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Case No: CL-2021-000670

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 May 2023

Before :

MR CHARLES HOLLANDER KC
(Sitting as a Judge of the High Court)

Between :

CARE TREE INVEST 2 LTD

Claimant

- and -

ALEXANDER EDWARD ALAN BELL

Defendant

James Cutress KC and Sam Rabinowitz (instructed by Dentons UKMEA) for the Claimant
David Allen KC and Jason Robinson (instructed by Ward Hadaway) for the Defendant

Hearing dates: 25th – 28th April 2023

JUDGMENT

This judgment was handed down remotely at 10.00am on Monday 15th May by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

CHARLES HOLLANDER KC:

1. This is the judgment on a trial on quantum for misrepresentation and breach of warranty.

The SPA

2. By a Share Purchase Agreement (the SPA) dated 9 July 2021 the Defendant (Mr Bell) sold to the Claimant (Care Tree) the issued share capital in two companies he owned, Hollingwood Care Home Limited (Hollingwood) and Whitwell Park Care Home Limited (Whitwell) for the sum of £30,447,601. Hollingwood had a wholly owned subsidiary, Elmcare Ltd (Elmcare). These companies owned seven residential care homes one of which is Elmwood House. Care Tree is a special purpose vehicle created for the purchase of the relevant shares; its parent owns 46 care homes in the UK and the ultimate shareholders control a larger network of operators engaged in the provision of full-time care for some 2,000 individuals across Europe.
3. On 29 June 2021, ten days before the SPA, the Care Quality Commission (CQC) performed an unannounced inspection of Elmwood House. As a result on 1 July the CQC took Enforcement Action by issuing a Decision Notice under s31 of the Health and Social Care Act 2008 imposing seven conditions on Elmwood House's registration as a service provider. The first prohibited the admission of any new residents (often referred to as service users) without the consent of the CQC (Restriction of Admissions) and the other six required immediate reviews to take place in specific areas and that Elmcare provide ongoing monthly reports to the CQC on the implementation of the policies and governance systems identified.
4. The issues raised mostly arose in relation to COVID policies and addressed questions of safety of residents and governance. There were conclusions that "*the environment at Elmwood House was not "safe"*" the provider's actions "*put service users at high risk of potential harm*" and there had been "*widespread disregard to government guidance*" and "*poor quality governance in place.*"
5. Feedback was given in relation to the Inspection in a meeting on 7 July 2021. This resulted in a downgrade under the Care Act 2014 of the home on 12 July 2021, shortly after Completion under the SPA, from 'Good' to 'Inadequate'. An "Inadequate" rating, means according to the CQC that "*the service is performing badly and we've taken action against the person or organisation that runs it.*" The rating system has "Outstanding" then "Good" "Requires Improvement" and "Inadequate." There are potentially five areas which the CQC will review ; the inspection only looked at two. The Inspection Report found that Elmwood House was Inadequate in the only two areas that were reviewed: whether it was "*safe*" and whether it was "*well-led.*" "*Safe*" meant that "*people were not safe and were at risk of avoidable harm.*" Not "*Well-led*" meant "*there were widespread and significant shortfalls in service leadership. Leaders and the culture they created did not assure the delivery of high quality care*" and "*the provider had not implemented systems and processes to ensure they could assess, monitor and improve the quality and the safety of the service.*"

6. The Inspection Report recorded that Elmwood was in breach of Regulation 12 (Safe Care and Treatment), Regulation 17 (Good Governance) and Regulation 19 (Fit and Proper Persons employed) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.
7. The CQC experts who gave evidence before me were agreed that an “Inadequate” rating was to be expected in the light of the terms of the s31 notice issued on 1 July.

Non disclosure

8. None of this was disclosed to Care Tree prior to the SPA. It should have been. Care Tree only learned of what had occurred on 13 July 2021. Because the SPA treats warranties as also representations, this involved breach of warranty and misrepresentation by Mr Bell. It is accepted that the non-disclosure is to be treated as fraudulent and the measure of damages in fraud is applicable.
9. There are a number of warranties under which these matters should have been disclosed. It was not suggested that it mattered which of those provisions were breached:
 - a. 5.1: “Each Group Company [which includes Elmcare] has at all times conducted its business in accordance with, and has acted in compliance with all applicable laws, regulations, orders and byelaws of any relevant jurisdiction”. This was breached because Elmcare was in breach of Regulations 12, 17, 19 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, in the ways that had been set out in the Decision Notice and Feedback Form (and post-completion, the Inspection Report);
 - b. 5.4: “Each Group Company has at all times complied in all material respects with their registration with the CQC as a provider of Regulated Activities in connection with the Business and all requirements issued by the CQC and there are no requirements issued by the CQC and which are outstanding as at the date of this agreement”. This was breached because: (i) it is a requirement of registration with the CQC as a provider of Regulated Activities that Elmcare comply with the Regulations described above, but it had breached them; and (ii) there were outstanding requirements issued by the CQC as at the date of the SPA, namely those set out in the Decision Notice and the requirement to remedy the failings identified in the Decision Notice and Feedback Form;
 - c. 9.1.2: “No Group Company...nor any person for whose acts such Group Company may be vicariously liable...is engaged in or involved in or otherwise subject to...any dispute with, or any investigation, inquiry or enforcement proceedings by, any governmental, regulatory or similar body or agency in any jurisdiction”. This was breached because Elmcare was subject to enforcement proceedings by the CQC: the action taken under s.31, issuing the Decision Notice and imposing the Conditions, constitutes such proceedings;
 - d. 9.3.1: “No Group Company...is affected by any subsisting or pending judgment, order or other decision or ruling of a...governmental, regulatory or

similar body or agency in any jurisdiction;...and there are no facts or circumstances likely to give rise to any Group Company becoming subject to such a judgment, order or other decision or to be a party to any such undertaking or assurance”. This was breached because as at Completion, Elmcare was subject to the CQC’s pending ruling, following the Inspection and Decision Notice;

- e. 33.1: “All notices and correspondence received by each Group Company from the...CQC in the 12 months preceding the date of this agreement have been Disclosed”. The Decision Notice, Feedback Form and further correspondence between Elmwood House and the CQC between the date of the Inspection and the SPA, had not been disclosed.
 - f. 33.3: “Copies of all reports prepared by...the CQC in respect of any Care Home during the period of 3 years preceding the date of this agreement have been disclosed and there are no outstanding reports due to be prepared by the...CQC following an inspection of any Care Home”. This was breached because the Feedback Form constituted a report that had been prepared in the prior 3 years, and the Inspection Report was outstanding.
10. There was a further breach of 9.1.2 on the basis that Ms Deborah Metcalfe, Home Manager for Elmwood House, “*a person for whose acts Elmcare may be vicariously liable*”, was subject to an investigation by the Nursing & Midwifery Council (“NMC”), which is a regulatory body. Mr Bell admits that Ms Metcalfe was under NMC investigation at the time of the SPA in relation to an allegation of falsification of documents. He also admits that he was aware of this by 5 July 2021 and was interviewed about it on 7 July, but did not disclose it to Care Tree prior to the SPA. It follows that there was a further breach of this warranty. Although this breach was not admitted on the pleadings, Mr Bell conceded the point in evidence. In the event the investigation was dropped without charge some time later. Whilst it was suggested by the Claimant that this separate breach was relevant to damages to the extent that it needed to be “thrown into the mix” I do not consider it caused any damage.
11. By the SPA:
- a. Mr Bell warranted and represented to Care Tree that, “*except as Disclosed, each Warranty is true, accurate and not misleading on the date of this agreement*”: clause 9.2.
 - b. He acknowledged that Care Tree was “*entering into this agreement on the basis of, and in reliance on, the Warranties*”: clause 9.1.
 - c. By clause 9.2 of the SPA, the parties expressly agreed that the Warranties took effect as representations and not merely as contractual warranties;
 - d. By clause 9.1 of the SPA, the parties agreed that the falsity of the representations could give rise to a claim in misrepresentation and that that the Buyer was entering into the SPA in reliance upon such representations.

The Rival Contentions

12. This, therefore, is a trial of quantum. The measure of damages in tort and contract is different. In contract it is the difference between the value of the shares as warranted and the actual value at the date of the SPA. In tort it is the difference between the consideration paid under the SPA and the actual market value of the shares. Because this is a claim in fraud, the usual rules of remoteness do not apply and Mr Bell is liable for all the damage suffered by Care Tree, foreseeable or not, although in this case, remoteness is not really an issue.
13. Care Tree says the simplest method of assessing loss is to compare the price paid with the value of the shares at the date of discovery of the fraud, 13 July 2021. An alternative way of looking at it is to value the shares on the date of the SPA, 9 July 2021 but on the hypothesis that the Inspection Report with its “Inadequate” rating had by then been received. These alternatives come to the same thing.
14. So far there was no dispute between the parties. What it comes to is how far the actual value of the shares in July 2021 was less than the price paid.
15. There was really only one difference in approach between the parties. In determining the value as at July 2021 as between willing seller and willing buyer, Mr Cutress submitted that it was necessary to recognise the s31 Notice and Inadequate rating had just occurred and thus the hypothetical buyer would not have had proper time to react. I do not consider this is the right approach. It is permissible to look at subsequent events in order to establish the value as at the relevant date: see for example *Derry v Peek* [1889] LR 14 App Cases 337. Moreover, there is no good reason why damages should not be assessed on the basis that a prudent buyer learning of the relevant facts would have carried out a further detailed inspection of the homes before negotiating a price. Otherwise, where the matters which should have been disclosed arose just before the sale, no hypothetical buyer would ever proceed in a no-transaction case.
16. There were references in argument to fair and just compensation or whether Care Tree might obtain a windfall. These seem to me unhelpful ways of re-characterising the exercise I am required to undertake in assessing quantum.
17. Where the parties differed was in their case as to the value of the shares in July 2021 in their adversely affected state.
18. Care Tree says that the effect of the breach was that one of the major assets purchased, Elmwood House, had no value other than its bricks and mortar. Moreover, the taint of the “Inadequate” inspection affected the value of the other care homes, put an increased focus on their adequacy, and increased the risk of CQC looking carefully at the adequacy of the other homes and that this risk would have affected the price a buyer would have been willing to pay for the shares.
19. Mr Bell’s case accepts that there was a diminution in the value of Elmwood House, but not to the extent alleged by Care Tree, and also accepts, but to a lesser extent, the diminution in value of the other homes sold.
20. It was the evidence of Mr Coleman for Care Tree that if there had been proper disclosure, Care Tree would have pulled out of the agreement. That evidence was not challenged and I accept it.

21. Care Tree would have been entitled to rescind the SPA for fraud, but elected not to do that and sue for damages instead. They ran and continue to run the portfolio of homes including Elmwood House. Given that they would not have entered into the SPA had they known the true position, it is perhaps surprising that they chose not to rescind. But that was an election they were entitled to make and nothing turns on it or the reasons for it.
22. Although it seems clear that the “Inadequate” rating for Elmwood House gave rise to the risk that the CQC would pay increased attention to the adequacy of the other homes in the portfolio, in the event this risk did not materialise.

Elmwood House

23. Elmwood House has 32 operational beds for residents; the other six homes in the portfolio combined have a further 71 operational beds. For the year ending 31 January 2021 (on which the price paid under the SPA was based), Elmwood House was responsible for 32.3% of the profits (in terms of EBITDARM) of the portfolio. Elmwood House was one of two specialist nursing care homes in the portfolio. It specialised in caring for those with physical or psychological problems arising from autism, which is indeed a specialised form of care. It had space for 32 residents and was fully occupied at the time of the SPA. As many of the residents were not elderly, the average stay of residents in the home at the time of the SPA was something like 14 years.
24. The effect of the s31 notice was that it could not accept new residents without the consent of the CQC. The s31 Notice had the effect that if a resident was admitted into hospital, Care Tree needed the consent of the CQC before that resident could be readmitted but in the event no problem arose in that regard. In the period to February 2022 they lost 7 residents (4 died and 3 were moved) but they never had the opportunity to test whether the CQC would give consent, principally because local authorities were not putting anyone in Elmwood House in the light of the “Inadequate” rating.
25. In the event there were two further inspections in April 2022, which led to an upgrade from “Inadequate” to “Requires Improvement”. That report was published in June 2022.
26. Where a home is not rated Inadequate, and therefore the risk is much lower, the CQC expect to inspect every 12 months rather than 6. In fact Elmwood House was inspected again after a rather shorter period. Elmwood House reverted to “Inadequate” on a further inspection on November 2022 (which notably was less than six months after publication of the previous inspection) and in April 2023 Care Tree took the decision to close it. Whilst it is relevant to record these developments, as they relate to events subsequent to July 2021, it is not relevant to consider precisely why they occurred.

Factual evidence

27. A number of factual witnesses on both sides were called to give evidence before me. All of those who gave evidence, without exception, gave honest evidence and did their best to assist me. But much of that evidence was irrelevant to the question I have

to decide, although to be fair the boundary between what is relevant and what is not in the present case is difficult to draw.

Expert evidence

28. I heard from two sets of experts.
29. Mrs Sue Howard and Mr Michael Trafford gave evidence on matters concerning the CQC regime. There was very little between these two experts, and both gave helpful evidence. It was important to understand the CQC regime and its effect.
30. The s31 Notice prevented Elmwood House from taking new admissions without the consent of the CQC. In the event, the “Inadequate” rating meant that new admissions were unlikely because local authorities would not place service users there. The s31 Notice required monthly reporting by Elmwood House to the CQC.
31. The Inadequate rating and the finding that residents were not “safe” meant that the CQC’s risk based approach required it to pay close attention to Elmwood House. The CQC would expect to gather and review the monthly reports which they required under the s31 Notice and would inspect six months after publication of the report arising from its 29 June inspection. Although that report was provided to Elmwood House on 12 July, it was not published (on the website) until September 2021 (the process leading up to publication recognised, for example, possible appeals). So the next inspection would be expected six months thereafter.
32. The CQC’s processes are evidence-based. So they would rely on (i) the reports they were receiving (ii) any information obtained from stakeholders, such as other bodies and (iii) ultimately, their next inspection.
33. Mrs Howard explained in her evidence the problems in a home recovering from an Inadequate rating:

“CQC’s view is they cannot stay the same. They either have to improve or they have to leave the market. In my professional opinion, and having watched services be rated and see the consequence of “inadequate” rating, it is very difficult for a provider to make the improvements that they need. Usually by the time that a service has reached the point where they are inadequate, it doesn’t happen overnight. So a service rarely goes in reality from being fantastic one day to being inadequate the next day. It will have been happening over a long period of time. Things will have started to deteriorate, things will have started to get worse, things are not being picked up. Governance is really, really key in all of this, in monitoring and making sure that things are all of the time as they should be. It just it will have happened over a long period of time. For a service to be inadequate, there are systemic and cultural issues that can’t just be easily rectified. So if I go into do an inspection as an inspector, and I say this care plan isn’t up to date, that is one issue. But if I actually look at the care that is delivered to that person and it absolutely is as it should be,

everybody understands what that person needs, everybody understands the risks that are involved with caring for that person, whilst I will still require that service to update that care plan, that isn't going to be of serious risk to me, because they can quickly update that care plan. If however, those care plans are not only not up to date, nobody knew they weren't up to date, because they are not being monitored, people's care is not therefore as it should be, staff don't know what it is they have to deliver to that person and the risks, it is a much bigger issue and it's all then about who is monitoring that service, who is training those staff, who is making sure that everybody knows the needs of every single person? So it's much more systemic and it comes from the leadership, the way that the manager manages that service, the governance of that service, the constant oversight. Having managed a service as well as regulated services, it is not an easy job at all. It's really not. And there is much more to it than just, you know, making sure everybody is okay. You have however many people in that service and you have to meet the individual needs of every single one of those people safely. It's not easy. When you reach that point of it being inadequate, it is incredibly difficult to turn it around. That is certainly what I have seen in my professional opinion."

Mr Trafford did not significantly disagree with that evidence.

The condition of Elmwood House

34. Mr John Coleman, M&A director of BC8 SPRL, which set up Care Tree and was Care Tree's principal witness, was pressed with a series of emails he wrote to the lenders on the deal after the discovery of the problems with Elmwood House. These emails present a much more optimistic picture than has been put forward by Care Tree in this litigation. Care Tree had enhanced reporting obligations towards the lenders but the breaches meant that, through no fault of Care Tree, there was a risk of an Event of Default occurring which would have potentially entitled the lenders to call in the loan. It is not surprising that Care Tree, and Mr Coleman, were concerned about this. It is probably fair to describe Mr Coleman's emails as representing the most optimistic gloss that could be put on events without actually misleading the funders.
35. On 16 July, three days after the discovery, Mr Coleman emailed the lenders as follows:

"It is important to point out that the inadequate rating is not a result of an abusive culture or an uncaring and unpleasant environment for the service users, which would be extremely challenging to rectify. The central issue here is that the necessary processes and controls, largely relating to COVID, were not in place and this is something we can act on quickly by installing our existing processes and controls, and by properly integrating the home into our wider organisation with the additional oversight this will bring. ...we hope it will allow

us to demonstrate to you the quality of our operational team in the UK, and so long as the team delivers there should be no impact on the base case business plan cashflows.”

36. By 23 July his report to the lenders was as follows:

“The issue is isolated to one of the homes there is no risk of contagion in other homes, the CQC isn’t removing residents from the home and therefore there should be no impact on the headline cashflows. There will be additional legal costs incurred by the Borrower, but we are working to have a proportion of these be contingent. There will also be some costs associated with advisor fees if we need to engage valuers to quantify the impact on equity value of the seller’s misrepresentation.”

37. By 17 February 2022 things had moved on:

“The impact of the special measures and turnaround required at Elmwood on the finances has been far greater than we initially foresaw and as a result, whilst we have not broken our covenants, we will come quite close to the default level on the Debt/EBITDAR covenant.

The EBITDAR from Elmwood has been materially impacted by two factors:

- 1. On the revenue line we have lost 7 residents (this is due to 4 deaths and 3 being removed by contracting authorities) and due to the special measures we have been unable to replace them with new residents-this has an annualised impact on EBITDAR of c£300k, and*
- 2. On the cost line we have incurred c£250k more in agency staff cost at Elmwood than we would expect as the cultural re-set at the home has required a heavy turnover in legacy staff, particularly with respect to the nursing, which has meant a greater reliance on agency to meet any short term shortfalls.*

The remaining 6 homes in the portfolio continue to perform in line with expectation, but with Elmwood now close to breakeven as a home level P&L we have a 20% shortfall in the overall level EBITDAR for the portfolio.

.. This overhaul has been a huge task for management, but we are confident now the home is fit for purpose and will be recognised as such by CQC.

-We continue to wait on the CQC for a re-inspection of the home and anticipate this in the coming weeks, in the meantime we continue to receive positive feedback from the contracting Las[local authorities] on the improvements that have been made at the Elmwood home and indeed across the full Elmcare portfolio.”

38. It is said on behalf of Mr Bell that as Mr Coleman accepted he would not have deceived the lenders, these emails should be taken as a fair representation of the position at Elmwood House in the months that followed the SPA.
39. However, there was a lot of evidence from Care Tree’s factual witnesses as to the problems at Elmwood House both before and after the sale indicating that the problems were worse even than the CQC had found. All of Ms Tina Kelly, Ms Farah Hutchinson and Ms Elise Todd gave evidence as to the extent of the problems at Elmwood House and the difficulties in remedying such deep-seated and fundamental problems in the period after the sale. There was almost no cross-examination on these matters. It would be quite wrong to ignore this evidence.
40. I do not accept that I should treat Mr Coleman’s emails to the funders as a fair representation of the position at Elmwood House. In my view the position was much worse than he was suggesting and he was seeking to put the best gloss on the position that he could.

The Valuation Experts

41. The evidence before me which was most significant was that of the valuation experts, Mr Daniel Smith of Grant Thornton and Mr David Hayton of Eddisons.
42. Mr Smith’s evidence was that in the light of the Inadequate report, Elmwood House was worth no more than the value of the bricks and mortar: it should be valued on the basis of a care home ready to be put into operation but goodwill should be valued at nil. As for the other care homes in the portfolio, the Inadequate rating for Elmwood House tainted their value by “contagion”: there was an enhanced risk to a buyer that where one home in the portfolio had been downgraded to Inadequate, others might suffer a similar fate where the homes were managed on the basis of similar policies and management, and that additional risk would be reflected in a lower PE ratio for the other homes in the group from 10 to 7.5.
43. Mr Hayton’s approach was to assume lower revenue and higher costs for Elmwood House over a two year period, the time he considered it could be expected to take to get the home back to a “Good” rating. In addition, he accepted the problems at Elmwood House and the potential increased risk on the other homes would lead to a downgrade on the overall price. Mr Hayton recognised that there was no analytical means of ascertaining the financial effect of that, so took the approach of assessing the likely extra costs and shortfall in income over a two year period for Elmwood House and then made a generalised deduction of £2m in recognition that a buyer would be expected to seek a discount to the purchase price overall in the light of what had occurred. Although the £2m deduction was not scientifically calculated, there is nothing objectionable in principle in such an approach.

44. Both Mr Smith and Mr Hayton were experienced valuers of care homes and sought to assist me in their evidence. But in my view Mr Hayton gravely underestimated the effect of what had occurred at Elmwood House.
45. Mr Hayton did a series of calculations based on the possible alternatives that the effect of the 29 June inspection could, as matters would have appeared at the date of the SPA, give rise either to a “Requires Improvement” or an “Inadequate” rating. In the light of the evidence from the CQC experts that, given the terms of the s31 Notice, an Inadequate inspection was inevitable, he did not seek to rely on the Requires Improvement calculations, but it was an indication that he had not grasped the extent of the problem.
46. Then Mr Hayton stated at 4.10 of his report:

“I am of the opinion that the reduction in the profitability of Elmwood House as a result of occupancy reductions would have been a temporary phenomenon and that once the restriction on seeking to obtain CQC approval for a placement had been lifted and the CQC rating had returned to “Good” the profitability would have largely returned to the previous level.”
47. For Mr Hayton to proceed on the assumption that the problems were a temporary phenomenon in this way was entirely unwarranted and at odds with the evidence from the CQC experts.
48. There were grounds for concern that Mr Hayton had been influenced by Mr Bell’s views in the preparation of his report, as the version in the trial bundle contained two paragraphs from an early draft which he said had been retained in error and were omitted from the final version, according to Mr Hayton because Mr Bell had taken issue with them. That would appear to reflect an inappropriate method of preparation of an independent expert report in accordance with rules and guidance. Giving Mr Hayton the benefit of the doubt, I will simply assume he had been persuaded in the course of preparation of his report that his initial views on this point were incorrect. However, I do not think Mr Hayton really appreciated the seriousness of the s31 Notice and the Inadequate finding and his views on Elmwood House were coloured by this misapprehension.
49. It is also relevant to note that the inspection into Elmwood House and the subsequent s31 Notice and Inspection Report only covered two of the five issues which would be the subject of any full inspection. Any buyer would be able to see (i) that things had gone badly wrong at Elmwood House recently (ii) it was unclear what the extent of those problems was because the CQC had only looked at two areas.
50. Mr Smith, the Claimant’s expert, was subjected to a sustained attack in cross-examination in respect of Elmwood House on both his methodology and the way he had dealt with the materials on which he relied. I should therefore say that I found Mr Smith a compelling and credible witness on this issue and entirely reject the criticisms levelled at his analysis.

51. Mr Smith's evidence was that care homes with an "Inadequate" rating are pretty well inevitably loss making and are not marketable. His evidence was that Elmwood House was worth no more than the bricks and mortar in July 2021 because there was simply no market in care homes rated Inadequate. It is difficult in this sort of exercise to find comparables but Mr Smith had made an impressive effort to identify data which was capable of assisting:
- a. An analysis of care home inspections 2018-2021 showed that of about 5500 specialist learning disability care homes, only about 1% had been rated Inadequate.
 - b. Of the 51 ranked Inadequate in July 2019, by July 2021 12 were ranked Good, 15 Requires Improvement, 7 Inadequate and 17 were no longer in the ratings dataset.
 - c. Of those 17, 8 had closed, 6 were assumed closed and 3 were registered under a new provider.
 - d. Data from Christies, leading specialist advisers for sales of businesses in the sector, showed 157 instructions since 2015 in specialist care homes regulated by the CQC. Seven of those instructions referred to a home which (at some stage of the sale process) had an "Inadequate" rating. For three of those, the instruction was withdrawn, three proceeded on the basis that the home was treated as closed, one went through but at a lesser price than the value of the properties.
 - e. Of the 51 specialist care homes rated Inadequate in July 2019, 46 had comprehensive inspections (ie were assessed against all five categories). Of these, two received Good ratings for one or more of the five categories. Across the full database of 51 homes there were three Good ratings against a key category. One of the homes which received more than one Good rating was in July 2022 Requires Improvement and the other had closed.
52. Mr Smith asserted with certainty that Inadequate care homes simply do not sell on the market. He also said in evidence that in practice, even if they have been previously profitable, they become loss making very quickly with an Inadequate rating: costs are incurred to try to fix the problems, staff leave so agency costs increase which are much higher than the costs of permanent staff. The effect of the s31 Notice will be that it is in practice almost impossible to attract new admissions, and there will be a gradual reduction in residents as existing residents die or are moved.
53. Then there is the key problem of financing. Banks will simply not lend on Inadequate care homes, other than perhaps on a bricks and mortar value basis. In the present case the purchase was funded by an £18m loan on a purchase of about £30m. So if the bank had refused to lend for Elmwood House other than to the extent of the property value, that would inevitably have created all sorts of problems.
54. Throughout Mr Smith's cross-examination he was entirely clear that there simply was no market for Inadequate care homes, and that, as he put it, Inadequate homes do not make money.

55. Mr Hayton was asked about his experience of valuing Inadequate care homes. He made clear that he needed to be careful not to breach confidentiality in instructions he had received. His valuation experience in this regard related to elderly rather than specialist care homes, which he said was different because in such cases there was much less difference between the value of the business and the value of the bricks and mortar.
56. Mr Allen submitted that Mr Smith had failed to consider the evidence of Mr Coleman's emails to the funders, had ignored the factual position, and had failed to do any factual analysis of the maintainable profits. Mr Hayton had looked at the likely diminution in revenue and the likely additional costs caused by the s31 Notice and Inadequate rating, and sought to quantify the period over which these revenue shortfalls and additional costs should be assessed; it was submitted that the failing in Mr Smith's evidence was that he had failed to undertake a similar task and thus his report ignored the facts.
57. The trouble was that this analysis by Mr Hayton assumes that in July 2021 a willing buyer would have been willing to pay a price for Elmwood House on the basis that it was a profitable business which could be expected to return to profitability in the foreseeable future. The Defendant's analysis assumes that a buyer in 2021 with the benefit of full disclosure would have been willing to purchase the home on the basis of a PE ratio. The fact that it was accepted no bank would be willing to finance such a purchase shows how unrealistic this is. I accept Mr Smith's statement that buyers do not pay for Inadequate homes other than on a bricks and mortar basis and the data produced supports such a conclusion.
58. In my view Mr Smith's analysis was unanswerable, and I accept his conclusion that the value in July 2021 of Elmwood House was no more than the bricks and mortar value which he puts at £1,665,666.
59. I have been careful not to rely on what happened subsequently, as that gives rise to a separate and impermissible enquiry as to the reasons for what happened subsequently. But what happened subsequently is instructive. By August 2021, a month after the SPA, the letter before action claimed damages on the assumption that Elmwood House could only be sold for the value of the bricks and mortar. The claim was brought in November 2021 on the basis of the same figures as subsequently used by Mr Smith in his report. Mr Coleman's evidence shows that Elmwood House was lossmaking within 12 months of the SPA, and a decision was made to close it less than two years after the sale. So it is very striking that what Mr Smith was predicting very shortly after the SPA has turned out to be borne out by what actually occurred. That does provide some measure of backup support for Mr Smith's analysis.

The other homes

60. Both experts recognised that the Inadequate rating and the s31 Notice provided an additional risk for a buyer in July 2021 in relation to the other homes. The other homes in the portfolio were under the same overall management. The CQC would be bound to place more focus on the other homes in consequence. Mr Smith thought the way of dealing with this was to reduce the PE to 7.5 from 10 on these other homes. Mr Hayton took £2m off the overall price although importantly this included loss of goodwill on Elmwood House.

61. The fact is, there was nothing wrong with the other homes. There never were any problems. The CQC did not make any additional inspections; on the contrary they took the view that nothing they had learned about Elmwood Houses gave them cause to investigate any of the other homes.
62. It was submitted on behalf of Care Tree that there was a disadvantage in owning a portfolio of care homes where one in the group had an Inadequate rating, and that gave rise to reputational risks.
63. It seems to me that if a buyer learned of the Inadequate rating and s31 Notice on Elmwood House, it would carry out a full inspection of the other homes to assess whether there was any evidence of similar problems. Such an inspection was in fact done by Care Tree and no problems of significance found. An alternative possibility is that perhaps Elmwood House could have been hived off and sold separately.
64. In my view it is important not to exaggerate the effect of this risk factor. There is no right answer to the means of valuing a risk factor to a buyer in relation to which there was in fact no problem and no evidence of any potential problem. I think Mr Smith's deduction is excessive. I think a hypothetical buyer would reduce the value by £750,000 to take into account this factor.

Conclusion

65. Damages in relation to Elmwood House are assessed at £9,518,089, (the proportionate value of Elmwood House in the portfolio based on the SPA price) less £1,665,666 (£7,852,423) plus £750,000 in relation to the other properties, a total of £8,602,423."

Indemnities

66. I did not hear argument on the indemnities claim pleaded. I did not understand this claim to add anything to the other claims but if necessary this can be dealt with subsequently.