

Care Homes Briefing

Solicitors

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No duty of care owed by CSCI to care home operators for home closure

Introduction

The Court of Appeal have recently published their decision in *Jain & Anr v Trent Strategic Health Authority*¹. In *Jain* the Court considered the operation of s. 30 of the Registered Homes Act 1984 which has now been repealed but substantially re-enacted by s.20 of the Care Standards Act 2000.

The Court held that the registration authority, which was the local PCT under the old regime but would now be the Commission for Social Care Inspection (CSCI), owed no duty of care to the Claimant care home owners when making an urgent application to the magistrate for an order cancelling the owner's registration under the Act.

Lord Justice Jacob described the application made by the registration authority to the magistrate as '*materially defective and in at least one respect highly misleading*' and Lord Justice Wilson described the statutory scheme as '*deficient*'. However, the majority of the Court were not persuaded that the registration authority were nevertheless liable to pay damages to the care home owners, the Jains.

The Facts in Jain

The claimant couple operated a single care home in Nottingham. In 1998, the registration authority made an

application to the local magistrate for an urgent cancellation of the couple's registration. No notice of the application was given to the Jains and it has been acknowledged by the Court that the application was misleading and defective. The magistrate approved the application and the couple's registration was cancelled. The Jains were successful in an application for judicial review of the decision, an earlier Court deciding that the behaviour of the registration authority was unreasonable, but this decision came too late to allow them to resuscitate their business. As a result they ran into significant financial difficulties and claimed damages for their loss.

The Argument for a Duty of Care

The question at the heart of this case is whether registration authorities owe a common law duty of care, breach of which could result in payment of damages, to care home operators when applying urgently to the magistrate for an order cancelling the operator's registration. The case put forward on the claimant's behalf was that the registration authority owes a duty both in the manner in which it carries out investigations and in the content of applications placed before the magistrate.

The Decision of the Court

The Court held that registration authorities are under no duty of care in respect of care home operators. They were critical of the authority in respect of the investigation,

¹ [2007] EWCA Civ 1186

application content and the decision to make an application without notice. However, notwithstanding the criticism the majority of the Court found that the legislative scheme was clearly developed to protect vulnerable adults. They felt that the regulator would be unable to operate effectively if it owed duties to both the vulnerable adults in care and care home operators due to the conflict of interest that may arise. Care home operators would obviously wish to protect their registration whilst the needs of the residents must be protected. A number of other policy considerations were also cited against the establishment of a duty of care including the public nature of the registration authority and a reluctance to award damages from public funds.

The Implications of the Decision

The decision rested on an interpretation of the statutory scheme under the Registered Homes Act 1984 rather than the almost identical provisions under the Care Standards Act 2000 but is good authority for the proposition that there is no duty of care owed by CSCI to care home operators. The Court of Appeal had their hands tied in this case because of the law but they nevertheless said that it *fails to satisfy the basic judicial instinct of seeing justice is done*.

Care home operators must ensure that they co-operate with the regulator as far as possible to ensure that a without notice application is not necessary and can but hope that magistrates and CSCI take notice of this case. This is an area of law in which further developments are likely, either by an appeal to the House of Lords in this or another case or a review of the current statutory regime, something which the Court recommended.

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Action to take

CSCI may apply to a magistrate for an emergency closure Order to cancel registration. To obtain such an Order, the regulator will need to produce evidence that unless the Order is made, there will be a serious risk to a person's life, health or wellbeing. That is not a test that is likely to be fulfilled easily.

In our experience, such applications invariably do not arise completely "out of the blue". A care service is unlikely suddenly to constitute a serious risk to the residents without issues having been raised by the inspectors during previous visits and reports. These should not be taken lightly and must be appropriately addressed by care home operators as soon as they are received. In many cases the key issue is to address the concerns raised immediately, rather than ignoring them, or by apparently ceasing to co-operate with CSCI. Obtaining expert advice at that stage is often critical. Solicitors with expertise in this specialist area of law can be useful advisors.

As a result of the new CSCI enforcement teams, it is to be anticipated that action against what are perceived to be under performing operators is likely to increase. Accordingly, where there is a genuine disagreement as to the appropriateness of adverse comments being made by the regulator, it is that much more important to address these matters as soon as the issue comes to light.