**Unfair terms in care home contracts: the need for legal advice**

Many residents entering into a care home, do so following a crisis. Their family usually take on the responsibility of finding a suitable home, and few give little consideration to the terms of the contract to which the resident will be bound. The average cost of a residential care home in the UK, in 2017/18, was £32,344 a year. This rose to over £44,512 a year when nursing care was included.

As stays are usually for years rather than months, it is hard to imagine why anyone entering into a contract would do so without proper advice. Yet many do not see a contract until they are in situ – even fewer will have sought independent advice on its terms. Without such advice there is a high chance the resident is signing a contract that is not in their favour.

***Competition and Markets Authority Guidance***

The Competition and Markets Authority (CMA) which has responsibility for enforcing consumer protection legislation, carried out a market study into care homes for the elderly, to review how well the market works and if people are treated fairly. It concluded they were not.

In May 2018, the CMA published ‘*UK care home providers for the elderly – consumer law advice on the charging of fees after death’,* and then on the 16 November 2018, published guidance entitled, *‘UK care home providers for older people –advice on consumer law: Helping care homes comply with their consumer law obligations.* This article explores the main points contained in the guidance and what advisers should do if they encounter such terms.

To comply with consumer law, the CMA consider care homes should:

* Provide key information upfront, so residents and their representatives are not misled and can make informed decisions.
* Ensure that contracts are fair and not put residents at an unfair disadvantage, by tilting the rights and responsibilities under the contract too much in favour for the care home.
* Perform services with reasonable care and skill.
* Have an effective procedure for dealing with complaints, which is easy to find, easy to use and fair.

***First contact information***

Care homes should prominently highlight prescribed key information, such as whether it accepts State-funded residents (with or without a ‘top up’), indication of weekly fees, whether it requires a guarantor, and any upfront payments. This must be displayed on its website and in other written materials that it gives or sends to prospective residents or their representatives, when they get in touch for the first time. The key information must also be drawn to the attention of the prospective resident and their representative at the point of first contact (regardless of how this occurs).

***Important additional information***

Any important additional information should also be provided to prospective residents and their representatives in a clear, accurate, accessible, unambiguous and timely manner. This includes an explanation of the impact on the resident if their funding changes, such as subsequently qualifying for State support. These should be provided at the latest, before the care home agrees to undertake an assessment of the prospective resident’s needs, as should, a copy of its standard contract/terms and conditions. Where the care home accepts State-funded residents, there will be a placement contract between the home and the public funding body, which will determine the terms of the resident’s placement. However, those residents and their representatives will still need to understand the terms and conditions of their stay, and will usually be provided with a pro-forma copy of a ‘residency agreement’, that they may be required to sign before agreeing to a care needs assessment. As with the main contract, the residency agreement should not impose unfair terms on the resident.

Once the prospective resident or their representative decides to move in, the care home must confirm the final, total amount that the resident will have to pay (including the total gross weekly fee rate, inclusive of taxes, and any permissible upfront payments), as part of its offer of a place. In addition, for State-funded residents, there should be confirmation of what has been agreed between the home and the funding body, as it relates to the resident’s care and any ‘extras’ they have agreed to pay for. Advisers should be aware that in such cases, the public body remains responsible for the full cost of care, even if another person has agreed to make an additional payment so the resident can move into their preferred care home.

***Unfair terms***

The CMA has identified terms which it considers unfair.

***Hidden terms***

Binding residents to ‘hidden’ terms, such as incorporating policies and all correspondence into the contract will be unfair, because the resident would not have a real opportunity to read and understand their rights and obligations under the contract, before being bound.

***Security or reservation deposit***

Terms that require a substantial security deposit, or which give the care home a wide discretion to retain it, without clear justification when the contract ends, are likely to be unfair, as this may operate as a financial sanction for ending the contract, or even deter residents from complaining or challenging invoices where they are dissatisfied with the service, for fear of losing their deposit.

A term which makes a reservation deposit non-refundable in all circumstances, where a prospective resident does not move in, is likely to be unfair. Such a term allows the care home to retain payment, even when it is at fault, or its actions prevent the resident moving in, as agreed. Any reservation deposit should be financially limited, as the potential loss is limited.

A term requiring a resident to pay a wholly or partially non-refundable fee on signing a contract is also likely to be unfair. It can have the effect of taking away the resident’s right to terminate the contract, particularly within any trial period, and can operate as a financial sanction on the resident and a windfall for the care home.

***Placement fees***

Imposing a requirement to pay an upfront non-refundable fee as a condition for being able to move into a care home is likely to exploit the resident’s need to be admitted to the home, and so cause them to pay a fee which they would not pay if their negotiating power was equal to that of the care home.

These terms may be explained by the care home, as costs associated with admission and are likely to be unfair. Admissions related activities are a necessary part of ensuring that the care provider meets the needs of the individual resident.

On 11 February 2019, the CMA confirmed it plans to take legal action against Care UK, one of the UK’s largest care home providers, because it refused to refund residents who were charged a compulsory upfront ‘administration’ fee, of as much as £3,000. Ultimately, the court will now decide whether this breaches consumer protection law.

***Guarantors***

Some care homes require someone to co-sign a self-funding resident’s contract as a ‘guarantor’, or to sign a separate contract, where they agree to be liable for the resident’s fees if payment ceases, and in some cases being liable for the performance of all the resident’s obligations under the contract, without limitation or further explanation.

Where a guarantor is required, they and the resident must be able to understand and assess the potential extent of their liability and evaluate the practical implications for them both, before they accept responsibility.

If the home pressurise someone into acting as a guarantor, as a condition of accepting a resident, or where it is only mentioned late in the admissions process (when the prospective resident is likely to already be committed to taking up a place), this is likely to infringe consumer law.

***Terms to notify when financial resources are reduced***

Some care homes require self-funding residents, as a condition of acceptance, to confirm that they can continue to pay the agreed fees for a minimum period. This may involve assessing the prospective resident’s finances during the pre-admission process, to check that they have sufficient funds for the stated minimum period, or requiring them to self-certify that they have sufficient assets to self-fund for this period.

If the care home fees are liable to be changed at its discretion, it is difficult to see how the resident can offer any assurance that they will be able to pay what is an unknown future amount. If fee increases are foreseeable, then the term is likely to be fair, but unfair if it is not foreseeable.

Neither the care home staff nor the contract should prohibit, or deter, self-funding residents from seeking State funding if they become eligible during the minimum period. Care homes which require the resident to notify the care home within a specified timeframe where they anticipate becoming eligible for State funding, cannot be set excessively far in advance, as it will be very difficult for a resident to anticipate and comply with such an obligation.

***Paying a funding shortfall***

Care homes should not oblige self-funding residents or their representatives to agree, at the time of entering the contract, to be liable for any future funding ‘shortfall’ (between the self-funder fee rate and local authority rate) that may arise in the event the resident seeks State funding during the minimum period, as it is not possible to foresee at the time of the contract, what their liability will be.

 ***Interest rates***

Terms that allow the home to impose disproportionately high charges for breach of contract are likely to be unfair. For example, where they require the resident to pay more in compensation than any loss suffered as a result of the resident’s actions, or where the home require residents to pay interest on outstanding fees, at a rate above their clearing bank’s base rate, is unfair as it makes the resident pay more than the cost of making up their default. It may also be unfair if it is not possible to identify how much needs to be paid, for a breach.

***Absence from the home***

A term that requires a resident to always pay full fees, regardless of whether allowance could be made by the home for savings or gains available because of the resident’s absence, may be unfair. A resident may need to be absent from the home for an extended period (for example, due to hospitalisation), during which time the resident may still be paying fees. Fairness is more likely to be achieved where the home limit the period for which full fees are payable, after which a discount will be applied, and ensure the discount represents a reasonable estimate of the home’s likely savings.

***Terms where the resident must immediately leave***

The care home should give a permanent resident at least 28 days written notice to leave, as obliged under the Protection from Eviction Act 1977. Where the resident is unwilling to leave the home once notice has expired, the care home must apply to the County Court for an order to evict. As such, terms which oblige the resident to vacate immediately are likely to be unfair.

***Fees charged post death***

Terms which have the effect of requiring residents or their representatives to continue to pay fees beyond the point at which possessions are cleared from the room are, in principle likely to be unfair. The CMA’s advice is that care homes can charge:

1. For no more than a reasonable short and fixed period of up to three days, from the day following the resident’s death, provided that provision is made for fees to stop being charged if a new resident occupies the room within this period; or
2. Until possessions are cleared from the resident’s room by their representatives, provided that a reasonable backstop period of no more than ten days is included in the contract term for fees to cease from that point.

***Third party top ups for State- funded residents***

Where the home accepts State-funded residents, there will be a contract between the home and the public funding body (such as the local authority or NHS funding body) setting out the terms of the resident’s placement. The content of any agreement that the home ask the resident or their representatives to sign should not conflict with the terms of the placement contract. If a third party is making an additional payment toward the cost of the resident’s care, the payment should be made to the local authority as it remains liable for the full cost of the care (see Annex A, para 25 of the Care & Support Statutory Guidance/chapters 4 & 5, Annex C, para 8.9, Social Services & Wellbeing (Wales) Act Code of Practice). Care homes must tell the resident and their representatives (and the third party- if this is someone else) about the option of covering the shortfall through an arrangement with the local authority, and must not simply ask them to cover the extra costs themselves in a private arrangement, as this is likely to infringe consumer law, as it exploits their unfamiliarity with the legislation and statutory guidance relating to top-ups.

Similarly, if the home tells the local authority that it is willing to accept the resident at the rate it has offered to pay, but then privately asks the resident, their representative or the third party to make additional top-up payments to cover a ‘shortfall’, as a condition of moving into the home (or in order to remain in the home), then this is likely to infringe consumer law and is also inconsistent with the Care Act 2014 and the Care and Support and After-care (Choice of Accommodation) Regulations 2014 in England and its equivalent Welsh legislation.

There is now a plethora of reports by the Local Government and Social Care Ombudsman of upheld complaints made by residents and their families about unlawful contractual arrangements, where care homes have charged additional fees, ‘behind’ the contract. Some where the local authority have colluded with the arrangements. The CMA guidance attempts to further close the net around these practices.

Some residents may be in receipt of NHS Continuing Healthcare (CHC). The contract terms and business practices the care home uses with CHC residents must be consistent with NHS rules, and relevant policy guidance. The care home cannot ask residents in receipt of CHC or their families to make top-up payments towards the cost of the care package that has been agreed between the home and the NHS commissioning body. Access to NHS services is based on clinical need and not on an individual’s ability to pay. Patients should never be charged for their NHS care, or be allowed to pay towards NHS care, so seeking additional contribution would contravene the founding principles and legislation of the NHS.

***Consequence of unfair contract terms***

It is clear the CMA are working closely with consumer and regulatory partners, including the Care Quality Commission and the Advertising Standards Authority, over this particular issue.

Advisers who encounter a term which they consider is unfair, should initially take it up with the care home manager. If the placement was arranged via a public body, they should also make a complaint to the Complaints’ Manager of the public body. If these routes do not provide redress, then the complaint can be escalated to the Local Government and Social Care Ombudsman in England or the Public Services Ombudsman for Wales. The process is relatively straight forward, and there is no fee charged by the Ombudsman for investigating the complaint. However, not all complaints have to be investigated, but where they are, it can be effective.

A complaint can also be made to the Care Quality Commission in England, or the Care Inspectorate Wales, which regulates care. The Regulators will take this into account in deciding whether the care provider is complying with statutory regulatory obligations.

Care homes which fail to comply with consumer law, run the risk that the CMA will bring court proceedings to stop infringements, seek compensation on behalf of residents, and in certain cases, bring criminal prosecutions. Residents are encouraged to complain to the CMA if the home does not treat them fairly, on carehomes@cma.gsi.gov.uk.

This is in addition to a resident’s right to seek damages, and allege unfair contract terms resulting in the terms being unenforceable against them, through civil court proceedings.

Lawyers working for older clients, their attorneys or deputies should encourage them to seek advice on this important area, which forms part of care funding advice plans. Clients may otherwise run the risk of a care home seeking to enforce an unfair contract term, and the client feeling they have little option but to pay up, or move.

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