

Code of Conduct: Real Estate Agents (REAs)

This Code has been issued by the Minister with responsibility for consumer and commercial affairs in accordance with the provisions of Section 91(3) of the Fair Trading Act 2015 for real estate agents (REAs) who are required to hold an appropriate business licence in accordance with the provisions of Part 9 of the Fair Trading Act 2015.

This Code is designed to promote best practices in this sector. While parts of the Code cover legal obligations owed by REAs to their clients under Gibraltar law, it should not be regarded as the definitive authority on REAs' legal responsibilities. REAs should become separately acquainted with these legal obligations which are not prejudiced by this Code.

The Office of Fair Trading (OFT) is committed to preventing business practices which cause harm to consumer interests. It will therefore consider any unreasonable departure by an REA from the best practices guidance set out in this Code as a practice which significantly harms consumer interests for the purposes of the Fair Trading Act 2015.

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1. Interpretation

- a) This Code is addressed to all REAs conducting business in Gibraltar and all references in this code to ‘you’ and ‘your’ should be interpreted as such.
- b) All references in this Code to communications in “writing” shall include e-mail.

2. The Code

- a) You should have available, free of charge, copies of this Code to give to clients on request at your offices and on your website.
- b) You should provide every client with a copy of this Code with your Terms of Business (see code 5) before entering into a formal binding relationship with them.
- c) You should ensure that all your staff are fully conversant with all aspects of this Code and their legal responsibilities, and observe these in all their dealings with your clients.
- d) You may use and display material promoting this Code. Any promotion involving the use of the OFT’s logo should be approved by the OFT in advance.

3. Your service

- a) You should provide a service to clients and consumers consistent with fairness, integrity and best practice and in keeping with the legal obligations owed by you to your client.
- b) You should immediately recognise who your client is and who you owe your contractual obligations to.
- c) Upon recognising who your client is you should ensure you understand your legal obligations and duties of care to act on their behalf and in their best interest avoiding conflicts at all times (see code 4).
- d) You should not seek business by methods that are oppressive or involve dishonesty, deceit or misrepresentation.
- e) You should treat all parties involved in transactions fairly and with courtesy.
- f) You should deal with all correspondence with your clients as promptly as possible and, in any event, within the following time limits:
 - i. An acknowledgement shall be sent not later than 7 days from the date of receipt of correspondence; and
 - ii. A detailed reply, or a reply containing a detailed explanation for any delay, shall be sent not later than 14 days from the date of receipt of correspondence.

4. Conflicts of Interest

- a) You should avoid any conflict of interest. You should disclose at the earliest opportunity in writing to your client or any relevant third party any existing or potential conflict of interest.
- b) If you are dealing with a property that is:
 - i. owned by you, an employee or an associate; or
 - ii. in which you, an associate or an employee has an interest,

you should disclose this interest to all parties in writing, before negotiations begin.

5. Instructions and Terms of Business

- a) You should always have written terms of business signed by your client and setting out the basis of your instruction and any fees, commissions and charges which may reasonably arise (see code 6).
- b) Prospective clients must be given sufficient time to consider your terms of business before agreeing to instruct you.
- c) Your terms of business should be:
 - i. consistent with this Code;
 - ii. fair and reasonable;
 - iii. clearly presented; and
 - iv. written in plain and intelligible language.
- d) Any documentation containing standard terms or clauses that seeks to create a contractual relationship between you and your clients must clearly set out the rights and obligations of each party. Such documentation must comply with the requirements of the Unfair Terms in Consumer Contracts Act.
- e) Your terms of business should state the duration of your instruction, how it may be terminated by either party and the consequences thereof.
- f) You should give your client written confirmation of your acceptance of their instructions and written details of your terms of business. You must sign and date your terms of business before a copy is given to your client.
- g) You should always clearly explain the consequences of any contractual relationship entered between you and your client, in particular detailing any fees, commission and charges and how these may arise (see code 6).
- h) If you are instructed in the sale or letting of a property you should take reasonable steps to satisfy yourself that the vendor or landlord are entitled to instruct you on behalf of all co-vendors or co-landlords.
- i) You shall not accept instructions or in any manner assist in a transaction of a property which would be in breach of the title documents to that property. Without prejudice to the generality of the forgoing this shall include the rental of co-ownership properties.
- j) You should not instruct other agencies to assist you in dealing with any property without your client's written permission. If your client gives you permission, as the instructing agent, you may be held liable for the actions of the sub-instructed agent.
- k) Any terms regarding your 'sole agency', 'sole selling rights' or similar restrictive terms should be clearly defined, expressly highlighted in the terms of business and specifically brought to the client's attention before they instruct you.

6. Fees, Commissions and Charges

- a) You should be clear and transparent with fees and avoid hidden costs.
- b) All fees, Commissions and other additional costs should be included in your terms of business. They should be fully explained and clearly and unambiguously stated in writing.
- c) Where your commission fee is a percentage you should clearly state whether your fee will vary depending on whether the agreed price is higher or lower than the asking price.
- d) Where you charge a fixed fee you should state the actual amount payable and ensure that your client understands that the fee will not vary, irrespective of the final sale price or rent.
- e) You must not make a client pay a charge or be liable for an element of your service that the other party has also been charged for in the course of the same transaction.

f) Where you are approached by a seller who has previously instructed another agent to sell their property you must, before they are committed to another contract, explain and specifically draw to the seller's attention the potential of paying fees to more than one agent, particularly where the first agent may have introduced the property to the eventual purchaser already.

g) When you know the property has been marketed by another agent and:

- i. that agent may have been instrumental to the sale of the property; and/or
- ii. there is (or it would be reasonably foreseeable that there will be) a dispute regarding which agent shall be entitled to the payment of a commission fee,

you shall communicate promptly with the other agent before marketing the property and reach an agreement in relation to which agent shall receive the relevant commission fee. Such agreement shall be reasonable and fair to the client in the circumstances. The proposed agreement, or a failure to reach an agreement, must be communicated promptly and clearly to your client.

h) Where there is a dispute with regard to any fee or commission payable you shall keep any funds held by you in escrow pending the resolution of the dispute. You shall try to resolve the dispute promptly in good faith. Where appropriate you should consider mediation.

7. Deposits

a) A deposit is entrusted to you for safekeeping as stakeholder and should not be renamed or disguised as an introducer's fee, commission or other brokerage fee.

b) The purpose of any holding deposit and its use must be explained before any client is committed to paying it.

c) Before a deposit is accepted, the circumstances under which the deposit is to be held, refunded, forfeited or used towards the purchase, sale, lease, rental or tenancy agreement, or other (as the case may be) must be clearly stated in writing, agreed by the relevant parties and a copy of the agreement provided to those parties.

d) Notwithstanding code 7 b) and c) above, you should presume that all deposits made by a consumer are to be held by you:

- i. on a 'subject to contract' basis; and
- ii. in your client account (see code 8),

unless the parties expressly agree otherwise in writing amongst themselves and provide you with a copy of their agreement.

e) Subject to any express agreement between the parties or between you and your client and the parties, if for any reason, the parties do not proceed to exchange contracts in relation to a sale, purchase, lease or other or enter into a rental or tenancy agreement (as the case may be), the deposit should be returned forthwith to the payee in full without deduction or set-off.

f) In the case of deposit held at the end of a tenancy agreement you shall comply with code 17 (c) to (e).

g) Where a contractual arrangement between you and a landlord is terminated, and a relevant managed property is still tenanted, you must promptly tell the tenants, in writing, of the change in arrangements, including where it is proposed the deposit will be held. In such circumstances, the written authority of the tenant(s) to release their deposit to a third party must be obtained.

8. Client Accounts

a) It is a legal requirement under Section 66 (2) of the Fair Trading Act 2015 to hold all deposits from clients and client monies in a separate client account.

b) The account designated as a client account, should contain the word 'client' in the account name with the bank or building society.

- c) You should comply with the Code of Conduct for businesses handling client monies, a copy of which can be found in the 'Documents' section of the OFT's website (www.oft.gov.gi).
- d) Your client account or accounts should be reconciled regularly and at least monthly to your bank statements and clearly identify which client holds which deposit with you. Monies not reconciled must be investigated in a timely manner and efforts made to return money to clients where it is no longer necessary to hold a deposit.
- e) The monies contained in such client account(s) must be segregated from your office account and held to the order of the particular client.

9. Market Values

- a) When you advise a client or prospective client as to the sale or rental value of their property, your advice should be given in good faith and reflect your professional opinion.
- b) Your advice regarding market value should reflect information about the relevant property and current market conditions. Your advice should also, where possible, be supported by comparable evidence.
- c) You should never directly or indirectly misrepresent the market value of a property.

10. Advertising

- a) You should not advertise any property without written permission from the owner.
- b) All your adverts should be legal and decent, and shall not be misleading.
- c) You should be able to objectively substantiate your statements.
- d) Advertised properties should be available at the time of advertising.
- e) If you intend to include material produced by a third party, you must obtain that party's written permission to do so prior to the commencement of marketing.
- f) Your website should be updated at least weekly.
- g) When an offer has been accepted subject to contract you should seek your client's instructions as to whether the property should be withdrawn from the market, or continue to be marketed. In the latter case, you should notify the prospective buyer or tenant in writing. The prospective buyer or tenant should also be informed in writing should your client first decide to withdraw the property from the market and then later decide to put the property back on the market.

11. Viewings and Representations

- a) You should take instructions from your clients as to their requirements regarding viewings, specifically whether or not they should be conducted by you.
- b) You should record any viewings that have been arranged for the property and communicate feedback from those viewings to your client within agreed timescales.
- c) Where possible, you should obtain an inventory before carrying out viewings, so that both parties are clear from the outset on what is included in the price or rent (as the case may be). You should advise your clients to formally raise in writing any notable discrepancies, deficiencies or differences identified with the inventories, within a specified period of time.
- d) When you know the property has been marketed by another agent you should establish if a potential buyer has previously viewed the property through that agent (see code 6 f) and g)).

12. Access to Properties

- a) Unless otherwise instructed by your client, if you hold the keys to the property you should be present at any viewings of the property. You should not allow a prospective purchaser or tenant (as the case may be) to visit the property without your supervision.
- b) If you are arranging for someone to view a property that is not vacant, you should agree the arrangements with the occupier (including any tenants) beforehand with 24 hours' notice, where possible.
- c) You should make sure that all the keys you have are kept secure.
- d) You should maintain records of when you issue keys and to whom, and when they are returned. These records should be kept secure and separate from the actual keys. You should only give keys to people providing you with satisfactory identification. The keys and their key rings should not identify the property address.
- e) If access to a property is required by a person on behalf of the purchaser or tenant (e.g. a surveyor, builder or tradesman) and you hold the key but are not able to accompany that person, written permission should be obtained from the vendor or landlord before you hand over the key.
- f) You should exercise reasonable diligence to ensure that, after any visit by you, the relevant property is left as secure as you found it.
- g) Where appropriate to the services being provided, and unless you have instructions to the contrary, you must arrange for, or carry out, the final check-out as soon as is reasonably practicable after tenants vacate a property at the end of a tenancy, preferably during daylight hours. The outgoing tenants should always be offered the opportunity of being present to observe the final check-out. The check-out must be conducted thoroughly, and a sufficiently detailed report or summary prepared with specific reference back to the inventory and schedule of condition prepared prior to the tenancy.

13. Offers

- a) You should notify your client as soon as reasonably possible and in any event in writing within two working days of receipt of all offers and /or responses to offers that you receive at any time up until the point at which contracts have been exchanged or a rental agreement entered into, unless the offer is an amount or type which your client has specifically instructed you, in writing, not to inform him of.
- b) Prior to the acceptance of any offer, you should take reasonable steps to ascertain the availability of the purchaser's funds and inform the vendor accordingly. Such information will include whether the prospective purchaser is relying on the sale of another property to use towards the relevant purchase and whether they require a mortgage or are cash purchasers.
- c) When an offer in respect of a sale has been accepted subject to contract, you shall clearly explain to your client:
 - i. what the next steps in the process up to completion are and what the relevant timeline is likely to be;
 - ii. if a reservation deposit is paid by the prospective purchaser, what this is for and whether it is refundable (see code 7); and
 - iii. whether the property has been removed from the market (see code 10 g)).
- d) For offers in respect of lettings you must provide the parties with a draft or specimen tenancy agreement prior to the tenant becoming liable for fees or charges associated with the rental of the property except where such opportunity is declined. Where there is to be a guarantor for the tenant for the tenancy, this facility must be extended to that person.
- e) Once an offer is received you should comply with your anti-money laundering and combatting the financing of terrorism obligations (see code 16).

14. Involvement Between Offer and Exchange of Contracts

a) After acceptance of the offer by the vendor, and until exchange of contracts you should not influence the legal process or the mortgage lending process. Your obligations to the vendor are:

- i. to monitor progress and keep your client up to date;
- ii. to assist where possible, if asked; and
- iii. to report information deemed helpful to bringing the transaction to fruition.

b) If your client becomes involved in a contract race, they should be told promptly of the situation and given such information which comes to your attention as is consistent with your duty to the other parties.

15. Exchange and Completion

After exchange of contracts you should not give the purchaser the keys to the property without the written permission from the vendor or landlord (as the case may be) or, where applicable, their lawyer. Keys and title to the property should as a matter of good practice transfer simultaneously at completion and should be managed by the parties' respective lawyers unless agreed otherwise by the parties expressly.

16. Anti-money Laundering Requirements

a) You shall comply with all of the requirements set out in the Proceeds of Crime Act 2015 and in the OFT's Anti-money laundering and combatting the financing of terrorism guidance notes for Real Estate Agents, copies of which can be found in the 'Documents' section of the OFT's website (www.oft.gov.gi).

b) You shall conduct an appropriate risk assessment of your business to determine the risk of it being used for the laundering of money and the financing of terrorism. Based on that risk you shall develop appropriate policies and procedures to mitigate and monitor that risk and to prevent the laundering of money and the financing of terrorism through your business.

c) You shall appoint a Money Laundering Reporting Officer and shall report any suspicious activity to the Gibraltar Financial Intelligence Unit as soon as possible.

d) You shall provide adequate training to your employees to ensure they are aware of:

- i. their legal obligations as set out in the Proceeds of Crime Act 2015 and in the OFT's Anti-money laundering and combatting the financing of terrorism guidance notes for Real Estate Agents;
- ii. your anti-money laundering policies and procedures;
- iii. how to identify suspicious activity; and
- iv. how to report such activity.

e) You shall carry out appropriate due diligence before entering into a new client relationship and shall carry out risk assessments prior to carrying out any transaction.

17. End of tenancies

a) On giving or receiving notice to bring a tenancy to an end, you must provide a tenant with general written guidance as to what steps need to be taken relating to the preparation of the property for the final checkout, handover of keys and other matters.

b) You must actively flag and draw the tenant's attention to any specific clauses or obligations within the tenancy agreement relating in particular to proposed deductions from the tenancy deposit but also for example, to specified standards of cleaning etc.

c) Any deductions from a deposit at the end of a tenancy agreement, must be reasonable and must take account of the specific circumstances of the situation. Any holding deposit due to be returned must be repaid within 10 working days from the conclusion of the tenancy.

d) Wherever possible, once proposed deductions have initially been raised with the parties, you must pay over to each relevant party any amount of the deposit that is not subject to a dispute, as soon as administratively practicable and in accordance with code 17 (c).

e) You should ensure that any contractor's or supplier's quotations or receipts provide a sufficiently detailed breakdown to clarify precisely what work is to be or has been carried out and in which areas of a property. It should then be simple for all parties to assess and understand what portion of the work and costs can be allocated to the landlord or tenant in the light of the inventory, check-out report or tenancy agreement obligations.

18. Confidentiality and Data Protection

a) You should treat all transactions and communications with your clients as confidential.

b) You shall respect data subjects' right to privacy and follow the data protection principles set out in the Data Protection Act or other relevant legislation.

19. Complaints handling

a) You should maintain and operate a complaints procedure. Such procedures should be in writing and explain how to make a complaint against your business.

b) All verbal and written complaints should be recorded by you. All written complaints should be acknowledged in writing within 14 calendar days of receipt and investigation promptly undertaken. A senior member of staff not directly involved in the transaction should deal with the complaint.

c) If the complainant remains dissatisfied, they should be told how their complaint may be pursued further within your business. Following the conclusion of your investigation, a written statement of your final view, and including any offer made (where relevant), should be sent to the complainant. This letter should also tell the complainant how the matter can be referred to the Office of Fair Trading.

20. The Office of Fair Trading's role

a) The OFT may investigate your business practices following the receipt of a complaint against you. In conducting their investigation, the OFT will consider any departure by you from this code.

b) If, following its investigation and appropriate consultation with you, the OFT is of the view that your practices are harmful to consumers, the OFT shall invite you to provide an undertaking that you will refrain from that conduct in the future. Failure to provide such undertaking shall result in the OFT referring you to the OFT's Commission for enforcement action.

c) If you fail to comply with your undertaking once given the OFT shall refer you to the OFT's Commission for enforcement action.

d) Following a referral by the OFT regarding your matter, the OFT Commission may, in its discretion issue an appropriate enforcement order against your business in accordance with the Fair Trading Act 2015.