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Technical Releases

TR 12/2016 - Accountants' reports - UK Estate agents

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1.Introduction

Readers of this document should note that on May 3, 1982 the Estate Agents Act 1979 ("the Act") and the Estate Agents (Accounts) Regulations 1981 ("the Regulations") were brought into force. Chartered Accountants Ireland has reviewed the attached guidance issued in October 1983 and in June 2016. Although five sections of the Act (sections 16, 17, 19, 22 and 35) have yet to be enacted, the guidance as issued continues to be relevant to those members reporting under Regulation 8 of the Regulations. For the purpose of the consideration of estate agents' accounts, of the five sections of the Act yet to be enacted, only section 16 (insurance cover for clients' money) and section 19 (regulations governing the amount of pre-contract deposits outside Scotland) have any bearing.

This Technical Release² (TR) 12/2016 replaces Miscellaneous Technical Statement M19 Estate Agents Act 1979 and the Estate Agents (Accounts) Regulations 1981 (UK).

2. The Estate Agents Act 1979

The Act regulates and controls estate agency work carried on in the United Kingdom including Northern Ireland. The Act in its definition restricts estate agency work to transactions on behalf of clients relating to the disposal or acquisition of an interest in land (commercial, industrial or residential) to or from third parties. However, by defining the activity covered by the Act rather than the person (i.e. estate agent), the provisions of the Act apply to anyone carrying on as a business, the defined activities whatever their title or profession, unless they are specifically exempted in the Act itself (e.g. solicitors).

The Act and the Regulations are narrower in scope than the most recent guidance – "Clients' Money: General advice for firms" Version 2 – which was published by the Royal Institution of Chartered Surveyors ("RICS") on April 4, 2011. This guidance will still apply to members of the RICS in relation to fields of work not covered by the Act. Estate agents who are also chartered surveyors will have to maintain two sets of clients' accounts. They will require one for contract and pre-contact deposits in order to meet the legal requirements under the Regulations and another for clients' money other than as defined by the Act in order to comply with the existing RICS rules.

The RICS has discontinued the requirement for RICS registered firms to provide an annual third party accountant's report about the status of the firm's accounts, as RICS is now undertaking this task using its own reviewers and those from its appointed professional partner. You can find more details on this on the RICS website: www.rics.org/uk/.

The National Trading Standards Estate Agency Team, run by Powys County Council is the UK's regulator under the Estate Agents Act 1979². They may determine who is permitted to perform estate agency work in that they may prohibit either totally or in part persons "unfit" through convictions for offences involving fraud, dishonesty, violence or certain other prescribed matters, or who have committed discrimination in estate agency work or failed to comply with certain regulations under the Act (section 3). An undischarged bankrupt is also prohibited from acting as an estate agent (section 23).

The Act also lays down specific requirements governing how estate agency work is to be conducted. In general these include the following:

- Contract and pre-contract deposits, whether received as agent, bailie, stakeholder or any other capacity, are clients' money and are held in trust for the person or persons entitled to them and must be properly accounted for in special client accounts (sections 12 and 13).
- Client accounts must be maintained only with "authorised institutions" to be defined by the accounts regulations, and must be audited annually by an approved auditor (section 14).
- Estate agents must account to the client for interest as prescribed in the regulations (section 15).
- Insurance cover must be maintained to insure clients against any loss (section 16). (This requirement has not yet been brought into effect but will commence on a date to be announced by the Secretary of State.)
- Clients must be notified in advance of the circumstances in which remuneration will become payable to the agent and either the amount or the basis of calculation of that remuneration. The clients must also be notified of any non-remuneration payments (e.g. advertising expenses) including the amount or the basis of calculation and an estimate of the charge. It is noteworthy that if the agent fails to comply with this requirement, the contract is unenforceable against the client except by a court order (section 18).
- Estate agents must disclose any personal interest in any property and are prohibited from seeking or receiving any contract or pre-contract deposit in relation to such transaction. It should be noted that the Act draws a fairly wide ranging definition of personal interest (section 21).

3. Commencement

The provisions of the Act, were brought into force on May 3, 1982 by the Estate Agents Act 1979 (Commencement No. 1) Order with the exception of five sections: numbers 16, 17, 19, 22 and 35.

For the purpose of the consideration of estate agents' accounts, only sections 16 (insurance cover for clients' money) and section 19 (regulations governing the amount of pre-contract deposits outside Scotland) have any bearing. On this same date May 3, 1982 the Regulations came into force.

4. The Estate Agents (Accounts) Regulations 1981

The Regulations prescribe how clients' money (that is contract and pre-contract deposits) is to be kept and recorded by the estate agent.

A contract deposit is any sum which forms part (or the whole) of the purchase consideration for any interest in land and is paid on or after entering into a contract. A pre-contract deposit is any such sum or any amount paid as an earnest of good intention or any amount paid in respect of a connected contract so paid before the buyer enters into an enforceable contract. (It should also be noted that the Act gives the Secretary of State power to fix a prescribed limit for pre-contract deposits, and any sum received as a pre-contract deposit by an estate agent in excess of the prescribed limit must immediately be returned to the prospective purchaser (section 19).)

After the commencement date, all contract or pre-contract deposits must be paid without delay into a client account. The authorised institutions specified in the Schedule to the Regulations are:

- The Bank of England.
- A recognised bank or other licensed institution within the meaning of the Banking Act 1979.
- The Post Office -
- A Trustee Savings Bank.
- A designated building society.

Such account(s) must be in the name of the estate agent and have "client" in the title.

It should be noted that there is no limit to the number of client bank accounts that an estate agent may have, nor any requirement that they should all be with the same institution.

The Regulations also provide for the estate agent being accountable to the client for interest on money deposited in clients' accounts. Exceptions to this are money held by the agent as stakeholder, or where the deposit is less than £500, or the interest is less than £10 (Regulation 7).

This interest may be payable whether or not it has been earned or received by the agent. Where the money is held in an authorised separate deposit account, the client is entitled to the actual interest earned. If it is paid into a "general" (not separate) client deposit account, the client is entitled to the appropriate proportion of the interest earned, as if it had been a separate account. Where, however, the agent fails to pay the money into a client deposit account, the client is entitled to be paid the interest which could have been earned if it had been deposited at whichever of the authorised institutions used by the agent offered the highest rate of interest to depositors on the day when the money should have been lodged. If the agent fails to maintain any client account, then the interest is to be calculated at the highest rate being offered by any of the authorised institutions.

These provisions for interest apply to all sums which are first available for paying into an account on or after May 3, 1982.

5. Permitted transactions in a client account (Regulations 4 and 5)

The following may be lodged to a client account:

- Contract or pre-contract deposits as defined.
- The minimum sum required for the purpose of opening or maintaining the account.
- Any sum required to rectify an error in paying money out in contravention of the Regulations.

If part of the money paid to an agent by an intending purchaser does not form part of a contract or pre-contract deposit as defined then, provided the money is received in cash or other form which it is practicable to split, only the part forming the contract or pre-contract deposit shall be lodged to the client account. If the money cannot be split, it is permitted to pay the whole amount into the client account and draw out the excess into another account.

Money may only be paid out of a client account as follows:

- Proper payment to the client entitled to the money.

- Remuneration for estate agency work (with the agreement of the person for whose benefit the money is held).
- In the exercise of any lien which the agent is entitled to exercise.
- Where it is transferred to another client account.
- Where it is the withdrawal of money incorrectly paid into the account.
- Where non-client money was required to open or keep open the account.

It follows that a properly kept client account can never be overdrawn.

6.Client account records (Regulation 6)

In general terms, the Regulations require estate agents "to keep such accounts and records relating to clients' money received, held or paid out as are sufficient to show and explain readily at any time all dealings with that money, including the title of the client account into which it is paid, the date of such payment and the identity of the institution with which that account is held, any payments out and all dealings with any other money which may have been dealt with through that account".

Specifically, the Regulations require to be recorded for all receipts:

- The amount.
- The name and address of the payer.
- Whether the sum is a contract or pre-contract deposit.
- Whether it includes any sum in respect of a connected contract.
- Whether it includes any non-client money, and if so, for what purpose and in what form it is received.
- The interest in land to which the money relates.
- The name of the vendor.
- The capacity in which the money is received.
- If known, the identity of the person for whom the money is held.
- The date of receipt.

This information must also be recorded on all counterfoil or duplicate receipts issued by an agent.

The details required in the case of payments are:

- The amount.
- The identity of the payee.
- The date of the payment.
- The interest in land to which the payment relates and such other information to enable the corresponding receipt to be identified.
- The occasion on which the payment is made. If the payment is in respect of remuneration for estate agency work or in exercise of a lien there must also be shown sufficient details to enable the required explanations to be given to the client.

If transfers are made from one client account to another, a proper transfer journal must be kept.

The agent's records must also be able to identify all clients' money held by reference to the interest and the identity of the land to which it relates.

All records should be kept for six years after the end of the accounting period.

7.Accounts and audit (Regulation 8)

Accounts relating to the receipt, safe-keeping and expenditure of clients' money (as defined) should be drawn up for consecutive periods of not more than 12 months and seven days (to accommodate those who like to end their accounts on particular days of the week). They should be prepared and audited within six months of the end of the accounting period, and the agent must produce them on demand to a duly authorised enforcement officer (Department of Enterprise, Trade and Investment).

Approved auditors under the Act means a person who is eligible for appointment as a company auditor under the Companies Act 2006. Under section 1212, such persons are eligible for appointment as a company auditor only if they are a member of a recognised supervisory body and are eligible for the appointment under the rules of that body. An individual or a firm may be appointed a company auditor in accordance with section 1212.

The auditor is entitled to examine all books and records relating to clients' money and to require such further information and explanations necessary to satisfy them that the records and

accounts have been properly maintained at any time during the accounting period. To ensure that this obligation is met will normally require the auditor to test the records at random on a date other than the end of the accounting period, in addition to any work performed at the balance sheet date.

The Regulations, however, do not require the verification of client account balances. There is no mandatory obligation to obtain bank certificates or any other third party evidence and it is left to the auditor to decide what tests need to be conducted in order to properly discharge their responsibility.

The audit report must state whether in the opinion of the auditor the requirements of the Act and the Regulations have been complied with or substantially complied with.

Substantial compliance applies where the requirements have been met save for trivial breaches due to clerical errors or mistakes in book-keeping, all of which were rectified on discovery, and none resulting in a loss to any client.

The definition of clients' money (section 12 of the Act) does not include interest. However, Regulation 8(3) does extend the audit to "the requirements ... of the Regulations", which include the interest requirements (Regulation 7). Therefore, the auditor should include the interest requirements within the scope of the report.

If, in the auditor's opinion, the requirements of the Act and the Regulations have not been complied with, they must specify the matters which are in default, and if the auditor is unable to reach an opinion, they must specify the unsatisfactory matters.

There is no prescribed form of auditors' report, but a suitable form of report is given in the Appendix. It should be noted that this is addressed to the persons who are required to keep the accounts.

Appendix Estate Agents Act 1979 , Estate Agents (Accounts) Regulations 1981 and Auditor's Report

To: (full names of sole principal, partners or directors)

Firm's/company's name(s) and address(es)

Accounting period

Beginning Ending

I/we have examined the accounts and records in respect of the above-mentioned accounting period relating to clients' money kept by the above-named persons and, in compliance with Regulation 8 of the Estate Agents (Accounts) Regulations 1981, and report:

A- (where full compliance with the Act and the Regulations has been found):

that in my/our opinion the requirements of the Estate Agents Act 1979 as to the manner in which clients' money is to be dealt with and of the said Regulations have been complied with.

B- (where substantial compliance – that is trivial breaches only (paragraph 27) – has been found):

that in my/our opinion the requirements of the Estate Agents Act 1979 as to the manner in which clients' money is to be dealt with and of the said Regulations have been substantially complied with within the meaning of Regulation 8(4) of the said Regulations.

C- (where breaches are more than trivial but have been quantified):

that in my/our opinion the requirements of the Estate Agents Act 1979 as to the manner in which clients' money is to be dealt with and of the said Regulations have not been complied with or substantially complied with in respect of the following matters:

D- (where there are unresolved matters and uncertainties):

that I/we have been unable to form an opinion as to whether or not the requirements of the Estate Agents Act 1979 as to the manner in which clients' money has been dealt with and of the said Regulations have been complied with or substantially complied with as I/we have been unable to satisfy myself/ourselves in respect of the following matters for the reasons specified:

Signed

Qualifications

Name and address

Note: In the event that paragraph C or D applies, the paragraph must be appropriately completed.

1 A Technical Release addresses technical issues of ongoing relevance and importance to members of the Institute of Chartered Accountants in Ireland. A Technical Release is a source of good practice guidance on technical and practice issues relevant to the work of chartered accountants.

2 <http://www.powys.gov.uk/en/licensing-trading-standards/national-estate-agency-standards/>