

ESTATE AGENCY UPDATE

An occasional newsletter dealing with regulatory and compliance issues

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HIPs: frightening and confusing?

DID you see the report on Home Information Packs on *'Tonight with Trevor MacDonald'*? To be honest I am not sure either side won. One could easily agree with both, although I thought Nick Salmon, as usual, came over rather well and, significantly, it was only Maria Colman and the Minister who were standing up for the proposals. Apart from Habitas, whose surveyor got some useful publicity out of it, there was no professional support for the scheme whatsoever. Was that a fair impression? For what it is worth my wife thought it made HIPs sound both frightening and confusing.

A warning shot

Perhaps a more significant development in the debate came with the recent uncompromising commentary from the Council of Mortgage Lenders (CML). If you have not read them, please e-mail eau@davidperkins.co.uk and I will send you copies.

Throughout all the arguments and debate this far I have seen HIPs as being a done deal and one decision where the Government was not likely to back down.

However some opponents cite the Treasury and its surprising about-face over allowing private residential property to be put into SIPPs. That decision came late and only after many financial organisations had spent time and money putting suitable systems in place.

So this CML report, for the first time, has made me hesitate. The odds have shortened though not a lot: as one colleague put it *"you would be very ill-advised to build next year's business plan on an assumption that HIPs are dead!"*

The original idea

The decision to institute a reform of the house purchase system was taken just over 20 years ago and this can be traced down directly to the idea of mandatory HIPs. The idea was first suggested in a Government Report entitled *'The Simplification of House Purchase'* for the which the research started in 1981 and it was eventually submitted to the Secretary of State at the Department of Trade and Industry (DTI), Norman Tebbit, in 1985.

Tebbit agreed with the recommendations and the Report was later endorsed by the full Cabinet. In fact only one Minister voted against it and not surprisingly that was Lord Hailsham, the Lord Chancellor.

He and Tebbit were often at odds. I believe that, but for the IRA causing him considerable injuries with the Brighton bomb (far worse than admitted at the time), things would now be very different.

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Solicitors might still be producing contracts and legal material but this would be earlier in the process, probably as soon as estate agents put the properties on the market which, in itself, would save time.

Anyway, once through Cabinet, simplification became official Government policy and it was later included as a Tory Election Manifesto commitment: one of the few that Mrs Thatcher actually failed to deliver and largely thanks to concerted opposition by Lord Hailsham and the legal lobby.

In fact, I was mainly responsible for floating the idea initially. Firstly, to set the scene: I was not the National Association of Estate Agents (NAEA) representative on the Farrand Committee (set up in 1979 to investigate non-solicitor conveyancing) although that was the original intention.

When the then President, Maureen Freeman, realised what progress I was making she insisted that only the President could represent the NAEA on something so high profile. At the time, I was furious having worked so hard to get the investigation authorised and this open type of committee of enquiry sanctioned following the success of Austin Mitchell's Private Member's Bill.

Snappy

As it transpired the Farrand recommendations were not that earth-shaking and I doubt I would have made much of an impression on my own. However shadowing this public committee was a team of senior civil servants keeping an eye on what was happening. This working party, reported directly to the Number 10 Policy Unit, was chaired by Richard Gibson from the DoE and called *'The Inter-Departmental Group for the Simplification of House Purchase'* – a nice snappy title!

Incidentally, when this Inter-Departmental Group (IDG) was stood down, Gibson retained oversight of all developments affecting the housing market. As he was from the DoE the development of HIPs has devolved down to the Office of Deputy Prime Minister (ODPM). The Deputy Chairman of the IDG, Neil MacKenny, came from the DTI which remains responsible for the regulation of estate agency, but – illogically in my opinion – not HIPs. Certainly, had MacKenny been the IDG chairman HIPs would now be handled by his Department and matters would be very different indeed.

Back to the origins of HIPs

Anyway, I had submitted a wide-ranging paper to the Farrand Committee. Although a bit too strong and radical for that Committee, it was picked up by the IDG and I was invited to meet them to discuss my ideas. Fortunately the meeting went rather well and, thereafter, I became informally attached to this Group as its estate agency adviser.

HIPs have evolved indirectly over the years from an afternoon discussion at the IDG. The main subject was speeding up property marketing and conveyancing systems. I explained that, as estate agents work on contingency fees, it was in our interests to get property sold quickly as opposed to the solicitors, who charged a time fee, and hence took as long as they could and more if possible! I was asked a specific question: *"What could we do which would be of greatest assistance to estate agents in speeding things up?"*

My reply was that we needed more co-operation from the solicitors. *"When we take instructions to sell a house it would help if the solicitor started to draft the contract at the same time. That could save two or three weeks,"* I said. *"Now they wait until we have found a buyer before doing anything. Only then do they start to locate and retrieve the Deeds and begin putting together the contract documents, etc."*

Remember this was 20 years ago. I added that even if we wrote to the solicitor and formally asked them to get matters in hand they would write back and refuse. Save few would write back. If they did, the message would read: *"We have no instructions from our client. We do not accept third-party instructions, certainly not from an estate agent! The client may decide to instruct a different firm of solicitors. You may not sell it. The client may change their mind. We will not get paid. We will await your normal solicitors' instructions in due course when we will seek confirmation from our client."* You will all know exactly what I meant.

I told the IDG that all it needed (note the *'all'*) was for solicitors to start work at the same time as the estate agents which would save on average three weeks. Richard Gibson said: *"What a good idea!"* As there were no solicitors advising the IDG, the idea was picked up unquestioned. It went into the Report and was agreed by the Cabinet in November 1985. And, no I have not mistyped the date.

At the time I was merely talking about preparing a normal auction-style package of material for all sales including those being negotiated normally by private treaty. I was not thinking of Home Information Packs – and certainly not the bureaucratic quagmire HIPs have since become!

Over cooked

This has become a classic case of too many cooks. The Tories worked on the basis of consulting a small number of (hopefully) sensible individuals, maybe too few, as for around ten years, I ran estate agency policy virtually single-handed. My contact at the DTI would ring up. We would discuss the point, make a decision and that was it. I assume the civil servants had other people who knew other topics and were equally trusted.

In contrast, when New Labour came to power it promised all things to all people. If the Tories had remained in power and decided to produce HIPs it would have been so different. When we thought up and drafted the Estate Agents Act Orders and Regulations in 1991 there were just six or seven of us involved, again I was the only non-civil servant. And I don't think we did too bad a job either.

I guess a Tory HIPs Working Party would have been a little larger but still well under 20. When New Labour started discussing implementation of recommendations from *'The Key to Easier Home Buying and Selling'* they had invited 145 individuals, or thereabouts, to the first meeting. Not surprisingly the various factions soon started arguing. And they have not stopped since.

Stalemate from the start

Personally I realised this scheme was not going anywhere when I first read *'The Key ...'* and noticed that every recommendation supported by the estate agents was opposed by The Law Society and anything endorsed by The Law Society was opposed by the NAEA and Royal Institution of Chartered Surveyors (RICS). It was stalemate from the start.

Faced by that situation what do civil servants do? As they have no idea who to trust they have merely got on and done their own thing. Had the NAEA had one or two sound people with any degree of consistency of approach advising them, it might have offered worthwhile guidance but as every NAEA President has taken a different line, and a former Chief Executive had his own agenda, it is no wonder the NAEA has been largely ignored.

Likewise, at one stage the RICS thought it had Home Condition Reports (HCR) all tied up through its subsidiary, SAVA – the Surveyors' and Valuers' Accreditation. But no longer, oversight now rests with ABBE – the Accreditation Body for the Built Environment, which knows even less about estate agency than the ODPM! Is it any real wonder something as complicated as this has gone pear-shape?

Too late to stop?

Anyway, back to where I started this note, I do not think anyone has been in a position really to stop the rot. Now time is running out fast.

The ODPM has, unfortunately, given me one bum steer – and that was over the question of timing. What the Department did not like was the way any period of silence was immediately being hyped into stories that Government commitment was waning. These things take time and any policy once decided remains policy until it is formally changed.

Even a change of Government party does not automatically mean a change of policy – each new incoming Minister holds a review of all the work

being carried out by the Departmental staff and awards each project a revised priority. Some go to the backburner, others get greater emphasis, a few get stopped or reversed. Where a Minister is in doubt he takes the question to the Policy Unit or, if it is a major initiative, back to Cabinet for reassessment.

Initially New Labour had made much out of its plans to stop gazumping. However the incoming Ministers were told in short order that this would not be so easy. Instead they agreed to look at procedures elsewhere in the world and examine other ideas, and hence *'The Key ...'*; etc. Ministers also found that simplification of the housing market had long been a policy commitment so they was was no opposition in Parliament.

Too advanced, too committed

When the first Homes Bill was lost due to the General Election some people thoughts HIPs would die. As just explained I knew that policy decisions remain until reversed and in this case the various Ministers all authorised work to continue pending the necessary primary legislation. Other than on critical headline issues the media has little influence over on-going preparation of this kind, however the civil servants were keen to get the legislation approved to stop the persistent *'HIPs are dead'*-type stories gaining credibility.

Thereafter, I was told, the urgency would drop away and they could take their time over implementation. Everybody knew it would take a year or more to ensure the Regulations, the systems and above all, adequate Home Inspectors (HI) were in place. I quote: *"It is no help if we have enough HIs inside the M25 but only three in Cornwall and none at all in Cumbria, we must have enough nationwide."* Hence although the target date was late 2007 *"... if the date slips into 2008 or even 2009 or 2010, we would remain fairly relaxed."*

As that was a senior civil servant speaking, that was the line I took. Save New Labour Ministers no longer look at what is practical and try to operate to a tighter timetable as though speedy implementation is all that matters.

One consequence is that many regulations are ill-thought through and patently rushed: by all means get it wrong but do it quickly!. So when Yvette Cooper became the new Housing Minister she decided to set a firm date and worry about practicalities later! Hence she picked on 1 June 2007 as HIP day.

All a conspiracy?

There is a story circulating among the conspiracy theorists that Cooper opted for this date at the behest of Gordon Brown who realised HIPs are not going to be resounding success story and wanted to

be able to pin the blame firmly on his predecessor! I am not so sure. My feeling is were the Chancellor to look at this farrago carefully he might realise it was going to cause wide collateral damage and hold back rather than rush it through half-baked!

Disruption of the housing market – which surely is inevitable in the short term – could easily carry over into the economy generally. Housing is after all the largest consumer market, larger than the next two, groceries and cars, combined and even a small degree of disruption will impact on the wider money supply, inflation rates, interest levels and much more – all largely outside the control of the Treasury.

Well, until I read that latest submission from the CML I had regarded Friday, 1 June 2007, as pretty well fixed, despite continuing professional concern. Whenever I have expressed my concern at the hard line being taken by the CML I have been given to understand that, when push finally came to shove, the Treasury would ensure the CML came on side.

Still some time away

One critical question has been whether and to what extent HCRs would obviate the need for additional mortgage valuations and reports. The story was that many mortgage lenders – with the Halifax being cited as leader in this field – were going over to a credit status checking coupled to a desk-top data base valuation and that this information, coupled to sight of the HCR, would be sufficient for a speedy mortgage offer.

However, reading the CML Press Release and the accompanying Submission, the Treasury has patently failed to deliver: the CML is not *'on side'*. Even if the CML members decided to go over to this new approach to mortgage lending immediately it reports there is no realistic possibility of having the necessary computer systems operational within two years. And a decision could not be made by CML members until the ODPM had provided far more information about how the data base holding the HCRs will operate. The CML Report has also mentioned many other aspects, some of them quite significant, which add up to a pretty powerful set of problems which cannot simply be ignored.

The CML has stopped short of saying that HIPs cannot work. But it has said very definitively, that they cannot work effectively for mortgage lenders until some while beyond the published mandatory launch date in mid 2007. And for the delays it lays the blame firmly with the Department.

Short-sighted

What I do not understand is why estate agents, almost to a man, see HIPs as primarily intended to disrupt estate agency! That is not, and never has been the intention. Go back to the beginning of this

commentary, the objective was to save time by speeding up the legal work. The main target was the lethargy of the solicitors.

Almost 30 years ago when I began my personal campaign I wanted to make it easier and quicker to buy and sell houses. Largely I had persuaded the NAEA to support that objective. I say largely as some argued that it was in our interests to keep everything complicated as that would mean sellers needed to use estate agents: *"Make it too easy and they'll start selling their own!"* At least HIPs should please agents following that school of thinking.

My own motivation stemmed from the extreme conditions at the bottom of the housing ladder where I have had some personal experience, working with a multi-racial Housing Association in Oxford and as a Cherwell District Councillor and vice-chairman of its Housing Sub-committee where each meeting we faced agonising decisions over rent arrears, intimidation and evictions, etc.

I realised we had enough bedrooms in the country but the problems come from over-crowding and under-occupation. By improving estate agency we could make better use of our housing stock as people would move more frequently and then more tenants might be able to buy a home releasing property where it was most needed.

Twin targets

I had identified two monopolies which had to go: the building societies hold on the mortgage supply; and the solicitors who insisted it should take two of them several months to convey a simple registered freehold – work apparently too complex to trust to anyone less qualified!

The first of these monopolies was easily overcome and following the Building Societies Act 1985 the mortgage market was soon opened up to real competition. Arguably too much so, as it soon led to the house price boom and subsequent market collapse. No, I was not to blame! I had warned the Treasury and the Bank of England of the risks they faced in a paper entitled *'A Recipe for Disaster?'*

I had also taken an interest because this new legislation allowed building societies to own estate agencies as well as many other professional operations and I was keen to ensure fair and appropriate regulations were put in place first.

One down: one to go

Unfortunately the second monopoly remains. If anything, and largely due to my efforts, the legal backing for the monopoly is stronger than ever. When I started it was merely unlawful for an unqualified person to draft a conveyance and there were ways and means around that. Law Society prosecutions of non-solicitor operators usually failed.

Now it is unlawful for any unqualified person to draft a conveyance or even a contract for the sale of land yet when selling a registered freehold that can be as simple as two three-line paragraphs. I can instantly make that point as I always carry such a potential draft contract with me tucked into a pocket of my wallet.

Okay, one result of Julian Farrand's investigations was Licensed Conveyancers but they are still as qualified as solicitors – although they cannot divorce their clients – however there are very few of them around. After tremendous effort we nearly achieved a greater breakthrough with Authorised Conveyancing Practitioners and a regulatory board but The Law Society managed to get that initiative pulled within days of its launch.

If estate agents could employ, or themselves become, an authorised conveyancing practitioner, then we would be there – seriously, HIPs would be totally irrelevant and unnecessary.

Not for the want of trying

Somewhat half-heartedly, over the last 25 years, the Government has tried to speed conveyancing up although The Law Society has resisted all its efforts. Now Government is saying to estate agents: *"Here is your chance to take control of the conveyancing side. We want faster conveyancing, please get on and provide it!"*

Many years ago now, the Prime Minister, then Edward Heath, remarked: *"I hear what you say but have to tell you that, even with my full support, these proposals would never go through the House of Commons which is dominated by a cross-party single-interest group with an overwhelming majority - the legals and academics always work together in their own self-interests."*

How right he was. Ten years later I was told by a member of the Cabinet Committee concerned, that the Government was not going to implement the Farrand Report. Yet despite that Hailsham took it through Parliament in five months flat, as Farrand himself later told me he had been promised in advance! That is a powerful lobby at work.

Real fear

Back up-to-date, if estate agents do not relish HIPs, then solicitors are petrified! It looks as if The Law Society could be losing out at last. True the Society is preparing its own HIP and still seems to believe estate agents will merely ask their seller clients' solicitors to prepare one. Maybe: maybe not.

Conveyancing is not legal work, 95% or more can be undertaken by clerical staff and usually is. Do not get me wrong I am not against conveyancing by solicitors, far from it. A good one is vital, but I would emphasise the word good.

I used to recommend a local solicitor in whom I had confidence. Now retired. One of his maxims was that you cannot safely act for a buyer without seeing what he hopes to purchase: *"... that is vital,"* he'd say, *"it immediately tells me what really matters, what questions I need to investigate, etc."*

A quick story, he phoned me one afternoon to say: *"I cannot allow my client (in this instance the buyer's building society) to accept this lease as security."* He had read it and found it defective. My reply was something like: *"But there are 138 of these flats all with similar lease, and we have sold 127 already."* Guess what resulted? 127 deeds of variation.

An incompetent majority?

How many solicitors actually read and think about the leases? From my Property Misdescriptions Act experience I can report that in the majority of cases, somewhere (not necessarily the one acting for the buyer) is a negligent solicitor. Of course they do not care, at worst it is a modest PI claim: it is the estate agent who faces the criminal charges!

But with registered titles, do we really need two qualified conveyancers working in an adversarial style and taking weeks to check material they will rarely bother to read?

This ignores a dramatic development, all this material is now available from the Land Registry (LR) down the line for a few pounds – with plans and documents referred to included! Even the coloured lines on plans are shown in colour – brilliant.

The future

The LR – and I am a great fan of the LR – wants to do far more than just supply certified copies of the documents. Basically, it is developing a whole new system and wants to offer dealing rooms as a service to the market. This is an electronic service where everything about any property being sold is made available to everybody involved. Everything is effectively factual information and there is no logic in the present secrecy with qualified and slow disclosure. Finally the funds would be transferred electronically, based on electronic signatures.

Much modern commercial conveyancing is already there – the solicitors, sometimes several with different clients, use an electronic assembly system and consequently even major transactions can take days rather than weeks. Many commercial conveyancers use electronic dealing rooms. They may already exchange based on their electronic signatures.

There is one major difference – large commercial decisions are based on business judgements not personal and emotional issues where what really takes the time is the parties coming to terms with the move they are about to make – maybe.

The date in doubt?

So if anyone can make the Government rethink 1 June 2007, it is CML as one of the main benefits extolled by Ministers was the speed with no waiting for a mortgage survey. Two inspections, one before and one after a sale will look silly – especially if one picks up something the other has missed!

That said, in Scotland, the Single Survey (as the HCRs are being called) will include a provisional indicative valuation. In Scotland one gets the impression that the civil servants preparing PIPs – Purchasers' Information Packs – are devising a much simpler process than in England and Wales. Why? Is that because in Scotland, be it houses, purchasers, PIPs, or civil servants, there are a lot less of them?

Suppose the date is allowed to slip, what happens then? Well, if the conspiracy theory is right Gordon Brown once PM is unlikely to want them anyway and if David Cameron were to take over I have it on good authority that he would repeal the legislation.

He is not into reversing this aspect of policy pointing out that the Tories pledged at the last General Election to scrap HIPs altogether since they will do little to address the actual problems faced by people who are buying and selling houses. They would do nothing to prevent offers falling through due to a lack of financial backing on the part of the buyer, and would fail to introduce any measures regarding insurance for loss of fees.

He sees them designed to benefit surveyors and solicitors, and representing a vast increase in state control over the property market. He added that the Select Committee looking at the Draft Bill and the Local Government Association had both concluded that HIPs would not speed up the house-buying process significantly but only create further red tape and expense. No room there for flip-flopping!

Overtaken by events

Apart from which, in my opinion, coming through fast are the benefits of the Land Registration Act 2002 (LRA). This is a massive piece of reform legislation which effectively relaunches all land law in this country from scratch. It repeals the Law of Property Act 1925 and all subsequent legislation that relies on paper records, deeds, or whatever. The whole thing is to become electronic with powerful new systems and new procedures which will blow the mind of any ageing conveyancer!

In future, any delays will be measured in seconds, not months! Implementation of the LRA is being pushed through by the Department for Constitutional Affairs as quickly as lawyers can accept the quite fundamental changes it heralds.

While HIPs more or less fit into this new environment as time passes they will obviously become less relevant once the documentation can be prepared on-line in a matter of minutes.

This is thanks to another initiative with which I was lucky enough to be associated and now available nation-wide as the National Land Information Service or N-LIS: the idea is simple enough, to have all sources of property-related information on-line and immediately available to anyone authorised to access the data.

In the pilot system we had devised for British Telecom it was called a National Property Network (NPN) and was set up and trialed successfully in the Bristol area. Who thought the choice of Bristol for the HIPs' pilot was an arbitrary decision? The NPN worked then and N-LIS although not yet quite nation-wide is getting there and works well.

One coincidence, I claim no more, is the initial operator of N-LIS in the UK, a Canadian firm called MacDonald Detwiller & Associates (MDA). Due to my involvement with the initial simplification research and the NPN project I was invited to Canada where the Government of Ontario planned new estate agency legislation. I explained to their Commercial Affairs Committee what we were doing and answered questions from their MPs.

The new Law was passed in 1992 and Toronto-based MDA won the first contract to supply and operate their NPN. Then, based on this experience in Canada, MDA had tendered for and won the contract from the UK Government to develop and operate N-LIS in England and Wales. As I say, coincidence, or what?

All in real time

Critics of HIPs worry about searches getting dated. That can't happen in this new system as all the information is drawn down fresh for each enquiry. Searches once took weeks – one Local Authority which took 12 weeks on average now turns round full searches in 10 or 12 minutes. This is now. In two years, maximum, N-LIS will be as near universal as makes no difference. By then, what point is there in having a HIP prepared in advance when virtually all the information can be assembled in about 30 minutes? Leaseholds excepted.

That leaves just one question, how to deal with EU Directive 2002/91/EC which requires all member states to ensure an Energy Performance Certificate is made available to every buyer or tenant, whenever a building is constructed, sold, or let. If mandatory HIPs and HCRs disappear, then compliance with that EU Directive may require further thought! It is supposed to be implemented across the entire European Union by year 2010 so perhaps HCRs could be allowed to slip a bit? ■