

**ESTATE AGENT'S
LEGISLATION
TRAINING SEMINAR**

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WHAT IS NOT COVERED BY EAA?

1. Surveys (not part of estate agency work)
2. Rentals/property management
3. Overseas property transactions (but CPRs?)
4. Contractual disputes e.g. over fees
5. Quality of service issues
6. Valuations

DEFINITION OF ESTATE AGENCY WORK

The Act does not define an estate agent – Parliament consulted on the definition but total disagreement! Therefore, Parliament decided that, whatever you call yourself, if you do certain things you will be deemed to be doing estate agency work

S.1(1) of the Estate Agents Act 1979 sets out these things:

Introducing and/or negotiating with people who want to buy or sell freehold or leasehold property (includes commercial, agricultural and industrial)

Doing this in the course of a business

Acting on instructions from a client

DEFINITION OF ESTATE AGENCY WORK (2)

OFT Press Release on 13 December 2005

“Greater clarity on buying and selling via property retailers”

Internet property retailers claiming not to be estate agents when they are, in fact, doing estate agency work – this is because they know that most of their clients are also using a high street agent under a “sole agency” contract

“sole agency” definition – if a seller finds a buyer himself (e.g. through an IPR who is not an estate agent) he does not have to pay his agent his fee

DEFINITION OF ESTATE AGENCY WORK (3)

With effect from 1 October 2008, all persons doing estate agency work must belong to an approved redress scheme.

Approximately 260 IPRs at present – many claiming not to be estate agents. Lack of understanding of statutory wording “doing something with a view to introducing a prospective purchaser to a seller”. Our view, though, is that most are acting as estate agents.

Therefore, they will be required to abide by the requirements of the EAA, PMA, HIPs , redress scheme and money laundering Regs.

SOLE AGENCY – RECENT COURT OF APPEAL DECISION (1)

Previously, under the statutory “sole agency” definition, an agent could claim his fee if he had “introduced” a prospective purchaser to the property, even if another agent actually sold it. This position is well established - courts nearly always supported their claims.

Statutory wording is open ended i.e. if an introduction is made during an agent’s sole agency period, he can still claim his fee if another agent sells to the same prospective purchaser three years later!

SOLE AGENCY – RECENT COURT OF APPEAL DECISION (2)


Foxtons v Pelky-Bicknell 2008

Foxtons had introduced a buyer to Mr Bicknell, the vendor, but no deal was reached as the buyer made it clear that too much work need to be done. As Foxtons had failed to find a buyer, Mr Bicknell instructed Hamptons to market it on a joint sole agency basis. The same buyer later saw the property a year later advertised through Hamptons and bought it. Hamptons accordingly received their fee and Foxtons also claimed their fee on the basis that they had originally introduced the buyer to the property the previous year. Mr Bicknell refused to pay them and Foxtons sued him – Kingston upon Thames County Court heard the case and sided with Foxtons. Mr Bicknell appealed and the Court of Appeal upheld his appeal and ruled against Foxtons.

SOLE AGENCY – RECENT COURT OF APPEAL DECISION (3)

The three senior appeal judges said that Foxtons were not entitled to their fee even though they had originally “introduced” the buyer to the property.

Their Lordships ruled that, for an agent to be entitled to claim his fee, he must be able to show that he has introduced the purchaser to the purchase and not merely to the property.



MAIN ESTATE AGENTS ACT 1979 PROVISIONS

S.14 – contract and pre-contract deposits must be paid into a separate “clients account” – corporate estate agents do not now take pre-contract deposits but some sole proprietors do.

S.18 – agents must set out in writing how much they intend to charge and when their fee will become payable prior to any contractual obligation – usually set out in their contracts which clients should read before they sign but could be just a letter.

S.21 – Agents must declare any personal interest of their own or any “connected person” to a potential buyer

ESTATE AGENTS (PROVISION OF INFORMATION) REGULATIONS 1991 (POI)

POI clarifies and extends s.18 EAA

Not Parliament's intention to interfere in how an agent contracts with his client

For the first time, agents are required to advise their clients as to certain services offered to prospective purchasers (e.g. arranging mortgages, insurance services, surveys). Again, this is now usually done by a standard term in the contract.

ESTATE AGENTS (PROVISION OF INFORMATION) REGULATIONS 1991 (2)

Defines “sole agency”, “sole selling rights” and “ready, willing and able purchaser”

If an agent uses any of these terms he must use the statutory definition to explain them (unless this would make another term in his contract misleading)

Under CEAR Act 2007, these terms could be clarified – DBERR currently consulting on this issue

Failure by an agent to comply with the POI is a breach of s.18 EAA and therefore a “trigger” event for OFT action

ESTATE AGENTS (UNDESIRABLE PRACTICES)(No.2) ORDER 1991

Followed on from a report by the OFT into how well the EAA was working (or not working, as the case may be!)

OFT concluded that certain “undesirable practices” were still occurring

UPO requires an estate agent:

To disclose any personal interest that he or a connected person may have to his client – this corrects the anomaly in s.21 EAA.

ESTATE AGENTS (UNDESIRABLE PRACTICES)(NO.2) ORDER 1991 (2)

Not to misrepresent the details/existence of any offer or the existence/status of any purchaser

This includes their financial standing, whether or not they are a “cash” buyer and their ability to exchange contracts expeditiously

ESTATE AGENTS (UNDESIRABLE PRACTICES)(NO.2) ORDER 1991 (3)

Not to discriminate against a prospective purchaser who does not want to take any additional services e.g refusing to send property details to a prospective purchaser if he does not want to arrange his mortgage through you.

To forward all offers promptly and in writing to his client, unless his client has specified in writing that there are some offers he does not want to receive. Even if an offer has been accepted for a property that an agent is marketing, he has arranged the mortgage and taken the property off the market, he must still pass on all other offers for the property up to exchange of unconditional contracts.

To provide his client with a list of services offered to a buyer – doesn't have to say how much his fee will be – alerts client to a possible conflict of interest situation.

ESTATE AGENTS (SPECIFIED OFFENCES)(NO.2) ORDER 1991

Schedule of specified offences under various consumer protection legislation

Offences under the Property Misdescriptions Act 1991 are the most common referred to the OFT

Conviction for a specified offence provides grounds for the OFT to consider the fitness of the individual to continue as an estate agent

NB: wef 1 October under CEAR Act 2007, conviction no longer required – OFT can consider evidence that an offence has been committed.

INVESTIGATIVE POWERS

S.9 Estate Agents Act – power to request by formal notice information and/or copies of documents. Failure to co-operate is a criminal offence but, wef 1 October, under the CEAR Act 2007 it is also a “trigger” for an OFT fitness investigation

S.11 Estate Agents Act – power of entry and seizure but only if a criminal offence is suspected

S.224 Enterprise Act – power to request by formal notice information and/or copies of documents. Failure to co-operate – apply to Court for an Order requiring compliance with original information request.

MAIN CRIMINAL OFFENCES UNDER ESTATE AGENTS ACT

Failing to co-operate with a formal notice issued under s.9

**Failure to pay a contract or pre-contract deposit into a separate
“client’s account”**

Continuing to do estate agency work when banned by the OFT

**Practising as an estate agent (except as an employee of another
person) whilst bankrupt**

Obstruction of an authorised officer

ENFORCEMENT OF THE ESTATE AGENTS ACT

No positive licensing system – instead, a system of “negative licensing”

Complaint from a TSO or a buyer/ seller alleging a breach of the estate agents legislation

Investigation by the OFT’s EA Enforcement Team will result in one of the following:

Advisory letter when complaint not substantiated

Warning letter if substantiated but relatively minor breach

Warning Orders – serious breaches but not quite enough to ban - Public Register/Press release – if same breach committed again, however, OFT will immediately ban agent concerned

Prohibition Orders – very serious breaches - Public Register/Press Release

ENFORCEMENT OF THE ESTATE AGENTS ACT (2)

Warning/Prohibition Orders – is the procedure fair?

EA Enforcement team investigates allegations and prepares the Order.

It is then submitted to an independent Adjudicator who invites the agent to make representations in his defence.

Adjudicator then makes a decision to either make a Warning/Prohibition Order or not, having considered the OFT's evidence and the agent's defence.

If an Order is made, the agent can appeal to the Secretary of State represented by the Appeals Tribunal.

ENFORCEMENT OF THE ESTATE AGENTS ACT (3)

Estate agents should be very aware that EAA makes an employer equally responsible for an employee's breach. OFT can therefore make a Warning/Prohibition Order against an estate agency company/partnership for an employee's breach. Can only avoid this action if employer can show that they have done everything possible to prevent the breach occurring.

ENFORCEMENT OF ESTATE AGENTS ACT (4)

A director or partner of an estate agency business is deemed under the Act to be a “business associate” of the company or partnership and can also be held equally responsible for any breaches.

Thus a serious breach by an employee could lead to him being banned from all further estate agency work, the company/ partnership as the employer being banned and the directors/partners being banned as “business associates of the company/partnership.

TRIGGERS UNDER S.3 ESTATE AGENTS ACT (AS AMENDED BY CEAR ACT 2007)

“Trigger event” under s.3 EAA must have been alleged before the OFT can commence an investigation into an estate agent’s fitness to continue doing estate agency work. These are:

Evidence that a person has committed an offence involving fraud, other dishonesty or violence

Evidence that a person has committed an offence under the EAA

Evidence that a person has committed a “specified offence” under the Estate Agents (Specified Offences)(No.2) Order 1991

TRIGGERS UNDER S.3 ESTATE AGENTS ACT (AS AMENDED BY CEAR ACT 2007)

Racial or sexual discrimination (following the finding of a tribunal) – the Equality Act 2006 has amended the Estate Agents Act such that the OFT can take other forms of discrimination into account such as disability discrimination and age discrimination

Breaches of s.18 or 21 of the EAA

Breach of the Estate Agents (Undesirable Practices)(No.2) Order 1991

Breach of a Warning Order

Failure to join an approved redress scheme

Failure to comply with an undertaking given or an Enforcement Order made under the Enterprise Act 2002

Failure to comply with a Notice issued under s.9 EAA

CHANGES TO THE ESTATE AGENTS ACT UNDER CEAR ACT 2007 (1)

OFT published its report on the estate agency market in England and Wales in March 2004.

Certain recommendations were made to Government to improve the regulation of estate agents.

Government has implemented most of these recommendations via the Consumer, Estate Agents and Redress Act 2007 – came into effect on 1 October 2008. DBERR is currently consulting on precisely which documents an agent must keep for 6 years and possible changes to the statutory definitions.

CHANGES TO THE EAA UNDER CEAR ACT 2007 (2)

1. Evidence that an offence has been committed is now a “trigger” event – in the past, there had to be a conviction.
2. Breach of a statutory undertaking given by an agent is now a “trigger” event
3. Warning Orders can now be made for convictions – WOs in the past could only be made for breaches of the EAA and the UPO.
4. Records of offers made for properties and other relevant documents must be kept for a designated period of time (DBERR consulting on this). Previously, no legal requirement to do this.

CHANGES TO THE ESTATE AGENTS ACT UNDER CEAR ACT 2007 (3)

5. **OFT/TSOs now have the power to require the production of documents relating to property transactions from an estate agent where there is reason to suspect that a breach of the EAA has occurred (previously only where a criminal offence was suspected).**
 - **Failure to respond to a S.9 Notice or providing false information is now a “trigger” for OFT to investigate fitness to continue doing estate agency work (previously we would have to prosecute and obtain a conviction before any action could be taken).**
 - **Govt is currently consulting on whether the statutory definitions should be amended or even abolished**

CODES OF PRACTICE / REDRESS SCHEMES (1)

Ombudsman For Estate Agents Code has been approved by OFT under its Consumer Codes Approval Scheme. Sets a very high standard of behaviour for agents who belong. The Ombudsman's powers allow him to make awards of compensation for financial loss and/or aggravation, distress and inconvenience, where he feels that is appropriate. The service is free of charge for the public.

RICS/NAEA are trade bodies with their own Codes and can fine and/or expel their members for breaches but do not award redress to consumers.

CODES OF PRACTICE / REDRESS SCHEMES (2)

Redress Schemes under the Consumers, Estate Agents and Redress Act 2007

With effect from 1 October 2008, all persons doing “estate agency work” in relation to residential property must belong to an approved (by the OFT) redress scheme. Any failure to belong to such a scheme is a “trigger” under s.3 EAA for the OFT to consider their fitness to continue doing estate agency work.

Two approved redress scheme providers at present:

Ombudsman For Estate Agents

Surveyors Ombudsman Service (on behalf of RICS)

CODES OF PRACTICE / REDRESS SCHEMES (3)

Benefits:

1. Anyone with a complaint about an estate agent relating to residential property now has access to a free redress scheme
2. Raise standards throughout whole estate agency sector
3. Regulatory Impact Assessment for the CEAR Act – DBERR estimated value of unresolved complaints as £18 million per annum

Types of Redress available

1. Paying compensation
2. Providing an apology
3. Taking other action in the interests of the complainant

FLYBOARDING

The Town and Country Planning (Control of Advertisements) Regulations 1989 require property boards to be removed within 14 days after a sale is completed or a tenancy is granted

Local authority Planning Departments can prosecute where there is a failure to comply with the regulations (but very rarely ever do – TSDs used to prosecute under TDA)

The OFT considers that the maintenance of property boards after a sale is completed or a tenancy is granted could misrepresent an agent's market share and may be a matter that can be considered under the CPRs.

THE HOUSING ACT 2004

With effect from 14 December 2007 Estate agents are required to have commissioned a Home Information Pack (HIP) prior to marketing any property

Failure to comply with duties related to the provision of HIPs may result in a penalty charge notice being given by a local Trading Standards Officer

A TSO may notify the OFT of any breach of duty by an estate agent in relation to the provision of HIPs and must notify the OFT of any penalty charge notice given

OFT can also take action if it receives evidence that an agent has not complied with the HIPs Regs

With effect from 6 April 2009, a HIP must actually be in place before a property is marketed

UNFAIR CONTRACT TERMS (1)

OFT Press Release 18 July 2006:

Following referrals from Which?, the OFT has secured the amendment or removal of a number of unfair terms from the contracts of 25 estate agency businesses. The terms in question breached the Estate Agents Act, the Estate Agents (Provision of Information) Regulations and the Unfair Terms in Consumer Contracts Regulations. Amongst the terms found in a number of the contracts were:

UNFAIR CONTRACT TERMS (2)

- Terms that were unclear as to the duration of the contract period because of the termination provisions. Contracts were often stated as being for a minimum period of, for example, 12 weeks. However, the contracts were also subject to 14 days cancellation notice after that minimum period, in effect extending the duration of the contracts by a further two weeks.
- Terms that stated that the seller gives his solicitor 'irrevocable authority' to pay the agent's fees. Such terms may have the effect of unfairly restricting the seller's right to withhold some, or all, of the agent's fee if he considers that the agent has provided an unsatisfactory service.

UNFAIR CONTRACT TERMS (3)

Incorrect/misleading definitions of the terms 'sole selling rights,' 'sole agency' and 'ready, willing and able purchaser.' The law requires that estate agents must adhere to the statutory definitions of these terms unless it would be misleading to do so because of other terms in the contract.

- Terms which placed the responsibility on the seller to declare a personal connection with the agent, whereas the law requires the estate agent to disclose any personal interest.
- Terms which required sellers to pay disproportionately high default charges on late payment of the agent's fees.

CANCELLATION OF CONTRACTS MADE IN A CONSUMER'S HOME OR PLACE OF WORK REGS 2008

- Came into force on 1 Oct 2008
- originally only applied to unsolicited visits but now also apply to solicited visits made at a consumer's request e.g. prearranged appointments with estate agents
- Consumers must be advised that they have the right to cancel a contract within 7 calendar days of signing
- Agents must give consumers a "Notice of the Right to cancel" when the contract is made

OFT LAUNCHES STUDY INTO HOME BUYING AND SELLING

- OFT Press Release dated 25 Feb 2009
- Study will take a comprehensive look at:
 - competition on price and quality between estate agents
 - prospects for entry by new business models, including internet property retailers
 - whether the existing regulatory framework provides the right balance between protecting consumers buying and selling properties and ensuring that the market remains open to competition
 - relationships between estate agents and other service providers e.g. mortgage brokers, surveyors, solicitors

OFT LAUNCHES MARKET STUDY INTO HOME BUYING AND SELLING

- Study will cover the whole of the UK, recognizing significant differences in Scotland
- Will not cover agents marketing properties overseas
- Will not cover residential lettings
- Will consider possible changes to the legislation to increase consumer confidence
- Will assess the role of HIPs
- Will consider whether existing legislation is sufficiently protecting consumers
- Will consider whether there are grounds for introducing a positive licensing regime in the UK for estate agents

PROPERTY MISDESCRIPTIONS ACT

1991 (1)

Effective from 4 April 1993 when the Property Misdescriptions (Specified Matters) Order came into force

The Order prescribes those matters in respect of which false or misleading descriptions will be an offence

The PMA and the Order make it an offence to make false or misleading statements about 'specified' aspects of land (including buildings) offered for sale by those in an estate agency or property development business

PROPERTY MISDESCRIPTIONS ACT

1991 (2)

There are 33 “Specified Matters” listed in The Property Misdescriptions (Specified Matters) Order 1992 – these are a few of the more important ones identified from the Returns of Legal Proceedings from TSOs:

- local or address
- aspect, view, outlook
- availability of services/amenities
- proximity to any services/amenities
- accommodation, measurements/sizes
- fixtures and fittings
- structural characteristics
- history (age/ownership/use of land)
- length of any lease
- public or private rights of way .

PROPERTY MISDESCRIPTIONS ACT 1991 (3)

**There is no general requirement to disclose information -
but where it is given it must be accurate and must not be
misleading**

**The aspects of property in respect of which
misdescription is an offence are listed in the Order**

**The PMA does not apply to the provision of
conveyancing services**

PROPERTY MISDESCRIPTIONS ACT 1991 (4)

The PMA does not apply to statements made directly to prospective purchasers by private individuals

It covers both residential and commercial property

It does not generally extend to rented property - but the Order does include references to rent receivable from tenants, ground rents payable or garages available for rent to purchasers of flats

PROPERTY MISDESCRIPTIONS ACT 1991 (5)

What constitutes a false or misleading statement?

One which is false to a material degree - thus trivial errors or discrepancies in descriptions will not constitute an offence. However, it will vary with the circumstances e.g. what may be a material discrepancy between quoted and actual room sizes may be considered one of no consequence if it relates to, for example, the dimensions of a garden

A court is likely to base its view on what a normal prospective purchaser would consider to be false to a material degree having regard to generally accepted standards

There may be a difference in what would be considered material by a private purchaser of residential property and buyers of large commercial premises

PROPERTY MISDESCRIPTIONS ACT 1991 (6)

What constitutes a false or misleading statement? (2)

A misleading statement is one from which a reasonable person would be likely to make a false inference, even though the statement may not itself be false

The offence under the PMA is one of strict liability

It is not necessary for the prosecution to prove that there was an intention to mislead in order to secure a conviction - only that the statement was false or misleading

A statement may be oral or written or be in the form of a picture, model or any other means of conveying information

PROPERTY MISDESCRIPTIONS ACT 1991 (7)

What can an estate agent do to check the accuracy of information?

Check it and, if necessary, correct the information before disclosing it to prospective purchasers

Qualify it so that the prospective buyer will be clear as to the extent to which he can rely on what he is told

Avoid saying anything about aspects of the property where there are doubts about the reliability of the information

PROPERTY MISDESCRIPTIONS ACT 1991 (8)

Verifying Information (1)

Due diligence defence – if an agent can satisfy a court that, although a false statement had been made, he has done everything possible to avoid it occurring, he may avoid being convicted

No absolute obligation for an agent to check all information received from vendors or others - but to avail himself of the “due diligence” defence, he would need to convince a court that it was reasonable to believe the information supplied was correct

A Court will consider the steps an agent has taken or could have taken to verify the information - and whether there was any reason to disbelieve that such steps have in reality been taken

PROPERTY MISDESCRIPTIONS ACT 1991 (9)

Verifying Information (2)

If an agent is charged with an offence and proposes to use the defence that he committed it as a result of information supplied by another, he must give the investigating TSD seven day's notice of this proposal

He must also identify the person who supplied the information

This may enable an agent to secure an acquittal, even where an offence has been committed, if he can satisfy a court that it was reasonable to rely on the information provided

PROPERTY MISDESCRIPTIONS ACT 1991 (10)

DISCLAIMERS (1)

The PMA neither specifically allows for- nor prohibits- disclaimers

The courts' view of disclaimers has been shaped by the Trade Descriptions Act 1968 (now replaced by the CPRs) and the same principles usually apply to the PMA

Any disclaimer which is used must be

- as bold, precise and compelling as the statement to which it relates
- be as effectively brought to the notice of anyone to whom the property may be sold and
- equal the description in the extent to which it is likely to register with/impact upon prospective purchasers

PROPERTY MISDESCRIPTIONS ACT 1991 (11)

DISCLAIMERS (2)

If an agent applies a disclaimer to a statement that he knows to be false, it will not be effective. It may not always be effective in other circumstances e.g. where an agent stated that room sizes were approximate and then systematically overstated them

Blanket statements that information has not been checked may also not be effective – a court may consider what information could/should reasonably have been checked

Disclaimers may be prudent where an agent considers that an unqualified statement might be misleading e.g. a statement that a house has full central-heating when it may not have been used for several years and might not therefore be in working order. In such circumstances, it would be prudent for the agent to state that the condition of the system was unknown

PROPERTY MISDESCRIPTIONS ACT 1991 (12)

No general requirement to disclose information

But an offence can arise where a statement is misleading because of an omission e.g. where a property was stated to have views over open country when there was a cement works a couple of fields away

There is no obligation to volunteer either the existence of a survey or any results from it, but answers to questions about such matters must be truthful and not misleading

Updating particulars – if they are no longer accurate this could constitute an offence. A prospective purchaser must be told the up-to-date position.

PROPERTY MISDESCRIPTIONS ACT 1991 (13)

Who can be held liable for an offence?

The person by whom the estate agency business is carried out

An individual, a body corporate or a partnership

In addition, officers of a body corporate and employees of the person carrying on the business can also be liable

It is possible for both a company and its officers to be prosecuted

PROPERTY MISDESCRIPTIONS ACT 1991 (14)

WHO ENFORCES THE PMA?

Primarily Trading Standards Officers

If a TSO has reasonable cause to suspect that an offence has been committed, he can require the production of books, documents and hard copies of information held on a computer (he can also take copies)

If a TSO has reasonable cause to believe that an offence has been committed, he can seize and retain such material. There are powers for TSOs to enter premises at a reasonable hour and, on production of credentials, to ascertain whether an offence has been committed. In certain limited circumstances, with a warrant from a JP, a TSO may enter premises by force

OFT now has powers to consider evidence that a criminal offence has been committed – if proven, OFT can warn or ban an estate agent from all further estate agency work

PROPERTY MISDESCRIPTIONS ACT 1991 (15)

Penalties for making a false or misleading statement

On summary conviction (i.e. before a Magistrates' Court) a fine not exceeding the statutory maximum – currently £5,000.

On conviction on indictment (i.e. before a Crown Court), an unlimited fine

The Estate Agents (Specified Offences) (No.2) (Amendment) Order 1992 added a PMA conviction to the list of offences in respect of which the OFT can consider the fitness of an agent to continue doing estate agency work

PROPERTY MISDESCRIPTIONS ACT 1991 (16)

What would a TSO expect an agent to do to avoid a conviction?

There must be a system in place to ensure that all statements made regarding properties being marketed are correct/ have been checked

A questionnaire could be sent to the vendors at the outset

An agent cannot automatically assume that the vendor is correct – reasonable steps must be taken to verify any questionable information

WORKING WITH TRADING STANDARDS

OFT's Estate Agents Enforcement Team gives advice to TSOs regarding possible breaches/interpretation of the EAA and/or its associated legislation

Only the OFT has the power to consider the fitness of estate agents to continue doing estate agency work

OFT keen to co-operate with any property/estate agency projects that a TSD may be considering

OFT/TSOs can work in partnership in enforcing the estate agents legislation