



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

## SUMMARY

**50  
YEARS**

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**THE LAW COMMISSION**

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

**SUMMARY**

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## How to respond

We welcome responses from all interested parties by  
**29 January 2016**

A response form is available on the project web page for those who wish to use it. It can be found on the project webpage:

<http://www.lawcom.gov.uk/project/transfer-of-title-and-change-of-occupancy-fees-in-leaseholds/>

Please send your responses in any form:

**By email to:** [event\\_fees@lawcommission.gsi.gov.uk](mailto:event_fees@lawcommission.gsi.gov.uk); or

**By post to:** Max Marenbon, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne's Gate, London SW1H 9AG

Tel: 020 3334 3603

If you send your comments by post, it would be helpful if, where possible, you also send them to us electronically.

# 1. INTRODUCTION

- 1.1 Some residential leases require the leaseholder to pay a substantial fee on the sale of the property or other event. These fees are common in specialist housing for older people. They have a bewildering variety of names, including “transfer fees”; “contingency fees” or “deferred management fees”. We call these fees by the generic term, “event fees”, because they are all payable on the occurrence of an event, typically when the property is sold.
- 1.2 Our consultation paper considers event fees in detail, looking first at the problem and then at the law. It makes provisional proposals and asks for views. We welcome responses to [event\\_fees@lawcommission.qsi.gov.uk](mailto:event_fees@lawcommission.qsi.gov.uk) by **29 January 2016**. A response form is available on the project webpage.

## **EVENT FEES IN SPECIALIST HOUSING: AN OVERVIEW**

- 1.3 When people move to specialist retirement housing, they buy more than a home. They buy a lifestyle. Residents can live as independently as possible, thanks to services provided on site. These can be anything from a gardener, or the use of a residents’ lounge, to swimming pools, restaurants or access to 24-hour care.
- 1.4 These services must be paid for. And while pensioners who own their own home may be comparatively asset-rich, they are often income-poor. They might prefer to defer payment until after the property is sold, rather than paying the whole cost through annual service charges.
- 1.5 Developers and the companies that manage this form of specialist housing have found a way to defer fees. People buy a long lease of a retirement property. There is a term in the lease that says that, when the property is sold, a certain percentage of the proceeds of sale must be paid back, either to the developer or into a fund for the upkeep of the site as a whole. Depending on the services available on site, the percentage can be as little as 1%, or as much as 30%.
- 1.6 While the system works well in theory, in practice it has caused widespread dissatisfaction. One reason is that people may not be told about the fee at a sufficiently early stage. They may not be told when they see the property advertised – or when they visit the estate agent, or view the property. They may not be told when they put in an offer and have it accepted.
- 1.7 Often, buyers hear about the fee when they hire a solicitor to read the lease. But by then they have already invested time and money in the purchase. It is too late to absorb a lot of complex information about a fee that they hope will only be payable after their death. Besides, they feel that they have reached the point of no return with the sale. Reluctantly, they go ahead.
- 1.8 Fees are not just payable on death. Residents may decide to sell for many reasons, for example to be nearer to relatives or to move into a care home. Where grown up children sell the lease to pay for residential care, they are often angered by the unexpected fee.

- 1.9 Another problem is that these fees may be triggered by other events, such as sub-letting it or taking out an equity release mortgage. In such circumstances they can operate unexpectedly and particularly harshly.
- 1.10 The project has ramifications beyond specialist housing for older people. We have already seen some examples of event fees in mainstream residential leases, though this is still rare.

### **THE OFFICE OF FAIR TRADING (OFT) INVESTIGATION**

- 1.11 In 2013, the OFT published its investigation into transfer fees, which are one type of event fee. It found that the complexity of these fees, coupled with the fact that payment is deferred, meant consumers may not take them into account when deciding whether to buy a property. It concluded:

The unusual, complex and delayed nature of transfer fee terms, coupled with behavioural biases, may... lead to a significant imbalance between landlords and consumers, to the detriment of the consumer.

- 1.12 The businesses involved did not accept that their terms might breach the law of unfair terms. However, nine landlords gave voluntary undertakings or clarified the way they used transfer fees. Each landlord gave a different undertaking: several apply only to some fees, or only in some circumstances. Event fees continue to be widely used in the specialist housing market.

### **THIS PROJECT**

- 1.13 The OFT commented on the lack of clarity in the existing legal framework and recommended that consideration be given to legislative reform. In September 2014, the Department for Communities and Local Government asked the Law Commission to look at the problem and the law, and to consider whether more protection was needed.
- 1.14 Our overall conclusion is that event fees have an important role to play in meeting the costs of specialist housing for older people. But the market needs to be much more transparent. People should be told about event fees at an early stage, clearly, and prominently. They should be given enough information, early enough in the purchase process, to make an informed decision about the event fee and whether the property is right for them. And they should be entitled to redress if estate agents and developers break the rules.

## 2. THE ISSUE

### SPECIALIST HOUSING FOR OLDER PEOPLE

- 2.1 Subject to rare exceptions, event fees are found in leases of specialist housing for older people. Chapter 2 of the Consultation Paper outlines this market.

#### Types of specialist housing

- 2.2 Specialist housing falls into three broad categories:
- (1) *Age-exclusive housing* is aimed at older people who can live independently, but would like to be with others of the same age. A clause in the lease sets a minimum age for the occupier (often 55). There is little difference with mainstream housing, though there is often a care alarm system, and may be a communal area or garden.
  - (2) For *retirement housing* a manager or warden is on hand to provide support. There will usually be a communal lounge and may be other facilities, such as a laundry. For one major provider, the average age of residents is 79.
  - (3) *Extra-care housing* has carers available on site to provide care in the resident's own home. Some developments take the form of "retirement villages", offering a wide range of communal facilities (such as a clubhouse, gym or swimming pool). The average age of residents is older: for one provider it is 83.
- 2.3 Wardens and communal facilities are generally paid for through monthly service charges, which may be supplemented by event fees. Residents pay separately by the hour for personal care, though providers say that event fees make it possible to have carers available.
- 2.4 Research shows that specialist housing benefits residents' physical and mental health. Residents feel happier and healthier, reduce their use of medication and are less likely to suffer falls. Moreover, when good quality specialist housing is available, older people who wish to downsize from large family homes can do so easily. This helps to alleviate the shortage of housing stock.

#### Too little provision

- 2.5 There are only 145,000 units of owner-occupied specialist housing in England and Wales. This is small in comparison with the rented retirement sector (of over 500,000 units). It is very small in comparison with the target population. Less than 2% of those aged 65 or over currently live in owner-occupied specialist housing. In the USA, 17% of those over 60 live in specialist housing (and 13% in Australia). And it is extremely small in comparison with future projections. Over the next 20 years the number of people aged between 75 and 83 is expected to increase by 50% and the number of those aged 85 and over will more than double.

- 2.6 A House of Lords Select Committee concluded that “the Government and our society are woefully underprepared” for these demographic changes.<sup>1</sup> Among many changes needed, “sufficient provision of suitable housing, often with linked support, will be essential to sustain independent living by older people”.<sup>2</sup>

### **Barriers to growth**

- 2.7 There are problems with both the supply and demand for this type of housing. On the supply side, it can be difficult to get planning permission and the additional facilities make specialist housing more expensive to develop.
- 2.8 On the demand side, the cost of the additional services raises issues of affordability. As it is difficult for older people to obtain a mortgage, they will need enough equity in their existing homes to cover the purchase price and associated costs. And those on fixed incomes are often concerned about high service charges, especially if the costs are unpredictable and outside their control.
- 2.9 There are also practical and emotional barriers. The process of moving is daunting; and people are emotionally attached to their homes. There is a lack of understanding of what retirement housing offers, exacerbated by the lack of consistency in the terminology used. One report also notes “a general dearth of information, advice and help for older people to navigate the housing market”.<sup>3</sup>
- 2.10 The result of all these factors is that people rarely move until there is some kind of crisis. As one research report puts it:
- Few people are making a positive choice to move into retirement housing until something forces them to do so – a death of a partner, an accident or fall within the house, burglary or major maintenance problem.<sup>4</sup>
- 2.11 Many of those buying specialist housing have recently suffered a stressful event; they have little understanding of the models and terminology associated with this market; and there is a dearth of advice. It is therefore particularly important for the full implications of event fees to be explained clearly.
- 2.12 Also, older people can easily be put off moving, whatever the benefits of specialist housing. Negative publicity which suggests that specialist housing is exploitative, or charges high hidden fees, is particularly damaging to this underdeveloped market.

<sup>1</sup> House of Lords Select Committee on Public Service and Demographic Change. *Ready for Ageing?* (2013) para 1.

<sup>2</sup> Above, para 6.

<sup>3</sup> C Wood, *The Top of the Ladder*, Demos: 2013, p 24.

<sup>4</sup> C Wood, above.

## WHAT ARE EVENT FEES?

2.13 Event fee terms in leases are drafted in many different ways. In Chapter 3 we identify the following types:

- (1) **Transfer fees** require a given percentage of the resale price or property value to be paid to the developer. The fee is not said to be for anything in particular and there are no restrictions on how it is spent. The percentage is usually 1% but it can be higher.
- (2) **Contingency fees** and **deferred service charges** are paid into a sinking fund for the long-term maintenance of the site. Contingency fees are usually 1%, but deferred service charges can be as much as 15%.
- (3) **Deferred management charges** and **deferred membership fees**. Like deferred service charges, these are substantial, often ranging from 10% to 30%. However, there is usually no restriction on how the money is spent.
- (4) **“Selling service” fees** are described as a fee for assistance with reselling the property. However, the fee can be anything from 1% to 12.5%, so may bear little relation to the cost of the assistance. It may also be mandatory to pay the fee even if the vendor decides to use an external estate agent.

### Examples

2.14 In Chapter 3 we set out event fees drawn from a sample of leases. This is an example of a transfer fee:

3.11.a On every assignment... the Leaseholder will pay to the Landlord 1% of the sale price of the Premises.

2.15 This is an example of a deferred management charge. The leaseholder (called “the Tenant”) agrees:

9. To pay the Deferred Management Charge to the Management Company on the date of any Change.

This is defined as follows:

“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” [means] any change of:

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

- 2.16 Note that this fee is not only payable on resale, but on each change of occupation. Where a property proves difficult to sell, people may consider sub-letting, if only to obtain enough income to cover the service charges. Terms such as this can operate particularly harshly on sub-letting.

### **Defining event fees**

- 2.17 Although the various terms are referred to by different names, they share many aspects in common. For the purposes of this project, we developed a generic label, “event fee”, to refer to all these types of term.

- 2.18 An event fee term is a term in a residential lease with the following characteristics:

- (1) It imposes an obligation for the tenant to pay a fee on the happening of (or in connection with) an event defined in the lease;
- (2) The event is where title to the lease changes hands; where there is a change in the occupancy of the property; or where some other event creates a third party interest in the lease;
- (3) The fee is fixed (such as £10,000) or calculated in accordance with a formula in the lease (such as a percentage of the purchase or sale price of the property).

- 2.19 On the other hand we would not want to include the relatively small administration charges which are common in mainstream residential leases, where (for example) the vendor must pay the landlord £150 to provide information to a purchaser’s solicitor. These fees are already subject to review under schedule 11 to the Commonhold and Leasehold Reform Act 2002. Our definition therefore excludes administration charges within the scope of the 2002 Act.

### **THE PROBLEM WITH EVENT FEES**

- 2.20 Event fees have attracted public anger. The OFT also made four main criticisms:

- (1) The terms often come as a surprise: they may apply in unexpected circumstances and be higher than anticipated.
- (2) Often the fees are not linked to any service which the landlord provides.
- (3) The terms are not always transparent to consumers: the full effects may not be given prominence in pre-sale material.
- (4) Even if consumers become aware of the terms, the terms may exploit consumers’ behavioural characteristics (or “biases”) so that consumers do not take the terms into account in their decisions.

## **Behavioural characteristics**

2.21 Traditionally, the law has assumed that when consumers are presented with the right information they make rational decisions about what to buy. Over the last ten years, however, a growing body of economic literature suggests that consumers display behavioural characteristics which lead to “predictably irrational” decisions.<sup>5</sup> Three tendencies are particularly relevant to event fees:

- (1) *An undue focus on the present*, so that future fees can “pass under the radar”.
- (2) *Over-confidence*. Purchasers tend to imagine a rosy future, in which they remain in the property for the rest of their lives. They tend to discount the likelihood of moving, for example to residential care.
- (3) *An aversion to losing sunk costs*. Once consumers have invested time and effort into finding a product, they are often reluctant to walk away if unappealing terms and conditions are revealed late in the buying process.

2.22 These behaviours apply to all consumers, not just those who are vulnerable through age or ill-health. However, they are particularly strong when consumers make complex decisions under stress, as occurs with event fees.

2.23 For this project, we commissioned three small research studies, outlined below. The studies show that often consumers are only told about event fees when they have made an offer, had it accepted and incurred costs. At this stage it can be too late for consumers to take full account of the fee.

### **Our survey of conveyancing solicitors**

2.24 With the help of the Law Society Land Law and Conveyancing Committee, we surveyed 50 solicitors who acted for people buying and selling specialist housing.

2.25 Most solicitors (77%) said that purchasers only found out about transfer fees when they were told about them by their conveyancer. By the time the event fee is disclosed, the client is emotionally committed to the purchase:

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

2.26 Clients also displayed “overconfidence”, discounting the fee as they did not anticipate selling during their lifetime:

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!

<sup>5</sup> D Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (2008).

2.27 Conveyancers are under a duty to inform purchasers of adverse terms. All the solicitors in our study said that they did this. However, conveyancing is now often a routine process, without face-to-face contact. It cannot be relied on as a source of advice:

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

2.28 The overwhelming majority of solicitors said that their clients complain about event fees, particularly when they come to sell. Even when sellers are aware that that a fee applies, they may be surprised by its amount:

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.<sup>6</sup>

2.29 Where the sale is conducted by heirs or relatives, the fee may come as a particular surprise to them.

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.

#### **Our mystery shopping exercise**

2.30 We commissioned a small mystery shopping exercise. The shopper visited six retirement properties for sale, noting what was said about event fees during the visit and in subsequent follow-up conversations.

2.31 Four were resales through conventional estate agents. In none of the four cases was the mystery shopper given accurate information about the event fees. Here is one example:

After discussion of the service charge, I asked if there were any other charges I should be aware of. I was categorically told there were no other charges. This was wrong. A lease from this development reveals that there is a 1% transfer fee and 1% contingency fee.

2.32 When a retirement property is sold by a developer's sales team or a specialist retirement sales agency, more information is made available. However, even here the information may be patchy. One development was still being built and the charging structure did not appear to have been finalised.

Nothing was said about event fees. When I asked, she said she understood that there was a one percent charge though this was not actually laid down.<sup>7</sup>

<sup>6</sup> Law Society Survey, para 1.41.

To clarify the position, one would need to see the lease, and for this, the purchaser would need to pay a deposit of £1,000.

### **Developers' websites**

2.33 We asked our mystery shopper to go through these websites to see what how easily a prospective purchaser could find information about event fees. The report concludes:

- (1) There were examples of websites that were attractive, easy to navigate and informative.
- (2) On other sites, the reader had to be pretty persistent to find all the fees. One website included a "list of charges related to sale", but it could take many clicks to reach this page.
- (3) The use of different terms to describe event fees caused confusion. For example, one website reassured purchasers that it did not charge an assignment fee, only to mention later that "upon resale of the property a 4% fee was paid into the sinking fund".
- (4) Two websites gave such limited information that it was impossible to tell whether there were any event fees or not.

2.34 Some sites give the impression of an industry which is not fully committed to fee transparency.

### **Problems with fees on sub-letting and other events**

2.35 On some schemes event fees are triggered by events other than sale, such as sub-letting and mortgaging. These cause particular problems

2.36 When a sub-letting fee is calculated as a percentage of the open market value of the property, the sums involved may appear large and disproportionate. One person who contacted us explained that they had decided to let the property as they were unable to sell it:

I have paid one exit fee of over £1500 in order to sub-let and am still responsible for management fees and ground rent.

### **The advantages of event fees**

2.37 Specialist housing offers many benefits to residents in terms of health and wellbeing, but some consumers struggle to afford it. For some, deferred fees are an attractive way to pay.

<sup>7</sup> Mystery Shopping Report, (available on the project page of the Law Commission website).

- 2.38 Associated Retirement Community Operators (ARCO) provided several examples of how event fees could make service charges more predictable and affordable. For example:

One operator uses an event fee of 30% of the sale price or 20% of the sale price plus a 50/50 split of the equity uplift on sale. The current monthly service charge is £520. However, without an event fee, this would need to increase to £1,461: an increase of 182%.

In the course of this project, we met many residents who fully understood their event fee obligations and thought that the deal benefited them.

#### **Are some event fees more problematic than others?**

- 2.39 We initially assumed that higher fees would be more problematic than lower ones. This is not necessarily the case. We have seen examples of 30% fees which are explained clearly to purchasers, both in face-to-face discussions and in writing. People told us they were happy to pay them.
- 2.40 Much of the public criticism has been aimed at smaller, cumulative charges. Purchasers are unlikely to pay much attention to a 1% transfer fee, or a 2% administration fee. However, when they come to sell a flat for £500,000, and are hit by a surprise fee of £10,000 for no reason apparent to them, they may feel misled. They may also fail to appreciate the likely size of a charge fixed at 1% per year of occupancy. On a £500,000 flat, after 15 years, this would amount to £75,000.

#### **CONCLUSION**

- 2.41 Specialist housing has major benefits and is a crucial part of preparing for an ageing population. Our aim is to encourage this market sector to develop.
- 2.42 This requires a balance. It is important that developers are given adequate and reliable income streams which incentivise them to build more specialist housing. Furthermore, those who are capital rich and income poor may welcome the opportunity to defer some parts of the purchase price or service charges.
- 2.43 On the other hand pricing structures must be transparent to buyers, who may be vulnerable through age and stress, and who have a great deal of information to absorb with little specialist advice. Publicity suggesting that pricing structures are exploitative or unfair could set back the whole market, and deter cautious older consumers from making the decision to purchase. There is an urgent need for the industry to work together to ensure that event fees are transparent.

### 3. THE LAW

- 3.1 Leases operate both as contracts and as property rights in land. They are subject to land law, which regulates the relationship between landlords and tenants. They are also subject to the law applying to consumer contracts. This means that the law applying to event fees is complex, and can be problematic. Event fees fall uncomfortably between the two legal regimes, with the result that the law on event fees is not as clear and certain as it should be.

#### LANDLORD AND TENANT LAW

- 3.2 Leases of property are regulated by landlord and tenant law. This applies even to long leases (of 99 years or more), such as those of owner-occupied specialist housing. The leaseholder is referred to as the “tenant”; the company that owns the freehold (such as the developer) as the “landlord”.
- 3.3 Landlord and tenant law provides various protections against unreasonable charges, but none of these protections apply to event fees

#### Controls on variable service charges

- 3.4 Most leases require the tenant to contribute to the costs of maintenance and services, in the form of a service charge. Where service charges vary with the costs incurred, the law controls the amount the landlord or management company may recover.
- 3.5 Under section 19 of the Landlord and Tenant Act 1985, when calculating the service charge, the costs of providing the service can be taken into account:
- (1) only to the extent that they are reasonably incurred; and
  - (2) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.
- 3.6 In the event of a dispute, either side can apply to the First Tier Tribunal (Property Chamber) for a ruling.
- 3.7 These protections do not apply to event fees: they apply only to charges where the amount “varies or may vary according to the relevant costs”.<sup>8</sup> Event fees are fixed (typically as a percentage of the sale price or open market value) and do not vary according to the cost of the services consumed. A recent Supreme Court judgment has confirmed that the courts have no jurisdiction to review fixed service charges.<sup>9</sup>

<sup>8</sup> Landlord and Tenant Act 1985, s 18(1)(b).

<sup>9</sup> *Arnold v Britton* [2015] UKSC 36.

### **Other controls**

- 3.8 The law also regulates administration charges. These are the charges tenants are required to pay for applying for approval under a lease, or for grants of approval, or for information or documents. Under schedule 11 to the Commonhold and Leasehold Reform Act 2002, unreasonable administration charges may be challenged before the First Tier Tribunal. However, event fees are not drafted as administration charges. In 2006, a tribunal held that a “selling service fee” did not fall within the legal definition in the 2002 Act.<sup>10</sup>
- 3.9 Thirdly, section 19 of the Landlord and Tenant Act 1927 prevents landlords from unreasonably withholding consent for a disposal (and excessive fees might in some circumstances amount to unreasonable withholding). Again, event fees are not drafted in a way which would fall within the scope of this provision.

### **UNFAIR TERMS LEGISLATION**

- 3.10 Under a European Directive, terms in consumer contracts must be fair: otherwise they are not binding on the consumer. The Directive was first introduced into UK law on 1 July 1995 and is now set out in Part 2 of the Consumer Rights Act 2015.<sup>11</sup>
- 3.11 Unfair terms legislation may be enforced both by individuals and by regulators. Regulators may apply to court for injunctions to stop traders from using the term, or may accept undertakings. As we have seen, in 2013 the OFT thought that some event fee terms were potentially unfair and accepted undertakings from landlords about how the terms would be applied.
- 3.12 Unfair terms legislation can offer powerful protection to consumers. However, there are four thorny issues about how it applies to event fees. These are summarised below and explored in detail in Chapter 6 of the Consultation Paper.

### **Are event fees price terms?**

- 3.13 Where terms are transparent and prominent, the Directive states that a court may not assess “the appropriateness of the price” in comparison with the services supplied. It was thought that the courts should not be arbiters of whether a price was too high: instead the market should decide. In practice, however, this exemption has been the subject of considerable litigation and debate.

<sup>10</sup> *Decision of the Midland Leasehold Valuation Tribunal as to its Jurisdiction* (23 March 2006) (unreported).

<sup>11</sup> The Unfair Terms Directive 1993 was first implemented in the Unfair Terms in Consumer Contracts Regulations 1994. There were later replaced by the Unfair Terms in Consumer Contracts Regulations 1999.

- 3.14 As event fees appear to be price terms, may a court assess whether they are fair? Many of the event fees we have looked at are not transparent because they are not in plain, intelligible language. Even where the terms are transparent and prominent, we think that a court could find that terms were unfair – not because the charges were too high, but because of other aspects of the way that they were structured, presented and applied. However, the law in this area is more complex and uncertain than it should be.

#### **How far are leases contracts?**

- 3.15 The legislation only applies to consumer contracts. It is clear that a lease is a contract when it was made: the first tenant (T1) and the first landlord (L1) are in a contractual relationship. The position is less clear after T1 has sold the lease to another tenant (T2), or L1 has sold the freehold to another landlord (L2). Are subsequent parties also in a contractual relationship?
- 3.16 Traditional English land law does not recognise a contract between subsequent tenants and landlords. In this respect, English law appears out-of-line with the rest of Europe (including Scotland). In other European jurisdictions, the original lease is a contract – and it remains a contract through its life, irrespective of any change to the parties. We think that for the purposes of unfair terms law, a concept of a “contract” should be interpreted according to European principles, rather than in a traditional English way.
- 3.17 Our tentative conclusion is that the relationship between the landlord and subsequent tenant is a contract for the purposes of unfair terms legislation. But again, the law is too complicated and uncertain.

#### **Can the court look at what each tenant was told?**

- 3.18 Under unfair terms legislation, a court must decide whether a term is fair by looking at “all the circumstances existing when the term was agreed”. The focus is on how the term was presented to the consumer.
- 3.19 This raises the question of when an event fee term was agreed. Is it agreed between the first tenant and the first landlord, when the lease is initially granted? Or is it agreed when each new tenant becomes bound by the term?
- 3.20 As a matter of policy we think it is important that the court should focus on what each new tenant was told before they became bound by the event fee term. However, the legislation as currently drafted may not achieve this effect.

### **Does unfair terms legislation apply to leases created before 1995?**

- 3.21 The normal rule is that a contract must be judged in accordance with the law in force at the time it was agreed. A lease may be seen as one continuing contract which is simply assigned to new parties. On this basis, leases created before unfair terms legislation was introduced on 1 July 1995 may not be reviewed for fairness.<sup>12</sup>
- 3.22 The OFT commented that this would make event fees immune from challenge for decades or even centuries. We agree with the OFT that this has the potential to create a serious gap in consumer protection.

### **Conclusion**

- 3.23 Unfair terms legislation has the potential to provide powerful and appropriate protection against unfair event fees. Proceedings can be brought by enforcement agencies as well as individual consumers. And the court can focus on how the event fee term was presented to the consumer. However, this protection is undermined by the various complexities and uncertainties in the way that unfair terms legislation applies to leases.

### **CONSUMER PROTECTION LAW**

- 3.24 The Consumer Protection from Unfair Trading Regulations 2008 (“CPRs”) prohibit businesses who deal with consumers from omitting to give them material information. Material information is information which the average consumer needs to take an informed transactional decision. A transactional decision is not just a purchase but can be something less definite, such as the decision to view a property or pay a deposit.
- 3.25 We think that developers, management companies and estate agents will be omitting material information if they fail to inform a prospective buyer that the property has an event fee on top of the purchase price. This is a criminal offence, which can be prosecuted by Trading Standards.
- 3.26 Where a property has an event fee, the CPRs may be breached if:
- (1) an advertisement states the price of the property, but does not state the event fee;
  - (2) a developer’s or management company’s sales presentation mentions the price of the property, but does not state the event fee;
  - (3) an estate agent conducts a viewing and does not tell the buyer that event fees apply (unless the estate agent did not know and could not reasonably have been expected to know about the event fee).

<sup>12</sup> See the statement to this effect in *Arnold v Britton* [2015] UKSC 36, at para 93.

- 3.27 Some of the practices we encountered appear to contravene the CPRs. The CPRs need to be better known and understood by developers, managing agents and estate agents involved in selling retirement leases.

### **Redress**

- 3.28 Individual consumers have only limited rights to redress for breach of the CPRs. In October 2014 the CPRs were amended to allow consumers a right to redress in some circumstances,<sup>13</sup> but this does not apply to property sales; nor does it apply to misleading omissions. If an estate agent omits information about event fees, an individual consumer does not have a right to seek compensation before the courts.
- 3.29 However, estate agents and managing agents are required to be members of one of three approved redress schemes.<sup>14</sup> All three schemes can award compensation of up to £25,000. Importantly, they may award compensation for breach of the CPRs. This means that, where an estate agent or property manager failed to provide material information about event fees, the leaseholder could make a complaint to the appropriate redress scheme and obtain compensation.
- 3.30 We are not aware of anyone who has taken action over event fees in this way. Consumers may not realise that compensation is possible. They may also face practical difficulties in remembering which agent sold the property, and what they said, when they discover the full effect of the event fee on resale, perhaps many years later.

### **CODES OF PRACTICE**

#### **The Competition and Markets Authority (CMA) study**

- 3.31 In 2014 the CMA published a market study into residential property management services.<sup>15</sup> The CMA drew attention to the importance of codes of practice in regulating property management. It commented:

Although the existing codes have their limitations, they serve an important function in raising standards across the sector.<sup>16</sup>

- 3.32 The CMA recommended substantial revisions to the codes of practice, particularly to improve pre-purchase information. In the light of the study, many trade organisations are strengthening their existing codes.

<sup>13</sup> Consumer Protection (Amendment) Regulations 2014 (SI 2014 No 870).

<sup>14</sup> These are The Property Ombudsman, "Ombudsman Services: Property"; and the "Property Redress Scheme" (PRS). See Consultation Paper, paras 8.18 to 8.23 for more details.

<sup>15</sup> Published 2 December 2014.

<sup>16</sup> Para 1.44.

### **Codes relevant to event fees**

- 3.33 We have identified eight codes of practice applying to estate agents, managing agents and developers which have some relevance to event fees.
- 3.34 Three codes have specific rules about event fees: those from Associated Retirement Community Operators (ARCO); the Association of Retirement Housing Managers (ARHM); and the National House Building Council (NHBC). The next version of the Consumer Code for Home Builders is also likely to cover event fees.
- 3.35 Although the ARCO code is only binding on ARCO members, the ARHM Code has been approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. This means that the code must be taken into account by a court or tribunal where it is relevant, even if the parties are not signatories to the code.
- 3.36 In Chapter 8, we examine the details of these codes. Until now, the ARHM and NHBC codes have not done enough to ensure that potential purchasers are given information about event fees early in the sales process. However, all the organisations are currently reviewing their codes of practice and their new editions are likely to feature more stringent requirements. This is an encouraging development.

### **AN INTERNATIONAL COMPARISON**

- 3.37 The market for specialist housing is much more developed in the USA, Australia and New Zealand than in Britain. The USA has over 2,000 Continuing Care Retirement Communities (CCRCs). These offer a wide range of communal activities and facilities. Many allow residents to “age in place” by having a care home on-site. The idea spread to Australia and New Zealand, where “retirement villages” are common.
- 3.38 The high level of service provided by “retirement communities” or “villages” inevitably leads to high charges. The sector relies heavily on deferred fees, and we were keen to see how these fees were regulated in the US, Australia and New Zealand.
- 3.39 None of these jurisdictions have attempted to ban deferred fees. Nor did we find any attempts to regulate their amount. Instead, the focus was on transparency. For example, the New Zealand Retirement Villages Act 2003 states that “before any occupation right agreement can be entered into, the intending resident must receive a disclosure statement”. We identified similar provisions in New York and in the Australian Capital Territory.

## 4. PROVISIONAL PROPOSALS

### OUR OVERALL APPROACH

- 4.1 The way that event fees are currently used risks bringing specialist housing for older people into disrepute. At a time when we need more such housing, this could be extremely damaging.
- 4.2 Event fees have benefits but they also exploit behavioural characteristics. Consumers pay less attention to future fees, especially when they are presented at a late stage. This tendency is particularly acute for specialist housing, where consumers have to absorb a lot of complex information, often following a stressful life event. If consumers are to take proper account of the fees when they make purchasing decisions, they must be explained clearly and openly when potential purchasers are first given any information about the price.
- 4.3 We recommend stringent codes of practice to require developers, operators and managing agents to bring event fees to the attention of prospective purchasers. We think that these codes should be backed up by legal sanctions in the event of non-compliance. We ask consultees if they agree with this approach.
- 4.4 A response form, setting out a full list of questions, is available on the project webpage.

### PROPOSALS ON CODES OF PRACTICE

#### **The status of new provisions**

- 4.5 We propose new provisions about event fees that could be annexed to the relevant codes of practice for developers, operators and managing agents.
- 4.6 We think that these provisions should be approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. This would require a court to take the provisions into account - giving greater certainty to developers that, if they have complied with the relevant provisions, the event fee will be enforceable. We ask for views on how the provisions would operate.

#### **Event fees in unexpected circumstances**

- 4.7 As we have seen, some event fees may be charged when a property is mortgaged, or when a carer moves in. Many landlords have now agreed that they will not charge event fees except on sale or sub-letting. We think that this should be part of the approved provisions on event fees.
- 4.8 It may be appropriate to charge some fees on sub-letting, but where sub-letting fees are expressed as a percentage of the open market value they often operate particularly harshly. We welcome views on a fair and proportionate way in which to charge fees on sub-letting.

### **A choice to pay fees up-front?**

- 4.9 In its investigation, the OFT pointed out that where an event fee is a percentage of the sale price, consumers do not know how much they will have to pay. It suggested that consumers should be given an alternative payment option (such as a flat fee) to provide more certainty.
- 4.10 We are interested in views on whether alternative payment options might be attractive. We are conscious that purchasers already have a great deal of information to take in, and would not wish to overload them with too many choices.

### **Where the landlord sells the property directly**

- 4.11 On sales of new-build properties and where the landlord operates the development, the landlord will advertise the property, sell the property directly to the purchaser, or be responsible for showing round prospective purchasers. In these cases, the event fee provisions should require the landlord to provide material price information in a clear and prominent way early in the process.
- 4.12 We ask for views on the following provisional proposals:
- (1) An advertisement which mentions the price of the property should also mention the event fee.
  - (2) Prospective purchasers should receive a disclosure document when they first visit the property (or if the property is sold off-plan, at the first significant interaction with sales staff).
  - (3) The disclosure document should set out all the event fees applying to the property, illustrate their effect, and give details for advice organisations.
  - (4) The provisions should specify how illustrative examples are calculated. We think there is a case to standardise the intervals and the range of likely house price increases. The example should also be based on a price which is fairly representative of that development and extend to an adequate number of years.
  - (5) The event fee should be mentioned in face-to-face discussions.

- 4.13 In practice, the task of informing prospective purchasers about event fees will fall on managing agents, who often handle resales of specialist housing. Where the agents act for the landlord, we think that they should be subject to similar provisions.

### **Where the property is sold by the leaseholder's agent**

- 4.14 The greatest problems arise when the lease is sold by one resident to another, using a conventional estate agent. Although estate agents are under a legal requirement to give upfront cost information, they may not be aware of the fee. There are many reasons why the leaseholder may not provide the information: they may have forgotten, be suffering from dementia, or have died.

- 4.15 Developers and managing agents are currently under no obligation to inform estate agents about fees. We think this needs to change, so that estate agents can include information about event fees in their initial advertisements and property particulars.
- 4.16 We have two suggestions as to how such information might be provided and welcome views.
- (1) Landlords could place the information on an online database. The aim would be to allow all estate agents to go online and type in the address. The website would then provide details of the event fee and an outline of the disclosure document.
  - (2) Alternatively, the estate agent could contact the managing agent, who would have a dedicated telephone number or email address for this purpose. The managing agent would then be required to supply the estate agent with a completed event fees disclosure document. We think this would need to be done quickly – within two working days – as the estate agent would not be permitted to advertise the property until the information had been supplied.

#### **BRINGING EVENT FEES WITHIN UNFAIR TERMS LEGISLATION**

- 4.17 In our view, those landlords who fail to comply with the appropriate code provisions should face a legal sanction. We think that unfair terms legislation has the potential to provide an appropriate sanction against event fees which are used in an unfair way. Complaints can be brought by both enforcement agencies and individuals; the court focuses on how the term was presented; and where terms are unfair they are not binding on the consumer.
- 4.18 However, this project has identified complexities and uncertainties about how unfair terms law applies to long leases. We provisionally propose statutory reform to treat event fees as if they were terms of a contract between the tenant and the landlord, made when the current tenant first becomes bound by the term. We ask for views.
- 4.19 The Consultation Paper looks at whether the new legislation should affect existing leases. As the focus of unfair terms law is on how the term was explained to each tenant, we think that the new legislation should apply on the next sale of the lease after the reform comes into effect.
- 4.20 Our terms of reference are confined to event fees, so we make these proposals for event fees only. However, we ask whether similar provisions should apply to residential leases more generally.

## **AN ADDITION TO THE GREY LIST**

- 4.21 As we have seen, unfair terms legislation includes an exemption: where terms are transparent and prominent, a court may not assess “the appropriateness of the price”. However, the legislation also contains an “indicative and non-exhaustive” list of terms which may be regarded as unfair (the “grey list”). Where a price term is on the grey list, the court can assess all aspects of its fairness, including its amount.
- 4.22 In 2013, the Law Commission and Scottish Law Commission argued that the price exemption should only apply where terms are prominent. However, in some circumstances, prominence may not be enough. Some products are aimed at consumers who are particularly vulnerable. Furthermore, some terms exploit the way that consumers reach decisions: even if consumers are aware of the term, they fail to take it into account in their decision-making. The two Commissions argued that a term known to exploit behavioural biases should be added to the grey list.<sup>17</sup> The Consumer Rights Act 2015 therefore includes a power for the Secretary of State to add terms to the grey list by statutory instrument.<sup>18</sup>
- 4.23 We provisionally propose that the Secretary of State should use the power in the 2015 Act to make a new addition to the grey list for event fees that fail to comply with the relevant provisions in a code of practice. Again, we ask for views
- 4.24 Statutory reform will only be effective if we can define event fees appropriately. If the definition is too wide it will catch other terms; if too narrow, it can be avoided. We therefore ask about our proposed definition.

## **A STATUTORY TRUST FOR SINKING FUND EVENT FEES**

- 4.25 Some event fees such as “contingency fees” must be used exclusively for the maintenance, repair or improvement of the development. Often, landlords hold this money on trust for the benefit of tenants. However, this is not a legal requirement. By contrast, the law requires that variable service charges must be held on a statutory trust.
- 4.26 We propose that where the lease requires the money paid to be used exclusively for the maintenance, repair or improvement of the development, the money should be subject to a statutory trust. This is not intended to change the way that the money is spent. However, it would protect the money if the landlord became insolvent.

<sup>17</sup> Law Commission and Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (March 2013), paras 3.52 to 3.58.

<sup>18</sup> s 63(3) – (5).

- 4.27 Event fees which are subject to a statutory trust must be used for the benefit of the tenants. This means that any finding that the fee was unfair would damage the interests not only of the landlord but of the other tenants as well. We would not wish to encourage that outcome. We therefore ask if event fees subject to the proposed statutory trust should be excluded from our proposed amendments to unfair terms legislation.

#### **CODES APPLYING TO ESTATE AGENTS**

- 4.28 The Consumer Protection from Unfair Trading Regulations 2008 prohibit estate agents from omitting material information. We think that The Property Ombudsman (TPO) could usefully give more guidance on how this applies to event fees.
- 4.29 We provisionally propose that the code should clarify that whenever an advertisement mentions the price of the property, it should also mention the event fee. Furthermore, where a prospective purchaser views a property which is subject to an event fee, the estate agent should supply a copy of the disclosure document.
- 4.30 If the vendor's estate agent breaches the code, the TPO could award compensation against them. However, the event fee would still be payable. Breaches by the estate agent alone would not be enough to make the term unfair (or even to place it on the grey list). A term would only be on the grey list if there was a breach by the landlord (or the landlord's agent).

#### **UNDERTAKINGS TO EXISTING TENANTS**

- 4.31 All the proposals we have made so far are designed to protect new purchasers, rather than existing tenants who are subject to event fees. We do not think it appropriate to pass retroactive legislation which would apply to existing tenants.
- 4.32 Instead, current tenants would need to rely on the current law of unfair terms. The OFT has made a convincing case that many commonly seen event fee terms are unfair. To reduce the uncertainty of further litigation and to restore the confidence of consumers, we think that landlords should give undertakings to their existing leaseholders as a matter of best practice.
- 4.33 We ask whether landlords should undertake that, for existing tenants,:
- (1) event fees will only be applied on sale or sub-letting;
  - (2) on sub-letting, event fees will not be calculated as a percentage of the open market value of the property;
  - (3) except where purchasers are given illustrations on the effect of the fee calculated as a percentage of the sale price, the fee should only be charged as a percentage of the lower of the purchase price or the sale price.

## **POSSIBLE OPTIONS WHICH WE ARE NOT MINDED TO PURSUE**

### **Rejecting an outright ban**

- 4.34 Inevitably, specialist retirement housing has high service charges, not only for normal maintenance, but also to pay for communal amenities and staff. For those who are capital rich and income poor the idea of deferring some of these charges is often attractive, especially if it is combined with a clear cap on monthly fees.
- 4.35 Any attempt to ban event fees could reduce the development of more specialist housing for older people or make that housing less affordable. We ask consultees if they agree that event fees should not be banned completely.

### **No assessment under landlord and tenant law**

- 4.36 The law provides two separate models of how charges may be assessed for reasonableness. In unfair terms legislation the focus is on how the term was presented to the consumer. By contrast, under section 19 of the Landlord and Tenant Act 1985, the First-tier Tribunal is able to assess the amount of the service charge against the costs which were reasonably incurred, for services of a reasonable standard.
- 4.37 We think that unfair terms legislation offers a more suitable method of assessment, for three reasons
- (1) Unfair terms legislation can be enforced by the CMA and other agencies. Under landlord and tenant law, tenants must bring tribunal proceedings, which can be costly and unpredictable, even for reasonably simple disputes.
  - (2) Any attempt to assess an event fee against the cost of providing the service would require an extensive amount of detailed information. In assessing a fee payable after 15 years, for example, it would be necessary to look at all the services provided over that 15 year period.
  - (3) Some tenants will consume more services than they have paid for; others less. Event fees are often used to give tenants greater certainty over how much they will be required to pay. In return the landlord takes a risk they will be over or under compensated. Allowing some tenants to reduce their costs on the basis that they have not consumed the services risks undermining the overall bargain that has been struck.
- 4.38 We ask consultees whether they agree event fees should not be reviewable by the First-tier Tribunal under landlord and tenant law. The consultation paper considers three possible provisions: the Landlord and Tenant Act 1985, section 19; Commonhold and Leasehold Reform Act 2002, schedule 11 and the Landlord and Tenant Act 1927, section 19. We are not minded to extend these provisions to apply to event fees.

## **ASSESSING THE IMPACT OF REFORM**

- 4.39 Finally, we are interested in information about the benefits and costs of these proposals. We ask specific questions on this issue in Chapter 13.