



The Estate Agency Affairs Board

PURCHASER'S COOLING OFF RIGHT: GUIDELINES FOR ESTATE AGENTS

The following guidelines are issued by the Estate Agency Affairs Board to assist estate agents in discharging their legal and ethical duties when negotiating a transaction which is subject to the cooling off right provided for by the Alienation of Land Act 68 of 1981 ('the Act'). Clause 2.1 of the Code of Conduct states that an estate agent may not 'do or omit to do any act which is or may be contrary to the integrity of estate agents in general', while in terms of clause 2.2 an estate agent must protect a client's interests to the best of his or her ability, with due regard to the interests of all other parties concerned. Failure to comply with the guidelines may constitute a contravention of these clauses, and/or the other clauses of the Code of Conduct referred to in the guidelines specifically.

1. If a purchaser enjoys a cooling off right, every offer and/or sale agreement signed by such purchaser must state that the purchaser is entitled to revoke the offer or terminate the sale agreement (as the case may be) in terms of s 29A of the Act. Estate agents must ensure that their offer/sale documents comply with this requirement. The Board does not prescribe any specific wording for the relevant clause, except that the expiry date of the cooling off right must be stated together with an explanation of how the date is calculated. The following clause serves as an example:

Purchaser's cooling off right

1. This clause only applies if s 29A of the Alienation of Land Act, 68 of 1981, is applicable to this offer/agreement.

2. Notwithstanding any other clause in this document, the purchaser has the right to revoke this offer or terminate this agreement by written notice to be delivered to the seller, or his/her agent, within five days after he/she (the purchaser) has signed the offer or agreement. The five day period is calculated with the exclusion of the day upon which the purchaser signed the offer or agreement (as the case may be), and of any Saturday, Sunday or public holiday. If the purchaser wants to exercise the aforesaid right, the notice must therefore be delivered to the seller on or before midnight on _____ (date). This notice will have no effect unless it

- (i) is signed by the purchaser or his/her agent acting on his/her written authority;
- (ii) refers to this offer or agreement as the offer or agreement that is being revoked or terminated, as the case may be; and
- (iii) is unconditional.

Stating the expiry date is undoubtedly the best way of avoiding confusion as to when the buyer's cooling off right expires. An estate agent must therefore take care to fill in the expiry date correctly.

2. In terms of clause 6.2.1 of the Code of Conduct an estate agent must explain to both the buyer and seller the meaning and consequences of the material provisions of an offer or sale agreement, before such offer or agreement is signed by the buyer/seller. If the estate agent is unable to furnish the explanation, the buyer/seller must be referred to a person who can explain the document. A buyer's cooling off right is a material provision of an offer / sale agreement and estate agents will have to explain to both a buyer and seller what the cooling off right entails, before the buyer/seller signs the document; alternatively, if an estate agent is unable to explain the implications of the cooling off right, the respective parties must be referred to someone who can furnish the necessary explanation. What must be explained are the following:

- (a) The fact that the buyer has the right to revoke the offer or terminate the sale agreement within five days after he signed it.
- (b) How, and by when, the buyer must exercise the cooling off right, should he wish to do so.
- (c) The fact that the offer or sale agreement in question will no longer have any legal effect and will not be binding on any of the parties if the buyer has exercised the cooling off right in the prescribed manner.

3. Clause 6.1.1. of the Code of Conduct imposes a duty on an estate agent to present to a seller every offer received by the estate agent before the sale of the seller's property has been finalised. The only exception is if the seller has specifically instructed the estate agent not to present a particular offer. This means that if an estate agent obtains an offer from a purchaser who enjoys a cooling off right, such offer must be presented to the seller unless the seller has specifically instructed the estate agent not to present any offer which is subject to a buyer's cooling off right. If an estate agent has such instructions, he may hold back the offer until the cooling off period has expired. In such cases the estate agent must

- (a) explain the position to the buyer; and
- (b) check the expiry date of the offer to make sure that the offer will still be valid when it is presented to the seller.

An estate agent who is instructed not to present certain offers to a seller, is advised to obtain such instructions in writing to avoid misunderstanding and disputes.

4. A purchaser who wishes to exercise a cooling off right must deliver a written notice to this effect to the seller *or his or her agent* within the prescribed five day period. An estate agent acting for a seller is not necessarily the seller's *agent* for the purposes of receiving a cooling off notice from a buyer. This is a matter for negotiation between the seller and the estate agent. If the seller appoints the estate agent as his or her agent for the aforesaid purpose, and the estate agent accepts the appointment, the buyer will be entitled to deliver the cooling off notice to the estate agent and the estate agent will then be obliged to accept such notice on the seller's behalf. This must be disclosed in the relevant offer or sale agreement and details must be given of where and how the cooling off notice must be delivered to the estate agent. Should the buyer deliver a cooling off notice to the estate agent, a receipt stating the time and date of receipt of the notice must be given to the buyer. The estate agent must then forthwith inform the seller of the fact that the buyer has exercised his or her right to cool off.

If an estate agent is not the seller's agent for the purposes of receiving a cooling off notice, this fact must be disclosed in the relevant offer or sale document and details must be given in such document where and how the buyer can contact the seller for the purposes of delivering the cooling off notice. It must be stated clearly that delivery of a written cooling off notice (which complies with the requirements specified in the Act) will be deemed to be a valid

delivery if it is delivered in the manner and/or at the address stated in the offer or sale document.

The following clause serves as an example of how the disclosures referred to above may be worded:

The estate agent is/is not* authorised to accept a cooling off notice for or on behalf of the seller. Such notice will be deemed to have been validly delivered if it is delivered or tendered to the seller or the estate agent* personally or to any person over the age of 16 years that resides or is employed at the seller's or estate agent's* address stated in this offer/agreement. The seller/estate agent* shall on demand provide the purchaser with a receipt in respect of the cooling off notice referred to herein.

* Delete if not applicable

(This clause assumes that the estate agent's name and address, and the address of the seller, are stated in the offer/agreement. If this is not the case, the necessary details must be recorded in the clause itself.)

5. In terms of the Act a buyer does not enjoy a cooling off right if he or she has reserved the right to appoint a nominee. The inclusion of a standard nominee clause in a pre-printed sale document will therefore have the effect that no buyer who signs such document will have a cooling off right. Estate agents are not prohibited from including nominee clauses in their pre-printed documents, but the Estate Agency Affairs Board does not recommend the use of standard nominee clauses in offer or sale documents which are subject to a cooling off right. A nominee clause may be included in such documents only if

- (a) good cause exists, ie there is a good reason why the clause must be included; and
- (b) the clause is contained in a separate addendum to the offer/agreement, signed by the parties; and
- (c) such addendum clearly states that the inclusion of the nominee clause has the effect that the buyer no longer enjoys a cooling off right.

The effect of the nominee clause must be explained to the buyer before he or she signs the relevant document (clause 6.2.1 of the Code of Conduct).

6. A sale agreement which is subject to a cooling off right 'hangs in the air' until the buyer has exercised the cooling off right or the right has expired (whichever occurs first). An estate agent is not prohibited from including a clause in a sale agreement to the effect that the seller may continue marketing the property during the cooling off period and that if a better offer is received during this period, the sale agreement will terminate unless the buyer is prepared to buy the property on the terms stipulated in the better offer. If such a clause is included, the meaning and practical implications thereof must be explained to both the seller and the buyer (clause 6.2.1 of the Code of Conduct).

7. The Act states clearly that a purchaser cannot be made to pay any penalty or fee should he or she exercise the cooling off right. An estate agent may not impose an administration fee or levy for handling or submitting an offer which is subject to a cooling off right.

8. In terms of the Act there is no cooling off right for a buyer if the seller and buyer have previously concluded a similar transaction in respect of the same property on substantially the same terms. This means that if a seller and buyer cancel a sale agreement and thereafter enter a fresh agreement on similar terms, the buyer will not have a cooling off right in respect of the second agreement. An estate agent who negotiates the second transaction must, if he or she is aware (or ought to be aware) that the seller and buyer have cancelled an earlier agreement in respect of the same property, explain to the buyer that the cooling off right no longer applies.

The Estate Agency Affairs Board considers it to be a species of fraud for an estate agent to assist in cancelling a sale agreement and to draw up a fresh agreement for the parties, if this is done purely to bypass the buyer's cooling off right. If a buyer enjoys a cooling off right in respect of a particular transaction, an estate agent may assist in cancelling that transaction and negotiating a fresh agreement for the parties on similar terms only if

- (a) there is a sound reason why the agreement has to be cancelled and cannot merely be amended; and
- (b) the estate agent discloses to the buyer in writing, before the agreement is cancelled, that he or she will not have a cooling off right in respect of the second transaction if the terms thereof are similar to the cancelled transaction.

9. An estate agent who has closed a transaction may show the buyer other properties and advise the buyer to cool off in respect of the first transaction, should the buyer wish to do so. The estate agent must, however, disclose to the seller that he or she will be showing the buyer other properties during the buyer's cooling off period and that there may be a possibility that the buyer could cool off in respect of the (first) sale. It is not necessary for the estate agent to obtain the seller's consent before showing the buyer other properties; all that is required is that the seller must be informed *before* the estate agent endeavours to find the buyer an alternative property.

10. An estate agent who is asked by a buyer whether or not a cooling off right should be exercised, may advise the buyer in good faith even if the result would be that this would scuttle his own or a competitor's deal. However, the estate agent must remain objective and base his advice on facts. Great care should be taken to weigh up all relevant considerations and not to make misrepresentations or hide material facts.

11. The Act states that a buyer who buys, or makes an offer on, a property (referred to below as the 'second property') within the five day cooling off period after having bought another property, is deemed to terminate the first transaction except if the buyer in good faith intends buying both properties. The first seller therefore has a material interest in the second transaction. In terms of the Code of Conduct an estate agent who negotiates the second transaction must protect the interest of the first seller, if such seller was the estate agent's client in respect of the first transaction; if he was not the estate agent's client, the estate agent must nevertheless have 'due regard' to his interests and the interests of the buyer. Accordingly, an estate agent who negotiates a sale of land (as defined in the Act) must comply with the following requirements:

- (a) The estate agent must ask the buyer if he or she has within the previous five day period (calculated in the manner stated in the Act) concluded a transaction in respect of which he or she has a cooling off right. If the answer is no, this should be recorded in the offer or sale agreement relating to the second property so that there is at least some record of the buyer's statement.
- (b) If the answer to the aforesaid question is affirmative, the following applies:
 - (i) The estate agent must advise the buyer that disputes can easily arise as to whether he (the buyer) has cooled off in respect of the first transaction by entering into the second deal. The crucial question will be whether or not the buyer in good faith intended to buy both properties. Accordingly it is in the buyer's best interest to advise the first seller in writing within the relevant cooling off period whether or not the second transaction (ie the offer or sale agreement relating to the second property) has terminated the first

- (ii) If the estate agent who negotiates the second transaction acted for the seller in closing the first sale, the estate agent must protect the interests of his client (the first seller) by informing him that the buyer has within five days of the first transaction bought, or has made an offer on, another property. The estate agent must also convey to his client whether or not he knows that the buyer in good faith intends buying both properties, or whether the second transaction or offer had the effect of terminating the first.

To avoid uncertainty and disputes in this regard, estate agents may consider including the following clause in every sale agreement in respect of which a buyer enjoys a cooling off right:

If the purchaser buys a second property whilst still having a cooling off right in respect of this agreement, the purchaser shall forthwith upon signature of the second agreement inform the seller and the estate agent whether or not he or she intends in good faith to buy both the properties referred to in this agreement and the second agreement. Should the purchaser fail to notify the seller, and this agreement is later deemed to have been terminated by reason of the fact that the purchaser entered into the second agreement, such failure shall constitute a breach of this agreement and expose the purchaser to whatever remedies the seller and/or the estate agent may have in respect of such breach.

12. If more than one party sign an offer or sale agreement as purchaser, the cooling off right can be exercised only by all those parties acting jointly. It is not possible for one party to cool off, leaving the other(s) as the purchaser. This applies also where an offer or sale agreement was signed by a husband and wife as joint purchasers. However, where one spouse married in community of property signed the document as purchaser, the other spouse having consented thereto in writing; it is arguable that the cooling off right can be exercised by the spouse who signed, without having to first obtain the other spouse's written consent to do so. The Matrimonial Property Act 88 of 1984 does not expressly require any spouse to obtain the other's consent before terminating an agreement or revoking an offer. The matter is nevertheless not entirely clear. To avoid disputes or uncertainty a spouse married in community of property who wishes to exercise a cooling off right in respect of an offer or sale agreement by him or her, is best advised to first obtain the written consent of the other spouse, signed by two competent witnesses.