Contracting and Commissioning for Personal Budgets

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What you’ve got here

• The challenge and the common sense guidance that is out there from CSIP and the NMDF – no good if you’re not talking to each other, though!
• Why would you not be talking? What law is it that this would be a breach of, please?
• Deployment routes: DPs vs Managed personal budgets
• Individual service funds = managed contracts with power to sub-contract
• Councils acting as formal agents for the client on direct payments – no top-ups then possible
• Spots vs blocks and outcomes based commissioning and frameworks, etc
• Specific mechanisms for inclusion in council / provider contracts – like reconfiguration clauses etc
• Material on risk sharing types of Ts and Cs
• Material for providers contracting with individuals – suggestions
• Third Parties rights under contract – a suggestion
The major challenge for commissioners

- Most contracts have no terms which could be used to require the personalisation of residential care packages. The Putting People First policy required the personalisation of managed personal budget commissioning, not just direct payments, where people could be persuaded to take them.

- Allowing choice and control really boils down to allowing the client to take on the role of calling off the services, from whom they prefer, and in terms of quantity, according to their particular circumstances. That imposes a major risk transfer onto providers in relation to staff rotas, exposure to voids, etc. It remains to be seen what they think of it.

- Another major trend is trying to get providers to manage the money and what used to be called further brokerage, although whether it can really be seen to be managing the money depends on whether it’s a managed personal budget that has been used to commission a council service, or a direct payment that the client has passed onto the provider. The former is simply a contract allowing for sub-contracting, if the client wants some of the services from elsewhere.

- Councils cannot make providers contract with direct payment clients on terms that the councils choose, or at prices they wish to fund. They can’t make direct payment clients’ agreements FOR them, unless consensually acting as agents, for capacitated recipients or appointed Suitable Persons.

- So Councils need to make new contracts or vary existing ones, and that requires agreement by councils and providers.

- The Pembrokeshire case says that you must take all relevant factors into account, such as contractors’ problems, and guidance which demands co-operation and a partnership approach, because these contracts are key to fulfilling statutory duties.
NEW guidance from NMDF on public procurement

• **Framework agreements** are useful for authorities wishing quickly to access services for the benefit of service users where the authority is obliged to control the contractual arrangements. (Ie non-direct payments)

• **Frameworks for Part B services** do not need to involve bidding exercises whether they are above or below the threshold. However, there needs to be transparency as to the criteria by which the ultimate choice will be made, when call off occurs later, because that aspect of Part A services rules for frameworks requires that much and is incorporated if you wish to avoid having to issue contract notices each time a call off is made.

• You can involve clients in choosing after a mini-competition, or say that client choice will be part of the determination of value for money.

• This is different from an authority merely making lists of suppliers available for individual direct payment service purchasers to choose from when making their own decisions as to whom to contract with.

• Authorities may set up *recommended* draft agreements or Council provider lists which are made available to individual service users purchasing services with their Direct Payments or their own money, so long as it is understood that these DP users cannot be limited to providers who are pre-approved, and are free to buy from virtually anyone.

• The Public Contract Regulations do not apply with this type of arrangement, although it is also good practice to have in place reasonable quality assurance arrangements and make publicly available information about how providers on any *recommended* lists have performed. One example may be a list of providers who have indicated that they are willing to provide services at the rate allowed for by the council in its Resource Allocation system.
More recommendations for managed budget commissioning

• Sharing information and experience with enterprises of all sizes outside of the tendering process is crucial to ensure the market is well briefed on how to approach the process. The procurement process should be tailored to the target market that the required services are aimed at (for example, small providers, voluntary sector, large commercial organisations). It would be disproportionate for small providers or the voluntary sector to have to run their businesses along the same lines as a large commercial organisation.

• An extension, renewal or material amendment to a public contract can make for a 'new' contract under the public procurement regime if these changes fall outside of specific variation clauses. Whilst it is usual for a contracting authority to reserve rights to amend the contract the variation right must not amount to a right to redraft the contract, because that breaches the requirement of transparency. A key test is whether there is a material change in the contract by adding new terms, new services or extending timescales – local legal advice should be sought if in doubt.

• If providers are concerned they have not had a fair opportunity to participate in the letting process for below threshold or exempt contracts, perhaps where they feel the process has not been fair and transparent, then they may raise issues with senior council officers or members of the council or ask for the matter to be considered by the relevant Scrutiny Board or the Council’s Audit Committee. Matters of serious concern should be raised with the council’s Monitoring Officer or Chief Finance Officer.
The threshold differential for the Public Contracts Regulations

• In summary, the position is as follows:
• Part A above threshold services must follow the full Regulations and the EC Treaty principles of non-discrimination, transparency and equal treatment.
• Part A below threshold services have to comply with the EC Treaty principles and an authority’s own standing orders.
• Part B above threshold services must comply with limited provisions in the Regulations in addition to EC Treaty principles.
• Part B below threshold services have to comply with the EC Treaty principles and an authority’s own standing orders.
Personal Budget Deployment Routes...

- There are essentially two ways to take a personal budget – as a direct payment or as a ‘managed’ personal budget.

- ‘Managed’ – in this context - means the council’s officers concluding the contract for the service, in as personalised a way as providers will allow, or feel it would be necessary or feasible to offer.

- The council-managed PB route is always subject to public procurement rules and standing orders. If the council changes providers, TUPE will or at least may apply.

- Direct payment clients’ purchases are not subject to public procurement. They are individual private purchases, even though the money came from local government.

- With a Direct Payments PB, the client is the purchaser, the employer, the contractor – and thus owes the legal obligations associated with all those roles – and is bound by any legal rules governing direct payments.

- It could be the council that the Direct Payment client would like to manage the payroll or the payment system for purchases. What is then done by any such council is NOT public procurement – that’s the council choosing to act as the client’s agent – under s2 of the Local Government Act 2000. NB –

- If the client agrees to have a direct payment, and gives it to someone to manage (friend relative or council) the client will obviously think of that as a “managed” personal budget as well, so you do need to be careful here with language.
Can one use conditions within direct payments to achieve the equivalent of terms and conditions in managed commissioned contracts?

• The client who says yes to a direct payment is bound by any legal rules governing direct payments, such as what they can be spent on...
• The council can attach conditions to direct payments, as they see fit, but the conditions have to be reasonable.
• It is possible that a person could be required to accept help with management through a range of nominated or self-chosen payroll service (if funded for this in the DP) but not told who to go to unless it was a free service.
• It is highly unlikely to be lawful to demand that the money be spent only on one of the council’s preferred providers. That would risk challenge as a condition negating choice - the whole point of the direct payment scheme.
Individual Service Funds

• An Individual Service Fund is always one thing or the other, out of these 2 deployment routes – it is not a distinct ‘third way’....

• It’s an arrangement where ‘X’ manages the budget for ‘Y’ – but the variations arise from who X and Y might be....

• The budget may be a managed budget left with the council – in which case it’s a council contracted ISF.

• Or the budget may be a budget taken in the form of a direct payment, in which case the client has decided to create their own ISF, with a provider, or a provider/broker.

• It is not a three way agreement – emphatically not – because in neither situation is the third stakeholder providing any consideration!
Council contracted ISFs

- So the manager - X - might well be the provider
- The owner of the fund – Y- might be the local authority purchaser, in a managed personal budget model.
- Unless the contract for this part of the role is specific and separate, X remains legally responsible to Y for providing the community care service for the client, but can sub-contract out some of these services to others to provide input
- ...with the client, hopefully, being the one to drive the choice, despite the provider’s inevitable commercial preference to provide the largest possible percentage of the services itself.
- The contract monies belong to the provider, in this situation, presumptively – as the consideration for the service (the whole service).
The other model....

- X could equally be a service provider, where Y is a client who has said a formal ‘Yes’ to a direct payment.
- In this model, X is 2 things – a service provider, but also Y’s agent for managing the fund, which can be tricky.
- First of all Y needs to have capacity, or a Suitable Person, if incapacitated, and if so, maybe even an appointee or joint bank account holder so that the Direct Payment money AND the client’s own contribution by way of assessed charges can be passed onto the provider.
- There are implications for where the money should be kept too – because it’s not all for the service provider in return for services, if some of it is going to be spent on other providers.
- In this sort of an individual service fund, the provider needs to keep his different ‘hats’ or roles, distinct...
Is a *managed personal budget* the same as Councils ‘managing’ a direct payment?

- Some authorities are letting Y, the client, choose the council, to be X – ie as the manager of the Direct Payment, and this can have advantages.
- For instance, they are providing payroll services for clients who are employing people, or payment services to providers whose goods or services the clients have chosen, from online directories, so that the client doesn’t have to handle the money or keep it safe.
- But anything then bought by the council wearing that hat, is a private service, purchased on behalf of the client, not a publicly procured service.
- Taking on this role is a matter of choice and agreement for the council and the client, and it carries liability risks and involves strategic questions, such as whether or not to charge for the administration.
- It’s also very dangerous for councils to do it for clients who have not got mental capacity, because it could mean that any direct payment supposedly being used, is not really a direct payment.
- The knock-on risk of that is that any employment of an individual, is quite possibly employment by the local authority, not the service user.
Potential Liability to the **client** for providers who act as **private** brokers – including councils

- **Breach of Contract** (doing something not authorised at all, or doing something authorised, but doing it badly, so that a loss is suffered)

- **Negligence** liability for recommending a provider who was objectively able to be seen at the time as not right for the needs, or the client’s situation, but is now itself not worth suing, or not insured for what’s happened.....

- Negligence liability for **inadequate advice on rights**, insurance cover and/or health and safety or on the liability implications of the client’s owing a health and safety liability to their own **worker**...

- Concerns about **independence** and **competition**, if the same one or two providers are consistently recom-mended....particularly if they are the council’s formal preferred providers.
Does a pre-paid card, amount to a direct payment?

• Some councils are using pre-paid cards loaded with a person’s resource allocation to maximise the choice and control of their clients.

• Some are calling this a direct payment, but it turns out that the money might still belong to the council, in legal form – ie the bank account is the councils.

• I don’t think that this is a direct **PAYMENT** - in legal terms. I think it’s a managed personal budget.

• The reason that this really matters is that the money is being spent through the choices of the clients, and even being paid to Pas, but if I am right, the purchase, **the contract, the employment relationship is, in reality, between the council and the vendor, the other party, or the employee**, and that won’t be consistent with standing orders or public procurement expectations – or the council’s own insurance policy, in all probability.

• I don’t think that **virtual** control over a sum of money is the same as a direct payment.
De-commissioning and cuts – basic public law principles

• Termination of a contract does not require consultation – it simply requires **contractual notice** as per the agreed terms. Councils do not owe even ‘preferred’ providers a living...

• **Council grants** to the voluntary sector are also discretionary and can be cut off when the going gets tough, financially. They are not contracts.

• However, if councils decide to terminate **grants** to local voluntary bodies, and the impact is sufficient as to be **likely to close the service down**, councils are **now obliged to consider discrimination and equality promotion obligations in the community before doing that**, and this will mean **consultation**, via a roundabout route.

• See the **Southall Black Sisters** and **Boyejo** cases!

• And if consultation is not done **well enough**, it can be challenged anyway.

• **Now, it also** seems as if Councils can be judicially reviewed for unreasonableness or want of procedural propriety or straightforward illegality in their commissioning decisions – as just happened to **Pembrokeshire** where the approach to the rate to be agreed was regarded as having statutory underpinning, and **had** to be informed by Welsh Assembly government guidance.
The general position in private law

• Parties are normally free to contract how they want to – there is no contract, until there is an agreement that suits both parties.
• Abuse of a dominant position or anti-competitive conduct associated with agreements only to sell high, or buy low, is regulated by the Competition legislation with civil and criminal penalties.
• The Competition legislation applies to social care providers, but not to social care purchasing, by the public sector, according to the DTI. What a great basis for a partnership, one might say, in passing....not.
• In terms of contracting freedom, there are a few types of clause that are positively illegal in contract law, whoever is contracting – for reasons of public policy, or under the general law.
• There are plenty of contract terms that could be ultra vires (outside the limited powers) of local authorities but for the protection of providers, there is a legal presumption that a contract made by a council, once made, is valid.
The basic framework, continued

• There have been some cases in the last few years suggesting that when one of the contracting parties is the public sector, and the purpose of contracting is fulfilment of a statutory duty or function, the contracting authority must not contract on terms that would impact negatively on the discharge of that underlying function.

• Public procurement and State Aid rules also apply to public sector bodies, but not private sector bodies.

• Parties who deal as consumers are protected from Unfair Contract Terms by legislation, and can claim that any such terms are void. This will cover all self-funding and direct payment clients making private arrangements that amount to contracts.

• The Office of Fair Trading has done a report on care home contracts, but not domiciliary care, indicating what it thinks is fair or unfair. It did not say that it was unfair to charge different rates to different clients, only that homes had to be transparent about it.

• This is the basic framework for contracting – negotiation and consensus.
The link between the contract and the care/support plan

- The care or support plan is the authority’s record of what it is going to be obliged to arrange, deliver, or buy, in order to meet the assessed eligible needs.
- The more general the statement of needs, the more flexibility there is, in relation to how they are met.
- You can formulate need in terms of successful risk management, looking at the wording of the indicators in FACS – but the current guidance requires that ‘how the support will be organised’ be entered into the support plan. There is scope for just putting ‘a direct payment’ down as the ‘how’ here, under case law – but the size of the DP will depend for its legality on the rationality of the link between the type and amount of services that could feasibly meet the assessed needs, and the evidence as to market rate.
- Innovation only thrives within a flexible framework, but the plan is the record of what has to be sorted out – or else the council is in breach of statutory duty.
Don’t ever forget you’re doing this to discharge a public law function – the *Pembrokeshire* case says so

- You can now be judicially reviewed for inadequate consultation with providers, because if they go under, en masse, you will be in breach of public law duties to the extremely needy, and that is unacceptable.

- This is the case even if the contract gives you the right to set the fee and makes no mention of the need to negotiate.

- You would have to go back to square one again, but you could still offer a nil percent increase and see if the market capitulated....
Differential pricing as between clients – the Bolton LGO decision

• If the LA agrees a price for a client, without a prior framework agreement, and then applies a percentage increase every year, to its contribution only, whilst accepting higher rate demands for new clients, there will be an ever increasing differential between the longest surviving clients and the most recent arrivals.

• If the LA’s contract or the spot placing culture lets the homes put up the new headline gross fee that is advertised to the outside world, across the client body, the third parties topping up will pay a bigger and bigger proportion of the increases. It also amounts to letting the home ‘contract’ with the client’s relatives for the third party top up. In fact, the council is obliged to contract for the full contractually agreed amount of the full package.

• Even if the LA applies the percentage increase to the gross amount (ie to its bit and the client’s charge and any third party top-up), but still allows new clients in at different prices from old ones, there will still be a differential between clients, older and more recent.

• The Ombudsman has said that even this is not good. March 2004 – Bolton. She pointed out that the Council’s system created a nonsense whereby, if the resident moved to a different home or was temporarily discharged and readmitted to the same home, the new higher usual rate would apply and her relatives would have had to make a smaller contribution. The fact of whether an individual is a new or continuing resident is not logically relevant to the cost of meeting that individual’s care needs.
Why it isn’t right to have differential fees for one LA’s clients, in one home, for identical services

• In February 2003 and again in March and April Mrs and Mr Randel queried why Mrs Easton was eligible for a lower standard rate than other residents and why, as a consequence, their contribution toward her residential care fees was significantly higher than that of the relatives of newer residents. The Council’s response was that:

• “Each year the Department has an allocated budget and enters into discussions with representatives from Bolton residential homes to agree placement costs for new clients and increases to the fees for existing clients for the forthcoming year. This is the reason for differing rates for clients as the standard fee is determined by the year they were admitted into care.”

• “It is to the Council’s credit that it has now changed its policy in favour of one which, to all intents and purposes, pays the same standard rate regardless of the date the placement commenced. I have to conclude however that I consider the Council’s original policy to have been contrary to the spirit and intention of the directives and guidance and to amount to maladministration.”
Risk sharing – what’s fair and prudent, according to CSIP?

• Apparently, some commissioners have used their market powers to drive prices down and squeeze as much as possible from providers in the short term.

• Some providers have used market position to exploit prices and have not always delivered good quality services, albeit sometimes because of commissioner pressure for them to keep doing more and more.

• In the long term this approach will prevent the development of the high quality services commissioners want, and will remain expensive in terms of high transaction and monitoring costs.

• In order to move forward and to allow providers to provide a quality cost-effective service for which they make an acceptable return, commissioners and providers need to better understand the pressures each face. They need to base their relationship on a partnership approach rather than the traditional adversarial arrangements.
Risk sharing...

• Contracts should recognise that both parties carry responsibilities and liabilities for service provision. Both commissioner and provider need to consider *which party should be responsible for which risks.*

• In writing contracts, commissioners should, with the cooperation of their providers, undertake a risk assessment in relation to the service they want, so that they can assess the risks they are seeking to accept or assign.

• It is also the responsibility of the provider to assess risks from their own standpoint as businesses and employers, in order to understand the level of their exposure and to inform discussion and contract development with commissioners.
Evaluating fairness

Good indicators:

• Contracts reflect working together between commissioners and providers. They should acknowledge and protect the interests of both.

• All parties should have a reasonable and equal opportunity to negotiate amendments, terminate, extend or renew a contract, if appropriate.

• Whatever the relationship is between the commissioner and provider it should always minimise jeopardy to a service user.

• Requirements on providers and commissioners are proportionate and measurable.

Bad indicators:

• There is no requirement on the provider to give the rationale behind requests for price increases [I personally disagree that the absence of a justification clause makes a contract unfair – I think that is what you would expect from a business – but parties can agree to put in such an obligation.]

• Contracts reflect only the interests of the commissioners, whether in price setting and review or other unreasonable demands on the provider that make it impossible for them to run a sustainable and quality service or would encourage reasonable providers from making applications.

• Excessive and unreasonable monitoring demands, particularly if retrospectively imposed.

• Terminology and requirements are based on an ideal or expressed in non-specific or subjective language.
Do I believe all this rhetoric???

- Good contracting calls for a recognition of risk. Fair contracts seek to ensure that each signatory to the contract bears some of the risk. Yet it is often in this area that contracts fail.
- Risk becomes more (or less) significant depending on the likelihood of the risk *happening* and the *impact* of the risk, when it does.
- One function of a good contract is to seek to reduce both the impact and likelihood of risk to within acceptable levels *and to define what each side must do to make this possible*.
- The contract may also wish to establish ways of responding when risks remain high and require resolution.
- Risk to the service user must also be borne in mind. If there is too much risk placed on a provider then there is, for example, the possibility of home closure and service users losing where they live. Every effort should be made by commissioners and providers to avoid unplanned home closures.
- One could make the same point for insolvent trading by domiciliary care companies...
Is anyone doing this?

• Providers need to be involved at the earliest possible stage so that their input can help to shape contract clauses and/or specifications. Ideally a contract should be written jointly between the two parties or, for similar types of service and arrangements, written with input from representatives of that providing sector.

• Commissioners should develop with providers a rolling programme of drafting and reviewing contracts in a similar way to their programme for commissioning strategies.

• In addition, they should regularly meet with stakeholders, especially those who provide the services, to discuss areas of concern from any party. The relationship, which is one of mutual dependency, goes beyond the contractual relationship.

• In addition, users’ views should be sought on all aspects of service delivery and they should be consulted before any major change is made to contract arrangements that directly affect them.

• What is morally, politically, strategically or legally perceived to be wrong with incorporating rights of Third Parties?
Risk transfer when de-commissioning and re-provisioning

• Where models of service are changed at the request of commissioners to meet changes in local patterns of need, it is reasonable for providers to expect commissioners to share some of the risks associated with the introduction of new service types or reflect in the price any additional risks passed on to the provider.

• Agreement needs to be reached, in a spirit of collaboration and partnership, over the proportion of risk borne by the commissioner and the provider to introduce a new form of service and to overcome slow take-up of a new service until it is bedded in, or the burden of ‘double-running’ whilst one form of service is phased out and another phased in. It will be in the interests of individual service users already in the service to ensure that this process is properly managed and may involve short term additional costs to support overheads of continued operation, as a service is wound down.

• In order to re-provision existing services or introduce new services, commissioners may wish to offer incentives to providers to encourage them to adopt a new approach. Such incentives might include offering guaranteed contracted volumes of work or time-limited premiums on the cost of care in order to off-set any additional costs to the providers in changing their services.

• Equally, providers may, at any time, decide to diversify into new forms of service delivery: if this is without any consultation with local commissioners it would not be realistic for providers to expect commissioners to automatically purchase the new service or to contribute to its development costs.
Spot Contracts

Are generally considered to create:

• Flexibility about numbers placed.
• More choice for those using services.
• A more individualised service and price.
• No costs to commissioners for unused services.
• An easier route for new service providers to enter the market.
• An environment where it is easier for commissioners to shift from old to new providers.

But are also generally considered to create:

• Lack of security for providers leading to lack of capital investment.
• An insecurity of supply for commissioners.
• Potentially higher prices to be paid.
• An inhibition about closer working relationships between providers and commissioners.
Block Funding

Generally considered to create:

• More security for the provider enabling better planning.
• More mature, long-term relationships enabling both parties to concentrate on non price issues.
• An attraction to capital investment (if required).
• Less time spent by care managers in searching for and making placement arrangements.
• High occupancy levels that may mean that placements cost less.

But generally considered to create:

• Less flexibility for those using services.
• A situation where commissioner may be tied into outmoded and outdated services.
• Less choice for those using services and more standardised services.
• Periodic instability for purchasers and providers due to re-tendering.
• Under-used capacity.
• Tendering processes that increase transaction costs.
• An environment where new market entrants are discouraged.
Cost and Volume Contracts

Are generally considered to create:

• Lower financial transaction costs than spot purchasing.
• Providers feeling more secure about long term purchasing requirements than spot contracting.
• The development of more mature long-term relationships which enables concentration on non price issues.
• The best of spot and block contracting through flexibility.

But are also generally considered to create:

• More standardised service and reduced choice and flexibility for those using services.
• One-sided security of supply for commissioners – obligation to supply with no guarantee of work and little real security for providers.
• Pressure on accurate contracting in that specialist market knowledge is required to get the balance right between cost and volume and spot elements.
• A tendering process that may increase transaction costs.
• Periodic instability for purchasers and providers due to re-tendering.
• An environment where new market entrants are discouraged.
Frameworks versus Spots?

- When a council wants to do a lot of similar business, on the basis of standard terms and conditions, but the price of each person’s care package may well have to differ, because not everyone needs the same things, or the same amount of services, they use framework agreements – umbrella agreements, under which individual call-offs are then agreed, for particular clients or areas of a council’s patch.

- A spot contract will simply be a contract on the same or similar terms, but without any tendering exercise having been carried out in advance.

- The national public procurement regulations require the contracts for social care services, which are for more than £750 a week are subject to the limited regulatory regime under the Public Procurement Regulations (Part B).

- A framework arrangement, in conjunction with a bidding exercise, whether one is required or not, gives a council the opportunity to set the rate at which it will buy services, by excluding anyone who wants to charge more. All the council has got to do, is figure out how much it can afford to pay for the number of people it expects to qualify for this sort of care, and then make it clear it will not consider expressions of interest on other than those terms, or at above that price. **If the market does not respond, or will not do business on those terms, the council will have to provide services directly, or buy from further afield, or raise its price.**

- Spots enable a provider to specify a price that is right at the time, given market fluctuations in supply and demand, but the terms as to price, within the spot, may still give the council power over the level of annual increases thereafter.
Block low-level or top-up services

- Some people will be getting a RA for an individual support package on top of something else that the council has already had some involvement in procuring, like the low level care and support in an Extra Care Facility, from the on site provider. As the person deteriorates, the individual package will only be feasibly adequate to meet need because of that other existing provision, which reduced the size of the unmet need in the first place.

- Services below the threshold are legal, because none of the community care service statutes depend on an actual assessment.

- But whether they are grant funded or provided under service level agreements will determine whether they can be charged for or not.

- Also whether a person could have a direct payment for an aspect of this service DOES depend on whether the need is an eligible one. So you want to keep these below the line.

- If you are grant-funding a voluntary sector provider to do this, then it is the provider, and it has freedom to charge, subject to grant conditions. The person’s choice to pay this fee or not, occurred when they decided to go and live in the sheltered or extra care community.

- If the provider is not a voluntary organisation, the likelihood is that the arrangement will be a contract, and if it’s actual services, the likelihood is it will be a contract for things that count as community care services.

- They could be charged for by the council under Fairer Charging. But the money for them will not be in the person’s resource allocation (it’s not eligible unmet need) so it is difficult to see how the charge could be netted off.

- So it is better to grant fund providers and make it a condition that they charge no more than the person would be obliged to have to pay under Fairer Charging.... And then you allow that as Disability Related Expenditure....
Pooling and voids

• Some clients will need extra funds injected into a service to make it viable, either individually or in a group. 6 people’s direct payments for recreation won’t pay sufficient for a yoga person to come to them – s/he needs 7.

• 3 tenants from one authority instead of 4 will still need the services represented by the original 4th person’s budget! If it’s a direct payment that each has got, you can’t pool it for them!

• This is legal, but it means that your colleagues will have to decide whether this money is provided outside of the person’s individual pot, by way of contingency to meet needs and abide by the law, or comes out of reserved non-RAS monies for ‘preventative’ services.
Outcomes-based commissioning

• Outcome based contracting is designed to: "...shift the focus from activities to results, from how a programme operates to the good it accomplishes."
• A commissioning organisation would publish the detailed outcomes it wishes to achieve, the rationale behind those outcomes as appropriate and an indicative amount or range the commissioner is prepared to pay to have them met.
• The provider market would respond by stating:
  • What methods/approaches to achieving the outcome they would individually propose and what outputs will or cannot be delivered?
  • What evidence is there that the methods of work suggested would be effective?
  • What measures would be used to demonstrate whether the provider is achieving each outcome and how would that monitoring be conducted (by whom, how, frequency, etc.)?
  • How would accuracy and impartiality be guaranteed in the monitoring process?
  • Are there outcomes described in the tender that are inappropriate or better outcomes that could be achieved (where the outcome is joint there should be a description of what contribution the provider will make towards achieving it)?
• It may be that some of the above responses represent an iterative process with the commissioner and provider working together through an intermediary to find solutions. Or at least an open forum....
Adopting a full outcomes based contract to domiciliary care would ...

- need to be much more negotiation with service users and carers about what outcomes are desired and are achievable.
- require a level of creativity in providing a response (the new emphasis is on solutions, on delivering good outcomes, rather than in saying ‘we have done our hours’ or ‘the service has been delivered to standard’; therefore we have fulfilled our contract).
- require understanding by service users and carers of when, how and what service may be delivered. The relationship between greater flexibility and certainty would need to be explored with each service user.
- build in ways to record satisfaction so as to assess the quality of service from the point of view of the service user.
- Acknowledge that the main means of ensuring that needs are being met/outcomes are being achieved, is by individual care management review. However, few authorities have an effective system for aggregating the findings of these reviews up into an understanding of the performance of a service provider as a whole. Such systems need to be developed where they do not exist.
Specifications in outcomes based contracts...

The fundamental questions for those writing service specifications for domiciliary services and care homes are:

• Who should be involved in developing them?
• What responsibility does the purchaser have to ensure the quality of service provision for those users for whom care is purchased via a managed personal budget?
• What should be the focus for describing what is to be bought; outcomes or outputs and processes?
• What is required by way of service standards and monitoring arrangements given that CQC regulates and monitors these services?
Varying terms and prices

• Check the contracts: the variation clause may apply merely to the general **specification** or to the **contract** itself, the price from year to year, or to an **individual’s service plan**.

• You may find that purchasers and providers have different powers in relation to each of these, and that **financial changes** are envisaged to flow from some of these variations, but not all...

• Understanding these options really matters to providers and Councils, if the only realistic thing to do is to carry on with the contract for the time being, rather than to threaten or implement termination.
Changing the spec vs changing the individual service agreement...

- If the specification is simply a set of minimum standards for the relationship between the parties and the culture of the service provided, I don’t see how a council could feasibly reduce the specification, in real life, because the specification is simply the minimum standards applicable to various types of care.

- Changing the quantity of care will amount to changing the care plan, if the care plan specified quantities in the first place.
Formal Reconfiguration clauses

I am not saying that this is a **good** clause – just that it is one I have seen which was treated as a justification for awarding a multi-million pound contract to one single provider for all the council’s learning disabled clients in the area.

The Provider **shall** – ie it is a duty, not a choice -

....annually within 6 months from receiving a list of expectations and aspirations for the service from the council, such list to be provided by the council to the Provider at the annual review in March ...

• ...present to the council for its consideration a **detailed reconfiguration plan** for the service – ie its detailed plans to **achieve** the expectations and aspirations;

• The council will thereafter, subject to the Provider’s plan) meeting the council’s expectations and the detail of the aforesaid framework – **consult** upon such plan and

• ...subject to both the agreement of those consultees, and the plan meeting all relevant applicable legislation and the council’s best value obligations,

• ...thereafter **seek to implement it** within a reasonable time period.
Formal reconfiguration clauses - what’d be in them for a council?

• These tend to be used because everyone recognises that to *get* a block contract with a guaranteed contract sum for 10 years, regardless of the exact amount of usage of the services, the provider has to offer something of real value.

• The intention is that the clause *guarantees change within the contract price, without it being a variation to the specification*, and thus not carrying with it a right to have the contract revalued, just because ‘more’, or something a bit different was being asked for. That would be valuable to any council.

• It needs to be viewed in parallel with any clauses about termination at the behest of the Provider because if change is required which they consider impossible, and that sort of situation is positively *excluded* from a right to terminate, discontent with changes that come about as a result of the reconfiguration clause will run particularly high.

• Usually such clauses are tied into what should happen on breach of contract. So if the clause is not being operated as expected, and the council has at least shown that it has asked for reconfiguration or modernisation, and *if it has been breached* already by the Provider, rights to terminate could arise.

• That would of course require the council to have actually *asked* for some reconfiguration - but if it is the case that this has happened at least once in the last few years, and been ignored, then non-compliance with it, would give councils an immediate right of *termination – with or without use of the ordinary default procedure, depending on the wording.*
Day care vs supervision to use mainstream community facilities

• ‘Day care’ *could* in theory be a generic term for the kind of housing related welfare services offered to people in supported living, or to broader services which keep people busy and active, regardless of any link with their housing arrangements.

• I have seen contracts in which day care was defined as day care services provided for service users ‘in accordance with the Specification, in the Day Centres and elsewhere’ – so this was consistent with it having been envisaged from the outset that not all the day care would be in a day care centre, but would incorporate supervision in using mainstream community activities.
How to get providers to use community based facilities for day care: a suggestion

- The specification says that the service provider must produce and provide adequate information to help service users make informed choices about locally available day opportunities.
- The specification goes on to require access to **mainstream services and facilities wherever feasible** and stipulates that people would not be asked to participate in activities they did not want to join in on, unless their health or wellbeing or that of others would be jeopardised.
- The specification says that wherever possible these activities must be from the **wider community** provided this is consistent with the service user’s wishes. And that use of **community facilities** must be **demonstrably maximised**.
Risk and Price

The ability to reach satisfactory conclusions on this issue has enormous implications in a market where staff can be difficult to recruit and retain, where regulation and legal requirements are changing, often quickly and certainly within the lifetime of most contracts, and where the quality and flexibility of care is essential to the service user and their families as well as underpinning government policy in extending choice and empowerment.

Overall, the contract needs clearly to identify the following issues:

• Any automatic triggers for a price review; eg annually.
• The circumstances in which either party may require a price review; eg the care needs of the service user change.
• There is a change to the Care Specification by the provider.
• Changes in the cost of providing the Service
• The mechanism by which any price review is undertaken and agreed; eg inflation formula, council decision or discretion after open book accounting exchange
• The factors which are to be taken into account in the make-up of the price
Risk and non-use of services

• Where someone is admitted to hospital and is not receiving care for a period; either in their care home or in their own home; there needs to be agreement between the commissioner and provider on the holding of that service for the service user’s return, the number of days for which this is reasonable, and the continuation of fee payment. These arrangements are likely to vary in response to planned, unplanned, brief or longer absences.

• Whichever party first becomes aware of a planned or unplanned absence must let the other party know as soon as possible.

• Such variations would normally be notified, or confirmed, in writing unless this is impracticable.

• It would be reasonable for the commissioner to at least pay for wasted time that may arise from a carer’s visit to a service user’s home when neither party have been made aware of an absence.

• It would be reasonable to have different arrangements for holding a residential care room pending the service user’s return compared to holding a domiciliary care service, as the former is a person’s own home.

• In a care home a person’s room should never be used by another service user without consent being given by the user and both parties.
Risk: business change and service development

• It is not uncommon for service providers to either sell or change partnership arrangements with regard to their business.
• Equally, contracts should cover the use of agency staff.
• Council clients’ choice and control cannot feasibly fetter a business’s freedom to change the way it operates.
• Development of a business model or an infrastructure may well make a client’s care package too expensive to strike the council as adequate...
• Providing for as much advance notice as possible is all you can really do about this sort of problem.
Service development investment – technology, new premises etc

- Ie any elements of reward for risk and investment in the development and management of the service and towards future improvements in service delivery.
- This could include past or current investment in buildings and adaptations or equipment, or future investment (for instance in developing a specific service or IT system) although these may be negotiated outside the main agreement (for instance initial start-up costs). All costs and pressures that are known at the time of pricing should be discussed.
- In the case of a contract renewal or price review, the consequences of any potential change for the service user, the provider and the commissioner. There are always likely to be tensions as providers attempt to meet and surpass regulatory requirements and purchasers try to ensure that the finances at their disposal are used to best effect without any excess profits being made at the public expense.
- Openness and reasonableness are the keys to being able to discuss this part of the contract.
- Purchasing managers may not have the financial understanding to reach conclusions on price alone and will require support from colleagues within their organisation (particularly finance and audit) who may themselves have to be supported in fully understanding the issues involved in purchasing care services. Equally many providers do not adequately express their costs and risks and may need greater help from accountants to assist this process.
Risk and Variation

• The contract should ensure that both parties can and must agree variations to the contract before they are binding.

• Either party may propose a variation to the terms of this agreement. No alteration to this agreement shall be effective unless it is in writing and signed by the [authorised / nominated] representatives of both parties.

• Acceptance of a proposed variation shall not be unreasonably withheld or delayed.

• The guidance recommends that where an agreement cannot be reached as to a proposed variation, the matter may be referred to mediation and, if required, to arbitration, in accordance with the terms of this agreement. [I disagree strongly with this, because if the parties have reserved effective variations to those issues on which agreement has been achieved - one cannot arbitrate in the sense of determining who is right or wrong, a refusal to agree,!!]
Risk and financial hardship and market failure

• In the event of either party getting into difficulties, that party should have the right to approach the other to request relief. This will enable parties to openly discuss their respective difficulties with a view to agreeing an amicable and effective compromise. Commissioners receiving such approaches should not reduce the rate of referrals for service or withdraw service users from the care of the provider unless it is clear that there would be a risk to their safety or it is apparent that the service is in danger of imminent closure.

• In many cases, where financial difficulties would result only in the appointment of an administrator and care would continue, premature action could precipitate the problem. Unless explicit reassurance is stated in the contract, providers may be unwilling to confess to problems of viability until it is too late.

• In the event that either party considers that it is no longer able to provide or purchase a viable service, that party may serve a written notice to the other stating that it is unable to continue to provide or avail itself of the service and the reasons why it considers itself unable to do so.

• Each of the parties shall be entitled to serve a Material Change Notice within six months of becoming aware of any Material Change in circumstances which affects them.

• Upon service of a Material Change Notice the Commissioner and the Provider shall each use all reasonable endeavours to negotiate and agree a variation to this Agreement or other mutually acceptable solution within the Material Change Negotiation Period.

• Upon receipt of a notice under clause [ ] above or a Material Change Notice the parties shall meet within [days] for the purpose of agreeing a course of action. If the parties fail to agree a course of action, either party may refer the matter to mediation in accordance with clause [ ]. This is without prejudice to any right either party may have to terminate in accordance with clause [ ].
Risk and legislative or other change

• National Minimum Wage, Working Time Directive, Deprivation of Liberty Safeguards, the rules on pension change, the Mental Capacity Act – you name it, there is a cost to complying with these things.

• Who should bear the risk of this? To my mind it is clear – in a dominant purchasing culture, the body that has got the duty to provide lawfully. That is the only way the duty will get done lawfully...

• Where a change is asserted to carry an associated cost with it, the contract should determine a process for reviewing dependency based fees and ensuring that changes can readily be responded to.
Risk and service user lack-of-fit

• When a service user first moves into a care home, they should have a trial period to ensure that the service they receive meets their needs and they are content with the service. It also allows providers the opportunity to ensure that they are able to provide the service user with the care that they require.

• A care review shall take place at the end of the trial period and at least annually thereafter and also by agreement or at the reasonable request of any interested party.

• Recommended but rarely seen: a review must involve the person receiving services [and/or] their representative to help consider the needs of the service user. A representative of both parties to the contract must be present.
Risk and duration...

• For contracts over a number of years there can be break points within the overall duration to allow mutual review of the terms and conditions. Such a review should not be left to the last minute and time should be left for re-tendering if required.

• Any extension of the contract must be properly negotiated and agreed by both parties. However, an extension of a contract should not be used as a means of avoiding discussions about contract renewal.

• By agreeing not to vary the price beyond inflation this should encourage providers to renegotiate contracts with the commissioner.
Performance Review processes

• The council could use an annual review process to do whatever that process *allows* it to do through ‘default’ terms in relation to service provision and the default process.

• Unfortunately, if you haven’t also got good monitoring terms or have not *done* good monitoring, historically, that will not help very much.

• Deductions can be made through the default process, for want of progress on modernisation, or reconfiguration, in future, if only the council can find the will and resources to actually do monitoring and stick to the default procedure, before ceasing to pay, otherwise it will be in breach of the term to pay the price.
Monitoring

• It is crucial for the proper discharge of best value functions, which impose an ongoing obligation to keep under consideration whether it is better to purchase rather than to provide, that contract monitoring of all outsourcing arrangements is proactive and well-resourced.

• A very important clause for parties when things are not going well, is what is to happen in the case of remediable default, and these are always tied to the outcome of monitoring.

• Annual monitoring is obviously crucial to the question of default here. There may be service review, in a contract, and also annual contract monitoring, which might incorporate service review and consider progress on reconfiguration.

• Service review, price review, etc are not care management reviews and need to be done by different staff, unless you have social workers who have moved into commissioning.
If I were a care home provider...

• I would try to ensure that a concept of standard accommodation is agreed with the council (one that meets national and my local regulator standards would be the obvious concept) so that both the provider and purchaser can each try to justify legitimate use of top-ups for a service that is *better* than one that just meets assessed needs, and *better* than average accommodation, at least for a few places.

• I would insist that the contract with the authority distinguished between *standard* rooms and top up rooms, if there was any objective basis for doing so, and charge differential rates.

• I would be willing to agree that self funders could be accommodated at an *(acceptable)* LA rate after their assets came down below the threshold, but only if they move into particular rooms, so as to save my more expensive rooms for new self funders. Otherwise they would need to find a top-up to stay where they had been, or else be funded in full by the LA on the basis of need.

• *I might* give a discount for a block contract, if a certain number of beds were to be bought regardless of whether they were occupied by LA clients.

• On a month by month basis, IF I could sell these rooms privately elsewhere, I could always let the council off the bed rate for those rooms by way of concession. I would not double sell them!!

• If all my rooms were the *same quality*, I would overtly charge differential rates to self funders on the basis that the LA was a bulk purchaser and therefore deserved a discount.
More suggestions on what it makes sense to aim for...

General terms I’d want to see in the contract:

• I would hold out for a fixed term contract for, say, three years, with an agreed uplift, according to a formula I could really live with as making sense, given my wages costs.

• I would refuse to sign any contract with an evergreen clause in it applying to clients in the beds at the date of expiration.

• I would insist on banded rates for different levels of dependency, and I would insist on backdating increases to higher bands, to the date when I first notified the LA of the perceived increase in dependency, whenever that was finally acknowledged.

• I would insist on being able to give short notice in respect of any individual client if in my view as a provider they posed an unacceptable risk to the comfort and wellbeing of other clients or to my relationship with the CQC by reason of their refusal to permit my staff to care...

• I would ensure that there was an absolute contractual right of termination of the placement of any given individual, on my initiative, on reasonable notice – so that I could always terminate for reasons to do with the difficulty of providing for a particular person at a particular price – when strenuous negotiation about increased dependency or needs and re-assessment have not worked....
Self – funders’ contracts with providers

• The CSIP guide does not attempt to consider the contracts formed between providers of services and individual people who are paying for their own service.

• In the case of these contracts guidance is available from the Office of Fair Trading (OFT) on unfair contract conditions “Unfair Terms in Consumer Contracts Regulations” and particularly “Care homes for older people in the UK” also by OFT which is designed to help people decide whether the terms of their care home contract are fair and gives details of where advice can be obtained.

• It does not deal with important matters concerning how services are specified; including any differences of requirement between different service user groups; and how users and carers may be involved in this process.
The OFT report on care home contracts and fees

• The OFT is not against differential pricing as between self funders and LA clients in principle. It just wants transparency.

• Which? (formerly the Consumers’ Association) remains of the view that the use and misuse of power by some local authorities is a threat to the long-term viability of this sector and runs counter to the consumer interest.
‘Care homes for older people in the UK’
- the OFT’s report

The OFT highlighted the current information gap:

- What financial help am I entitled to from my Authority?
- What suitable care homes have vacancies in my area?
- What are the care homes’ fees and structures?
- What happens if my financial or health circumstances change, or fees go up beyond my means?

This is basic legal awareness - these issues can be easily explained!

- You could wait for the DH or CQC to prepare a leaflet, or tell you what to tell prospective clients. But why not work together on a leaflet which puts it the way providers and the local authority can live with?
Some OFT recommendations useful to proprietors...

All Local Authorities should:

• give self funded older people with an assessed need guidance, if they want it.

• ensure their advice and information materials state very clearly that an older person with an assessed need, who is entitled to authority funding, does not need to secure a top up in order to find a care home place suitable for their needs.

• Now, what does *that* mean?

• It’s because it is the Local Authority’s statutory duty to purchase or provide adequate care and attention for those eligible for it according to FACS criteria and the local eligibility threshold.
Who has to contract for the full fee if the provider decides to charge a top up?

• The OFT report emphasises that the National Assistance Act 1948 (*Choice of Accommodation*) Directions LAC (2004) makes it clear that **councils are contractually responsible for meeting the full costs of accommodation to meet assessed needs, including any top-up fees.**

• The risk of the third party defaulting must lie fairly and squarely with the LA, not the care home.

• “It is clearly important that local authorities not only adhere to these Directions, but also ensure that prospective care home residents are told about their entitlements.”
The kind of terms clients could look for in contracts with providers

- **What the extent of the available flexibility is** – how much notice needs to be given if no service is wanted that week and whether there is an admin charge for changing the routine.

- **What the provisions are for changing a worker if it doesn’t seem to be working out?**

- **What the provider will do if it cannot find a worker for the appointed care or support:**
  - Arrange back-up via the council
  - Make a payment TO the client or reimburse the client for the service, so that the client is recompensed for having to go out to buy more care, in an emergency.

- **What the consequences of late payment would be.**
Duration – fixed term vs rolling

- A fixed term contract expires at a certain date, by definition. It may be extended, if the contract provides for this, by agreement, but if there is no agreement, the old contract does not continue.
- At the point of expiry, there will be clients in service – and the provider will often feel that the client is owed a duty of care independently of the contract, making it impossible to put the client out onto the street.
- The care home is not willing to provide the ongoing services for free, but does not have any contractual consensus about the price.
- There may be an implied continuation of the old contract, the arising of a new one, or a non-contract situation, which gives the provider the right to claim what’s called a fair price for the services.
- A rolling contract continues until terminated, whether that be a framework one governing the relationship between the care home and the purchasing council, overall, or an individual one simply relating to a particular client, and no opportunity to be left simply holding the client on risk, can arise.
- Some councils try to get the best of both worlds by putting in what they call ‘evergreen’ clauses, whereby even after the date of expiry or termination, there is a special clause saying that any client in the service as at that date shall continue in service on the previously agreed terms and conditions, unless or until the individual service agreement for that person, as an individual, is terminated. That stops the restitutionary claim for a fair price from arising.
Quantum Meruit – what happens when there is no contract?

- If contractual relations break down, completely, so that the old one is terminated, or expires and is not renewed, you can’t say that the provider is accepting your price just because they haven’t put the clients out on the street.
- They are not likely to be able to say that you have accepted their fee demands either, just because you haven’t moved the clients.
- But taking the benefit of their ongoing care for the clients, without moving the clients, and without paying what is demanded, will very likely lead to an action in the private law courts for a quantum meruit – a fair price for the job to be done.
- Once the judge opines as to what is a fair price, taking into account the rest of the market’s approach to the value of an increasingly scarce commodity, all other home providers would want the same.
- However, no care homes case has ever gone all the way to judgment – they have all settled before a full hearing – probably because the consequences of losing are so terrible for each side.
- The authorities are Lincolnshire, Durham and the Isle of Wight, on the preliminary issue of liability.
- Bury got squeezed by a judicial review of its usual price at the same time as a private law action for a quantum meruit, about 5 years ago now.
Quantum Meruit

• Where SP grants have been cut, the SP provider will have been threatened with loss of the contract, replacement by a floating support provider, or tempted to negotiate the same services for a lower cost, or reduced services for a lower cost.

• In some areas, social care assessments have led to the perceived shortfall being made up.

• Where this has not been done, but the SP provider has not accepted a new contract for less money, the question arises – is the SP provider doing the same work, outside of contract, for nothing?

• If so, and if the work is being accepted by the ex purchaser (ie they know about it and have not declined the services) a quantum meruit arises.

• There was a test case in Worcestershire involving provision for men with challenging LD and MH backgrounds. The Judge has said that the matter is not one depending on the underlying public law dispute as between the men and the LA about their assessment and needs. It was a private law dispute about the price.

• The judge ended up agreeing the rate was fair, but only awarded it for an appropriate period of notice, to match giving notice on the tenancy, even though the work carried on afterwards and the men did not get thrown out!
Termination

- Some contracts provide for termination on specified grounds **only**.
- If that is the case, there is no other provision for termination.
- But would a contract for services of this nature be regarded as non-**terminable**? Probably not – public policy leans against non-termination of contracts of personal service, and these are contracts where unwilling provision would trigger the same sort of public policy concerns. This has not been tested in this field, however.
- Others provide for termination on particular grounds to require a particular number of weeks’ notice, whilst still allowing for termination at will, on say 6 weeks, or 3 months notice, depending on whether it is an agreement for an individual’s care, or for a whole set of clients.
- If I was a day care or care home provider, I would not sign a contract that failed to acknowledge my dependency on the commissioner’s honesty with me, at the outset, about needs, in the context of the commissioner’s very likely control over subsequent price levels, when I should know that I owe a duty of care to all my other clients to protect each from the other’s unmanageable behaviour. If I had shareholders I would expect them to expect me to be a more savvy business person than to expose myself to the risk of having to finance unlimited amounts of care to avoid being sued for negligence.
Dispute resolution mechanisms

• Dispute resolution mechanisms appear in most contracts, so that the parties can see that it isn’t all or nothing: there is scope for raising concerns, meetings, discussions, and then mediation, and/or arbitration.

• An arbitration clause effectively means that the parties are giving up their normal civil rights to go to court.

• An arbitration is an adjudication, usually in private, by a non-judge, supposedly more informal than a court case. The outcome is private, unless the parties agree otherwise.

• No arbitrator can arbitrate a failure to agree, if the agreement calls for agreement as to a price variation – unless the contract has given such a role to an outsider, exceptionally.
Third party rights for non-parties

- The Contracts (Rights of Third Parties) Act 1999 enables a third party, who is not a party to the contract, to enforce terms against a party to that contract. The third party which must be expressly identified in the contract is given the same rights as the parties to the contract.
- The parties to the contract can expressly exclude or limit third party rights in the contract.
- It is not recommended by any government contracting advice that residents or any third parties have the same rights to enforce a contract which has been made between the commissioner and the provider. But ironically it is the easiest way of making the contract into a three way one, without the client having to provide any form of consideration to enable proper enforcement.
Contract (Rights of Third Parties) Act

• **Section 1** sets out the circumstances in which a third party would have the right to enforce a term of the contract. **Subsection (1)** sets out a two-limbed test for the circumstances in which a third party may enforce a term of a contract. The first limb is where the contract itself expressly so provides. The second limb is where the term purports to confer a benefit on the third party unless it appears on a true construction of the contract that the contracting parties did not intend him to have the right to enforce it (**subsection (2)**).

• **Subsection (3)** requires that, for subsection (1) to apply, the third party must be expressly identified in the contract by name, class or description, but establishes that the third party need not be in existence when the contract is made. This allows contracting parties to confer enforceable rights on, for example, an unborn child or a future spouse or a company that has not yet been incorporated.

• **Subsection (4)** clarifies subsection (1). The third party’s right of enforcement is subject to the contract’s terms and conditions. It is open to the parties to limit or place conditions on the third party’s right; for example, if he wishes to enforce the right he is to do so by way of arbitration and not litigation.

• **Subsection (5)** makes it clear that the courts may award all the remedies which are available to a person bringing a claim for breach of contract to a third party seeking to enforce his rights under subsection (1). The normal rules of law applicable to those remedies, including the rules relating to causation, remoteness and the duty to mitigate one’s loss, apply to the third party’s claim.

• **Subsection (6)** makes it clear that the Act is to apply so as to enable a third party to take advantage of an exclusion or limitation clause in the contract, as well as to enforce “positive” rights. The Act, for example, allows a term of a contract which excludes or limits the promisee’s liability to the promisor for the tort of negligence and expressly states that the exclusion or limitation is for the benefit of the promisee’s “agents or servants or subcontractors” to be enforceable by these groups.

• The Act allows the contracting parties to rescind or vary an agreement where the agreement contains an express term permitting them to do so without the consent of the Third Party. Alternatively, the agreement may contain terms which specify the circumstances in which the consent of the Third Party is required before the agreement can be either rescinded or varied.
Thank you so much for attending!

- Belinda can be contacted on belinda@careandhealthlaw.com, or Tel 01252 725 890 or 07974 399361.

- My website, www.careandhealthlaw.com, offers free (and some charged-for) topic overviews about health and social care law; ‘hot news’ emails when an important case has been decided by the courts, and access to these web-based training courses.

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