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# Real Estate Law in Practice

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Week 10 - Estate Agency

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# Learning objectives

- By the end of this section, you will be able to:
  - demonstrate good understanding of the legislation and regulation for estate agency practice
  - critically discuss the role and responsibilities of an estate agent
  - apply the relevant law to a estate agency practice problem

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# Agenda

- Role of the estate agent
- Regulation: Estate Agents Act 1979
- Fee commission
- Marketing
  - Consumer Protection Regulations 2008 (CPR) and Business Protection from Misleading Marketing Regulations 2008 (BPR)
- Misrepresentation and Negligent Misstatement
  - Considerable overlap between different areas of law

# What is the Role of the Estate Agent?

- 'Broking the deal' – intermediary or professional advisor?
- Law of agency
  - duties of an agent
  - exercised within the scope of its authority
  - compare:
    - auctioneer has implied authority to make statements relevant to individual properties.
    - estate agent has no implied authority to give a warranty that premises can be used for a specific purpose.
  - accepting deposits, fees, signing contracts
- No requirement for licence in UK

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# Accepting a deposit

- An estate agent was instructed by the property owners to find a purchaser.
- The estate agent accepted a deposit from a prospective purchaser as “agent” of the owners.
- Agent had not been expressly authorised to accept deposits.
- The agent absconded with the deposit
- Did the prospective purchaser succeed in getting its deposit back from the owner?

*Ryan v Pilkington*[1959]

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# Is verbal authority enough?

- D instructed agents to sell her house at auction with reserve £140,000
- Failed to sell and sale subsequently agreed at £115,000
- Contracts exchanged but D refused to complete
- M sued for specific performance
- D argued that the agent had no authority to sign the contract for sale
- Contracts for the sale of land must be in writing and signed (LPMPA 1989)
- Did agent need written authority to enter such a contract on D's behalf?

*McLaughlin v Duffill* [2008] EWCA Civ 1627

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# Clarify who is your client

- Lorenz Consultancy advised Mr R who was seeking to acquire offices for the private equity firm Fox-Davies Capital
- Mr R explained that he was taking over the firm and needed new accommodation
- Lease agreed and £143,000 fee became payable
- Lorenz claimed this from Fox-Davies on the basis that Mr R had acted as its authorised agent
- Fox Davies rejected this claim: did Lorenz get its fee?

*The Lorenz Consultancy Ltd v Fox-Davies Capital Ltd* [2011] EWHC 574 (Ch),

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# Duties and obligations arise through:

- Statute & Regulations
  - Estate Agents Act 1979
  - Misrepresentation Act 1967
  - Consumer Protection Regulations 2008 (CPR) and Business Protection from Misleading Marketing Regulations 2008 (BPR)
- Common Law
  - Contract – agency, misrepresentation
  - Tort – negligent misstatement
- Professional standards/codes of practice
  - RICS Real Estate Agency and Brokerage Guidance (2016) 3<sup>rd</sup> edn. (REABS)



# Estate Agents Act 1979

- To whom does it apply?
  - “any person who in the course of a business receives instructions from a client who wishes to dispose of/acquire an interest in land and that person will introduce and/or negotiate with a third party who wishes to acquire/dispose of such an interest”
  - specifically excludes “passive” intermediary since 2013
- To what types of property interests?
  - freehold and leasehold interests (not rental agreements)
- Who regulates/enforces it?
  - local Trading Standards officers will investigate alleged breaches of the EAA 1979 and can issue penalty notices. Where appropriate, breaches may be referred to the National Trading Standards Estate Agency Team (NTSEAT) who can ban you
- What duties and obligations does it impose?
  - supplemented by the Estate Agents (Provision of Information) Regulations 1991

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# Duties and obligations

- Any personal interest must be disclosed (s.21)
- If you intend to offer other services, this must be disclosed (EAR 1991, s.2)
- Handling client's monies (pre-contract or contract deposits) (s.12)
- The agent must provide written confirmation of the circumstances when fees will be charged, the basis of calculation and any other charges that may be incurred (s.18 EEA 1979). This must be done before a contract is agreed for estate agency services. If these refer to 'sole selling rights' or 'sole agency' or 'ready, willing and able purchaser', the specific definitions in EAR 1991 must be used.
- If fee information is not provided in the correct manner, the contract will not be enforceable without a court order (s.18 EEA 1979)
- Keep permanent records, inform client of all offers and avoid bias

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# What do these phrases mean?

- “Ready, willing & able purchaser”
  - one prepared and able to exchange unconditional contracts for the purchase of the property
- Types of agency:
  - Sole agency
  - Sole selling rights
  - Joint agency
  - Multiple Agency “winner takes all”
- Question?
  - As the seller of property, which of these four bases would you be most likely to choose? Would it depend on the type of property?

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# Getting your Fee Commission

- The four hurdles:
  - is there a contract?
  - has you complied with statutory obligations?
  - has the event which triggers the payment occurred ?
  - have you proved you were the 'effective cause'?

Seitler (2016)

- *Great Estates Group v Digby* [2011] EWCA Civ 1120
- *Nicholas Prestige Homes v Sally Neal* [2010] EWCA Civ 1552
- *Estafnous v London & Leeds Business Centre Limited* [2009] EWHC 744 (QB)

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# *Great Estates Group v Digby (2011)*

- Great Estates Group (GEG) entered a sole agency agreement with Mr Digby for the sale of his property. The property was sold within the period of the sole agency agreement but through another agency. GEG issued proceedings to recover damages for its lost commission, nearly £60,000.
- If the term “sole agency” is used, the agent is obliged to explain the intention and effect of that term to his client in the form and content of the statement set out in the Estate Agents (Provision of Information) Regulations 1991.
- GEG omitted the last sentence “*..with a purchaser introduced by another agent during that period.*”
- The Court of Appeal held?

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# *Nicholas Prestige Homes v Sally Neal (2010)*

- In 2006, Neal instructed a number of agents to sell her property. In December, she disinstructed all but two agents and informed Nicholas Prestige Homes that, as from 1<sup>st</sup> January 2007, they would be her sole agents.
- However, she failed to disinstruct the second agent.
- Later in January, the eventual buyer of the property rang NP Homes but the phone was engaged. She therefore rang the other agent and, although NP Homes rang straight back, the purchaser was by then engaged with the other agent, and bought through them in May 2007.
- Was NP Homes entitled to commission as 'sole agent'?

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# *Estafnous v London & Leeds Business Centre (2009)*

- Estafnous had an agreement whereby he would be entitled to £2million in commission if he found a buyer for the leasehold interest in a property in Westminster.
- Estafnous did introduce a buyer but to reduce Stamp Duty it was proposed the buyer would acquire the shares in the owning company rather than purchase the interest in the property itself.
- The vendors were able to **distinguish the sale of shares in the company, from a sale of the actual property interest** and Estafnous lost his claim for commission.

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# Marketing and Sales Particulars

- Property Misdescriptions Act 1991 (PMA) and the Property Misdescriptions (Specified Matters) Order 1992 - **repealed 1 October 2013**
- Consumer Protection from Unfair Trading Regulations 2008 (CPR)
- Business Protection from Misleading Marketing Regulations 2008 (BPR)
- Advertising Standards Authority
  - Express Estate Agency Ltd – ‘offers in excess of’  
[http://www.asa.org.uk/Rulings/Adjudications/2013/11/Express-Estate-Agency-Ltd/SHP\\_ADJ\\_226041.aspx](http://www.asa.org.uk/Rulings/Adjudications/2013/11/Express-Estate-Agency-Ltd/SHP_ADJ_226041.aspx)



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# Property Misdescriptions Act 1991

repealed 1 October 2013

- Criminal offence to make false or misleading statements, in the course of **estate agency or property development business**, about any of the 33 aspects of land (and buildings) set out in the Property Misdescriptions (Specified Matters) Order 1992
- Applied to sale of freehold and leasehold interests
- False to a material degree – excludes minor errors & discrepancies
- Misleading is statement from which reasonable person would be likely to draw false inference, even though statement is not itself false (Trade Descriptions Act 1968)
- Strict liability ie irrelevant whether intention to mislead
- Enforced by Trading Standards Officer; Employee and/or firm could be fined; £5,000 per offence in Magistrates' Court, unlimited in Crown Court could commit several offences in single set of particulars!

# Is it a bungalow?

- Property advertised for sale as including a one-bedroom bungalow in the garden
- However, the building had no planning permission for residential use
- CA considered whether doubts should have been raised in the mind of a reasonable estate agent
- Held the estate agency had taken reasonable steps in this case

*Enfield LBC v Castles Estate Agency*  
[1996] 2 EGLR 21

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# Misleading Photograph

- Statement can be a picture or model
- *“There will be some changes from these pictures which show the house type on a previous development”*  
*Lewin v Barratt Homes [2001]*  
1 EGLR 77

# CPR – consumer protection

- Cover any form of misleading information, previously covered under the PMA, but the scope is wider.
- Cover all forms of trading, not merely estate agency, so letting agency and property management are also covered.
- Unfair trading practices when dealing with consumer - **misleading actions** (and omissions) and **aggressive practices**
- Cover **material information** required by the **average consumer** (someone who takes reasonable care of their own interests) to make an informed **transactional decision** in a specific context
  - Guide price at auction
- Can rescind the contract or seek damages
- Defence of due diligence remains:
  - Mistake/ Reliance on information supplied by another/ Act or default of another/ Accident/ Another cause beyond the trader's control
  - AND all reasonable precautions and due diligence were taken to prevent it happening

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# BPR – business protection

- Misleading marketing practices includes making a representation, statement or advertisement that:
  - Contains a false statement of fact
  - Conceals or omits important facts
  - Promises to do something when there is no intention of carrying it out
  - Creates a false impression (even where the information is actually true)
- Applies to marketing your own business as well as advertising property for sale.
- Same defence of due diligence as for CPR

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# How to avoid problems

- Record and document all information known to you
- If there are any gaps, ask your client or legal advisers for additional information
- If you have any reason to doubt the accuracy of this information, verify through other sources
- If you are unhappy with any information you receive, you should investigate further or challenge what you have been told
- Disclose all information promptly at all stages of the sales process
  
- Question?
- *What unusual marketing initiatives have you seen used for property sales?*

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# Misrepresentation

- Complex area of law!
- Two kinds:
- “True” misrepresentation
  - One party to a contract makes incorrect statements which induce the contract
  - Can be innocent, negligent or fraudulent
  - If it relates to a term of the contract, can rescind
- Negligent Misstatement
  - Agent provides information in Hedley Byrne “special relationship”

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# “True” Misrepresentation

- Common law of contract
- Misrepresentation Act 1967
  - A civil offence to make a misrepresentation or false statement during pre-contractual enquiries which induces the other party to purchase. This means a false or misleading statement that is:
    - Misrepresentation of fact
    - Addressed to person misled
    - Intended to be acted upon
    - Induced the contract
- Can limit liability subject to the Unfair Contract Terms Act 1977 “test of reasonableness” and the Unfair Terms in Consumer Contract Regulations 1999
- Disclaimers not valid for fraudulent misrepresentation



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# Negligent Misstatement

- Not strictly misrepresentation but where person alleges the estate agent owes him a professional duty of care and has provided professionally incorrect information
- Disclaimers will often be effective except where a fraudulent misstatement made.
- Claim is against the agent

# Disclaimer – Deansgate Square, Manchester

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September 2020
- <https://www.deansgatesquare.com/brochure-downloads> accessed 8/10/20

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# Garden shrinks from 0.92 to 0.48 acres

- The estate agent's sales particulars stated *“The property, approached by a 90 foot driveway, is a detached freehold house built in 1931 and set in 0.92 of an acre of its own private gardens”*
- The purchaser (McCullagh) exchanged contracts to buy the property for £875,000, intending to demolish the house and rebuild on the plot. Within a few days, his architect advised him that the plot was **half the expected size**.
- The purchaser sued the estate agent for misrepresentation
- Lane Fox did not deny being negligent but did rely on the standard disclaimer printed on the sales particulars
- Was the disclaimer effective so that the agent avoided liability?

*McCullagh v Lane Fox* [1996] 1 EGLR 35

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# Stop 24

- This retail and service facility opened Jan 2008. Adjacent to the motorway, two miles from Channel Tunnel.
- Retail units marketed on basis that 88,000 visitors per week predicted: actual numbers 10% of this.
- Tenant claimed misrepresentation
- Any defence?
  - 'Non-reliance' clause so had to be fraudulent misrepresentation
  - Was it reasonable to rely on the consultant's report

*FoodCo UK LLP (T/A Muffin Break) & Ors v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch)

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# A murder in the house

- SPIF Q 13: *“Is there any other information which you think the buyer may have a right to know?”*
- Whilst selling their house, the Taylor-Roses heard from a neighbour that a gruesome murder had occurred in it.
- Should they disclose this information?
- The Sykes moved in, they saw a TV programme about the murder and the possibility that body parts remained in the property. They were so horrified that they moved out and sold the house at a loss.
- Did the Sykes recover their loss from the previous owner?

*Sykes v Taylor Rose* [2004] EWCA Civ 299

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# To summarise

- Caveat Emptor - no general duty to disclose
- Statutory duty not to provide misleading information on marketing materials
- Some uncertainty how the CPR will be interpreted
- Misrepresentation of a fact which induces a contract
- Negligent Misstatement in a professional capacity

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# Minimum Energy Efficiency Standards (MEES)

- Introduced through The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
- On 1 April 2018 it became unlawful to grant new leases of residential or commercial property with an EPC rating of less than "E".
- From 1 April 2020 applies to all residential leases (both new and existing) lettings.
- From 1 April 2023 this will be extended to include all existing commercial leases.
- Limited exemptions.

<https://www.gov.uk/government/publications/the-private-rented-property-minimum-standard-landlord-guidance-documents>

<https://www.rics.org/uk/news-insight/latest-news/news-opinion/mees-the-stick-that-became-a-carrot/>

<http://www.colliers.com/-/media/files/emea/uk/research/speciality/1505-mees-summary.pdf?la=en-gb>

# Statute and Regulation References

- Royal Institution of Chartered Surveyors
  - RICS Real Estate Agency and Brokerage Guidance (2016) 3<sup>rd</sup> edn.(REABS)  
<https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/real-estate-and-agency-brokerage-3rd-edition-rics.pdf>
  - RICS UK Commercial Real Estate Agency (2016)1<sup>st</sup> edn.  
<https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/uk-commercial-real-estate-agency-1st-edition-rics.pdf>
  - RICS UK Residential Property (2017) 6<sup>th</sup> edn. <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/real-estate/uk-residential-real-estate-agency-6th-edition-rics.pdf>
- Estate Agents Act 1979  
<https://www.legislation.gov.uk/ukpga/1979/38>
- Estate Agents (Provision of Information) Regulations 1991  
<https://www.legislation.gov.uk/uksi/1991/859/introduction/made>
- Consumers, Estate Agents & Redress Act 2007  
<https://www.legislation.gov.uk/id/ukpga/2007/17>