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**The Long Road to Professionalism -  
- the Hong Kong Experience**

Stanley To  
Solicitor  
Senior Manager (Professional Development)

Estate Agents Authority  
Hong Kong Special Administrative Region  
(Web site : [www.eaa.org.hk](http://www.eaa.org.hk) )

Abstract :

1. The common aim of real estate licensing officials<sup>[1]</sup> is to raise the standard of their charge and to make them more professional.
2. This talk looks at the five aspects that reportedly make up a *profession* in common law jurisdictions: *formal training and learning*; *licensure and regulation*; *code of conduct*; *system of discipline*; and *relationship of trust and confidence*. Professions there, irrespective of discipline, share certain common values reaching the *ethics* plane of the academia.
3. Estate agents in Hong Kong, a newly regulated occupational group, fare reasonably in some aspects. There is still plenty of room for improvement especially in *formal training and learning*. The road to professionalism is a long one.

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## **I. Who are the “professionals”?**

1. Estate agents play an important role in a country’s economy, wherever that country may happen to be. Africa is a vast continent inevitably with some countries having a well developed regulatory regime while others may still be considering whether to have one. The recent experience of Hong Kong (which remains a common law<sup>[2]</sup> jurisdiction) may give aspiring regulators some insight. It is a matter of debate whether estate agents are a trade or a profession. But first who are the “professionals”<sup>[3]</sup>?
2. “At the heart of professionalism is the renunciation of certain things”, Professor Khurana of Harvard Business School so alludes to the sanctity of *ethics* in the realm of the “professions”, while lamenting the inability of “professional managers” to develop into a profession the way that “other activities in which society prizes a sense of restraint, judgment and the pursuit of the common good, such as law, health care and religion, have evolved into professions”<sup>[4]</sup>. One academic view is that professional status and privileges may come either when an occupational group is conferred legal authority to grant a licence to practise (e.g. law, medicine) or when public opinion blesses it with legitimacy (e.g. journalism<sup>[5]</sup>, social work).

## **II. Five aspects of a profession**

3. While the academia may be subtle in its approach, the New York Court of Appeals has proclaimed forthrightly that the matters that make up a “professional” include:
  - a. extensive formal learning and training;
  - b. licensure and regulation indicating a qualification to practise;
  - c. a code of conduct imposing standards beyond those accepted in the marketplace;
  - d. a system of discipline for violation of those standards; and
  - e. a professional relationship of trust and confidence, carrying with it a duty to counsel and advise clients.<sup>[6]</sup>

This article hopes to explore where our licensees stand in this scheme of things.

### **II(a) Extensive Formal Learning and Training**

4. While it is true that 3 to 4 years’ formal tertiary learning is the usual route to the professions, some professions (did) allow lateral or mature entry through non-academic routes. Up to the 1980’s one could qualify as a solicitor in Hong Kong without formal legal education by taking the English Law Society Examinations<sup>[7]</sup>.

5. This might still be true for accountancy (e.g ACCA) and a few other professions, though with the wider availability of tertiary education the significance of these alternative routes has gradually diminished.

## **II(b) Licensure and regulation**

6. Solicitors and accountants etc. require annual certification before they can practise, and may also have to satisfy other requirements such as continuing education and liability insurance etc. Full disclosure of anything that may impinge on an applicant's fitness to practise is of paramount importance,<sup>[8]</sup> and dishonesty while undertaking pre-qualification education could be fatal.<sup>[9]</sup>

## **II(c) A code of conduct imposing standards beyond the marketplace**

7. A common theme runs through the professional codes (solicitors' *Guide to Professional Conduct*<sup>[10]</sup>, surveyors' *Rules of Conduct*<sup>[11]</sup>, or Medical Council's *Professional Code and Conduct*<sup>[12]</sup> etc.) - that they owe duties to their profession, clients and fellow members<sup>[13]</sup> (legal practitioners additionally owe a duty to the court) - all of which hold them to a higher standard of conduct "beyond the market place". The codes mark the academics' higher *ethics* plane, with its attendant *renunciation*, *sense of restraint* and *common good* etc. Misconduct may lead to forfeiture of licence, but consider the issues below.

### **II(c)(i) Professional Misconduct**

8. The term "professional misconduct"<sup>[14]</sup> underpins most professional codes of conduct, and its variants include "unprofessional conduct", "conduct unbecoming" and "fit and proper person" etc. Some professions have them defined in policy statements<sup>[15]</sup> or in statutes<sup>[16]</sup>, but they will have little meaning until interpreted by the court,<sup>[17]</sup> who may form its own views when reaching a verdict<sup>[18]</sup>, or have the accused's interests at heart in sentencing<sup>[19]</sup>.
9. The term "professional misconduct" has sometimes been limited to misconduct in the course of professional work.<sup>[20]</sup> Instances of such misconduct include:
  - a. gross negligence<sup>[21]</sup> – performing unnecessary total hysterectomy on a patient<sup>[22]</sup> (Hong Kong), but not every failure of duty<sup>[23]</sup>, nor just "error of judgment"<sup>[24]</sup>
  - b. failing to observe legal and civic responsibilities<sup>[25]</sup> (New South Wales)
  - c. failing to be frank when investigated for a complaint<sup>[26]</sup> (South Australia)
  - d. sexual relations with a female client<sup>[27]</sup> (UK), and
  - e. abusing patients<sup>[28]</sup> (Manitoba).

## **II(c)(ii) Personal Misconduct**

10. One thorny task is to differentiate “personal” misconduct from “professional” misconduct so that not every folly will fall into the disciplinary net. It is said that there are two kinds of relationships that justify extending “professional misconduct” to acts not occurring directly in the course of professional practice<sup>[29]</sup>, such as acts or conduct: -
- (i) sufficiently closely connected with actual practice, albeit not occurring in the course of such practice, e.g. a medical superintendent having sexual relations with a nurse on hospital premises<sup>[30]</sup> (note in this situation there may be no “victim”), or
  - (ii) which manifests the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice, e.g. a farm owner mistreating his farm animals may not be fit to remain a veterinary surgeon<sup>[31]</sup>.

## **II(d) System of Discipline**

11. “No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body. These comments are just as apt when applied to the nursing profession”<sup>[32]</sup>. This statement encapsulates the hallmarks of a disciplinary system, that members’ conduct is to be judged by his peers<sup>[33]</sup>, and according to self-made standards.<sup>[34]</sup>

## **II(e) Relationship of trust and confidence**

12. Probably all professionals owe their clients a duty to counsel and advise on matters within their retainer, but where there is a fiduciary relationship<sup>[35]</sup> the professional has a higher duty of confidentiality and has to account for secret profit etc. Solicitor-client relationship is such a case (as is estate agent – client relationship) and the duties may continue even after the client relationship has ended.<sup>[36]</sup>

## **III. Estate Agents in Hong Kong**

13. The property sector has always been the mainstay of the Hong Kong economy. This, coupled with the free market system and the “quick buck” mentality, resulted in widespread malpractice that led Government to enact the *Estate Agents Ordinance* (“EAO”) and establish the Estate Agents Authority (“EAA”) in 1997. Drawing on the experience of other local professions, and of licensing regimes overseas, every effort has been made to raise the professional standard and competence of licensees<sup>[37]</sup>. As at 31 March 2005 there were 19,000 licensees (9,000 estate agents and 10,000 salespersons), excluding business firms.

### **III(a) Formal learning and training**

14. Applicants need to have completed high school, and to pass a qualifying examination. From July 2005 a new case study will feature in the estate agents qualifying examination with an emphasis on testing candidates' practical experience. Despite the rather low educational requirement, in 2003 and 2004 about 50% of the estate agents' qualifying examination candidates have tertiary education.

### **III(b) Licensure and Regulation**

15. Other than the educational threshold, an applicant has to show mental fitness, the ability to manage personal finances and, more crucially, that he is a "fit and proper person" – both before and after joining. Our refusal in 2001 to renew a licence shortly after a licensee's deplorable conduct came to light<sup>[38]</sup> showed our strong stand on misbehavior that pre-dated EAO and not done in the course of estate agency work.
16. Guidelines and circulars are promulgated regularly as standards for good practice. Our courts in the past had expressed certain views not fully reflective of our regulatory efforts - say that estate agents were only brokers<sup>[39]</sup>, not trained to handle *deeds of gift*<sup>[40]</sup> nor under any duty to advise on market price<sup>[41]</sup>. We redoubled our training efforts through measures like seminars, educational publications and adjusting the examination standard etc. It is therefore gratifying to see that increasingly we are being summoned as an independent witness to testify authoritatively on matters touching estate agency practice, whether in civil claims<sup>[42]</sup> or in criminal prosecutions<sup>[43]</sup>. This may suggest a growing recognition that there are practice standards for estate agents – a precursor of a profession.

### **III(c) Code of Ethics**

17. To keep his licence all licensees need to remain a "fit and proper person"<sup>[44]</sup>, which appears synonymous with "professional misconduct" and like terms<sup>[45]</sup>, at least in so far as solicitors<sup>[46]</sup> and barristers<sup>[47]</sup> are concerned. In deciding if there is a *prima facie* breach of our *Code* warranting disciplinary proceedings, regard will be had to the case law to ensure alignment of standard with other professions and estate agents overseas.

### **III(d) System of discipline**

18. Modeling on other professions, our disciplinary tribunal is a panel of three including one trade member. It is close to the principle of self-regulation<sup>[48]</sup>, considering that estate agents in some jurisdictions have no "peers" to judge them<sup>[49]</sup>. We held 205 disciplinary

hearings in 2003 resulting in 19 revocations and 22 suspensions (the corresponding figures for 2004 are 108, 1 and 16), a testimony to our robust approach to discipline. In view of the subtle differences between professions, no attempt is made to draw direct comparison with the Hong Kong Law Society<sup>[50]</sup> or Medical council.<sup>[51]</sup>

### **III(e) Relationship of trust and confidence**

19. Estate agents may owe fiduciary duties to their clients<sup>[52]</sup> (like solicitors), and both the common law and our *Code of Ethics* hold them to a high moral standard. If secret profits are made, they not only have to account to clients for them but may also be prosecuted for fraud related offences<sup>[53]</sup>. We refer cases to the police<sup>[54]</sup> or the Independent Commission Against Corruption (“ICAC”)<sup>[55]</sup> whenever we unearth grave malpractice such as price manipulation or ‘front-man’ buyers, and two have resulted in terms of imprisonment (unfortunately both were overturned on technicalities on appeal). Less serious cases may result in disciplinary sanctions.

### **IV. Where is Hong Kong in the long road to professionalism?**

20. Being a late starter, the experience of more developed jurisdictions no doubt can save us from “reinventing the wheel”. We are therefore most keen to learn from fellow ARELLO members, and have never been disappointed whenever we asked questions, such as : any prohibition against licensees lending deposit money to clients to complete a purchase; how to handle reciprocal recognition of qualifications etc. The Canadian members have recently made some notable advances in standardizing estate agency law and we are looking at that with keen interest.
21. But ultimately we have to make things work ourselves. Raising the educational requirement is important, but that is not the key to making a profession – journalism may be a case in point. As most people take a profession as a life long career, maintaining and updating knowledge is as important as, if not more important than, the entry qualification. From May 2005 we shall introduce a Continuing Professional Development (“CPD”) Scheme, as is implemented by many professions<sup>[56]</sup> and most ARELLO jurisdictions.
22. Community education and impartial complaints investigation are also vital to gaining public recognition and in instilling a sense of discipline. These we have largely managed in the brief history of the EAA. It may also be time to raise the education standard of licensees, in particular estate agents. Some streaming may also be in order.
23. We are not a *profession* yet, but are hopeful that with time we may become one!

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**Note:** where “at [x]” appears after the name of a judgment, “x” denotes its paragraph number. Where “EAA/COM” appears, the case is the subject of a disciplinary investigation.

- [1] The 2005 ARELLO Digest (P. 18) puts the number of license law establishments at : USA 38; Canada 5; and South Africa, New Zealand and Hong Kong. This presumably excludes governmental organizations that oversee a number of different trade licences such as the Department of Fair Trading in some Australian states.
- [2] Article 8 of the Basic Law. Common law is the legal system of the mainly Anglophone countries where the court would refer to precedent cases in addition to other legal sources when making their decision. Judgments referred to in this paper mainly concern doctors and lawyers, because cases on other professions are few and far between.
- [3] “Professional” is a term in wide usage, commonly understood to refer to the learned professions, exemplified by law and medicine... It also has other meanings. For example, it denotes a measure of quality, as in professional dry cleaners; a distinction from trade or businesspeople, and from amateur status, as in professional golfers; a lifework as opposed to pastime, as in professional musicians. Often there are study, licensure and continuing skills requirements, as for barbers, electricians and real estate brokers. Thus, neither common parlance nor licensure can determine the meaning of “professional” - *Chase Scientific Research, Inc., v NIA Group, Inc.* 2001 NY Int. 24, in which the court decided that insurance brokers could not take shelter from the “profession’s” shorter 3-year malpractice suit limitation period, and that the normal 6 years would apply; [http://www.law.cornell.edu/ny/ctap/I01\\_0024.htm](http://www.law.cornell.edu/ny/ctap/I01_0024.htm)
- [4] “Business School”, *The Economist*, 22 May 2004, P. 65; also Harvard Business School website (visited 18.6.2004) - [http://dor.hbs.edu/fi\\_redirect.jhtml?facInfo=res&facEmId=rkhourana&loc=extn](http://dor.hbs.edu/fi_redirect.jhtml?facInfo=res&facEmId=rkhourana&loc=extn)
- [5] Though journalism is recognized as a profession in most countries, licensing of journalists is considered not appropriate. The Inter-American Court of Human Rights said in 1985 that Costa Rica’s compulsory licensing of journalists and requirement for journalists to belong to an association infringed the freedom of thought and expression - the basic principles of a democratic public order – Advisory Opinion OC-5/85
- [6] *Chase Scientific Research* (supra)
- [7] our Secretary for Justice, Ms Elsie Leung, GBM, JP, (see <http://www.doj.gov.hk/eng/about/sjo.htm>) is a notable case. A candidate has to pass examinations in prescribed subjects through private studies while gaining practical experience under his principal - *Articled Clerks Rules*, Cap. 159 (1983 ed.).
- [8] A Queensland nurse who had previously been de-registered by their nursing board was refused admission as a solicitor for two reasons : that his making an uninvited visit to a female patient after gleaning her address from her treatment record called into doubt his future ability to handle the close professional relationship between solicitors and clients, and further that his failure to disclose the de-registration undermined “the primacy of his pro-active obligation to make candid, comprehensive disclosure”, see *Re: Hampton* [2002] QCA 129, at [25]; <http://www.austlii.edu.au/au/cases/qld/QCA/2002/129.html>
- [9] solicitor refused admission for cheating at a law course despite having later passed that course *Re: AJG* [2004] QCA 88; <http://www.austlii.edu.au/au/cases/qld/QCA/2004/88.html>
- [10] [http://www.hklawsoc.org.hk/pub\\_e/professionalguide/](http://www.hklawsoc.org.hk/pub_e/professionalguide/)
- [11] [http://www.hkis.org.hk/hkis/html/about\\_conduct.jsp](http://www.hkis.org.hk/hkis/html/about_conduct.jsp)
- [12] <http://www.mchk.org.hk/draft.htm>
- [13] e.g. denigrating a fellow doctor next door for “killing, not curing, patients” – case of Dr. Au Yeung K W; heard in June 2004 - *Ming Pao Daily News* 24.6.2004; misconduct found.
- [14] e.g. “If a medical practitioner in the pursuit of his profession has done something which will be reasonably regarded as disgraceful, unethical or dishonourable by his professional colleagues of good repute and competency, then it is open to the **Medical Council of Hong Kong**, if that be shown, to say that he has been guilty of professional misconduct”, and “the seriousness of misconduct will be judged by the rules, both written or unwritten, of the profession itself.”; [http://www.mchk.org.hk/draft/part3\\_pro.htm](http://www.mchk.org.hk/draft/part3_pro.htm)
- [15] see preceding statement of Medical Council of Hong Kong
- [16] NSW *Legal Profession Act* (1987) Section 127 (1) “For the purposes of this Part, “professional misconduct” includes: (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or (c) ...”
- [17] “The concept of unprofessional conduct was included in the *Dentists Act* 1931, which preceded the present Act and the phrase “unprofessional conduct” in s. 45 of that Act was given a wide interpretation by the courts in accordance with previous decisions at common law...”, see *Reyes v The Dental Board of South Australia* [2002] SASC 239 at [27]; <http://www.austlii.edu.au/au/cases/sa/SASC/2002/239.html>
- [18] e.g. the court said the moralistic “litmus test” of “disgraceful, unethical or dishonourable” conduct, though in Medical Council’s policy statement (supra), was not an ingredient for “misconduct in a professional respect”, see *Dr To Chun Fung Albert v The Medical Council of Hong Kong* CACV000206/2000 at [21];

- [http://www.hklii.org.hk/hk/eng\\_jud/HKCA/2001/20011101\\_CACV000206\\_2000.html](http://www.hklii.org.hk/hk/eng_jud/HKCA/2001/20011101_CACV000206_2000.html).
- [19] Despite “the only penalties expressly provided for in the legislation and delegated legislation are erasure and suspension” the Privy Council said that “admonition or censure” are implied in favour of a dentist found committing serious professional misconduct - *Preiss v. General Dental Council (GDC)* [2001] UKPC 36 at [30]; <http://www.bailii.org/uk/cases/UKPC/2001/36.html>; also “...it is open to us to take no action at all even when we are satisfied, as we are, that Mrs Scott is not a fit and proper person to be a registered tax agent...(no criteria is set out for the course to be adopted) for the infinite variety of ways in which a person may err and so fail in his or her duties is as boundless as the range of human activity itself. Simply to err does not of itself justify a person's being suspended. Suspension, or cancellation, is only a course that should be adopted if it is necessary for the public protection...” *Scott v Tax Agents' Board of Queensland* [2001] AATA 435 at [206]; <http://www.austlii.edu.au/au/cases/cth/aat/2001/435.html>
- [20] *New South Wales Bar Association v Cummins* [2001] NSWCA 284 at [49]; <http://www.austlii.edu.au/au/cases/nsw/NWCA/2001/284.html>
- [21] *NSW Legal Profession Act* (1987) Section 127 (1)(a) (supra)
- [22] The test is “whether (his) conduct has fallen short of the standard expected amongst doctors”, see *Dr To Chun Fung Albert* (supra) at [13]
- [23] “... something more was required than mere professional incompetence or deficiencies in the practice of the profession. It included a deliberate departure from accepted standards or such serious negligence as, although not deliberate, portrayed indifference and an abuse of the privileges which accompany registration as a medical practitioner” *Pillai v Messiter (No.2)* (1989) 16 NSWLR 197, cited in *Law Society of Tasmania v Turner and Kench* [2001] TASSC 129 at [46]; [http://www.austlii.edu.au/au/cases/tas/supreme\\_ct/2001/129.html](http://www.austlii.edu.au/au/cases/tas/supreme_ct/2001/129.html)
- [24] a barrister father when moving the admission of his son as a barrister failed to disclose to the court that the latter had cheated at a law course – *Law Society of Tasmania v Richardson* [2003] TASSC 9 at [92]; [http://www.austlii.edu.au/au/cases/tas/supreme\\_ct/2003/9.html](http://www.austlii.edu.au/au/cases/tas/supreme_ct/2003/9.html); or a solicitor misreading law society circulars when advertising his firm - *A Solicitor v The Law Society of Hong Kong* FACV000007/2003 at [98]; [http://www.hklii.org.hk/hk/eng\\_jud/HKCFA/2003/20031219\\_FACV000007\\_2003.html](http://www.hklii.org.hk/hk/eng_jud/HKCFA/2003/20031219_FACV000007_2003.html)
- [25] Being “an officer of the court”, it was professional misconduct for an Australian barrister not to lodge tax returns or pay income tax for 20 years, see *NSW Bar Association v Stevens* [2003] NSWCA 261
- [26] *Legal Practitioners Conduct Board v Phillips* [2002] SASC 63; <http://www.austlii.edu.au/au/cases/sa/SASC/2002/63.html>
- [27] “using position of trust to establish an improper relationship when the patient was extremely vulnerable”; *Dare v. General Medical Council* [2002] UKPC 54; <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKPC/2002/54.html>
- [28] *Snider v. Manitoba Association of Registered Nurses*; <http://www.canlii.org/mb/cas/mbca/2000/2000mbca10015.html>
- [29] *Cummins* (supra) at [56]
- [30] “...the place was the hospital, the woman was a nurse, the man was a doctor and moreover superintendent of the hospital. It arose out of a relationship professionally established and it was destructive of the position he should have held in the hospital and of his influence.”, see *Hoile v. The Medical Board of South Australia* [1960] HCA 30 at [7]; <http://www.austlii.edu.au/au/cases/cth/HCA/1960/30.html>
- [31] a veterinary surgeon in England was found to have committed “disgraceful conduct” for not giving adequate care for animals on his farm, even though that neglect arose out of him being the owner of his farm, not as a vet - it betrays a quality unbecoming a veterinary surgeon, see *Marten v Royal College of Veterinary Surgeons Disciplinary Committee* [1996] 1 QB 1, cited in *Reyes* (supra) at [33]
- [32] *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285, cited in *Snider* (supra)
- [33] tribunal members : Medical Council - 5 with 1 lay member; Law Society - 3 with 1 lay member
- [34] The court often has supervisory (i.e. appellate) jurisdiction over decisions of disciplinary tribunals under either statute as for UK doctors, see *Dare* (supra); or its inherent jurisdiction over dentists (UK, *Preiss v the General Dental Council* [2001] UKPC 36 at [2] <http://www.bailii.org/uk/cases/UKPC/2001/36.html>) or solicitors (*A Solicitor v The Council of the Law Society of New South Wales* [2004] HCA 1 at [2]; <http://www.austlii.edu.au/au/cases/cth/HCA/2004/1.html> )
- [35] “... three general characteristics: the fiduciary has scope for the exercise of some discretion or power; the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests, and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power” *Frame v Smith* (1987), 42 D.L.R. (4th) 81, cited in *Alvest Properties Ltd. v Roppelt* 1998 ABQB 1027, at [6]; <http://www.canlii.org/ab/cas/abqb/1998/1998abqb1027.html>
- [36] *A and B, Legal Practitioners v Disciplinary Tribunal* [2001] TASSC 55 at [53]; [http://www.austlii.edu.au/au/cases/tas/supreme\\_ct/2001/55.html](http://www.austlii.edu.au/au/cases/tas/supreme_ct/2001/55.html)
- [37] their principal duty is to introduce a third party to a client who wishes to acquire or dispose of a property.

- Property management does not require a licence
- [38] In a claim by his god-mother, the licensee was found to have, inter alia, cheated her in various property investments in 1997, suggesting an abuse of his professional knowledge - *Ho Yin Yuk v Lam Ka Lok* HCA012957/1999; [http://www.hklii.org.hk/hk/eng\\_jud/HKCFI/2001/20011119\\_HCA012957\\_1999.html](http://www.hklii.org.hk/hk/eng_jud/HKCFI/2001/20011119_HCA012957_1999.html) ; EAA/COM/CAS/02/170
- [39] The court said, unlike in the UK, Hong Kong estate agents are only brokers. Author doubts - UK estate agents are not even licensed! *Tai Sang Kung Limited v Paraking Limited and Another* HCA002503/1998 at [54] ; [http://www.hklii.org.hk/hk/eng\\_jud/HKCFI/2001/20010825\\_HCA002503\\_1998.html](http://www.hklii.org.hk/hk/eng_jud/HKCFI/2001/20010825_HCA002503_1998.html); see *Chu Wai Ha* (infra)
- [40] read EAA monographs! *Chiu Wai Ling v Chan Yau Chi and Another* DCCJ000346/2001 at [30]; EAA/COM/CAS/00/033 [http://www.hklii.org.hk/hk/eng\\_jud/HKDC/2002/20020301\\_DCCJ000346\\_2001.html](http://www.hklii.org.hk/hk/eng_jud/HKDC/2002/20020301_DCCJ000346_2001.html)
- [41] read Practice Regulation s. 11(b)! *Chu Wai Ha v Tse Ki Po and Ano* DCCJ011039/2001 at [94]; EAA/COM/CAS/01/467; [http://www.hklii.org.hk/hk/eng\\_jud/HKDC/2003/20030506\\_DCCJ011039\\_2001.html](http://www.hklii.org.hk/hk/eng_jud/HKDC/2003/20030506_DCCJ011039_2001.html)
- [42] Properties inspected by client in quick succession – when to sign inspection record? SCTC 024914/03; EAA/COM/CAS/03/253
- [43] Role of estate agent in securing mortgages for clients - DCCC 365/2002; EAA/COM/CAS/00/363
- [44] The term “fit and proper person” commonly appears in legislation governing “tradesmen” such as taxi drivers (UK), migration agents (Australia), insurance agents and security guards (Hong Kong), and the author surmises that one reason for using this term instead of “professional misconduct” is to sidestep any possible defence challenge that, not being “professionals”, they cannot commit “professional misconduct”. In *Hughes and Vale Pty Ltd v The State of New South Wales (No. 2)* [1955] HCA 28 at [9] the court said (per Dixon C.J., McTiernan and Webb JJ) “(t)he expression “fit and proper person” is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. “Fit” (or “idoneus”) with respect to an office is said to involve three things, honesty knowledge and ability: “honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it” - Coke. When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances...”; <http://www.austlii.edu.au/au/cases/cth/HCA/1955/28.html>
- [45] *Cummins* (supra) at [50]
- [46] “Where an order for removal from the roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a *fit and proper person* to be a legal practitioner of the Supreme Court upon whose roll the practitioner's name presently appears.” *A Solicitor v The Council of the Law Society of NSW* (supra) at [15]
- [47] “It has not generally been useful or necessary to distinguish the terminology of “professional misconduct” from other phrases such as a “fit and proper person”, “good fame and character”, “unprofessional conduct”, “unsatisfactory professional conduct” etc. Statutory formulations differ from one jurisdiction to another. Some of the terminology, originally based on statute, has been adopted in cases decided under the inherent jurisdiction. In the exercise of this jurisdiction, it is not appropriate that the Court should indulge in the splitting of fine hairs on terminology” - *Cummins* (supra) at [50]
- [48] *Snider* (supra)
- [49] discipline for estate agents in Australia is generally in the hands of administrative tribunals : Victorian Civil and Administrative Tribunal (Victoria); Commercial and Consumer Tribunal (Queensland)
- [50] 24 cases resulting in 2 members struck off and 4 suspended - 2003 *Annual Report*. Solicitors declared bankrupt are automatically struck off, but estate agents must go through a “fit and proper person” inquiry
- [51] 13 cases heard with 8 members “removed” for a few months – *Newsletter* Issue No. 9, February 2004
- [52] *D’Atri v Chilcott* (1975), 7 O. R. (2d) 249 (H.C.), cited in *Alwest Properties* (supra) at [51]; also *Chu Wai Ha* (supra) at [95]
- [53] it is an offence for Queensland estate agents to buy a client’s property without his true consent - Section 145 *Property Agents and Motor Dealers Act 2000*. Hong Kong does not have such a specific offence
- [54] HCMA No. 693/2002 – appeal allowed as the court failed to properly explain the defendants’ right of silence; EAA/COM/CAS/00/139
- [55] FACC No. 2 of 2004 – conviction overturned by the Court of Final Appeal due to alibi evidence; [http://www.hklii.hk/hk/jud/en/hkcfca/2004/FACC000002\\_2004.html](http://www.hklii.hk/hk/jud/en/hkcfca/2004/FACC000002_2004.html); EAA/COM/CAS/01/589
- [56] a submission suggests that CPD is a means of adoption of standards for the professions : “By “standards” we mean two elements - Firstly, proper professional competence, which goes beyond entry standards, which is the element mentioned in the Paper. There are also **continuing professional development** obligations on legal practitioners, as there are in many professions.”, see para. 10, Chapter A *Review of the Regulatory Framework for Legal Services in England and Wales* Final Report, December 2004. <http://www.legal-services-review.org.uk/content/report/report-chap.pdf>