

Guidance on unfair terms in care home contracts

A guide for professional advisers

October 2003

This is the first issue of the Office of Fair Trading's guide to potentially unfair terms in agreements made by care homes with older people.

A first draft guide was published as an annexe to our 1998 report, *Older People as Consumers in Care Homes*.

This guide is based on a review of a sample of agreements and our experience of enforcing the Unfair Terms in Consumer Contracts Regulations 1999.

Contacting the OFT

If you think that any of the standard terms in a consumer contract are unfair you may contact the Office of Fair Trading (the OFT) at the address below. If you have any comments on this guidance, please write to:

Contract Regulation Unit, OFT, Fleetbank House,
2-6 Salisbury Sq, London EC4Y 8JX

We are happy to deal with enquiries by email cru@oft.gov.uk

Unfair contract terms bulletins

Copies of bulletins, the explanatory OFT briefing note *Unfair Standard Terms* (ref: OFT143), and other OFT publications are available, free of charge, from:

EC Logistics, Swallowfield Way, Hayes, Middlesex UB3 1DQ
tel 0870 60 60 321 fax 0870 60 70 321 email oft@eclogistics.co.uk

The OFT is moving to electronic distribution, and back issues of earlier bulletins will not always be available. If you have received a paper copy of bulletins but have electronic access, you are invited to send us your email address for future issues.

The Regulations

Copies of the *Unfair Terms in Consumer Contracts Regulations 1999* (ref: SI 1999/2083) can be purchased, current price £2.00, from Stationery Office bookshops, or by post from:

The Stationery Office Publications Centre, PO Box 29 Norwich NR3 1GN

Copies are also available on the internet at:

www.hmso.gov.uk/si/si1999/19992083.htm

Copies of the amendments to the Regulations, the *Unfair Terms in Consumer Contracts (Amendment) Regulations 2001* (ref: SI 2001/1186) are also available from the Stationery Office as above, current price £1.50, or on the internet at:

www.hmso.gov.uk/si/si2001/20011186.htm

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1 INTRODUCTION

Aim of this guide

- 1.1 The Office of Fair Trading (the OFT) considers certain standard contract terms used in care home agreements to be potentially unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). The final decision whether a term is unfair rests with the courts, but care homes can greatly reduce the risk of a legal challenge by reviewing their agreements for unfairness. This guide sets out the views we take and explains the basis on which enforcement action may be taken. It is intended for our partners in consumer law enforcement, particularly trading standards officers and for other professional advisers.

Scope of this guide

- 1.2 This guide is confined to the standard contract terms used in care home agreements with self funding consumers (including those who are topping up local authority funding from their own funds). It does not apply to agreements between care homes and other providers, such as local authorities, because the consumer is not a legal party to the contract. But, where the terms of these agreements are intended to regulate the residents' rights and obligations, we hope that contracts made between local authorities and care homes will meet the same standards of fairness as those regulated by the Regulations and to which this guidance applies. If one contract is used both for partly and wholly local authority funded users and contains terms that are binding on the residents, it will have to conform with the Regulations since the Regulations apply to some of the transactions for which it will be used.
- 1.3 Our advice is based on a sample of existing contracts and may not identify all potentially unfair terms. Comprehensive advice on unfairness in consumer contracts can be found in our *Unfair Contract Terms Guidance* (OFT311), and briefing note, *Unfair Standard Terms* (OFT143). Where appropriate in this guidance, references to 'consumers' and 'residents' include the representatives or persons acting on the individual resident's behalf where they, rather than the resident, are party to the contract.

Content of this guide

- 1.4 The guide is divided into the following sections:
- Chapter 1 is this introduction.
 - Chapter 2 explains the test of unfairness set out in the Regulations.
 - Chapter 3 sets out our main areas of concern.
 - Chapter 4 discusses the types of unfair term listed in Schedule 2 to the Regulations.

- Chapter 5 covers additional categories of unfair terms not listed in Schedule 2.
- Annexe A contains some examples of unfair and revised terms.
- Annexe B is an index.

Where appropriate, the structure of the guide follows that of Schedule 2 to the Regulations, although certain groups of terms are omitted.

The Regulations

- 1.5 The Regulations implement the EU Directive on unfair terms in consumer contracts. They came into force on 1 July 1995 and were re-enacted in 1999 (coming into force on 1 October 1999). Please note that this guide is not a substitute for the Regulations and should be read alongside them.
- 1.6 National minimum standards for care homes for older people (and adults aged 18 to 65) were introduced as part of the Government reforms to modernise the regulatory system for care services and independent healthcare under the Care Standards Act 2000 in England and Wales, and the Regulation of Care Act 2001 in Scotland. Standards are also being taken forward under The Health and Personal Social Services (Quality Improvement and Regulations) (Northern Ireland) Order 2003. All care homes in England, Wales and Scotland are now regulated in accordance with their own national standards and each care home must provide prescribed information about the home, and supply an introductory pack or service user's guide to the home to each resident and prospective resident. See
- for England www.carestandards.org.uk/
 - for Scotland www.carecommission.com/
 - for Wales www.wales.gov.uk/subisocialpolicycarestandards/
 - for Northern Ireland www.nio.gov.uk/

Advice to consumers

- 1.7 Care homes must have an appropriate complaints procedure that can be used by residents or their representatives. Residents should be given a copy of the complaints procedure, and it should be made available to their representatives as well. Residents or their representatives may also complain to the relevant regulatory authority such as the National Care Standards Commission in England. The care home should be able to provide details of an independent and confidential advocacy service.

Enforcement

- 1.8 The OFT has a duty to consider all complaints sent to us about unfair terms in consumer contracts. Since October 1999 enforcement has been shared with other Qualifying Bodies, including UK statutory regulatory bodies, all local authorities providing a trading standards service and the Consumers' Association.

- 1.9 If the OFT considers a term to be unfair we have the power to take action on behalf of consumers in general to stop its continued use, if necessary by seeking a court injunction (or an interdict in Scotland). The OFT cannot seek redress for individuals. The Regulations allow consumers to make their own legal challenge, independent of any action by the OFT or other Qualifying Bodies. A term found by a court to be unfair is not binding on consumers. Consumers considering taking such action are strongly urged to seek legal advice first.
- 1.10 Part 8 of the Enterprise Act 2002 which came into force on 20 June 2003 gives the OFT and other enforcers increased injunctive powers, through enforcement orders, against traders who breach consumer legislation. The Enterprise Act replaces the Stop Now Orders (EC Directive) Regulations 2001. Like the legislation it replaces, the Enterprise Act gives the OFT and other enforcers powers to accept undertakings from, or seek a court order against, businesses that breach UK laws giving effect to certain EC Directives, including the Unfair Terms in Consumer Contracts Directive, where the collective interests of consumers are harmed. The Act has formalised the OFT's coordinating role to ensure that action is taken by the most appropriate enforcement body in each case. More information on the Enterprise Act can be found on the OFT's website, www.offt.gov.uk
- 1.11 Social and health care services in the UK are regulated by three bodies. In England regulation is provided by the National Care Standards Commission, an independent non-governmental public body. In Scotland it is the Scottish Commission for the Regulation of Care, and in Wales it is the Care Standards Inspectorate for Wales. In Northern Ireland responsibility lies with the Health and Social Services Board Regulation Inspection Units.
- 1.12 There are national¹ minimum standards published for care homes including those that provide accommodation for older people. One of these is to give prospective service users the information they need to make an informed choice about where to live. The care home is required to give prospective residents a service user's guide or introductory pack containing details of the care services and facilities, the accommodation and services provided, and including the amount and method of payment of fees. This is written in plain English and made available in a language and format suitable for the prospective resident. The care home is also required to provide the resident with a standard form contract for the provision of services and facilities. The English/Welsh standard requires that the terms and conditions include:
- details of the room to be occupied

¹ Currently under consideration in Northern Ireland

- information about overall care and services (including food) covered by the fee
- fees payable and by whom (service user, local or health authority, relative or another)
- details of additional services (including food and equipment) to be paid for over and above those included in the fees
- rights and obligations of the service user and registered provider (care home) and who is liable if there is a breach of contract
- terms and conditions of occupancy, including period of notice e.g. short/long term intermediate care/respice.

The Scottish standard is wider in scope but covers similar ground.

2 TEST OF UNFAIRNESS

- 2.1 A standard term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer' – Regulation 5(1). A standard contract term is one that has **not** been negotiated with the consumer.
- 2.2 The requirement of good faith includes 'fair and open dealing'. This does not simply mean that a term should not be used in a deceitful way. Suppliers are expected to respect consumers' legitimate interests. The test of unfairness takes note of how a term could be used. Terms that give the supplier powers or protection that **could** be used to the detriment of the consumer, whether or not harm is caused, may cause imbalance and so be open to challenge. Arguing that the term is not used unfairly in practice does not produce immunity under the Regulations. Such claims usually indicate that a term needs to be redrafted to reflect the more limited use of the term.
- 2.3 When assessing unfairness, we consider what a consumer is likely to understand by the wording of a clause. Those taking up care home contracts do not normally seek legal advice, so the language used in contracts should be plain and intelligible to ordinary people (see page 31). The consumer should have the chance to read all the terms before agreeing to the contract, and it should be in a format suitable for the consumer, which includes the use of suitable print.
- 2.4 The test of unfairness applies to most standard terms (i.e. terms that have not been individually negotiated) in contracts between businesses and consumers. If a standard term is found to be unfair, it is not enforceable. An exemption applies to terms that set the price or describe the main subject matter of the contract (usually known as 'core terms'), provided they are in plain, intelligible language. Terms in a care home agreement that state the fees and charging period, the agreed length of stay and the facilities and services provided by the care home are likely to be considered 'core terms'.
- 2.5 We share power to enforce the Regulations with other Qualifying Bodies. These bodies may form their own views on what is fair and unfair and take action accordingly. And, of course, it is ultimately for a court to decide whether a term is unfair.

3 MAIN AREAS OF CONCERN

Clarity

Financial liabilities

- 3.1 Our main concern with care home agreements is the lack of clarity about the resident's ongoing financial liabilities. For example, indemnity and guarantee clauses that set a resident's financial liabilities are key components of most care home contracts. These clauses can lead to unexpectedly high bills when the contract is ended, as on the death of the resident. However, we often find that guarantee and indemnity clauses are not drafted in plain, intelligible language, as required by Regulation 7, and are difficult to read because the print is too small. We object to guarantee and indemnity clauses that are ambiguous and consider that care home contracts should be absolutely clear about the fees payable and who is responsible for them, and, where appropriate, the arrangements needed if private funding runs out.

Legalistic terms

- 3.2 Care home contracts are often unnecessarily long and legalistic. They often require both the resident and a guarantor to be jointly and severally liable for the charges. We object to the use of legal and other jargon such as 'joint and several liability' where there is no further explanation, since residents and their representatives may well not understand this. Contracts that have been drawn up without professional advice can be confusing, particularly where they have been based on an inappropriate model such as an assured shorthold tenancy agreement. Terms that are complex and difficult to understand do not meet the plain and intelligible language requirements of the Regulations and the courts will construe a written term in favour of the consumer where there is doubt about its meaning (Regulation 7).

'Core terms'

- 3.3 We consider the charging period (i.e. whether fees are charged on a daily, weekly or monthly basis) to be a 'core term' under the Regulations. As such, it is not subject to a test for fairness (see Chapter 2). But we expect absolute clarity about:

- the date from when the fees are due
- the period charged for and the basis of this calculation.

Provided the core terms about the price of the agreement are in plain and intelligible language, they are exempt from the test of unfairness.

Capacity

- 3.4 We would object to any term that could have the effect of causing particular detriment to a person deteriorating mentally. Residents may lack capacity to contract or may later become mentally incapable of understanding the contract. Where the resident's representatives are contracting on the resident's behalf, it should be clear whether they are contracting as an appointee/attorney or receiver or are taking on liabilities directly themselves. As an appointee/attorney or receiver they use only the resident's money over which they have authority and do not become personally liable on contracts signed for a person lacking capacity. Contracts should not require that the representative has an Enduring Power of Attorney as this may not always be in the resident's best interests and representatives should seek advice on this.

Exclusions of liability

- 3.5 A care home is a supplier of a service and should not exclude liability for failure to carry out that service with reasonable care and skill. We have concerns about care homes using terms excluding their liability for failures relating to the care of the resident or the care of the resident's possessions or clothing. However we do not object to the use of terms excluding liability where the care home is not in default of its obligations.

4 ANALYSIS OF PRINCIPAL GROUPS OF UNFAIR TERMS

Exclusion and limitation clauses in general

- 4.1 Terms that seek to exclude or limit liability, (also known as disclaimers or exemption clauses), are common and take many different forms. The following observations apply to all such terms.
- 4.2 Rights and duties under a contract are not appropriately balanced unless both parties are equally bound by their obligations under the contract and the general law. This includes the national statutory care requirements. A term may be unfair if it hinders residents from seeking redress from care homes that have not complied with their obligations.

Exclusion of liability for implied terms

- 4.3 A disclaimer will often exclude or limit liability for breach of 'implied' terms. These are terms that the law **presumes** are included in a contract in the absence of express agreement on the issues. Implied terms ensure that agreements reflect what the law considers a reasonable person would have agreed to. Excluding liability for these can have the effect of allowing one party to act unreasonably or negligently. Any such disclaimer in a consumer contract is likely to be considered unfair.

Effect of other legislation affecting the validity of terms

- 4.4 Many disclaimers are deprived of legal validity by other legislation. Exclusions or restrictions of liability for death or personal injury caused by negligence are legally ineffective. Even though using a void and unenforceable term is pointless, such terms are potentially misleading and open to challenge on this basis.
- 4.5 Consumers have additional protection against terms that, though not prevented from use under common law or statute, may still be unfair. Examples include disclaimers that could be used to defeat legitimate claims as well as unjustified demands, or that have the same purpose as an unfair exemption clause.

Group 1: Excluding or restricting liability for death or injury

- 4.6 Schedule 2, paragraph 1(a), states that terms may be unfair if they have the object or effect of:
- excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier

Exclusion of liability for care

- 4.7 A contract term cannot legally have the effect of excluding a supplier's liability for death or injury caused by its negligence. Such terms are always void under Section 2 of the Unfair Contract Terms Act 1977. Although the Act does not prohibit their use, we would challenge use of such a misleading term as unfair. Care homes are now statutorily required to have regard to the health and welfare of their residents and also to notify death, illness and other events. We would also challenge any attempt to exclude liability for death or injury caused by an act or omission that constitutes a breach of statutory or common law duty. Therefore terms that exclude liability for death or injury are not exempt from challenge simply by the care home accepting liability for loss or damage caused by negligence. Terms should set out clearly the care home's liability for breach of duty, whether this arises by statute or in any other way.
- 4.8 The care home is under a duty to ensure the safe administration of medicines. We object to terms stating that the administration of medicines is at the resident's risk. These could be unfairly relied upon to exclude the care home's liability for its own negligence. The care home is required to make arrangements for residents to be registered with a general practitioner of their choice and, so far as practicable, enable residents to make decisions relating to their health and welfare. Where a resident lacks capacity, only a healthcare professional can make a decision about medical treatment but relatives should be consulted as a matter of good practice. To avoid potential unfairness, any term seeking to exclude or limit the care home's liability for following medical advice should recognise that the care home is required to act in accordance with the relevant national statutory requirements governing the health and safety of care home users.

Group 2: Exclusion or restricting liability for breaches of contract

4.9 Schedule 2, paragraph 1(b), states that terms may be unfair if they have the object or effect of:

inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him

4.10 Terms that give the care home discretion not to carry out its side of the contract, or any important obligation under it, without liability, have clear potential to disadvantage residents and should not be used. The terms that should not be used include those that allow the care home not to carry out the contract altogether and those that permit it to suspend the supply of any significant benefit to the resident.

4.11 Suppliers who provide services to consumers accept certain contractual obligations as a matter of law, such as carrying out services to a reasonable standard. For a contract to be fully and equally binding on both supplier and consumer, each party should be entitled to full compensation if the other fails to honour its obligation. We object equally to terms that limit liability and to those that exclude liability altogether. Disclaimers that deny or limit liability for breach of contract are likely to be considered unfair, particularly if they allow care homes to carry out the service without reasonable care and skill. Care homes cannot use disclaimers to avoid their statutory liability to residents.

Resident's property

4.12 Care homes are required to provide secure facilities where the residents' money and valuables may be kept for safe keeping. Care homes should not exclude all liability for damage or theft of the resident's property since this may arise from their own default. We take the view that residents should have some redress, even where they are partly at fault, for loss or damage caused by the failure of the care home to take elementary security precautions. Terms that place liability on the resident - using words such as 'at your risk' and 'management cannot accept any responsibility' - are not acceptable as they have the effect of allowing the care home to deny liability for any fault on its part. We expect the care home to take reasonable care of residents' possessions, particularly while they are absent from the home, e.g. during a period of hospitalisation.

4.13 We think it is unfair for a care home to accept no responsibility for personal property left on the premises at the end of an agreement, except, for example, where the property has clearly been abandoned. Where an agreement is terminated by a resident's death, the relatives should be given time to clear the room, if time is needed. In our view, the care home's liability for due care of the resident's property should continue until it is clear that items have been abandoned. We would not object to a term specifying a reasonable time limit for the collection of personal property. (See also Group 6 and paragraph 5.6 below about goods left behind).

Right to set-off

4.14 Terms that limit or remove a resident's right to redress are unfair. A resident may legitimately exercise a right of set-off to obtain compensation if the care home has been in serious default. Where a consumer has an arguable claim under a contract against a supplier, the law generally allows the amount of that claim to be deducted (or set-off) from anything the consumer has to pay. Where a sponsor has confirmed that the resident's fees will be met, this guarantee will apply only to fees that are lawfully due and these may be subject to a deduction based on a justified claim to set-off.

'No refund' terms

4.15 We are likely to consider 'no refund' terms unfair because they may deny the resident the right to a refund if the care home is in breach of contract. If residents are justified in cancelling a contract, we think they should be entitled to a pro-rata refund. (See also Group 4 below).

Group 4: Cancellation by the resident – effect on prepayments

4.16 Schedule 2, paragraph 1(d), states that terms may be unfair if they have the object or effect of:

permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract

Retainers and payments in advance

4.17 Terms will generally be considered unfair if they require a resident to pay for something they have not received. Care homes cannot exclude the resident's basic rights under contract law and should not seek payment for services not yet provided when the care home itself cancels the contract. If a resident cancels the contract, the care home should not seek to retain any prepayments for services not yet supplied, beyond what is needed to cover losses or costs directly suffered due to cancellation and which the care home cannot reasonably reduce by supplying the services to someone else. If the care home cancels, residents are entitled to a refund of prepayments for services that have not been provided or that have been terminated without significant benefit to the resident. In some circumstances residents may justifiably end the contract and be entitled to a refund.

4.18 Residents, or those acting on their behalf, should have the basic right to cancel a contract if the care home is in serious default. Where the resident cancels with justification, i.e. because the care home is at serious fault and the resident has not received anything of value or has suffered loss as a result of the care home's shortcomings, the resident may be entitled to a full refund of prepayments and also to compensation. We would object to terms that:

- penalise resident cancellations in all circumstances
- allow the care home to cancel the contract and retain the deposit in all circumstances.

Trial periods

- 4.19 Trial periods of residence are a standard feature of some care home agreements. These agreements can usually be ended by either side at very short notice, e.g. 24 hours, without reasons. We consider that residents should be entitled to a refund for any prepayments made for the continued use of the room if they choose or are required to leave. Preferably, care homes should have a policy for refunds and this should be stated prominently in the agreement.

Group 5: Financial penalties

4.20 Schedule 2, paragraph 1(e), states that terms may be unfair if they have the object or effect of:

requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation

4.21 Residents should not be required to pay more in compensation for defaulting on a contract than is needed to cover the loss caused to the care home. A term imposing excessive sanctions would normally be void as a penalty under common law. Penalty terms can also be unfair if they mislead the resident into thinking the care home is entitled to more compensation than is really the case, or if they give the care home discretion to impose a penalty. In addition a care home is expected to act reasonably when dealing with a resident who no longer has legal capacity.

4.22 Where a prospective resident cancels an agreement and is in breach of contract, the care home is legally required to take reasonable steps to reduce its loss. Terms that require payment of a specific fee such as a week's charges where a prospective resident cancels, would be open to challenge if this exceeds the loss incurred by the care home. We would not object to a care home setting a fee for holding a room, and retaining this fee if the prospective resident opts not to take it. However, in our view, the agreement should be clear about the care home's duty to reduce its loss and any charge made be in line with this. Where a reservation fee or retainer is required, the contract should state clearly what the care home will provide for it.

Interest charges

4.23 A requirement to pay unreasonable interest on fee arrears, for instance at a rate excessively above the clearing banks' base rates, is likely to be considered unfair. Interest rates should not be linked vaguely to inflation, without making clear which measure of inflation is being used, nor should they be linked to unspecified overdraft charges. We expect an annual, not monthly, rate of interest to be quoted.

Group 6: Unequal cancellation rights

4.24 Schedule 2, paragraph 1(f), states that terms may be unfair if they have the object or effect of:

authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract

4.25 The care home is required to give reasonable notice of cancellation to the resident (and to the person who appears to be the resident's next of kin) unless it is impracticable to do so. Where a care home reserves the right to cancel an agreement on a shorter than normal notice period, for example if the resident is in serious breach of the agreement, the resident should have equal rights to cancel where the care home is in default. We would regard any term that gave the care home greater rights to cancel than those given to the resident as unfair.

Death

4.26 Terms governing the payment of fees on the death of the resident will normally be regarded as 'core terms' which are exempt from the fairness test (see Chapter 2). However such terms should be clear and prominent so that all parties to the contract are fully aware of their obligations. The agreement should state the period for which fees remain due after the death of the resident. This can vary from one care home to another and may influence the consumer's choice of home. A 'notice' period may not be unfair if the room is unoccupied for that time, but the care home is expected to re-let the room as quickly as possible and provide a refund. We would generally object to a notice period of longer than four weeks since notice cannot generally be given on behalf of a resident. Since fees are frequently paid monthly in advance, we would expect the care home's policy on refunds in the event of death to be clearly stated in the agreement.

4.27 Where the care home does not require the continued payment of fees, in line with the notice period, following the death of a resident, we think it is reasonable if care homes set a time limit and charge for a brief period after a resident's death during which personal effects can be cleared from the room, or charge for storing the resident's belongings for a reasonable fee. These fees should be clearly stated in the agreement.

Group 7: Supplier's right to cancel without notice

4.28 Schedule 2, paragraph 1(g), states that terms may be unfair if they have the object or effect of:

enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so

Notice

4.29 These are generally contracts of indeterminate duration and as such the notice period for withdrawing from the agreement should be the same for both parties and clearly stated. We would challenge a contract where there is an imbalance in favour of the care home. The care home is required to give the resident a reasonable period of notice and also inform the resident's next of kin. We expect notice periods to relate either to the charging period or, if this is short, to the resident's needs. The agreement should be clear about how the resident should give notice. Notice periods that expire on the usual invoice date, or on the last day of the calendar month, may have the effect of lengthening the notice unfairly. Unfair imbalance can also occur where the care home seeks early termination in exceptional circumstances without giving residents the same right.

4.30 The grounds on which an agreement can be ended, as well as the arrangement for refunding fees, should be clearly and prominently stated in the contract. Where there is a change in the resident's needs, which the care home cannot meet, the contract should be clear about which party is to give notice. Acceptable reasons for termination would include:

- a voluntary decision by the resident
- the need for residents to move to accommodation that can better meet their needs
- the need for the resident to go into hospital or other care at short notice
- the need for the resident to move to extra care or supported accommodation
- death of the resident
- a breach of contract or non-payment of fees.

4.31 If the care home decides to terminate the contract for reasons other than a serious breach by the resident, it should give enough notice for the resident to find alternative accommodation. We would object to a term

that provides for termination if **any** term of the contract is breached. We would expect this to apply only to a serious breach of contract.

- 4.32 The process for ending the agreement should be clear and should allow for shorter notice periods in extreme cases. Care homes are not obliged to provide services indefinitely, and there may be exceptional reasons for termination outside their control, but where possible they should include within the agreement the reasons they would rely on for their ending it.

Behaviour causing detriment

- 4.33 Some contracts include a 'detrimental behaviour' term that allows the care home to terminate residents' contracts if their conduct is unacceptable. However such a term must be specifically limited in scope to being reasonably exercised, taking account of the type of care the care home has promised to provide, and after efforts have been made to manage the resident's care. A term allowing the care home to be arbitrary in its decision would be unfair. The need for residents to relocate to more appropriate accommodation should be discussed with them and their relatives. Residents may be asked to leave at shorter than usual notice for unacceptable conduct that the care home does not have the expertise to manage, but we consider that outstanding pre-paid fees should be refundable in such circumstances. Where the care home has sustained loss as a result of another material breach of contract by the resident, it would be entitled to cover the reasonable costs of remedying that breach. We would challenge an 'exceptional notice' term if the agreement also states that fees are non-returnable or non-refundable in all circumstances. (Please see Group 4 above.)

Closure of care home

- 4.34 The contract will end if the care home closes or its registration is withdrawn. Residents should be given reasonable notice of this. If the closure is the direct fault of the care home where it has been in gross breach of duty, residents may be entitled to some kind of compensation. We would consider any term denying this right in all circumstances to be unfair.

Group 9: Binding consumers to hidden terms

- 4.35 Schedule 2, paragraph 1(i), states that terms may be unfair if they have the object or effect of:
- irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract
- 4.36 Consumers should always have an opportunity to read and understand contracts before agreeing to them. Terms that bind consumers to provisions they have not seen are liable to be considered unfair. Care homes should ensure their contracts are printed legibly and include all the terms of the agreement. We would challenge any standard terms so presented that the resident is unable to understand them.
- 4.37 The care home is required to produce a service user's guide or information pack, which may include a brochure (or Statement of Purpose), and this should be made available in advance. Any changes to these should be brought to the consumer's attention before the agreement is entered into. We are likely to challenge terms that provide for the agreement to supersede any statements in guides, information packs or the brochure. These could allow the care home to deny liability for material discrepancies, and effectively to mislead the consumer.

Group 10: Supplier's right to vary terms generally

4.38 Schedule 2, paragraph 1(j), states that terms may be unfair if they have the object or effect of:

enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract

4.39 A contract cannot be considered balanced unless both parties are bound by their agreed obligations. We would therefore closely scrutinise any term enabling a care home to vary the terms of an agreed contract - even with a notice period - without the resident's consent. Terms are likely to be unfair if they allow the care home to make an arbitrary or unilateral decision without a valid reason specified in the contract, about the terms of the agreement. It is not unreasonable for a care home to specify the circumstances under which it can no longer provide care, or may vary the agreement to meet the changing needs of residents or improve the service. Whatever the reason for varying the contract, we would consider it unfair for a term to give a shorter notice period for variations than that required to end the agreement, as it would have the object or effect of binding residents to changes before the contract could be terminated.

4.40 Terms that could be used to force the resident to pay unrestricted increased costs or penalties, or accept unreasonable new requirements or reduced benefits, are likely to be considered unfair, even if they were not intended for that purpose. A care home may seek to use such terms to make only minor modifications to the contract or where it is subject to regulatory change. If so, the wording should make this clear.

Power to make rules

4.41 A care home should be allowed to make reasonable changes to rules for the benefit of residents and in consultation with them. However, we would object to any term that gives the care home broad discretion to impose unreasonable new restrictions or burdens on the residents without their consent.

Group 11: Right to change what is supplied

4.42 Schedule 2, paragraph 1(k), states that terms may be unfair if they have the object or effect of:

enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided

4.43 A term allowing the care home to change what it provides to the resident's disadvantage, and without a good reason set out in the contract, is unfair. A right to vary contract terms can be fair in some circumstances if the resident is given a right to cancel the contract, and has been notified as early as possible of the care home's intention. But we think that the variation should not take effect before the resident has been able to cancel the agreement without penalty. In any event, a right to cancel will generally be of limited benefit to residents who may have a substantial attachment to their care home and is also unlikely to achieve fairness if residents suffer loss or substantial inconvenience as a result of cancelling and being forced to move. This is discussed further in the following section.

Facilities and services

4.44 Terms describing the facilities and services provided by the care home are considered to be 'core terms' and, provided they are written in plain, intelligible language, are not subject to the test for fairness. A statement of the accommodation and services to be provided is required in the introductory pack/service user's guide and this should be reflected in the contract. But a term allowing a variation in what is supplied is not a 'core term' and would be unfair if it could be used to deprive residents of their main benefits under the contract, even if it was intended to permit only minor changes. It would also be potentially unfair if it left the care home free to make a variation at its discretion. The care home is required to arrange consultation with the residents about the operation of the care home.

4.45 Contracts should be specific about the circumstances in which the accommodation and services provided for residents may change and show that there are valid reasons for this. This is the resident's home and changes should not be made unless absolutely necessary. Any significant change in what is provided should be with the resident's agreement and should be subject to a notice period enabling the resident to leave without penalty if the change is not acceptable.

Visiting

- 4.46 The care home is required to provide details of the arrangement for contact between residents and their relatives, friends and representatives and is expected to be open to visitors at any time. We would challenge terms that allow the care home complete discretion to impose or vary visiting hours during the day.

Group 12: Price variation clauses

4.47 Schedule 2, paragraph 1(l), states that terms may be unfair if they have the object or effect of:

providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded

Review of charges and right to increase prices

4.48 Terms allowing a care home to make unrestricted increases in the costs of residence are likely to be unfair, especially if the resident has no choice but to pay. In theory a right to leave a contract without penalty in response to a price increase should be sufficient to protect a consumer from an objectionable price variation clause. But we recognise that this may be of little practical value in care home contracts if residents are not inclined – or indeed able - to shop around for a better deal.

4.49 Fee review terms are a standard part of a care home agreement. We do not object to these terms in principle, but we would be concerned if they allowed the care home to increase fees arbitrarily i.e. without reference to clear and objective criteria. We do not object to terms that provide for increases following a review of the resident's care needs. But a balanced term provides for a reduction where the review shows that the resident's needs have reduced. In our view, general fee reviews that occur more than once a year should have very strong justification, such as a change in legislation that demonstrably increases costs. We think a right to increase prices within the twelve month period to cover general costs may well be unfair. Care homes are much better able than residents to anticipate and control changes in their costs. Such terms are also open to abuse, since residents will be unable to determine if the increases are reasonable and match **net** cost increases.

4.50 Where the amount and timing of any price increases are specified in the agreement, such variation terms effectively form part of the agreed price and, provided they are prominent, clear, and drawn to the resident's attention, are likely to be seen as 'core terms' (see Chapter 2).

4.51 Where the price variation terms are not core terms we would not object to them if they:

- link increases to a relevant published price index outside the care home's control, such as the RPI

- assess fees according to objective verifiable criteria which give a valid reason for any increase
- provide an adequate notice period which at least corresponds to the notice required for termination of the contract.

4.52 Vague or general statements on the timing or reasons for a fee review will not be acceptable, nor will terms allowing the care home to review fees at its sole discretion. There would be no objection to a term providing for a change in fees due to a demonstrable change in regulatory costs.

Group 13: Supplier's right of final decision

4.53 Schedule 2, paragraph 1(m), states that terms may be unfair if they have the object or effect of:

giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract

4.54 Under the normal rules of law a resident has a right to refer disputes about the meaning or application of a term to the courts. This is an important right and we would challenge terms that allow the care home to decide whether it has performed an obligation properly, or to decide the meaning of a term. Terms that allow the care home to make an arbitrary or unilateral decision about the meaning of the agreement are unfair, even if notice is given.

Group 14: Entire agreement and formality clauses

4.55 Schedule 2, paragraph 1(n), states that terms may be unfair if they have the object or effect of:

limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality

Complaints procedures

4.56 The care home is required to have a complaints procedure appropriate to the residents' needs. We would object to a term requiring that all complaints be put in writing. We consider that residents and their representatives should first have the option of complaining in person.

Notice

4.57 Some contracts require residents to give written notice of temporary absence, but this may prove difficult in cases of sudden illness. We think such a term may be unfair unless it applies only to planned absences.

Group 15: Binding consumers where a supplier defaults

4.58 Schedule 2, paragraph 1(o), states that terms may be unfair if they have the object or effect of:

obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his

4.59 A term that requires the resident to continue paying, while allowing the care home to opt out of its obligations, has clear potential for unfairness. Such clauses are sometimes intended to deal with circumstances beyond the control of the care home, such as damage due to a fire or flooding that prevents the care home from providing its services. However it would be unfair for a care home to require residents to continue paying fees while the services are unavailable for any significant time. We think it would be fairer for terms to allow the residents to terminate the agreement without penalty in the event of any serious disruption of services. In less serious cases, a proportionate fees rebate might be more appropriate.

Group 16: Supplier's right to assign without consent

4.60 Schedule 2, paragraph 1(p), states that terms may be unfair if they have the object or effect of:

giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement

4.61 If the care home sells all or part of its business and residents find themselves dealing with someone else, the residents' legal position should be unaffected by the change. Residents should be fully consulted when contracts are transferred to ensure that they understand the implications. We would regard any term that prejudices the residents' rights in such circumstances as unfair. The best way to protect a resident's interests is through consultation, and by ensuring a contract that may prejudice the resident's interests is only assigned to someone else with the resident's consent.

5 OTHER TYPES OF UNFAIR TERM

5.1 We have found a range of other terms in use in the UK that could be unfair in ways that are similar to those in Schedule 2, but which operate differently. We discuss the most commonly used terms below.

Group 18 (a): Allowing the care home to impose unfair financial burdens

Absences

5.2 Terms in care home agreements may refer to a period of absence, such as for planned holidays or hospitalisation. We consider that any terms requiring full fees to be paid during all or part of the resident's absence should be dependent on the resident's right to retain a room and for it not to be used by temporary residents in the meantime. Some contracts allow rooms to be re-let on a short term basis with a resident's permission. In these circumstances, we consider a refund or abatement of fees is appropriate.

Additional charges

5.3 Terms allowing a care home to make additional charges for personal services, such as laundry, are considered core terms. However, care homes should make it absolutely clear what services will be subject to an additional charge. We would object to any terms that give the care home the general right to decide this later. Terms allowing a care home to charge for 'extras' or for unspecified services outside the care home are imprecise and may be unfair. Details of these charges should be provided, particularly where sponsors are responsible for paying additional charges.

Group 18 (b): Transferring inappropriate risks to consumers

5.4 We think it is unreasonable to require a sponsor to guarantee the resident's performance of the contract, although we would not object to a term requiring payment in the event of the resident's default. Terms that require the sponsor to agree to a 'waiver of rights as surety' are potentially unfair as the sponsor may not be in a position to assess the extent of the liability. We consider that any agreement requiring a sponsor to sign a guarantee should clearly state:

- who is liable to pay fees
- in what circumstances these fees are payable
- the situations in which the guarantor has liability under the agreement.

5.5 We object to clauses that state that the care home must be 'indemnified' for costs that could arise through no fault of the resident or sponsor. These costs could arise when the care home itself has been at fault. Such

legal jargon implies a threat to pass on legal or other expenses without regard to reasonableness. Similarly residents and their sponsors are unlikely to understand the meaning of 'joint and several liability' unless this is clearly explained in the agreement.

Group 18 (c): Unfair enforcement powers

- 5.6 We would challenge terms allowing the care home to hold a resident's possessions as security where fees or other charges are outstanding (often referred to in contracts as a lien). Such terms represent an increase in the care home's rights which has no basis in common law or statute.
- 5.7 We do not think a care home should have unlimited rights to dispose of a resident's possessions. An opportunity should always be given for sponsors, friends or families to collect personal items. Any uncollected property should be disposed of in accordance with relevant legislation, such as the Torts (Interference with Goods) Act 1977. We would object to any term that stated that goods may be sold immediately and without adequate notice of the date and place of sale, or that excluded a duty on the care home to obtain the best price or to refund surplus proceeds.

Group 18 (e): Consumer declarations about contractual circumstances

- 5.8 Many contracts require residents to sign a statement (often at the end of the terms and conditions) confirming that they have read and understood the contract and associated documents. This requires them to make a statement or declaration which may put them at a legal disadvantage and may be untrue. In our view this requirement is potentially unfair. Residents are unlikely to realise its significance and may be disadvantaged in a later dispute if it is argued that they have 'signed away their rights' to challenge any part of the contract they do not accept or did not understand.
- 5.9 There is no objection to residents stating facts they know to be true. Even residents who have read the contract cannot be sure that they have understood it correctly and so should not be required to make a definitive statement about this. We consider that a clear and prominent warning that **the resident should read and understand the terms before signing** is more acceptable.

Group 18 (f): Exclusions and reservations of special rights

- 5.10 Any term that could deprive residents of normal protection under the law may be considered unfair.

Data Protection Act 1998

- 5.11 A term would be open to challenge if it permitted the care home to pass on personal information about a resident in breach of the Data Protection Act. The use or disclosure of personal information may be acceptable if this is fully explained and the residents give their consent, for example through an optional clause separate from the rest of the agreement. The implications of the choice should be fully explained to the resident.

Distance Selling Regulations

- 5.12 The Distance Selling Regulations (DSRs), which came into force in October 2000, apply, with certain exceptions, to all contracts made under an organised scheme of distance sales or services, where there is no face to face contact between the consumer and supplier. Examples are contracts entered into by telephone, mail order, fax, digital television and the internet. Under the DSRs, consumers usually have an unconditional right to cancel a contract during a 'cooling off' period of seven working days. This begins the day after the day on which the contract was agreed. If the consumer has paid in advance, the supplier must refund this money within 30 days of the contract being cancelled. Unless the parties agree otherwise, this right to cancel does not apply to contracts where a service is delivered before the end of the cooling off period. However, consumers must be informed of this in writing. The law expressly states that any contract term that does not comply with these regulations will be void.

Group 18 (g): Care home's discretion in relation to obligations

- 5.13 Unfair terms described in Group 13 above permit the care home to have excessive discretion in interpreting the contract. We have similar objections to other types of term that give the care home the ability to free itself from compliance with its presumed obligations, or to penalise residents for what the care home considers to be breaches of contract. It is reasonable for a care home to give notice in the event of an objectively serious breach, such as significantly late payment or non-payment of fees. However, the contract should be clear about what constitutes a serious breach of contract and when it occurs and should not give the care home sole discretion on this.

5.14 We think a term allowing for termination on subjective grounds, such as 'persistent bad manners', could be used unfairly if there is no right to consultation or appeal, (see also Group 7 above). Where an individual resident's continued residency is at risk under the contract, this should be subject to consultation, proper notice and, where appropriate, help with finding alternative accommodation.

Group 18 (h): Unreasonable ancillary obligations and restrictions

5.15 Terms that put residents at risk of incurring contractual penalties that are more severe than is necessary to protect the care home's interests are likely to be considered unfair. We object to terms that impose obligations or restrictions that are, or can be, wholly unreasonable or give the care home the power to make unreasonable demands of the resident. In most cases, fairness can be achieved by strictly limiting the scope of a restriction.

Group 19 Regulation 7: plain and intelligible language

5.16 Regulation 7 provides that:

a seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language. If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail.

5.17 Contracts must be intelligible to ordinary consumers without legal advice. This means using words in their normal sense and avoiding jargon such as 'indemnity' and 'waiver of surety' wherever possible. If legal terms have to be used they should be fully and clearly explained.

5.18 Terms are less likely to be considered unfair if the consumer has been given a proper chance to read and understand the contract before signing it. To meet this requirement, we expect care homes to draw attention to and explain provisions that are of particular importance. The English/Welsh standard requires that the service user's guide be written in plain English and made available in a language and/or format suitable for intended residents.

5.19 A cooling-off period in which the consumer can withdraw from the contract without penalty is likely to make the terms fairer since consumers have an opportunity to reflect on what is being offered.

Small print

- 5.20 The Regulations do not specify how large the print in contracts should be. However, illegibility is a cause of unfairness in its own right. Legibility means taking account not only of print size but also of colour, background and the quality of the paper used.

ANNEXES

A EXAMPLES OF FAIR AND UNFAIR TERMS

- A.1 This annexe gives examples of standard terms used by businesses in consumer contracts. Its aim is to illustrate how we interpret the Regulations and examples have been selected from cases where the OFT has acted under the Regulations. They include terms that were successfully challenged as unfair and those that were revised in lieu of action.
- A.2 These examples are based on our current view of terms that are likely to fall foul of the Regulations and should not be considered definitive. It is up to the courts to give a final ruling on whether a term is fair or unfair. These examples are not necessarily fair or unfair in all instances and the full circumstances of the contract have to be taken into account.
- A.3 The revised terms shown here are seen as being sufficiently improved, based on evidence available at the time, to require no further action under the Regulations. The OFT cannot 'clear' terms for the purposes of the Regulations. However, the OFT has a statutory duty to consider complaints about any terms brought to our attention and if there are complaints about these terms we would have to consider them again.
- A.4 For purposes of clarity, some of the text in these examples has been edited.

Group 1: Excluding or restricting liability for death or injury

EXAMPLE 1

A term having the potential effect of excluding the home's liability for causing death or injury.

Old term

The Home shall not be liable in the event of any interruption to the services if such interruption arises due to events beyond the reasonable control of the Home.

Revised term

The Home shall not be liable if there is any interruption to the services where the interruption arises due to events beyond the reasonable control of the Home unless the Home has been negligent or has breached any duty it may owe to the Resident (either arising under this Contract or by virtue of any other duty imposed or implied by law).

EXAMPLE 2

A term allowing the home to exclude liability for negligence.

Old term

The Home cannot be held responsible in any way for the safety of Residents once outside the Home.

Revised term

The Home shall not be responsible for the Resident once they are outside the Premises if the Resident leaves the premises and is not accompanied by a member of staff of the Home, unless the Home has been negligent or has breached any duty it may owe to the Resident (either arising under this Contract or by virtue of any other duty imposed or implied by law).

Group 2: Excluding or restricting liability for breach of contract

EXAMPLE 1

A term excluding the care home's liability for negligence for care of the resident's property.

Old term

(The Resident agrees) to be responsible for insuring to full replacement value all personal furniture and belongings it being hereby expressly agreed that the Home shall not be responsible in any way for cash, credit cards, cheques, certificates, bonds, deeds, documents or personal effects of the resident.

Revised term

(The Resident agrees) to be responsible for insuring to full replacement value all personal furniture and belongings. The Home shall not be responsible in any way for cash, credit cards, cheques, certificates, bonds, deeds, documents or personal effects of the Resident unless the Home has been negligent or fraudulent or breached this agreement in respect of the Resident's belongings.

EXAMPLE 2

A term excluding the care home's liability for negligence in laundering the resident's clothes.

Old term

(The Home agrees) to provide a laundry service for the Resident's personal belongings but such a service shall not include dry cleaning. The Home shall not be held responsible for items of clothing damaged in the normal process of laundering.

Revised term

(The Home agrees) to provide a laundry service for the Resident's personal belongings which are machine washable (but not including professional dry cleaning nor hand washing of any item). The Home shall not be held responsible for items of clothing damaged in the normal process of laundering unless it has been negligent in providing the laundry service.

EXAMPLE 3

A term excluding liability for Resident's valuable possessions or unmarked personal possessions.

Old term

Valuables can be locked away for safekeeping when not in use upon request to matron or sister in charge. No responsibility can be taken for items not handed in for safe keeping. No responsibility can be taken for personal possessions not clearly and permanently named.

Revised term – term deleted.

EXAMPLE 4

A term excluding liability for loss or damage.

Old term

Whilst every effort is made to look after patients' personal effect, clothing, etc. we accept no liability for loss or damage.

Revised term – term deleted.

Group 6: Unequal cancellation rights

EXAMPLE 1

A term requiring the guarantor to clear the room within two days but seeking four weeks' fees without provision for mitigation of loss.

Old term

In the event of death we would expect the resident's bedroom to be cleared within 48 hours. In the event of death the home reserves the right to withhold or charge for a period of four weeks.

Revised terms

In the event of death three days monies will be due the Home and after this period this Contract will cease.

In the event of death we would ask the resident's bedroom be cleared within three days. However, if you are unable to do so, please inform the matron/manager and arrangements can be made for us to clear the bedroom and items can be stored at [the home] for seven days.

Group 11: Right to change what is supplied

EXAMPLE 1

A term allowing the care home discretion to change the accommodation supplied.

Old term

The Home shall provide accommodation for the resident in the Room referred to in the Schedule hereto (or other similar accommodation as may be determined from time to time by the Home) together with the right in common with others having the like right to use all rooms and gardens provided for common use.

Revised terms

No tenancy of any kind is intended to be created in respect of the room and the control of the Room occupied by the resident shall remain with the Home.

The Resident shall be consulted by the Home and given four weeks notice of proposed change of room and the reason for the proposed change by the Home.

EXAMPLE 2

A term allowing for variation of the care home rules without providing for the resident to be consulted or to terminate the agreement without penalty.

Old term

To observe the Resident's Rules and Regulations issued by the Home from time to time together with any reasonable modifications thereof or additions thereto made from time to time for the proper conduct of the premises as if the same were incorporated herein.

Revised term

To observe the Residents Rules and Regulations which shall be made available for the resident to inspect. The Home shall be entitled to make reasonable modifications to the Residents Rules and Regulations provided that the resident is consulted and given four weeks notice of any modifications. If the resident objects to the modifications he may terminate this agreement without penalty.

Group 12: Price variation clauses

EXAMPLE 1

A term allowing fees to be reviewed annually without giving the grounds for increase, and also binding the resident to pay increased fees, even if he wished to withdraw from the agreement, by providing a shorter notice period than the termination notice period.

Old term

The Home shall be entitled to increase the Residential Fee upon the first and subsequent anniversaries of this Agreement. The Home shall give two weeks notice in writing of any such increase in fees.

Revised terms

The Home shall be entitled to increase the Monthly Residential Fee:

Upon the first and subsequent anniversaries of this Agreement in line with the retail prices index:

The Home shall give four weeks notice in writing to the Resident of any such increase in the Monthly Residential Fee.

EXAMPLE 2

A term allowing an increase in fees at any time.

Old term

Fees will be increased from time to time.

Revised term - (from a standard agreement)

Fees will be reviewed on an annual basis in line with RPI.

Group18 (a): Allowing the care home to impose unfair financial burdens

EXAMPLE 1

A term allowing for unspecified additional costs.

Old term

The Home shall be entitled to pass on to the Resident any additional costs incurred by the Resident for any provisions additional to those normally provided by the Home.

Revised term

Where the Resident or the Resident's Representative specifically requests any provisions additional to those normally provided by the Home the Resident shall be responsible for all costs and charges incurred in purchasing those provisions, whether those provisions are purchased by the Home or by the Resident.

Group 18 (c): Unfair enforcement powers

EXAMPLE 1

A term allowing for the resident's property to be held as security (or lien) against a debt.

Old term

We are entitled to a general lien in respect of patient's possessions until all charges outstanding to us have been discharged in full.

Revised term - term deleted

EXAMPLE 2

A term allowing the Home to retain the resident's furniture on death unless agreed in writing at the time of admission.

Old term

Furniture may be brought into the home by the Resident subject to inspection and agreement by the Home as to its condition and suitability and on the sole understanding that in the event of death the items of furniture shall remain the property of the Home unless agreed in writing at the time of admission that certain articles may be excluded from this clause.

Revised terms

If property (not including property which has clearly been abandoned) belonging to the Resident ('Property') remains in the Resident's Room following their departure from the Home or their death, the Home shall be entitled to charge a daily rate for five days from their departure or death, and for a further five days where the presence of the Property is preventing the room being used for accommodation for another Resident.

At any time after the departure of the Resident from the home or their death, the Home may give notice to the Resident (or in the event of their death, to a close relative or a member of the Primary Health Care Team) requiring the Property should be collected ('Notice'). Notice should be given in accordance with the following sub clauses:

- Notice should be given by the Home in writing to the Resident (or a close relative of the Resident or a member of the Primary Health Care Team as appropriate) and may be given either in person, or by post or by leaving it at the address of the addressee.

- The Notice should give the name and address of the Home, details of the Property and the address where the Property is held, state that the Property must be collected and specify any charges due to the Home up to the date of the Notice.
- The Notice will be deemed to be received by the addressee either two days after posting or immediately if delivered in person or left at the address of the addressee.

If the Property is not removed within ten days from the date on which the Notice was received, the Home shall be entitled to arrange for bulky items to be stored either at the Home or elsewhere at a secure location if there is insufficient space in the Home. The Home shall be entitled to make a reasonable charge for storage from the date of the Notice, including third party costs if the Property had to be stored elsewhere if there is insufficient space at the Home.

One month from the date on which the Notice was received, the Home shall be entitled to sell the Property adopting the best method of sale reasonably available and deduct its reasonable costs, including third part costs as above, from the proceeds.

If the Home takes reasonable steps to trace the Resident or in the event of their death a close relative or a member of the Primary Health Care Team) and has failed to trace them or communicate with them the Home shall be entitled to treat the Property in accordance with [term above] as if one month had elapsed since the Notice.

Group18 (e): Consumer declarations about contractual circumstances

EXAMPLE 1

Unfair 'read and understood' declarations.

Old terms

Please read the terms before signing this form. Failure to do so does not excuse you from compliance with them.

I have read the conditions and accept them.

I have read the above Terms and conditions before signing, and fully accept them.

Revised term – terms deleted

Group18 (h): Unreasonable ancillary obligations and restrictions

EXAMPLE 1

Term restricting the resident's movements.

(NB this term was considered in the context of a previous term which provided for residents to be taken out by friends or relatives.)

Old term

The Matron or the RGN has the right to refuse residents to go out due to medical conditions.

Revised term – term deleted.

Group 19: Plain and intelligible language

EXAMPLE 1

Incomprehensible guarantee clause having the effect of intimidating the guarantor and containing unreasonable obligations and unenforceable liabilities at law.

Old term

In consideration of your agreeing to admit the above-named patient in the terms and conditions contained above. I/We agree with you as follows:

To indemnify the nursing home in respect of any failure to pay the fees due, not withstanding that I/We shall not have notice of any neglect or omission by the patient to pay the fees and not withstanding any forbearance in the nursing home's part to recover any fees due from the patient.

To indemnify the nursing home in respect of any breach by the patient of any of the other terms and conditions contained and to guarantee the performance thereof, not withstanding any forbearance in the nursing home's part to recover any loss that may be sustained

In order to give effect to this indemnity and guarantee I/We declare that the nursing home shall be at liberty to act as though I/We were the principal debtor and I/We waive all or any of my/our rights as surety which may at any time be inconsistent with any of these.

This indemnity and guarantee shall be a continuing indemnity and guarantee to the nursing home for all sums due from the patient and shall only be capable of determination by me/us when all fees or sums due from the patient or me/us under the terms and conditions herein contained, have been discharged in full. Until that time the terms of this indemnity and guarantee shall not be determinable and shall in the event of the death of me/either of us be binding upon our personal representatives.

All terms, indemnities, guarantees and obligations given or entered into by more than 1 person are given or entered into jointly and severally.

Revised term

In the event of non-payment from the above named patients, I the above signed will be responsible for all payments outstanding.

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