

Is the OFT gearing up to call time on retirement home exit premiums?

Last month the Office of Fair Trading (OFT) made the proud announcement that it had secured an agreement from the specialist retirement housing provider McCarthy & Stone to amend its leases in relation to the re-sale of properties.

As things had stood, residents or their families, were obliged to pay McCarthy & Stone a fee of 1% of the sale price when selling on a property which had been bought from the developer. The provider's justification for this arrangement was that the money raised through the inclusion of such so-called exit premiums was used to keep service charges down.

The OFT, however, considered this term in breach of the **Unfair Terms in Consumer Contracts Regulations (1999)**.

Throughout discussions with the OFT, McCarthy & Stone made clear that it did not agree with the view that these costs were unfair but co-operated with the investigation nonetheless.

According to experts, the OFT has been looking into this matter for quite sometime and the move on McCarthy & Stone could be a sign of things to come.

As a result of this change, the OFT has raised the issue of transfer fees with the proposed regulatory body that will be responsible for delivering a code of conduct and redress scheme in the homebuilding industry – which itself is being formed as the result of the OFT's Homebuilding market study.

This new organisation will consider the matter of transfer fees across the entire sector and facilitate future discussions with the industry's major players.

Commenting on the decision, OFT director of consumer protection Mike Haley said: 'These changes will benefit thousands of elderly and potentially vulnerable residents selling their homes. We are pleased that the changes have been accepted and implemented without the need for further action by the OFT. Moving forward, we welcome the opportunity to work with the code body for the homebuilding industry as a means to improve lease agreements across the sector.'

The decision will do little to help the struggling home developer which currently faces a debt burden said to total £900m. Leaders have blamed the failing housing market which has prevented a number of older people from selling their own properties and therefore delaying potential moves into its specialist developments.

In the latest twist to McCarthy & Stone's misfortunes, a proposed takeover plan put together by the property tycoons the Reuben brothers with backing from HBOS has allegedly been rejected by the holders of the senior debt who would have had to write off more than half of their loans if they had agreed to the proposals.

The OFT move will set further alarm bells ringing among care village and private extra care providers, already hit by the credit crunch and the fall in house prices. Private buyers of units in care villages and extra care developments are typically asked to sign leases with exit premiums which are much higher than McCarthy & Stone's 1%. A premium of 3% is on the low side for true extra care providers and it can range as high as 12.5%.

Extra care operators would have a much stronger claim than McCarthy & Stone that exit premiums are necessary to maintain communal facilities, but equally they would be much more at risk from any adverse decision to ban such premiums and indeed their current business models could not survive such an event.

CCMN

The OFT vs. retirement home exit premiums fees - a legal point of view

With the OFT signing an agreement with one retirement home provider which will put an end of so-called exit premiums, CCMN asked lawyer Tessa Naylor of the London firm Seddons how far this could impact the industry

Owners and operators of care homes and retirement villages who derive an income stream from the exit-premiums payable on unit re-sales, should be aware that the Office of Fair Trading (OFT) has been considering for some time now whether the practice is one which the courts

should be asked to rule unlawful and thus unenforceable under the **Unfair Contract Terms Regulations (1999)**.

Ominously, the OFT has just announced its agreement with McCarthy & Stone which will see the provider remove exit fee provisions from future leases and not enforce them in current leases. It needs to be clarified, however, that this does not count as a determination of the legal position which is as yet untested. It does though suggest that the OFT's resolve may be strengthening.

A successful challenge may materially threaten the profitability of the longer lease care home business model, and that may impact upon the availability of future lending in this sector. Owners and investors who fail to update their models to take account of the risks posed by these new regulations, run significant financial risks further down the line.

These consumer focused regulations first came into force in England in 1995 to enhance the protection which English law traditionally offered consumers in their dealings with tradesmen and suppliers, and to create a stronger legal framework to redress the imbalance forced on consumers by standard clauses in service or product contracts.

In 1999, the regulations were updated to apply those protections to contracts involving real property and leases. The introduction of the 1999 regulations marked a revolution in English land law where, for the first time, clear, transparent and otherwise legally binding contractual obligations might still be rendered unenforceable where held to be unfair to the consumer tenant

Much can be done to modify leases to fall in line with these new regulations and Seddons has already been advising care home operators on this and related matters and undertaking re-assessments of lease structures to make them more compliant with this new European dimension.

A prudent owner would be wise to review its documentation to protect these valuable investments from OFT challenges on transfer fees or other 'at risk' lease provisions. The opportunity also presents itself for adding provisions that could add new income possibilities over the terms of new estate programmes

Care home and retirement village owners or operators who would like advice on the legal aspects of structuring or re-structuring their developments, or advice on how to deal with the Office of Fair Trading, can contact Tessa Naylor of Seddons on tessan@seddons.co.uk

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