

UK care home providers for the elderly – consumer law advice on the charging of fees after death

Helping care home providers comply with their
consumer law obligations

31 May 2018

CMA81

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1. Introduction

Background

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority. It is a public authority, which from 1 April 2014 took over many of the functions formerly performed by the Office of Fair Trading (OFT) and the Competition Commission. It aims to make markets work well for consumers, businesses and the broader economy.
- 1.2 Effective enforcement of the law is central to the CMA's purpose. It has powers to enforce a range of consumer laws to tackle practices and market conditions that make it difficult for consumers to exercise choice – this includes powers to protect consumers from unfair contract terms (for which it has the lead role) and unfair business practices.¹ These enforcement powers are shared with other bodies, such as local authority Trading Standards Services.
- 1.3 The CMA also shares with the Chartered Trading Standards Institute (CTSI) the role of providing advice to businesses to drive up standards through clarifying their legal obligations. The CMA generally focusses on sector-specific issues that have emerged from a market study or other in-depth analysis of business practices in a particular market where it has obtained relevant expertise.²
- 1.4 On 2 December 2016, the CMA launched a market study into how well the care homes market for the provision of care home and nursing home services to over 65s in the UK was working for residents and fairly competing businesses.
- 1.5 On 13 June 2017, the CMA opened an investigation under consumer protection law, including laws on unfair contract terms, following concerns that a number of care home providers' contractual terms and practices might be unlawful. The focus of this investigation is on certain care homes who require fees to be paid for extended periods after a resident has died (in addition to concerns relating to care homes charging large upfront fees).

¹ Further details on the CMA's consumer powers and its approach on their use can be found in [Consumer protection enforcement guidance: CMA58](#)

² The CMA primarily provides guidance to businesses on specific issues identified in the course of its market studies, in connection with Part 2 of the Consumer Rights Act 2015 and issues where its particular knowledge of the market makes it best placed to advise business. Other business guidance on consumer law is produced by the CTSI and more information is available on the [Business Companion website](#).

Consultation

- 1.6 On 30 November 2017, the CMA published the final report on its market study findings³ and announced that it would be consulting on advice in relation to the practice of charging fees after death, due to concerns about some care homes and the:
- a) extent to which they continue to charge fees after the death of the resident;
 - b) charging for any shortfall in NHS Funded Nursing Care (FNC) payments;
 - c) charging of third parties for any shortfall in local authority funding;
 - d) treatment of the resident's possessions, and
 - e) lack of clear and transparent contract terms.
- 1.7 On 19 January 2018, the CMA launched a consultation on draft advice for care home providers covering the issues above.⁴
- 1.8 Following consideration of the information received during the CMA's market study and responses received to the consultation, the CMA has now finalised its advice, as set out in section 2 of this document.

Who this advice is for

- 1.9 This advice is for providers of residential care home and nursing home services for people in the UK over 65 ('care homes'). It relates to their dealings with self-funded and part-funded residents.

The purpose of the advice

- 1.10 The purpose of this advice is to help care homes understand and comply with their responsibilities under consumer law following the death of a resident. It will also be of interest to care home residents and their representatives, consumer groups, charities representing the elderly, representative bodies for care homes, government departments, enforcers of consumer law such as local authority Trading Standards Services, relevant Ombudsmen, and sector regulators.

³ [Care homes market study - Final report](#)

⁴ [Care Homes for the elderly – charging fees after death](#)

- 1.11 This advice sets out the CMA's views on the application of two pieces of consumer law, namely Part 2 of the Consumer Rights Act 2015 (CRA) in relation to unfair contract terms and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) in relation to unfair business practices. These laws apply across the UK and therefore this advice is relevant to England, Wales, Scotland and Northern Ireland.
- 1.12 This advice is not a substitute for the law itself, and it does not replace the role of the courts which is to provide the definitive interpretation of consumer law. It sets out the views of the CMA. Care homes, if in doubt, should seek their own independent legal advice on the interpretation and application of the law. They may also be able to get advice from any representative body they belong to, or any local authority with which they have a Primary Authority relationship.

Next steps

- 1.13 Now that the advice is finalised we expect all care homes to review as soon as possible and, where necessary, change their contract terms and practices or risk enforcement action.
- 1.14 Separately, the CMA is consulting on comprehensive advice on other consumer law concerns identified in the CMA's final market study report.⁵ The final advice on the charging of fees after death, as set out in section 2 of this document, will be incorporated into the comprehensive advice once finalised. This will ensure that all of the CMA's consumer law compliance advice for care homes is set out in one place.

What happens if you do not comply with consumer law

- 1.15 Where you fail to treat residents and their representatives fairly and infringe consumer law, enforcers, residents and other compliance partners may take action against you.

Action by bodies that enforce consumer law

- 1.16 Non-compliance with consumer law could result in enforcement action by the CMA, local authority Trading Standards Services or, in Northern Ireland, the Department for the Economy. All have powers to enforce the consumer

⁵ Chapter 11 of the Care Homes market study - Final report identifies these concerns.

protection legislation referred to in this advice and can bring civil proceedings or (in relation to certain breaches) criminal prosecutions, as appropriate.

- 1.17 Where appropriate, enforcers can also seek redress for residents (including monetary compensation) or other remedies (such as the right for the resident to cancel the contract) where the resident has suffered loss as a result of the unfair terms or practices giving rise to the enforcement action.
- 1.18 Further guidance on the CMA's approach to its use of its consumer powers can be found on the CMA webpages.⁶

Action by residents under consumer law

- 1.19 A contract term (or consumer notice) which is found to be unfair is not enforceable against a resident, and any money paid because of that term may be recoverable by them. A resident would also be entitled to resist making payment on the basis that a term is unfair under consumer law. In some circumstances, a resident may also have the right to seek redress in the courts under the CPRs in respect of misleading actions and aggressive practices.⁷ This is in addition to any other rights to seek redress through any private civil action they may pursue for breach of contract.

Action by sector regulators

- 1.20 Sector regulators, namely the Care Quality Commission (in England), the Care Inspectorate (Scotland), the Care Inspectorate Wales and the Regulation and Quality Improvement Authority (Northern Ireland) may also take action in respect of any breaches of the rules and regulations which they are responsible for enforcing. The sector regulators are responsible for registering care homes and inspecting and monitoring them to ensure that they meet the standards of quality and safety set out in relevant regulations and guidance.

Ombudsmen

- 1.21 The Ombudsmen (the Local Government and Social Care Ombudsman in England, the Scottish Public Services Ombudsman, the Public Services Ombudsman for Wales and the Northern Ireland Public Services

⁶ [Consumer protection enforcement guidance: CMA58](#)

⁷ This may include the right to unwind the contract, receive a discount or seek damages for detriment caused by the breach. For further information, see BIS, [Guidance on the Consumer Protection \(Amendment\) Regulations 2014, August 2014](#).

Ombudsman) may also consider and refer to the CMA's compliance advice when considering complaints about care homes.⁸

⁸ The remit of the different national Ombudsmen vary. For example, unlike the other national Ombudsmen, the Northern Ireland Public Services Ombudsman cannot currently investigate complaints from private funders.

2. Compliance advice

Introduction

2.1 In this section, we provide the CMA's views on what care homes (which are, where appropriate, addressed directly in the advice as 'you') need to do to meet their consumer law obligations in relation to the following matters that may arise following the death of a long-term resident,⁹ including any contractual terms which permit care homes to:

- a) continue to charge residential fees for care or accommodation (or both) of a self-funded resident (see paragraphs 2.6 to 2.17);
- b) continue to charge residential fees for part-funded residents (see paragraphs 2.22 to 2.24);
- c) charge for any shortfall in Funded Nursing Care (FNC) payments (see paragraphs 2.25 to 2.26); and
- d) charge third parties for any shortfall in local authority funding (see paragraphs 2.27 to 2.29).¹⁰

2.2 This advice also covers the treatment of residents' possessions (see paragraphs 2.18 to 2.21) and the transparency of related terms in your contracts with residents¹¹ (see paragraphs 2.30 to 2.31). However, the main issue for the CMA is the maximum length of time for which you can reasonably continue to charge fees following the death of a resident.

Our approach to assessing the fairness of relevant terms in care home contracts

2.3 We consider that contract 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. This is because, once residents' representatives have cleared residents' rooms, the contract is likely to be of no benefit at all to them.

⁹ The CMA's focus is on long-term residents as opposed to respite residents.

¹⁰ The CMA recognises that some care homes do not charge any fees following the death of a resident, in which case many of the consumer law compliance issues raised in this advice will not arise.

¹¹ Where we refer to the 'contract' in this advice, we are referring to the document which sets out the rights and obligations between the resident and the care home. This document is commonly named by care homes as the Admission Agreement, Contract of Admission and Residency or Resident's Agreement.

2.4 At the time the contract is entered into, it is likely that residents would have a reasonable expectation that their representatives will continue to have access to their room for a short period following their death. This will enable their representatives to pack up and remove the resident's possessions. We can see that, in principle, it is reasonable for care homes to continue to charge fees during this brief period. It is also in care homes' legitimate interests to use contract terms which ensure a degree of certainty as to when they will be able to recover the room, so that it can be re-occupied by a new resident as soon as possible.

2.5 As explained in more detail below, we are unlikely to object to contract terms which permit a care home to charge fees:

- a) 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 (see paragraphs 2.6 to 2.10); or
- b) 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 (see paragraphs 2.11 to 2.14).

Care homes could also include terms which permit a representative, after the death of a resident, to request in writing an extension of the fixed period or backstop period, respectively.

Length of usual payment period of residential fees after the death of a self-funded resident

Charging fees for a fixed period

2.6 As indicated above, we consider that it can be legitimate for contracts to set out a specific period during which fees will continue to be paid, where this period is a reasonable estimate of the amount of time it would reasonably take residents' representatives to clear the room. Doing this provides care homes with the certainty of a guaranteed income for a period following a resident's death, and allows them to plan for the admission of the next resident. Preparation of the room for a new occupant can usually only begin once the room is cleared of the resident's possessions and the room is handed back to the care home by the resident's representatives.

2.7 Any fixed period which obliges the payment of fees, after the resident's death, should be short. This reflects care homes' legitimate interests to use contract

terms which ensure swift recovery of the room. It also reflects residents' interests not to be required to pay fees beyond the point in time when the contract is no longer of any benefit to them or their representatives.

- 2.8 It is the CMA's view that a payment period of up to three days (beginning from the day following the resident's death) should normally strike the right balance between the legitimate needs of the care home and the resident. The CMA notes that many care homes offer resident rooms on a fully furnished basis, with residents usually bringing into the home items such as clothes, photographs, pictures, soft furnishings and maybe a few small items of furniture, all of which are relatively easy to remove. In these circumstances, a payment period of up to three days (beginning from the day following the resident's death) should normally allow residents' representatives sufficient time to remove possessions, without undue pressure. We would be unlikely to challenge this period.
- 2.9 As many residents pay their residential fees in advance, in practice this means that, after their death, you should usually refund any advance payments that go beyond the short fixed term period. Such refunds should be timely. Concerns are likely to arise if terms make provision for refunds beyond 28 days from the date on which they become due or, where applicable, 28 days from the date on which you have identified those who are entitled to receive the refund.
- 2.10 Further, if a room is re-occupied during the short fixed payment period (for example, where another resident moves into a room which has already been cleared¹²), fees should cease from the point when the room is re-occupied. We can see no basis for contract terms that provide for fees to continue to be paid for the resident's room after their death, when the room has been re-occupied by another resident, since this would allow you to charge twice for the same room.

Charging fees until possessions are removed

- 2.11 If it is your policy to continue to charge fees for a period following a resident's death, an alternative approach is to link payment directly with the time it takes a resident's representatives to clear the room.¹³ This too would be consistent with the legitimate interests of residents, in requiring payment only for as long as the room remains uncleared. It also protects your reasonable interests, in

¹² That is a resident who is either new to the home or transferring from another room.

¹³ Note the need for timely refunds of any advance payment is equally applicable to such a term.

that it incentivises residents' representatives to move possessions swiftly, so that the room is available to you early for re-occupation.

- 2.12 This type of contract term accommodates more fully the range of circumstances that can arise when a contract is entered into. For example, the time needed by a resident's representatives to organise the removal of possessions may vary.¹⁴ Such a term can also accommodate more fully the range of circumstances which can arise, following the death of a resident.¹⁵ Further, such terms may be beneficial to smaller care homes which may have to rely on external organisations to store possessions if they are not removed from the room by residents' representatives in a timely manner.
- 2.13 However, for this type of contract term to be fair, it is the CMA's view that provision should be made for a backstop period where the payment of fees will cease, even if possessions have not been removed by the resident's representatives from the room. This reflects a general legal duty upon you to take action to reduce your losses, for example by taking steps to ensure re-occupation of the room.
- 2.14 With regard to what constitutes a reasonable backstop period, the CMA considers that a period of no more than ten days, starting from the day following the resident's death, is likely to be reasonable. A backstop period provides an element of certainty for you as to when the room will be handed back to you. However, a period of longer than ten days would not sufficiently recognise that a point of time is likely to be reached when ultimately the removal of the possessions from the resident's room becomes your responsibility, thereby enabling you to get on with preparing the room for re-occupation.

Extending the usual payment periods by agreement

- 2.15 There may be circumstances in which a resident's representative is unable to clear the room within the time period usually provided for them to do so in your contract terms (for example where they are overseas) but they do not wish you to clear the room. In order to provide for this eventuality, you could include a term which permits a representative to request an extension. Such a term should set out clearly that the fees will remain payable during the agreed extended period (if you intend to continue charging).

¹⁴ Depending, for example, on the amount of possessions to be cleared from the room, which will be dependent on whether the room has been provided on a furnished or unfurnished basis.

¹⁵ Depending, for example, on the nature of the resident's death (eg whether it was sudden or expected).

- 2.16 In order to prevent confusion or disagreements about what has been requested, it would be appropriate to require that the request be made in writing (for example by email). The request must not be a pre-selected option on standard paperwork. It should be made on the representative's initiative, following the resident's death.
- 2.17 Consent to such a written request should not be unreasonably withheld by you, and we would be likely to object to any term which requires payment of a fee for you to consider the request.

Treatment of possessions

- 2.18 It is reasonable for you generally to expect residents' possessions to be cleared within a short period of time after death. However, there may be occasions when residents' representatives do not do this, for example, if they are abroad, or lack transport or mobility, or simply do not organise the room clearance in time. Consequently, the contract terms should set out clearly what steps you will take in such circumstances. These terms must also be fair, as set out below.
- 2.19 If possessions have not been removed by the resident's representative within the period specified in the contract and a longer period has not been agreed in writing, we would expect you to take steps to inform the resident's representative before clearing the room in order to allow you to prepare it for a new occupant. We would be unlikely to challenge, for example, a term which, after the expiry of the fixed term or backstop period, allows you to pack up the resident's possessions, and if necessary remove the resident's possessions from the resident's room, in order to allow you to prepare the room for a new occupant.
- 2.20 Contract terms which permit you to clear the room should set out what, if anything, you will charge for doing so, and any charges payable for storage of possessions. Any such charges should reflect the costs which you have reasonably incurred, for example, for removal of possessions and storage thereafter.
- 2.21 If it is necessary for possessions to be stored and they remain uncollected, we recognise that ultimately a point could arise when it will become clear that possessions will not be collected at all. We consider that it is reasonable for you to make provision in the contract for such circumstances, including allowing for the disposal or sale of residents' possessions, as appropriate, provided that:

- a) if possessions are to be disposed of or sold the timing of this is reasonable and clearly set out in your contract;
- b) your terms make provision for adequate notice to be given to residents' representatives before disposing of or selling the possessions;
- c) if the appropriate course is to sell items (eg because they are of some financial value), you are obliged to obtain a reasonable price for the possessions; and
- d) if any monies are received from the sale of possessions then your relevant term makes provision for such sums, minus your reasonable expenses, to be returned to a resident's representative, within a reasonable timeframe (ie no longer than a 30 day period following the sale).

Residential fees payable by a third party after the death of a part-funded resident

2.22 Where a person is eligible for local authority funding but would like to move to a care home, or into a room, that costs more than the local authority will pay, then a 'third party', who could be a family member or friend, can pay a 'top-up' fee to meet the additional cost.¹⁶ If a local authority is meeting a person's needs by arranging a place in a care home, it is responsible for contracting with the care home and paying the care home's charges for meeting those needs in full, including where a top-up fee is required. When all parties are agreed, the local authority may choose to allow the third party to pay the care home directly for the top-up rather than via the local authority.

2.23 If it has been agreed that a third party will pay top-up fees directly to you, they will typically have an agreement with you in addition to a written agreement with the local authority. There will also be an agreement between the local authority and you in respect of the resident's placement and funding thereof. The terms of any third-party agreement with you must be provided on the same terms as your agreement with the local authority.¹⁷

¹⁶ In some limited circumstances, the resident can pay the top-up fee themselves. In these circumstances the concerns we raise regarding breaches of consumer law in relation to third party top-up payers still equally apply. Further, the term 'top-up' does not feature in the relevant legislation for Wales (The Care and Support (Choice of Accommodation) (Wales) Regulations 2015 and the supporting Part 4 and Part 5 Code of Practice (Charging and Financial Assessment) Annex C). The official terminology is 'additional cost'.

¹⁷ See for instance, for England, the Care and Support and After-care (Choice of Accommodation) Regulations 2014, Regulation 3(1) specify the conditions which must apply in order for the local authority to be required to meet the adult's preference for accommodation. Regulation 3 (1)(e) provide "where the preferred accommodation

2.24 Consumer law concerns will arise if you require a third party to continue making top-up payments for a payment period that is longer than the period of local authority payment following a resident's death. Such an obligation is contrary to sector legislation (see footnote 17) and the effect of such a provision is to penalise the third party for making payments directly to you rather than via the local authority. In order to be fair, the CMA would generally expect your contract terms governing the period for which top-up payments must be paid to be the same as those that apply between you and the local authority, so as to ensure that the third party is not subjected to more onerous contract terms than if they were paying the top-up fee via the local authority.

Fees payable to cover 'shortfalls' in any contributions which are no longer paid by the State upon (or shortly after) the death of the resident

Charging for any 'shortfall' in FNC

2.25 FNC is the contribution paid by the NHS to care homes in England and Wales, in order to support the provision of registered nursing care for eligible residents. The policy intention of the FNC payment is that the average cost of nursing care by a registered nurse is covered by the NHS, and should not be paid for by the resident.

2.26 The NHS stops FNC contributions on, or shortly after, the death of a resident because the nursing care by a registered nurse is no longer needed and cannot be provided to the resident.¹⁸ Given that it is the intention that payment for specified nursing care by a registered nurse is the NHS's liability rather than the resident's, the CMA can see no legitimate grounds for contract terms that require payments for FNC to continue for a period after the death of a resident. It is the CMA's view that terms which have the effect of transferring this liability from the NHS onto the resident, or their representative, are unfair.

Charging for any 'shortfall' in local authority funding

2.27 As explained above, where a person is eligible for local authority funding but would like to move to a care home, or room, that costs more than the local

is not provided by the local authority, the provider of the accommodation agrees to provide the accommodation to the adult on the local authority's terms."

¹⁸ In England the '[NHS-funded Nursing Care Practice Guide](#)' states that Clinical Commissioning Groups will need to agree a payment to cover the period after death in line with any agreements reached with providers and Local Authorities. In Wales, the relevant guidance ('[NHS Funded Nursing Care in Care Homes Guidance 2004](#)') states that FNC payments may be made by Local Health Boards for a period after a resident has died but normally this would not exceed four days.

authority will pay, a third party can pay a top-up fee to meet the additional cost (see paragraphs 2.22 to 2.24).

- 2.28 Just as terms of an agreement between you and a third party which require the third party to continue to pay a top-up fee after the local authority's contribution has ceased following the death of a resident are likely to be unfair (see paragraph 2.24), so too are terms which require the third party to meet the shortfall in the local authority's contribution, ie to pay the amount the local authority was paying.
- 2.29 The effect of such a provision, in an agreement between the care home and the third party, is to require the third party to take on responsibility for residential fee payments which far exceed the top-up fee they agreed to pay whilst the resident was alive. It takes advantage of the third party's unfamiliarity with the subject matter, and is contrary to what a well advised third party, acting on equal bargaining terms, would agree to.

Clear and transparent contract terms

- 2.30 Prospective residents and their representatives need prominent, clear, accurate and full information about the contract terms that will apply in the event that the resident dies. Such terms should be brought to the prospective resident's attention and clearly cover:
- a) the length of time, if any, that you will expect fees to be paid following death or how the length of time will be determined;
 - b) the deadline for personal possessions to be removed from the room by residents' representatives and the action you will take if the deadline is not met;
 - c) whether, if necessary, items can be stored, if so for how long, whether there is a storage charge and if so, how much is the charge or how it will be determined; and
 - d) the steps you will take to dispose of or sell items which are not, or cannot be, removed within the home's required timescale, which should include the provision of written notice to residents' representatives before disposing of or selling the possessions.
- 2.31 As well as presenting these clearly in the contract, you should also communicate clearly to the resident's representative, as soon as possible following the resident's death, the information listed above. It is important also that in good time, before you take any steps that may involve the packing up of possessions or incurring costs, you inform the resident's representative of

the proposed course of action. This will allow the representative to take steps to remove the possessions themselves and to avoid or reduce storage charges or any other charges, as applicable.

A summary table of the CMA's approach

Do not:

- Be afraid to discuss with prospective residents and their representatives the rights and obligations of a resident who dies during their contract with you;
- Hesitate to inform sensitively a resident's representative of their rights and obligations shortly following a resident's death including the time period they have to remove possessions, what will happen if they do not meet this timeframe and any charges that may arise;
- Charge fees for more than a fixed period of three days, following the resident's death;
- Alternatively, charge fees after possessions are cleared from the room by the resident's representative or, if this is not done, beyond ten days;
- Require a third party top-up payer to continue to make payments, after the resident's death, when the local authority's payment period has stopped;
- Raise the level of fees payable after a resident's death in order to cover a shortfall in State funding;
- Clear a resident's room of their possessions without informing the resident's representatives first and giving them a reasonable opportunity to clear the room themselves;
- Charge the resident's representative inflated storage charges;
- Reserve the right to take ownership of a resident's possessions which are not collected from your care home;
- Dispose of or sell the resident's possessions too quickly;

- Dispose of or sell the resident's possessions without giving their representative adequate notice of what you intend to do; and
- Reserve the right to keep all the proceeds from a sale of the resident's possessions.