

Update on consumer law and care home residents contracts

Following its unsuccessful case against Care UK in July 2021 and subsequent withdrawal of proceedings against Barchester, the Competition and Markets Authority (CMA) has revised its guidance for care homes on complying with consumer law obligations (*UK care home providers for older people- advice on consumer law 8 December 2021*).

Most of the Guidance remains unchanged from the original version issued in November 2018. The main changes relate to:

- The length of time for which fees should be charged after a resident's death. In 2018 the CMA carried out an investigation into Maria Mallaband's practice of requiring payment of one month's fees following death. It resulted in Maria Mallaband dropping its policy and the CMA issuing revised guidance on this point. It carried out subsequent investigations into 3 other large operators who all changed their policy as a result. That guidance has now been incorporated into the 2021 Guidance. Our perception of the market is that the CMA's stance on this point has been accepted as forming part of the law and become established practice. We would encourage providers to comply with it.
- Re-iteration of the "need" for homes to provide key information to prospective residents on first contact, however they are funded. Particular emphasis is placed on fees, charges, reservation deposits and security deposits and ensuring that all costs are known by prospective residents from the outset so they can compare like for like when choosing a home. The Guidance is very specific about what information should be provided and how. Implementing it in its purest form would no doubt bring some operational challenges for providers, particularly smaller groups or single homes who may not have numerous admin and admissions staff. It is noteworthy that the CMA is standing its ground on this point and sticking with language such as "need" or "must". The commentary given by the judge in the Care UK case did not support the CMA's requirement for all possible costs and charges to be listed on the home's website for consideration by prospective residents at the outset.
- Terms requiring upfront payments such as security deposits and reservation deposits. The Care UK case sought redress for residents who were charged a compulsory upfront administration fee, which it dropped in 2018. Similar proceedings were taken against Barchester in respect of historic administration fees but were withdrawn when the CMA lost the Care UK case. As a result of the case, the Guidance rows back from an outright ban on upfront payments but does provide detailed examples on the types of payments the CMA considers are likely to infringe consumer law. These include ensuring that prospective residents are not charged for general marketing activities or for maintenance of common parts of the home. There is also detailed provision on how deposits should be kept and refunded and what happens in the event of a dispute.

The CMA has taken the position that the High Court ruling in the Care UK case adopted a narrow interpretation and is not binding as precedent. It maintains its stance that its Guidance reflects consumer law and should be adhered to, although it is clear from the latest

revision that the CMA has had to back down and re-assess its stance. The Guidance is not statutory and its application will depend on a court's interpretation. There are plenty of parts, particularly the section on increasing fees, which are uncomfortable to implement commercially but have yet to be tested.

It will be interesting to see how the position develops. Whilst much of the Guidance is, in our view, a positive for the sector in terms of encouraging transparency and easy-read contracts, many of its provisions are overly prescriptive, lack commerciality and arguably go much further than is necessary or required by the consumer law which underpins it. This makes implementation for providers a real challenge as they attempt to balance compliance against commercial realities.

Our advice to providers remains the same: to review your contracts with the Guidance clearly in mind. It is not just the CMA that can cause providers issues with contracts. Well-informed families are more than willing to raise complaints and escalate them to Trading Standards or the Local Ombudsman, creating unwelcome hassle and cost for already-stretched managers. The Guidance should not be ignored but should be carefully considered and risk-assessed against commercial needs. A watching brief should be maintained on what the CMA does next. Given its previous success against some of the large operators, I doubt we have seen the last of these cases.