

Care Standards

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

[2018] 3264.EA

**Hearing held Royal Courts of Justice
on 9th and 10th October 2018**

Before

**Tribunal Judge Ian Robertson
Specialist Member Lorna Jacobs
Specialist Member Mike Cann**

Centurion Health Care Limited

Appellant

-v-

Care Quality Commission

Respondent

AMENDED DECISION

1. This is an appeal brought by Centurion Health Care Limited (the company) on 27 February against a decision by the Quality Care Commission (CGC), dated 31 January 2018, to refuse the company's application to vary the conditions of their registration, by adding an additional location to that registration, in respect of the regulated activity, namely accommodation for persons who require nursing or personal care.
2. The Company was represented by Mr Richards of counsel and the CQC by Mr Graham, solicitor. We are grateful for the manner in which they conducted this hearing and for the assistance they provided to us. At the outset of the hearing we agreed to the production of a series of photographs and maps of the

premises in question and were provided with three research documents, requested by us on the second day, based upon literature reviews by Dr Julie Beadle-Brown from Kent University.

BACKGROUND

3. In 2008 the company opened a home called Penley Grange. They run two other units one a 6 bedded unit and the other a 35 bed nursing home. Penley Grange is a six bedded establishment set in three acre of grounds about a mile outside Stokenchurch in Buckinghamshire. In an inspection report dated 8 November 2017, based upon an unannounced inspection in September, the home was rated good in all areas. The home specialises in Service Users with Autism and Severe Learning Difficulties. The Service Users have severe difficulties and have high need. 4 of the 6 current Residents were described as being non-verbal and requiring 2:1 staffing. None of the residents are capable of going out on their own and need constant attention.
4. In 2013 the company decided that they wanted to expand operations on the large site in Stokenchurch and applied for planning permission for an extension to Penley Grange, the intention being, so we were told by Ms Akhtar a director of the company, to open a new home independent of Penley Grange called Penley View, using the same model as Penley Grange, but operating completely independent of it. We were told by Ms Akhtar that before submitting a formal application to CQC, she telephoned their help line and was advised to apply to vary a condition of registration. The CQC were unable to challenge this assertion as although Ms Akhtar had a call reference number, it did not appear that this had been checked or if it had the results of any check were not put into evidence. That application was lodged on 16 February 2017 and sought to vary condition as follows;

“Registered Provider must only accommodate a maximum of 14 Service Users at Penley Grange”
5. In its reasons the application form states as follows;

“We have built an extension to the existing home to accommodate 8 more service users. The new home will have its own lounge, dining and sensory room. A separate entrance so they can run independently. A separate staff team. The buildings are connected to comply with building regulations and kitchen and laundry facilities will be shared. They will be managed by one registered manager.”

6. The application was allocated by CQC to Mr Stephen Malyan a registration inspector. He is an extremely experienced inspector having worked in the field since 1986. He arranged a site visit on 11 May 2017. He advised that the wrong application had been made and indicated that if a further application were made, to add a location, he would not need to visit further.
7. Between 12 May and 19 June there was E mail correspondence between the company and CQC in which, inter alia, the company agreed to redesign the building to include a kitchen and laundry to make it completely independent. They agreed that the downstairs adjoining door would be blocked and that the upstairs door would be incorporated into fire safety provisions and therefore not able to be used.
8. This new application was lodged on 17 July 2017. Attached to this was a six page statement detailing plans for Penley View as the new home was to be called. This included acknowledgement and reference to National Guidance which included at this point in a document entitled “Building the right support”. Reference was made to the Winterbourne View scandal and also the mid Staffordshire report.
9. Internal management meetings were held at the CQC on 20 June and 16 August and it is clear from the notes of these meetings, that the CQC regarded the new development as an extension to the existing home, bringing 6 additional patients and associated staff onto the same plot, making it a congregate or campus site. This is important as it would be against current guidance regarding small homes which, should be of no more than 6 people,

save in exceptional circumstances. This guidance is now set out in “Registering the Right support “(June 2017). This is the CQC guidance based upon the guidance produced by NHS England, The Association of Directors of Adult Social Services and the Local Government Association. It is issued by the CQC under S23 of the Health and Social Care Act 2008.

10. The guidance says that new services should not be developed as part of a campus style development or congregate setting. Footnotes to the guidance define these as follows;

“Campuses: group homes clustered together or on the same site and usually sharing staff and some facilities. Staff are available 24 hours a day”

“Congregate settings are separate from communities and without access to the options, choices, dignity and independence that most people take for granted in their lives”

11. On 25 October a Notice of Proposal was served upon the company. This stated as follows;

“The reasons for proposing to refuse your application are that on assessment of it the Commission is not satisfied that the proposed manner in which you would continue to provide the regulated activity should this be approved, would be compliant with the requirements of regulations made under S20 (so far as applicable) of the Health and social Care Act 2006”

12. Having canvassed its evaluation of the application in particular the nature of the building, the number of Service users on site and the lack of an evidence based demonstration of need, the Notice concluded as follows;

“The evidence above demonstrates that this is a congregate setting for 12 people, which is not in line with the national model and the principles of Registering the Right Support. Applying to make Penley View” a separate location is an attempt to present it as a separate service, when it would clearly be part of a large congregate service – twice the recommended size. The provider has given no satisfactory explanation of how they have had regard to the policy guidance as required.

The evidence demonstrates that at the time of applying to vary your conditions of registration you have not identified how you would provide a service in a manner which is consistent with the principles of registering the right support and as such is compliant with the health and social care act 2008 (regulated activity) regulations 2014.”

13. On 22 November the company filed detailed representations in response to the Notice in accordance with procedure. On 31 January 2018 Claire Robbie Head of Representations as the Decision Maker, provided the company with a Notice of decision. The core of this decision perhaps is summed up in this paragraph;

“there remains the concern that prospective service users might not receive person centred care in line with the national model and the principles set out in Building the Right Support, including quality of life, keeping people safe, and choice and control which are consistent with both the fundamental standards set out in regulations and CQC’s overall framework of quality”

14. As indicated above that decision is the subject of this appeal which was lodged on 27 February 2018.

STATUTORY FRAMEWORK

15. This is agreed between the parties and I set out below as taken from the skeleton argument of Mr Richards

Health and Social Care Act 2008

Section 12 provides:

“(1) Subsections (2) to (4) apply where an application under section 11 has been made in accordance with the provisions of this Chapter with respect to a regulated activity.

(2) If the Commission is satisfied that—

(a) the requirements of regulations under section 20, and

(b) the requirements of any other enactment which appears to the Commission to be relevant, are being and will continue to be complied with (so far as applicable) in relation to the carrying on of the regulated activity, it must grant the application; otherwise it must refuse it.”

Section 20(1) provides:

“The Secretary of State must by regulations impose requirements that the Secretary of State considers necessary to secure that services provided in the carrying on of regulated activities cause no avoidable harm to the persons for whom the services are provided.”

Section 23(1) provides:

“The Commission must issue guidance about compliance with the requirements of regulations under section 20, other than requirements which relate to the prevention or control of health care associated infections.”

Section 26(3) provides:

“The Commission must give the applicant notice in writing of a proposal to refuse the application.”

Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

Regulation 9 provides:

“(1) The care and treatment of service users must—

- (a) be appropriate,
- (b) meet their needs, and
- (c) reflect their preferences.

(2) But paragraph (1) does not apply to the extent that the provision of care or treatment would result in a breach of regulation 11.

(3) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include—

- (a) carrying out, collaboratively with the relevant person, an assessment of the needs and preferences for care and treatment of the service user;
- (b) designing care or treatment with a view to achieving service users' preferences and ensuring their needs are met;
- (c) enabling and supporting relevant persons to understand the care or treatment choices available to the service user and to discuss, with a competent health care professional or other competent person, the balance of risks and benefits involved in any particular course of treatment;
- (d) enabling and supporting relevant persons to make, or participate in making, decisions relating to the service user's care or treatment to the maximum extent possible;
- (e) providing opportunities for relevant persons to manage the service user's care or treatment;
- (f) involving relevant persons in decisions relating to the way in which the regulated activity is carried on in so far as it relates to the service user's care or treatment;
- (g) providing relevant persons with the information they would reasonably need for the purposes of sub-paragraphs (c) to (f);
- (h) making reasonable adjustments to enable the service user to receive their care or treatment;

(i) where meeting a service user's nutritional and hydration needs, having regard to the service user's well-being."

Regulation 15 provides:

"(1) All premises and equipment used by the service provider must be—

- (a) clean,
- (b) secure,
- (c) suitable for the purpose for which they are being used,
- (d) properly used
- (e) properly maintained, and
- (f) appropriately located for the purpose for which they are being use

Regulation 21 provides:

"For the purposes of compliance with the requirements set out in these Regulations, the registered person must have regard to—

- (a) guidance issued by the Commission under section 23 of the Act in relation to the requirements set out in Part 3 (with the exception of regulation 12 in so far as it applies to health care associated infections)..."

THE EVIDENCE

16. We have read a very extensive bundle of evidence covering all relevant documentation relating to this specific application, background and Guidance documentation, relevant statutory instruments and some case law, although there is actually a dearth of case law on the issues raised. We also read 4 witness statements from Ms Hunter, Mr Malyan, Ms Akhtar and Ms Brown and had the benefit of hearing oral evidence from the latter three. We were also greatly assisted by the careful case summaries prepared by both advocates.

17. What is unusual in this case is the absence of disputed facts. Forensically there are few points of difference between the parties about the sequence of events

and the particulars of conversations. This case falls to be decided upon a fundamental difference in the interpretation of the facts as applied to the Guidance. In this decision therefore reference is only made to the evidence where it amplifies the factual matrix.

THE ISSUES

18. The most fundamental questions are the nature of the home at Penley View. Is it a truly independent unit or simply an add on to Penley Grange. If it is an independent unit does its geographic and actual proximity give it the character of a campus. If not a campus does its relative isolation create a congregate setting, where effectively the two homes run as one with little interaction with the community. A further issue raised by the CQC is whether in any event the company has established a need for this home.
19. The CQC say that this is in reality a 12 bed unit run on the same site. They point to the original planning application in 2013 which was for an extension to Penley Grange. They say that there is a further clue in the nature of the application in February 2017, to increase the number of Service Users to 14 rather than adding a further location. They say that the fact that the original application had shared kitchen and laundry facilities gives a more insight into the true intentions. Furthermore the fact that detailed plans for the kitchen, for splitting the grounds and for signage had not been prepared and would only be prepared once registration is granted, suggests that these were not thought through as would be expected of a separate unit. They point to the building itself which presents as one unified structure with neither home architecturally differentiated.
20. The company's response to these issues came from Ms Akhtar in her evidence.
21. She said that the original application for planning permission did indeed describe the building as an extension. That was their architects description and it cannot really be gainsaid that the additional building attached, as it is to Penley Grange, is an extension. Are we assisted by the use of the word

extension? Given the plans that we saw which are for a complete new home, attached by a party wall, very little weight should be put on this word per se. It is a question of semantics which does not advance the matter. What is more important is what was actually envisaged in the plans and subsequently built.

22. Two aspects of the original architectural and company plans do not assist the company's case. The first is the presence of inter connecting doors through the party walls on the ground and first floors and the second is the absence of a kitchen and laundry in Penley View. If these plans had not been rethought it seems to us that there would be solid evidence of an interconnection between the two homes. The fact is however that following correspondence and discussions with Mr ~~Malyn~~ **Maylan** in May 2017 the company blocked the ground floor door and linked the upper floor door to fire regulations making it inaccessible. They redesigned the interior of the home to include a kitchen and a laundry. They gave confirmation that they would provide detailed plans for the kitchen, for signage and splitting the grounds once registration was agreed. The question that this raises is whether this was cynical attempt to pull the wool over the eyes of the CQC or a proper reaction to advice received?
23. One of the roles of the regulator is to advise. This advice was acted on and we are satisfied having seen Ms Akhtar give evidence that this was a genuine response, rather than a cynical exercise. We can understand given the huge Capital outlay already spent in building Penley View, why the company would not spend further money unless registration was assured. There is nothing suspicious about this.
24. Ms Akhtar says that she submitted the original application on the advice of the CQC advice line. Her evidence on this point was compelling and has not been challenged by the CQC. It was not put to her that this phone call did not happen and therefore we accept her evidence. If the application was indeed submitted in this form on the advice of the CQC they cannot take any point on it. Furthermore as set out at Para 5 above the body of the application made it clear that the building was to be used as an independent unit.

25. It appears to us that the question of whether Penley Grange and Penley View will be two separate homes is a question of Fact. On the one hand they are physically attached on the same site and would share the same registered manager (the CQC took no point on this). Furthermore Mr ~~Malyn~~ **Maylan** felt that there would be an inevitable move to sharing staff given the geographic proximity. This was not backed by any evidence but rather a view held by him. Ms Akhtar told us that the staff would be completely separate, with their own rota's and different payrolls. There would be no shared facilities and each home would, for example, have their own chill out and sensory rooms. There would be no need for any spillage from one home to the other. This was not on her evidence simply a reflection of expediency but rather a reflection of good practice. She said in terms that she fully endorsed the Guidance and that in running Penley Grange and Penley View she would apply a person centred approach with each service user in each house having provision made for them based upon their personal need. We saw no reason to disbelieve her on this. Indeed when the registered manager of Penley Grange, Ms Brown, gave evidence we were struck how much the individual needs of service users were to the fore.
26. We find therefore that Penley Grange and Penley View will be two separate homes run independently of the other with their own ethos and approach to their clients.
27. That however is not the end of the matter. CQC argue that the presence of two units on one site in this manner creates a Campus type environment. We do not accept this argument. A campus by according to the definition in the guidance, is group homes, clustered together, sharing some facilities. Two homes cannot by definition cluster and there are no shared facilities. By any reading this cannot amount to a campus setting.
28. The other argument advanced by CQC is more compelling. Does the existence of the two homes together in this way create a Congregate setting.

29. We are troubled by this phrase and the context in which it appears in this case. As used by the CQC in the context of this application it appears to relate to isolation from the community as a whole. Furthermore that isolation appears to have taken on a Geographical context that does not appear anywhere in the definition. We understand what the phrase is trying to convey. It anticipates a conglomeration of Homes isolated from the community, where personal client centred care, gives way to an institutionalised approach to care. Where everyday activities that assist in moving towards independence and maintain dignity are lost to an institutionalised corporate approach to service users. In other words the very approach that the Winterbourne enquiry highlighted and led to the guidance as it currently stands. We fully endorse this.
30. The difficulty in this case is that we see no sign in the way in which the CQC approached this case, of looking at the proposals holistically. There appears to have been no attempt to consider specific groups of service users and whether the two homes separately would meet the specific and specialist needs of the service users that they cater for.
31. It goes without saying that the range of disabilities covered by the terms Autistic Spectrum Disorder and Learning difficulties are huge. Putting it simplistically some people will be capable of moving to independent or light touch assisted living. Their needs will be very different to people at the other end of the Spectrum who will never be capable of independent living, who require constant care on a 1:1, 2:1 or 3:1 basis. Whilst with the first group of people, the capacity to pop out to the pub or to the local shop on their own, go for walks in the community or engage in localised activities, may be a critical part of their care plan, for others this will be impossible without assistance or indeed even with assistance.
32. What we found extremely hard to understand is the lack of any assessment by the CQC of the nature of the service users who would be placed at Penley View. Ms Akhtar told us about the current cohort of service users at Penley Grange. She said that she intended to apply the same model to Penley View. She is committed to provide care for people with serious disabilities as set out above.

Surely in assessing the provision seeking registration the Regulatory authority should enquire as to the Service Users being catered for and look to see if there is any evidence to suggest that there is a track record of the provider meeting those needs. Mr ~~Molyon~~ **Maylan** however told us that he made no enquiries as to the nature of the Service Users nor did he consider the inspection reports of Penley Grange. There is no evidence before us that anyone at CQC made those enquiries.

33. The inspection report of Penley Grange in 2016 stated that in some areas it required improvement, by November 2017 following the introduction of a new regime, it was Good in all areas. This is therefore a provider who on the face of it can meet the needs of its particular Service Users.
34. Mr ~~Molyon~~ **Maylan** in his evidence kept repeating that his objection to Penley View was that it was a congregate setting. There was a whiff of this being a policy decision and nothing we have seen in the papers dispels that suspicion. There will be 12 Service users on the site with associated staff but we cannot see there is any evidence to suggest that the six people in each home will receive anything other than person centred care.
35. The CQC further state that the congregate nature of the setting is reinforced by its relative isolated location. It is about a mile away from the local village/town set in its own grounds with a long drive and just two neighbours. This therefore isolates the service users from the community and tends towards the congregate argument.
36. A number of issues arise from this. The first is one of choice. This is a fundamental principle of the guidance. Some people choose to live in city's, some in towns, some in villages and some in the country. If they are economically able that is their choice. If the CQC argument is followed this choice is denied to this group of service users. Not all service users need or want to live within a town, city or village. What Penley View and Penley Grange offer is life in the country. Given the sensory needs of many people with the

disorders they cater for, the peace of a rural setting may meet their needs far better than the hustle and bustle of a town house.

37. Furthermore CQC have equated geographic isolation (we do not consider being a mile from a town actually is geographic isolation) with lack of engagement with the community. Ms Akhtar gave us compelling evidence of how far from reality this is for her residents. As most have 1:1 support there is a great deal of flexibility for support staff to be creative and for example to drive them out to different activities. She cited examples such as music classes in High Wycombe, train spotting or art classes in Aylesbury that were made available for service users. She gave compelling evidence of a service user who likes to go to the pub but doesn't like noise. She explained in great detail the negotiations with a local pub landlord to manage this dichotomy. The residents of Penley Grange interact with the community as much as they are able. We are confident that the residents of Penley View will be similarly assisted.

38. A further ground for rejecting the application was the failure of the company to show need. The company sent the CQC a document entitled "Buckinghamshire County Council Market Position statement for Specialist Housing - December 2016". Under the heading Autistic Spectrum Disorders the document states inter alia;

"Establishing accommodation with support for individuals with ASD needs to give consideration to the suitability of urban and rural areas. Accommodation in urban areas is not always suitable for some adults with ASD who can be exceptionally sensitive to noise levels and clients with challenging behaviour benefit most from plenty of space

Currently in Buckinghamshire there are insufficient appropriate housing options for adults with autism As a consequence placements are made out of area. The aim is to develop support and accommodation to meet an individuals needs closer to the family. Specialist provision for autism or challenging behaviour anywhere would offer opportunity for these

clients to return to Buckinghamshire or for others to avoid an out of county placement”

39. We struggle to see how much clearer a statement of need could be. We are also surprised given the clear description of rural need within the document that the CQC failed to consider this aspect at all. Mr ~~Molyan~~ **Maylan** in evidence said that the applicant had failed to demonstrate engagement with Commissioners but Ms Akhtar countered this by saying Commissioners in Buckinghamshire will not engage with a small provider such as herself. Furthermore she produced to the CQC a series of 7 cases where commissioners (local authority and health) and relatives had approached her. Two had assessments but these were on hold because of the refusal of registration.

40. The argument regarding need put forward by CQC is spurious and rather undermines the objectivity of their decision making. There is patently a need, Centurion are a commercial organisation they would not have undertaken this project without a clear understanding of the market.

DECISION

41. It follows from the above discussion that we do accept that Penley ~~Vale~~ **View** is a separate unit from Penley Grange. We do not accept that together they form a campus setting. We find that together they do not create a congregate setting and that there is a local need for the services offered. It follows therefore that we consider that this application does fall squarely within the Guidance and that accordingly the application should have been granted

42. If we are wrong on our conclusion for the reasons we have set out above we do not consider that CQC have exercised their discretion appropriately. They have failed to properly evaluate the application. They have failed to consider the needs of the particular Service User group that Penley ~~Vale~~ **View** would cater for. They have failed to consider whether any of the objections they have

raised, could be met through the imposition of Conditions. They have fallen into the very trap that their own guidance warns against.

“We do not wish to be overly prescriptive, and it is not our intention to create a ‘one size fits all’ approach”

42. Accordingly we allow the appeal and direct that the decision of the CQC dated 31 January shall have no effect.

Judge Ian Robertson

18 October 2018

Amended: 24 October 2018