

**TRANSFER TRANSPARENCY: REFORMING THE LAW OF
TRANSFER FEES**

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Ladies and gentlemen, I want to introduce you to Elsie. Everyone knows an Elsie, or perhaps a George. Elsie is a lady in her late seventies. She lives alone in a big old four bedroom house. But now it's too big for her. It's too expensive to heat so she's always cold. She can't manage the stairs very well and is worried about falling. The garden is overgrown and she can't look after it any more.

Elsie wants to move. She'd like to move to a cosy retirement flat. A flat in a scheme with other people to talk to so she isn't lonely. A well-insulated flat that's always warm and snug thanks to the communal heating. A flat with no stairs to worry about. With a garden that Elsie doesn't have to take care of.

But as you can see, there's something stopping Elsie, called the "affordability gap", which will talk more about later. But in the meantime, think about what is going to happen to Elsie because she can't afford to move. In her big old house, she's likely to suffer mental and physical health issues due to loneliness, cold and falls. In fact, if she doesn't move to suitable housing she's likely to have to move to hospital instead. For poor Elsie, that might be the last move she ever makes. And leaving aside the human cost for a second, we know that older people suffer health problems due to poor housing that cost the NHS a total of £1.4 billion a year.

But Elsie and the NHS aren't the only ones affected by the affordability gap stopping Elsie from moving house. There are other people in the picture too. Young families like this one are looking round everywhere for houses big enough to live in. But the housing crisis means they aren't finding any. Elsie's old house would be perfect for them, but Elsie's still stuck in there because she can't afford to move.

So what is this affordability gap? Well, Elsie doesn't have a big pension. She's worried that she won't be able to afford the service charges in a new retirement flat. Besides, she doesn't have that much equity in her old house. If she sold it and bought a retirement flat, she wouldn't have enough money left to live on.

People came up with a way to bridge that affordability gap. They said that Elsie could pay a lower service charge while she lived in her retirement flat. But when she left and the flat was sold, a percentage of the proceeds of sale would be put into a sinking fund. And, in addition, some would go to the developer because retirement flats were expensive to build because of all the communal areas. That meant the developers would find it easier to build and sell retirement flats at a price people like Elsie could afford.

But right now, Elsie doesn't want to take this route to bridge the affordability gap. Because she's heard a lot of bad things about it. She's heard that a lot of people are very angry about something called "transfer fees". She heard that they signed up to buy a retirement flat, and weren't told until much later that, as well as the purchase price, they had to pay a big fee on resale too. So right now, she's staying put.

Forms of deferred payment like contingency fees, transfer fees and deferred service charges can be a great way to bridge the affordability gap. But you have to be transparent about them. You have to be upfront about them. And right now, that's not happening. Here are some quotes from solicitors who wrote to us about advising their clients who were buying retirement flats with transfer or contingency fees.

“payment of the transfer fee is a necessary evil.”

They are ***“an endemic abuse in leases of retirement flats.”***

Clients say that it’s ***“not a problem”*** because ***“the flat won’t be sold until they are dead!”***

Survey of Law Society members (2015)

That's what people are saying. And until we fix the problem, Elsie stays stuck.

I'm Stephen Lewis, Law Commissioner. And as I take the opportunity to thank the ARHM for inviting me to speak today on the subject of *Transfer transparency: reforming the law of transfer fees*, I want to be quite clear. This issue is not one sided. There is no easy fix. And I want to recognise today that retirement housing managers are not part of the problem. You're part of the solution.

So what I'm going to do today is talk you through where we've got to in this project. I'm first going to introduce the Law Commission. Then I'll introduce this project. After that, I'm going to talk about why retirement housing is important, and how deferred payment models – including the use of event fees – can be relevant to this. Then I'll explain why it's so important to be transparent about transfer fees. But our research, which I'll outline, suggests that this doesn't always happen. I'll finish by giving you a preview of our provisional proposals to make things better. Then I'll take questions.

To start with who we are, the Law Commission of England and Wales was set up under the Law Commissions Act 1965:

To take and keep under review... the law... with a view to its systematic development and reform.

What about me? Well, there are five Law Commissioners responsible for different areas of law. I am the one responsible for commercial and common law.

We are completely independent of government. Although this project was referred to us by the Department for Communities and Local Government, they have no control over what we recommend. We are going to begin a public consultation this October. Then we'll make firm recommendations to the Department in March of next year.

They have asked us, and I quote – *to 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.*

We are interpreting that to mean transfer fees, contingency fees and deferred management fees. Collectively, we are calling these different fees “event fees”. We are not concerned with small fees like a £250 admin fee.

If you're looking at your handout, you'll see that in there, we called them something different. That's because we used to call them "transfer charges", but we decided to change the collective label to "event fees" to make sure people knew we were talking about contingency fees and deferred management fees, and not just transfer fees.

All these fees can have their uses.

The income stream from transfer fees may incentivise developers to build retirement housing. Otherwise, they might just build regular one bedroom flats, where they don't have to build communal lounges or to have an age restriction. And if they did build retirement flats, they might have to charge more for them.

Besides, elderly people like Elsie, who don't have a big income, may well prefer to pay a one-off contingency fee when their property is sold rather than higher service charges reflecting sinking fund contributions.

If people who want to downsize can afford good quality retirement housing, then they will often sell larger family homes, which could help alleviate Britain's housing crisis.

Retirement housing also helps elderly people avoid the unnecessary suffering and injury that poor housing can cause. As I said earlier, poor housing for the elderly costs the NHS an extra £1.4 billion per year according to Age UK. That's mostly due to cold, falls and fire.

So it's no wonder a poll by YouGov found that 39% of people over 65 were interested in retirement housing.

More worrying, is that only 3% said they already lived there.

And that discrepancy may be due to what I've called the affordability gap. Right now, 40-50% of older people are priced out of the retirement housing market in some areas, according to a report by Lord Best. Remember Elsie? She didn't have enough equity in her big old house. And if she sold it, she would have needed to use some of that money to live on. So she couldn't afford to move to a retirement flat. Well, Lord Best's report suggests how event fees might be a way to bridge this affordability gap.

I've been talking about how event fees can make retirement housing affordable, and about why retirement housing is so important. I recognise that what you do, in managing retirement housing, is very important to society as a whole. Let me also take a moment to recognise ARHM's contribution to our work in particular. Since the Law Commission started work on this project we have found it immensely helpful to engage with your organisation. In particular, the help we've been given by Debbie Mausevicius, Cecilia Brodigan, Richard Wheeldon, Don Kennedy and Paul Silk in our mission to understand the retirement housing sector has been invaluable, and very much appreciated.

Now, to move on to my next point, there are dangers with event fees too, which create a real need for transparency in the sales process.

Remember that “event fees” is our broad label for transfer fees, contingency fees and so on? Well, the OFT did an investigation into just one sort of event fee. They only looked at transfer fees.

As you’ll know, transfer fees are not ring fenced for a sinking fund or to keep the service charges down. They go straight to the freehold owner as pure profit.

The OFT found that terms in leases which impose transfer fees are “potentially unfair”.

The OFT said:

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

What the OFT means when it talks about behavioural biases, is that people do not always behave rationally. For example, they “fall in love” with the property and cannot be dissuaded by sensible argument. Also, they tend to overvalue present pleasure, and undervalue future pain. This is called present bias. This means that they would prefer to pay less money now, even if it means paying much more money later. Of course, elderly buyers may also assume they will not be around to have to pay the event fees. But they may be wrong. As you know, in many cases retirement properties are sold while the resident is still alive.

We have received many complaints that event fees are unfair, and those complaints are not just about transfer fees but about contingency fees too. A vocal activist group, Carlex, which I'm sure you've heard of, campaigns against them. The Daily Express published a quote describing them as a **"tax on the elderly"**.

Event fees have been subject to negative press coverage, negative activist campaigns, and investigation by the OFT. This negativity may put people off from buying retirement housing unless the problem is tackled. To do this, we need to make sure that event fees can no longer exploit consumers' behavioural biases. We want people who buy a property with event fees to know what they are signing up to.

The way to ensure this is through transparency. Buyers should be told about event fees **early, clearly and prominently**.

But this is not always happening. Our survey of solicitors and the mystery shopping expedition we commissioned make this clear.

Many people only find out about event fees after they've already offered to buy, and are therefore already "emotionally committed" to buying the property.

We worked with the Law Society to gather evidence about the scale of the problem. We did a survey of 50 residential conveyancing solicitors who dealt with retirement property.

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.

And now I'm going to let you in on a secret. You know the mystery shopping I mentioned? Well, we have done a mystery shop of retirement property. We sent an undercover reporter around the country. What she encountered was genuinely shocking.

Let me quote you a passage from one of the encounters our mystery shopper had with an estate agent.

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.

He said he would check the position for both. This really reflects the lack of information the estate agent had.

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.

I want to be clear. This does not mean that estate agents are getting it wrong on purpose. But when we spoke to the Property Ombudsman, we were told that estate agents who don't warn buyers about event fees aren't doing their job properly. They could be breaking consumer protection law.

After all, a 1% transfer fee and a 1% contingency fee add up. You buy a property for £250,000 and when it's sold for £300,000 you pay another £6,000 in deferred fees. That means that the property which was marketed to you for £250,000 really cost you £256,000. That's a £6000 difference. It makes a big difference to the overall price you have to pay, even if half of that £6000 goes into a sinking fund. Buyers should be told about the extra fees up front.

Yes, it's true, once your solicitor gets the lease they will see the event fees. But wait a minute. By then, you've found your dream retirement home, put in an offer, had it accepted, paid to instruct a solicitor, maybe even paid for a survey too. If you're unlucky, you could also have sold your house and furniture already, and be living with family while you're waiting to get the keys of your new home.

You've already invested a lot of time and money in the purchase. Realistically, you've passed the point of no return. By the time your solicitor tells you about the event fee, it's too late. Reluctantly, you go ahead, even though if you'd known about the event fees from the start, you might have bought another, cheaper property.

We're changing all this. We believe that estate agents should already be warning buyers up front, under existing consumer law.

But we're planning to work with the Property Ombudsman to give guidance to make that clear.

Where you – the ARHM – come in, is to make the information available so that estate agents have it. At the moment, you give all the information to the buyer's solicitor. But we want to work with the ARHM to get some of that information to the estate agent up front. The facts about event fees applying to the property should be available right from the point when the property is on the market. Then estate agents will have no excuse for failing to be transparent about event fees right at the very outset.

Of course, when you are the ones doing the sale, we'll ask *you* to tell the buyer the facts about any event fees at an early stage.

So, I've given you a brief snapshot of our thinking as it stands. We understand how important your work is. We want you to succeed. But we want to make sure buyers know what they're signing up for from the start.

We also want to put clear procedures in place that are easy to follow. That way, if you follow them, you can be confident that what you're doing is fine. And not just you, but developers, estate agents and extra care operators who follow the procedures we set out for them will be able to get the same certainty as well.

With certainty comes the ability to make sound business decisions with confidence. And we hope the new rules will increase consumer confidence in the retirement housing market as well.

I've spoken today about what the Law Commission does, and my own role. I've explained what our project sets out to do. I've recognised how transfer fees and contingency fees are important for making retirement housing work financially. But I've also told you about the need for transparency about transfer fees, and how it is sometimes lacking in the sales process today. And I've outlined what we want to do to try to fix this problem.

But now I'm going to conclude by asking for your help. In October, we'll be publishing a consultation paper. This is where you come in. Our provisional proposals will be in there. Please, read the paper, and write back to us. Tell us what you think. Have we got the balance right? We want your business to flourish, but without unfairness to purchasers. Will our proposals achieve that goal?

After a twelve week consultation period, we'll consider what everyone has told us. Then in March, we'll make our final recommendations to the government.

How good those recommendations will be will depend in part on the quality and quantity of consultation responses we receive. We want to get both the direction of travel and the detail right. So please help us to achieve that, and help you.

Thank you.