

The Regulation of Estate Agency

– Reliable Advice and Guidance

Statute Law

Estate agency in the UK is effectively regulated by two specific pieces of legislation. The Estate Agents Act 1979 (EAA) which came into force in 1982 was later supplemented by various additional Orders and Regulations introduced in 1991. Some ten years later the Property Misdescriptions Act 1991 (PMA) came into force with its main definitions drawing on the 1979 Act although the enforcement provisions are different.

More recently have come the Money Laundering Regulations (MLR) which require strict compliance and to make that point are backed by harsher penalties including large fines and/or imprisonment.

Scope and Limitations

The main statutory obligations, set out in the EAA, are designed to allow varied interpretation as the legislation has to cover all types of agency work – residential, agricultural, industrial and commercial. However the sale of overseas property is excluded from these controls as are lettings and property management. Both the EAA and the PMA include a due diligence defence provision.

Future Changes

As outlined in greater detail below, the Government is looking shortly to introduce Home Information Packs: the necessary legislation was contained in the Housing Act 2004. Consultation is ongoing. There are then further changes likely to impinge on estate agency practice which will flow from the introduction of electronic or e-conveyancing, presently intended to become compulsory in 2011.

Scotland

For the record, responsibility for both the EAA and the PMA was devolved to the Scottish Parliament. Presently, no amendments have been made to either Act and the Scottish Executive is planning to replicate HIPs as Purchasers' Information Packs in order to keep the systems north and south of the border broadly similar. The Executive could, of course, introduce different regulations at any time.

Essential Principles

Within the overall flexibility, there are a number of basic essentials which must be addressed. Firstly, *'Know your client'* procedures must be in place under the MLR while certain record-keeping and client reporting is also mandatory under EAA Orders. Clearly, staff induction training is paramount and each agency should provide a basic operational system backed by clear procedural guidance for all the staff to follow. In addition there should be arrangements for ongoing staff refresher training, complaints handling, ideally with internal monitoring and compliance audits.

Although not expressed in such terms, an underlying objective of the EAA, and more particularly the PMA, was to introduce quality-assured management techniques to the profession, with certain specific mandatory aspects designed to ensure adequate standards of consumer protection.

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Disciplinary Provisions

Presently there is no formal regulatory authority for the profession nor are estate agents obliged to join either the Royal Institution of Chartered Surveyors (RICS) or the National Association of Estate Agents (NAEA) although the majority of estate agents belong to one or other body. In addition there is an Ombudsman scheme which Government is committed to making mandatory in the near future.

The main enforcement responsibility lies with the Office of Fair Trading in the case of the EAA, and with Trading Standards Authorities in relation to the PMA. The new SOCA (Serious Organised Crime Agency) monitors the MLR. All have powers to investigate and take disciplinary action if necessary.

The Office of Fair Trading

The OFT has wide discretion powers: it may warn an estate agent for a specified breach of an Order or Regulation, or, in an extreme case, issue a formal banning order preventing an individual, or the whole company, from doing 'estate agency work' – as defined in the EAA. There are appeal provisions.

Under the PMA, any Investigating Officer who believes an offence has been committed may issue an informal warning, a formal caution, or lay an Information before magistrates. The courts may levy a fine, and the OFT can take any conviction into consideration when deciding on a full practice ban which can name an individual manager or partner, a particular branch, or a whole firm.

Compliance

While most estate agents put in place staff training, management systems and office procedures when the legislation was new, it is equally important that high standards of vigilance are maintained to avoid staff becoming lax or complacent. All new staff must have appropriate induction training.

Estate agency is a complex, highly competitive, fast-moving business operating under considerable pressures and stress. Inevitably this can result in a real risk of non-compliance with some of these statutory obligations. This makes it even more important that all staff are fully committed to acting totally professionally and ethically at all times, and follow the letter of the law. They must understand that their legal and professional responsibilities lie with the seller-clients, to whom they have a fiduciary duty of care which means they should avoid all potential conflicts of interest.

External Standards

The OFT has published an Estate Agency Guide which is a recital of the basic law but there is no single source of authoritative professional guidance which is why sound staff training is so critical.

The Ombudsman for Estate Agents (OEA) published a Code of Practice which has since been adopted by the RICS and NAEA (in a slightly adapted format). This Code is mandatory for members of these organisations and increasingly being recognised by the courts. Accordingly it should be regarded as *de facto* estate agency practice regulations and followed consistently.

Future Developments

Home Information Packs

On the immediate horizon are Home Information Packs. Assuming these are introduced, as the Government has planned, in June 2007, they will result in the largest ever change in estate agency practice. The registration and sale of residential property will then be tightly prescribed. No home may then be put on the market for sale unless a package of information is available for inspection by any applicant or prospective buyer. The contents are all to be set out in Regulations and will, effectively, replicate the sort of information conventionally made available by property auctioneers.

Initially, the Government hoped to include a new style of Home Condition Report (HCR) – basically a quick snapshot designed to avoid unexpected problems arising at a later stage in proceedings. It is now to be an 'authorised' document which makes inclusion of an HCR voluntary.

Home Condition Reports

Technically these will be an objective report on the present superficial condition of each property with three ratings, 1, 2 and 3. They will not be a survey as such although a 3 rating will carry some explanation but the HCRs will have few professional opinions as such. Still mandatory is the Energy Performance Certificate (EPC) which uses standard SAP Ratings to assess the insulation standards. This EPC will include ideas on how to improve the insulation standards with estimates of the costs.

Once finally signed off by a certified Home Inspector, any HCRs and all the EPCs will be centrally held on a new data base and available for public inspection. Subsequent improvements made to a property may be recorded in an addendum but once any HCR is centrally recorded it may not itself be modified again - the idea being for a continuous history of each property to be built up over time.

Support and Advice

Having said there is no definitive estate agency guidance available David Perkins has had over 40 years professional estate agency experience. A Past President and former Business Practices Officer of the National Association of Estate Agents he runs a comprehensive estate-agency consultancy service.

Widely acknowledged as a leading expert on the legal aspects of the profession, he was Executive Editor of *'The Estate Agent's Factbook'* from its launch in 1985 and a founder and a long-term editor of the *'Estate Agency News'*, where he remains a regular and popular columnist.

Parliamentary Experience

For many years, Perkins was closely involved with parliamentary consultation and negotiations dealing with the Orders, Regulations and estate-agency-related legislation generally. As the UK's leading expert on the PMA he has assisted with many defence cases, including the landmark Castles' case. He is also the author of the only professional text book dealing exclusively with this Act.

Due to this unique experience his formal Opinions are respected by the Courts in both civil and criminal cases. His Opinions have been cited in two successful High Court applications for Judicial Review.

Professional Services Available

Staff Training

Numerous types and styles of training courses are available, including:

- induction training covering the basic principles of agency law and the specific obligations that stem from the various Orders and Regulations;
- money laundering with a simple, straightforward approach to *'know your client'* procedures, record keeping and what to do and how to report any cases of possible money laundering;
- preparing property particulars in the light of the Property Misdescriptions Act obligations with stories and examples based on genuine case histories;
- more advanced law of agency, dealing with the principles and the practices including compliance with the Code of Practice, complaints handling and redress procedures; and
- preparing for HIPs, looking at the various options and alternatives to deal with the new approach to property marketing. Remember that David Perkins has no vested interest and so his advice and guidance is uniquely honest, practical and impartial.

Confidential Hot-Line Advice Service

This is another valuable service as Perkins is able to deal with any estate-agency-related query especially PMA difficulties, resolving commission disputes, etc. This unique support service is extremely popular with many estate agents who have been regular subscribers for several years.

Professional Practice Notes

A series of some two dozen Professional Practice Notes are available on request, covering particular topics in more depth. These range from declarations of personal interest and deposit handling, to how to handle a Property Misdescriptions Act investigation of the firm or individual members of staff. They offer comprehensive guidance and are intended to reflect best practice.

Drafting Service

Possibly the most important document for any estate agent is the company's Terms of Business. Get this wrong and one may not get paid! These must be re-thought to cover the new HIP regime.

Unless the prescribed information is presented fully, accurately and in close accord with the Regulations, an instruction may well be invalid and, accordingly, any commission claim unenforceable.

Agency Agreements

Compliance with the legal requirements is not difficult. The Estate Agents (Provision of Information) Regulations 1991 augment s.18 of the EAA and the OFT has published a guidance note and what it considers appropriate particularisation. There are also various other business provisions which should be correctly disclosed.

There are then several other aspects, beyond those specified in the Regulations, which could usefully be incorporated in an agency's Terms of Engagement although the document needs to be carefully structured to avoid problems with the Unfair Terms in Consumer Contracts Regulations 1999.

David Perkins is ideally placed to advise and assist. Not only was he a member of the working party assisting with the EAA but he was the only estate agent working with the team of Parliamentary Counsel in drafting the Estate Agents Orders and Regulations in 1991. Consequently, he knows exactly what is required and how best to cover all the salient points most effectively.

One additional advantage of his having been part of the Department of Trade & Industry's Drafting Team, was that the County Courts tend readily to accept his interpretation and opinion in any commission dispute or estate agency-related court cases.

Other Formal Correspondence

In addition to terms of engagement, drafting advice is offered in relation to standard confirmatory correspondence and complaints handling in accordance with the RICS, NAEA and OEA procedures.

Compliance Audits

While managers must keep a close eye on their branches and staff, this occasional independent assessment can be particularly valuable. Perkins provides a concise written report drawing attention to any aspect requiring attention. For any diligent firm, this outside appraisal is the icing on the cake.

The compliance auditing provisions are based strictly on regulatory and Code of Practice criteria and follow a structured approach investigating systematically all relevant aspects of the business.

The confidential report will highlight any critical shortcomings and offer more general advice on compliance aspects. It will draw attention to any inherent weaknesses and serve as a quality control guide to the corporate due diligence being maintained by the agency.

In Conclusion

Summing up, David Perkins not only knows his estate agency but, unlike many consultants, he really is an estate agents' estate agent.

For further information and full details about any aspect of the service either call 0870 350 1865 or e-mail david@davidperkins.co.uk.