



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 was approved under the Housing Act 2004 as a redress scheme in relation to Home Information Pack disputes and from 1 October 2008 the OEA has gained OFT approved Estate Agents Redress Scheme Status.

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

This, my report for the quarter ending 30 September 2008, will concentrate on the disputes I have resolved in relation to Home Information Packs (HIPs).

I will not remark here on the history of how HIPs came into being, on the staggered start dependent on the type of property or whether they have had a positive or negative effect on the housing market. There has been much comment from elsewhere by those actively involved in the market on these aspects and my contribution is most appropriately confined to the effects of the introduction of HIPs as presented to me in the disputes I have seen.

Given that it was only on 14 December that HIPs became compulsory for all residential properties placed on the market and that there is always a time lag between a market event and complaints finding their way to me, it is only now that I am beginning to see HIPs related disputes arising. Since the start of the year my office has received 146 initial enquiries related to HIPs and I have decided 22 formal disputes. I should point out that these disputes were not necessarily solely related to the HIP but were part of a wider dissatisfaction being expressed by the complainants.

I have included summaries of the HIP element of those cases later in this report but I thought it would be helpful if I detailed some of the issues that appear to be arising in regard to the Packs.

- In general it appears that the HIP agreements being used adequately describe the liabilities that a seller is incurring when signing that agreement. I will not rewrite a contract if the seller has signed to confirm their understanding of it but I caution that agents should ensure they have re-iterated clearly to the seller the terms of that agreement and where relevant point out that the agreement is with the HIP provider and not the agent.
- It is obvious to me that there is a lack of understanding amongst sellers about the HIP. In particular it appears that sellers see the charge for the HIP as simply a fee for selling their property and of course if it doesn't sell, they do not expect to pay. In drawing a client's attention to the terms of the HIP agreement agents should emphasise that it is a legal requirement under the Housing Act 2004 for a Pack to be produced; and if the relationship between seller and agent ends, the payment of the fee means that the seller gains ownership of the HIP.
- As the responsible person for marketing the property the agent has some specific obligations (amongst others) under Part 5 of the Housing Act 2004. Included in these obligations is that of providing interested buyers, on request, a copy of the Pack. If, as has happened, I receive a complaint on this aspect and I find that there was no good reason for the agent not to provide a copy to the potential buyer, I am required by virtue of the OEA being appointed by the Department for Business, Enterprise and Regulatory Reform (BERR) as an approved HIPs redress scheme,

to report the matter to the Office of Fair Trading. That could have serious consequences for a firm.

- Agents should not be drawn into commenting on the content of a HIP. If that occurred and resulted in a complaint to me where it turned out that the agent (perhaps in trying to assist) had misled the buyer then I would have to support the complaint.

General Workload

To be consistent with my previous quarterly reports I have included statistical data about my general workload in terms of initial enquiries and formal disputes. I have shown a comparison with the previous quarter split between disputes referred to me involving sales transactions and those involving lettings transactions.

The figures show that the number of formal disputes referred to me have declined very slightly over the most recent quarter compared with the previous quarter. However whilst I had expected my workload to follow the obvious trend in the market place, it is clear that sales disputes have not dramatically declined, as during 2007 I received an average of 64 cases per month and during 2008 to date I have received an average of 65 per month.

Again although lettings disputes have reduced in the quarter under report, in comparison with the previous quarter, overall this year I have received 213 lettings cases, 115% more than in the whole of 2007.

The total number of enquiries received, whether relating to members, non-members or just general enquiries shows a small reduction from the previous quarter but so far this year in total this category of work is running at the same level as 2007.

Consumers Estate Agents and Redress Act 2007

By the time this report is released we will be working under a new regime for redress. The OEA is now an OFT Approved Estate Agents Redress Scheme and estate agents have been required in accordance with the above Act and since 1 October to sign up with such a scheme. Through other notifications and advice from the membership department of the OEA you have already been informed of what this means for you. I emphasise that for the vast majority of existing members of the OEA no action need be taken.

See the website at www.oea.co.uk for all the latest updates

Christopher J Hamer
Ombudsman

► General Statistics

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

Enquiries		Q3 2008	Q2 2008
General		277	448
Non-member	(sales)	415	235
	(lettings)	311	450
Outside Terms of Ref	(sales)	127	157
	(lettings)	22	36
Within Terms of Ref	(sales)	983	1141
	(lettings)	673	518
	(HIP)	74	51
	Total	2882	3036
Disputes		Q3 2008	Q2 2008
New Cases	(sales)	179	182
New Cases	(lettings)	71	73
Cases closed	(sales)	242	241
<i>Withdrawn</i>		2	2
<i>Against Complainant</i>		95	76
<i>For Complainant</i>		145	163
Cases closed	(lettings)	45	30
<i>Withdrawn</i>		0	1
<i>Against Complainant</i>		14	9
<i>For Complainant</i>		31	21

▶ Case Summaries - HIPs

Case A

The Complainants requested that the cost of the Home Information Pack (HIP) be waived, because of what they perceived to be poor service during the sales transaction.

The Agent maintained their contractual entitlement to the HIP payment. It was clear that there were two separate contracts involved relating to marketing of the Property, the HIP contract and the Agency Agreement. Although the Agency Agreement was terminated, the cost of the HIP was not affected by the withdrawal of the property. From my examination of the Home Information Pack Instruction Form, I noted the following was included:

Declarations

I/We make the following declarations which I/we confirm are true and complete.

I/We confirm that I/we agree to pay the price of the HIP. Further, I/we confirm that I/we accept such price will be a debt due and owing by me to the firm." Furthermore, the HIP Terms and Conditions contained the following clauses:

"1. You acknowledge and agree that on signing these Terms you will be responsible for the price of the HIP.

5.If you do not pay for the HIP when ordered, you must pay at and on any of the following events

- Exchange of contracts when you sell your property;*
- or if you withdraw your property from the market;*
- or if you or we terminate our agency agreement;*

6.2 The price of the HIP is £299 plus VAT (in total £351.33) payable as set-out in Term 5 above. However, the price of the HIP is £399 plus VAT (in total £468.83) payable immediately

- if you withdraw your property from the market;*
- or if you terminate our agency agreement;"*

I pointed out for the benefit of the Complainants that the contract they entered into with the Agent regarding the HIP, was a contract whereby they agreed to pay the price of the HIP to the Agent. The contract was not a service level agreement, where the HIP cost would be abated by any failures in the level of service provided. I had dealt with the service issues previously in my review (some of which I had supported), separately from the contractual issue of whether or not the firm was entitled to their HIP payment. I confirmed that under the Terms of the Agreement signed by the Complainants the Agent was contractually entitled to payment of £468.83.

Case B

The Complainant claimed that he was not treated fairly when he wished to cancel the HIP and stated:

- He signed the Agreement with Estate Agent A but subsequently realised that he already had a HIP in place, arranged via another Estate Agent B and contacted to cancel the same.
- The Complainant was advised by A that the HIP could not be cancelled and hence no refund could be provided.
- The Complainant considered that he was not clearly advised on this issue and requested the refund of the HIP fee.

► Case Summaries - HIPs

Case B - continued

A in response confirmed that, as per the Agency Agreement signed by the Complainant, once the instruction to order the HIP had been placed, the process had started and they were unable to provide a refund, as they were contracted to pay the HIP Provider upfront.

In coming to a judgement on this Complaint, I noted that the Complainant had previously instructed B. B's progress notes stated that the Complainant approached them, advising that he was not happy with them and wanted to place the Property on the market with another Estate Agent. It appeared that at that time the Complainant had not paid for the HIP through B who stated that they explained to the Complainant that they could not market the Property without a HIP but if he paid for the HIP arranged through B, they could obtain the URL number of that HIP. The Complainant was adamant that he would not pay the second agent for the HIP and insisted that the first agent apply for a new HIP.

From a detailed examination of the first A's Branch file, I noted that the Agency Agreement had been prepared on the basis that a HIP was already in existence. However, following the Complainant's statement that he would not be obtaining the previous HIP through B, a new Agency Agreement was signed in which Part 4 of the Agreement stated.

"I confirm that I will pay the price of the HIP".

The Complainant has then signed Part 4 underneath the sentence *"I have read these terms and Declarations and agree to be bound by them"*. If the Complainant had had any queries about this issue, I would have expected him to have raised such concerns with the agent at the time he signed the Agreement. It would appear that he chose not to do so.

I advised that I considered the Agency Agreement to be very clear. The Complainant signed the contract, confirming that he would pay for the necessary HIP and the Agent immediately instructed the HIP provider. In the circumstances, I considered that the Complainant had given his authority for commissioning the HIP, and paid for the same. The contract provided no right to cancel the requisition of the HIP and hence I was unable to support this complaint or direct the Agent to refund the HIP fee.

Case C

The Sellers complained they were never given access to view the HIP until they had paid the £587.50 Withdrawal Fee. Upon receipt of the HIP the Complainants realised it was inaccurate. There were two major inaccuracies resulting in poor energy consumption readings. Contrary to the report the Property had temperature controls on all radiators and full insulation within the walls.

The Agent responded that the HIP and rating on the Sales Particulars were only available from November 2007. At no point prior to disinstruction was the Estate Agent asked to supply a copy so were not aware of any errors.

I advised that the Agent marketing the property could not be responsible for the accuracy or omissions from the Pack if that information had been provided by someone other than the Agent (in this case the HIP provider) and provided the Agent did not believe that the documents were incorrect or did not comply with the HIP Regulations.

Guidance offered by the NAEA, which, in my view is appropriate as best practice, is for the Agent to initially check the HIP to ensure accuracy and to review the contents with the Seller who is paying the costs of the Pack.

Whilst I noted that the Agent responded that the energy rating was available on the Sales Particulars, I saw no evidence to suggest that the Complainants either saw or approved those specific Sales Particulars. A copy of the draft Sales Particulars was appended to the Branch File which had some handwritten amendments and additions inscribed within them. A letter from the Agent to the Complainants, enclosed a draft copy of the Sales Particulars and explained the liability of the Agent with regard to the Property Misdescriptions Act. The letter requested that the Complainants inform the Agent of any discrepancies and return the details with the "Certificate attached". I could find no record of any certification from the Sellers that the draft Sales Particulars had been approved. Most significantly the draft Sales Particular (of which I accepted that the Complainants had sight as I presumed the handwritten amendments were inscribed by them) had no information documented in relation to the HIP or associated energy ratings.

► Case Summaries - HIPs

Case C - continued

My examination of the Branch File also revealed that the HIP provider forwarded an undated message to the Estate Agent confirming that the Agent had "started off" the HIP and could now market the Property. The message contained the information that, once the EPC had been uploaded, the graph should be included in the Sales Particulars. The message advised the Agent that the details entered by the Agent, indicated that the Sellers could not be contacted by email or text message and it was therefore assumed that the Sellers would not be able to access their part of the HIP online. The HIP provider forwarded the instruction to the Office, as the Sellers could not be contacted by email or text, the Estate Agent would have to contact the Sellers *"about the property forms through the post"*.

Under Paragraph 4i of the OEA Code of Practice the written details of a property (Sales Particulars) must be agreed with the Seller to confirm that the details are correct. I consequently I took the view that, as the Agent stated that the HIP information had been circulated within the Sales Particulars since November 2007, the Estate Agent should have made every effort to ensure the Sellers had seen and approved that information. It would appear that the Complainants had not even seen the HIP prior to the HIP information being inserted into the Sales Particulars and that no such checking by the Sellers, of the information contained within that insertion, was requested by the Estate Agent.

I therefore supported this complaint and made a small award.

Case D

The Complaint was that the Complainants had stated that the Agent failed to provide them with a copy of the HIP Agreement. The Agent had not commented on whether or not they had left the Complainants with a copy of the Agreement at the time it was signed but that the Complainants were sent a copy of the HIP Agreement with the HIP instruction form, at their request. The Estate Agent had an obligation under paragraph 3d of the OEA Code of Practice to provide the Complainants with a copy of their Terms of Business and to clearly define any charges due. These should have been provided before the Complainants were committed to the Agent. It was clear that the Complainants had signed the HIP Agreement. However, it would appear that they were not given a copy of the Agreement until they requested it. The Agent was therefore in breach of their obligations under paragraph 3d of the OEA Code of Practice. However, the Complainants had signed the Agreement and the terms were clearly defined and if the Complainants were not happy with the terms, they could have requested some time to consider the terms further.

I supported this element of the Complaint.

The Complainants considered that they should not have to pay £470 (inc. VAT) for the HIP, as the HIP was incomplete and because the Agent had not incurred this cost. The Agent had stated that they paid the HIP fee in full to their HIP provider, when they ordered the HIP. The Agent claimed that the HIP was incomplete as a consequence of the Complainants' actions in cancelling the Energy Assessment appointment. The Agent had advised that they were prepared to complete the HIP, if the Complainants allowed the Energy Assessor access to the Property. However the Agent considered they were contractually entitled to payment of the HIP. In coming to a decision on this element of the Complaint, I considered the contract the Complainants entered into, with regards to the HIP Agreement. The Complainants signed a Sole Agency Agreement and signed a separate HIP Agreement. The Property was on the market for a two week period, when the Complainants withdrew it. It was not disputed that the Property was on the market and as consequence the Complainants were required by law to obtain a HIP. The HIP Agreement signed by the Complainants provided that *"You agree to purchase the Home Information Pack from the Estate Agent, if you do not exchange on the sale of the Property via the Estate Agent... The price you pay to purchase the HIP is £400 (plus VAT)." It is clear that under the Terms of the Agreement, the Complainants agreed to pay the Agent £470 (inc. VAT), should the Property not sell through the Estate Agent. I therefore supported the Agent's contractual entitlement to a fee of £470 (inc. VAT). I also noted that the Complainants did not consider the terms of the HIP Agreement to be clear. I did not agree with this assessment of the Agreement in relation to this particular element of the Complaint.*

The reason the HIP was incomplete was because, the Complainants cancelled their appointment with the Energy Assessor. I was therefore persuaded that it was the Complainants own actions which resulted in them receiving an incomplete HIP. They were contractually liable to pay for the HIP and it was their own choice as to whether they chose to allow the Energy Assessor access to their Property to complete

► Case Summaries - HIPs

Case D - continued

it or whether they accepted a partially complete HIP. Either way the Complainants were contractually liable to pay for the HIP in full. The Complainants had further stated that they would be prepared to pay for the HIP less any money which the HIP provider, had refunded to the Estate Agent. Whilst I appreciated this suggestion from a practical viewpoint, I did not consider it relevant to the contractual position. The Estate Agent's own arrangement with their HIP provider was not relevant to the agreement between the Estate Agent and the Complainants. It did not alter the Complainants' contractual liability to pay for the HIP, which by law they were obliged to provide, as part of the marketing of their Property. It was the Complainants' choice to withdraw the Property from the market, which they did before the minimum period stated in the Sole Agency Agreement.

I did not support this element of the Complaint.

The Complainants stated that the HIP agreement tied the Complainants into using a particular conveyancing firm. The Agreement provided that the conveyancing firm were on a 'no completion-no fee' basis. However, the conveyancing firm required a £200 (plus VAT) deposit. The Agent stated that this fee was a file opening fee, however it was not paid by the Complainants as a sale did not complete. In coming to a decision on this element, I advised the Agent that making it a condition of a HIP Agreement that a client must use a particular conveyancing firm, is somewhat unusual. This clause is in the middle of the Agreement and I advised the Agent that such a term should be made very clear both in writing and verbally to a client. In addition the Agreement stated that the conveyancing fee would be £450 (plus VAT and disbursements) on a 'no completion-no fee' basis. However, both parties agree that the HIP provider requested £200 (plus VAT). That was not made clear on the HIP Agreement and was therefore misleading as to the actual costs due.

As far as I was aware, the Complainants had not paid the Conveyancing firm the £200 (Plus VAT) which was requested. However, I advised the Agent, that I would have no hesitation in making an Award against the Agent for these costs, had the Complainants had to pay them. Under paragraph 3h of the OEA Code of Practice the Agent must make clear any costs due as part of their HIP Agreement. I considered the Agent to be in breach of paragraph 3h of the OEA Code of Practice for failing to make clear that a deposit would be due to the conveyancing company instructed as part of the Agent's HIP Agreement.

I therefore supported this element of the Complaint.

The Complainants state that the Agent failed to address their concerns, or offer complaint resolution and denied that they needed to join a HIP Redress Scheme. The Agent refuted these allegations. In coming to a decision on this Complaint I considered the Estate Agent's obligations under paragraph 12d of the OEA Code of Practice, which states that the Estate Agent must respond to all complaints within 3 working days and fully investigate the Complaint. In this case the Complainants wrote a letter of complaint which the Estate Agent responded to within 3 working days and made a goodwill gesture in an attempt to resolve the Complaint. I was therefore persuaded that they met their obligations under paragraph 12d of the OEA Code of Practice.

With regards to the comments relating to a redress scheme, I was unable to determine what took place. I was able to reassure the Complainants and advise them that the Estate Agent was a full member of the OEA and was so before the Housing Act 2004 came into being, requiring all Estate Agents to join an Approved Redress Scheme for HIP's – related business. The OEA was approved under that legislation. I did not support this element of the Complaint, I suggested to the Complainants that the goodwill offer made by the firm was an adequate solution and I made no further award.

▶ Staff

as at 30 September 2008

Title	Name
Ombudsman	Christopher J Hamer
P A to Ombudsman	Natalie Hallett
Finance Manager	Martin Brown
Finance Assistant	Anne Hall
Special Projects Manager	Julia Hawkins
Support Services Manager	Sue Hurst
Case Officers	Mary Birch Josephine Bailey Kate Chandler Colin Dixon Maria Evans Natalie Pughe Jane Reed Christine Rowland-Jones
Case Administration Manager	Tracey Baldwin
Senior Case Administration Officer	Amanda Stiggants
Case Administration Team	Joanne Beatty Roz Butcher Alan Bowers
Initial Enquiries Manager	Anya Browne
Initial Enquiries Management Support	Kim Hilton
Initial Enquiries Team	Sarah Andrews Kevin Grey Martin Noke Susan Russell Annemarie Simpson-Wild Kimberley Saunders
Membership Manager	Sarah Sartin
Senior Membership Administrator	Laura Baldwin
Membership Team	Matthew Tucker Jay Johnson Holly Myers



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