

Competition and Markets Authority – Market study of Care Homes – Charles Taylor comments

I would like to submit a response to the recent call for evidence in this market study. I am a care home owner and operator based in Oxfordshire running two care homes, with 99 beds. We have run these care homes as a family operation for almost 15 years and therefore have a long period of experience within the care home market.

I can only answer for ourselves as an organisation when stating that we do not disadvantage residents through our standard terms and conditions, we believe that these are fair for both ourselves and our residents. I will now highlight some of the key issues that have appeared recently in the newspapers and can be deemed “controversial”. We have a notice period of one month for individuals to move out of our care, which is much less onerous than terms used by many other businesses. For example as a business we are required to give 3 months’ notice, at a particular time, to change our utility provider. We also provide one-months’ notice prior to raising fees so that residents are adequately warned.

One of the key issues is that when dealing with a frail individual there is an onus not to move a resident from a care home, as this could be detrimental to an individual’s health. This is a truth that care homes have to deal with and consider when setting their fees. In all honesty however fee increases within the care home sector are rarely the choice of owners and managers of these services. Over the past few years for example the national minimum wage has caused huge inflation in the costs of staff, our regulator has more than doubled their fees since their introduction, we are required to pay pensions to all of our staff members, and the cost of nurses have spiked due to a government caused shortage. All of these are completely external to care homes and in some areas have led to massive increases in care home costs. These are therefore passed on to customers of these services. So whilst a headline stating 10% increase in care home fees in a single year might cause an emotive reaction, this is genuinely the effect that government interference within our sector has on our costs.

One of the other controversial issues in the news articles recently have been charges after an individuals’ death. We charge families for a one-week period post the death of a resident. Family members are suffering from a bereavement at this time and often take this week to remove personal items from an individuals’ room, and to say goodbye to the person in the place of their passing. The alternative is for the care home to fill the bed the day following the death and to pack up the individuals’ belongings to be collected, which does not allow the family the time to grieve properly.

Most care homes freely advertise their terms and conditions when individuals are looking round. These will explain the major terms of living within the care home in full. We are however trusting the responsible adults that are looking round our care homes to read these conditions and consider them. Many charities, such as Age UK, have a list of “key questions” to ask a care home when looking round. We are increasingly finding that this kind of information is being used by families to ask questions about finances within care homes, and as an organisation we are always more than happy to explain these.

I think it is important at this stage to highlight why care homes have terms and conditions. In the majority of cases care homes are dealing with individuals that are at some stage of losing the ability to manage money. This is managed in a number of different ways. Rarely, an individual will have power of attorney and can manage an individuals’ affairs fully. In most cases however we find that a family member, or close friend will have access to an individuals’ funds and we will need to liaise with that individual for payments. As these arrangements are not at all

regulated or “official” then we need the protection of a robust placement agreement if the individual managing the resident’s money decides not to pay us.

We have found over the 13 years running care homes that these informal arrangements for dealing with financial affairs are often abused. We have had many instances where individuals managing a person’s money have considered this to be their own and either spent savings or are actively utilising the resident’s income as part of their daily lives. All care home operators will have experienced this at some stage of their running of a care home, however this remains largely un-reported because action is simply not taken when this is reported to social services. This may be an area where residents in care homes are very widely open to financial abuse that you could consider investigating.

Moving on from our companies practices, we often contract with the local authority in Oxfordshire and in this instance we feel that customers are less well contracted with. This predominantly revolves around choice of accommodation. Under the new choice regulations¹ released in 2014 Local authorities are now able to refuse to place in a care home that is not deemed “affordable”. This means that when individuals approach a Local authority asking for a placement they are able to insist that the person accepts a particular care home. This care home can sometimes be miles away from family members and friends, or in a completely different county. If families ask for a different care home then the local authority is able to insist on a “top-up” payment from the family, thereby getting the family members to pay for care that should be paid for by the local authority. This situation is getting worse and worse as Local authority Fees are getting lower, and less care homes are able to accept their fees. We feel that this slight change in law has forced many families to pay significant top-ups that before 2014 would not have been chargeable.

In your request for information you have asked how Local authorities are utilising their powers of “market shaping”. My answer is look at what is happening within the health and social care market. Care homes are closing down at an ever increasing rate, as our population continues to age, at the same time hospitals are overflowing with patients that cannot find a place to reside. When you look at Market Position Statements written by Local Authorities these will invariably say that they are expecting care home demand to reduce over the coming years, and that there are no problems with discharges from hospitals. These conclusions are invariably drawn from a mixture of outright lies and inappropriate market analysis. Local Authorities are able to get away with this however because there is no oversight of any of their activities. As a care home provider within Oxfordshire, for example, we were not asked or consulted on what the market was like in our area when the county wrote their market position statement. This is not necessarily a problem as I am only one provider within this market. The worrying thing for me is that no social care providers were consulted or involved in this documents production, so how can it be an accurate picture of how the market is for those same providers?

“Third Party top-ups” themselves are an area that is regularly abused by local authorities. The law is extremely simple, the top-up must be paid by a “third-party”, not from the residents own funds. The truth however is that the “third party” that is contracted with will be the individual that is responsible for managing our resident’s funds. This individual will then pay these top-ups from the funds of the individual in the care home, and not from their own money. Again this practice is commonplace in third-party arrangements, however it is overlooked because otherwise families would be much less likely to pay these top-ups. My feelings are simple, if the government feels that these top-ups can come from the person residing in a care home directly, the law should be changed. If this is not the case then local authorities should have a duty to

ensure that funding is coming from a third-party source, as they are the organisations charged with managing these payments.

One of the key questions around contractual issues is can residents adequately complain if they feel they are being treated unfairly? My answer to this is a resounding yes. Care homes are one of the most closely regulated bodies in the world. We are required to have a complaints procedures and to record and respond to complaint in a set time period. If we do not do this then individuals can complain to the Local Authority. The local Authority is then empowered to investigate any incidents that they deem to be abusive (in this case financially). If the individual is not happy with the LA's response then they can take the matter up with the Local Government Ombudsman, who has the power to intervene and investigate issues of negative care further. If this has no effect then the individual can go to our regulators, CQC. This body has wide-ranging powers to look at any aspect of a care home's operation, including placement agreements, and can order a care home to change their policies or procedures. The CQC also have the legal power to close down or fine care homes where they feel they are not acting in resident's best interests. Finally if all of these different avenues have been exhausted then the individual can bring a complaint within the British court system, who are enabled to pass judgement. This all means that there are 4 statutory bodies that are empowered to force care homes to change their terms and conditions, if these are deemed to be inappropriate. My conclusion is that if the Competition and Markets Authority believes that care homes are treating residents unfairly, why not get one of the statutory bodies that should already be policing this to do their jobs? Rather than creating any more red-tape within an already complicated system.

Competition between care homes

As your investigation centres around competition within the care home sector I would like to bring your attention to a tribunal case from 2002 between a care organisation and Northern Ireland Health Authority ^[ref]. This case involved a complaint made by the care organisation to the Office of Fair Trading that the health authority (the body responsible for commissioning care within Northern Ireland) was using its dominant position as a buyer within the sector to force down prices. The care homes felt that this was illegal under the Chapter II prohibition set out in section 18(1) of the Competition Act 1998, namely:

"...[A]ny conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom"

Importantly this case was rejected by the Office of Fair Trading at the time on the grounds that the Health authority was not an "undertaking" and therefore could not be investigated within this act. This decision was overturned in a tribunal case brought against The Director General of Fair Trading by the Better Care Group. This tribunal's findings were:

"We therefore unanimously find, on the material available to us, that North & West's activities in running its statutory residential homes and engaging in the contracting out of social care to independent providers are for the purposes of the Competition Act 1998 to be regarded as economic activities for the purpose of deciding whether North & West is an undertaking within the meaning of section 18(1) of the Act."

And elsewhere expanded on this by saying:

"Indeed, despite the extensive exclusions, in Schedules 1 to 4 of the Act, of a wide range of agreements and conduct from the prohibitions contained in Chapters I and II, there seems to be no exclusion from the Act of HSS trusts, NHS trusts or local authorities, either generally or in respect of

the activities here in question. If there is no express statutory exclusion, it seems to us that the onus must be on the Director to show that the entity in question is outside the ambit of the Act, for example by showing that the relevant activities are not 'economic'."

This situation has not fundamentally changed in the years since this judgement was given. Across the country Local Authority and other statutory bodies are still imposing fees on providers that are well below the market costs of provision of services, and are using their dominant market position as the largest buyer to do so.

The tribunal also stated elsewhere in their judgement that:

"If an HSS trust, NHS trust, or local authority having a dominant position adopts pricing policies which favour their own homes to the detriment of independent providers, with the result that competition between providers in the market is distorted, we cannot see any reason, in principle, why such allegedly discriminatory conduct should fall outside the ambit of the Chapter II prohibition."

I raise this second point in particular because a new situation has arisen within the care home market in recent years that has further blurred the lines between commissioners and providers. [text excised].

My point here is simple. Local Authorities are using their powers in ever more imaginative ways to force private care home companies across the UK to accept artificially low fees. This is leading to the closure of a record number of care homes across the country this year by forcing many providers to go out of business. Whilst this year represents a record number of closures this is only the tip of the iceberg. The Governments promise to increase the national living wage substantially over the next three years will dramatically increase the costs of providing care in the country, and will only increase the rate of care home closures. Unless Local Authorities are held to account for the illegal way that they manipulate the care market then there may well be no care market for your organisation to oversee.

ⁱ www.legislation.gov.uk/uksi/2014/2670/pdfs/uksi_20142670_en.pdf, *The Care and Support and After-care (Choice of Accommodation) Regulations 2014*.