Neutral Citation Number: [2021] EWHC 2088 (Ch)

Case No: FS-2019-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL SERVICES AND REGULATORY LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

23 July 2021

Before :

MRS JUSTICE BACON

- -

Between :

COMPETITION AND MARKETS AUTHORITY **Claimant**

- and -

(1) CARE UK HEALTH & SOCIAL HOLDINGS LIMITED
(2) CARE UK COMMUNITY PARTNERSHIPS LIMITED **Defendants**

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- -

Sarah Ford QC and **Julia Smith** for the **Claimant**
Gerry Facenna QC and **Daisy Mackersie** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendants**

Hearing dates: 11–14, 18 May 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to BAILII.

Mrs Justice Bacon:

1. The Defendants (**Care UK**) operate care homes in the UK. Between October 2013 and July 2018 Care UK charged an "administration fee" to self-funded residents at the point of their admission to their care homes in England, in addition to the weekly fees payable for accommodation and care services. The fee was said to cover Care UK's administration costs in admitting a resident to one of its homes. For most of Care UK's care homes the fee was calculated as two weeks' residential fees for any particular resident.

2. The Competition and Markets Authority (**CMA**) says that the administration fee was unfair, misleading and exploitative, contrary to the Unfair Terms in Consumer Contracts Regulations 1999 (**UTCCRs**), Part 2 of the Consumer Rights Act 2015 (**CRA**) and the Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**). The CMA also says that the unfair fee and the practices relating to it caused consumers to suffer loss, and that Care UK should be ordered to compensate consumers by refunding the administration fees paid to it between October 2015 and July 2018.

3. Care UK denies that the administration fee or its practices relating to that fee were in any way unfair, denies that loss was suffered by consumers, and contends that it would not be reasonable or proportionate to make an order for redress as sought by the CMA.

4. In the circumstances of the current Covid-19 pandemic, the trial was conducted entirely remotely using Microsoft Teams.

WITNESSES

5. The CMA relied on evidence from three officials of the CMA:

    i) Ms Jennifer Dinmore is a Project Director in the Consumer Protection Group of the CMA. She provided uncontroversial evidence as to the history of the CMA's investigation into Care UK. While her evidence as to the documentary record was tendentious, it was common ground that this should be the subject of submissions rather than necessitating cross-examination.

    ii) Mr Mahoney is a Senior Investigating Officer at the CMA, and described the covert investigations carried out by the CMA. His evidence was not controversial and he was not cross-examined.

    iii) Dr Gavin Knott is a Director in the Remedies, Business and Financial Analysis team at the CMA. His evidence addressed the inferences to be drawn from Care UK's financial records, as to the purpose of the introduction of the administration fee. I am inclined to agree with Mr Facenna QC, for Care UK, that most of this was quasi-expert evidence for which no permission had been given. In any event, however, as explained further below Mr Knott's evidence was irrelevant to the issues that I have to decide.

6. In addition, the CMA adduced evidence from four consumers whose relatives were admitted to Care UK homes while the administration fee was being charged: Mr Christopher Walker, Ms Janet Smallwood, Mr Michael Shipley and Mr Peter Smith. It was agreed at the outset of the hearing that the minor factual disputes as to the evidence of some of these witnesses were not relevant to the legal issues, and therefore none of these witnesses were cross-examined. While the CMA continued to rely on some aspects of their evidence, for the reasons that I discuss further below I do not consider that their evidence had any probative value for the purposes of the issues in dispute in the present case.

7. Care UK relied on evidence from three senior officers of the company:

    i) Mr Michael Parish has been the Chairman of the Care UK Group since 2019, and before that was Group CEO. He provided background evidence on the care home sector, Care UK's shift to focus on self-pay residents (as opposed to publicly-funded residents) and the consequent change in the admissions process and introduction of the administration fee, although he noted that he was not closely involved in the decision to introduce the latter.

    ii) Mr Andrew Knight joined Care UK in 2014 as Managing Director for residential care services, and has been the CEO of the residential care services division at Care UK since 2017. By the time that he joined Care UK the administration fee had already been introduced. His evidence nevertheless addressed (to a limited extent) internal discussions in 2015–16 as to the appropriate level of the fee, the CMA's investigation, and the change in Care UK's fee structure after it stopped charging the administration fee.

    iii) Mr Matthew Rosenberg is the CFO of Care UK, and addressed the profitability of Care UK during the relevant period, the accounting treatment of the administration fee, and the likely cost of implementing a redress scheme to refund the administration fee.

8. Care UK also relied on evidence from six staff members:

    i) Ms Jacqui White was Head of Marketing for the residential care side of Care UK's business during most of the relevant period. She explained Care UK's sales and admissions practice generally, and the policies in relation to the administration fee specifically.

    ii) Ms Karen Milligan and Ms Pamela Wilson were (during the relevant period) and remain customer relationship managers at Care UK. They explained their typical dealings with consumers during the admissions process, particularly in relation to the administration fee, and responded to the evidence of Mr Walker and Mr Smith.

    iii) Ms Justine Conway was in various managerial positions in Care UK during the relevant period, and gave evidence as to the training of staff in relation to the administration fee.

iv) Mrs Michelle Day and Mr Michael Parr were (during the relevant period) and remain administrators within Care UK. They gave brief evidence in response to specific factual points in the evidence of Ms Smallwood and Mr Shipley. As noted above it was common ground that nothing turned on those factual disputes and they were not cross-examined.

9. The Care UK witnesses who gave evidence were, I consider, honest and careful witnesses who did their best to assist the court with evidence based on their own knowledge and experience. The staff members showed compassion and empathy for the situation of the consumers who they were dealing with, and it was evident that they took very seriously their responsibilities to care home residents and their families or other representatives.

FACTUAL BACKGROUND

Care UK

10. The Defendants are providers of (among other things) residential and nursing care homes in the UK, with the first Defendant being the ultimate parent company of the second Defendant. By 2018 Care UK operated 118 care homes, and in 2019 Care UK was the fourth largest provider by capacity of care homes for older people in the UK.

11. While there is a pleaded issue as to the division of responsibilities between the two Defendants, and the extent of the first Defendant's knowledge of the administration fee, the parties have agreed that it is not necessary to determine that dispute, and the first Defendant will be bound by any order made against the second Defendant. On that basis the Defendants are referred to collectively in this judgment as Care UK, and no distinction is drawn between them for the purposes of the issues in this case.

The CMA's investigation

12. In December 2016 the CMA launched a market study into the market for the provision of residential accommodation with nursing or personal care for older people. As part of its investigation the CMA sought information from a wide range of stakeholders including care home providers, consumer bodies, local authorities and members of the public. In addition, the CMA commissioned research from Ipsos MORI into the experiences of care home residents and their representatives regarding the process of choosing a care home, which resulted in a report published in August 2017. The CMA's subsequent *Care homes market study* report dated 30 November 2017 identified (among other things) concerns regarding the transparency of pricing information and the practice among certain care home providers of charging large upfront administration fees.

13. During the course of the market study the CMA opened a consumer protection case in relation to Care UK, and subsequently began a consultation in relation to the administration fee charged by Care UK to self-funded residents in its English care homes.

14. In light of the CMA's concerns, Care UK's administration fee was abolished from August 2018. Care UK denied, however, that the administration fee contravened any consumer protection legislation, and did not agree to refund the administration fee paid by residents from 1 October 2015, as sought by the CMA.

The administration fee

15. Prior to the introduction of the administration fee, no separate charge was made by Care UK in respect of administration costs. Residents were instead simply charged four weeks' residential fees upfront, plus a refundable deposit amounting to four weeks' residential fees. Thereafter residential fees were charged on a monthly basis while the resident remained in the home.

16. The practice of charging an upfront admission fee was trialled at a few Care UK homes in early 2013, before being rolled out across the other care homes in England from October 2013. At that point the fee was set at a flat rate of £250 in certain care homes in the north of England, and a fee equivalent to two weeks' residential fees at all other English care homes, in all cases being charged only to self-funded permanent residents. It was not charged to residents of Scottish Care UK care homes, or publicly-funded or respite residents of any Care UK homes.

17. In addition to the administration fee, self-funded residents were required (as before) to pay four weeks' residential fees in advance, plus a refundable deposit which was equal to two weeks' residential fees. The effect of the introduction of the fee was therefore to convert half of the deposit that had previously been charged into a non-refundable fee. Care UK's analysis indicated that the average two-week administration fee paid during the relevant period was £2,188.

18. Care UK has provided various versions of the admission agreements used by it while the administration fee was being charged, which describe the fee as a "non-refundable payment to cover administration costs". In the contracts used up to and including March 2016 the fee was referred to as part of the "deposit". From April 2016 onwards the reference to the fee being a "deposit" was removed, apparently to avoid giving the impression that the fee would or might be refunded at the end of the contract.

19. For new permanent residents the administration fee was payable prior to admission to the home. For residents who had been admitted into a home on a respite basis and were converting that into permanent residency, the fee was payable when the permanent residency agreement was signed and returned.

20. In their response to an information request by the CMA early in the investigation, Care UK said that the administration fee was introduced to cover costs relating to "a resident's admission to a home, including completing the relevant contract, undertaking relevant care needs and risk assessments, initial care planning, room preparation and consultation with the resident (and/or their relatives and/or other third parties)". Care UK subsequently clarified that the fee is "intended to contribute to Care UK's <u>total</u> costs in handling admissions across its business as a whole", as opposed to being referable to the specific costs of individual residents.

21. Care UK has not provided a breakdown of the costs of admission activities across its care homes. It has, however, described those activities as including marketing activities to promote Care UK care homes, employing customer relationship managers (**CRMs**) to handle enquiries from prospective residents, showing prospective residents around the homes, undertaking pre-admissions care needs assessments and buying specialist equipment where necessary. For the purposes of these proceedings Care UK has provided indicative estimates of the costs of admitting different types of residents, which I discuss further below.

22. It is common ground that the administration fee was frequently waived, either in whole or in part. Care UK's evidence was that between 2016–2018 between 31% and 37% of customers liable to pay the administration fee received a full waiver, either on an individual basis or because the relevant home was offering a promotional waiver of the fee. Those instances included a small number of cases where the fee was refunded after having been paid, because the prospective resident did not ultimately enter the home. In addition, many residents received a partial waiver of the fee, particularly in cases where a resident was converting from respite care to permanent residency.

Purpose of introduction of the administration fee

23. The CMA sought to place reliance on contemporaneous documents showing the discussions within Care UK at the time of introduction of the administration fee, in order to argue that the purpose of the fee was not to recover the costs of services provided to consumers but to boost Care UK's profits. The CMA relied in particular on the evidence of Dr Knott, who opined (among other things) that the normal weekly fees charged by Care UK were sufficient to cover the total costs incurred and a reasonable profit.

24. I do not consider that this evidence is relevant to the issues in this case. It is a rather obvious proposition to say that the introduction of the administration fee, when no such fee was previously charged, would have improved the profitability of Care UK by reference to what that would have been had the fee not been introduced. Care UK does not, however, operate in a regulated sector where its profits are controlled. Nor did Dr Knott refer to any other benchmark of reasonable profitability.

25. In any event, the unchallenged evidence of Care UK was that on a range of measures of profitability its residential care services division was below – and in some cases significantly below – the average profitability figures for "large providers" of care homes set out in the CMA's market study report.

26. In addition, as Mr Parish explained, from around 2010 the focus of Care UK's business underwent a fundamental shift from predominantly serving the publicly-funded market (i.e. residents whose care was funded by a local authority) to focusing on self-pay residents. That was in part a response to the gradual reduction in public funding for care homes, as well as being a strategic decision on the part of Care UK. That change in strategy was implemented through the construction of new homes for self-pay residents, with around 60 new homes being built since 2010.

27. Mr Parish explained that Care UK incurs higher costs in admitting self-funded residents by comparison with publicly-funded residents. There are several reasons for this. One is that publicly-funded residents have typically had some form of care needs assessment carried out by the local authority or clinical commissioning group as part of the process of assessing eligibility for local authority funding. Self-pay residents, by contrast, are usually assessed primarily (or exclusively) by Care UK. Care UK also customises the rooms of self-funding residents, which it does not normally do for publicly-funded residents. In addition, its contracts for self-funded residents are individually negotiated and require discussion on a case-by-case basis, whereas most publicly-funded residents are admitted under block contracts in place with the relevant local authority.

28. One of the consequences of the different admissions process for self-funded residents was that in 2013 Care UK introduced the role of CRMs to oversee the admissions process for those residents. This step – which obviously increased costs – was taken not only because the more complex admissions process for those customers made it helpful to have a single point of contact for a prospective resident and their families or representatives, but also because Care UK acknowledged that its care home managers tended to come from a background in nursing (or other caring professions) and did not always feel comfortable discussing financing arrangements and contractual terms with the relevant decision-makers for a new resident.

29. I accept Mr Parish's explanation that the strategic shift in Care UK's business and the need to recover the additional costs of admitting self-pay customers was one of the motivations for the introduction of the administration fee in 2013. That conclusion is not undermined by the fact that Care UK also identified the administration fees as a basis on which additional revenue and profit could be made.

Timing of discussion of administration fee

30. An important factual dispute between the parties was the timing of Care UK's discussions about the administration fee with the relatives or other representatives of prospective residents.

31. In initial responses to questions raised by the CMA during its investigation, Care UK said that a prospective customer would be given information about the administration fee when the CRM or care home manager considered that they were "seriously interested" in proceeding with the pre-admission process, which could be on the customer's first visit, or might equally be on a second or third visit.

32. At the hearing, however, the consistent evidence of the Care UK witnesses was that Care UK's policy and practice was for the administration fee to be discussed (together with other key contractual terms) during the first visit to a care home, normally at the end of that visit.

33. Care UK recognised that there would inevitably have been occasions when that did not happen, for various reasons. In some cases, for example, the person doing

the tour understood that the customer was not interested in the home, or that they were not responsible for the financial arrangements. In other cases the customer might be shown around the home by someone such as a receptionist who had not been trained to discuss the fees; in those cases Care UK's evidence was that there would have been a follow-up call by the CRM or home manager to address the matters that were not discussed. In general, however, the policy was for the discussion to take place on the first visit, and Care UK's witnesses said that they did so, or trained others to do so. In particular:

i) Ms White said that CRMs were trained to discuss the key contractual terms during the first visit to a home. She commented that Care UK thought that prospective customers would be more likely to absorb important financial information if they were taken through it at a pace they could follow in a face-to-face meeting.

ii) Ms Milligan said that she was trained to provide a breakdown of pricing, including the administration fee, to a prospective customer on their first visit, and that this was part of the routine she followed for new enquiries. She was confident that she referred to the administration fee in the vast majority of first visits.

iii) Ms Wilson likewise said that she was trained to provide this information to customers on their first visit, and that it was her usual practice to do so. In her view this information needed to be relayed before the pre-admission care needs assessment, since "there would be no point carrying out the assessment if the fees were too high or not acceptable for any reason … This would be a waste of time for all involved."

iv) Ms Conway said that Care UK takes the training of its staff very seriously, and that she trained home managers and CRMs to discuss the administration fee with prospective customers on their first visit.

34. The CMA noted that some of Care UK's internal training documents did not expressly require the administration fee to be discussed at the end of the first visit. Ms Conway explained, however, that CRMs and home managers were provided with a "Guide to Administration Fee Charges for Private (Self-Paying) Customers", and were trained to discuss the administration fee on the basis of that guide. That document set out in detail the fee information that should be addressed when speaking with customers during a home visit, including in particular the administration fees, stating that these were the "equivalent of 2-wks care fees and forms part of the contract discussion". A detailed set of frequently asked questions was provided at the end of the guide, explaining in more detail what the administration fee covered, when it was applicable and why it was charged. The guide noted that if the administration fee had not been discussed with the customer at the outset, that might lead to dissatisfaction or a formal complaint when the customer received their first invoice from the billing team.

35. Both the CMA and Care UK referred to Care UK's internal "mystery shop" exercises as part of its ongoing monitoring of standards at its care homes. One of the issues monitored during those exercises, during the relevant period, was whether the staff member informed the mystery shopper of the administration fee.

If a mystery shop identified that relevant information was not provided, Care UK said that the managers or CRMs would receive follow-up training.

36. As Ms White pointed out, the mystery shop exercises were only carried out at a limited number of homes due to resource constraints, and Care UK therefore focused these on the homes that were perceived as being higher risk in relation to performance. She also noted that the questions that addressed the administration fee for the years 2015–2017 grouped this point with other price issues. For those reasons, while some general trends could be identified – including that over the relevant period the scores for discussing pricing and administration fees improved – I do not consider that the results of these exercises can be taken as a reliable indicator of overall compliance with Care UK's policy and training on administration fees. Nevertheless the fact that Care UK used its mystery shop exercises to monitor whether the administration fee was being discussed, and provided further training where staff may not have provided the relevant information, corroborates the evidence of the witnesses as to Care UK's policy and practice in this regard.

37. The CMA also carried out its own covert visits to Care UK homes, nine of which were handled by a home manager. The administration fee was not specifically referred to on four of those visits. Ms White recognised that these were examples where Care UK's policies had not been complied with by the staff in question, but noted that these visits represented a very small sample from the many thousands of enquiries handled by Care UK during the relevant period. She also said that one of the four homes where the fee was not mentioned was about to run a promotion waiving the fee, which might have explained the omission.

38. Having regard to the evidence before me, I am satisfied that it was Care UK's policy and general practice to discuss the administration fee during the first care home visit, where the visit was conducted by a CRM or home manager. This is of relevance, in particular, to the CMA's case on Care UK's commercial practices regarding the administration fee.

REGULATORY FRAMEWORK

Jurisdiction to make an enforcement order

39. The UTCCRs and subsequently Part 2 CRA gave effect to Directive 93/13/EEC on unfair terms in consumer contracts, and the CPRs gave effect to Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market. The UTCCRs, Part 2 CRA and the CPRs are therefore EU-derived domestic legislation within the meaning of section 1B(7) of the European Union (Withdrawal) Act 2018. Accordingly, under section 2(1) of the Withdrawal Act those provisions continue to have effect in domestic law as they did immediately prior to the end of the EU withdrawal implementation period (i.e. "**IP completion day**") at 11pm on 31 December 2020, and under s. 6(7) of the Withdrawal Act they are to be interpreted in accordance with not only domestic case law but also any principles laid down by, and decisions of, the European Court that take effect before IP completion day.

40. The CMA's authority to seek an enforcement order in relation to the administration fee charged by Care UK is derived from Part 8 of the Enterprise Act 2002. Section 213(1)(a) of the Enterprise Act designates the CMA as a "general enforcer", with the consequence that the CMA may apply for an enforcement order in respect of any infringement under s. 215(2).

41. An infringement for these purposes may be either a domestic infringement (defined in s. 211 of the Enterprise Act) or – in the version of the Enterprise Act that applied prior to IP completion day – a Community infringement (defined in s. 212). In both cases, to constitute an infringement there must be an act or omission which harms the collective interests of consumers: s. 211(1)(c) and s. 212(1).

42. On the basis of the definitions in those sections, if there is harm to the collective interests of consumers, an act or omission in respect of Part 2 CRA which is done in the course of a business will constitute a domestic infringement under s. 211; and a contravention of the UTCCRs, Part 2 CRA or the CPRs will constitute a Community infringement under s. 212.

43. References to Community infringements in the Enterprise Act have now been replaced by references to "Schedule 13 infringements" for infringements that are alleged to have occurred after IP completion day. For present purposes, however, the infringements are alleged to have occurred from 2013–2018, such that the version of the legislation in force before IP completion day applies.

44. On an application for an enforcement order under s. 215 of the Enterprise Act, if the court finds that there has been an infringement it may make various enforcement orders as set out in s. 217 of the Enterprise Act. Sections 219A and 219B of the Enterprise Act provide that the enforcement order may include such enhanced consumer measures as the court considers to be just, reasonable and proportionate. In particular, those may include provisions for redress where it is found that consumers have suffered loss as a result of infringing conduct.

45. Sections 219A and 219B of the Enterprise Act were inserted by Schedule 7 of the CRA, and came into force on 1 October 2015, which is why the redress sought by the CMA in the present case covers the period from 1 October 2015 onwards.

Unfair terms under the UTCCRs and Part 2 CRA

46. The fairness of terms in contracts made before 1 October 2015 is governed by the UTCCRs, and for contracts made on or after 1 October 2015 by Part 2 CRA.

47. Regulation 4(1) of the UTCCRs provides that the Regulations apply to unfair terms in contracts concluded between a seller or a supplier and a consumer, and s. 61(1) CRA provides that Part 2 CRA applies to a contract between a trader and a consumer. It is common ground that Care UK is a supplier as defined in Regulation 3 of the UTCCRs and a trader as defined in s. 2(2) CRA. It is also common ground that the individuals with whom Care UK contracts for the provision of self-funded accommodation and care are consumers as defined in Regulation 3 UTCCRs and s. 2(3) CRA. Accordingly, there is no dispute that the

UTCCRs and Part 2 CRA apply to Care UK's contracts for the provision of self-funded accommodation and care.

48. The central definition of an unfair term for the purposes of the UTCCRs is in Regulation 5(1) as follows:

> "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

49. Regulation 6(1) further provides that:

> "… the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent."

50. Section 62(4) and (5) CRA contains provisions that are very similar in their wording to Regulations 5(1) and 6(1) respectively, and for present purposes it was common ground that the effect of the relevant provisions of the UTCCRs and Part 2 CRA was the same.

51. Regulation 6(2) UTCCRs and s. 64 CRA exclude from the assessment of fairness the consideration of the adequacy of a price or remuneration, as against the goods or services supplied in exchange, in so far as the relevant term is in plain and intelligible language. The application of this exclusion was initially in issue between the parties, but as explained further below this point fell away during the course of the hearing.

Unfair commercial practices under the CPRs

52. Regulation 3 CPRs prohibits unfair commercial practices that amount to a misleading action under Regulation 5, a misleading omission under Regulation 6 or are aggressive under Regulation 7.

53. Regulation 5(2)(a) defines a *misleading action* to include a commercial practice that:

> "contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct".

Paragraph (4) includes at (g) "the price or the manner in which the price is calculated".

54. Regulation 6(1)(b) defines a *misleading omission* to include the situation where a commercial practice omits "material information", which is defined in

paragraph (3)(a) to mean "the information which the average consumer needs, according to the context, to take an informed transactional decision".

55. Regulation 7(1)(a) defines an *aggressive commercial practice* to mean a practice that:

> "significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence".

Paragraph (3) defines "undue influence" to mean "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision".

56. In each case, a practice is only misleading or aggressive (as relevant) if it "causes or is likely to cause" the average consumer to take a transactional decision they would not have taken otherwise: Regulations 5(2)(b), 6(1)(a) and 7(1)(b).

THE ISSUES

57. The *first issue* is whether the requirement to pay the administration fee was an unfair term within the meaning of Regulation 5(1) UTCCRs and s. 62 CRA.

58. The pleadings and skeleton arguments also raised the question of whether any assessment of the fairness of the administration fee is excluded under Regulation 6(2) of the UTCCRs and s. 64 CRA, as being an assessment of the appropriateness of the price payable under the contract by comparison with the services supplied under it. Given the way in which Ms Ford QC put the CMA's case as to the unfair terms issue, Mr Facenna confirmed in his closing submissions that he no longer pursued the exclusion point.

59. The *second issue* is whether Care UK's practices in relation to the administration fee amounted to unfair commercial practices prohibited by Regulation 3 CPRs. That requires consideration of:

    i) whether Care UK's conduct was likely to deceive the average consumer in relation to the price or the manner in which the price was calculated (Regulation 5), or omitted information which the average consumer needed to take an informed transactional decision (Regulation 6), or was an aggressive commercial practice that was likely significantly to impair the average consumer's freedom of choice or conduct, by exploiting a position of power (Regulation 7), and if so

    ii) whether Care UK's conduct caused or was likely to cause average consumers to take a transactional decision that they would not otherwise have taken.

60. While formally listed as a separate issue, Mr Facenna QC confirmed that Care UK's case as to whether Care UK's conduct harmed the collective interests of

consumers turned on its submissions on the first two issues and did not raise any separate point to be decided.

61. If I find against Care UK on one or both of the first two issues, the *final issue* is whether consumers suffered loss as a result of the infringing conduct, and if so whether it is just, reasonable and proportionate to order Care UK to compensate consumers by refunding the administration fees paid during the period from 1 October 2015 to 31 July 2018.

THE AVERAGE CONSUMER

Identification of the average consumer: general principles

62. Before addressing the issues set out above, it is necessary to address the question of what is meant by the average consumer, since the identification of the average consumer and the reactions of that average consumer to the practice in issue is a central element of the assessment of the court under the CPRs, and is also relevant to the CMA's case under the UTCCRs/CRA.

63. Regulation 2(2) of the CPRs provides that account shall be taken of the "material characteristics" of the average consumer affected by a commercial practice, but sets out a basic assumption that the average consumer in that regard is "reasonably well-informed, reasonably observant and circumspect". This reflects the fact that the relevant statutory rules exist to protect consumers who take reasonable care of themselves, rather than the careless or over-hasty consumer: Briggs J in *OFT v Purely Creative* [2011] EWHC 106 (Ch), §62.

64. It is therefore necessary to consider how the average consumer, defined in that way, would have reacted to the administration fee and the way it was presented by Care UK. As set out in recital 18 to Directive 2005/29/EC, that is not a statistical test, but is a matter for the judgment of the national court.

65. Under Regulation 2(4) of the CPRs, "where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group". There was some debate as to the relevance of this provision in this case, given that it cannot be said that the administration fee was targeted at a particular group of consumers, unlike for example television advertising directed at children. I do not, however, consider that Regulation 2(4) is limited to the situation where a particular commercial practice is targeted at a particular demographic group or consumers with specific *a priori* characteristics (such as age or gender). Rather, it is also relevant where, by virtue of the type of product or service in issue, a commercial practice will necessarily only affect a specific group of consumers.

66. That is the case for the administration fee in this case. For the purposes of these proceedings, therefore, the starting point is that it is necessary to consider the consumers at whom Care UK's fees and fee practices are directed, namely consumers who are making decisions about the admission of a prospective resident to a care home.

67. In seeking to ascertain the characteristics and experience of the average consumer in that group, the court will need to consider the factual material before it. That may include, for example, survey data such as the Ipsos MORI report commissioned by the CMA in the present case, as well as witness evidence. Considerable caution is necessary, however, in relation to the evidence of individual consumers, whose views and experience may well not be representative of the range of affected consumers in the group: see the comments of Etherton J in *OFT v Officers Club* [2005] EWHC 1080 at §147. A similar point was made more recently by Lord Reed in *Healthcare at Home v Common Services Agency* [2014] UKSC 49, §3:

> "It follows from the nature of the reasonable man, as a means of describing a standard applied by the court, that it would [be] misconceived for a party to seek to lead evidence from actual passengers on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard."

68. That does not mean that evidence from individual consumers should be regarded as entirely irrelevant for all purposes related to the assessment of unfair terms or unfair commercial practices. It might be used to illustrate, by way of background or contextual information, the range of experiences of consumers, or might provide anecdotal detail of particular issues or circumstances that are addressed in the more general evidence. What is not appropriate, however, is to rely on the evidence of a small sample of individual consumers as reflecting or informing the court's definition of the *average consumer* within a particular group.

69. While Ms Ford suggested that, having defined the average consumer on the basis of the court's judgment and taking into account other relevant material, the evidence of individual consumers might be referred to by way of "comfort" or support, it is difficult to see what such evidence could properly add. If it served merely to corroborate a judgment formed on the basis of other material without influencing that judgment at all, it would be superfluous and unnecessary. If on the other hand it were to form part of the evidence base used to form that judgment, that would be contrary to the principles set out above, since the court's judgment would in that event be influenced by a sample that was unrepresentative and therefore with the potential to mislead.

Characteristics of the average consumer in the present case

70. On the basis of the comments that I have just made, the evidence of the four CMA consumer witnesses is irrelevant to my assessment of the characteristics of the average consumer in this case. Indeed Ms Ford in her closing submissions was

not able to point to any specific point on which that evidence could be regarded as informative, as opposed to simply corroborating an exercise of judgment based on other factors.

71. The CMA also sought to place some reliance on the content of four complaints received by Care UK and disclosed to the CMA. As with the consumer witnesses, such a small set of complaints (in circumstances where over 5000 self-pay residents were liable to pay the administration fee over the relevant period) cannot remotely be regarded as representative or informative of the experience of the average consumer for the purposes of these proceedings.

72. Both parties agreed, however, that I should have regard to the Ipsos MORI report commissioned by the CMA. The Ipsos MORI research surveyed over 100 representatives of care home residents, as well as 16 care home residents themselves and five social workers. The report notes that representatives of care home residents are most likely to be the key decision-makers when choosing a care home. That is consistent with the evidence of Care UK's witnesses, in particular Ms Milligan, Ms Wilson and Ms White, which was that in admitting a new resident to a home they would almost always communicate with the family or representatives of that resident, and that it was extremely rare to deal with the residents themselves.

73. For the purposes of this case, therefore, the average consumer is a family member or other representative of the prospective care home resident, and it is necessary to consider their material characteristics.

74. In that regard it was common ground that the search for a care home is often urgent, and commonly triggered by a crisis event such as a fall or illness that makes it clear that the resident is unable to continue to live independently in their own home. The priority in such cases is to settle the resident as quickly as possible in a suitable home. That is borne out by Care UK's internal data, which indicate that between March 2018 and April 2019 the median time between Care UK opening an enquiry and admission of a self-pay resident was 21 days. Care UK's witnesses recognised that they were dealing with customers at what was often a difficult and stressful time for them, and that the process of admitting a relative to a care home could be an emotional experience. They also acknowledged that in some cases families feel under time pressure.

75. The CMA argued that these circumstances were such as to limit the relevant consumers' circumspection and capacity for rational decision-making. The evidence does not, however, support that submission. The evidence of the Care UK witnesses was that while some prospective customers may initially have limited knowledge of what to expect from the care home sector, the family and other representatives of self-funded residents are increasingly well-informed and take their responsibilities seriously. As Ms White pointed out, a lot of the people with whom she deals hold power of attorney for the resident, giving them an obligation to do their research and make a rational decision. Care UK's evidence in this regard was corroborated by the Ipsos MORI report which notes that "self-funders tended to have a clear understanding of the financial details of the resident's care".

76. Care UK's research indicated that the representatives of a prospective resident will on average visit their preferred choice of Care UK home around three times before deciding to enter into a contract. In similar vein, surveys carried out for Care UK by an external provider (based on 260 self-pay customers) found that over 60% of self-pay customers visited at least two other homes in the area, and around 40% visited at least three other homes in the area, before deciding which care home to go with. Those findings are strikingly similar to the Ipsos MORI findings that representatives of a prospective care home resident typically visit three to four homes before making a decision. These data indicate a decision that is only taken after careful thought and research, notwithstanding the time and emotional pressure that the decision-maker may be under.

77. The evidence before me therefore supports Ms Milligan's comment that "[t]he process of choosing a care home for a relative is an important one and, in my experience, a lot of thought goes into it". While there is no doubt that the decision will in many cases be difficult and stressful for the family members and other representatives of the resident, I do not consider that for the average consumer the degree of stress is such as to impair the rationality of their decision-making.

78. On the contrary, I consider that the average consumer is able to make a rational and carefully-considered decision as to the selection of a care home for the prospective resident. In particular I consider that they are able to understand the information that they are given as to the pricing structure of a care home, and to weigh that objectively in the balance alongside other factors in reaching their decision.

UNFAIR TERMS

General comments on the legal test

79. The assessment of whether a term is unfair for the purposes of the UTCCRs and Part 2 CRA turns on whether it causes a "significant imbalance" in the parties' rights and obligations under the contract to the detriment of the consumer, and if so whether that imbalance is "contrary to the requirement of good faith". While in the present case it became clear that the dispute on this issue turned on the facts rather than any material dispute as to the legal principles, both Ms Ford and Mr Facenna made submissions as to the relevant test, and I will therefore make some comment on that.

80. In *DGFT v First National Bank* [2002] 1 AC 481, Lord Bingham at §17 said that there would be a significant imbalance if a term was "so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour". As Lord Millett commented later in the same case, at §54, there can be no one single test of this, and it is necessary to consider all the circumstances of the case, which may include:

> "the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in

> commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate."

81. The concept of a significant imbalance was addressed by the CJEU in Case C-415/11 *Aziz* EU:C:2013:164. At §68 the Court held that to ascertain whether a term causes a significant imbalance it is necessary to consider in particular what rules of national law would apply if there was no agreement between the parties. In addition, the Court noted at §71 that the assessment of the unfairness of a term must take into account the nature of the goods or services for which the contract was concluded, "all the circumstances" of conclusion of the contract, and the consequences of the term. Those principles were cited by Lords Neuberger and Sumption in their joint judgment in *ParkingEye v Beavis* [2016] AC 1172, at §105.

82. The need to take account of all of the relevant circumstances of an individual case bears emphasis. As Lord Mance pointed out at §208 of *ParkingEye* (and referring to the comments of Lord Millett in *DGFT v First National Bank*), the CJEU in *Aziz* cannot be taken to have been identifying considerations that would by themselves be conclusive, rather than relevant.

83. Regarding the question of good faith, the CJEU held at §69 of *Aziz* that the national court must assess whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations. This approach to good faith was also endorsed by the Supreme Court in *ParkingEye*, with the majority concluding that ParkingEye had a legitimate interest in imposing a £85 charge on motorists who exceeded the two-hour car park stay limit (§107), that the charge was not exorbitant (§109), and that a hypothetical reasonable motorist would have agreed to be bound by the term imposing the charge (§109).

84. As Advocate General Hogan noted in his opinion in Cases C-84, 222 and 252/19 *Profi Credit Polska* EU:C:2020:259, §§101–104, although the CJEU has regarded the criteria of a significant imbalance and a lack of good faith as distinct elements in the assessment of whether a contractual term is unfair, in practice similar considerations arise under each part of the test. Accordingly, he considered, if a term provides for duties or obligations that "depart conspicuously from an average generally informed and reasonably attentive consumer's legitimate expectations as to the content of a contract", that term might be declared to be unfair (§104).

The CMA's case on unfair terms

85. In opening submissions Ms Ford put the CMA's case in two ways:

    i) That the imposition of a substantial upfront payment in the form of an administration fee representing (for most care homes) two weeks'

residential fees created the risk of a disproportionate burden in the event that the resident's stay in the care home turned out to be relatively short.

ii) That the administration fee was charged at a point where Care UK had provided no, or only *de minimis*, services.

86. Both of these, in the CMA's submission, created a significant imbalance to the detriment of the consumer, in circumstances where Care UK could not reasonably have assumed that consumers would have agreed to pay the administration fee in individual contract negotiations.

87. In opening submissions, it appeared at times that the first of the CMA's objections in this regard was a complaint about the administration fee not being "costs reflective". During the course of the hearing, however, it became apparent that the CMA's submissions on the risk of a disproportionate burden turned on the premise that the consideration for the administration fee in substance consisted only of the accommodation and care services provided to the resident once they were admitted to a care home, rather than on any material service provided before that point. Ms Ford therefore ultimately conceded that both of the ways in which the CMA put its case on unfair terms came down to the same objection, namely that no (or no material) separate service was provided by Care UK in return for the administration fee.

88. Care UK's response was to contend that significant services were indeed provided in consideration for the administration fee, in respect of which Care UK incurred significant costs. Those services included, in particular, the pre-admission assessment of care needs and (on the basis of that assessment) the preparation of a detailed care plan for each resident.

89. The CMA did not dispute that Care UK incurred some costs in admitting new residents. Ms Ford said, however, that this did not mean that a material and distinct service was provided at that point. Rather, she submitted, the pre-admission steps that are taken by Care UK are an intrinsic part of (and therefore not severable from) the provision of accommodation and care services to a resident.

90. On the basis of those submissions, the issue of whether the administration fee was an unfair term turns on the question of whether or not Care UK did provide more than *de minimis* services to residents (and their families or other representatives) prior to their admission, in consideration for the administration fee, which are distinct from the provision of accommodation and care services to that resident once admitted.

91. Both parties put their arguments on that point as submissions almost exclusively on the facts. Neither of them referred to any point of legal principle that should inform my assessment, save for a subsidiary point raised by the CMA as to the purpose of the introduction of the administration fee, which I will discuss further below.

The materiality of the pre-admission services provided by Care UK

92. The services which Care UK said that it provides to residents and their representatives were described in most detail in the witness statement of Ms White. She set out the various stages of the process of admitting a new resident to a Care UK care home, beginning with various forms of marketing and ending with the arrival of the new resident.

93. There is in my judgment some force in the CMA's submission that the provision of marketing materials (on Care UK's website or in other advertising) and the handling of initial enquiries, including visits to the care home by a resident and/or their representatives, are matters that are more appropriately described as marketing by Care UK rather than the provision of services to either the resident or their representatives. Whether put in terms (as per Lord Millett in *First National Bank*) of whether a consumer would be surprised to be paying for it, or whether one looks at the nature of the activity and whether Care UK could reasonably assume that a consumer would agree to pay for it, I do not consider that any reasonably well-informed consumer would expect or agree in individual negotiations to pay for marketing activities or an initial visit to a care home.

94. The position of the activities subsequently undertaken by Care UK is, however, quite different. Before a self-funded resident can be admitted to a home it is necessary to carry out an assessment of their care needs, and it is apparent that the assessment carried out by Care UK for a prospective self-funded resident is very detailed indeed. The assessment will typically be carried out in the prospective resident's home, and will be carried out by one of the senior staff members of the care home. Where there is a nursing requirement, a qualified nurse will also be involved in the assessment. The assessment involves completion of a detailed report which will include information about the prospective resident's life history, daily routine, medical history and medication (including detailed comments on how that medication is taken), allergies, specific behavioural problems or needs, dietary requirements and preferences, sleeping routines and support needs, communication abilities, personal care requirements and end of life care plans (if any).

95. As Ms White explained, each assessment is reviewed by the home manager to determine whether the home has appropriate equipment and staff to support the admission of the resident. It may also be necessary for the care home staff to liaise at that stage with external healthcare professionals such as the GP of the prospective resident, or the nurses and doctors at any hospital where the resident is staying prior to admission to the home. Modifications may also need to be made to the prospective resident's room, which may include the purchase of specialised equipment. Prior to admission, a moving-in plan and a care plan are drawn up by the care home staff.

96. For the purposes of the CMA's investigation, Ms White estimated the costs of the pre-admission activities for Care UK's residents, from the stage of initial enquiries to admission. Recognising that each resident's needs will be different, her estimates were prepared on the basis of illustrative examples of three hypothetical residents with (1) straightforward requirements and "low complexity" care needs, (2) more complex needs requiring several prior visits by

the resident's representatives to the care home, and (3) highly complex needs requiring a second care assessment and the installation of specialist equipment in the resident's room. The indicative pre-admission costs under those three scenarios were respectively £1,133.01, £2,164.38 and £4,056.24.

97. On the basis of that evidence, which was not challenged by the CMA, it is clear that Care UK does carry out very significant activities prior to the admission of a new self-funded resident. Those activities are of course preparatory to that resident's admission, and do not at that stage involve the provision of accommodation or care to the prospective resident. Nevertheless Care UK clearly regards the work it does at that stage as necessary in order to enable and facilitate the resident's admission to the care home, and it is work carried out for the benefit of the prospective resident and their relatives or other representatives.

98. Ms Ford argued that the pre-admission activities could not be regarded as a "distinct" service severable from the later provision of accommodation and care. I disagree. The work done prior to admission is obviously very closely related to the services that are subsequently provided, and some elements of the pre-admission activities are effectively continued following admission (for example the initial care plan is kept updated after the resident moves in). But the pre-admission stage as a whole is both temporally and qualitatively distinct from the provision of accommodation and care services to the resident once admitted.

99. The CMA did not, moreover, identify any point of legal principle that would require a preparatory activity to be regarded as an inseparable part of a subsequent service, and therefore necessarily subsumed within that subsequent service for the purposes of fees, merely because the purpose of the preparatory activity is to enable or facilitate the provision of the subsequent service. Nor is there in my judgment any reason why an average consumer would expect the costs of admission work to be subsumed within the weekly residential fees for a care home, rather than being billed separately. It is therefore difficult to see why the identification and imposition of a separate charge for that part of the service provided by Care UK should be regarded as causing a significant imbalance in the parties' rights and obligations under the contract.

100. Ms Ford also relied on the comments of Mann J in *OFT v Foxtons* [2009] EWHC 1681 (Ch), §§84–85, dismissing Foxtons' argument that a renewal commission charged to landlords if a tenant remained in occupation was justified because it was part of the payment for an income stream that had been introduced to the landlord. One of the reasons for dismissing that argument was that there was no evidence that Foxtons' had costed their relevant activities, nor was any evidence subsequently provided by Foxtons for the purposes of the proceedings. That being the case, the judge considered that it was just as likely that Foxtons relied on the renewal commissions as an "adventitious benefit".

101. Ms Ford said that in the present case Care UK had likewise not sought to cost its pre-admission activities prior to the CMA investigation, and that Care UK's internal documents showed that as in the *Foxtons* case the administration fee was merely extra profit for Care UK. That, she said, indicated that the administration fee was not genuinely charged in consideration for the provision of separate and distinct services.

102. In *Foxtons*, however, the point being made was that there was no evidence *at all* of the costs of activities referable to the renewal commission charged by Foxtons. In this case, as I have set out above, there is extensive evidence as to the activities carried out by Care UK at the pre-admission stage, together with indicative illustrations of the (significant) costs of those activities. That evidence is not negated simply because Care UK's internal discussions regarding the introduction of the administration fee also identified the fee as a source of additional revenue and/or profit.

103. The CMA's contention that the administration fee was an unfair term therefore fails on the facts. The administration fee was charged at a point when Care UK had provided material and distinct pre-admission services to prospective residents and their families or representatives, and there was no reason of principle why Care UK should not have made a separate charge for the significant costs of those services. In those circumstances the administration fee did not cause a significant imbalance in the parties' rights and obligations under the contract.

104. It is therefore not necessary to go further and consider whether the administration fee was contrary to the requirement of good faith. In any event, however, the CMA's case on good faith likewise turned on the question of whether a material service was provided to the consumer. As Ms Ford put it in her opening submissions, the CMA's position was that in equal contract negotiations a consumer would not have agreed to pay the administration fee because they received no tangible additional benefit in return. I have, however, rejected the premise of that submission, and it follows from the conclusions that I have already reached that I consider that Care UK had a legitimate interest in imposing the administration fee.

Other considerations

105. For completeness I note that the majority of residents admitted to Care UK homes during the period in which the administration fee was in force did pay that fee (i.e. did not benefit from a waiver), and there were very few complaints made about it, either to Care UK itself or to the CMA (following a call for information and publication in national media). The evidence does not, therefore, suggest that the administration fee was regarded as unreasonable or exorbitant by the average consumer, such that the average consumer would in individual negotiations have refused to pay it.

106. Ms Ford suggested that consumers may not have challenged the administration fee because they may not have understood its economic effect. I have, however, found that the average consumer is able to understand the information that they are given as to the pricing structure of a care home. While individual complainants may for whatever reason not fully have understood the details of their care home contract, what is relevant is the experience of the average consumer.

107. In that regard, Care UK's training documents rightly recognised that its contracts would be signed at what was often a difficult time for its customers. Care UK's "Guide to Administration Fee Charges for Private (Self-Paying) Customers" said "never assume the contract has been read or thoroughly understood as it is often

signed during an anxious time for a customer. Of course, as adults we all take personal responsibility for signing contractual agreements but step-by-step support and guidance is required by our customers in some cases". A more extensive sales and marketing guide emphasised that the home manager or CRM must in all cases discuss the details of the resident contract with a customer, noting that "Nothing must come as a surprise when they read it through at their own leisure later".

108. Care UK's witnesses confirmed that this was their practice. As Ms White commented in her oral evidence:

> "We do everything that we can to make sure that the customers understand the key points of the contract. We're entering into a long-term relationship with them, so getting off on the wrong foot by trying to lead them or not being transparent isn't in our interest. So we do what we can to help people as much as we can to make them aware of what they're entered into. … I would like to think particularly where people have a power of attorney, that they take that responsibility seriously and they do review the contract, but we don't make that assumption."

109. The internal training documents and Care UK's witness evidence thus indicates that Care UK took its responsibilities to its customers seriously, recognising the pressure that many would be under when they were dealing with the admission of a permanent resident to a care home, and emphasising that it was important in those circumstances that the contractual details were properly explained at the outset. There was no evidence suggesting that despite that policy Care UK's customers typically did not understand the economic effect of the administration fee before they agreed to pay it.

110. Ms Ford also said that in considering the good faith limb of the unfairness test it is relevant to take into account the timing of the information given as to the administration fee, and the CMA's contention that the fee was not disclosed until such time as the representatives of the prospective resident were already "emotionally committed" to the care home. I reject that submission on the evidence for the reasons discussed further below.

Conclusion on unfair terms

111. For all the reasons set out above I reject the CMA's case that the administration fee was an unfair term under the UTCCRs and Part 2 CRA.

UNFAIR COMMERCIAL PRACTICES

General comments on the legal test

112. The assessment of whether a practice amounts to an unfair commercial practice prohibited by Regulation 3 CPRs requires consideration of whether the relevant practice involves a misleading action, omission or aggressive commercial

practice that causes or is likely to cause the average consumer to take a transactional decision that they would not otherwise have taken.

113. A commercial practice will therefore only be prohibited by Regulation 3 if three cumulative conditions are satisfied: (1) the practice is a misleading action, a misleading omission or an aggressive commercial practice; (2) a subsequent decision taken by a consumer who has been exposed to the practice can be regarded as a transactional decision; and (3) the practice caused or was likely to cause that transactional decision, when taken by an average consumer, to be different to the decision that would otherwise have been taken.

114. As with the CMA's case on unfair terms, the question of whether Care UK's practices amounted to unfair commercial practices turns primarily on questions of fact rather than disputed issues of law. The one significant dispute of principle concerned the scope of the concept of a transactional decision. I will address that further below.

The CMA's case on unfair commercial practices

115. The CMA's case was that three aspects of Care UK's practices were unfair practices prohibited by Regulation 3 CPRs:

    i) Care UK's practice of providing, on its website and in telephone enquiries, indicative pricing information which included reference to examples of weekly residential fees but which did not mention the administration fee. This was put as being a misleading action as well as a misleading omission.

    ii) An allegation that Care UK represented that the admission fee was to cover the costs incurred in admitting individual prospective residents, when it was not in fact calculated by reference to the cost of admitting any particular resident. This was put as being a misleading action.

    iii) An allegation that Care UK had a practice of only disclosing sufficient information about the administration fee once a consumer was seriously interested in proceeding towards admission to a Care UK home. This was put as being an aggressive commercial practice, on the basis that it pressurised the consumer and impaired their freedom of choice or conduct by only disclosing the admission fee once the consumer had a degree of emotional commitment to the home.

116. All of those practices, the CMA said, caused the relatives or representatives of prospective residents to take transactional decisions that they would not otherwise have taken.

117. It is appropriate to consider each of the CMA's three contentions in turn.

Omission of administration fee in initial pricing information

118. Care UK accepted that the price information given on its websites and in initial telephone enquiries provided indicative weekly residential fees but did not refer

to the administration fee. Its position was, however, that this was not misleading, since it was made clear that the prices quoted were for guidance only.

119. A general statement of principle regarding the assessment of price information, where one element of the price is omitted or presented less conspicuously, can be found in the judgment of the CJEU in Case C-611/14 *Canal Digital Danmark* [2016] EU:C:2016:800, §§43–44:

> "Where the price of a product … is divided into several components, one being particularly emphasised in the marketing, while the other, which nevertheless constitutes an inevitable and foreseeable element of the price, is completely omitted or is presented less prominently, an assessment should be made, in particular, whether that presentation is likely to lead to a mistaken perception of the overall offer.
>
> This will be the case, in particular, if the average consumer is likely to have the mistaken impression that he is offered a particularly advantageous price, due to the fact that he could believe, wrongly, that he only had to pay the emphasised component of the price …"

120. In the present case, the following was an example of the price information on Care UK's website:

> "**Indicative Pricing**
> Prices quoted are for guidance only. All prices are subject to an individual care needs pre-assessment. Nursing care may be funded in part by a contribution from the NHS which, where applicable, is paid directly by the NHS.
>
> Residential from £1017 per week Nursing from £1165 per week"

121. It is clear from this that the price information given concerned the ongoing weekly costs only, was purely illustrative, represented the starting point of the range, and that the cost for individual residents would depend on their individual care needs pre-assessment. No reasonably well-informed, reasonably observant and circum–spect average family member or other representative of a prospective care home resident could have believed that the indicative fee given represented the weekly price that would be charged to that particular resident, still less that the figure included all elements of the fees charged by Care UK.

122. The same is true of price information given in response to telephone enquiries. Care UK's evidence was that the call centre staff, in particular, were trained to provide "indicative starting prices". There was no evidence suggesting that the prices given in any initial telephone enquiries were represented to be a comprehensive estimate of the fees that would be charged to any individual prospective resident; nor could they have been, in circumstances where what is offered by Care UK is a highly bespoke accommodation and care package, the cost of which will depend on the particular needs of each resident.

123. I do not, therefore, consider that the initial indicative pricing information given by Care UK was misleading.

Representation regarding the nature of the administration fee

124. The CMA's second contention was that Care UK instructed care home staff to explain the administration fee as covering the costs incurred in admitting the individual prospective resident in question. The basis for that claim was one of the guidance documents used to train Care UK staff, described as a "Sales & marketing toolkit", which referred to the administration fee as covering the pre-admission administration and management costs "involved in your relatives care and assessments".

125. In addition, a sentence on Care UK's contract in use during the trial period from February to September 2013 stated that:

> "The two weeks non-refundable deposit covers our costs associated with the provision of pre-admission assessments, medical history liaison, establishment of a care plan and other ad hoc costs we encounter during the course of your admission process".

126. The CMA's case was that this was misleading, because Care UK accepted that the administration fee did not relate to the specific costs of any particular resident, but was intended to contribute to Care UK's total costs in handling admissions across its business as a whole.

127. I have no hesitation in rejecting this aspect of the CMA's case. The wording in the initial version of the contract and the sales and marketing toolkit simply reflected the fact that the administration fee was explained as covering the costs incurred prior to the admission of a new resident. It is, as Mr Facenna submitted, not plausible that an average consumer would have understood from that wording that the administration fee represented the costs incurred in relation to any specific resident, given that the fee was calculated on a standard basis of two weeks' residential fees (or a flat rate of £250), rather than being an itemised calculation of the costs of a particular resident.

128. Rather, I consider that an average consumer would have readily understood that the administration fee was for reasons of simplicity set on a standard basis, and that the specific costs of admitting an individual resident might be more or less than the fee charged depending on the particular needs of that resident and the corresponding extent of the pre-admission preparation required by the care home in question.

129. The identified wording was therefore not in my judgment misleading.

Emotional commitment of consumers

130. The CMA's final objection was that the administration fee was not explained to consumers until they were emotionally committed to the admission of their relative to the care home in question. The CMA relied, in particular, on Care UK's responses to questions from the CMA during its investigation, in which Care UK

said that a resident was likely to be given information on the administration fee once the home manager or CRM considered that they were "seriously interested" in proceeding with the pre-admission process.

131. On that basis the CMA said that it was only once consumers had "formed a view that the home will provide suitable care for their loved one and so become emotionally committed to it" that they were told about the administration fee. That, in the CMA's submission, was an aggressive commercial practice, since it exploited a position of power over the consumer, exerted pressure on the consumer and impaired their freedom of conduct.

132. Again, I unhesitatingly reject that contention. I have found as a fact that Care UK's policy and practice was to inform consumers about the administration fee during their first visit to a care home. The question as to whether the consumer was "seriously interested" was not part of the training provided to staff. Rather, Care UK's initial reference to the consumer being "seriously interested" was, as Care UK explained, merely intended to convey that staff may not have provided pricing information to consumers who were obviously not going to consider their home any further.

133. There is no basis on which that can be described as the exploitation of a position of power over the consumer, or in any other way aggressive. Rather, it was logical and reasonable that fees would be discussed with the representatives of prospective residents once they had visited the home and had indicated that they remained interested and wanted to know more about the process of admission to the home.

134. Moreover, where representatives did remain interested and proceeded to a discussion about the terms of admission (including the administration fee), that did not imply that they were already "emotionally committed" to the home. As I have set out above, the evidence indicated that the representatives of a prospective resident will on average visit a Care UK home three times before proceeding to a pre-admission assessment and ultimately admission to the home, and will also typically visit several other local homes before making their decision. That is inconsistent with the suggestion that a commitment to the home is likely to be formed during the first visit. Still less can it plausibly be said that an average consumer would have been committed to such a degree that their freedom of conduct was impaired by the time they received information about the administration fee.

135. I acknowledge that some individual representatives of care home residents may have been unsatisfied with the timing of or circumstances in which they became aware of the charge, and may have felt under pressure at that point. As discussed above, however, the question that I have to decide turns on the information provided to and the awareness or understanding of an average consumer.

136. In that regard, much of the CMA's case on this point seemed to rest on its general submission that the relatives or other representatives of a prospective resident are in a vulnerable position when they are visiting a care home, and that the administration fee took advantage of that vulnerability. As I have already found, however, while Care UK's witnesses consistently acknowledged that the process

of admission to a care home would be a difficult and often stressful experience for the resident and their representatives, the evidence did not support the CMA's claims that average consumers' abilities to make rational and considered decisions was compromised in those circumstances.

137. I do not, therefore, consider that the timing of discussion of the administration fee constituted an aggressive commercial practice.

Identification of relevant transactional decisions

138. In light of the conclusions that I have reached above, it is not necessary for me to consider whether the commercial practices to which the CMA has taken objection caused or was likely to cause the average consumer to take a transactional decision that they would not have taken otherwise. I will, however, address this for completeness since there was considerable argument on this point.

139. Care UK's case was that even if any of their commercial practices were misleading or aggressive in the ways alleged by the CMA, they did not cause the average consumer to take a transactional decision that they would not have taken otherwise.

140. In addressing that contention it is first necessary to identify which decisions taken by consumers in the admission of a resident to a care home can be described as transactional decisions. It is then necessary to consider whether those transactional decisions were or were likely to have been influenced by the practices complained of by the CMA.

141. Regulation 2(1) CPRs defines a transactional decision as:

> "any decision taken by a consumer, whether it is to act or to refrain from acting, concerning–
> (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product;
> (b) whether, how and on what terms to exercise a contractual right in relation to a product;"

"Product" is defined to include (among other things) goods or a service.

142. It is well-established that a transactional decision for these purposes is not confined to a decision to purchase a particular product or service, but may also include a decision preparatory to the purchase of a product that is nevertheless "directly related" to the decision to purchase, such as a decision to enter a shop: Case C-281/12 *Trento Sviluppo* EU:C:2013:859, §§36 and 38.

143. The CJEU in that case held that this interpretation followed, in particular, from the words of Article 2(k) of Directive 2005/29/EC (which is implemented by the CPRs), defining a transactional decision as "any decision taken by a consumer concerning whether, how and on what terms to purchase". In that case the relevant transactional decision was a consumer's decision to go to a particular supermarket following a promotional advertisement advertising a laptop computer at a reduced price.

144. A similar fact pattern arose in Case C-562/15 *Carrefour* EU:C:2017:95, concerning comparative advertising by a retail chain claiming that 500 leading brand products sold in its shops were cheaper than those at competitor stores. The CJEU commented at §33 of its judgment that the advertising was liable to influence the economic behaviour of consumers by leading them to believe that they would benefit from the lower prices "when buying the products concerned in all the shops in the advertiser's retail chain rather than in shops belonging to the competing retail chains". The relevant transactional decision in that case included a decision to buy the products concerned in one shop rather than another (§35).

145. In the present case, it is common ground that a decision to enter into a contract for the provision of accommodation and care in a Care UK home, and a decision to pay the administration fee, are both transactional decisions within the meaning of Regulation 2(1) CPRs. Both of these are direct decisions to purchase the services offered by Care UK.

146. The more difficult question is the extent to which the preparatory steps taken by a prospective resident of a care home, or their relatives or other representatives, can be described as transactional decisions. The CMA's case (disputed by Care UK) is that a decision to visit a care home, a decision to be taken on a tour of a care home and a decision to arrange for a pre-admission assessment are all transactional decisions comparable to the decision to enter a shop following advertising by the retailer.

147. It is, however, necessary to exercise caution when trying to draw an analogy from cases relating to the purchase of products in a retail outlet, for the purposes of a quite different and considerably more complex decision to enter into a contract for the provision of a bespoke service such as the provision of accommodation and care by a care home. The decision of a consumer to walk into a shop in order to buy a particular advertised product (such as the laptop advertised in *Trento Svilippo*, or the products compared in the disputed advertising campaign in *Carrefour*) is very different in nature to the decision of a consumer to visit a care home.

148. In particular, I consider that Mr Facenna is right to say that a consumer making an initial visit to a care home is not making any decision about whether, how or on what terms to purchase care home accommodation. Rather, at that stage the consumer is merely gathering information so as to inform a subsequent decision of that nature. That is supported by the evidence to which I have already referred as to the number of visits that representatives of a prospective resident will make to a care home, and indeed other homes in the area, before making a decision as to which care home (if any) to choose.

149. Accordingly, when a relative or other representative of a prospective resident makes their first visit to a Care UK home, and goes on a tour of that home, it is very unlikely that they will have made even a provisional decision as to their choice of home. I do not, therefore, consider that a transactional decision is taken at that stage.

150. By contrast, when the representative of a prospective resident decides to arrange for a pre-admission assessment of the resident, that is the first formal step towards entering into a contract for the admission of the resident. As I have already described, the pre-admission assessment is a time-consuming process, involving one or more of the senior staff of the care home, and requiring the provision of a large amount of detailed information about the resident. All of that indicates that by the time a pre-admission assessment is arranged the representatives of the prospective resident will have gone beyond the initial information-gathering stage and will have at least provisionally decided that the Care UK home is suitable for the resident, subject to the outcome of the assessment.

151. While it appears that some consumers may arrange a care needs assessment from multiple care homes, in order to have a full understanding of the package on offer in each case, the evidence before me does not suggest that this is typical; and the fact that this sometimes occurs does not in my view change the nature of the pre-admission assessment as a formal part of the admission procedure which is qualitatively different from an initial visit to a care home.

152. In those circumstances the decision to proceed with a pre-admission assessment is, in my judgment, "directly related" to the decision to enter into a contract for the provision of services by Care UK, and is therefore a transactional decision within the meaning of Regulation 2(1).

153. The relevant transactional decisions in the present case are therefore: (1) a decision to proceed with a pre-admission assessment; (2) a decision to enter into a contract for the provision of accommodation and care in a care home; and (3) a decision to pay the administration fee.

Causation of transactional decisions that would not otherwise have been taken

154. The final question is therefore whether Care UK's commercial practices identified by the CMA caused or were likely to have caused consumers to take one or more of the three transactional decisions set out above, that they would not otherwise have taken.

155. The parties were agreed that the following passage from the judgment of Briggs J in *OFT v Purely Creative* set out the test of causation that I should apply in this case:

> "71. It was common ground that the phrase 'causes or is likely to cause' is equivalent to the English standard of the balance of probabilities. The phrase 'to take a transactional decision he would not have taken otherwise' suggests *sine qua non* test, namely, whether but for the relevant misleading action or omission of the trader, the average consumer would have made a different transactional decision from that which he did make. This may not mean that the misleading act or omission was the sole cause of the average consumer's decision, but it appears to mean that those Regulations will not have been infringed if the court concludes that, but for the misleading act or omission, the average consumer would nonetheless have decided as he did.

> 72. At first sight it might appear from the structure of Regulations 5 and 6 that, for the purposes of applying the causation test, misleading acts require to be assessed separately from misleading omissions. In my judgment that structure did not intentionally impose such an impracticable barrier, in particular because the causation test is the same under each regulation. I consider that the combined effect of all relevant misleading acts and omissions must first be ascertained, and then subjected to the test whether, taken in the aggregate, it would probably cause the average consumer to take a transactional decision which he would not otherwise have taken."

156. Assuming, as I have found, that the relevant transactional decisions in the present case commenced with the decision to arrange a pre-admission assessment for a prospective resident, by the time that decision was taken by the average consumer they had been informed of the administration fee charged by Care UK. Indeed that was the case even if the administration fee was not discussed on the consumer's first visit to a home, but was discussed on a subsequent visit prior to the decision to arrange a pre-admission assessment.

157. The consumer would not of course have known at that stage the precise administration fee that would be charged (save for the homes where a flat rate fee of £250 applied), because that would depend on the weekly fee, which would in turn depend on the particular care needs of the individual prospective resident. But by the time of the subsequent transactional decisions to enter into a care home contract and payment of the administration fee the consumer would have known precisely what fee was to be charged, not least because it was set out explicitly in the contract.

158. It follows that the CMA's first objection as to the absence of information as to the administration fee on the Care UK website or in any initial telephone enquiry could have had no impact on the transactional decisions taken by consumers in this case, because the relevant information had been provided by the time that any transactional decisions were taken.

159. That leaves the question of whether the CMA's second and/or third objections (even if made out, contrary to my findings above) could have caused transactional decisions. In other words, if the average consumer was indeed led to believe that the administration fee related to the pre-admission costs of the individual resident, and/or felt "emotionally committed" by the time that they learned of the administration fee such that their freedom of conduct was impaired, were those practices likely to have caused transactional decisions that the consumers would not otherwise have taken?

160. That requires consideration of the extent to which the price of a care home, and specifically the additional price implied by the administration fee, impacted upon the decisions of average consumers during the relevant period.

161. Care UK engaged an external provider to carry out focus group research in 2018 and 2019 in relation to self-pay customers. That research indicated that in so far as consumers were interested in price information, they were (in Ms White's

words) "looking for an indication of whether they were in the ballpark or not in the care home and whether that was the kind of place they could afford". Mr Parish's evidence was likewise that consumers were "more focused on the weekly fee" than on the administration fee, because they would be considering long-term affordability potentially over a number of years.

162. Beyond a consideration of long-term affordability, Care UK's focus group research indicated that price was rarely considered to be a main reason why a particular care home was shortlisted for a visit or ultimately selected. Rather, the main factors that influenced a choice of home were the atmosphere and feel of the home, the location of the home, the condition of the building and rooms, how residents were treated by staff and the quality of care, the facilities available, independent quality measures (e.g. reports on the Care Quality Commission website), and whether the home feels secure and clean. Consistent with that research, Ms White commented that of the unique visits to Care UK's home websites, only around 6% are ones where the individual clicks the link to review pricing information.

163. The Ipsos MORI report reached very similar conclusions. Under the heading "What matters to people" the report notes that the participants in their research wanted the care home to "be located close to their family and/or friends; have a good look and feel; be clean and tidy; have staff with a good attitude; and have appropriate facilities" (§9.30). Regarding fees, the report says that:

> "Where the resident could fund their own care, representatives told us that they did not feel that the level of the fee should restrict choice, since the money funding the care was not their own. However, long term affordability was more likely to be considered if the representatives themselves were contributing to the cost of care." (§9.36)

164. I also note that a two-week administration fee represented a very small proportion of the total fees charged by Care UK for the average self-pay resident – less than 2% for a stay of two years, and only 2.3% for the average stay in a Care UK care home of 20 months. A flat rate fee of £250 would have had even less of an impact on the total costs.

165. In light of the evidence on this point I do not consider that the existence of the administration fee is likely to have made any material difference to the transactional decisions of average consumers during the relevant period, whatever the basis on which that was explained to consumers, and whatever the degree of commitment of consumers by the time that they became aware of it.

166. Finally, even if the earlier decisions of a resident's representatives to visit or go on a tour of a care home could also be regarded as transactional decisions, the same evidence set out above indicates that the average consumer would have taken the same decisions to visit or tour the home even if they had been aware of the administration fee by that point (for example if the pricing information on Care UK's website or the information given on initial telephone enquiries had included information about the administration fee alongside the indicative weekly fees quoted).

167. I do not, therefore, consider that Care UK's commercial practices caused or were likely to cause transactional decisions that would not otherwise have been taken, even if they were misleading and/or aggressive, and even if (contrary to my findings above) transactional decisions are construed to include decisions to visit or go on a tour of a care home.

Conclusion on unfair commercial practices

168. I therefore reject the CMA's case that Care UK's practices in relation to the administration fee amounted to unfair commercial practices within the meaning of the CPRs.

OVERALL CONCLUSION

169. For the reasons set out above, I dismiss the CMA's case, and it is not necessary to consider the issues of consumer loss and redress.