PROTECT

Care Standards

The Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

In the First-Tier Tribunal (Health, Education and Social Care)
Heard At: Pocock Street Hearing Centre
On Monday 15th April 2013

Before:

Deputy Chamber President Judge John Aitken
Specialist Member Ms Margaret Halstead
Specialist Member Ms Marilyn Adolphe

MNS Care PLC

Appellant

v

Care Quality Commission

Respondent

[2013] 2027.EA

Representation:

The Appellant: **Mr Michael Curtis QC, Counsel**

The Respondent: **Ms Samantha Broadfoot, Counsel**

Decision

1. The Appellant, MNS Care Plc, is registered to carry out three regulated activities under the ***Health and Social Care Act 2008***, accommodation for persons who require nursing or personal care, treatment of disease disorder or injury and diagnostic screening procedures all at stated locations. By an appeal dated 22nd March 2013 the appellant appeals against a decision of the respondent dated

22nd February 2013 to impose a condition on the registration of the appellant in relation to one of its registered locations, Mabbs Hall Care Home in Mildenhall under ***Section 31 of the Health & Social Care Act 2008***. The condition imposed is that "*The Registered Provider must not admit any service users to Mabbs Hall Care Home without the prior written agreement of the Commission*".

2. This is an expedited hearing under the terms of the Memorandum of Understanding between the Care Quality Commission and the Tribunal. There is no dispute that Section 31 provides an urgent procedure for, amongst other actions, the imposition of conditions of registration "*If the Commission has reasonable cause to believe that unless it acts under this section any person will or may be exposed to the risk of harm*". On appeal against such a decision the burden of proof is on the respondent. The reasonable belief is to be judged by whether a reasonable person assumed to know the law and possessed of the information available would believe that a person might be at risk if the conditions did not take immediate effect.

3. The Tribunal are in the position of the Commission at the date of hearing 15th April 2013 and consider the position as to the risk on that date.

4. There appears to have been some confusion with regard to the extent of the condition, the appellant having regarded it as a “blanket ban” since they believed that the Care Quality Commission intended to decline to admit future service users. We do not consider it such, that is not a natural reading of the condition which plainly admits of exceptions in the form of written consent from the Care Quality Commission and we consider that such consent could only be withheld reasonably. No application by MNS for a service user to be admitted has been made since the imposition of the condition, and it was plain from the evidence of Ms Robinson the Director of Care at MNS that whilst there may have been good reasons for not making such application the Inspectors who attended at Mabbs Hall on the 2nd April 2013 encouraged them and made it plain that they expected applications would be made to the Commission. We find no substance in the suggestion that this was a “blanket ban” either in the wording of the condition or

the behaviour of either party.

5. The history of the matter as it reasonably appeared to be to the Commission, and as we accept for the purposes of this expedited matter only is that there has been no registered manager in charge of Mabbs Hall since at least October 2012. Mabbs Hall was inspected on 10 October 2012 at that inspection the Inspectors identified a significant number of failures to comply with the relevant regulations, the ***Health and Social Care Act 2008 (Regulated Activities) Regulations 2010***. Two of those failures were judged to be classified as "major shortfalls" and required enforcement action to be taken. This was done by the issuing of Warning Notices. The Warning Notices were issued in respect of: a) ***Regulation 9*** of the 2010 Regulations (care and welfare of people who use services) a failure to correctly assess service users on the risks of developing pressure sores and failing to manage the care of individuals with pressure sores and b) ***Regulation 14*** (meeting nutritional needs) service users were not assessed correctly to minimise the risk of inadequate nutrition or dehydration, food and fluids were not recorded, individuals were not provided with regular drinks and weight was not managed appropriately. Other shortfalls requiring action to be taken included staff shortages, staff training, inadequate systems relating to the investigation and reporting within the adults at risks safeguarding policy of injuries and issues relating to care plans.

6. A further inspection took place on 29 November 2012 for the purpose of checking compliance with the Warning Notices. This inspection was conducted by the same Inspectors as the October inspection and in addition, they were accompanied by Mary Granville-White, who is an Expert by Experience from Age UK'. Jo Govett, Compliance Manager at the Commission, attended the latter part of the inspection. The outcome of that inspection was in essence that the service remained non-compliant with both Warning Notices.

7. The Care Quality Commission received a phone call at the beginning of December 2012 from Mr Sandip Ruparalia the nominated responsible person for Mabbs Hall, who explained that a crisis management team was now in place to

turn the service around. The Commission was informed in mid January 2013 that Mabbs Hall was now compliant and ready for inspection. Accordingly an inspection was carried out over the evening of 29/30 January 2013 and the early morning of the following day. The two inspectors (the same ones as previously) were accompanied on the evening visit by the same Expert by Experience, Mary Granville-White and were accompanied on the early morning visit by specialist advisor Angie Martin, a trained Registered Nurse. The outcome of this inspection indentified a list of concerns as set out in the inspection report parts of which are disputed.

8. Following that inspection a further management review occurred on 1 February 2013 at which it was decided that as a result of the continuing concerns the Commission would now draft a Notice of Proposal to vary the conditions of the Appellant by removing Mabbs Hall as a location for the provision of regulated activities. Those notices were issued on 19 February 2013 and, as provided for by the statutory framework, representations can be made in respect of them (which have been) and the decision to make them can be appealed, those proposals have been finally adopted by the Care Quality Commission and although that has not yet been served the appellant's were notified during the course of the hearing that it was intended that the Care Quality Commission would do so. The service of Notices does not prevent the Appellant from providing services at Mabbs Hall in the meantime.

9. During February 2013 the Commission received further information from other bodies (Suffolk County Council Safeguarding Adults at Risk, Adult Social Care and the police) indicating that they were in the process of carrying out their own investigations and that concerns had been expressed about the quality of care that Mabbs Hall was providing to service users. Suffolk County Council conducted its own visit on 5 February 2013. Other information from people outside these organisations, including from a member of the public, also indicated further safeguarding concerns. Suffolk County Council withdrew a number of residents it was responsible for and although it was suggested before us that this could have been a contractual matter, we note the timing and surrounding

circumstances and the lack of any other explanation and are satisfied that it reflected a concern over standards. Although there was a Police investigation, no action was taken by them and that does not provide further evidence.

10. The Commission also received information from MNS Care that it was proposing, subject to assessment, to admit a new resident to the home. The Commission, concerned about the possibility of new residents being admitted to Mabbs Hall came to the conclusion that the best way of protecting the existing service users and minimising risk of harm to them as well as to new service users was to impose a new condition on the Appellant's registration that the Commission's written agreement would have to be sought prior to any new admissions. This was an interim measure and subject to review.

11. Little was factually in dispute before us. Those area where compliance is disputed we have not considered, rather we have looked at the position as the commission reasonably believes it to be, that is in accordance with their inspectors reports. We heard from two Commission witnesses, Jo Govett and Leanne Wilson and Ms Gillian Robinson from Mabbs Hall. We did not form the impression that any of the witnesses were doing anything other than their best to recall events accurately and the only area of real dispute before us was whether at an inspection on 2nd April 2013 inspectors had encouraged Ms Robinson to believe that the state of the home was such that new residents would be allowed. Ms Wilson recalled under cross examination that her co-inspector may have used the word encouraged in the context of making such an application and we find that the inspectors did leave the impression that an application to admit further service users might well be granted. Importantly there was no suggestion by the CQC Inspectors that service users with complex care needs nor of numbers which might be favourably considered. This at a time of inspection when the home was looking after about 19 people rather than the 29 it could actually accommodate. Indeed Ms Robinson recalls saying herself that increasing number would have to be done very gradually. Thus although we consider that encouragement to apply was given, that does not in the context of this case indicate that the inspectors considered that there should be no restriction on service users numbers or level

of need up to the maximum.

12. We were particularly impressed by Gillian Robinson. She explained to us that she had previously managed the home, then been a regional manager and had been recalled to act as Director of Care for MNS and work with consultants to get the home back up to compliance standards, she had taken over in December 2012. She frankly admitted that the home was not at a proper standard when she took over but gave a detailed account of the steps she had taken to improve matters, which she viewed as a 'work in progress' she gave the impression that she had radically reformed training, record keeping and procedures to do so. She demonstrated commitment, enthusiasm and was clearly passionate about her work. She accepted however that until the date of the hearing, notwithstanding the assertions that the home was fully compliant in January, that it was not effectively compliant (allowing always that there may be some minor matters) until the date of the hearing. She went on to accept that there was a difference between being able to demonstrate compliance on a particular date, or inspection and demonstrating that this can be sustained. She accepted that is would be sensible and cautious for improvements to be seen to be sustained. She also pointed out that it was not for the Care Quality Commission to manage the home, it was for the Care Quality Commission to monitor and enforce as necessary and for the Home to mange itself.

13. Ms Broadfoot argued that the restriction was a sensible precaution given that the Care Quality Commission had seen 7 months of non compliance and claims of present compliance were entitled to be treated with a degree of circumspection. As to whether it should be time limited, her final position was that there was a mechanism to apply to review a condition and that was sufficient protection.

14. Mr Curtis argued that the decision of the Care Quality Commission was irrational in that it was imposed after the notice of proposal to close the home at a time when effectively no new information had come to light other than the home were proposing to act as normal in accepting a service user for whom they had a good deal of vacancies and the required rota of trained staff to meet the service users

care needs. Having presumably concluded that there was no need for such a restriction when they proposed to close the home there was no need or justification for it subsequently when all that had happened were improvements. A blanket ban would have the effect of closing a home by attrition or a lesser standard of proof that a proper closure but this was the net effect here. The condition was subject to the needs of present and future residents being met, and this in itself was unreasonable as it could never be properly demonstrated. Looking at the picture in relation to the home itself admission of residents was a management function and there was no proportionate or good reason why that management function should be delegated or adopted by the Care Quality Commission. As to the lack of time limiting, the right to review would cease as soon as the final notice of proposal was served and demonstrated the unreasonable nature of the condition.

15. As we have indicated previously we do not consider that the condition imposed was ever intended to be a blanket ban, although in the event it has never actually been tested by reference to seeking permission to increase numbers of service users. We consider that the entirely of the history must be looked at in considering whether a condition is necessary, and whilst Mr Curtis may be correct in his technical criticisms of the Care Quality Commission if one approaches decisions on a strict timeline basis we consider that the approach to such decisions must be wider, and that at all stages the Care Quality Commission are entitled, indeed obliged to reflect on the past and consider all of the available evidence when making a decision. We consider that having had 7 months of poor compliance, and systemic problems at the home which in the words of Ms Robinson led to her stripping it back to “bare bones”, action to ensure the safety of residents is necessary. We accept that as of the present hearing compliance may be effectively in place, equally we do not find that it is yet demonstrably sustainably so, even Ms Robinson working as she and the consultants have done over the past few months have found that it is not an easy or a simple task to reform the home and that it seems to us it might well be derailed were the wrong number or need of residents to be admitted. Ms Robinsons herself considered it prudent to notify the CQC in February that the home was considering accepting

another resident.

16. Given that there have been previous assurances of compliance when it was manifestly not the case we consider that it is a prudent and reasonable course necessary to ensure the care and well being of residents that there is for a period at least, a condition restraining the admission of new service users, not a blanket ban, but one which reflects the duty of the Care Quality Commission to ensure residents are protected. We consider that there is reasonable cause to believe that unless action is taken under ***Section 31 of the Health & Social Care Act 2008*** residents or potential residents will or may be exposed to the risk of harm. We note in addition in this context that although Ms Robinson is working as the Director of care at MNS she is not the person nominated as responsible for the home, that is Mr Sandip Ruperelia.

17. We consider that Ms Robinson and the Care Quality Commission might well agree on future increases in capacity, there is a plainly a desire on both sides to ensure high quality levels of care are sustained but taking into account the entirety of the history, for a limited period the Care Quality Commission should be entitled to reject admissions unless satisfied that the needs of current residents and a future placements would be properly met in safeguarding adults at risks. We do not consider that such a condition is effectively impossible to meet, compliance with procedures and regulations is very good evidence that needs are being met, and Ms Robinson has indicated that any inspection in the near future would show that. Sustainability of such compliance, which of course has yet to be demonstrated at an inspection will no doubt be a feature of whether such a condition would need to be renewed.

18. We have considered whether reviewing the decision would be adequate in these particular circumstances rather than imposing a time limit, which is now complicated by the intention of the Care Quality Commission to seek to have the home removed form the list of places at which registered activities can take place. Whilst that does not prevent a review of the condition under ***Section 19*** of the ***Health and Social Care Act 2008*** since there is no notice to cancel (The Care

Quality Commission are giving notice to vary the conditions to remove the home as a place where activities can take place) it makes it very unlikely that the Care Quality Commission could review admission without reviewing closure. We do not seek to express any view on the closure proposal, we have not considered the underlying issues and it would be wrong to do so. We consider as of today looking at the matter before us that the decision should be that the condition has a time limit enabling the appellant to have a date to work towards a position of sustainable full compliance, with of course the option of seeking review under Section 19 in the meantime.

Decision

The appeal is allowed only to the extent that the condition shall remain in force for a period of 6 months from the date of this decision.

Judge John Aitken
Deputy Chamber President
Health Education and Social Care Chamber
Thursday, 18 April 2013