



Tips and reminders

Break clauses in healthcare leases - avoid the traps

Many present day healthcare leases contain a "break clause" which gives the tenant the right to terminate the lease before the end of its term.

Landlords will often include conditions attaching to the break clause such as:

- The rent has been paid up to date
- The tenant gives up the premises with vacant possession
- The tenant must have complied, or materially complied, with all the covenants in the lease
- The tenant must not be in breach, or materially in breach, of the repairing covenants

Break clauses will be strictly interpreted by the courts and tenants must ensure that they comply with all the terms of the break clause. Particular attention should be given to the following:

- The notice must be served on the correct party and the correct number of months before the break date. The lease often contains provisions relating to service of notices and these should be followed literally.
- If there is a requirement for vacant possession to be given on the break date the tenant must ensure that they have vacated the premises and all their possessions have been removed by that date. A tenant who remained on the premises to carry out dilapidation repairs after the break date was deemed not to have given vacant possession even though he had no intention of excluding the landlord from access to and occupation of the premises from that time.
- If there is a condition that the rent must be paid up to date the last quarter's or month's rent should have been paid. A tenant who paid the rent up to the break date was held not to have complied with this condition. The tenant should check that there has not been any previous late payment that may be subject to an interest charge and has not been claimed

by the landlord. If there is a potential liability, it should be calculated and paid to the landlord. Also, the tenant should ensure that cleared funds have been provided.

- If there is a condition requiring compliance with repairing obligations the tenant should consider carrying out a compliance audit with their surveyor so that any breaches can be remedied by the break date.

If you would like advice in connection with your healthcare building lease or wish to ensure that notices are served correctly during its term, we will be pleased to assist.



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More articles on health and social care can be found on our website
www.birkettlong.co.uk/site/library/sectors_library/health



Health and Social Care

NEWS AND ADVICE FOR HEALTHCARE PROFESSIONALS FROM BIRKETT LONG

Controversial regulations redrafted



Controversial regulations based on section 75 of the Health and Social Care Act 2012, the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013, came into force on 1 April 2013.

The regulations impose requirements on the National Health Service Commissioning Board ("Board") and clinical commissioning groups ("CCGs") in order to:

- ensure good practice in relation to the procurement of health care services for the purposes of the NHS
- ensure the protection of patients' rights to make choices regarding their NHS treatment, and
- prevent anticompetitive behaviour by commissioners with regard to such services.

Following concerns from GP leaders and campaigners that the proposed legislation for the NHS would force GPs to waste time and money defending their practice resources from competition if CCGs were required to put all services out to tender as a default, the redrafted regulations will permit CCGs to exempt themselves from putting services out to competition if they can demonstrate that it will undermine integration. However, under the revised legislation they will still have to demonstrate that services can only

be provided by a 'single provider' or they will be forced to put that service out to competition.

Despite the amendments, concerns remain that these revisions to the competition provisions of the regulations will still place unnecessary obligations on CCGs, which are likely to hinder their ability to put patients' needs first. The concern remains that commissioners will be focussed on their legal duties rather than on patient care.

Birkett Long's Health & Social Care team keeps you up to date with legislation and provides guidance on laws and regulations.



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Reference: NEWS/HEALTHCARE09/2013

Care home fee rates...

...the saga continues

Our winter newsletter reported on a variety of court cases and judicial reviews brought against local authorities by care home providers, challenging the way care home fees had been set by the authorities. For the most part the care home groups were successful in their challenge although one authority was successful in its defence of a claim.

February 2013 saw another victory for local government, with Northumberland County Council seeing off a challenge to its care home fee rate setting process.

The claim raised various contentions that the local authority had acted contrary to the formal statutory guidance in Local Authority Circular (2004) 20. Also referenced was the October 2001 guidance from the Department of Health, entitled Building Capacity and Partnership in Care, which indicated that "fee setting must take into account the legitimate current and future costs faced by providers as well as the factors that affect those costs, and the potential for improved performance and more cost-effective ways of working".

However, the Council successfully argued that Building Capacity was advice issued at a time when public sector finances were different and that it was reasonable to depart from it.

The court was satisfied that the Council did have due regard to the actual costs of care as required by the circular and that guidance was taken into account and clear reasons given for departing from it.

The Council was found to have properly engaged in the consultation process and the allegation that it had abused its dominant position was not accepted.

No doubt this decision will be seized by other authorities seeking to align their budgets with statutory requirements and will lead to further uncertainty for care home providers seeking to challenge fee rates.

Care provider profiles

launched by NHS website

New online information on local care providers is now available to the public on the NHS Choices website with the aim of helping people to choose and compare good quality care. The profile should include information on every registered care and support provider together with advice and information on care options.

Registered care providers will be able to search for their profile, which will contain basic information to start with, and add further information to promote their service. There will be no charge for adding information and care providers will be able to identify what makes their service special, showcase their specialised care provision, inform people about the quality of their care using new measures, champion their staff and provide practical information about their home such as visiting times, activities and menu options.

The profile will also include genuine customer feedback from service users, their families and carers - all with the aim of enabling people to make confident decisions about care choices. www.nhs.uk



How do things stack up?

Legal health check for your care home

New from Birkett Long is a range of fixed priced bespoke services for care homes. Select from specialist services and benefit from first class legal skills at your fingertips - at extremely cost effective rates.

Employment

This is such a significant area that we offer an employment/HR retainer, employment law training and bespoke contracts of employment for use across your workforce.

Issues that affect your residents

We can arrange for a visit to your home if several of your residents would like to chat to one of our specialists. The areas that are likely to be of concern are wills, lasting

powers of attorney, life assurance and care home fees, but our specialists will be ready to help with all legal or financial matters.

Buildings and grounds

Understand the terms of your lease fully with a fixed price review from our property experts. We also provide a free 30 minute phone consultation on title papers or leases.

Helpline

This annual fixed price helpline gives you instant access to all the legal advice you need in your management capacity.

For information call Tracey Dickens on 01206 217326 or tracey.dickens@birkettlong.co.uk

Meet the team

Ian Dawes

Ian joined Birkett Long in February 2012, specialising in commercial dispute resolution.

He has acted for care homes and care home management companies in both disputes and negotiations with health authorities and has been involved in the care home fees recovery offering for Birkett Long.

As part of the dispute resolution team Ian advises a wide range of public and private clients in relation to commercial disputes including professional negligence, contractual and warranty claims, IT and

maintenance contracts, shareholder and partnership disputes, obtaining injunctive relief and cross border disputes.

He has also represented clients in judicial review proceedings, challenging Government and Government bodies' decisions.



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