



**Law
Commission**
Reforming the law

Event Fees in Retirement Properties Summary

**Law Com No 373 (Summary)
20 March 2017**

Chapter 1: The case for reform

- 1.1 Some older people move to specialist retirement properties for reasons relating to their health and lifestyle. Retirement properties are often owned by the retired person on a leasehold rather than freehold basis.
- 1.2 Many long leases for specialist retirement properties require the leaseholder to pay a fee on certain events, such as sale, sub-letting or change of occupancy (we call these fees “event fees”). Event fees go by a variety of other names including “exit fees”, “transfer fees”, “deferred management fees”, “contingency fees” and “selling service fees”. Such fees may be payable to the freeholder, the developer, the operator or the managing agent (for brevity, we refer to the party who can require payment of the event fee as the “landlord/operator”).
- 1.3 The amount of event fee payable may be expressed as a percentage of the purchase price or of the open market value of the property. This may be a flat rate percentage or a rate that increases for each year of occupation. Alternatively, the leaseholder may be required to sell the property back to the freeholder at the original purchase price, losing any increase in the value of the property.

THE PROBLEMS WITH EVENT FEES

- 1.4 In 2013, the Office of Fair Trading reported on transfer fees, a type of event fee. It found that particular features of transfer fees made them potentially unfair.¹ The OFT made certain criticisms of such fees, including:
 - (1) Event fees may apply in unexpected circumstances. A consumer may expect to pay an event fee when they sell their property. However, they may not expect such a fee to be payable on sub-letting, when a loan is secured against the property or when their spouse or carer moves into the property. The fees may also be higher than anticipated.
 - (2) The fees may not be linked to any service provided by the party who receives the fee. Some event fees are put into the development’s sinking or maintenance fund, or structured as deferred service charges to ensure that monthly service charges are not prohibitively expensive. However, other event fees are not linked to any benefit or service provided by the landlord.
 - (3) The terms of the lease which require the payment of event fees are not always transparent to consumers, and the financial consequences may not be given prominence in the sales materials.
 - (4) The terms may exploit consumers’ “behavioural biases”, which means that consumers may not take the terms into account in their decision-making.

¹ Office of Fair Trading, *Investigation into retirement home transfer fee terms, a report on the OFT’s findings* (2013), OFT1476.

Legal uncertainty around event fees

- 1.5 The OFT concluded that transfer fee terms were potentially unfair contract terms, but that there was a “lack of clarity in the legal framework”.² Following their investigation, the OFT decided not to bring proceedings against landlords. Instead, they obtained undertakings from several of them. As a result this lack of clarity has not been resolved.
- 1.6 The effect of this uncertainty is that developers have found it difficult to obtain funds to build more specialist retirement housing. Investors have been reluctant to lend on the security of an event fee income stream, given the perceived risk that such terms may be found to be unfair (and therefore unenforceable).
- 1.7 We have been told that if this uncertainty is removed or reduced, there is likely to be a significant increase in the amount of investment in this sector.

THIS PROJECT

- 1.8 In 2014, the Department for Communities and Local Government (DCLG) asked the Law Commission 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.

Consultation

- 1.9 In October 2015, we published a consultation paper and received 168 responses.³ The consultation paper was supported by extensive background papers, including a survey of residential property solicitors and a mystery shopping report. In May 2016 we published an analysis of responses received.
- 1.10 In June 2016, we published a progress report. We proposed that a detailed code of practice for event fees should be set in place, approved by the Secretary of State,⁴ and backed up by legislation, so that event fees which did not comply with the code of practice would be unenforceable.
- 1.11 In September 2016, we published a draft code of practice and accompanying consultation document. We received 43 responses.

² Office of Fair Trading, *Investigation into retirement home transfer fee terms, a report on the OFT's findings* (2013), OFT1476, ch 9.

³ Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226. We refer to this document throughout this summary as the “consultation paper”. It is available at http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf (last visited 22 March 2017).

⁴ We recommend that the code of practice should be approved by the Secretary of State under the Leasehold Reform, Housing and Urban Development Act 1993, s 87.

- 1.12 We would like to thank all those who met with us or responded to the consultation paper and our other requests for information. We are grateful for all contributions to this project.

Report

- 1.13 This is a summary of a more comprehensive final report, published in March 2017 and presented to Parliament with our recommendations to Government.⁵

WHY NOT ABOLISH EVENT FEES?

- 1.14 Some stakeholders, including some current residents of retirement properties, advocate the abolition of event fees.
- 1.15 Although we agree that older consumers, who are often vulnerable, need protection from event fees that are unfair or which are imposed in unfair circumstances, we consider that event fees should be regulated, rather than abolished, for the following reasons.
- 1.16 First, event fees can make specialist retirement housing affordable to consumers. Older people are often “asset rich, but cash poor”. Event fees can help by subsidising high operating costs which would otherwise result in high service charges. We refer in our report to responses from current leaseholders who explain that event fees which operate as deferred service charges have enabled them to enjoy a better standard of living than they would be otherwise able to afford.
- 1.17 Secondly, the use of event fees may facilitate the overall supply of specialist retirement housing. There is evidence that good quality specialist housing may benefit both individuals and the wider community. For individuals, such housing may provide health, social, financial and emotional benefits. For the wider community, increased supply of specialist retirement housing may reduce pressure on the NHS and health services. It may also make housing stock available, by allowing older people to move out of family homes and by encouraging the development of new retirement properties through developers borrowing against event fee income.
- 1.18 We have considered whether to abolish only event fees which are purely for the landlord/operator’s profit. However, that would ignore the benefits of specialist retirement housing, the desirability of offering older consumers a choice of type of housing to suit their circumstances and the role that event fees have to play in financing the development of specialist housing. Also, such a blanket ban would be difficult to implement in practice.
- 1.19 We have concluded that it would be better to regulate all event fees rather than attempting to abolish certain types of them. However, we acknowledge stakeholders’ concerns, and we recommend substantive controls on the charging of event fees.

⁵ Law Commission, *Event Fees in Retirement Properties* (March 2017) Law Com No 373. This is available at <http://www.lawcom.gov.uk/project/event-fees-in-retirement-properties/> (last visited 29 March 2017).

OUR OBJECTIVES AND RECOMMENDATIONS

- 1.20 We have concluded that reform is required to provide older consumers with greater protection and to clarify the legal status of event fees.
- 1.21 Although we do not consider that event fees should be abolished, we have concluded that there is a case for regulating event fee terms, by:
- (1) Preventing event fees from being charged in unexpected circumstances.
 - (2) Imposing obligations on landlord/operators to provide standardised, transparent information about event fees to consumers at an early stage, including an indication of how much a consumer may have to pay, enabling informed choices to be made.
 - (3) Making it easier for consumers to challenge unfair event fees by providing increased legal certainty.
- 1.22 We set out the detail of our recommendations in Chapter 2 below.
- 1.23 The OFT report discussed other options for reform, including enabling event fees to be reviewed by the First-tier Tribunal. We do not consider that this is the best way to regulate event fees, since any attempt to assess an event fee against the service provided would inevitably require detailed evidence and be an expensive and time-consuming exercise. We have also considered whether landlord/operators should be obliged to offer consumers the option of an upfront payment. Although we encourage landlord/operators to do so, we have decided not to make this mandatory.

Chapter 2: Recommendations for reform

THE CODE OF PRACTICE

- 2.1 We have drafted a code of practice⁶ which is intended to protect consumers from demands for event fees based on unfair or hidden contract terms. Specifically, the code of practice:
- (1) limits the circumstances in which event fees may be charged and, in certain circumstances, the amount that can be charged; and
 - (2) imposes obligations on landlord/operators to provide transparent information about event fees to consumers at an early stage of the purchase process, including an indication of how much the event fee is likely to be.

WHEN DOES THE CODE OF PRACTICE APPLY?

- 2.2 The code of practice applies to event fees which take the form of obligations either to pay a fee or to sell the property back to the freeholder at the purchase price (referred to as an “equity uplift” event fee).⁷ It does not apply to variable service charges, administration charges and ground rents.⁸
- 2.3 The code of practice applies to transactions between traders and consumers, rather than corporate professional leaseholders. It does not apply to private sales.
- 2.4 The obligations in the code of practice are imposed on a “landlord/operator”, which is defined as any person or organisation (or their agent) who has the right to require payment of the event fee.⁹
- 2.5 We recommend below that the Consumer Rights Act 2015 should be amended to enable the code of practice to be enforced directly by a consumer.¹⁰ The effect of this amendment would be that the code of practice would apply to all new leases, regardless of whether the landlord/operator had signed up to the code of practice.
- 2.6 Additionally, those who subscribe to the code of practice must give effect to it under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).¹¹ This means that, where the landlord/operator has subscribed to the code of practice, they must

⁶ We recommend that the code of practice be given statutory approval under the Leasehold Reform, Housing and Urban Development Act 1993, s 87. The code of practice is provided at Appendix 3 to our report.

⁷ Code of practice, para 1.1, Appendix A.

⁸ Code of practice, paras A.2, A.3.

⁹ Code of practice, para 1.4.

¹⁰ See paras 2.31 to 2.39 below.

¹¹ Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 5(3)(b).

comply with it in relation to new leases and to existing leases. Failure to do so will be a breach of the CPRs.

- 2.7 Furthermore, under the Leasehold Reform, Housing and Urban Development Act 1993, in deciding a relevant issue before a court or tribunal, the approved code of practice will be admissible as evidence regardless of whether the parties have signed up to it.¹² The code of practice will not apply retrospectively.

WHEN EVENT FEES CAN BE CHARGED

- 2.8 At present, depending on the terms of the lease, event fees may be payable in circumstances which a consumer may not expect when they purchase the property. For example, an event fee may be charged when the property is inherited or mortgaged, when a spouse, civil partner or carer moves in, or an existing resident moves out. Event fees may also be payable on sub-letting, regardless of the length of the sub-lease.

- 2.9 We recommend that event fees should only be chargeable on:¹³

- (1) sale;
- (2) sub-letting, where the property is no longer the resident's only or principal home; and
- (3) change of occupancy, where the resident has died or where the property is no longer the resident's only or principal home.

Sale

- 2.10 Under our recommendations, a landlord/operator would only be entitled to charge an event fee on sale if they have complied with their obligations in the code of practice.¹⁴

Sub-letting or change of occupancy

- 2.11 Under the code of practice, an event fee may only be charged on sub-letting or change of occupancy if the property is no longer the resident's "only or principal home".¹⁵ For example, an event fee may not be charged if the resident sub-lets the property when they are admitted to hospital for an extended period of time.

Exceptions on change of occupancy

- 2.12 We recommend that an event fee should not be charged when the resident ceases to occupy the property, if the property is thereafter occupied by the resident's spouse or civil partner or by a person who was living with the resident as their only or principal home. Furthermore, if a person such as the resident's son or daughter moves into the property to live with their resident to care for them, we do not consider that an event

¹² Leasehold Reform, Housing and Urban Development Act 1993, s 87(7).

¹³ Code of practice, Part 3.

¹⁴ Code of practice, para 3.1(1). The obligations are those in Parts 4 and 5 of the code of practice.

¹⁵ Code of practice, para 3.1(2), (3). We discuss sub-letting and change of occupancy from para 4.14 of our report.

fee should be charged if that person continues to live in the property following the resident's death.

- 2.13 Some stakeholders expressed concern that this exception could be used by successive generations to avoid payment of the event fee in perpetuity. We have not been provided with evidence as to how often someone of a successive generation moves into a retirement property with a resident, and remains in the property after their death. Such a person would have to meet any restrictions under the lease as to their age or health. We accept, however, that this does occur, and that the number of cases is likely to increase with the ageing population. Therefore, we recommend that this exception should be subject to an additional requirement that an event fee must have been paid on the resident purchasing or entering into occupation of the property. This would mean that succession without an event fee would only be allowed to happen once.

The "prescribed cap"

- 2.14 We recommend that, where an event fee may be charged on sub-letting or change of occupancy, it should be subject to a maximum limit.¹⁶ The code of practice therefore sets out a "prescribed cap". This is the maximum amount of an event fee which can be charged in these circumstances. Its purpose is to ensure that a landlord/operator does not receive a windfall.
- 2.15 When the prescribed cap applies, the amount of the event fee payable in a year will be no more than 10% of the event fee which would be payable on sale of the property. For example, if the event fee payable on sale of the property is £2,000, the event fee payable when the prescribed cap applies will be no more than £200 in a year. The figure of 10% is based on the average length of stay in a retirement property. The prescribed cap is calculated on the purchase price or open market value of the property, whichever is the lower amount. The code of practice sets out a formula to calculate the prescribed cap.
- 2.16 Some event fees are calculated on the length of ownership of the property. For example, an event fee may be calculated as 1% for each year of ownership. After ten years of ownership, the event fee would be 10%. When the event fee increases according to length of ownership, up to a maximum rate (for example, 1% of the purchase price for each year of ownership up to maximum of 10%), no event fee is payable on sub-letting or change of occupancy until the maximum rate is reached. This is designed to ensure that a landlord/operator is not paid an event fee twice for the same period of time.

OBLIGATIONS OF THE LANDLORD/OPERATOR

- 2.17 The 2013 OFT report raised concerns that event fee terms are not always presented transparently to consumers when they are deciding whether to buy a property. The Law Commission's own research, involving a mystery shopper exercise and a survey of conveyancing solicitors, confirmed these concerns.¹⁷

¹⁶ We discuss the prescribed cap from para 4.42 of our report.

¹⁷ Consultation paper, paras 4.28 to 4.78.

- 2.18 The CPRs already impose important disclosure duties on traders involved in the sale of specialist retirement properties. Those giving price information about retirement properties must not give false information or present information in a way which is likely to deceive the average consumer.¹⁸ However, a consumer of a specialist retirement property has no legal rights to enforce these obligations directly against a trader. Additionally, the CPRs are not at present well known and understood by developers, landlord/operators, managing agents and estate agents.
- 2.19 We therefore recommend that the code of practice should place obligations on landlord/operators to provide clear information about event fees to consumers in a specified format.¹⁹ On consultation, this recommendation received strong support from the majority of stakeholders.

Disclosure document

- 2.20 We recommend that clear information about event fees should be provided to consumers in a standard disclosure document. This will include an explanation of how the fee is calculated, who will receive the fee, and what the consumer will receive in exchange for the fee. It will also include bespoke worked examples, showing how much the event fee is likely to be, depending on length of ownership and fluctuations in the market price of the property.
- 2.21 The nature of the obligations on landlord/operators to provide the disclosure document to consumers depends on whether the property is being sold directly through them, or by the leaseholder through an estate agent.

When the property is sold by or through the landlord/operator

- 2.22 When the property is sold by or through the landlord/operator, we recommend that the code of practice should provide that any advertisement that mentions the price of the property must also state that an event fee is payable, with a general indication of the amount and method of calculation of that fee.²⁰
- 2.23 The code of practice provides that where the landlord/operator is selling the property off-plan, they must provide a prospective buyer with the disclosure document when the prospective buyer expresses an interest in a particular property.²¹ For properties which are not sold off-plan, the disclosure document must be provided on the prospective buyer's first visit to the property.²²

When the property is sold by the leaseholder through an estate agent

- 2.24 Some retirement properties are sold by the leaseholder, or their estate, through an estate agent. This situation presents different challenges from that of a direct sale by the landlord/operator. The estate agent may not be aware that event fees apply to the

¹⁸ We discuss the CPRs and their application to event fees from para 5.8 of our report.

¹⁹ We discuss the obligations of the landlord/operator in our report, chs 5 and 6.

²⁰ Code of practice, para 4.2.

²¹ Code of practice, para 4.4.

²² Code of practice, para 4.5.

property, or even that it is a retirement property. The landlord/operator may not be aware that the property is for sale.

- 2.25 We recommend that these problems should be addressed by the use of a central online database. Its purpose would be to provide information about event fees to estate agents and consumers. The information and advice charity, Elderly Accommodation Counsel, has offered to host this database.
- 2.26 Following consultation, we acknowledge that not all landlord/operators wish to provide information to the central database in the same manner. Therefore we recommend that, to satisfy transparency requirements, the landlord/operator should either:
- (1) Provide certain specified information to the central database about the event fees for each of their properties. This information would be used by the central database to produce a disclosure document automatically when requested by an estate agent or consumer in relation to a particular specialist retirement property.
 - (2) Provide their contact details to the central database so that an estate agent or consumer can contact the landlord/operator for the information about event fees. The landlord/operator would have an obligation to provide the disclosure document to the estate agent or consumer within two working days.
- 2.27 Information must be provided to the central database free of charge and must be complete and accurate. It must also be kept up to date.²³

Working with estate agents and redress schemes

- 2.28 Some stakeholders are concerned that, even with our recommended reforms, estate agents may fail to provide the disclosure document to consumers, and that this may negate the enforceability of the fee. The event fee will, however, be enforceable as long as the landlord/operator has complied with the code of practice, even where the estate agent has failed to bring the event fee to the consumer's attention.
- 2.29 In that case, the consumer would be able to seek redress from an approved redress scheme, such as The Property Ombudsman, which has its own code of practice for residential estate agents. We recommend that this code of practice should be amended to include reference to the code of practice on event fees. The Property Ombudsman has indicated it is willing to take this action.
- 2.30 It is clear from our research and consultation that estate agents need to be reminded of their obligations under the CPRs and made aware of the existence of event fees and our recommended reforms. We propose to do this by working with the redress schemes, as well as with NAEA Propertymark (formerly the National Association of Estate Agents), to develop guidance for estate agents and to raise awareness among consumers. We recommend that such guidance should provide an explanation of

²³ Code of practice, paras 4.7, 4.9.

event fees, outline estate agents' obligations and suggest how to identify that a property is a retirement property.

RECOMMENDED AMENDMENT TO THE GREY LIST

- 2.31 In our report we recommend that where there has been a breach of the code of practice, the relevant event fee term should be presumed to be unfair and unenforceable. We suggest that the best way to achieve this would be to amend Schedule 2 to the Consumer Rights Act 2015.²⁴
- 2.32 Part 1 of Schedule 2, which is known as the “grey list”, contains a list of contract terms which may be regarded by a court as indicatively unfair. If a term is on the grey list, it may be assessed by a court even if it would normally be excluded from assessment under the 2015 Act. For example, section 64 of the 2015 Act provides that a court cannot assess the appropriateness of the price payable under a contract, provided that the term is transparent and prominent. Significantly, where a term is on the grey list, these exceptions do not apply and a court may assess the appropriateness of the price, even though the term is transparent and prominent.

Grey list – recommended amendment

2.33 We recommend that an item should be added to the grey list which covers a term:

- (1) of or relating to a residential lease;
- (2) which has the object or effect of requiring payment of a fee or foregoing of a benefit other than on conclusion of the contract; and
- (3) where there has been a breach of an approved code of practice involving the substance of the term or the circumstances in which the term was brought to the attention of the consumer.

2.34 We consider that this amendment would cover a breach of the code of practice on event fees. Such a breach could relate either to the substance of a term or to the circumstances in which the term was brought to the attention of the consumer.

2.35 Our recommended amendment to the grey list will only apply to new leases created after such amendment. Existing leases are unaffected, but, in our report, we discuss possible future reform which would provide that the grey list amendment would apply on the next assignment of an existing lease.²⁵

Qualifications to the grey list

2.36 We recommend that there should be exceptions to the application of the grey list for event fees.²⁶

²⁴ We discuss our recommended amendment to the Consumer Rights Act 2015 in the report, ch7.

²⁵ See para 2.40 below, and in the report, ch 8.

²⁶ These exceptions, known as “qualifications” would be added to Part 2 of Schedule 2 to the Consumer Rights Act 2015.

- 2.37 First, we recommend that any fee, to the extent that it can be challenged before the First-tier Tribunal, should be excluded. This is to ensure that we do not restrict a leaseholder's right to challenge charges, such as variable service charges and administration charges, in the First-tier tribunal.
- 2.38 Secondly, we recommend that any fee held on trust for the purposes of maintaining or improving the property should be excluded. This is to incentivise landlord/operators to put the appropriate trust mechanisms in place to protect event fees earmarked for a contingency or sinking fund. These will be enforceable by the landlord/operator, regardless of a breach of the code of practice, as long as the money is kept on trust for the property.
- 2.39 In our report we discuss whether there may be a case for exploring in a future project whether a statutory trust should apply to event fees to be used exclusively for the maintenance, repair or improvement of the development.

FUTURE REFORM

- 2.40 We have explained above that, if our recommendations are implemented, a consumer will be able to enforce the code of practice directly, pursuant to the Consumer Rights Act 2015, in relation to a new lease. However, a consumer will not be able to enforce the code of practice under that Act in relation to an existing lease unless the landlord/operator has subscribed to the code of practice.
- 2.41 This is because a lease is a contract when it is created, but there is some uncertainty over whether it remains a contract after it has been assigned to a new leaseholder or to a new landlord. As a result, the extent to which unfair terms legislation applies to an existing lease after it is assigned is unclear.
- 2.42 We have previously suggested that, for the purposes of unfair terms law, an event fee term should be treated as if it were a term of a new contract made when the consumer first became bound by the term.²⁷ This would mean that our recommended reforms would apply to any event fee term in a lease that is assigned to a consumer after our recommendations came into effect, irrespective of when the lease was first granted.
- 2.43 However following consultation, we now accept that it would not be appropriate to make such a fundamental change to the law for event fee terms only. If we were to recommend such reform, it should be for all terms in residential leases. The complications of such a fundamental change would need to be considered thoroughly. Accordingly, we recommend that the question of whether a lease should be treated as a new contract on each assignment for the purposes of unfair terms law generally should be the subject of a new Law Commission project.
- 2.44 This project is currently under active consideration as part of the Law Commission's 13th programme of law reform. If taken forward, we consider that this project could be an important step towards greater consumer protection from unfair terms in residential leases generally.

²⁷ Consultation paper, para 11.11.