



# **The Property Lawyers Alliance**

## **Submission of The Property Lawyers Alliance**

### **1 Introduction**

This submission is made by the Property Lawyers Alliance (**PLA**), in respect of the consultation on the draft guidance published on the 11<sup>th</sup> December 2024 (**DG**), by the Competition and Markets Authority (**CMA**) concerning protections from unfair commercial practices (**UCP**) set out in The Digital Markets, Competition and Consumers Act 2024 (**Act**).

### **2 Scope of the Act**

PLA believes the UCP provisions in the Act intend (amongst other things):

- 2.1 To prohibit practices likely to cause the average consumer to take a different 'transactional decision' because of a misleading action, misleading omission, aggressive practice, or a contravention of the requirements of professional diligence.
- 2.2 To prohibit omission of 'material information' from an 'invitation to purchase,' UCP provisions in Schedule 20 to the Act, and the promotion of unfair commercial practices in codes of conduct.

### **3 Selling or Leasing Property**

PLA notes with concern, the reference in the DG to the proposed definition of the word 'Product.'

3.1 So, in paragraph 3.4 of the DG:

“the definition of ‘product’ covers both physical and intangible things, including

- goods (including immovable property, rights, and obligations), services; and
- digital content. For example:

3.1 (a) a pencil, a car, music purchased online, a right to use a caravan for a certain period, membership of a club and premium rate phone calls would all fall within the definition.

(b) immovable property is included, and so the UCP provisions apply to the practices of traders concerned with the sale or lease of land to consumers.”

3.2 Buying land cannot equate with the purchase of mere goods. Land can be exploited by mining, planted with trees, developed, taxed (several times over) sold, leased, or affected by myriad other legal interests.

3.3 Land is not a “product” – it’s not like a car or pencil where if it is faulty, it can be returned (most ‘products’ are protected by appropriate legislation).

#### **4 What practices should be caught by the USP Provisions?**

The PLA believes the following are properly the domain of UCPs:

##### *Reservation Agreements (RAs)*

4.1 Estate agents use RAs in so-called “modern auctions.” There are several problems with them.

4.2 Consumers will sometimes pay several thousand pounds before they have even obtained any independent legal advice. The agent will prepare some form of “legal pack” but to keep costs low and secure a sale, these packs are often riddled with legal issues, which only become apparent following proper due diligence. At that point, the buyers are metaphorically on the ‘back foot,’ attempting to persuade the seller to rectify the issues.

4.3 Conversely the seller sees no tangible benefit, as it is the agent, who retains the entire reservation fee should the buyer withdraw.

4.4 RAs are rarely for the benefit of either party and are there simply to ensure that the agent, who would normally only be paid at completion, instead is paid in full before any transaction is even completed.

4.5 RAs have the potential to generate litigation, no matter how well drafted they appear.

4.6 RAs do not provide the 'clarity' that people expect to ensure that the transaction will go through smoothly since there are external factors such as mortgage lenders being able to withdraw offers, even if an exchange of contracts had occurred.

4.7 RAs also generate unwelcome legal costs for consumers and in PLA's view, damage the consumer's interest.

4.8 As mentioned in paragraph 4.2 RAs encourage estate agents to put forward properties prematurely because it is a painless way for them to make money from abortive fees, as they get to keep the reservation fees come what may.

## **5 Conditional Selling**

5.1 'Conditional selling' (CS) involves for example, an estate agent, sales representative or anyone else with the power to sell a property, telling, pressurising or 'incentivising' a consumer, to use the agent's 'in-house services', quite often as part of a single commercial entity, comprising an estate agent and a 'conveyancing factory', for their offer to be put forward on a property.

5.2 So, a consumer may already have a mortgage in principle, only to be advised by the agent, that the deal will only be put forward to the owners if the consumer uses their 'recommended' partner. More subtle techniques are sometimes employed, for instance, by advising that the consumer can use his or her broker. However, the in-house broker must assess the consumer's situation first, to verify that the consumer meets the 'criteria'.

5.3 PLA considers that CS can properly be described as a UCP, that should be more vigorously enforced to protect the vital interests of consumers.

## **6 Referral Fees**

The PLA feels there are many problems with referral fees that are often heavily embedded in CS arrangements (**RFs**):

6.1 Because of RFs, estate agents, via a CS, can manipulate consumers so that consumers end up ceding control/independence/influence in the purchase to the beneficiary of those fees.

6.2 Because of RFs estate agents achieve indirectly, what they could not do so directly - control of the conduct of a purchase.

6.3 No degree of transparency can ever compensate for the conflicts of interest generated by the payment of RFs.

6.4 Unfortunately consumers are often not sophisticated enough to understand the conflicts of interest arising because of the payment of RFs.

6.5 The increased 'imbalance' in bargaining power between a consumer and estate agents because of RFs is not in the interest of consumers.

6.6 Payment of RFs encourages consumers to go to the wrong law firms that lack competence in complex conveyancing such as leaseholds.

6.7 Payment of RFs puts pressure on lawyers to break their duty to act ethically a duty which is enforced robustly by the Solicitors Regulation Authority.

## **7 What should be excluded from UCP provisions?**

7.1 In November 2023 the National Trading Standards Estate and Letting Agency Team (**NTSELAT**) published guidance that aimed to provide consumers with "material information" (**MI**) in property listings, purportedly to ensure consumers could make an informed decision whether to buy or rent a property (**MI Guidance**).

7.2 NTSELAT stated that the MI Guidance was intended to 'assist' agents with complying with the Consumer Protection from Unfair Trading Regulations (2008) (**CPRs**). However, the MI Guidance was in PLA's view, unlawful, since it misinterpreted the source legislation. The purpose of the CPRs at the time was to protect consumers from the unfair practices of 'traders.'

7.3 The term 'trader' meant at the time "a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf." Whilst there is no doubt that an estate agent could be a trader in that context, an unforeseen consequence of the MI Guidance is that MI extended those obligations to the individual consumer selling a property. NTSELAT did this by imposing them on the seller's agent. However, given that the agent acts on behalf of the seller, much of the responsibility for complying with the MI Guidance would, in practice, fall indirectly upon the shoulders of consumers. The CPRs however, were concerned with traders who "omit," "hide" or provide misleading information. There was at the time no coherent interpretation of these terms.

7.4 PLA suggests that the NTSELAT exceeded its statutory remit by re-interpreting the law and so its MI guidance is unlawful.

7.5 PLA believes it is now evident, that the MI Guidance, which has been in full effect since November 2023, has failed to achieve a significant difference in how properties were marketed. Compliance with the MI Guidance by estate agents remains generally poor and shows little sign of improvement.

7.6 PLA believe that the reasons for this are primarily twofold:

7.6.1 full compliance with the MI Guidance poses a significant burden for agents. For example, because it requires the early involvement of other professionals, such as conveyancers, which sellers are often reluctant to pay for at such an early stage; and

7.6.2 there was no reasonable prospect of enforcement action being taken against estate agents who did not comply, and the property 'portals' largely declined the responsibility of enforcing the MI Guidance on NTSELAT's behalf.

7.7 In short, the MI Guidance was too ambitious. Unfortunately, in PLA's opinion, NTSELAT overplayed its hand.

7.8 The CMA should be careful not to repeat the same mistakes. Of course, the alternative would be for the CMA to take a more robust approach to enforcement. However, in PLA's view, this would be unwise, given the still untested nature of the legal position concerning the ambit of MI generally.

7.9 The PLA considers it preferable for the CMA to consult with agents to find a sensible alternative to the MI Guidance, rather than taking a heavy-handed approach to implementing an onerous and possibly unlawful, MI Guidance the alleged benefits of which, remain unproven.

7.10 To sum up, what is a relatively recent, potentially unlawful and expanded interpretation of MI contained in the MI guidance, cuts across several other statutory regimes, undermining decades of conveyancing practice. Furthermore, the practical lessons concerning the implementation of MI cannot be ignored.

## **8 Problems with MI in Greater Detail**

8.1 The stated purpose of MI was to provide "information which the average consumer needs, according to the context, to take an informed transactional decision."

8.2 The proponents of MI claimed it would speed up transactions and reduce fall-through rates. These claims do not reflect the experiences of most property lawyers.

8.3 The concept of 'Caveat Emptor' plays a pivotal role in the conveyancing process. The MI Guidance tries to change this core policy to 'Caveat Venditor.' However, this merely shifts the burden of legal problems from one type of consumer to another – buyer to seller.

8.4 The consumer's disclosure of information on a sale, is inserted in conveyancing forms after the conveyancer is instructed. This is beneficial because the consumer receives legal advice throughout that disclosure process. MI deviates from this normal practice by shifting disclosure to a point before the property is marketed, potentially depriving the consumer of the opportunity of independent legal advice and creating problems that would otherwise not have occurred.

8.5 The property market is often short of supply. Adding an extra layer of complexity and expense will inevitably deter consumers from placing their properties on the market, exacerbating the supply problem.

8.6 In practice, consumers sometimes list their properties for sale merely to 'test' the market. MI will deter these consumers from doing so.

## **9 Isolating Consumers**

9.1 MI runs the risk of isolating consumers from independent legal advice.

9.2 Would the average consumer as a buyer be able to interpret the information provided via MI without access to appropriate legal advice? Certainly concerning 'Part C' of the MI Guidance, it would be difficult for an average consumer to understand the significance of subjects, such as covenants, building safety, planning permissions and tenure(s).

9.3 A consumer would still rely on their property lawyer to advise before committing to an exchange of contracts in the usual way, reducing any benefit of the information being provided 'upfront'.

9.4 "Consumers" are unsophisticated when buying and selling property – so sometimes a consumer doesn't remember anything from when they purchased a property, or when presented with mountains of "data" they will not know how to interpret it. Consumers cannot expect guidance from estate agents who know little about the law.

9.5 Estate agents should not be compelled by MI Guidance, to become 'quasi-lawyers.' It is not their proper function in the home-buying process.

## **10 Misrepresentation**

10.1 MI represents potentially a fertile breeding ground for misrepresentation and other civil claims against a consumer as a seller, quite apart from any enforcement action the CMA might take against an estate agent under the Act.

10.2 Statements made innocently or recklessly by a seller, via the selling agent or a seller's lawyer, to a buyer or the buyer's lawyer in conveyancing's crucible, can be slowly 'unpicked' later in court.

10.3 Encroaching into the realm of property law by inappropriately worded guidance, significantly increases the risk of a claim against selling consumers under the Misrepresentation Act 1967. Similarly, because of existing legislation and regulations, there would also be an increased risk of judicial review.

## **11 Summary**

11.1 The increasing growth of 'conveyancing factories' or 'giants' off the back of covert CS arrangements, often funded by RFs, is anti-competitive and represents unfair commercial practices for the consumer. Moreover, such UPCs discriminate against smaller law firms, which also reduces the choice for the consumer.

11.2 So, in conclusion, PLA considers that it would be damaging to consumers and anti-competitive, for the panoply of existing statutory and common law protections for buyers of property, to be duplicated, undermined or contradicted, either by the Act or by any future guidance published by the CMA.

21<sup>st</sup> January 2025

**The Property Lawyers Alliance**