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# Consumer law guidance

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Presented by

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# Aims of Today's Session

1. Introduction – contract law v consumer law
2. CMA guidance – key points / contract terms affected
3. Are you compliant ? – self-assessment form
4. CMA guidance – CHC / FNC / top-ups
5. Contract drafting – best practice
6. Are you compliant ? – compliance options

# Attendees

- How many attendees have revised their contracts in the last 12 months ?
- ...in the last 3 years?
- Of these groups, how many introduced brand new contracts, how many amended existing ones?
- How many have had a resident/relative question or challenge a contract?
- Has anyone ever had a CQC inspector ask about contracts during an inspection?

# Contract law 1

## Basic principles

- Offer
- Acceptance
- Common intention
- Consideration



# Contract law 2

## Basic principles

- Freedom to contract
- Equality of bargaining power
- Vulnerable parties
- Public interest

# Consumer law

## Basic principles

- The Consumer Rights Act 2015 - consumer rights covering contracts for goods, services
- The law that protects consumers
  - developed piecemeal over time
  - initially it was the courts that recognised clear and justified, but sometimes unspoken, expectations
  - the courts developed a body of case law which gave buyers rights
  - case law was then made into legislation that protected buyers

# Contract law v Consumer law



- business to consumer contracts
- care home contracts / home care
- CMA – Competition and Markets Authority

# CMA Guidance – key points

- upfront information
- treating residents fairly
- quality of service
- handling complaints



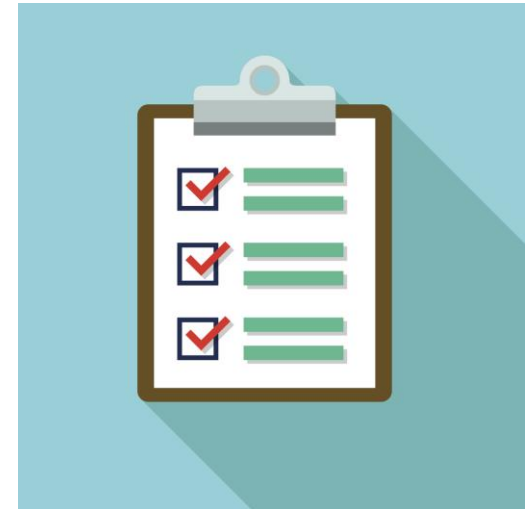
# CMA Guidance – key points

- residential and nursing for over 65s
- useful to all providers in the sector
- CMA's Director of Consumer Protection – “CMA's advice is there to help you comply with the law” while warning that care homes that are not complying “risk facing enforcement action”
- From November 2019 – CMA compliance reviews

# CMA Guidance – are you compliant?

Upfront “key information” – section 3 of CMA’s guidance

- Funding arrangements
- Particularly important / surprising terms
  - how self-funding fee may change
- Services offered
  - types of care services, rooms, facilities, other services available, total number of beds, staffing
- Fees and charges
  - deposits, optional extras, unavoidable additional costs  
e.g. to attend medical appointments



# CMA Guidance – are you compliant?

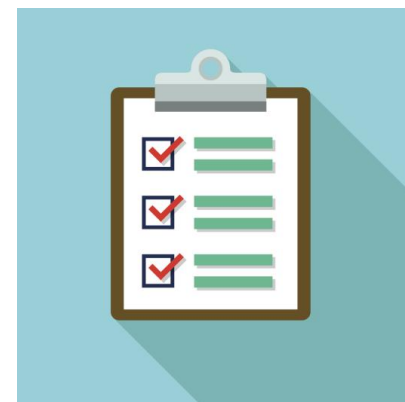
upfront “key information” – section 3 of CMA’s guidance

Would you include the following additional information?

- about trial periods
- about how residential contracts can be ended

When would you provide the following by?

- “Key Information”
- Additional information
- Copy of the standard contract terms and conditions



# CMA Guidance – are you compliant?

## Treating residents fairly – section 4 of CMA's guidance

- what does “fair” mean?
- changes to contract terms
  - revising fees
  - moving rooms
  - revising the list of services include in the fee
- what process should be followed?
- Fairness around contract termination



# CMA Guidance – are you compliant?

## Quality of service – section 5 of CMA's guidance

- why is the CMA concerned with quality of service? – CQC inspects for quality of service
- “reasonable care and skill” under contract law and consumer law
- can a failure to provide care services with “reasonable care and skill” be grounds for a claim for compensation by a resident?
- sector regulator standards (CQC, CSSIW, CI)
  - only one element of consumer law compliance

# CMA Guidance – are you compliant?

## Handling complaints – section 6 of CMA's guidance

- written procedure
- complaints procedure must be easy to find and understand
- complaints to be handled
  - promptly
  - fairly
  - effectively
  - consistently (across all homes within a group)

# CMA Guidance – key points

- upfront information
- treating residents fairly
- quality of service
- handling complaints

PLEASE REFER TO/COMPLETE THE CHECKLIST

5 MINUTES

# CMA Guidance – are you compliant?

- Top-up payments for state funded residents
  - what is a ‘top-up’
  - role of the local authority (community care law)
  - three-way contract with the local authority is preferred to a separate agreement between you and the third party
  - what if the third party can no longer meet the top-up payments?
  - what if a self-funder becomes eligible for local authority funding?



# CMA Guidance – are you compliant?

- Continuing Healthcare (CHC) and top-ups
  - what is CHC?
  - role of the NHS funding body
  - NHS rules (clinical need not ability to pay)
  - No top-up payments are permitted
  - Genuine costs for additional services (e.g. beauty treatment, physiotherapy – no clinical need) are permitted but the contract must be very clear on this issue:
    - resident's decision must be voluntary
    - refer to the NHS funding body

# CMA Guidance – are you compliant?

- Funded nursing care (FNC)
  - what is FNC?
  - *National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care* - the Department of Health and Social Care
  - Transparent and fair terms
    - clearly define the services paid for by FNC and those paid for by the resident's own contribution
    - effect on resident's own contribution if the FNC payment changes (upwards or downwards)
    - demonstrate that the resident's contribution has been fairly calculated

# Contract drafting – best practice

- Plain English
- Index, headings and subheadings
- Highlighting key terms
- Logical structure
- Diagrams and appendices
- Definitions
- Agreeing the terms
- Unfair contract terms

# CMA Guidance – are you compliant?

## Options

- No action needed
- Revision of existing contracts
- Introduction of Key Information
- Introduce new contracts for all new residents
- Introduce new contracts for new and existing residents
- Review of relevant policies and procedures (including complaints)
- Staff training
- In house or external support

# CMA Guidance – are you compliant?

## Options

➤ CMA review ↔ 'good news' story

➤ CMA compliance reviews

➤ CQC



# Recap

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# Further resources

- CMA website
- CQC website
- <https://www.archers-law.com/#Reports>

**ANY  
QUESTIONS?**





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