Consumer Protection from Unfair Trading Regulations 2008

Guidance for Estate Agents

Please note: this guidance is for advice only and does not form part of the TPO Code of Practice for Residential Estate Agents. It is based on the Ombudsman’s approach to best practice but may not be accepted as a defence to any action taken by the Trading Standards Service.

Introduction

The Consumer Protection from Unfair Trading Regulations 2008 [the Regulations] came into force on 26 May 2008. They are based on certain European Directives which in relation to real estate matters require a minimum level of protection to be provided across all member states. They are not specific to the property sector but aim to prevent commercial practices that are unfair to consumers in general.

Failure to comply with the law could mean that an agent would face civil and/or criminal sanctions as a result of enforcement action by Trading Standards.

The Office of Fair Trading (OFT) issued guidance in September 2012 on how the Regulations apply to property sales to assist agents in compliance. That guidance makes clear that if agents treat consumers and competitors fairly then they are unlikely to breach the Regulations. The Regulations emphasise that it is the ‘consumer’ who must be treated fairly so although the agent is instructed by the seller there is a clear responsibility also to be fair and even-handed with prospective buyers and potential viewers.

The guidance can be found at:


Agents must ensure that they do not engage in any unfair commercial practice by saying, doing or omitting to do something which causes, or is likely to cause, the average consumer to take a different transactional decision. Agents should provide all material information that the average consumer needs to take an informed transactional decision.

Important Definitions

• The definition of a consumer is an individual acting for purposes outside their business.

• The definition of an ‘average’ consumer is someone who is reasonably well-informed, and reasonably observant and circumspect. It is expected that such a person would pay some attention to documentation but not necessarily to the small print unless key points are brought to their attention; they would check out publicly available facts if that is easy so to do but they could be influenced in those checks by what information they have been given.

• The Regulations also provide expressly for groups of consumers who are ‘vulnerable’ to commercial practice. This might for example, include the elderly and first time buyers. If services are canvassed at, or property is marketed at, a vulnerable group, then the average consumer will refer to a member of that group and not the average consumer generally.

• Unfairness may arise from:

  • Giving false or misleading information to consumers (a misleading action)
  • Hiding or failing to provide material information to consumers (a misleading omission)
  • Exerting undue pressure on consumers (an aggressive practice)
  • Not acting with the standard of care and skill that is in accordance with honest market practice and in good faith (a failing to show professional diligence)
  • Engaging in any one of 31 banned practices such as claiming to be a member of a redress scheme or professional body when you are not.

• Commercial Practices cover the whole range of an agent’s business activities that may affect consumers including advertising of services, pre-agreement advice to clients, describing property for sale, negotiating and making sales and handling complaints about service.

• A transactional decision is any decision taken by a consumer whether it is to act or refrain from acting on whether, how and on what terms to view, purchase, make payment in whole or in part, retain or dispose of a product or whether, how and on what terms to exercise a contractual right in relation to a product. Bearing in mind that the Regulations apply to all businesses this definition might be unwieldy for the property sector and an appropriate shorthand would be causing the consumer to ‘take a different decision’.

• Material information is that information which the average consumer needs, according to the context, to take an informed transactional decision. A transactional decision is not just the decision to purchase but includes, for example, a decision to view a property. The Regulations also apply to an agent’s dealings with a seller.

Application of the Regulations to the property sector

Agents should follow closely the standards laid down in the TPO Code of Practice for Residential Sales Agents which cover in principle terms the obligations under the Regulations.

The OFT guidance makes clear that in the most straightforward sales the material information that would need to be given to potential buyers may be quite basic and might consist of (for example) asking price, location, number and size of rooms and the tenure of the property. However that guidance then goes on to say that the material information that would need to be given will be dependent on the circumstances of each sale.
For sellers the agent will need to fully disclose what services are being offered, fees and charges, terms of business and the duration of the agreement.

The application of the Regulations is therefore not an easy matter. The nature of those Regulations is that they do not specify precisely how the legislation applies in individual scenarios, rather it is left open to interpretation by the agent according to the circumstances presented to him. It is not possible therefore to specify how an agent should act in individual cases.

The TPO Code of Practice will help compliance with the obligations but it is important that agents review the way they approach business. To assist in ensuring that a diligent approach has been taken to meeting their legal obligations and to lessen the chance of consumer disadvantage agents should now:

- When carrying out a market appraisal you must follow up and ascertain the precise position on any aspect that does not feel / appear right or that you are aware is not consistent with other properties in the same road, for example loft conversions, oversize garden for type of property, temporary looking access etc. Even if the seller is forthright on a particular matter you must make further enquiries if you are 'on notice' about something.

- Not use disclaimers where there is a responsibility on you as agent to provide the information accurately and openly. You should confine matters to a factual statement, for example, that electrical appliances have not been tested or that you have been unable (despite appropriate enquiries) to ascertain the precise position.

- Correctly and fully describe all aspects of the property such as outlook, tenure, local services and restrictive covenants to the extent that you can do so given the sources of information available to you. The Property Misdescriptions Act 1991 has been repealed but you should ensure that you have disclosed as appropriate information related to the 33 specified matters under that legislation. You should explain to sellers the importance of providing accurate information since any action could be taken against them under the Regulations (Regulation 16), as well as you, should incorrect information be discovered for example during the conveyancing process.

- Use photographs that give an accurate portrayal of the property and do not deliberately hide neighbouring ‘features’ if those ‘features’ are unusual or are likely to have a bearing on an individual’s transactional decision.

- You should signpost prospective buyers and viewers to publicly available information about the area which may have a bearing on their decision about a property but this does not supersede your own diligence.

- Disclose anything that you become aware of through a previous survey / abortive sale or that is made known to you during the transaction. You should endeavour to establish why a sale collapsed and to advise the seller that defects will have to be advised to future viewers and that future viewers are told. Realistically if defects can be remedied you should encourage your client to deal with the issue or issues and report the defect and remedy applied to potential buyers.

- Determine what Green Deal arrangements apply to the property. There is a legal responsibility under the Energy Act to disclose such arrangements at the earliest opportunity (even as early as point of enquiry) and whilst the EPC provides the required form of notification you should establish the precise details of what the arrangements are. Full information about Green Deal responsibilities has been issued by the Department of Energy and Climate Change and can be found at: https://www.gov.uk/government/collections/green-deal-quick-guides

- Systems and processes must be put in place to ensure that all members of staff have access to up to date and accurate information. You should ensure that appropriate training is provided to all members of staff.

- In regard to sensitive issues such as murders or suicides occurring at a property you should explain these to the consumer at the earliest sensible opportunity and certainly at any viewing.

- Disclose the fact that you will earn a referral fee (not the amount) for referring consumers to third party services if such a fee applies.

- Maintain comprehensive records of your dealings which provide an audit trail should enforcement action be taken against you or a complaint is referred to TPO.

It is effectively the case now that ‘caveat emptor’ does not apply. As agents you will be responsible for equipping individuals with all material information and ensuring that they have been properly advised. Therefore as best practice the agent will now have to carry out a fact-find of the seller and buyer. This need not be as detailed as a financial services ‘know your customer’ process but should, in addition to the routine determination of requirements also include:

- Reason for the move.

- How familiar they are with the house buying / selling process (for example are they first time buyers, regular movers).

- Particular requirements beyond the nature of the accommodation / facilities into such aspects as proximity of schools, transport links, access to shops/ countryside etc, workplace.

- Negative factors about existing property and specific negatives in relation to the current search.

- Funding of the proposed purchase in terms of where funds are coming from, availability of those funds (for example if they are in accounts requiring notice of withdrawal), what the consumer is expecting / aiming to spend on refurbishments etc.