

Commentary – Things to Note on Estate Agency Agreements

[2010] HKIEA C1

1. Introduction

1.1 Due to the intricacies of the property practice and outdated land registration system in Hong Kong¹, it is advisable to appoint an estate agent to serve you when you buy or sell a property. In this commentary *estate agent* refers to both a licensed estate agent and a licensed salesperson whose distinction for practical purposes makes little difference to you. ‘He’ of course includes ‘she’. The footnotes can be skipped unless you wish to explore matters deeper.

1.2 Estate agency work involving residential properties (which is the focus of this commentary) is regulated in detail by a statute commonly known as the Practice Regulation². Your estate agent has to complete and explain certain prescribed forms³ before he can act for you. The detail requirements are published on the website of the Estate Agents Authority⁴ (‘EAA’) so only a few salient points are discussed in this commentary.

1.3 The prescribed forms are :

- Form 1 – Property Information Form - setting out details of the property (normally completed by the estate agent for the vendor (i.e. seller) – to be provided to both the vendor and purchaser.
- Form 3 – Estate Agency Agreement for Vendor (i.e. the seller) - setting

¹ The *Title Registration Ordinance* enacted in 2004 will replace the already century-old deed registration system with a title registration system similar to the Torrens system in use in Australia. However there is no implementation date yet.

² *Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation* under the *Estate Agents Ordinance* Chapter 511

³ statutory estate agency agreements and related documents made pursuant to the *Practice Regulation* - <http://www.eaa.org.hk/practice/standard.htm>

⁴ <http://www.eaa.org.hk/consumers/index.htm>

out the terms of appointment and duties etc. – for the vendor only.

- Form 4 – Estate Agency Agreement for Purchaser - setting out the terms of appointment and duties, and attaching a schedule of properties inspected by the purchaser. – for the purchaser only.

1.4 What is discussed about sale and purchase also applies generally to letting and renting. The corresponding prescribed forms for letting/ renting are Form 2, 5 and 6 respectively.

1.5 Before you sign a sale and purchase agreement (which is the next step if a deal is agreed) please read our companion Commentary *Observations on the 3-party Provisional Agreement for Sale and Purchase* - [2010] HKIEA C2. A reference to ‘Report’ in both commentaries means the 32-page (and rather legalistic) report entitled *The Provisional Agreement for Sale and Purchase – R.I.P.* - [2009] HKIEA 1. All these publications are available on our website www.hkiea.hk.

2. Form 1 – Property Information Form

2.1 Generally the vendor owes the purchaser a duty of disclosure, though the extent of the duty varies from country to country⁵. The principle *caveat emptor* (meaning ‘let the buyer beware’) still holds good in most places.

2.2 There is also certain duty of disclosure in Hong Kong. However, unlike most countries, the duty is placed on the vendor’s estate agent instead of the vendor himself. The vendor here is only asked to complete the *Vendor’s Statement* part of the Property Information Form (Form 1), and even that is not mandatory – he can refuse to complete it.

2.3 An important declaration to be made in the Vendor’s Statement is the vendor’s knowledge of unauthorized building works (‘UBW’) in the property. Generally referred to as an ‘illegal structure’, UBW is a common sight and perhaps a main reason leading to non-disclosure. It is not possible

⁵ In the State of Victoria, Australia, the vendor has to provide a Vendor’s Statement (not the Hong Kong sort) usually prepared by the vendor’s solicitor or conveyancer. In England the vendor had to provide a Home Information Pack but it was abolished on 20th May 2010.

for an estate agent to identify all UBWs in a property by searching public registers.

- 2.4 UBWs which run real risks of enforcement by the authorities may encumber the property with a bad title voiding the sale. But not every UBW is necessarily fatal⁶. Properties with UBWs can still be bought and sold provided that the risks are properly discussed and accounted for in the sale and purchase agreement, ideally with the benefit of advice from professionals like solicitors or surveyors if your estate agent has not received proper training.
- 2.5 Purchasers should therefore be vigilant if you do not receive a copy of Form 1, or if the Vendor's Statement in it is left blank.
- 2.6 You should also be provided with a copy of the land search showing the documents that have been registered against the property. Unless you have good knowledge of the Hong Kong property practice, the land search itself may not mean much to you. Ask your estate agent to explain those entries that may still impact on the property. Spent entries can be disregarded.

3. Form 3 – Vendor's Estate Agency Agreement

3.1 Noteworthy matters

- 3.1.1 If you are the vendor appointing an estate agent to sell your property, four matters may be worth noting :
 - (i) validity period of agency,
 - (ii) time to pay agency commission,
 - (iii) exclusive agency, and
 - (iv) dual agency.

3.2 Validity Period

⁶ Hong Kong courts do acknowledge the utility of UBWs, which is not uncommonly found in residential properties, provided there is full disclosure.

- 3.2.1 Your estate agent will earn a commission if during the validity period he finds you a purchaser⁷. In completing **Form 3 Clause 1** you should therefore give him a reasonable time to do his work. There is no recommended validity period for Form 3 (vendor's agency agreement), but for Form 4 (purchaser's agency agreement) it is **three months**⁸. That may be a reasonable reference for the validity period for Form 3 as well. You can always extend the validity period on expiry.
- 3.2.2 However, if you give your estate agent an exclusive agency (see below), you should consider giving him a shorter validity period.

3.3 Time to Pay Agency Commission

- 3.3.1 In **Form 3 Schedule 2 Clause 1** you will be asked to specify a time for the payment of the agency commission, which will be either :
- (i) the time you sign the agreement for sale and purchase, or
 - (ii) the time of completion.
- 3.3.2 In law an estate agent will earn a commission when he finds the vendor a *ready, willing and able* purchaser (and vice versa for the purchaser's agent). The vendor will not know if the purchaser is *ready, willing and able* until the balance of the purchase price is paid over on completion. This is therefore the time to pay agency commission⁹.
- 3.3.3 There may be occasions when the estate agent will deserve to be paid his commission before completion, and one example is when the vendor agrees to give the purchaser an unduly long completion time.¹⁰ It is up to the estate agent to justify the early payment in this or similar situations.

⁷ Form 3, Schedule 2, Clause 1

⁸ Form 4, Clause I 'Caution'

⁹ If the deal falls through due to the purchaser's default, any commission already paid by the vendor (i.e. pre-maturely paid on signing the sale and purchase agreement) has to be refunded to the vendor - Form 3, Schedule 2, Clause 2. A similar provision is mirrored in Form 4, Schedule 3, Clause 2.

¹⁰ If a purchaser is intent on sub-selling his property before completion (an unusual practice in other countries), he may ask for a long completion time of, say, 6 to 12 months instead of the usual 2-month ballpark period.

Ultimately matters relating to agency commission are to be mutually agreed between the client and the estate agent.

3.4 Exclusive Agency (*cf.* sole agency)

- 3.4.1 Generally a vendor can list his property with more than one estate agent for sale at the same time (i.e. non exclusive agency), and the commission is only payable to the one who finds him a purchaser. This will be the case if you select ‘non-exclusive agent’ in **Form 3 Clause 1**.
- 3.4.2 If an estate agent offers you service or terms over and above the standard ordinarily provided to a vendor¹¹, you may consider awarding him an exclusive or sole agency. However you must know the difference between exclusive agency and sole agency before making the choice.
- 3.4.3 In an *exclusive agency*, you may be liable to pay commission to the estate agent even if the property is not sold through him during the validity period¹². Therefore even if you sell it yourself without any effort on the part of the exclusive agent, you may still have to pay him a commission. Your right to sell your own property *yourself* is therefore restricted.
- 3.4.4 On the other hand, if you award the estate agent a *sole agency*, this means that the estate agent is the only agent allowed to act for you. If during the validity period you sell to a purchaser through another estate agent, the sole agent has a right to claim agency commission from you¹³. However you need not pay your sole agent a commission if you sell it yourself. Your right to sell *by yourself* is not restricted.

3.4.5 That is *exclusive agency* and *sole agency* as commonly known¹⁴. The

¹¹ Form 3, Schedule 1. Note that agency commission is negotiable. It is common to award 1% of the purchase price if the agent serves as dual agent, meaning he can earn 1% from each of the vendor and purchaser making a total of 2%.

¹² Form 3, Clause 1 – ‘Caution’

¹³ Form 3, Schedule 4 – Explanatory Notes (3), despite the ‘Exclusive agency’ label

¹⁴ See section 19 of the Queensland *Property Agents and Motor Dealers Act 2000*
http://www.austlii.edu.au/au/legis/qld/consol_act/paamda2000355/s19.html.

term sole agency is not mentioned in Form 3 itself despite being provided for in it¹⁵. If you select ‘exclusive agent’ in **Form 3 Clause 1**, your estate agent should clarify in *Extra Terms* in **Form 3 Clause 13** whether you are liable to pay agency commission to him if you sell the property yourself. He should also record there the *genuine* additional benefits you will enjoy in exchange for awarding him the exclusive or sole agency.

3.4.6 The terms of agency appointment are to be mutually agreed between you and the estate agent. An estate agent has the right to offer you service on condition that you appoint him an exclusive or sole agent, as may be common in, say, Sydney. You can of course accept, decline or further negotiate the estate agent’s offer.

3.5 Dual Agency (*cf.* single agency)

3.5.1 It is common for an estate agent here to serve in the same property transaction both the vendor and the purchaser and receive an agency commission from each of them. All that is required is your consent in **Form 3 Clause 2** - oblivious to the inexorable conflict of interest flowing from an estate agent serving both masters at the same time¹⁶, and aggravated by the Hong Kong unique 3-party provisional agreement for sale and purchase (‘3p-PASP’)¹⁷.

3.5.2 There are no apparent benefits to you if you allow your estate agent to serve the other side. The harms are aplenty, including *inter alia* (i) unjustified demand for double default commission and (ii) the risk of criminal prosecution.

3.5.3 In the first place, even if you lawfully withdraw from a transaction in accordance with the terms of the 3p-PASP¹⁸, you may have to pay the

¹⁵ Form 3, Schedule 4 – Explanatory Notes (3), *ibid*

¹⁶ For this reason estate agents in New Zealand are banned from receiving agency commission from both sides to a property transaction :
<http://www.reaa.govt.nz/sites/default/files/u49/REAA%20Fact%20sheet%20Buyers%20Agent.pdf>.

¹⁷ discussed in the Report

¹⁸ typical example at Clause 9 of Annex to the Report

dual agent not only your own agency commission but also that payable by the purchaser. In law the vendor's estate agent has no right to receive the purchaser's commission in this situation.¹⁹

3.5.4 Further, the Estate Agents Authority has warned that if the vendor pays the dual agent additional commission to reward him for persuading the purchaser to pay a higher purchase price, both the estate agent and the vendor may be guilty of an offence under s. 9(1) of the *Prevention of Bribery Ordinance*. The same offence is committed by the purchaser and his dual agent in the mirror situation.²⁰ Under that Ordinance it is as much an offence to *offer* as to *accept* an advantage, though the Independent Commission Against Corruption has *a discretion to (or not to) prosecute* the client offeror.

3.5.5 It is of course your right to demand your estate agent to obtain the best price for you and to pay him more than the agreed commission if you consider him deserving it. You and your estate agent, and no one else, are the only parties to that agency relationship. No one should interfere with your right as the principal.

3.5.6 To avoid committing the offence of offering a bribe to your dual agent in the event that he neglects to secure the purchaser's consent to receive the extra commission, it may be prudent for you not to allow him to serve the purchaser in the first place. You then need not worry about committing a bribery offence. When filling in **Form 3 Clause 2** you should therefore

¹⁹ Form 4, Schedule 3, Clause 2

²⁰ EAA Practice Circular 07-05 (CR) explains the bribery offence with the following two examples : http://www.eaa.org.hk/practice/documents/07-01_CRE.pdf

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

think carefully whether or not it is to your benefit to select *single agency* (instead of *dual agency* or *potential dual agency*).

- 3.5.7 Bear in mind that your estate agent has to provide the same service to you whether or not you allow him to serve the purchaser. Note also that it will be a breach of the statute²¹, terms of agency appointment²² and best practice²³ for your estate agent to impose conditions for passing offers to you²⁴.
- 3.5.8 An estate agent who devotes total loyalty to you as your single agent will necessarily earn less than what he might earn as a dual agent, like everyone else does. It may therefore be justifiable for him to negotiate for a higher agency commission rate from you. It is a matter of your choice as to the premium you are prepared to pay for total loyalty²⁵ or the risks you are prepared to bear for divided loyalty²⁶.

4. Form 4 – Purchaser’s Estate Agency Agreement

4.1 Noteworthy terms

- 4.1.1 If you engage an estate agent to find a property, what is said above about the *validity period* and *dual agency* in Form 3 will also hold true.
- 4.1.2 This section will briefly address two issues : waiver of Form 1 *Property Information Form* and liability for agency commission for purchasing through another party.

²¹ Practice Regulation Section 11(e) and (f)

²² Form 3, Schedule 1

²³ *Practice Guide for Hong Kong Estate Agency Practitioners* Part II para. 1.10

²⁴ He has a duty to arrange all prospective purchasers to inspect the property (Form 3, Schedule 1) therefore he cannot turn away prospects who do not appoint him as dual agent, i.e. those served by their own single agent or not served by any agent. A duty to pass on all offers includes a duty to arrange inspection, otherwise an offer will be nib in the bud.

²⁵ Footnote 30 of this commentary

²⁶ typical risks at Footnote 31 of the Report

4.2 Waiver of Property Information Form (Form 1)

- 4.2.1 In **Form 4 Schedule 1** a purchaser will be asked if he would waive receipt of Form 1. It is common for a purchaser to view a large number of properties before shortlisting a few that will meet his requirements, therefore from the ecology viewpoint it may be sensible at this early stage not to ask for a Form 1 for each of the properties viewed.
- 4.2.2 As mentioned in Section II above, Form 1 in particular its Vendor's Statement may contain information about UBWs and other matters not ascertainable from property searches. Therefore you should read Form 1 carefully before giving a property serious consideration, and definitely before signing any agreement to purchase. If you have waived Form 1 earlier, ask for one and read it now.

4.3 Liability for agency commission

- 4.3.1 A purchaser is liable to pay agency commission if during the validity period a property listed in **Form 4 Schedule 1** is purchased by (i) the purchaser himself, or (ii) by a party related to the purchaser, such as his spouse or nominee etc²⁷.
- 4.3.2 That a purchaser should be liable for agency commission if after the estate agent's introduction he purchases through a third party the property introduced is to protect the estate agent from abuse by unscrupulous purchasers. A purchaser therefore cannot evade his liability by buying through his spouse or nominee etc.
- 4.3.3 On the other hand, to avoid future disputes about when a property was purchased through the introduction of one estate agent (and therefore a commission is payable to him) rather than another, the purchaser should only put his signature against a property listed on **Form 4 Schedule 1** after actually viewing it.²⁸

²⁷ Form 4, Schedule 3, Clause 5

²⁸ A dispute might arise in the following, though luckily not common, scenario. Purchaser signs against a list of properties on Form 4 Schedule 1 prepared by Estate Agent A before inspection but for some reason does not actually view Property X listed. Unknowingly, he later buys Property X through Estate Agent B and is chased agency commission by Estate Agent A which arguably might be an honest mistake because, say, the handling salesperson forgot to cross out Property X on Schedule 1. Having signed against Property X, it will be

5. Concluding remarks

- 5.1 True to the *capitalist system* guaranteed under Article 5 of the *Basic Law*, the Hong Kong property sector is relatively unregulated in comparison with Western economies, in particular for developers' *first sale*.²⁹ Usually a developer will not allow its estate agent to serve the purchaser³⁰, therefore the purchaser has to learn to protect himself.³¹
- 5.2 A loyal and professionally trained estate agent will be invaluable when you buy or sell in the secondary market. Do know your rights before appointing one.

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quite difficult for Purchaser to prove that Estate Agent A was not the effective cause of introduction for Property X.

²⁹ Called 'off the plan' sale in some countries. As they are uncompleted you can view, not the real property, but often only an illusory *off-site* 'show flat'. Hopefully the nine measures on first sale announced by the Financial Secretary on 21st April, 2010 can work this time : <http://www.info.gov.hk/gia/general/201004/21/P201004210173.htm>.

³⁰ Developers often award their single agent agency commission well above 1%.

³¹ Unlike most developed countries where an estate agent serving as a single agent will still owe a *customer* (i.e. the other party) certain express duties, there appears to be none here.