



**Law
Commission**
Reforming the law

Consultation on Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events

Background Paper 2 Law Society Survey

**50
YEARS**

October 2015

LAW SOCIETY SURVEY: ANALYSIS

METHODOLOGY

- 1.1 We are extremely grateful to the Law Society for collaborating with us over this questionnaire; in particular to the Land Law and Conveyancing Committee for allowing us to distribute it; to Diane Latter for her help at every stage of the process; and to all the Law Society members who gave up their time to answer it.
- 1.2 Research was conducted between 19 February and 6 April 2015.
- 1.3 A link to the questionnaire, along with a blurb, was distributed in the Law Society's "Professional Update" email. Members of the Law Society's Land Law and Conveyancing Committee who had expressed a particular interest in the area were also sent the questionnaire directly and asked to complete it.
- 1.4 There were 50 responses. Three responses came out blank, so the analysis was based on 47.
- 1.5 Where questions asked for written, rather than tick box responses, these written responses were analysed and common themes identified. These themes then formed the basis of a percentage analysis, which is given where appropriate alongside selected written responses.
- 1.6 The label "transfer fees" was used throughout to mean "event fees" because it was thought to be what solicitors working in the field would be most likely to recognise. However, the label was defined throughout as applying to all event fees including contingency fees and deferred service charges.

HOW FREQUENTLY HAD RESPONDENTS COME ACROSS EVENT FEES?

- 1.7 We asked respondents how frequently they had come across event fees.

| Have you come across transfer fee terms before? If so, how frequently? ¹ | | |
|---|-----|----|
| Often | 55% | 26 |
| Sometimes | 34% | 16 |
| Rarely | 11% | 5 |

- 1.8 All respondents who completed the questionnaire had at least some experience of event fees in practice, and the majority had frequent exposure to them.

¹ Based on 47 responses. Figures in the right hand column are numbers of respondents who gave that answer.

USE OF EVENT FEES OUTSIDE SPECIALIST HOUSING

- 1.9 The second question asked respondents whether they had encountered event fees outside of specialist housing for older people.

| Are transfer fee terms ever used in residential leases other than leases of specialist housing for over-55s? | | |
|--|-----|----|
| Yes | 21% | 10 |
| No | 79% | 37 |

- 1.10 Respondents who answered “yes” were asked to give details. Some of them interpreted the term “transfer fee terms” more broadly than the interpretation taken by this project.

Park home licences, although not technically leases.

Transfer fees or registration fees are frequently imposed in leases and are very often excessive and completely unrelated to the simple administrative process involved.

- 1.11 However, some respondents did refer to event fees as defined by this project.

I came across a transfer fee on the sale of a residential flat in Cheshire, which I thought was very onerous and ought to have been challenged under the unfair terms legislation. My clients were keen to sell their flat and move on and simply paid the large fee to the landlord!

- 1.12 We followed up with this respondent and she explained that the flat in question had been in a luxury gated community in Cheshire. There had been an event fee applied to outgoing residents of 0.1% of the sale price per year of occupation, plus a further 0.1%. The respondent had made an argument based on the construction of the lease and successfully persuaded the landlord to drop the first of these two charges, but not the second.

- 1.13 Another respondent found an event fee in a surprisingly high profile development.

On the development of the Bull Ring in Birmingham.

- 1.14 There was also one respondent who said that event fees could be found in mainstream residential shared ownership leases.

AT WHAT STAGE IS THE PURCHASER MADE AWARE OF THE EVENT FEE AND BY WHOM?

- 1.15 The third question asked respondents at what stage in the purchase process a prospective purchaser would be told about the event fee.

- 1.16 Respondents fell into two main categories, those who said that the purchaser learned about the event fee from their solicitor, and those who said that they already knew about it before the solicitor was instructed.

| When acting for a purchaser, at what stage has the purchaser been made aware that the lease includes a transfer fee term and by whom? | | |
|---|-----|----|
| By solicitor | 77% | 36 |
| Before solicitor instructed | 23% | 11 |

Finding out from the solicitor

- 1.17 Solicitors would tend to warn the client at an early stage that event fees were likely in retirement property.

I have never seen transfer fees mentioned in estate agents particulars so I imagine [my client is first made aware of the fees] when I tell my client. I always mention at the first opportunity and again in my contract report.

Finding out beforehand

- 1.18 Some respondents did say that by the time they were instructed by the client, the client tended to have been made aware of the event fee already,

normally by the selling agents who in this area are specialist retirement agents.

- 1.19 Other respondents said that whether the client would have been told about the event fee before instructing a solicitor depended on the circumstances.

Depends on the transaction - for a new build it should be made known from the moment a tenant expressed interest.

- 1.20 There was some scepticism about the effectiveness of attempts by developers to disclose event fees before the purchaser instructs their solicitor.

It is lost in the middle of a glossy brochure if at all; moving on is the last thing they are focusing on when buying.

DRAWING THE CLIENT'S ATTENTION TO THE EVENT FEE

- 1.21 The fourth question asked how respondents, having spotted an event fee term in the lease, would draw it to their client's attention.

- 1.22 The conveyancer will have a duty to inform the client of the term. Clients are normally informed of significant matters in the solicitor's reports on contract and title. However, for particularly onerous and unusual terms like event fees, many solicitors take further steps to highlight the term.

| If the lease contains a transfer fee term, what steps do you take to draw the term to the client's attention? ² | | |
|--|-----|----|
| Specifically inform | 62% | 29 |
| Advise informing family | 4% | 2 |
| Highlight in report on contract/title | 21% | 10 |
| Mention in report on contract/title | 21% | 10 |

Specifically inform

- 1.23 The majority of respondents would specifically inform the client of an event fee term when they discovered it in the lease. This could be in a separate letter, a face to face meeting, or by some other means of drawing specific attention to the event fee term.

I would emphatically draw this to the client's attention both in writing and verbally and have the client sign to confirm the advice had been given.

- 1.24 Some went even further, advising clients in addition to inform their family of the event fee.

Also advise clients that they must inform members of their immediate family who would ultimately deal with a sale for them following either death of the proprietor or the proprietor's inability to sell.

Highlight in report on contract or report on title

- 1.25 A further 21% of respondents said that they would draw attention to the term by highlighting it in one of the reports provided to the client.

It will be in the main report but usually in bold type.

I write to the client with a preliminary report on receipt of the contract and copy lease and spell out in detail the transfer fee term and the consequences at the time of an onward sale/dealing.

Mention in report

- 1.26 Only a minority of respondents (21%) did not say that they draw particular attention to the event fee term. However, they would still mention it to the client in a report.

² Some solicitors took more than one of the steps listed in the table.

When acting for a buyer, we would advise the client in the lease report, usually issued within 10 working days of receipt of the contract pack or the client's instructions, whichever is the later.

DO EVENT FEES AFFECT THE DECISION WHETHER TO BUY?

- 1.27 The fifth question asked about how far respondents' clients were influenced by the event fee in their decision about whether to buy the property.

| | | |
|---|-----|----|
| In your experience, how far do clients take account of transfer fees in their purchasing decisions? | | |
| Not a lot | 83% | 39 |
| To some extent | 17% | 8 |

No effect

- 1.28 An overwhelming majority of respondents said that the presence of an event fee made no or very little difference to the decision whether to buy. For some prospective purchasers, this was because they felt event fees were unavoidable.

Most of them consider they have no choice... they have made a decision to move into sheltered accommodation and payment of the transfer fee is a necessary evil.

- 1.29 Or as one respondent put it, more forthrightly:

Almost invariably clients just accept them reluctantly as part of the deal and apparently an endemic abuse in leases of retirement flats.

- 1.30 Given the average age of purchasers of retirement property, it is perhaps not surprising that many of them discount the event fee as something they will not personally have to deal with.

They usually tell me it is not a problem as they won't be paying the fee because the flat won't be sold until they are dead!

- 1.31 Other respondents noted that their clients already felt committed to the purchase, having made an offer which was accepted and paid costs (such as a deposit or solicitor's fees), by the time they found out about the event fee.

By the time a client becomes aware of the fee they have already made the decision to purchase and incurred costs, but occasionally it will put them off proceeding.

- 1.32 The purchaser's being unaware of the event fee while negotiating the price of the property, and only finding out when a solicitor has been instructed afterwards, can mean that the market does not function in the way classical economic theory would predict.

Purchase price is not usually reduced to compensate for transfer fees.

1.33 It appears that some clients are simply indifferent to the prospect of the event fee.

They take the information on board and proceed with the purchase in any event.

It did not factor particularly highly on the client's decision making.

Some effect

1.34 For the few respondents who said that event fees were taken account of by clients in deciding whether or not to purchase, there was division over whether the charge encouraged or discouraged purchase. One conveyancer said that event fees "have been known to put off a sale."

1.35 Others noted that some event fees had the effect of reducing the costs prospective purchasers would have to pay while living in the property. They said that in these circumstances, the use of an event fee could actually make the property more attractive to a prospective purchaser.

As long as their monthly service charge payments are kept to a minimum, tenant would prefer to have a larger transfer fee.

USE OF MORTGAGES

1.36 The sixth question asked about whether mortgages were used to purchase retirement property and about the impact of event fee terms on mortgagees' decisions to lend.

| How often are mortgages used to purchase retirement property? | | |
|---|-----|----|
| Sometimes | 9% | 4 |
| Rarely | 57% | 27 |
| Never | 34% | 16 |

1.37 Those who thought that mortgages were used could go on to answer a follow-up question.

| When they are, does the inclusion of a transfer fee term discourage the mortgagee from agreeing to lend against the property? | | |
|---|-----|----|
| Yes | 27% | 7 |
| No | 73% | 19 |

HOW CLIENTS REACT TO EVENT FEES WHEN THEY SELL

- 1.38 The seventh question was “how do clients (private individuals) react to transfer fee terms when they come to sell their property?”
- 1.39 The response tended to differ according to whether the original purchaser was dead and the sale was to be completed by executors or beneficiaries, or whether the original purchaser was alive. Although very few people were happy to pay the event fee, the trend was that original purchasers were generally aware of it, whereas it came as a shock to executors or beneficiaries.

| How do clients (private individuals) react to transfer fee terms when they come to sell their property? | | |
|---|-----|----|
| The original client is usually dead . | 43% | 20 |
| The original client is not usually dead . ³ | 57% | 26 |

Reaction of the original purchaser

| Where original purchaser is alive - how do clients (private individuals) react to transfer fee terms when they come to sell their property? | | |
|---|-----|----|
| Surprised | 32% | 9 |
| Not surprised | 68% | 19 |

- 1.40 It has been assumed that where respondents did not say that their answer was based on the reaction of the original purchaser’s beneficiaries or executors, they were referring to the reaction of the original purchaser.
- 1.41 68% of respondents indicated that the client was not surprised by the event fee (although almost without exception the client was still unhappy about having to pay it).

They are usually aware that they will have to pay but in a rising market are often staggered by the amount and the fact that they have not had the benefit of the money.

³ Where the respondent has not stated or implied that the original purchaser is dead, they have been put into this response category. The suggestion that the original purchaser is more likely than not to be alive when the property is sold is corroborated to some extent by the Offering Circular for Peverel’s 2006-7 securities issue, which suggested that the figure for properties disposed of on death of the resident was somewhere between 20% and 54%.

Clients are unsurprised in our experience as it is made so clear at the outset what the transfer fee is and that it is a key part of the deal.

- 1.42 Some respondents (32%) did indicate that clients reacted with surprise at having to pay the event fee on sale.

Some claim not to have been made aware at the time of purchase.

- 1.43 In some cases, the client was surprised even though they had been told of the event fee when purchasing the property.

They say that they've forgotten about it. They react with alarm and are unhappy, but normally know about it but have forgotten.

Where the original purchaser has died

| Where original purchaser has died - how do clients (private individuals) react to transfer fee terms when they come to sell their property? | | |
|--|-----|----|
| Beneficiaries surprised | 75% | 15 |
| Beneficiaries not surprised ⁴ | 25% | 5 |

- 1.44 Respondents distinguished between the reaction of clients who had purchased the property, and the reaction of their heirs. 43% of respondents said that the original client who had purchased the property was usually dead. When respondents focused on the reaction of the deceased's beneficiaries to the event fee, it was clear that the beneficiaries tended to react with surprise. They might not ever have been told about the event fee.

Mostly clients who are themselves selling remember the explanation given to them. However, typically sales occur after death or incapacity of clients and the personal representatives or attorneys may not know and usually are unhappy about such provisions.

- 1.45 Out of those respondents who discussed the situation where the resident has died, a majority (75%) said that beneficiaries tend to react to the event fee with surprise.

The client who purchased is usually dead or in hospital or some form of residential care and often being represented by executors, attorneys or family members who because of the circumstances have a lot on their plate. Most will be unaware of the provision and think it unreasonable but accept it because they want the property to be sold.

- 1.46 Only 25% said that beneficiaries would not react to the event fee with surprise.

⁴ Respondents who have stated or implied that the beneficiaries are surprised have been put into this response category.

It is often the beneficiaries who sell but they are aware of them and just accept that they have to be paid as part of the sale.

COMPLAINTS ABOUT EVENT FEES

- 1.47 The eighth question asked whether clients would complain to their solicitor about having to pay event fees.

| | | |
|---|-----|----|
| Do clients (private individuals), whether vendors or purchasers, complain about transfer fee terms? | | |
| Yes | 89% | 41 |
| No | 11% | 5 |

- 1.48 Part (a) of the question went on to ask “If so, when does this usually happen? (tick all that apply).”

| | | |
|--|-----|----|
| If so, when does this usually happen? (tick all that apply). | | |
| Pre purchase | 46% | 21 |
| Post purchase | 13% | 6 |
| On resale | 73% | 34 |

- 1.49 Part (b) of the question asked “What proportion of complaints about transfer fees are made on behalf of a lessee (for example, by family members)?”

| | | |
|--|-----|----|
| What proportion of complaints about transfer fees are made on behalf of a lessee (for example, by family members)? | | |
| None/very few | 25% | 11 |
| Some | 41% | 18 |
| Most | 34% | 15 |

- 1.50 Part (c) of the question asked “what aspects are most likely to lead to complaints?” Three options were given, and respondents could tick all that applied. They also had the chance to give separate details of any other aspects that led to complaints.

| What aspects are most likely to lead to complaints? | | |
|--|-----|----|
| Lack of transparency/disclosure about fees on purchase. | 26% | 12 |
| Perceived unfairness of the term – that it is for nothing, or it is excessive. | 85% | 40 |
| Hardship suffered as a result of having to pay the fee. | 17% | 8 |

- 1.51 One respondent separately drew attention to the fact that an event fee is triggered every time a property changes hands. Hence one flat may contribute more than its fair share to the total received in event fees by the landlord or the sinking fund, if it changes hands more often.

The fact is that if one flat in a retirement block is sold many times more than another flat the first one's owners will have paid much more in transfer fees, yet derived no equivalent benefit, in effect subsidising the other tenants where (if that is the case) the fee is paid into the service charge fund.

- 1.52 Another implied that the practice of imposing event fees caused complaint as it could be seen as exploitation of a vulnerable group of consumers.

It is seen as a particular "rip-off" exploiting elderly clients in retirement flats.

DISPUTING EVENT FEES

- 1.53 The ninth question went further than the eighth. Beyond merely enquiring whether event fees were the subject of complaint, it asked whether respondents had disputed an event fee on behalf of their client.

| Have you ever disputed a transfer fee term with the party seeking to enforce the term? | | |
|--|-----|----|
| Yes | 21% | 10 |
| No | 79% | 37 |

Reluctance to dispute

- 1.54 Of the 79% who had not disputed an event fee, many expressed their frustration at the fact that, in their view, under the current law any challenge to an event fee was likely to be futile:

I don't need to waste mine or the client's time or money on an abortive exercise.

To what end? They are all enforceable and the clients always receive legal advice before they enter into these contracts.

They [the landlords] rely on the lease and won't debate the point.

- 1.55 Even practitioners who thought that the legal basis of event fees was more doubtful were not encouraged by their clients to engage in a dispute.

I have advised clients that such terms are under review (as they have been so for a few years!) but generally purchasing clients don't want to risk losing the property and have taken the view if they wish to argue they will try to do so on resale.

Disputing the event fee

- 1.56 The 21% of respondents who had disputed an event fee tended to meet with outright rejection from the landlord. This was both the case on sale and prior to purchase.

I have challenged these fees on several occasions but the landlord has always refused to agree any reduction.

We have an ongoing dispute with a landlord's agents about a transfer fee, where they confirmed a figure over the phone and we then wrote to them telling them how it had been worked out, they did not provide an account until weeks after it had been requested and by that time on the basis they had not contacted us we had completed, the demand was for over £2000 more than they had told us over the phone, they are now threatening legal proceedings against our client.

Only when buying new from the original Lessor, to try to persuade them to remove the provision. I have never succeeded!

- 1.57 Where the circumstances of the case were very unusual, solicitors had a little more success in disputing the charges:

Some clients had bought two adjoining flats and had them knocked into one with the landlord's consent. A husband and wife lived there and the husband died. Wife wanted to stay on in one half and wanted to put up the wall again and sell the other half. The landlord wanted the transfer fee on the other half when it was sold, and we got them to waive it. That's the only time. It's an unusual situation.

- 1.58 The Office of Fair Trading (OFT)'s investigation also seems to have given some assistance.

On behalf of executors who could not sell a retirement flat and wished to let short term. Landlord wanted to charge full transfer fee on each new tenancy agreement. Extracted a concession that a minimal administration fee would be charged (but subsequently discovered that the Office of Fair Trading were putting pressure on the landlord/agents concerned at the time and this is now a routine measure).

1.59 Not all landlords have treated the OFT's findings with such respect.

I referred the freeholder to the OFT view that such provisions were unfair, but this was dismissed by the freeholder as not a view they shared and on the basis that they were not a party to any undertakings given to OFT. Elderly clients or their attorneys or personal representatives normally have little taste for litigation or incurring fees in such disputes, so the matter has ended there.

IMPROVING TRANSPARENCY ABOUT EVENT FEES IN THE SALES PROCESS

1.60 The tenth and last question asked for respondents recommendations on how transparency about event fees could be improved in the sales process. "How could prospective purchasers be made more aware of transfer fees when they buy? By whom?"

The manner of making purchasers aware would depend on who is making the disclosure. Therefore, responses tended to focus on the second part of the question – who should be making prospective purchasers aware of event fees? Some respondents made more than one suggestion.

| How could prospective purchasers be made more aware of transfer fees when they buy? By whom? | | |
|--|-----|----|
| Estate agent/sales team | 62% | 29 |
| Conveyancer | 28% | 13 |
| Event fees should be restricted or banned | 17% | 8 |
| Managing agent or landlord | 13% | 6 |
| Other | 6% | 3 |

Sales agent

- 1.61 A majority of respondents suggested that the estate agent – or the developer’s sales team, in the case of new build sales – should be making purchasers aware of event fees.

The estate agents need to up their game on this. We have problems with people never having been told about transfer fees.

- 1.62 One respondent called for a “prominent "Health Warning" by developers on first disposal, thereafter by selling agents.”

- 1.63 Some responses went into detail about how disclosure should be made. Some thought that it should be made in advertisements for the property.

It should be a requirement that any transfer fee is disclosed by the selling agent at the outset - it should be stated in all advertising.

- 1.64 Others stopped short of calling for all advertising to state the event fee, but agreed that estate agents should have to disclose it “in sales particulars,” that is, in the written details of a property supplied to prospective purchasers.

Conveyancer

- 1.65 The next most popular view was that it was the role of the conveyancer – that is, the purchaser’s solicitor or conveyancing professional – to make the client aware of the event fee.

- 1.66 The conveyancer already has a legal duty to do this, so for some respondents, no change to the current regime was needed to make prospective purchasers more aware of event fees.

It is up to them to be familiar with the terms of the lease before they buy, guided of course by their conveyancer.

- 1.67 Others thought that some conveyancers needed to do more, raising concerns about whether in practice conveyancers were always drawing sufficient attention to the event fee.

Clearly a solicitor ought to warn clients about the fees. Unfortunately conveyancing is low margin work at many firms, and often carried out by unqualified paralegals.

"Factory" (on-line) mass-conveyancing firms are the worst offenders in not providing proper, detailed advice.

Managing agent or landlord

- 1.68 Some respondents said that the landlord or managing agent should disclose the event fee at an intermediate stage.

Most purchasers require prior approval by the managing agent or freeholder before purchase. The fees should be disclosed at this stage as well as by lawyers at contract stage.

Event fees should be restricted or banned

- 1.69 Several respondents argued that transparency was not the issue that needed to be dealt with. According to them, it was not that purchasers needed to be more aware of event fees. Rather, imposition of event fees should be restricted or banned altogether.

With respect this is not an issue. Buyers' solicitors will always advise their clients of these fees as soon as they are known. The real issue is the uncontrolled imposition of excessive fees.

This question misses the bigger picture and, in my opinion, shouldn't even be asked. More regulation is needed in this area to ensure that the fees are justified from the outset. As with payday loans, these arrangements completely take advantage of vulnerable people. The way that the issue is approached by these providers is unfair but that's business - what should we expect?

The real solution is to make such fees unlawful and to give the right to reclaim any such paid in the last 6 years.