



Bar Council response to the Law Commission Consultation Paper No.226 'Residential Leases: Fees on Transfer of Title, Change of Occupancy and other Events'

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's Consultation Paper No.226 – 'Residential Leases: Fees on Transfer of Title, Change of Occupancy and other Events'¹.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Outline

4. We have several concerns about the proposals. Whilst we agree entirely that it is desirable to take steps to protect tenants who are subject to the types of fee with which the consultation is concerned, many of whom will be in a vulnerable position, we are concerned that some of the proposals may present practical difficulties and/or may have an undesirable impact on the viability of this industry sector.
5. We have also found it difficult to be sure, in some respects, that we have followed and identified the final form of the proposals, particularly as regards their intended application to existing leases and when leases are assigned.

¹[Law Commission \(2016\) 'Residential Leases: Fees on Transfer of Title, Change of Occupancy and other Events'](#)

6. Our concerns can broadly be divided into three areas:
 - a. The impact of the proposals on the initial landlord-tenant relationship;
 - b. The potential implications of Financial Conduct Authority (FCA) regulated areas, specifically consumer credit; and
 - c. The impact of the proposals after leases have been granted.
7. We have addressed our concerns in narrative form since they do not fit easily with the specific consultation questions. We will also comment briefly at the end on the business models to which the proposals are directed, the sinking fund proposals and the alternative possibilities which the Law Commission has considered.
8. If it would assist, we would be more than happy to meet to discuss the proposals in more detail.

The initial landlord-tenant relationship

9. The complications as to privity of contract and/or estate do not arise in the context of the initial landlord-tenant relationship. It is therefore the most simple to analyse as regards the likely approach of a court to the current proposals.
10. In general terms, we consider that it is likely that there is sufficient protection afforded to the initial tenant by the provisions of the Unfair Terms in Consumer Contracts Regulations and/or Part 2 of the Consumer Rights Act 2015 (the CRA)².
11. We prefer the view that terms which impose “event fees” on consumers are reviewable for fairness. We agree that there is a risk that a Court would conclude that certain types of fee are a component of the “price”, but even if that is the case the Court will be able to review the fairness of such terms in the manner set out in paragraph 6.46 of the consultation paper. Moreover, this limited exemption from the assessment for fairness will not assist a landlord who fails to ensure that the term is transparent and prominent (s. 64(2) of the CRA). We note that the Law Commission recognises this as at least a possibility, but we are not sure that the Commission has given full consideration to the ramifications of its proposals (particularly, but not only, its ‘deemed new contract’ proposal) if it turns out to be the case. This is an important point, and colours our approach to the proposals; but even if we are wrong about it, we still have reservations about the effect of the proposals.
12. If we are right, then the current proposal is that a further layer of protection should be added by including event fees on the “grey list”, in circumstances where the landlord has failed to comply with an applicable code of practice. We are not convinced that this additional

² The precise provisions which apply will of course depend on the date of the lease. For current purposes, we will refer to the relevant provisions of the CRA.

element is necessary or desirable. The presence or absence of a term on the grey list does not determine whether it is unfair. Inclusion on the grey list will not in our view materially add to the protection afforded to consumers and may cause further complication, for the following reasons:

- a. codes of practice are commonly drafted so as to express, often in relatively general terms, a form of best practice for the relevant industry. That does not sit easily with a legislative provision. We are concerned that parties may become embroiled in satellite disputes concerning the extent to which the landlord has or has not complied³.
- b. A Court which was required to consider the fairness of an event fee would be likely to take into account the terms of any applicable code of practice in assessing fairness in any event. The extent to which the landlord had complied with the code could be taken into account as part of the overall assessment.
- c. The 'grey list' is not currently used to address problems which arise only in specific sectors. We are not persuaded that the need to protect consumers in the sector is such that this principle should be altered.

13. Even if we are wrong about the application of the CRA at the moment, for those three reasons, the proposal will still involve an awkward approach, specific only to one particular type of term, and we question whether that is a suitable or desirable approach in an area of consumer protection which is already complex. Moreover, until the position has been established definitively, the current state of uncertainty about the enforceability of event fees will remain.

14. The Law Commission is doubtless already aware of the decision of the High Court in *Burrell v Helical (Bramshott Place) Ltd* [2015] EWHC 3727 (Ch). We address the detail of that judgment below in the context of our second area of concern, but it is apparent that, unless the claims are compromised, there will be a High Court decision on the application of the UTCCRs to event fees later this year. It might well be prudent to wait for that decision in order to consider whether the reforms are necessary or whether, as we suggest, the existing law may provide sufficient safeguards.

³ For example, it is proposed that the code will require provision of a disclosure document (paragraphs 12.37-12.43). It is common for litigating parties to disagree as to whether documents were provided. We make the point below that codes are not designed with the application of the unfair terms provisions in mind.

Consumer Credit legislation and FCA regulation

15. In the *Burrell* case⁴, the High Court was concerned with the potential application of the consumer credit regime to event fees. The claim includes the allegation that the term imposing a “Transfer Fee” on tenants was unfair within the UTCCRs. The defendant landlord included within its defence to that claim an averment that such fees represented the return on the capital invested by the defendant in the amenities and facilities of the site. In correspondence, the defendant’s solicitors described this fee structure as a way of funding the purchase by tenants of the lease. The claimant tenants argued that this meant that there was provision of regulated credit, since part of the purchase price was deferred until the transfer fee became payable.

16. This argument was rejected. On construction of the particular lease in question, the Court concluded that there was no deferment of consideration, for two principal reasons: (a) the Fee was in fact payable by the transferee, not the tenant; and (b) the Fee was payable in order to enable an assignment to take place, not as part-payment for the lease.

17. The consultation paper deals with the issue of regulated credit only briefly (see for example paragraph 12.26 of the consultation paper). We are concerned that it merits greater consideration, and that if care is not taken, the proposals may have unintended consequences, particularly in terms of (1) added complexity in seeking to identify the relationship between the two consumer protection regimes, and (2) giving landlords a false sense of security about the (in)applicability of the consumer credit regime. Whilst the decision in *Burrell* might be considered to support the view that there is no risk of a court concluding that regulated credit is being advanced, our view is that the decision is necessarily fact-specific and that a different conclusion might well be reached in other factual contexts, some of which are considered in the consultation paper. For example, in paragraph 4.69 of the consultation paper, a situation is described in which sinking fund contributions are calculated and billed annually, but are payable only as an event fee on resale. We consider that there is a real risk that a court would consider this to be a deferment of payment of the relevant contribution, and therefore conclude that credit was being provided.

18. The application of consumer credit legislation would, of course, have wider consequences, not least on the requirement for FCA authorisation and regulation by the FCA.

19. Our view is that it is undesirable to seek to undertake a reform of these types of fee when the potential implications of other areas of regulation are unclear and will not be clarified as part of the proposal. We do not know to what extent the Commission has been able to draw upon the assistance of the FCA in formulating these proposals, but we consider that it is important that this aspect is considered.

⁴ The judgment is on an interlocutory application.

The effect of the proposals on the situation after a lease has been granted

20. We have several concerns about this aspect of the proposals. We shall summarise the main concerns under individual headings.

The proposal to deem the creation of a new contract

21. We would agree that it would be possible to deem the creation of a new contract every time a lease is assigned by one tenant to another. An analogous provision appears in section 82(2) of the Consumer Credit Act 1974, which applies on variation of a regulated credit agreement. Such a variation is treated, for the purposes of the Act only, as revoking the original agreement and creating a new agreement.

22. We assume that it would be made clear that this is to happen only on an assignment or transfer of the term from lessee to successor lessee. We assume that it is not intended that it would apply, for example, on the term being vested in a new person by operation of law (e.g. vesting in personal representatives following the lessee's on death, or vesting in a trustee in bankruptcy) or on an assignment from more than one existing lessee to fewer of their number (e.g. an assignment from two joint lessees to one of them alone, perhaps on divorce). In the former situation, the landlord is likely to have no opportunity to take any steps to provide any information to the new lessee, and nor will anyone else. In the latter situation, there seems to be no good reason to require the landlord to repeat the steps already taken in relation to all of the existing lessees, just because one of the lessees is ceasing to be a lessee.

23. Those examples do illustrate, however, that the circumstances in which it is to be deemed that there is a new contract made will need to be clearly identified, and will need careful consideration.

24. We also assume that it is not intended that this will happen as a result of any change in the identity of the landlord, and that it is intended that the new landlord will be entitled to rely on whatever steps were taken by its predecessor(s).

Lease variations - new contracts?

25. The consultation paper indicates a belief on the part of the Law Commission that a lease variation will lead to the creation of a new contract. We can follow the reasoning, but we are not aware of any case authority confirming this, nor are we convinced that it is necessarily right. If this were so, then (rightly or wrongly) it may come as a surprise to many lawyers, given that a lease can be varied without effecting a surrender and re-grant except in limited circumstances (in particular, where the length of the term is altered, or new property is added to the lease). There has, thus far, been little need to analyse what, if any, contractual effect a variation of a lease might have on successors to the original landlord and/or tenant, so the law can certainly not be regarded as settled.

26. If the Law Commission's reasoning were correct, however, then it could create a serious trap for unwary landlords. A landlord may be entitled to rely on event fee provisions, as a result of having complied with applicable requirements at an earlier stage, but may then lose the right to do so as a result of having failed to appreciate that those requirements needed to be complied with all over again (in relation to the same tenant) simply as a result of the landlord agreeing even a minor variation of the lease with a new tenant (including one which would not result in the surrender and re-granting of the lease).

The aim of the proposal to deem the creation of a new contract

27. As we understand it, the deeming of a new contract would be solely for the purposes of the application of the unfair terms legislation as between the then landlord and the new tenant.

28. We agree that it would be possible to do this, for this single purpose. We question, however, whether the proposals recognise the very different circumstances that will apply to this deemed contract in comparison with the situation when a lease is created for the first time. Our concerns are set out below. Our concerns are greater if we are right in our initial assessment that the unfair terms legislation already applies to event fees when a lease is first granted.

The EU law background

29. In framing the proposals, the Law Commission has referred to the EU law background.

30. We can follow the reasoning which has led the Law Commission to conclude that the EU unfair terms provisions apply to leases as they would to other contracts which are assignable under the law of other member states. We agree, however, that the current position remains uncertain. We can see the benefit that could flow from clarifying the position, but we are concerned that this is a more complex exercise than the Law Commission's current proposals appear to recognise. Again, our concerns are set out below.

31. As part of its proposals, the Law Commission also seeks to draw on one particular document: the draft Common Frame of Reference (DCFR).

32. We disagree with the Law Commission's approach to this, for two main reasons.

33. First, the DCFR has yet to reach a final, agreed form or to be adopted. It has been many years in development, and several roles for it have been mooted. It remains controversial and it is unclear whether the European Commission will actually endorse it, given that its present position is to concentrate on two draft directives dealing with the supply of digital content and online purchases of goods. We do not accept that its current status provides a firm guide to which the Law Commission may sensibly have regard in its current proposal.

34. Second, the consultation paper does not suggest that DCFR actually deals with the effect of the unfair terms provisions on assignable contracts. As a result, we do not regard it as of any real assistance. Its failure to deal with this issue may be because it has not yet been raised or addressed, or it may be because it is particularly complex, difficult or controversial; whatever the reason, we do not see it as providing any guide to how the unfair terms provisions are to be applied as between successors to the original contracting parties.

35. On the contrary, the way in which the current directive is framed is in terms which refer clearly to the time of creation of the contract. Even if the DCFTR were to have something to say about how assignable contracts might be treated in EU legislation, that would need to be considered in the context of the consumer rights legislation and, in particular, the requirements of that legislation. Our concerns set out below illustrate that the application of the unfair terms provisions in this context is fraught with difficulties. We do not, with respect, see the DCFR as providing any guide to how these difficulties should be resolved.

Our concerns about the proposals in relation to subsequent lessees

36. There are two main areas of concern under this heading.

The nature of the situation when a lease is assigned

37. First, the unfair terms provisions do not cater for this situation, and do not fit well with the proposal.

38. The unfair terms provisions are framed on the basis that they apply when a contract is created. This is more than just an assumed situation; it has practical effects. In particular, the situation is one in which the landlord (as the 'trader') has control over the amount, nature and format of information supplied to the intended lessee (the 'consumer'), over the terms of the contract, and over the timing of the negotiations, the provision of information, and the making of the contract. The landlord will also know the identity the intended lessee.

38. Not one of those elements applies to the landlord on an assignment between lessees. Subject to any applicable terms of the lease (such as a requirement for the landlord's prior consent):

- a. The landlord may not even know about the assignment until after it has taken place.
- b. The landlord may not know the identity of the intended assignee until after the assignment has taken place.
- c. The landlord has no direct role in the negotiations, no control over the timing of the transaction, and no control over or even knowledge of the information which is (or is not) being supplied to the proposed assignee.

d. If and to the extent that the terms of the lease, or the way in which they are written, are relevant, the landlord has no control over those terms on the lease has been granted: they have already been set. It cannot, as a result, make any variations that might be needed in order to ensure that a current lease clause will be enforceable against the new lessee as a term of the 'deemed contract'. To put it another way: where the lease is being granted for the first time, the landlord can control its terms, and so can ensure that they are such as to be enforceable; but on an assignment, the landlord has no control over its terms, and so no right to ensure that they are enforceable. The assignee may or may not agree to a variation, and the landlord cannot ensure enforceability simply by offering an undertaking to enforce an event fee only to a particular extent or in more limited circumstances (unless the Law Commission is proposing to introduce such a possibility). While we would agree with the Law Commission that a term is not likely to be regarded in most cases as unfair simply as a result of providing for an event fee, there may still be cases in which charging an event fee is in itself unfair, and a wider provision may be invalid as a result simply of one aspect of it being held to be unfair. We also note in this regard the Law Commission's (possibly somewhat contradictory) view expressed at paragraph 12.88 of the Consultation Paper that, "The OFT has made a convincing case that many commonly seen event fee terms are unfair" (which in context appears to be a reference to fairness in the context of the unfair terms legislation).

40. Even if current leases contain provisions giving landlords some control, they are unlikely to address all of those issues. Even if new leases were to include provisions giving landlords control, those provisions may not be able to address all of these issues, and even if they do, that may affect the value of the leases and their attractiveness to mortgagees as security, which could have an unintended detrimental effect on the market which the Law Commission is seeking to encourage.

41. It is not clear to us how the proposals meet this difficulty. In particular, it is not clear how the proposal will enable landlords to be confident of their position.

The situation on assignment – if the unfair terms legislation already applies to event fees

42. In order to explain our concerns in this respect, we propose to begin by looking at the situation if we are right in our assessment that the unfair terms legislation is likely to apply to event fees when a lease is granted. We will then turn to our reservations about the proposals even if we are wrong about that.

43. Looking first at new leases, two things may well happen:

a. First, landlords will - we presume - try to ensure that they take the action necessary for their event fees to be compliant with the legislation and any relevant code of practice applicable at the time when the lease is granted.

b. Second, landlords may well seek to frame provisions in their leases which are designed to ensure that they can take whatever steps they consider may be necessary as between themselves and new lessees - before the lease can be assigned - to enable them to render the event fee provisions enforceable.

44. Landlords might also (if they were to think it necessary or prudent) try to include provisions in their leases which enable them to vary the event fee clauses, although the effect of such clauses may be unpredictable and may, in itself, be open to challenge.

45. Even if those things were all to happen, changes in legislation or codes of practice after the lease is granted may present difficulties which were not foreseen or catered for even in those new leases. In those situations, even conscientious landlords may find themselves in the same position as landlords of existing leases.

46. The position is even more difficult for landlords of existing leases:

46.1 For the reasons explained in paragraph 39 above, they may be unable to take the steps that they would need to take in order to ensure that the event fees are enforceable under the unfair terms legislation. The proposal to include event fees on the 'grey list' could only make the situation more difficult; even if the landlord is able to take the steps necessary to enable it to have its event fee provisions 'taken off' that list, that will not put it in the position of being able to do whatever might be needed for those event fees to be compliant more generally under the unfair terms legislation. Most obviously, the codes of practice on which the proposals depend will do nothing to enable the landlord to *ensure* that the right information (or even any information) will reach the buyer at the time of the 'deemed new contract', contrary to what the Law Commission appears to be suggesting in paragraph 11.16 of the consultation paper. This is in stark contrast to the position when a lease is being granted for the first time; and in this respect, we find it difficult to follow the basis on which the Law Commission could take the view (expressed in paragraph 11.33 of the consultation paper) in relation to deemed new contracts on assignments of leases that, "If landlords comply with the code, the term is highly likely to be held to be fair".

46.2 Similarly, they may not have included provisions in their leases which are sufficient to enable them to satisfy a code of practice. Many leases are likely to include a requirement for the landlord's consent, but this may fall well short of what a landlord may need in order to be able to ensure (despite the potentially contrary interests of the selling and buying lessee) that it can do whatever it may need to do (so far as it can) to ensure that the existing event fee provisions remain enforceable. If and for so long as codes of practice do no more than require a landlord to provide defined categories of information to a central repository of some sort, which a landlord can do at any time, this may not be a problem, although it may give impetus to arguments over whether the landlord has complied fully with the relevant code. The Law Commission's current

proposal seems to be limited to this, but it is not clear whether the person or body given the task of approving codes of practice (proposed to be DCLG) will be prevented from insisting on anything more onerous.

46.3 Their event fee provisions will also be set in stone, as will the other provisions of their leases. They will not be able to amend them to enable them to withstand a challenge under legislation brought in after the lease was granted, or to enable them to comply with a subsequent code of practice (which may not even have existed when the lease was granted). For example, they may be unable to do anything to the wording of the event fee provisions to make them “transparent” if that is not already the case, or to remove objectionable elements in what would otherwise be a permissible clause (unless this can be done effectively by way of a unilateral undertaking). As a result, event fees in such leases may, in practice, be made subject to a retrospective ban.

47. The proposals might have a very different effect if they were to enable a landlord to ensure the enforceability of an event fee following the assignment of a lease simply by providing readily available information at a time which makes this practical and practicable for the landlord (e.g. by providing particular information to be included in a database such as the one proposed); but we do not understand the proposals to go this far and, indeed, we can see that this might in some cases enable landlords to enforce event fees that could not be made enforceable against an original tenant. As a result, however, existing leases, and new leases which are affected by changes in legislation and in codes of practice, will be made subject to subsequent legislation: a retrospective effect which the Law Commission rightly recognises as unacceptable. Retrospectivity is not what the Law Commission appears to intend; and if it were to intend this, then we would suggest that it would be going too far.

48. This reveals a further difficulty with the ‘deemed new contract’ proposal. The proposal as currently framed will have the result of applying the current law and code(s) of practice at the date of assignment. In the scenario with which we are concerned in this section – the applicability of the unfair terms legislation irrespective of the ‘grey list’ proposal – then it will inevitably involve lease provisions becoming vulnerable to retrospective legislation and to challenges which could not have been made to them when the lease was originally granted, without the landlord being able to adjust its position to avoid this (as a landlord would be able to do when a new lease is granted). This would apply both to existing leases and to future leases. This appears to be the Law Commission’s intention (as explained in paragraph 11.15 of the consultation paper), but it is not clear to us that the practicalities and possible consequences have been fully recognised. We question whether this intention is right, given those possible consequences, and whether provisions giving effect to it could survive a human rights challenge.

49. Having reflected on this, we would also go further than that. It seems to us that although the current unfair terms approach of focussing on transparency (rather than

'fairness' in a more general sense) may be suitable for application on the assignment of contracts by consumers, the current legislation is not. We do not see the Law Commission's proposals as providing a solution to this: on the contrary, we are concerned that the proposals will compound the difficulty, not least as a result of being a patchwork of various measures which do not sit comfortably with the various pieces of legislation on which they are intended to build. This leads us to be very concerned at the suggestion that a similar approach might be taken to applying consumer rights legislation to leases in all respects. We would urge the Law Commission either to think again about this aspect of its proposals, or to look more fundamentally - and more carefully - at how consumer rights legislation should and could apply to long term, assignable consumer contracts (which, in England and Wales at least, means leases in particular). Other areas, such as timeshares, have been the subject of dedicated legislation; and irrespective of any deficiencies in such legislation, we are minded to think that a dedicated solution for leases (at least after they have been granted) may be the only way in which to ensure that the legal solution to the difficulties which the Law Commission is trying to address is clear, fair, and workable.

The situation on assignment – if the unfair terms legislation does not already apply to event fees

50. If event fees are not currently within the unfair terms legislation when a lease is granted, our main concerns would fall away; but unless and until this has been determined definitively by a court, no landlord would be able safely to proceed on this basis. This would not, therefore, remove the uncertainty which currently exists, with the result that one of the important aspects of the proposals will not be met by the proposals themselves.

51. It might be possible to address this by confirming in new legislation that the unfair terms legislation will not apply to event fees which are 'taken off' the grey list as a result of compliance with a code of practice, but that is not the current proposal. It could also have the unintended effects identified in paragraph 48 above, and would still be subject to the reservations concerning the appropriateness of the proposal more generally (as explained in the first section of this response) and of the use of codes of practice (as explained in the next section).

52. Even if the inapplicability of the unfair terms legislation to event fees were established by the courts, or set out in new legislation, we would still hold to the view expressed in paragraph 49 above: that it would be preferable to adopt dedicated legislation.

The appropriateness of linking 'fairness' to codes of practice

53. Our second area of concern relates to the reference to codes of practice, and builds on what we said about this in relation to the initial creation of a landlord and tenant relationship.

54. We are concerned that the codes of practice to which the Law Commission has referred do not cater satisfactorily for the application of consumer rights legislation to 'deemed new contracts' on sales of leases.

55. To a large degree, this is likely to reflect the matters to which we have already referred: in particular, the fact that all that a landlord can do at that point is be ready, willing and able to make information available about the event fee provisions in the lease to anyone with an interest who may ask for it.

56. It seems to us, however, that there is also an additional issue here, at least if event fees are already subject to the unfair terms legislation. That issue is that the current codes of practice are just not concerned with the enforceability of event fees, particularly (but not only) when leases are assigned. Most obviously, they are not designed to enable landlords or others to ensure that they can meet the requirements of consumer rights law: rather, they are concerned with what landlords can and should do in practice to give a proper opportunity to those buying retirement leases to have accurate information about them.

57. The Law Commission's proposals would involve the codes being used for a purpose for which they were not designed. In particular, as compliance with a code of practice is unlikely to be enough to resolve all consumer rights issues, it is not a suitable tool to use to try to give landlords certainty when they have no control over the situation in any other respects. This will apply most obviously on disposals of leases by lessees. This has the effect of compounding the deficiencies in the proposals in their application to the original granting of leases.

Event fees on sub-lettings

58. The Law Commission's analysis of the situation in relation to sub-lettings ignores two factors which we think are likely to be important, and to be significant reasons why landlords have sought to impose an event fee to be payable on sub-letting (or, indeed, any other change of occupancy) as well as on assignment.

59. The first factor is the potential for a lessee to use a long-term sub-letting, or other occupation arrangement, as a method of avoiding having to pay an event fee. Other forms of occupation would not enable the lessee to release capital; but a long-term sub-letting might do so. In order to avoid this, landlords might prohibit sub-lettings, or ensure that they can control those which are allowed under the terms of any particular lease (e.g. for limited periods and only at full market rents); but some lessees, at least, may prefer to pay an event fee rather than be prevented from sub-letting in such circumstances.

60. The second factor is that the greater the flexibility a lessee has as regards the occupation of the property - even if subject to age restrictions - the lower the landlord's event fee income, as a lessee may be able to postpone a sale for many years simply by deciding to

sub-let instead. If and to the extent that event fee income is needed by the landlord - including for the benefit of the whole development - it has an interest in either restricting the lessee's freedom in this respect, or in requiring an event fee to be paid instead.

61. We do not see much recognition of these factors in the Law Commission's proposals. That is not to say that we do not appreciate the difficulties, and the potential unfairness for lessees of being required to pay substantial event fees on sub-letting: we do. Rather, it strikes us that the situation may just be more complicated than the current proposals recognise. This may be an inevitable facet of a long-leasehold business model, but that does not remove the need to consider the issue from all perspectives, nor just the perspective of a lessee wishing to sub-let on a temporary basis.

A requirement to offer an option to pay 'up front'

62. We are concerned as to how a proposal to require this option to be given would be put into effect in relation to new leases. For example, would landlords be required to include this option in leases, or would it operate as a statutory alternative?

63. This leads to a greater degree of uncertainty as to how such a system would operate in relation to existing leases which do not provide for this option. It seems likely to be possible to frame provisions which would enable this to be done by way of a statutory alternative (with the lease provisions being thereby rendered unenforceable on the occurrence of the relevant event), but this would need to be catered for expressly, and there may be complications in making this applicable in a straightforward and workable fashion in relation to all of the different types and structures of event fees in existing leases.

Moving into and out of the unfair terms provisions

64. We are not comfortable with the extent to which this aspect of the proposals has been analysed and its effect identified. We would accept that in most situations, any lessee is likely to be a 'consumer'. In most situations, the landlord is also likely to be a 'trader'. There may be situations in which this is not the case, however. In particular, in some sectors of the residential property market, it is still common for leases to be purchased by companies.

65. The Law Commission does not appear to have identified any evidence that retirement-type leases are being granted or assigned to companies at the moment. This may well be because the market at the moment is not one which is attracting those who might wish to buy in the name of a company, and/or that the values of the properties currently on offer do not justify such arrangements. This does not mean, however, that it may not apply in some cases, or that the market may not change.

66. Given the likely application of the unfair terms legislation at the moment, this also suggests that no attempt is currently being made to use the granting of leases to companies as a way of seeking to avoid the application of that legislation. Developers are likely to find this

difficult in any event except in a market with a large proportion of sophisticated cash buyers. It may also not fit with age-restriction requirements in at least some forms of lease, which may require the lessee - explicitly or implicitly - to be one or more individuals.

67. In the light of those observations, we are minded to suggest that the possibility of leases being granted to companies as a way of avoiding the application of the unfair terms provisions is not currently a sufficiently significant risk to justify giving it substantial weight in framing the Law Commission's proposals. In particular, we would not see this as providing much justification for the 'deemed new contract' proposal. We suggest that in current circumstances, justification for this proposal needs to be found elsewhere.

68. We also note for completeness that the potential application of the unfair terms provisions through the 'deemed new contract' proposal might be a good reason for a landlord to refuse consent to an assignment from a company to one or more individuals, if that might put at risk the enforceability of an event fee provision.

The intention to provide certainty

69. In view of our various concerns, we take the view that the proposals as they currently stand will not provide the certainty which the Law Commission intends. On the contrary, they will in some respects bring about new uncertainties in addition to, or in place of, those which exist at the moment, which may lead to even greater uncertainty.

70. This will apply both to new leases and also to those which are already in place, and are likely to increase the longer a lease is in existence, due to a trend in both the law and codes of practice towards increasing protection for consumers.

71. It is difficult to see a clear solution to this within the structure of the Law Commission's current proposal which would have the desired protective effect on lessees. We suggest that the most that would be legitimate within that current structure would be to require landlords to provide accurate information which is available to potential assignees of leases (with a suitable sanction for default), but not to adopt the 'deemed new contract' analysis, and to enable landlords to be sure that event fees will be enforceable after assignment if (1) they were enforceable against the original lessee, or (2) if the only reason they were not enforceable against the original lessee was a failure to provide the same information about them which the landlord must make available for potential assignees.

72. This would not go as far in protecting lessees as the Law Commission intends, but we are not at the moment persuaded that the current proposals are the right way to achieve that level of protection.

The scope of the proposed definition

73. The authors of this response do not have personal experience of payments being made in other situations that might fall within the proposed definition of event fees, but we certainly do not rule that out as a possibility.

74. Even if this is not happening at the moment, the proposal would be likely to prevent a market developing in other areas in which it might be desirable to allow such payments. The impact of this is difficult to assess; but it is, perhaps, another reason for preferring dedicated legislation to the current proposal.

Agreeing limitations on enforcement of event fees with existing leaseholders

75. We are not sure of the scope of this part of the Law Commission's proposal, or what sanction it proposes for any failure to comply. As a result, it is difficult to respond from a legal perspective. Others will be better placed to respond to this from a commercial perspective.

76. We are also not sure whether it is intended that any such 'agreement' might in itself involve the creation of a 'new deemed contract', or how the 'deemed new contract' analysis is to be applied in the context of such an agreement. This might be worthy of further consideration.

The effect of event fees being rendered unenforceable

77. We do not question the Law Commission's focus on the effect of event fees on the lessees who are required to pay them or, indeed, on the landlords who are entitled to charge them. We do, however, question the lack of apparent consideration of the effect of event fees being rendered unenforceable on other lessees of other retirement units in a development.

78. As the Law Commission rightly recognises, the value of a development, and of the individual units within it, depends on continued investment not just in upkeep but in improvements. In a similar way, it might also be said that where event fees vary with values, then it will be in a landlord's interest to maintain a level of investment in a development even if not obliged to spend all event fee income on doing so, in order to keep up the level of income from event fees. The recoverability of event fees may thus have an important bearing on the value of the flats owned by those affected, and on the values of other units in the same development. This gives all owners of units in the development a stake in the recoverability of such fees.

79. The Law Commission has recognised the likely effect on the provision of retirement housing if there are doubts as to the recoverability of event fees. What it fails at the same time also to recognise, however, is the potential effect on other lessees. This is a more difficult effect to address because other lessees do not have it in their control to ensure that event fees are

recoverable from other lessees, and yet they may suffer just as much from the penalty of unenforceability which is imposed on their landlord.

80. Several situations can be identified - and some developments will involve a combination of more than one - but in each of them, there is likely to be at least some effect on other lessees:

80.1 The landlord may be obliged to invest event fees. A failure to collect a fee in this situation will clearly affect other lessees.

80.2 The landlord may not be obliged to invest event fees, but may be obliged to carry out works of upkeep and improvement, and may rely on the flow of income from event fees in order to be able to fund those works. The landlord will be obliged to carry out the works, whether or not it receives event fee income, but there is no guarantee for the lessees that the landlord will be able to afford to fund those works. If not, then no-one else is likely to be willing to take on the obligations of the freehold, and even if the lessees themselves were able to acquire the freehold, they will have no obvious way in which to ensure that the lessees as a body provide the funds necessary to carry out the required works. Again, the lessees as a body are likely to suffer.

80.3 The landlord may have no obligation to carry out any works, but if event fees are linked to the values or prices of the leases when they are sold. Here, the landlord's income is likely to diminish over time if it does not invest in the development. There is, as a result, an incentive to invest at least a part of those fees on keeping up the standard of the development and in improving or adding facilities. Difficulties in recovering event fees are likely to reduce any incentive on the part of the landlord to invest.

81. Beyond encouraging landlords to comply, and to some degree giving them the tools to enable to do so, the proposals do nothing to ameliorate the impacts on other lessees. This may be a further factor which may reduce the attractiveness of the sector for both buyers of leases and buyers of reversions (and, thus, depress prices for both). It may be that this is to some degree an inevitable problem, which flows from the longer-term types of business model currently being adopted, but it ought to be recognised and appreciated when framing any final proposals. It also provides an additional reason not to ban event fees altogether, at least if and to the extent that current business models continue to hold sway.

Business models

82. We have referred several times to the long-leasehold business models which appear to prevail in the UK retirement home market. We can well appreciate that this may be the natural result of the structure of the UK residential housing market, and the experience of

those funding developments and ownership in that market. We take the opportunity, thought, to make two observations.

83. First, it seems to us that the Law Commission might be able to frame more effective proposals if it were first to conduct more research into the business models - particularly from a financial point of view - of current providers, and their likely impact in the longer-term.

84. Second, we observe that a partial solution to the difficulties identified by the Law Commission and others may be to encourage a change of business model rather than depend on trying to mould the law - or, perhaps, bend it out of all recognisable shape - to try to improve the workability of a partially flawed business model, or mitigate its inevitable disadvantages. There is only so much that the law can do to facilitate business models: there will be some models that no amount of law reform can make fully workable.

Sinking fund proposals

85. We see the merit in these proposals. The main difficulty we foresee is a possible one of identifying - particularly in existing leases - when the event fees are of such a type as to trigger this proposal.

86. This proposal, if implemented, should not apply to event fees paid before its implementation which are not already subject to a s.42 trust.

Alternatives considered by the Law Commission

87. For reasons which largely accord with those given in the consultation paper, we agree with the rejection of the alternatives considered by the Law Commission, subject to what we have said above about the possible application of the consumer credit legislation.

Bar Council⁵

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⁵ Prepared by the Law Reform Committee on behalf of the Bar Council.