

**RICS Seminars 2012/13 on the *OFT Guidance on Property Sales: Compliance with the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008***

**Additional Questions and Answers**

**Introduction**

In the course of the above Seminar series, RICS members raised a number of questions on which the RICS speakers agreed to approach the OFT for its informal views. These questions, and the views that the OFT has offered on them, are shown below, together with further RICS commentary. The OFT has not provided any views on the RICS commentary.

Where the OFT has offered an informal view on how the CPRs may apply in practice, it is not intended to be exhaustive and would not cover every situation or practice in which a breach of the CPRs may occur. These informal views should therefore not be regarded as a substitute for, or definitive interpretation of, the CPRs and should be read in conjunction with those regulations. If you have any doubts about how the law applies to your business, or if you want advice about a dispute, you should seek professional legal advice.

For completeness, this Q&A sheet also includes additional RICS advice (Question 4) about when and how to release information on a property contained in 'supplementary information sheets', as this has generated questions from a number of RICS members following the conclusion of the Seminar series. RICS has not sought a view from the OFT on the answer to Question 4, and the OFT has not offered a view on the answer provided by RICS.

**Q1 Time limits – how long do agents need to retain material information on a particular property transaction?**

**A1 – OFT informal view:**

- a. In relation to a property that the agent is still marketing:

The OFT considered this straightforward – as long as the information remains material, there is no question that the agent must retain it.

- b. In relation to a property that the agent is no longer marketing (e.g. because the property has sold and completed or has been withdrawn from the market):

Here, the answer is less straightforward as there may be various considerations.

Estate agents must comply with all applicable legal duties to retain certain records (for example, for five years under the Money Laundering Regulations 2007 and six years under the EAA 1979). In those cases the information will need to be retained for as long as the legislation requires.

Estate agents may need to retain certain information in order to defend any future criminal or civil legal action which they may face. It will be for the agent to assess how long they think is appropriate to retain the necessary information and to take legal advice or consult their insurers as appropriate on this issue. There are, of course, risks attached to destroying information immediately; however agents may need to weigh the costs of retaining information for long periods against the potential risks they may face. Estate agents may also wish to retain information to allow them to deal with any future complaints (for example to the relevant Ombudsman). Relevant considerations may include:

- the types of legal action they may face and any applicable time limits (e.g. the limit for prosecution for a criminal offence under s.14(1) of the CPRs of three years from the date of the commission of the offence or one year from the date of discovery of the offence by the prosecutor, whichever is earlier, but other offences will carry different time limits or may have no applicable time limits at all), and
- other relevant factors (e.g. insurer's requirements).

#### **A1 – RICS commentary:**

RICS recommends that agents have processes in place to retain information for at least six years from a property they were marketing being taken off the market, in order to ensure compliance with the Money Laundering Regulations 2007 and the Estate Agents Act 1979. There may be certain circumstances where agents need to retain information for longer.

RICS recommends that agents, when preparing to archive information when a property is taken off the market, have internal processes in place to review the information to make and record an initial assessment of whether that information will need to be retained for longer than the minimum six years.

Agents are also advised to have internal processes in place to review information when the six year period ends to decide and record at that stage whether the information can be destroyed, or whether it needs to be retained for further review. The timing of that further review will vary, and is likely to be dependent on the recorded reasons for retaining the information beyond the six year minimum.

**Q2 Can the term 'offers invited' be used in sales literature and tenders without a reference to a specific asking price? Or does such an approach fall foul of the CPRs?**

**A2 – OFT informal view:**

Based on two scenarios presented to the OFT by RICS members:

1. Sale by tender where no price indication is given

This scenario can usefully be broken down into two categories:

- a) No price indication is given, but the agent and client do have a price or price range in mind.
- b) No price indication is given, because there genuinely is no price or price range.

At the outset, it is important to understand clearly what the CPRs require. To avoid misleading by omission, a business must provide the material information that the average consumer needs in order to make informed transactional decisions. Although the point when a consumer starts making such decisions may vary, early decisions may still be transactional decisions. By way of example, the OFT's position is that deciding whether or not to view a property is a transactional decision.

As stated in the OFT guidance on the application of the CPRs to property sales, the OFT considers that an asking price is likely to be material information that the average prospective buyer will need in order to make an informed decision about whether to view a property.

Looking at (a), if the seller or agent has a guide price or price range in mind for the property then this is very likely to be material information and should be disclosed to a prospective purchaser, at the very least before they arrange a viewing (or make any other transactional decision such as a bid, if this is to be done without a viewing). To comply with the CPRs, the agent may therefore need to give a price indication in the advertising materials, the tender or, at least, 'on application' so that it is available to the consumer before they make a transactional decision.

Turning to (b), it is difficult to imagine this scenario presenting in real life, as it implies that a seller does not consider the price to be relevant to the sale and that the agent has no professional opinion on what price the property might expect to sell for.

If there really are occasions when there is no price, then the estate agent may need to consider what other information they can give that might assist prospective buyers who are thinking about viewing the property or making other transactional decisions.

For example, they may need to explain details of how the successful bidder will be chosen.

The OFT also notes that properties marketed on internet portals are usually assigned a price, even if this is not visible to browsers. If a property has been assigned an asking price or price range for an internet portal, then this would tend to indicate that there is information that can be shared with prospective buyers before they make transactional decisions, such as whether to view the property.

## 2. Some high-end property sales, which are advertised as 'offers invited'

Ordinarily, the same arguments would apply as with (1). However, consideration can also be given to whether the agent's marketing is only targeted at a particular group of prospective buyers (e.g. extremely wealthy ones) whose material information needs (in order to make an informed transactional decision) might be different to those of the average consumer generally.

If the marketing targets a specific group and the price indication is material – i.e. the average prospective buyer in the targeted group needs a price indication in order to make an informed transactional decision (including whether to view a property), then the price indication is material information that the agent must disclose. However, if the average prospective buyer in the targeted group would not require a price indication to make that transactional decision (including the decision whether to view the property), then a price indication may not constitute material information. If this is the case, the agent and seller could choose not to give an asking price in sales literature or even on application.

However, there are important points to bear in mind:

- Agents would need themselves to be satisfied, and, if challenged, would need to satisfy enforcers or a court, that the targeted group of prospective buyers did not need to know a price indication in order to make, on an informed basis, the specific transactional decision (e.g. whether to view).
- The price of a property, even if it is not material information at an early stage, will become material at some point during the sales process and it may, for example, become material at a point as early as where the prospective buyer is considering paying for a survey or putting in a bid. In other words, the information on price will need to be disclosed at some point in the process and it may become material earlier than the agent might expect.
- Agents must also be prepared to explain the nature of any targeted group and show how they are targeting them specifically, such as through the way advertising is placed, the language used, the nature of the product and the context. For example, if adverts for a property appear on standard internet

portals or in literature, accessible by anyone, it would be difficult to argue that they were targeted at a particular type of prospective purchaser.

In summary, the phrase 'offers invited' is not itself necessarily a problem, but a price indication will normally need to be given before the prospective buyer commits to view the property. For scenarios (1) and (2), the OFT recognises there might be circumstances, albeit very limited ones, where it is possible for an agent not to give a price indication in sales literature, tenders or on application and still comply with the CPRs. The OFT wonders whether such circumstances would be more theoretical than likely to arise in real-life.

## **A2 – RICS commentary**

In the light of the OFT views above, RICS recommends that if agents do intend to use 'offers invited' instead of an asking price when marketing a property, that they keep clear records of the reasons for adopting such an approach. In addition, the property details being used to market the property will need to explain clearly and accurately the main features of the property, including location, and give a brief explanation of the reasons for 'offers invited', for example:

“Offers invited on this substantial Grade 1 listed terraced Georgian townhouse”

“Victorian detached property in need of full renovation. Offers invited”

The rationale for such an approach is to enable the average well informed, circumspect and informed consumer to make an informed transactional decision in the absence of an asking price.

**Q3 Compliance with the CPRs may be at odds with my client's wishes. If I fail to follow my client's wishes I run the risk of losing their business to my competitor who is less scrupulous about CPRs compliance, and suffers no consequences for adopting that approach. What should I do?**

## **A3 – OFT informal view:**

The OFT has previously commented on this in the response to the consultation document ([www.of.gov.uk/shared\\_of/estate-agents/OFT1364resp.pdf](http://www.of.gov.uk/shared_of/estate-agents/OFT1364resp.pdf)); see the bullet (and three sub-bullets) at the bottom of page 8 and top of page 9.

If agents have serious concerns about the conduct of a particular estate agent, then they are free to complain to the OFT or Trading Standards. Providing the complaint is well substantiated, and is motivated by genuine consumer protection concerns, rather than commercial ones, then the OFT (and TSS) will consider the complaint. If unscrupulous agents are not reported to enforcers, it may be difficult for enforcers to identify and take action against them.

### **A3 – RICS commentary**

As the RICS speakers made clear at all the seminars, compliance with the CPRs outweighs any responsibilities agents have to their seller clients. If agents do need to disclose information to prospective buyer(s), which is not in accordance with their seller client's wishes, they are advised to communicate with their seller clients before doing so, in particular to explain how and why the CPRs require such disclosure in order to ensure the reasonably well informed, and reasonably observant and circumspect consumer can make an informed transactional decision.

**Q4. There was some discussion about keeping 'material information' about a property on a 'supplementary information sheet'. Does this need to be annexed to the current format for property particulars? If not, how should the information be released to prospective buyers?**

### **A4 – RICS commentary\***

[\*RICS did not consider it necessary to seek any views from OFT on the issues raised in this question and this answer does not reflect any views from the OFT]

As the RICS speakers made clear at the seminars, the key additional requirement placed on agents by the CPRs compared with the Property Misdescriptions Act 1991 is obtaining and releasing additional 'material information' about a property. This is to manage the risk of breaking one of the five rules of unfair practice under the CPRs - 'failing to give necessary information to consumers'.

RICS considers that keeping a 'supplementary information sheet' on a property might be a useful way administratively of recording the collection and disclosure of such additional material information on a property. Such a sheet does NOT need to form an annex to the current format for property particulars. Rather, the current format of property particulars can be retained.

Agents will need to judge, based on the stage of the property transaction and the needs of individual prospective buyers, when to release information contained on a supplementary information sheet to a prospective buyer.

To maintain a robust audit trail, RICS strongly advises that any release of such information is undertaken in writing, and a record is kept of both the form and date of such disclosure.

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**April 2013**