

Care Standards

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

[2015] 2496.EA-SUS

**FINAL DECISION following hearings at Bedford Shire Hall on 14 October 2015 and 4 December 2015
Deliberation Meeting: 15 December 2015.**

BEFORE:

**Melanie Lewis-Tribunal Judge
Denise Rabbetts-Specialist Member
Wendy Stafford-Specialist Member**

BETWEEN:

Old Village Care Limited

Appellant

-v-

Care Quality Commission

Respondent

DECISION

Representation:

Mr Curtis QC represented the Appellant instructed by Ridouts. His witnesses were Mr Aman Badiani*, Ms Charlotte Jones* BKR Consultancy and Ms Megan Tranter BKR Consultancy.

Mr Marshal Counsel represented the Respondent attended by Mr. James Lester CQC Principal Legal Adviser. We read witness statements from Ms. Anne Palmer *Principal Legal Adviser CQC*, Ms Eileen Sproson Principal Legal Adviser CQC, Ms Penny Bolam Inspector CQC, Ms. Lynda Higgins Inspection Manager CQC, Ms Jemima Burnage* Head of Inspection Central South Regions CCQ, Ms Lynda Higgins*, Inspection Manager CQC, Ms Julia Mead Service lead for Integrated Community Services South East Partnership and Ms. Mel Gunstone* Head of Patient Experience Bedfordshire Clinical Commissioning Group.

Those witnesses who additionally gave oral evidence are marked with an asterisk *

Decision:

The appeal is allowed with conditions.

Appeal:

1. The appeal is against an Order made at the Luton Magistrates Court on 7 August 2015 under section 30 Health and Social Care Act 2008. states :

The Law:

2. Section 30: Urgent procedure for cancellation

(1) If—

(a) the Commission applies to a justice of the peace for an order cancelling the registration of a person as a service provider or manager in respect of a regulated activity, and

(b) it appears to the justice that, unless the order is made, there will be a serious risk to a person's life, health or well-being,

the justice may make the order, and the cancellation has effect from the time when the order is made.

(2) An application under subsection (1) may, if the justice thinks fit, be made without notice having been given to the registered person.

(3) As soon as practicable after the making of an application under this section, the Commission must give notice of the application—

(a) to such Primary Care Trust or English local authority as may be determined in accordance with regulations,

(b) where the person registered as a service provider is a Primary Care Trust or National Health Service trust, to such Strategic Health Authority as may be so determined,

(c) where the person registered as a service provider is an NHS foundation trust, to the Independent Regulator of NHS Foundation Trusts, and

(d) or such other persons as the Commission considers appropriate.

(4) An order under subsection (1) must be in writing.

(5) Where such an order is made, the Commission must, as soon as practicable after the making of the order, serve on the person registered as a service provider or manager in respect of the regulated activity—

(a) a copy of the order, and

(b) notice of the right of appeal conferred by section 32.

3. Section 32: Appeals to the Tribunal

(1) An appeal against—

(a) any decision of the Commission under this Chapter, other than a decision to give a warning notice under section 29, or

(b) an order made by a justice of the peace under section 30, lies to the Tribunal.

(2) No appeal against a decision or order may be brought by a person more than 28 days after service on the person of notice of the decision or order.

(3) On an appeal against a decision of the Commission, other than a decision to which a notice under section 31 relates, the Tribunal may confirm the decision or direct that it is not to have effect.

(4) On an appeal against an order made by a justice of the peace the Tribunal may confirm the order or direct that it is to cease to have effect.

(5) On an appeal against a decision to which a notice under section 31 relates, the Tribunal may confirm the decision or direct that it is to cease to have effect.

(6) On an appeal against a decision or order, the Tribunal also has power—

(a) to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates,

(b) to direct that any such discretionary condition is to cease to have effect,

(c) to direct that any such discretionary condition as the Tribunal thinks fit shall have effect in respect of the regulated activity, or

(d) to vary the period of any suspension.

(7) In this section—

- “discretionary condition”, in relation to registration under this Chapter, means any condition other than a registered manager condition required by section 13(1);
- “the Tribunal” means the tribunal established by section 9 of the Protection of Children Act 1999

4. The relevant regulations are set out in **The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 SI2014/2936.**

5. Fit and proper persons: directors

5.—(1) This regulation applies where a service provider is a health service body.

(2) Unless the individual satisfies all the requirements set out in paragraph

(3), the service provider must not appoint or have in place an individual—

(a) as a director of the service provider, or

(b) performing the functions of, or functions equivalent or similar to the functions of, such a director.

(3) The requirements referred to in paragraph (2) are that—

(a) the individual is of good character,

(b) the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed,

(c) the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed,

(d) the individual has been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and

(e) none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.

(4) In assessing an individual's character for the purposes of paragraph (3)(a), the matters considered must include those listed in Part 2 of Schedule 4.

(5)

6. The requirements where the service provider is a body other than a partnership

6.—(1) This regulation applies where the service provider is a body other than a partnership.

(2) The body must give notice to the Commission of the name, address and position in the body of an individual (in these Regulations referred to as “the nominated individual”) who is—

(a) employed as a director, manager or secretary of the body, and

(b) responsible for supervising the management of the carrying on of the regulated activity by the body.

(3) The registered person must take all reasonable steps to ensure that the nominated individual—

(a) is of good character,

(b) has the necessary qualifications, skills and experience to properly supervise the management of the carrying on of the regulated activity,

(c) is able by reason of their health, after reasonable adjustments are made, of properly doing so, and

(d) is able to supply to the registered person, or arrange for the availability of, the information specified in Schedule 3.

7. The burden of proof is on CQC to make out their case. The Tribunal must carry out a present-time determination and may confirm the order or make a cessation. It may also attach conditions. It is not limited to the circumstances at the time of the District Judges' order. It is making a new decision appropriate for the time of its decision and which is not simply reviewing the order made.

8. Mr Curtis QC took us to references in the White Book re the applicant's duty of disclosure. Case law established the relevant principles which included the need for detailed, precise and compelling evidence: see X Council v B (Emergency Protection Orders) [2004] EWHC 2015:. On an appeal under section 30 the Tribunal is solely concerned with serious risk: see

Background:

9. Aman Badiani is the sole director of Old Village Care Limited the provider of the Old Village School Nursing Home. For some years the Home was compliant and a manager was in place for some considerable time upon whom it seems Mr Badiani was heavily reliant

10. Prior to CQC's inspection on 8 and 10 June 2015, the Home had been consistently meeting all standards at 5 inspections carried out by CQC since January 2009 with the exception of one minor concern at a 6 March 2013 visit. At the Inspection prior to the June 2015 visit the Home was rated 'Good' across all Key Lines of Enquires.

11. On 8 June 2015 CQC inspected the Home. It was rated as 'inadequate' and placed in special measures. There were concerns about the complex needs of individuals, the competency of nursing staff to manage their needs, that people's capacity to consent to their care and treatment had not been properly assessed and that planning and documentation did not contain current information about how people's needs would be met

12. On Monday 3 August 2015 CQC again inspected the Home on a focussed inspection to look at nursing competency, care planning and medication management. Feedback was given to the Home Management team and they were told that CQC were considering what actions would be necessary given the lack of improvement.

13. On Tuesday 4 August CQC held a management review meeting. They sent Mr Badiani a 'letter before urgent action' requiring him to submit an Action Plan to the points listed by 2pm on Thursday 6 August 2015 and telling him that they were considering exercising their powers under section 31 2008 Act and imposing conditions.

14. Things developed and Mel Gunstone of Bedfordshire Clinical Commissioning Group informed Lynda Higgins Inspection Manager CQC that the management team at the home were leaving the premises. South East Essex Partnership Trust (SEPT) were also involved. Ms Higgins returned at the Home at about 14.30 pm. A management review meeting was held with the staff from the council and CQC and the decision was made to apply for section 30 Order to the Magistrates. Mr Badiani was present at the Home and Miss Higgins '*was concerned that he hadn't taken steps to address our concerns and that he was unable to give real concrete evidence as to how he was going to rectify matters*',

15. The CQC were notified by Ridouts solicitors that they would need at least five hours notice to attend a hearing. In the event they did not attend the hearing when CQC attended the Magistrates Court at 2pm and the hearing took place at 4pm, lasting until 4.55pm. Mr Badiani did not attend the hearing.

16. The reasons why CQC applied for the section 30 Order are helpfully summarised in the 'Statement of Reasons' presented to the District Judge on 7 August 2015. The reasons were 1) serious deficiencies in the management of medicines 2.) serious deficiencies in the feeding of service users 3) inadequate staffing so that the needs of service users were not responded to promptly and in some cases call bells had been removed and 4) breaches of legal requirements including a failure to obtain consents, record important matters, poor hygiene and a failure to provide personalised care. The feeding, medicines and staffing issues were the key issues that lead CQC to conclude there was a serious, very real and immediate risk to people in the service. They had been told the services of BKR had been engaged and made the District Judge aware of this, which is contested.

Procedural matters:

Proceedings before the Magistrates Court: Order Section 30 Health and Social Care Act 2008.

17. The Order signed by the District Judge on 7 August 2015 which had been prepared by Ms Sproson CQC solicitor deleted the words "AND IT IS APPEARING to the undersigned District Judge that there will be a serious risk to a person's life, health or wellbeing unless this order is made".

18. Ms Sproson, set out in her oral and written evidence, that this was a simple error on her part. We specifically record that the suggestion that she had deliberately obtained an invalid Order was abandoned by the Appellant.

19. The Appellant's solicitors had followed this up with Luton Magistrates Court and a clerk emailed on 21 August 2015 that the District Judge had made findings of fact that satisfied him both that there been a serious risk to residents life, health and well being; and that there would be such a risk if he did not make the order'. Further correspondence resulted in the parties being summonsed to attend the Magistrates Court on 30 September 2015. The Appellant's case is that this was an *ex parte* order as CQC had not had the five hours notice they requested, but 90 minutes only.

20. We record that despite his opening submission Mr Curtis QC accepted that if he wished to challenge the validity of the Section 30 H&SCA 2008 Order, his remedy lay elsewhere. Our power is limited to dismissing or confirming the order and does not impart a meaning that we can somehow 'cure' an order that is defective.

21. The Appellant's Interim Position Statement did not dispute that there were severe difficulties at the service. Time was therefore not spent on those issues. The case instead was that the difficulties were well known, were being addressed as a matter of urgency and that there was collaboration with the relevant stakeholders to address concerns.

Proceedings before HESC First - tier tribunal

22. This decision should be read in conjunction with our decision dated 13 November 2015, when we adjourned for further evidence to be heard as to the proposals Mr Badiani made by additional submissions and evidence. This is a case with an evolving factual background. By the time of the adjourned hearing we had considered updated draft conditions, an updated Uplift Plan and an updated Action Plan both dated late October 2015.

23. The hearing re convened on 4 December 2015 but the panel were not able to deliberate until 15 December 2015 when they considered additional written submissions by both parties.

Evidence:

24. We summarise only such evidence as is necessary to explain our decision.

25. Ms Burnage as decision maker was a key witness. She highlighted that the inspection on 8 and 10 June 2015 identified a number of significant concerns and the Home was entered into 'special measures'. This should have alerted Mr Badiani that urgent action was required.

26. Ms Burnage attended the Home on 4 August 2015 for the review meeting. A legal adviser was present and the decision was to draft a Notice to cancel registration. A 'Letter before Action' was sent, including but not limited to concerns re safety with an emphasis on the lack of suitably qualified and experienced staff to provide for people with very complex care needs and in particular for service users with PEG feeding needs and needs associated with tracheotomy care. There were no protocols in place for the administration of medicines that had been prescribed on an 'as needed' (PRN) basis.

27. Examples of the poor care were that the oxygen supply on which a resident was dependent was not replaced when it ran out, an infected wound was untreated, a person's call bell had been removed and they had been moved to a room where their calls for assistance would not disturb other people, people were using a commode in a communal area, several service users had pressure sores, people did not receive adequate amounts of fluid, tracheotomies were not suctioned regularly, it was unclear if insulin had been administered as there were no written notes, staff from the home had refused to provide personal care to someone in the communal area who had soiled themselves and SEPT staff had to order large quantities of equipment to support and meet people's needs: e.g. beds and moving equipment.

28. The case for the Appellant was that CQC took no or inadequate regard of the fact that they had consulted BKR Consultancy. Correspondence was received from Ridouts Solicitors on the evening of the 6th and the morning of 7 August 2015 but CQC, whilst aware that BKR Consultancy had been instructed, concluded that this was insufficient assurance that action would be taken to mitigate the serious risk. Ms. Burnage said she had seen the short note uplift plan from BKR at court but it was not sufficient to

persuade her that the risk was mitigated.²⁹

29. Ms. Higgins was the Inspection Manager. She met with Mr Badiani on the afternoon of Tuesday 4 August 2015 together with Ms. Mead. Mr Badiani said he thought the proposed action from CQC was excessive and that he did not see the need for the levels of nursing staff suggested. She spoke again to Mr Badiani on the afternoon of 6 August 2015. She took the view that the Uplift Plan lacked sufficient detail. We record that when she gave evidence Ms. Jones, BKR representative said that it was only ever intended as a holding position and in her view it would have been reasonable to give them more time. She mentioned the proposal when she got to court but by then Ridouts had already sent it on, albeit to a member of CQC staff with no immediate responsibility for the planned court case.

30. Ms. Higgins continued to meet with Mr Badiani throughout 5 August 2015, to try to be clear as to the support he would put in. Ms. Gunstone remained at the Home until 21:00 that evening. In conversation with the Interim Manager and the Deputy Manager, both expressed concern that they were putting their professional registration as nurses in jeopardy and felt that Mr Badiani was not listening to their concerns. They said they did not like to come to work anymore but felt obliged to do so for the sake of the residents. Matters escalated and she was informed at 13:10 hours on 6 August 2015 that the Deputy Manager was about to walk out. Two women she has previously spoken to said they felt unable to continue working in the home.

31. This was taken up with Mr Badiani who thought the deputy manager was going to work out her notice period due to end on 31 August 2015. Mr Badiani thought she would stay on, even after that. Ms Gunstone was aware that Mr Badiani had arranged for a Consultancy to come to the Home on Friday 7 August, but when she spoke to Ms Jones she understood that they were saying that if they had been brought in three months earlier they might have been able to do something. She set off for Court. Ms. Jones attempted to negotiate with her. When Ms. Jones came to give evidence her view was that she could, with more time, have taken steps to lessen the risks to residents. She had asked if CQC would agree to a reduced number of residents staying on. A secondary point was if a team of staff were 'shipped' in to provide care, would that would be accepted? Overall the view of CQC was that this was all 'too little too late'.

32. At the first hearing Mr Badiani said that he intended to engage BKR Consultancy for 18 months and had £100,000 available for that purpose. BKR would select the Manager. His family have owned care homes for 27 years and he has been a Director of the company since January 2007. Ms Jones agreed that the Action Plan she had drafted on the 7th of August was a 'holding position' that identified that Ms Marie Morris would be brought in as Manager. The Tribunal wanted to know if this arrangement was viable and how involved Mr Badiani would be.

33. By the time of the adjourned Hearing on 4 December 2015 matters had moved on. In his updating statement dated 23 November 2015, Mr

Badiani set out and filed evidence to support that by that time, he had deposited £250,000 into the company's accounts from personal funds. He is a qualified accountant and had produced a 12 month financial forecast, which indicated that for ordinary service bills the home would run at a loss for the first year.

34. Mr Badiani attached a copy of the management contract that Old Village Care Limited had with BKRCC Limited to provide consultancy management services at the home for a minimum of 18 months and a detailed Uplift Plan. His position was that he was going to be involved on at least a weekly basis. He intended to work with Ms Jones who would be the Nominated Individual with a view to possibly regaining the role himself after 18 months or appointing the Manager to the role. He had undergone Dignity in Care training, taken part in the medication workshop, done an inspection 'walk through' and had a number of one to one sessions with Ms Jones relating to the management skills.

35. Staffing was a major concern raised by CQC and the Tribunal, not least as the threatened walk out by the senior team showed a deep rooted problem. There was agreement that there is a shortage of well qualified staff in the residential/nursing care sector, particularly at the more senior levels. The Disciplinary proceedings had been concluded. Ms. Jones confirmed that: 78 staff who were employed at the service at the time of registration were removed, three were physiotherapists, eight were bank staff but 66 were offered voluntary redundancy packages. These packages were designed to be weighted to favour longer serving members of staff whom she considered the highest risk group in terms of the potential level of resistance to change: 35 staff remained on role: 17 carers, four nurses, one activities coordinator, one handyman, eight domestics, two laundry staff and two administrators.

36. Ms. Jones, in her oral evidence answered each of the concerns and issues raised by Ms Higgins in her updating statement and oral evidence.. Her DBS was portable to her. Whilst four nurses remained and she was aware had all been part of a general referral to the Nursing and Midwifery council, three were bank staff. Her view was that it was necessary to introduce new service users at a slower rate than had originally been set out in the suggested conditions, namely two per month. While she agreed with Ms. Higgins that there were significant difficulties in recruitment of suitably qualified and experienced staff, they were paying a premium and she had received some enquiries only that week. Ms. Higgins was concerned that the uplift plans of 26 October and 23 November made no mention of the Care Act or compliance with the 2014 regulations. Ms. Jones explained she was aware that the Framework of Regulated Qualification had been introduced in 2015. She agreed that two staff still had a problem with English, one of whom was on maternity leave; they were looking to get them both to a functional level. She was referring to "outcomes" as that terminology was still used but was aware that since 1 October 2014, these had been replaced by Key Lines of Enquiry (KLOES).

37. Miss Higgins had made enquiries of CQC colleagues and raised a

number of issues about BKR Consultancy based on what she was told. It was put to her in cross examination that this was a selective portrait as BKR had over 300 clients historically. One was a case which came before the Tribunal: [2014] 2255.EA refers. The case proceeded on submissions and Ms. Jones did not give evidence. She said that she had only been involved for ten days in July 2014, so did not agree that BKR had not proved capable of bringing the Home back into compliance.

38. She was pressed as to how she saw her role with Mr Badiani. This was the crux of CQC's concern. Who was to be in charge and who would they enforce against? Ms Jones explained that Mr Badiani was to be the Director; she would be the Nominated Individual with Ms. Morris under her as the Manager. Both Ms Jones and Mr Badiani spoke of having developed a constructive working relationship.

39. Time was spent looking at the Service Level Agreement between Old Village Care Limited and BKR Care Consultancy. In particular we noted it only provided for one weekly visit by the Nominated Individual or delegated individual once per week for the first six month. A quarterly fee was to be charged and it was clarified that Mr Badiani was prepared to pay additional sums for the level of input suggested by Ms. Jones, namely five days per week for four weeks, thereafter two days per week is reducing to one day. She wished this to be flexible according to the needs indentified and did not want it reduced to writing at this point. He had been involved in the redundancy consultation. The employment of Marie Morris as Manager was dependent on the outcome of the appeal. They had concluded disciplinary proceedings in relation to three members of staff. Overall the thrust of his evidence was that in future he would go in with a more critical eye. He accepted Ms Jones's recommendation that they did not take in any new residents until March 2016, using January and February 2016 to make sure that the Home was fully up to speed and that they would operate in a safe and systematic manner.

40. He and Ms. Jones set out that they had used the interim period to undertake some refurbishment works which would not be possible if service users were there. The cost was about £70,000 and included capital works suggested by Ms. Jones. She had worked with the BKR Health and Safety Representative and also spoken with the proposed outside building contractor.

41. Mr Ridout Solicitor prepared a submission on 23 November 2015 to address the concern raised by CQC that Old Village Care (the Company) had appointed BKR Care Consultancy as an Agent. The key point was whether the Company was required to register and appoint a manager. Ms. Morris would be employed by the Company. He set out that the Company owned the premises, would employ the staff, owned and would replace the equipment and would provide the funds and absorb any losses and receive the profits. Mr Badiani was re called to give evidence on one point. Whilst he had read this statement it was not correct that the company owned the premises, they were owned by a family trust. His family were beneficiaries.

42. A statement from Ms Marie Morris confirming that she was a member of a Managers Learning set focused on policy and research into the elderly and an Executive Member of the East Midlands Care Association. She has 25 years' experience. She had previously worked with BKR and has experience of bringing homes into compliance. It was not suggested that she was not somebody of appropriate experience. The company have offered her an enhanced package including accommodation owned by the provider.

Submissions:

43. We were assisted by full written submissions from both parties comprising Appellant's closing submissions dated 28 October 2015, Respondent's submissions following the adjournment dated on 14 October 2015, Respondent's post evidence submissions dated 30 October 2015 and Appellant's responsive Submissions dated 1 November 2015. We then received written submissions from the Appellant following the adjourned hearing dated 7 December 2015 and from the Respondent dated 8 December 2015.

44. In summary the Appellant submits that the Tribunal should allow the appeal because there was no serious risk when the Order was made and there is no risk now Secondly, the Tribunal should allow the appeal because CQC failed to comply with its duty to make full and frank disclosure when applying for an order and thirdly that the Tribunal should allow the appeal because the findings made by the District Judge did not allow him to make an order under section 30.

45. The follow up submission focussed on Ground One. This was not a Home with a long history of non compliance. Faced with CQC's concerns which were not challenged, the Appellant took a lawful, reasonable and responsible decision to engage the services of an external consultant. Ms Jones was eligible to be the Nominated Individual. It was wrong in law and fact for CQC to suggest that BKR would be carrying on the regulated activity. If the appeal were BKR were to provide the services it had been engaged to provide under the Service Level Agreement. Mr Badiani was not simply handing over to BKR Care consultancy. It was wrong in law and fact for CQC to belatedly attempt to rely on the 'fit and proper' person test for a director in Regulation 5 2014 Regulations. Neither would allowing the appeal, amount to a new registration.

46. On behalf of the Respondent it was submitted that unless a valid order had been made then there could be no appeal. The form of the Order was lawful. The Order made complied with the requirement to be in writing. With regards to Ground Two it was submitted that all the relevant facts had been put before the District Judge. Both the Appellant and his solicitors had notice and could have attended if they wished.

47. The Appellant's proposals were not lawful. Ms Jones could not be the 'Nominated Individual' as she was not employed by the appellant and was

neither an employee, director or manager. It was submitted at the close of the first hearing that the proposal amounted to BKR taking over the entire running of the home and not the appellant company making them the service provider carrying out the regulated activity within the meaning of Regulation 4 of the Care Quality Commission (Registration) Regulations 2009. The sole Director Mr Badiani would not be directing the company's business and would have no day –to–day responsibility for it. Regulation would not be possible as Mr Badiani as the registered person would raise a defence that he had passed control to BKR. The Uplift Plan and the then proposed conditions still established a serious risk to life health and well being of the service users.

48. In their second submissions the Respondent stated that the risks had not lessened, the proposals as evidence by written agreements did not provide confidence in the arrangements and that the organisational structure was outwith the regulatory scheme. Ms Jones was not eligible to be the 'Nominated Individual' and Mr. Badiani was not eligible by reason of the Fit & Proper Person requirement to be a Director and BKR would carry on a regulated activity. They would not be consultants.

Conclusion and Reasons

49. We have kept fully in mind the draconian nature of a Section 30 H&SA Act 2008 order. The test is 'serious harm unless an order is made' but it is clear that it can have very serious consequences for the service users, their families and the staff. We observe that in our experience these appeals are rare, no doubt for those considerations.

50. We must look at the evidence at the date of this decision and are conscious of the time that has now elapsed since the order was made. Unlike the District Judge we have the power to attach conditions.

Findings:

Duty of Disclosure:

51. We accept the duty on CQC in making and application under section 30 H&SCA 2008 to make full and frank disclosure to the court, including when one party does not attend. We accept there were two classes of documents namely the BKR summary plan which may not have been given to the District Judge although his clerk's notes record the fact of that letter. We accept that all the correspondence from Ridouts was passed to the District Judge and that refers to the appointment of BKR. The notes disclosed record that the District Judge was aware that removals were taking place.

Notice of Hearing:

52. We accept that notice of the hearing was given to Ridouts. On the evening of 6 August 2015, Ridout's knew that CQC would be going to court at some point the next day, exact time and venue to be confirmed. Ms. Sproson had emailed Ridout's at 12:47 pm to check that they were aware of the

hearing. The e-mail correspondence further supports that the solicitor instructed confirmed she would not be at Court and it was unlikely Mr Badiani would attend. In short, he was on notice that he had to do something. It would not have been unreasonable for Mr Badiani whose home is not far from the Court, or indeed Ridout's who were only in London, to have attended or have contacted the Court if they wished to apply for more time or draw any matter to the Court's attention. Neither Mr Badiani or his solicitors took those steps.

'Serious risk' at the date of the Order.

53. We are not reviewing the decision of the District Judge but we find evidence that passed the high threshold set of for a section 30 Order H&SCA 2008. Not every concern reaches that threshold, but there were issues relating to feeding/hydration, medication and staffing issues which were life threatening. Similarly the removal of call bells. The nursing care fell far below standard in relation to PEG feeds, an open facial wound and the failure to check on an oxygen cylinder.

54. The evidence of Ms Gunstone, Ms Burnage and Ms Higgins all establishes that they were attempting to work with Mr Badiani. Overall, our assessment is that he had clear warnings that he needed to take steps and he failed to take them, just as he failed to go before the Magistrates Court which at the very least would have shown he understood the seriousness of what was alleged. He was asked for an Uplift Plan on 4 August 2015 and did not produce one.

55. It seems clear that the driver for the application for the emergency order was that the senior staff threatened to walk out. Mr Badiani was reliant on his manager, who in turn had replaced a long standing member of staff. He knew she had given notice but did not appear to take this seriously. None of the senior staff wished to remain and support him.

Charlotte Jones as the 'Nominated Individual'

56. We accept that the role of 'Nominated Individual' is a senior and important role. Nothing in the regulatory framework lays down how often they are to be in the Home but they must be able to speak with authority on behalf of the company.

57. We have revisited our preliminary finding made in our decision dated 13 November 2016 but find no reason to revise it. Regulation 6 of the 2014 regulations require her to be employed as a manager 'of the body'. However Regulation 2 defines 'employment' as including under a '*contract for services*' or '*otherwise than under a contract*'. We accept that the intention is that she will have management responsibilities but not the day to day management of the Home. If she were an employee, then the Company would have more control but we see some advantages of a 'contract for services', which may make it easier for BKR to withdraw from the agreement if the Company or more realistically Mr Badiani does not deliver on the funds, time and commitment he says he will put in. In that sense they have the power, as they

have the knowledge.

58. We accept that consultancy agreements of the sort between the Company and BKR are common in this industry, as CQC itself acknowledged at the first Hearing. This also accords with our experience as a specialist Tribunal. We accept that when faced with CQC's concerns, albeit later than we would have liked, Mr Badiani took a lawful, reasonable and responsible decision to engage the services of an external consultant. He did not cut corners and was prepared to pay for a premium service that specialises in bringing homes into compliance.

59. The letter to Ms Jones dated 3 November 2015 does not define her duties with precision, but refers to the agreement with BKR Consultancy and the need to implement the Uplift Plan and Action Plan. The Consultancy agreement does not allow for payment to BKR to cover the days Ms Jones states would be necessary. However that can be covered by recording the level of her intended involvement in the Conditions. We accept that some flexibility is sensible.

60. Mr Marshall argues that it is a requirement that the person is 'employed by the company'. We agree that requires close consideration of the precise relationship between the proposed 'Nominated Individual' and the Company, because those not employed are ineligible. We conclude that whilst Ms Jones is an external consultant, the level of that engagement is sufficient to make her "*in*" or "*of*" the current company. In recent weeks, whatever the position was before, she has been very active. She impressed as a knowledgeable professional and we accept she has been involved with bringing about physical changes, staff training, medication, appointing a Manager and had close engagement with the Uplift Plan. This shows that BKR Care Consultancy Limited is acting as an agent to provide management services supporting the operation of the home to support the company and the provision of the regulated activity. It also shows that Mr Badiani is now prepared to commit time and money to making this a safe and compliant Home.

61. Our jurisdiction on this appeal is more restricted than the usual route of an appeal against conditions or cancellation of registration. We are not looking at breaches of Regulations but whether there is serious risk and whether the 'rescue package' is sufficient to take any risk below that level. There are concerns but we are not satisfied that they amount to serious risk today either singularly or taken together.

62. A consistent part of the Respondent's case is that allowing the appeal would be tantamount to completely new Registration. We reject that argument as we accept that the Company remains the registered provider engaging the services of an external consultant.

Our findings as to 'serious risk' today:

63. At the date of the first hearing we had the beginnings of an Uplift Plan

but it lacked detail. This was of concern given that the hearing took place on 14 October 2005, so there had been time to put a remedial package together. We were concerned that BKR's re-involvement seemed to be recent, following their attendance at the Home shortly before the Order was sought.

64. After the first hearing we had some reservations regarding the written and oral evidence of Mr Badiani, who did not appear to be fully accepting what had gone wrong and his part in it. Insight and willingness to acknowledge failure is always an important factor to be weighed in the balance. We accept the fact that there are proceedings elsewhere which may have made him reticent. By the conclusion of the second hearing, our concerns that Mr Badiani was simply handing over things to Ms Jones and BKR were considerably reduced.

65. On the basis of the evidence we heard and read including close cross examination of Ms Jones on two occasions we find that Ms Jones and Ms Marie Morris are sufficiently competent to avert any serious risk if the appeal were allowed. Both are very experienced. Both have experience of being 'change makers'. Ms Jones was robust in her view that unless Mr Badiani had given her control over discipline, supervisions, progress checks, contractors and access to agreed funds then she would not have agreed to be the Nominated Individual.

66. Ms Jones answered each point put to her and we heard her being cross examined on two occasions. Whilst the language in the Uplift Summary and Uplift Plan may have referred to previous legislation she offered an explanation about that and clearly was up to date with current legislation and regulation. Ms Burnage acknowledged that she was experienced and that she very properly put the experience of the service users as central. The key question is whether they will be allowed to carry out their respective roles.

67. A consultancy like BKR will have successes and failures and a key question in this and other appeals will be: were they allowed to manage? Were they given the resources? Each case will turn on its own facts and findings by this Tribunal another case in which they were involved, but did not give oral evidence are of limited evidential value. Soundings from CQC colleagues are also of limited value and Ms Jones had an answer to why BKR had not always been successful. These concerns do not cause us to conclude that CQC have discharged the burden of proof to establish that BKR is not competent.

68. We do not characterise the evidence of Ms Higgins and Ms Burnage as seriously suggesting otherwise. At the first hearing Ms Higgins accepted that if the Uplift Plan was in place the risk of serious harm would not be there. We accept that there are concerns but overall we conclude that the Company has gone as far as it sensibly can without knowing whether the appeal will be allowed. These are Mr Badiani's own funds and he had expended significant amounts, which we do not conclude he would do unless he thought this could be a safe, compliant and financially viable Home. They cannot be expected to employ Ms Morris if there is to be no functioning Home but we accept they

intend to and have offered her an enhanced package to make the post more attractive.

69. Staffing is an issue that caused us particular concern but we accept that Mr Badiani and Ms Jones have taken radical action to improve the work force including redundancies and disciplinary proceedings. They have implemented training packages, worked to get the staff working together whatever their level and worked on making sure that staff take responsibility for raising any concerns.

70. This was a Home which had been compliant but in mid 2015, the level of care was of such a poor level that there was a serious risk to a person's life, health or well being. Investment of time and money has now been made and a cautious timetable adopted. Accordingly we find that when the Home re opens in accordance with the BKR Uplift Plan and Action plan it is more likely than not that the service users who will be gradually admitted will not be at serious risk. Accordingly we allow the appeal.

71. We have amended the Conditions as suggested to incorporate the approach agreed with Ms Jones. We conclude that such an approach is both proportionate and necessary. It sets out the minimum expectation without descending into the detail of the business arrangement. We have kept in mind that it is not the role of CQC to monitor.

72. In closing we make it clear that we have no criticism of the approach by CQC. We understand that they may be reviewing their internal guidance The basis of an application under Section 30 H & SCA 2008 is not in our view designed to be used in circumstances about the running of an establishment, serious as those concerns maybe, where there is not an immediate serious risk to a person's life or well being. The effect of an immediate closure may have a traumatic effect on service users, many of whom are very frail and vulnerable by definition. It affects their families. It affects the staff. It will also have a dramatic effect on the Home itself, even if they successfully appeal to their tribunal which as here takes some months. To make such an application must therefore be a last resort when other approaches have failed and undoubtedly requires all known facts to be disclosed.

BY CONSENT

It is ordered that:

1. That the Appeal is allowed.
2. The order granted by Luton and Bedfordshire Magistrates Court on 7 August 2015 under section 30 of the Health and Social Care Act 2008 in respect of Old Village School Nursing Home, Bedford Road, Marston Moretaine, Bedford, Bedfordshire MK43 0ND ("Home") shall cease to have effect immediately.

Conditions

3. It shall be a condition of the registration of the Appellant in respect of the Home with immediate effect that the Appellant shall not admit as a service user to the Home more than two service users in any period of 7 calendar days computed consecutively from 1 March 2016 for the first four weeks.
4. After this initial four week period the number of admissions will be increased to a maximum of three service users per week for the next 20 week period.
5. BKR Care Consultancy Limited (BKRCC) is appointed by the Appellant under a management agreement to provide professional management services for the purpose of carrying out the accommodation together with nursing or personal care and treatment for disease, disorder or injury (as defined under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) for a minimum period of 18 months.
6. Marie Morris (who the Respondent acknowledges holds a valid portable CQC DBS check) will undertake the day to day management of the Home for at least the first 18 months of operations and apply to become registered with the Respondent. Any subsequent person who is identified to become the registered manager will not be appointed as such until the Respondent has registered that person in respect of the Home.
7. Charlotte Jones of BKRCC is appointed by the Appellant as a manager of the Appellant under a management consultancy agreement to oversee the day to day management of the Home and provide the role of Nominated Individual for a minimum of 18 months. She will visit the Home for a minimum of five days per week in the first four weeks of operation and a minimum of two days a week for the next two months and one day per week thereafter; and in each such month prepare and provide a report to the Board of Directors of the Appellant with a copy to the Respondent.
8. (1) Before the admission of the first service user to the Home upon re-opening, the Home shall have in place sufficient numbers of suitably qualified, competent, skilled and experienced staff who are permanent employees of the Appellant so that there are on duty at the Home between the hours of 8am and 8pm not less than four staff and between the hours of 8pm and 8am three such staff dedicated to direct service user care of whom one on each "shift" is a first level registered nurse.

(2) When further admissions are made that would require an increase in staffing levels, admissions will pause whilst suitable additional suitably qualified trained care staff are recruited.

(3) Temporary staff engaged by an agency shall only be used in cases of necessary absence of permanent staff due to sickness, leave or sudden and unexpected absence or departure.

9. Any service user to be admitted to the Home will be admitted after a pre-admission acceptance by the Home manager, on a pre-arranged date and time with a member of the care team allocated to complete all admission paperwork upon their arrival. A 72 hour care plan will be created to bridge the gap between admission and the completion of a full care file. Following 72 hours after admission the Home manager will verify in written form to BKRCC that all required documentation is in place (for the period for which their management agreement is in place).

10. Service users will be admitted to locations within the Home in the following order:

- a. Woburn Unit – Ground Floor
- b. Knebworth Unit – First Floor
- c. Old School Unit – Ground Floor

11. Before any service user is admitted to the Home, Aman Badiani will undertake the following training:

- a. Safeguarding;
- b. dignity in care;
- c. moving and handling;
- d. dementia;
- e. infection control; and
- f. COSHH

12. For the period that Charlotte Jones is appointed Nominated Individual, Aman Badiani shall also attend the Home with Charlotte Jones at least three times per month to observe and learn from her the skills of supervising day to day management.

13. There shall be no Order as to costs.

Tribunal Judge Melanie Lewis
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 4 January 2016