



**Law  
Commission**  
Reforming the law

## Event Fees in Retirement Properties





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Reforming the law

(Law Com No 373)

# **Event Fees in Retirement Properties**

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# The Law Commission

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# Glossary

<b>Administration charge</b>	A charge payable under the terms of a lease by a leaseholder in addition to rent, in connection with (a) the landlord giving approval to something such as internal modifications; (b) the landlord providing information to a third party; or (c) some default by the leaseholder such as breaching one of the terms of the lease.
<b>Consultation paper</b>	<i>Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events</i> (2015) Law Commission Consultation Paper No 226. Available at: <a href="http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf">http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf</a>
<b>Consumer Protection from Unfair Trading Regulations 2008 (CPRs)</b>	The CPRs implement the EU Unfair Commercial Practices Directive 2005. They are designed to protect consumers against misleading or aggressive trade practices.
<b>Contingency fund</b>	See sinking fund.
<b>Event fee</b>	A fee payable under a term of or relating to a residential lease of a retirement property on certain events such as resale or sub-letting. Event fees may be referred to by a variety of names including exit fees, transfer fees, deferred management fees, contingency fees and selling service fees.
<b>Fixed service charge</b>	A service charge that does not vary according to the costs actually incurred by the landlord or management company in providing services.
<b>Freeholder</b>	The owner of the freehold interest in the property. The freeholder owns the property outright. See, in comparison, the definition of leaseholder, below.
<b>Grey list</b>	The Unfair Terms Directive 1993 contains an “indicative and non-exhaustive” list of contract terms which may be regarded as unfair. This list is now set out in Schedule 2 to the Consumer Rights Act 2015.
<b>Ground rent</b>	A regular payment required under a lease made by a leaseholder to the freeholder of the property.
<b>Head leaseholder</b>	The head leaseholder is the leaseholder with the longest lease, from which shorter leases have been created. They are sometimes referred to as the superior leaseholder.

<b>Landlord/operator</b>	Any person or organisation who has the right to require payment of the event fee, and includes any agent acting on their behalf.
<b>Leaseholder</b>	The owner of a leasehold interest in land where the lease is a long lease, typically granted for an original term of 99 or 125 years.
<b>Right to manage company</b>	A company established under the Commonhold and Leasehold Reform Act 2002 to acquire the landlord's management functions.
<b>Service charge</b>	A payment made by a leaseholder to a landlord or management company towards the cost of providing services such as repairs, insurance or maintenance of communal areas.
<b>Sinking fund</b>	A fund held by a landlord or management company to "cover the cost of irregular and expensive works such as external decorations, structural repairs or lift replacement." (Source: the Leasehold Advisory Service). The fund is paid for out of contributions made by leaseholders.
<b>Specialist housing (for older people)</b>	Housing designed for older people, where the resident owns their own home. Includes age-exclusive housing, retirement housing and extra-care housing. There may be a term in the lease setting a minimum age for occupiers.
<b>Superior leaseholder</b>	See definition above for head leaseholder.
<b>Unfair contract term</b>	Defined in the Unfair Terms Directive 1993 as "a contractual term which has not been individually negotiated" that "contrary to the requirement of good faith ... causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."
<b>Unfair terms legislation</b>	Legislation designed to strike out terms in a contract between a business and a consumer if they are unfair to the consumer. For the purposes of this report, references to unfair terms legislation include the Unfair Terms Directive 1993 and its implementing legislation: the Unfair Terms in Consumer Contracts Regulations 1994, Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015.
<b>Variable service charge</b>	A service charge that varies according to the costs actually incurred by the landlord or management company in providing services.

# Table of Abbreviations

<b>APPG</b>	All-Party Parliamentary Group
<b>ARCO</b>	Associated Retirement Community Operators
<b>ARHM</b>	Association of Retirement Housing Managers
<b>ASA</b>	Advertising Standards Authority
<b>CAP</b>	Committee of Advertising Practice
<b>CARLEX</b>	Campaign Against Retirement Leasehold Exploitation
<b>CMA</b>	Competition and Markets Authority
<b>CPRs</b>	Consumer Protection Regulations 2008
<b>DCLG</b>	Department for Communities and Local Government
<b>EAC</b>	Elderly Accommodation Counsel
<b>LEASE</b>	Leasehold Advisory Service
<b>NAEA Propertymark</b>	Formerly the National Association of Estate Agents
<b>OFT</b>	Office of Fair Trading
<b>RICS</b>	Royal Institution of Chartered Surveyors
<b>TPO</b>	The Property Ombudsman



# THE LAW COMMISSION

## EVENT FEES IN RETIREMENT PROPERTIES

*To the Right Honourable Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice*

### Chapter 1: Introduction

#### WHAT ARE EVENT FEES?

- 1.1 Some people, when they get older, decide to move into a specialist retirement property. They may do so because they want to move to a smaller property or because they have particular health issues which make their current home impractical. They may want to move because they would like to live in a community of likeminded people of a similar age.
- 1.2 When a person purchases a retirement property they may say that they own the property. This could mean one of two things. They may own the freehold – that is, they own the property outright – or, particularly where the property is a flat rather than a house, they may own a long lease. A long lease typically lasts 99 years or more. Such leases are usually issued in return for payment of a capital sum and can be bought and sold (subject to any terms in the lease). In legal terms, the owner of a long lease (the leaseholder) is regarded as the tenant of whoever owns the freehold (the landlord).<sup>1</sup>
- 1.3 A lease creates mutual obligations between the landlord and the leaseholder. Typically, leases oblige the landlord to maintain common areas and shared facilities and to insure the building, with a corresponding obligation on the leaseholders to contribute to the cost of such maintenance and insurance as a service charge. Leaseholders may also have to pay a periodic rent, known as a ground rent.
- 1.4 The law around long leases is particularly complex because leases operate as both contracts and property rights in land. This means that terms in leases are subject to land law, which regulates the relationship between landlords and leaseholders.<sup>2</sup> They

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<sup>1</sup> Definitions and abbreviations can be found from page v of this report.

<sup>2</sup> We discuss how landlord and tenant law may apply to event fees in Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, ch 5. We refer to this document throughout this report as the “consultation paper”. It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017).

may also be subject to the law applying to consumer contracts.<sup>3</sup> In this report, we refer to prospective buyers of long leases as “consumers”.

- 1.5 Some long leases require the leaseholder to pay a fee on certain events, such as sale, sub-letting or change of occupancy. These fees, which we call “event fees”, are common in specialist housing for older people. Event fees go by a variety of names including “exit fees”, “transfer fees”, “deferred management fees”, “contingency fees” and “selling service fees”. The name given to an event fee is not necessarily an indication of why the fee is being imposed or how the money is used.
- 1.6 There is no standard way in which event fee terms are drafted. In our consultation paper, we drew on a sample of specialist leases sold to older people.<sup>4</sup> Typically, in the example leases we considered, the event fee was expressed as a percentage. We came across a range of percentages charged, from 1% of the purchase price or open market value of the property to 30% of the purchase price. These may be a flat rate percentage or an event fee calculated on the basis of 1% for each year of occupation. In some cases, the leaseholder is required to sell the property back to the freeholder at the original purchase price. That means that the leaseholder will lose any increase in the value of the property.
- 1.7 The recipient of the event fee may include the freeholder, the developer, the operator or the managing agent. The event fee may also go to a sinking fund established for the maintenance of the development. In this report, we refer to the person or organisation who may require payment of the event fee as the “landlord/operator”.

## **CONTROVERSY AROUND EVENT FEES**

### **Disadvantages and benefits of event fees**

- 1.8 Event fees are controversial and often leave leaseholders frustrated and angry. Such fees may be triggered in circumstances which a leaseholder may not expect or which come as a surprise. Event fees are typically a deferred payment made at the end of a person’s period of occupation; however, they may be broadly drafted. For example, some event fees are payable on any “disposition” or “material change in occupation”. A leaseholder may expect to pay an event fee when they sell the property. However, in certain cases event fees can also be charged when the property is inherited or mortgaged, when a spouse, civil partner or carer moves in, or when an existing resident moves out.<sup>5</sup> In this report we refer to these situations as “unexpected circumstances”. Event fees may also be payable on sub-letting, regardless of the length of the sub-lease.

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<sup>3</sup> We discuss how consumer contract law has been applied to leases in the consultation paper at paras 6.70 to 6.92.

<sup>4</sup> Consultation paper, ch 3.

<sup>5</sup> A couple may move into a retirement property together at the same time. However, there are occasions where an event fee is charged on the resident’s spouse or civil partner moving into the property. We have heard from stakeholders about scenarios where one spouse or civil partner may move into a property before the other. Reasons for this include that one member of the couple may require greater access to care initially, or a resident may marry or enter into a civil partnership whilst in occupation.

- 1.9 Event fees and their financial consequences are not always clear to consumers when they are deciding whether to purchase a retirement property. An event fee of 1% and an event fee of 1% for each year of residence may have markedly different financial consequences. Our research indicates that event fees and such consequences are often not explained clearly enough to consumers.
- 1.10 Additionally, event fees may exploit consumers' "behavioural biases", which means that consumers may not take event fees into account when making a decision to purchase a retirement property. For example, consumers give more attention to immediate costs than to future costs. They fail to adjust their assessment of the total offer when future costs are revealed. We believe that it is paramount that consumers are provided with clear information about any event fees at an early stage in the purchase process to counteract these biases.
- 1.11 Despite these problems, event fees may have some advantages for older residents who, typically, have more capital than income.<sup>6</sup> We discuss below that specialist housing may offer many benefits to residents in terms of health and wellbeing.
- 1.12 However, some consumers may struggle to afford it. Inevitably, specialist retirement housing has high operating costs, which must cover not only maintenance of the property but also the cost of cleaning and maintaining the communal amenities.
- 1.13 Event fees may assist in deferring some of the service charges associated with these high operating costs. In turn, this may enable a consumer to live in a property with services they may not otherwise be able to afford. In this way, event fees may increase the options available to an older consumer for their retirement.

### Office of Fair Trading Report

- 1.14 In 2013, the Office of Fair Trading (OFT) investigated the use of transfer fees (a type of event fee) in leases of specialist housing for older people.<sup>7</sup> The OFT found that terms in leases imposing this type of event fee were potentially unfair contract terms, contrary to what is now the Consumer Rights Act 2015.<sup>8</sup> For example, event fee terms could apply in unexpected circumstances, were not always transparent and could exploit consumers' behavioural biases. In this report, we recommend that event fees should be disclosed to consumers transparently and early in the purchasing process. We also recommend that landlord/operators should be prevented from charging event fees on events other than on sale and, in limited circumstances, sub-letting and change of occupancy.

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<sup>6</sup> We discuss the advantages of event fees at paras 2.11 to 2.45 below.

<sup>7</sup> Office of Fair Trading, *Investigation into retirement home transfer fee terms, a report on the OFT's findings* (2013), OFT1476.

<sup>8</sup> Successor to the Unfair Terms in Consumer Contracts Regulations 1999, then in force. Office of Fair Trading, *Investigation into retirement home transfer fee terms, a report on the OFT's findings* (2013), OFT1476, para 2.2.

- 1.15 The OFT did not mount a legal challenge, but it secured undertakings from many landlords in the sector either not to enforce these terms, or to enforce them to a limited extent only.<sup>9</sup> We discuss their report further in Chapter 2 of this report.

### **Other models**

- 1.16 We acknowledge that event fees may not be the only way for a consumer to purchase a retirement property. For example, an asset-rich, income-poor consumer may be able to use another mechanism, such as an equity release product, which enables a consumer to access the equity in their home. However, as outlined below, our terms of reference are limited to event fees, and therefore this report does not deal with these other options.

### **TERMS OF REFERENCE**

- 1.17 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.<sup>10</sup>

### **THE CONSULTATION EXERCISE**

- 1.18 We published our consultation paper in October 2015, seeking views on our provisional proposals. This was supported by extensive background papers, including a survey of residential property solicitors and a mystery shopping report.
- 1.19 The consultation paper described the retirement housing sector, setting out the different types of owner-occupied specialist housing for older people.<sup>11</sup> We considered the size of the sector and the reasons for the lack of retirement housing. We also described the variations in the drafting of event fee terms, drawing on a sample of specialist leases sold to older people, obtained from Land Registry.<sup>12</sup> In the consultation paper, we proposed that event fees should be disclosed to consumers transparently and at an early stage in the purchasing process. Consumers should, we said, be provided with information which clearly shows how much an event fee on a particular property may be.
- 1.20 Along with our detailed response form, we designed and distributed leaflets with a questionnaire for residents living in retirement properties. This was intended to provide residents with an alternative to the longer consultation paper response form. We received 157 responses to our consultation in the form of detailed response forms and leaflet questionnaires. We also received 11 responses in the form of reports and letters.

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<sup>9</sup> Consultation paper, Appendix B.

<sup>10</sup> Department for Communities and Local Government, Terms of Reference. See Appendix 2 to this report.

<sup>11</sup> Consultation paper, ch 2.

<sup>12</sup> Consultation paper, ch 3.



- 1.21 In June 2016, we published a progress report.<sup>13</sup> It set out our initial policy conclusions and recommended next steps. We proposed that a detailed code of practice for event fees in retirement properties should be set in place. This code of practice is attached to this report at Appendix 3. It should be supported by primary legislation, so that event fees which do not comply with it would be unenforceable.
- 1.22 In September 2016 we published a draft code of practice, draft disclosure document and accompanying consultation document. We received 43 responses to this consultation document.
- 1.23 We tested the disclosure document with current residents of leasehold retirement properties at a focus group meeting in Kent, organised by the Leaseholder Association. We found feedback from the 18 residents involved in this exercise very useful and have taken it into account. We are grateful to the Leaseholder Association for organising this meeting and to the leaseholders who gave their time to participate.

## **THIS REPORT**

- 1.24 This is the final report of the project. Its purpose is to provide and explain:
- (1) Our recommendations for a code of practice on event fees in retirement properties.
  - (2) Our recommendations for an amendment to Schedule 2 to the Consumer Rights Act 2015. The effect of this amendment would be that if the code of practice has been breached, the event fee may be regarded as unfair.<sup>14</sup>
  - (3) Our recommendations for providing guidance to estate agents.
- 1.25 Chapter 2 of this report outlines the case for reform. In Chapters 3, 4, 5 and 6, we set out the recommended code of practice for event fees in retirement properties and provide commentary on these provisions. In Chapter 7 we look in detail at our recommended amendment to the Consumer Rights Act 2015 and provide commentary on this change. Chapter 8 considers future reform. Chapter 9 provides a consolidated list of our recommendations.
- 1.26 Additional information is included in the appendices:
- (1) Appendix 1 contains a list of stakeholders who responded to the consultation or have otherwise corresponded with us.
  - (2) Appendix 2 sets out the terms of reference from the DCLG.
  - (3) Appendix 3 contains the recommended code of practice for event fees on retirement properties.
  - (4) Appendix 4 contains the recommended amendment to Schedule 2 to the Consumer Rights Act 2015.

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<sup>13</sup> Event Fees Progress Report (June 2016). This is available at [http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event\\_fees\\_progress\\_June\\_2016.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event_fees_progress_June_2016.pdf).

<sup>14</sup> Consumer Rights Act 2015, s 63(1).

- (5) Appendix 5 contains a flowchart illustrating how the code of practice applies to a leaseholder selling a retirement property through an estate agent.
- (6) Appendix 6 contains examples of the standardised disclosure document.

## **ACKNOWLEDGEMENTS**

- 1.27 Our thanks go to all who responded to our consultation or who have supported our project in other ways. We are grateful for the work, time and careful thought given to the issues we have highlighted and in answering the questions we have posed.
- 1.28 Throughout this project we have been very grateful to those who have responded to our consultation and who have met with us. The comments and feedback we received have been instrumental in considering and finalising our recommendations. A list of these consultees can be found at Appendix 1.
- 1.29 We are also very grateful to the residents who have generously given their time throughout this project to outline their experiences and offer feedback on our recommendations. These accounts have formed a central part of our work.
- 1.30 Finally, we thank the officials from various Government departments who have given us their time to discuss the project and consider the recommendations that we make in this report.

## **THE TEAM WORKING ON THE PROJECT**

- 1.31 The following members of the commercial and common law team have contributed to this report at various stages: Tamara Goriely (head of policy); Laura Burgoyne (team manager); Sarah Witchell (team lawyer); Sarah Young (team lawyer); Siobhan McKeering (team lawyer); Max Marenbon (senior researcher); Veena Srirangam Nadhamuni (research assistant) and Ruth Keating (research assistant).

## Chapter 2: The case for reform

2.1 In this chapter, we set out the case for reform. We highlight that consumers need protection from event fees which are unfair. We also consider whether event fees, or certain types of event fees, should be abolished. We then outline our policy objectives and how we intend to achieve them.

### CONSUMERS NEED PROTECTION FROM EVENT FEES WHICH ARE UNFAIR

2.2 Event fees have unsurprisingly attracted public anger and media attention.<sup>15</sup> The Campaign Against Retirement Leasehold Exploitation (Carlex), working in conjunction with the Leasehold Knowledge Partnership, has campaigned extensively against poor practice in the retirement leasehold sector.

2.3 Carlex's campaign on event fees and a report by Age UK<sup>16</sup> led to an investigation by the OFT. In its 2013 report on transfer fees, a type of event fee, the OFT made certain criticisms of event fees, including:<sup>17</sup>

- (1) They may apply in unexpected circumstances, such as sub-letting, when a loan is secured against the property or when the resident's spouse or carer moves into the property.<sup>18</sup> The fees may also be higher than anticipated.
- (2) The fees may not be linked to any service provided.
- (3) The terms 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.

2.4 Similarly, throughout this project, we have heard from leaseholders who have been left understandably angry and frustrated by their experiences with event fees on retirement properties.

2.5 As highlighted by the OFT, a major problem with event fees is that they are often disclosed too late in the purchase process for the consumer to take account of the fee in their decision to purchase a property. Fees which are not upfront or which are

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<sup>15</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, paras 4.5 to 4.8. We refer to this document throughout this report as the "consultation paper". It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017).

<sup>16</sup> *Age UK Putting Retirement Housing in Order 2010* <http://www.ageuk.org.uk/Documents/EN-GB/Putting%20retirement%20housing%20-%20corrected%20report.pdf?dtrk=true> (last visited 7 March 2017).

<sup>17</sup> Office of Fair Trading, *OFT investigation into retirement home transfer fee terms, a report on the OFT's findings* (2013), OFT1476, para 1.5. We refer to this report as the OFT Report (2013), OFT1476. It is available at [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared\\_of/consumer-enforcement/retirement-homes/oft1476.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared_of/consumer-enforcement/retirement-homes/oft1476.pdf) (last visited 22 March 2017).

<sup>18</sup> We discuss "unexpected circumstances" at para 1.8 above.

deferred have been found to exploit consumers' "behavioural biases", which lead people to make "predictably irrational" decision.<sup>19</sup>

- 2.6 Behavioural biases may affect all consumers – not simply those who are vulnerable through age, ill-health or bereavement. However, behavioural biases have particular application when consumers make complex decisions under stress. In such conditions, behavioural biases may distort purchasing decisions.<sup>20</sup>
- 2.7 Such biases include:
- (1) Consumers tend to focus on the upfront purchase price and fail to adjust their assessment of the total offer when additional future costs are revealed;
  - (2) Consumers give more attention to upfront costs than to future costs; and
  - (3) Consumers may find it difficult to forecast future events and preferences.
- 2.8 When a consumer discovers the existence of an event fee, they may fail to appreciate its financial consequences. For example, when a consumer buys a property for £250,000, an event fee of "1% of the property's sale price for each year of residency" may seem innocuous. However, when the consumer sells the property after ten years for £300,000, they may be shocked to discover that they owe the freeholder a £30,000 event fee.
- 2.9 Consumers may also be unaware of the events which trigger these fees. For example, a consumer may expect to pay an event fee on sale. However, a consumer may not expect to have to pay an event fee when they sub-let the flat, when their spouse or carer moves in, or when they die and a family member inherits. In some cases, an event fee is charged each time the leaseholder's property is sub-let, regardless of the length of the sub-lease. This means that a leaseholder may be charged multiple event fees in a year.
- 2.10 Some event fees are for the sinking fund of a development or to ensure that service charges are not prohibitively expensive. However, other event fees are not linked to any benefit or service provided by the landlord. These fees may be charged with no explanation for the obligation to pay and no restriction on how the money will be spent. The fee may be purely for the freeholder's profit. In general, event fees are often structured in a way that cannot be related to the costs of the property. A consumer can feel more aggrieved by a 1% event fee which is of no benefit to them than by a 10% event fee which goes toward a sinking fund for the improvement and maintenance of the development.

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<sup>19</sup> This results in excessive discounting of future costs. D Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (2008). For discussion of how this affects consumer behaviour, see OFT Consumer Behavioural Biases in Competition 2011 <http://londoneconomics.co.uk/wp-content/uploads/2012/06/Consumer-behavioural-biases-in-competition-OFT1.pdf> (last visited 7 March 2017).

<sup>20</sup> *OFT Consumer Behavioural Biases in Competition 2011* <http://londoneconomics.co.uk/wp-content/uploads/2012/06/Consumer-behavioural-biases-in-competition-OFT1.pdf> (last visited 7 March 2017), para 4.39.

## WHY NOT ABOLISH EVENT FEES?

- 2.11 We have mentioned above that consumers need protection from event fees that are unfair or are imposed in unfair circumstances. The logical next question is: why not abolish event fees entirely?
- 2.12 As part of our consultation exercise, we asked current residents of retirement properties whether event fees should be banned altogether or whether they were a useful way of making retirement housing more affordable.
- 2.13 Some residents advocated for a total ban on event fees:  
Yes they should be banned as it is only making money for landlords who do not contribute in any way to the property. Leasehold is a con. Why when I pay £400 per annum to a contingency fund why should we pay 1% on sale as well. (Mr H)  
You pay a fee when buying for the upkeep of the general public areas, why should you have to pay again on selling? (Mrs H)
- 2.14 Other residents argued that only event fees which are solely for profit should be banned:  
If they are used in part to benefit the owner O.K. not when it all goes to the landlord. (Mrs M)  
Contingency is useful but the money to the landlord is wasted money. (Mrs H)
- 2.15 This was echoed by Carlex, in response to our consultation:  
Any event fee that does not go towards the contingency fund, or provide a direct benefit to the site in proportion to the fee charged, should be banned.
- 2.16 We are grateful for the responses from residents, many of whom suggest that they have suffered from poor practice in the retirement housing industry. We also acknowledge the significant role that Carlex has played in highlighting this poor practice. Throughout this project we have been grateful for their feedback and comments at conferences, meetings and in correspondence.
- 2.17 However, in this report we do not recommend that event fees should be abolished, either entirely or in part, for the reasons set out below. Instead, as discussed below and in Chapters 3 to 6 of this report, we conclude that the best way forward is regulation of event fees. This approach restricts the situations in which event fees can be charged and imposes stringent transparency requirements on landlord/operators.

### Event fees can make specialist housing affordable to consumers

- 2.18 Inevitably, specialist retirement housing has high operating costs, covering maintenance of the property and the cost of cleaning and maintaining the sometimes extensive communal amenities. In some cases, developments will also provide a manager or other staff.<sup>21</sup> Older people on a fixed income may be deterred or prevented from buying a retirement property by service charges covering the full cost of these services and facilities, which may be unaffordable.

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<sup>21</sup> Consultation paper, paras 4.86 and 10.33.

2.19 Event fees may, however, be a way of making service charges, and therefore specialist retirement housing, affordable to consumers. A consumer can pay a predictable, affordable service charge because upon resale the landlord/operator will receive a deferred additional payment to compensate for not receiving the full service charge. For example, in response to our consultation, Mr and Mrs H explained that a deferred fee has enabled them to enjoy a better standard of living. They added:

We cannot envisage a situation when such fees should be banned. What are the alternatives? – Rising maintenance fees.

2.20 Similarly, Mrs P said that an event fee may be useful:

If it helps keep the monthly charges down. Some may find it harder to finance larger monthly payments and find it better to have it deducted on the sale of the property.

2.21 In our consultation paper, we referred to evidence from the Associated Retirement Community Operators which demonstrated that, in some cases, without an event fee, the service charge would more than double.<sup>22</sup> Although the figures provided can only be regarded as estimates, it is clear that, without event fees, the impact on service charges would be substantial.

2.22 The All-Party Parliamentary Group (APPG) on Housing and Care considered that deferred payments may have a role to play in offsetting service charges.<sup>23</sup> People may use some of the capital tied up in their property to fund their retirement. In response to our consultation, Mr M suggested that event fees are the best business model for retirement properties. He pointed out that “many residents are, like me, asset rich and income poor”.

2.23 Another resident, considering contributions to sinking funds, cautioned that without the event fee capital repairs may cost more than a resident could afford to pay, leading to uncertainty and worry. Further:

Such an unknown commitment might well be a deciding factor in whether to move to a smaller property in the first place. It is not feasible to ban such fees totally as there would be no funds for any ongoing major repair works and failure to undertake such works would decrease the value of your property.

2.24 In our consultation paper, we provisionally concluded that event fees may have some advantages for older residents who have more capital than income.<sup>24</sup> They may increase the number of options available to older consumers for their retirement. Following consultation with residents and the industry, we maintain that conclusion. This is a significant advantage of event fees, and a benefit to consumers, which should not be dismissed lightly.

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<sup>22</sup> Consultation paper, para 4.91.

<sup>23</sup> *All-Party Parliamentary Group on Housing and Care for Older People the Affordability of Retirement Housing 2014* [https://www.demos.co.uk/files/Demos\\_APPG\\_REPORT.pdf?1415895320](https://www.demos.co.uk/files/Demos_APPG_REPORT.pdf?1415895320) (last visited 7 March 2017), p 7.

<sup>24</sup> Consultation paper, para 4.79.

## Event fees and the development of specialist housing

2.25 The use of events fees may also facilitate the overall supply of specialist retirement housing, providing more options for older consumers. As discussed below, this is significant in light of the ageing population, the benefits of such housing and the government's wider objectives. DCLG has said that "our department has a driving focus to increase housing supply".<sup>25</sup> Boosting the supply of specialist homes for older people was cited as a government priority in the 2015 Autumn Statement.<sup>26</sup>

### The ageing population

2.26 In our consultation paper we explained that over the next 20 years the number of people aged over 65 in England and Wales will increase rapidly.<sup>27</sup> In 2015 the number of people aged over 65 in England and Wales was 17.8% of the population. In 2035 they will make up 23.6% of the population.<sup>28</sup> The most significant changes will be among the very old, who are most likely to be in need of care and support. Over the next 20 years the number of people aged 85 or over will more than double from 1.4 million in 2015 to 3.5 million in 2035.<sup>29</sup>

2.27 A House of Lords Select Committee concluded that "the Government and our society are woefully underprepared" for these demographic changes.<sup>30</sup> This includes the increase in long-term health conditions afflicting the aged in the UK.<sup>31</sup> We consider that event fees may facilitate the provision of, and payment for, much needed housing and support for older people.

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<sup>25</sup> *Department for Communities and Local Government Single departmental plan: 2015 to 2020*, <https://www.gov.uk/government/publications/dclg-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020> (last visited 19 January 2017).

<sup>26</sup> HM Treasury, *Spending Review and Autumn Statement* (2015), p 41.

<sup>27</sup> Consultation paper, paras 2.28 to 2.29.

<sup>28</sup> *Office for National Statistics March 2017* <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/mar2017> (last visited 23 March 2017).

<sup>29</sup> *The National Archives National Population Projections 2010* <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/mro/news-release/national-population-projections---2010-based--uk-population-projected-to-hit-70m-by-2027/national-population-projections---2010-based.html> (last visited 23 March 2017).

<sup>30</sup> *House of Lords Select Committee on Public Service and Demographic Change Ready for Ageing? 2013* <https://www.publications.parliament.uk/pa/ld201213/ldselect/ldpublic/140/140.pdf> (last visited 7 March 2017), para 1.

<sup>31</sup> The House of Lords Select Committee on Public Service and Demographic Change report found that there will be over 50% more people with three or more long-term conditions in England by 2018 compared to 2008. Further, over 80% more people aged 65 and over will suffer from dementia (moderate or severe cognitive impairment) in England and Wales by 2030 compared to 2010. See *House of Lords Select Committee on Public Service and Demographic Change Ready for Ageing? 2013* <https://www.publications.parliament.uk/pa/ld201213/ldselect/ldpublic/140/140.pdf> (last visited 7 March 2017), para 2.

## Benefits of specialist housing to the individual and wider community

2.28 There is considerable evidence that good quality specialist housing brings health, social, financial and emotional benefits to its residents.<sup>32</sup> The APPG on Housing and Care for Older People reported that:

Older people who move to specialist retirement housing enjoy a higher quality of life and improved social networks. Evaluations also show positive outcomes in terms of health, safety and well-being, while moving to smaller, more energy efficient accommodation can help older people to stay warm and save money on energy bills.<sup>33</sup>

2.29 Such housing, particularly retirement properties with care on-site, may also reduce pressure on the NHS and health services.<sup>34</sup> The recent Housing White Paper said:

Offering older people a better choice of accommodation can help them to live independently for longer and help reduce costs to the social care and health systems.<sup>35</sup>

2.30 A report by Demos, a cross-party think-tank, summarises studies which show that older people who move to specialist housing enjoy a better quality of life than they did before they moved, and have better health than others in their age group.<sup>36</sup> Similarly, in the context of a report on specialist housing for older people, Shelter reported:

At a time when Government is seriously concerned about the costs of providing health care and social care, it is vital to recognise the role that housing can play both in improving older people's health and well-being, and in meeting wider policy objectives.<sup>37</sup>

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<sup>32</sup> We provide a summary of this evidence in our consultation paper, paras 2.16 to 2.22; Event Fees Progress Report (June 2016), paras 1.19 to 1.25. This is available at [http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event\\_fees\\_progress\\_June\\_2016.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event_fees_progress_June_2016.pdf). See, for example, *Demos the Top of the Ladder 2013* <https://www.demos.co.uk/files/TopoftheLadder-web.pdf?1378922386> (visited 7 March), p 41; *Ball Housing Markets and Independence in Old Age 2011* <http://centaur.reading.ac.uk/24443/1/HousingMarketsinOldAge.pdf> (last visited 7 March 2017).

<sup>33</sup> *All-Party Parliamentary Group on Housing and Care for Older People the Affordability of Retirement Housing 2014* [https://www.demos.co.uk/files/Demos\\_APPG\\_REPORT.pdf?1415895320](https://www.demos.co.uk/files/Demos_APPG_REPORT.pdf?1415895320) (last visited 7 March 2017). The Inquiry confined itself to the question of affordability for those who would like to move to a retirement property.

<sup>34</sup> *University of Reading, Housing Markets and Independence in Old Age: Expanding the Opportunities 2011* <http://centaur.reading.ac.uk/24443/1/HousingMarketsinOldAge.pdf> (last visited 9 February 2017), p 7. See also *Collaborative Research between Aston Research Centre for Healthy Ageing (ARCHA) and The ExtraCare Charitable Trust 2015* [www.aston.ac.uk/EasySiteWeb/GatewayLink.aspx?allid=245545](http://www.aston.ac.uk/EasySiteWeb/GatewayLink.aspx?allid=245545), p 7 (last visited 3 March 2017).

<sup>35</sup> Department for Communities and Local Government, *Fixing our broken housing market* (February 2017), para 4.42.

<sup>36</sup> *Demos The Top of the Ladder 2013* <https://www.demos.co.uk/files/TopoftheLadder-web.pdf?1378922386> (last visited 7 March 2017), p 41.

<sup>37</sup> *Shelter A better fit? Creating housing choices for an ageing population 2012* [http://england.shelter.org.uk/\\_data/assets/pdf\\_file/0005/427730/Policy\\_report\\_A\\_better\\_fit.pdf](http://england.shelter.org.uk/_data/assets/pdf_file/0005/427730/Policy_report_A_better_fit.pdf) (last visited 7 March 2017), p 23.



2.31 In our consultation paper we noted that England and Wales suffer from a serious shortage of housing stock.<sup>38</sup> This affects not just first-time buyers, but also prevents families from moving into bigger homes. Each time a person leaves a family home for a retirement property, it frees up a house for a family, which may in turn free up another property for a first-time buyer. If event fees can facilitate an increase in specialist housing, this will have direct benefit for everyone across the community who is seeking a home.

#### Supply and demand issues

2.32 The retirement housing industry suffers from both supply and demand issues.

2.33 In 2015, there were 11.6 million people aged 65 or over living in England and Wales.<sup>39</sup> Elderly Accommodation Counsel (EAC) has estimated that there are only approximately 160,000 specialist housing properties for older people in England and Wales.<sup>40</sup> This represents a small percentage of people aged 65 and over who live in owner-occupied specialist housing. In contrast, 17% of over 60s in the USA live in specialist housing, 13% in Australia, and 13% in New Zealand.<sup>41</sup>

2.34 This shortage has been caused, at least in part, by a lack of investment. In 2015, the Law Commission commissioned a background paper by Iain Lock, Head of Independent Health at Bilfinger GVA, a property consultancy firm, into the retirement property market from a developer's perspective.<sup>42</sup> In this paper, Mr Lock reported that "developers may experience difficulties in obtaining funding to build specialist housing for older people". He continued:

Lenders have not been prepared to take income from transfer charges since the Office of Fair Trading investigated the practice. They have considered the security of income to be below their standards for secured lending. Any continued doubt over the ability to levy transfer charges will restrict funding and investment into the sector.<sup>43</sup>

2.35 We discuss the OFT's report below.<sup>44</sup> We noted in the consultation paper that event fees which are not put into a trust (for example, for a sinking fund) may contribute to landlord/operators' income stream and in the future may be able to be borrowed

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<sup>38</sup> Consultation paper, paras 2.20 to 2.21.

<sup>39</sup> *Office of National Statistics Population Estimates* <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates> (last visited 28 February 2017).

<sup>40</sup> According to statistics provided to the Law Commission from the EAC (December 2016). This figure includes age exclusive housing, housing with support and housing with care.

<sup>41</sup> *House of Lords Select Committee on Public Service and Demographic Change Ready for Ageing? 2013*, Annex 16, para 270. See also Knight Frank, *Retirement Housing Exclusive Retirement Survey* <http://content.knightfrank.com/research/696/documents/en/retirement-housing-2014-2388.pdf> (last visited 3 March 2017).

<sup>42</sup> *Lock Background Paper 1 – Age Restricted Housing with and Without Care 2015* <http://www.lawcom.gov.uk/wp-content/uploads/2015/10/Background-paper-1.pdf> (last visited 7 March 2017).

<sup>43</sup> *Lock Background Paper 1 – Age Restricted Housing with and Without Care 2015* <http://www.lawcom.gov.uk/wp-content/uploads/2015/10/Background-paper-1.pdf> (last visited 7 March 2017), para 5.2.

<sup>44</sup> See paras 2.60 to 2.61 below.

against or used as security.<sup>45</sup> This is consistent with other jurisdictions, such as Australia and New Zealand, where event fees are a key part of the business models of the retirement housing industry. In those jurisdictions, the emphasis has been on regulating event fees to ensure that consumers are provided with transparent information about the bargain they are entering into. The relevant legislation, which we considered at length in our consultation paper, does not attempt to ban event fees or regulate their amount.<sup>46</sup>

- 2.36 There are also demand issues affecting the retirement housing industry. There is significant interest among older people for specialist housing. For example, in the Demos report one quarter of those surveyed (increasing to 41% of people between the ages of 76 and 81) were interested in buying a purpose-built specialist property. However, many people were ultimately reluctant to commit to buying such a property.<sup>47</sup>
- 2.37 Concerns include the affordability of retirement housing<sup>48</sup> and a lack of information about what retirement housing offers.<sup>49</sup> There are several reasons why there is reluctance to commit to moving to specialist housing. However, this reluctance may have been compounded by the recent negative publicity about problems in the specialist housing sector, such as those surrounding event fees.<sup>50</sup>
- 2.38 In correspondence, Carlex pointed out that:
- Far more older people downsize to non-retirement accommodation than to sites specifically designated retirement property, and they do so without any need at all for transfer fees.<sup>51</sup>
- 2.39 We consider that it should nevertheless be open to older consumers to choose the type of housing that suits their needs, whether that is specialist housing or otherwise. We have noted above that there is significant interest among older people for specialist housing,<sup>52</sup> which is the focus of our work. Our recommended reforms impose stringent obligations on landlord/operators of such housing to provide transparent information about event fees, including the likely amount of an event fee, to consumers. This will enable a consumer to compare a retirement property

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<sup>45</sup> Consultation paper, para 4.94.

<sup>46</sup> Consultation paper, ch 9.

<sup>47</sup> *Shelter A better fit? Creating housing choices for an ageing population 2012* [http://england.shelter.org.uk/data/assets/pdf\\_file/0005/427730/Policy\\_report\\_A\\_better\\_fit.pdf](http://england.shelter.org.uk/data/assets/pdf_file/0005/427730/Policy_report_A_better_fit.pdf) (last visited 7 March 2017), p 28.

<sup>48</sup> *All-Party Parliamentary Group on Housing and Care for Older People the Affordability of Retirement Housing 2014* [https://www.demos.co.uk/files/Demos\\_APPG\\_REPORT.pdf?1415895320](https://www.demos.co.uk/files/Demos_APPG_REPORT.pdf?1415895320) (last visited 7 March 2017), p 18.

<sup>49</sup> *Age UK Making it work for us: A residents' inquiry into sheltered and retirement housing 2012* <http://www.ageuk.org.uk/Documents/EN-GB/For-professionals/Housing/Sheltered-And%20Retirement%20Housing%20Report.pdf?dtrk=true> (last visited 7 March 2017), p 17.

<sup>50</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, paras 2.49 and 13.5.

<sup>51</sup> Letter to the Law Commission from Leasehold Knowledge Partnership, undated but received on 3 November 2016.

<sup>52</sup> *Demos The Top of the Ladder 2013* <https://www.demos.co.uk/files/TopoftheLadder-web.pdf?1378922386> (last visited 7 March 2017), p 24.

(including its event fee) against a non-retirement property (without an event fee) and to make an informed decision based on their individual circumstances.

### **Why not abolish event fees which appear to be solely for profit?**

- 2.40 Carlex and residents have argued that event fees which appear to be solely for the landlord/operator's profit should, in any event, be abolished.
- 2.41 We have discussed above the benefits of such housing and the desirability of providing older consumers with a choice of the type of housing to suit their circumstances, and the role that event fees have to play in the development of specialist retirement housing.
- 2.42 A blanket abolition on event fees which are for profit may encourage landlord/operators to find ways to circumvent the ban. This may be by drafting event fee terms or introducing new, and potentially inflated, fees or charges, such as a fixed service charge.<sup>53</sup>
- 2.43 We also consider that such a ban would be difficult to implement. In practice, identifying precisely whether an event fee is for the landlord/operator's profit may not be straightforward. Even where the fee goes to the landlord/operator without restriction as to how it is applied, it may in fact be applied to cover operating costs. In any case, it may not be clear whether the value of the services provided are commensurate with the value of the event fee. For example, one sample lease which we have examined charges a fee of up to 12.5% for a mandatory selling service. That service includes the review of details of prospective purchasers and reasonable efforts to seek a potential purchaser for the property. Similarly, another lease includes an event fee of 1% for the landlord/operator's costs and expenses for, among other things, ensuring the new leaseholder enters into a deed of covenant with the landlord and providing "assistance or advice" to the leaseholder. It may be difficult to assess the value of such services and therefore whether there is a profit to the landlord/operator.
- 2.44 Additionally, as discussed below, some event fees are comprised of several components. For example, an event fee of 2% may include a 1% contribution as income for the developer and a 1% contribution to the sinking fund. This adds another layer of complexity when determining whether an event fee is for the landlord/operator's profit.
- 2.45 On this basis 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 about event fees which appear to be for the landlord/operator's profits. We have taken these concerns into account when formulating our recommendations as to transparency. In particular, we have included an obligation on landlord/operators to provide accurate information as to the service or benefit, if any, which the leaseholder receives in exchange for the event fee in a disclosure document.<sup>54</sup> We have also recommended substantive controls on the

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<sup>53</sup> Fixed service charges cannot currently be challenged at the First-tier Tribunal, which has jurisdiction to consider the reasonableness of variable service charges only: Landlord and Tenant Act 1985, ss 18, 27A.

<sup>54</sup> See para 5.41 below.

charging of event fees, by recommending limits on the circumstances in which event fees can be charged, and in some cases limits on the amount that can be charged.

## LEGAL UNCERTAINTY SURROUNDING EVENT FEES

2.46 As discussed above, in 2013 the OFT published a report about transfer fees, a type of event fee which is not directly linked to any service or benefit. It found that there were features of transfer fees which made them potentially unfair.<sup>55</sup>

2.47 As a result of its investigation, certain landlords undertook:

to either cease enforcing a transfer fee, to replace it with a flat fee, or to make changes – such as enforcing the term on final sale and not in a wide range of other circumstances – that mitigate what [the OFT] consider to be the most egregious unfairness of the respective transfer fee terms.<sup>56</sup>

2.48 The undertakings provided by the landlords were complex and varied.<sup>57</sup> The OFT highlighted why it had not secured uniform outcomes:

First, the landlords' existing leases and business models are different. Second, we are constrained by the limits to which each firm can voluntarily agree to undertakings – some are either controlled or constrained by finance providers such as funding banks or bondholders. Third, enforcement action where there are differences in circumstances between cases has to be individually targeted and can only be resolved by individual negotiations, which inevitably tend to produce a non-uniform result. Only legislation could deliver a uniform market.<sup>58</sup>

2.49 The OFT also explained why it did not bring court proceedings against landlords who refused to agree voluntarily to cease charging transfer fees on final sale. First, the voluntary undertakings by landlords had “dealt with the most egregious features of these fees”, limiting the additional impact of any proceedings.<sup>59</sup> Indeed, court proceedings would have delayed the implementation of the undertakings, which would not benefit consumers.

2.50 Secondly, the OFT referred to the uncertainty of litigation:

Moreover, we consider, on the basis of recent experience in comparable cases, that court proceedings, with appeals, could have taken many years and involved heavy costs for all those involved. These factors were relevant in our consideration of the risks and resources necessary to bring court proceedings to secure changes beyond those offered.

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<sup>55</sup> OFT Report (2013), OFT1476, para 1.5.

<sup>56</sup> OFT Report (2013), OFT1476, para 1.6.

<sup>57</sup> A summary of the undertakings is provided at Appendix B to the consultation paper.

<sup>58</sup> OFT Report (2013), OFT1476, para 6.18.

<sup>59</sup> OFT Report (2013), OFT1476, para 1.6.

- 2.51 In its 2013 report, the OFT drew attention to the lack of clarity in the legal framework surrounding event fees. This was also highlighted by our consultation paper.<sup>60</sup>
- 2.52 The law of unfair terms is set out in Part 2 of the Consumer Rights Act 2015. If a court considers a term in a contract between a trader and a consumer to be unfair, that term is not binding on the consumer. However, the application of this relatively simple principle of law to event fees has several complexities and uncertainties. If event fees are considered to be part of the price, they could be exempt from the courts' control of unfair terms, provided the contract term imposing the event fee is transparent and prominent. We discuss Part 2 of the Consumer Rights Act 2015 in more detail in Chapter 7 of this report.
- 2.53 Also, event fees are found only in leases, which are a special type of contract with a large body of related law. The way that unfair terms law applies to leases has not yet been fully explored by the courts. The OFT did not bring proceedings against landlords because, in part, of the predicted complexity and risks of the litigation. This highlights the current difficulty for a consumer who wishes to challenge an unfair event fee. There is no clear means of redress for such a consumer and the current legal framework is unclear and complex.

### **The effect on the market**

- 2.54 One effect of the OFT's report, against the background of legal uncertainty, was that investors have been reluctant to lend on the security of an event fee income stream in case that income stream is found to be unenforceable. This lack of lending means that developers have found it difficult to obtain funds to build more specialist housing for older people. This has consequences for the entire property market, as explained above.<sup>61</sup>
- 2.55 In theory, developers may be able to borrow money against the future income stream from event fees to finance their projects, which may improve supply and affordability of new specialist retirement properties. This could only take place, however, once the uncertainty around the legal status of event fees has been removed.<sup>62</sup>

### **OTHER OPTIONS FOR REFORM CONSIDERED BY THE OFT**

- 2.56 The OFT report discussed the possibility of enabling fixed service charges to be reviewed by the First-tier Tribunal under the Landlord and Tenant Act 1985.<sup>63</sup> This would mean that the First-tier Tribunal would be able to assess whether the amount of the event fee matched the costs reasonably incurred for the services provided, and the works carried out.
- 2.57 We said in the consultation paper that we do not consider that this is the best way to regulate event fees.<sup>64</sup> Any attempt to assess an event fee against the service provided

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<sup>60</sup> Consultation paper, chs 5 to 7.

<sup>61</sup> See para 2.31 above.

<sup>62</sup> Consultation paper, para 13.2.

<sup>63</sup> OFT Report (2013), OFT1476, para 1.10.

<sup>64</sup> Consultation paper, para 10.38.

would require detailed evidence and would be time consuming and expensive.<sup>65</sup> We used the example of an Australian case, where the court was satisfied that the event fee represented the bargain entered into by the residents and the management company, without any need for the “dissection of the minutiae of the costs of the operation” of the retirement village.<sup>66</sup>

- 2.58 The OFT report also suggested that consumers should be offered the option of an upfront flat event fee.<sup>67</sup> The advantage of such an upfront payment option would be that purchasers would know their financial liabilities at the point of purchase.
- 2.59 We considered this option in our consultation paper.<sup>68</sup> Although we heard from some landlord/operators that they already provide this option, we were told that there was very little demand for an upfront payment option from consumers, who prefer to defer payment.<sup>69</sup> We were concerned that providing this option may result in an overload of information and choice for consumers, affecting their decision-making ability.<sup>70</sup>
- 2.60 For these reasons we have decided not to proceed with obliging landlord/operators to provide an upfront payment option as an alternative to a deferred event fee. However, we encourage landlord/operators to offer consumers such a choice of payment options.

## **POLICY OBJECTIVES**

- 2.61 It is clear that reform is needed to provide older consumers with greater protection and to clarify the legal position with regards to event fees.

### **Protecting consumers**

- 2.62 We believe consumers should be protected from event fees that are unfair. Our recommended reforms protect consumers by:
- (1) Preventing event fees from being charged in unexpected circumstances.<sup>71</sup>
  - (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.<sup>72</sup>

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<sup>65</sup> Consultation paper, paras 10.41 to 10.43.

<sup>66</sup> *Coffey v Fernbank Management Pty Ltd* [2001] NSWSC 192. In that case, the court found it difficult to find any other way to value the range of services provided to the many different residents.

<sup>67</sup> OFT Report (2013), OFT1476, paras 8.3.

<sup>68</sup> Consultation paper, paras 12.25 to 12.29.

<sup>69</sup> In their response to the consultation, Retirement Villages Group supported the proposal, noting that they already provide this option. However, they highlighted that there was very little demand for the option from the residents. FirstPort, who act as managing agents, highlighted that alternative payment at the time of purchase may not be attractive to residents, who were likely to prefer payment at a later date or by their estate.

<sup>70</sup> Consultation paper, para 12.29.

<sup>71</sup> See Chapter 4 below.

<sup>72</sup> See Chapter 5 and 6 below.

- (3) Making it easier for consumers to challenge unfair event fees by providing increased legal certainty.<sup>73</sup>

### **Clarifying the legal status of event fees**

2.63 Our proposed reforms are also intended to reduce the uncertainty currently surrounding the legal status of event fee terms. We have heard from stakeholders that if the legal uncertainty around event fees is removed or reduced, there is likely to be significant increased investment in this sector. We have been told that this investment could be up to £3.2 billion over the next ten years.<sup>74</sup> We have also heard that this increase in investment will be less likely to occur if the uncertainty continues. For example, one stakeholder has said:

Serious investment and funding interest in our sector has only emerged since the Law Commission began to express positive signals that the current uncertainty around event fees would be removed. If the reforms proposed by the Law Commission do not proceed, the investment interest in our sector will evaporate and with it most of the planned growth. (LifeCare Residences)<sup>75</sup>

2.64 An increase in investment and new development would have clear benefits for consumers. We have discussed above the benefits of specialist housing.<sup>76</sup> We maintain that it is important that consumers are provided with more options for their retirement.

### **IMPLEMENTING OUR POLICY OBJECTIVES**

2.65 As outlined in our progress report and recent consultation paper on the draft code of practice,<sup>77</sup> our reforms are split into two stages. The code of practice is attached to this report at Appendix 3. The first stage responds to the urgent need to protect purchasers of, and encourage investment in, new specialist retirement housing. It comprises:

- (1) A set of code of practice provisions on event fees to give guidance to the industry to be given statutory approval by the Secretary of State for the Department for Communities and Local Government.
- (2) An amendment to Schedule 2 to the Consumer Rights Act 2015, which would provide the code of practice with statutory support and enable enforcement.
- (3) The provision of guidance to estate agents on how to comply with their existing legal obligation to disclose event fees.

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<sup>73</sup> See Chapter 7 below.

<sup>74</sup> We have received letters from the following providers and groups: ARCO, Audley Retirement, Carterwood, Enterprise Retirement Living, Jones Lang LaSalle Ltd, K&L Gates LLP, LifeCare Residences, Places for People, Renaissance Villages, Retirement Villages Group Ltd, Savills, The ExtraCare Charitable Trust, TLT LLP and Trowers & Hamblins LLP.

<sup>75</sup> Letter from Mr Richard Davis, LifeCare Residences Limited, dated 18 November 2016.

<sup>76</sup> See paras 2.28 to 2.30 above.

<sup>77</sup> Consultation on Draft Code of Practice Provisions (September 2016), para 1.3. This is available at <http://www.lawcom.gov.uk/wp-content/uploads/2015/10/Consultation-on-draft-code-provisions.pdf>.

2.66 In Chapter 8 of this report we discuss a possible second stage of our reforms.

### **Code of practice on event fees**

2.67 The aim of the code of practice is to protect consumers from demands for fees imposed by 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;
- (2) Imposes clear obligations on landlord/operators to ensure that transparent information about event fees is provided to consumers at an early stage. This includes the provision of a worked example to explain how much an event fee is likely to be.

2.68 We recommend that the code of practice should be approved by the Secretary of State under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. This section provides that the Secretary of State may approve a code of practice designed to promote desirable practices in the management of residential property.<sup>78</sup> The code of practice may make provision in respect of any landlord of residential property or any person who discharges management functions in respect of such property.<sup>79</sup>

2.69 Once the code of practice is approved, those who subscribe to the code of practice must give effect to it under the Consumer Protection from Unfair Trading Regulations 2008.<sup>80</sup> Additionally, 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.<sup>81</sup>

2.70 The code of practice will not apply retrospectively. It will apply to new leases and will take effect on the next sale of an existing lease. This means that it cannot help consumers who are already obliged to pay an event fee on a future event and who may have suffered from poor practice in the past. However, we are persuaded that over time the code of practice will help create best practice in the industry, increasing transparency and certainty for all consumers.

2.71 We provide commentary on the code of practice provisions in Chapters 3, 4, 5 and 6 of this report.

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<sup>78</sup> Leasehold Reform, Housing and Urban Development Act 1993, s 87(1)(a).

<sup>79</sup> Leasehold Reform, Housing and Urban Development Act 1993, s 87(6), (8).

<sup>80</sup> Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 5(3)(b).

<sup>81</sup> Leasehold Reform, Housing and Urban Development Act 1993, s 87(7).



## **Amendment to Schedule 2 to the Consumer Rights Act 2015**

2.72 In the progress report, we proposed that where there has been a breach of the code, the event fee should be presumptively unfair and unenforceable.<sup>82</sup> We suggested that one way of achieving this would be to add an entry to the “grey list” in Part 1 of Schedule 2 to the Consumer Rights Act 2015.

2.73 The grey list provides an indicative and non-exhaustive list of contractual terms in consumer contracts that may be regarded as unfair.<sup>83</sup> As discussed in Chapter 7 of this report, under the Consumer Rights Act 2015, a court cannot normally assess the appropriateness of the price payable under a contract, as long as the term is transparent and prominent.<sup>84</sup> Terms on the grey list are assessable for fairness, even if they are part of the contract price and meet the legal requirements for transparency and prominence.

2.74 We explain our recommended addition to the grey list in Chapter 7.

### **Effect of the code of practice and amendment to the grey list**

2.75 The combined effect of the code of practice and grey list addition will be that a consumer will have a clear mechanism to challenge an unfair event fee term.

2.76 We consider that the practical effect of the grey list addition is that, when the code of practice has not been complied with, the event fee will be “indicatively” unfair.<sup>85</sup> The consequence, in the main, would be that the consumer would not have to pay the event fee. Conversely, if developers have complied with the code of practice, consumers will have been provided with transparent, early disclosure, and developers will have the comfort that the event fee is likely to be enforceable.

2.77 We have discussed above that the code of practice will apply to new leases and to existing leases on the next sale of the lease.<sup>86</sup> The grey list addition will only apply to new leases. This is because of the way that unfair terms legislation applies to long leases, which we explored in the consultation paper.<sup>87</sup> Under English law a lease is considered to be a contract only between the first landlord and the first leaseholder. Once Leaseholder 1 has sold to Leaseholder 2, the relationship between the landlord and Leaseholder 2 is no longer a contractual one. In the consultation paper we tentatively concluded that under principles of EU law a residential lease continues to be a consumer contract even when it is assigned to a new leaseholder.<sup>88</sup> However, the position is not entirely clear.

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<sup>82</sup> Event Fees Progress Report (2016), para 1.41. This is available at [http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event\\_fees\\_progress\\_June\\_2016.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event_fees_progress_June_2016.pdf).

<sup>83</sup> Consumer Rights Act 2015, s 63(1).

<sup>84</sup> Consumer Rights Act 2015, s 64(1)(b), (2). See para 7.4 below.

<sup>85</sup> Consumer Rights Act 2015, s 63(1).

<sup>86</sup> See paras 2.69 to 2.70 above.

<sup>87</sup> Consultation paper, paras 6.70 to 6.108.

<sup>88</sup> Consultation paper, para 6.91.

2.78 We discuss the question of whether there is a need for reform of unfair terms legislation to clarify this issue in Chapter 8.

### **Undertakings to the Office of Fair Trading**

2.79 As noted above, some freeholders had provided undertakings following the investigation by the OFT.<sup>89</sup> Our recommendations do not affect these undertakings, which will remain in force.

### **Guidance to estate agents**

2.80 We discuss our proposals for providing guidance to estate agents, and working with NAEA Propertymark (formerly the National Association of Estate Agents) and the redress schemes, in Chapter 6.

## **RECOMMENDATIONS**

### **General recommendations**

#### **Recommendation 1.**

Consumers should be protected from event fees that are unfair by a code of practice approved by the Secretary of State under the Leasehold Reform, Housing and Urban Development Act 1993.

#### **Recommendation 2.**

The code of practice approved under the Leasehold Reform, Housing and Urban Development Act 1993 should protect consumers from unfair event fees by:

- (1) Preventing event fees from being charged in unexpected circumstances;
- (2) Limiting the amount of event fee that can be charged in certain cases; and
- (3) Imposing obligations on landlord/operators to provide standardised, transparent information about event fees at an early stage, including an indication of how much a consumer may have to pay.

#### **Recommendation 3.**

The Consumer Rights Act 2015 should be amended to enable enforcement of breach of the code of practice.

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<sup>89</sup> See paras 2.47 to 2.49 above. See also the consultation paper, paras 3.42 to 3.59, Appendix B. A summary of the undertakings is provided at Appendix B to the consultation paper.

# Chapter 3: Code of practice on event fees – applicability and definitions

## INTRODUCTION

- 3.1 In our June 2016 progress report, we proposed the creation of a single set of code of practice provisions relating to event fees. In September 2016, after working with stakeholders, we published a draft code of practice and an accompanying consultation document.
- 3.2 There was strong agreement among stakeholders that our proposed reforms would increase consumer confidence:<sup>90</sup>
- With an ageing population, to re-cycle family houses we (the older generation) need to be reassured that there are standards of practice in place before we take the leap from freehold to leasehold. (Mrs D)
- Will undoubtedly increase consumer confidence. (Mr T)
- It will promote transparency within this market around the true cost of owning a retirement property and increase consumer confidence. (ARHM)
- 3.3 The code of practice is attached to this report at Appendix 3. It comprises five parts and three appendices:
- (1) Part 1 defines the terms used in the code of practice. The key definition is that of an event fee, which is expanded upon in Appendix A to the code of practice.
  - (2) Part 2 outlines the scope of the code of practice.
  - (3) Part 3 sets out when an event can be charged and when the amount of an event fee is limited by the prescribed cap. Appendix B to the code of practice defines “prescribed cap” and provides examples of how it will apply.
  - (4) Part 4 explains the obligations on the landlord/operator, including the provision of a standardised disclosure document, contained in Appendix C to the code of practice.
  - (5) Part 5 outlines provisions which are best practice obligations or obligations which are enforceable other than through the code of practice.
- 3.4 In this chapter we consider when the code of practice applies and look in detail at certain key definitions.

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<sup>90</sup> We received 31 responses to the question whether the Law Commission’s proposals would increase consumer confidence in the specialist housing market. 24 consultees responded “yes”, 3 consultees responded “no”, and 4 consultees responded “other”.

## PART 2 OF THE CODE OF PRACTICE

- 3.5 During our consultation on the draft code of practice, stakeholders asked about the scope of its provisions. For example, landlords were concerned that they would be obliged to allow sub-letting, even where sub-letting was prohibited by the lease, because the code of practice provides that an event fee may be charged on sub-letting. Other stakeholders wanted to know whether the code of practice on event fees would affect any undertakings which they had provided to the OFT.

2.1 The code of practice does not affect any existing terms of a lease which do not relate to an Event Fee.

2.2 The code of practice does not affect any undertaking provided by a Landlord/Operator to the Office of Fair Trading.

2.3 Where a requirement is stated to be a matter of best practice, it is not a mandatory requirement and any failure to comply with it will not constitute a breach of under the code of practice.

### Effect of the code of practice on existing terms and undertakings

- 3.6 These paragraphs confirm:

- (1) at paragraph 2.1, that any existing restrictions under a lease, such as to sub-letting or the resident's age or health condition, will not be affected by the code of practice.
- (2) at paragraph 2.2, that the code of practice does not affect the terms of any undertaking provided to the OFT. These undertakings remain in force.

### Matters of best practice

- 3.7 Part 5 of the code of practice includes provisions which are expressed to be "as a matter of best practice". Paragraph 2.3 of the code of practice provides that breach of any best practice provision will not constitute a breach of the code of practice. This is significant because in Chapter 7 of this report we recommend an amendment to the Consumer Rights Act 2015 so that breach of the code of practice may lead to a finding that the event fee is unfair and unenforceable.
- 3.8 For example we recommend that a central online database should be established, which is discussed in greater detail below.<sup>91</sup> The purpose of such a database would be to provide information about event fees to consumers. The code of practice contains a best practice provision that a landlord/operator should maintain evidence in writing of the provision of information to the central database.<sup>92</sup> We consider this an important provision which should be included in the code of practice so that it can be admissible in evidence and a court or tribunal can take it into account when deciding any relevant question.<sup>93</sup> However, we do not consider that a breach of this provision in itself should lead to a finding that the event fee is unenforceable. Therefore we have

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<sup>91</sup> See paras 6.7 to 6.20 below.

<sup>92</sup> Code of practice, para 5.5.

<sup>93</sup> Leasehold Reform, Housing and Urban Development Act 1993, s 87(7).

included paragraph 2.3 to make clear that a breach of this provision will not itself lead to a finding that the event fee is unenforceable.

## DEFINITIONS

3.9 Part 1 of the code of practice sets out the relevant definitions applicable to the code of practice. We identify and discuss these definitions throughout this report as appropriate. For present purposes, we address key definitions below.

### “EVENT FEE”

3.10 Paragraph 1.1 and Appendix A define “event fee”.

1.1 An Event Fee is a fee payable under a term of, or relating to, a residential lease of a Retirement Property on certain events such as resale or sub-letting. An Event Fee is sometimes referred to as an exit fee or transfer fee. The full definition of Event Fee is given in Appendix A and takes precedence over this definition.

## APPENDIX A

### DEFINITION OF EVENT FEE

A.1 Subject to the exclusions in A.2, an Event Fee is a fee payable under a term of, or relating to, a residential lease of a Retirement Property which requires a Leaseholder to pay an amount or forego a financial benefit on, or in connection with, the happening of any of the following events:

- (1) Title to the lease vesting or ceasing to vest in any person;
- (2) A change in the person(s) in occupation of the Property; or
- (3) Any other event which creates, transfers or extinguishes an interest of a person; and

The fee is fixed or calculated in accordance with a formula.

A.2 This is a non-exhaustive list of fees that **are not** within the definition of Event Fee:

- (1) Administration charges regulated under Schedule 11 to the Commonhold and Leasehold Reform Act 2002;
- (2) Service charges regulated under the Landlord and Tenant Act 1985; and
- (3) Ground rents.

A.3 This is a non-exhaustive list of fees that **are** within the definition of Event Fee:

- (1) Any fee payable to the Landlord/Operator or to the Landlord/Operator’s estate agent where the Leaseholder is required to sell the Property through the Landlord/Operator’s estate agent; and
- (2) Any obligation to forego in favour of the Landlord/Operator a financial benefit normally arising in connection with the event, such as an obligation to re-sell the Property to the Landlord/Operator at the purchase price.

A.4 These provisions apply notwithstanding that there is no obligation on the Leaseholder to pay the Event Fee, if the practical effect of the lease is to require the Leaseholder to pay the Event Fee.

- 3.11 If a fee falls within the definition in paragraph A.1, it is an event fee and the code of practice will apply.
- 3.12 The definition applies to any deferred payment of a fee, or foregoing of a benefit, which is triggered by an event listed in A.1. Service charges and administration charges which are challengeable before the First-tier Tribunal are expressly excluded from the definition, as are ground rents. Below, we look at some of the details of this definition.

#### **“fee payable under a term of, or relating to, a residential lease of a Retirement Property”**

- 3.13 We have included the wording “of, or relating to, a residential lease” because an event fee could be included in a contract which is separate from the lease. We have not seen any examples of such a contract. However, a landlord/operator might introduce an agreement, separate from the lease, which regulates the terms on which someone occupies the property. The inclusion of a term “of, or relating to, a residential lease” would protect consumers in situations where an event fee term was included in such an agreement.
- 3.14 The definition of “event fee” is limited to residential leaseholds of retirement properties. We have defined “Retirement Property” as a leasehold property which has a minimum age requirement for occupation which is specified by the lease.
- 3.15 This definition is intended to encompass all specialist housing for older people. We explained in the consultation paper that such housing takes a variety of forms, from properties that are almost indistinguishable from general housing to specialist “retirement villages” offering 24-hour care.<sup>94</sup> It is therefore crucial to have a broad definition.

#### **“pay an amount or forego a financial benefit”**

- 3.16 Some leases require the leaseholder to sell the property back to the freeholder at the purchase price originally paid by the leaseholder. For example, the lease might provide that “the leaseholder must sell the property back to the freeholder at the purchase price”. The leaseholder therefore gives up any profit they would have received from an increase in the property’s market value during the period of their ownership. We call this profit the “equity uplift”.
- 3.17 Some stakeholders have expressed concern about event fees which include an equity uplift. For example, TPO said:
- TPO would suggest that where a property is sold back to the developer/freeholder at the price it was purchased, yet has increased in value during the time of the leaseholder’s ownership, there should not be an opportunity for an event fee to be charged. In this respect it appears unfair for the leaseholder to be charged a fee in

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<sup>94</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, paras 2.1 to 2.15. We refer to this document throughout this report as the “consultation paper”. It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017).

the circumstances where a developer/freeholder is benefitting from the property's increased value, which could be significant.

- 3.18 We consider that the equity uplift model of event fee has certain benefits. As discussed below, some retirement properties decrease in value.<sup>95</sup> Under an equity uplift model, when a consumer sells their property, they will have the certainty of receiving their purchase price from the landlord/operator. It may also incentivise the landlord/operator to keep the property in good repair, to reduce the risk of it falling in market value. However, event fees calculated on an equity uplift model will sometimes be significantly higher than event fees calculated on a percentage rate basis, depending on whether the value of the property has increased. It is therefore crucial that consumers are provided with clear information which shows them how much an event fee is likely to be. We discuss our recommendations for disclosure of this information below.<sup>96</sup>
- 3.19 In contrast, the Leaseholder Association considered that the definition of event fee should not be extended to cover equity uplift models.
- 3.20 We consider that an obligation to forego a sum of money is tantamount to an obligation to pay a fee. It is important that consumers are aware of the financial consequences of their decision to purchase a particular retirement property. We have accordingly included equity uplift models in the definition of event fee.

#### **“any of the following events”**

- 3.21 The list of defined events in paragraph A.1 is designed to cover the situations in which an event fee may be charged at present. This includes an assignment of the lease, sub-letting, mortgage, death, bankruptcy and inheritance.

#### **“fixed or calculated in accordance with a formula”**

- 3.22 This wording excludes variable service charges from the definition of “event fee”. Such charges are reviewable by the First-tier Tribunal.<sup>97</sup>

#### **Express exclusions and inclusions**

- 3.23 When a consumer, landlord/operator, court or tribunal is faced with deciding whether a fee is an event fee for the purposes of the code of practice, we consider that the starting point should be paragraph A.1 which defines “event fee”.
- 3.24 However, following consultation, several stakeholders asked for greater clarity. We have therefore included paragraphs A.2 and A.3. These paragraphs identify whether certain fees fall within the definition in paragraph A.1. The lists contained within these paragraphs are non-exhaustive.

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<sup>95</sup> See paras 4.56 to 4.57 below.

<sup>96</sup> See paras 5.19 to 5.30 below.

<sup>97</sup> Landlord and Tenant Act 1985, ss 18, 19.

## Administration charges, service charges and ground rents

- 3.25 Paragraph A.2 confirms that certain fees are not “event fees” within the definition in paragraph A.1. These include administration charges and variable service charges, both of which may be challenged for reasonableness before the First-tier Tribunal.<sup>98</sup>
- 3.26 Following discussions with the Leaseholder Association and ARCO, we have also clarified in paragraph A.2 that the definition of event fee does not apply to ground rents.

## Selling service fees

- 3.27 In the consultation paper we explained that some terms are described as payment for the landlord’s assistance with resale of the property. Although the fee may be described as payment for a service, the charging structure may relate to the length of occupation and property value rather than the service provided. Such fees may also appear to be substantially more than one would expect to pay an estate agent for the same service.<sup>99</sup>
- 3.28 We concluded that where the landlord offers the leaseholder a choice of whether to use an external estate agent instead of paying the fee, we would not classify the term as an event fee term. The leaseholder can evaluate whether the charge offers good value for money at the time they come to sell.<sup>100</sup>
- 3.29 However, where selling service fees are compulsory, and do not fall within the definition of “administration charge”, they appear to be another form of event fee. Paragraph A.3(1) confirms that any compulsory selling service fee comes within the definition of “event fee” and is subject to the code of practice.

## Event fees calculated on an equity uplift

- 3.30 Paragraph A.3(2) expressly includes fees calculated on an equity uplift, discussed above, within the definition of “event fee”.

## Practical effect of the lease

- 3.31 Sometimes the practical effect of the lease is to oblige the leaseholder to pay the event fee on assignment of the lease, even if there is no explicit obligation on the leaseholder to pay the fee.<sup>101</sup>
- 3.32 For example, a lease may state that when the lease is assigned, an assignee will pay an event fee. However, in practice, the leaseholder will bear the economic burden of the event fee. This is because the leaseholder will either pay the event fee to facilitate the assignment or the assignee may pay the leaseholder less for the property because of the event fee.

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<sup>98</sup> For administration charges, see the Commonhold and Leasehold Reform Act 2002, Sch 11. For variable service charges, see the Landlord and Tenant Act 1985, ss 18, 19. We discussed administration charges and variable service charges in the consultation paper, paras 5.45 to 5.55; 5.73 to 5.82.

<sup>99</sup> Consultation paper, paras 3.27 to 3.34.

<sup>100</sup> Consultation paper, para 3.34.

<sup>101</sup> *Burrell v Helical (Bramshott Place) Ltd* [2015] EWHC 3727 (Ch), [2016] HLR 303.



3.33 We consider that the code of practice should apply in this scenario and the consumer should be protected. Paragraph A.4 confirms that this situation falls within the definition of “event fee” in paragraph A.1.

#### **“LANDLORD / OPERATOR”**

3.34 Paragraph 1.4 defines “landlord/operator”.

1.4 A Landlord/Operator is any person or organisation who has the right to require payment of the Event Fee, and includes any agent acting on their behalf.

3.35 In previous drafts of the code of practice, we used the term “freeholder”, defined as “the owner of the freehold of the Property and includes any agent acting on their behalf”.

3.36 Feedback from stakeholders indicated this definition was too narrow and would not cover, for example, a superior leaseholder, a head leaseholder or a right to manage company. Similarly, this definition would not cover the situation where multiple parties may be entitled to a share of the event fee. This may occur where the event fee is split between the freeholder and the managing agent.

3.37 Accordingly, we have included a new term, “Landlord/Operator”, which is broadly defined. This is to ensure that anyone who has the right to require payment of the event fee must comply with the code of practice. We consider that this definition encompasses everyone who should be subject to the obligations in the code of practice, regardless of their interest in the property.

3.38 One stakeholder has suggested to us that the onus to disclose information about an event fee should be on the leaseholder of the property. We do not consider this appropriate or proportionate. Retirement properties are often sold by the leaseholder’s bereaved family or by the leaseholder themselves in circumstances where they may be ill. We do not believe, as a matter of policy, that the disclosure obligation can be placed sensibly on someone in these circumstances, especially where they do not benefit from payment of the event fee.

#### **“LEASEHOLDER”**

3.39 Paragraph 1.5 defines “leaseholder”.

1.5 A Leaseholder is any consumer who owns the lease to the Property.

3.40 The focus of the code of practice is on protecting consumers. We have therefore defined leaseholder as a “consumer”.

3.41 Under the Consumer Rights Act 2015, “consumer” means “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”.<sup>102</sup> The provisions of the 2015 Act relating to unfair terms apply only to consumers.<sup>103</sup>

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<sup>102</sup> Consumer Rights Act 2015, s 2(3).

<sup>103</sup> Consumer Rights Act 2015, s 61(1).

- 3.42 Using this definition we consider that a company which purchases the leasehold of retirement properties in order to sub-let them to consumers would not be protected by the code of practice. Corporate, professional leaseholders do not share the same vulnerabilities as the average older consumer.
- 3.43 It is possible, however, that an individual who owns a buy-to-let retirement property may be a consumer. If a landlord/operator wishes to claim that an individual is not a consumer because they were not acting for purposes “wholly or mainly” outside of the individual’s trade, business, craft or profession, then the landlord/operator must prove that fact.<sup>104</sup>
- 3.44 Private sales, between individuals and without estate agents, will not be covered by the code of practice. This is because the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008 apply to the relationship between traders and consumers.<sup>105</sup>

## RECOMMENDATIONS

### Definitions

#### Recommendation 4.

The definition of “event fee” should:

- (1) be limited to residential leaseholds of retirement properties;
- (2) include payment of a fee or foregoing of a financial benefit; and
- (3) exclude administration charges pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and variable service charges pursuant to the Landlord and Tenant Act 1985.

#### Recommendation 5.

The definition of “landlord/operator” should be broadly defined to include anyone who has the right to require payment of the event fee, regardless of their interest in the property.

#### Recommendation 6.

The definition of “leaseholder” should be limited to consumers within the meaning of the Consumer Rights Act 2015.

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<sup>104</sup> Consumer Rights Act 2015, s 2(4).

<sup>105</sup> Consumer Rights Act 2015, ch 1; Unfair Trading Regulations 2008, Part 1; OFT, *Consumer Protection from Unfair Trading* (May 2008), p 13.

## Chapter 4: Code of practice on event fees – when an event fee may be charged

- 4.1 In this chapter, we consider the restrictions in our recommended code of practice on when an event fee may be charged and the amount of the event fee that can be charged. We set out the policy underpinning these provisions and consider in detail the scenarios of sale, sub-letting and change of occupancy. We also respond to stakeholders' feedback on earlier drafts of the code of practice.
- 4.2 Part 3 of our recommended code of practice (annexed at Appendix 3 to this report) sets out when an event fee may be charged.

3.1 Event Fees may only be charged on the following events:

- (1) sale of the Property;
- (2) sub-letting of the Property, provided that the Property has ceased to be the Resident's only or principal home;
- (3) entering into occupation of the Property by anyone following the death of the Resident or after the Property is no longer the Resident's only or principal home;
- (4) any event that would fall within (1)–(3) above but for the use of an artificial device to avoid payment of the Event Fee.

3.2 Any Event Fee charged under 3.1(2) or 3.1(3) must not be more than the Prescribed Cap.

3.3 An Event Fee must not be charged under 3.1(3) if:

- (1) the person is the Resident's spouse or civil partner or was living in the Property as their only or principal home with the Resident; and
- (2) an Event Fee was charged on the Resident purchasing or entering into occupation of the Property.

### LIMITING WHEN AN EVENT FEE CAN BE CHARGED

- 4.3 As we have explained, the primary aim of the code of practice is consumer protection. A key part of achieving this aim is limiting when an event fee can be charged.
- 4.4 We have previously discussed that, at present, event fees do not arise solely on selling or sub-letting the property.<sup>106</sup> Some apply to any "disposition" or to any "material change in occupation". This means that event fees can 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.

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<sup>106</sup> See para 1.8 above.

- 4.5 Part 3 of the code of practice protects consumers by:
- (1) Preventing an event fee from being charged, except on:
    - (a) Sale;
    - (b) Sub-letting; and
    - (c) Change of occupation following the resident's death or when the property is no longer the resident's only or principal home.
  - (2) Limiting the amount of the event fee that can be charged on:
    - (a) Sub-letting; and
    - (b) Change of occupation.
- 4.6 By restricting when an event fee can be charged, the code of practice protects consumers from having to pay an event fee in unexpected circumstances, discussed above.<sup>107</sup> By limiting the amount of an event fee that can be charged in some cases, the code of practice prevents landlord/operators from receiving a windfall in unfair circumstances.
- 4.7 In the following paragraphs, we examine how event fees are currently charged on sub-letting and change of occupancy. We also discuss our recommended reforms, the responses we received to our consultation, and the effect of the code of practice.
- 4.8 In summary, under our recommended reforms an event fee must not be charged on sub-letting or change of occupancy unless the property is no longer the resident's "only or principal home". The amount of any event fee charged in these circumstances will be limited by the application of the "prescribed cap".

#### **"ONLY OR PRINCIPAL HOME"**

- 4.9 The concept of whether a property is a person's "only or principal home" is included in housing legislation and has been considered by the courts.<sup>108</sup>
- 4.10 For a property to be a person's "only or principal home", there must be evidence of the person's intention to return to the property. It is not sufficient that it was the person's subjective belief and intention that the property was their only or principal home. An objective assessment must bear out the reality of that belief and intention.<sup>109</sup>

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<sup>107</sup> See para 1.8 above.

<sup>108</sup> See, for example, the Housing Act 1985, s 81 and the Housing Act 1988, s 1(b). The test of "only or principal home" has been considered by the courts, including by the Court of Appeal in *London Borough of Islington v Boyle* [2011] EWCA Civ 1450, [2012] PTSR 1093.

<sup>109</sup> *London Borough of Islington v Boyle* [2011] EWCA Civ 1450, [2012] PTSR 1093 at [65]. For example, in *London Borough of Hammersmith & Fulham v Clarke* [2000] All ER (D) 1893, a tenant who spent time in a residential nursing home was found to have evidenced an intention to return to her home, despite a written note from a social worker stating that the tenant had told her that she intended to live permanently at the nursing home. This was demonstrated by the tenant's evidence in court, her explanation of the social worker's note, and circumstances including her family members' presence at the property.

## RESIDENT

- 4.11 The code of practice defines “resident” as the person to take up occupation of the property, as their only or principal home, after the grant of the lease or the most recent assignment of the lease of the property.<sup>110</sup> Where a couple purchase a retirement property and move in together, with the lease in joint names, both of them are the “resident”.
- 4.12 If a person, such as the resident’s carer, moves into the property, that person is not the “resident” even if the property becomes their only or principal home. In that case the carer will only become the “resident” for the purposes of the code of practice if the lease is assigned to them – for example, where the resident dies or moves permanently into a care home, and the carer inherits the property. We consider that, in this type of situation, assignment of the lease to such a person should be encouraged, and may well be a condition of continued occupation.

## SALE

- 4.13 An event fee can be charged on sale as long as the landlord/operator has complied with the obligations in Part 4 of the code of practice.<sup>111</sup> We describe these obligations in Chapters 5 and 6 of this report.

## SUB-LETTING

- 4.14 In many leases, an event fee is payable on sub-letting as well as on sale. This may lead to unfairness as it raises the possibility of a leaseholder paying an event fee multiple times in an unexpected manner.
- 4.15 For example, when a leaseholder moves into a care home, they may be unable to sell their retirement property. However, they may still have to pay service charges on the property. It may be an economic necessity that they sub-let their retirement property. Currently, the event fee could be payable on each sub-lease, regardless of its length.<sup>112</sup>
- 4.16 We have heard from the family of a leaseholder in this situation who was charged an event fee each time the property was sub-let, even when the sub-lease only lasted five months. Each event fee was over £2,000. Under our recommended reforms, the maximum event fee that the leaseholder could be charged each year would be 10% of the event fee payable on sale, which in that scenario would be £200.

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<sup>110</sup> Code of practice, para 1.11.

<sup>111</sup> Code of practice, para 3.1(1).

<sup>112</sup> In its report the OFT noted that the application of a transfer fee on sub-letting is one of the most detrimental and controversial features of such fees: Office of Fair Trading, *Investigation into retirement home transfer fees, a report on the OFT's findings* (2013), OFT1476, para 6.20. We refer to this report as the OFT Report (2013), OFT1476. It is available at [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared\\_of/consumer-enforcement/retirement-homes/oft1476.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/shared_of/consumer-enforcement/retirement-homes/oft1476.pdf) (last visited 22 March 2017).

4.17 In response to our consultation, Mrs D said:

It was only after the purchase of flat no. 2 that I discovered that if I attempted to let it for even the odd few days, the “event fees” had to be paid every time the tenant changed.

4.18 We consider that this is unfair. The landlord/operator should not receive a windfall in this situation.

4.19 However, we do not propose banning event fees on sub-letting, which might encourage landlords to prevent sub-letting altogether. Sub-letting can be an important tool for leaseholders, especially where they find themselves unable to sell their property. Additionally we do not think that retirement properties should be left empty.

4.20 For the landlord/operator, the practical effect of prolonged sub-letting is delay in receipt of an event fee payable only on sale. This means that any business model that depends on the payment of event fees at regular intervals could be adversely affected by extensive sub-letting.

4.21 That being the case, we consider that controls are required which strike a balance between these interests. Where there is a significant delay in selling the property, depriving the landlord/operator of the expected event fee, a small proportionate event fee should be payable.

4.22 Paragraph 3.1(2) of the code of practice provides that an event fee may be charged on sub-letting. However, this only applies where the property is no longer the resident’s “only or principal home”.<sup>113</sup> In these circumstances the resident has departed from the property and the landlord/operator is being deprived of an event fee which they could have reasonably expected upon sale.

4.23 Such an event fee would also then be subject to the “prescribed cap”.<sup>114</sup> As explained below, this means that the event fee payable on sub-letting per year would be a maximum of 10% of the event fee which would be payable on sale of the property.

## **CHANGE OF OCCUPANCY**

4.24 At present an event fee may be payable on any change of occupancy. For example, an event fee may be charged when a new resident, such as a carer or the resident’s spouse or civil partner, moves into the property. Likewise, an event fee may be charged when the resident dies, and the resident’s spouse or civil partner, not previously a party to the lease, inherits and moves into the property. We do not consider that it is fair that an event fee is charged in these circumstances.

4.25 Paragraphs 3.1(3) and 3.3 of the code of practice provide that an event fee may only be charged on a change of occupancy where:

- (1) A person (other than a spouse or civil partner) enters into occupation after the death of the resident; or

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<sup>113</sup> Code of practice, para 3.1(2). See our discussion of “only or principal home” at paras 4.9 to 4.10 above.

<sup>114</sup> Code of practice, paras 3.1(2), 3.2. See our discussion of the prescribed cap at paras 4.42 to 4.46 below.

- (2) A person (other than a spouse or civil partner) enters into occupation after the property is no longer the resident's only or principal home.<sup>115</sup>

#### **When the resident is alive**

- 4.26 According to the code of practice, when the resident is living, an event fee can only be charged on change of occupation when the property is no longer the resident's only or principal home.<sup>116</sup> This means that someone, such as the resident's carer, can move into the property without incurring an event fee, as long as the property remains the resident's only or principal home.<sup>117</sup>
- 4.27 Paragraph 3.3 of the code of practice also provides an exception to paragraph 3.1(3) for the resident's spouse or civil partner. Even where the property is no longer the resident's only or principal home, their spouse or civil partner can move into the property without incurring an event fee. This may be relevant when the resident has moved into a care home and their spouse or civil partner has not previously been living in the retirement property.
- 4.28 This is subject to a further exception at paragraph 3.3(2) as to succession, which we discuss below.<sup>118</sup>

#### **When the resident is deceased**

- 4.29 The code of practice provides that an event fee may be charged when anyone enters into occupation of the property following the death of the resident.<sup>119</sup> This does not apply to the resident's spouse or civil partner.<sup>120</sup>
- 4.30 It also does not apply to any person who was living in the property as their only or principal home with the resident.<sup>121</sup> For example, a person who was living with the resident as their carer may continue their occupation of the property following the resident's death without paying an event fee. However, they would be subject to any restrictions in the lease, such as conditions in the lease which prescribe that a resident must be over a certain minimum age or have a certain level of health.
- 4.31 This is subject to a further exception at paragraph 3.3(2) as to succession, which we discuss below.<sup>122</sup>

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<sup>115</sup> Code of practice, paras 3.1(3), 3.3.

<sup>116</sup> Code of practice, para 3.1(3).

<sup>117</sup> See our discussion of "only or principal home" at paras 4.9 to 4.10 above.

<sup>118</sup> See para 4.41 below.

<sup>119</sup> Code of practice, para 3.1(3).

<sup>120</sup> Code of practice, para 3.3.

<sup>121</sup> Code of practice, para 3.3.

<sup>122</sup> See para 4.41 below.

## The prescribed cap

- 4.32 Any event fee charged under paragraph 3.1(3) is also subject to the prescribed cap, which we discuss below.<sup>123</sup> This applies to change of occupancy, as well as to sub-letting. We consider that, for example, the scenario where the resident's son or daughter moves into the property following the resident's death is analogous to a sub-lease. The same policy considerations apply as to sub-leases, as outlined above. Therefore, each year the resident's son or daughter would only pay 10% of the event fee which would otherwise be payable on sale of the property.<sup>124</sup> We discuss below that the figure of 10% is based on the estimated average length of stay in a retirement property.<sup>125</sup>

## Avoidance of the event fee in perpetuity

- 4.33 Paragraph 3.1(3) of the code of practice provides that an event fee may be charged on change of occupancy when the resident has died or moved into a care home. In consultations with stakeholders, we provided the following draft wording for paragraph 3.3 of the code of practice, which provides exceptions to the liability.

3.3 An Event Fee must not be charged under 3.1(3) if the person is the Resident's spouse or civil partner or was living in the Property as their only or principal home with the Resident.

- 4.34 Stakeholders expressed concern that the provisions on change of occupancy might lead to avoidance of the event fee in perpetuity. One stakeholder said:

[W]e agree that where a carer or partner, presumably of the same generation, is in occupation they should be permitted to remain in occupation without the payment of an event fee.

However, there is an anomalous situation ... where an heir of the next generation resides in the property as their principal residence caring for the resident. On the death of the resident under the proposed code the heir could continue to reside in the property without payment of the event fee and this is unfair on the freeholder as they will miss the receipt of a fee they would otherwise have expected to receive. In the same way a carer who might be very much younger residing in the property is permitted to stay without payment of an event fee and, again, this is unfair to the freeholder.

Residents now live into their 90's and their children will be above retirement age and qualify to live in retirement housing so we see this type of situation becoming more common, and therefore opening a door to areas where a fee would not be payable between occupiers of different generations. We consider ... the draft code needs clarification to ensure that an event fee should always be payable on an inter-generational transfer of occupation. (Retirement Villages Group)

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<sup>123</sup> Code of practice, para 3.2.

<sup>124</sup> See para 4.16 above.

<sup>125</sup> See para 4.48 below.



- 4.35 We have not been provided with evidence as to how often someone of a different generation moves into a retirement property with a resident, and remains in the property after the resident's death. However, we accept that it does happen and that the number of such cases is likely to increase with the ageing population.
- 4.36 Stakeholders suggested restrictions to prevent indefinite avoidance of the event fee. Some of the restrictions suggested included requiring a person to have lived in the property for a certain minimum period before the resident's death or requiring that any new occupant of the property be made a party to the lease before the resident's death. Stakeholders also suggested that where the property passed to a successor without an event fee, the landlord/operator should be able to charge multiple event fees when the property was ultimately sold. As discussed below, the code of practice contains different provisions to prevent avoidance of the event fee in perpetuity.<sup>126</sup>
- 4.37 Our general policy is that if a person moves into the property to live with the resident as their only or principal home, no event fee should be payable if that person continues to live in the property following the resident's death. Stakeholders were particularly concerned that these provisions could be used by multiple generations to avoid payment of the event fee. As pointed out by Retirement Villages Group in the example above, where a person from a younger generation moves in with the resident, they are likely to be caring for the resident. We consider, however, that requiring payment of an event fee as a condition of their remaining in their "only or principal home" following the resident's death could operate harshly.
- 4.38 We do not agree that we should impose the minimum time condition suggested by stakeholders. Any person who moves into the property is already subject to restrictions under the lease as to, for example, their age and health. Further, it would be arbitrary to require a minimum time for the person to have lived in a property. For example, it would be difficult to distinguish between someone who had lived in a property with the resident for two years minus one day and someone who had lived in the property for two years. Therefore we have reached the conclusion that whether the property is the person's "only or principal home" should be the determining factor.
- 4.39 We do not consider that there should be an obligation to assign the lease into joint names, where there may be various personal reasons behind a leaseholder's decision not to do this. Furthermore, the code of practice acknowledges that the resident of the property may not always be the leaseholder. For example, the leaseholder may purchase the property in their own name for their parents to live in.
- 4.40 Nor do we consider that multiple, deferred event fees should be chargeable. Such an approach would undermine our policy of protecting consumers from unfair or unexpected event fees.
- 4.41 However, we acknowledge stakeholders' concerns that these provisions could be exploited to avoid payment of the event fee in perpetuity. In these circumstances, we recommend that succession without payment of an event fee should be limited to cases where an event fee has been charged on the previous resident purchasing or entering into occupation of the property. This would mean that succession without

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<sup>126</sup> See para 4.41 below.

payment of an event fee could only happen once. Paragraph 3.3 of the code of practice has been drafted accordingly.

3.3 An Event Fee must not be charged under 3.1(3) if:

- (1) the person is the Resident's spouse or civil partner or was living in the Property as their only or principal home with the Resident; and
- (2) an Event Fee was charged on the Resident purchasing or entering into occupation of the Property.

## THE PRESCRIBED CAP

- 4.42 Paragraph 3.2 of the code of practice provides that any event fee payable on sub-letting or change of occupancy is subject to the prescribed cap.<sup>127</sup> The prescribed cap is the maximum amount of an event fee payable under the code of practice in these circumstances.<sup>128</sup>
- 4.43 The prescribed cap ensures that an event fee paid on sub-letting or change of occupation must be proportionate. It is designed to ensure that the landlord/operator does not receive a windfall.
- 4.44 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 payable on sale of the property. For example, if the event fee payable on sale of the property is £5,000, the event fee payable when the prescribed cap applies will be no more than £500 in a year. The figure of 10% assumes a ten-year average length of stay in a retirement property.
- 4.45 Furthermore, when the event fee increases according to length of ownership, up to a maximum rate, no event fee is payable on sub-letting or change of occupancy until the maximum percentage rate is reached.<sup>129</sup> This is because the landlord/occupier is not disadvantaged by the delay in selling the property. Instead the cost to the landlord/operator will be offset by the increased percentage rate that will eventually apply when the property is sold.
- 4.46 The prescribed cap is set out in Appendix B to the code of practice.

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<sup>127</sup> Code of practice, para 3.2.

<sup>128</sup> Code of practice, para 1.8.

<sup>129</sup> See paras 4.73 to 4.83 below.

B.1 Subject to B.2 and B.3, the Prescribed Cap is calculated as follows:  
 $(E \times P) \times 10\% = \text{Annual Event Fee}$   
 $\text{Annual Event Fee} \div 365 = \text{Daily rate}$   
 $\text{Daily rate} \times N = \text{Prescribed Cap}$   
Where:  
E = the Event Fee percentage payable on sale (for example, 10% is expressed as 0.1)  
P = the purchase price or market value of the Property, whichever is the lower amount  
N = the Period of Occupation by anyone other than the Resident, in days

B.2 Where the amount of an Event Fee increases based on length of ownership, the Prescribed Cap is zero until the Maximum Rate has been reached. If there is no Maximum Rate, the Prescribed Cap is zero.

B.3 To the extent that an Event Fee consists of an obligation to forego a financial benefit, as described in A.3(2), the Prescribed Cap is zero.

B.4 Any Event Fee payable on sub-letting is payable at the end of the sub-lease, or at the end of each calendar year, whichever is the shortest period.

### **The prescribed cap formula**

- 4.47 The effect of the prescribed cap formula is that the event fee payable for each year of sub-letting or change of occupancy would be no more than 10% of the event fee that would be payable on sale.
- 4.48 The figure of 10% is based on an estimated average length of stay in a retirement property of ten years.
- 4.49 We received no response to the consultation on the draft code of practice suggesting that this average length of stay was incorrect. Since the consultation closed, we have heard from one stakeholder that the average length of stay in housing with care is approximately seven years. We have heard from another stakeholder that the average stay is 12 years. In the circumstances, we consider that 10% is the correct proportion.

### **How the prescribed cap is calculated**

- 4.50 When a leaseholder dies, or moves into a care home, service charges may continue to be payable, even if the property is not occupied. A leaseholder who moves into care will almost certainly also have to pay care home fees. Therefore, if the leaseholder (or their executor) is unable to sell their property, they may need to sub-let in order to generate an income stream to cover these charges. As the OFT pointed out, sub-letting will often occur when the leaseholder or their family has no other choice, because they are unable to sell their property and have other charges to pay.<sup>130</sup>

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<sup>130</sup> OFT Report, OFT1476, para 6.25.

- 4.51 Being unable to sell a retirement property appears to be more than simply a hypothetical risk. Anecdotal evidence from Carlex indicates that there are some retirement properties which decrease in value, and which are difficult to sell. A particularly dramatic example of this is a property in East Sussex which was sold in 2008 for approximately £225,000. In 2015, it was sold for £61,500.<sup>131</sup>
- 4.52 We have considered whether the prescribed cap should be calculated on the basis of:
- (1) The purchase price of the property;
  - (2) The open market value of the property;
  - (3) The higher of the purchase price or open market value of the property; or
  - (4) The lower of the purchase price or open market value of the property.
- 4.53 Calculating the prescribed cap on the purchase price alone would provide certainty to the leaseholder as to future financial obligations. A consumer, when purchasing a retirement property, would know how much the event fee on the property would be if they needed to sub-let in the future.
- 4.54 This approach would also be consistent with our general approach of not regulating the method of calculation of the event fee payable on sale of the property, thus allowing the landlord/operator to stipulate that the fee should be calculated on any one of the above bases.
- 4.55 However, although we have taken a permissive approach to the basis on which an event fee payable on sale is calculated, calculating the prescribed cap on sub-letting can be distinguished from calculating an event fee on the subsequent sale of the property. First, when an event fee is calculated on sale, the leaseholder will be able to pay that fee from the proceeds of sale. In contrast the leaseholder will not have access to any proceeds of sale when paying an event fee on sub-letting.
- 4.56 Secondly, the leaseholder or their family will often be obliged to sub-let in unexpected circumstances, as discussed above.<sup>132</sup> In such circumstances, applying this “freedom of contract” approach to the prescribed cap may operate harshly against a leaseholder when the market value of their property has decreased significantly.
- 4.57 Take, for example, the property referred to above, which had decreased in value from £225,000 to £61,500. For the purposes of this example, we will assume that the event fee on sale would be 1% of the purchase price of the property.

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<sup>131</sup> *Carlex reveals abysmal retirement housing re-sale values 2016* <http://www.leaseholdknowledge.com/carlex-reveals-abysmal-retirement-housing-re-sale-values> (last visited 3 March 2017). In contrast, we have been provided with anecdotal evidence from JLL, a professional services and investment management firm, that more than 80% of ARCO members’ retirement properties either hold their value or increase in value on re-sale. This was based on a review of approximately 5,500 sales since 1996: correspondence to the Law Commission from JLL dated 8 March 2017.

<sup>132</sup> See paras 4.50 to 4.55 above.

- 4.58 If the prescribed cap was calculated using the purchase price of the property, the maximum event fee payable each year on sub-letting would be £225.<sup>133</sup>
- 4.59 In comparison, if the prescribed cap was calculated using the market value of the property, the maximum event fee payable each year on sub-letting would be £61.50.<sup>134</sup>
- 4.60 Finally, although a prescribed cap calculated on the purchase price alone would provide certainty as to future financial obligations, this must be considered in the light of the unexpected circumstances in which sub-letting would usually arise. Although a leaseholder may be aware of the event fee to be paid on sub-letting in theory, they may never actually expect to sub-let their retirement property. In these circumstances the benefits of such certainty are diminished.
- 4.61 Accordingly, we think that a different approach is justified. We do not consider that the prescribed cap should be calculated on the purchase price alone.
- 4.62 One stakeholder suggested that the calculation should be based on the higher of the purchase price or open market value of the property, or simply the open market value of the property, arguing that otherwise “this is unfair to the freeholder and does not reflect the balance in the draft code”.<sup>135</sup>
- 4.63 Allowing the prescribed cap to be calculated on the purchase price or the open market value, whichever is the higher amount, would mean, in practice, that the landlord/operator would be likely to obtain a valuation of the property each time it was sub-let. In its 2013 report, the OFT noted that, although it may be open to a consumer to challenge an open market valuation, this is likely to be difficult in practice because of the cost of employing a surveyor to challenge the landlord/operator’s valuation. That cost would be likely to outweigh any difference in the valuations.<sup>136</sup> We have explained above the circumstances in which a leaseholder may have to sub-let their property. On this basis, we do not agree that the prescribed cap should be calculated on the higher of the purchase price or open market value of the property, or on the market value alone.
- 4.64 On balance, we consider that there is a stronger case for the prescribed cap to be calculated on the purchase price or the open market value, whichever is the lower amount. This would have the benefit of enabling a consumer to pay a lower event fee on sub-letting where their property has decreased in value and they are forced to sub-let. It would also provide certainty to the leaseholder as to their future financial obligations on sub-letting, which would be no more than the prescribed cap calculated on the purchase price. This may also incentivise landlord/operators to take any action they can to help combat a decrease in the value of their properties. Finally, although this option would, in some cases, still require a valuation of the property, where this occurred it would be for the benefit of the leaseholder.

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<sup>133</sup> This is calculated using the prescribed cap formula, outlined above at para 4.46. That is,  $(0.01 \times £225000) \times 10\% = £225$ .

<sup>134</sup> That is,  $(0.01 \times £61,500) \times 10\% = £61.50$ .

<sup>135</sup> Retirement Villages Group’s response to the consultation on the draft code dated 1 November 2016.

<sup>136</sup> OFT Report, OFT1476, para 4.12.

4.65 Therefore, we recommend that the prescribed cap should be calculated based on the purchase price or open market value of the property, whichever is the lower amount.

#### **Example of the formula in practice**

4.66 The leaseholder, LH, owns a leasehold retirement property which is subject to an event fee, payable on sale or sub-letting, of 1% of the purchase price that LH paid for the property. The purchase price of the property was £200,000.

4.67 At present, this means that each time the property is sub-let, LH may be charged £2,000 (that is, 1% of £200,000), regardless of the length of the sub-lease.

4.68 Under our recommended reforms, for each year of sub-letting, LH will instead pay a maximum of 10% of the event fee otherwise payable on sale. In this example, for one year, the calculation is:

$$(0.01 \times £200,000) \times 10\% = £200 \text{ (that is, the annual event fee)}$$

4.69 If, for example, LH sub-lets the property from 1 October 2016 to 30 November 2016 (61 days), the calculation would be:

$$£200 \div 365 = £0.55 \text{ (that is, the daily rate)}$$

$$£0.55 \times 61 \text{ days} = £33.42$$

4.70 Therefore LH would pay £33.42 as an event fee for a sub-lease of 61 days.

#### **EVENT FEES BASED ON LENGTH OF OWNERSHIP**

4.71 We have discussed above that event fees may be charged on sub-letting in certain circumstances. Such fees would be subject to the prescribed cap, which means that the landlord/operator could only charge a maximum of 10% of the event fee payable on sale for each year of the sub-lease. However, where an event fee increases based on the length of ownership, the application of the prescribed cap may result in a landlord/operator being paid an event fee twice for the same period of sub-letting. In this section, we discuss our recommendations for this scenario.

4.72 Event fees which increase depending on the length of the leaseholder's ownership may fall into one of two categories:

- (1) Event fees which increase according to the length of ownership; or
- (2) Event fees which increase according to the length of ownership, up to a maximum amount.

#### **Event fees which increase according to the length of ownership**

4.73 An example of a term under which an event fee increases according to the length of ownership is as follows:

##### **Example 1**

The Deferred Service Charge shall be such sum as is equivalent to the Deferred Service Charge Proportion [i.e. 1%] of the Market Value of the Dwelling as at the Lessee's acquisition of the Dwelling for each year (apportioned on the basis of

complete months) that shall on each occasion have elapsed since the date of his acquisition of the Dwelling.

- 4.74 In this example, the event fee is 1% multiplied by the number of years of ownership. There is no limit on the total amount of that event fee. A leaseholder who sells their property after 10 years would pay a 10% event fee. A leaseholder who sells after 20 years would pay a 20% event fee.

#### **Event fees which increase according to the length of ownership, up to a maximum amount**

- 4.75 An example of a term under which an event fee increases according to the length of ownership, up to a maximum amount, is as follows:

##### **Example 2**

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%.

- 4.76 In this example, like Example 1, the event fee is 1% multiplied by the years of occupation. However, in contrast to Example 1, there is a limit on the ultimate event fee which is payable. A leaseholder who sells their property after 10 years would pay a 10% event fee. However, a leaseholder who sells their property after 20 years would only pay a 15% event fee, because that is the maximum which can be charged under the event fee term.

#### **Sub-letting**

- 4.77 This distinction between these two types of event fees is of particular significance when the leaseholder sub-lets their property. The landlord/operator would be entitled to an event fee, subject to the prescribed cap, for each year of sub-letting under paragraphs 3.1(2) and 3.2 of the code of practice. The ultimate fee on sale may also increase over the period of sub-letting.
- 4.78 On the one hand, the prescribed cap is designed to ensure that the landlord/operator does not receive a windfall when the leaseholder sub-lets their property. Where the amount of the event fee is calculated by reference to the length of ownership, there is a risk of such windfall, particularly where an event fee may increase without limit. For example, where the event fee is 1% for each year of ownership, if the property is sold after 15 years, the event fee on the sale would be 15%. If for the last five years of that period, the leaseholder sub-lets the property, the landlord/operator would be entitled to an additional annual event fee calculated on the sub-letting using the prescribed cap formula.<sup>137</sup> Ultimately, the landlord/operator would be paid two event fees for the same period of time (that is, the final five years of occupation).
- 4.79 On the other hand, where an event fee increases over time, but is capped, the landlord/operator might be disadvantaged if an event fee was not payable on sub-letting. This is because sub-letting may delay the point in time at which the landlord/operator receives their event fee. For example, where the event fee is 1% for each year of occupation up to 10%, if the property is sold after 15 years (including five

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<sup>137</sup> That is, a maximum each year of 10% of the event fee payable on sale.

years of sub-letting), the event fee on sale of the property would remain 10%. As such, the landlord/operator would not benefit from an increased amount of the event fee on sale for the final five years of this 15-year period.

### **The code of practice**

- 4.80 We have concluded that the prescribed cap provisions in the code of practice must be sufficiently flexible to deal with both these situations. Therefore we have included a definition of “maximum rate” in the code of practice as the highest percentage rate at which an event fee on sale is chargeable.<sup>138</sup>
- 4.81 Where the amount of an event fee increases based on length of occupation, no additional event fee is payable on sub-letting (that is, the prescribed cap will be zero), until the maximum rate has been reached.<sup>139</sup> From that time, an event fee for sub-letting will be payable, subject to the prescribed cap.
- 4.82 Where the amount of an event fee increases based on length of occupation, but the event fee term has no maximum rate, no event fee will be payable on sub-letting at all (that is, the prescribed cap will always be zero).<sup>140</sup>
- 4.83 These provisions, which we consider are sufficiently broad to encompass the examples of event fees outlined above, effectively act as a form of set-off, to ensure that the landlord/operator is not paid event fees twice in respect of the period of any sublease.<sup>141</sup> We have drafted paragraph B.2 of the code of practice accordingly.

### **APPLICATION OF THE PRESCRIBED CAP TO “EQUITY UPLIFT” EVENT FEES**

- 4.84 In the consultation on the code of practice, we asked for stakeholders’ views on how the prescribed cap would work when the event fee model was based on an “equity uplift” model. As discussed in Chapter 3, under this model, the leaseholder must sell the property back to the freeholder at the purchase price.<sup>142</sup> In practice, this means that for each year the market value of the property increases, the freeholder will benefit from this increase. The leaseholder gives up any equity uplift which constitutes the event fee.
- 4.85 We have decided that an event fee should not be charged on sub-letting where an event fee is calculated using the equity uplift model. This is for two reasons.
- 4.86 First, stakeholders’ suggestions for calculating the prescribed cap in these circumstances involved consideration of the amount by which the property may have increased in value. This could lead to a comparatively expensive event fee on sub-letting or change of occupancy, which may have the effect of preventing the consumer from sub-letting their property. It would also require a valuation of the property on

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<sup>138</sup> Code of practice, para 1.6.

<sup>139</sup> Code of practice, para B.2.

<sup>140</sup> Code of practice, para B.4.

<sup>141</sup> See paras 4.71 to 4.76 above.

<sup>142</sup> See para 3.16 above.



each sub-lease or change of occupancy. We have discussed above that neither of these options is a desirable outcome for a consumer.<sup>143</sup>

- 4.87 Secondly, in the context of sub-letting or change of occupancy, the equity uplift model is akin to an event fee which increases based on length of ownership, with no maximum rate. Although a sub-lease or change of occupancy will delay when the landlord/operator receives their event fee, if the open market value of the property increases, the amount of the event fee will increase correspondingly. When the property is sold, any delay will be made up for by the increased total amount of the event fee. The commercial risk that the open market value of the property may decrease is one that the landlord/operator has already accepted when deciding to use the equity uplift model.
- 4.88 For these reasons, we recommend that where an event fee is calculated using the equity uplift model, no event fee should be payable on sub-letting or change of occupancy.<sup>144</sup> The code of practice accordingly provides as follows.

B.3 To the extent that an Event Fee consists of an obligation to forego a financial benefit, as described in A.3(2), the Prescribed Cap is zero.

- 4.89 We have seen some event fee models which include both a percentage rate and an equity uplift element. An example of such an event fee would be 1% of the purchase price of the property plus an obligation to sell the property to the landlord/operator at the purchase price.
- 4.90 We have explained above that we recommend that an event fee on sub-letting or change of occupancy should not be charged where the event fee is calculated using the equity uplift model. However, an event fee on sub-letting or change of occupancy may be charged where the event fee is calculated using a percentage rate, subject to the prescribed cap.
- 4.91 Where an event fee is calculated using both a percentage rate and an equity uplift, we recommend that any event fee payable on sub-letting or change of occupancy should be calculated on the amount of the percentage part of the event fee only. Therefore, in the above example, the prescribed cap payable on sub-letting or change of occupancy would be based on the amount which is 1% of the purchase price of the property. There would be no event fee payable on the equity uplift part of the event fee.

#### **COLLECTION OF THE EVENT FEE ON SUB-LETTING**

- 4.92 In response to the consultation, stakeholders questioned when an event fee on sub-letting may be payable. For example, one stakeholder said:

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<sup>143</sup> See para 4.63 above.

<sup>144</sup> Code of practice, para B.4.

If it is ... the Commission's intention that the fee should be calculated retrospectively, and paid only when the Property is sold, this will have cash flow implications for Freeholders. (Audley Retirement)

- 4.93 We have considered whether an event fee on sub-letting should be collected at the end of the sub-lease, annually, or when the property is sold.
- 4.94 The code of practice provides that any event fee payable on sub-letting is payable at the end of the sub-lease, or at the end of each calendar year, whichever is the shorter period.<sup>145</sup>
- 4.95 We believe that this provides the best balance. The consumer will not have to pay a large, cumulative fee at the end of a long sub-lease with no sale proceeds out of which to pay. It also means that any cash flow problems for the landlord/operator caused by sub-letting or change of occupancy are reduced.

### ARTIFICIAL DEVICE

- 4.96 Paragraph 3.1(4) of the code of practice deals with the use of an "artificial device" to avoid payment of an event fee.

3.1 Event Fees may only be charged on the following events:

[...]

(4) any event that would fall within (1)–(3) above but for the use of an artificial device to avoid payment of the Event Fee.

- 4.97 We consider that there will be an artificial device where there is no other genuine commercial purpose except the avoidance of the event fee. In these circumstances we do not consider that landlord/operators should be deprived of an event fee.

### RECOMMENDATIONS

#### When an event fee may be charged

##### Recommendation 7.

An event fee should only be charged on:

- (1) sale;
- (2) sub-letting; and
- (3) change of occupation following the resident's death or when the property is no longer the resident's only or principal home.

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<sup>145</sup> Code of practice, para B.4.

**Recommendation 8.**

The total event fee which can be charged on sub-letting or change of occupancy in any one year should be restricted in amount to a maximum of 10% of the event fee which would be payable on sale. This should be calculated based on the purchase price or open market value of the property, whichever is the lower amount.

**Recommendation 9.**

An event fee should not be payable on the resident ceasing to occupy the property if it is thereafter occupied by the resident's spouse or civil partner or by a person who was living in the property with the resident as their only or principal home.

**Recommendation 10.**

Succession without payment of an event fee should be limited to cases where an event fee has been charged on the previous resident purchasing or entering into occupation of the property.

**Recommendation 11.**

Where an event fee increases based on length of occupation, no additional event fee should be charged on sub-letting or change of occupancy until the maximum rate at which an event fee can be charged on sale has been reached. Where there is no maximum rate, no event fee should be charged on sub-letting.

**Recommendation 12.**

An event fee should not be payable on sub-letting or change of occupancy to the extent that the event fee is generated by an obligation on the leaseholder to sell the property back to the freeholder at the purchase price.

**Recommendation 13.**

An event fee payable on sub-letting or change of occupancy should be collected at the end of the sub-lease or at the end of each calendar year, whichever is the shorter period.

## Chapter 5: Code of practice – when the property is sold through the landlord/operator

- 5.1 In this chapter we discuss the obligations on the landlord/operator when the property is being sold through them. We start with the background to the policy and an overview of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). We set out how these provisions apply to advertisements of property. We also discuss the provision of information to a consumer about the event fees for a property. The provision of that information, along with a worked example showing a consumer how much an event fee is likely to be, is a key part of our recommendations.
- 5.2 In Chapter 6 we discuss the situation where the property is being sold by the leaseholder through an estate agent.

### BACKGROUND

- 5.3 Part 4 of our recommended code of practice imposes obligations on the landlord/operator to provide clear information about an event fee to a consumer in a specific manner. Our recommended code of practice is attached to this report at Appendix 3.
- 5.4 These obligations are a response to the concerns raised by the OFT in its 2013 report.<sup>146</sup> In particular, the OFT was concerned that:
- (1) Event fee terms are not always transparent to consumers and the financial consequences may not be given prominence in the sale materials.<sup>147</sup>
  - (2) Event fee terms may exploit consumers' "behavioural biases", which means that consumers may not take the terms into account in their decision-making.<sup>148</sup>
- 5.5 The OFT's concerns were confirmed by the Law Commission's own research. Our mystery shopper exercise found that consumers were not being told about event fees where properties were being sold by estate agents.<sup>149</sup> We also surveyed conveyancing solicitors, most of whom said that consumers only found out about

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<sup>146</sup> See para 1.14 above.

<sup>147</sup> Office of Fair Trading, *Investigation into retirement home transfer fees, a report on the OFT's findings* (2013), OFT1476, paras 1.5, 4.24. We refer to this report as the OFT Report (2013), OFT1476. It is available at [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared\\_of/consumer-enforcement/retirement-homes/oft1476.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_of/consumer-enforcement/retirement-homes/oft1476.pdf) (last visited 22 March 2017).

<sup>148</sup> OFT Report, OFT1476, paras 4.31 to 4.46. We discuss consumer behavioural biases at paras 2.5 to 2.7 above.

<sup>149</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, paras 4.55 to 4.65. We refer to this document throughout this report as the "consultation paper". It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017).

transfer fees when they were told about them by their conveyancer.<sup>150</sup> This is too late. Consumers need to be provided with transparent information about event fees early, to enable them to make an informed decision about a property and to counteract consumer behavioural biases.<sup>151</sup> Additionally, by the time a consumer has instructed a conveyancer, they are likely to have already invested in the property emotionally, as well as financially, making it harder to withdraw from the purchase.

- 5.6 Stakeholders, including current residents, have been supportive of our proposed reforms. In response to our consultation on the code of practice, Mrs A said:

More comprehensive disclosure will provide reassurance during the purchase process and encourage downsizers to take the step into a small or more suitable property.

- 5.7 The code of practice provides that transparent information must be given to the consumer about event fees at an early stage in the purchase process. This must include a worked example so that consumers can understand how much the event fee is likely to be. As we discuss below, traders are already under a legal obligation to give transparent price information. The code of practice is designed to ensure this occurs, removing the problems identified by the OFT and our own research.

## **THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008**

- 5.8 In the consultation paper, we discussed how the CPRs already impose important duties on businesses involved in the sale of retirement properties.<sup>152</sup> 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. It is a criminal offence to give misleading price information if it is likely to cause an average consumer to take a “transactional decision” which they would not have done otherwise.<sup>153</sup> A “transactional decision” may be, for example, going to view a property, making an offer on it, or incurring costs regarding it. It is also a criminal offence to omit material information, if it is likely to cause an average consumer to make a transactional decision.<sup>154</sup>
- 5.9 In our consultation paper, we concluded that the CPRs need to be better known and understood by developers, landlord/operators, managing agents and estate agents involved in selling retirement leases which contain event fees. If the industry fails to improve the transparency of these terms, it would be open to Trading Standards services to take enforcement action.<sup>155</sup> Moreover, if a landlord/operator fails to disclose an event fee term, in breach of the CPRs, this would be a factor in any assessment of whether a term is unfair.

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<sup>150</sup> Consultation paper, para 4.30.

<sup>151</sup> See para 1.10 above.

<sup>152</sup> Consultation paper, ch 7.

<sup>153</sup> Consumer Protection from Unfair Trading Regulations, SI 2008/1277, regs 3, 5, 8.

<sup>154</sup> Consumer Protection from Unfair Trading Regulations, SI 2008/1277, regs 3, 6, 8.

<sup>155</sup> See para 6.50 below.

## THE CAP CODE AND ADVERTISEMENTS

- 5.10 In the UK the advertisement of retirement properties, in non-broadcast media, is subject to the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code). The CAP Code is maintained by the Committee of Advertising Practice (CAP) and administered by the Advertising Standards Authority (ASA). The ASA and CAP comprise a self-regulatory system which is recognised as an “established means” of protecting consumers with regards to non-broadcast marketing communications.<sup>156</sup> We explained in the consultation paper that the CAP Code sets out the principles in the CPRs and states that the CAP Code should be read in conjunction with them.<sup>157</sup>
- 5.11 As discussed, the CPRs deal with misleading omissions. Regulation 6 provides that when considering whether a commercial practice is a “misleading omission” certain matters are taken into account.<sup>158</sup> These matters include the limitations of the medium used to communicate the commercial practice, including limitations of space or time, and the measures taken by the trader to make the information available by other means.<sup>159</sup>
- 5.12 The central principle of the CAP Code is that all marketing communications should be “legal, decent, honest and truthful”.<sup>160</sup> The CAP Code provides that “quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers”.<sup>161</sup> We regard this as including event fees. The CAP Code goes on to state:
- If a tax, duty, fee or charge cannot be calculated in advance, for example, because it depends on the consumer's circumstances, the marketing communication must make clear that it is excluded from the advertised price and state how it is calculated.<sup>162</sup>

### Code of practice provisions

- 5.13 We have considered both the CPRs and the CAP Code when formulating the following recommended code of practice provisions in relation to advertisements.

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<sup>156</sup> CAP Code (12th ed), p 11.

<sup>157</sup> Consultation paper, paras 8.24 to 8.26.

<sup>158</sup> Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 6(1).

<sup>159</sup> Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 6(2).

<sup>160</sup> CAP Code (12th ed), r 1.1.

<sup>161</sup> CAP Code (12th ed), r 3.18.

<sup>162</sup> CAP Code (12th ed), r 3.19.

4.1 The following provisions apply when the property is sold by or through the Landlord/Operator.

#### **Advertisements**

4.2 Any advertisement that mentions the price for the Property must state that an Event Fee is payable and must provide a general indication of the amount and how the Event Fee will be calculated.

4.3 In considering whether the Landlord/Operator has complied with 4.2, the limitations of the medium of advertising, including space and time, and any measures taken by the Landlord/Operator to make the information available by other means, shall be taken into account.

- 5.14 Stakeholders have raised concerns that certain event fees may be too complex to include in an advertisement. We acknowledged in the consultation paper that where the event fee calculation is complicated it may be unwieldy to display the full method of calculation in an advertisement.<sup>163</sup> For example, a developer may offer two options for payment of an event fee, or an event fee may comprise a percentage rate and an equity uplift component. An advertisement may also be for an entire development, comprising multiple properties, each with different event fees. Paragraph 4.3 of the code of practice provides that this can be taken into account.
- 5.15 The provisions in the code of practice as to advertisements merely reflect the current law. As such, a breach of the code of practice provisions as to advertisements may not simply affect the enforceability of an event fee. Non-compliance is also arguably a breach of both the CAP Code and the CPRs.
- 5.16 The ASA investigates complaints of breach under the CAP Code and may ask for marketing communications to be withdrawn or amended.<sup>164</sup> The CAP Compliance team enforces ASA rulings and can take various actions. For example, CAP may advise its members to withhold their services from non-compliant marketers or require pre-publication vetting of marketing communications.<sup>165</sup> In certain cases, CAP may refer the matter to Trading Standards for action under the CPRs.<sup>166</sup>
- 5.17 Breach of regulation 6 of the CPRs constitutes an offence, which is punishable by a fine or imprisonment.<sup>167</sup>
- 5.18 CAP has indicated that it would be happy to work with advertisers and property advertisement portals to find a suitable solution. The aim is to ensure consumer protection and compliance with the existing obligations under the CPRs and the CAP Code.

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<sup>163</sup> Consultation paper, para 12.36.

<sup>164</sup> CAP Code (12th ed), p 98.

<sup>165</sup> CAP Code (12th ed), p 105.

<sup>166</sup> CAP Code (12th ed), p 106.

<sup>167</sup> Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, regs 10, 13. Regulation 18 provides a defence of innocent publication of advertisement.

## THE DISCLOSURE DOCUMENT

- 5.19 We have explained above that consumers need to be provided with clear information about event fees at an early stage in the purchase process to empower them to make an informed decision about purchasing a retirement property and what that means for their future financial obligations.
- 5.20 We consider that the best way of doing this is by the provision of a disclosure document, highlighting key information about any event fees and how much it is likely to be. We recommend that all prospective purchasers should be provided with a standardised disclosure document. We discuss the timing for provision of this document later in this chapter.
- 5.21 As we discussed above, not all older consumers wish to move into a specialist retirement property. As Carlex has pointed out, some older consumers move to non-retirement accommodation. Alternatively, they may be looking at specialist retirement properties that do not require payment of event fee. If this is the case, then the disclosure document will alert such consumers to the existence of an event fee at a particular property, and enable them to compare the prices of properties accordingly. We consider that this will enable them to make the decision that is most appropriate for their circumstances.
- 5.22 During our consultation, we asked stakeholders who were residents of retirement properties whether they would have found a disclosure document helpful. There was unanimous support from the 109 residents who responded to this question. For example, residents said:
- It has to be realised that when people down-size they can often be very emotionally upset particularly if they have recently lost a partner. The last thing they can comprehend is a complicated lease. A Disclosure Document therefore should be required by law—then there are no surprises or nasty shocks. (Mr and Mrs T)
- You can make a more informed decision if you have all the facts. (Ms B)
- 5.23 We have also tested the disclosure document with current residents of retirement properties, at a focus group meeting in Kent, organised by the Leaseholder Association. Feedback from the 18 residents involved in this exercise was very useful when finalising the disclosure document. All members of the focus group agreed that having a document which provided them with information about event fees at an early stage was important. As one resident said, it is “very important to know what you are buying into”.

### Code of practice provisions

- 5.24 The code of practice sets out the obligations on the landlord/operator to provide a disclosure document to a consumer in paragraphs 4.1 and 4.4 to 4.5.



4.1 The following provisions apply when the property is sold by or through the Landlord/Operator.

**Disclosure document: timing**

4.4 Where a Property is being sold off-plan, the Prospective Buyer must be given a Disclosure Document when they express an interest in a specific Property, but before they reserve a Property.

4.5 For all other properties, the Disclosure Document must be provided to the Prospective Buyer on their first visit to a Property.

- 5.25 The code of practice also includes specific provisions dealing with the contents and presentation of the disclosure document.

4.11 The Disclosure Document must contain the wording and be in the format set out at Appendix C to the code of practice.

4.12 If there is more than one option for the payment of an Event Fee, the Prospective Buyer must be provided with one Disclosure Document for each option.

4.13 The Disclosure Document must contain illustrative examples showing how much the Event Fee may be on sale. Where there are multiple Event Fees on sale, they must be aggregated and shown as one Event Fee.

- 5.26 The standard disclosure document is appended to this report as part of the code of practice at Appendix 3. We have also provided example completed disclosure documents at Appendix 6.

**Disclosure document: timing**

- 5.27 Paragraphs 4.4 and 4.5 of the code of practice outline when the landlord/operator must provide a disclosure document to a consumer. These provisions apply when the property is being sold through the landlord/operator.

- 5.28 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.<sup>168</sup> For properties which are not sold off-plan, the disclosure document must be provided on the prospective buyer's first visit to the property.<sup>169</sup> The code of practice defines "prospective buyer" as "any person who expresses an interest in the Property to the Landlord/Operator, Leaseholder or estate

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<sup>168</sup> Code of Practice, para 4.4.

<sup>169</sup> Code of Practice, para 4.5.

agent, with a view to becoming the Leaseholder or the Resident”.<sup>170</sup> The “property” is the leasehold property in question.<sup>171</sup>

- 5.29 We have considered whether the code of practice should oblige a landlord/operator to retain documentary evidence of having provided the disclosure document to a consumer. In future proceedings, any landlord/operator who wishes to argue that they have complied with the code of practice would be expected to provide proof that they had provided the consumer with the disclosure document. We have decided not to prescribe how they should prove this as each landlord/operator may already have an established system for this. However, the code of practice includes a best practice provision which provides as follows.

When a property is sold by or through the Landlord/Operator

5.1 As a matter of best practice, where the Landlord/Operator provides the Disclosure Document directly to a Prospective Buyer, that correspondence should be evidenced in writing.

- 5.30 We suggest that one way of satisfying this provision would be to retain a copy of the disclosure document provided to the consumer, with the consumer’s signature to confirm that they have received the original disclosure document for the property. If the information has been provided by email, this provision could be satisfied by retaining a copy of the email.

#### **Concerns about a standardised disclosure document**

- 5.31 We have taken stakeholders’ feedback on the disclosure document into account. We are confident that the proposed disclosure document will be accessible to consumers and will provide them with the information needed to make an informed decision about the event fees on a retirement property.
- 5.32 Estates & Management Ltd did not accept the concept of a standardised document, saying that it was “too ambitious”. They argued that their event fee model could not fit within the standardised disclosure document.
- 5.33 We do not agree. As part of this project we have considered a sample of specialist leases sold to older people, drawn from Land Registry.<sup>172</sup> We have been able to complete a standard disclosure document for each of these properties. We do not consider that a standard disclosure document for event fees on retirement properties is too ambitious. Indeed, a standard disclosure document is a crucial tool to provide transparent information about event fees to a consumer.
- 5.34 We have considered whether a landlord/operator should be able to provide its own bespoke disclosure document and have decided against this. A consumer may be interested in more than one property when buying a retirement property. We

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<sup>170</sup> Code of Practice, para 1.10.

<sup>171</sup> Code of Practice, para 1.9.

<sup>172</sup> See para 1.19 above.

recommend that the disclosure document provided for each property should be in the same format to facilitate direct comparison between properties.

- 5.35 Furthermore, there was strong agreement among stakeholders that the disclosure document should be standardised to allow direct comparison between different properties. Mr T, a resident, said that standardisation was “essential”. This was echoed by TPO who said:

[T]he standardisation of the document will be essential to allow consumers the ability to compare properties. Standardisation will also have the medium and long term benefit of educating consumers and, therefore, increasing consumer confidence in the sector.

- 5.36 Housing & Care 21 said:

Standardisation would achieve the intended purpose of both clarity of information and ease of comparison between similar properties for sale.

- 5.37 Accordingly, we have included an obligation in the code of practice that the disclosure document “must contain the wording and be in the format set out at Appendix C to the code of practice”.<sup>173</sup> If there is more than one option for payment of an event fee on a property, the consumer must be provided with one disclosure document for each option.<sup>174</sup>

- 5.38 We also regard it as important to ensure that the disclosure document does not overload the consumer with information.<sup>175</sup> We have tried to keep the document as short as possible and include only that information which is essential for the consumer.

- 5.39 The disclosure document is split into two sections:

- (1) Information about the event fee; and
- (2) Illustrative examples.

- 5.40 We discuss these sections below.

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<sup>173</sup> Code of practice, paras 4.11 and 1.3.

<sup>174</sup> Code of practice, para 4.12.

<sup>175</sup> Information overload is the phenomenon when people become swamped with information to the extent that it affects their decision-making ability (see T Paredes, “Blinded by the Light: Information Overload and its consequences for Securities Regulation” (2003) 81 *WashUL* 417). Research into behavioural economics shows that often large amounts of information simply do not get taken into account and attention must be paid as to how information is presented to the consumer (see Armour et al, *Principles of Financial Regulation* (2016), ch 12). This has been illustrated by a recent Financial Conduct Authority study which found that reducing the amount of text in a letter to consumers more than doubled the response rate to the letter: The Financial Conduct Authority, *Occasional Paper No 2* (2013). A consequence of this is that the way in which information is presented or framed makes a difference to consumer choices and can assist consumers by making the information easier to comprehend. Presenting only the key features and essential information in a prescribed format can facilitate better consumer decision making.

## Contents of disclosure document: information about the event fee

5.41 We recommend that the disclosure document provides the following information about the event fee:

- (1) The property address. This should include the name of any development or scheme of which the property forms part.
- (2) A short definition of event fees. Stakeholders strongly agreed that this would be useful. One stakeholder noted that this may be particularly important where an estate agent may not have previously sold a retirement leasehold property. We have not included a definition of an event fee calculated on an equity uplift basis. This is because, as discussed above, we want to ensure that the document is kept as simple as possible and does not include any unnecessary information. We consider that an event fee payable on an equity uplift basis is encompassed by the definition in the disclosure document.
- (3) An explanation of how the fee is calculated. This will include the events which trigger the fee, such as sale and sub-letting. It will also include the sum total of all event fees, including any transfer fee and contingency/reserve fund fee, and whether the event fee is calculated on purchase price, sale price, or market value.
- (4) The asking price for the property. This is the price at which the property is offered for sale. If the asking price of the property changes, perhaps due to negotiations between the parties, a new disclosure document does not have to be provided. The consumer will already have information indicating how much the event fee is likely to be. We consider that it would be disproportionate to require a landlord/operator to provide a new disclosure document each time the proposed purchase price of the property changed during negotiations.
- (5) A description of who the event fee goes to, their role and their contact details. This is meant to provide information about who will receive the fee, rather than who will collect the fee. Members of the focus group held with the Leaseholder Association strongly agreed that this information was important and that they would like to know who receives the event fee. We have included enough space for the entry of up to three names and contact details. These may include, for example, the landlord/operator, who may be the ultimate beneficiary of the fee, and a sinking or contingency fund.
- (6) The percentage of the event fee, if any, that goes into a sinking fund. Not all event fees include a portion for a sinking fund. In that case, the landlord/operator may state that the percentage of the event fee that goes into a sinking fund is 0%.
- (7) A description of what the consumer will receive in exchange for the event fee. Following feedback from stakeholders, we have introduced a requirement to explain on the disclosure document the service or benefit, if any, the consumer will receive for the event fee. As discussed above, certain event fees may be for the sinking fund or to ensure that service charges are not prohibitively expensive. However, other event fees are not linked to any benefit or service provided by the landlord. This was a concern highlighted by the OFT in its 2013 report. These fees may be charged with no explanation of the obligation to pay and no restriction on how the money will be spent. The fee may be purely for the freeholder's profit.

We have included a word limit to ensure that the information provided by landlord/operators is succinct and easy to read.

Some landlord/operators have expressed concern that the information in this section of the disclosure document could be challenged by a consumer. However, it is within the control of the landlord/operator to ensure that the information within this section is accurate. We maintain that the benefits to the consumer of being provided with this information outweigh these concerns.

- (8) Information about other fees and charges, which we discuss below.<sup>176</sup>

### **Essential contents of the disclosure document: illustrative examples**

- 5.42 A vital feature of the disclosure document is the use of illustrative examples.<sup>177</sup> A consumer may be aware that under the lease they have to pay 1% of the market value of the retirement property for each year of their residence. However, it may be less clear what this will mean in terms of the amount of money they will have to pay. Research shows that consumers frequently struggle to understand percentages and the effect of compound increases of price over time.<sup>178</sup>
- 5.43 This may be especially complex where the market value of the property may fluctuate. The examples in the disclosure document are based on the asking price of a property and the event fees applicable to that property. They show the consumer:
- (1) how much they may have to pay as an event fee; and
  - (2) the differences between the different types of event fee.
- 5.44 We believe that the illustrative examples address an urgent need to provide consumers with clear information about event fees. In Appendix 6, we have provided three disclosure documents based on event fee terms found in sample leases. These examples have all been calculated using the same asking price. The event fees payable range from £10,000 to £120,000. We maintain that the difference between these figures provides compelling evidence of the value of providing this information to consumers.
- 5.45 The illustrative examples must be calculated on standard rates of annual property price inflation. Following consultation, we have chosen the rates of -3%, 0% and +3%, which are generally considered to be reflective of the range of possible property price inflation rates.
- 5.46 We have included positive, neutral and negative property price inflation rates. We have heard from stakeholders that the values of retirement properties sometimes decrease. We consider it important to highlight to the consumer that a significant event fee may still be payable even where the value of the property has decreased.

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<sup>176</sup> See para 5.52 below.

<sup>177</sup> Code of practice, para 4.13.

<sup>178</sup> For example, in an OECD study, only 37% of those surveyed were able to identify correctly the effect of compound interest: OECD, *Financial literacy and inclusion: Results of OECD/INFE survey across countries and by gender* (2013) cited in Financial Conduct Authority, *Market Study Asset Management Market Study Interim Report* (2016).

- 5.47 There is also a wide variety in how different fee models apply in the context of falling property prices. In most models, the event fees are lower when the property's market value falls. However, in some examples we have seen, such as where the fee is calculated on the original purchase price or open market value, whichever is the higher, this is not the case. Therefore we consider it important to include a negative price inflation rate in the worked example.
- 5.48 We have included a statement that the rates of property price inflation are indicative only.
- 5.49 The illustrative example also includes a column showing the percentage rate of an event fee depending on length of ownership. We inserted this column after hearing from residents of retirement properties who did not understand at the time of purchase that an event fee under their lease would increase over time. Where an event fee periodically increases, such as an event fee of "1% of the purchase price, rising by 1% for each year or part year of occupation", this column will highlight that increase.

#### **Should the disclosure document include other charges and fees?**

- 5.50 There was support amongst stakeholders and members of the focus group held by the Leaseholder Association for a comprehensive disclosure document which showed all the fees and charges associated with living in a retirement property. Such fees and charges would include service charges, ground rents, administration charges, payments to a sinking fund or for major works, and event fees payable on sub-letting.
- 5.51 We acknowledge the potential benefits of having all the charges and fees in one document. However, this is outside the remit of our project, which is to consider event fees only. Further, we have not consulted on the efficacy of including fees such as ground rents or service charges on a standard disclosure document.
- 5.52 We have, however, included a warning on the disclosure document in the following terms:

You should ask the Landlord/Operator about other ongoing fees and charges. These may include service charges, payments to a sinking fund, ground rent and administration charges. This list may not be exhaustive. Please check with your independent legal adviser for more information.

#### **Should the disclosure document include a worked example for sub-letting?**

- 5.53 We consider that there are strong practical arguments against including a second worked example for sub-letting the property. First, not all properties allow sub-letting. Therefore not all disclosure documents would include this second example. This may hinder comparison of disclosure documents and confuse consumers.
- 5.54 Secondly, there is a risk of information overload.<sup>179</sup> Including an extra set of numbers is likely simply to confuse a consumer or focus their mind on the sub-letting event fee, which will be a smaller amount than the event fee on sale. When purchasing a retirement property, usually a consumer will not intend to sub-let or will not give the

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<sup>179</sup> See para 5.38 above.

matter much, if any, thought. However, their family may find that they have to sub-let the property, if it cannot be sold.

5.55 Thirdly, presenting an event fee on sub-letting accurately is a complex task. The amount of event fee payable on sub-letting will vary according to the event fee model and whether it involves a percentage rate which increases periodically.

5.56 Our approach, therefore, is to impose a control on event fees to limit the amount which can be charged on sub-letting, rather than providing another worked example on the disclosure document.

## **RECOMMENDATIONS**

### **When the property is sold through the landlord/operator**

#### **Recommendation 14.**

Where a retirement property is sold through the landlord/operator, the code of practice should provide that any advertisement that mentions the price for the property must state that an event fee is payable and provide a general indication of the amount and method of calculation of the event fee.

#### **Recommendation 15.**

Where a retirement property is sold through the landlord/operator, there should be an obligation on the landlord/operator to provide any prospective buyer with a standardised disclosure document for that property, including illustrative examples showing how much the event fee may be. The document must be provided to a prospective buyer:

- (1) if the property is being sold off-plan, when the prospective buyer expresses an interest in a particular property; or
- (2) if the property is not being sold off-plan, on the prospective buyer's first visit to the property.

## Chapter 6: Code of practice – when the property is sold by the leaseholder through an estate agent

- 6.1 Not all retirement properties are sold through the landlord/operator. Some are sold by the leaseholder, or their estate, through an estate agent. This situation is less straightforward than a direct sale by the landlord/operator. The estate agent may not be aware that event fees apply to the property, or even that it is a retirement property. The landlord/operator may not be aware that the property is for sale. These are major issues which need to be addressed.
- 6.2 It is clear in these circumstances that there must be a way for the estate agent to discover that a property is subject to an event fee. In this chapter we consider the possible mechanisms for providing this information, and we discuss the obligations on the landlord/operator.
- 6.3 We recommend that a central database should be established. The purpose of such a database would be to provide either the disclosure document or the contact details of a landlord/operator to estate agents and prospective buyers.
- 6.4 In this chapter we also consider the obligations on estate agents and redress for consumers. Estate agents are subject to the CPRs.<sup>180</sup> They must not provide false information about event fees or present information in a way which is likely to deceive the average consumer.<sup>181</sup> Some estate agents in our mystery shopping exercise appeared to breach these requirements.<sup>182</sup> They gave inaccurate information, or no information at all, about event fees. It is clear more needs to be done to ensure that estate agents' legal obligations, particularly in relation to event fees, are better known and are enforced.

### THE CODE OF PRACTICE PROVISIONS

- 6.5 Paragraphs 4.6 to 4.10 of the code of practice set out the obligations on the landlord/operator when the property is sold by the leaseholder. Our recommended code of practice is attached to this report at Appendix 3.
- 6.6 Following discussion with stakeholders, we have produced a flowchart which outlines how these provisions operate. The flowchart is attached at Appendix 5.

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<sup>180</sup> Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 10.

<sup>181</sup> Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 6.

<sup>182</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, paras 4.55 to 4.65. We refer to this document throughout this report as the "consultation paper". It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017).



## **(2) When the Property is sold by the Leaseholder**

4.6 The following provisions apply when the Property is sold by or through the Leaseholder other than through the Landlord/Operator.

4.7 For each Property, the Landlord/Operator must provide free of charge to the Central Database either:

- (1) their contact details; or
- (2) the Specified Information.

If the Landlord/Operator does not provide the Specified Information to the Central Database, 4.8 applies.

4.8 The Landlord/Operator must provide a Disclosure Document for the Property free of charge to any Prospective Buyer or estate agent who requests information about the Property within two working days of being contacted.

4.9 Information provided to the Central Database must be complete, accurate and kept up to date.

4.10 If the Central Database has ceased operation, the Landlord/Operator must:

- (1) display their contact details in some equally prominent place; and
- (2) provide a Disclosure Document for the Property to any Prospective Buyer or estate agent who requests information about the Property within two working days of being contacted.

## **THE CENTRAL DATABASE**

- 6.7 In the consultation paper, we proposed that a central database should be established to provide information to estate agents about event fees.<sup>183</sup>
- 6.8 Many consultees, including the Law Society, the National Association of Estate Agents (NAEA PropertyMark) and TPO, supported this proposal, arguing that a public database would allow for transparency as well as accessibility of information for consumers concerning event fees.
- 6.9 In the subsequent consultation paper on the draft code of practice, we noted that the information and advice charity, Elderly Accommodation Counsel (EAC), had offered to host the information. We asked for stakeholders' views on whether this raised any practical issues.
- 6.10 Stakeholders were generally in favour of EAC hosting the central database but concerned about the practicalities of the proposal. One stakeholder summarised the position:

We agree, subject to capability, that EAC would be an ideal location to hold the on-line database. However, there are a number of considerations around ownership of

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<sup>183</sup> Consultation paper, paras 12.66 to 12.69.

data, transitional arrangements and also wider resource/commercial issues to consider for freeholders. (ARHM)

6.11 The British Property Federation cautiously welcomed the proposal:

We welcome the fact that the information will be held centrally, and the Elderly Accommodation Counsel currently has an extremely comprehensive offer. Sufficient resource must be allocated to this to ensure its success.

6.12 However, Estates & Management Ltd strongly disagreed with the proposal of a central database:

We think the use of a third party database in order to provide information on our properties would be disproportionate in terms of costs both in terms of start-up, ongoing maintenance and monitoring in order to ensure functionality and access can be maintained. Because of the variety and complexity of the information it would not be straightforward for a third party to host this.

6.13 Other industry stakeholders were supportive:

We believe that the current solution of offering freeholders the option of uploading details to the EAC website, or supplying details after being contacted (through contact details on the EAC website) is a good solution. (ARCO)

It is sensible to have a common database host and the Elderly Accommodation Counsel is a respected organisation with expertise in this field. (Retirement Housing Group)

6.14 It has been suggested that Land Registry should be used as an alternative host of information about event fees. The Law Commission has considered using Land Registry for this purpose. However, we have decided that the register of title is not the appropriate place to provide information about event fees. Although the lease will be lodged with Land Registry and accessible for payment of a fee, the terms of an event fee would not necessarily be clear. We discussed in the consultation paper that there is no standard way of drafting event fee terms and that the combined effect of the event fee and the OFT undertakings mean that even a solicitor may find it difficult to advise a purchaser on the effect of an event fee term.<sup>184</sup> Furthermore, there is no obvious mechanism for ensuring that the information is extracted from the lease and made apparent on the register of title.

6.15 There are also accessibility issues for estate agents or members of the public. It is crucial that it is as simple as possible for an estate agent to access this information via a database. Access to Land Registry requires registration of a business account and the payment of a fee each time information about a lease is accessed. As discussed below, we recommend that the information about event fees should be provided to consumers or estate agents free of charge.

6.16 EAC already operates a database of retirement properties and has volunteered to host information about event fees. We have worked with EAC to ensure that it is aware of the type of information it would have to provide and we have alerted it to stakeholder concerns. As discussed below, we have also made provision in the code

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<sup>184</sup> Consultation paper, para 3.58.

of practice in the event that EAC ceases to operate the central database. In the circumstances, we consider that the EAC database is a more proportionate way to achieve our policy goals.

- 6.17 We have heard that not all landlord/operators want to provide the details of their event fees to the central database. Some landlord/operators do not want to put this information about their properties online. Other landlord/operators prefer to maintain control of the purchase process. If a property in their development is for sale, they want to be involved throughout the sale of that property, to market the development and to ensure that prospective buyers meet any conditions in the lease such as to health and age.
- 6.18 Event fees are not confidential. Leases are public documents which are already available from Land Registry, albeit at a cost.<sup>185</sup> However, we acknowledge that not all landlord/operators wish to provide information about event fees to an online database run by a third party. Therefore our recommended reforms are flexible on this point. We recommend that to satisfy transparency requirements the landlord/operator should either:
- (1) Provide certain information to the central database about the event fees for each property; or
  - (2) Provide contact details to the central database so that an estate agent 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 within two working days.
- 6.19 Information provided to the central database must be complete, accurate and kept up to date.<sup>186</sup> This information must be provided free of charge to the central database.<sup>187</sup>
- 6.20 The code of practice defines “central database” as the database containing information about retirement properties, hosted by EAC or a replacement manager.<sup>188</sup> We have considered whether the use of a central database raises any issues under the Data Protection Act 1998. We do not believe this is the case because the information on the database is unlikely to “relate to a living individual” who can be identified from the data and other information, and is therefore not personal data within the meaning of the Act.

#### **LANDLORD/OPERATOR PROVIDES “SPECIFIED INFORMATION”**

- 6.21 A landlord/operator may fulfil their disclosure obligations under the code of practice by providing “specified information” to the central database. This information will be used to produce a disclosure document for the property if requested by an estate agent or a member of the public.

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<sup>185</sup> Consultation paper, para 12.69.

<sup>186</sup> Code of practice, para 4.9.

<sup>187</sup> Code of practice, para 4.7.

<sup>188</sup> Code of practice, para 1.2.

6.22 “Specified information” is defined by the code of practice and includes:<sup>189</sup>

- (1) The address of the property;
- (2) When the event fee is payable;
- (3) The event fee payable and how it is calculated;
- (4) The role, name and contact details of who receives the event fee;
- (5) The percentage of an event fee which goes into a sinking fund; and
- (6) An explanation of the service or benefit, if any, which the leaseholder receives in exchange for the fee.

6.23 We consider that providing this information to the central database is the easiest option for the landlord/operator to fulfil their obligations under the code of practice.

6.24 We have included a best practice provision in paragraph 5.5 that the landlord/operator should maintain evidence of having provided information to the central database. Because this obligation is one of best practice only,<sup>190</sup> breach of this obligation does not constitute a breach of the code of practice for the purposes of the grey list.<sup>191</sup>

6.25 However, this best practice provision is significant for two reasons. First, under the Leasehold Reform, Housing and Urban Development Act 1993 any code of practice provision which appears to be relevant shall be taken into account by a court or tribunal.<sup>192</sup> Secondly, without such evidence it will be difficult for a landlord/operator to prove that they have complied with their obligations under the code of practice.

## **LANDLORD/OPERATOR PROVIDES CONTACT DETAILS**

6.26 As discussed, we have heard from some stakeholders that they would prefer not to provide the specified information to the central database.

6.27 In that case, in order to satisfy the disclosure obligations in the code of practice, the landlord/operator must provide their contact details for each property to be listed on the central database. If contacted by an estate agent or prospective buyer, they must provide a disclosure document, free of charge, to that person within two working days of being contacted.<sup>193</sup>

6.28 Estates & Management Ltd have argued that putting the “specified information” onto the central database would be a disproportionately onerous task. We disagree. The “specified information”, listed above, is all information to which a landlord/operator should already have access. Furthermore, as discussed above, landlord/operators are already under a legal obligation under the CPRs to provide this information to a

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<sup>189</sup> Code of practice, para 1.13.

<sup>190</sup> See paras 3.7 to 3.8 above.

<sup>191</sup> Code of practice, para 2.3.

<sup>192</sup> Leasehold Reform, Housing and Urban Development Act 1993, s 87.

<sup>193</sup> Code of practice, para 4.8.

consumer at an early stage in the purchase process. Other stakeholders in the industry are less concerned:

We believe that operators charging event fees are prepared to take responsibility for familiarising themselves and implementing these changes – if they are not already familiar with them. (ARCO)

- 6.29 Estates & Management Ltd have also argued that two working days is not a realistic timeframe to provide the disclosure document. They proposed an alternative time period of ten working days.
- 6.30 As discussed above, the effect of the CPRs is that an estate agent should not advertise a retirement property for sale without information about the event fee for that property.<sup>194</sup> Thus a delay in obtaining information about an event fee will lead to a delay in putting the property on the market. Relatives of the leaseholder may wish to sell the property as quickly as possible to pay for the costs of the leaseholder's residential care or to avoid service charges for an empty property.
- 6.31 We consider that two working days strikes the correct balance between providing a landlord/operator with sufficient time to access information which they already have about an event fee and providing an estate agent with the information they need to advertise a property as soon as possible.
- 6.32 There may be landlord/operators who feel that they will not have the resources to meet the time limit of two working days. In that case, we suggest that they provide the specified information to the central database to avoid a breach of the code of practice and the risk that their event fee will be unenforceable.
- 6.33 If a landlord/operator has provided a disclosure document directly to an estate agent or prospective buyer, the code of practice sets out that as a matter of best practice, the landlord/operator should maintain evidence in writing of having done so.<sup>195</sup> Breach of these best practice provisions will not constitute a breach of the code of practice, as we explained in Chapter 2.<sup>196</sup> However, we regard it as important that landlord/operators comply with these provisions for the reasons explained above.<sup>197</sup>

#### **IF THE CENTRAL DATABASE HAS CEASED OPERATION**

- 6.34 One question raised by stakeholders is what would happen if EAC ceased to exist or otherwise ceased to operate the central database. We have dealt with this concern in two ways.
- 6.35 First, the definition of central database<sup>198</sup> envisages a situation where EAC may be replaced by another manager of the central database.

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<sup>194</sup> See para 6.4 above.

<sup>195</sup> Code of practice, paras 5.1, 5.5.

<sup>196</sup> Code of practice, para 2.3.

<sup>197</sup> See paras 6.34 to 6.37 below.

<sup>198</sup> Code of practice, para 1.2.

- 6.36 Secondly, the code of practice provides for the situation where the central database is no longer operating. In that case, the landlord/operator must display their contact details in “an equally prominent place”. This could be on another consumer-facing website. The landlord/operator must then provide a disclosure document for the property to any estate agent or prospective buyer who requests information about the property within two working days of being contacted.<sup>199</sup>
- 6.37 This is a more onerous obligation than providing the specified information to the central database. We hope that this will encourage the industry to support the establishment and maintenance of the central database.

## **WORKING WITH ESTATE AGENTS**

- 6.38 We have mentioned above that it appears that some estate agents are currently providing inaccurate information, or no information at all, about event fees to consumers.<sup>200</sup> We consider that this may be a breach of their obligations under the CPRs.
- 6.39 Part 5 of the code of practice includes a summary of the obligations on estate agents which are enforceable under the CPRs.<sup>201</sup> We have also suggested that as a matter of best practice, an estate agent should encourage a prospective buyer to make direct contact with the landlord/operator.<sup>202</sup>
- 6.40 Some stakeholders are concerned that even with our proposed reforms, estate agents may fail to provide the disclosure document to consumers. This may be because the estate agent does not know about the central database or even that the property is a retirement property. Landlord/operators are concerned that this may affect the enforceability of their event fee.
- 6.41 As long as the landlord/operator has complied with their obligations under the code of practice, we consider that the event fee will be enforceable. This will be the case even where the estate agent has failed to bring the event fee to the attention of the consumer. We discuss below that, in that case, the consumer is able to seek redress from the estate agent.

### **Redress and enforcement against estate agents**

- 6.42 In the consultation paper, we discussed the codes applying to estate agents.<sup>203</sup> Estate agents are required to register with an approved redress scheme.<sup>204</sup> The majority (approximately 95%) of sales agents are registered with TPO which applies its own

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<sup>199</sup> Code of practice, para 4.8.

<sup>200</sup> See para 5.5 above.

<sup>201</sup> Code of practice, para 5.2, 5.3.

<sup>202</sup> Code of practice, para 5.4.

<sup>203</sup> Consultation paper, paras 12.75 to 12.80.

<sup>204</sup> Estate Agents Act 1979, s 23A; Estate Agents (Redress Scheme) Order 2008, SI 2008/1712.

code of practice for residential estate agents.<sup>205</sup> This code of practice already reflects the requirements of the CPRs. It provides:

7i You must by law comply with the Consumer Protection from Unfair Trading Regulations 2008 ... The Consumer Protection from Unfair Trading Regulations 2008 require you to disclose any information of which you are aware or should be aware of in relation to the property in a clear, intelligible and timely fashion and to take all reasonable steps that all statements that you make about a property, whether oral, pictorial or written, are accurate and are not misleading. All material information (\*) must be disclosed and there must be no material omissions which may impact on the average consumer's (\*) transactional decision (\*) and where information is given to buyers or their representatives, it must be accurate and not misleading.<sup>206</sup>

- 6.43 The code of practice for residential estate agents has recently been updated to deal with event fees, providing that “[i]n relation to sheltered housing, you should include in sales particulars the existence and level (if known) of event fees”.<sup>207</sup>
- 6.44 We recommend that the code of practice for residential estate agents should be updated again to include reference to checking the central database for the disclosure document. We will work with TPO to achieve this. We will also work with TPO to provide guidance to estate agents and to raise awareness of the new code provisions among members of all redress schemes.
- 6.45 If an estate agent breaches the code of practice for residential estate agents, a consumer may bring a complaint to TPO. We have been told that this is a clear and simple process which has been designed to be accessible for all consumers. In 2015, TPO resolved over 3,300 complaints.<sup>208</sup>
- 6.46 Legal representation is not necessary for a complaint to TPO. If an estate agent is found to have breached the code, the consumer may be entitled to compensation up to a maximum of £25,000. Compensatory awards are made for actual, proven financial loss as a direct result of the actions or inactions of the agent and/or avoidable distress, aggravation and inconvenience.<sup>209</sup>
- 6.47 Some stakeholders have pointed out that some event fees may be in excess of £25,000 and that, even with redress from TPO, the consumer may be left out of pocket. We consider this unlikely. A consumer may be told about the event fee before completion of the purchase by their solicitor or licensed conveyancer. Whilst we maintain that this disclosure is not early enough, in that situation the consumer may be able to take steps to mitigate the loss by, for example, pulling out of the purchase. They may then be able to claim redress from TPO for proven financial loss such as conveyancing fees or transport costs to visit the property.

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<sup>205</sup> TPO, Code of Practice for Residential Estate Agents (effective 1 October 2016).

<sup>206</sup> TPO, Code of Practice for Residential Estate Agents (effective 1 October 2016), para 7i.

<sup>207</sup> TPO, Code of Practice for Residential Estate Agents (effective 1 October 2016), paras 7i, 7k and 18l.

<sup>208</sup> TPO, *Annual Report* (2015).

<sup>209</sup> Ombudsman's Terms of Reference (20 July 2015), para 38b.

- 6.48 In the worst case scenario, if a consumer is not told about the event fee on the property until after completion of the purchase, they would have various avenues for redress. They may be able to seek redress from TPO. They may also be able to bring an action for negligence against their solicitor or licensed conveyancer. Additionally, they could submit a complaint to the Legal Ombudsman, which has a compensation limit of £50,000.<sup>210</sup>
- 6.49 A breach of TPO's code of practice by an estate agent would not result in the event fee being unenforceable. However, a breach of that code of practice may constitute a breach of regulation 5(3)(b) of the CPRs. Regulation 5 provides:
- (1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3) ...
- (3) A commercial practice satisfies the conditions of this paragraph if— ...
- (b) it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if—
- (i) the trader indicates in a commercial practice that he is bound by that code of conduct, and
- (ii) the commitment is firm and capable of being verified and is not aspirational, and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances.
- 6.50 Local Trading Standards services have the power to bring enforcement action against an estate agent.<sup>211</sup> The National Trading Standards Estate Agency Team, which is hosted by Powys County Council, enforces the Estate Agents Act 1979 and associated legislation, including the CPRs and the Consumer Rights Act 2015. The team has the power under the Estate Agents Act 1979 to prohibit a person (which includes a limited company) from doing estate agency work,<sup>212</sup> or to issue a formal warning order. We have been told by the National Trading Standards Estate Agency Team that a complaint about an estate agent may be brought by a consumer, a landlord/operator or another enforcement agency.

### **Raising awareness of event fees**

- 6.51 We believe that it is clear that estate agents need to be made aware of event fees and the proposed reforms, including the central database. We also maintain they need to be reminded of their obligations under the CPRs.
- 6.52 We propose to do this by working with the three redress schemes, which are TPO, Ombudsman Services and the Property Redress Scheme, to develop guidance for estate agents. This guidance will:
- (1) Provide an explanation of event fees;

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<sup>210</sup> Legal Ombudsman, *Scheme Rules* (28 January 2015), para 5.43.

<sup>211</sup> Estate Agents Act 1979, ss 25(1) and 26(1).

<sup>212</sup> Estate Agents Act 1979, s 3.



- (2) Outline the estate agent's obligations; and
- (3) Suggest how to identify a property as a retirement property and that it may be subject to event fees.

6.53 We will also work with the NAEA Propertymark to develop guidance for estate agents which can be used at conferences and in their syllabus for qualifications.

6.54 It will also be important to raise awareness amongst consumers. As TPO said in their response to the consultation on the draft code of practice:

TPO would recommend that Law Commission works to ensure that developers, freeholders, conveyancers and consumer advice groups such as Citizens Advice are made aware that consumers, faced with event fees that have not been disclosed by an estate agent, are able to bring their dispute to an Ombudsman scheme. TPO is happy to work with all stakeholders to ensure that awareness is raised in this respect.

## RECOMMENDATIONS

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

#### **Recommendation 16.**

An online database ("the central database") should be established to provide information about event fees to estate agents and prospective buyers.

#### **Recommendation 17.**

Landlord/operators should have the option to provide either their contact details or specified information to the central database.

#### **Recommendation 18.**

Landlord/operators who choose to provide their contact details to the central database should be required to provide the standard disclosure document free of charge to an estate agent or prospective buyer within two working days.

#### **Recommendation 19.**

The Property Ombudsman code of practice should be amended to include reference to the code of practice on event fees.

#### **Recommendation 20.**

Guidance should be developed for estate agents which:

- (1) provides an explanation of event fees;
- (2) outlines estate agents' obligations; and
- (3) suggests how to identify that a property is a retirement property and may be subject to event fees.

## Chapter 7: Amendment to the “grey list”

### THE CONSUMER RIGHTS ACT 2015 AND THE “GREY LIST”

- 7.1 In the progress report, we proposed that where there has been a breach of the code, the relevant event fee should be presumed to be unfair and unenforceable.<sup>213</sup> We suggested that one way of doing this would be to amend Schedule 2 to the Consumer Rights Act 2015.
- 7.2 Schedule 2 to the 2015 Act contains an “indicative and non-exhaustive” list of contract terms which may be regarded as unfair.<sup>214</sup> This list is known as the “grey list”: the terms on it are not necessarily unfair (black) but there is some indication of unfairness (grey).<sup>215</sup> The list covers terms which are commonly encountered in consumer contracts, including penalty clauses and price escalation clauses. Schedule 2 also contains a list of exceptions or “qualifications” to the grey list.
- 7.3 The grey list is copied from the Annex to the Unfair Terms Directive.<sup>216</sup> However, it is not identical. It includes three items which were introduced by the 2015 Act.<sup>217</sup> Importantly, the 2015 Act also empowers the Secretary of State to amend the grey list by adding, modifying or removing an item on it by statutory instrument.<sup>218</sup> This provision was added to deal with future problems which might arise.
- 7.4 The principal intention of the grey list is to provide guidance on terms which are indicatively unfair. Additionally, if a term is on the grey list the main exclusions do not apply. For example, section 64 of the 2015 Act provides that a court cannot assess the appropriateness of the price payable under the contract, provided that the term is transparent and prominent.<sup>219</sup> Significantly, the exceptions in section 64 of the 2015 Act do not apply to a term on the grey list.<sup>220</sup> This means that where a term is on the

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<sup>213</sup> Event Fees Progress Report (June 2016), para 1.41. This is available at [http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event\\_fees\\_progress\\_June\\_2016.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2016/06/Event_fees_progress_June_2016.pdf).

<sup>214</sup> Consumer Rights Act 2015, s 63(1).

<sup>215</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events: A Consultation Paper (2015) Law Com No 226, para 6.16. We refer to this document throughout this report as the “consultation paper”. It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017). The term “grey list” is widely used in European law in relation to unfair terms. It appears the term was first used during discussions surrounding the European Directive on Unfair Terms in 1993 (Council Directive 93/13/EEC of 5 April 1993, OJ 1993 L 95).

<sup>216</sup> Council Directive 93/13/EEC of 5 April 1993, OJ 1993 L 95.

<sup>217</sup> Consumer Rights Act 2015, Sch 2, Pt 1, paras 5, 12, 14. For a discussion of these new items, see Competition and Markets Authority *Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (2015), CMA37, ch 5.

<sup>218</sup> Consumer Rights Act 2015, s 63(3).

<sup>219</sup> Consumer Rights Act 2015, s 64(1)(b), (2).

<sup>220</sup> Consumer Rights Act 2015, s 64(6).

grey list, the court may assess the appropriateness of the price, even if it is a price term which is transparent and prominent.

## THE AIMS OF OUR RECOMMENDED REFORMS

7.5 Amending the grey list to include a provision dealing with event fee terms would have three benefits. It would:

- (1) Make it clear that a term which breaches the code of practice for event fees may be regarded under the Consumer Rights Act 2015 as unfair and unenforceable.<sup>221</sup> This provides consumers with a route to challenge an event fee.
- (2) Bypass the difficult legal arguments as to whether an event fee term is a price term and therefore exempt from an assessment for fairness under section 64 of the Consumer Rights Act 2015. We discussed the complexity of these arguments in the consultation paper.<sup>222</sup>
- (3) Provide reasonable certainty to landlord/operators:
  - (a) A court or tribunal will give prominence to the grey list when deciding whether a term is fair.
  - (b) In its 2013 report, the OFT found that some event fees were potentially unfair because of certain features, such as a lack of transparency, which we have outlined above. Our recommended code of practice, which is attached to this report at Appendix 3, addresses these problems. Under the Leasehold Reform, Housing and Urban Development Act 1993, a court or tribunal can consider any provision of the code of practice which appears to be relevant to any question arising in any proceedings.<sup>223</sup>
  - (c) If the landlord/operator complies with the code of practice, and the term is transparent and prominent in accordance with section 64(2) of the Consumer Rights Act 2015, the appropriateness of the price of the event fee is not assessable for fairness.<sup>224</sup>

## NEW LEASES AND EXISTING LEASES

7.6 We consider that the recommended amendment to the grey list will only apply to new leases created after such amendment. We have previously proposed that for the purposes of unfair terms legislation, an event fee term should be treated “as if it were a term of a contract made between the landlord and tenant when the current tenant first became bound by the term”.<sup>225</sup> If this substantive proposal is implemented in the future, the grey list entry would also apply on the next assignment of an existing lease. We discuss our proposals for further reform in Chapter 8 of this report.

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<sup>221</sup> Consumer Rights Act 2015, s 63(1).

<sup>222</sup> Consultation paper, paras 6.32 to 6.69. We refer particularly to the Supreme Court’s decision in *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696.

<sup>223</sup> Leasehold Reform, Housing and Urban Development Act 1993, s 87.

<sup>224</sup> Consumer Rights Act 2015, s 64(1).

<sup>225</sup> Consultation paper, para 11.19.

## GREY LIST

### Proposed wording

- 7.7 Schedule 2 to the Consumer Rights Act 2015 is made up of two parts. The first part is the grey list, discussed above. The second part of Schedule 2 is a list of qualifications to the grey list. Our recommendations for amendments to the Consumer Rights Act 2015 follow this structure. We have worked with Parliamentary Counsel to provide a recommended addition to the grey list and a recommended addition to the list of qualifications. The Secretary of State is empowered to make these changes by statutory instrument under section 63(3) of the Consumer Rights Act 2015.
- 7.8 Our proposed new paragraph 20A sets out the proposed addition to the grey list.

20A A term of or relating to a residential lease which has the object or effect of requiring, other than immediately upon conclusion of the contract, the payment of money or the foregoing of a financial benefit where —

(a) the term breaches a code of practice relating to such terms, or

(b) the trader breached such a code of practice in presenting the term to the consumer;

and for this purpose “code of practice” means a code which has been approved under an enactment or has a status equivalent to such a code.

- 7.9 We look at this wording in more detail below.

### “object or effect of”

- 7.10 All the items on the grey list start with “A term which has the object or effect of ...”. This wording comes from the Unfair Terms Directive.<sup>226</sup> We consider that the new item should start the same way. This should mitigate the risk that landlords/operators or their lawyers might draft terms which circumvent the proposed controls. This would also mean that the new item would be consistent with the rest of the list.
- 7.11 This wording covers situations where the obligation under the lease to pay the fee may be on a party other than the leaseholder, if the practical effect is that the leaseholder is obliged to pay the fee, as discussed above.<sup>227</sup>
- 7.12 We have included the wording “of, or relating to, a residential lease” because an event fee may be included in a contract which is separate from the lease. We do not have any examples of where this has occurred, but we are mindful that this could be a way for landlord/operators to avoid the protections of the code of practice on event fees.<sup>228</sup>

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<sup>226</sup> Council Directive 93/13/EEC of 5 April 1993, OJ 1993 L 95.

<sup>227</sup> See paras 3.31 to 3.33 above.

<sup>228</sup> See para 3.13 above.

**“other than immediately upon conclusion of the contract”**

7.13 The code of practice is not intended to apply to the sum paid by a purchaser in return for the grant or assignment of the lease. Instead, it is intended to apply to fees which are deferred. Such fees have the potential to be unfair because they may exploit consumers’ behavioural biases. We discuss consumer behavioural biases in Chapter 2 of this report.<sup>229</sup>

**“payment of money or foregoing of a financial benefit”**

7.14 The grey list addition covers not only the obligation to pay a deferred or contingent “fee” but also the situation where the customer is foregoing a financial benefit, which we discussed above.<sup>230</sup>

**“code of practice”**

7.15 The grey list refers to a term which breaches an approved code of practice.

7.16 There are currently two codes of practice which have been approved under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. These are the ARHM code<sup>231</sup> and the RICS code.<sup>232</sup> We have confirmed with the ARHM and RICS that their approved codes of practice are not affected by our proposed addition to the grey list.

7.17 Codes of practice may also be approved through other means, such as the Consumer Codes Approval Scheme, which operates under a quasi-statutory scheme. This is a scheme which was established by the OFT under section 8 of the Enterprise Act 2002, which provided the OFT with the power to approve and promote consumer codes. Section 8 of the 2002 Act has been repealed, and the scheme is now managed by the Chartered Trading Standards Institute.

7.18 None of the current approved codes would fall within the scope of the recommended addition to the grey list. In the future, this addition could apply more widely than event fee terms, if there was an approved code of practice in place. This could provide a mechanism for dealing with other unfair terms in residential leases.<sup>233</sup>

7.19 We recommend that the addition to the grey list should include a breach of a code of practice which has been approved by a public body under a statutory or quasi-statutory scheme. This would include codes which are approved under the Consumer Codes Approval Scheme.

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<sup>229</sup> See paras 2.5 to 2.7 above.

<sup>230</sup> See paras 3.16 to 3.20 above.

<sup>231</sup> *ARHM Code of Practice* [http://www.arhm.org/wp-content/uploads/ARHM\\_Code-of-Practice.pdf](http://www.arhm.org/wp-content/uploads/ARHM_Code-of-Practice.pdf) (last visited 19 October 2016).

<sup>232</sup> *RICS Code of Practice Service charge residential code and additional advice to landlords, leaseholders and agents 2016* [http://www.rics.org/Global/Service\\_charge\\_residential\\_management\\_code\\_PGguidance\\_3rd\\_edition\\_2016.pdf](http://www.rics.org/Global/Service_charge_residential_management_code_PGguidance_3rd_edition_2016.pdf) (last visited 19 October 2016).

<sup>233</sup> We discuss potential future reform of unfair terms law in Chapter 8 of this report.

7.20 We acknowledge that this is a broad category. However, we maintain that this is mitigated by the other conditions of the provision. These require the term to be of, or relating to, a residential lease and the term to have the object or effect of requiring a deferred payment or foregoing of a financial benefit. We consider that this narrows the application of the grey list addition. Additionally, a term on the grey list is not automatically unfair, rather, it is assessable for fairness. This assessment adds a safety net. As a result, we do not consider it necessary to limit the scope of the grey list addition to a code of practice approved under a statutory scheme as distinct from a quasi-statutory scheme.

#### **“breach”**

7.21 The code of practice provides:

- (1) When an event fee can be imposed;<sup>234</sup> and
- (2) Obligations on the freeholder to provide transparent information about event fees at an early stage.<sup>235</sup>

7.22 Therefore, a breach of the code of practice may involve:

- (1) The substance of the term; or
- (2) The circumstances in which the term was brought to the attention of the consumer.

7.23 We recommend that the grey list addition should only be engaged 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.

7.24 This recommendation is consistent with the current grey list, which includes entries about contractual terms themselves<sup>236</sup> and about the circumstances surrounding such terms.<sup>237</sup>

#### **QUALIFICATIONS TO THE GREY LIST**

7.25 Part 2 of Schedule 2 to the Consumer Rights Act 2015 provides a list of qualifications to the grey list. The purpose of Part 2 is to limit the scope of the grey list in specific contexts.<sup>238</sup> For example, there are qualifications about financial service contracts, ongoing contracts, sales of securities and foreign exchange, and other transactions where recognised price indexes are involved.<sup>239</sup>

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<sup>234</sup> Draft code of practice, ch 3.

<sup>235</sup> Draft code of practice, ch 4.

<sup>236</sup> For example, Consumer Rights Act 2015, Sch 2, Pt 1, para 1, which is: “A term which has the object or effect of excluding or limiting the trader’s liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.”

<sup>237</sup> For example, Consumer Rights Act 2015, Sch 2, Pt 1, para 10, which is “A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.”

<sup>238</sup> Competition and Markets Authority, *Unfair contract terms guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015* (2015), CMA37, para 2.41.

<sup>239</sup> Consumer Rights Act 2015, Sch 2, Pt 2, paras 21 to 25.

## Proposed wording

7.26 We have worked with Parliamentary Counsel to provide the following recommended addition to the list of qualifications.

26 Paragraph 20A (residential leases) does not apply to the extent that any sum payable or liable to be forgone by virtue of the term—

- (a) may be brought before the First-tier Tribunal for determination;
- (b) is or would be held on trust for the purposes of maintaining or improving the property to which the lease relates or any associated property.

7.27 We set out each of the recommended qualifications below.

### Fees which can be challenged before the First-tier Tribunal

7.28 Our recommended reforms are not intended to restrict the leaseholder's right to challenge charges in the First-tier Tribunal. For example, administration charges can be challenged in the First-tier Tribunal under Schedule 11 to the Commonhold and Leasehold Reform Act 2002. Variable administration charges are only payable to the extent that they are reasonable.<sup>240</sup> Fixed administration charges may be varied on the grounds that either the fixed sum specified in the lease or a formula specified in the lease is unreasonable.<sup>241</sup>

7.29 Similarly, variable service charges may be challenged in the First-tier Tribunal under section 27A of the Landlord and Tenant Act 1985.<sup>242</sup> An application may be made for a determination on whether a service charge is payable, and if so, by whom, the amount to be paid and the date and manner of payment.<sup>243</sup>

7.30 The right to challenge these charges in the First-tier Tribunal is an important remedy for leaseholders, which we do not want to discourage or inadvertently limit.

7.31 Furthermore we consider that the qualification should not be limited to administration charges and variable service charges. It is possible that in the future the First-tier Tribunal's jurisdiction may expand to include other types of charges, such as ground rents or fixed service charges.

### Fees held on trust for a sinking or contingency fund

7.32 The purpose of an event fee term will differ according to the lease. Some event fees simply go to the landlord/operator of the property as income. Other event fees may go to a contingency or sinking fund, to be held by the landlord to cover the cost of future works to the development, such as external decorations or structural repairs. Other event fees may comprise several components. For example, an event fee of 2% of the original purchase price may include a 1% contribution as income for the developer and a 1% contribution for the sinking fund.

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<sup>240</sup> Commonhold and Leasehold Reform Act 2002, Sch 11, para 2.

<sup>241</sup> Commonhold and Leasehold Reform Act 2002, Sch 11, para 3.

<sup>242</sup> Landlord and Tenant Act 1985, ss 18, 27A. *Arnold v Britton* [2015] UKSC 36.

<sup>243</sup> Landlord and Tenant Act 1985, s 27A(1).

7.33 As discussed above, the addition to the grey list means that, if the code of practice is breached, the event fee may be unfair. We consider that this creates a problem where part of the event fee goes to a sinking fund. Other leaseholders may suffer because:

- (1) Without the expected funds, maintenance of the development may not be carried out; and
- (2) Landlord/operators may be tempted to “top up” the sinking fund by increasing all leaseholders’ variable service charges.

7.34 In the circumstances we conclude that the sinking fund portion of an event fee should be enforceable even where there has been a breach of the code of practice by the landlord/operator.

7.35 There was strong support for this proposal from stakeholders. The British Property Federation said:

The sinking fund is to cover maintenance, repair or improvement of the entire estate, and there would therefore potentially be a negative impact on the remaining residents in the retirement community if this part of the fee could not be enforced regardless of whether the code was breached.

7.36 However, LEASE queried whether the risk was realistic:

It would be a rare lease that would make the performance of obligations such as repair conditional on the payment of sums by one or more leaseholders. Hence, is there a real case that leaseholders will suffer as the basis for making the sinking fund payable in spite of the illegitimacy of the Event Fee?

7.37 A minority of stakeholders suggested that the landlord/operator should be required to cover any shortfall in the sinking fund.

7.38 We see the force in the argument that the sinking fund portion of an event fee should not be enforced against a consumer where the code has been breached. However, despite stakeholder feedback we still have serious concerns that a landlord/operator could increase the service charges for all leaseholders to recover the shortfall. We do not consider that these concerns are met by the right of the consumer to challenge the amount of the service charge as unreasonable under existing legislation. Any increase in the service charge to make up for the shortfall would affect all leaseholders. A leaseholder could challenge the service charge as unreasonable under the Landlord and Tenant Act 1987.<sup>244</sup> However, aside from the costs of litigation, it would appear to be disproportionate to require each individual leaseholder to challenge the increase in their service charge.

Holding money on trust

7.39 For this exception to apply, the money must be held on trust. This is intended to encourage landlords to set up trusts to safeguard the money in the event of their insolvency. Several stakeholders thought this was important for greater protection of consumers so that that there could be no shortfall. TPO said:

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<sup>244</sup> Landlord and Tenant Act 1985, ss 18, 27A.



TPO would strongly recommend that these funds are held in trust for the benefit of the other leaseholders and, where appropriate, costs are evidenced.

- 7.40 The Retirement Housing Group suggested that “the sinking fund should be ring-fenced in an account which is independent of the freeholder’s main account”.
- 7.41 In the consultation paper, we looked in detail at section 42 of the Landlord and Tenant Act 1987, which provides that money paid for variable service charges must be held on trust.<sup>245</sup> We have heard from stakeholders that they believe that the statutory trust in section 42 applies to sinking funds raised through event fees.
- 7.42 We do not agree with this view. Section 42 applies to “service charges” which includes only variable service charges.<sup>246</sup> As such, we consider that the statutory trust does not apply to money raised by event fees. Therefore, whether that money is held on trust in a particular case will depend on whether a voluntary trust has been established.<sup>247</sup>
- 7.43 Where trusts are established on a voluntary basis, they may not be legally watertight. A recent Law Commission consultation paper on protecting consumer prepayments on retailer insolvency noted that it is not enough simply to pay the money into a separate bank account. The trader needs to show a clear intention to establish a trust, preferably (but not necessarily) through having a property trust deed drawn up.<sup>248</sup>
- 7.44 Holding the money on trust provides protection for the consumer. For example:
- (1) Without a trust, any service charge monies held by the landlord could be claimed by the landlord’s creditors if the landlord becomes insolvent; and
  - (2) With a trust, the landlord and its agents are subject to trustees’ duties.<sup>249</sup>
- 7.45 In the consultation paper, we proposed that where the terms of the lease required the money paid on event fees to be used exclusively for the maintenance, repair or improvement of the development, such money should be subject to a statutory trust.<sup>250</sup> We are not currently proceeding with this proposal because we consider that there is a case for considering whether it should apply more broadly to other fees, such as fixed service charges, which would require further consultation.<sup>251</sup> However, we have included a “best practice” provision in the code of practice.<sup>252</sup>

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<sup>245</sup> Consultation paper, paras 11.38 to 11.47.

<sup>246</sup> Landlord and Tenant Act 1987, s 42(1); Landlord and Tenant Act 1985, s 18(1).

<sup>247</sup> *Woodfall: Landlord and Tenant*, para 7.179.1. As explained in the consultation paper, this paragraph only contemplates s 42 not applying where the lease is not of a dwelling. However, its reasoning is valid in other cases where s 42 does not apply, such as here where although the lease is of a dwelling, the money is not “service charge” money as defined in s 18 of the Landlord and Tenant Act 1985. See the consultation paper, para 11.42.

<sup>248</sup> Consumer Prepayments on Retailer Insolvency: A Consultation Paper (2015) Law Com No 221, para 2.63.

<sup>249</sup> Consultation paper, para 11.40.

<sup>250</sup> Consultation paper, para 11.19.

<sup>251</sup> See paras 8.24 to 8.26 below.

<sup>252</sup> Code of practice, para 5.6.

5.6 As a matter of best practice, to the extent that the lease requires Event Fees to be used exclusively for the maintenance, repair or improvement of the development, the Event Fee should be held on trust for the purposes of maintaining or improving the development.

7.46 For the reasons discussed above, we consider that it is important that the landlord/ operator follows the best practice provision. Therefore, we recommend a qualification to the grey list. An event fee earmarked for a sinking fund will be enforceable regardless of a breach of the code of practice as long as the money is kept on trust. This would incentivise the landlord to put the appropriate trust mechanism in place.

7.47 This is only an interim solution. We consider that there is a need for primary legislation and we hope that this will be included in the Law Commission's future work. We discuss this in Chapter 8 when we consider the need for future reform.

## RECOMMENDATIONS

### The Consumer Rights Act 2015 and the grey list

#### Recommendation 21.

Part 1 of Schedule 2 to the Consumer Rights Act 2015 should be amended to add a new item. This item should cover 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.

#### Recommendation 22.

A qualification should be added to Part 2 of Schedule 2 to the Consumer Rights Act 2015 as regards any such fee to the extent that it can be challenged before the First-tier Tribunal.

#### Recommendation 23.

A qualification should be added to Part 2 of Schedule 2 to the Consumer Rights Act 2015 as regards any such fee to the extent that it is held on trust for the purposes of maintaining or improving the property to which the lease relates or any associated property.

# Chapter 8: Future reform

## INTRODUCTION

- 8.1 In this chapter we discuss the potential for future reform arising out of the event fees in retirement properties project.
- 8.2 In the consultation paper we made certain provisional proposals which we are not pursuing at this stage because the issues they raise extend beyond event fees and require further consultation. However, we consider they merit further consideration. We provisionally proposed 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. We also provisionally proposed that unfair terms law should apply to event fee terms on the next sale of the lease after the reform comes into effect, irrespective of when the lease was first granted. In this chapter, we expand on these provisional proposals and consider whether there is a need for further changes to unfair terms legislation.
- 8.3 We also consider the potential for future reform in relation to statutory trusts, particularly with regards to money raised by event fees.

## IS THERE A NEED FOR OTHER CHANGES TO UNFAIR TERMS LEGISLATION?

- 8.4 So far we have discussed the need for a code of practice, backed by an addition to the grey list, to be implemented through secondary legislation. The advantage of these recommendations is that they can be implemented quickly, to bring immediate benefits to consumers.
- 8.5 In the consultation paper we discussed other more fundamental changes to the way that unfair terms law interacts with leasehold law, which would need to be implemented through primary legislation. We reached the view that residential leases are consumer contracts between the original landlord and the original leaseholder.<sup>253</sup> We tentatively concluded that a residential lease continues to be a consumer contract even when it is assigned to a new freeholder or leaseholder.<sup>254</sup> However, the position is not clear.
- 8.6 We argued that reform was needed to achieve the following three objectives:
- (1) To put beyond doubt that unfair terms legislation applies to event fee terms, not only as between the original leaseholder and the original landlord but also between subsequent leaseholders and landlords.
  - (2) To ensure that the fairness of an event fee term is assessed by reference to the circumstances existing when the leaseholder became bound by the term,

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<sup>253</sup> *R (Khatun) v Newham LBC* [2005] QB 37.

<sup>254</sup> Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events (2015) Law Commission Consultation Paper No 226, para 6.91. We refer to this document throughout this report as the “consultation paper”. It is available at [http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226\\_residential\\_leases.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/10/cp226_residential_leases.pdf) (last visited 22 March 2017).

including how the term was presented to that particular leaseholder, rather than when the lease was first granted.

- (3) To apply current unfair terms legislation to any event fee in a lease that is assigned to a consumer after our recommendations come into effect, irrespective of when the lease was first granted.<sup>255</sup>

8.7 Below we look at each of these objectives in turn.

### **Clarifying that subsequent leaseholders benefit from unfair terms legislation**

8.8 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. In the consultation paper we discussed the tension between the English approach and that taken in other European jurisdictions. In English land law, a lease creates a contract only between the original parties. The relationship between subsequent parties is not seen as contractual in nature. Under principles of EU law, we tentatively concluded that for the purposes of unfair terms law a lease would be regarded as a contract throughout its life, irrespective of who the parties to it are.<sup>256</sup> However, given the debate on this issue, we thought that the matter could usefully be clarified.

8.9 We therefore provisionally proposed statutory reform to provide that unfair terms legislation applied even if the lease had been assigned to a new leaseholder or if the freehold had been assigned to a new landlord.

### **The circumstances surrounding the assignment**

8.10 We thought that when assessing whether an event fee is fair, the court should focus on the circumstances which existed when the current leaseholder became bound by the term. We explained that the current law does not appear to achieve this effect. A lease may be seen as one continuing contract, which is formed when the first leaseholder agrees to its terms.<sup>257</sup> This suggests that a court should look only at the circumstances of the original grant or sale of the lease – not at what the current leaseholder was told.

8.11 If implemented, our recommended code of practice will apply to a new lease on its first grant to a leaseholder. However, if a subsequent leaseholder challenges an event fee term, the court will consider the circumstances of the original grant or sale. The court will not consider whether there was a breach of the code of practice on event fees when the property was sold to the subsequent leaseholder.<sup>258</sup>

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<sup>255</sup> Consultation paper, para 11.4.

<sup>256</sup> The English approach is discussed in the consultation paper, ch 6, paras 6.70 to 6.92. We explain that the Landlord and Tenant (Covenants) Act 1995 was a partial move away from the doctrine of privity of contract, as it applied to leases. We also discuss the European approach at paras 6.81 to 6.90 of the consultation paper.

<sup>257</sup> Consultation paper, paras 6.93 to 6.97, 11.10.

<sup>258</sup> The code of practice will, however, be admissible as evidence: s 87 of the Leasehold Reform, Housing and Urban Development Act 1993.

- 8.12 We consider that when a court regards the fairness of a term it should focus on what the current leaseholder was told about it – not what the first leaseholder was told, possibly decades earlier.

### **Applying current unfair terms law to old leases on assignment**

- 8.13 One particular problem with leases is that they may last a very long time – typically 99 years or longer. This raises questions about whether leases should be subject to current legal rules, or only to the law which applied when they were first created. This is an important issue, because our current law of unfair terms in consumer contracts was first introduced on 1 July 1995, and does not apply to leases created before that date.

- 8.14 In Chapter 10 of the consultation paper we discussed how far it was legitimate to apply current law to old leases.<sup>259</sup> We concluded that it would be wrong to interfere with legal obligations that were already in place. By contrast:

It might be legitimate to impose controls on existing leases which affect event fees falling due in the future. However, special justification would be needed. Where developers have planned their affairs on the basis of a right to an income, and have a reasonable expectation of that income, the courts would be wary of depriving developers of that income without compensation. It would have to be shown not only that the deprivation was in the public interest, but that the aim could not have been achieved by a less intrusive measure and that the reform was proportionate.<sup>260</sup>

- 8.15 That said, we thought that human rights law would not prevent Parliament from imposing obligations on landlords to inform future consumers fully about event fees.<sup>261</sup> We saw no reason why the transparency requirements in our recommended code of practice, as procedural safeguards, should not apply to all leases. This would include those created before 1995, when they are next assigned.

### **OUR PROVISIONAL PROPOSALS**

- 8.16 In the consultation paper we provisionally proposed statutory reform to address these three objectives. We 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. This meant that any assessment of whether the event fee was fair would look at the circumstances when the lease was assigned to the current leaseholder who then became bound by the term, including when and how they were told about the term.<sup>262</sup>
- 8.17 We also provisionally proposed that unfair terms law should apply to event fee terms on the next sale of the lease after the reform came into effect, irrespective of when the lease was first granted. The effect would be to bring event fee terms of existing leases within the scope of our recommended reforms. Each of the existing 160,000 retirement leasehold properties would accordingly become subject to our

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<sup>259</sup> Consultation paper, paras 10.16 to 10.30.

<sup>260</sup> Consultation paper, para 10.28.

<sup>261</sup> Consultation paper, paras 10.27 to 10.29.

<sup>262</sup> Consultation paper, para 11.11.

recommended reforms as and when they were assigned to new leaseholders, even if the leases were first created before 1995.

- 8.18 Given the terms of reference of the event fees project, our provisional proposals in the consultation paper were limited to event fee terms. However, we welcomed views on whether similar principles should apply more widely. We asked whether the whole lease should be treated as if it were a new contract created when each consumer became bound by it.<sup>263</sup>

## RESPONSE FROM STAKEHOLDERS

- 8.19 There was strong support from stakeholders for the proposal that unfair terms legislation should apply to event fee terms on the next sale of the lease after the recommended reforms took effect, irrespective of when the lease was first granted.<sup>264</sup> For example, LifeCare Residences, a retirement housing developer of extra care housing, regarded it as logical to extend the scope of the unfair terms legislation. LifeCare Residences argued that each new incoming tenant should be afforded the same disclosure and transparency ahead of becoming bound by the lease.
- 8.20 A minority of consultees agreed that similar proposals should apply more generally to all covenants in residential leases.<sup>265</sup> Several consultees were concerned that this suggestion was beyond the scope of the event fees project and may have wide-ranging implications.<sup>266</sup> They suggested that separate consultation on this question was required. For example, Dr Nicholas Roberts, an Associate Professor at the University of Reading, noted that there could be far-reaching implications and a separate consultation would be necessary to address them.

## A NEW PROJECT?

- 8.21 As discussed above, these provisional proposals were limited to event fee terms. However, we accept that it would not be appropriate or proportionate to make such fundamental changes to the law for event fee terms only. If we were to recommend such reform, it should be for all terms in residential leases. As highlighted by consultees, this change would be likely to have implications for landlords and leaseholders which need to be considered thoroughly. We do not consider that the event fees project is the correct vehicle for such consideration.
- 8.22 We also consider that further consultation is necessary in order to draw out and debate these implications. For example, a landlord may argue that it is reasonable for him or her to withhold consent for assignment of the lease, where such assignment

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<sup>263</sup> Consultation paper, para 11.19.

<sup>264</sup> We received 43 responses to this question. 35 agreed, four disagreed and four answered “other”.

<sup>265</sup> We received 37 responses; 14 agreed, 13 disagreed and 10 answered “other”. Most consultees did not oppose the proposal as a matter of principle. Some consultees said that they were not aware of any concerns regarding general covenants in leases or that it was not their area of expertise. For example, Anchor, Orders of St John, ARCO, Home Builders Federation, Renaissance Villages.

<sup>266</sup> For example, Dr N Roberts, Pegasus Life, McCarthy and Stone, ARHM, Christopher Jessel, Trowers & Hamblins and LEASE.

would be financially prejudicial because it would attract the application of unfair terms law. This is clearly an issue on which we would need to consult stakeholders.

- 8.23 Our conclusion is 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. 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.

## STATUTORY TRUSTS

- 8.24 In the consultation paper we proposed that where the terms of a lease require money raised by event fees to be used exclusively for the maintenance, repair or improvement of the development, that money should be subject to a statutory trust. The statutory trust would oblige the landlord to hold the money on trust for a particular purpose and/or for the benefit of particular persons. This trust would be equivalent to the trust arrangements set out in section 42 of the Landlord and Tenant Act 1987.<sup>267</sup>
- 8.25 The main effect of the proposal would be to protect leaseholders on the landlord's insolvency.<sup>268</sup> We discuss above that placing this money on voluntary trust may achieve this.<sup>269</sup> However, we are of the view that it would be easier for the landlord and provide more protection for the leaseholder if a statutory trust applied.
- 8.26 Our proposal in the consultation paper was limited to money raised by event fees. However, we consider that there is a case for exploring whether it should also apply to other fees, such as fixed service charges. We consider that this is a question on which there should be consultation, and we hope that it could be included as an issue in a future Law Commission project.

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<sup>267</sup> Consultation paper, para 11.49.

<sup>268</sup> Consultation paper, para 11.50.

<sup>269</sup> See paras 7.42 to 7.44 above.

## Chapter 9: Recommendations

This chapter brings together all of the recommendations contained in this report.

### GENERAL RECOMMENDATIONS (CHAPTER 2)

#### Recommendation 1.

Consumers should be protected from event fees that are unfair by a code of practice approved by the Secretary of State under the Leasehold Reform, Housing and Urban Development Act 1993.

#### Recommendation 2.

The code of practice approved under the Leasehold Reform, Housing and Urban Development Act 1993 should protect consumers from unfair event fees by:

- (1) Preventing event fees from being charged in unexpected circumstances;
- (2) Limiting the amount of event fee that can be charged in certain cases; and
- (3) Imposing obligations on landlord/operators to provide standardised, transparent information about event fees at an early stage, including an indication of how much a consumer may have to pay.

#### Recommendation 3.

The Consumer Rights Act 2015 should be amended to enable enforcement of breach of the code of practice.

### DEFINITIONS (CHAPTER 3)

#### Recommendation 4.

The definition of “event fee” should:

- (1) be limited to residential leaseholds of retirement properties;
- (2) include payment of a fee or foregoing of a financial benefit; and
- (3) exclude administration charges pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and variable service charges pursuant to the Landlord and Tenant Act 1985.

#### Recommendation 5.

The definition of “landlord/operator” should be broadly defined to include anyone who has the right to require payment of the event fee, regardless of their interest in the property.



**Recommendation 6.**

The definition of “leaseholder” should be limited to consumers within the meaning of the Consumer Rights Act 2015.

**WHEN AN EVENT FEE CAN BE CHARGED (CHAPTER 4)****Recommendation 7.**

An event fee should only be charged on:

- (1) sale;
- (2) sub-letting; and
- (3) change of occupation following the resident’s death or when the property is no longer the resident’s only or principal home.

**Recommendation 8.**

The total event fee which can be charged on sub-letting or change of occupancy in any one year should be restricted in amount to a maximum of 10% of the event fee which would be payable on sale. This should be calculated based on the purchase price or open market value of the property, whichever is the lower amount.

**Recommendation 9.**

An event fee should not be payable on the resident ceasing to occupy the property if it is thereafter occupied by the resident’s spouse or civil partner or by a person who was living in the property with the resident as their only or principal home.

**Recommendation 10.**

Succession without payment of an event fee should be limited to cases where an event fee has been charged on the previous resident purchasing or entering into occupation of the property.

**Recommendation 11.**

Where an event fee increases based on length of occupation, no additional event fee should be charged on sub-letting or change of occupancy until the maximum rate at which an event fee can be charged on sale has been reached. Where there is no maximum rate, no event fee should be charged on sub-letting.

**Recommendation 12.**

An event fee should not be payable on sub-letting or change of occupancy to the extent that the event fee is generated by an obligation on the leaseholder to sell the property back to the freeholder at the purchase price.

**Recommendation 13.**

An event fee payable on sub-letting or change of occupancy should be collected at the end of the sub-lease or at the end of each calendar year, whichever is the shorter period.

**WHEN THE PROPERTY IS SOLD THROUGH THE LANDLORD/OPERATOR  
(CHAPTER 5)****Recommendation 14.**

Where a retirement property is sold through the landlord/operator, the code of practice should provide that any advertisement that mentions the price for the property must state that an event fee is payable and provide a general indication of the amount and method of calculation of the event fee.

**Recommendation 15.**

Where a retirement property is sold through the landlord/operator, there should be an obligation on the landlord/operator to provide any prospective buyer with a standardised disclosure document for that property, including illustrative examples showing how much the event fee may be. The document must be provided to a prospective buyer:

- (1) if the property is being sold off-plan, when the prospective buyer expresses an interest in a particular property; or
- (2) if the property is not being sold off-plan, on the prospective buyer's first visit to the property.

**WHEN THE PROPERTY IS SOLD BY THE LEASEHOLDER THROUGH AN ESTATE  
AGENT (CHAPTER 6)****Recommendation 16.**

An online database ("the central database") should be established to provide information about event fees to estate agents and prospective buyers.

**Recommendation 17.**

Landlord/operators should have the option to provide either their contact details or specified information to the central database.

**Recommendation 18.**

Landlord/operators who choose to provide their contact details to the central database should be required to provide the standard disclosure document free of charge to an estate agent or prospective buyer within two working days.

**Recommendation 19.**

The Property Ombudsman code of practice should be amended to include reference to the code of practice on event fees.

**Recommendation 20.**

Guidance should be developed for estate agents which:

- (1) provides an explanation of event fees;
- (2) outlines estate agents' obligations; and
- (3) suggests how to identify that a property is a retirement property and may be subject to event fees.

**THE CONSUMER RIGHTS ACT 2015 AND THE GREY LIST (CHAPTER 7)****Recommendation 21.**

Part 1 of Schedule 2 to the Consumer Rights Act 2015 should be amended to add a new item. This item should cover 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.

**Recommendation 22.**

A qualification should be added to Part 2 of Schedule 2 to the Consumer Rights Act 2015 as regards any such fee to the extent that it can be challenged before the First-tier Tribunal.

**Recommendation 23.**

A qualification should be added to Part 2 of Schedule 2 to the Consumer Rights Act 2015 as regards any such fee to the extent that it is held on trust for the purposes of maintaining or improving the property to which the lease relates or any associated property.

(signed) David Bean, Chairman  
Nick Hopkins  
Stephen Lewis  
David Ormerod  
Nicholas Paines

Phil Golding, Chief Executive

20 March 2017

# Appendix 1: List of consultees

A.1 The following bodies and individuals responded to our consultations, which ran from 29 October 2015 until 29 January 2016 and from 30 September 2016 until 31 October 2016.

## Academics

Professor James Driscoll, University of Essex; Judge, First-tier Tribunal (Property Chamber)

Dr Nicholas Roberts

## Estate agents

NAEA Propertymark (formerly the National Association of Estate Agents)

## Industry advisers

Trowers & Hamlins LLP

## Managing agents

Association of Retirement Housing Managers

FirstPort

## Professional bodies

The Bar Council

British Property Federation

The Chartered Institute of Legal Executives

Chartered Trading Standards Institute

Home Builders Federation

The Law Society

National House Building Council

Surrey Law Society

## Regulators and redress schemes

Consumer Code for Home Builders

The Property Ombudsman

## Residents and consumer groups

Patricia Adams

Age UK

Campaign Against Retirement Leasehold Exploitation

Sally Davies

Alan Eadie  
Elderly Accommodation Counsel  
Derrick Fuller-Webster  
Michael Garrick  
Lord R J Hollins  
Leasehold Advisory Service  
Leasehold Knowledge Partnership  
Leaseholder Association  
Norah Lightowler  
Niall Munro  
Roger Geoffrey Teague  
Ken Walker  
Seven confidential responses

**Retirement housing developers and operators**

Anchor Trust  
Associated Retirement Community Operators  
Audley Retirement  
Enterprise Retirement Living Ltd  
Hanover Housing Association  
Hart Retirement Developments  
Housing & Care 21  
LifeCare Residences  
McCarthy & Stone  
MHA  
Middleton Hall  
Midland Heart  
Retirement Housing Group  
Retirement Villages Group Ltd  
The Orders of St John Care Trust  
Four confidential responses

**Other**

Winefride Cummins  
Estates & Management Ltd  
Christopher Jessel

Richard Martin

A.2 Between September 2014 and March 2017, the Law Commission met or otherwise corresponded with the following people and organisations with respect to the event fees project.

**Academics**

Professor James Driscoll (University of Essex; Judge, First-tier Tribunal)

Dr Nicholas Roberts (Associate Professor of Law, University of Reading)

**Consumer groups**

Age UK

Campaign Against Retirement Leasehold Exploitation

The Campaign for Housing in Later Life

The Consumers' Association (Which?)

Elderly Accommodation Counsel

Leasehold Advisory Service

Leasehold Knowledge Partnership

Leaseholder Association

The Right to Manage Federation

The Silver Line

**Industry advisers**

Carterwood

GVA Grimley Ltd

Jones Lang LaSalle Ltd

JPS Law

K&L Gates LLP

Savills

TLT LLP

Trowers & Hamlins LLP

**Managing agents**

Association of Residential Managing Agents

Association of Retirement Housing Managers

**Professional bodies**

The Bar Council

Conveyancing Association

Home Builders Federation

The Law Society  
National Federation of Property Professionals  
National House Building Council  
Royal Institution of Chartered Surveyors

**Regulators and redress schemes**

Committee of Advertising Practice  
Competition and Markets Authority  
Consumer Code for Home Builders  
Council for Licensed Conveyancers  
Legal Ombudsman  
National Trading Standards Estate Agency Team, Powys County Council  
The Property Ombudsman  
Property Redress Scheme

**Retirement housing developers and operators**

Anchor  
Associated Retirement Community Operators  
Audley Retirement  
Churchill Retirement Living  
Enterprise Retirement Living  
LifeCare Residences  
McCarthy and Stone  
Places for People  
Renaissance Villages  
Retirement Housing Group  
Retirement Villages Group Ltd  
St Monica's Trust  
The ExtraCare Charitable Trust

**Other**

Lord Richard Best  
Sir Peter Bottomley MP  
Tim Calland, Maitland Chambers  
Department for Business, Energy and Industrial Strategy  
Department for Communities and Local Government  
Estates & Management Ltd



Jim Fitzpatrick MP

Ian MacDonald, Gough Square Chambers

Judge Siobhan McGrath, Property Chamber President, First-tier Tribunal

Philip Rainey QC, Tanfield Chambers

Martin Rodger QC, Deputy President, Upper Tribunal (Lands Chamber)

Andrew Walker QC, Maitland Chambers

## Appendix 2: Terms of reference

B.1 On 9 September 2014, the Department for Communities and Local Government asked the Law Commission:

- (1) 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.
- (2) To consider how the current law addresses the problems that are identified.
- (3) Following consultation with relevant stakeholders, to consider whether greater protections are needed to address these problems and what the impact of any greater protections would be. These protections may relate to, though are not limited to:
  - (a) unfair terms legislation;
  - (b) landlord and tenant law; and/or
  - (c) conveyancing procedure.
- (4) To make interim recommendations by March 2017.

## **Appendix 3: Code of practice on event fees in retirement properties**

## Part 1: Definitions

- 1.1. An **Event Fee** is a fee payable under a term of or relating to a residential lease of a Retirement Property on certain events such as resale or sub-letting. An Event Fee is sometimes referred to as an exit fee or transfer fee. The full definition of Event Fee is given in Appendix A and takes precedence over this definition.
- 1.2. The **Central Database** is the database containing information about retirement properties, hosted by Elderly Accommodation Counsel or by a replacement manager.
- 1.3. The **Disclosure Document** is a document which contains Specified Information about an Event Fee in the format set out at Appendix C.
- 1.4. A **Landlord/Operator** is any person or organisation who has the right to require payment of the Event Fee, and includes any agent acting on their behalf.
- 1.5. A **Leaseholder** is any consumer who owns the lease to the Property.
- 1.6. The **Maximum Rate** is the highest percentage rate at which an Event Fee on sale is chargeable.
- 1.7. The **Period of Occupation** is:
  - (1) For a sub-lease, the period of that sub-lease.
  - (2) For a change of occupancy under 3.1(3), the period of time from the date of such change of occupancy to the next date on which an event listed in 3.1 occurs.
- 1.8. The **Prescribed Cap** is the maximum amount of an Event Fee payable on sub-letting and change of occupancy, pursuant to the provisions in Part 3. The full definition of Prescribed Cap is given in Appendix B and takes precedence over this definition.
- 1.9. The **Property** is the leasehold property in question.
- 1.10. A **Prospective Buyer** is any person who expresses an interest in the Property to the Landlord/Operator, Leaseholder or estate agent, with a view to becoming the Leaseholder or the Resident.
- 1.11. The **Resident** of the Property is the person to take up occupation of the Property, as their only or principal home, after the grant of the lease or the most recent assignment of the lease to the Property.
- 1.12. A **Retirement Property** is a leasehold property which has a minimum age requirement for occupation specified in the lease.
- 1.13. The **Specified Information** about an Event Fee includes:
  - (1) The address of the Property;
  - (2) When the Event Fee is payable;
  - (3) The Event Fee payable and how it is calculated;
  - (4) The role, name and contact details of those who receive the Event Fee;

- (5) The percentage of an Event Fee which goes into a sinking fund; and
- (6) An explanation of the service or benefit, if any, which the Leaseholder receives in exchange for the fee.

## **Part 2: Applicability of the code of practice**

- 2.1 The code of practice does not affect any existing terms of a lease which do not relate to an Event Fee.
- 2.2 The code of practice does not affect any undertaking provided by a Landlord/Operator to the Office of Fair Trading.
- 2.3 Where a requirement is stated to be a matter of best practice, it is not a mandatory requirement and any failure to comply with it will not constitute a breach of the code of practice.

## Part 3: When Event Fees may be charged

3.1 Event Fees may only be charged on the following events:

- (1) sale of the Property;
- (2) sub-letting of the Property, provided that the Property has ceased to be the Resident's only or principal home;
- (3) entering into occupation of the Property by anyone following the death of the Resident or after the Property is no longer the Resident's only or principal home;
- (4) any event that would fall within (1)–(3) above but for the use of an artificial device to avoid payment of the Event Fee.

3.2 Any Event Fee charged under 3.1(2) or 3.1(3) must not be more than the Prescribed Cap.

3.3 An Event Fee must not be charged under 3.1(3) if:

- (1) the person is the Resident's spouse or civil partner or was living in the Property as their only or principal home with the Resident; and
- (2) an Event Fee was charged on the Resident purchasing or entering into occupation of the Property.

## Part 4: The obligations of the Landlord/Operator

### (1) WHEN THE PROPERTY IS SOLD BY OR THROUGH THE LANDLORD/OPERATOR

- 4.1. The following provisions apply when the property is sold by or through the Landlord/Operator.

#### Advertisements

- 4.2. Any advertisement that mentions the price for the Property must state that an Event Fee is payable and must provide a general indication of the amount and how the Event Fee will be calculated.
- 4.3. In considering whether the Landlord/Operator has complied with 4.2, the limitations of the medium of advertising, including space and time, and any measures taken by the Landlord/Operator to make the information available by other means, shall be taken into account.

#### Disclosure document: timing

- 4.4. Where a Property is being sold off-plan, the Prospective Buyer must be given a Disclosure Document when they express an interest in a specific Property, but before they reserve a Property.
- 4.5. For all other properties, the Disclosure Document must be provided to the Prospective Buyer on their first visit to a Property.

### (2) WHEN THE PROPERTY IS SOLD BY THE LEASEHOLDER

- 4.6. The following provisions apply when the Property is sold by or through the Leaseholder other than through the Landlord/Operator.
- 4.7. For each Property, the Landlord/Operator must provide free of charge to the Central Database either:
- (1) their contact details; or
  - (2) the Specified Information.

If the Landlord/Operator does not provide the Specified Information to the Central Database, 4.8 applies.

- 4.8. The Landlord/Operator must provide a Disclosure Document for the Property free of charge to any Prospective Buyer or estate agent who requests information about the Property within two working days of being contacted.
- 4.9. Information provided to the Central Database must be complete, accurate and kept up to date.
- 4.10. If the Central Database has ceased operation, the Landlord/Operator must:
- (1) display their contact details in some equally prominent place; and



- (2) provide a Disclosure Document for the Property to any Prospective Buyer or estate agent who requests information about the Property within two working days of being contacted.

### **(3) THE DISCLOSURE DOCUMENT**

- 4.11. The Disclosure Document must contain the wording and be in the format set out at Appendix C to the code of practice.
- 4.12. If there is more than one option for the payment of an Event Fee, the Prospective Buyer must be provided with one Disclosure Document for each option.
- 4.13. The Disclosure Document must contain illustrative examples showing how much the Event Fee may be on sale. Where there are multiple Event Fees on sale, they must be aggregated and shown as one Event Fee.

## **Part 5: Other provisions**

### **WHEN A PROPERTY IS SOLD BY OR THROUGH THE LANDLORD/OPERATOR**

- 5.1 As a matter of best practice, where the Landlord/Operator provides the Disclosure Document directly to a Prospective Buyer, that correspondence should be evidenced in writing.

### **WHEN A PROPERTY IS SOLD BY A LEASEHOLDER THROUGH AN ESTATE AGENT**

- 5.2 The estate agent must ensure that any advertisement for the Property which mentions the price also states that an Event Fee is payable and must provide a general indication of the amount and how the Event Fee will be calculated. This is enforceable under the Consumer Protection from Unfair Trading Regulations 2008.
- 5.3 The estate agent must provide information about Event Fees and the Disclosure Document for the Property to the Prospective Buyer. The requirement to provide information about the Event Fee payable on the Property is enforceable under the Consumer Protection from Unfair Trading Regulations 2008.
- 5.4 As a matter of best practice, the estate agent should encourage the Prospective Buyer to make direct contact with the Landlord/Operator.
- 5.5 As a matter of best practice, the Landlord/Operator should maintain evidence in writing of the provision of information to the Central Database. Where the Landlord/Operator provides the Disclosure Document to an estate agent, that correspondence should be evidenced in writing.

### **EVENT FEES THAT GO TO A RESERVE FUND, CONTINGENCY FUND OR SINKING FUND**

- 5.6 As a matter of best practice, to the extent that the lease requires Event Fees to be used exclusively for the maintenance, repair or improvement of the development, the Event Fee should be held on trust for the purposes of maintaining or improving the development.

## Appendix A: Definition of Event Fee

A.1 Subject to the exclusions in A.2, an Event Fee is a fee payable under a term of or relating to a residential lease of a Retirement Property which requires a Leaseholder to pay an amount or forego a financial benefit on, or in connection with, the happening of any of the following events:

- (1) Title to the lease vesting or ceasing to vest in any person;
- (2) A change in the person(s) in occupation of the Property; or
- (3) Any other event which creates, transfers or extinguishes an interest of a person; and

The fee is fixed or calculated in accordance with a formula.

A.2 This is a non-exhaustive list of fees that **are not** within the definition of Event Fee:

- (1) Administration charges regulated under Schedule 11 to the Commonhold and Leasehold Reform Act 2002;
- (2) Service charges regulated under the Landlord and Tenant Act 1985; and
- (3) Ground rents.

A.3 This is a non-exhaustive list of fees that **are** within the definition of Event Fee:

- (1) Any fee payable to the Landlord/Operator or to the Landlord/Operator's estate agent where the Leaseholder is required to sell the Property through the Landlord/Operator's estate agent; and
- (2) Any obligation to forego in favour of the Landlord/Operator a financial benefit normally arising in connection with the event, such as an obligation to re-sell the Property to the Landlord/Operator at the purchase price.

A.4 These provisions apply notwithstanding that there is no obligation on the Leaseholder to pay the Event Fee, if the practical effect of the lease is to require the Leaseholder to pay the Event Fee.

## Appendix B: The Prescribed Cap

B.1 Subject to B.2 and B.3, the Prescribed Cap is calculated as follows:

$$(E \times P) \times 10\% = \text{Annual Event Fee}$$

$$\text{Annual Event Fee} \div 365 = \text{Daily rate}$$

$$\text{Daily rate} \times N = \text{Prescribed Cap}$$

Where:

E = the Event Fee percentage payable on sale (for example, 10% is expressed as 0.1)

P = the purchase price or market value of the Property, whichever is the lower amount

N = the Period of Occupation by anyone other than the Resident, in days

B.2 Where the amount of an Event Fee increases based on length of ownership, the Prescribed Cap is zero until the Maximum Rate has been reached. If there is no Maximum Rate, the Prescribed Cap is zero.

B.3 To the extent that an Event Fee consists of an obligation to forego a financial benefit, as described in A.3(2), the Prescribed Cap is zero.

B.4 Any Event Fee payable on sub-letting is payable at the end of the sub-lease, or at the end of each calendar year, whichever is the shorter period.

## **Appendix C: The Disclosure Document**

# Event Fees: key facts

Property address:

## What is an Event Fee?

It is a fee payable when you sell or sub-let the property. It may be referred to as an “exit fee”, “transfer fee” or “deferred fee”.

## How is the fee calculated?

The fee is payable on:

Fee payable:

## How much could I have to pay?

Asking price:

Time after purchase	Event Fee %	Estimated amount of Event Fee based on rates on annual property price inflation*		
		+ 3%	0%	- 3%
Up to 1 year				
3 years				
6 years				
10 years				
Maximum rate: give number of years after purchase, or state if fee continues to rise each year				

\* These rates of property price inflation are indicative only. Property prices may go up or down and vary from property to property.

### Who does the fee go to?

Role	Name	Contact details
e.g. Landlord/ Operator, managing agent or sinking fund		

Percentage of fee which goes into a sinking fund:

### What do I get for the fee?

An explanation of the service or benefit, if any, which the Leaseholder receives in exchange for the fee:

(max 80 words)

### What about other fees and charges?

You should ask the Landlord/Operator about other ongoing fees and charges. These may include service charges, payments to a sinking fund, ground rent and administration charges. This list may not be exhaustive. Please check with your independent legal adviser for more information.

An event fee may be payable on sub-letting as well as on sale. Please ask the Landlord/Operator for further details.

**Note:** Different fees may apply for corporate purchasers.

## Appendix 4: Recommended amendment to Schedule 2 to the Consumer Rights Act 2015

### CONSUMER CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR

#### PART 1

##### LIST OF TERMS

20A A term of or relating to a residential lease which has the object or effect of requiring, other than immediately upon conclusion of the contract, the payment of money or the forgoing of a financial benefit where—

- (a) the term breaches a code of practice relating to such terms, or
- (b) the trader breached such a code of practice in presenting the term to the consumer;

and for this purpose “code of practice” means a code which has been approved under an enactment or has a status equivalent to such a code.

#### PART 2

##### SCOPE OF PART 1

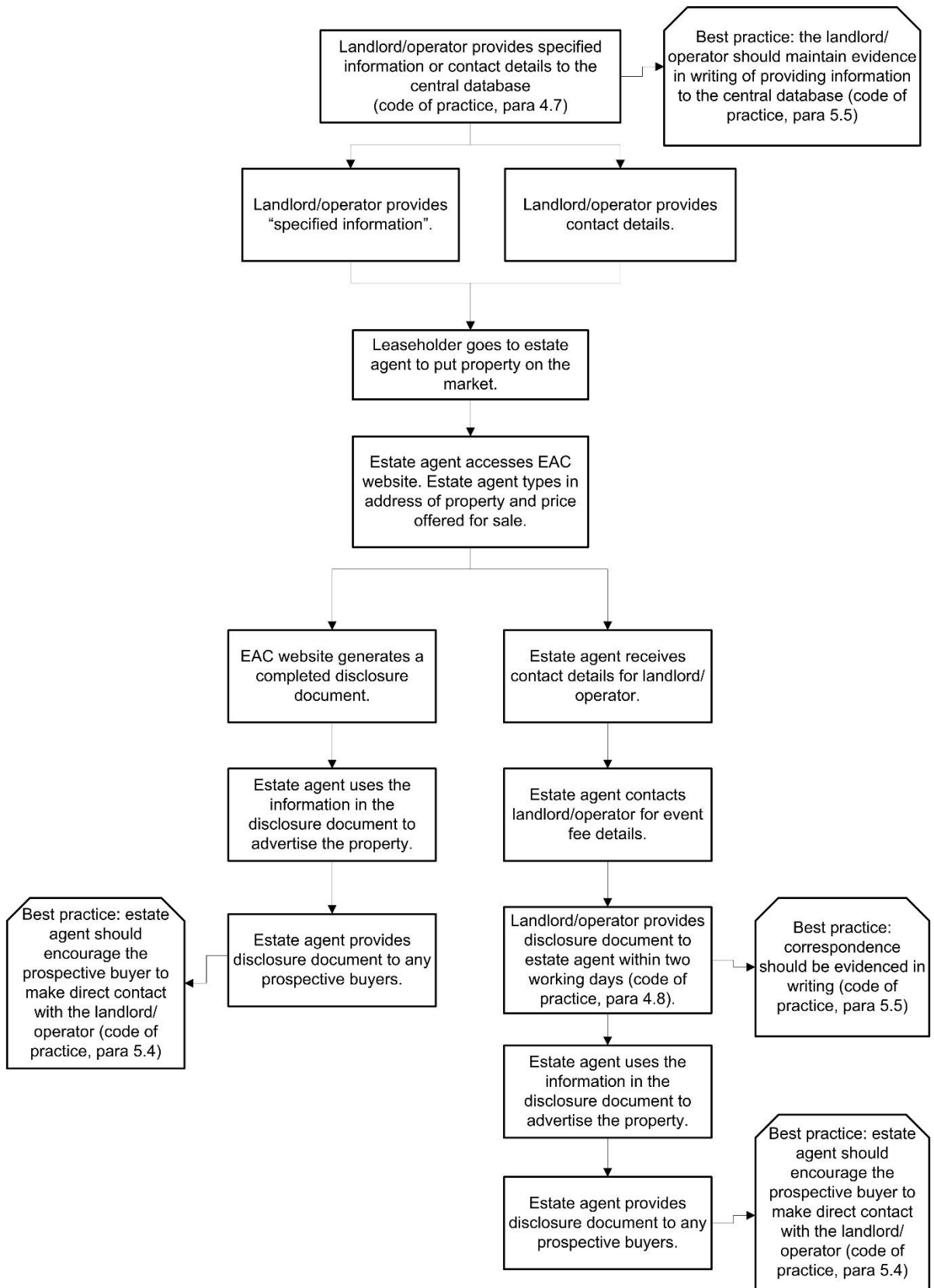
##### Residential leases

26 Paragraph 20A (residential leases) does not apply to the extent that any sum payable or liable to be forgone by virtue of the term—

- (a) may be brought before the First-tier Tribunal for determination;
- (b) is or would be held on trust for the purposes of maintaining or improving the property to which the lease relates or any associated property.



# Appendix 5: Flowchart: leaseholder selling through an estate agent



## **Appendix 6: Examples of the standardised disclosure document**

## Event Fees: key facts (Example “Property A”)

Property address:

Flat 16, Green Villages, Leicester, LE1 1FY

### What is an Event Fee?

It is a fee payable when you sell or sub-let the property. It may be referred to as an “exit fee”, “transfer fee” or “deferred fee”.

### How is the fee calculated?

The fee is payable on:

Sale and sub-letting.

Fee payable:

4% of the market value of the property.

### How much could I have to pay?

Asking price:

£250,000

Time after purchase	Event Fee %	Estimated amount of Event Fee based on rates on annual property price inflation*		
		+ 3%	0%	- 3%
Up to 1 year	4%	£10,300	£10,000	£9,700
3 years	4%	£10,927	£10,000	£9,127
6 years	4%	£11,941	£10,000	£8,330
10 years	4%	£13,439	£10,000	£7,374
Maximum rate:	N/A			

\* These rates of property price inflation are indicative only. Property prices may go up or down and vary from property to property.

### Who does the fee go to?

Role	Name	Contact details
Landlord	MW White Ltd	22 Watersea Place, Leicester LE1 1FY
Sinking fund	Londsdale Group	48 Darby Close, Leicester LE1 1FY

Percentage of fee which goes into a sinking fund:

20%

### What do I get for the fee?

An explanation of the service or benefit, if any, which the Leaseholder receives in exchange for the fee:

The event fee contributes to cleaning costs, administrative staff at reception and decorating communal areas. Part of this fee will provide a sinking fund for ongoing repairs and maintenance of the communal areas.

### What about other fees and charges?

You should ask the Landlord/Operator about other ongoing fees and charges. These may include service charges, payments to a sinking fund, ground rent and administration charges. This list may not be exhaustive. Please check with your independent legal adviser for more information.

An event fee may be payable on sub-letting as well as on sale. Please ask the Landlord/Operator for further details.

**Note:** Different fees may apply for corporate purchasers.

## Event Fees: key facts (Example “Property B”)

Property address:

Flat 2, South Hill Village, Manchester, M30 3RT

### What is an Event Fee?

It is a fee payable when you sell or sub-let the property. It may be referred to as an “exit fee”, “transfer fee” or “deferred fee”.

### How is the fee calculated?

The fee is payable on:

Sale and sub-letting.

Fee payable:

5% of the market value of the property on sale is payable up to five years of occupation. 10% of the market value of the property is payable after five years of occupation. 15% of the market value of the property is payable after ten years of occupation.

### How much could I have to pay?

Asking price:

£250,000

Time after purchase	Event Fee %	Estimated amount of Event Fee based on rates on annual property price inflation*		
		+ 3%	0%	- 3%
Up to 1 year	5%	£12,875	£12,500	£12,125
3 years	5%	£13,659	£12,500	£11,408
6 years	10%	£29,851	£25,000	£20,824
10 years	15%	£50,397	£37,500	£27,653
Maximum rate:	15%			

\* These rates of property price inflation are indicative only. Property prices may go up or down and vary from property to property.

### Who does the fee go to?

Role	Name	Contact details
Landlord	Best Landlords & Co Ltd	22 Mounthill Place, Manchester M46 9YU
Sinking fund	Star Housing Ltd	56A Stockport Street, Manchester M90 2QR

Percentage of fee which goes into a sinking fund:

50%

### What do I get for the fee?

An explanation of the service or benefit, if any, which the Leaseholder receives in exchange for the fee:

The fee contributes towards maintenance of the communal garden areas and a porter. The event fee ensures that a high quality is maintained across all communal areas and that individual units are periodically renewed. A proportion will also go to the landlord who oversees the maintenance and development of the properties.

### What about other fees and charges?

You should ask the Landlord/Operator about other ongoing fees and charges. These may include service charges, payments to a sinking fund, ground rent and administration charges. This list may not be exhaustive. Please check with your independent legal adviser for more information.

An event fee may be payable on sub-letting as well as on sale. Please ask the Landlord/Operator for further details.

**Note:** Different fees may apply for corporate purchasers.

## Event Fees: key facts (Example “Property C”)

Property address:

Apartment 7, Victoria Lane, Dewsbury WF09 9YK

### What is an Event Fee?

It is a fee payable when you sell or sub-let the property. It may be referred to as an “exit fee”, “transfer fee” or “deferred fee”.

### How is the fee calculated?

The fee is payable on:

Sale.

Fee payable:

The property must be sold back at purchase price. In addition there is a surrender fee of 1% of the price the apartment is sold for, calculated on the basis of each full year or part year of occupation (capped at 10%).

### How much could I have to pay?

Asking price:

£250,000

Time after purchase	Event Fee %	Estimated amount of Event Fee based on rates on annual property price inflation*		
		+ 3%	0%	- 3%
Up to 1 year	Sale at purchase price + 1% event fee	Loss of £10,075	Loss of £2,500	Gain of £5,075
3 years	Sale at purchase price + 3% event fee	Loss of £31,377	Loss of £7,500	Gain of £14,987
6 years	Sale at purchase price + 6% event fee	Loss of £66,424	Loss of £15,000	Gain of £29,262
10 years	Sale at purchase price + 10% event fee	Loss of £119,577	Loss of £25,000	Gain of £47,208
Maximum rate:	Sale at purchase price + 10% event fee			

\* These rates of property price inflation are indicative only. Property prices may go up or down and vary from property to property.

### Who does the fee go to?

Role	Name	Contact details
Landlord	Land and Home Ltd	No. 9 Waterbridge Road, Daresbury WU8 6NB
Sinking fund	Starwise Group	Suite 5, Seaside Offices, Dewsbury East WF67 1GH

Percentage of fee which goes into a sinking fund:

35%

### What do I get for the fee?

An explanation of the service or benefit, if any, which the Leaseholder receives in exchange for the fee:

A percentage of this fee goes directly to the landlord. A proportion of the fee will go into a sinking fund. This sinking fund contributes towards the maintenance and repair of communal pathways and gardens. It is also used to maintain security features including the 24 hour porter, emergency alarm system and home security system.

### What about other fees and charges?

You should ask the Landlord/Operator about other ongoing fees and charges. These may include service charges, payments to a sinking fund, ground rent and administration charges. This list may not be exhaustive. Please check with your independent legal adviser for more information.

An event fee may be payable on sub-letting as well as on sale. Please ask the Landlord/Operator for further details.

**Note:** Different fees may apply for corporate purchasers.





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