
THE GOOD, THE BAD AND THE UGLY

Stephen Lewis, Law Commissioner for Commercial and Common Law

Thatcher Room, Portcullis House, Westminster

9 July 2015

Ladies and gentlemen, I want you to imagine you're buying a house. You've found the perfect one. (So if it's in London you have to imagine you're pretty well off too.)

Anyway, you've scrimped and saved, got enough money together for a deposit, worn out shoe leather searching for the right house or flat – and finally found it. You put in an offer. It's accepted. With palpable excitement, you arrange a survey. No problems are uncovered. You speak to your mortgage broker and instruct a solicitor.

You finally allow yourself to daydream about living there. You wander around antique shops and department stores at the weekend looking for the perfect furniture to go inside.

Then your solicitor calls. There's a problem. The price you offered to pay – let's say two hundred grand – so definitely not in London – was just the up front price. When you sell the house, a tenth of what you sell it for will go back to the developer who built it.

You'd be outraged. You'd be astonished. And yet, in one sector of the housing market, the events I've just described are commonplace. That, ladies and gentlemen, is the retirement sector. And since this is a joint event between Carlex and LKP, I should add that the problem isn't unheard of in mainstream residential leasehold property. But I'll come on to that later.

For now let's focus on the retirement sector.

I want to be absolutely clear. I have no objection in principle to people agreeing to pay an additional premium when they resell a property. And there is evidence that, in the retirement sector, such an additional payment is part of a financial model that can make things more affordable for those who wish to move to specialist older people's housing.

But what I do object to is the fact that, as in the example I just gave, a purchaser will not know what he or she is signing up for. People can spot, enquire about, view, offer to buy a property, have the offer accepted, instruct a solicitor and only then find out that the final cost is more than they expected because of the swingeing fees on resale.

And I object to the fact that purchasers are given no choice. They should always, in my view, be given the option to pay more up front instead of having to pay an event fee when they sell.

I'm Stephen Lewis, the Law Commissioner for Commercial and Common Law at the Law Commission of England and Wales. We have been asked by the Department for Communities and Local Government to come up with a solution to the problem of what we are calling "**event fees**".

This talk has the somewhat provocative title of "the Good, the Bad and the Ugly".

After explaining what we mean by "event fees", I'm going to talk about the good, the bad and the ugly. I'll give some examples of **good practice** regarding event fees.

Then I'll describe the **bad behaviour** that we're setting out to prevent. Finally, I'll explain the **ugly** legal problem we have to solve in order to do this.

So to start with, what is an event fee? Is it the same thing as a transfer fee? Well, the answer is that it can be.

An event fee in a lease is any fee that is triggered by the happening of an event. The event is normally the sale of the property, but it can also be sub letting, or taking out a mortgage, or even a change of occupier.

Transfer fees are one type of event fee. These were the fees that the OFT focused on in its investigation. They were the fees buried in leases from some landlords that required the resident to pay 1% of the property's resale price back to the landlord.

But there are other types of event fee too. Contingency fees, where the money goes into a sinking fund for the upkeep of the property, are an event fee too. They are triggered by an event. The same goes for the much higher percentage deferred fees that are common in retirement **villages**, like deferred management fees, deferred membership fees and deferred service charges.

Now, you may remember that the OFT said, and I'm quoting:

“The unusual, complex and delayed nature of transfer fee terms, coupled with behavioural biases, may mean that consumers do not make optimal purchasing decisions.”

We think that the same reasoning applies to all event fees. We want consumers to be able to make fully informed purchasing decisions about properties with event fees. That's what our reforms will set out to achieve.

Well, let's start with the **good**. There are some providers out there who charge event fees, but are already giving consumers all the information they need about event fees up front.

For example, I note from the Carlex website that there has never been a complaint to Carlex about the ExtraCare Charitable Trust. Our team visited one of their retirement villages. They had made an informed decision to buy their properties, knowing full well about the event fees. They had no regrets.

And that's even though they have to pay an event fee of up to 10%, and if their flat goes up in value they don't get any of the increase. It goes back to the charity. But service charges are kept low because of this. Otherwise the service charge would have to be more than twice as much.

So event fees can be a great way to make retirement living affordable. But this only works if people know what they are signing up to from the start.

And this doesn't always happen. I've talked about the Good, the shining examples of best practice. Now it's time to move on to the Bad.

The Bad is what Carlex has so rightly highlighted in the past. The cases of vulnerable pensioners being taken unawares by hidden fees.

And thanks to the efforts of campaigners, valiantly now led by Sebastian O'Kelly of Carlex, the outrageous behaviour of the cowboys in the sector has come to wider attention. The *Daily Express* described event fees as "a tax on the elderly". The *Daily Mail* went further, saying that event fees

"can add to the distress of bereaved relatives when elderly residents pass away".

It continued:

"elderly, sick and vulnerable residents feel they are being condemned to worry and misery by the very people they trusted to provide them with a trouble-free home in their old age."

So what it looks like from all this criticism is that event fees are wrong in themselves.

But that can't be right. After all, the Extra Care Charitable Trust uses them, and not only has it never given rise to a complaint to Carlex, but the residents they have who we spoke to said they were very happy to pay event fees. It made living there affordable for them.

Besides, in countries like Australia, New Zealand and the US where specialist housing for older people is far more popular than here, event fees are very widely used.

So what is the real problem?

Well, to start with, consumers have no real choice at the moment. Although some providers, like Retirement Villages Limited, do give buyers the chance to pay event fees up front, so that there is no "lock-in" and no uncertain future liability, the majority do not.

Let me be absolutely clear and say right away that we want to change this. No one should be forced into accepting an event fee in their retirement flat. They should always be given the choice to pay up front instead.

So lack of choice is one problem. But the other problem is rather more disturbing.

Remember the example I gave at the beginning of this talk? People buying a property with event fees are being led to believe that the purchase price is the only capital sum they have to pay. Only when their solicitor sees the lease do they find out that they have to fork out thousands of pounds in event fees when they come to sell the property.

How do we know this? We did a mystery shop. We found that estate agents who sell retirement property are not telling buyers about event fees. Even when the developer is selling the property directly the buyer isn't being told early enough. Let me read you a passage from our mystery shopper's report:

"Having been shown both properties, I stressed to the agent that I was anxious to know all the charges that attached to each property. There had been no mention of a transfer or contingency fee. I asked the agent directly and he said:

No. None.

As an afterthought, he said:

Oh, unless the developer - not these guys - I think they may take 10% of what it sells for. I'll check. It's not like that on [the first development] but they may have added it in here.

When the estate agent did not get back to me about the event fees, I rang to ask. On the line, he told me that there was a 10% transfer fee on one property and none at all on the other. According to the leases, he was wrong about both properties. There is in fact a 1% transfer fee and a 1% contingency fee on both."

The results of our survey of fifty solicitors with experience in retirement property were similar. Only twenty-three percent said that clients already knew about the event fee before instructing their solicitor. Seventy-seven percent said that they did not.

Seventy-seven percent had clients who were completely in the dark until they had already invested significant time and money in the purchase. Who – if only they knew it – had actually fallen victim to serious breaches of the existing law.

So that's the bad. We've had the good and the bad – now we're coming on to the ugly. The law is the ugly part. It's ugly because there are existing laws in place being broken, but they aren't being enforced. It's ugly because event fees fall squarely in between two different legal areas – consumer protection law and landlord and tenant law. And above all it's ugly because there is a mish mash of overlapping regulation in the sector, with multiple codes of practice, but nothing out there that quite hits the nail of event fees on the head.

Is the law being broken at the moment? Yes. How? Well, if you advertise a property at a particular price but forget to mention the event fees, this is seriously misleading to buyers. The same goes – even more strongly – when a viewing takes place. We think this is a breach of the Consumer Protection Regulations 2008. That makes it a criminal offence.

If you've been victim of a misleading omission about event fees, your first port of call should normally be the Property Ombudsman or the Advertising Standards Authority. We're working with both of these bodies to try and get the problem fixed and get people to understand their responsibilities under the 2008 Regulations.

Then there's the difficulty about overlapping areas of law. Event fees are terms in leases. Leases of residential property are a property right in English law. But they can also be a consumer contract. That's why the OFT was able to say that transfer fees were potentially unfair contract terms in its report. We think that whether event fees are unfair contract terms depends on a number of factors, including the nature of the triggering event, whether the consumer had a choice to pay the fee up front instead, and whether there was full transparency about the event fees from the start of the sale process.

We want to bring clarity to the existing law of unfair contract terms, and to make clear how it fits in with property law.

And we want to make sure people operating in the sector understand how to act fairly to consumers. We are going to do this by working with the owners of Codes of Practice, like the CCHB, the NHBC, the ARHM and ARCO (these acronyms – for those of you who are in the dark, and that included me until recently – stand for: the Consumer Code for Home Builders, the National House Building Council, the Association of Retirement Housing Managers, and the Associated Retirement Community Operators.)

Now if you're a little confused by that list you're right to be. Almost all the different bodies I just mentioned have different codes of practice. And each of these Codes has some application to event fees. But they are all different. We want to sweep away the complicated, sometimes half-hearted, often overlapping regulation of event fees in these codes. We want there to be one simple and clear scheme for dealing with event fees. We want every Code Owner to be able to copy and paste our new scheme into their own code of practice. It will be a scheme that every Code Owner can implement to ensure fairness and transparency, which will apply whether you're buying an NHBC-guaranteed flat, or living in an ARCO retirement village.

Another ugly problem is what to do about existing leases? We can change the way the industry behaves for the future, but what about now? Well, we propose to make a minor amendment to Landlord and Tenant law so that our reforms will be effective from the next conveyance of the property. That means that the next time an existing leasehold property is sold, there will be a strong legal incentive for the industry to behave with transparency and fairness towards the incoming purchaser.

Even for people who are already living in a flat with event fees, help should be forthcoming. We are planning to end the practice of charging extortionate sub let fees. Some people in the industry have been charging the same event fee that would be payable on resale every time the leaseholder sub lets the property or there is a change in occupancy. We don't think that is fair, and we are working with the Code Owners to stamp out that practice.

Of course, there are going to be many people living in a flat with event fees now who have been taken unawares by them. They may have had an experience like the one I described in my example at the beginning. The bad news is that we can't change what has happened to them. We cannot change the law retrospectively. Making law reform retrospective is very difficult.

But while we can't do as much as we'd like for the current generation of leaseholders, we can stop the cycle of unfair commercial practices and hidden fees catching people unawares for the future.

And it's time to act. I mentioned that I would come back to mainstream residential leasehold. Because event fees are found outside the retirement sector. We found one in a gated community in Cheshire. We've heard of other examples in Birmingham. Right now, they are rare. And we believe that there are commercial reasons why event fees fit better in the retirement sector than in mainstream leasehold.

But developers are savvy. I could certainly imagine them trying to bring event fees into the mainstream. And that's why we need to make sure that if anyone tries to do this, the protections for consumers are ready and in place.

I've talked today about the good: the way that event fees can be used in a positive way by ethical operators to make specialist housing affordable. And I've talked – at length – about the bad. The lack of transparency and fairness that affects many people who buy a property with event fees. And I've explained how ugly the legal problem is, and how we intend to solve it.

And to recap, by making people disclose event fees right from the start, curtailing extortionate sub let fees and ensuring that consumers have a real choice whether to pay an event fee on resale or to pay up front instead, we hope to improve the law and improve people's lives.

Thank you.