subject matter	Parties	Contract sum - 'C\$'	Payment in default
L	land deal	V v P	land price (i.e. L C\$)	Deposit (<= 10% of land price, i.e. L C\$)
V	EA service	V v V_EA	1% ⁴¹ of land price (i.e. 'V C\$')	2% of land price (= 200% of V C\$)
P	EA service	P v P_EA	1% of land price (i.e. P 'C\$')	2% of land price (= 200% of P C\$)

Chart 2 – Contract sum camouflaged as liquidated damages

48. In Agreement L, a deposit is paid by the purchaser as an earnest and liquidated damages, and

⁴⁰ *Polyset Ltd v Panhandat Ltd* [2002] 3 HKLRD 319; at para. 71-75

⁴¹ Agency commission is freely negotiable – “1%” is common so is adopted for illustration only.

may be forfeited by the vendor in the event of default. The Court of Final Appeal said:

*Where ... the amount of an agreed deposit matches or is less than the conventional amount, its forfeiture will not attract judicial scrutiny, whether or not the innocent party has suffered any loss as a result of the other party's breach.*⁴²

49. The conventional amount for Hong Kong and most places is 10% and Clause 7 of Annex A provides for its forfeiture which appears within the legal bounds⁴³:

Should the Vendor after receiving the deposit paid hereunder fail to complete the sale in the manner herein contained the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the deposit as liquidated damages together with the refund of the deposit and the Purchaser shall not take any further action to claim for damages or to enforce specific performance.

50. However, Clause 9 of Annex A hijacks the term “liquidated damages” and applies the label to the aggregate of the *contract sums* payable to the estate agent by both V and P under Agreement V and Agreement P⁴⁴. It takes more than courage to suggest that a scheme whereby the principal only has to pay the *contract sum* of 1% agency commission if the deal goes ahead, but double the amount (200% instead of the conventional 10%) if he defaults (because he has to pay the other party’s commission as well), is not a penalty but a genuine pre-estimate of the agent’s loss and therefore *liquidated damages*. Is this not a case of *the sanction prescribed for a failure to pay money is payment of a sum greater than that which ought to have been paid*? The court’s displeasure over a fiduciary’s *freedom of contract* has been discussed earlier.

51. The absurdity of Clause 9 will be even more apparent if one looks at DCCJ 4201/2005 again. Suppose it was Purchaser 1 who reneged on the deal, she had to pay \$210,000 “liquidated damages” (\$140,000 + \$70,000) because the vendor at the last minute agreed surreptitiously to increase by 100% her reward for the dual agent. Could 300% of Purchaser 1’s \$70,000 agreed commission (i.e. the contract sum) be a genuine pre-estimate of the estate agent’s loss *acting in its capacity as Purchaser 1’s estate agent*? Is it not absurd that the more your opponent bribes the dual agent (doubling the reward at the last minute), the more default commission you have to pay *your agent*?

⁴² *Polysset Ltd* ibid at para. 90

⁴³ The initial deposit is usually between 1% - 5%, see *EAA Study Guide* p. 64.

⁴⁴ Agency B uses the term “agreed damages” instead of “liquidated damages”, but still this does not alter the fact that the principal cannot “agree” if he is not in a position to give informed consent.

52. Clause 9 is so strategically placed (right after a conventional innocuous liquidated damages clause) that even the court (in DCCJ 4201/2005, and numerous previous cases) failed to notice the camouflage (or rather V's lawyers had not argued this point), though fortunately justice could still prevail through other means in that case. Whoever estate agent suing on this clause not only deceives his principal but also the whole world by labeling something *liquidated damages* which it is not.
53. The liquidated damages clause also trumps the clear legislative intent⁴⁵ that the estate agent is only entitled to one commission in the event of default – earning only from the party in the wrong and nothing from the innocent party⁴⁶.

II(iii) Issue 3 – Imposing unfair term on principal/other party

54. The Issue 3 clause reads: (Annex A Clause 10)

Should the Vendor and Purchaser after signing that agreement both agree to cancel this agreement without the consent of the Agent they will jointly and separately become the defaulting parties of this agreement and will still be liable for the payment of their own commission mentioned herein before.

55. There was support for the proposition that an estate agent's legitimate expectation that a principal *obliged to pay commission* is not to so act as to deprive the agent of it⁴⁷:

A party on whom is cast an obligation to pay money on a given event, is liable to the party who is to receive such sum of money if he does any act which prevents or renders it less probable that such other should receive it.

56. This view might be reflected in Clause 3, Schedule 2 of Form 3 (mirrored in Schedule 3 of Form 4):

The commission shall become payable to the Agent in the case of mutual cancellation of a binding agreement for sale and purchase of the Property not arising from any provisions of

⁴⁵ Applying *Association des courtiers et agents immobiliers du Québec* *ibid.*

⁴⁶ Clause 2 of Schedule 2 to Form 3 (mirrored in Form 4)

⁴⁷ Lloyd and Joske, *The Remuneration of Commission Agents in Australia and New Zealand* 2/e, The Law Book Co. of Australia Pty Ltd, 1943, p. 156, referring to *Weston v Mills* (31 N. Z. L. R. 590). Note that the estate agent in that (somewhat archaic) case was a single agent acting for the vendor, not a dual agent.

the agreement for sale and purchase

57. The first problem with the Issue 3 clause is that there is no reason why the vendor and purchaser should “*jointly and separately become the defaulting parties of this agreement... and will still be liable for the payment of their own commission*” – whatever that means! The principal is liable *only* for his own commission, no more and no less.
58. Secondly, estate agents over-zealous in protecting their own pockets may abuse this clause. In DCCJ 3530/2006, Agency B arranged a vendor and purchaser to signed its 3p-PASP to sell a commercial property. After signing, Agency B, at P’s request, asked V to consider selling to P the shares of the company holding the property instead, so as to save P’s stamp duty costs. V agreed to consider provided the sale was on the same terms as already agreed.
59. Eventually the deal fell through as P’s solicitors insisted on V giving warranties on the liabilities of the company owning the property. V refused and sold the property to another party instead. Agency B sued V for having “cancelled” the deal.
60. The court dismissed Agency B’s claim as V did not cancel the deal. It was P who did not proceed with the original bargain and when Agency B asked V to consider the sale of shares after the original agreement for sale of land interest was signed it implicitly consented to cancel the land sale agreement.
61. It is not known whether Agency B did sue the purchaser, but it appears oppressive even for Agency B to sue V in the first place. V would receive no benefit from selling the shares instead of the property interests (any savings on stamp duty would only benefit P) so was reasonable in not shouldering the extra burden arising from the warranties the purchaser demanded⁴⁸.

II(iv) Issue 4 – Misinformed entire contract clause

62. The Issue 4 clause reads: (Annex A Clause 12)

This agreement supersedes all prior negotiations, representation, understanding and agreements of the parties hereto.

⁴⁸ As a side issue, not infrequently when vendor and purchaser agree to cancel a sale and purchase agreement they do not explicitly apportion the blame in the cancellation agreement amidst the spirit of amicable settlement. The risk that the innocent party may later be sued by the estate agent under this clause is often overlooked thereby exposing him to unnecessary litigation later.

63. An agreement with an *entire contract clause*⁴⁹:

“...constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such clause might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible ...

“The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search.

64. The average estate agent could hardly know the true meaning of an *entire contract clause*, much less being able to explain it to his principal. More importantly it offers the unfair opportunity for the vendor to cover his lies to the purchaser (e.g. that there was no illegal structure, see below), or the estate agent his principals. The purchaser is unlikely ever to benefit from the clause.

65. The vendor in *Leung Kai Hong*⁵⁰ sought to take shelter behind this clause when she had lied about certain illegal structure, but the court rightly rejected her defence:

I have however already found that V deliberately concealed the fact of the Notice and represented that the Canopy was an authorised structure when she knew it was not. I have no doubt that P relied on this in entering into the Agreement.

(V counsel) has put forward lengthy arguments that Clause 14 of the Agreement, which bears to supersede all prior negotiations, representation, understanding and agreements of the parties, defeats P’s claim in misrepresentation.

It is of course correct, and it is not disputed that if a clause of this sort clearly excludes liability for misrepresentation it will be given effect. (V counsel)’s arguments are no doubt very clever, but without going into an exhaustive discussion of the arguments put forward

⁴⁹ *Inntrepreneur Pub Company (GL) v. East Crown Limited* [2000] 2 Lloyd’s Reports at p.614, cited in *Harvest Regent Development Ltd v Wing Hung Hay Co Ltd* HCA 746/2006 at para. 15

⁵⁰ *Leung Kai Hong and Anor v Sheehan Danny William and Anor* [2007] 3 HKLRD 707 para. 73-73

and the cases relied on, I simply do not see how it can seriously be argued that a purchaser, in signing an estate agent's standard form agreement of this sort, can be said to bind himself to absolve the vendor from liability for fraudulent misrepresentation as to a matter affecting the title.

If that is wrong, I would have no hesitation in finding that Clause 14 must be regarded as having no effect, because it is not reasonable for the purposes of section 4 of the Misrepresentation Ordinance, Cap 284. (emphasis added)

66. Such finding unfortunately appears to be the exception rather than the rule. In cases not impinging the vendor's implied duty to give good title the court will more readily respect the parties' "freedom of contract" (i.e. between V and P) in putting their signatures to an agreement. It will unlikely investigate why the *entire contract clause* is in the 3p-PASP in the first place, whom does it benefit, or whether the estate agent has fully explained its implications.
67. In *Mok Wai Lun Alan*⁵¹ P refused to complete alleging that V had lied about the size of the car park which could not fit P's car. P had signed Agency A's 3p-PASP, and later the FASP, both of which had an entire contract clause.
68. Leaving aside the merits of P's arguments, the court's view on what should be done to extricate a purchaser from his predicament is instructive:

(V counsel) submitted that even if there were misrepresentation, P's claim is defeated by the "entire agreement clause". Clause 13 of the provisional sale and purchase agreement provides that "this agreement supersedes all prior negotiations, representation, understanding and agreements of the parties hereto". Clause 10 of the formal agreement provides that "this agreement comprises all the terms agreed between the parties hereto and supersedes all previous agreements, whether oral or in writing entered into by the parties or their agents. No warranty or representation express or implied is or has been made a given by the Vendor or by any person on his behalf relating to the Property prior to the signing hereof and if any such warranty or representation express or implied has been made the same is withdrawn or deemed to have been withdrawn immediately before the parties entered into this Agreement".

*Obviously, the scope of Clause 10 is wide enough to cover the representations made by Mr. Ma*⁵². *(P counsel) submitted that it is not applicable as it fails to pass the reasonable test as*

⁵¹ *Mok Wai Lun Alan v Yeung Tony Ming Kwong* DCCJ 7255/2002
http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2002/DCCJ007255_2002.doc

⁵² Salesperson of Agency A - dual agent but allegedly making the representation in question as V agent.

laid down by S3, Control of Exemption Clauses Ordinance, Cap. 71. I do not accept this submission. P had already retained his then solicitors before signing the provisional agreement. Although the provisional agreement is a standard form contract, it is not that of V. It is the standard form of (Agency A). There is no evidence that it cannot be amended. Indeed, two clauses were inserted to cover the building order and fixtures. It shows that the terms of the provisional agreement are negotiable. Further, there were negotiations between the parties' solicitors concerning the terms of the formal agreement. P can ask to have Clause 10 amended or deleted. In the present case, the terms of the formal agreement were negotiated through their solicitors. It cannot be said that it is unfair and unreasonable for V to rely on the "entire agreement clause"⁵³. (emphasis added)

69. The moral of this case appears to be that if P has instructed his solicitors before the 3p-PASP is signed, and if P does not seek to delete the *entire contract clause*, the court would unlikely set it aside even if misrepresentation is found⁵⁴.
70. In a more recent case involving Agency A in which a purchase was rescinded due to the vendor's fraudulent misrepresentation about the user of a bowling alley, the court echoed a similar view⁵⁵:

A clause like clause 13 is supposed to operate for the benefit of both parties. There was nothing to prevent (purchaser) from suggesting deletion of clause 13 if she was concerned whether the clause would operate against her. There was also nothing to prevent (purchaser) from stipulating in the agreement the user of the property being sold and purchased... The terms were therefore not proposed or dictated by (vendor).

82. (Counsel for purchaser) submitted that clause 13 is against the letter and the spirit of clause 3.3 of the Code of Ethics⁵⁶ promulgated by the EAA which states that estate agents should protect their clients against fraud, misrepresentation or any unethical practices in connection with real estate transactions. I do not see how the operation of clause 13 is

⁵³ Mok Wai Lun Alan *ibid* paras. 96-97

⁵⁴ A common contention is whether a supplemental agreement acknowledging unauthorized building works signed along with the 3-p PASP is covered by the clause. Estate agents are simply not trained to handle an *entire contract clause*, so better leave it to the solicitors at the formal agreement stage.

⁵⁵ *Win Wave Industrial Limited v Gosbon Industries Limited and Ors* DCCJ 209/2007 paras. 77-85
http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2007/DCCJ000209_2007.doc

⁵⁶ EAA Code of Ethics clause 3.3 says : "Estate agents and salespersons shall, in the course of business, provide services to clients with honesty, fidelity and integrity. They should protect their clients against fraud, misrepresentation or any unethical practices in connection with real estate transactions."

inevitably incompatible with the discharge of the duty of the estate agent to protect their clients against the misfeasance stipulated under clause 3.3 of the Code of Ethics as alleged. Exactly because of the inclusion of the entire agreement clause like clause 13, the estate agent's discharge of his or her duty under clause 3.3 of the Code of Ethics becomes more important. (emphasis added)

71. The court went on to discuss the application of s. 4 of the *Misrepresentation Ordinance* Cap. 284 and the “reasonableness” test of s. 3(1) of the *Control of Exemption Clauses Ordinance* Cap. 71 to the clause, but in the end it decided that “*once fraudulent misrepresentation is established on the part of a party to the agreement, that party cannot rely on an entire agreement clause like the present one*” and ordered the rescission.
72. That particular case concerned the purchase of a bowling alley. In an ordinary purchase of a second-hand residential property one might legitimately query whether an *entire contract clause* in a 3p-PASP, as opposed to one in a solicitors’ FASP, is really “*for the benefit of both parties*”, or benefit them equally? If the important duty ‘*to protect her clients against the misfeasance stipulated under clause 3.3*’ is ignored by her estate agent and proper advice is not given, would a purchaser be knowledgeable enough to ask whether an entire contract clause would operate against her interests? If offered proper advice that it *could be deleted*, would any purchaser in her right mind not delete it?

II(v) Issue 5 – Unfair disclaimer

73. The Issue 5 clause reads: (in Agency B’s 3p-PASP, also in more recent versions of Annex A of Agency A)

Save and except those mentioned in this Agreement, any staff of the Agent ranking below branch manager⁵⁷ has no authority to give or make any promise, warranty or representation for and on behalf of the Agent.

74. Unless all its clients are served by branch managers or above, or unless all staff below this rank will make the necessary “declaration of no authority” before serving a client, this clause attempts to exempt unfairly Agency B’s liabilities for misrepresentation by its lower ranking staff. It is doubtful if it will pass the “reasonableness” test of s. 4 of the *Misrepresentation Ordinance*.

75. The duty of an estate agent, whether under general law or the prescribed estate agency

⁵⁷ It is not clear if ‘branch manager’ here is equivalent to the ‘manager’ mandated under EAO s. 38.

agreements, is to obtain information for the principal. This is the duty of the “agent” in Forms 3 and 4, meaning the estate agency. V agent when providing information to P is ordinarily making a representation on behalf of V provided that that is within the scope of V agent’s appointment, and vice versa when P agent passes information to P⁵⁸.

76. An estate agency must necessarily provide information to (or on behalf of) its principal through its salespersons⁵⁹ most of whom would be below “branch manager”. If a salesperson does not have the authority to make representation on behalf of the employer estate agency who is agent for its principal (V), what is P to get from the salesperson apart from unauthorized representation? Are information in the Property Information Form (Form 1 - which a salesperson is duty bound to supply to the principal before the 3p-PASP is signed) a nullity?
77. This clause was seized by one vendor to argue that, as the salesperson of Agency B (apparently below “manager” rank, acting as dual agent) had no authority to make representations (that a cockloft in a commercial premises was a legal structure) to the purchaser on behalf of Agency B, no representation about the cockloft could be attributed to V at all. In the end the court need not decide this issue as the cockloft turned out to be a legal structure.⁶⁰
78. The question remains – why is the clause there in the first place? Agency B probably intends this clause to be a second safety net for its own protection in case the *entire contract clause* fails. The end result is that the purchaser client would be doubly disadvantaged by it, firstly vis-à-vis the estate agent and secondly vis-à-vis the vendor.

II(vi) Issue 6 – Flouting data privacy laws

79. The Issue 6 clause reads: (in Agency B’s 3p-PASP, seemingly also in a newer version of Annex A)

The Purchaser and Vendor hereby agree that the Agent may disclose to XXX (Holding) Limited, XXX Cybernet Limited and/or XXX Corporation (HK) Limited (the “companies”) and/or any of their respective subsidiaries affiliates and/or associated companies (the “Subsidiaries”) any of the Purchaser’s or Vendor’s personal information or data for the purposes of marketing promotion or providing services / products of all kinds made available

⁵⁸ *Jopard Holdings Ltd v Ladefaith Ltd and Another* [2005] 1 HKLRD 317 at para. 29 : http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2001/HCA003775_2001.doc

⁵⁹ e.g. a salesperson in the position of Mr. Ma, see para. 68 above

⁶⁰ *Forever Business Limited v Long Surplus International Investment Limited* HCMP 1630/2005 at para. [15] http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2005/HCMP001630_2005.doc

by the Companies or the Subsidiaries. The Purchaser and the Vendor are aware of their respective rights to request access to or correction of their respective personal information or data by writing to the Data Protection Officer of the Agent at the above address.

80. This clause attempts to obtain through the backdoor the principal's consent to pass their personal data to Agency B's associates for marketing its other products. What it hopes to achieve is to satisfy the *prescribed consent* requirement in Data Protection Principle ("DPP") No. 3 which reads:

"Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data."

81. The problem with the Issue 6 clause is that even if the prescribed consent hurdle can be satisfied⁶¹, which is doubted, the personal data probably cannot be said to be collected by *means which are ...fair in the circumstances of the case* in accordance with DPP No. 1(2).
82. It is unfair because the consent sought is buried amidst an agreement for sale and purchase of a property which is the sole purpose for which Agency B is appointed. When V and P sign the 3p-PASP the last thing on their mind would be to consent to Agency B passing their personal data to its subsidiaries or third parties for their marketing purposes.
83. Secondly, even if they do address their mind to the matter, what if V agrees but P does not? No allowance is given for only one of them to opt out. Agency B is therefore taking unfair advantage of the client for its future marketing objective.

II(vii) Issue 7 – False language choice (in Agency B's 3p-PASP, also in a newer version of Annex A)

84. The Issue 7 clause reads:

This agreement should be interpreted in its Chinese / English version in case of ambiguities.

85. While this clause appears to offer the principal a free choice of language, in effect it may subordinate the principal's contractual rights to a game of chance. Firstly because the translation may not be authentic, and secondly the estate agent may not be able to explain the true meaning

⁶¹ In 2003 the Privacy Commissioner issued an enforcement notice against Agency B for breaching DPP No. 3 for passing clients' personal data to its subsidiary club without client consent. Agency B appears to have learned to do just enough to bypass DPP 3. (Complaint case no. 2003003: http://www.pcpd.org.hk/english/casenotes/case_complaint2.php?id=198&casetype=O&cid=3)

of the two language versions before asking his principal to make a choice.

86. *See To Keung* is a good illustration of this issue⁶². V and P signed a 3p-PASP which as usual stipulated that a FASP was to be signed later. On the appointed date P refused to sign the FASP (over a dispute about the sitting tenancy), and also refused to pay the further deposit. The well established principle that payment of the further deposit was tied to the signing of the FASP supported P's case and at first instance P obtained judgment.
87. On appeal, the Court of Appeal said the issue turned on the Chinese meaning of clause 2 of the agreement as the parties chose to complete it in Chinese and clause 13 of the agreement said it would be interpreted in its Chinese version in case there were ambiguities⁶³.
88. The pertinent part of Clause 2 reads:

“該物業之成交價為港幣\$29,800,000.00。買方須按下述方式付款予賣方。
The purchase price of the said premises shall be \$_____ which shall be paid by the Purchaser to the Vendor in the manner as follows:

(b)於簽訂正式買賣合約之時或之前，即2004年11月8日加付訂金港幣
\$2,480,000.00。

*Upon signing of the Formal Agreement for Sale and Purchase on or before
_____ further deposit shall be paid in the sum of HK\$ _____.*

89. The court said according to the Chinese version, the focal point of the payment obligation was the date (8.11.2004) rather than the event (signing of the FASP)⁶⁴:

*... reading the Chinese agreement (the English translation as accepted by the parties before this court being set out at para 8), what is important is the sense that the Chinese words of the agreement convey. The meaning of the Chinese version (“於簽訂 ... 之時或之前，即 2004 年 11 月 8 日”) is clear. **The further deposit must be paid on 8 November 2004, that date being on or before the signing of the Formal Sale and Purchase Agreement.** The obligation on the defendant was thus to pay the further deposit of HK\$2,480,000 on 8 November 2004 irrespective of whether a Formal Sale and Purchase Agreement was signed on that date. (emphasis added)*

⁶² *See To Keung and Anor v Sunny Way Limited* CACV 25/2006; [2009] 5 HKLRD 300

⁶³ *Ibid* para. 5

⁶⁴ *Ibid* para. 18

90. The meaning in Chinese of Clause 2(b) has the opposite effect to its English version (both highlighted above). The appeal was allowed in favour of V though not without Stone J. expressing some misgivings⁶⁵:

In the circumstances, it is difficult to disagree with the construction placed by Yuen JA upon the Chinese words of the agreement, as now translated (vide paragraph 8 of her judgment), albeit I have the uneasy feeling that in fact this was not the subjective intention of these parties. (emphasis added).

91. According to the English version P would win as it was the established practice, but V would win the way that the Chinese version was worded. Without disrespect, it is doubtful if any estate agent could explain such nuances to his principal to enable him to make an informed choice. Though it may be good intentioned, the choice of language clause may turn property rights into a game of chance.
92. It will be interesting to know which party the estate agent chased for the default commission – see earlier lament of the late Hon Mr Justice Godfrey V.P.⁶⁶. This kind of dispute arising from inconsistencies in the two language versions in the 3p-PASP is likely to continue⁶⁷.
93. The Court also ruled that clauses like Clauses 6 and 7 of the Annex allow a party to buy his way out of performing the contract, i.e. to escape by ‘alternative performance’⁶⁸.

⁶⁵ Ibid para. 26

⁶⁶ see para. 5 above

⁶⁷ The problem caused by identical clauses in a recent case is as summarized by the court as follows:

The parties held different views over these clauses. JIL indicated that it would not proceed to completion. It claimed that he was entitled to the return of the Further Deposit ... because there had been no signing of the formal sale and purchase agreement. Its claim in correspondence was purportedly backed up by authorities. On the other hand, both the Plaintiff and the Solicitor contended (with the support of counsel's advice) that the Further Deposit was liable to forfeiture. The Plaintiff had no outstanding mortgage and the Further Deposit should thus be released to the Plaintiff. JIL did not agree to the views of the Plaintiff and the Solicitor. It even objected to the Solicitor transferring the Further Deposit to the new firm of solicitors appointed by the Plaintiff who was expected to continue to stakehold the Further Deposit. The Plaintiff complained that the Solicitor should not have sought the consent of JIL to transfer the Further Deposit and demanded the Solicitor to return the Further Deposit to the Plaintiff without delay. It was apparent that the new firm of solicitors acting for the Plaintiff had no intention to continue to stakehold. In such circumstances, the Solicitor has, in my view, rightly taken out the inter-pleader summons. – Tsang Siu See v Josefin Investment Ltd and Anor HCA 672/2009 at para. 3.

Apparently the dispute was compounded by the estate agent's strict adherence to EAA Practice Circular 05-07 http://www.eaa.org.hk/practice/circulars_05-07.htm. The circular cautioned the deletion of the stakeholding clause if there were outstanding mortgages. There appears to be no mortgage, but the superfluous clause was not deleted.

⁶⁸ See *To Keung* ibid para. 4

III Service contract buried in land contract

94. Consumers abused by unfair contract terms can ordinarily enjoy the protection of the *Control of Exemption Clauses Ordinance* Cap. 71 or the *Unconscionable Contracts Ordinance* Cap. 458. The court may invoke these statutes where it is reasonable to do if the offending clauses are set out in a standalone agreement. In any event any extra terms added to the prescribed estate agency agreements cannot conflict with its standard terms⁶⁹.
95. The creativity lies in interspersing the offending clauses within a land contract, therefore taking them outside the purview of *Control of Exemption Clauses Ordinance*, or purportedly so⁷⁰.
96. Worse still, the Housing Authority adopts terms similar to those in the 3p-PASP for its prescribed PASP for use in the Home Ownership Scheme (“HOS”) secondary market. Their terms read⁷¹:

**[12. In consideration of the services rendered by the Vendor’s Agent and the Purchaser’s Agent, the Vendor’s Agent shall be entitled to receive HK\$ from the Vendor and the Purchaser’s Agent shall be entitled to receive HK\$ from the Purchaser as commission. Such commission shall be paid on or before .]*

OR

**[12. In consideration of the services rendered by the Agent, the Agent shall be entitled to receive HK\$ from the Vendor and HK\$ from the Purchaser as commission. Such commission shall be paid on or before .]*

**[13. If in any case either the Vendor or the Purchaser fails to complete the sale and purchase in the manner herein mentioned, the defaulting party shall compensate at once the Vendor’s Agent HK\$ and the Purchaser’s Agent HK\$ /the Agent HK\$ as liquidated damages.]*

15. *This Agreement supersedes all prior negotiations, representation, understanding and agreements between the parties hereto.*

97. Though commendably the agency relationships have been further clarified, the plight of the

⁶⁹ Clause 13 of Form 3 (also Clause 9 of Form 4) says “... *extra terms cannot conflict with or limit the other terms of this Agreement*”.

⁷⁰ Clause 1(b) Schedule 1 Cap. 71 – “*Sections 7, 8 and 9 do not apply to ...any contract so far as it relates to the creation or transfer of an interest in land...*”.

⁷¹ <http://www.housingauthority.gov.hk/hdw/content/document/en/others/pasp.doc>

consumer is not helped because a contract term “... *incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function ...*” may fall outside the purview of the *Control of Exemption Clauses Ordinance*⁷² or the *Unconscionable Contracts Ordinance*⁷³.

98. The adoption of these terms in the HOS secondary market 3p-PASP by the Housing Authority, no doubt a competent authority, may serve to take the 3p-PASP out of the purview of consumer protection statutes.

IV The way forward

99. That estate agents in Hong Kong should stop using the 3p-PASP is beyond argument, and it could lead to unintended consequences⁷⁴. Conveyancing solicitors are aware of its pitfalls⁷⁵. In its place should be an agreement for the sale of property that fairly balances the interests of the vendor and purchaser, and theirs alone. The estate agent should have no place in that agreement, and rightly so as the benefits and obligations of an estate agency relationship are (or should be) provided for in the estate agency agreement, not the PASP.⁷⁶

⁷² S. 18(2) Cap. 71

⁷³ S. 8(2) Cap. 458

⁷⁴ The 3p-PASP could backfire against the EA. In DCCJ 3153/2005, P instructed EA to find a property. EA succeeded in doing so and a 3p-PASP was signed. V later cancelled the deal to sell to a higher bidder. V alleged that EA had underquoted the original price and sued EA for repayment of the compensation it paid P for the cancellation. The first thing the court had to decide was whether EA owed V any duty as they had not signed any Form 3 and therefore EA could not chase V for agency commission. Both V and EA counsels agreed that EA still owed V the duties of an estate agent arising from contract. The only contract signed between V and EA was the 3p-PASP, presumably with the clause “*in consideration of the service provided by the agent to V and P...*”. Had EA not used the 3p-PASP, it would arguably be P agent only and need not suffer the predicament of not being able to sue for commission yet could be sued for breach of agency duty - a view deduced from the judgment (in Chinese): http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/ch/2005/DCCJ003153_2005.doc.

It is not the purpose of this article to argue that any agreement could or should be bypassed – one has to look at the overall circumstances of each case to determine if there is any agency relationship.

⁷⁵ On 21.4.2009 a CPD seminar entitled ‘*Discussion on Preliminary Sale and Purchase Agreement*’ was held by the Hong Kong Conveyancing and Property Law Association to canvass members’ views.

⁷⁶ The prescribed estate agency agreements for residential properties may be viewed as but just the first step of a two-stage solution over the pre-EAA era *inspection form* – “...*To date, standardised Inspection Forms and PSPAs widely adopted by local estate agencies have yet to emerge. While many clauses in Inspection Forms and PSPAs are worded in favour of the agency, estate agents are not required to commit their obligations in these legally binding contracts. Most prospective purchasers do not have the necessary legal knowledge to identify the unfavourable clauses and inadequacies in these documents. As a result, unwary property purchasers may suffer from the unfair terms and conditions in these documents once they have signed them...*” para. 3.12 *Report of the Working Group on Regulation of Estate Agents* August 1994, *ibid* (emphasis added).

The prescribed agreements standardized agents’ obligations in 1999, but the unfair terms remain largely unscathed for 15 years. They grow worse instead – many of the para. 8(b) terms are recent inventions.

100. The Law Society of Hong Kong has published a two-party *provisional sale and purchaser agreement* ('2p-PASP') in separate Chinese and English versions on its website⁷⁷. Apart from minor updating⁷⁸ it appears ready for immediate use. [Please see Postscript (2).]
101. This 2p-PASP does clarify much of the ambiguities of the 3p-PASP that have troubled estate agents and conveyancing solicitors, and may alleviate the fore-mentioned unfairness against consumers. There is no reason why it should not be adopted as the standard agreement for general use. Until this is done vendors and purchasers, in particular their solicitors, should take care to delete the offending clauses from the 3p-PASP⁷⁹.
102. The primary responsibility to protect the public of course falls on the regulator of estate agents and the consumer watchdog.
103. It is also advisable for the Housing Authority to consider amending its HOS 3p- PASP in light of what has been discussed.
104. The prescribed estate agency agreements have been in use since November 1999. It is therefore time to review its effectiveness and to extend them to non- residential properties⁸⁰. In the meantime they may be adapted on a voluntary basis for non-residential properties with the necessary accommodation for practical difficulties arising from incomplete property information for this class of property⁸¹.
105. There is also the wider question whether the two stage process - PASP followed by FASP – should be streamlined⁸² with the (still awaited) advent of title registration⁸³.

⁷⁷ http://www.hklawsoc.org.hk/pub_e/resource/bilingual.asp

⁷⁸ e.g. by removing the reference to "Saturday" in Clause 15 "Time", see EAA Practice Circular No. 06-04 – five day week for banks

⁷⁹ Note the court's comments in *Mok Wai Lun Alan* *ibid*.

⁸⁰ Reg. 6 of the Practice Regulation stipulates that the prescribed estate agency agreements (Forms 3 and 4) have to be signed before the sale and purchase agreement of a residential property is signed. Section 45 of EAO bars an estate agent from suing for agency commission if the prescribed agreements are not signed. These provisions do not apply to non-residential properties.

⁸¹ e.g. saleable area for non-residential properties may not be available from the Property Information Online service of the Rating & Valuation Department

⁸² A view echoed at the 21 April 2009 CPD seminar of the Hong Kong Conveyancing and Property Law Association.

⁸³ The *Land Titles Ordinance* was enacted in 2004 but is not yet implemented. In December 2008 the Land Registrar sought further consultation on certain issues so there may be further delay.

106. Consumer protection⁸⁴ and corporate social responsibility⁸⁵ demand more than lip service!

Stanley To

Honorary Researcher⁸⁶

Postscript :

(1) The Real Estate Agents Authority of New Zealand, established in November 2009, appears forthright against *dual agency* as is apparent from the following public advisory:

Q. Can an agent act for both a buyer and seller of the same property?

A. No. This is a conflict of interest. An agent cannot work in the interests of two different parties (the buyer and the seller) in a negotiation concerning a property. The Real Estate Agents Authority's Code of Professional Conduct and Client Care specifically states that an agent cannot receive commissions from both parties to a transaction. If you engage an agent (whether as a buyer or seller) the agent must always work in your interests only.

<http://www.reaa.govt.nz/sites/default/files/u49/REAA%20Fact%20sheet%20Buyers%20Agent.pdf>

(2) On 5th November 2009 the Law Society of Hong Kong replied to HKIEA's request for a licence for their 2p-PASP as follows:

We noted that the “*2-party provisional sale and purchase agreement*” mentioned in your letter was published by our Society under a Circular to our members. As the form was first published 9 years ago in 2009 and for the sole purpose of providing our members with a bilingual version of a provisional sale and purchase agreement for “*reference*” purpose, we regret that it will not be appropriate for estate agents to adopt this for execution purpose.

You may also like to note that we have specifically advised our members in our Circular “*not to*” make use of the form for execution purpose.

⁸⁴ Both the Consumer Council and Secretary for Transport and Housing are represented on the EAA Board.

⁸⁵ The chairman of both Agency A and Agency B are past or current members of the EAA Board.

⁸⁶ B. Soc. Sc. (Hon), MBA, LLM (Human Rights), solicitor (non practising). He served the EAA between 1998 and 2005, for a significant period as Regulatory Affairs Controller with responsibilities for discipline, enforcement, prosecution and appeals, and later looked after its professional development function. In 2004/05 he broached, in vain, the 3p-PASP issue. One may therefore find instead on the 3p-PASP form that appeared in training material of that era (such as the standard form workshop) a warning notice to the effect that ‘*The 3-party PASP predates the Practice Regulation and may not be compatible with the spirit of the prescribed estate agency agreements*’.

The opinion expressed in this report is the author's and may not necessarily reflect the view of the Institute. Comments are welcome: research@hkiaa.hk.

本 合 約 訂 於 _____ 合 約 之 一 方 為 []
THIS AGREEMENT made the _____ BETWEEN (NG Vendor)
(持 有 香 港 身 份 証 號 碼 []) 地 址 在 _____ (以 下 稱 賣 方)
(holder of Hong Kong Identity Card No. []) of [] (hereinafter called "the Vendor") of the first part

合 約 之 第 二 方 為 [] (持 有 香 港 身 份 証 號 碼 []) 地 址 在 [] (以 下 稱 買 方)
and (CHONG / LI) (holder of HKID No. []) of _____ (hereinafter called "the Purchaser") of the second part

合 約 之 第 三 方 為 **A 地 產 代 理 有 限 公 司** 註 冊 地 址 在 香 港 [address] (以 下 稱 經 紀)
and **Agency A** whose registered office is situated at [address] (hereinafter called "the Agent") of the third part.

合 約 三 方 茲 同 意 買 賣 條 款 如 下 :
NOW IT IS HEREBY AGREED as follow:

賣 買 雙 方 須 以 下 列 條 款 通 過 經 紀 出 售 及 購 入 位 於 [] (以 下 稱 該 樓 宇) 之 物 業
1. The Vendor shall sell and the Purchaser shall purchase all that Apartment 10m 11/F of [] Ventris Road Hong Kong (with carpark) (hereinafter called "the said premises") through the Agent subject to the terms and conditions herein contained.

該 樓 宇 之 樓 價 為 港 幣
2. The purchase price of the said premises shall be HK\$(7,600,000-)

買 方 須 按 下 述 方 式 付 款
which shall be paid by the Purchaser to the Vendor in the manner as follows:

- 港幣 須在簽本合約之同時付清作為定金
(a) HK\$(200,000-) shall be paid upon signing of this agreement as deposit.
- 港幣 須在簽正式買賣合約時付清作為首期餘款正式買賣合約須於 或之前簽妥
(b) HK\$(560,000-) shall be paid upon signing of formal agreement for sale and purchase on or before _____ as balance of deposit.
- 港幣 須於 或之前付清作為部份樓款
(c) HK\$ - shall be paid on or before - as further deposit.
- 港幣 須於買賣完成時付清作為樓價餘款而買賣須在 或之前完成
(d) HK\$(6,840,000-) shall be paid upon completion on or before _____ as balance of purchase price. _____

(CHONG) 買 賣 完 成 時 賣 方 須 負 責 將 樓 宇 交 吉 / 買 方 同 意 連 同 該 樓 宇 現 有 之 租 約 一 起 購 入 該 樓 宇
[NG] 3. Upon completion, the Vendor shall deliver vacant possession of the said premises to the Purchaser/
[CHAN] ~~The Purchaser agrees to purchase the said premises subject to its existing tenancy.~~
(CHONG) 賣 方 屬 轉 售 者 故 本 合 約 受 賣 方 與 原 賣 方 原 先 之 買 賣 合 約 條 款 約 束

[CHAN]4. ~~The Vendor is selling as confirmor and this agreement is subject to the terms and conditions of the principal-~~
[NG] ~~agreement made between the Vendor and the Head vendor.~~

該 樓 宇 是 以 現 狀 售 予 買 方
5. The premises is sold to the Purchaser on "as is" basis.

如 買 方 未 能 履 行 本 合 約 之 條 款 以 至 本 合 約 不 能 順 利 完 成 則 已 付 之 定 金 將 由 賣 方 沒 收 而 賣 方 有 權 再 將 該 樓 宇
6. Should the Purchaser fail to complete the purchase in the manner herein contained the deposit shall be forfeited
出 售 與 任 何 人 唯 賣 方 不 可 再 為 此 而 向 買 方 進 一 步 追 究 責 任 或 要 求 賠 償 損 失
to the Vendor and the Vendor shall then be entitled as his absolute discretion to sell the said premises to anyone he
thinks fit and the Vendor shall not sue the Purchaser for any liabilities and/or damages caused by the Purchaser's
default of this agreement.

[NG] _____ {SIGNATURE}
SIGNED BY THE VENDOR (CHONG)
SIGNED BY THE PURCHASER (CONNIE)
SIGNED BY THE AGENT

- 如賣方在收取定金後不依合約條款將該樓宇售與買方則賣方除須退還所有買方已付之定金外並須以同數目
7. Should the Vendor after receiving the deposit paid hereunder fail to complete the sale in the manner herein contained the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the deposit as liquidated damages together with the refund of the deposit and the Purchaser shall not take any further action to claim for damages or to enforce specific performance.

[7A. Stakeholding clause in relation to charge/mortgage added here in newer versions.]

- 基於經紀已提供之服務經紀有權在此合約後向賣方收取港幣 _____ 及 _____
8. In consideration of the service rendered by the Agent, the Agent shall after this agreement be entitled to receive _____ 作為佣金該等佣金之繳交日期不得遲過 []
HK\$ [NIL] from the Vendor and HK\$[76,000] from the Purchaser as commission...not later than [23 JAN 1998]

- 無論在任何情況下若賣方或買方任何一方未能依本合約之條款賣出或買入該樓宇
9. If in any case either the Vendor or the Purchaser fails to complete the sale and purchase in the manner herein contained the defaulting party shall compensate at once the Agent \$[76,000] as liquidated damages. 毀約之一方並須負責繳付印花費。
The defaulting party shall be responsible for the payment of the stamp duty.

- 簽署本合約後如買賣雙方在未得經紀同意下協議取消本合約則買賣雙方將同時及分別成為本合約之毀約者並仍須各自負責付與經紀應得之上述佣金。
10. Should the Vendor and Purchaser after signing that agreement both agree to cancel this agreement without the consent of the Agent they will jointly and separately become the defaulting parties of this agreement and will still be liable for the payment of their own commission mentioned herein before.

- 買賣雙方同意分別委託其代表律師。
11. The Vendor and the Purchaser agree that they shall separately appoint their own solicitors.
賣方的代表律師為 []
The Vendor shall be represented by Messrs. (To be Advised) [K. S. & Co.]
而買方的代表律師為 []
whereas the Purchaser shall be represented by Messrs. _____ (To be Advised)
雙方各自負責其律師費
Each party shall pay his own legal costs.
印花費則由買方單獨負責除本合約第九條所說的情況外。
The stamp duty shall be paid by the Purchaser solely. Except in the condition mentioned in clause 9.

- 本合約取代任何過往之三方在談判中的聲稱，理解，承諾與及協議
12. This agreement supersedes all prior negotiations, representation, understanding and agreements of the parties hereto.

- (13. 上述樓價包括全屋入牆裝修及冷氣機) [唯不包括燈及二部分體式冷氣機及一部窗口機] [CHAN] {CHONG}[NG]

合約三方茲於上述年月日憑此親筆簽字為據

AS WITNESS the hands of the parties hereto the day and year first before written.

賣方 SIGNED by _____) [NG]
for and on behalf of the Vendor _____) [CHAN]
買方 SIGNED by [xxx] + Identity Card Number _____) [CHONG]
for and on behalf of the Purchaser)
經紀 SIGNED by (_____)
for and on behalf of the Agent (_____) Agency A LIMITED _____) [xxxx] Authorised Signature

茲收到上述規定之定金 RECEIVED the above mentioned sum HK\$200,000.00 (First Pacific Bank Ltd Cheque No. 568157) being the deposit hereinbefore mentioned _____)

見證人 WITNESS: _____ [NG] _____ [CHAN]