

Revision Workshop

Agency Practice

- The starting point is the instruction from the clients.
- It is then for the professional agent to define the scope of work and confirm the instructions (including the payment of fees)
- In the case of a development property or one which may require renovation or alterations, a detailed work schedule may be needed. Why? To be considered.

Preparation Works

- Do we need site inspection prior to the submission of the marketing proposal?
- What can be identified on site?
- The existing state of the property;
- Features of the surrounding areas;
- The existence of rights and liabilities that can only be identified during on-site inspection, etc.
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The Importance of Land Search

- What information can be revealed in the land search?
- The titles - ?
- The ownership -? The owners vs. occupiers
- The encumbrances - ? DMC, Enforcement Orders, Agreement for S & P, Agreement for Tenancy, etc.

Who may be a Landlord ?

- A landlord may be:
- An individual;
- A company with property investment as core business;
- A company with property investment as side business;
- That company may be a listed company in HK or in other stock exchange (e.g. London);

Landlord

- A developer may hold the development property as long term investment
- It may also be a private or an institutional fund.
- A fund often has its objectives in relation to a targeted market, a specified return, an exit provision after a period.

Landlord

- The booming markets in Asia have attracted funds from local investors and elsewhere.
- A trend going towards treating property as an asset in the capital market.
- An investor makes an investment with a purpose. Knowing the purpose behind is important to draft an agency instruction.

An instruction from Clients

- Why must a client's instruction be stated clearly?
- An instruction is part of the contract of work. It defines the scope of work that a professional has to carry out. The professional in this regard is in the position of an agent who is to perform his part in order to earn his fee. Upon performance, the professional is entitled to issue the billing and request payment.

Client's Instruction

- Defining the scope of work also helps defining the liability on the part of the professional. In practice, an instruction may be given orally. It is good practice to confirm the instruction in writing or to state clearly in the written report the terms of reference so as to avoid any misunderstanding or subsequent disputes.

Property – the Subject Matter

- Property in existence [the Property Portfolio]
- The development property
- The property as a long-term investment
- Other schemes going side by side with the agency work.

The Subject Matter

- The subject matter under construction/renovation
- The subject matter cannot be leased out before the issuance of an occupation permit. One may, however, make a 'forward contract' with the prospective tenant. A binding contract to be adopted is 'Agreement for Tenancy'.

Agreement for Tenancy

- How does the 'agreement for tenancy' work?
- 1. A schedule to be followed – time is of the essence [What is the common law position?]
- 2. A standard tenancy agreement to be enclosed with the agreement for tenancy
- 3. A deposit is to be made upon the signing of the agreement for tenancy
- 4. One should take note of how the area of the premises is defined
- 5. One should avoid any commitment of the layout, the common areas, and facilities
- 6. One should avoid any commitment during oral presentation – which may turn out to be misrepresentation
- 7. One may ask: Is an agreement for lease is as good as a lease?

A Tenancy

- It is a contract and may be created orally or in writing.
- A lease is an interest in land.
- There is a requirement for a legal interest in land.

Section 3 of the CPO

- The legal requirement: CPO (Cap 219)s. 3:
- (1) Subject to section 6(2), no action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized by him for that purpose.

Section 3(2) of the CPO

- (2) This section applies to contracts or other dispositions whenever made and does not affect the law relating to part performance or sales by the court.

Lease and Licence

- The distinction between lease and licence
- The case of Street v. Mountford [1985] 1 AC 809:
- It was a unanimous decision that restates the hallmarks of a lease of exclusive possession, a periodic term and period payments

Some Important Express Terms

- Option to renew – A clear mechanism must be provided in the clause itself
- Time is of the essence – Why?
- Reference to independent valuation or arbitration
- Rent review - Similar requirements
- One should appreciate the importance of the use of option to renew / rent review clause as a strategy in asset management

Break / Redevelopment Clause

- Break clause
- Whoever has the right of an early termination, this party has the flexibility; the other party will have difficulty in planning for its own business.
- In practical terms, a break clause has to be exercised with an agreed mechanism of service of notice and strict compliance is required.
- Redevelopment clause – sufficient notice? Any compensation?

Implementation of Agency Work

- The information passed to prospective purchasers or tenants.
- Information from reliable source?
- Caution with the possibility of misrepresentation

Estate Agents Ordinance & Regulations

- Anyone in estate agency practice should hold a licence.
- But the EAO and Rs apply mainly to residential properties.
- Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation should be observed.

Estate Agents Practice (General Duties & HK Residential Properties) Regulation

- **Section 8 : Seeking Instructions**
- (1) When seeking an instruction from a client, a licensee shall not supply any information to the client which is false or misleading in a material particular in relation to a residential property.

Section 8: Seeking Instructions **cont'd.**

- (2) (a) A licensed estate agent shall keep a record of all listings of residential properties received by the agent, and keep a copy of all estate agency agreements entered into in relation to residential properties, for not less than 3 years after the listings were received or the agreements entered into, as the case may be.

Section 8(2): Seeking Instructions cont'd.

- (b) Any officer of the Authority authorized in writing by the Authority for the purpose shall have the right to inspect a record kept under paragraph (a) at any time during ordinary office hours without prior notice.
- (c) A licensee shall answer any question and supply any information requested by any officer of the Authority in relation to an inspection under paragraph (b).

Section 8(3)

- (3) A licensee shall not pass to a sub-listing agent any information of a vendor or his residential property supplied by the vendor without the prior written consent of the vendor.

Section 8(4) of the Regulation

- (4) A licensee shall not solicit an instruction from a vendor if he knows, or ought reasonably to know, that the residential property concerned is subject to an instruction exclusively granted to another licensed estate agent under an executed estate agency agreement unless the licensee has drawn to the attention of the vendor that the vendor may be liable for additional commission if he signs another estate agency agreement in respect of the property.

Section 10: Property Viewing

- A licensee shall-
- (a) assist in making arrangements for the inspection and viewing by a purchaser of a residential property (including a car parking space and common areas if applicable) and accompany the purchaser for such inspection and viewing unless otherwise instructed by the purchaser;
- (b) not arrange an inspection and viewing by any person of a residential property without the prior consent of the vendor of the property;
- (c) before the signing of an agreement for sale and purchase or a lease, establish what is to be included in the disposition of the residential property concerned and prepare a written inventory thereof.
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Section 11: Conduct of Negotiation

- A licensee shall-
- (a) not cause or permit a claim to be made of the existence of an offer from a purchaser unless the offer exists;
- (b) where information and comparables on residential property prices and rentals have been supplied to a client for reference or comparison, ensure that the information or comparables supplied do not misrepresent the value of the residential property concerned;

Section 11: Conduct of Negotiation

- A Licensee shall:
 - (c) not exercise any undue influence on a vendor or a purchaser for the purpose of inducing him to enter into an agreement for sale and purchase or a lease;
 - (d) keep a written record of all offers in respect of a residential property;
 - (e) present an offer to a client for acceptance as soon as is practicable after receiving it;
 - (f) subject to section 13(2)(b), inform a client of all offers received in the order he receives them and present them in an objective and unbiased manner.
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Section 13: Agreements for Sale & Purchase AND Lease

- (1) A licensee shall, before a client of the licensee who is not legally represented enters into an agreement for sale and purchase or a lease of a residential property-
- (a) explain to the client the meaning of each clause of the agreement or lease, as the case may be, and draw to his attention the meaning of any essential terms and provisions thereof; and
(b) recommend that the client seek legal advice if the client does not understand any part of the explanation given under paragraph (a).

Section 13 cont'd.

- (2) A licensee shall not-
- (a) continue to market a residential property after the signing of an agreement for sale and purchase or a lease in respect of the property;
- (b) be obligated to disclose any further offers to the vendor concerning the property.

Section 13 cont'd.

- 3) A licensee shall, for the purpose of avoiding the fraudulent misrepresentation of identity in an agreement for sale and purchase or a lease of a residential property, take all practicable steps to ensure that the name of the vendor is correct

Section 13 cont'd.

- (4) A licensee acting for the vendor of a residential property shall, immediately before an agreement for sale and purchase or a lease of the property is entered into, cause to be carried out a land search in the Land Registry in respect of the property and supply a copy of the land search to the purchaser of the property.

Undue Influence

- Not defined in the Ord. or Reglns
- Lord Nicholls in Royal Bank of Scotland plc v Etridge (No 2) [2002]2AC 773 [8], actual undue influence “comprises overt acts of improper pressure or coercion such as unlawful threats” and overlaps with the principle of duress.
- Classic Case: unless arrangement made, son be prosecuted.

Misrepresentation

- A misrepresentation is a false statement of fact, made during pre-contractual negotiations, which induces a party to enter into a contract.
- A false statement – ‘substantially correct’
- A statement – conduct amounting to misrepresentation
- Fact – not mere opinion or future intention

Inducement

- For a statement that induced the other party to enter into the contract, the representation must be:
 - (1) material;
 - (2) known to the representee;
 - (3) intended to be acted upon;
 - (4) actually acted upon.

A Non-reliance Clause

- The Parties agree that no statements or representations made by either Party have been relied upon by the other in agreeing to enter into the Contract.
- Reasonableness Test under s. 4 of Misrepresentation Ordinance – in which reference was made to s. 3(1) of the Control of Exemption Clauses Ordinance (Cap. 71)

Section 4 of Misrepresentation Ordinance

- If a contract contains a term which would exclude or restrict-
- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation,

Section 4 of MO cont'd.

- that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 3(1) of the Control of Exemption Clauses Ordinance (Cap 71); and it is for the person claiming that the term satisfies that requirement to show that it does.

S. 3(1) of the Control of Exemption Clauses Ord. Cap. 71

- (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Ordinance and section 4 of the Misrepresentation Ordinance (Cap 284) is satisfied only if the court or arbitrator determines that the term was a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

Good Practice

- Why do we need to make a site-inspection?
- How do we make sure we have identified the legal and/or equitable interests in land?
- Land search? Written documents? Site inspection?
- Bearing in mind the rules and guides to be followed.

The Practice of Agency

- The End