

Quarterly Report

Quarter 2 2009

The Property Ombudsman



April 2009 – 30 June 2009

Quarterly Report

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About The Property Ombudsman

The Property Ombudsman (TPO) came into being on 1 May 2009. The Ombudsman for Estate Agents (OEA) changed its name to this to reflect the wider jurisdiction in resolving disputes covering residential sales, lettings, small commercial transactions and UK based international agents.

The scheme is open to all those firms with a principal, director or partner who is a member of the National Association of Estate Agents (NAEA) or the Royal Institution of Chartered Surveyors (RICS); to all corporate estate agents; and to other independent estate agents who can provide the necessary references and carry appropriate Professional Indemnity cover.

The TPO offers an independent service for the resolution of disputes between member agencies and buyers, sellers, tenants or landlords of property in the UK. The scheme has gained the status of an OFT Approved Estate Agents Redress scheme under the provisions of the Consumer Estate Agents and Redress Act 2007.

The Ombudsman is entirely independent of member agencies and reports to a Council which is likewise independent of those Agents. He provides a fair and impartial resolution of disputes which fall within his Terms of Reference. Resolutions are designed to achieve a full and final settlement to the dispute and the Ombudsman can, where appropriate make an award of financial compensation up to £25,000. The Ombudsman will not

normally review a case until the internal complaints procedure of the member agent has been exhausted. The service is free to complainants.

The Ombudsman's Terms of Reference, the Codes of Practice, Consumer Guides and other documents about the operation of the scheme are available from the TPO at the address shown below. They are also available on the TPO website (www.tpos.co.uk) together with previous annual and quarterly reports, an explanation of governance arrangements and a full list of member agents.

Contact details:

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Introduction



“ clarity and precision when describing charges and fees and when they apply are absolutely vital ”

Fees

The level of fees charged by agents for their services in relation to marketing property for sale, to the letting of property and for the provision of HIPs is a commercial decision in which I cannot become involved. Market forces will dictate the levels and without any legislation over price controls it would be impossible for me to decide on the fairness or otherwise of those fees.

The fees charged to sellers, landlords or tenants are agreed between the parties by virtue of the client signing an Agreement to say that they have read and understood the various terms and conditions laid out. In considering the disputes referred to me my starting point is that I will not rewrite a properly agreed contractual position. However, I am regularly presented with scenarios where the fees although stated in the Agreement have been clouded in some way either during substantiated conversations during the market appraisal or through some ambiguity in the wording of the contract.

With regard to sales transactions paragraph 3m of the TPO Code of Practice requires terms and conditions to be fully explained, and clearly and unambiguously stated in writing. However, I have seen cases where the agent has operated a fixed fee basis but it was clear from the evidence presented to me that the charge was portrayed as a percentage of the selling price and sellers therefore rightly assumed that it related to the achieved sale price. Although the Code of Practice (paragraph 3h) requires a percentage to be shown together with a monetary amount it is clearly only relevant where a sliding fee scale applies. We are redrafting the Code to reflect specific requirements in relation to fixed fees. Whilst any charges need to be highlighted Agreements (and any other document referring to terms and conditions) should clearly state that the fee is fixed. The status of the fee should be specifically drawn to the client's attention.

HIPs are usually the subject of a separate Agreement often direct with the HIP provider. Many agents offer a 'free' HIP provided certain conditions are met. Agents must ensure that such conditions are clearly explained and should ensure that

the point at which the charge can apply is again drawn to the clients specific attention.

Although I have not seen many cases involving disputes over lettings or management fees in the context of being unfair or described opaquely, the same message of emphasising the level of charge and when it applies is still important.

I also see many disputes between tenants and letting agents over holding deposits. The OFT has expressed the view that in certain circumstances the non-refundable nature of such deposits could be unfair. That has not, to my knowledge, been tested in court so I will not rewrite the deposit terms, provided there is no ambiguity over repayment or otherwise. To be fair and to avoid dispute, agents must provide a clear statement of the status of the deposit and the circumstances of forfeiture or repayment.

The message that I want to give from these circumstances is that clarity and precision when describing charges and fees and when they apply are absolutely vital. Do not assume that clients have understood the detail of what is presented. Although they have committed themselves to a contract it is in my view best practice to highlight and specifically emphasise the relevant information.

It will, for certain, reduce the number of complaints arising.

Workload

The statistical analysis of my workload for the second quarter of 2009 appears later in this report. This analysis shows an overall increase for this quarter in new cases of 15% although, as I have indicated my expectation of in previous reports, the proportion of lettings referrals is now greater than sales (104 in number for sales, 117 in number for lettings). Initial enquiries have increased by 5% over the recent quarter against the first quarter of 2009, with enquiries relating to matters within my terms of reference increasing by 2.5%. The trend however is for the higher proportion to relate to sales rather than lettings.

Christopher J Hamer
Ombudsman

General Statistics

Quarter 2 2009 / Quarter 1 2009

		Quarter 1 2009	Quarter 2 2009
General		361	385
Non-member	Sales	138	158
	Lettings	643	596
	Other	88	64
Outside Terms of Ref	Sales	42	52
	Lettings	36	43
	Other	65	83
Within Terms of Ref	Sales	822	866
	Lettings	810	807
Insufficient Info		152	150
	Total	3157	3204

New cases - Quarter 1 2009

102

SALES

90

LETTINGS

New cases - Quarter 2 2009

104

SALES

117

LETTINGS

Sales	Quarter 1 2009	Quarter 2 2009
Cases Closed	132	162
Withdrawn	2	0
Against Complainant	50	56
For Complainant	80	106

Lettings	Quarter 1 2009	Quarter 2 2009
Cases Closed	96	130
Withdrawn	0	3
Against Complainant	30	51
For Complainant	66	76

Case Summaries

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Cleared Funds

The Complainant was the Landlord who claimed that the Agent had failed to ensure that the Tenant was both suitable and that they had received cleared funds for the deposit and rent before handing over the keys of the Property. The Complainant asserted that, due to these failings, the Agent was subsequently liable for the following 9 months of rent arrears, legal fees and damage to the Property caused by the Tenant.

Outcome: For complainants, award made

Summary of Case:

In reaching a judgement on this Complaint, I noted that West London County Court had made an order for the Tenant to vacate the Property and to pay rent arrears of £8,340.62 along with legal costs of £2,057.74 to the Complainant. I also noted the fact that, following the Complainant's rejection of the Agent's goodwill offer of £2,158.48, she had engaged a firm of solicitors who sought to hold the Agent entirely responsible for all the losses suffered.

From my examination of the Branch File, it was apparent that the Agent had used the services of a recognised Referencing Service provider, in accordance with Paragraph 7b of the TPO Code of Practice. The reference received confirmed that *"on current income levels [the Tenant] should prove good for your figure [the Rent] and purpose. No adverse credit history"*.

While it was the case that the Tenant turned out to be unsuitable, I concluded that the Agent had abided by both the TPO Code of Practice and the Terms and Conditions of the Management Contract by obtaining the necessary assurances from a recognised Referencing Service provider, prior to agreeing the Tenancy. As I concluded that the Agent took the necessary actions to ensure that the Tenant was suitable, I did not support this part of the Complaint.

I then considered the events surrounding the start of the Tenancy Agreement with specific reference to whether the Agent had ensured they held cleared funds before providing the keys of the Property to the Tenant.

Reasons:

My examination of the Branch File showed that when the Tenant attended the Agent's offices to sign the Tenancy Agreement she produced a paying in slip, marked 'draft' and endorsed by

the bank, stating that the outstanding balance of the rent and deposit had been paid into the Agent's account. As the paying in slip was hand written the negotiator concerned contacted the Agent's Accounts Department, who confirmed that a credit for the amount on the slip was showing on their account. The Tenant then signed the Tenancy Agreement and was provided with the Property keys. The monies were subsequently returned unpaid to the originating bank three days later.

While I accepted that the Agent fell foul of the same misrepresentation which the Tenant later used to mislead West London County Court, I pointed out that my role was to consider whether the Agent's conduct could be considered sufficiently diligent by taking all reasonable steps to safeguard against such fraudulent behaviour, as required under Paragraph 7a of the TPO Code of Practice. I also noted the Agent's Management Agreement which stated that they would *"on or before the first day of The Tenancy collect the first month's rent in cleared funds before allowing the Tenant to access the property"*.

Given the fact that funds were returned unpaid, I concluded that the Agent had failed to adhere to both the Code of Practice and the Management Agreement by ensuring that the funds received were cleared before the keys were provided to the Tenant. I also pointed out that I would have expected any accounts department to have access to a banking system which showed whether funds had cleared or were pending completion of the clearing process or, alternatively, contacted their bankers direct to establish the position. I, therefore, supported this Complaint.

With regard to the quantum of the claim made by the Complainant, I concluded that, as the Court had already passed judgement regarding the rent arrears and legal costs against the Tenant, the Agent was not liable for this part of the Complainant's loss.

Recommendations:

The Agent's failure to ensure the Tenant's funds had cleared before providing the keys had subsequently caused the Landlord over 9 months of potentially avoidable distress, aggravation and inconvenience. I noted that the Agent's previous offer of £2,158.48, whilst offered with reference to rent arrears figures, was also made as a gesture of goodwill and not as a refund of fees or as a contribution towards the documented losses. I therefore considered this an appropriate amount to cover the distress and inconvenience suffered and awarded this in favour of the Complainant.

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Cost of HIP

The Complainants (sellers) were unhappy with the price they had been charged for the HIP pack, stating that the HIP provider charged £399 plus VAT, but the agent had charged them £699 plus VAT without explanation as to what the extra £300 plus VAT was for. They complained that the agent should have advised them that they could purchase a HIP pack independently.

Outcome: For complainant, award made

Summary of case:

The Complainants raised a Complaint over the amount of the HIP fee charged when they dis-instructed the Selling Agent. They claimed the Agents fee was £300 more than that charged by the HIP Provider and they sought clarification from the Agent as to what the £300 was payable for. The Agent confirmed that the Complainants had entered an 'all inclusive' package and the Agreement clearly stated that a fee of £699 (plus VAT) was charged if the Complainants terminated the Agency Agreement. I concluded that the Selling Agent had invited the Complainants to sign an uncompleted Credit Agreement, when they signed up for the 'all inclusive package', which subsequently meant the Complainants had signed to pay for something without an amount being stipulated, which was considered unfair. An Award of the difference in HIP fees was made for £352.50

Reasons:

I was very critical of the Agency Agreement. The fees were not fully explained and there was no instruction or termination letter which confirmed what fees were payable. A fee of £399 plus VAT is what is said to have been charged by the HIP provider. There was no explanation for the extra £352.50 charged to the Complainants. On review of the complaint I concluded that the HIP fee to be paid by the Complainants should have been in the region of £399 plus VAT.

It also appeared to me that the agent invited the Complainants to sign up to a credit agreement with Close Payment Services when they signed up for an "all inclusive" package. The agreement had not been completed properly and allowed the Complainants to sign something where bank details had to be provided without an amount being stipulated.

Recommendations:

I considered in this case that the Complainants had suffered actual proven financial expenditure, which could be directly attributable to the actions of the agent, namely that they incurred an unreasonable and unjustified sum for a HIP pack.

I also considered that the Complainants suffered avoidable and undue aggravation, distress and inconvenience as a result of the agents' failures.

I supported some of the complaints made and made an award of £400. The award was made up of £352.50 financial losses, £47.50 distress, aggravation and inconvenience

Lack of clarity regarding fees

The Complainants were potential sellers who complained that the Agency Agreement was not clearly explained and that the 20 week agency period was explained in a misleading way, in that it was their understanding if a sale was not established during the 20 weeks no fee would be payable.

However, it became apparent that the agent could withdraw the Property at any time and for any reason and then charge a fee of £411.25 (incl VAT). The Complainant complained that the agent had been 'unscrupulous, misleading and dishonest' when it would have been easier if they had said that the Agreement incurs a charge rather than confusing clients regarding the time of the Agreement and sole agency terms.

Outcome: Complaint about misleading, not supported

Summary of case:

The Complainant was pursuing a Complaint on behalf of her partner, the Potential Seller. She complained that the Potential Seller had been misled about the terms of the Agency Agreement, believing that, if the agency period expired and no sale had been achieved, then no fees would be due. However, the Potential Seller was invoiced a withdrawal fee even though it was the Agent's decision to dis-instruct themselves. It was also complained that the Agent removed the 'for sale' board, did not make sure that their notification letter of withdrawal

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reached the Potential Seller, and submitted their invoice prior to the expiry of the 14 day notice, as such they had breached the Agency Agreement. Due to this, the Potential Seller refused to pay the withdrawal fee.

I concluded that the terms of the Agreement were clear and adhered to the TPO Code of Practice. They were not misleading and outlined how the Agreement could be terminated, when it could be terminated and what fees would become payable.

Reasons:

The Potential Seller stated that had he known that a timeless agreement was in place, which would have allowed either party to withdraw or cancel for an unspecified and unlimited period, he would not have signed it.

I concluded that the terms of the agreement were clear and in line with The Property Ombudsman Code of Practice. When any seller enters into a legally binding contract it is up to the individual seller to make sure that they understand the terms of the agreement before signing. In this instance, the agreement was for a period of 20 weeks, after which time the agreement would continue until the property was sold or either party withdrew from the agreement. In the latter case a 14 day notice period must be provided and a fee of £350 plus VAT would become payable.

Recommendations:

The only complaint which was supported was that the Agent had failed to acknowledge the complainant's correspondence within the required timescale and for this a modest award of £25 was made.

Disclosure of fees

The Complainant was acting on behalf of her mother (the seller) who raised a number of issues which all concerned the level of fee invoiced by the agent. The Complainant felt her mother had not been given full information about the Agency Agreement, was misled as to what the fee would be and was not given enough time to read the terms and conditions.

Outcome: Supported, award made

Summary of case:

The Complainant was with her mother when the decision was made for the property to be put on the market. Two valuations were obtained, both suggesting a selling price of £250,000. Within a week, whilst the Complainant and her mother were deciding what to do, they received a note from another agent stating that they had a client particularly interested in the property. On receipt of this information the agent was invited to also value the property, the Complainant stated they provided her with a guide price of £300,000. Whilst doing so they also advised the Complainant and her mother that they had several people on their books interested in the property and would expect a sale to be completed within 4-5 week's.

When the fee was discussed the Complainant stated that it was a flat rate of £7,000 (plus VAT) on the suggested price. The Complainant also stated she queried the amount and requested a percentage fees. She was then informed by the agent that they did not do percentage figures. When they asked what happened if the asking price was not achieved, the agent informed them that the fee would be less. They therefore were given the impression that the fee would reduce and had some relation to the selling price. The agent was later instructed on the proviso that if a buyer was not secured within two weeks the asking price would be reduced in line with what the other agents had quoted. When the agent visited the seller with the necessary paperwork, there were also two other men present, apparently doing a viewing. The Complainant believed that the whole situation was confusing for her mother who was made to sign the documentation there and then. The Complainant felt that the agent should have left the paper work with her mother to read and consider with family members. The Complainant then stated that the first time the fee was brought to her attention was in a letter two months later, which was followed up with several telephone calls to the agency. The agent recorded in their notes that the seller was a recent widow and elderly.

It appeared from correspondence that the seller was unfamiliar with the buying and selling process and merited careful explanation of the Agency Agreement throughout all stages. I was also concerned that the sale price of the property was £220,000. The result of there being such a difference between an asking price and the selling price is that the seller faces a contractual liability which has been negotiated on the

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strength of an asking price which the market has shown to be unachievable. This has the consequence of inflating their fee. In such cases I would expect a member agent, where a marketing valuation is challenged, to be able to justify that valuation. I explained to the Complainant that the agreement her mother entered into was a legally binding Agreement whereby the agent would be entitled to their fee, if they introduced a successful buyer. I advised that it is not within my role to re-write the terms of an Agreement and therefore, I believed that the agent was contractually entitled to payment.

That said, the complaint was common with others that have come before me, in that it seems the seller (and complainant) understood that regardless of the Agency Agreement terms, the fee would abate if the sale price was less than the asking price.

In this case the agent had not fully explained their fixed fee terms, in their discussions as opposed to their agency agreement, consistent with their responsibility under paragraph 3h of The Property Ombudsman Code. I also believed that they were in breach of paragraph 1f due to the seller's age, personal circumstances and relative inexperience of the buying and selling process.

Recommendations:

The agent had made a goodwill gesture of £500 (plus VAT), which I did not feel represented appropriate compensation for their actual admitted shortcomings in the provision of service. I took the view when considering what level of compensation that was appropriate in this matter that the fee charged by the agent should more appropriately have been £5,715 (plus VAT). This fee was stated in their commission Fee Sliding scale.

I made an award equivalent to the difference in the commission fee invoice.



Staff List

As at 30 June 2009



Title	Name
Ombudsman	Christopher J Hamer
PA to Ombudsman	Natalie Hallett
Finance Manager	Sarah Davies
Finance Assistant	Anne Hall
Support Services Manager	Sue Hurst
Case Officers	Josephine Bailey Kate Chandler (Legal) Colin Dixon Maria Evans Mike Evans Peter Habert Natalie Pughe Jane Reed Christine Rowland-Jones Matt Tucker
Case Administration Manager	Amanda Stiggants
Senior Case Administration Officer	Joanne Beatty
Case Administration Team	Alan Bowers Roz Butcher Stephanie Spencer
Initial Enquiries Manager	Anya Browne
Initial Enquiries Assistant Manager	Kim Hilton
Initial Enquiries Team	Sarah Andrews Samantha Hathaway Martin Noke Susan Russell Annemarie Simpson-Wild Kimberley Saunders Kirstie Williams
Membership Manager	Sarah Sartin
Senior Membership Administrator	Laura Baldwin
Membership Team	Jay Johnson Nicole Lake Louise Wilson



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