

Over the last few years, TPO has seen an increase in the number of dual fee complaints referred, and, against the rising level of consumer detriment, has revisited this issue.

Our aim is to:

- Raise Standards in the Industry
- Ensure Consumer Awareness

By doing so, this should lead to a reduction in Consumer Detriment and Distress.

Key Points

Effective Introduction

In dual fee cases, two agents will have been instructed and be pursuing for a fee. There are two scenarios that are generally presented:

1. One agent is instructed on a Sole agency/Sole Selling Rights basis, dis-instructed and a second agent instructed.
2. Both agents are instructed on a multi-agency instruction.

Having discussed with the industry, the key point is the definition of **effective introduction**. To provide clarity and certainty to both industry and consumers, there is a need to define what will constitute an effective introduction; the current lack of clarity in this area and lack of definition of introduction is at the root of the disputes that we see. The disputes reflect poorly on the industry and lead to consumer distress.

We have taken on board the feedback from agents who consider that sharing a fee allows the second agent to 'take a punt' and, instead of referring a sale back, continue with the sale in the hope of receiving at least part of the fee. Our view is that in dual fee cases the agent who effectively introduced the buyer should be the agent who is entitled to the fee.

An introduction must be capable of being evidence based. **An effective introduction must evidence that the agent carried out an act that initiated the buyer's reaction to the property. As such, there is a need for a defined transaction event to occur. In our view, this can be most clearly evidenced by an agent carrying out a viewing.** When considering if an agent has introduced the buyer, we will expect to see evidence that the viewing has been booked, confirmed in writing to both seller and buyer and taken place. In this way, we will be in a position to state that, following the viewing, the agent that conducted the viewing introduced the buyer.

A viewing more than 6 months prior to dis-instruction without evidence of continuity of interest will not be deemed an effective introduction by the first agent to any subsequent sale post dis-instruction.

Obligations Upon Dis-Instruction

Under a sole agent agreement, an agent will be due a fee after dis-instruction 'if at any time unconditional contracts for the sale of the

property are exchanged ... with a purchaser introduced by the agent during the period of their sole agency or with whom they had negotiations about the property during that period'.

On dis-instruction, it will be a requirement of the TPO Code that the agent discloses to the seller with a list of parties that they have introduced, i.e. a list of those who have viewed the property.

If the seller signed a sole selling rights agreement, the agent must advise the seller on dis-instruction, in writing, that a fee will be due if any party who was introduced during the sole selling rights period proceeds to exchange of contracts.

We would also clarify that if an agent is instructed on a sole agency basis, but the seller wishes to switch to a multi-agency agreement, the agent should confirm the instruction change and comply with the requirements of Paragraph 5r of the TPO Code at that point, stating that if anyone that they have introduced during the period of the sole agency goes on to buy the property they will be due a fee. A list of viewers should be provided.

The Second Instructed Agent

We consider that all agents have a specific responsibility **NOT** to put a consumer at risk of paying two fees.

The obligations upon the second agent will be:

- To ask all sellers if they have previously instructed another agent in respect of their property (if they have, the agent will become the second instructed agent in respect of the sale);
- If advised yes, to ask to see a copy of the previous agency agreement to ensure that by instructing the second agent, the seller will not be in breach of contract and ask for details of all those parties who viewed through the first agent;
- To specifically advise consumers of the possibility of a liability to pay more than one agent;
- To ask all interested parties if they have previously viewed the property through another agent;
- If an interested party has previously viewed through the first agent and makes an offer through the second agent, to disclose this information and to refer the sale back to the first instructed agent.

As stated, the second instructed agent should ask to see a copy of the previous agency agreement to ensure that by instructing the second agent, the seller will not be in breach of contract. If the seller is unable or refuses to supply a copy, the second instructed agent must advise, in writing, that they are unable to advise as to whether the seller is in breach of their agreement with the first agent; the seller should satisfy themselves on this point.

All agents should keep full written records of all communications with both the seller and interested parties and note the advice provided and provide that evidence to TPO should a dispute arise.

If these steps are followed, the seller will be fully advised and aware of the implications.

TPO's stance

If a dual fee complaint is referred to TPO, we will be looking to address any consumer detriment. Our stance is that no consumer should unknowingly be placed in a position of paying more than one commission fee.

TPO will reach a conclusion against the requirements of the Code of Practice and associated TPO Guidance, having taken into account the contractual entitlement of the agent under the terms of the agreement signed by the consumer. To establish an effective introduction, there must be a viewing of the property.

There will be occasions when a seller insists on the sale being conducted through the second agent, that is, they refuse to allow

the sale to be referred back, albeit the buyer viewed through the first agent. In such cases we will expect to see clear evidence, in writing, that the second agent advised that the sale should be conducted through the first agent as the introducing agent. If both agents have complied with all requirements, such that the seller is aware that both agents will have a fee entitlement, we will support both agent's fee entitlement.

TPO awards are limited, under the Terms of Reference, to £25,000. If the commission fee in dispute is greater than £25,000 the matter will be outside the Terms of Reference. In such cases, the matter may, with the agreement of all parties, be referred to TPO's associated mediation service, the Mediator Network, <http://www.mediatornetwork.org/tpo-services>

In such cases, we advise the consumer to ask their solicitor to hold the fee pending an agreement as to which agent is entitled. In all cases, if both agents agree, there is the option for referral to mediation to allow the parties to seek mutual agreement rather than through TPO arbitration. Agents may choose to pursue this route directly with a mediator to allow the matter to be resolved without the need for the consumer to raise a complaint. We have worked with Mediation Network who are aware of the obligations within the TPO Code of Practice and Guidance.

We have sought advice from the Competition and Markets Authority on this issue and their comments can be found at Annex 1.

The Property Ombudsman

March 2019

Annex 1 - Competition and Markets Authority Comments

Although it would not be appropriate for the CMA to provide legal advice or approve the documents, we can set out some general compliance principles from a competition law perspective which estate agents involved in 'dual fee' arrangements may find useful:

- Legitimate contact between estate agents (including when putting in place 'dual fee' arrangements) is not prohibited by competition law.
- However, you should be careful when talking business with your competitors – make sure you don't agree not to compete with each other.
- Be especially wary of any conversations about pricing (fees), or about a shared approach to pricing.
- Each business must set and decide its prices independently.
- Competition law applies to all industries and the CMA will take action against those breaking the law.
- Competition law applies to small businesses as well as large ones.

- The consequences of breaking competition law can be severe; fines can be as much as 10% of a business' global turnover and a director can be banned from being a director of a company, or being involved in the promotion, formation or management of one, for up to 15 years. In the most serious cases, individuals can go to prison for up to 5 years.
- The CMA remains committed to tackling illegal anti-competitive conduct in the sector: the CMA has recently completed two investigations in the sector (Residential estate agency services in the Burnham-on-Sea area: <https://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s>; Property sales and lettings investigation: <https://www.gov.uk/cma-cases/investigation-into-property-sales-and-lettings-and-their-advertising>, and has one ongoing investigation in the sector: <https://www.gov.uk/cma-cases/provision-of-residential-estate-agency-services>).