

The Property Ombudsman

2010

INTERIM REPORT 1



# Interim Report

Interim 1 2010

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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, home information pack providers, and residential leasehold management companies.

The TPO offers an independent service for the resolution of disputes between member agencies and buyers, sellers, landlords, leaseholders, lessees and tenants 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's 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](http://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:

**The Property Ombudsman**  
**Beckett House**  
**4 Bridge Street**  
**Salisbury**  
**Wiltshire**  
**SP1 2LX**

**Telephone:** 01722 333306 (general enquiries)

**Email:** [admin@tpos.co.uk](mailto:admin@tpos.co.uk)  
[membership@tpos.co.uk](mailto:membership@tpos.co.uk)  
[casesupport@tpos.co.uk](mailto:casesupport@tpos.co.uk)

# Introduction



In my first interim report for 2010 I have to announce a sharp increase in the number of new referrals to my office during the period 1 January to 31 March. I can come up with no specific explanation as to why this increase might have occurred and indeed talking to people in the sales and letting agency sector they cannot provide any reason why this should be the case. Certainly there are no identified trends in the types of complaint being brought to my notice.

In my Annual Report for 2009 I forecast that there would be an increase of around 10% in my workload with lettings cases predominating. If the current trend in workload continues throughout the year my office will end up 48% ahead of forecast; and new sales cases will match those for lettings. At this stage I can only monitor the situation which will impact on my resourcing requirements and over the coming months I may be able to identify whether it is more than just a sudden peak.

A comparison of workload for the period 1 January to 31 March of this year against the previous period of 1 October 2009 to 31 December 2009 is shown on page 4 of this report.

## Case Summaries

Some examples of cases that I have been asked to resolve appear on pages 5 to 9.

### **Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681**

Readers of this report may be aware of the recent High Court case between the Office of Fair Trading (OFT) and Foxtons in which the OFT challenged the fairness of certain terms in that firm's letting contracts with consumers. The case was brought under the Unfair Terms in Consumer Contracts Regulations 1999.

The OFT wrote to me to advise of the Court's decision in the case, requesting that I inform all TPO members of the outcome and emphasising the significance of the judgment and the implications for lettings contracts with consumers. The full text of the OFT letter and its associated documents appear on my website at [www.tpos.co.uk/members\\_newsletters.htm](http://www.tpos.co.uk/members_newsletters.htm) but I felt it was important to further highlight the messages from the OFT in this report particularly with regard to the application of the ruling in the Foxtons case to other letting agents.

In summary the Court considered renewal commissions, third party renewal commissions and sales commissions where the property was sold to a sitting tenant.

The Judge in the case took the view that consumers approached letting agents to find a tenant and that the 'core' bargain was that a tenant was found in exchange for a commission fee. He therefore found that third party renewal commission and sales commission terms operated to the significant detriment of consumers and were therefore unfair because they potentially required payment to the agent of a large sum of money (and an on-going liability in the case of third party renewals) where the agent provided no services in exchange. The Judge expressed 'astonishment' that a contract concerned with the consequences and effects of renting a property contained such terms.

With regard to renewal commissions where the agent is conducting that renewal the effect of the judgment is that such a term is not necessarily unfair but that it must be actively flagged to the consumer. As Ombudsman I have been asked to consider several cases where the renewal commission has been at issue. These pre-dated the judgment that has now been handed down by the Courts and I will now reflect that in any future cases referred to me. Previously I would not have rewritten a contract but might have awarded compensation if I felt the term had not been drawn clearly to the clients attention. The judgment will bring no change in my approach. I still feel it appropriate, however, that where a renewal of a tenancy is being discussed, best practice would dictate that the client is reminded of the liability he will face to pay such a commission fee.

The OFT has made it clear that, in its view, no letting agent should use sales commission or third party renewal terms in their letting or management services contracts and the OFT has further advised that any agent using these unfair terms may become subject to legal action to ensure compliance with the law. Any terms covering renewal commission where the agent is still instructed must be prominent, drafted in plain and intelligible language and specifically drawn to the client's attention prior to signing the contract.

I hope this explanation proves helpful for agents when transacting business.

**Christopher J Hamer  
Ombudsman**

# General Statistics

Quarter 4 2009 / Quarter 1 2010

Enquiries		Quarter 4 2009	Quarter 1 2010
<b>General</b>		387	393
<b>Non-member</b>	Sales	122	148
	Lettings	428	426
	Other	43	n/a
<b>Outside Terms of Ref</b>	Sales	38	104
	Lettings	42	197
	Other	56	n/a
<b>Within Terms of Ref</b>	Sales	690	832
	Lettings	943	998
<b>Insufficient Info</b>		216	220
<b>Total</b>		<b>2965</b>	<b>3318</b>

## New cases - Quarter 4 2009

# 128

SALES

# 102

LETTINGS

## New cases - Quarter 1 2010

# 183

SALES

# 171

LETTINGS

Sales	Quarter 4 2009	Quarter 1 2010
Cases Closed	98	145
Withdrawn	0	1
Against Complainant	37	48
For Complainant	61	96

Lettings	Quarter 4 2009	Quarter 1 2010
Cases Closed	137	120
Withdrawn	0	0
Against Complainant	40	36
For Complainant	97	84

# Case Summaries

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## SALES

### Case A: Fixed Fees

The Complainant was told the fee would be 2%. He signed the Agency Agreement without reading it. The fee was in fact a fixed sum (which equated to 2% of the asking price), he felt he had been misled as he assumed the fee was 2% of the eventual sale price. I agreed that the Agency Agreement was clear and that the Complainant must bear responsibility for not reading it. However the TPO Code of Practice requires agents to fully explain their fee before a client signs. Whilst, in this case, the Complainant had not been misinformed, nevertheless the failure to mention a fixed fee created the basis for misunderstanding, as most clients are used to estate agents charging a percentage of the sale price, not the asking price. I awarded £100.

### Case B: Fixed Fees

The Complainants were successful sellers who complained after receiving the commission fee invoice that they had believed the commission fee was going to be 1.5% and not a fixed fee. They believed the selling agent had deliberately misrepresented the terms of the Agency Agreement and the amount of the commission fee, and took advantage of their naivety. They signed the contract in good faith without reading it as they believed what had been verbally agreed with the agent had been inserted into the agreement. They are of the opinion that the contract was unfair and unreasonable and as such they should be refunded the difference between the fixed fee and 1.5%.

I concluded that the Agency Agreement did not say the word 'fixed' and whilst the agent may have failed to send an instruction letter confirming their fees, which would have prevented the complaint the agreement also never mentioned the word 'percentage'. As such there was no ambiguity. The commission fee quoted in the Agency Agreement was not 1.5% and therefore, it was difficult to understand why the Complainants, had failed to see the discrepancy in the agreement if they believed they would be paying only 1.5% of the selling price. The Complainants should have read the terms of the contract before signing and had they done so they could have challenged any of them. No award was made.

### Case C: Introduction

The Complainants were sellers who had dis-instructed their estate agent after the buyers had viewed the property. The Complainants went onto to sell the property privately to the buyers and raised a complaint against the agent, through their solicitors, upon receiving an invoice for the commission fee. The Complainants complained that the Agency Agreement was not valid and the agent had no right to demand payment or threaten Court proceedings when they were neither the 'effective introducer' nor the 'effective cause' of the sale. They also raised complaints regarding the Agency Agreement having no minimum term, no provision for a fee if the sale price was less than a certain figure and the fact that no copy of the Terms of Business were sent to them.

I noted in the review that one of the Complainant's was an estate agent and that all correspondence had been dealt with between solicitors. Legal arguments were being raised by both parties and I outlined at the commencement of my review that I did not adopt a legalistic approach; the complaint was considered in terms of the agent's obligations to the Complainants under the Agency Agreement and under the TPO Code of Practice.

I concluded that the agent was entitled to a commission fee under the terms of the Sole Selling Rights Agreement. I supported the complaint that the agreement had no minimum period and that the agent had failed to confirm termination in writing in line with Paragraph 3j, 3l and 3n of the TPO Code of Practice, but this only warranted a modest award as the Complainants' were aware of the implications of selling to the buyers. I could not determine whether the Complainants had received a copy of the Terms of Business, but in accordance with the Agency Agreement the agent was entitled to payment of their fee. For the supported elements of the complaint an award of £100 was made.

### Case D: Entitlement to a Commission Fee

The Complainant was a firm of solicitors, selling a property in their capacity as executor of the deceased. The agent had not been instructed in connection with the sale. However, the agent had contacted a family member of the deceased and had presented a copy of their terms of business to the Complainant, in the anticipation that they would be instructed.

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The Complainant had chosen to instruct another agent, as they were quite properly entitled to do, but had then agreed a sale privately. The agent alleged bias against the Complainant and, following completion of the sale, submitted a commission invoice, on the basis that they should have been instructed and, if they had been, would have been entitled to such a fee. The Complainant sought a ruling from this office that there was no fee entitlement.

The agent's claim was considered to be totally without foundation. All member agents, on joining this scheme, give an undertaking to comply with the TPO Code of Practice, and in particular to act in accordance with best practice. Although not harassment, it was deemed inappropriate to seek instructions in such a manner. There was no contractual agreement between the Complainant, as seller, and the agent and no basis whatsoever for the agent to claim a fee. A direction was made to withdraw the commission fee claim.

## Case E: Marketing/Viewings

The Complainant, who was selling a property he had completely refurbished, complained that the agent did not provide him with a draft copy of sales particulars and then later failed to make his requested amendments. He also complained that the agent did not conduct all the viewings as had been agreed, did not notify him in advance when viewings were taking place, failed to provide viewers with all the information about the considerable improvements he had made to the property and failed to provide regular updates and feedback on viewings. A complaint was also made about the conduct of staff. I supported the complaint concerning the sales particulars insofar as the agent failed to provide the Complainant with a draft copy and carry out the amendments he had requested. I was of the opinion that if the seller wanted viewers to be accompanied they should have been, wherever possible, but that it is not always possible for an agent to guarantee this due to staff not being available at short notice or outside normal office hours. It was then for the Complainant to decide whether or not to accept the viewing and to conduct it himself, which he did. I did not support this complaint. I determined that there were occasions when the Complainant was not notified of viewings in advance as he had requested and I supported this complaint. I was of the

opinion that feedback on viewings was below an acceptable level and supported this complaint. I made an award of £250 for those complaints that I supported.

## Case F: Marketing/Complaints Handling

The Complainants (potential buyers) alleged that the agent continued to market the property after the sellers accepted their offer without advising them. The agent's branch file indicated that the property was displayed as sold subject to contract (SSTC) after the Complainants' offer was accepted. I commented that it is common practice for agents to display properties with the label SSTC in their offices and on the website once an offer had been accepted. It was questionable whether this could reasonably be regarded as active marketing. That said, the agent was obliged to advise their client (the sellers) of any interest shown in the property and take their instruction as to how they wish to proceed. In this case, it appeared that the sellers were happy to allow potential buyers to view the property when it was SSTC. In my view, a viewing is actively marketing a property as this can lead to an offer being made. Therefore, the agent should have informed the Complainants, in writing, that the sellers had agreed to a viewing and had agreed to consider another offer. This would have put them on notice that there was another interested party. That said, as the Complainants' survey took place the day after the sellers accepted the viewing, I concluded that even if the agent had informed the Complainants in writing that the sellers had decided to re-market the property the earliest they would have known was the day the survey took place, therefore it was unlikely that they would have avoided the cost of a survey. The Complainants also complained about the manner in which the agent dealt with the complaint. In this case, the agent did not request the Complainants to put their complaint in writing until four weeks after they raised their initial complaint. During this period of time the agent promised to investigate the complaint verbally and in writing but did not. The Complainants persevered and after a meeting between the two parties the agent handled the complaint effectively. In my view, the Complainants suffered some inconvenience and aggravation in the processing of their complaint initially and therefore I supported an element of this complaint. I made an award of £250.



## LETTINGS

### Case A: Holding Deposit

The Complainant was in the process of renting the property and had paid a holding deposit of £350. He raised a complaint against the letting agent after he was informed he had failed the referencing checks and would need to put forward a guarantor to enable the let to go ahead. As he did not wish to bring in a guarantor, he was refused the let and his request for the holding deposit to be refunded was rejected by the agent, although he has said the agent offered him £175 as a gesture of goodwill, which he believed was an ‘absurd offer’.

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**“The Complainant made the decision to not provide a guarantor, one he was free to make, but which consequently caused him to forfeit the holding deposit”**

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The Complainant was only sent all the information with regards to the terms of the holding deposit the day after he had paid the same, however, despite acknowledging that this is a breach of Paragraph 6f and 1d of the TPO Code of Practice, it is clear that the Complainant did not challenge the terms. Delays with the application were encountered when the referencing company needed more information from the Complainant and then subsequently provided their report confirming that he had failed the checks due to failing to evidence his income. Due to this failure the agent confirmed that a guarantor would be required, which is standard practice in such circumstances. The Complainant made the decision to not provide a guarantor, one he was free to make, but which consequently caused him to forfeit the holding deposit. The agent had not disputed that they made a goodwill gesture of £175 to the Complainant, although this was not recorded in the branch file, therefore, I concluded that this was a suitable award for their failure to provide the terms and conditions of the holding deposit prior to them taking the money.

### Case B: Holding Deposit/Complaints Handling

The Complainant was a prospective tenant who had paid a holding deposit of £250 to secure the property. He had also provided the letting agent the details for his references. Twelve days later the Complainant discovered that due to an alleged computer error the references had not been logged

by the letting agent, but that they were to log them that day to enable him to continue to move into the property on the due date, two weeks hence. Five days before the Complainant was due to move into the property he discovered that the property had been rented to someone else, through another letting agent. The Complainant requested his holding deposit be returned by the agent, who did return the monies, however it was over two months later and only after the intervention of my office.

I concluded that the agent had failed to deal with the holding deposit in the correct manner, but the reasons for the let collapsing was, in all probability, down to the landlord and not the agent. That said, I also concluded that the agent had failed to return the holding deposit to the Complainant in a timely manner.

The agent had also failed to deal with the Complainant's complaint. They had failed to respond to the Complainant's letters, ignored his requests for a response and had failed to assist my office by failing to provide their company file when requested. For the supported complaints an award of £150 was made.

### Case C: Delays caused by Agent

This was a straightforward letting which did not proceed due to the prospective tenants finding an alternative property to rent. The Complainants (the landlords) complained that the member agent's actions had caused them financial loss. They questioned the agent's referencing of the prospective tenants, their advice concerning whether the Tenancy Agreement could be backdated, why they had not taken a holding deposit, their marketing and their failure to provide their complaint procedure when requested. My review noted that the prospective tenants were homeowners whose insurance company was to pay for temporary accommodation whilst work was being carried out to their home following flood damage, but that a delay in the insurance company providing the member agent with the required cleared funds, coupled with the ill health of one of the prospective tenants, delayed the potential start of the tenancy. I, therefore, did not agree that the Complainants had suffered financial loss as a result of the delayed start of the proposed tenancy. I did not support

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the complaints concerning the references undertaken by the member agent, as it was clear they used a recognised referencing service provider. I did not support the complaint that the member agent should have charged the prospective tenants a holding deposit, as it was clear that their Terms of Business and marketing material did not include such a service. I also did not support the complaint concerning the agent's marketing. I did, however, support the complaint that the member agent delayed providing the Complainants with their complaint procedure, but was not persuaded that any inconvenience had been caused to them (as this did not delay them in making a complaint) and I concluded that the member agent's apology was an appropriate resolution to the matter.

## Case D: Referencing/Holding Deposit

This was a straightforward transaction between the Complainants (the prospective tenants) and the member agent, which became contentious following the landlord rejecting the Complainants' initial references and requesting that guarantors were provided, which resulted in the transaction breaking down. The member agent sought to retain the Complainants' holding deposit on the basis that they had explained the terms and conditions of that payment to them during a telephone conversation. Whilst their progress notes did record that these terms and conditions were discussed, the Complainants contested the agent's account of the conversation. I was, therefore, unable to reach a judgement on precisely what was said during that conversation. However, my review found that the agent failed to adhere to Paragraph 6f of the TPO Code of Practice as they did not provide the Complainants with the written terms and conditions of the holding deposit, either in the form of a signed agreement or by issuing a receipt clearly stating that the payment was non-refundable. Furthermore, the Complainants had not signed the agent's contract which allowed them to retain the holding deposit if they subsequently decided to withdraw from the transaction. However, I considered that the Complainants shared a degree of responsibility for not establishing the terms and conditions of the holding deposit at the point this was paid. I, therefore, made an award of £300.

## Case E: Inspection Visits/Fees

This was a landlord complaint with issues raised in relation to inspections. The Complainant claimed that the agent failed to report, act or give appropriate advice regarding the inspections that took place, leaving the Complainant having to pay thousands of pounds to rectify the damage done. I supported this complaint to the extent that the agent appeared not to have undertaken an initial check-in inspection, or reported the issue of cleanliness to the Complainant or the tenant at the time. Whilst this issue was clearly caused by the tenant, the agent's failure to disclose details of the inspections until after the tenant left and the Complainant wrote to complain would have aggravated the matter. I also made the point that as the Complainant had been granted the tenant's deposit from the relevant scheme, he had been compensated, in some measure, for the tenant's actions.

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**“Whilst this issue was clearly caused by the tenant, the agent's failure to disclose details of the inspections until after the tenant left and the Complainant wrote to complain would have aggravated the matter”**

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The Complainant said that the agent took one month's management fees from the security deposit which was owed to him. I supported this as the agent had made a deduction for fees at the end of the tenancy. When the Management Agreement clearly stated that they were only due a fee provided that the rent is paid. As no rent had been paid, the agent had no justifiable claim to this fee.

The Complainant claimed that the agent had acted in an unprofessional manner, frequently ignoring calls and making spelling mistakes in their correspondence. I was unable to support this complaint, as the Complainant had supplied no specific examples or evidence to demonstrate that the agent failed to return his telephone calls. In respect of the agent's written correspondence, I took the view that the quality of their writing would not have adversely affected the Complainant. I made an award of £200, which included an award for financial loss of £29.50.



### Case F: Administration Fees

The Complainants were landlords who had paid the letting agent a fee to prepare the Tenancy Agreement on their behalf. After the tenancy had commenced they discovered that the letting agent had also charged the tenant the same amount (£170 + VAT) for the preparation of the Tenancy Agreement. The agent claimed that their terms were clear in both the Management and Tenancy Agreements and thus they had not done anything illegal. The Complainants however, believed that the money taken from the tenants should be payable to them and not the agent, as the agent was not a party to the Tenancy Agreement, and had acted in a misleading and deceptive manner.

I concluded that it was fair and reasonable for a letting agent to charge both the tenant and the landlords administration fees, and it is common for both parties to be charged for the same thing. However, it is not reasonable for a clause to be set out in the Tenancy Agreement, where the agent becomes a beneficiary of monies paid by the tenant under the terms of the agreement, when the agent is not party to that agreement. A Tenancy Agreement is a contract between the tenant and the landlord. Administration fees paid by a tenant to an agent should be set out in a separate document.

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**“I concluded that it was fair and reasonable for a letting agent to charge both the tenant and the landlords administration fees”**

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I did not believe the agent should pay the Complainants the amount paid by the tenant as I formed the opinion that the tenant was happy to pay the same to the agent at the start of the tenancy. For the confusion the agent's caused over the fees, an award of £50 was made.

### Case G: Failing to act on Clients Instructions

The Complainants had instructed the agent in connection with the let of the property. They were aware that the agent had sourced a tenant and referencing had been undertaken. However, the Complainants decided not to proceed and e-mailed the agent to advise them to put matters on hold. The next day they withdrew but the agent, in response to such an e-mail, merely advised that the tenant had 'probably' already signed the agreement and hence they would be bound. At no point would the agent confirm what day the tenant had signed but the tenant advised that it was the day after the agent had received the dis-instruction e-mail. I considered that, at that point, the Complainants had withdrawn, the agent had no authority to sign and they were fully aware that the Complainants had decided not to continue. The Complainants were subsequently bound by a two year Tenancy Agreement and agreed to proceed, on the understanding that the agent would reimburse them almost £3,000 in fees. The agent had indicated his agreement to this, but had failed to refund the monies to the Complainants (such fees having been deducted up front from rent received). I supported the complaint and made an award in respect of such fees that should have been reimbursed. Two further complaints concerning the administration of the tenant's deposit monies and poor complaints handling were also supported. An award was made of £3,391.20.

# Staff List

As at 31 March 2010

<b>Title</b>	<b>Name</b>
<b>Ombudsman</b>	Christopher J Hamer
<b>PA to Ombudsman</b>	Stephanie Spencer
<b>Finance Manager</b> <b>Finance Assistants</b>	Sarah Davies Anne Hall Louisa Dawson
<b>Support Services Manager</b>	Sue Hurst
<b>Senior Case Officer (Team 1)</b> <b>Team 1 Case Officers</b>	Colin Dixon Josephine Bailey Alan Bowers Peter Habert
<b>Senior Case Officer (Team 2)</b> <b>Team 2 Case Officers</b>	Jane Reed Christine Rowland-Jones Matthew Tucker
<b>Senior Case Officer (Legal)</b>	Kate Chandler
<b>Senior Case Officer</b>	Maria Evans
<b>Case Officer</b>	Mike Evans
<b>Case Support Manager</b> <b>Case Support Assistant Manager</b> <b>Case Support Team</b>	Amanda Stiggants Joanne Beatty Roz Butcher Jacqueline Gapper Lynn Howlett Natasha Russell



## Title

**Initial Enquiries Manager**  
**Initial Enquiries Assistant Manager**  
**Initial Enquiries Team**

## Name

Anya Browne  
Kim Hilton  
Sarah Andrews  
Martin Noke  
Anna de Ridder  
Susan Russell  
Kimberley Saunders  
Annemarie Simpson-Wild  
Kirstie Williams

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**Membership Manager**  
**Membership Assistant Manager**  
**Senior Membership Administrator**  
**Membership Team**

Sarah Sartin  
Emma Harris  
Nicole Lake  
Nicola Butcher  
Jay Johnson  
Ashley Rossitter



**The Property Ombudsman**

Beckett House, 4 Bridge Street, Salisbury, Wiltshire SP1 2LX

Tel: 01722 333 306 Fax: 01722 332 296 Website: [www.tpos.co.uk](http://www.tpos.co.uk) E-mail: [admin@tpos.co.uk](mailto:admin@tpos.co.uk)