

First-tier Tribunal Care Standards

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

[2022] 4609.EA

NCN: [2023] UKFTT 1085 (HESC)

Heard on 11-12 December 2023 and on the papers

**Before
Judge Meleri Tudur,
Dr David Cochran, Specialist Member
Ms Rachael Smith, Specialist Member**

Between:

Berrystead Nursing and Residential Home Limited

Appellant

v

Care Quality Commission

Respondent

DECISION

At the oral hearing on the 11 and morning of the 12 December 2023:

The Appellant did not attend.

Mr Oliver Connor, counsel, represented the Respondent.

APPEAL

1. The Appellant appeals under section 32 of the Health and Social Care Act 2008 (HSCA 2008) against the decision of the Care Quality Commission (the Respondent) made on the 24 May 2022 to cancel the registration of the Berrystead Nursing and Residential Home Limited as a provider in respect of the regulated activities, 'Accommodation for persons who require nursing or personal care', 'Diagnostic and screening procedures' and 'Treatment of disease, disorder or injury' at Berrystead Nursing and Residential Home, 1001 Melton Road, Syston, Leicestershire LE7 2BE (the premises).

Preliminary matters

2. Both parties made preliminary applications which were considered at the start of the first day of the hearing and an order issued on the 11 December 2023 refusing the request to adjourn the case for three months and requesting the attendance of the new Nominated Individual and Operations Manager, Mr G Hoonjan, at the hearing on the 12 December 2023.

3. The order further requested the Appellant to consider providing consent for the appeal to be concluded on the papers without further representations by the parties, pursuant to Rule 23 of the Tribunal Procedure Rules 2008.

4. By email received by the Tribunal at 9.50 on the 12 December 2023, the Appellant confirmed that they consented to the appeal being dealt with on the papers.

5. A further order issued on the 12 December 2023, confirmed that the Tribunal were satisfied that it was appropriate for the appeal to be concluded on the papers and without a site visit. The Respondent's representative and witnesses were released from the hearing.

6. The Tribunal then considered the appeal on the papers and had in evidence an electronic bundle running to 1541 pages together with the late evidence admitted from the Appellant.

THE LAW

7. The Respondent regulates the service provided by the Appellant in accordance with Sections 2 & 3 of the HSCA 2008.

8. Section 3(1) of the HSCA 2008 provides that the main objective of the Care Quality Commission in performing its functions is to "protect and promote the health, safety and welfare of people who use health and social care services."

9. Section 20 of the HSCA 2008 provides for the Secretary of State to make regulations in relation to regulated activities. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the Regulations) set out the Fundamental Standards which providers must comply with when carrying out a regulated activity.

10. The relevant regulations in this appeal are regulations 12, 13, 15, 17 and 18 of the Regulations.

11. Regulation 21 of the 2014 Regulations provides that the registered person must have regard to the guidance issued under section 23 HSCA 2008. In relation to Adult Social Care, there is also guidance issued by the Respondent.

12. The provision for cancellation of a provider's registration is contained in section 17 of the HSCA 2008, specifically that:

(1) The Commission may at any time cancel the registration of a person ("R") under this Chapter as a service provider or manager in respect of a regulated activity-
(a)..... (b)..... (c) on the ground that the regulated activity is being or has it any time being, carried on otherwise in accordance with the relevant requirements.

13. A regulated activity is defined as an activity of a prescribed kind by Section 8(2) of the HSCA 2008 as "the activity involves or is connected with, the provision of health or social care"

14. Section 4 HSCA 2008 provides that the Respondent must have regard to various matters including the need to protect and promote the rights of people who use health and social care services and to ensure that action taken by them in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed.

15. The burden of proof is upon the Respondent who must establish the facts upon which he relies to support cancellation on the balance of probabilities.

16. The powers of the Tribunal on an appeal are set out in section 32 HSCA 2008. The issue is determined afresh and is not a review of the Respondent's decision. The Tribunal may take into account circumstances and evidence since the Notice of Decision was issued. It may confirm that decision to cancel or direct that it shall not have effect. In the latter case, the Tribunal may impose conditions on the Appellant's registration or remove any of the current conditions.

17. As such, the Respondent (or the Tribunal which decides the matter afresh in the circumstances pertaining at the time of its decision) must exercise such a power fairly and proportionately. In essence, the Tribunal has to determine and make findings of fact about breaches of Relevant Requirements and If so, whether cancellation of registration is a proportionate and necessary step.

Background

18. The Appellant was registered on the 1 October 2010, to carry out the regulated activity of "accommodation of persons who require nursing or personal care", 'Diagnostic and screening procedures' and 'Treatment of disease, disorder or injury' for up to 46 persons. The Nominated Individual was Mr Kuldip Singh Hoonjan. He is the sole director of the Appellant company.

19. The Respondent had undertaken previous inspections of the premises and in both 2014 and 2016 it was rated as "Requiring Improvement". The assigned inspector since 2016 is Ms Debra Williams. Following a comprehensive inspection, the provider was rated as "Good" in 2017.

20. A notice of proposal to cancel registration due to non-payment of fees was issued on the 5 August 2021 and the fees were paid in September 2021.

21. Following an inspection of the premises on the 5 and 8 November 2021, the Respondent issued an urgent decision notice on the 11 November 2021 imposing two conditions with immediate effect, prohibiting any new placements and requiring an action plan to address the issues identified to be submitted to the Respondent by the 15 November 2021, with updates on progress every two weeks thereafter.

22. On the 7 November 2021, the Leicestershire Fire and Rescue Service issued an Enforcement Notice in respect of the premises following a fire safety audit held on the 5 November 2021. The notice identified breaches of the Regulatory Reform (Fire Safety) Order 2005, specifically breaches of Article 8(1) because of a failure to take

general fire precautions and Article 9(1) relating to an unsuitable and insufficient Fire Safety Risk Assessment document; Article 10 and Part 3 Schedule 1, as some preventative and protective measures had not been implemented to effectively reduce or remove the identified risks; Article 11(1) & (2) in that, the fire safety policy document and procedures were not suitable and sufficient; Article 14(2)(b) with a list of issues identified relating to fire safety exits and routes leading to a situation where in the event of a fire, persons would potentially be unable to evacuate the premises as quickly and as safely as possible; Article 17(1) because the structural fire precautions were inadequately maintained and the breach of Article 14.

23. On the 14 December 2021, the Respondent served a notice of proposal to cancel the Appellant's registration on the grounds that the regulated activity was or had been carried on otherwise than in accordance with the relevant requirements.

24. A further inspection took place on the 18, 19 and 21 January 2022 which identified breaches of Regulations 12, 13, 15, 17 and 18 of the Regulations. The particularly serious breaches were the breach of regulation 13 relating to safeguarding from abuse and regulation 18, staffing. Such was the concern raised that the Respondent made an application for an emergency cancellation of the registration to the Magistrates' Court.

25. An order made pursuant to section 30 of the HSCA 2008 brought about the urgent cancellation of the Appellant's registration on the 21 January 2022. The remaining 26 residents were relocated immediately within three days of the making of the order and the premises have not been occupied since that date.

26. The Appellant appealed to the Tribunal against the emergency decision and against the condition limiting new admissions, unless approved by the Respondent. The proceedings were expedited under the memorandum of understanding between the Respondent and the Tribunal, enabling appeals against emergency closures and imposition of conditions to be challenged on a shortened timetable. Those proceedings were concluded by a consent order approved by the Tribunal on the 19 April 2022.

27. The recitals to the signed consent order submitted by the parties to the Tribunal for approval included a record that the Appellant had removed the regulated activities of 'diagnostic and screening procedures' and 'treatment of disease disorder or injury' from its registration, leaving only nursing and personal care as the regulated activities to be offered at the premises.

28. By the 19 April 2022, the Respondent was aware that there were no longer any residents in the premises and the risk to life, health or wellbeing had been addressed. The consent order agreed between the parties included a schedule of work agreed by the Appellant as necessary to improve the environment in the home and a condition that once the Appellant notified the Respondent the scheduled and agreed environmental work had been completed, the Respondent would undertake a further inspection of the premises within four weeks. The parties agreed that the condition requiring the agreement of the Respondent to any admission of service users to the premises, undertaken on an individual case by case basis with a risk assessment

undertaken in each case, would also apply. Detail of the work required was also agreed between the parties.

29. The conditions imposed on the 19 April 2022 were:

The registered persons must provide appropriate documentation to the CQC regarding;

- a. The governance, systems and processes in place;
 - b. A legionella risk assessment;
 - c. Policies and processes in relation to health and safety;
 - d. Systems processes and procedures in relation to safeguarding concerns;
 - e. Maintenance polices and procedure for equipment, planned refurbishment and environment including contract with an appropriate maintenance provider;
 - f. Roles and responsibilities of staff structure and management regarding escalation of safeguarding concerns;
 - g. Contractors and suppliers.
- ii. The Registered persons must carry out and/or complete and provide appropriate documentation to the CQC regarding;
- a. A legionella risk assessment by a suitably competent person as per the Health and Safety Executives Legionnaires disease, the control of legionella bacteria in water systems;
 - b. Refurbishment work to the wet room of the north wing to a suitable standard;
 - c. Refurbishment of the kitchen to an appropriate standard;
 - d. Compartmentalisation works in relation to fire safety for any areas that will be used by service users;
 - e. Appropriate training and suitable competency for all staff regarding:
 - i. Safeguarding and dignity of service users;
 - ii. Risk of choking;
 - iii. Dementia;
 - iv. Risk of falls;
 - v. Whistleblowing;
 - vi. Risk of abuse.
 - iii. The registered persons must not admit any service users to Berrystead Nursing and Residential Home Limited, 1001 Melton Road, Syston, Leicester, Leicestershire, LE7 2BE, without the prior written agreement of the CQC.
 - iv. The registered persons must implement a dependency and needs analysis to inform the staffing team.
 - v. The registered persons must provide evidence of a proposed induction programme for new staff.
 - vi. The Registered Provider must only accommodate a maximum of 46 service users at Berrystead Nursing and Residential Home Limited.

30. The consent order of the 19 April 2022 concluded the proceedings brought in relation to the emergency cancellation and the condition imposed on the 11 November 2021.

31. There remained, however, the separate process commenced by the issue of the Notice of Proposal on the 14 December 2021, in respect of which the Appellant had been requested to make representations why the registration should not be cancelled.

The representations were received on the 12 January 2022 but consideration of them by the Respondent delayed to await the report following the further inspection of the premises in January 2022.

32. The inspection report was issued on the 20 May 2022 and the rating was "Location Inadequate" in the two key areas of "safe" and "Well led". This led to an overall rating of Inadequate for the premises.

33. Having taken into consideration the inspection report and the representations made on behalf of the Appellant, the Respondent issued a decision notice adopting the notice of proposal and cancelling the registration of the Appellant on the 24 May 2022.

34. The Appellant appealed the decision on the 20 June 2022. The grounds of appeal were that the evidence of the Respondent was grossly out of date and historical and the action to cancel disproportionate in light of the progress made since the last inspection; the conditions imposed as a result of the consent order were comprehensive, detailed and provide assurance to the Respondent that no residents will be admitted to the home without the prior written consent of the Respondent.

35. In the Response to the appeal, the Respondent maintained that the decision to cancel was appropriate and proportionate as required by s17(1)(c) of the HSCA 2008. At the point the appeal was made, two months after the date of the consent order, the Respondent had not received a notice from the Appellant that the works required had been completed nor had they received the agreed fortnightly progress reports. The response recorded that there was no evidence that the required improvements had been made, although some works, such as replacing some carpets and securing hot water cylinder cupboards, had been undertaken. It was the Respondent's position that the majority of the necessary works to the environment had not been carried out, which made the home fundamentally unsafe for any service user. The Respondent believed that the Appellant had no intention to carry out the necessary works to the environment and was concerned that the Appellant may not have the available resources to carry out the required works. Taking into consideration a long history of non-compliance, particularly the failure to pay fees, failure to comply with the November 2021 Action Plan requirements and the conditions set out as a prerequisite to the consent order, the Respondent continued to oppose the appeal.

36. In August 2022, Mr Gurdip Singh Hoonjan was proposed as the new nominated individual for the Appellant and Ms Clare Hentrich as proposed new registered manager.

37. The final hearing of the appeal was originally listed for 5 days from the 20 February 2023.

38. On the 10 February 2023, the final hearing was vacated by consent and the proceedings stayed because the Appellant notified the Respondent that it was intended to admit service users before the start of the hearing on the 20 February 2023. The Respondent considered it fair and proportionate to stay the proceedings, to afford the Appellant further time to admit service users and for the Respondent to carry out a

further inspection once regulated activities were resumed. The proceedings were ultimately stayed until 25 August 2023.

39. A targeted inspection took place on the 4 May 2023 to assess compliance with the conditions imposed with the consent order of the 19 April 2022. It was concluded that the terms of the order had been complied with and that the Appellant could now admit service users but only to the seven rooms already refurbished.

40. On the 29 November 2023, about ten days before the final hearing, the Appellant submitted a request for Ms Linda Georgina Amos, the new Registered Manager who was appointed on the 20 November 2023, to attend the final hearing to give live evidence. No information was provided about the qualifications or experience of Ms Amos and in the absence of any witness statement from her setting out the evidence she wished to present to the Tribunal, the application was refused. The application also sought permission to admit late evidence from Ms Tina Welford, a health care consultant and expert witness, which was to be prepared following a mock inspection she would conduct before the hearing. It was proposed that her witness statement would be presented in evidence on the 8 December 2023. Once again the Tribunal refused the application on the basis that it was not in the interests of justice to admit evidence so close to the final hearing date which the Respondent had not had an opportunity to consider.

41. Despite having been in a position to admit new service users since at least May 2023, at the start of the hearing on the 11 December 2023, no new service users had been admitted.

42. On the 12 December 2023, the Tribunal issued a further order confirming that the appeal would be concluded on the papers and that a site visit would not be conducted.

43. On the 13 December 2023, the Appellant responded to the order issued on the 12 December 2023, requesting that the site visit be held on the 14 December 2023 because it would be beneficial to the Tribunal to have sight of the premises before making their decision.

44. Having already sought to arrange a site visit on two dates which were declined by the Appellant and being unable to attend on the dates proposed by the Appellant, the Tribunal had already concluded that a decision could be made without a site visit and therefore declined the request for a site visit on the 14 December 2023.

The Evidence

45. The Tribunal had before it a bundle of documents running to 1541 electronic pages, together with the additional evidence submitted by the parties in advance of the hearing.

46. In her witness statement dated 4 October 2022, Ms D Williams, the assigned inspector for the premises, set out her background and experience as well as the

history of the registration and details of the position since November 2021. She stated that there were whistle blower allegations in respect of the premises in April 2020, relating to a lack of fire alarms and again in May and July 2021. Her evidence was that the concerns about the environment and service user safety raised in July 2021 led to the inspection in November 2021.

47. The inspection discovered several serious breaches of the regulations which led to an immediate notice of proposal being served on the 7 November 2021 to impose conditions on the registration and the issue of a Notice of Decision on the 11 November 2021 imposing those conditions. The conditions were that the Appellant should not admit any new service users without the prior written agreement of the Respondent and to provide a progress report showing progress against the action plan submitted in response to the Letter of Intent on 7 November 2021, every two weeks.

48. The findings of that inspection found only one working shower for the 28 resident service users. It also found hot water temperatures in the service users' rooms well in excess of the required 44 degrees centigrade, with the water temperature in two rooms over 80 degrees, one at 70 and another four over 60 degrees. Ms Williams statement to the court in support of the emergency application to cancel confirmed that:

“These temperatures are high enough to cause serious injury or death to service users. The Health and Safety Executive’s guidance ‘Managing the risks from hot water and surfaces in health and social care’ states if hot water used for showering or bathing is above 44 °C there is increased risk of serious injury or fatality.”

49. Due to the multiple health and safety risks and lack of governance oversight, the Respondent also decided to issue a Notice of Proposal to Cancel the Appellant’s registration. The Notice of Proposal was issued on the 14 December 2021 with written representations submitted in response by the Appellant on the 12 January 2022.

50. Because of the ongoing concerns and the length of time which had passed since some of the concerns relating to fire safety had been raised with the Appellant and not actioned, a further inspection was carried out on the 18, 19 and 21 January 2022 which disclosed additional breaches relating to safeguarding concerns placing service users at serious risk of harm. The original breaches to regulations 12, 15, 17 and 18 remained unresolved.

51. Taking into consideration the Appellant’s responses to the Letter of Intent and the failure to address the issues relating to the hot water temperatures and legionella risk, the Respondent decided to take emergency enforcement action pursuant to Section 30 of the HSCA 2008 on the 20 January 2022.

52. At a further site visit on the 1 April 2022, Ms Williams recorded that little progress had been made, although the ground floor communal lounge had been redecorated and a new communal shower room was in progress but not completed. The compartmentalisation work required for fire safety had not taken place.

53. The appeal against the emergency closure order was concluded by a consent order on the 19 April 2022. Conditions were agreed between the parties setting out the further work and improvements required to the environment in the premises. At the time Ms Williams' statement was prepared in October 2022, the Appellant had still not notified the Respondent that the required work had been completed.

54. The statement of Mr G Rielly, then interim Head of Inspection for the Respondent, dated 11 October 2022 set out his background and involvement in the case. He described how he had first become involved with the Appellant in 2020 because of a serious issue with non-payment of fees. The Finance Department notified Mr Rielly that there were outstanding invoices dating back to 2017 amounting to a total sum of £25, 641. The statement described how, in November 2020, Mr K Hoonjan had requested arrangements for a payment plan.

55. In March 2021, Mr K Hoonjan contacted the Respondent again and set up a payment plan to repay the balance over a nine month period. Although the initial payment was made, payments were missed and by August 2021, the Appellant still owed £19 943.

56. On the 5 August 2021, a Notice of Proposal to cancel registration pursuant to s 17(1)(e) of the HSCA 2008 and Regulation 6(1)(b) of the Care Quality Commission (Registration) Regulations 2009 was issued. In response to the notice of proposal, the Appellant paid the remaining balance in September 2021 and the Notice of Proposal was withdrawn.

57. Mr Rielly confirmed in his statement that his concerns about the financial viability of the Appellant owing to the non-payment of fees contributed to the decision to authorise an inspection of the premises in September 2021.

58. Ms Natalie Reed, Head of Inspection for the Respondent, in her statement dated 11 October 2022 set out her professional background and her role in the decision making process of taking enforcement action against the Appellant. She conducted a review of the Appellant's reasons for appeal and concluded that it had been proportionate to allow the Appellant time from April 2022 to make improvements at the service. She emphasised that the consent order was dependent on a change in the nominated individual due to the serious concerns about Mr K Hoonjan's understanding of the responsibilities of oversight of the Appellant's service. It was, however, recognised that Mr G Hoonjan, the proposed new nominated individual, did not have a background in running care services and specific training was required to be undertaken by him. At the time of completing the statement, evidence of completion of the training had not been provided.

59. In a statement dated 8 December 2022, Ms L Furze, lead inspector confirmed the detail of her subsequent inspection of the premises and discussions had with Mr K Hoonjan on the 29 November and 1 December 2022. In concluding her statement, she stated:

"When I visited the Location on 29 November and 1 December 2022 it was apparent that the Appellant has invested time and money in improving the environment at the Location.

However, at the time of my inspection, the environment was still not safe for the admittance of new service users.

71. The Appellant has also failed to fully comply with the aspects of the Consent Order that I reviewed and has not provided the documentation that I would need to review to be assured. I am therefore not assured that the Appellant will make thorough and complete changes to improve the Location to a suitable standard.”

60. Details of his role in the inspections in November and December 2022 were set out in the witness statement of Adrian Watson dated 10 January 2023. He concluded that the timescales for concluding the necessary refurbishment works supplied in the refurbishment plan were reasonable. He had been reassured by both Mr Hoonjan and Ms Hentrich on his visit that the premises were not yet ready to receive new residents until the refurbishment work was completed.

61. Ms Furze prepared a third witness statement as lead inspector dated 7 September 2023 and covering the inspection of the 4 May 2023 conducted with Adrian Watson. In her statement, she confirmed the improvements made to the premises since the last visit but also the remaining concerns about the environment which had not been addressed.

62. Following the inspection on the 4 May 2023, the Respondent wrote a letter to the Appellant confirming that residents could be admitted but the restriction on admissions would remain as a condition on the registration. The letter was sent to the Appellant on the 17 May 2023. It confirmed that the conditions of the consent order had now been met but that the inspection on the 4 May 2023 had found seven bedrooms refurbished and that until the further refurbishment was completed, the only available rooms for placements would be those seven. The letter went on to set out the process for requesting admissions from the Respondent and the information required to undertake the relevant risk assessment.

63. In a further witness statement dated 12 October 2023, Mr Rielly confirmed that it was the practice of the Respondent to cancel the registration of providers who do not carry out regulated activities for 12 months or more. In this case, the Appellant has now been without residents for almost two years and Mr Rielly set out in his statement why he considered the cancellation to be both appropriate and proportionate now. He also mentioned that the fees of £7, 829 due from the Appellant in December 2022 had not been paid and further fees will be incurred in December 2023. Failure to pay fees can be a ground for cancellation of registration without other factors. He concluded that because the Appellant has made repeated promises that improvements will be made or service users admitted, the time taken to rectify matters has been very long and if residents had been in the premises, they would be at prolonged risk of harm waiting for issues to improve.

64. In his witness statement dated 14 October 2022, Mr K.S. Hoonjan set out his experience in the care industry owning care homes for over 21 years and stepping back as Nominated Individual as he reached his 70th birthday. He expressed his view that the urgent cancellation on the 21 January 2022 was unreasonable and the issues

should have been addressed by requesting further documentation and information before assessing whether enforcement was necessary. He stated that he could not understand why the urgent cancellation procedure was necessary because there was no serious risk to life health or wellbeing.

65. The witness statement confirmed that Clare Hentrich had applied to be the Registered Manager again and expressed the view that “Contrary to what CQC has said, the Home was always safe and once reopened will remain safe under the management of Clare Hentrich. Regular maintenance of the building will continue...”. He confirmed that the works specific in the consent order had been completed and the conditions imposed, met. The planned reopening as a residential care home was proposed on the basis that the residents would be placed in eight rooms on the ground floor followed by the other eight rooms on the other wing of the ground floor.

66. Mr K Hoonjan contested the decision to issue the cancellation notice on the 24 May 2022 when the Respondent had allowed the previous appeal by consent. It was stated that many residents did not wish to move and were desperate to return to the premises. Mr K Hoonjan stated: “my son Gurdip and I have drawn no income from the company since March 2022 and our living expenses and cost of refurbishment at the home had to be supplemented by cashing our personal investments, my personal pension fund build(stet) over many years, personal jewellery and raising money personally..” and “...my son Gurdip has been working seven days a week, sometimes up to 18 hours a day to prepare for reopening.” And “...CQC are wasting my precious time and that of my team having to prepare for this appeal and limiting our time to prepare for reopening whilst limited resources are being wasted on legal fees.”

67. The statement of Mr G Hoonjan dated 12 October 2022, set out his background and qualification as Operational Manager at the premises since July 2017 and recently appointed Nominated Individual. He described his role as being to oversee the day to day running of the care home and to support the Registered Manager in making sure that the home is run safely and efficiently. He also liaises with contractors and other suppliers on a day to day basis and negotiate with them. He described his daily duties including reviewing policies, audits and action plans with the Registered Manager and walking around to inspect the environment as well as attending staff meetings and interviews. He described how he had worked with the Provider and care consultant Phillippa Williamson to produce an action plan in response to the letter of intent to use emergency enforcement powers and provided a response to the issues raised. He described the work undertaken on the hot water system, the carpets and staffing. He too considered the urgent closure application to be unreasonable and that the Respondent should have given the Appellant more time to address the identified issues. He was confident that given more time, the work required could have been completed because the actions were already being implemented. He did not accept that there was a risk to life, health and wellbeing to justify urgent cancellation as the risks had been mitigated and works were planned so that they could be done safely without disrupting the service. He asserted that all the work required by the consent order was completed and that the home was ready to reopen.

68. The statements presented by Mr K Hoonjan and Mr G Hoonjan generally challenged the evidence of the inspectors relating to the inspections carried out in November 2021 and January 2022. Attention was drawn to discrepancies between the evidence of Ms D Williams and Mr G Rielly, for instance because Mr Rielly had stated at para 22 that the enforcement and inspection had been triggered by concerns about financial viability of the Appellant and Ms Williams had stated at para 21 that the inspection was triggered by whistleblowing allegations.

69. Mr Hoonjan challenged the comment of the inspector Ms D Williams that “..no action had been taken some 20 months later”, stating that it was factually incorrect. The information was challenged on the basis that the basis is historic and irrelevant to the current appeal. Evidence was provided that a Fire Risk Assessment was completed in December 2021 by Chubb Fire and Security which replaced previous and historic risk assessments and submitting that the statement by Ms Williams referring to “..the poor fire safety management at the service” was also historic and irrelevant to the current appeal.

70. A statement and two supplementary witness statement were presented on behalf of the Appellant by Clare Hentrich dated 12 October 2022. She was the Registered Manager from January 2022 to November 2023 stated:

“I understand that Home’s previous care consultant, Philippa Williamson, worked urgently with the Operations Manager and the Provider to produce an action plan dated 19 January 2022. I was not involved in the Home’s initial action plan in response to the letter of intent. Having looked at the action plan, I thought that it lacked information that would have assisted CQC and the court. I feel that if I had been able to get involved to support the Home sooner, all this would not have happened. Unfortunately, due to my work commitments, I wasn’t able to. I feel that the action plan would have benefitted by more detail. There was a lot more evidence available that would have strengthened the Home’s case at that time.”

71. Ms Hentrich stated that: “... 28 people were moved out of the Home in three days, with residents crying and being told by social workers that they were being transferred to a particular home and then having plans changed at the last minute and going to a different home. Lots of family members were on site and they were confused with what was going on. The local authority social workers were on also site. Some staff were too scared to come into work because reporters were waiting at the end of the drive on site and one of them had even hidden in a bush in the Home’s garden.”

72. She continued: “I carried out audits in the home, including a bedroom audit. I did a full walk-around of the home several times and I found that the Home needed a thorough clean. This was because the domestics might not have been working to standard under the former manager. The former manager had also changed the cleaning products and had given domestic staff just one product, namely ‘Milton’ but toilets cannot be properly cleaned with this produce, so lime-scale had been building up around the toiled and the taps. It became apparent to me when speaking to domestic staff that their knowledge of how to use the carpet cleaner was not good enough. Some bedrooms were in the process of being refurbished and were clearly not in use during these works. Anyone would have realised that these bedrooms were

being refurbished and unoccupied. The doors to these bedrooms were locked. The provider was in the process of upgrading the Home and investing in the environment. Some rooms were being prepared to be re-decorated. There was a risk to the wellbeing of staff arising from the former manager not ensuring safeguarding notifications were made. I don't think that there was a serious risk to wellbeing and I certainly don't think that there was a risk to life or health. And with the right manager in place, this would not be a risk at all. I have been working with the Nominated Individual / Operations Manager since April 2022 to support the Home's completion of the works specified in the consent orders and to take the actions required to comply with the conditions imposed on the provider's registration. I am satisfied that the works required have all been satisfactorily completed."

73. In her witness statement dated 12 October 2022, Ms Hentrich confirmed that she was satisfied that the premises now complied with regs 12, 15 and 17. She stated that her intention as regards re-opening was to initially admit residents to the 16 beds on the ground floor. This would be for personal care only for the time being.

74. In his supplementary statement dated 3 November 2022, Mr K Hoonjan stated that: "...both the Nominated Individual and I have worked around the clock for almost a year now. We work seven days a week and sometimes into the early hours of the morning and I have become very ill many times due to this working pattern. The time, energy and money we have spent in appealing against the two Notices of Decisions could have been spent positively making improvements and would have resulted in earlier inspections so we could have opened earlier. We are still spending money and working hard without even a day off and we would not be doing all that if we were unwilling to make the improvements."

75. The supplementary witness statement of Gurdip Hoonjan dated 3 November 2022 confirmed that there had been a lot of progress in the renovation and refurbishment work. He added : " I appreciate the CQC may have a concern with my abilities, but having been involved with Berrystead since 2011 I am more than capable and knowledgeable in the day to day runnings of a Care service. Berrystead is a large Home, but this has never dissuaded me from taking up the challenge. If I didn't have an interest in the Home or the Care Sector I wouldn't have helped to put all of this effort into making the Home a beautiful place to live for our Service Users. I have the support of and receive guidance from a highly experienced Registered Manager (Ms. Clare Hentrich) who has been managing Care Homes for 11 years and who has been in the Care industry for over 24 years. As well as Ms. Philippa Williamson from whom I receive regular and ongoing mentoring, working with the current Registered Manager is very useful for me. Both the current Registered Manager and Ms. Williamson have stated that they are fully confident in my abilities to fulfil the Nominated Individual role. I am in a unique position where I have had many years of working with the current Registered Manager and we both share a strong work ethic along with similar visions and goals for Berrystead and its Service Users. I have gone above and beyond for Berrystead and its Service Users in the past when I was not a Nominated Individual and spent quality time with Service Users and staff whenever possible. Now as a Nominated Individual, the experience I have gained with the numerous mentors picked up along the way strengthens my position. I would encourage the CQC to have faith in

my abilities instead of doubting them as I believe (as do others who I have worked with in this industry) I possess all the qualities of a Nominated Individual and a leader that people look up to. This alone is enough to give confidence to anyone deciding whether I am qualified for the role working in the best interests of the Service Users.”

76. Mr G Hoonjan continued: “I am utterly shocked at the behaviour of CQC reserving an opportunity in the background ready to cancel a Provider’s registration depending on the outcome of an appeal should they be unhappy with the result or not achieve what they were hoping for. Embarking on this second attack to cancel our registration is a clear act of malice. It is a clear indication of CQC inspectors behaving out of line and shows that the inspectors already had it in their minds to close the Home at whatever cost. For a public body that prides itself with helping and encouraging care services to improve to then use devious and merciless tactics to win over Providers.”

77. Mr G Hoonjan produced evidence of the letter received from the fire service on the 21 March 2022. The letter stated: “I would advise you that, at the time of the inspection, a broadly compliant level of fire safety was evident. The visit was not a comprehensive audit of all fire safety matters but looked into a variety of structural and management aspects from which our findings were drawn. You should be aware that you have an on-going responsibility to maintain fire safety standards and to carry out periodic reviews, to ensure that the fire safety provision remains adequate. I would also remind you to take action in the areas where advice was given by the inspecting office.”

78. In a supplementary statement dated 13 October 2023, Ms Clare Hentrich stated: “After CQC had informed the home that we are able to take admissions we arranged for a start date with the staff, we contacted social services via email and phone to inform them that we had 7 beds available for admissions, however we were not receiving any referrals. I contacted the brokerage team and they informed me that this may be due to no placement being needed in our area. After nearly 6 weeks we made contact once again to express our concerns on the lack of referrals and the brokerage team then told us that our contract was retracted and we would have to apply for our contract back. This again took time as they had to arrange for an inspector and a health and safety officer to come and do a visit, after they had visited they then wanted to arrange a further visit with the fire brigade. Following this they wanted our contingency plan updated with a suggested layout, once this was sent our inspector was on holiday so we had to wait for her to get back. All this has delayed our admissions. We did have some private enquiries but none of the service users wanted to be the first to be placed at Berrystead which again put a delay on the admissions.”

SUBMISSIONS TO THE TRIBUNAL

79. In the notice of appeal, the Appellant submitted that in view of:
“1. the passage of time since the inspection on which the Notice relies;
2. the appeal against the urgent cancellation being allowed; and
3. the extensive conditions that currently apply to the Appellant's registration;

the Notice to cancel registration is entirely without merit, is unsupported by up-to-date evidence and moreover the evidence has been superseded by that obtained by the Respondent in the course of the urgent appeal. The notice continued: "It is arguably oppressive and certainly disproportionate for the Respondent to issue this Notice in light of the significant developments since the inspection over seven months ago."

80. The Appellant's position remains that the Respondent's decision was and is not a justified and proportionate decision in all the circumstances. The Appellant submits there have been significant improvements made at the premises since November 2021 / January 2022. The Appellant seeks that the Respondent's Notice of Decision dated 24 May 2022 does not take effect.

81. The Respondent submitted to the Tribunal that the decision to cancel remains reasonable and proportionate. Significant breaches had been identified in November 2021 and January 2022 and in the 22 months since January 2022, whilst some improvements have been made to the premises, significant concerns remain that should the decision to cancel not take effect, service users will be at risk from receiving care not compliant with the relevant regulations.

CONCLUSIONS AND DECISION

82. The Tribunal has paid particular attention to the chronology and timeline of events in the appeal. We have reminded ourselves that the regulatory process has several separate strands which need to be clearly set out to ensure that the correct and relevant facts are addressed in this decision.

83. In the first place, there were concerns about the financial situation and the failure of the Appellant to pay the fees. This led to the issue of a Notice of Proposal to cancel registration for failure to pay fees. This was withdrawn by the Respondent when the fees were paid in full in September 2021.

84. A failure to pay fees is a red flag for the regulator because it may be indicative of a lack of funds which could impact on the proper running of the premises. This concern about the financial viability of the business was mentioned by Mr G Rielly in his statement of 11 October 2022. We accept therefore that the issue of a notice of proposal to cancel for failure to pay fees would trigger concerns about the way in which the premises were run. In those circumstances, the information shared by the whistle blower would be sufficient to trigger an inspection to ensure that the premises were complying with the relevant regulations.

85. We accept the evidence of Ms Debra Williams that the inspection of November 2021 uncovered a number of serious issues relating to the premises which demanded immediate attention and an urgent decision notice regarding breaches of the regulations. That inspection triggered urgent action, with a notice of proposal dated 7 November 2021 and a notice of decision dated 11 November 2021 imposing two conditions on the registration with immediate effect. The Appellant lodged an appeal against those conditions which was concluded by a consent order but with agreed conditions on the 19 April 2022.

86. A third strand of the enforcement process was the notice of proposal to cancel registration issued to the Appellant on the 4 December 2021 which was not decided upon until 24 May 2022. The delay in concluding that process cannot be criticised because the Respondent can be seen to be providing the Appellant with every opportunity to bring the premises up to the required standard, to avoid the need to cancel the registration. The notice of proposal set out the issues; further conditions were included in conjunction with the Consent Order in April 2022 and only after another period of six weeks had passed and the necessary work not completed, was the final decision made to cancel the registration.

87. It is also of note that the proceedings in the Tribunal have been delayed twice in October 2022 and again in February 2023, to provide the Appellant with the opportunity to improve the condition of the premises, complete the necessary work to comply with the regulations and standards and to admit new residents. Despite all the additional time provided, that work has still not been completed by the time of the appeal hearing in December 2023.

88. The Appellant, Mr K and Mr G Hoonjan have all been dismissive of the breaches of the regulations as historical ones, refusing to acknowledge that there were issues in November 2021 and denying that there were any risks to the service users when the emergency cancellation powers were utilised in January 2022. Both Mr Hoonjans have described the emergency closure in their statements as “unreasonable” and have suggested that to pursue the emergency closure procedure was unnecessary.

89. We have concluded that the historical context is relevant because although the environmental issues were first brought to the attention of the Appellant in November 2021, the remedial action was not taken immediately, the necessary improvements not implemented with urgency to ensure the safety and welfare of the 28 service users in the home, but rather, approached with a slowness which led to the second inspection in January 2022 which warranted an emergency closure order. We are satisfied that there were significant issues identified in November 2021 which had not been remedied by the end of January 2022 and consequently, the emergency enforcement action was warranted particularly because of the history of failure to manage the fire safety regime, the failure to ensure that the hot water system was safe, the risk of legionella and the lack of hygiene facilities, all of which we accept were in breach of the relevant regulations.

88. There were therefore four separate strands to the enforcement process in respect of the Appellant – the first was the proposal to cancel due to the non-payment of fees, which was withdrawn following payment of the fees in September 2021; the second was the urgent action imposing conditions in November 2021 which led to an appeal which was combined with the appeal against the emergency closure in January 2022. That appeal concluded in April 2022 with the consent order and finally the Notice of Proposal to cancel registration (known as the “slow cancellation” process) which led to the decision in May 2022 leading to the appeal which is under consideration in this decision.

89. It is apparent from the statements of both Mr K Hoonjan and Mr G Hoonjan that they have not understood the separate strands of the process and the role of the regulator in the process. The supplementary statements contain allegations that the Respondent pursued the decision of the 24 May 2022 because of dissatisfaction that the appeal against the urgent closure had been allowed. It appears to have been forgotten that the detailed conditions attached to the consent order were agreed by both parties and that the Appellant had agreed to undertake the works listed presumably on the basis that they were necessary work to bring the premises back to standard. That is not an accurate interpretation of the position – the regulator was carrying out its statutory obligations properly at the time and consequently should not be criticised for undertaking its statutory duties in an appropriate way.

90. The other concerning element of the comments made by both Mr K Hoonjan and Mr G Hoonjan is that they demonstrate a lack of understanding of the gravity of the situation in November 2021 when the serious breaches of the statutory requirements were first identified and a lack of understanding, by two who have been and currently are Nominated Individuals, about the working of the regulatory system.

91. Whilst the original findings are now over two years old and it has been confirmed that the outstanding fees were paid and an advance payment made for the following year, there is now a new set of arrears which have been accrued with the current year's fees remaining unpaid.

92. The findings of the Fire Officer's inspection of the premises at the beginning of November 2021 led to the issue of a separate enforcement notice by the fire service, for breaches of the fire regulations. Those breaches have been listed and constitute a serious breach and risk to the service users in residence then. Whilst improvements have been made and a qualified approval given to the condition of the premises in March 2023, the full inspection will not take place until there are new residents in place.

93. We accept the evidence of Mr K Hoonjan and Mr G Hoonjan that substantial works have been undertaken since 2021 and that there may now be full compliance with the fire regulations, but we note the length of time taken in putting those remedial works in place and will return to the issue of time taken to undertake the work required to meet the statutory requirements later in this decision.

94. The Tribunal is now looking at the situation as it finds it at the time of the hearing and we have been assisted by the additional information provided by both Mr K Hoonjan and Mr G Hoonjan and the then Registered Manager Clare Hentrich.

95. The Tribunal was notified in early December 2023 that there was a change to the Registered Manager on the 20 November 2023 yet no information was forthcoming in the form of a witness statement to identify the experience and qualifications of the new manager nor her vision for the service if the appeal was successful.

96. We conclude that the evidence we have accepted indicates that the Appellant had been sailing close to the wind for some time, with failures to pay fees, failure to implement improvements to the fire safety system, as well as the more serious risks

caused by the failure to reinvest in the property and improve the environment for some years leading up to the dire conditions which existed as identified by the inspection in November and December 2021. We have accepted the Respondent's evidence that there were serious breaches of regulations 12, 13, 15, 17 and 18 of the Regulations as identified in January 2022.

97. At the date of the hearing, the question is whether those breaches have been remedied and the premises made compliant with the regulations? If those improvements have been carried out, will the requirements be maintained and sustained in the future? We were particularly concerned about the length of time which has been taken to improve only a relatively small part of the property. The lack of progress in addressing the need to improve the environment is not supportive of the assertion that the Appellant will continue to improve the remaining rooms and enable the full use of the property again within a reasonable time.

98. The evidence given in the witness statements is that both Mr K Hoonjan and Mr G Hoonjan have been working seven days a week, often into the small hours of the morning, with the resultant impact on the director's health because of the long working hours. Despite that effort, only limited progress has been made up to the date of the hearing and only eight rooms are considered habitable to the required standard some two years after the original concerns were raised. We are not confident that even if we allowed the appeal, the improvement work would be completed within a reasonable time. The effort required to make the incremental progress achieved so far has been sustained and long drawn out. If there had been residents at the premises during that period, or new residents admitted now, we question whether the efforts required to improve the premises would be sustainable. We conclude on the basis of the evidence of the limited progress made which has only enabled eight rooms out of the total of 46 within the premises to meet the required standard over a period in excess of two years, that the improvement will not be completed nor sustained in the longer period.

99. In reaching that conclusion, we have taken into consideration the fact that the experienced Registered Manager has left with no explanation evidenced. We have not been provided with any information about the new Registered Manager, her training or experience nor her proposal for ensuring that the work is completed and standards sustained following her appointment.

100. We have very limited confidence that Mr G Hoonjan has the relevant experience and training to enable him to fulfil the role of the Nominated Individual effectively. His description of his responsibilities in the home and the evidence of his involvement since 2011 do not give confidence that the improvements to the environment will be completed or maintained. He has been the Operations Manager since 2017 and although he claims to have been ensuring the quality of the environment, had failed to recognise the significant and serious issues in that environment prior to the inspection in November and December 2021 and he did not accept the gravity of the situation even when the further inspection in January 2022 revealed that the situation was even worse than it had been on the prior inspection.

101. Whilst he has given evidence that he has been involved in the running of the home for many years, the evidence from the inspections following the “good” overall rating in 2017, is that under his supervision as Operations Manager, the condition of the premises was allowed to deteriorate to such an extent that it became too risky for residents to remain. We have no confidence that he is capable of ensuring that the necessary renovation work is undertaken in a timely fashion to bring the entire premises up to the required standard nor that the standard would be maintained in the longer term.

102. We noted that the evidence of Ms Hentrich placed the blame for the poor condition in the home on the previous manager and the poor condition of the environment on failures to provide suitable equipment and training for staff. That does not explain the lack of staff at the premises when the inspection took place in November 2021. She also blamed the poor inspection outcome on the failure to provide evidence to the inspectors which was already available at the premises. This does not explain the serious issues relating to the regulation of the hot water temperatures and the failure to ensure sufficient hygiene arrangements for residents. None of this reassures the tribunal that the current situation would be any better than it was in 2021 because Mr G Hoonjan was Operations Manager when the former Registered Manager was in post and did not successfully ensure that the environment or the staffing was adequate.

103. The criticism of the inspectors and the regulatory regime does not reflect the reality that the same inspector (Ms Williams) had been involved over an extended period, including when the premises had seen improvement in their rating in 2017, to “Good”. We accept the evidence of the several inspections which have taken place since 2021 and conclude that the improvements made to the environment have neither been sufficient nor have they been timeously undertaken to such an extent that we can be confident that the home will be run in compliance with the standards in future.

104. We considered whether there were any conditions we could impose on the registration in order to enable the registration to continue but noting the number and detail of the conditions imposed over the last two years and the length of time taken to comply with them, the failure to ensure that the entire premises are brought up to the required standards and the failure to maintain the improvements undertaken, we concluded that the imposition of any additional or further conditions was not a solution to the problem caused by the operational failures in running the premises.

105 Finally, we considered whether the future was a financially viable one for the premises. The Appellant changed the designation of the home to residential care only in 2022 but to date, although in a position to accept up to 7 residents since May 2023, the home is still empty. The evidence of Mr Hoonjan is that there have been enquiries but all are for challenging behaviour or nursing care which is not within the home’s designation. It is not clear whether the change of designation was made in response to any specialist advice from an expert in the care industry but appears to be a decision made without consideration of the changed demographic among service users now, whereby those requiring residential care only will be supported to remain in their own homes for as long as possible with the main demand for places in residential

accommodation being for nursing, especially dementia care and challenging behaviour. We conclude that the with its current designation and the failure to attract any residents over an extended period, the premises does not have a financially viable future.

DECISION

The appeal is dismissed.

Judge Meleri Tudur
Dr David Cochran (Specialist member)
Ms Rachael Smith (Specialist member)

Date Issued: 28 December 2023