



A briefing note for retirement community operators

The main provisions of the Consumer Rights Act 2015 (CRA) have now come into force. The CRA modernises and simplifies the law on consumer protection in the UK, following more than a decade of proposals around reforming the Unfair Contract Terms Act 1977 (UCTA) and Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR's) to make them clearer in their application to business to consumer contracts.

While much is a restatement of previous law, the CRA does add some new principles, and modifies others. The coming into force of the bulk of the CRA is a good opportunity for operators to remind themselves of their legal duties to consumers, which will be relevant to a number of their activities including advertising, information supplied and its timing and exclusions of liability. The CRA also plays a central role in the Law Commission's current proposals for disclosure of event fees (currently out for consultation). As a Corporate Supporter of ARCO, we have prepared this briefing paper to provide a summary of the Consumer Rights Act 2015 and its impact on operators of retirement communities.

What the CRA covers

Consumers and traders

The focus of the CRA is the relationship between traders and consumers. The CRA offers protection for consumers in their dealings with traders. Retirement community operators will be traders. A consumer is an individual acting for purposes wholly or mainly outside of their trade, business or profession. It is for a trader to show that a person is not a consumer and not acting in a business capacity - in practice this will not be relevant for retirement community operators as residents will be consumers.

Contracts for goods, services, digital content

There are different rules relating to goods, services and digital content. Though they overlap in their effects there are some differences, for example in remedies available to consumers. In some cases contracts can be a mixture of more than one of these and this would allow a remedy available for one category to apply to the whole contract.

Various standards are implied into contracts. For example:

When selling or supplying goods:

- Certain pre-contract information required under the Regulations must be provided in advance. This can include a requirement to give a 14 day cancellation right in a prescribed form, depending on the type of contract.
- Goods have to be of satisfactory quality and fit for purpose .
- Goods must match a sample or model seen or examined by the consumer, unless any differences were brought to the consumer's attention before the contract was made.
- Installed goods must be installed correctly.
- For goods which include digital content, the digital content must "conform to the contract to provide that content".

In the case of services contracts, the CRA implies that:

- The trader must perform the service with reasonable care and skill.
- Unless expressly stated or the method of fixing it is set out in the contract, the consumer must pay a reasonable price for the services.
- Unless expressly stated or the method of fixing it is set out in the contract, the trader must perform the services within a reasonable time.

Consumer remedies

The CRA gives consumers different remedies depending on whether the contract is for goods, services or digital content. Remedies include:

- Rejecting goods
- Asking for a service to be repeated
- Requiring a repair or replacement of goods
- A price reduction

As noted above, if a contract is a mixture of these the remedies available can be impacted. The explanatory notes to the CRA indicate that (unless the different elements are severable), a mixed contract will attract the remedies available to each element making it up.

Unfair terms

Purpose

The focus of the CRA is to enable the consumer to make an informed choice about contracts he or she may enter into. It reproduces (for the benefit of consumers) provisions in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 that imply terms into contracts for the supply of goods (for example, goods to be of satisfactory quality) and services (for example, services to be supplied with reasonable skill and care). As such it is intended to be a complete code on unfair terms in consumer contracts.

In many cases it restates the previous law, for example it renders ineffective attempts by suppliers to exclude or restrict liability to consumers for breach of the implied statutory terms in relation to goods. In some cases it extends the law. An example is that a complete exclusion of liability for failing to provide services with reasonable skill and care is void. This is a change from UCTA, which only made void an attempt to limit or exclude liability for injury or death caused by a lack of reasonable skill and care - other limitations and exclusions would be valid if they passed a reasonableness test.

The test of fairness

A term in a consumer contract (or a consumer notice, see below) is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Unfair terms are not binding on consumers - they are voidable. The consumer can choose to rely on them, but doesn't have to. As such, avoiding unfair terms, particularly in key terms of key contracts, is essential. Whether a term is fair is to be determined "on the facts" - taking into account the nature of the subject matter of the contract, the circumstances in which the term was agreed and the wider contractual relationship as a whole. This is a restatement of the previous law, although it uses slightly different terminology.

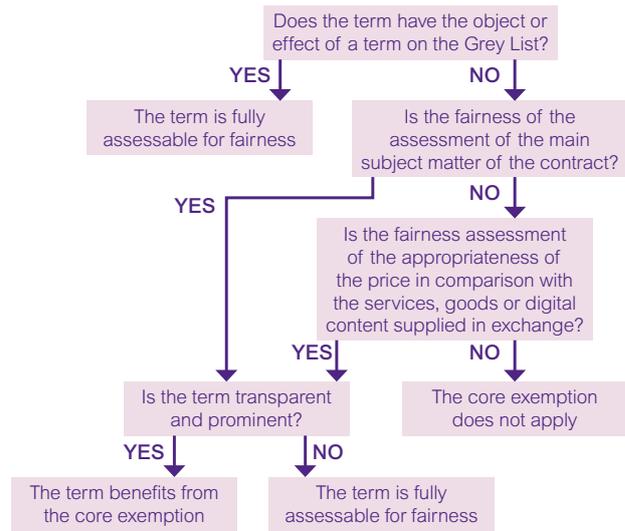
Consumer notices

The CRA extends the unfairness principle beyond contract terms and into non-contractual notices. These are notices

relating to rights or obligations between a trader and consumer, or which seek to limit the trader's liability to the consumer. Examples of consumer notices might be those seeking to discharge a duty of care by giving the consumer enough warning of a risk or danger. The same principles of fairness and transparency described above will apply to such notices.

Negotiated terms

The UTCCR's only applied to "non-negotiated" terms. The CRA is not and by implication, therefore, the CRA is wider as even a negotiated contract term between a trader and consumer can be unfair.



Written terms must be "transparent"

All written terms of a consumer contract must be "transparent" This means legible, and in plain and intelligible language. The requirement for plain and intelligible language is not new. The Competition and Markets Authority guidance on the CRA states that ordinary language is needed, used in its ordinary sense. Using short sentences will help. Order, headings, font size, colour, clarity and (where used) paper quality are all relevant. However, the CMA guidance says that legible and clear language may not themselves be enough. Vague or misleading language (even if clearly written) could fail. Legal concepts that would not be familiar to a non-lawyer can also be a problem, even if standard in contracts (e.g. "indemnity"). The drafting should set out all rights and duties in a clear and comprehensible way, so the consumer can see how they relate to each other, and foresee and evaluate at the time of entering the contract the possible consequences of the terms.

The aim is to ensure that consumers can make an informed choice. Other pre-contract information may be needed to achieve this, and time to read and understand the transaction.

Lack of transparency does not make a contract term unenforceable. However, any ambiguity will be interpreted against the trader.

Exemption for price and subject matter

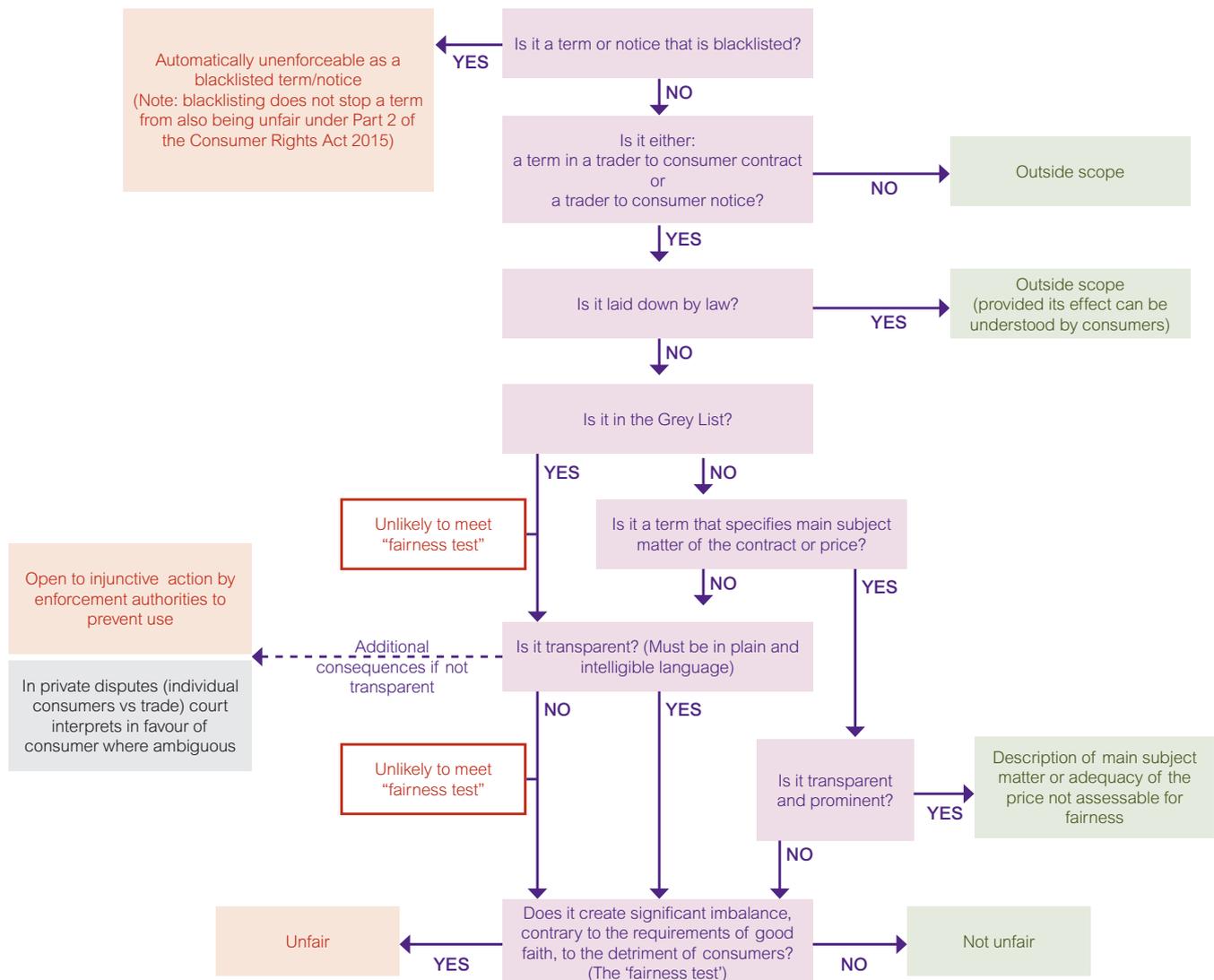
Under the UTCCR's, as long as they were drafted in plain and intelligible language, neither the "main subject matter" of a contract nor the "adequacy of the price" by comparison to what is provided under it could be challenged for fairness. While this test (with some revised language) has been carried over to the CRA, in order to benefit from this "core" exemption under the CRA, terms relating to price and the core subject matter must be transparent (as noted above) and prominent. Prominent means brought to the consumer's attention in such a way that the average (i.e. a reasonably well-informed, observant and circumspect) consumer would be aware of it. Prominence is a new requirement and a reaction to relatively recent Court decisions which made it more difficult for consumers to claim that core terms are unfair, including the Supreme Court in decision over bank charges in *Office of Fair Trading v Abbey National Plc* and others. The core exemption is also overridden by grey list terms (see below) which are fully assessable for fairness - even if they relate to price or main subject matter and are both transparent and prominent.

Grey list and black list

The CRA "blacklists" certain contract terms and notices, by making them legally ineffective, in a number of specific situations. Effectively, they are automatically unfair. An example is that a trader cannot generally exclude or restrict liability for death or personal injury resulting from negligence.

The UTCCRs contained an "indicative and non-exhaustive" list of terms which may be unfair, depending on the context. Matters such as penalty and price escalation clauses were covered. This grey list is replicated in the CRA, with three additions:

- Disproportionately high charges where the consumer decides not to perform the contract or for services which have not been supplied.
- Terms which allow the trader to determine the characteristics of the subject matter of the contract after the consumer is bound.
- Terms which allow the trader to determine the price after the consumer is bound.



Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

Operators should also ensure compliance with the CPRs, which cover a range of different areas, including business to consumer contracts. They make it a criminal offence to engage in commercial practices which amount to a misleading act or omission, where this would cause the average consumer to take a transactional decision he or she would not otherwise have taken. The average consumer concept creates an objective test as to what is misleading. The CPRs also go further than the CRA in applying this concept, creating a reference to the average consumer in a clearly identifiable group who are vulnerable to a practice or product by reason of age or infirmity.

Risk areas and tips

The test of fairness is determined in the particular circumstances of the case. This will include the possibility that a consumer you are dealing with is vulnerable. Clear contracts, helpful supporting documentation and the amount of time given for people to make decisions without feeling pressured will all be relevant. Keeping clear records of when information was supplied and any verbal communications will no doubt help with any later issues.

Contracts for the sale of property, covenants in transfers, the grant of leases and leases themselves could be within the definition of consumer contracts. As such these must be carefully considered to ensure that key terms are not assessed for fairness unfavourably if challenged. This can be particularly tricky when dealing with terminology and clauses which are very standard for lawyers and professional property owners and managers, such as those dealing with service charges.

Your decision-making processes should consider the application of the CRA to contract terms. Keeping records of those processes may also assist in dealing with future challenges.

As well as unfair contract terms generally there are specific rules governing the sale and hire of goods. If your transaction with the consumer includes, for example, the sale of furniture or white goods, those specific rules will need considering.

There are also specific rules for services and it may well be that consumers seek to argue that service charge provisions in leases and tenancies are subject to these, notwithstanding other protections which exist in the law. For other services, in particular the provision of care and support, the rules on services will clearly apply.

If you operate a deferred management or transfer fee model, consider which (if any) services are specifically linked to the payment. CMA's guidance is clear that if a charge is payable but is not in return for a specifically identifiable good or service, the "core" exemption might not

apply. This will be open to interpretation in specific cases. Being outside the core exemption doesn't make a term unenforceable; however, it would be "fully" assessable for fairness rather than only being assessed for transparency and prominence. While largely a restatement of previous law, the "grey list" of potentially unfair terms has been added to. These additions are not surprising (they are reflected in the CMA guidance which itself incorporates significant elements of the previous OFT guidance on the law the CRA replaces) and the grey list remains a good starting point for considering areas which might lead to difficulty.

The grey list overlaps with other elements of the CMA guidance, dealing with matters such as reservation fees and refunding them; and what can be claimed or retained from consumers where a contract is not performed. There is also overlap with other legal and regulatory obligations, such as the Consumer Code for Home Builders.

Take care with mixed contracts covering both goods and services, where remedies might cause difficulty, for example by giving a consumer a right to a refund for goods already installed.

Consider where and how you use notices to consumers and the extent to which they might need revising to stay within CRA requirements.

Consider the application of the CPRs on advertising and pre-contract marketing literature – transactional decisions could occur long before any formal reservation is taken or contract signed. Also, consider the specific average consumer test - which for retirement community operators will be a reasonably well-informed, observant and circumspect older person with infirmities - and ensure your practices meet the CPR requirements in this context.

Trowers & Hamblins has a leading practice in health and social care. Our work as Corporate Supporters of ARCO has allowed us to develop a deep insight into the housing-with-care market. Our team adds value to clients by combining core legal practice areas with a clear understanding of the legal and regulatory frameworks and the market drivers relevant to the sector. If you have any questions or would like more advice relating to the application of the CRA to your business please don't hesitate to contact us.

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