



## BRIEFING PAPER

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# Leasehold retirement homes: exit/event fees

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## Summary

Companies that own or manage retirement properties, usually flats owned on a long leasehold basis, often include a clause in their lease agreements requiring owners to pay an "exit" or "transfer" fee when they wish to sell or rent out their homes. The Law Commission notes that payment of these fees is triggered by an event (such as resale or sub-letting) and for this reason has started to refer to them collectively as "event fees." The fee, according to the Law Commission "can be up to 30% of the property's resale price."

Owners have questioned whether this practice is legal and the matter has attracted a good deal of media attention.

Between 2009 and 2013 the Office of Fair Trading (OFT), carried out an investigation into these fees. The OFT closed on 1 April 2014 and its responsibilities passed to a number of different organisations, including the [Competition and Markets Authority](#) (CMA) and the [Financial Conduct Authority](#).

Overall, the OFT concluded that "transfer fee terms, as typically currently drafted, are likely to constitute unfair terms under the UTCCRs." However, the OFT decided not to test this proposition in the courts as a number of companies voluntarily agreed to drop event fees and make changes to enforcement practices. The OFT *did* recommend some further policy and legislative changes.

The Law Commission subsequently announced that it had started work in October 2014 on the [Transfer of Title and Change of Occupancy Fees in Leaseholds](#) project, as referred by the Department of Communities and Local Government. The Law Commission conducted a consultation exercise between 29 October and 29 January 2016. An interim report is expected in summer 2016 with a final report in March 2017 if the project continues.

Constituents with queries about event fees as part of their lease agreements should seek professional legal advice.

This note summarises the outcome of the OFT investigation and details the Law Commission's review of event fees.

# 1. A requirement to pay exit/event fees

Companies that own or manage leasehold retirement properties, usually flats, often include a clause in their lease agreements requiring the leaseholder to pay an "exit" or "transfer" fee when they (or their beneficiaries) wish to sell or rent out the property. The Law Commission has observed that these fees can be described in a number of different ways:

The fees are called by a bewildering variety of names, from "transfer fees" and "contingency fees" to "deferred membership fees" and "selling service fees". [...] And all of them are triggered by an event (such as resale or sub-letting). For this reason we refer to them collectively as "event fees".<sup>1</sup>

It is not uncommon for this fee to take the form of a percentage of the property's market value at the time of selling. On signing the lease agreement the leaseholder agrees to this provision and it becomes a binding clause in their contract (lease agreement).

The practice of charging these fees has received a good deal of negative media attention. Owners subject to these fees have questioned whether they are legal as it can result in firms obtaining substantial sums of money when properties change hands. Some firms argue that the fee covers administration expenses incurred when the lease is assigned.

It is recognised that event fees can allow people to use some of their housing wealth to pay for a higher standard of living in their later years, but there is ongoing concern over the lack of transparency associated with these fees as part of the sales process. A number of owners claim to be unaware of the existence of the fees until the point at which a payment is requested.

Unlike normal service charges, these fees cannot be challenged by long leaseholders at a First Tier Tribunal (Property).

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<sup>1</sup> The Law Commission, [Transfer of Title and Change of Occupancy Fees in Leaseholds – current project status](#) [accessed on 23 March 2016]

## 2. The Office of Fair Trading investigation<sup>2</sup>

In January 2009 the Office of Fair Trading (OFT) secured an agreement from one company, McCarthy and Stone, to remove this type of clause from future contracts and not to enforce it in existing contracts. OFT considered the term likely to be in breach of the *Unfair Terms in Consumer Contracts Regulations 1999* (the UTCCRs). McCarthy and Stone said that it did not agree with the OFT's view but co-operated with discussions and agreed to the changes, see: [Retirement housing company agrees to change its lease agreements.](#)<sup>3</sup>

The UTCCRs apply to standard contract terms with consumers:

The UTCCRs protect consumers against unfair standard terms in contracts they make with traders. The OFT, and certain other qualifying bodies (such as local authority trading standards, national regulatory bodies, and Which?) can take legal action to prevent the use of potentially unfair terms. A term is likely to be considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers. The UTCCRs say that a consumer is not bound by a standard term in a contract with a trader if that term is unfair. Ultimately, only a court can decide whether a term is unfair.<sup>4</sup>

The OFT produced [specific guidance](#) on unfair terms in tenancy agreements.<sup>5</sup>

On 3 September 2009 the OFT announced an investigation into exit fees charged by retirement home companies:

The OFT has today announced an investigation into the contracts signed by occupants of purpose built owner occupied retirement homes. The OFT considers that a number of terms on **exit fees** in these contracts may be unfair and so may breach the Unfair Terms in Consumer Contracts Regulations (UTCCRs).

The OFT is issuing formal written notices to 26 retirement home firms setting out its concerns over terms on exit fees charged when residents sell or rent their properties.

No assumption should be made that any individual company has been found to have breached consumer protection legislation at this time.<sup>6</sup>

The OFT did not investigate the fairness of exit fee terms by comparing the amount of fee payable against the service(s) a firm was offering in return, it considered:

... a wider set of circumstances including the information provided to the consumer during the sales process, whether the firms made

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<sup>2</sup> The OFT closed on 1 April 2014. Its responsibilities passed to a number of different organisations including the [Competition and Markets Authority](#) (CMA) and the [Financial Conduct Authority](#).

<sup>3</sup> McCarthy & Stone PLC, 14 January 2009

<sup>4</sup> OFT Press Release 1 January 2009 (now archived)

<sup>5</sup> OFT, [Guidance on unfair terms in tenancy agreements](#), 2005

<sup>6</sup> [OFT investigates retirement home exit fees](#), 3 September 2009

the charges known to the consumers and whether consumers clearly understood the liability and took that into account in purchasing the lease.

The OFT's report on the findings was published in February 2013: [OFT investigation into retirement home transfer fee terms](#). On publication the OFT said:

The report sets out a number of general principles the OFT would expect all landlords to abide by when enforcing transfer fee terms in existing leases and recommends that legislative reform be considered to address the difficulties leaseholders face in challenging the reasonableness of such fees.<sup>7</sup>

The investigation was formally closed in April 2013:

The OFT has now written to the remaining businesses whose cases it placed 'on hold' earlier in its investigation, drawing their attention to the OFT's published findings report and in particular the general principles it expects all landlords to comply with if they make use of transfer fee terms. The OFT reserves the right to consider whether to take action against a landlord under the Unfair Terms in Consumer Contracts Regulations 1999 should they not abide by these general principles, in light of all the facts before it, current overall priorities (see also the OFT's published [Prioritisation Principles](#)) and appropriate legal considerations.

Although the OFT has now closed its formal industry-wide investigation, it will keep the sector under review in order to monitor compliance with the undertakings given by some landlords, and will have specific regard to any new evidence or changes in the law that may arise.<sup>8</sup>

Overall, the OFT concluded that "transfer fee terms, as typically currently drafted, are likely to constitute unfair terms under the UTCCRs." The OFT decided not to test this proposition in the courts:

We have, however, decided not to test this in the courts at this stage on the basis that the landlords we have reached agreement with have either voluntarily dropped the transfer fee, replaced it with a flat fee, or agreed to make various changes to the way they enforce such terms with a view to mitigating what we consider to be their inherent unfairness. We have reserved our position on certain remaining concerns to see if the mitigating factors are sufficient.<sup>9</sup>

However, the report set out a number of general principles that OFT expects all landlords to comply with.

#### **Existing Leases**

##### **Limiting the circumstances in which the transfer fee is charged to final sale**

If charged at all, a transfer fee should only be payable on final assignment by way of a sale, and not in any other circumstances such as sub-letting, upon inheritance, a change in occupation, surrender or an equity release.

<sup>7</sup> [OFT Press Release](#), 1 February 2013

<sup>8</sup> [OFT Press Release](#), 9 April 2014

<sup>9</sup> [OFT investigation into retirement home transfer fee terms](#), February 2013, chapter 8

### **Providing certainty as to the tenant's transfer fee liability**

The tenant should be able to assess their maximum potential liability arising under the transfer fee term, for example by being offered one or more of the following options:

- through the charging of a flat fee
- through the calculation of the transfer fee as a percentage of the lower of the price the tenant originally paid for the property or the sale price achieved by the tenant
- by being given the option to switch to a ground rent
- by the transfer fee being expressly treated as credit.

### **Not using the 'open market value' of a property as a basis for calculating the transfer fee payable on sale**

Tenants should not be required to pay a transfer fee on sale that is calculated on the basis of the open market value of the property. We consider it unfair that a landlord is able to determine the property value against which the transfer fee will be calculated, even in circumstances where the lease term allows for the tenant to dispute the landlord's valuation.

### **Ensuring the transfer fee term is transparent**

A landlord's obligations under the UTCCRs may not be discharged solely by reliance upon the fact that a tenant will receive advice from a solicitor or conveyancer prior to purchase.

The transfer fee term must be sufficiently clear to enable the typical consumer to have a proper understanding of it, which requires not only that the actual wording of the term is comprehensible to consumers but that they can understand how the term affects their and the landlord's respective rights and obligations.

It should also be made clear to consumers whether the transfer fee is:

- simply payable as a consequence of an assignment of the lease taking place but not related to the provision of any services or consent, or
- payable in respect of any administrative services undertaken by the landlord (including fees for the landlord to give their consent under a lease) and is therefore subject to a test of reasonableness and challengeable at the Leasehold Valuation Tribunal in England and Wales. In this regard we expect statements made by landlords about the nature of the transfer fee, and what it is for, to be completely accurate and not misleading. We do not expect landlords to give the impression that a transfer fee is a condition for consent, or paid in respect of any services provided by the landlord, unless the landlord also makes clear the consumer's rights to challenge the fee before the Leasehold Valuation Tribunal.

In practice, we would expect that in addition to pre-sale material - such as the Purchaser Information Pack - including a clear and prominent explanation of the transfer fee term, prospective tenants will also be provided with a 'key facts' summary document explaining their financial liabilities under the transfer fee term (including the circumstances under which the tenant will



become liable, how the transfer fee is calculated and a number of worked examples).

We expect landlords and their managing agents to use their best endeavours to bring the transfer fee term (in addition to other material information about the retirement home property) to the attention of prospective tenants. This would include, for example, not only providing pre-sale documentation to the prospective tenant or their solicitor but also, where it was not possible to obtain details of the prospective tenant's solicitor, providing such documentation to the seller's solicitor with prominent instructions that it be passed to the buyer as quickly as reasonably practicable.

### **OFT enforcement policy**

We expect landlords to abide by these overarching principles when enforcing transfer fee terms in existing leases. They represent the **minimum** steps we consider necessary to address the most egregious unfairness around transfer fee terms.

We will have regard to these general principles on a case-by-case basis when considering whether enforcement action under the UTCCRs might be appropriate against a landlord who enforces transfer fee terms in contracts with consumers. The principles are not, however, intended to be exhaustive or set in stone and will be kept under review in the light of new case law or legislation that may emerge in relation to the fairness of transfer fee terms or any evidence of significant continued consumer detriment. If we receive further complaints, we would be obliged to consider them, in the context of any new evidence and any changes in the law.

### **Newly created or acquired leases**

We take the view that the nature of transfer fee terms, coupled with consumers' strong behavioural biases, are such that there remains a risk of consumers suffering detriment.

We consider that landlords should not include or enforce transfer fee terms in newly created or acquired leases, other than in circumstances where the fee is for a service and is no more than the actual costs reasonably and necessarily incurred in providing that service, or where it is presented as a credit facility.<sup>10</sup>

In chapter 9 the OFT recommended further policy and legislative changes:

We therefore recommend that legislative reform be considered by expanding the remit of the Leasehold Valuation Tribunal to allow the tribunal to rule on the reasonableness of all transfer fees (possibly through an amendment to Schedule 11 to the CLRA<sup>11</sup> and/or any other necessary changes). Further, or alternatively, there could be consideration of whether the model currently in force in Scotland of restricting or prohibiting certain classes of fees would be appropriate.<sup>12</sup>

## **Contingency Fund fees**

Although not the focus of its report, the OFT also expressed concerns about contingency fund fees. These are typically paid into a reserve fund

<sup>10</sup> [OFT investigation into retirement home transfer fee terms](#), February 2013, chapter 8

<sup>11</sup> *Commonhold and Leasehold Reform Act 2002*

<sup>12</sup> [OFT investigation into retirement home transfer fee terms](#), February 2013, chapter 9



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held by the management, in order to pay for irregular and expensive repair and maintenance works.

The OFT expressed concerns about the drafting and application of contingency fund fees, as they tend to be drafted in a similar way to transfer fees, and apply in a similar range of circumstances. The report found:

Contingency Fund Fees may be covered by other legislation as service charges, and so may be challengeable in the LVT. However, where the fee is applicable on sub-letting, because it can be large, this could also have a significant impact on the ability of a tenant to sublet their property, or even have it occupied at all. Where it applies on final sale, it is also practically difficult to challenge, since generally the fee must be paid before the sale can complete.<sup>13</sup>

The OFT recommended that any reform of transfer fees should also include reform of contingency fund fees.

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<sup>13</sup> [OFT investigation into retirement home transfer fee terms](#), February 2013, chapter 9

### 3. Law Commission review

On 1 September 2014, the Secretary of State for Communities and Local Government, Eric Pickles, said his Department would look to address the issue of transfer fee covenants particularly found in the retirement leasehold sector by referring the matter to the Law Commission.<sup>14</sup>

The Law Commission subsequently announced that it had started work in October 2014 on the [Transfer of Title and Change of Occupancy Fees in Leaseholds](#) project, as referred by the Department of Communities and Local Government:

The project will consider the problems caused by terms in residential leases generally which require the lessee to pay a fee on a transfer of the title or change of occupancy, and in the retirement home sector and similar markets in particular.

We will look at how the current law addresses the problems that are identified and consider whether greater protection is needed for lessees. This may involve unfair terms legislation, landlord and tenant law and conveyancing procedure. We will also consider what the impact of any greater protection may be.

The project will be reviewed in March 2016 at which point we will make interim recommendations for reform. If the project continues we will make final recommendations in March 2017.<sup>15</sup>

A consultation exercise, with an associated [consultation paper](#), was conducted between 29 October and 29 January 2016.<sup>16</sup> The Law Commission is scheduled to publish its interim findings in summer 2016.<sup>17</sup>

Alongside the consultation paper the Law Commission published several background documents including a [Law Society survey](#) on the prevalence of event fees, a [mystery shopping report](#), and [an assessment of information on service charges, exit and other fees in retirement villages as presented on the websites of eight providers](#).

Once the Law Commission reports, it will be for the Government to decide whether or not to act on any recommendations.

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<sup>14</sup> [HC Deb 1 September 2014 c3WS](#)

<sup>15</sup> The Law Commission, [Transfer of Title and Change of Occupancy Fees in Leaseholds](#), October 2014

<sup>16</sup> Law Commission Consultation Paper, 226, [Residential leases: fees on transfer of title, change of occupancy and other events](#), October 2015

<sup>17</sup> The Law Commission, [Transfer of Title and Change of Occupancy Fees in Leaseholds – current project status](#) [accessed on 23 March 2016]

## 4. Constituents' enquiries

The OFT's (now archived) website has a useful [Q&A section](#).

If constituents are concerned that they may have been unfairly treated or want advice on their personal circumstances the OFT advised them to contact [Citizens Advice](#). Alternatively they could contact their local trading standards service and obtain independent legal advice.

Chapter 10 of the [OFT investigation into retirement home transfer fee terms](#) report contains the following information on private rights of action:

...individual consumers have their own rights under the UTCCRs. Where a term is not drafted clearly, it must be construed in the way that most benefits the consumer. An unfair term is not binding on the consumer and a supplier cannot rely on it in any dispute. Consumers cannot be made to comply with obligations arising from unfair terms, and may make claims for compensation or other redress even if the term states that they may not. A consumer may argue in a dispute with a supplier that the terms of a contract are unfair and ask a court to make a decision on the matter. This right exists independently of the OFT's powers under the UTCCRs and can be enforced regardless of any view we have given on the same or similar terms, or indeed, any action it has taken. Ultimately the question of whether or not a term is unfair is a question for the court to decide.

We are unable, however, to provide direct advice or assistance to individual consumers, and strongly advise that tenants seek legal advice before considering any such action.

10.4 Further, we cannot say with certainty that our findings will apply to a particular lease, as the unfairness of any lease term would need to be assessed by a court on a case-by-case basis by reference to all the circumstances surrounding the conclusion of the contract.

10.5 In addition to private rights of action, in some circumstances there may be scope for disputes to be taken to mediation; however we would recommend that tenants seek independent advice before doing so.<sup>18</sup>

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<sup>18</sup> [OFT investigation into retirement home transfer fee terms](#), February 2013, chapter 10

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