



18 February 2015

Law Commission project: transfer fees in residential and retirement leasehold

The Law Commission is considering problems caused by terms in residential leases generally, and in the retirement sector in particular, which require the lessee to pay a fee - typically a fixed percentage (e.g. 1%) of the sale price or open market value - on a transfer of title or change of occupancy (including sub letting). We are calling these "transfer fee terms".

This form contains ten questions. It is addressed to members of the Law Society. We would be most grateful for your response.

Here is one example of a transfer fee term. More are given in the appendix.

3.11.a

On every assignment or upon the grant of probate or letter of administration of the estate or by the Leaseholder the Leaseholder will pay to the Landlord 1% of the sale price of the Premises or in the case of the death of the Leaseholder 1% of the probate valuation of the Premises... .

(1) Have you ever come across transfer fee terms before? If so, how frequently?
Unless you answered "never," please answer the other questions below before submitting this form.

- Never
 Rarely
 Sometimes
 Often

(2) Are transfer fee terms ever used in residential leases other than leases of specialist housing for over-55s? If "yes", please give details:

- Yes
 No

(3) When acting for a purchaser, at what stage has the client been made aware that the lease includes a transfer fee term and by whom?

(4) If a lease contains a transfer fee term, what steps do you take to draw the term to the client's attention?

(5) In your experience, how far do clients take account of transfer fees in their purchasing decisions?

(6) How often are mortgages used to purchase retirement property?

- Never
- Rarely
- Sometimes
- Often

When they are, does the inclusion of a transfer fee term discourage the mortgagee from agreeing to lend against the property?

- Yes
- No

(7) How do clients (private individuals) react to transfer fee terms when they come to sell their property ?

(8) Do clients (private individuals), whether vendors or purchasers, complain about transfer fee terms?

- Yes
- No

(a) If so, when does this usually happen? (tick all that apply).

- Pre-purchase
- Post-purchase
- On resale

(b) What proportion of complaints about transfer fees are made on behalf of a lessee (for example, by family members)?

- None/very few
- Some
- Most
- All

(c) What aspects are most likely to lead to complaints?

Lack of transparency / disclosure about fees on purchase.

Perceived unfairness of the term - that it is for nothing, or it is excessive.

Hardship suffered as a result of having to pay the fee.

Other (please give details)

(9) Have you disputed a transfer fee term with the party seeking to enforce the term?

Yes

No

Details

(10) How could prospective purchasers be made more aware of transfer fees when they buy? By whom?

Name

Organisation

APPENDIX

Background

1.1 The project was referred to the Law Commission by the Department for Communities and Local Government (DCLG). The terms of reference are that we:

- (1) Consider the problems caused by terms in residential leases generally, and in the retirement sector in particular, which require the lessee to pay a fee on a transfer of title or change of occupancy.
- (2) Consider how the current law addresses the problems that are identified.
- (3) Following consultation with relevant stakeholders, consider whether greater protections are needed to address these problems and what the impact of any greater protections would be. The protections may relate to, though are not limited to:
 - (a) Unfair terms legislation;
 - (b) Landlord and tenant law; and/or
 - (c) Conveyancing procedure.
- (4) Make interim recommendations by March 2016.

1.2 As per the terms of reference we are looking at these terms generally. However, as the complaints about these terms centre on retirement home leases we will be looking closely at that sector. Our project builds on earlier work carried out by the Office of Fair Trading (OFT), whose role has now been taken on by the Competition and Markets Authority (CMA). Concerns about how these terms operated were raised with the OFT who conducted a review and published a report of their findings in February 2013. Their main findings were that the terms were potentially unfair and that there was a lack of transparency, particularly in the sales material. In response some landlords voluntarily gave undertakings to limit the use and enforcement of the terms but it appears some problems persist.

The over-55s housing sector

1.3 From our early researches and discussions with stakeholders we estimate that there are around 105,000 units of owner-occupied specialist housing for over-55s in the UK. A YouGov poll (Feb 2012) indicated that 33% of people over 55 are interested in specialist housing. Given the UK's ageing population and shortage of housing stock, this market is set to grow. However, one aspect of the way it is financed has attracted criticism.

1.4 In addition to purchase price and service charge, many developers charge a fee when the property is sold on. This is typically a percentage of the sale or purchase price. We have seen examples of the terms where fees range from 1% to over 15% and properties priced from around £100,000 to over £1 million, so substantial sums are involved. The transfer fee is imposed by a leasehold covenant and so binds successors in title. The terms can also be indirectly enforced against successors through forfeiture.

The information we require

- 1.1 We are interested in any information or experience you have relevant to these terms in all residential leases wherever you have encountered them. We have included examples of transfer fee terms that we are aware of in the Appendix to this questionnaire; these have all been taken from over-55s housing leases.
- 1.2 We are not concerned with terms that impose an administration fee for a service provided in connection with transfer of title where the fee is related to the costs of the service provided. We are aware that concerns have been raised about such terms and that some transfer fees are self-described as being for admin fees, for example, where the fee is a fixed percentage of sale price demanded for services provided in connection with a resale. As the sum demanded bears no relation to the cost of providing the service we consider that this falls within the class of term we are concerned with. Some fees may be demanded as service charge but do not vary according to the costs of providing the service, again we class these as transfer fee terms.

Example transfer fee terms

(A)

39. To pay the Deferred Management Charge to the Management Company on the date of any Change. [...]

“Deferred Management Charge” 1% for each year or part year that the Tenant for the time being has been the Tenant of the greater of any premium payable on a Change and the Open market Value on the date of the Change to a maximum of 15%

“Change” any change of:

- (a) The Tenant or if the Tenant is a limited company the control of that company; or
- (b) The Occupier

(B)

10.5. On completion of every assignment, underletting or other disposition of the Premises (excluding devolution on death and the completion of any mortgage or charge) to pay to the Landlord the Contingency Fee... .

Definitions

Contingency Fee in relation to any assignment, underletting or other disposition of the Premises (excluding devolution on death and the completion of any mortgage or charge) a fee amounting to 1% of the gross sale price or open market value (which in default of agreement shall be determined by the Landlord's Surveyor) whichever shall be the greater sum.

10. Any Contingency Fee received by the Landlord shall be credited to the Contingency Fund.

10.1. The Contingency Fund shall be held by the Landlord or its agent on trust for the tenants of the building and may be invested by the Landlord at its discretion in any manner it shall consider desirable as if it were beneficial owner of the Contingency Fund.

10.2. The Landlord may in its discretion use the Contingency Fund or any part of it... to discharge or reduce the Service Charge payable by the Tenant... .