

Quarterly Report

Quarter 3 2009

The Property Ombudsman



1 July 2009 – 30 September 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, UK based international agents and home information pack providers.

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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Beckett House
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Introduction



“ Trends in the market are mirrored in the numbers of cases that I am asked to judge on about three to four months later ”

The statistics which appear in this report covering the period 1 July to 30 September 2009 show the continuing trend of increasing lettings disputes referred to my office. I have noted however a small surge in sales disputes in this period and whilst there has been much talk about the market beginning to pick up, if that is true it will be some months yet before that has an effect on my workload. Trends in the market are mirrored in the numbers of cases that I am asked to judge on about three to four months later so any actual increase in activity in the market will become apparent in my workload towards the end of the year.

Readers of this brief report should be aware that my jurisdiction only extends to disputes between consumers and agents which are members of the TPO scheme. I have no powers to intervene or decide on disputes between agents.

I receive much correspondence from agents aggrieved at the actions of a competitor. The main area of contention appears to be in relation to the making of unsolicited approaches as a way of gaining new properties to list. From what I understand these unsolicited approaches are usually made with a ‘flyer’ either covering a general area or are directed at property already for sale (or indeed already to let). This latter approach clearly upsets the agent who is currently under instruction.

It is not for me to comment on a commercial decision as to how firms seek new business or indeed to control competition amongst agents. I do however have a legitimate interest where the terms of the TPO Code of Practice are not being adhered to. In that context the Code makes clear at paragraph 3b that an agent must not use unfair methods or harass an individual to gain instructions. Whilst for the seller a ‘flyer’ potentially could be seen as harassment I do take the view that the format and quantity of these leaflets could certainly be an irritation.

It is important to point out that the Code (paragraph 4m) also currently requires any such flyer to include a clear warning about the possibility of a seller becoming liable to two fees if they are currently or have been previously selling their property through another agent. So one agent targeting another agent’s

clients is potentially creating an unnecessary expense for the seller if he chooses to change agent and does not have the commitment and the position with the other agent fully explained to him.

I should also point out that The Consumer Protection from Unfair Trading Regulations 2008 now make it an offence to make misleading claims about, for example the performance of another agent.

Given that I have no jurisdiction to act in such circumstances, complaints about these approaches should be directed to the professional bodies or to Trading Standards. All I can do under my terms of reference is to write to the offender and ask that, in the spirit of the scheme, the activity ceases where it does not conform to the Code of Practice.

HIPs

Apart from the sales statement and the index in a HIP an agent has no responsibility for the content of the Pack. It is best practice to ensure that all the statutory documents are included and that the seller agrees that the content relates to his property. However the Pack Provider is the right place for any complaint about the document outside of the agents remit. TPO has now agreed with the Property Codes Compliance Board (PCCB) that any dispute between a consumer and a HIP provider or personal search organization registered with the PCCB can be referred to me if the matter cannot be resolved by the parties themselves. It means that consumers have one place to refer regardless of what aspect of HIP distribution or production aggrieves them.

Christopher J Hamer
Ombudsman

General Statistics

Quarter 2 2009 / Quarter 3 2009

		Quarter 2 2009	Quarter 3 2009
General		385	458
Non-member	Sales	158	108
	Lettings	596	585
	Other	64	44
Outside Terms of Ref	Sales	52	42
	Lettings	43	63
	Other	83	63
Within Terms of Ref	Sales	866	816
	Lettings	807	1031
Insufficient Info		150	220
	Total	3204	3430

New cases - Quarter 2 2009

104

SALES

117

LETTINGS

New cases - Quarter 3 2009

122

SALES

127

LETTINGS

Sales	Quarter 2 2009	Quarter 3 2009
Cases Closed	162	171
Withdrawn	0	0
Against Complainant	56	59
For Complainant	106	112

Lettings	Quarter 2 2009	Quarter 3 2009
Cases Closed	130	127
Withdrawn	3	0
Against Complainant	51	44
For Complainant	76	83

Case Summaries

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Sales

1. Marketing, Communication and Complaints Handling

The seller raised issues concerning the marketing of the property, as the property was advertised in the local paper with the wrong photograph. I supported this element of this complaint as the agent admitted to this failing. However I made no award as this was corrected by the agent and caused no further aggravation. The Complainants advised that no marketing updates were issued by the agent. I supported this element of the complaint, as the progress notes from the branch file reflected this and the agent also again admitted to this failing. Under Paragraph 2c of the TPO Code of Practice, member agents are required to keep their general marketing strategy under regular review with their client.

The agent did not contact the Complainant with viewer feedback; the Complainant had to contact the agent instead. I supported this element of the complaint, as the progress notes did not show that feedback was issued to the Complainants. The agent failed to adhere to Paragraph 5b of the TPO Code of Practice under which member agents have an obligation to record any feedback from viewings and pass this to the seller within a reasonable time.

The Complainant was not informed of the branch closure and who was due to take over the sale of her property. I was unable to come to a judgement on this element of the complaint, as neither party had supplied any contemporaneous supporting evidence, I was presented with the word of the Complainant against that of the Agent.

The Complainant raised further issues concerning the complaints handling, an acknowledgement letter received from the agent arrived later than the date on the document, the agent was slow in responding to the complaint and the agent did not supply the Complainant with a copy of their complaints procedure. I supported this element of the complaint to the extent that their acknowledgement was sent 18 days later than specified under Paragraph 12d of the TPO Code of Practice and they failed to issue the Complainant a copy of their complaints procedure. I made an award of £345 although I was actually simply upholding the agents goodwill offer.

2. Marketing, Viewings, EPC and Complaints Handling

The sellers raised a complaint concerning the marketing, as there was a “total lack of updates”. I supported this element of the complaint as there had been little communication during the second half of marketing. The Complainants advised there was a “lack of advertising”, according to the Complainants the property was only advertised in the local paper twice, and the agent’s promises to include the property in a local publication were not kept. I did not support this element of the complaint as the property was advertised six times and I took the view that the agent had discretion as to advertising arrangements. The Complainants advised that the agent failed to provide them with an e-mail containing dates the property was advertised, I supported this element of the complaint as the agent themselves admitted that this was never sent. The property was removed from the agent’s website twice. I supported this element of the complaint as the agent again admitted this was the case.

The Complainants also raised issues concerning the viewings, as there was a lack of viewer feedback. I did not support this element of the complaint as the progress notes in the branch file showed feedback was issued for all viewings. The agent lost track of the keys they had to the property and gave misleading statements regarding this failure, I supported this element of the complaint as contrary to Paragraph 5e of the TPO Code of Practice, the agent failed to keep a key log and the agent had not disputed that they gave the Complainants conflicting information regarding their whereabouts.

The Complainants advised that strangers accessed the property without their permission. I supported this element of the complaint to the extent that the Branch Manager appeared to have accessed the property for no apparent reason and without the Complainants’ permission.

The Complainants raised a complaint concerning the EPC; the agent did not give the Complainants a copy of the EPC until 10 weeks after they paid for it. I did not support this element of the complaint as whilst the agent should have provided the Complainants with access to the report once it was completed, this did not prevent the property from being marketed. The

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Complainants also raised issues concerning the complaints handling, the agent failing to acknowledge the Complainants original complaint letter and responses given by the Branch and Divisional Managers were poor. I supported this element of the Complaint to the extent that the agent did not send a written acknowledgement investigating the issues raised until 6 months after the complaint was initially made although the complaint was later handled in accordance with their complaints procedure. I made an award of £500.

3. Deposit

The potential buyers raised a complaint as they were informed by the agent that when they made their offer on the property that they had to pay a deposit of £1,000 purely to show their interest, but which would be refundable if the survey or title was adverse or if they failed to get a mortgage. As they could not obtain the mortgage without providing a 25% deposit they were of the opinion that they failed to obtain a mortgage and they believed the deposit was refundable. They also believed that the survey was adverse as it down-valued the property by £39,950 from the original asking price. The agents advertisement leaflet for the property stated that only £500 of the deposit was non refundable.

According to the agent the property did not have an adverse survey simply because it was down-valued and the seller was willing to accept the lower offer from the Complainants. There was no adverse title and the Complainants did not fail to get a mortgage. For those reasons they were unable to return the deposit to the Complainants. The deposit was paid to secure a reservation of a particular apartment and the seller was in receipt of the deposit.

When a complaint concerning a deposit arises I would expect to see a clear written instruction from the seller that a deposit was being sought and a detailed note of the receipt provided by the agent to the buyer providing details of if, and how, it would be repaid and the terms of forfeit. Best practice is that an agent does not become involved in taking deposits and this is arranged through solicitors, however, when they do it is important that they adhere to Section 8 of the TPO Code of Practice.

On examining the branch file I noted that there were no instructions from the seller regarding any deposit. The only

evidence to suggest that a deposit / reservation fee would be taken from prospective buyers is the leaflet that the Complainants supplied. However, I noted that the agreement signed by the Complainants contained different terms. Paragraph 8a of the TPO Code of Practice places an obligation on any member agent who takes deposits to provide a written receipt and explain the circumstances under which the deposit is refundable.

I recognise that the general status of such deposits is that they are non refundable. I am of the opinion that when such an agreement has been provided it is for the signatory to read before signing and question any terms which they do not understand. This agreement was however ambiguous in that it failed to explain the term 'adverse survey'. I take the view that adverse means unfavourable and therefore, a down-valuation of £39,950 can be regarded as adverse. The agreement also did not explain the approach of when a purchaser fails to get a mortgage.

The deposit agreement was an agreement between two parties, the Complainants and the agent. Nowhere did it state that the agreement was being signed by the agent on behalf of the seller. The agreement may have been made in response to an instruction from the seller with the seller not being party to it, but this was not recorded anywhere. The receipt which was provided to the Complainants did not provide details of where the money was being held and when it may be forfeited.

I believe that the terms of the agreement were too vague and it could be argued that the Complainants did acquire an adverse survey and failed to obtain a mortgage which would allow them to proceed with the purchase at the original offer price or even at the reduced offer price. As the seller was not party to the agreement I take the stance that the agreement was between the Complainants and agent and the deposit was therefore, refundable.

I supported this complaint and made an award of £1,000.

4. Marketing and HIP Fee

The Complainants raised a complaint as they said they were pressured into putting the property on the market, when they only requested a valuation from the agent. The agent advised that the Complainants agreed to market the property by signing the agency and HIP agreements and by later verifying the property particulars.

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Under Paragraph 1d of the TPO Code of Practice, member agents are expected to provide a service consistent with fairness, integrity and best practice. They should also not seek business by methods that are oppressive, involve dishonesty, deceit, misrepresentation or harassment.

Whilst I was not party to the conversations that preceded the signing of the agency agreement and while the Complainants claim that they were pressured into doing so by the agent, they did sign an agency and HIP agreement indicating that they wished to market the property.

As the Complainants clearly consented to marketing the property by signing both agreements, I did not consider that they were pressurised into doing so by the agent, or that the agent had failed in their obligations under Paragraph 1d. If the Complainants were unsure about putting the property on the market, they could have declined to sign the agreements. It is clear that this did not happen. I did not support this element of the complaint.

The Complainants say that while a branch representative stated that they would only need to pay for a HIP on completion of a sale, they were invoiced for a HIP fee upon withdrawing their Property from the market. The agent had advised that a HIP was legally required under the Housing Act 2004 and considered that it was also clear from the HIP agreement that the Complainants agreed to defer payment of the HIP. The HIP agreement also stated that an invoice for the HIP would be raised should the property be withdrawn from the market.

Under Paragraph 3f of the TPO Code of Practice, member agents should ensure that their Terms of Business are written in plain and intelligible language and are required to clearly explain the implications of the terms to their client. Under Paragraph 3h of the TPO Code of the Practice, member agents also have an obligation to ensure that all fees and charges are included in their Terms of Business; they must be fully explained and unambiguously stated in writing. Fees should also clearly state whether VAT is chargeable; and they must be expressed as an actual amount plus VAT.

Whilst I was not party to the conversations that preceded the signing of the HIP agreement and while the Complainants say they thought that they would only have to pay for a HIP if they

successfully sold the Property, they did enter into a contract with the agent whereby they agreed to pay a HIP fee in the event of them withdrawing the property from the market. It is clear that the agent was justified in issuing the Complainants an invoice for the HIP fee as the Complainants terminated the agency agreement. As a result, I did not consider that the agent had failed in their obligations under Paragraph 3f. I did not support this element of the complaint.

Whilst I did not support any of the complaints raised, I noted the agents failure to complete the HIP agreement correctly, they invoiced the Complainants for an amount that was not contractually owed to them. I therefore, made an award of financial compensation for their financial loss as a result of being overcharged for the HIP Fee by £7.50.

Lettings

1. Deposit and Communication

The landlord raised a complaint as the agent had released the deposit without the Complainant's instruction. In coming to a judgement in this complaint I felt the issue was not that the deposit was returned in full to the tenant, but that the Complainant was not consulted during this process. Under Paragraph 1d of the TPO Code of Practice the agent is expected to provide a service consistent with fairness, integrity and best practice. I acknowledged that the agents terms and conditions state that the deposit will be returned to the tenant in 7 working days, but by not allowing the Complainant to be part of this process in the release of the deposit the agent had not acted in accordance with the TPO Code of Practice. I supported this element of the complaint.

The Complainant also raised issues concerning communication, as they were unaware the tenant had give notice. The agent advised they informed the Complainant, however the letter sent from the agent regarding the tenants termination of the tenancy agreement was incorrectly addressed and the Complainant claimed not to have received it. Given the failure to properly address that correspondence I was of the view that the Complainant was not made aware of the tenant vacating the property. I supported this element of the complaint.

Another issue was raised concerning outstanding utility bills at the property. According to the agent's terms and conditions

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it was the landlord's responsibility to ensure all the utility companies have the latest information to settle outstanding bills. I supported an element of this complaint as the agent did not specifically inform the Complainant of her liabilities when the property was empty.

According to the Complainant the agent did not undertake a final inventory. The agent advised that a check-out was undertaken in the presence of the tenant. The agent did undertake a final check-out using the original inventory when the tenant occupied the property and I therefore did not support this complaint.

For the aspects of the complaints I had supported I reinstated an offer of £200 from the agent.

2. Referencing Fee

The tenants raised a complaint concerning the referencing fee. Due to financial difficulties the Complainants decided to look for cheaper rented accommodation. They agreed to rent a property and paid the agent a referencing fee. The agent advised this office that the Complainants would have been given their standard tenancy application procedure notes and terms which state that the referencing fee was non-refundable. A few days later the Complainants existing landlord offered to reduce their rent and they therefore decided not to move after all. The Complainants contacted the agent to inform them and asking them to stop the referencing process. The agent advised them the fee was non-refundable.

The referencing company did not charge for the reference checks they had started but not completed before the agents instructed them to stop. The agent did not claim that they incurred any expenses. The agent did however spend time collating the information needed ahead of preparing the reference application. The agent's view was that the fee which the Complainants paid was not the referencing company fee for doing their checks. It was the agents fee for obtaining the references i.e. only an element of their charge was destined for the referencing company, the rest was for the agent's time.

I could not tell if the Complainants were told that the referencing fee was non-refundable or not, or if they were given the agents tenancy fees explanatory notes because the agent had not

kept any record of this. Paragraph 6f of the TPO Code of Practice requires letting agents to give applicants written explanation of liability for fees if the applicant withdraws, and apart from telling me that this is standard practice, the agent could not prove that the Complainants were given their fee explanatory notes. I would add that, whilst conscious of the provisions of the Data Protection Act, it seems to me that the agent had destroyed their records prematurely given that there was an ongoing complaint and the agent had an obligation as TPO members to keep and produce full records.

On the other hand, the wording of the Complainants' email, telling the agent that they were not proceeding, indicates that they understood that, even if the reference could be stopped in time, they would not be certain of getting their fee back. They asked if it would be "possible" to have a refund, from which I deduce that they understood that the fee was non-refundable but were hopeful that, if they could stop the reference in time, they would not be charged.

I would add that anyone who pays a fee for a service cannot assume that they will recover the fee if they later decide they do not want the service. It is basic contract law, that a refund in such circumstances is not an entitlement. It is a matter for commercial goodwill, and it is therefore always important to ask before paying.

I did not support this complaint and no award was made.

3. Fees Paid

The landlord raised a complaint concerning the gas safety certificate; the Complainant requested a full refund of the cost of the gas safety check. A double payment was taken by the agent for this fee as payment was made by the Complainant and her mother. The agent refunded the fee to the Complainant after they received written confirmation they requested. This issue had therefore been resolved.

The Complainant raised the issue that she did not receive a copy of the inventory. The agent advised that an inventory was taken with the tenants but unfortunately it was misplaced. They attempted on several occasions to compile the inventory again but each time the tenants cancelled the appointment.

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The agent was unable to produce the necessary inventory or check-in report. Under the management agreement and Paragraph 8c of the TPO Code of Practice the agent had an obligation to ensure that an inventory was prepared at the start of the tenancy agreement. I supported this element of the complaint as I did not consider the agent complied with their obligations to the Complainant.

The Complainant advised that there were discrepancies in their rental statements. In coming to a judgement on this complaint I examined all the rental statements but could not find these discrepancies and the Complainant had not advised how she had calculated the same. I did not support this element of the complaint.

The Complainant who lived abroad provided the agent with a copy of the necessary tax exemption application form, the agent lost the form. This matter was not chased up until the Complainant returned to the UK and then had to complete another form. I examined the branch file and found no evidence that persuaded me that the agent lost the form as there was no evidence they ever received it. However I would have expected the agent to chase up the document from the Complainant and query why they had not received the form. I supported an element of this complaint as I felt under Paragraph 1d of the TPO Code of Practice, the agent had an obligation to act in the Complainants best interests, I am not persuaded the agent complied with that obligation.

An award of £200 was made for the aspects of the complaint I supported.

4. Management and Deposit

An early resolution was attempted on this case as the agent had offered a goodwill gesture of £2,000 which was thought to be generous. However the landlords (the complainants) wanted me to undertake a full review on their case.

The complaints were that the property was not managed in accordance with the management agreement and that the deposit was not returned to the landlords. I advised the landlords that their issues relating to the management of the property I was unable to examine as the events all took place prior to when the agent joined The Property Ombudsman scheme.

Regarding the deposit, it would appear that the ownership of the agency changed during 2007 and that the deposit 'disappeared'. I concluded that the new owner had a responsibility to ensure that the deposit was in place. I believed that the goodwill offer made by the agent was to compensate the landlords for not having the deposit when they requested it at the end of the tenancy and for any perceived mistakes made.

I made an award of £1000 which was equal to the deposit plus an additional £100 for aggravation, distress and inconvenience.

Staff List

As at 30 September 2009

Title	Name
Ombudsman	Christopher J Hamer
PA to Ombudsman	Stephanie Spencer
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 Support Manager	Amanda Stiggants
Senior Case Support Officer	Joanne Beatty
Case Support Team	Alan Bowers Roz Butcher Lynn Howlett
Initial Enquiries Manager	Anya Browne
Initial Enquiries Assistant Manager	Kim Hilton
Initial Enquiries Team	Sarah Andrews 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



The Property Ombudsman

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