



**CHRISTOPHER HAMER** IS THE PROPERTY OMBUDSMAN

## The pre-contract predicament

Many agents are using pre-contract agreements, but how do they work? Christopher Hamer explains.

**T**here has been considerable coverage recently in the property press about the recent proposal by leading members of the industry for the introduction of a preliminary contract as a standard procedure in the home buying and selling process. The perceived aim, first proposed by E-Homebuying Forum president Sir Bryan Carsberg in his *Review of Residential Property* in 2009, is to introduce certainty at a much earlier stage in the process, thus avoiding gazumping and gazundering. The figure quoted for the number of transactions that currently fall through is around 31%.

It is envisaged that such an agreement would require sellers and buyers to commit to the transaction at the agreed price, subject to certain conditions that had been approved from the outset. This legally-binding agreement, requiring payment of a deposit of between 5% and 10% of the purchase price, would be entered into once an offer has been accepted. As such, a financial payment indicating a willingness to commit would be required from the buyer at the start of the process. However, there is no intention of punishing home buyers or sellers from pulling out for genuine reasons connected with the process. In particular, it is envisaged that the agreement would become void if the survey should reveal significant issues, or if the buyer was unable to secure the necessary finance.

It is not as yet clear how such deposits will apply to chain transactions. I am aware that in some jurisdictions where such preliminary agreements have been adopted, it is not uncommon to include a clause that such agreement will be void if the

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buyer has been unable to find a buyer for the sale of their own property within a certain timeframe. Furthermore, I presume that the agreement would also be

voided if the chain collapsed. Dropping out of a chain helps to perpetrate the popular perception that house buying and selling is stressful and a legal minefield.

It is not my role to regulate the house selling process. My Code of Practice makes clear the approach that I expect agents to take and clarifies their obligations. The Code advises agents not to take such deposits (see paragraph 8). I am aware from the complaints referred to this office that such deposits can create false expectations. They do not bind either sellers or buyers to go through with the deal, although I accept that if the penalty payment is sufficiently large, it is more likely that the transaction will proceed. I would certainly caution against a member agent involving themselves in the preliminary agreement, aware of the possible complaints that may arise.

In cases seen by this office, a transaction falls through because of issues that would, in any event, nullify the preliminary agreements, such as an issue with the buyer's finances or survey, or because either party is concerned by delays or affected by significant personal issues. No amount of transparency and disclosure or my usual cries for resolving issues will overcome this, but such an agreement may introduce a degree of certainty at an earlier stage in the process.

I support any initiative that seeks to enhance the house selling process and hence I approach this proposal with a degree of cautious optimism, whilst fully aware that the reality of the house selling process makes it particularly difficult to introduce the degree of certainty that many buyers and sellers would welcome. ●

