



Setting Standards for
Retirement Communities



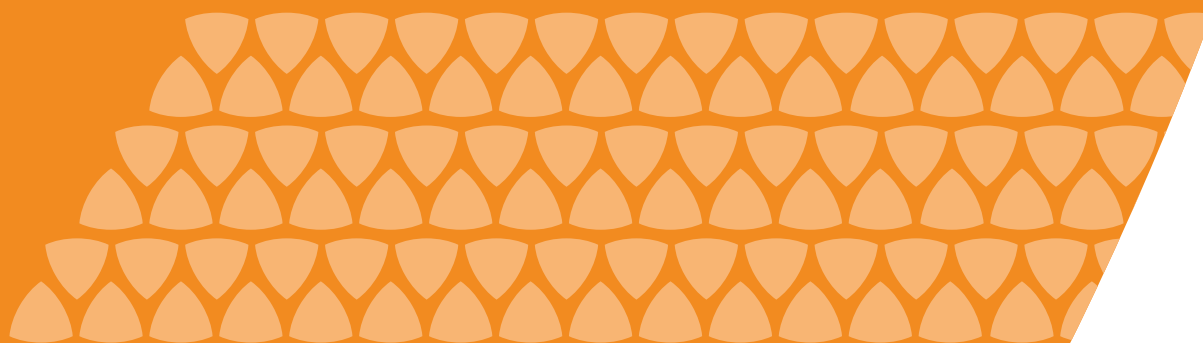
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Event fees and housing with care: What Now?



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Foreword

At ARCO we are delighted to present this timely guide to the law and regulation of event fees in housing with care settings, in conjunction with the leading law firms advising the sector.

As the Law Commission has set out, 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.”* (Law Com No 373, 2017). In housing with care, a common term is *“deferred fees”*. In our view, the use of event/deferred fees can benefit both the consumer buying a housing with care property and the operator. Event fees make housing with care developments sustainable for operators in the longer term. They mean that the resident and the operator have a mutual interest in maintaining the long-term sales values of the properties in the scheme – and therefore in keeping standards high.

They can increase customer choice – allowing older people to purchase a property that might otherwise be at a higher upfront price that they could not afford – and help to keep monthly costs of living in a housing with care scheme affordable and predictable. Operators are able to fix monthly charges (or index them against inflation) – meaning that the operator takes on the risk of unexpected expenses and repairs. Consumer research has shown that cost certainty is highly sought after by customers whose incomes are unlikely to increase beyond inflation. Increasing awareness of the benefits of event fees in housing with care and the current network of law and regulation that ensure that they are used properly and transparently is important to help the sector grow in the United Kingdom. This guide is therefore intended for operators – including ARCO members, provisional and prospective members and accelerators – as well as investors, funders, conveyancers and policy makers considering how event fees could and should be used and whether further regulation would be beneficial.



M. Voges

Michael Voges
Executive Director, ARCO



Kyle Holling
Partner, Trowers & Hamlins



As longstanding partners of ARCO, and having been extensively involved in the Law Commission's review of event fees, Trowers & Hamlins is delighted to have contributed to this important guide. We share ARCO's goal to raise awareness of and confidence in, as well as to grow, the retirement community model. We believe that this guide adds important clarity to the legal treatment of event fees and hope you will find it valuable.



Dominic Morris
Partner and Head of Senior Living,
Gowling WLG



We are very pleased to support ARCO in producing this guide on event fees. For most operators in the retirement community sector, event fees form a critical part of their business model, enabling them to invest in the long term prosperity of their communities whilst at the same time making living in these communities more affordable for residents.



Candice Blackwood
Partner, CMS



ARCO, the Law Commission and the OFT have gifted the sector a set of principles and a code by which to hold itself accountable and – off the back of that – we are increasingly seeing investors (domestic and international), developers, operators and consumers embrace what is being heralded as bringing improved transparency to a sector previously shrouded with hidden costs and uncertainty.

Deciphering the enigma of event fees has spurred renewed interest in the sector and there is plenty to capitalise on – not just for existing players, but for new alike.



Phillip Tunney
Partner and Head of Senior Living
Sector, Eversheds Sutherland
(International) LLP



We very much welcome this guide which will be a very helpful tool for those new to or unfamiliar with the use of event fees in the retirement living sector. Event fees have been recognised as an important method of funding for developers, operators and investors and in turn providing high quality retirement living at an affordable cost. An ageing population with more and more older homeowners looking at senior living options means this clear and concise guide to event fees use in the sector has come at a perfect time.



James Long
Partner, Pinsent Masons LLP



Later Living is a very hot topic at the moment, particularly for investors and operators looking to gain access to the market. Many different and flexible propositions are being considered in what remains a very nascent market. Continued collaboration amongst stakeholders and transparency as to the make up of event fees can only be a positive for the future.
















Event fees and housing with care

A customer purchasing a housing with care property in the UK is buying – in addition to the bricks and mortar – a place in a community where a wide range of services and support are available. These will include 24-hour staffing, meals and – for those who need it – domiciliary care and support services designed to keep people living independently for as long as possible. Providers offer a range of additional services which can include gyms, pools and leisure facilities, clubs and classes, libraries and shops, cafés, bars and restaurants, hairdressing and community transport. Retirement communities in the UK are generally purpose built. In order to maintain sustainability in a sector with a high level of service and amenities for residents, “event fees” – sometimes called “deferred fees” – are often used.

In the past, instances of a lack of transparency about fees and charges in retirement housing had affected perceptions of both event fees and of the wider housing sector for older people. ARCO and its members have therefore continually stressed the importance of upholding high standards of transparency and compliance, in order to ensure that consumers can have confidence in a housing with care purchase and access the many benefits it can offer them.

Living Options for Older People



 Retirement Housing Also known as sheltered housing or retirement flats	 Retirement Communities Also known as extra care, retirement villages, housing-with-care, assisted living or independent living	 Care Homes Also known as Nursing Homes, Residential Homes, Old People's Home
 Self-contained homes for sale, shared-ownership or rent	 Self-contained homes for sale, shared-ownership or rent	 Communal residential living with residents occupying individual rooms, often with an en suite bathroom
 Part-time warden and emergency call systems	 24-hour onsite staff with optional care and domestic services available	 24-hour care and support (including meals)
 Usually have a lounge, laundry facilities, gardens and a guest room	 Range of facilities including a restaurant or café usually alongside leisure and wellness facilities such as gyms, hairdressers, activity rooms, residents' lounges and gardens	 Range of facilities and activities, including gardens, lounges and dining rooms
 Typically 40 - 60 units	 Typically 60 - 250 units	 Sizes vary considerably

Currently in the UK, apartments and houses in housing with care schemes are either rented (for social/affordable or market rent) or bought on a shared ownership basis or outright as leasehold properties. Many customers purchasing the housing with care property under a lease will typically agree to pay as follows:

Initial purchase price

(which should be sufficiently competitive to persuade customers to move/downsize)

Regular service charge/management fee

(this can be weekly or monthly, and fixed, indexed or variable)

Event fee/deferred fee

(typically levied when the property is sold or the lease is assigned, and can be charged in some other circumstances e.g. subletting, where this is permitted)

Event fees are used widely in other parts of the world, but have only recently become more widespread in the UK. In countries with more mature housing with care sectors, models based on long term operational income through event fees are the norm, not the exception. Usually, these are coupled with sector specific legislation that enshrines consumer rights and clearly sets out the rights and responsibilities of housing with care operators. Examples include the Retirement Villages Act 2003 in New Zealand, and state-based legislation in Australia and the USA (such as the Australian Capital Territory's Retirement Villages Act 2012 and article 46 of the New York Public Health Law).

Both the UK Government and the Law Commission have recognised that the use of event fees is consistent with consumer rights legislation and may offer advantages for older residents and increase the range of options available to the older consumer for their retirement. However, it is imperative that fees are disclosed transparently, are fair and are understood by the consumer (Law Com No 373, 1.11 and 1.13). ARCO's Consumer Code sets high standards for transparency against which ARCO Approved Operators are assessed. This model of self-regulation has been successful, and has helped to ensure consumer confidence in housing with care.

This guide, with contributions from leading lawyers advising the sector on leasehold and real estate matters, sets out the current position in England and Wales regarding event fees and the Law Commission's proposals. The Scottish conveyancing system has different requirements for the structure of event fees, which is outside the scope of this guide.

The Current Legal Status of Event Fees and the Law Commission's Proposals

Key principles

- a. Event fees increase consumer choice when purchasing retirement property, subject to compliance with existing consumer law (fairness)
- b. Fairness is unlikely to be dependent on the amount of the fee, but on its timing, structure and presentation (Law Com CP226, 6.69)
- c. Some aspects of consumer law are likely to apply only to the first sale of the lease rather than subsequent sales or assignments
- d. Both the Law Commission and the Government have confirmed that event fees are in line with Consumer Rights legislation if properly and transparently disclosed under current law
- e. The Law Commission sets out broad principles going forward including the use of an approved Code of Practice, and additions to the Consumer Rights Act 2015 to make parts of the Code legally enforceable. Its proposals have been broadly welcomed by Government but not yet enacted.
- f. The Law Commission proposals – together with the ARCO Consumer Code - give the best guide to good practice pending further regulation.

“Event fees” is the expression coined by the Law Commission as part of its project (discussed below) considering charging models in the retirement housing sector, commenced in 2014. Broadly, they are charges payable, or a benefit foregone, under a lease of a retirement housing dwelling when it is sold or otherwise disposed of. This is often following the death of the owner of that lease but can apply in other situations – sale, subletting, or changes of occupation such as sharing with a carer or new partner. A wide range of charging structures exists across the retirement sector. The Law Commission’s original consultation suggests the following types of event fees as examples:

- (a) **Transfer fees** – payable on assignment or underletting, not linked to any service provided
- (b) **Contingency fees** – paid into a sinking fund for future capital item repairs, reducing ongoing service charge costs
- (c) **Deferred management/membership fees** – payable for other deferred services or club membership, intended to give occupiers cost certainty - a “use now, pay later” model
- (d) **Selling service fees** – for sales agency or “change of ownership” services

[The Law Commission’s proposed full definition, from its draft Code of Practice, is set out in Annex 1.]

Event fees can also be used to cover the costs of communal facilities, ensuring that the sector remains sustainable for operators and that purchase prices remain reasonable.

The legal context

The Law Commission's Event Fees project highlighted that the key applicable area of law to better regulation is consumer protection law. That law is:

- (a) The Consumer Protection from Unfair Trading Regulations 2008, which relate mainly to the **advertising and marketing process and the nature and timing of information disclosed** to potential purchasers of retirement dwellings. These Regulations prohibit traders (those acting for business purposes) from engaging in unfair commercial practices in their dealings with consumers; and
- (b) The Consumer Rights Act 2015, in particular the parts of it relating to **unfair contract terms**, which relates mainly to the **terms of applicable contracts** (which in the case of retirement dwellings are the leases which impose event fee charging structures).

After a wide and lengthy sector engagement, the Law Commission published a final report in March 2017.¹ Their findings were that the existing law offers a good degree of protection to customers and that it was a failure to comply with that law by properly disclosing information to buyers that historically was largely the problem. The Law Commission recognised the need for the senior living sector to grow and the importance that event fees can have in attracting operators and investors and providing customers with choices in that market. The Law Commission did though recommend some sector-specific regulation on event fees, providing clarity to operators about what "good" looks like and to customers on transparency as a result.

[¹See: <http://www.lawcom.gov.uk/project/event-fees-in-retirement-properties/>]

The Law Commission's suggested approach is to adapt the existing law to achieve this goal. The Consumer Rights Act, which as we have said above is one of the key aspects of existing law governing event fees, sets out an "indicative and non-exhaustive" list of terms which may be unfair, depending on the context, which was set out in the previous law. This list is known as the grey list. These types of contract term are not automatically unfair, but they carry a suspicion of unfairness and so a greater risk of being deemed unfair if imposed on consumers. The Law Commission proposed changes to the law to clarify the disclosure processes required in relation to event fees. The proposals would not have retrospective effect. The main changes are:

- (a) To create a Code of Practice for operators to comply with, when a retirement community home is sold (for the first time or when resold to a new owner), clarifying what needs to be disclosed and when to comply with the Consumer Rights Act. It is worth noting that there is significant overlap between the ARCO Consumer Code and the Law Commission's proposed Code of Practice around event fee disclosure; and

- (b) To make failure to comply with certain aspects of the Code of Practice a "grey list" item, with the intention that doing so would likely mean an operator's process was not fair in consumer law terms and the event fee not chargeable as a result (and that complying with the Code was by contrast very likely to mean the event fee was chargeable).

The Government response to the Law Commission's proposals was published in March 2019 and confirmed its intention to implement the recommendations made, subject to two points being explored in further detail (one of these is about how data required for the disclosure process will be captured and held, the other is about succession rights). At present no further movement has occurred. However, that means that the current position is that the Law Commission and Government have both confirmed that event fees are lawful if properly and transparently disclosed under current law, and there is no intention to move to ban them.

Key features of the Law Commission's proposed Code of Practice

The proposed Code of Practice would:

- (a) Define event fees and other key terms.
- (b) Limit the circumstances in which event fees may be charged, broadly to:
 1. Sale (assignment) of the lease;
 2. Subletting (where the amount of any event fees payable will be a proportion of the "full" event fee payable on a sale, limited by a formula);
 3. In some but not all instances, on changes of occupation after a resident has died or has ceased to occupy the property permanently. Some of these instances relate to the ability of a person who occupies with a customer to remain in place after that customer has died or permanently left the home. This is the succession rights issue which Government has said it intends to consider further.
- (c) Limit the amount that can be charged as an event fee on subletting and other changes of occupation.
- (d) Place a set of disclosure obligations on the operator, or the estate agent, when they are selling a property. The proposed Code of Practice would set out what must be disclosed, and when, on a first sale of a new home and on its resale.

The Law Commission also suggested that if any part of an event fee is specifically intended to be used as a contingency or sinking fund for future work to a retirement community, that it is held on trust. The use of trusts is not compulsory (save to the sinking fund element of variable service charge structures, which would usually not apply) and is a matter of best practice under the proposed code of practice. To go further would require changes to more legislation.

Leases as contracts - when the code and the grey list will apply

One of the potential challenges of the Law Commission's approach is how the law ties to the disclosure process. There is an acknowledged lack of clarity about when consumer rights law can apply to leases, and it is entirely arguable that it applies only on the formation of the contract and the circumstances which applied at that time (i.e. the original grant of the lease, and disclosure and transparency afforded to the original buyer, not in relation to the process followed for a subsequent buyer on an assignment).

ARCO's approach has been to ensure transparency around fees for both new and resale properties, by applying the same requirements on disclosure for any sales where the operator acts as the agent – but also requiring operators to equip customers with the relevant information as soon as they become aware of the sale, in cases where an external resale agent is used. In our view, the best approach is to seek to structure leases and sales and marketing processes in accordance with the current law but also, so far as practicable, taking into account the Law Commission's suggested approaches.

The use of event fees in practice

There are a large range of models incorporating event fees used in the retirement community sector. However, more typically, newer entrants to the market are seeking to define a proposition where the operator assumes more risk than in traditional leasehold structures, taking the risk of service charge cost fluctuations by fixing (completely, or by indexing an initial fixed amount). In addition, some operators are offering increased flexibility for customers – with different payment options in leases from which each successive tenant can select, balancing monthly charges and event/deferred fees to suit their own needs. This is coupled with a strong service offering, including amenities, lifestyle options and care and support where needed. This can be highly attractive to a customer base with largely fixed (pension) income, for whom upward cost fluctuations can be very difficult. Event/deferred fees are then used to ensure the service offer is delivered, maintained and indeed improved over time, and to mitigate the risks the landlord is assuming.

There are three main areas for operators to consider when dealing with these models (aside from considering the ARCO Consumer Code which is, of course, an important element of self-regulation for its members), from a sales and marketing and legal documentation perspective:

(a) Sales and marketing must be conducted in a way which is compliant with consumer rights legislation, in particular the Consumer Protection Regulations. This should be coupled with the adoption of best practice by accommodating the elements of the proposed Law Commission Code which relate to the sales and marketing process. These include principles such as refraining from providing (or not providing) information which misleads and as a result distorts consumer behaviour and decision-making.

(b) Leases should be drafted in a way which is compliant with consumer rights legislation, again adopting the proposed Law Commission Code so far as practicable as a matter of good practice. This means, for example, using plain language in documents wherever possible, providing explanatory documents where technical language is used and being transparent in the disclosure of lease terms.

(c) The ability to evidence a disclosure process is likely to be critical. As an operator, you may be asked to provide proof of all of the marketing materials and documents disclosed to a particular customer, which may have happened several (or many) years ago. This is likely to include showing not only what was provided, but also when it was provided as the customer took the journey toward becoming a retirement community occupier. This may also include demonstrating what was said to the customer, as well as what was put in writing. Operators will need to consider an armoury including:

1. Policies and procedures which marketing teams should adhere to regarding the disclosure and explanation of documentation and models.
2. Staff training, to ensure those policies and procedures are adhered to. This could include training on identifying capacity issues.
3. Standardised documentation which records interactions in a way which ensures essential data about those interactions is captured – while also allowing bespoke commentary to be added where considered necessary.
4. Bespoke sales agency contracting terms where those arrangements are outsourced.
5. Signed documentation from both the customer and their legal advisers acknowledging what was explained to them (noting though that consumer rights law will not automatically assume that someone signing something to say they understood means they actually did).

Event fees in Housing with Care: What Now?

Future evolution of the sector and a move towards a specific set of regulatory standards are likely to follow at some point, and will build on these principles. Currently, event fees are both enforceable and fundamental to the housing with care model where the operator has a long-term interest in running the scheme and not merely in property sales. Event fees are also important to investors looking to take long income positions which will be critical to provide capital underpinning the growth of the sector, and for operators and consumers in providing flexibility in charging structures. The enactment of the Law Commission reforms would provide even greater legal certainty within the current system of tenure. In the longer term, ARCO is calling for amendment of consumer protection legislation to expressly clarify that consumers are equally protected when purchasing a resale property (from an existing resident) as when purchasing a property on initial grant of the lease. We also support the development of new models of tenure, moving away from leasehold ownership, to allow greater flexibility based on what consumers want from housing-with-care: for example high levels of service provision, with fixed affordable regular charges.

Greater consumer and investor confidence in event fees, in particular as part of a wider programme of planning and regulatory reform, will allow growth of the housing-with-care sector. At present in the UK, only 0.6% of people over 65 live in Retirement Communities, compared to 6.1% in the USA, 5.4% in New Zealand and 4.9% in Australia. Meanwhile, the number of people over 65 in the UK is expected to increase by more than 40% over the next 17 years to over 16 million.

We know that Retirement Communities are good for maintaining physical and mental health and for providing more efficient and cost-effective delivery of health and care services, while freeing up under-occupied housing stock for younger families. They are an important part of the future housing and care landscape in the UK. The transparent use of event fees that gives consumers real confidence is, in our view, an essential tool allowing the sector to achieve ARCO's vision of 250,000 people living in retirement communities in the UK by 2030.

Associated Retirement Community Operators

June 2020

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Annex 1: Law Commission's proposed definition of Event Fees

This is the proposed definition wording from the Law Commission final report:

*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:*

- (4) Administration charges regulated under Schedule 11 to the Commonhold and Leasehold Reform Act 2002;*
- (5) Service charges regulated under the Landlord and Tenant Act 1985; and*
- (6) Ground rents.*

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

- (7) 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*
- (8) 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.*

About ARCO

Founded in 2012, ARCO is the main body representing both private and not-for-profit operators of Retirement Communities in the UK. We work in three distinct areas, each vital in supporting our Members and growing the sector that helps people to live independently for longer.

- **Setting the Policy Agenda**

Delivered through policy campaigning work with MPs, Peers, Government Ministers, Local Authorities and other key sector stakeholders to influence the future of much-needed sector-specific legislation.

- **Compliance & Regulation**

Delivered through our Consumer Code and standards framework, with continual assessments of Members to drive high standards for customer and resident experience.

- **Knowledge Sharing and Best Practice**

Delivered through our extensive events programme, annual What Next? Conference, Network bulletins, online Knowledge Bank, and ARCO Analytics.

Our Mission

ARCO believes that meaningful, long-lasting partnerships and commitments are at the heart of solving the challenge of meeting the housing, care, and support needs of our ageing population.

We emphatically believe that older people should:

- Be treated with respect and dignity.
- Be valued for their contributions to society and to their communities.
- Have what they need to be happy and healthy, including access to good support, care, and health services.
- Be enabled and supported to live independently for as long as possible.
- Be empowered and free to make informed choices.

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