

TERMS OF REFERENCE

# Terms of Reference for The Property Ombudsman

Effective from 12 May 2010



# Terms of Reference for The Property Ombudsman

## INTRODUCTION

1. The Property Ombudsman scheme is designed to reach a resolution of unresolved disputes in full and final settlement. It provides actual and potential buyers, sellers, landlords, leaseholders, lessees and tenants of property with free and independent redress of complaints relating to acts or omissions of Members in connection with the sale and/or purchase and/or letting and/or management of property in the United Kingdom.
2. The TPO scheme is set up as a limited company, The Property Ombudsman Limited, and has three parts to its structure:
  - a. TPO Council
  - b. The Office of the Ombudsman
  - c. TPO Board
3. Complaints start and finish with the Ombudsman. In his Decisions, he is impartial and independent of the TPO Council, TPO Board and all outside influences.
4. These Terms of Reference have been principally framed to guide the Ombudsman in dealing with complaints and in coming to his independent Decisions. They allow him to use his discretion within the general guidelines given.

## PART 1 – REPORTING LINE

5. The Ombudsman reports to the TPO Council. This ensures the Ombudsman's independence and impartiality.
6. It is from the Council that he receives, or asks for, any general guidance.
7. His relationship with the Council is explained further at Part 5.

## PART 2 - PRINCIPAL DUTIES AND POWERS

### Duties

8. The Ombudsman's principal duties are:
  - a. To receive unresolved complaints by, or on behalf of, any actual and potential buyers, sellers, landlords, leaseholders, lessees and tenants of property in relation to the carrying out of relevant estate and/or letting agency and/or property management work by any Member; and to investigate such complaints and issue a Decision within the powers of the Ombudsman. See Part 3.
  - b. To play his part in helping to raise standards throughout the industry by highlighting best practice and promoting it, and by identifying bad practice and helping to eliminate it. See Part 4.

## **Powers**

9. The Ombudsman's principal powers are:
  - a. to direct that a Member take, or desist from taking, such steps as he may specify, including the issuing of a formal apology to the Complainant;
  - b. to direct that a Member pay the Complainant a financial Award, in full and final settlement, not exceeding £25,000 by way of compensation for actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act or omission which was the subject matter of the complaint.

## **PART 3 – DEALING WITH COMPLAINTS**

### **SCOPE OF INVESTIGATIONS**

#### **10. Grounds of complaint**

The grounds of any complaint must be that in relation to the Complainant, the act or omission by the Member complained of constitutes:

- a. a breach of the Member's obligations under the law;
- b. a breach of the Member's obligations under any relevant Code of Practice or any internal rules, procedures or statements of practice of the Member;
- c. unfair treatment;
- d. maladministration;

in a way that results in the Complainant suffering loss, expense and/or aggravation, distress and/or inconvenience.

#### **11. General conditions for acceptance of a complaint**

The Ombudsman shall only consider, or continue to consider, a complaint if he is satisfied that:

- a. the complaint is made against a Member;
- b. the complaint is made to him by or on behalf of all the living persons collectively who are or may be entitled to make a complaint for whom the relevant estate and/or letting agency and/or property management work in question was carried out;
- c. the Internal Complaints Procedure of the Member has been exhausted, but the Complainant remains dissatisfied with any observations made, or conditions of full and final settlement offered by such Member; or more than eight weeks have elapsed since the Complainant first made the complaint to the named Member in writing. If the Member ignores the complaint made or persistently fails to address the complaint, the Complainant may ask the Ombudsman to intervene even if eight weeks have not elapsed;

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- d. the complaint is made to the Ombudsman not later than six months after the date of the Member's final viewpoint letter;
- e. the act or omission giving rise to the complaint, first occurred not more than twelve months before the Complainant first made the complaint in writing to the Member;
- f. the act or omission of a Member giving rise to the complaint first occurred after the date on which the Member's membership started;
- g. the subject matter of the complaint was not contained in a complaint from, or on behalf of, the same Complainant previously considered by the Ombudsman except where relevant new evidence is available – unless an Award has been made, accepted and paid in full and final settlement. The Ombudsman need not, therefore, be bound by a previous Decision in cases where no such Award has been made, accepted and paid in full and final settlement;
- h. the Ombudsman may, in the instances set out in paragraph 12 below, not investigate a complaint or may discontinue an investigation. Notwithstanding these instances he may still consider any complaint put to him provided that:
  - there is no other relevant independent body for the conciliation, arbitration or adjudication of complaints in relation to the matter;
  - and he feels that it is in his competence to do so;
  - and both the Complainant and the Member so agree.

## 12. General exclusions

The Ombudsman shall not investigate a complaint (or any part of a complaint), or shall discontinue his investigation of a complaint (or any part), if:

- a. at any time it appears to the Ombudsman that it is more appropriate for the complaint to be dealt with by a court or under another independent complaints, conciliation or arbitration procedure;
- b. at any time that the Ombudsman finds out the complaint is already being considered by a Court, or under another independent complaints, conciliation or arbitration procedure, he should discontinue his investigation. If that other body is not considering all aspects of the complaint or if that body is not designed to offer financial compensation to the Complainant, the Ombudsman may then resume his consideration of the complaint.

## GENERAL PROCEDURE

13. The Ombudsman shall first decide whether or not a complaint falls within his Terms of Reference. In determining this, he shall take into account the guidelines in paragraphs 10-12 above and consider any Representations from the Complainant and the Member.
14. The Ombudsman may give advice to a Complainant on the procedure for making a complaint to him and/or on the procedure for making a complaint to any other relevant independent scheme for the conciliation, arbitration or adjudication of complaints where such other scheme appears to him to be more appropriate for the investigation of any complaint or part thereof. He shall not advise individuals on the selection of an agent or on the services that they offer but he can advise them as to which agents are or are not in the TPO scheme.

## **Consideration of a Complaint**

15. Subject to the other provisions of these Terms of Reference, the Ombudsman shall, at his own discretion, decide the procedure to be adopted by him in considering complaints, provided that he may not exercise his discretion to remove any rights given to the Complainant by law. Such consideration could include conciliation, mediation or a full case review.
16. In his consideration, the Ombudsman shall act impartially and fairly in all circumstances and must give reasons for his Decisions in writing.

## **Confidentiality**

17. Following the receipt of any complaint, the Ombudsman shall promptly:
  - a. require the Complainant to give his written consent to give up his right to any duty of confidence owed to the Complainant by the Member in terms which permit the disclosure by the Member to the Ombudsman of information and documents requested by the Ombudsman;
  - b. send such written notice of consent to the Member.
18. The Ombudsman may use any information freely provided to him by a Complainant or a Member in his consideration of a complaint provided it is for the express purpose of dealing with that complaint.
19. The Ombudsman may refuse to disclose information to either the Complainant or the Member if:
  - a. in his reasonable opinion, it is not relevant to the consideration of the complaint;
  - b. in his reasonable opinion and in all the circumstances of the complaint, it is inappropriate;
  - c. it concerns issues of national security or the personal security of the Complainant or Member or third party;
  - d. it is protected by legal or professional privilege (and such privilege has not been waived by the Complainant or the Member, as appropriate);

provided that the Ombudsman shall always consider any specific requests for disclosure received from either party.

20. The Ombudsman shall take all reasonable steps to ensure that he and all TPO Office staff keep confidential any information provided as part of the investigation of a complaint, whether or not it is disclosed to the other party.

## **Requests for Information**

21. For the purpose of his investigation into a complaint, the Ombudsman may require the Complainant or a Member to provide to him:
  - a. such information and/or documents which are within their knowledge or reasonably ascertainable by them;
  - b. and such information and/or documents in their possession or under their possession or control;as is or are relevant to the complaint.

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The Ombudsman will draw his own conclusions if, in his opinion, such requested information is not provided.

22. Neither party shall be required to disclose documents to the Ombudsman which he is satisfied are protected by legal or professional privilege (where such privilege has not been waived by the Complainant or the Member, as appropriate).
23. The Ombudsman may also request information from third parties if he believes it may be relevant to his investigation.
24. The Ombudsman shall not be bound by any legal rule of evidence. He is not permitted to take evidence on oath or cross-examine witnesses. He shall reach his Decisions based on the evidence as he sees it; the guidelines given in paragraph 25 below; on common sense; and on what appears to him to be fair and reasonable under the circumstances.

## Guidelines

25. In making any Decisions under these Terms of Reference, the Ombudsman shall have regard to:
  - a. the law;
  - b. any relevant Code of Practice and any internal rules, procedures or statements of practice of the named Member;
  - c. the provisions of any contract binding the Member and the Complainant;
  - d. any other matter the Ombudsman considers relevant to the act or omission by the Member and which is the subject matter of the complaint.

## Changes to General Procedure

26. The Ombudsman shall operate in accordance with these Terms of Reference and shall consult and obtain the approval of the Council in respect of any proposed changes to the procedure for making a complaint to him.

## DECISIONS AND SETTLEMENTS

### Proposed Decision

27. Having come to a Proposed Decision on the complaint received, the Ombudsman will send the case review containing that Proposed Decision first to whichever party he has not supported. If he decides that there is insufficient evidence for him to support the complaint, he will first send that Proposed Decision to the Complainant. The Complainant then has 28 days in which to provide any additional evidence that may persuade the Ombudsman to change the Proposed Decision. If the Complainant does not reply within that time, the case will be closed. If the Complainant does produce significant evidence that persuades the Ombudsman to change the Proposed Decision, it will be necessary to go back to the Member and ask him to comment on the new evidence.
28. If the Proposed Decision is to make a financial Award of compensation in favour of the Complainant, the case review is first sent to the Member who has 14 days to accept that Proposed Decision or make comments. Any such comments received are considered and incorporated as necessary in the Proposed Decision. The revised case review is then sent to the Complainant who has 28 days in which to accept the Proposed Decision, or to make comments. If the Complainant produces significant evidence that persuades the Ombudsman to change the Proposed Decision, it will be necessary to go back to the Member and ask him to comment on the new evidence.

29. Where the Proposed Decision provides for an Award which exceeds the limit of £25,000, the Ombudsman will attempt to reach an appropriate settlement with the Member before he declines to take on the case.
30. When sending the Proposed Decision to the Complainant, the Ombudsman will include a copy of the Member's submission and copies of those documents relevant to the Ombudsman's Proposed Decision, not previously seen by the Complainant.

### **Representations**

31. Following the procedure in paragraphs 27 and 28, the Ombudsman shall consider any Representations made by either party before making his Final Decision.
32. The opportunity to make a Representation is a fundamental part of TPO procedures but will normally only be considered:
  - a. if it can be shown that there has been a significant error in fact that would have had a material effect on the Decision;
  - b. if significant new evidence is produced that will have a material effect on the Decision.

### **Oral Hearings**

33. Any request for an oral hearing must be considered by the Ombudsman (or his appointed deputy) by reference to the nature of the issues to be determined and in particular the extent to which the complaint raises issues of credibility or contested facts that cannot be fairly determined by reference to documentary evidence and written submissions. In deciding whether there should be a hearing and, if so, whether it should be in public or private, the Ombudsman will have regard to the provisions of the European Convention on Human Rights.

### **Final Decision**

34. Having considered any Representations, the Ombudsman shall come to a Final Decision, in which (in line with his powers at paragraph 9) he may direct:
  - a. that the Member takes, or desists from taking, such steps as he may specify including the issuing a formal apology to the Complainant;
  - b. and/or that the named Member pays the Complainant an Award (not exceeding £25,000) by way of compensation for actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act or omission of the subject matter of the complaint.
35. A Final Decision shall be in writing and shall:
  - a. give a summary of the reasoning for making the Decision;
  - b. state the amount, if any, of the Award of compensation to be paid and the conditions for acceptance;
  - c. not be subject to further Representation;
  - d. not be subject to appeal. See paragraph 3.

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## Awards

36. The Awards made by the Ombudsman are compensatory and not punitive. They are to compensate a Complainant for any actual, proven financial losses - or for undue and avoidable aggravation, distress and/or inconvenience – that have been occasioned by the act or omission of the Member.
37. Any Award shall be for the payment by the named Member to the Complainant of a sum not exceeding £25,000.
38. The Award shall state that if, within 28 days (14 days if there has been a Representation) after its issue, the Complainant agrees to accept it in writing in full and final settlement of the subject matter of the complaint, it shall be binding on both the Complainant and the named Member.
39. If the Complainant fails to accept the Award within 28 days (14 days if there has been a Representation) of receipt thereof, the Award shall lapse.
40. If the Complainant accepts the Award in writing in full and final settlement of the subject matter of the complaint within 28 days (14 days if there has been a Representation), the Ombudsman shall notify the Member of that fact within 14 days of his receipt of the Complainant's acceptance. The Member shall then pay the amount of the Award to the Complainant:
  - a. within 28 days of the Ombudsman's notification; or
  - b. if the Award states that any monies are due to be paid by the Complainant to the Member, within 28 days of the Complainant making such payment.

## Full and Final Settlement

41. Any Award made and accepted is in full and final settlement of all the complaints made against the Member upon which the Ombudsman has made a formal Decision.
42. The Ombudsman must inform the Complainant that acceptance of an Award and/or a Decision might compromise his ability to pursue that complaint through the Courts. By his acceptance of the Ombudsman's Award, the Complainant is agreeing to the full and final settlement of that dispute. However, if he rejects the Ombudsman's findings in their entirety, he is perfectly entitled to pursue his case through the Courts – as he is with any complaint on which the Ombudsman has been unable to make a formal Decision.

## Closure and Discontinuance

43. On any settlement, withdrawal or lapse of a complaint, the Ombudsman shall discontinue his consideration of that complaint.
44. Once the Ombudsman has made a Final Decision and an Award has been accepted and paid in full and final settlement, and the case is closed. That is the end of the matter. The case cannot be re-opened by either party, even with the production of new evidence.
45. The Ombudsman shall not be bound or in any way limited by any previous Decision made by him or by any predecessor.

## **PART 4 – IMPROVEMENTS IN STANDARDS**

46. The Ombudsman is to put before the Council proposals for the improvement of practice within the industry.
47. The Ombudsman is to report to the Council when there appears to him to have been any single flagrant breach and/or any persistent breaches of the Code of Practice (where that applies) by any Member. The Council's powers to deal with such disciplinary matters are set out in the Articles of Association of the TPO.
48. During the consideration of any complaint, the Ombudsman has a duty to consider whether the complaint is one which raises fitness to practice issues and accordingly whether it should be referred directly to the OFT because it appears to trigger action under Section 3 of the Estate Agents Act 1979.

## **PART 5 - OTHER POWERS AND DUTIES**

### **Promotion of the Scheme**

49. The Ombudsman has an obligation to explain to the general public, buyers, sellers, landlords, leaseholders, lessees and tenants of property, estate and letting agents and the media how he and his Office go about their business and so help The Property Ombudsman Limited publicise and promote the TPO scheme.

### **TPO Office**

50. The Ombudsman shall be responsible for the day to day administration and conduct of the business of the TPO Office and its staff. He shall have power to incur expenditure on behalf of the Company in accordance with the current financial budget approved by the Council.
51. In consultation with the Chairman of the Council, and subject to his approval, the Ombudsman shall have power on behalf of the Company to appoint and dismiss employees, consultants, independent contractors and agents, and to determine their terms of employment or engagement.
52. The Ombudsman shall not exercise any power which the Articles of Association of the Company expressly assigned to the Board, the Council or any other person.

### **Council Meetings**

53. The Ombudsman shall endeavour to attend each meeting of the Council and put before it such business that he deems fitting and give it any information and assistance (including any general information about any reference) which it reasonably requests. Nothing in this clause excludes the Council from meeting in the absence of the Ombudsman.
54. Except in pursuance of paragraph 46 and save as mentioned in paragraph 52, or as required by any competent authority, or as properly and reasonably required in connection with any legal proceedings instituted by or against the Company or any of its officers, the Ombudsman shall not disclose to any person (including a Board Member or Council Member) any information concerning a complaint considered by him from which it would or might be possible to identify the Complainant or any Member named in the complaint or any other information of a confidential nature which he has obtained in the course of his duties.
55. Paragraph 54 shall not prohibit the disclosure of any information to the Complainant and any Member or to the Chairman of the Council or any Member of the Council authorised by Council; or to any employee, consultant, independent contractor or agent of or with the Company to the extent that such information is reasonably required by that person for the purpose of performing his duties to the Company.

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## Annual Report

56. At a time to be agreed with the Council, the Ombudsman shall send to the Council Members (and also to the Board Members) a report containing, in relation to the preceding financial year of the Company, a general review of his activities during that year and such other information as the Council may reasonably direct.
57. The Ombudsman's Report will be included in the Annual Report published by the Council for the interest of all stakeholders.

## PART 6 - INTERPRETATION

58. In these Terms of Reference, the following expressions have the following meanings:
  - a. "Award" means the compensatory element in money, or money's worth, of a Decision or Final Decision.
  - b. "Board Member" means a member of the Board of Directors of the Company.
  - c. The "Company" means The Property Ombudsman Company Limited.
  - d. "Complainant" means a seller or buyer or potential seller or potential buyer or landlord or leaseholder or lessee or tenant of property by whom or on whose behalf a complaint is made to the Ombudsman. It includes a personal representative or any person so entitled to stand in his place after his death.
  - e. "Council" means the Council of the Company appointed in accordance with the Company's Articles of Association.
  - f. "Day" means a calendar day, not a working day.
  - g. "Decision" is a direction and/or decision made by the Ombudsman within his powers under these Terms of Reference.
  - h. "Estate Agency Work" means any things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from an individual (the "client") who wishes to sell or purchase any property in the United Kingdom:
    - for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to purchase or, as the case may be, sell such property; and
    - after such an introduction has been effected in the course of that business, for the purpose of securing the sale or, as the case may be, the purchase of that property;
    - provided that nothing shall constitute estate agency work unless it relates exclusively to the sale or purchase of property.
  - i. "Final Decision" means the Decision where accepted by the parties in full and final settlement, or any Final Decision made by the Ombudsman following any Representations.
  - j. "Internal Complaints Procedure" means a written procedure for the resolution of complaints by actual or potential buyers, sellers, landlords, leaseholders, lessees or tenants of property in relation to acts or

omissions which could be the subject of an investigation by the Ombudsman, being a procedure under which the complaint, if not previously settled or withdrawn, is to be considered by the senior management of the relevant Member.

- k. "Member" means a Member of the Company or a Designated Associate or a Firm registered under the Consumers, Estate Agents and Redress Act 2007 – whose acts or omissions are the subject matter of a complaint referred to the Ombudsman.
- l. "UK" means England, Wales, Scotland and Northern Ireland; it excludes the Channel Islands and the Isle of Man.

59. In these Terms of Reference:

- a. references to the provision of services include, where the context admits, references to their non-provision;
- b. references to the singular number (including without limitation references to "individual", "Complainant" and "Member") include, where the context admits, the plural and vice versa;
- c. references to the masculine include the feminine;
- d. references to paragraphs are to paragraphs of these Terms of Reference.

