

# Buying a care home –



**DUNCAN ASTILL**, partner, and **AMANDA NARKIEWICZ**, principal associate, at national law firm Mills & Reeve outline some of the regulatory pitfalls of conveyancing in the care home sector.

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For those looking to generate a healthy return and create real social value, care homes can seem an attractive investment. That's definitely true, but in a highly regulated sector to get it right one does need to take due diligence seriously.

When considering an investment in this sector, it is essential to have a basic understanding of the regulatory landscape – it is a heavily regulated market place and, in recent years, regulators have become far more willing to flex their muscles, posing challenges to those looking to buy or sell.

## CQC's role and powers: the basics

The Care Quality Commission is the independent regulator of health and social care services in England. "Regulated Activities" are set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Details of each location from which a service provider carries out regulated activity must be provided to the CQC. Failing to comply with the regulatory framework around registration is a criminal offence.

The CQC monitors service providers' compliance with its "Fundamental Standards" by inspecting, reporting on and rating locations from 'outstanding' to 'inadequate'.

## Service provision for people with learning disability and autism

Although the size and scope of a service is generally a matter for the operator, the CQC's guidance, Registering the Right Support (RTRS) informs the CQC's approach to the registration of any new service for people with a learning disability and/or autism. Such services can be attractive to investors because the specialist nature of the care can offer better returns on investment than other areas.

A significant feature of the CQC's approach to such services is that it includes a presumption that accommodation will be for six service users or fewer. A new application for registration will be subject to the strict application of criteria in RTRS.

Transfer of ownership of existing services for people with learning disability and autism can take place (particularly with a share sale, where there is no change in registration) but it is important to be aware that the current guidance (which is under review) also poses a challenge to existing services, which are expected to adapt their existing premises, as far as it is possible to do so, to meet the guidance.

## CQC's civil enforcement powers

The CQC has a range of civil and criminal enforcement powers in its

toolkit and it appears to be increasingly willing to deploy them.

The CQC's civil enforcement powers are set out in the Health and Social Care Act 2008. Enforcement action includes: imposing, varying or removing conditions of registration; suspending registration; cancelling registration; and urgent cancellation of registration (which can lead to an almost immediate closure of a location) in cases where there is evidence that there is 'serious risk to a person's life, health or well-being'.

Whether buying or selling, it is important to consider the potential impact of ongoing enforcement action and to be aware of the complexities – transferring assets subject to enforcement action can be trickier and may take some careful navigation.

The right of appeal against more serious civil enforcement action is with the First-tier Tribunal; such proceedings can be expensive and, in our experience, take between six and 24 months, so it is not always going to be practical to wait for proceedings to conclude.

## Criminal prosecutions following serious incidents and fatalities

The CQC's criminal enforcement powers enable it to take action against both companies and individuals, such as registered managers and directors, who

# don't skip due diligence

fail to comply with the "Fundamental Standards". Some offences carry small fixed fines, however, for other more serious offences, such as 'failing to provide safe care and treatment', the fines are unlimited.

CQC has increased the number of criminal prosecutions of health and care providers by more than 32% in a year according to its 2018/19 annual report. Here are samples of high profile fines.

- Southern Health NHS Foundation Trust was fined £125,000 in 2017 after it admitted it had failed to provide safe care and treatment when a patient was injured after falling from a hospital roof.
- Hillgreen Care Ltd was fined £300,000 and ordered to pay £141,000 towards the CQC's legal costs in 2019 for failing to provide care and treatment in a safe way for service users and a failure to put in place, and operate effectively, systems and processes to prevent abuse to service users.

The CQC has also taken over from the Health and Safety Executive to take the lead in enforcement of safety matters involving service users who are in receipt of a health or adult social care service from providers registered by the CQC.

The HSE and/or local authority will still prosecute, in circumstances where it is not appropriate for the CQC to take the lead. The Embrace Group fell foul of HSE regulations when a resident of the care home died after falling down an unlit internal concrete fire escape – the group was fined £1.5 million and ordered to pay £200,000 towards the HSE's costs.

## Criminal prosecution

Following serious incidents involving fatalities, service providers can also be investigated by the police for offences such as corporate manslaughter.

A company can be guilty of an offence of corporate manslaughter if the way in which its activities are 'managed or organised causes a person's death' where that 'amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.

We have seen service providers investigated by the police following the deaths of service users that had been suffering with pressure sores, in

circumstances where the police have suspected that the provider did not have adequate systems in place and the pressure sores caused or contributed to the death.

The first care home to be convicted of corporate manslaughter was Sherwood Rise Ltd in 2016, following the death of a resident which was found to be contributed to by neglect. The company was fined £300,000 and ordered to pay prosecution costs.

## Financial impact of a prosecution

The Sentencing Council has a definitive guideline that applies to prosecutions of health and safety offences and corporate manslaughter. Although not directly applicable to CQC prosecutions, if it considers it appropriate to do so, the court can have regard to it.

Following this guideline, the fine to be applied will vary significantly, depending on a number of factors including:

- Level of culpability;
- Harm (likelihood and seriousness); and significantly;
- Turnover of the defendant company.

Fines are linked to a company's turnover to ensure that they have a real economic impact – therefore the greater the turnover, the greater the fine will be. For example, applying the highest level of 'culpability' and 'risk of harm', a small company (turnover of £2-£10 million) could be at risk of a fine ranging from £300,000 to £1,600,000.

This range decreases for a 'micro' company and increases for 'medium' and 'large' companies. Large care home groups could therefore face fines well over £10 million.

It is important to know that although insurance policies may cover the legal fees incurred in defending an investigation by the police, HSE or CQC, some policies will not cover legal costs after a decision to prosecute has been made, and for public policy reasons no policy will cover the fine imposed by a criminal court, or the prosecution's legal costs.

For anyone undertaking a share purchase of a care home or group of homes, it can be financially devastating to inherit this kind of liability: due diligence is therefore essential.

## Due diligence - what can be relied upon?

The first thing that is often looked at when purchasing a care home or group of homes is the rating given to each "location" by the CQC. Ratings and inspection reports are important: a poor rating is likely to attract an increased regime of inspection and oversight from the CQC; have an impact on the number of public and privately funded service users it can attract; and face more difficulties in attracting and retaining staff. But just how reliable is a rating?

Although in most cases ratings can be relied on, Whorlton Hall is a cautionary tale – it was rated as 'good' until it was re-inspected by the CQC, following concerns raised by Panorama in relation to alleged abuse.

Even if a rating is reliable, it is only half the story. Accidents and failures leading to serious harm and death happen in the care sector, and although services may have been transformed, lessons learnt and ratings improved, investigations can lie dormant for years, and almost be forgotten before being resurrected by enforcing authorities.

It is therefore essential to get under the bonnet: review policies; meet the senior team; collate information on historic incidents and civil enforcement action; and request information on investigations by the coroner; police; HSE and CQC. If you don't know what you're looking for, seek advice.

If due diligence is carried out and a serious investigation by the police, or a regulator is discovered, all is not lost. If both parties are willing to be sensible, identified risks can usually be quantified and factored into agreements to allow business to progress.

We've worked with clients who have either agreed to place a portion of sale proceeds into an escrow account or negotiate indemnities from the selling shareholders to cover-off unknown risks at the point of sale.

The message is simple: the consequences can be huge so don't skip the due diligence. For those that get it right, there are many opportunities in this marketplace to generate a healthy return and create real social value. ct