



## RESPONSE TO THE GOVERNMENT CONSULTATION ON TRIBUNAL FEES

15 September 2015

### 1. Background on ALEP

#### About ALEP (Association of Leasehold Enfranchisement Practitioners)

Formed in 2007 and now with more than 180 member organisations, ALEP is a not-for-profit association that brings together barristers, enfranchisement intermediaries, managing agents, solicitors and surveyors working in the residential leasehold sector. ALEP promotes best practice by vetting individual barristers and organisations to ensure they have significant expertise in leasehold enfranchisement. Membership of ALEP acts as a badge of assurance so that leaseholders and freeholders can be confident that they are employing professionals with the right level of experience in handling potentially complex transactions.

For further information about ALEP, telephone 0845 225 2277 or visit [www.alep.org.uk](http://www.alep.org.uk)

Find ALEP on Twitter at: [twitter.com/alepofficial](https://twitter.com/alepofficial)

### 2. Why ALEP should be consulted

We represent the majority of enfranchisement practitioners, all of whom will be affected by the proposals. We have established solid relationships with third-party organisations and associations in the wider property industry and hold meetings twice a year with LEASE, RICS, ARMA, IRPM, NAEA, etc.

ALEP was instrumental in 2014 in the passing of the Leasehold Reform (Amendment) Bill 2014.

As an organisation, ALEP has always sought to engage government on anomalies and inconsistencies in the Leasehold Reform legislation and has been in dialogue with the government over the last six years or so on these issues. We believe there are a number of other points that still need to be addressed, and we are keen to be involved in any consultation on future legislative reform in this area.

This collaborative effort is consistent with our aim of being a member organisation, run by professionals working in the sector, seeking not only to promote excellence within this particular field, but also to make it easier for leaseholders to exercise their rights, and to improve awareness of leaseholders' rights generally.

### 3. Why ALEP is concerned by the proposals

Since finding out about the proposals, ALEP has undertaken extensive research and consultation following significant communication from its members. ALEP has concerns regarding the legitimacy of the proposal from the Ministry of Justice for the following reasons:

a. The Leasehold Advisory Service data

The introduction of fees appears to be based on data provided by The Leasehold Advisory Service, a government-funded organisation. The data is skewed as it does not compare cases on a like-for-like basis. Additional information was provided to the Ministry of Justice by moneysavingexpert.com. One of our members has undertaken extensive analysis of the figures and can prove beyond doubt that the data is flawed.

b. Lack of consultation

Other than the aforementioned research, there has been no other consultation or consideration of the matter. Particularly, there has been no relevant Impact Assessment obtained from those professionals using the legislation on a day-to-day basis, which has led to a flawed decision to introduce fees.

In paragraph 89 of the consultation, it refers to the impact on the employment tribunal since fees were introduced there and the imminent report following a “post-implementation review”. As the FtT is similar to the Employment Tribunal, would it not be worth postponing the introduction of fees until this report has been published?

c. Misconception that enfranchisement is a luxury

There seems to be a misconception that leaseholders obtain lease extensions and buy their freeholds as a luxury, but this is not the case. Many leaseholders cannot sell their flats without obtaining a lease extension due to mortgage lender and purchaser requirements. Raising finance to complete transactions also eats into the majority of many leaseholders’ equity, with many having to refinance to afford it.

d. One-sided transaction

The process is already a one-sided transaction. The onus is on the leaseholder to progress matters throughout the transaction, with no incentive for the freeholders to negotiate or settle. The leaseholder already has to pay the freeholder’s legal and valuation costs on top of the premium and the leaseholder’s own costs. The introduction of additional fees just adds to an already expensive process, which will push some leaseholders a step too far financially.

e. Access to justice

Many applicants who extend their leases or enfranchise are on very limited incomes, with many being stretched to the absolute bounds of their financial limits. The proposed fees will in many cases equate to one month’s salary for many leaseholders in addition to all the other amounts payable. ALEP is of the view that the introduction of fees will severely infringe leaseholders’ access to justice on the grounds that these fees will be a step too far. It will lead to leaseholders not being able to afford a determination and being forced to accept unreasonable freeholder terms. Alternatively, they will not be able to afford to commence the process at all, knowing that they cannot afford the fees. All leaseholders have the right under the legislation to pay a fair and reasonable purchase price or premium, and introduction of these fees will take away this fundamental right for many leaseholders. ALEP questions the legality of the proposals on the basis that it will inadvertently prohibit leaseholders from being able to secure a fair determination.

f. What will happen in practice

By introducing fees in this manner, it is feared that many freeholders will have no incentive to negotiate terms. Alternatively, freeholders may offer significantly worse terms, knowing that leaseholders will have to either accept those onerous terms or pay high fees in the alternative. Freeholders will, in effect, hold leaseholders to ransom. Unless the legislation is changed to

counteract this, introduction of fees could prove fatal to leaseholders who already have to pay significantly under the 1993 Act.

Although having no legal right significantly to alter the terms of the new lease, freeholders can undertake terms that benefit them because leaseholders will not be able to afford to challenge.

This is a backward step for leasehold reform and justice, as leaseholders are forced to make FtT applications to protect their legal position.

#### **4. ALEP's findings**

A meeting was held on 4 September 2015, which was attended by a selection of its members and representatives from the Royal Institution of Chartered Surveyors (RICS), Property Litigation Association (PLA), and Leasehold Forum. As a result of this meeting, and a subsequent meeting with the Ministry of Justice on 9 September 2015, ALEP has collated a formal response to the proposal, which is as follows.

#### **5. ALEP's position**

- a. ALEP's position on this is clear. No fees should be charged for any cases relating to the 1993 Act.
- b. The proposal is premature, and based on a wholly inadequate report and data prepared by LEASE.
- c. There has been no proper consultation, nor any assessment of the impact the introduction of fees will have on the sector.
- d. The introduction of fees will allow unscrupulous freeholders to take advantage of the system.
- e. In some cases leaseholders will be forced to accept unreasonable terms.
- f. The proposals may even lead to some leaseholders not being able to extend their leases as they simply will not be able to afford the additional fees.

#### **6. In the alternative**

ALEP is commercially minded, and accepts that the Ministry of Justice must raise income. Whilst ALEP's position is very clearly against the introduction of fees, it accepts that the Ministry of Justice will inevitably introduce fees at some point. With this in mind, ALEP would ask the following to be taken into account.

##### **a. Scalability**

The fees must be reasonable and proportionate to the transaction in hand. ALEP suggests the introduction of a sliding scale fee system. The sliding scale would be based on the amount of the purchase price or premium set out in the leaseholder's initial or claim notice. This system will ensure that those with low value claims are not penalised and paying a disproportionate amount. ALEP is in the process of preparing a sliding scale which is proportionate and will allow the Ministry of Justice to raise income. Unfortunately, due to the tight timescales provided for responding to this consultation, it has not been possible to prepare a suggested scale within the time limits given. As agreed during the meeting on 9 September 2015, ALEP will forward the fee proposal following a meeting with its Advisory Committee on 21 September.

b. Separate fees for freehold purchases (Part 1 of the 1993 Act) and lease extensions (Part 2 of the 1993 Act)

The consultation suggests that all 1993 Act claims will be dealt with in the same way. This is unjust given that the value of freehold purchases will often be significantly more than the value of lease extension claims. There are also very different valuation and legal issues which the Tribunal would be asked to determine for each type, so it is only equitable that different fee structures be introduced for each Part of the 1993 Act.

c. Payment of hearing fees

The obligation to pay a hearing fee should not apply until much nearer the hearing date, as is standard with other Tribunal cases.

d. Hearing fee reimbursement

In the event that a case does not proceed to a full hearing, the hearing fee should be reimbursed to the payer if the hearing is cancelled not less than seven days before the hearing. This mirrors the current system in the County Courts. This will incentivise the parties to continue working towards settlement.

e. Exempt cases

The following cases should be exempt from having to pay fees at all:-

- (i) Absentee Landlord claims (Sections 26 & 27, 50 & 51 of 1993 Act);
- (ii) Paper Hearings (typically adjudication on Sections 33 & 60 of 1993 Act costs);

f. Introduction of formal offer procedure

Part 36 of Civil Procedure Rules strictly governs the making of offers during the course of a matter, which then has an impact on costs liabilities at the end of a transaction. Part 36 works well as it ensures that the parties focus on settlement, and it limits the amount of vexatious conduct. There is no equivalent in the Tribunal, and participating ALEP members feel that introduction of such a procedure would be extremely advantageous. It would ensure that freeholders (or indeed leaseholders) are not simply “holding out” on settlement and will avoid Tribunal fees from being paid unless absolutely necessary.

g. Costs penalties

The Tribunal currently has jurisdiction to make adverse costs orders against a party who has acted vexatiously or unreasonably. The majority of participating ALEP members have reported that it is extremely difficult to secure a costs order, even in clear cases where the freeholder has acted vexatiously or unreasonably. A more rigorous scheme of awarding costs must be enforced against freeholders who abuse the system and clearly act vexatiously or unreasonably.

## 7. Summary

- a. ALEP seeks postponement of the introduction of fees until such time that a proper consultation has been carried out. ALEP rejects the proposal outright as it stands, on the basis that it is wholly unfair to leaseholders and will further strengthen the position of freeholders.

- b. ALEP believes that there may be a way of introducing fees into this sector, but only if properly introduced and taking into consideration the factors referred to above.
- c. The current proposal has been rushed and will have a significant impact on the system; hence ALEP's request to postpone the proposal.
- d. Particularly, ALEP is concerned that the proposals will severely restrict leaseholders' access to justice.
- e. By 25 September ALEP will forward its proposals for a sliding scale fee, which will show that fees can be introduced in a fairer way.
- f. In the event that fees are introduced unreasonably, ALEP will seek to consult its members with regard to challenging the legality of the introduction of fees by way of judicial review. ALEP has been closely following the position with regard to the introduction of fees in the Employment Tribunal and awaits with interest the outcome of the ongoing litigation and Government review.