

# Buying a care home: pitfalls to avoid



There are a number of issues which commonly arise when buying care homes. It is useful for potential buyers to be aware of these from the outset so that appropriate investigations are made during the due diligence phase. This ensures that the issues are either resolved or protection built into the acquisition agreement.

## Sleep-in liability

For many years care providers have paid staff carrying out sleep-in shifts a flat rate, on the basis that the National Minimum Wage was not payable. In 2018 the Court of Appeal allowed an appeal brought by Mencap, holding that sleep-in workers are entitled to be paid the NMW only when they are awake to carry out any relevant duties (and not for hours when they are asleep at their place of work during a sleep-in shift). The reasoning behind this decision was that care workers who are required to sleep at (or near) their workplace and be available to provide assistance were available for work rather than actually working. A subsequent appeal was made to the Supreme Court and publication of the ruling is awaited. If the Supreme Court reverses the Court of Appeal decision, there could be enormous cost implications for care providers. Until the case is published it is important when buying a home to assess the financial risk and build in protection against any liability within the terms of the contract.

## Furlough / Shielding

Covid-19 brought with it a complicated set of rules and guidance relating to the furlough and shielding of workers. When carrying out due diligence on a home, buyers should review the arrangements made by the seller, ensuring that they are compliant and consistent. If the shares in a trading company are being purchased, it is recommended that an indemnity is included to protect against any potential clawback by HMRC in relation to the application of the Coronavirus Job Retention Scheme.



## Holiday pay

Another common issue we see in purchases is the failure of providers to pay holiday pay compliantly. If workers have variable hours or pay, it is unlawful to calculate holiday pay based on their contracted hours. Workers should receive their “normal remuneration” when taking holiday. Holiday pay should reflect the pay they would have received if they had been at work and reflect average working hours, overtime payments and other allowances (e.g. sleep-in payments). This should be checked and if non-compliant, sellers should be asked to rectify the underpayment prior to completion.

## Maintenance

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## Top ups

Under the Care Act, top ups for local authority fees are only enforceable if they are agreed with the local authority funding the resident. If they haven't been agreed and the third party defaults on payment, the top up may not be enforceable and the home will be out of pocket. All top up agreements should be reviewed and checked to ensure they are compliant.

These and other issues can be resolved by instructing specialist lawyers who are experienced in care acquisitions.

## About the author

Hazel Phillips a Partner in Royds Withy King's Health & Social Care team whose expertise covers mergers, sales and acquisitions, service user and commissioning contracts, business structure, governance and refinancing.



# ABOUT ROYDS WITHY KING'S HEALTH & SOCIAL CARE TEAM

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