

Terms of Reference for The Property Ombudsman Scheme

INTRODUCTION

1. The Property Ombudsman (TPO) scheme is designed to reach a resolution of unresolved disputes in full and final settlement. It provides consumers (who may be actual or potential buyers, sellers, landlords, leaseholders, lessees and tenants of property or have been otherwise involved by the actions of an agent) with free and independent redress of complaints relating to acts or omissions of Member or Registered Agents in connection with the sale and/or purchase and/or letting and/or management of property in the United Kingdom, Channel Islands and the Isle of Man. The scheme will also provide that redress to small businesses and charities as defined in Part 6.
2. These Terms of Reference can also be read as applying to consumer related disputes for any specific aspect of the Ombudsman's jurisdiction as agreed from time to time.
3. The TPO scheme is set up as a limited company, The Property Ombudsman Limited, and has two parts to its structure:
 - a. TPO Board
 - b. The Office of the Ombudsman
4. Complaints start and finish with the Ombudsman. In reaching Decisions, the Ombudsman is impartial and independent of the TPO Board and all outside influences.
5. These Terms of Reference have been principally framed to guide the Ombudsman in dealing with complaints and coming to independent Decisions. They allow the Ombudsman to use their discretion within the general guidelines given.

PART 1 – ACCOUNTABILITY

6. The Ombudsman is accountable to the TPO Board. This ensures the Ombudsman's independence and impartiality.
7. It is from the Board that they receive, or ask for, any general guidance.
8. Their relationship with the Board, and the role of the Board, is explained further at Part 5.

PART 2 - PRINCIPAL DUTIES AND POWERS

Duties

9. The Ombudsman's principal duties are:
 - a. to receive unresolved complaints by, or on behalf of, any small business, charity, trust or consumer (who may be an actual or potential buyer, seller, landlord, leaseholder,

lessee or tenant of property or who has otherwise become involved) in relation to the carrying out of relevant estate and/or letting agency and/or property management work by any Member or Registered Agent; and to investigate such complaints and issue a Decision within the powers of the Ombudsman in accordance with Part 3;

- b. to actively assist in and contribute to raising standards by highlighting best practice and promoting it, and by identifying bad practice and helping to eliminate it as in Part 4.

Powers

10. The Ombudsman's principal powers are:
 - a. to direct that a Member or Registered Agent takes steps to improve practice and/or to desist from a continuance of existing practice where appropriate, including the issuing of a formal apology to the Complainant,
 - b. to direct that a Member or Registered Agent pays the Complainant a financial Award, in full and final settlement of a complaint, not exceeding £25,000 per complaint by way of compensation for actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act(s) or omission(s) which was/were the subject matter of the complaint.

PART 3 – DEALING WITH COMPLAINTS

SCOPE OF INVESTIGATIONS

Grounds of complaint

11. The grounds of any complaint must be that in relation to the Complainant, the act or omission by the Member or Registered Agent complained of constitutes:
 - a. a breach of the Member or Registered Agent's obligations under the law;
 - b. a breach of the Member or Registered Agent'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 actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act(s) or omission(s) which was/were the subject matter of the complaint.

General conditions for acceptance of a complaint

- 12.** The Ombudsman shall only consider, or continue to consider, a complaint if they are satisfied that:
- a.** the complaint is made against a firm registered with TPO for the provision of redress to a Complainant for the relevant period;
 - b.** the complaint is made to them by or on behalf of the living persons or the small commercial enterprise or charity collectively who/which are or may be entitled to make a complaint;
 - c.** the Internal Complaints Procedure of the Member or Registered Agent has been exhausted, but the Complainant remains dissatisfied with any observations made, or conditions of full and final settlement offered by such Member or Registered Agent; or more than eight weeks have elapsed since the Complainant first made the complaint to the named Member or Registered Agent in writing. If the Member or Registered Agent 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;
 - d.** the complaint is made to the Ombudsman not later than twelve months after the date of the Member or Registered Agent's final viewpoint letter;
 - e.** the act or omission giving rise to the complaint first occurred or could reasonably have come to the notice of the Complainant not more than twelve months before the Complainant first made the complaint in writing to the Member or Registered Agent;
 - f.** the act or omission of a Member or Registered Agent giving rise to the complaint first occurred after the date on which such firm became subject to the Ombudsman's jurisdiction;
 - g.** the subject matter of the complaint was not contained in a complaint form, made by or on behalf of, the same Complainant previously considered by the Ombudsman. However, the Ombudsman may reconsider complaints previously considered if relevant new evidence is available and no Award has been accepted and paid in full and final settlement;
 - h.** the Ombudsman may, in the instances set out in Paragraph 13 and 14 below, not investigate a complaint or may discontinue an investigation. Notwithstanding those instances, they may still consider any complaint put to them provided that:
 - there is no other relevant independent body for the conciliation, arbitration or adjudication of complaints in relation to the matter; and
 - the Ombudsman feels that it is in their competence to do so; and
 - both the Complainant and the Member or Registered Agent so agree;
 - where the amount claimed by the Complainant exceeds the monetary limit defined in 10b above the Ombudsman will advise the Complainant of that limit to their jurisdiction and provide the option of either discontinuing the investigation or proceeding by agreement to restrict the claim to the award limit.

General exclusions

- 13.** The Ombudsman shall not investigate a complaint (or any part of a complaint), or shall discontinue the investigation of a complaint (or any part), if:
- a.** it appears the Complainant is seeking a legal decision or sanction that can only be obtained in the Courts and/or an adjudication of potentially criminal activity or claims of negligence;
 - b.** at any time that the Ombudsman finds out the specifics of the complaint (or part of the complaint) is being (within a 3 month timescale) or has been considered by a Court, or under another independent complaints, conciliation or arbitration procedure, they will discontinue their investigation into those matters. 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 consideration of the complaint. The Ombudsman may, at their discretion, determine that it is not proportionate to consider, or resume consideration of, the remaining matters.
- 14.** The Ombudsman may not investigate a complaint (or any part of a complaint), or may discontinue the investigation of a complaint (or any part), if:
- a.** the complaint does not have reasonable chance of success or the Complainant has not suffered (and is unlikely to suffer) financial loss or other detriment that is likely to result in an award;
 - b.** the Member or Registered Agent has already offered fair and reasonable redress in relation to the issues complained about by the Complainant and the offer remains open for acceptance;
 - c.** the Complainant is acting unreasonably, including:
 - failing to provide information requested;
 - failing to comply with deadlines set;
 - is abusive;
 - has clearly fabricated evidence;
 - the Ombudsman considers the complaint to be frivolous or vexatious; or
 - d.** there are other compelling reasons why it is inappropriate for the issue to be dealt with by The Property Ombudsman.

GENERAL PROCEDURE

- 15.** The Ombudsman shall first decide whether or not a complaint falls within their Terms of Reference. In determining this, they shall take into account the guidelines in Paragraphs 13 -14 above and consider any Representations from the Complainant and the Member or Registered Agent.
- 16.** The Ombudsman may give advice to a complainant on the procedure for making a complaint to them 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 them to be more appropriate for the investigation of any complaint or part thereof. They shall not advise individuals on the selection of an agent or on the services that they offer, but they can advise the Complainant as to which Member or Registered Agents are subject to the Ombudsman's jurisdiction and their registration status.

Consideration of a Complaint

- 17.** The Ombudsman must advise the parties within three weeks of the date the complete complaints file was prepared if they are intending to decline to take the matter forward. In such cases they must explain their reasons in writing.
- 18.** Subject to the other provisions of these Terms of Reference, the Ombudsman shall, at their own discretion, decide the procedure and timescales to be adopted in considering complaints, provided that no lawful rights are removed from the Complainant, Member or Registered Agent. Such consideration may include conciliation, mediation or a case review. This discretion includes the delegation of making decisions on a complaint as approved by the Board in the TPO Scheme of Delegation.
- 19.** In their consideration, the Ombudsman shall act impartially and fairly in all circumstances and must give reasons for the Decision in writing.

Confidentiality

- 20.** Following the receipt of any complaint, the Ombudsman shall promptly:
 - a.** require the Complainant to give written consent to give up their right to any duty of confidence owed to the Complainant by the Member or Registered Agent in terms which permit the disclosure by the Member or Registered Agent to the Ombudsman of information and documents requested by the Ombudsman;
 - b.** send such written notice of consent to the Member or Registered Agent.
- 21.** The Ombudsman may use any information freely provided to them by a complainant or a Member or Registered Agent in their consideration of a complaint provided it is for the express purpose of dealing with that complaint.
- 22.** The Ombudsman may refuse to disclose information to either the Complainant or the Member or Registered Agent if:
 - a.** in their reasonable opinion, it is not relevant to the consideration of the complaint;
 - b.** in their reasonable opinion and in all the circumstances of the complaint, it is inappropriate, or unlawful;
 - c.** it concerns issues of national security or the personal security of the Complainant, or Member or Registered Agent or third party;
 - d.** it is protected by legal or professional privilege (and such privilege has not been waived);provided that the Ombudsman shall always consider any specific requests for disclosure received from either party.
- 23.** The Ombudsman will act in accordance with Data Protection legislation and shall take all reasonable steps to ensure that they 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

- 24.** For the purpose of the investigation into a complaint, the Ombudsman may require the Complainant or Member or Registered Agent to provide to them:
 - 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.

- 25.** The Ombudsman will be entitled to proceed with their consideration of the complaint and to draw their own conclusions if, in their opinion, such requested information is not provided within a reasonable timescale previously notified to the relevant party.
- 26.** Neither party shall be required to disclose documents to the Ombudsman which they are satisfied are protected by legal or professional privilege (where such privilege has not been waived by the Complainant or the Member or Registered Agent, as appropriate).
- 27.** The Ombudsman may also request information from third parties if they believe it may be relevant to the investigation.
- 28.** The Ombudsman shall not be bound by any legal rule of evidence. They are not permitted to take evidence on oath or cross-examine witnesses. They shall reach their Decision based on the evidence as they see it; the guidelines given in Paragraph 29 below; and on what appears to them to be fair and reasonable under the circumstances.

Guidelines

- 29.** In making any Decisions under these Terms of Reference and in determining what is fair and reasonable, the Ombudsman shall have regard to:
 - a.** the law;
 - b.** any relevant Code of Practice and any internal rules or procedures or rules, procedures or statements of practice issued by a trade association of the named Member or Registered Agent;
 - c.** the provisions of any contract binding the Member or Registered Agent and the Complainant;
 - d.** any other matter the Ombudsman considers relevant to the act or omission by the Member or Registered Agent and which is the subject matter of the complaint.

Changes to General Procedure

- 30.** The Ombudsman shall operate in accordance with these Terms of Reference and shall consult and obtain the approval of the Board in respect of any proposed changes to the Terms of Reference for making a complaint to them.

DECISIONS AND SETTLEMENTS

Proposed Decision

- 31.** Having come to a proposed decision on the complaint received, the Ombudsman will send a case review containing the proposed decision to both parties. Each party will have 14 days in which to accept or represent against the proposed decision, following which either:
 - (i)** the proposed decision will be confirmed as the Final Decision; or
 - (ii)** in the event that a representation has been received to show that there has been a significant error in fact or that significant new evidence has been provided (which was not previously available) which is likely to result in a change

to the proposed decision, it will be necessary to allow the other party the opportunity to comment on the representation (within 14 days) and such comments will be taken into account before issuing a Final Decision to both parties at the same time.

Representations

- 32.** A Representation 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 (not previously available) is produced that will have a material effect on the Decision.
- 33.** The Ombudsman can decline to consider a Representation if they consider it falls within any of the categories defined in Paragraphs 13 and 14 above or is, after due consideration, a reiteration of the original complaint.

Oral Hearings

- 34.** Any request for an oral hearing must be considered by the Ombudsman 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

- 35.** Having considered any Representations, the Ombudsman shall come to a Final Decision, in which (in line with their powers at Paragraph 10) they may direct:
- a. that the Member or Registered Agent takes, or desists from taking, such steps as they may specify including the issuing of a formal apology to the Complainant;
 - b. and/or that the named Member or Registered Agent 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.
- 36.** 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. specify any other direction that the Ombudsman has made;
 - d. not be subject to further Representation;
 - e. not be subject to appeal (as in Paragraph 4).
- 37.** The Ombudsman may at their discretion employ a conciliation, mediation or other informal resolution process to determine matters. Any settlement agreed by both parties at the end of that process will have the status of a Final Decision and the amount will have the status of the Award in such decision. The Member or Registered Agent is therefore then under an obligation to conform to any direction and/or award that the Ombudsman may make about implementing that settlement in accordance with Paragraphs 10a and 10b and within the timescales set out in Paragraph 43.

- 38.** Although such decisions are not subject to Appeal or further Representation this does not preclude the Complainant or Member or Registered Agent making a complaint about the Ombudsman's service processes and procedures, which will then be dealt with in accordance with the TPO complaints handling procedure.

Awards

- 39.** The Awards made by the Ombudsman are compensatory and not punitive. They are to compensate a Complainant for any actual, proven financial losses and/or for undue and avoidable aggravation, distress and/or inconvenience that have been occasioned by the act or omission of the Member or Registered Agent.
- 40.** Any Award shall be for the payment by the named Member or Registered Agent to the Complainant of a sum not exceeding £25,000 per complaint.
- 41.** The Decision shall state that if, within 14 days after its issue (and a further 14 days if there has been a Representation), 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 or Registered Agent.
- 42.** If the Complainant fails to accept the Decision within 14 days of receipt thereof (and a further 14 days if there has been a Representation), the Decision and any award therein shall lapse.
- 43.** If the Complainant accepts the Decision in writing in full and final settlement of the subject matter of the complaint within 14 days (and a further 14 days if there has been a Representation), the Ombudsman shall then notify the Member or Registered Agent of that fact within 5 days of the Ombudsman's receipt of the Complainant's acceptance. The Member or Registered Agent 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 or Registered Agent, within 14 days of the Complainant making such payment.

Full and Final Settlement

- 44.** Any Award made and accepted is in full and final settlement of all the complaints made against the Member or Registered Agent upon which the Ombudsman has made a Final Decision.
- 45.** The Ombudsman must inform the Complainant that acceptance of an Award and/or a Decision might compromise their ability to pursue that complaint through the Courts. By acceptance of the Ombudsman's Award, the Complainant is agreeing to the full and final settlement of that dispute. However, if they reject the Ombudsman's Final Decision, a Complainant can pursue their case through the Courts, as with any complaint on which the Ombudsman has been unable or has declined to make a Final Decision.

Closure and Discontinuance

- 46.** On any settlement, withdrawal or lapse of a complaint, the Ombudsman shall discontinue the consideration of that complaint.

47. Once the Ombudsman has made a Final Decision and an Award has been accepted and paid in full and final settlement, the case is closed. The case cannot be reopened by either party, even with the production of new evidence.
48. The Ombudsman shall not be bound or in any way limited by any previous Decision made by them or by any predecessor.

PART 4 – IMPROVEMENTS IN STANDARDS

49. The Ombudsman can put before the Board proposals for the improvement of practice within the industry.
50. Subject to guidance (as updated from time to time) from the Board as to the categories of cases that do not require routine reporting, the Ombudsman is to report to the Board when there appears to them to have been any single flagrant breach and/or any persistent breaches of the Code of Practice (where that applies) by any Member. The Board's powers to deal with such disciplinary matters are set out in the Articles of Association of the Company and the Terms of Reference of the Board's Compliance Committee.
51. 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 NTSELAT 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

52. The Ombudsman has an obligation to publicise the scheme and to explain to the media, general public, buyers, sellers, landlords, leaseholders, lessees and tenants of property, estate agents, residential leasehold managing agents and letting agents, and other agents within their jurisdiction of the scheme's processes and procedures.

TPO Office

53. The Ombudsman shall be responsible for the day-to-day administration and conduct of the business of the TPO Office and its staff. They shall have power to incur expenditure on behalf of the Company in accordance with the current financial budget approved by the Board.
54. Subject to the general oversight of the Chair of the Board 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.
55. The Ombudsman shall not exercise any power which the Articles of Association of the Company expressly assigned to the Board or any other person.

Board Meetings

56. The Ombudsman shall endeavour to attend each meeting of the Board and put before it such business that they deem 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 Board from meeting in the absence of the Ombudsman.

57. Except in pursuance of Paragraph 49 and 50, or as required by any competent authority or appropriately mandated body, 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) any information concerning a complaint considered by them from which it would or might be possible to identify the Complainant or any Member or Registered Agent named in the complaint, or any other information of a confidential nature which has been obtained in the course of their duties.
58. Paragraph 56 shall not prohibit the disclosure of any information to the Complainant and any Member or Registered Agent or to the Chair of the Board or any Member of the Board authorised by the Board; 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 their duties to the Company.

Role of the Board

59. The TPO Board has specific responsibilities under the Companies Act and the Articles of Association. It has no role in the discharge of the Ombudsman's duties or decisions. The Board is therefore responsible for the functioning of the Company, raising sufficient funds and the administration of and promotion of TPO membership. Any termination of Membership shall be executed by the Board, either where recommended by the Compliance Committee or where a Member or Registered Agent fails to meet their contractual requirements.

Annual Report

60. The Ombudsman will produce an Annual Report containing, in relation to the preceding financial year of the Company, a general review of the Scheme's activities during that year.
61. In accordance with the Ombudsman Scheme's various independent external approvals, the Ombudsman will also produce, and where appropriate publish, specific information required under the criteria for the approvals.

PART 6 - INTERPRETATION

62. 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 Final Decision.
 - b. 'Board Member' means a member of the Board of Directors of the Company appointed in accordance with the Company's Articles of Association.
 - c. The 'Company' means The Property Ombudsman Limited.
 - d. 'Complainant' means a seller, including any small business, charity or trust (see 9. a.), 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, and any other person who has become involved as a result of an agent's actions. It includes a personal representative or any person so entitled to stand in their place after their death.
 - e. 'Day' means a calendar day, not a working day.

- f.** 'Decision' is a direction and/or decision and/or conciliation, mediation or other informal resolution process (see Paragraph 42) made by the Ombudsman within their powers under these Terms of Reference.
 - g.** 'Estate Agency Work' means any things done by any person in the course of a business (including a business in which they are employed) pursuant to instructions received from an individual (the 'client') who wishes to sell or purchase any property in the United Kingdom, Channel Islands or Isle of Man:
 - 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.
 - h.** 'Final Decision' is the Decision made by the Ombudsman following any Representations and in accordance with these Terms of Reference.
 - i.** '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.
 - j.** 'Letting' means the finding of a tenant for a third party landlord and/or the management of a property on behalf of that landlord.
 - k.** 'Member or Registered Agent' means any firm who is directly a Member of TPO or who is subject to the Ombudsman's jurisdiction and these Terms of Reference by virtue of a contractual agreement with a trade association of which the firm is a Member and has agreed to abide by their rules.
 - l.** 'Residential Leasehold Management' means the management of residential leasehold blocks of flats, in accordance with the terms of the lease and statutory requirements and under the instruction of the freeholder or legal entity with the control of the property.
 - m.** 'Small business' (to include Charities and Trusts) is defined as:
 - a small business (or group of companies) with an annual turnover of less than £3 million;
 - a charity with an annual income of less than £3 million;
 - a Trust with a net asset value of less than £3 million.
 - n.** 'UK' means England, Wales, Scotland and Northern Ireland
- 63.** 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 'Registered Firm') include, where the context admits, the plural and vice versa;
 - c.** references to Paragraphs are to Paragraphs of these Terms of Reference.