

Number 19

Contracts with Care Home Residents

All care home providers will have Contracts under which residents' care is provided, either in specific individually tailored contracts or by incorporating standard Terms and Conditions. Indeed, the Care Standards Legislation requires this¹.

It is essential that these contracts are carefully drafted to provide clarity in what may often be difficult situations. The contracts should include in particular clear provisions dealing with:

- Termination
- Personal Possessions
- Medical Services
- Other chargeable services
- Transfer between rooms or homes
- Payment of fees and the mechanism to increase fees
- Data Protection
- Limitation of liability

The contents of such contracts are not however a matter totally within the discretion of the care home operator. Where these contracts are made between the care home provider and self funding residents (even if their fees are topped up by the local authority) the contracts will be subject to the Unfair Terms and Consumer Contracts Regulations 1999 and may also be reviewed by the Office of Fair Trading ("OFT"). If a term in a contract is found by a Court to be unfair, it will not be binding as a Court will assume it has been simply struck out of the contract. In such situations, the care home may have difficulty enforcing some or all of its contractual terms. Accordingly, it is important that contracts are reviewed to ensure that they comply with the regulations and do not appear to be unfair under the terms of the guidance issued by the OFT².

Key Issues

- Financial Liabilities – Although the price payable is known as a "Core Term" and not covered by the Regulations, the OFT is concerned to ensure that financial liabilities are clear, particularly when indemnity and guarantee clauses are included. The OFT would be likely to find any such clause which was unclear, unfair. An example of this might be the situation to apply upon the death of a resident.
- Exclusion of Liability – A contract should not seek to exclude the obligation to perform services to the resident with reasonable skill and care.
- Capacity – The OFT would object to terms which cause particular difficulties for those who had lost or were losing capacity.

¹ The Standards provide that the terms and conditions of residence should include the rights and obligations of the service user and registered provider and who is liable if there is a breach of contract.

² Guidance on Unfair Terms in Care Homes Contracts 2003

CARE HOMES BRIEFING

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- Legalistic Terminology – The OFT is keen to ensure that provisions are clear and intelligible. Legalistic jargon should be avoided. Where there is doubt about the meaning of a provision, it is likely to be construed in favour of the resident.
- Absence from the home – If a resident is absent from the home for a holiday or a period of hospitalisation, the OFT would expect there to be some form of discount on the fees payable if the room is re-let. If the room is kept available for the patient's use, this would not be necessary.

Further examples of unfair terms are set out in the OFT Guidance. Broadly, the 1999 Regulations provide that a term is unfair if it is contrary to the requirement of good faith, or it causes a significant imbalance in the rights and obligations under the Contract to the detriment of the residents. However, it should be noted that this applies to standard terms, rather than contracts which have been significantly negotiated and will not cover "Core Terms" as to the price or the main subject matter of the Contract (i.e fees, charging period, length of stay, facilities and services to be provided).

Further details of the Guidance is available from the OFT website³ and advice on the enforceability or drafting of Care Agreements is available from RadcliffesLeBrasseur.

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing. Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7388.

³ www.offt.gov.uk

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