

house agents

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1. introduction

The buying or selling of a house normally goes through three stages. First, the parties have to come to an understanding as to the price and arrive at a so-called "subject to contract" agreement, which has no legal force at all and leaves either party free to withdraw at will. Then the purchaser will want to satisfy himself as to certain matters. He may want a survey. He may require a mortgage. He will want to find out whether there are any local authority proposals affecting the property. He will make enquiries about rights of way and so on. Above all, if he is selling his present house in which his capital is invested, he will want to ensure that he will receive the proceeds of sale, ready to assist him in his new purchase. Indeed he will probably want to move out of one house and into the other on the same day. The purchaser may pay a deposit as a token of good faith, but at this stage, when he has not entered into any binding commitment, he can always ask for it to be repaid to him. Meanwhile, the vendor may be receiving and considering higher offers, as he is under no legal obligation until the purchaser enters into a legal obligation with him.

Secondly, the parties will enter into a binding contract, binding, that is, subject to nothing untoward being revealed to the purchaser when he makes those investigations traditionally made after a binding contract. The purpose of these investigations, which reveal the history of the ownership of the property, including previous prices paid, is primarily to ensure that the vendor has the right to sell what he claims he is selling. At the moment of a binding contract the deposit changes its character and the vendor is thereafter entitled to keep it provided he is prepared to fulfil his part of the bargain. A contract is made when the half signed by the vendor and the half signed by the purchaser are exchanged.

The contract can be made conditional on certain eventualities occurring before the time for completion and thereby avoid delay in the parties being legally bound to each other; in other words, the curtain is shifted and certain matters are finalised after, rather than before, the moment of commitment. A conditional contract defines and restricts the grounds upon which either party can decline to proceed without being in breach of contract. However, a conditional contract, being by definition, one that can be broken with impunity if the condition is not fulfilled, is not satisfactory to a party who is attempting to synchronize a sale of one property and a purchase of another.

Thirdly, there is the completion of the sale, when the purchase money is handed over against a deed which operates to transfer the ownership of the property (something the contract does not itself do). At the moment for completion the vendor can compel the purchaser to hand over the balance of the price or forfeit the deposit. However, the person who has said he will lend the purchaser money on mortgage is under no legal liability to the purchaser, if at the moment for completion he fails or refuses to provide the money.

functions

The main function of the House Agent is to introduce the parties to each other. He acts, however, as the vendor's salesman and not as a disinterested middleman. If the transaction proceeds to completion he will be paid a commission on the price by the vendor. If the house is ultimately sold to someone introduced by another agent, he will (in the absence of an arrangement to the contrary) be paid nothing.

A house agent is not, or at any rate

should not be, in the property business. He earns fees for carrying out the instructions of someone who is selling property. An estate agent takes a fixed percentage of the sale price. A property dealer takes (or shares) the difference between the sale price and a subsequent sale price. An agent's duty to a vendor is to obtain the highest price. A property dealer masquerading as an estate agent will try to arrange a sale below the market price to a limited company he controls or with which he is associated or to a colleague or nominee who will then sell again at a substantial profit. Alternatively, the agent may arrange the sale at this undervalued price to a client who has retained him to find properties, and who will then forthwith instruct the agent to arrange a sale at the full market price. The agent thus gets paid three commissions, one by the unwitting vendor who paid him dear for bad advice as to what price to hold out for, one by the retained client on his purchase, and one by the retained client on the ultimate sale. Occasionally the legal title to the land may never even vest in the intermediate profiteer—the completion of his purchase and his sale may take place simultaneously, so that the vendor for all practical purposes transfers direct to a sub-purchaser, after a middleman has taken a substantial cut in disposing of something that was never his. "Nominee-buying" is forbidden by the codes of the various organisations. However, there is a reprehensible practice, pursued by some leading agencies, which have links with large public property companies, whereby an attractive property which they are instructed to sell is earmarked for a property company of which one of the partners is a director. Professional honour is satisfied if the interest is declared, at least if the agent refuses to act further as such. The sponsor of the Estate Agents Bill 1966 has said: "I have al-

ways considered that in this question of divided loyalties any professional man can cover himself completely by declaring his interest" (Standing Committee, col 95).

The Code of Conduct of the Chartered Auctioneers' Institute provides that: "Agency and dealing are two incompatible occupations, and any attempt to combine them in one person or firm must inevitably be fatal to any pretension to a professional reputation." However, there are many estate agents, who are members of the Institute and other bodies, who do not recognise that the two functions of agency and dealing cannot be carried on in parallel. For example, Mr Arthur Jones, FVI, the sponsor of the Estate Agents Bill 1966, stated in the Standing Committee: "I do not accept that. I do not accept that they are incompatible." (col 138). The rule exists, but no effort is made to enforce it. Letters of complaint from those affected by instances of the practice are ignored by the various bodies (col 86).

the vendor

Estate agents are paid a percentage of the sale proceeds by way of commission. The usual rate is 5 per cent on the first £500; 2½ per cent on the next £4,500 and 1½ per cent on the remainder. However, the agent and his principal are free to agree on what terms they please. If there is an agreement, real or notional, the questions are, what is the condition on which that agreement provides commission is payable and has that condition arisen?

If the Agent "confirms" his instructions by letter and sets out the terms on which his commission is to be payable, then if the Vendor does not dissent promptly he will be in some difficulty in disputing those terms later on. He

will certainly not be helped by arguing that he did not understand the jargon and the mechanics of conveyancing.

The type of agent, who wishes to stipulate that his commission is payable at some stage in the process being reached short of completion and payment of the purchase price, usually has an expertly drafted and very one-sided form of contract to which he endeavours to obtain the signature of the vendor. The vendor is bound by what he signs unless he can prove that he was misled by something the agent said and as a result had no idea that the document which he was signing had anything to do with the agent's entitlement to commission.

Those who sign these documents do not mean to pay commission unless the sale goes through, or to put themselves at the risk of becoming liable to two agents, both of whom do what they stipulated they had to do to earn commission. They simply do not bother to consider the small print and are scarcely likely to be encouraged to do so by the agent. There are cases in the Law Reports of agents collecting a commission in respect of a person introduced by them who completed the purchase and then suing for a second commission in respect of an earlier applicant for the same house who did not go on to complete.

With a view to securing their commission, agents sometimes themselves prepare a contract of sale and purchase for signature by the parties and make their commission payable upon its signature. If the purchaser is a man of straw his signature is not worth much to the vendor. If the contract is badly drafted it may cause the vendor considerable trouble. The agent, especially if he touted for custom after another agent had already been instructed, may be anxious to tie up a sale quickly rather

than get the best price for his client; a commission in the hand being worth more to him than a somewhat higher commission in the bush.

Where agents do not themselves prepare the contract of sale and purchase, they may try to tie their commission to the making of a "subject to contract" offer. When a person agrees to buy or sell land there are frequently more details to be settled than a mere agreement in principle to buy and the amount of the price to be paid. Until these further details are settled the vendor and purchaser are not bound to each other and either can withdraw. All the vendor asks his agent to do is to produce a purchaser able and willing to purchase at a price acceptable to him. He does not, however, expect to have to pay the agent commission if, after such a person has been introduced, either party chooses not to go ahead. The vendor is not liable to the purchaser at that stage because he has not given the purchaser *carte blanche* to settle the outstanding details between them.

Some agents try to secure their commission by requiring the deposit to be paid to them. If there is an argument about the particular agent's entitlement to commission, the vendor (assuming he has become entitled to the deposit as against the purchaser) has to sue for the deposit to be paid over, rather than the agent having to sue the vendor for his commission.

deposits

"The only reason that an agent likes to hold a deposit," according to one North London agent, "is that this is the only method at present whereby he can be certain of obtaining his fees on the completion of the transaction" (*Estates Gazette*, 18 December 1965). The de-

posit does not, however, secure a sale for the purchaser. Indeed a number of people may pay a deposit on the same house and draft contracts may be submitted to a number of prospective purchasers more or less simultaneously. The agent takes the deposit from the purchaser to secure his commission from the vendor.

If a prospective purchaser does not want to go on, or is unable to go on with a particular sale, he wants his deposit back quickly so as to use it somewhere else, but the agent may delay in returning it so as to bring pressure to bear. At present an estate agent does not have to maintain a separate account for other people's money. He may make payments out of the deposit without reference to the purchaser, especially if he has insufficient working capital. The agent may even speculate with the deposit, hoping that he will be in a position to repay it when the time comes. In the leading case of *Chillingworth v Esche*, Lord Justice Warrington made the following extraordinary observation: "The purchaser, by payment of a deposit shows he means business. The purchaser has not bound himself, but in order to show a definite intention he is willing to part with money and run the risk of the vendor or his agent spending the money and being unable to return it if negotiations are broken off."

Thus the purchaser runs the risk of a defalcation of the deposit by the agent. Even after the contract is entered into, the purchaser may find his deposit forfeited to the vendor because of misconduct by the agent which prevents the sale from proceeding to completion. If the agent misleads a Building Society, or other lender of money on mortgage, as to, for example, the purchaser's means, the purchaser may enter into a binding contract to buy on the strength

of an offer of advance. If the lender then becomes suspicious and withdraws its offer of advance the purchaser may not have the funds to go on with the purchase, and if he is unable to raise the money from another source very speedily he will forfeit his deposit, perhaps his life savings, to his vendor. For example, at the end of 1964, in twelve cases known to a London Citizens Advice Bureau, twelve people, all West Indians, lost deposits ranging from £200 to £600 through the breakdown of mortgage negotiations consequent upon an agent's falsification of mortgage applications to a building society. These deposits have never been recovered and are not likely to be.

The danger of the purchaser forfeiting his deposit to the vendor is especially acute where the agent prepares the contract of sale and purchase, particularly if the purchaser is selling his existing property through another agent, so that the agent has no interest in a synchronisation. If the agent induces, firstly, the vendor to sign a document making the agent's commission payable on a contract being entered into, secondly, the purchaser to pay a deposit to him and thirdly, the purchaser to enter into a binding contract to purchase before he has found someone who is ready to commit himself to buy the purchaser's present house, then, if the purchaser cannot complete his purchase in accordance with the contract, because he cannot dispose of his present house in time, the purchaser loses this deposit. The agent secures a commission and possibly the vendor loses his deposit on a purchase he is making.

A deposit is not the only money a purchaser stands to lose. To push a sale through, the agent may well help the purchaser to raise mortgage finance. The agent may introduce a mortgage broker, who will charge a fee for his

services, which he may divide with the agent or the agent may act as his own broker and charge a procuration fee himself. Agents and brokers often obtain the procuration fee in advance. This is sometimes partly to evade the Moneylenders Act, which makes brokerage fees irrecoverable from the borrower when the lender is in law a "moneylender." Where the fee is paid in advance it is not always readily refunded if the loan is not granted, whether because the lender withdraws after approving the loan in principle or because the borrower declines to take up the loan after discovering the true rate of interest. There can be a very wide variation in the rate of interest depending on whether it is expressed as flat (on the full amount of the loan throughout the period of repayment) or reducing (on the balance from time to time remaining owing) and whether it is expressed as gross or net (after deduction of tax).

other abuses

The Milner Holland Report (Cmd 2605) showed that coloured immigrants "are all too often the victims . . . of exploitation by a disreputable fringe of persons making quick profits out of their difficulties, such as the self-styled but quite unqualified 'estate agent' (p 189) . . . A great deal of unsatisfactory property nearing the end of its useful life finds its way into the hands of these purchasers; nor are the prices paid generally appropriate for this class of property; indeed, it is often rubbish sold dear. Advice and warning about the likelihood of early demolition, and the cost of necessary repairs, is often either not given or not understood, and the difficulty of getting vacant possession where part of the property is occupied by controlled tenants is frequently not explained before purchase; some

of our witnesses believe, as a more sinister variant of this situation, that coloured immigrants have been led to assume that the presence of a landlord from the West Indies or Africa will encourage the controlled tenant to find other accommodation (p 192)."

Another sinister practice is "block-busting," a term used in the United States to describe the technique of property men who try "by deception, manipulation and the instilling of fear and anxiety, to induce white people to sell out at the lowest possible price in order to exploit the desperate need of coloured people for a place to live, and charge them exorbitant prices" (*New York City Commission on Human Rights Report*). Estate agents benefit by the increase in the number of transfers of property engendered when they bring a road "alive." One Paddington estate agent sends out a circular to prospective vendors in hitherto "all-white" streets saying "Please state whether you have any objection to a coloured purchaser, as we usually obtain a much higher than market value price from our Commonwealth friends." A West Indian estate agent sends out a circular saying "If you have no objection to overseas purchasers we guarantee to obtain for you the best possible price in the shortest possible time." Once the coloured purchaser has moved in, agents foster the notion that the presence of coloured householders progressively reduces the value of property in the street. At the same time, agents seek to keep other streets "all-white."

accommodation agencies

If one advertises a property in a newspaper one will be pestered by agents soliciting business. What is less widely known is the extent to which a certain kind of agent will use the classified ad-

vertisement columns of newspapers to publish advertisements which to the casual reader appear to have been inserted by a private individual. A thorough perusal of advertisements in many suburban papers over a period of a few weeks will reveal the same telephone numbers cropping up again and again. The advertisements will reveal no name, no address, just a telephone number, sometimes with numbers instead of letters for the exchange. The advertisers are frequently persons who run accommodation agencies in their spare time. On being telephoned they will often expect the applicant to pay their fees or some kind of "key money" before divulging further information about the premises. Great difficulty may be obtained in recovering the fees if the premises are not what the applicant required, and not what he was led to expect them to be.

There are many full time accommodation agencies which advertise openly. They bring together landlord and tenant of furnished and unfurnished flats and rooms, usually at the tenants' expense. The most prominent part of the advertisement usually indicates that the service is free to landlords. In other words, the usual position is reversed, and the tenant pays the agent's commission. The advertisement may even say "Landlords, we pay you a fee." It also generally states that the prospective tenants are vetted by the agent for suitability. Sometimes a particular type of tenant is specified, for example, "English business couples" or "European business couples."

Accommodation agencies are subject to the *Accommodation Agencies Act, 1953*, which was meant to expire on 31 December 1957, and has since been continued by the Expiring Laws Continuance Acts. The Tory Housing Minister in 1953, Mr Harold Macmil-

lan, was confident that the whole of our housing problems would have been dealt with by the end of 1957! The Act makes each of the following a criminal offence: firstly, to take money on the pretext of "registering" a person seeking a tenancy; secondly, supplying for payment a list of addresses and particulars of properties to let; and thirdly, issuing an advertisement describing any house as being to let without having the owner's authority. The Act aimed to protect those who were induced to pay non-returnable registration fees to an agency before the agency had done anything and without any sort of guarantee that the agency would provide them with accommodation. Some agents had merely collected a few names and addresses from recent (and not so recent) newspapers and circulated them.

The number of persons proceeded against since 1955 under this Act is as follows:

1955	1	1960	0
1956	2	1961	0
1957	1	1962	0
1958	0	1963	3
1959	0	1964	6

In 1964 six persons were convicted, and one had his case dismissed.

local authority registers

The process of bringing parties together is extraordinarily inefficient, as there is nowhere in an area where a comprehensive list of available properties can be found. A purchaser must go round all the local agents to get a list of properties being sold through them. In Manchester some agents have formed a multiple listing co-operative, but this is believed to be unique in England though it is common in many parts of the Commonwealth and in the USA.

Moreover, estate agents rarely pay heed to an applicant's precise instructions, but usually provide details of properties on their books well outside the terms of reference given, particularly those in a somewhat higher price range than that quoted. They may then urge the purchaser to meet the difference with a second mortgage arranged by them and repayable over a short period. The Labour Government has set up a pilot scheme for local authorities to set up registers of houses for sale. The eight local authorities in the experiment, "chosen," in the words of the Ministry of Housing, "as providing a reasonable geographical distribution," are Salford, Southampton, Coventry, Enfield, Leicester, Newcastle-upon-Tyne, Reading and Wolverhampton. (Percy H. Light "Councils can do better than estate agents," *Municipal Journal*, 13 August 1965).

Registers will contain brief factual details about the houses for sale and their prices. It would have been better if pictures could have been included as well. In Leicester the work will be undertaken as an extension of the service provided by the City Information Department to enquirers for furnished accommodation and rooms to let. In Enfield duplicates of the register will be kept at public libraries, and so on. In Reading only houses with an asking price not exceeding £7000 will be eligible for inclusion. The local authority will simply bring the parties together. Southampton is providing a pamphlet urging intending purchasers not to delay in seeking professional advice on matters such as survey. Reading will warn people to consult a solicitor before parting with any money or signing any document. In Newcastle, Salford, Reading and Southampton registrations will remain valid for one month only unless renewed and in Enfield for three weeks. In Salford, Enfield and Newcastle the

register will be subsidised, and no fees will be paid. In Southampton a registration fee will be paid of £2 per month.

No definite trial period has been fixed for the experiment. However some of the local authorities concerned asked the Minister, as it is an experiment, to settle "control conditions" after discussion with all the authorities involved, rather than each authority arranging different details.

the cost of house transfer

Nobody wishing to sell a house is obliged to employ either an estate agent or a solicitor. However, a conveyance of land must to be fully effective be by deed, and a deed can be prepared for *gain* only in the office of a solicitor. Probably more skill is required in drafting the contract than in drafting the conveyance, and yet an estate agent can draw the contract. Presumably the rule, introduced when state registration of title was in its infancy, was designed to prevent a title being weakened for years by a defective link, but the rule applies to transfers of registered land which do no more than form the basis for an entry on the register and are then redundant.

If a person chooses to employ both an estate agent and a solicitor he will have to pay two scale fees, both increasing with the price of the house. The agent's scale is on a percentage basis. The solicitor's scale is not, but flattens out in the middle price range. If the title to the land is registered the solicitor will receive two-thirds of the scale fee. The solicitor's fee on a sale is identical to his fee on a purchase at the same price, although more work and very much more responsibility is entailed on a purchase than on a sale. On a sale at £2500 the agent's fee will be £75, and

the solicitor's fee £30 if the title is registered, £45 if it is not. On a sale at £7500 the agent's fee will be £175, and the solicitor's fee £53 2s 6d if the title is registered, £86 5s if it is not.

A purchaser has no agent's fee to pay, though he may employ a surveyor. His solicitor's fee will be the same as the vendor's solicitor's fee, but unlike the vendor he will not save a full third of the solicitor's fee if the title is registered, because he will have to pay (whether or not he employs a solicitor) a Land Registry fee of about half of the third. He will also have to pay stamp duty of $\frac{1}{2}$ per cent of the price if it is between £4500 and £6000, and 1 per cent if it is over £6000. The solicitor's fee is the same, at whatever stage he may be brought in. So although the risk of paying for abortive work is lessened, the purchaser saves nothing on a completed sale by going to the solicitor only after an agent has handled, or mishandled, the contract.

The cost of house purchase increases when the house is being bought with a mortgage. In addition to the foregoing, there is a second payment of stamp duty, at $\frac{1}{8}$ per cent of the amount of the advance, there is a second Land Registry fee if the title is registered, the lender always employs its own surveyor and although the borrower will not see the report he will have to pay the fee, and there will be additional solicitor's costs. The purchaser's solicitor will be entitled to another fee for the additional work in connection with the mortgage. On an advance of £3200 the fee, again on a sliding scale, would be £20. In addition the purchaser/borrower will have to pay the lender's solicitor's costs, which will be of the same amount as his own solicitor's costs. This second fee will however be avoided if the lender employs the borrower's solicitor. Building societies will do this if

the borrower's solicitor is on their panel. The Greater London Council invariably does this. If there is a second mortgage because not all the money can be obtained from one source there will be further expense.

Cost then depends on price. According to Co-operative Permanent Building Society figures, between the second quarter of 1960 and the second quarter of 1965 the percentage increase in existing house prices was 73 per cent in London and the South-East, and about half that figure in the North-East.

In Hayes a company operates a housing "supermarket" at half the scale fee, and is planning to introduce "mail order" estate agency at about a quarter of the scale fee. In addition the company, through a "House Owner's Society," the prototype for which was formed in Harrow by Mr S. G. Carter, arranges the legal side at half the normal solicitor's fee. This is possible as Greater London is an area where nearly all freehold houses are on the state title register.

2. registration

Somebody without qualifications of any kind can set up as an estate agent. A solicitor who has been struck off the roll for fraudulent conversion of deposits can set up in business as an estate agent and take deposits. There is no code of conduct for agents who are not members of any organisation. There are a number of professional and quasi-professional organisations whose members include estate agents, and these and local associations of agents do have codes of conduct. It is not possible to say what proportions of agents are members of these organisations, as there are no figures of the number of "independent agents."

Until the nineteenth century most house agency was performed by solicitors in the course of their practices. Today in Scotland estate agency is primarily carried out by solicitors and the Scots have a very different system of conveyancing, some aspects of which would repay study south of the border. The position has been described by Carr-Saunders and Wilson: "Towards the end of the eighteenth century the practice grew up of disposing of real estate by auction, and when this was done it became the custom among solicitors to call in an outside specialist to take charge, at first, simply of the actual conduct of the bidding. Gradually the outside specialist took over more and more of the work . . . until now nothing remains to the solicitor . . . but matters of a purely legal character." (*The Professions*, p 197, OUP 1933.)

Towards the end of the nineteenth century house agency in England and Wales began to become increasingly within the purview of surveyors. Much estate agency today is carried on by them or by firms in which a chartered surveyor is a partner. Auctioneers also carry on much estate agency. Anyone may call himself an auctioneer, just as

anyone may call himself an estate agent, and do what he pleases in his own sale room. However, only members of the Chartered Auctioneers and Estate Agents' Institute may sell at official auction marts.

In addition to the Institute and the Royal Institution of Chartered Surveyors, there are other professional organisations many of whose members are engaged in private practice estate agency. These include a third chartered body, the Chartered Land Agents' Society; the Incorporated Society of Auctioneers and Landed Property Agents, which was formed in 1923 to block a registration Bill because estate agents working as a department of a business carrying on a wider range of activities, such as Harrods, could not be members of any of the three chartered bodies and feared a closed shop from which they would be excluded; and the Valuers' Institution, which was incorporated in 1929 as a professional body embracing many of the unattached agents who had opposed the registration legislation sponsored by the chartered bodies. The 1966 Estate Agents' Bill was, in fact, introduced by a Fellow of the Valuers' Institution.

In addition to the foregoing professional bodies the National Association of Estate Agents, formed as an interest group of unattached agents when the 1962 registration Bill was mooted with the object of resisting statutory control in the form proposed, is also now in favour of registration. In 1923 the surveyors' organisations sponsored a Bill providing for registration of estate agents and precluding any person from practising who was not registered. It failed to get a second reading. It was opposed by agents who were not members of the sponsoring organisations and by the Law Society. These opposing practitioners later formed them-

selves into bodies, which established qualifications and standards. In 1962, these bodies joined in sponsoring a Bill providing for registration. In the inter-war years local associations were formed to combine the new and old bodies. The 1962 Bill, in its turn, was opposed by agents unattached to any of the sponsoring bodies, and many of these agents joined together to form the National Association of Estate Agents. Proposals for statutory control of estate agents have been in the air for half a century, but have never come to anything because the agents have been unable hitherto to agree amongst themselves on the best method of control and the ambit of that control. The abortive registration and licensing Bills have been Private Members' Bills, although the subject is much too complex to be dealt with in that way. The measures have been designed as much to protect professional interests as to protect the public. Until 1966, the Bills have not dealt with fees. Provision for a scale of maximum charges was introduced into the 1966 Bill in response to Government pressure.

The legislation introduced this year, and lost because of the timing of the General Election, followed the lines of the Bill introduced in 1962. There were however, important modifications. These were of two kinds. Certain modifications were made in the text of the Bill to bridge the gap between the professional bodies and the National Association of Estate Agents, which supported the recent Bill. Further modifications were included in response to Government pressure. In 1962 the then Conservative Government adopted an attitude of benevolent neutrality towards the efforts of agents to put their house in order. The Labour Government clearly saw for itself a much more positive role in seeing that the public interest is safeguarded. The

Government pressure was more apparent in Committee than in the original text of the Bill.

the estate agents' bill, 1966

The Estate Agents' Bill applied to any person who for payment brought together vendors and purchasers (or landlords and tenants) and/or negotiated as to the terms of sale or letting. In other words, the Bill dealt solely with house brokerage, which is purely and simply a commercial transaction. Socialists have traditionally been in favour of trades regarding themselves as professions (R. H. Tawney, *The Acquisitive Society*, pp 106-8), but this is the first time a business has been registered.

The Bill provided for the setting up of an Estate Agents' Council, to be responsible for establishing and maintaining "adequate" standards of competence and conduct. The Council was to prepare a statement of "disgraceful conduct in a professional respect," to serve as a guide but not to be conclusive in any instance. These rules were not to prohibit any act "unless in the opinion of the Council the doing of the Act is contrary to the public interest." The specific reference in the 1962 Bill to touting being disgraceful conduct had been dropped from the Bill. In its place it was provided that, in deciding whether any conduct is disgraceful, account should be taken of the fact that estate agency has commercial attributes as well as professional ones, and of the "desirability" of giving agents latitude in the employment of new commercial techniques.

A person's name could be removed from the register, whose establishment the Bill provided for, for disgraceful conduct, but not for incompetence. The Bill sought to make it a punishable

offence for anyone not on the register to practice as an estate agent. A solicitor, accountant or architect would not be considered as having practised as an estate agent in respect of anything done in the course of his practice. In this instance, then, registration implied monopoly. Most registration Acts seem to be based on the principle that the public ought to be free to choose between qualified and unqualified practitioners. (Geoffrey Millerson, *The Qualifying Associations*, Routledge and Kegan Paul 1964.)

For the future, agents would be entitled to registration only on satisfying conditions as to character and elementary qualifications laid down by the Estate Agents' Council. However, transitional provisions provided for registration being automatically open to present members of the recognised professional bodies, and to all other agents practising as principals on the date of the publication of the Bill, provided that they applied for registration within two years. In Committee, a proviso was added that those who are *prima facie* entitled to registration as being in practice at the date of the Bill must be "of good character." It is not clear whether or not this is to be construed in the narrow sense of not having been convicted of a criminal offence.

Under the Bill, the Estate Agents' Council will consist of four persons nominated by the Government to represent the public, eighteen to be drawn from the representative bodies in accordance with the number of their members on the register, and three to be nominated by the Government from amongst agents who are not members of any representative association. Unlike, under the 1962 Bill, the chartered bodies would not have any special position on the Council. In response to Government pressure, the number to be nomi-

nated by the Government to represent the public was to be increased to seven.

However, the Government's view (*Hansard*, vol 723, col 629) was that the public would be protected not by the mathematical constitution of the Estate Agents' Council, but by the fact that all the rules, the code of conduct, the scale of charges, and particulars of registration would be subject to the *approval* of the President of the Board of Trade and capable of *amendment* by him. The Board of Trade was substituted in Committee for the Privy Council Office, which is concerned almost entirely with purely professional bodies. The view of the Consumer Council was that the public interest would be adequately represented at the formative stage of policy.

The Chairman of the Estate Agents' Council could in theory be either an estate agent member or an independent member. In view of the voting balance he was likely in practice to be the former. Because of the fragmented nature of estate agency, provision should have been made for an independent Chairman.

The Bill provided for maximum charges to be fixed by the Estate Agents' Council. These were likely in practice to be minima as well. Local associations advertise in local papers that their objects are to ensure that commissions do not exceed the recognised scale, but admit that their function is also to ensure that there is no undercutting. However, under the Monopolies and Mergers Act, 1965, the President of the Board of Trade is able to refer services as well as goods to the Monopolies Commission. If a group of agents agree amongst themselves not to charge less than prescribed maximum fees the matter could be referred to the Monopolies Commission. The initia-

tive must come from the Board of Trade.

One weakness of the Bill was that various agents were partially within the Bill and partially outside it, for example, business transfer agents, amongst whom are to be found the worst sharks of all. Any sale of a business includes the transfer or grant of a freehold or leasehold interest in land, but it also includes the transfer of goodwill, fixtures and fittings, and stock. The business transfer agent would be able to charge the maximum fee, plus an indefinite amount on top.

The Bill also followed the legislation for some years past applicable to solicitors in providing: first, that clients' money, or money held as stakeholder, should be kept in a separate bank account; secondly, that the account should be audited; and thirdly, that a compensation fund should be set up, financed by contributions from agents on the register, from which payments could be made to those who suffered through an agent's dishonesty. The Bill further provided that, until an adequate compensation fund is built up, registered agents will have to take out a fidelity bond, the amount of the premium for which will no doubt depend upon their record, for losses up to £10,000.

3. conclusion

Long overdue and generally acceptable measures, like those relating to deposits and agent's accounts, must no longer be held up by failure to agree on more controversial questions. On the other hand, agreement among estate agents should no longer be a pre-requisite to action by Parliament. Leaving standards of conduct wholly within the province of agents themselves will have one or other of two results, or some unhealthy compromise in between: at the one extreme, the code of conduct could be dominated by professional restrictive practices; at the other, no steps might be taken on which there was not a consensus, the pace thus being set by the lowest common denominator. The significance of the recent proposals for registration lay not in their content, but in the way in which they would, as and when implemented, be operated by agents. Registration is by no means the only answer even to the problems with which it deals, and estate agents have not shown themselves in any hurry to take the initiative on all the problems which concern the public.

The question of principle, as the Government has recognised, is whether Parliament should in legislation draw attention to specific matters as matters with which the Estate Agents' Council should deal in its statement of conduct, or whether Parliament should not deal with specific matters at all, but leave them entirely to the Council.

Mr. Jones' Bill itself, as one would expect from a Bill sponsored by the Estate Agents' organisations, was based firmly on the latter alternative. Sir Eric Fletcher made it clear that the Government favoured the former alternative, and there is no doubt that this is the view of not only the Labour MP's, but also of many Conservatives who are not associated with estate agency. Mr. Jones' Private Members' Bill was lost

by the intervention of the General Election. It is to be hoped that the Government will take the Bill over and strengthen it, and that essential reforms will not be further delayed until another Tory estate agent is lucky in the ballot. The Committee stage of Mr. Jones' Bill, as far as it went, reinforced the need for Parliament itself to draw the outlines, and then leave the estate agents, subject to the supervision of the Board of Trade, to work out the details, rather than leaving the code of conduct completely to agents.

An amendment whereby the code of conduct would contain regulations preventing registered agents, except in circumstances to be specified or with the particular permission of the Estate Agents' Council, from being developers or dealing in property, that is, buying it with a view to early resale (but not, incongruously, buying property for the purpose of holding it as an investment) was carried only as a result of a division, the amendment having been opposed by all the estate agent members of the Committee and by a minority only of the other Tory members. Those who will wield power on the Council will share the attitudes of the opposing members, not of the majority. It is to be hoped that when the Bill is revived, the composition of the Council and the choice of its Chairman will be reconsidered.

deposits and contracts

Payments from the proposed compensation fund are to be *ex gratia*. They should be payable as of right. Moreover, some recent deposit scandals have involved higher figures than £10,000. (*The Guardian*, 22 December 1965—£16,325; 25 January 1966—£14,353.) Again, as agents can form themselves into limited liability companies, the

fund should compensate losses occasioned by negligence as well as losses occasioned by dishonesty. The proposed rules relating to agents' accounts should extend to mortgage brokers.

A major omission from the Bill was the failure to ban estate agents receiving deposits. A compensation fund will not obviate delays in deposits being returned. Deposits should be paid to the vendor's solicitor as stakeholder, or, where the vendor does not employ a solicitor, to the Post Office. The Post Office would release the deposit to the vendor after completion of the sale against an authority from the purchaser, which would be handed over on completion, or on settlement of a dispute. Deposits would be available to the Post Office Savings Bank, thereby covering the cost of the scheme.

Also, estate agents should be forbidden to arrange and draw binding contracts of sale and purchase. The agent's sole desire in obtaining hurried signatures to the document is to found a claim for commission. The practice of agents preparing contracts has frequently been castigated by judges as "highly undesirable."

commission

Agreements drawn up by agents providing that their commission is to be payable on certain eventualities apart from a completed sale, or providing that some other payment may be due to them although the house is not sold through them, should, if permitted at all, be closely regulated by law. The precedent of the Hire Purchase Act, 1965, suggests the following formalities, failure to comply with which would render the agreement unenforceable. First, any agreement on which the agent relies would have to be signed

by the vendor, and would bind only him. Second, a copy of the agreement would have to be handed to the vendor at the time. Third, the Board of Trade should be empowered to make regulations prescribing, for example, that the agreement should be headed by simple words in bold type indicating that it is an agreement providing for the payment of the agent's commission on certain eventualities apart from a completed sale and the payment of the purchase price, or entitling the agent to make certain charges irrespective of a successful outcome. In addition, the vendor should be able to cancel the agreement within, say, 24 hours, unless his signature were witnessed by a solicitor.

An agent's scale commission for a sale of a house at £4,250 is £118 15s, at £5,500, £145, and at £6,750, £163 15s. Agents seek to justify exorbitant figures of this order, out of all proportion to the work, skill, responsibility and overheads directly involved, by reference to the fact that they do not get paid at all when they are beaten to it by a colleague. Some agents even try to recoup their advertising expenses irrespective of whether the sale goes through or on top of their commission if it does go through. The agent may obtain "sole selling rights," so that he is paid his full commission if the house is sold within a specified period even if he plays no part in the sale. Local agents may combine amongst themselves to restrict competition, for example, agreeing not to accept instructions where another agent has been instructed. Estate agents' commissions should surely be referred to the Prices and Incomes Board.

However, what is *primarily* required is not an examination of whether house agents (and solicitors) are paid too much for what they do, nor whether it

is necessary to have them for what they do, nor whether one category of persons could do both jobs. The fundamental requirement is to free the log-jam of house exchange by examining as a single problem the financial, legal and practical aspects of the subject with a view to simplifying the essential work and cutting out waste. The functions of the various persons involved and their proper fees should be considered in this context.

caveat emptor

Another important omission from the proposed legislation was the failure to cast on agents a positive duty of care towards purchasers. This is particularly significant because the agent's sale particulars form no part of the contract between his principal, the vendor, and the purchaser. For historical reasons, a purchaser of a house is afforded less protection by the law than a purchaser of chattels. *Caveat emptor!*—let the buyer beware! There is no reason why the vendor's anomalous immunity should extend to his agent where the agent holds himself out for reward as an expert on houses.

The Bill does not even deal with the situation where the estate agent is directly or indirectly the owner of the property in question and the purchaser is misled. (*The Sun*, 19 January 1966.)

dealing in property

It is clear that an agent cannot perform his duty to obtain for his vendor client the best possible price (or perform his function of providing the greatest possible selection of properties from which to buy) if he is continuously on the look out for bargains for himself. A man who holds himself out

as an agent to represent and advise others in certain matters should not in the same matters be in a position to choose to act for himself. The whole outlook of an agent whose obligations should be entirely to his client is bound to be affected in that relationship if he is dealing in property beyond that relationship.

A trustee is absolutely forbidden to purchase the trust property (except with the permission of the Court), whether directly or by a circuitous arrangement, even by public auction or after an independent valuation, and however fair the price may be. This uncompromising rule is necessary because it is generally impossible to tell, in the words of Lord Chancellor Eldon, "whether he had made an advantage or not." A like rule should be made to apply to estate agents.

If the estate agent has an interest either as an estate agent or as a property developer before deciding whether to accept instructions and take up the property on behalf of the client, he has a choice. He has foreknowledge of whether he will make more profit by acting as an agent or a dealer in property. The criterion is not the good of the prospective client, but which method of dealing will give the greatest profit to the agent.

Estate agents should be forbidden to deal in, invest in, or develop property, or to be directors of property companies.

local authorities

The experimental scheme for local authorities to set up registers of houses for sale has got off to a bad start, and it seems responsibility for this state of affairs rests primarily with the Ministry

of Housing rather than with the local authorities. The Ministry set the scheme in motion very soon after the idea was mooted in Parliament, but apparently did nothing more than approach the eight authorities selected for the experiment and outline the proposed scheme to them in the most general terms. The authorities were then left to get on with it. Some authorities set up schemes more or less straightaway without much reference to the Ministry or to the other authorities concerned, and the various schemes do not have a great deal in common with each other and are not particularly imaginative. The first authority to start the scheme was Salford, which has found the results so far "disappointing." Other authorities approached the Ministry to discuss the ideas they had with the Ministry with a view to the experiment being conducted more or less on similar terms in the boroughs that had not already set up registers and a somewhat inconclusive meeting was held at the Ministry on 25 February 1966. One cannot resist the conclusion that the Minister was attracted by a good idea which he did not think through.

Perhaps the most disturbing aspect of the scheme as it is being implemented is the failure to add to the information provided by the vendor on the register the information which the local authority itself gives to a purchaser's solicitor when he makes enquiries to the authority relating to local land charges and planning consents and conditions. There is a great danger of foolish people being misled if there is no indication on the register of steps about to be taken by the local authority, such as a clearance order. It is all very well for the authority to disclaim responsibility for the accuracy of the particulars recorded and the condition of the property. It is not however good enough

for authorities to expect people to appreciate that one department does not know what another department is doing and that the absence of any reference on the register of houses for sale to, say, a compulsory purchase order does not mean anything.

Further, delay in obtaining the relevant details about a property from the local authority is an important element in the slowness of conveyancing. It would be a positive attraction of the scheme if these details appeared on the register. It is suggested the register should be in three parts. The first part would be in the form of a questionnaire to the person selling dealing with all the matters about which a purchaser's solicitor normally makes enquiry of the vendor. The second part would deal with questions relating to the property within the knowledge of the local authority. The third part would be in the form of a standard warning and explanation to the purchaser, and this part would draw the purchaser's attention to local authority mortgages.

Registers of houses for sale kept by local authorities fill a gap by providing a clearing house for the disposal of properties not put into the hands of house agents. If local authorities are to achieve more than this limited purpose of competing with the advertisement columns of the local paper houses put at the moment into the hands of agents must also or instead be put on the register at the Town Hall. Agents will not co-operate in this respect, so that local authorities must compete successfully with estate agents on their own ground. Local authorities will not do this simply by being cheaper. They must provide a more efficient service, and be seen to be doing so.

young fabian group the author

The Young Fabian Group exists to give socialists not over 30 years of age an opportunity to carry out research, discussion and propaganda. It aims to help its members publish the results of their research and so make a more effective contribution to the work of the Labour movement. It therefore welcomes all those who have a thoughtful and radical approach to political matters.

The group is autonomous, electing its own committee. It co-operates closely with the Fabian Society which gives financial and clerical help. But the group is responsible for its own policy and activity, subject to the constitutional rule that it can have no declared political policy beyond that implied by its commitment to democratic socialism.

The group publishes pamphlets written by its members, arranges fortnightly meetings in London, and holds day and weekend schools.

Enquiries about membership should be sent to the Secretary, Young Fabian Group, 11 Dartmouth Street, London, SW1 ; telephone Whitehall 3077.

James Goudie is a lawyer and co-author of the Young Fabian pamphlet *Strangers Within*.

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