



Ombudsman for Estate Agents



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▶ About the OEA

The Ombudsman for Estate Agents (OEA) Scheme was established on 1 January 1998. The Scheme is open to all those firms with a principal, director or partner who is a member of the National Association of Estate Agents (NAEA) or the Royal Institution of Chartered Surveyors (RICS); to all corporate estate agents; and to other independent estate agents who can provide the necessary references and carry appropriate Professional Indemnity cover.

The OEA offers an independent service for the resolution of disputes between member agencies and Buyers, Sellers, Tenants or Landlords of residential property in the UK. The Scheme is also approved under the Housing Act 2004 as a redress scheme in relation to Home Information Pack disputes.

The Ombudsman is entirely independent of member agencies and he reports to an independent Council. He provides a fair and impartial resolution of disputes which fall within his Terms of Reference. Resolutions are designed to achieve a full and final settlement to the dispute and the Ombudsman can, where appropriate make an award of financial compensation up to £25,000. The Ombudsman will not normally review a case until the internal complaints procedure of the member agent has been exhausted. The service is free to complainants.

Copies of the Ombudsman's Terms of Reference, the Codes of Practice, Consumer Guides and other documents about the operation of the Scheme can be obtained from the OEA at:

Beckett House
4 Bridge Street
Salisbury
Wiltshire
SP1 2LX

Or by telephoning: **01722 333306 (enquiry lines open 09.30am – 4.30pm)**

Or from our website: **www.oea.co.uk**

A full list of Member Agents is available on request from the office or on the website.

▶ Introduction

The purpose of my quarterly reports is to provide stakeholders with an update on the scheme generally and particularly to advise of developments affecting my jurisdiction or the structure of the scheme; and also to continue giving feedback on disputes that I have been called upon to resolve.

This regular communication has allowed Members Agents to see how I approach cases referred to me, so that they are better placed to offer settlements as part of their own internal complaints handling arrangements. The reports have created greater publicity so informing the public of the presence of the scheme should they need to use it. That greater awareness puts across the message that it is better to deal with an agent who is a member of the OEA than an agent who is not.

I recognize that the current market conditions are very difficult for my Member Agents. It is not clear yet whether a downturn in the number of housing transactions will impact on the number of referrals to my office and whether that impact will mean fewer or more cases. It is possible that headcount reductions in firms may give Sellers and Buyers the impression that less attention is being paid to providing them with a service at the level they expect. That may mean a consequent rise in the number of complaints to firms with a proportion coming on to my office.

On the other hand it may be the case that a reduced number of transactions simply follows through to fewer complaints and therefore fewer disputes referred to me.

In this report I discuss the workload in more detail and have included some statistical data relating to my workload for the period 1 April to 30 June. The number of enquiries and full disputes show a small decrease over the previous three month period and a particular slowing down in sales disputes, but as with my previous quarterly report the most significant increase is in relation to lettings.

The figures may be showing a trend related to the end of the surge of new members which the scheme experienced in 2007; and to the fact that my lettings jurisdiction, which has had a slow start is now beginning to register with the public. Matters referred to me as disputes tend to be a few months behind what is happening in the market place. I do not believe therefore that this quarter's figures enable me yet to draw a conclusion as to the direction of my future workload.

Workload

During the second quarter of 2008 workload has remained at the same level as in the first quarter of the year across all enquiries but new disputes have reduced by 12%. In all 255 new disputes were referred to me during this period of which 182 related to sales and 73 to lettings and for the whole of the year so far it means I have received 402 Sales disputes and 142 Lettings disputes. This represents an overall 2% increase on the same period for 2007.

The number of enquiries on matters within my Terms of Reference was 1,710, an increase of 3% again with lettings being the prime reason for that. The total number of enquiries for the year so far is 6,089.

Membership

Membership of the scheme at 30 June 2008 stands at 5,812 members operating out of 12,593 offices. Whilst the number of Member firms increased slightly, there has been a marginal decrease in the number of offices from when I reported this statistic in my previous quarterly report.

Scheme Developments

In the last few weeks the Office of Fair Trading (OFT) has announced that the OEA has been approved as an Approved Redress Scheme under the Consumers, Estate Agents and Redress (CEAR) Act 2007. The CEAR Act provisions in respect of redress will come into force on 1 October and will require all those firms operating as Estate Agents within the definition laid down in Section 1(1) of the Estate Agents Act 1979 to join an Approved Redress Scheme. For the majority of firms there will be no need to take any action as they are automatically covered by their existing membership of the OEA. There are a number of firms who have registered with the OEA only for the provision of HIPs redress and those firms will need to upgrade their membership. The Membership department of the OEA will be advising members formally of what action (if any) they need to take. We will also take steps to identify and then write to non-members to explain their new obligations under the Act.

The CEAR approval process has been somewhat lengthy and has required a particularly heavy commitment to satisfy the OFT that the OEA meets the criteria for recognition. My view is that the scheme always did conform to what was required but we will now fine-tune aspects of our approach. These will largely have no bearing on how we operate but over the next few months we will be revisiting our documentation and internal procedures to maintain conformity with those recognition criteria.

Impact of Case Law

A major implication for the Estate Agency sector arises from the judgment by the Court of Appeal in the case of *Foxtons v Bicknell and Another (EWCA Civ 419, 17EG163)* in which the judge developed the position on 'introduction'. He decided that an Estate Agent must show that he was clearly the effective cause of the sale and that he had introduced someone to the purchase and not just to the property. My interpretation of this and therefore my approach in overall terms, backed up by various expert commentators is that:

- The judgment did not decide that Estate Agents have lost the right to a fee if a Buyer to whom they show a property then makes an offer through another agency.
- It did not decide that dual fee liability no longer exists and neither did it make my expectation of OEA members that they would try to agree a split fee redundant but each case will continue to be decided on its own merits.
- Fee entitlement will still be decided on the basis of what the agency agreement says but I may award compensation where there have been breaches of the code.
- An 'introduction' must now be shown to have resulted in the applicant becoming the purchaser to qualify for a fee.
- An introduction must be more than just proof that a viewing took place. The Buyers interest must be referable to that viewing and to whatever else the agent did to promote the Buyers interest.

A note of some of the common issues I have seen and my views on these appear later in this report together with example case summaries. I remind readers that case summaries are also available on the website at www.oea.co.uk.

Christopher J Hamer
Ombudsman

30 June 2008

▶ General Statistics

The following is a brief analysis of the workload of the OEA during the period 1 April 2008 to 30 June 2008

Enquiries		Q2 2008	Q1 2008
General		448	421
Non-member	(sales)	235	358
	(lettings)	450	450
Outside Terms of Ref	(sales)	157	138
	(lettings)	36	28
Within Terms of Ref	(sales)	1141	1140
	(lettings)	518	448
	(HIP)	51	67
	Total	3036	3050

Disputes		Q2 2008	Q1 2008
New Cases	(sales)	182	220
New Cases	(lettings)	73	69
Cases closed	(sales)	241	217
<i>Withdrawn</i>		2	1
<i>Against Complainant</i>		76	64
<i>For Complainant</i>		163	152
Cases closed	(lettings)	30	20
<i>Withdrawn</i>		1	0
<i>Against Complainant</i>		9	6
<i>For Complainant</i>		21	13

► Case Summaries - Sales

These general messages are directed at Member Agents to enable them to have an understanding of my views on certain matters which have been regular themes in cases I have decided. The OEA Codes of Practice (the sales code being approved by the OFT) lay down the standards that agents should apply in all aspects of their dealings but the points that follow may be seen as reminders, as in practice some agents do not always follow the letter of those codes.

Fixed Fees

It is not for me to comment on how agents determine the basis of their fees. However I have seen many cases recently where an agent has employed a fixed fee basis, generally arrived at by calculating a percentage of the asking price but then described as a cash amount, which has clearly not been explained fully or where some ambiguity has crept in as to whether that fee is a percentage or a fixed monetary amount. If a Seller has signed a contract on a fixed fee basis I will not rewrite that contract but if there is evidence that some confusion has been built into the process by the agent I am likely to make an award of compensation against the agent. This fixed fee issue is particularly serious where the property has been overvalued either deliberately or carelessly and sells for significantly less than the asking price; and where there were no supporting valuation comparables (Code of Practice paragraph 2a is relevant here). The effect of this is to give a huge advantage to the agent in terms of the fee received.

To avoid disputes and dissatisfied clients in relation to this matter, my message is that the property valuation must always be supportable but reflect the market situation and the fee must be openly described as fixed irrespective of the price finally achieved for the property.

The Complainant was selling his Property through the Estate Agent. During the transaction the Complainant believed the commission fee would be 2% of the selling price and signed the Agreement as it stated a commission of £5,000. The Asking Price was £250,000 so he equated the fee to 2%. When the sale completed the Solicitors were instructed to pay the invoice from the Estate Agents. It was only after the Complainant received the Solicitors bill that he noticed that he had paid £235.00 more than he thought he should have paid as the Property actually sold for £240,000.

The Agent stated that at no time did they tell the Complainant that it was a percentage agreement and that it clearly stated on the Agreement which had been signed that it was fixed at £5,000.

In normal cases such Complaints would not be supported as it is not my role to re-write the Agreement. However it was clear to me that the Complainant was confused about the rate of the commission from what had been an inadequate explanation on behalf of the agent. There was no copy on the branch file of the letter sent to the Complainant explaining their Terms and Conditions at the commencement of the instruction, such correspondence would have explained the commission fee and prevented the Complainant from interpreting the Agreement inaccurately. I therefore made an Award for the difference in what was paid and what the Complainant thought he was going to be paying - £235.

Deposits

I recognise that a number of firms do, as a matter of policy, not accept pre-contract deposits. No firm should accept any deposit unless they have appropriate client money accounting facilities but I have seen cases where the agent has accepted a deposit, signed a form of receipt and passed the funds (in whatever form those are presented) from the prospective Buyer on to the Seller. It is a requirement of the Code of Practice that the receipt for the deposit clearly states the status of the arrangement and when, for example, the deposit will be forfeit. Where there is a dispute over a deposit I will expect to see a written instruction from the Seller that a deposit should be sought (not a verbal exchange) and a detailed note of receipt by the agent as to when, if and how the deposit will be repaid and the terms of forfeit. I would suggest that as best practice, estate agents do not involve themselves at all in taking deposits and that it is better for the arrangement to be made through solicitors. Paragraphs 8a, 8b, 8c of the Code of Practice apply here.

The Complainants were attempting to buy a Property. A considerable amount of interest had been generated during the marketing, which resulted in several offers being submitted for similar amounts. The Complainants agreed to pay a £5,000 deposit, though the details surrounding the submission and terms subsequently became the main issue of dispute. The Complainants were unable to secure a mortgage offer and had to withdraw from the sale. At this point, the Complainants discovered that the deposit was non refundable.

Complaints were made that the Complainants were not provided with any written or verbal conditions relating to the deposit, with the consequence that the agents had failed in their duty of care and had failed to treat the Complainants with courtesy.

► Case Summaries - Sales

I was not able to support the complaint regarding the duty of care, as under the OEA Code of Practice, the agents' duty of care was to the Seller, not the Complainants as the potential Buyers. Furthermore, I was not able to take a view on whether the agents had made clear with the Complainants the conditions relating to the deposit or whether the agents had been discourteous, as these were verbal exchanges and it was not possible to verify, after the event, what was said by the agents or the manner in which it was said.

However, I supported the other complaints. I found that the agents had failed to provide the Complainants with the written terms regarding the circumstances under which the deposit was refundable or non refundable, prior to its payment, as required under the OEA Code of Practice. Furthermore, I found that the agents had failed to keep a record of the Seller's instructions. As a consequence of the agents' failures, I found that they had not treated the Complainants fairly. The Complainants had not been given the opportunity to make an informed decision as to whether to pay the deposit or not.

However, I recognised that the Complainants could also have requested confirmation of the conditions which had been attached to the deposit before they provided the cheque to the branch and this was taken into account in the level of compensation which was awarded.

An award of £3,250 was made in compensation.

Sales particulars

I have dealt with a number of cases where the sales particulars listed on a firm's website or one of the widely used property portals differ from the particulars agreed by the Seller. This gives rise to aggravation because, for example, the Seller believes the website photographs do not present the property in its best light, or because price reductions have not been updated. This might be classified as a minor failing but it gives rise to many complaints and therefore cannot be considered as a minor issue for the complainant. If I find that there has been some failure (albeit usually a matter of a simple administrative oversight), then I will be making an award against the agent.

The Complainants agreed to buy a Property which was advertised as an "attractive barn conversion". When problems arose regarding other matters the Complainants requested the Seller to provide a survey. With sight of the survey the Complainants raised further issues direct with the surveyor and discovered that the Property was not in fact a 100 year old barn conversion but it had been built as a bungalow just 36 years earlier, on the site of a pigsty.

The Complainants state that they would not have put in an offer and incurred the costs of instructing a mortgage advisor / solicitors if they had known the above at the outset. They were seeking compensation for some of their costs as admission for the error made.

I felt that there was no evidence that the Agents had tried to verify the description of the Property with the Seller, including obtaining a signed copy of the Particulars authorising their publication. The Agent had not taken reasonable steps to ensure the accuracy of the information given to the Complainants; this was in breach of Paragraph 4 of the OEA Code of Practice, although it had to be said that it appeared obvious that the property was not of the age originally described and such was the nature of the building that I suggested the agent revisit their training of staff carrying out market appraisals as their description could only display incompetence rather than a deliberate action. When the inaccuracy came to light the Complainants withdrew from the purchase having incurred significant costs. It was clear that these costs would not have been incurred had it not been for the misleading Particulars. I made an Award of £300.

► Case Summaries - Sales

Marketing issues

Building regulations

The Complainants made an acceptable offer for a property that was being marketed by the Estate Agent as having two reception rooms. During the course of the conveyancing process it emerged that one of the reception rooms had been converted from a storeroom that had in turn been converted from a garage. No Building Regulations approval had been obtained although in 1997 the local authority had issued a Regularisation Certificate, before the Sellers had purchased the Property. The Complainants opted not to proceed with the transaction and sought for the Estate Agent to pay their costs. My enquiries revealed that the conversion from a garage to a room had taken place many years ago and although the Sellers were aware that the room did not have Building Regulations approval they withheld this fact from the estate agent, although they knew it to be the case. I concluded that the Estate Agent took reasonable steps to ensure that he described the Property correctly and that there was nothing to put him on notice that all was not as it seemed. I did not support the Complainants' claim that the Estate Agent should pay their costs.

Loft conversion

A case in which the proposed Buyers of the Property withdrew from the transaction when it emerged that what was described by the Estate Agent as a fourth bedroom was within a loft conversion that had been carried out without Building Regulations approval and clearly without professional assistance. I concluded that the Estate Agent did not take all reasonable steps to ensure that he accurately described the Property as he should have been on notice that a loft conversion might not have had such approval. I, therefore supported the Complaint and proposed an award of £790 in respect of the Complainants' abortive costs and a further £200 for distress, aggravation and inconvenience.

Disclosure of Information

The Complainants withdrew their offer after reading a structural engineers report commissioned by the Seller six months earlier (in the course of an abortive sale). This disclosed that the property was of steel frame construction. They sought reimbursement of their wasted costs on the grounds that the Estate Agent knew about the non-standard construction but had not disclosed this.

I pointed out that an Estate Agent has no duty to disclose adverse information to Buyers, but must answer all questions honestly (Code of Practice paragraph 4I). The Complainants claimed to have asked if there were any problems with the property and why previous sales had fallen through. The survey report in question had not revealed any construction related "problems", only that it was non-standard but appeared in good condition. File notes indicated that personal factors had been the reason for previous sales falling through.

The Complainants further claimed to have asked at the outset if there had been any earlier surveys and to have been told "no". I could not be certain what exactly had been said. It was clear from the Estate Agent's file that they anticipated that the Property might be hard to sell and they had advised the Seller not to tell prospective Buyers about the non-standard construction. I suspected that they would have been keen not to disclose more information than strictly necessary, but I could not be sure they said that no surveys had been done. It seemed possible that the Complainants deduced more from their conversations than the Estate Agent actually said. Their account of what exactly they had asked was not consistent.

I could not be certain enough of the details of the conversation to be sure that the Estate Agent had misled the Complainants, nor could I be sure they had deliberately misinformed them. I further bore in mind the Complainants' responsibility to thoroughly check that the Property met their requirements, by careful inspection and seeking their own professional advice. When viewing the property the Complainants had been advised by an architect, and one of the Complainants was a mortgage manager, so they, better than many other Buyers, were well placed to assess any potential construction/mortgage related issues before incurring costs. The steel frame was easily visible by lifting the loft hatch. I concluded that there was insufficient evidence on which to support a claim for reimbursement of the Complainants' costs.

► Case Summaries - Lettings

Lettings

Issues arising from lettings disputes are broadly reported in my Annual report for 2007 although I have seen a number of cases also where disputes have arisen over the nature of holding deposits and whether, as with pre-contract deposits in sales disputes, agents do enough to ensure applicants are aware of when and if these deposits will be refunded. The other most common areas of dispute for Lettings are as follows:

- Accuracy of information in marketing particulars
- Handling of repairs to reported defects in properties
- Poor communication
- Failure to protect the interests of Landlords with accurate and adequate referencing
- Adequacy of property visit reports

Poor management

The Landlord complained that the Agents moved Tenants into the Property without providing suitable guarantors. I was unable to find the Agents to be in breach of the OEA Code at the time the tenancy began, since this predated their membership of the OEA Scheme. However, it was noted that the Agent had a letter signed by the Landlord which authorised the Agents to let the Property without the need for guarantors to be in place prior to the tenancy being agreed.

The next complaint was that the Agents failed to inspect the property as required under their management agreement. They later offered to do so, showing that they were unaware of their own terms and conditions. I found that the management agreement signed by the Landlord contained a section asking the Landlord whether she required the Agents to make property visits. She had not selected this option. Notwithstanding this, the Agents had visited the property voluntarily in response to the Landlord's concerns, but had made it clear this was a 'goodwill' gesture.

The third complaint was that the Agents failed to visit the Property after damage to the Property was reported to the Landlord by the Tenants. I was unable to find any evidence to show that the Agents had previously been aware of the damage, and as had been noted previously were under no obligation to visit the property routinely. I concluded that the Agents were not able to deal with issues about which they were unaware.

The fourth complaint is that the Agent managed the property poorly, resulting in the Tenants' failure to pay rent. The Landlord argued that due to their poor management of the property the Agents were responsible for the Tenants failing to pay their rent, which at one point totalled £2,600. I found that the Agents issued regular notices of rent arrears to the Tenants, meeting their obligations under the OEA Code of Practice for letting agents, and the Tenants responded by informing the Agents that the rent was withheld due to repairs not being made to the property. The agents duly informed the Landlord of this and sought instructions on whether to serve notice on the Tenants. The complaint was not upheld.

No refund of Deposit

This was a case where an Applicant for a tenancy claimed that the Agents had 'stolen' a deposit of £400 from him, and sought an apology from the Agents and a full refund.

The Applicant was renting a property through another Landlord, where he had understood that there was an agreement that his current tenancy could end early. He paid a holding deposit on the new Property, but his arrangement to leave his existing tenancy early fell through. He requested a refund of his holding deposit.

The Agents refused to refund the holding deposit, claiming that he had been informed that it was non-refundable. The evidence presented included a card payment receipt which stated "cardholder not present", which was attached to the Agents' own receipt form which stated "(Holding Deposit non refundable unless Landlord withdraws)".

Although holding deposits are frequently agreed between the parties to be forfeited where an applicant changes their mind, in this case I ruled in favour of the Applicant. The evidence presented failed to demonstrate that the Applicant was informed that any monies paid were non-refundable prior to payment being made. Such an explanation was only given on the Agents' receipt, which was provided after payment had taken place.

The OEA Code of Practice for Letting Agents states that an applicant must be given an example copy of the tenancy agreement prior to that applicant becoming liable for fees or charges associated with the rental of the property. I took the view that a similar principle should apply to the manner in which other related payments were obtained.

I awarded the Applicant a refund of the £400 holding deposit, £30 for the avoidable and undue aggravation, distress and inconvenience caused by the Agents' error and the sum of £20 to cover loss of interest and availability of the money.

I also concluded that the Agents needed to review their processes by which holding deposits are paid and at what point a holding deposit is taken.

▶ Staff

as at 30 June 2008

Title	Name
Ombudsman	Christopher J Hamer
PA to Ombudsman	Natalie Hallett
Case Officers	Jo Bailey Mary Birch Kate Chandler Colin Dixon Maria Evans Natalie Pughe Jane Reed Joanna Regan Christine Rowland-Jones
Finance Manager	Martin Brown
Finance Assistant	Anne Hall
Special Projects Manager	Julia Hawkins
Initial Enquiries and Facilities Manager	Sue Hurst
Initial Enquiries Supervisor	Anya Browne
Initial Enquiries Team	Sarah Andrews Holly Myers Kim Hilton Martin Noke Susan Russell Kimberley Saunders Annemarie Simpson-Wild
Case Administration Manager	Tracey Baldwin
Case Administration Team	Joanne Beatty Roz Butcher Bryony Smith Amanda Stiggants
Membership Manager	Sarah Sartin
Membership Team	Laura Baldwin Marianne Brewis Jay Johnson Matthew Tucker

▶ Council Members

Title	Name
Chairman	Lord Borrie QC
Members	Lord Best OBE Noel Hunter OBE Jane Vass Mary Wilson-Jones Diana Wright Peter Bolton King Bill McClintock
Secretary to the Council	Frances Hanks

▶ Board

Title	Name
Chairman of the Board	Bill McClintock
PA to Bill McClintock	Janet Fitzpatrick



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