

Our ref. : [2012] HKIEA P1

CB(1) 945/11-12(02)

28 January 2012

Chairman and Members,
Panel on Housing,
Legislative Council Secretariat,
2/F Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong.

By email : panel_h@legco.gov.hk
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Dear Sir/Madam,

Re : Submissions on the Proposed Legislation to Regulate the Sale of First-Hand Residential Properties ('the Proposed Legislation')

We welcome the general direction of the Proposed Legislation which we believe may offer home purchasers greater protection. It may also give the property sector an opportunity to redeem itself from the bad name past controversies have engendered.

To this end, we wish to make the following proposals with particular focus on the structural aspect of the local estate agency practice :

- (1) Mandatory representation for the purchaser;
- (2) Cooling off period;
- (3) Preliminary/provisional agreement for sale and purchase.

The details are set out at the Annex and we shall be pleased to elaborate further.

Yours sincerely,



Aparna Sordi
President

cc. Transport and Housing Bureau firsthandsale@thb.gov.hk

Proposed Legislation to Regulate the Sale of First-Hand Residential Properties
Submissions by the Hong Kong Institute of Estate Agents

January 2012

I. Proposal No. 1 – Mandatory Representation for the Purchaser

- 1.1 In recent years developers tend to engage one or more of the major estate agencies¹ to promote the sale of first-hand residential properties, instead of or in addition to their own sales staff. Usually they are only allowed to act as single agent for the developer and the purchaser is left unrepresented.
- 1.2 Under common law an estate agent acting for the vendor owes loyalty to the vendor only, subject to any statutory duty otherwise. We have made this point in our submissions to Legco over the Icon Affair dated 8th February 2011².
- 1.3 If a purchaser is induced into buying a first sale residential property owing to material oral misrepresentations (or other misdeeds) committed by the developer's estate agent, to seek remedies through the court he has to prove :
- a. that the oral misrepresentation was made by the estate agent which may not be easy in the hectic and noisy atmosphere of the developer's sales site;
 - b. further that the misrepresentation was made within the developer's scope of authority granted the estate agent. Unless the purchaser can so prove, he can only seek remedies from the estate agent instead of rescinding the property deal. It will not be an exaggeration to say that the home purchaser then has to fight an uphill battle against the combined resources of the developer and the major estate agencies.
- 1.4 For this reason, we submit that where a developer engages the major estate agencies for first sale, it be made a mandatory requirement that the purchaser be represented by his own estate agent³.

¹ Centaline, Midland, Ricacorp, Hong Kong Properties. A few estate agencies prominent in the locality may also be engaged.

² *Submissions on the Icon Affairs and sanctions for 'Misleading Omissions'* Legco Ref. CB(1) 1250/10-11 (01), paragraphs 19-24 - [http://www.hkiea.hk/admin/assets/7_\[2011\]%20HKIEA%20P2.pdf](http://www.hkiea.hk/admin/assets/7_[2011]%20HKIEA%20P2.pdf). It is understood that the estate agent concerned is facing disciplinary action therefore we express no views here on estate agents' duty to client/customer.

³ The rights of a purchaser in the secondary market is set out in a prescribed estate agency agreement

- 1.5 To offer true protection to the client, the purchaser estate agent must meet the following criteria :
- a. Be independent of developers and the major estate agencies;
 - b. Be in possession of professional knowledge over and above the entry examination requirement. He must be able to explain matters in the sales brochure like statutory plans, land grant conditions⁴, open kitchen⁵ etc which may be available only in English;
 - c. Be adequately covered by professional indemnity insurance - Hong Kong is one of the rare places among common law jurisdictions where estate agents need not be insured.
- 1.6 The purchaser should not have to pay any agency commission⁶. Instead the developer's estate agent should be made to share the developer's commission with the purchaser's agent notwithstanding that the latter would owe no duty to the developer. How the commission is to be split between the estate agents for both parties, and the terms of the engagement arrangement, would best be worked out by the Secretary for Transport and Housing after consultation with concerned parties such as REDA, EAA and estate agency practitioners.
- 1.7 This proposal may serve to correct the present anti-competitive practice⁷ in the estate agency market for first sale.
- 1.8 More importantly it may reduce the propensity for the developer's estate agents (meaning salespersons employed by the estate agencies) to literally fight

(Form 4) which the purchaser's estate agent is duty bound to observe. This protection is not available to a purchaser in the first sale market as usually a purchaser is not served by his own estate agent.

⁴ There is little point to include the 'key property information' mentioned in para. 19 of the consultation paper unless their salient features are explained to the purchaser who cannot be expected to read for themselves such technical information.

⁵ The open kitchen in the *Icon* saga clearly demonstrates the inadequacies of the present training and regulatory regime, see our article '*If open kitchens are unauthorized building works, ought estate agents verify?*' [2011] HKIEA P3 - Practitioners page www.hkiea.hk. The new URA joint development in Queen's Road East comes with open kitchens and under the present examination syllabus estate agents are not equipped to explain to the purchaser whether an open kitchen is lawful or otherwise. As mentioned in footnote 2 above, the estate agent concerned is facing disciplinary action though we do not know details of the allegations.

⁶ It is common practice for the developer to pay the purchaser's legal fees if the purchaser instructs the developer's appointed solicitor for the conveyancing transaction.

⁷ The anti-competition bill is now debated before Legco.

over clients at the sales site. Firstly it will be unprofessional for the vendor's estate agent to approach the purchaser, instead of the purchaser's estate agent, direct. Further, small scale estate agencies can ill afford an army of salespersons milling about the sales site to canvass customers leading inexorably to bodily contact and altercation and car-jacking seen so commonly nowadays.

1.9 Having said that, we believe the purchaser estate agent requirement may be suitably relaxed if :

(a) the purchaser is legally represented throughout the negotiation process, or

(b) the developer relies exclusively on its own staff to handle first sale without any estate agents. In this situation the developer would be vicariously liable for misdeeds committed by its staff reducing the burden on the purchaser in the event that he has to seek redress through the court.

II. Proposal No. 2 – Cooling-off period

2.1 The proposed 5% forfeiture appears to be on the high side. For instance in New South Wales, Australia, only 0.25% of the purchase price is forfeited if the purchaser cancels the deal during the cooling-off period.

2.2 On the other hand, as the rationale for the cooling-off period is to enable the purchaser to consult expert advice on the property transaction, the cooling-off requirement may be relaxed if the purchaser is already represented by his own solicitors or estate agent before the preliminary agreement is signed. They would owe the purchaser a duty of care, and have insurance coverage. In New South Wales, again as an illustration, the cooling-off period may be waived by the purchaser's solicitors.

III. Proposal No. 3 – Preliminary Agreement for Sale and Purchase ('PASP')

3.1 We are most pleased that the draft bill incorporates a two-party PASP, i.e. one signed between the vendor and purchaser only. We hope that with suitable modification it could be adapted for use in the secondary market. We are of the view that title defect is more of a problem for the secondary market than the first sale market, and the problem is exacerbated by the lack of a standard PASP.

3.2 At present each estate agency, big or small, appears to have its own version of a tripartite PASP (with the estate agency itself added as the third party). Most of them appear poorly drafted/translated and have caused much unnecessary litigation. We have been campaigning for years for a standard two-party PASP to replace the tripartite PASP but to no avail.⁸

3.3 Unlike other consumer conscious jurisdictions, no single institution in Hong Kong has shown any interest in such an important document as a standard provisional agreement for sale and purchase for use by estate agents in the secondary market.⁹

3.4 It appears anomalous for Legco and Government to focus so much attention on first sale (which is already comparatively highly regulated by LACO and/or the Law Society of Hong Kong, and seldom has title problems), yet remain oblivious to the plight of home owners in the secondary market when Government itself had identified the PASP and other problems as far back as 1994.¹⁰

Stanley To
Honorary Researcher
28 January 2012

⁸ See *'The Tripartite Provisional Agreement for Sale and Purchase – RIP'* [2009] HKIEA 1 - <http://www.hkiea.hk/index.php?page=memberscolumn>

⁹ *'We have noted your suggestions on a provisional agreement for sale and purchase. However, as you may understand, the EAA is the regulator of the estate agency trade and is not in a position to comment on such matters. We will closely monitor the situation and will review our practice circulars on the subject matter if necessary to ensure practitioners' compliance.'* - para. 13 of EAA's 10.3.2011 reply to our letter on the open kitchen issue, appended as Appendix to our article *'If open kitchens are UBW, ought estate agents verify?'* [2011] HKIEA P3 - [http://hkiea.hk/admin/assets/7 \[2011\]%20HKIEA%20P3 b&w.pdf](http://hkiea.hk/admin/assets/7 [2011]%20HKIEA%20P3 b&w.pdf).

¹⁰ *Report of the Working Group on Regulation of Estate Agents, Planning, Environment & Lands Branch 8/1994* - <http://www.cityu.edu.hk/hkhousing/pdoc/ReportofWorkingGrouponRegulationofEstate.htm>, in particular paragraphs 3.12 and 4.6. The estate agency agreements now prescribed in the *Estate Agents Ordinance* Cap. 511 only partially addressed the *duties of estate agents* and *property information* issues identified in the Report. The *breach of fiduciary duty* issue remains unabated to date, see footnote 6 above. Let us not forget that the *Estate Agents Ordinance* and thus the Estate Agents Authority owe their existence to the problems identified in the Report.



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1 February 2012

Chairman and Members,
Panel on Housing,
Legislative Council Secretariat,
2/F Legislative Council Complex,
1 Legislative Council Road,
Central, Hong Kong.

By email : mpoon@legco.gov.hk

Dear Sirs,

Re : Submissions on the Proposed Legislation to Regulate the Sale of First-Hand Residential Properties ('the Proposed Legislation') - addendum

We wish to elaborate on paragraph 1.4 of the Annex to our submissions dated 28 January 2012.

One difficulty faced by the purchaser buying at first sale is that none of the statutory duties stipulated in the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation Chapter 511 ("PR"), such as the completion of the property information form and estate agency agreement etc., need be complied with by the developer's estate agent (PR section 3(4)(c) and section 7 exemption) or staff.

Even assuming that the exemption would also apply to the purchaser's estate agent, if appointed (as we proposed) he would nonetheless owe a duty to protect the client's interest – say at the least to provide him the PR 7(2) property information. The rationale if any for the PR exemption (a most difficult statute to read) appears no longer a valid one and should be reviewed along with the Proposed Legislation.

Yours sincerely,

Aparna Sordi

President

cc. Transport and Housing Bureau firsthandsale@thb.gov.hk