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# An End to Double Dipping – Or Is It?

New draft RICS professional standard suggests the practice of taking agency fees from seller and buyer of commercial real estate will be ended, but significant numbers of deals would not be caught.

On 10 January 2017 the Royal Institution of Chartered Surveyors (RICS), the professional body and regulator of chartered surveyors in the UK, published a consultation on a proposed new professional standard which would prevent its members from entering into dual agency arrangements, commonly known as "double dipping", with effect from 1 January 2018. This has been widely welcomed in the industry – but the new rule may not go as far as is supposed.

Dual agency arises where the same surveyor represents both buyer and seller in relation to the sale of a real estate investment, taking a fee from both parties for the same deal in what is frequently, if not always, a conflict of interest. This practice, whilst common in some parts of the World, is not generally accepted in the UK. Current professional guidance from the RICS states that dual agency should not be undertaken as a general rule, but does not rule it out if all parties to the transaction have expressly consented to it. The new professional standard, if adopted, would remove this exception, prohibiting dual agency for all RICS members in any circumstances.

On its face, this would be a welcome protection for buyers and sellers of real estate. However the protection is not quite as strong as it looks for two reasons.

The first is a simple one; the professional standard has no power over those who are not members of the RICS. As there is no obligation to become a member in order to carry out investment agency work, there will be agents who are not bound by this rule. It will be for the parties to a deal to check whether their agent is in fact a member of the RICS and therefore whether they can safely assume that the agent is prohibited from double dipping.

The second arises from the wording of the draft standard itself, as it is stated to apply only to RICS members "acting on the ***open market*** sale or acquisition of commercial real estate investment opportunities in the UK" (my emphasis). "Open market" is defined to mean "an unrestricted competitive market in which any buyer and seller is free to participate". Whilst it is understandable that the standard should not apply in relation to deals between connected parties, by adopting this definition of open market, the standard will in fact not apply to a significant proportion of deals.

No open market sale as defined will arise where the market is restricted, or where no market exists – so clearly expressly off-market deals are not caught, but neither it would seem are deals where a seller approaches a selected subset of potential buyers, a very common practice for larger and more specialist investments in particular. One particular situation which will not be caught is the agent appointed to find an investment opportunity for a new client, who introduces them off-market to an existing client, where a conflict of interest would very clearly exist. Even where there is to be some market testing, an agent for a seller could quite easily recommend a sales strategy which would ensure that the rule against double dipping does not apply.

It is of course the case that reputable agents have been working individually and together for some time to address the issue of double dipping – for example, JLL, CBRE, Savills, Knight Frank and Cushman & Wakefield announced just over a year ago that they would be providing joint training on best practice in this regard – and no doubt those agents will apply high standards regardless of the precise wording of the RICS rule. But it is precisely those less scrupulous parts of the profession for whom mandatory standards are needed, and as currently drafted there is a substantial loophole for them to exploit. Hopefully this will be addressed before the consultation closes on 10 February 2017.

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