

## Care Standards

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

Heard on 18, 19 and 20 August 2014 at Pocock Street, London

BEFORE

JUDGE MELANIE PLIMMER  
SPECIALIST MEMBER MS MARILYN ADOLPHE  
SPECIALIST MEMBER MS LINDA REDFORD

[2014] 2187.EA

BETWEEN

AGAPE HOUSE LIMITED

Appellant

-v-

CARE QUALITY COMMISSION

Respondent

### DECISION

#### Representation

The Appellant was represented by Mr Wheeler (Counsel)

The Respondent was represented by Ms Rickard (Counsel)

1. The appellant appeals against a decision dated 24 February 2014 to cancel its registration under section 17 of the Health and Social Care Act 2008 ('the 2008 Act') in respect of the following regulated activity – accommodation for persons who require nursing or personal care. Mrs Siva (also known as Mrs Paramasivam) is the sole director of the appellant. The appellant is located at Chatham in Kent.
2. The parties have helpfully agreed a 'Scott Schedule' ('the Schedule'). This sets out in summary form the respondent's concerns together with the appellant's position in relation to those concerns.
3. The appellant seeks a finding that, having regard to all the circumstances, including those that have arisen since November 2013, the respondent's decision to cancel its registration is to have no effect. In putting forward this submission Mr Wheeler has expressly acknowledged that such a finding is unlikely without the imposition of discretionary conditions, and for these reasons proposed conditions

relating to oversight of the appellant by a consultant, Mr Mittal are set out in the Schedule.

4. The respondent does not consider that those conditions are appropriate or workable and therefore submits that cancellation is a proportionate response in all the circumstances of this case. The respondent contends that the appellant is a reactive service provider in breach of multiple regulations and is incapable of sustaining meaningful change.

## Hearing

5. The appeal was heard over the course of three days. At the beginning of the hearing Mr Wheeler sought an adjournment of the commencement time to later on that day in order to pursue an alternative proposal to the one involving Mr Mittal. This involved a Mr Grantham, the managing director of a domiciliary care business located near to the appellant. We declined to grant this application on the basis that the appellant had already had an extended period of time to pursue all possible proposals and in any event further enquiries regarding alternative proposals could be undertaken in parallel to the Tribunal hearing. We were told that a partner in the firm instructing Mr Wheeler was pursuing these enquiries.
6. Mr Wheeler also made an application to submit late evidence which was unopposed by the respondent. We accepted that evidence late but noted that the majority of this evidence could and should have been provided in advance of the hearing; at the time the directions required the bundle to be lodged. The parties seemed to have worked well together to prepare three helpful and carefully prepared bundles of extensive documentary evidence.
7. We heard brief opening statements from Mr Wheeler and Ms Rickard, which supplemented opening written notes. We then heard live evidence from a number of witnesses. On the first day we heard from Ms Burnham and Ms Butt, both inspectors employed by the respondent. They were cross-examined extensively by Mr Wheeler particularly regarding an inspection they carried out in June 2014.
8. At the beginning of the second day Mr Wheeler submitted a document outlining an alternative proposal involving Mr Grantham. The parties were given a further opportunity to discuss this but the respondent was not satisfied with the alternative proposal and we continued with the hearing. We then heard evidence from the respondent's final two witnesses, Ms Brown and Ms Tricker. Ms Brown is an inspection manager with the respondent and provided an overview of the decision-making process concerning the appellant. During cross-examination she explained why she did not regard either of the appellant's proposals to be appropriate or workable. Until recently Ms

Tricker worked at Medway Council as a Partnership Commissioning Officer.

9. We then heard from the appellant's witnesses: Mrs Siva, the nominated individual and sole director of the appellant; Ms Keith, the registered manager of the appellant; Mrs Price, the head of care at the appellant, Ms Vaughan, a cook and carer at the appellant; and finally, the consultant, Mr Mittal.
10. We were provided with a number of witness statements from individuals whose evidence was agreed by the appellant. We have also considered and taken into account supporting letters and witness statements from residents at the service provider and their family members together with a letter from the GP for some of the residents at the service provider, Dr Quereshi. We have considered all the evidence in the round, both written and oral.
11. At the end of the evidence both representatives agreed to provide written submissions for the following morning. On the morning of the third day the Tribunal received very helpful written submissions from both parties. The appellant also submitted a document described as an 'Action Plan to meet identified deficits from external regulatory audit' prepared by MIT consultancy, a business run by Mr Mittal. Mr Wheeler acknowledged that the evidence was very late but submitted that the Tribunal should be flexible in admitting it. It was an attempt to respond to the Tribunal's questions regarding the absence of any clear robust action plan to address the appellant's acknowledged deficits. He submitted that the respondent would not be prejudiced because Mr Mittal was present and could be questioned by the respondent.
12. Ms Rickard submitted that the document should not be admitted because it was simply way too late to do so. She pointed out that she was provided with the document for the first time 10 minutes before the start of the hearing that morning and in any event she would not have the opportunity to put any questions to any of the other witnesses (Mr Mittal was the only one of the appellant's witnesses to attend the final day of the hearing, albeit it had been agreed this would be limited to submissions only).
13. We decided to admit the document because it was relevant to some of the questions put by the Tribunal but indicated that it would be a matter for us to determine the weight to be attached to it in light of the delay in providing it and the respondent's inability to ask any of the other witnesses, particularly Mrs Siva and Mrs Keith about matters raised within it.
14. We then heard helpful oral submissions in support of their respective written submissions from both representatives before reserving our decision.

## Legal framework

15. Ms Rickard set out the relevant law in her written closing submissions. Mr Wheeler clarified that this is agreed. We therefore only set out a summary of the relevant legal framework.
16. This appeal is brought under section 32 of the 2008 Act against the respondent's decision under section 17 to cancel the registration of the appellant. Section 17 gives the respondent the power "*at any time*" to cancel a service provider's registration:

*"... (c) on the ground that the regulated activity is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements."*
17. The "*relevant requirements*" for the purposes of section 17 of the 2008 Act are "*any requirements or conditions imposed by or under this Chapter*", and "*the requirements of any other enactment which appears to the Commission to be relevant*": s.17(4) of the 2008 Act. The requirements imposed under that Chapter include requirements in Regulations. These have been made in the form of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (SI 2010/781). The most relevant regulations to this case have been summarised below.
18. Regulation 5 states that there must be a "*nominated individual*" who must be employed as a director, manager or secretary of the body. Further, the service provider must take "*all reasonable steps*" to ensure that the nominated individual is "*physically and mentally fit to supervise the management of the carrying on of the regulated activity and has the necessary qualifications, skills and experience to do so*".
19. Regulation 6 requires the service provider to ensure "*that the nominated individual undertakes, from time to time such training as is reasonably practicable as appropriate to ensure that there are the necessary experience and skills available for carrying on the regulated activity*". Further, that the registered manager must undertake from time to time "*such training as is appropriate to ensure that the manager has the experience and skills necessary for managing the carrying on of the regulated activity*".
20. Regulation 8 imposes a requirement on both the service provider and the registered manager that they "*must, in so far as they are applicable, comply with the requirements specified in regulations 9 to 24 in relation to any activity in respect of which they are registered*".
21. Regulation 9 requires that proper steps are taken to ensure that each service user is protected against the risks of receiving care or treatment that is inappropriate or unsafe. The Regulation requires that care is planned and delivered in such a way as to ensure not just the "*safety*", but the "*welfare*" of each individual service user.

22. Regulation 10 requires appropriate systems in place to assess and monitor service quality and to “*identify, assess, and manage*” risks relating to the “*health, welfare and safety of service users and others who may be at risk from the carrying on of the regulated activity*”.
23. Regulation 11 requires service providers to ensure service users are safeguarded against the risk of abuse by taking reasonable steps to identify the possibility of abuse and prevent it before it occurs.
24. Regulation 14 requires service providers to ensure that service users are adequately protected from the risks of inadequate nutrition and hydration.
25. Regulation 21 relates to the suitability of workers employed as well as the requirement to ensure that a written explanation of any gaps in previous employment is available and that a criminal record certificate is available.
26. Regulation 23 requires the service provider to support staff appropriately and to enable those staff to deliver care and treatment to service users safely and to an appropriate standard including by receiving appropriate training, supervision, professional development and appraisal.
27. The powers of the Tribunal can be found in section 32 of the 2008 Act. Essentially the Tribunal may either confirm a decision of the respondent or direct that it is not to have effect. The Tribunal also has the power to direct any such discretionary condition as it thinks fit. The Tribunal considers the appeal on the basis of the evidence available at the date of the hearing.

## **Background**

28. The background history to this case is lengthy and is only summarised below.
29. The appellant was registered with the respondent on 19 April 2013 to provide accommodation for persons who require nursing or personal care but under the conditions of registration the home as a service provider is only allowed to provide accommodation and personal care, not nursing care. Immediately prior to this Mrs Siva had been the registered provider of the home. She is the sole director, company secretary and nominated individual for the appellant. Both parties therefore accept and indeed invite us to consider the history of the home from 2004, when Mrs Siva bought it, and not just from the appellant’s registration in 2013. She appointed Ms Keith as manager of the home in 2008.

30. There are currently seven residents over the age of 65 at the home, who have a wide range of care needs. The service provider is registered for 20 service users but Medway Council decided to make a placement embargo on 13 January 2014, after a safeguarding concern was raised.
31. After an inspection in December 2008 the respondent considered the home to be non-compliant with a number of Regulations and issued a Statutory Requirement Notice. This was based inter alia on the home's failure to: promote the welfare of service users by failing to ensure that care plans were sufficiently detailed and up to date; ensure risk assessments are undertaken; take appropriate action regarding weight loss and nutritional records; ensure that service users are protected from abuse. A random inspection was undertaken in February 2009 and it was found that the Statutory Requirement Notice was not met.
32. The home was however considered adequate by May 2009. It was specifically noted that the care plans had improved significantly and were person centred and individualised. The home continued to be compliant until 2013. An inspection in May 2010 gave it an overall good quality of rating. In January 2012 and November 2012 the home was found to be meeting all the essential standards of quality and safety. During this period of compliance Ms Keith was the manager of the home.
33. In June 2013 a routine inspection was undertaken and the home was found to be non-compliant with two Regulations. Specific concerns were also identified in relation to the assessment of service users' pressure care and nutritional needs.
34. On 26 July 2013 a resident in the care home (service user A) was admitted to hospital with grade 3 and 4 pressure sores and a dry and blackened mouth. She died on 12 August 2013. The appellant reported this to the respondent on 7 October 2013. A safeguarding meeting was convened by Medway Council on 30 October 2013 in relation to service user A. This considered a report prepared by Ms O'Meara to be an accurate summary of what had happened. This report found that staff did not administer any mouth care and did not understand the need to provide such care, and there were also concerns regarding pain management, fluid intake; and also why staff did not request a review for service user A from Social Services. There was a conclusion of neglect based on lack of knowledge. The report however indicates that any neglect of A was not solely the responsibility of care staff and visiting healthcare professionals should have addressed matters as well. Mrs Siva and Ms Keith gave assurances that staff would be trained in pressure sores and oral care as soon as possible. It was also agreed that Ms Tricker would carry out a compliance visit.

35. At an unannounced inspection in November 2013 the home was found to be non-compliant. The assessment of pressure care and nutritional needs remained a concern. Ms Tricker also carried out a monitoring visit in December 2013 and highlighted a number of serious concerns at the home. This included considerable gaps in training and urgent environmental concerns. On 23 December 2013 a notice of proposal to cancel the appellant's registration was served and this was followed by a decision to cancel the registration on 28 February 2014.
36. At unannounced inspections in February 2014 and June 2014 the respondent found the appellant to be non-compliant with a number of Regulations.
37. Mrs Siva engaged Mr Mittal to undertake an independent audit of the home. He completed this in March 2014. This set out a number of significant deficits as well as recommendations on how to address these deficits. Mr Mittal completed another audit in May 2014, which described a number of improvements and positive steps taken by Mrs Siva, Ms Keith and other staff members.
38. The appellant proposes to instruct Mr Mittal to attend the home for two consecutive days per fortnight in order to provide a full audit once per month, and in order to support, train and supervise the manager and staff.

## **Findings of fact**

### **Approach to evidence generally**

39. The Tribunal has been assisted by the Schedule and has taken it fully into account. We consider it convenient to consider the evidence relevant to alleged historic compliance / non-compliance first before turning to the more recent evidence regarding the home during the course of 2014. Before turning to these matters we set out our general assessment of the witnesses who appeared before us. In our view all the witnesses provided broadly honest and straightforward evidence. Where they did not know an answer or were unsure they were candid in making that clear. This is a case that turns less on the credibility of witness and more on the judgments that individuals exercised, and are capable of making, in the performance of their respective duties.
40. We consider that Mrs Siva deserves credit for taking a pragmatic approach to these proceedings. She has accepted her personal failings as a nominated individual and the failings of the service provider as described in the November 2013 and February 2014 inspection reports. She was frank and clear in accepting that the appellant did not meet significant requirements within the Regulations at those times, and that she needed substantial assistance to implement systematic changes so as to address those deficits. Mrs Siva has sought to make some changes in response to the identified

failings. We are however satisfied that the changes thus far can properly be described as “too little, too late” such that the service provider has been and remains in breach of a number of the relevant Regulations.

**Compliance / non-compliance concerns up to the February 2014 inspection**

41. The appellant accepts that there have been periods in the past when it was not compliant – in the earlier period of 2008 / 2009 and then from November 2013 to March 2014. The appellant has not disputed the evidence of Ms McKenzie, a compliance inspector that it was in breach of Regulations during inspections in June and November 2013. Mr Wheeler has set out a number of explanations for this and argues that there was a sustained period of compliance for the majority of issues between 2010 and November 2013. He has invited us to re-read the May 2010, November 2012 and June 2013 reports. We accept that these reports are broadly positive and demonstrate that, in the past, compliance was achieved with the assistance of the current manager.
42. We are nonetheless very concerned that, although the appellant was able to maintain a sustained period of compliance, a large number of serious failings and breaches of the Regulations were identified in November 2013 and February 2014, and these are accepted. We accept Ms Rickard’s submission that a number of these adverse findings are similar to those identified back in 2008 and this demonstrates an inability to sustain improvements.
43. Mr Wheeler has submitted that it is relevant to take into account that the appellant found itself in difficulty suddenly after a period of sustained compliance. The respondent opted for cancellation rather than other enforcement options. We consider that the respondent was entitled to take this course at the time bearing in mind the serious and wide ranging nature of the breaches. This included Medway Council’s investigation of the safeguarding issue regarding service user A (which we have already outlined above). The appellant has accepted that this raised a safeguarding issue. Mr Wheeler has urged us to note that service user A was also under the care of the district nurses at the material time and was regularly having her sores dressed. However we entirely accept the evidence of Ms McKenzie to the effect that staff members were unaware of or incorrectly implemented methods or tools to prevent or reduce the risk of skin breakdown. Ms McKenzie concluded, and we accept, that Mrs Siva and Ms Keith did not appear to understand what had gone wrong in the care of A, did not appreciate basic issues surrounding mental capacity and were unable to demonstrate an understanding of pressure sores or when service users should be moved from a residential home to a nursing home.
44. We are satisfied that the appellant has been in breach of a number of Regulations as identified by the respondent and this is likely to have



been the case for the second half of 2013 continuing into 2014. We regard it to be significant that after the worrying deficiencies in the care provided to service user A was brought to the attention of the appellant in October 2013, at the time of the November 2013 inspection the respondent found that outstanding issues regarding capacity had not been addressed and staff had still not received training in identifying pressure areas and using risk-measuring tools correctly and effectively. Training remained woefully inadequate in December 2013 as recorded by Ms Tricker after her monitoring visit that month. We are concerned that the letter from Dr Quereshi does not address the safeguarding issues relating to A. Indeed the letter from the GP seems to be a very generalised one that has not in any way sought to engage with the identified (and accepted) deficits on the part of the appellant. We were not told the views of A's GP (if her GP is not Dr Quereshi) about the home.

### **Steps taken during 2014**

45. The appellant's case has been clearly and carefully argued on this basis: although the respondent's concerns after the November 2013 and February 2014 inspections are accepted, important steps have been taken during the course of 2014 to address the difficulties identified. Although it is acknowledged that deficits remain, it has been asserted that these can be properly addressed by the proposal involving Mr Mittal working with Ms Keith, a manager with a track record of managing the home when it was considered to be compliant by the respondent.
46. We acknowledge that there have been some positive developments during 2014. Mrs Siva has spent some £21,000 on the home but much of this was spent on that which she was required to do, for example, the installation of fire doors and meeting environmental requirements, in addition to paying for Mr Mittal's services. Ms Tricker accepted a number of immediate improvements in January 2014. Further training also took place in January 2014. There were, of course, still significant failings after this, as identified at the February 2014 inspection. An activity coordinator began work in early 2014. Mr Mittal was engaged but only for 6 days during the period from February 2014, when he started to the time that he gave evidence before us. Mr Mittal found Mrs Siva and Ms Keith receptive to advice. Mrs Siva and Ms Keith's relationship improved and they started to work more collaboratively. Ms Tricker also set out a number of improvements after compliance visits as contained in a largely positive email in June 2014.
47. Notwithstanding these positive developments we are concerned that the steps that have been taken are simply insufficient given the seriousness of the deficits. First, Mr Mittal told us that he was instructed to provide six days worth of work to the appellant. When we clarified why he only provided 6 days worth of work and whether this was sufficient he accepted and this amount of time was insufficient to

address the deficits identified. We were not told why Mr Mittal was not instructed to do more work generally or further work as a matter of urgency once the appellant received the June 2014 inspection report.

48. Second, we agree with Ms Rickard that the appellant has not been proactive in seeking to ensure it complies with requirements and has particularly over the last year been almost entirely reactive. We also agree with the respondent that this demonstrates a service provider that is either unable or unwilling to identify basic or significant risks. To safeguard safety and welfare of the residents, it is necessary for the service provider to be proactive rather than to react to past failings and omissions. We have identified a pattern of reaction over the last year in that the appellant, the nominated individual and the registered manager tend to react to and wait for direction from external professionals including inspectors, consultants and those working for the local authority. We have seen very little evidence of the appellant, the nominated individual and the registered manager proactively taking proper steps to ensure that each service user is protected against the risks of receiving care that is inappropriate or unsafe. The nominated individual and registered manager have given no regard to the need to have appropriate systems in place to assess and monitor quality of care.
49. Third, Mrs Siva's evidence betrayed a lack of understanding of her role and responsibilities as nominated individual as well as the proper role of the respondent. She seemed to look to the respondent for advice and believed that a reaction to the failings identified by the respondent was an appropriate and adequate way for the appellant to be managed. The respondent is a creature of statute, created pursuant to section 1 of the 2008 Act, with the powers conferred on it by that Act. It is a regulator, not an advisory body.
50. Fourth, we are satisfied that Mrs Siva has been very reluctant to provide the necessary funding to support the appellant and its staff to meet the requirements in the Regulations. We are concerned that, having identified Mr Mittal as a person who has assisted and has the potential to assist more, she has only engaged his services for six days during the course of 2014. He only trained some of the staff on one topic on one occasion. It is unclear how much time he spent with Ms Keith on care plans but it seems that very little if any time was spent on reviewing these after they were completed. Mr Mittal candidly accepted that the appellant required greater input than this but was not in a position to demand more. Further, Mrs Siva did not purchase an alternative hoist for care staff to use, despite the hoist being identified as inadequate after the November 2013 inspection until February 2014.
51. Fifth, we are not confident that Mrs Siva has been as supportive of members of staff as she needed to be. It is difficult to see why immediate steps were not taken to comprehensively train all members of staff. There was some training in January 2014 but there continued

to be significant gaps in training and the monitoring of the implementation of knowledge, understanding and skills gained from training. We are concerned that Mr Mittal was only asked to provide training to some of the staff on one topic. In addition, we note that Ms Price 'walked out' the day before the February 2014 inspection after Mrs Siva had shouted at her in front of relatives and residents.

### **June 2014 inspection report**

52. We now turn to the June 2014 inspection. The appellant criticises this report as being unfair and overly critical, and in parts factually inaccurate. The appellant received a draft version of the report on 23 July 2014. We note that it was given an opportunity to correct any factual mistakes in the report but declined the opportunity to do so.
53. We accept that the report includes some wording that does not accurately reflect the views of the authors. Ms Burnham and Ms Butts were prepared to acknowledge this, where relevant (see by way of example, para 15g of the appellant's closing submissions). We were however impressed that both Ms Burnham and Ms Butts were willing to accept that there might be errors in the report and to reflect carefully on whether those made a material difference to the outcome in each individual respect or overall. We accept their evidence that it did not. We consider that the judgment they provided was based upon what they saw and inspected over the course of the four days and was not adversely impacted by the history of the home or the fact that Tribunal proceedings were ongoing.
54. The report explicitly accepts that staff were caring and kind and the residents responded well in general to staff. Whilst the report did not go into the detail of the positive steps that had been taken, it acknowledged there were positive aspects. In any event the aim of the inspection was to make judgments for each standard inspected and not to set out a checklist of improvements made. We consider it significant that the home was found to not meet the standard relating to care and welfare and that the impact on residents in relation to this was found to be major. The assessments did not properly identify people's needs, there were inaccuracies with care planning, care plans were not followed through and staff were not properly trained in the importance and use of care plans. This is a deficit that had been identified as early as 2008/9 and again in November 2013.
55. We do not accept that the respondent unfairly raised the impact categorisations in the June 2014 inspection report. As part of the consideration of impact on people who use the services, account is taken of who uses the service and what their circumstances are. We consider that the report fairly reflects the genuine judgments of the inspectors. Mr Wheeler sought to contrast the various impact categorisations between the February 2014 and June 2014 inspections. We did not consider these criticisms to be well founded.

The impact on workers / recruitment was described as moderate in the June 2014 inspection for a combination of reasons. We considered this assessment entirely justified. We are concerned that the appellant was unable to appreciate the importance of one of the most basic requirements for those working with vulnerable adults – keeping records of DBS checks gaps in employment and training. We are satisfied that even subtle differences might give rise to a different assessment of impact.

56. We were very impressed by Ms Brown's evidence. She is an experienced inspector. She considered the conclusions in the reports to be fair and balanced. She acknowledged that the appellant had probably undertaken 'a lot of work' during 2014 but was concerned about the quality of the work. We accept her measured evidence and consider that she has reassessed the evidence impartially. We agree with the respondent's inspectors that, at the time of the June 2014 inspection, significant concerns remained in each outcome, notwithstanding some improvements such that the appellant continued to be in breach of Regulations 9, 10, 11, 14, 21 and 23.
57. Mr Wheeler asked the Tribunal to view any failings in June 2014 as a product of the extent and scope of the reform attempted. In our view it is more accurate to conclude that the steps that were taken to reform the appellant were insufficient and not implemented soon enough. There was an attempt to implement better systems but this exposed further failings. For example the attempt to provide assessments and care plans meant that staff untrained in following care plans or who were not given the opportunity to read care plans failed to implement them properly or at all.
58. Mr Wheeler submitted that Ms Keith is a competent manager and she has been found in the past to be such, by the respondent. He relies upon Mr Mittal as having assessed Ms Keith to have the potential to be a good manager under his supervision and direction. We are very concerned that recent events have exposed a deficiency in expertise and training on the part of Ms Keith. Absent a concrete action / training plan regarding Ms Keith we are not satisfied that she will be able to effectively implement and manage the fundamental changes required.. The June 2014 inspection demonstrates that she has not been able to make the necessary changes even though the deficits were clearly pointed out after the November 2013 inspection. It was clear to us that Ms Price, as head of care, simply did not have sufficient training in basic aspects of caring for elderly vulnerable people. For example, Ms Price accepted during oral evidence that she did not have any training in managing challenging behaviour. This came to light when she was explaining what happened when a resident hit her during the time of the June 2014 inspection. This is an issue that had been identified as a training need a long time ago and it was known that there was a particular resident who regularly exhibited challenging behaviour. We were provided with no reasonable explanation for the failure to

appropriately train the head of care and other staff in managing challenging behaviour. In our view this provides a good example of a sustained failure to support staff and to ensure the promotion of safeguarding the welfare of service users and staff.

59. It has also been argued that the appellant simply needed more time for the changes implemented by Mr Mittal to become 'embedded'. This is a case in which key concerns were clearly set out after the November 2013 inspection yet the June 2014 inspection continued to demonstrate failings in assessment and care planning. The appellant had considerable time to implement the necessary changes and in our view there was an unexplained and unreasonable delay in seeking to do so.

### **Proposed conditions**

60. The appellant's primary position regarding conditions is as set out in the Schedule. The appellant has accepted that it is unable to develop the 'alternative proposal' regarding Mr Grantham. At this stage this is clearly an incomplete and insufficiently particularised proposal as Mr Grantham has only provided a very sketchy outline of what he will do. We therefore focus on the proposal relating to Mr Mittal, as did Mr Wheeler during his closing submissions (oral and written).

61. The conditions proposed are that Mr Mittal shall be engaged by the registered provider to provide consultancy as set out in the Schedule and supplemented by the action plan, and that if his engagement ceases for any reason, the respondent will be notified. Mrs Siva wishes to sell the appellant and intends to take steps to do so once the home has been assessed positively. It is said that the effect of the conditions and the undertaking will be that if Mr Mittal ceases to be engaged, the service provider will be in breach of the conditions and the respondent will cancel registration.

62. As we have indicated above, we were provided with an action plan from Mr Mittal after the evidence closed and on the day reserved for submissions. We did not find this a particularly helpful document for a number of reasons, which we set out in more detail below. We have considered the action plan together with the proposals in the Schedule and we do not consider that the package of proposals are sufficiently robust to address and remedy the very significant deficits, most of which are having a moderate or major impact on the vulnerable elderly residents, and have been doing so over an extended period.

63. First, we are not satisfied that Mrs Siva as the nominated individual has provided Mr Mittal with sufficient time or resources to provide a comprehensive action plan. The action plan provided to us was not accompanied by any explanation as to why it had not been provided previously and why it was provided so very late. Mr Wheeler told us that it was provided in response to the Tribunal's questioning as to why there was no robust action plan for the appellant. This is another

example of the appellant failing to identify for itself what is properly required. In our view it should have been obvious from as far back as receipt of the November 2013 inspection report, that there needed to be a comprehensive action plan setting out with precision, details and outcomes, the person/s responsible for addressing the identified deficits, the resources required, the time scale, when and by whom it would be monitored / reviewed / supervised.

64. Second, the action plan seems to be a summary of work to be done by Mr Mittal but does not set out a clear action plan for the appellant, the nominated individual, the manager, the head of care or other staff members. We note that it is proposed that for the first audit Mr Mittal intends to produce a training action plan for the manager. We simply do not understand why this was not provided when Mr Mittal first became involved. It seems to be an obvious starting point. Although we have been told that Mr Mittal assesses Ms Keith's skills as a manager in a positive fashion, it is also acknowledged she requires further training and support, yet we have been provided with no detail in the form of an action / training plan for her. Mr Wheeler has stressed that we must consider Ms Keith as a manager who has managed a complaint service provider for over three years. We bear that in mind but the more recent history involves her managing an inadequate service provider, including very worrying failings regarding service user A and inadequate assessments / care plan implementation.
65. Third, the proposals / action plan do not set out with any degree of precision the budget necessary to implement the changes, the nature and level of the training, who would attend the training and how the impact of training on practice would be tested / monitored. We have been told that Mrs Siva has committed to contracting Mr Mittal for two consecutive days a fortnight but we have not been told about other associated costs such as staff training or any other necessary resources.
66. Fourth, we are concerned that we have been presented with an inconsistent appreciation of the nature and extent of the appellant's deficits at this very late stage. The appellant considered that important immediate and effective steps have been taken during the course of 2014. For the reasons we explain above we regard these steps to be insufficient. We note that in his first statement Mr Mittal described the home as 'not yet perfect' but 'vastly improved'. This has not been borne out by the June 2014 inspection or indeed Mr Mittal's recent action plan. The action plan acknowledges nine significant deficits in relation to assessments / care plans, lack of accurate documenting and recording, individual risk assessments, infection control, managing weight loss, recruitment, continence care, mental capacity understanding and monitoring quality of service. These represent core requirements in meeting the care needs of residents. The nature and extent of the deficits are significant and we are not satisfied that they

can be properly remedied by Mr Mittal spending two days a fortnight at the home.

67. Fifth, we consider that the respondent was entitled to regard the package of proposals as insufficiently detailed and unworkable in practice. Ms Brown gave very clear evidence that she had seen two audits but insufficient detail on precisely what would happen in the short term to directly address the issues raised in the audits or indeed the shortcomings raised after the June 2014 inspection. Ms Brown was concerned that nearly a month had elapsed since receipt of the last report to put forward a robust proposal. She regarded the absence of a robust action plan as key. We find that Ms Brown demonstrated a clear willingness to consider robust conditions but on the material provided was justified in not even putting forward the proposal to her director. We have no reason to doubt that Mr Mittal may have played a pivotal role in successfully turning around a failing service provider in the recent past. However we do not have sufficiently detailed and robust plans available to us in relation to this particular provider, particularly in light of the seriousness, extent and duration of the appellant's failings.

68. Sixth, we remain concerned about the role of the nominated individual. It is claimed that Mrs Siva will simply provide the funding. We have not been given any indication of how much she has set aside and whether this will be sufficient. In addition it has not been explained sufficiently clearly who will perform the role of the nominated individual if Mrs Siva will merely provide the funding and is looking to sell the appellant. We do not understand from the Schedule / action plan that Mr Mittal has been put forward in this role (although Mr Grantham was). We do not consider that Mrs Siva has the skills necessary for this role and are concerned that the proposal involving Mr Mittal is unclear on who will perform this role.

### **Proportionality**

69. We note that Ms Brown has taken steps to liaise with Medway Council regarding the current residents and she has received assurances that they can be re-homed appropriately in the event of cancellation. We accept that the residents would prefer to remain where they are (they have lived at the home for between two and nine years) and have expressed their happiness with the home and its staff. We have no doubt that it would be consistent with their health, safety and welfare for them to be placed with an alternative service provider. We also bear in mind that this is not a case in which the respondent has sought to invoke the urgent cancellation process.

70. In considering whether cancellation is proportionate we have had regard to the history of the appellant's inspections (both positive and negative), the nature and extent of the current concerns, the failure to demonstrate sufficient insight into what is necessary to remedy them at

an early stage by the nominated individual, the residents' wishes and the proposed conditions. We have also noted that this is a case in which there have been multiple breaches of requirements with major impact, non-compliance has continued for a significant length of time and there has been variable compliance over time. We conclude that the sanction of cancellation was and is appropriate and proportionate in all the circumstances. We do not consider that the proposed conditions are sufficiently robust and that if they are put in place, it is likely that the home will continue to breach the relevant requirements.

## **Conclusion**

71. We accept that the appellant has been in breach of the relevant requirements in 2008 / 2009 and then again in the latter half of 2013 / 14 for the reasons set out in the respective inspection reports.
72. We accept that the appellant continues to be in breach of similar requirements for the reasons set out in the report following the June 2014 inspection and in Mr Mittal's action plan.
73. We are not satisfied that the proposed conditions regarding the consultancy support from Mr Mittal are sufficiently robust to obviate the likelihood that the appellant will continue to be in breach of the relevant requirements and, in all the circumstances, it is proportionate for the appellant's registration to be cancelled.

## **Decision**

74. We dismiss the appeal and there shall be no order as to costs.

**Judge Melanie Plimmer**  
**First-tier Tribunal Judge (Health, Education and Social Care)**

**22 August 2014**