



# Christopher Hamer, The Property Ombudsman has been deciding some tricky dual fee liability cases



In most cases only one agent is instructed to sell a property and their contractual right to a commission fee is not disputed.

However disputes where both agents have claimed a fee for selling the same property have always been a regular cause of complaint. Lately I have seen an increase in the number of such disputes perhaps because of market conditions or the Foxtons judgement.

The Property Ombudsman Code of Practice is intended to ensure that no seller is unwittingly put in a position where he is liable for two fees for the sale of a property. Some of the scenarios that come before me arise as a result of a complainant paying the estate agent whom, they believe, effected the sale and then being pursued by another who claims that they are entitled to a fee. I have seen a trend where one estate agent will claim a fee based on being the effective introducer and/or having held negotiations, but one or other of them will be unwilling to negotiate a share of a single fee. Such claims may arise as a result of a sole agency contract being terminated and second agent instructed or when a buyer who may have viewed through the first agent comes back to view or offer on the property through the second agent. Another instance is where a second agent is instructed prior to the expiry of the initial Sole Agency agreement and a buyer is introduced by the second agent during that period.

When examining such complaints I consider whether the estate agent claiming the commission fee is able to show that they had carried out a positive fee earning event and so became the effective cause of the sale of the property to the buyer. Under section 3m of the Code of Practice, estate



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agents are required to give the necessary warnings about the potential dual fee liability and explain this to the seller on instruction and termination. The desired outcome is that an ‘innocent’ seller should only pay one fee.

I ascertain whether the agents involved have discussed sharing a fee. If not, I generally decide on the extent that I feel the complainant has been disadvantaged and any compensation takes into account any additional expense incurred as a result of the shortcomings on the part of one or both of the agents involved.

A recent case came before me where Agent A marketing the property undertook a viewing and the prospective buyers then

placed their own property on the market with Agent B. The Seller Complainants terminated their agreement with Agent A, instructed Agent B and went on to sell the property to the same buyers using Agent B. Neither Agent A on disinstruction nor Agent B on instruction advised the Complainants that there was a potential for two fees to become due. Agent A did not provide a list of those individuals they could claim as potential purchasers through them and Agent B made no attempt to find out from the sellers or Agent A for which individuals that agent might claim a fee based on introduction. Agent A discovered the sale prior to exchange of contracts and informed the Complainants of their contractual agreement and entitlement to a fee. I concluded that Agent A had been the effective cause of introduction but that Agent B’s contract was very clear in that they were entitled to a fee for negotiation.

However because the sellers had innocently been put in the position of now being liable for two fees, whilst I upheld the contractual position, I made a resolution whereby each agent gained half the fee.

Such instances tend to arise out of general confusion on behalf of the seller client, which can be further exacerbated by the buyer’s, albeit innocent, action. Whilst dual fee liability clauses are often included in agency agreements estate agents need to ensure that they fully explain to their seller clients the events that may lead to dual fee liability and protect their clients’ interest particularly where one agent is disinstructed and another instructed in relation to the same property. ≡



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