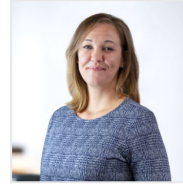




Updated Guidance for Providers: CMA Care Home Consumer Law Advice

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What with a couple of other matters drawing the interest of the healthcare sector in the past months, you would be forgiven for not putting your full attention on the CMA's update to its consumer law advice for care home providers. It is however vital reading for all in the sector.

On 13 August 2021, the CMA suspended former guidance document 'Consumer Law Advice for Care Home Providers' (published November 2018) whilst it considered the implications of the July 2021 High Court judgment in a case the CMA brought against Care UK.

The case (*Competition and Markets Authority v Care UK Health & Social Holdings Ltd and another [2021]*) concerned the charging of a large upfront administration fee by Care UK, with the CMA contending that this was a breach of consumer law.

The CMA's case

In December 2016 the CMA launched a market study into the provision of residential accommodation with nursing or personal care for older people. As part of its investigation the CMA sought information from a wide range of stakeholders and commissioned research from Ipsos MORI into the experiences of care home residents and their representatives regarding the process of choosing a care home. This resulted in the November 2017 *Care homes market study* report which identified (among other matters) concerns regarding the transparency of pricing information and the practice among certain care home providers of charging large upfront administration fees.

During the course of the market study the CMA opened a consumer protection case in relation to Care UK, and began a consultation in relation to the administration fee charged by Care UK to self-funded residents in its English care homes. As a result of this investigation, Care UK abolished the administration fee but denied that the administration fee was contrary to consumer protection legislation. Care UK also refused to refund the administration fee paid by residents from 1 October 2015, as sought by the CMA.

The CMA's case was that

1. The requirement to pay the administration fee was an unfair term within the meaning of Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations and section 62 of the Consumer Rights Act 2015, and
2. Care UK's practices in relation to the administration fee amounted to unfair commercial practices, in that they:
 1. were likely to deceive the average consumer in relation to the price or the manner in which the price was calculated, or
 2. omitted information which the average consumer needed to take an informed transactional decision, or
 3. was an aggressive commercial practice that was likely significantly to impair the average consumer's freedom of choice or conduct, by exploiting a position of power.

The decision

The High Court found that, contrary to the CMA's assertions, at the point of an individual's transactional decision to enter into a care home contract and pay the administration fee, they would have known precisely what fee was to be charged, not least because it was set out explicitly in the contract.

Further, the High Court noted that Care UK's own focus group research indicated that price was rarely considered to be a main reason why a particular care home was shortlisted for a visit or ultimately selected. Rather, the main factors that influenced a choice of home were the atmosphere and feel of the home, the location of the home, the condition of the building and rooms, how residents were treated by staff and the quality of care, the facilities available, independent quality measures (such as CQC inspection reports), and whether the home felt secure and clean. It was also noted that the Ipsos MORI report reached very similar conclusions.

The Court therefore concluded that Care UK's commercial practices did not cause or were unlikely to cause transactional decisions that would not otherwise have been taken.

The CMA's response

Following the High Court's ruling, the CMA issued a statement in August 2021, confirming that:

- the CMA decided not to apply to the Court of Appeal for permission to appeal the judgment;
- the CMA decided to discontinue a separate claim against Barchester because many of the key facts in the two cases were materially similar; and
- the CMA suspended its Consumer Law Advice for Care Home Providers and supporting documents while it considered the implications of the judgment.

The update

This brings us to the update. Last month, the CMA issued [amended guidance](#). The CMA made clear that it considered that the Court had 'adopted a narrow interpretation of the steps that amounted to a transactional decision... based on the particular facts of that case'. It further noted that this interpretation 'did not, in any event, form part of the reason for the judge's decision and is therefore not binding as precedent'.

Nevertheless, the updated guidance has moderated the previous approach to administration fees and also incorporates key aspects of its Consumer law advice on the charging of fees after death (*Fees charged after death and treatment of residents' possessions* at paragraphs 4.105 – 4.118).

With regards to administration fees, the amended guidance states that:

- Terms that may be unfair in certain circumstances include terms 'that require other upfront payments, unless there is a clear justification for it, such as where it is an advance payment of the resident's regular residential fees' (Paragraph 1.25).
- Whilst the CMA maintains that 'it is particularly important that information about fees and charges is provided on first contact', it does not advise that the failure to do so is not compliant with consumer legislation (Paragraph 3.12). However, paragraph 3.18 does include such information in the list of key information that they expect to be provided to prospective residents and their representatives on first contact (including on the provider's website).
- Payments likely to be considered infringements of consumer law include 'activities related to admissions which do not involve the provision of material and distinct services for the resident' (Paragraph 4.17).
- The CMA 'would also have concerns about a care home... gradually revealing the existence and amount [of a fee] during the course of the admissions process' (Paragraph 4.18).

- Providers are 'likely to mislead prospective residents and their representatives and infringe consumer law where' the provider represents or gives the impression that a payment:
 - Funds specific services provided to the resident as part of the admissions or moving in process, when no specific service is in fact provided at all in return for the payment; or where the provider describes the fee as covering the costs of the individual's admission, such as actual disbursements, when in fact the fee is calculated by reference to estimated costs that apply more generally across all residents or homes (Paragraph 4.19 (b)).
 - Covers or is related in any way to costs, expenditure or disbursements incurred (or to be incurred) by the provider, where there are no clearly identifiable costs or services which are provided to residents specifically in return for the payment (Paragraph 4.19 (c)).

The CMA guidance therefore maintains that it would have significant concerns where providers do not make the amount of a fee clear to prospective residents and their representatives and/ or where the provider does not give them '**clear, accurate, unambiguous and prominent upfront information to confidently work out how much the fee will be**'. However, it does not go so far as to say that failure to do so will definitely be in breach of consumer law.

However, this is not the final word that CMA will have to say on the matter. The CMA has confirmed that it will take a decision on the next steps for its review of compliance with the Consumer Law Advice for Care Home Providers in mid-2022. Hopefully this will clear up the remaining ambiguities in relation to CMA's expectations of providers. Until then, the current amended guidance remains that which providers should follow, and we look forward to their further advice later this year.

If you are a care provider and would like advice on your contracts, fee arrangements or any other matters affecting the running of your service, our specialist teams of care home solicitors are available to assist you.

If you'd to get in touch to discuss your matter further then please feel free to contact our care home lawyers on 01202 786135 or email online.enquires@la-law.com.