

**Care Standards**

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

**IN THE MATTER OF AN APPEAL UNDER SECTION 32 OF THE HEALTH AND SOCIAL CARE ACT 2008**

**BETWEEN**

**BLUESTONE CARE LTD  
(MR NEIL COOMBS)**

**Appellant**

**And**

**CARE QUALITY COMMISSION**

**Respondent**

**[2018] 3274.EA**

**BEFORE**

**HUGH BRAYNE (JUDGE)**

**HEATHER REID (SPECIALIST MEMBER)**

**MICHELE TYNAN (SPECIALIST MEMBER)**

**DETERMINED ON 2 JULY 2018 VIA TELEPHONE CONFERENCE WITHOUT ORAL HEARING UNDER RULE 23**

**The appeal**

1. Neil Coombs applied to the Respondent for the registration of Bluestone Care Ltd as a provider of a regulated activity, personal care, on 27 September 2017. On 8 February 2018 the Respondent served a notice of proposal to refuse the application. In 23 February 2018 the Respondent served notice of a decision to refuse the application. On 6 March 2018 Mr Coombs, as sole director of Bluestone Care Ltd, appealed that decision.

2. The reasons for the refusal, and the issues for this Tribunal, were that the Respondent was not satisfied under Regulation 5 Health and Social Care (Regulated Activities) 2014 that Mr Coombs was a fit and proper person; and that the CQC was not satisfied under Regulation 13 of the CQC (Registration) Regulations 2009 that Bluestone Care was, and would continue to be, compliant.

### **The legal framework for this appeal**

3. Section 12 of the HSCA 2008 sets out the criteria which the Respondent must follow when deciding to grant or refuse registration as a service provider:

*(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.*

4. Regulation 5 of the 2014 Regulations sets out the following requirements

#### *Fit and Proper Persons*

*This regulation applies where a service provider is a body other than a partnership. Unless the individual satisfies all the requirements set out in paragraph (3), a service provider must not appoint or have in place an individual*

—

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

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

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

*(a) the individual is of good character*

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

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

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

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

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

5. Regulation 13 of the 2009 Regulations provides as follows:

***Financial position***

*(1) Subject to paragraph (2), the service provider must take all reasonable steps to carry on the regulated activity in such a manner as to ensure the financial viability of the carrying on of that activity for the purposes of—*

*(a) achieving the aims and objectives set out in the statement of purpose; and*

*(b) meeting the registration requirements prescribed pursuant to section 20 of the Act.*

6. Although the above Regulations are from different statutory instruments, for convenience we refer to the Fit and Proper Person requirements simply as Regulation 5 and the Financial position requirement as Regulation 13.
7. The Respondent's case (Skeleton argument para 17) is that the Appellant "has not provided sufficient assurance to demonstrate, on the balance of probabilities that it has been, and will be, able to comply with Regulations 13 and 5".
8. The Tribunal must determine the appeal on the basis of the evidence as at the date of our decision. It can confirm the Respondent's decision or direct that it is to have no effect. It can also impose discretionary conditions instead of cancellation. It is for the Appellant to satisfy us that the conditions for registration are met.

**The Respondent's case and evidence**

9. We have carefully read the documents in the hearing bundle, but refer only to those necessary to reach and then explain our decision. Where facts are not in dispute we do not need to refer to the evidence.
10. The key facts relied on by the Respondent, most of which are not in dispute, are set out in its reasons for opposing the appeal and the reasons for the notice of intention. We summarise the Respondent's case with reference, but add information from other sources where relevant. (The facts summarised below are also referred to elsewhere, in witness statements and the notice of intention to refuse registration. It is not necessary to repeat each iteration.)
11. Mr Coombs is also the sole director, nominated individual and registered manager of Wii Care Limited, a provider registered with the Respondent. It is currently subject to conditions. Mr Coombs on 24 November 2017 applied to cancel the registration on the basis that Wii Care was closing down and the new company Bluestone Care was being formed. Staff testimonial forms dated January 2018 confirm the intention, which was "transferring from one named company to another to comply with the Care Quality Commission". Wii Care was at that time subject to conditions agreed in the course of a Tribunal appeal in July 2017. It was also the subject of a company voluntary agreement (CVA). This was because at the date of its August 2016 return to Companies House its liabilities exceeded its assets by over £40,000. Outstanding debts included fees payable to the Respondent since January 2016.

12. When interviewed on 24 November 2017 in relation to the application to register Bluestone Care Ltd Mr Coombs said the debts of Wii Care would be paid by Bluestone. Following the interview and site visit the Respondent considered that the Appellant's business plan and cash flow forecasts contained insufficient detail and indication of sources of funding. Correspondence led to receipt from the Appellant of further business plans. The Appellant indicated in those plans requests for meetings to seek sales to the NHS, Medway Council, Kent Council and Bexley Council. Medway had subsequently said the Appellant were not one of its framework providers and there was no evidence of any meetings with the other organisations mentioned.
13. The notice of intention concluded that there was "an overall lack of financial planning and management in the application to the CQC", and a "track record of Wii Care Limited, an organisation of which Mr Coombs was sole director in relation to the financial management of the business was poor. You have not been able to demonstrate that this will improve the new legal entity of BlueStoneCare Ltd."
14. More detail is contained in witness statements. Stephen Maylan is a Registration Inspector for the CQC, and his statement is dated 25 May 2018. He referred to the opinion of a financial analyst in relation to the Appellant's financial forecasts. The analyst is reported to have emailed on 24 October 2017 to state that the financial forecasts in the Appellant's business plan were not presented in a way which would lead to confidence that the business would be adequately funded, and that the health and wellbeing of people cared for would therefore be at risk. He refers to further opinion from the financial analyst received on 20 December 2017 in relation to the Appellant's revised business plan, noting that there would be "no funding in place and there were still creditors from Wii Care Ltd to be paid. The analyst's opinion was that "the previous financial record of WiiCare Ltd made Mr Coombs, in his view, totally unsuitable to be in charge of a company registered by the CQC to provide care services." It was unrealistic for Mr Coombs to expect to grow turnover from nothing to over £1 million in three years. Mr Maylan had then requested a financial forecast excluding income from the NHS and local authorities for the first year. The Appellant had sent a forecast in which turnover of £1m within three years was still predicted.
15. Mr Maylan also noted that the first two versions of the financial forecasts did not include a budget for payment of CQC fees or for training
16. The statements of Joanne Hunter, Registration Manager for the Respondent, and Philip Rainford, Senior Financial Analyst for the Respondent, both dated 11 June 2018, confirm the above. Mr Rainford states that is a Chartered Accountant, qualified for 36 years, who has worked for the CQC for three years. Amongst the additional information he provides are that WiiCare Ltd.'s accounts were failed late in 2017, and were in a form which does not require audit. He found that the company had been found by an employment tribunal in August 2017 to have unlawfully deducted pay from an employee. He says "I was, and remain, concerned that Mr Coombs was attempting to walk away from his debts and set up a new business." He found accounting errors in the business plan provided on 15 December 2017; he considered the forecast rate of growth to be excessive. Given the history of WiiCare Ltd it was an unattainable ambition "to become #1 health

care provider of choice within the UK". He said that Mr Coombs had provided a further 3 year financial forecast on June 6 2018. The calculations showed an overstatement of income each month because a figure for investment in fixed assets was also brought forward as part of the cash inflow. He considered forecasts for private sales rising from £377,499 in year 1 to £720,000 in year 2 and approximately a million, including NHS and local authority sales, to be "vastly overstated". He had considered that the letter from the Appellant's own accountants, BC&A (see below); it was not clear to what extent the firm had put these forecasts together, and he "would be surprised if a firm of chartered accountants were to associate themselves with figures that are so obviously incorrect". He identified an error in the forecasts (referred to by Mr Maylan above) for sales with or without NHS and local authority funding, and in both the accumulated cash flow had been "vastly overstated", because it exceeded projected sales figures.

### **The Appellant's case and evidence**

17. The grounds for appeal indicate that the Appellant considers the decision to be wrong. The Appellant compiled a robust appeal (sic) to the CQC with supporting evidence, showing that the company would be able to deliver a safe, caring, effective, responsive and well led service. The appellant felt the process of applying to have been tainted due to WiiCare's previous performance. CQC had ignored government restrictions from local authorities regarding monies still owing to WiiCare for work completed. Monies were still owing from the financial manager, who stole from the business. The Respondent had not taken into account the reasons why WiiCare had had cash flow issues. Mr Coombs had shown compliance with Regulation 5 requirements and had passed the site visit in November 2017. Although WiiCare had been found to be inadequate on inspection in September 2016 and January 2017, he had apologised, sought advice, and made improvements. The Respondent had withdrawn the decision to cancel registration and he had complied with all conditions. No safeguarding issues had arisen in respect of any service user. Since entering the CVA no issues had been raised about WiiCare's financial position. Conditions since January 2017 had restricted taking on new service users and that had prevented WiiCare from clearing its debts, and had caused the company to pursue the CVA. He had worked hard to review the reasons for the failure of WiiCare and to ensure that Bluestone would be compliant and financially healthy. He had himself been responsible for WiiCare's debt/credit management after the prosecution for theft of the previous finance manager. Bluestone's financial performance would be overseen by a chartered accountant and a senior bookkeeper with relevant experience and skills, who was also a trusted family member, would make sure the company's financial management remained healthy.
18. Mr Coombs' submissions following the notice of intention to refuse registration included the following. (We do not mention matters not relevant to the present appeal, such as the qualifications of the proposed registered manager.) He had always been transparent about his intentions, and WiiCare and Bluestone were two separate entities, though it had been the intention to "rebrand". He had

provided information as requested. He had always complied with regulations. No issues had been raised under Regulations 5 and 13 at the site visit in November 2017. He had made clear the intention to terminate the registration of WiiCare as soon as Bluestone was registered. The CQC had been satisfied that WiiCare had made significant improvements. Cash flow problems had been caused by late payments and theft by the finance manager. New policies had been implemented to improve financial control. The Respondent had withdrawn its decision to cancel registration of WiiCare and agreed to conditions. The CVA had been set up to improve the cash flow position, not to put the company into liquidation. Fees due to the CQC would be paid by WiiCare, and had nothing to do with Bluestone. The actions of the CQC had made it difficult to set up meetings with local authorities and the NHS. He would submit tenders for contracts in the future.

19. Mr Coombs submitted an Action Plan to address concerns relating to Regulations 5 and 13. The financial forecasts had been updated to reflect the fact that no meetings had been set up with local authorities and the NHS. Bluestone Care had received a cash advance of £20,000 to help with start up and running costs. Accountants had been asked to support the company's financial management. Financial procedures and policies had been updated. Mr Coombs had set up a pre-consultation assessment to make sure that the company was financially viable. "BluestoneCare will be closely managed by the accountants to make sure that the company doesn't have any financial difficulties in the future."
20. The Appellant provided a letter from BC&A Chartered and Management Accountants, dated 9 February 2018. The writer confirmed that the firm had been appointed by the Appellant to "regularly monitor and manage its cash flow and financial management". The firm had worked closely with Mr Coombs over the past six months to put together "conservative sales forecasts that is based on working with and without the local authorities for the first twelve months". The firm was instructed to review the financial management of the business every quarter. The firm was also instructed in the winding up of WiiCare, which Mr Coombs intended to put into voluntary liquidation. BluestoneCare had set up an initial cash advance, and a third-party investor(s) had "set aside an offer to release an equity stake up to 50%". Financial forecasts were attached "based on market conditions, calculated judgement and demand for personal care services within Kent and surrounding areas".

### **Tribunal's conclusions with reasons**

21. In the List of Issues sent to the Tribunal by the Respondent following the submission of the hearing bundles, the Respondent refers to the two grounds for refusal referred to in the notice of intention (Regulations 5 of the 2014 Regulations and Regulation 13 of the 2009 Regulations), but adds a third issue: "[w]hether the Appellant has provided sufficient evidence to demonstrate that it will be able to deliver a safe, caring, effective, responsive service in order for its application for registration as a service provider to be granted." This ground is not explained within the context of the Regulations, is not mentioned in the grounds for resisting the appeal or the skeleton argument, nor in the original reasons for the refusal. We

do not consider it necessary or fair to make a decision under this additional potential ground for refusal of registration.

22. The Respondent points out in the Skeleton Argument that much of the information and submissions provided by the Appellant are not relevant to the issues. For example, there is no reference to specific safeguarding concerns in any of the Respondent's inspections of WiiCare or the grounds for refusal of registration. Nor is there any suggestion of any breach of conditions by WiiCare. Complaints about the CQC are not relevant to this appeal.
23. We consider that there is no need, and no obvious benefit, in considering Regulation 5 and Regulation 13 separately. The sole reason for finding Mr Coombs not a fit and proper person would be the evidence of his financial management of WiiCare and of his financial projections for Bluestone Care.
24. We make the following observations of the quality of the evidence provided by the Appellant. The letter from the accountants does not provide reassurance, as it does not evidence the actual processes which the firm will put in place in relation to securing sound financial management. No attempt is made by the firm to address, or refute, concerns outlined by the Respondent as to the quality of the forecasts for which the firm says it is responsible. The assurances of this firm carry no significant weight in our analysis of the evidence.
25. The Appellant complains about conditions imposed on WiiCare as to taking on new service users, and the actions of the CQC, for the inability of the former to pay its debts, and the inability of Bluestone Care to secure meetings with local authorities and the NHS. We would consider it to be financially irresponsible to enter a CVA knowing the agreed debts cannot be paid for reasons already known to the debtor. The fact that the CQC was carrying out its statutory duties as a regulator, and had found WiiCare to be inadequate in published reports, does not provide a reason or an excuse for making inaccurate financial forecasts. We confirm we do find these forecasts to be inaccurate for reasons clearly set out, and not challenged, by the Respondent and summarised above.
26. The evidence is, we find, compelling and overwhelming. It shows that Neil Coombs was responsible for the management of a registered provider of personal care which had to enter into a CVA because its debts exceeded its assets. Mr Coombs complains that he is tainted by the history of WiiCare, but the Respondent would be wrong to turn a blind eye to this history. The financial collapse of one company managed by Mr Coombs as its sole director has a direct relevance to the ability of the Respondent, and now this Tribunal, in his ability to manage the rebranded company which has been set up to replace it. Were there to be clear evidence of accurate, evidence-based and cautious business planning for the new company, the past history would carry less weight. But present forecasts appear wholly unrealistic and have been shown to be inaccurate, even if the assumptions on which they were based could be believed.
27. The Respondent, in these circumstances, had no option but to refuse registration of a new personal care provider. It did not do so without giving Mr Coombs multiple opportunities to come up with realistic and accurate business plans and financial forecasts. There is no reason to expect Bluestone Care Ltd to be financially viable in these circumstances, and its collapse would impact adversely on any service

users placed there. We find both that Mr Coombs is not a fit and proper person under Regulation 5(c) and (d), and that he has not complied with the requirements of Regulation 13.

**ORDER**

1. The appeal is dismissed.
2. The decision of the Respondent dated 23 February 2018 to refuse the registration of Bluestone Care Ltd is confirmed.

**Hugh Brayne, Judge**

**Michele Tynan, specialist member**

**Heather Reid, specialist member**