

Consumer law in acquiring elderly care businesses post-Brexit

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08 October 2019

Where are we now?

In November 2018, the UK's Competition Markets Authority (CMA) issued guidance around consumer law specifically concerning care home providers for elderly people over the age of 65. The guidance tries to steer care home operators away from contractual terms that are not compliant with the Consumer Rights Act 2015 (CRA).

Whilst the CRA came about as a vehicle to implement a European Union directive, any operators under the impression that Brexit will let them off the hook are gravely mistaken. On issuing its guidance the CMA committed to conducting a compliance review in November 2019 to assess the CRA compliance of operators and the progress made since the publication of its advice. The CRA is statute of England and Wales and will remain in force for the foreseeable future, Brexit or Remain, deal or no deal.

The CMA and other enforcers, such as Trading Standards Services and the Care Quality Commission, may take action against care homes that do not comply with consumer law. As recent as September 2019, our experience is that the significant majority of operators have not implemented adequate changes to achieve compliance, with many having cherry-picked the obligations that they are willing to express in their contracts with residents and others ignoring or seemingly being unaware of the guidance altogether.

Common pitfalls for which the CMA gives clear guidance on how to avoid are:

- Inadequate up-front information;
- Unwarranted administrative charges at the outset;
- Vague rights to amend contractual terms and charges;
- Charges not reflective of loss suffered by operator in the event of non-compliance by the resident;
- Insufficient notice provisions for termination;
- Fees payable post-death;
- Onerous charges during periods of temporary absence; and
- Excessive interest rates for delayed payment fees.

What does this mean?

In the buoyant market of mergers and acquisitions in the elderly care sector, this presents a risk for buyers that, until now, has never taken such a degree of prominence in their due diligence investigations. Failure to comply with consumer law can have significant financial implications as well as reputational damage, with the CMA already requiring repayment of certain fees by a number of high profile providers deemed in breach and having the power to take court action against the non-compliant.

At almost 150 pages, it would be unwise of us to attempt to summarise the entire CMA guidance here. That said, regular areas of non-compliance have become apparent over the past 12 months and it is important for a buyer to remedy these issues on completion. Contract terms which are found to be unfair will be unenforceable against a resident and any money paid as a result may be recoverable

and residents may also seek compensation so buyers would be wise to identify whether they need indemnity cover under the acquisition document as early in the process as possible.

Through assisting clients with their internal compliance audits, bringing existing contractual terms with residents and up-front materials into line with the CRA and expertly carrying out due diligence on acquisition targets, we have a wealth of experience in working with businesses to ensure that they, and any potential part of their group in the future, are CRA compliant and following the CMA guidance. Feel free to contact Clare Auty or Joel Nixon to discuss your needs.

Contact

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