

New lease of life?

OFT A market study into residential leasehold management is under consideration. Andrew Francis and Suzanne Rab explore the implications

On 3 December 2013 the Office of Fair Trading (OFT) invited views on the scope of a market study into residential property management services for leasehold homes in England and Wales.

Interested parties, including freeholders, leaseholders and property management companies, will want to determine where their interests lie and how best to protect them. The OFT is inviting views on the scope of its study by 17 January 2014.

Competition issues

The focus of the study is on whether leaseholders receive value for money and are sufficiently informed and involved in decisions, whether there are conflicts of interest between freeholders and leaseholders, whether there are effective rights of redress, and whether there is effective competition for property management services. The OFT is proposing an inquiry following complaints from leaseholders that the charges imposed by property management companies for their services are too high.

Complaints against property management companies are not new. One property management company, Peveler, went into administration in 2011 although it was subsequently bought out by private equity investors for a reported £62m (see *The Guardian*, 6 March 2012). The company received negative publicity when, in 2011, *The Guardian* ran a feature involving a Mr Gadd whose service charge amounted to £4,400 a year. The charges related to the management of four properties without common parts. The same newspaper reported in 2013 that the charge was later reduced to £200 following a successful tribunal challenge.

Against that backdrop, it may not come as a surprise that the OFT has decided to examine the property management market. It concluded a study of property management in Scotland in 2009 where it recommended early implementation of a government-promoted self-regulatory scheme with an independent complaints redress mechanism. Concerns about the management of retirement homes were raised during the OFT's recent inquiry into retirement property transfer (see market study report: *OFT investigation into retirement home transfer fee terms*, OFT1476).



What is a "market study"?

The OFT may carry out a "market study" as part of its general function to obtain, compile and keep under review sufficient information to make informed decisions, including in relation to competition law and consumer protection matters. Market studies are not "fishing expeditions" and they do need to be founded on objective concerns that competition may not be working as well as it should.

During the study, the OFT will write to interested parties seeking information. It will usually send out detailed questionnaires to interested parties to gain a better understanding of how the market works and how any concerns might be addressed. At the end of the study, the OFT will publish its findings.

There are a number of potential outcomes of a market study ranging from:

- a full market investigation reference lasting potentially up to 18 months;
- investigation and action under consumer protection or other laws;
- recommendations on changes to laws or regulations;
- regulatory guidance;
- improved consumer or customer information; or
- a clean bill of health.

Is there a problem?

One of the questions being asked by the OFT is whether tenants are sufficiently informed when decisions are being taken by property managers, and whether there are effective rights of redress for tenants. This means that the focus should be on the comprehensive statutory provisions that govern almost every aspect of management of residential leasehold properties.

The most important regulation is contained in sections 18-30 of the Landlord and Tenant Act 1985 (the 1985 Act). This sets out what is, effectively, a

comprehensive code relating to service charges. One of the key safeguards for tenants is the requirement of reasonableness in section 19. In addition, Part II of the Landlord and Tenant Act 1987 contains provisions dealing with the appointment of managers by the court, variations of leases, the holding of service charge contributions on trust and information to tenants. Finally, Chapter V of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act) gives tenants the right to have a management audit.

Secondary legislation applies to supplement the statutory provisions. Protection is also given by the RICS *Residential Code*, which is approved under section 87 of the 1993 Act. Although there are innumerable cases heard by the former LVT and now the First-Tier Tribunal (Property Chamber) and the Upper Tribunal (Lands Chamber) on this area of law and while there are highly technical rules in the legislation, the general conclusion reached is that the protection to tenants, both in terms of information and remedies is satisfactory. While there may be some key issues and decisions, such as *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 EGLR 34, in the Supreme Court, concerning the exercise of the dispensing power under section 20ZA of the 1985 Act, it is hard to see what improvements could be made to the present regime as a result of the OFT review. But the review does ask questions that require consideration as to whether the present scheme works from the point of view of the tenant as consumer. It may be, for example, that in future there should be more emphasis on redress outside the tribunals on a more informal, but independent basis, and at less cost to tenants.

Next steps

The OFT will formally launch the market study early in 2014, in light of feedback on its scoping exercise. Depending on the outcome, the Competition and Markets Authority (CMA), which will replace the OFT and the Competition Commission with effect from April 2014, has a range of options available to it. If it finds evidence of anti-competitive conduct among market players it could start an investigation under the Competition Act 1998. Alternatively, it could launch a wider market investigation reference, which could last up to 18 months. If a full market investigation is launched this could be one of the first references handled by the new CMA. The consultation is available at: <http://bit.ly/JGU2k1>

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