

# Social Care: Contractual Disputes

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## STRUCTURE OF TALK

- 1) Contractual disputes in social care: the context, Care Act 2014
- 2) Market shaping: the duty under s.5 of the Care Act 2014
- 3) Public law challenges
  - a) Consultation
  - b) Breach of s.5 duty
- 4) Private law disputes
- 5) Is it a private law or public law dispute?

## (1) CONTEXT

- Shift to a market-based approach to social care services. Majority of social services now provided by the private sector. In 1979, proportion of residential and nursing care service provided by the state was 64%; by 2012, 6%.
- Local authorities remain the focal point of legal duties. The legal duties to (inter alia) assess and meet needs fall on local authorities (LAs). Key statute is the Care Act 2014.
  - Part 1 of the Care Act 2014 sets out certain general responsibilities/duties of local authorities.
  - Included is a general duty to promote diversity and quality in provision of services at s.5.

## (2) Section 5 of the Care Act 2014

Section 5(1) sets out the duty:

*“A local authority must **promote the efficient and effective operation of a market in services for meeting care and support needs** with a view to ensuring that any person in its area wishing to access services in the market—*

*(a) has a variety of providers to choose from who (taken together) provide a variety of services;*

*(b) has a variety of high quality services to choose from;*

*(c) has sufficient information to make an informed decision about how to meet the needs in question.”*

## (2) Section 5 of the Care Act 2014

- Section 5(2) sets out factors that the LA must, in performing the s.5(1) duty, have regard to “in particular” :
  - “(a) the need to ensure that the authority has, and makes available, information about the providers of services for meeting care and support needs and the types of services they provide;*
  - (b) the need to ensure that it is aware of current and likely future demand for such services and to consider how providers might meet that demand;*
  - (c) the importance of enabling adults with needs for care and support, and carers with needs for support, who wish to do so to participate in work, education or training;*
  - (d) the importance of ensuring the sustainability of the market (in circumstances where it is operating effectively as well as in circumstances where it is not);***
  - (e) the importance of fostering continuous improvement in the quality of such services and the efficiency and effectiveness with which such services are provided and of encouraging innovation in their provision;*
  - (f) the importance of fostering a workforce whose members are able to ensure the delivery of high quality services (because, for example, they have relevant skills and appropriate working conditions).*

## (2) Section 5 of the Care Act 2014

- Therefore, the effect of s.5(1) and 5(2)(d) is that:
  - LA must promote the efficient and effective operation of a market in care services
  - With a view to ensuring that any person in its area has access to variety of providers offering a variety of services, high quality services to choose from, and sufficient information to make an informed decision about how to meet needs
  - In performing the duty to promote, the LA must have regard to a number of factors, one of which is the importance of ensuring the sustainability of the market

## (2) Section 5 of the Care Act 2014: Guidance

- Part 4 of *Care and Support Statutory Guidance* deals with market shaping and commissioning of adult care and support, and provides detailed guidance on discharge of s.5 duty. LA must act under the guidance: s.78, CA
- Guidance highlights ‘principles of market-shaping and commissioning’:
  - Focusing on outcomes
  - Promoting quality
  - Supporting sustainability
  - Ensuring choice
  - Co-production with stakeholders
  - Developing evidence-based local strategies

## (2) Section 5 of the Care Act 2014: Guidance

- Paragraph 4.4 onwards emphasises the need to commission services:
  - having regard to cost-effectiveness and value for money; and
  - so as to:
    - Effectively shape and influence the market
    - Ensure that fees will enable the agreed quality of care to be provided
    - Ensure that care providers' staff are properly remunerated (at “*at least*” the minimum wage level) and are provided with effective training and development
    - Allow for retention of staff
    - Ensure that there is a range of appropriate and high quality providers and services for people to choose from

## (2) Section 5 of the Care Act 2014: Guidance

*“4.104 Contracts should incentivise value for money, sustainability, innovation and continuous improvement in quality and actively reward improvement and added social value. Contracts and contract management should manage and eliminate poor performance and quality by providers and recognise and reward excellence.”*

*“10.27 In determining how to meet needs, the local authority may also take into reasonable consideration its own finances and budgetary position, and must comply with its related public law duties. This includes the importance of ensuring that the funding available to the local authority is sufficient to meet the needs of the entire local population. ...”*

## (2) Section 5 of the Care Act 2014: setting standard rates

### TOO LOW

- Providers unable to improve or even maintain the quality of their service
- Can lead to a build up of liabilities, and perhaps lead to provider being unable to continue in business

### TOO HIGH

- Not delivering value for money
- Detrimental effect on limited local authority budgets; unnecessary reductions will have to be made elsewhere

### JUST RIGHT...

- Allows section 5(1) duty to be met
- Sufficient profit to enable providers to provide high quality services
- Value for money for LA

## (2) Section 5 of the Care Act 2014: overview

- LA under a range of duties
  - Section 5(1) duty – directed to ensuring a person within LA's area has variety, high quality and sufficient information to make an informed decision
  - Market shaping duties
  - To engage with stakeholders, partners, potential service users as appropriate
  - General public law obligations, as reinforced by specific statutory scheme: e.g. duty to consult, procedural fairness, taking into account s.5(2) factors
  
- In practice: this process will coalesce into the contracting arrangement; therefore, there will also be obligations under contractual arrangements

## CHALLENGES: can be on basis of public or private law

- LAs will enter into contractual arrangements with private providers in order to discharge their statutory duties. Therefore, social care contracting disputes can straddle both:
  - Private law issues based on contract law
  - Public law issues: as LA is acting as a public authority and is bound by public law obligations and statute, particularly s.5 of the Care Act.
- Scope for claims and disputes on either or both bases.

### (3) PUBLIC LAW CHALLENGES

- Normal public law grounds of challenge apply:
  - Departure from guidance, e.g. where LA agreed to set care home fees by reference to a toolkit, departing from specified capital return rate in toolkit without a rational reason was unlawful: ***R (Mavalon Care Ltd) v Pembrokeshire CC*** [2011] EWHC 3371
  - Public Sector Equality Duty under s.149 of the Equality Act 2010
  - ECHR: Art.8 claims by providers precluded by s.7 HRA 1998; but claims on basis of A1P1 “*peaceful enjoyment of ...possessions*” can be made: see ***R (Broadway Care Centre Ltd) v Caerphilly County Borough Council*** [2012] EWHC 37 (Admin)
  - Consultation?
  - Breach of s.5 Care Act duty?

### (3) PUBLIC LAW CHALLENGES (a) Consultation

- In relation to potential consultation challenges, note that guidance indicates importance of consulting appropriately by emphasis on:
  - Understanding the outcomes which matter most to people and ensuring that these outcomes are incorporated
  - Understanding the market, including: current and future needs, (where possible) providers' business models, and implications of future needs for service delivery
  - Understanding and working with stakeholders and partners in designing contractual mechanisms
  
- Requires LA to give careful thought to design of process for establishing contractual framework

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

- A focal point for disputes between service providers and LAs: contractual rates for services
- Duty under s.5 Care Act, specifically s.5(2)(d), has provided a public law basis to ventilate such disputes
- Note relationship between market shaping duties, position of LA in market and level of fees:
  - LA will be the dominant commissioner in the market
  - Thus, the prices that LA sets will have a very significant influence on the operation of the market

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

- "Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to providers nor the inevitable reduction in the quality of service provision that follows. This is short-sighted and may put individuals at risk. It is in conflict with the Government's Best Value policy. And it can destabilise the system, causing unplanned exits from the market. 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.*

...“

From: ***Building Capacity and Partnership in Care: An Agreement between the statutory and the independent social care, health care and housing sectors***, Department of Health, October 2001

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

***What is the approach of the courts to a challenge to standard rates/fees on the basis of a breach of the section 5 duty?***

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

- Claimants in *R (Care England) v Essex County Council* [2017] EWHC 3035 (Admin) raised a challenge to care home fee increase on the basis that (inter alia) it did not go far enough for purposes of s.5(2)(d) and was irrational

Per Lavender J at [49]-[50]:

- S.5(1) does not confer specific rights on individuals or providers
- Regard must be had to all factors listed in s.5(2)
- There are means other than setting fees for promoting efficient and effective operation of a market
- One aspect of promoting efficiency can be ensuring fees are not set too high
- Sustainability factor can point towards ensuring that fees are not set too low

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

- Lavender J began by noting that duty to have regard in s.5(2) imposed for a specific purpose, i.e. ensuring that people within the area had the three things specified in s.5(1). In this case, common ground s.5(1) objectives were being met. This was relevant to approach to s.5(2): [22].
- Lavender J dismissed the challenge on basis of s.5 breach, finding that Essex Council clearly did have regard to the importance of ensuring sustainability.
- As a matter of principle, provided *some* inquiry into the relevant factor, it is generally for the decision-maker to decide on the manner and intensity of the inquiry into the relevant factor

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

- In making its decision, Essex had regard to range of materials, including a Pricing Report which:
  - considered financial pressure on sector and sources thereof
  - set out three pricing options, with pros/cons for each:
    - No increase – major con was pressure on providers
    - Increase to reflect increase in National Living Wage
    - Full cost of care increase – major con was financial impact on council
  
- This significantly undermined claimant's case

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

- Claimants in **Care England** also raised a rationality challenge to fee increase on basis it not go far enough for sustainability.
- Lavender J said threshold for success on such a challenge *particularly* high in view of nature of statutory duty at [72]-[73]:

*“72. ...The Claimant's case, therefore, must be that there was a certain level of increase which was necessary if the section 5 duty was to be met. What that level was (assuming there was one), and, in particular, whether it was more or less than the level of the increases decided on in July 2016, is not a judgment which this court could easily make on an application for judicial review, and certainly not on the evidence in this case.”*

### (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

Lavender J continued:

*“73. It does not follow that, because some increase in fees was considered appropriate, the increase had to be one which addressed in financial terms each of the sources of financial pressure experienced by care home providers. That is not a necessary consequence of having regard to the sustainability factor. ...The section 5 duty cannot be viewed in isolation. The Defendant faced other competing pressures and duties, including the limits on its resources and the duty to obtain value for money. ...It was the Defendant's responsibility to strike a balance between these different considerations. ...The weight to be given to different factors was a matter for the Defendant.”*

## (3) PUBLIC LAW CHALLENGES (b) Breach of s.5

### Key points in relation to s.5 challenges:

- Where s.5(1) objectives are being met, review will likely be less intrusive
- Courts recognise the multi-factorial, judgment-laden nature of the s.5(2) exercise in the context of fees; therefore, once it is shown the factors have been considered, the threshold for a successful challenge will be high
- Evidence of the process very important. A claimant will need strong evidence that an LA ignored the statutory factor(s) in setting fees (etc). LA at significant legal risk without evidence setting out the process and showing relevant factors were considered

## (4) Private law claims

- Potential disputes could include:
  - As to the meaning of the contract. For example:
    - where a price review mechanism specifies a review at fixed intervals (e.g. annual), can rates be changed more frequently?
    - Does a dispute/arbitration clause apply to the dispute/preclude proceedings?
    - What happens when arrangements are made outside the contract?
  - Is one party (normally the LA) entitled to terminate the contract?  
Consequences of termination? See, e.g., ***Supportways***

## (4) Private law claims

- Examples of pure private law disputes:
  - Exercise of a contractual right to terminate: private law *R (Broadway Centre Ltd) v Caerphilly CBC* [2012] EWHC 37 (Admin)
  - Dispute over whether contract gave provider power to unilaterally increase was a q of contractual interpretation: *West Sussex CC v Amberley (UK) Ltd* [2011] EWCA Civ 11

## (4) Private law claims

- Procedure: claims would be brought as a Part 7 claim or, where no dispute of fact (e.g. pure q of interpretation on agreed facts), Part 8 claim
- Limitation period: 6 years from breach of contract, cf asap/3 months for JR
- Early resolution: Absent settlement or ability to obtain strike out/summary judgment, defendant LA may have little choice other than to 'ride out' proceedings to trial; cf permission stage, TWM certification in JR
- Cost: Such disputes can be high value and generally may be brought in High Court (QBD or Chancery Division). High Court private law proceedings can drive up costs significantly, particularly Part 7 proceedings

## (5) Private law or public law dispute?

- Challenges can straddle both. Why does distinction matter?
  - For claimants, potential for multiple avenues of ‘attack’
  - For defendants, opportunity for knock-out defence/undermining of claim
- Where is the dividing line?

*“...the mere fact that the party alleged to be in breach of contract is a public body plainly cannot, on its own, transform what would otherwise be a private law claim into a public law claim.”*

***R (Supportways Community Services Ltd) v Hampshire County Council*** [2006] EWCA Civ 1035.

## (5) Private law or public law dispute?

- Q is: can claimant establish a “*relevant and sufficient nexus*” between contractual action and statutory/public law duty?
  - s.5(2)(d) seems to make this test considerably easier to meet: e.g. **Care England**, where breach relevant to decision to set fees in the contract
- The test is specific to the legal context, so caution required in drawing analogies with pre-Care Act case law
- Where case is truly a private law claim, attempt to ‘sneak in’ public law arguments despite lack of nexus is abusive attempt to circumvent shorter limitation period for JR

## (5) Private law or public law dispute?

- Similarly, local authority cannot rely on public law arguments/procedural points to defeat what is in truth a private law issue.
- E.g.: ***Abbeyfield Newcastle Upon Tyne Society Ltd v Newcastle City Council*** [2014] EWHC 2437(Ch):
  - Issue was whether rate payable on expiry of contract was (i) old contractual rate or (ii) *quantum meruit* i.e. reasonable sum on basis of amount not being contractually stipulated
  - Court found (ii) was the case. Essentially a question of interpretation of the contract. Fact that LA had to have regard to public law duty capping its liability was an “*incidental consideration*” which did not affect nature of the dispute

## (5) Private law or public law dispute?

- Courts will also deprecate the ventilation of what are in substance private law arguments via judicial review:

*“I would not wish to leave this case without stating that it is regrettable that scarce resources have been employed by the respondents in having to meet the claims of the applicants which I have held to be clearly inadmissible. Inappropriately these proceedings sometimes took on the appearance of a fiercely contested private law action”*

From ***R (Cumbria Professional Care Ltd and Others) v Cumbria County Council*** (2000) 3 CCLR 79, QBD – judicial review claim where claimant failed to identify any public law wrong.

## (5) Private law or public law dispute?

- Other side of the coin: the mere presence of a contract does not transform a public law claim into a private law claim
- ***R (Davis) v West Sussex CC*** [2012] EWHC 2152 (Admin). LA terminated service contract following allegations of abuse. Care home owner challenged LA's investigation and decision-making on procedural grounds. LA argued that relationship was exclusively contractual, no public law issue.
- Court disagreed: the LA carried out the investigation under its public law powers and would have done so irrespective of the contractual arrangement. Termination of the contract was only one of many consequences of that investigation procedure.

## (5) Private law or public law dispute?

### Key points

- Is LA exercising public law powers? JR is appropriate procedure
- Is it purely a contractual dispute? Private law proceedings in County Court or High Court
- If there is an overlap of private and public law issues, is there a relevant and sufficient nexus between the two? See s.5(2)(d), e.g. **Care England** case.
- Note key procedural differences:
  - Much short limitation period for JR
  - Less opportunity to dispose of unmeritorious claims earlier in private law proceedings; corresponding costs consequences for defendants, esp in High Court proceedings

## Other potential issues

- Competition issues can arise:
  - See, e.g. ***Carewatch Care Services Ltd v Focus Caring Services Ltd*** [2014] EWHC 2313 (Ch):
    - dispute (between providers) about whether restrictive covenants (non-compete and non-solicitation clauses) in a franchise agreement for the provision of home care services were in breach of the prohibition on anti-competitive agreements in s.2(1) Competition Act 1998.
  - In principle, LA could abuse its dominant position as a purchaser of services so as to breach the provisions of Chapter II of the Competition Act but no case of actual abuse has ever been established.

## SUMMARY

- Contract disputes can straddle private/public law
- Section 5 Care Act 2014:
  - LA duty-bound to consider and weigh multiple, sometimes conflicting factors, including value for money and importance of ensuring sustainability of market
  - Section 5(2) a likely focal point for price disputes: see ***R (Care England) v Essex County Council*** [2017] EWHC 3035 (Admin)
  - Provided LA has taken factors into account, courts will afford LA significant leeway, particularly if s.5(1) objectives are being met
- Private law disputes likely to focus on interpretation of contract and termination issues, but can extend much further. NB potential for competition issues.
- Private/public law overlap provides potential for (sometimes) knockout procedural points

## TIPS: CLAIMANTS

- Section 5 Care Act: Can you dispute s.5(1) objectives being met? Is there good evidence of failure to take into account a mandatory factor under s.5(2)?
- In context of pricing disputes, s.5(2)(d) a strong answer to sufficient nexus test
- Potential consultation issues? See guidance.
- Challenges most logically to the formal process leading to the production of the contract; but arguments may be possible that reconsideration is required in light of some change of circumstance – e.g. effect of COVID-19 on care homes?
- Note potential procedural benefits of private law litigation

## TIPS: DEFENDANTS

- Section 5 Care Act:
  - Can you show/agree s.5(1) objectives being met? Focus of s.5(2) duty is s.5(1);
  - Is there good evidence of mandatory factors under s.5(2) being taken into account? Once shown factors *were* taken into account, LAs have significant latitude
- Where contractual scheme result of extended decision-making process, good argument that that is the only target for a public law challenge
- Public law claims procedurally more favourable: shorter limitation period, permission stage
- Courts unsympathetic to use of JR to litigate in substance private law points

# Thank you for listening

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