Neutral Citation Number: [2022] EWHC 965 (Admin)

Case No: CO/1770/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2022

Before :

THE HON MR JUSTICE BUTCHER

- -

Between :

The Queen on the application of
ADVINIA HEALTH CARE LTD **Claimant**

- and –

CARE QUALITY COMMISSION **Defendant**

- -
- -

Fenella Morris QC and Jack Anderson (instructed by **Browne Jacobson LLP**) for the **Claimant**
David Blundell QC and Admas Habteslasie (instructed by **Central Legal Services Team, Care Quality Commission**) for the **Defendant**

Hearing date: 30 March 2022

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Approved Judgment

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THE HONOURABLE MR JUSTICE BUTCHER

The Hon Mr Justice Butcher:

1. This is an application for judicial review made by Advinia Health Care Ltd ('Advinia'), of the revised Guidance for providers published by the Defendant, the Care Quality Commission ('CQC'), in relation to Market Oversight of 'difficult to replace' providers of adult social care.

2. Advinia is a registered provider of social care. The CQC is the independent regulator of health and social care services in England.

The 2008 Act

3. The CQC was established by the Health and Social Care Act 2008 ('the 2008 Act'). Section 2 sets out the CQC's functions, which include its market oversight functions.

4. Section 3(1) of the 2008 Act identifies the CQC's main objective as being to 'protect and promote the health, safety and welfare of people who use health and social care services'. Section 3(2) is as follows:

> (2) The Commission is to perform its functions for the general purpose of encouraging-
> (a) the improvement of health and social care services,
> (b) the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services, and
> (c) the efficient and effective use of resources in the provision of health and social careservices.

5. Section 4(1) of the 2008 Act sets out a range of matters to which the CQC must have regard in performing its functions:

> '(a) views expressed by or on behalf of members of the public about health and social care services,
> (b) experiences of people who use health and social care services and their families and friends,
> (c) views expressed by Local Healthwatch organisations or Local Healthwatch contractors about the provision of health and social care services,
> (d) the need to protect and promote the rights of people who use health and social care services(including, in particular, the rights of children, of persons detained under the Mental Health Act1983, of persons who are deprived of their liberty in accordance with the Mental Capacity Act2005 (c 9), and of other vulnerable adults),
> (e) the need to ensure that action by the Commission in relation to health and social care servicesis proportionate to the risks against which it would afford safeguards and is targeted only whereit is needed,
> (f) any developments in approaches to regulatory action, and
> (g) best practice among persons performing functions comparable to those of the Commission (including the principles under which regulatory action should be transparent, accountable andconsistent).'

The 2014 Act

6. The CQC's Market Oversight Regime was introduced by the Care Act 2014 ('the 2014 Act'). The relevant provisions of the 2014 Act were in part a response to the failure of

Southern Cross Healthcare in 2011, and had been preceded by a Department of Health Consultation (entitled 'Market Oversight in Adult Social Care') published on 1 December 2012, and an Impact Assessment dated 26 March 2013. The Market Oversight Regime which was introduced by the 2014 Act applies to providers of care services who, by reason of their size or concentration, would be particularly difficult to replace in the event of failure. The relevant criteria are contained in The Care and Support (Market Oversight Criteria) Regulations 2015 (SI 2015/314), made under section 53 of the 2014 Act.

7. The 2014 Act establishes a framework designed to respond to the risk of failure of care providers by two mechanisms.

8. One of those mechanisms is a duty imposed on relevant local authorities by section 48 of the 2014 Act. Under that section, where a registered care provider becomes unable to carry on a regulated activity because of business failure, the relevant local authority comes under an obligation to meet all the needs for care and support of adults (as well as the support needs of carers) that were being met by the registered care provider immediately before it became unable to carry on the regulated activity. By section 48(3) it is specifically provided that this obligation on the local authority arises whether or not the adults in question are ordinarily resident in its area.

9. The other mechanism is the Market Oversight Regime. This is provided for in sections 53-57 of the 2014 Act. Of particular relevance are sections 55-57, which, so far as germane, are as follows:

> **55 Assessment of financial sustainability of care provider**
>
> (1) Where this section applies to a registered care provider, the Care Quality Commission must assess the financial sustainability of the provider's business of carrying on the regulated activity in respect of which it is registered.
>
> (2) Where the Commission, in light of an assessment under subsection (1), considers that there is a significant risk to the financial sustainability of the provider's business, it may—
>
> (a) require the provider to develop a plan for how to mitigate or eliminate the risk;
>
> (b) arrange for, or require the provider to arrange for, a person with appropriate professional expertise to carry out an independent review of the business.
>
> (3) Where the Commission imposes a requirement on a care provider under subsection (2)(a), it may also require the provider—
>
> (a) to co-operate with it in developing the plan, and
>
> (b) to obtain its approval of the finalised plan.
>
> (4) Where the Commission arranges for a review under subsection (2)(b), it may recover from the provider such costs as the Commission incurs in connection with the arrangements (other than its administrative costs in making the arrangements).
>
> (5) Regulations may make provision for enabling the Commission to obtain from such persons as it considers appropriate information which the Commission believes will assist it to assess the financial sustainability of a registered care provider to which this section applies.

(6) Regulations may make provision about the making of the assessment required by subsection (1).

(7) The Commission may consult such persons as it considers appropriate on the method for assessing the financial sustainability of a registered care provider's business; and, having done so, it must publish guidance on the method it expects to apply in making the assessment.

56 Informing local authorities where failure of care provider likely

(1) This section applies where the Care Quality Commission is satisfied that a registered care provider to which section 55 applies is likely to become unable to carry on the regulated activity in respect of which it is registered because of business failure as mentioned in section 48.

(2) The Commission must inform the local authorities which it thinks will be required to carry out the duty under section 48(2) if the provider becomes unable to carry on the regulated activity in question.

(3) Where the Commission considers it necessary to do so for the purpose of assisting a local authority to carry out the duty under section 48(2), it may request the provider, or such other person involved in the provider's business as the Commission considers appropriate, to provide it with specified information.

(4) Where (as a result of subsection (3) or otherwise) the Commission has information about the provider's business that it considers may assist a local authority in carrying out the duty under section 48(2), the Commission must give the information to the local authority.

(5) Regulations may make provision as to the circumstances in which the Commission is entitled to be satisfied for the purposes of subsection (1) that a registered care provider is likely to become unable to carry on a regulated activity.

(6) The Commission may consult such persons as it considers appropriate on the methods to apply in assessing likelihood for the purposes of subsection (1); and, having carried out that consultation, it must publish guidance on the methods it expects to apply in making the assessment.

57 Sections 54 to 56: supplementary

(1) For the purposes of Part 1 of the Health and Social Care Act 2008, the duties imposed on the Care Quality Commission under sections 54(1) and 55(1) are to be treated as regulatory functions of the Commission.

…

(4) The Commission must, in exercising any of its functions under sections 54 to 56, have regard to the need to minimise the burdens it imposes on others.

10. As set out above, section 56(5) of the 2014 Act provides that Regulations might be made 'as to the circumstances in which the [CQC] is entitled to be satisfied for the purposes of subsection (1) that a registered care provider is likely to become unable to carry on a regulated activity'. No such Regulations were made.

11. Regulations were, however, made as to what constitutes 'business failure' for the purposes of sections 48 and 50-52 of the 2014 Act, and thus for the purposes of section 56(1), which refers to 'business failure as mentioned in section 48'. Those Regulations are the Care and Support (Business Failure) Regulations 2015 (SI 2015/301). Those Regulations provide, insofar as germane, that, in relation to a provider other than an individual, business failure consists of the appointment of an administrator, receiver or administrative receiver, the passing of a resolution for a voluntary winding up or the making of a winding up order.

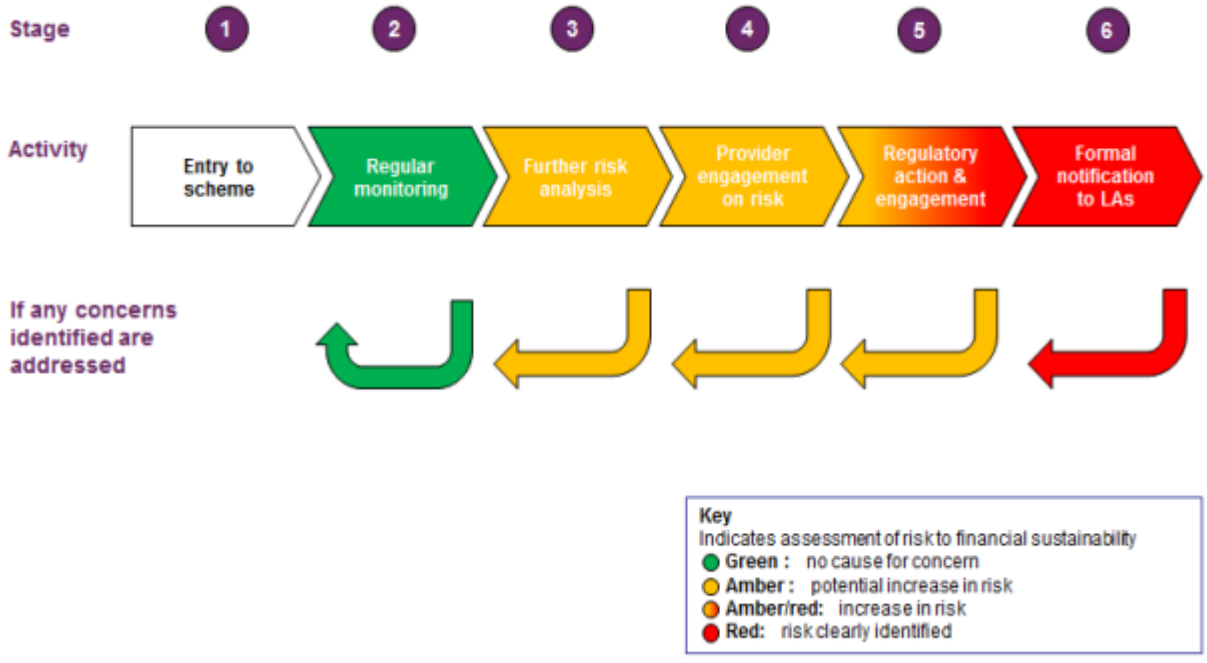
12. The evidence was that, at present, there are 61 registered care providers who are subject to the Market Oversight Regime. Advinia is one of those 61.

The Original Guidance

13. Pursuant to its obligations under sections 55(7) and 56(6) of the 2014 Act, the CQC has published Guidance for providers as to the operation of the Market Oversight Regime.

14. This Guidance was originally published in March 2015. I will refer to this as 'the Original Guidance'. The Original Guidance identified a six-stage process for monitoring risk, with stage 1 being entry into the scheme (i.e. being a provider to whom the Market Oversight Regime applied), and stage 6 being notification under s. 56(1) of the 2014 Act. This was summarised in a figure as follows:

Figure 1: Market Oversight high level operating model



15. The Original Guidance stated (at page 11), that:

'We will not publish the stage in the operating model that providers are at currently, or the stages they may have been at previously. The Market Oversight Scheme is not acting as a credit rating agency; our legal duty is to inform Local Authorities only when a potential business failure is likely to cause a regulated activity to cease. Providing an

external commentary on potential risk could precipitate failure which would put people who use services in a vulnerable position. This is the very situation which the Scheme is intended to avoid. Each specific provider will have particular risks and merely confirming the stage in the model is crude and open to misinterpretation if all facts are not known.'

16. In relation to stage 6, the Original Guidance, under the heading 'Satisfying the "likely" condition', provided:

> '"Likely" means that, on a balance of probabilities, a registered care provider satisfies the "business failure" and "unable to carry on a regulated activity" conditions (see above). We do not have to prove conclusively that the conditions will be satisfied, only that the conditions are more probable to occur than not. The decision will be based on a reasonable, fair and proportionate assessment of the information available from our assessment activity. There is,however, a possibility that actual business failure may never occur or the provider may never reach a position where it becomes unable to carry on a regulated activity even after Local Authorities have been notified by us that these events are likely. At all stages of the assessment of financial sustainability, we maintain open dialogue with providers and are transparent with them. There is always the opportunity for them to challenge us at any stage in the process by presenting new information about past performance and future strategy which could alter the views we may form. Before we make a decision on whether a provider is likely to become unable to carry on a regulated activity because of business failure, we will give providers the opportunity to confirm the accuracy of the information on which we intend to base the ultimate decision on financial sustainability.'

Consultation on revisions to Guidance

17. In August 2020, the CQC embarked on a consultation in relation to proposed new guidance as to the Market Oversight Regime, with the consultation closing on 19 October 2020. The CQC then issued draft revised guidance. That draft revised guidance maintained the six-stage process of the Original Guidance. Advinia points out that, while the draft revised guidance continued to note that 'Each specific provider will have particular risks, and simply confirming the stage in the model is crude and open to misinterpretation if all facts are not known', it no longer stated that: 'Providing an external commentary on potential risk could precipitate failure which would put people who use services in a vulnerable position. This is the very situation which the Scheme is intended to avoid.'

18. As to the duty to notify local authorities, the draft revised guidance provided:

> 'We do not have to prove conclusively that business failure will occur, and regulated activity will cease as a result. The primary purpose of CQC's duty is to give local authorities advance warning that they may be required to discharge their duties under the Act. CQC will need to be satisfied that both conditions are 'likely', i.e. there is a real possibility of business failure and a real possibility that the provider will become unable to carry on the regulated activity as a result'.

19. On 9 September 2020, the CQC gave a presentation to providers, including Advinia, as to the proposed revised guidance. The slide deck used identified a number of key

proposed changes. So far as the change to the interpretation of 'likely' is concerned, the slide deck stated:

> • 'We propose amending CQC's interpretation of the term likely i.e. when a business is considered "likely" to fail and when services are considered "likely" to stop as a result of that business failure.
> • Current guidance defines "likely" as "more likely than not". Presently a higher than necessary threshold re CQC duty to protect vulnerable people using services
> • We propose CQC should consider that business failure and resulting cessation of care is "likely" if there is a "real possibility" or "realistic prospect" that they will occur.'

20. Advinia's response to the consultation included the objections: that the meaning of 'likely' was not a matter for the CQC's discretion but a matter of statutory interpretation; that it was significant that Parliament had used the criterion of 'significant risk to the financial sustainability of the provider's business' as a threshold for requiring a provider to develop a financial plan or cooperate with an independent business review under section 55 but the threshold of 'likelihood' under section 56; and that there was a lack of any effective process to challenge the CQC's assessments or decisions.

The Revised Guidance

21. The CQC's revised Guidance ('the Revised Guidance') was published in February 2021.

22. The Revised Guidance retained a six-stage process. It states:

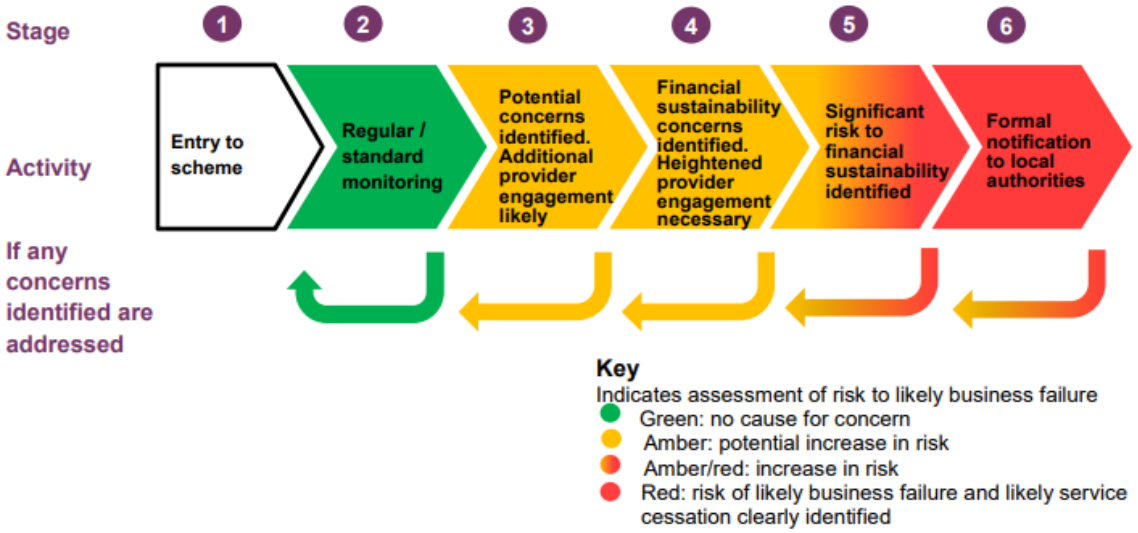
> 'We adopt a 6-stage approach to the assessment of financial sustainability, as set out in Figure 1 below. Providers progress through the stages on the basis of our assessment of their financial sustainability. This allows us to come to a decision about the likelihood of business failure and of this leading to the cessation of at least one regulated service.

Where providers are part of a wider corporate group, we engage with senior representatives of that group and focus our requests for information (in the context of its finances, operations and business) at the appropriate corporate level – for example, the executive team of the group. This enables us to assess the sustainability of registered providers in the Scheme in the most effective and least burdensome way.

This diagram illustrates how our activities and engagement with providers will change if concerns about financial sustainability increase. This is a useful illustration, but the assessment process is not a "one size fits all" approach. Each provider and each individual scenario require different approaches at each stage. The length of time

Market Oversight model

Figure 1: Market Oversight high level operating model



providers spend at each stage will also vary. It is best to think of this as an 'evolving conversation', which grows more complex and focused as the process moves up the stages. We also recognise that providers may pass through stages quickly and that some stages may be missed out in a fast-moving situation.

We will not publish the stage in the operating model that providers are at currently, or the stages they may have been at previously. Each specific provider will have particular risks, and simply confirming the stage in the model is crude and open to misinterpretation if all facts are not known. Therefore, CQC will only disclose its assessment of financial risk to local authorities where it is under a duty to do so under the Care Act, or where it is necessary to protect and promote the health, safety and welfare of people using services.'

23. The Revised Guidance proceeds to give more details as to the stages of the oversight scheme. They may be summarised as follows:

(1) Stage 1 – 'Entry to the scheme': 'This stage is to identify and notify providers that willenter the Scheme. There is no suggestion at this stage that providers are at any

risk offinancial failure, only that they meet the thresholds set out in law which suggest they would be difficult to replace'.

(2) Stage 2 – 'Regular/standard monitoring': 'To carry out routine monitoring of providers' finances and quality'. Registered care providers are required to submit, inter alia, business context information, financial information and quality monitoring information. Where the CQC's analysis of risk indicators highlights 'concerns or potential areas of concern', further analysis and engagement will need to take place.

(3) Stage 3 – 'Potential concerns identified, additional provider engagement likely': 'Where potential concerns have been identified at Stage 2. To carry out more in-depthanalysis of providers' finances and quality and to engage further with the provider asand when necessary'. Next steps are either a return to Stage 2, remaining in Stage 3 if potential areas of concern are identified but appear to be under management control, or moving to Stage 4 if the CQC needs to engage with the provider specifically about risk, or Stage 5 'should the assessment of the information held identify significant riskto the sustainability of a provider's business'.

(4) Stage 4 – 'Financial sustainability concerns identified, heightened provider engagement necessary': 'Where concerns have been identified at Stages 2 or 3, furtherinformation will be requested from the provider. Heightened engagement will be necessary'. Next steps are either returning to Stages 2 or 3, remaining at Stage 4,or moving to Stage 5 'if financial sustainability risks are confirmed and there is potential for them to escalate'.

(5) Stage 5 – 'Significant risk to financial sustainability identified': The Revised Guidance describes the purpose of this stage as being '[f]or us to gain more detailed information on financial sustainability risks, to access expert advice where appropriate and obtain and assess third party assurance – for example, HM Revenue and Customs (HMRC).For us to understand what the next steps are for the provider, to understand the intentions of its stakeholders (for instance, lenders, landlords, HMRC and shareholders), and to monitor any debt restructuring negotiations'. Further, '[w]here the provider's plans involve any form of business or debt re-structuring, it may be necessary to shadow the negotiationsit has with stakeholders at this stage. What this effectively means is that we will be observing ongoing negotiations and restructuring proposals so that we are able to assess how these will affect the provider's abilities to carry on regulated activities andwhether our duty to notify local authorities is triggered'. The CQC may seek anindependent business review or risk mitigation plan from the provider.

(6) Stage 6 – 'Formal notification of likely business failure and likely service cessation tolocal authorities': 'The statutory criteria set out within Section 56 of the Care Act 2014 are met. A notification made under Section 56 seeks to provide advance warning to local authorities and NHSEI (where possible) that the business of a provider in the Scheme is likely to fail and that this failure is likely to cause cessation of one or more regulated activities.'

24. In relation to the stage of notification under section 56 of the 2014 Act, which is intended to be stage 6 of the graded scheme, the Revised Guidance includes the following:

> 'We do not have to prove conclusively that business failure will occur, and regulated activity will cease as a result. The primary purpose of CQC's duty is to give local authorities advance warning that they may be required to discharge their duties under the Act. CQC will need to besatisfied that both conditions are 'likely', i.e. there is a real possibility of business failure and areal possibility that the provider will become unable to carry on the regulated activity as a result.(…)
> Notification to local authorities will only take place when we think that they may need to step in and carry out their duty under Section 48(2) because a regulated activity is likely to cease asa result of business failure. For example, if CQC is satisfied that the services will be continuedby another provider following a transfer of the business, local authorities will not be required toperform their duties under section 48 and we will not be required to serve a notice. Decisions will be made on a case-by-case basis and the specific facts will determine whether we will notify local authorities.
>
> This does not mean that we must second-guess the ultimate decision of a local authority; the decision to trigger the local authority's duty to ensure continuity of care is a decision solely for the local authority to make.
> (…)
> At all stages of the assessment of financial sustainability, we maintain open dialogue with the provider and are transparent with them. There is always the opportunity for them to challenge us at any stage in the process by presenting new information which could alter the views we may form. Before we make a decision on whether a provider is likely to become unable to carryon a regulated activity because of business failure, we will normally give providers the opportunity to confirm the accuracy of the information on which we intend to base the ultimate decision on financial sustainability. However, if we are concerned that further delay may pose a risk to people using services, we will not delay matters, particularly if the information has been verified by other means.'

25. The Revised Guidance further deals with what the notification to the local authority would include, as follows:

> 'The notification will provide as full a picture as possible as to what we believe will be the impact and timescales of the likely business failure on the registered provider's ability to carryon the regulated activity.
>
> In the notification, we will explain why we believe that the local authority's temporary duty toensure care continuity may be triggered. It will explain CQC's statutory duties under Section 56(1) and 56(2) of the Care Act, why the conditions for notification are met, as well as a brief summary of the requirements of local authorities under Section 48(2).
>
> Notifications will contain an assessment of the current situation and likely outcome and will highlight to local authorities where failure is not inevitable. We will clearly set out the risks oflocal authorities' actions pre-empting actual failure and will promote close cooperation betweenthem and the provider and its advisors. The notification will also remind local authorities that the act of notification itself is highly sensitive, and that it contains sensitive information that should not be shared more widely by them. Our notification to local authorities will always include:

(a) A clear statement that this provides as much notice as possible given the circumstances specific to the provider, giving them the opportunity to prepare to implement contingency plans, and that the next steps are for the local authority to engage with the provider/Insolvency Practitioner (IP).
(b) What the known intentions of any IPs are, for example, which specific care homes are at risk of closure.
(c) A paragraph summarising how we came to our decision that the conditions for notification (as set out above under Stage 6) have been met.
(d) Which business failure activity (appointment of an administrator or receiver, for instance) is considered likely to happen and when this is likely to occur.
(e) Which registered providers and what regulated activities are affected, and in which local authority areas they deliver care; local authorities will then be aware of which other local authorities have received the notification.
(f) Details on how to contact specific individuals at the provider and within CQC for further information or advice.'

26. The Revised Guidance specifies that, in addition to the local authority, other bodies and persons may be notified. That is dealt with as follows:

'To deliver the aims of the Scheme it may be appropriate in the circumstances to share the factof notification with key partners who will need to support any contingency planning, such as the Department of Health and Social Care ('DHSC'), Local Government Association ('LGA'), the Association of Directors of Adult Social Services ('ADASS') and NHSEI, who will informnecessary clinical commissioning groups. Where it has been deemed appropriate for CQC to share the notification with other key partners, we will set out risks and reminders consistent with those set out above (in relation to local authorities).

We may also publish the fact of notification to the wider public to prevent people who use services and their carers and families getting different accounts of the facts. Whether we do thisand the timing of it will be very carefully considered. For example, CQC will consider whetherit is appropriate to delay any public announcement of a notification to reduce the risk of disruption that an announcement may cause. The potential impact on the people using the services will be at the heart of the decision to publish a notification and when to publish it.

While we are clear there are advantages in sharing the notification, there are also important aspects that would need to be handled carefully to avoid any action being taken that will pre-empt or precipitate failure. The notification is of likely failure and not definite failure. There isa very real risk that, if not handled and communicated properly, wider sharing of a notification could pre-empt a failure that may not otherwise have happened or could increase the impact of a failure. It is important that the process of notification is shared in a consistent manner and from a single source.

We will always inform the Department of Health and Social Care, and where appropriate in the circumstances, other regulators (for example, Care Inspectorate Scotland, Care Inspectorate Wales, and the Regulation and Quality Improvement Authority in Northern Ireland. Beyond that, in deciding when and with whom we share the fact of notification, we will act in a fair, reasonable and proportionate way, taking

account of the specific circumstances in each case. Inparticular, we will consider the impact of failure and whether wider notification may adverselyimpact on people using the services: for instance, whether we would be likely to jeopardise thesuccess of a restructuring plan and, in doing so, have a negative effect on a provider's ability to deliver care.'

The Grounds of Challenge

27. Advinia contends that the Revised Guidance is unlawful in three ways.

(1) In the first place, Advinia contends that it erroneously states that the word 'likely' in 'likely to become unable to carry on the regulated activity in respect of which it is registered because of business failure', which is the wording of section 56(1) of the 2014 Act, means 'real possibility'. Advinia contends that, correctly interpreted, it means 'more probable to occur than not', and that the Original Guidance was in this respect correct. I will call this 'Ground 1'.

(2) Secondly, Advinia contends that the Revised Guidance is procedurally unfair in relation to decisions to use the powers in sections 55 and 56 of the 2014 Act in two respects, namely that (a) it fails to afford a regulated entity an adequate opportunity to make representations before the CQC decides that the entity is likely to become unable to carry on a regulated activity because of a business failure and/or exercises the power to require preparation of a risk mitigation plan or independent review, and (b) it fails to provide for an independent review of the CQC's decision. I will call this 'Ground 2'.

(3) Thirdly, Advinia contends that the Revised Guidance is procedurally unfair in its approach to the disclosure of confidential information, fails to direct officials to have regard to relevant considerations in that area, and/or is wrong in its terms. I will call this 'Ground 3'.

28. Permission to apply for judicial review on each of these Grounds was granted by Collins Rice J on 5 October 2021. The points arising were helpfully and economically argued by Fenella Morris QC, leading Jack Anderson, for Advinia; and by David Blundell QC, leading Admas Habteslasie, for the CQC. I am grateful to all counsel.

Ground 1

29. As regards Ground 1, there was no dispute that the Revised Guidance sought, in relation to when local authorities were to be notified, and when Stage 6 was reached, to give effect to section 56(1) of the 2014 Act. There was equally no dispute that, if the proper construction of section 56(1) was that 'likely' as used there meant 'more probable than not', then the Revised Guidance was wrong. This first Ground accordingly raises what is a short, though not straightforward, point of statutory construction.

The parties' contentions

30. For Advinia, Ms Morris contended that 'likely' in section 56(1) did indeed mean 'more probable than not'. She submitted that that was the ordinary and natural meaning of the word; that that construction was supported by the contrast with the use of the phrase 'significant risk' in section 55(2); and by the fact that section 56(1) imposes a duty on

the CQC to act if the threshold is met. Further she submitted that that construction better reflected the balance of risk which the legislation was intended to strike between the risks of too-late notification and of too-early notification; better fulfilled the overarching purposes of regulation by the CQC; and reflected the concern evidenced by pre-legislative materials that the regulator's actions should not precipitate an unnecessary exit.

31. For the CQC, Mr Blundell argued that a construction of 'likely' as meaning 'a real possibility' was consistent with where section 56(1) fitted into the Market Oversight Regime. Part of the scheme introduced by the 2014 Act was to allow the CQC to facilitate the discharge by local authorities of their section 48(2) functions should a regulated care provider became unable to carry out a regulated activity because of business failure. Section 56 is precautionary, and is designed to give local authorities advance warning that they may be required to take on onerous duties for a group of vulnerable clients. That context suggests strongly that 'likely' does not have the meaning of 'more probable than not' because to give it that meaning would have the effect that a notification to local authorities might be delayed to a point at which it became more difficult, or perhaps impossible, for the local authority to make arrangements to meet the needs of affected clients. The word 'likely' is capable of meaning 'a real possibility' and, in its context, that is the sense in which it is used in section 56(1).

Analysis

32. The word 'likely' has a number of possible meanings. Which is the one intended depends on the context in which it is used. So much is obvious as a matter of the ordinary use of language, but it has also been recognised in a number of authorities in which the question has arisen.

33. Thus, in Re H and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, Lord Nicholls of Birkenhead said, at 584G:

> 'In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored.'

34. In that case, the House of Lords decided that, in the context of section 31(2) Children Act 1989, the word 'likely' was used in the latter sense. This was because the prospect or risk in question was of significant harm to a child, and if 'likely' was interpreted as 'more probable than not', it would mean that there would be left outside the scope of care and supervision children to whom there was a real possibility of significant harm. That, as Lord Nicholls said at 585D, 'would draw the boundary line [as to when the court had the power to make a care order] at an altogether inapposite point.'

35. Equally, in Re Harris Simons Ltd [1989] 1 WLR 368, Hoffmann J concluded that, in the phrase 'the court … considers that the making of [an administration order] would be likely to achieve one or more of the purposes mentioned below' as it appeared in section 8(1)(b) of the Insolvency Act 1986, the word 'likely' had the sense of 'real prospect'. Part of Hoffmann J's reasoning was as follows, at 370 F-H:

'Secondly, the section requires the court to be "satisfied" of the company's actual or likely insolvency but only to "consider" that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change in language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former. … Thirdly, some of the stated purposes are mutually exclusive and the probability of any one of them being achieved may be less than 0.5 but the probability of one or other of them being achieved may be more than 0.5. I doubt whether Parliament intended the courts to embark on such calculations of cumulative probabilities. Fourthly, … section 8(1) only sets out the conditions to be satisfied before the court has jurisdiction. It still retains a discretion as to whether or not to make the order. It is therefore not unlikely that the legislature intended to set a modest threshold of probability to found jurisdiction and to rely on the court's discretion not to make orders in cases in which, weighing all the circumstances, it seemed inappropriate to do so.'

36. There are, by contrast, other cases in which it has been found that, in its context, 'likely' meant more probable than not. That was the case in Bailey v Rolls Royce (1971) Ltd [1984] ICR 688 in relation to section 72(1) Factories Act 1961. Part of the reasoning of Slade LJ (who agreed with May LJ and with whom Stephenson LJ agreed) in reaching that conclusion was:

'It is to be observed that section 72(1) refers to likelihood rather than to risk, and I agree with May LJ that "likely" in this context means "more probable than not". This construction of the phrase is, I think, one which not only accords with the natural meaning of the words according to ordinary English usage, but also with what may be presumed to have been the intention of Parliament.'

37. There are various other cases in which it has been decided, in relation to particular statutes, that Parliament used the word 'likely' in the sense of more probable than not. They include Chief Constable of Lancashire v Potter [2003] EWHC 2272 (Admin) in relation to section 1 of the Crime and Disorder Act 1998; and Kraus v Penna Plc EAT/0360/03/ST, in relation to section 43B of the Employment Rights Act 1996. Equally, in BAT Industries plc v Sequana SA [2019] EWCA Civ 112, [2019] Bus LR 2178, the Court of Appeal, though not directly construing the word 'likely' as used in a statutory provision, concluded that the trigger for the directors' duty under section 172(3) Companies Act 2006 is when they know or should know that the company 'is or is likely to become insolvent', and that in this context '"likely" means probable, not some lower test…' (at [220]). In the course of reaching that conclusion, David Richards LJ said, at [214]:

'As it seems to me, a real as opposed to a remote risk of insolvency is a significantly lower threshold than being either on the verge of insolvency or likely to become insolvent.'

38. Of some significance are the decisions in Re Primlaks [1989] BCLC 734 and In the Matter of Colt Telecom Group [2002] EWHC 2815. These cases, like Re Harris Simons, concerned the proper construction of section 8 Insolvency Act 1986, but each gave consideration to what was meant by the phrase 'the court is satisfied that a company is or is likely to become unable to pay its debts' as they appeared in section 8(1)(a) of that Act. In contradistinction to its meaning in section 8(1)(b), in each of

the cases it was said that in section 8(1)(a) 'is likely to' meant 'probably', in the sense of more likely than not. In Re Primlaks Vinelott J said (at 741):

'Paragraph (a) of s. 8(1) sets out a condition that must be met before the court can enter into an inquiry as to whether an administration order would serve any useful purpose. The court must be satisfied that the company is or is likely to become unable to pay its debts. Clearly in this context, the test prescribed must be whether a company currently able to pay its debts as they fall due will probably be unable to pay them in the future. It would be unjust to a company's creditors to impose on them the regime of an administration order so as to improve and, perhaps, expand the company's business if the probability is that the company will be able to pay its debts as they fall due'.

39. That analysis was accepted by Jacob J in Colt Telecom, who added, at [25]:

'To put a company into administration is a serious matter. Creditors, as well as the company itself, can apply. To expose the company to all the expense, danger, and problems associated with administration is a serious matter. It is most unlikely that Parliament intended this when there was only a real prospect of insolvency rather than where insolvency was more probable than not.'

40. With this introduction, I now turn to the proper construction to be placed on the word 'likely' as it appears in section 56 of the 2014 Act. In doing so, I have recalled the proper approach to statutory construction. An authoritative statement is to be found in what Lord Bingham said in R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687, at [8], as follows:

'The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confinedand a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (underthe banner of loyalty to the will of Parliament) lead to the frustration of that will, because undueconcentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, withinthe permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

41. A further and recent authoritative statement of the proper approach is to be found in the judgments of Lords Briggs and Sales in R (Fylde Coast Farms Ltd) v Fylde Borough Council [2021] 1 WLR 2794, at [6], as follows:

'Even where particular words used in a statute appear at first sight to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made and, to the extent that its purpose can be identified

(which may require examination ofadmissible travaux préparatoires), to arrive at an interpretation which serves, rather than frustrates, that purpose.'

42. Any exercise of statutory construction is an iterative one, in which it is necessary to consider both text and context and the implications of a consideration of the one for the other. An exposition of the results of the exercise has to start somewhere, and for that purpose I start with the words of section 56(1) itself. As already set out, that section provides that it is to apply when the CQC is satisfied that a registered care provider is 'likely to become unable to carry on the regulated activity … because of business failure'.

43. As is confirmed by the cases to which I have already referred, 'likely' is a word which can be used in a number of senses. As acknowledged by Lord Nicholls in Re H, perhaps its primary meaning in ordinary usage is more probable than not. Clearly, however, the analysis of its meaning in section 56(1) cannot stop there.

44. The immediate context in which the word 'likely' appears is subsections 56(1) and (2). One feature of that context is that subsection 56(1) applies 'where the [CQC] is **satisfied** that a registered care provider … is likely to become unable to carry on the regulated activity … because of business failure…'. The use of 'is satisfied' in subsection (1) may be compared with the use of 'considers' in subsections (3), (4) and (6). As Hoffmann J said in Re Harris Simons 'is satisfied' indicates a higher threshold of persuasion.

45. I do not think that, in the context of section 56(1), the significance of a word denoting a higher threshold of persuasion is as to the degree to which the CQC is persuaded. In other words, it is not denoting a heightened level of sureness on the part of the CQC. Instead, to my mind, it indicates that the CQC has to be persuaded of something which is harder-edged and more difficult to be satisfied of, and that this is an indication that 'likely' means more probable than not. Thus the phrase 'x is satisfied that it is likely' does tend to convey that there is to x's mind a greater degree of probability of the thing happening than the phrase 'x considers that it is likely'. That, indeed, is the thought which lies behind Hoffmann J's praying in aid the use of the word 'considers' in section 8 of the Insolvency Act 1986 as showing that 'likely' there meant that there was a 'real prospect'.

46. A further feature of the immediate context of the relevant phrase in section 56 of the 2014 Act is that, if the CQC is satisfied of likelihood of inability to carry on the regulated activity within section 56(1), by section 56(2) it 'must inform the [relevant] local authorities'. That means that the CQC has no choice in the matter: once the condition is satisfied, it has a duty to inform the relevant local authorities, and has no discretion to consider whether it is appropriate to do so on the facts. Just as in Re Harris Simons the fact that the satisfaction of the 'likelihood' condition conferred a discretion suggested a lower threshold, so here the fact that the satisfaction of the condition imposes a duty of notification, where such notification may have significant consequences for the provider, tends to suggest a higher threshold.

47. As regards the somewhat wider context in which the relevant phrase appears in section 56(1) of the 2014 Act, Advinia relies on the contrast between the terms of section 56(1) and the phrase used in section 55(2), namely a 'significant risk to the financial sustainability of the provider's business'. Quite rightly, Mr Blundell submitted that the

two provisions are not concerned with the same assessment of the provider's circumstances: section 55(2) is concerned with whether there is a significant risk to the financial sustainability of the provider's business, while section 56(1) is concerned with the possibility of the provider becoming unable to carry on the regulated activity by reason of business failure. The two are not simply different gradations of likelihood of the occurrence of the same thing.

48. While accepting that point, however, there is nevertheless a marked difference in language. It points towards the conclusion that a different degree of probability was intended. It is difficult to see why, if section 56(1) was intended to have the meaning for which the CQC contends it did not use similar language to that in section 55(2), such as 'where the [CQC] considers that there is a significant risk that a registered care provider will become unable to carry on the regulated activity because of business failure'. Given the phrase in section 55(2), for section 56(1) not to refer to risk at all, and to use only the word 'likely' suggests that its sense is different from that of a significant risk or possibility, but is instead that of its 'perhaps primary' meaning of probable or more likely than not.

49. I turn then to the context of the statute as whole, and its purpose. This has to be approached with care. There can be no doubt as to the overall purposes of sections 48 and 53-57 of the 2014 Act, namely to protect and promote the health, safety and welfare of people using social care services by reducing the risk of a business failure on the part of a provider which will cause uncertainty, anxiety and distress on the part of care users, to give early warning of a risk of business failure on the part of providers, and to seek to protect service continuity for care users. This is apparent from the terms of the Consultation and Impact Assessment for the then-proposed Market Oversight regime in the Care Bill, and from the 2014 Act itself. The difficulty is that there are arguments both ways as to whether a recognition of these overall purposes tends to support a construction of 'likely' in section 56(1) as meaning more likely than not. This is because there are competing considerations as to how the welfare of users of social care services is best promoted: on the one hand, there is the need to ensure that local authorities are given sufficient notice of a possible business failure, in order to prepare to assume onerous duties to vulnerable individuals; on the other there is the risk that a notification under section 56(1) may bring about exactly the failure of a care provider, with its attendant anxiety and disruption to care users, which the legislation was aimed at preventing, and thus constitute a 'self-fulfilling prophecy', to use the phrase employed in paragraph 17 of the Impact Assessment.

50. In my judgment the better argument is that the purposes of the legislation are served by a construction whereby 'likely' in section 56(1) means more likely than not. On this approach, the CQC will still be able and required to carry out the assessment of financial sustainability under section 55, and will have the power to require the provider to cooperate in developing a plan to mitigate or eliminate a risk to the provider's financial sustainability; and, if these processes reveal that it is probable that the provider will be unable to carry on the regulated activity because of business failure, then the CQC will be obliged to notify local authorities. Equally, on this approach, the CQC does not have to be sure that the provider will become unable to carry on the regulated activity because of business failure, nor be satisfied that it is certain that it will become unable to do so. It is enough that the CQC is satisfied that it is more likely than not. It appears to me that this approach, while preserving CQC's ability to warn local authorities in an

appropriate case, reduces the risk of a 'self-fulfilling prophecy' of failure. Moreover, I consider it unlikely that Parliament intended that there should be a mandatory notification to local authorities, with its potential adverse effect on the provider's business, in circumstances where it is more likely than not that the provider will not become unable to carry on the regulated activities by reason of 'business failure' (as defined). In this regard and to this extent, there is a parallel with the position in relation to the terms of section 8(1)(a) Insolvency Act, considered in Re Primlaks and Colt Telecom as already referred to.

51. Finally, I have considered whether there is any other admissible material which throws light on the proper construction of the relevant statutory provisions. What Advinia relied on in this regard were the terms of the Original Guidance, which had stated that 'likely' in section 56(1) meant more likely than not. Advinia contended that this amounted to 'contemporaneous exposition' of the 2014 Act, and referred to the principle as recognised by Lord Phillips of Worth Matravers PSC in Bloomsbury International Ltd v DEFRA 2011] UKSC 25, [2011] 1 WLR 1546, at [60]-[61], where he said:

'An important element in the construction of a provision in a statute is the context in which that provision was enacted. It is plain that those affected by the statute when it comes into force are better placed to appreciate that context than those subject to it 30 years later'. Advinia also contended that no explanation had been given as to why the CQC had changed its view as to the meaning of the word.

52. For its part, the CQC submitted that the principle of contemporary exposition, whatever its value might be in relation to a statutory provision 30 years old, had no relevance or application to one which was only about six years old when the CQC had embarked on its consultation leading to the Revised Guidance.

53. The observation by Advinia that the CQC's change of stance as to the meaning of 'likely' between the Original and Revised Guidance was unexplained seemed to me to be well-founded. In particular, there is no evidence as to why it was originally interpreted as it was, nor is there any evidence that there has been a case in which the CQC wanted to notify local authorities but could not under the interpretation of 'likely' put on the word in the Original Guidance whereas it would have been able to under the interpretation favoured in the Revised Guidance. Whether these points are admissible as an aid to construction of the 2014 Act is doubtful, however. I am inclined to think that the construction put on the word in the Original Guidance tends to suggest that the context in which the 2014 Act was enacted was one in which the importance of avoiding the 'self-fulfilling prophecy' had a greater importance than CQC now ascribes to it. I do not, however, need to give any significant weight to this point, as I have reached the conclusion that Advinia's proposed construction of section 56(1) is correct without regard to it.

54. For these reasons I have concluded that Advinia is correct in relation to Ground 1 and that the Revised Guidance was unlawful in stating that 'likely' in the phrase 'likely to become unable to carry on the regulated activity in respect of which it is registered because of business failure' in section 56(1) of the 2014 Act, means that there is a 'real possibility'.

Ground 2

55. Ground 2 is that the Revised Guidance perpetuated and exacerbated a procedural unfairness which was already present in the Original Guidance, in that (a) it fails to provide a registered care provider with an adequate opportunity of making representations prior to the CQC making a decision that the entity is likely to become unable to carry on a regulated activity because of a business failure and/or exercises the power to require preparation of a risk mitigation plan or independent review, and (b) it fails to provide for an independent review of the CQC's decision. In its submissions, Advinia placed the emphasis on (a).

The Parties' contentions

56. Advinia's argument in relation to (a) was that, while the Revised Guidance contains various references to how the CQC will 'engage' with providers, will 'maintain an open dialogue' with them, and provides, in relation to the section 56 stage, that the CQC 'will normally give providers the opportunity to confirm the information on which we intend to base the ultimate decision on financial sustainability', none of these provides a guarantee that the provider can make any representations before important decisions are made by the CQC under sections 55 or 56. A right to make representations is a basic requirement of fairness, and also contributes to good decision-making; if such a right existed, it would have been spelled out; instead what is provided for is too unstructured and informal. Advinia relied on the decision on CQC's role in reporting on and rating providers following a statutory inspection in R (oao SSP Health Ltd) v Care Quality Commission [2016] EWHC 2086 (Admin).

57. As to (b), Advinia contended that there needed to be the possibility for an independent review in the event of a disagreement between the provider and the CQC, at least in the ordinary case. Advinia accepted that there might be exceptional circumstances in which a review process might not be possible or required, but if that was so, such circumstances ought to be defined.

58. The CQC's essential response to this Ground was that it was misconceived. Mr Blundell pointed out that there was no challenge to a particular decision or proceeding by the CQC. Instead, the challenge was to the policy. Such a challenge, Mr Blundell submitted, could only be made on limited grounds, which had been authoritatively restated by the Supreme Court in R(A) v Home Secretary [2021] UKSC 37, [2021] 1 WLR 3931. The present case came nowhere near falling within those grounds.

Analysis

59. As stated in R(A) v Home Secretary, whether a policy is unlawful depends on whether it sanctions, in the sense of approves or encourages, unlawful conduct (see paragraphs 34, 38 and 41 in the judgment of Lord Sales JSC and Lord Burnett of Maldon CJ). Unlawful conduct will include procedures which contravene the common law requirement of fairness; and a policy which is inherently unfair will be unlawful because it sanctions or encourages such unlawful conduct (see paragraphs 42, 62-63). As also clarified in R(A) v Home Secretary, especially at paragraphs 64-65, there is no separate ground of challenge to a policy on the basis that it creates an unacceptable risk that an individual will be treated unfairly. When the issue is whether a policy is lawful, it must be addressed by looking at whether the policy can be operated in a lawful way, or whether the policy imposes requirements which mean that it can be seen at the outset that cases will be dealt with in an unlawful way (see paragraph 63).

60. Examining the Revised Guidance in this way, I consider that there is no basis for concluding that it is unlawful in the respect contended for in aspect (a) of Ground 2. Under the Revised Guidance, there is a gradated scheme, depending on the CQC's assessment of the risk of business failure. The scheme presupposes and requires engagement between the CQC and the provider, which will be more extensive in the higher stages of risk assessment. As the Revised Guidance puts it, this will be an '"evolving conversation", which grows more complex and focused as the process moves up the stages'. The Revised Guidance specifically states that 'At all stages of the assessment of financial sustainability, we maintain open dialogue with the provider and are transparent with them. There is always the opportunity for them to challenge us at any stage in the process by presenting new information which could alter the views we may form.'

61. Advinia drew attention to the fact that the Revised Guidance provides that before the CQC makes a decision on whether a provider is likely to become unable to carry on a regulated activity because of business failure 'we will *normally* give providers the opportunity to *confirm* the accuracy of the information on which we intend to base the ultimate decision on financial sustainability' and contended that this showed that there would be no proper opportunity to make representations. I do not consider that this is the case. This statement needs to be considered in the context of this being a final stage in what would be a process of assessment and engagement. Furthermore, this provision itself indicates that 'normally' the CQC will communicate what it considers to be the information relevant to a decision that the provider is likely to become unable to carry on a regulated activity because of business failure and give the provider the opportunity to comment. While Advinia pointed to the word 'confirm' and suggested that this would not give the opportunity for representations that the information being relied on by the CQC for its assessment was wrong, in my view it is clear that it would be open for the provider to supply information which contradicted or shed a different light on the information on which the CQC was planning to base its decision. Equally, the provision that it would 'normally' be the CQC's practice to give the provider this opportunity is explained by the following sentence of the Revised Guidance, which provides for an exception if the CQC is concerned that 'further delay may pose a risk to people using services'; and that in such a case the CQC may not delay, 'particularly if the information has been verified by other means'. This is not an unreasonable or unfair provision, given the fact that there will have been prior engagement; given that it caters for a situation in which matters are so urgent that it is necessary for the CQC to act promptly in order to safeguard the welfare of care users; and given also that a notification under section 56(2) is not a determination that a provider's business is bound to fail and does not of itself trigger a local authority's statutory duty.

62. Given these features of the Revised Guidance, I do not consider that it can be said to have been inherently unfair. It does provide opportunity for the provider to make representations and make its position known; and is a policy which, in my judgment, can be operated in a fair and lawful way.

63. For completeness, I do not accept Advinia's argument that the Revised Guidance is within category (iii) as referred to in paragraph 46 of the judgment of Lords Sales and Burnett in R(A) v Home Secretary. The Revised Guidance does not purport to provide a full account of the legal position; and even if it could be said to do so, I do not consider that it either contains a specific misstatement of the law or contains an omission which

means that, read as a whole, it presents a misleading picture of the legal position. Equally, I do not consider that the case of R (oao SSP Health Limited) v CQC to be of particular significance in relation to the present challenge. That was a case in which a regulated entity complained that findings of fact within an inspection report were demonstrably wrong or misleading and that there was no process in place to amend those findings of fact before publication of the report. In the present case, not only is there no challenge to any specific failure by CQC to correct findings; but also the nature of the step under section 56(2) is significantly different from the publication of an inspection report with a rating of the provider; and further, as I have already said, the Revised Guidance does provide for a dialogue or 'conversation' between the provider and the CQC at each stage, and, at Stage 6 for there normally to be an opportunity on the part of the provider to comment on the information on which the CQC will base its decision to notify local authorities.

64. The second aspect of Ground 2 is that there is no provision in the Revised Guidance for an independent review of decisions under section 55 and, in particular, section 56 of the 2014 Act.

65. As to this, the statutory scheme established by the 2014 Act is one for an evaluative risk assessment to be carried out by the CQC. The Act does not require a different body to review or re-perform the evaluation carried out by the CQC. The evidence is that, in fact, the CQC follows a formal decision-making process as set out within its published Scheme of Delegation; and that any decision to issue a section 56 notification to local authorities would be made by the CQC's Chief Executive in consultation with the CQC's Chair, Chief Inspector of Adult Social Care, Director of Legal Services and the Director of Corporate Providers and Market Oversight. To suggest that there should be a further independent process of review appears to me to be the suggestion of a scheme different from that established by Parliament, and is not something which, given that context, fairness requires.

Ground 3

66. Ground 3 is that the Revised Guidance is unlawful in relation to the disclosure by the CQC of confidential information.

The Parties' contentions

67. Ground 3 is put by Advinia on two bases. In the first place it is said that there is procedural unfairness, in that the CQC may disclose commercially confidential information without the consent of the provider, without the provider having an opportunity to make representations before information is disclosed, and without a procedure for an independent review. Secondly, it is said that page 11 of the Revised Guidance, which summarises how the CQC will handle commercially sensitive information, fails to have regard to all relevant matters, and in particular fails to refer to the mandatory considerations set out in section 4 of the 2008 Act, including section 4(1)(e). The statement on page 11 of the Revised Guidance that 'the statutory purposes of CQC are highly likely to outweigh treating providers' information as confidential' fails, according to Advinia, to have regard to section 4(1)(e) of the 2008 Act and gives rise to a risk of unfairness.

68. As to the first of these bases, the CQC argued that there was no unfairness in the Revised Guidance. At pages 9-10 the Revised Guidance states that the CQC will not publish the stage in the operating model that providers are at, and will only disclose its assessment of financial risk to local authorities when under a duty to do so or where it is necessary to protect and promote the health, safety and welfare of service users. The section in the Revised Guidance on 'How we will handle commercially sensitive information', states that the CQC recognises that providers consider that most of the information that they have to pass to the CQC is commercially sensitive; and states that, while the CQC cannot give assurances that it will not, 'in any circumstances', disclose information to others, it nevertheless 'will be mindful of the importance to providers of maintaining the confidentiality of commercial information so long as it does not conflict with the CQC's statutory duties'. While the same section states that, in the event of a conflict between the desire to maintain the confidentiality of provider information and achieving the CQC's statutory purposes, those statutory purposes are 'highly likely' to outweigh treating providers' information as confidential, nevertheless it is made clear that the decision will be one not taken lightly. As is stated on page 12 of the Revised Guidance:

> '… we understand the damage that could be done to a provider from any disclosure that it is in financial difficulties and therefore may not be able to continue with its business. There will always be a clear audit trail of the decision made and CQC's thought process behind any such step taken. This is **not** intended to be a blanket power for CQC to disclose commercially sensitive information to any party it chooses. The decision will always be based on the specific facts of each case, and providers will be given advance notice of a decision to disclose, unless exceptional circumstances require disclosure without notice.' (emphasis in original)

69. This, the CQC argued, represents a reasonable and balanced approach; and the Revised Guidance is entirely appropriate and lawful. There is no possible argument that the test set out in R(A) v Home Secretary is met.

70. As to the second aspect of Ground 3, the CQC contends that there is no error of law in the Revised Guidance not referring to section 4(1)(e) of the 2008 Act. There is no need for the Guidance to reproduce the CQC's statutory duties. As to the statement that if there were a conflict between providers' desire to maintain confidentiality and the CQC's achieving its statutory purposes the latter would be likely to prevail, this was not controversial and simply reflected the statutory framework.

Analysis

71. I consider that the CQC is correct in relation to both aspects of Ground 3, essentially for the reasons it gave.

72. In relation to the first aspect: that the CQC may have to pass confidential information to a local authority is a function of the exercise of the statutory duty under section 56(1) and (2), and the obligation imposed by section 56(4) of the 2014 Act. Given that, it is clear that the CQC cannot give an assurance that it will not in any circumstances supply confidential information to others. The Revised Guidance is clear that confidentiality will be carefully considered; provides that there will be an audit trail; and that there will be advance notice of a decision to disclose, save in exceptional circumstances. I

consider that the policy set out in the Revised Guidance is one which can be operated lawfully and fairly.

73. In relation to the second aspect, the Revised Guidance did not need to set out the terms of section 4 of the 2008 Act. Furthermore, what section 4(1)(e) of the 2008 Act enjoins is that the CQC must have regard to proportionality to risks and the targeting of action. I do not consider that it has been shown that the CQC did not take these matters into account in the formulation of the Revised Guidance which (a) involves a gradated scheme; (b) envisages and requires a close involvement between the CQC and providers; and (c) contains various express protections of providers, including in relation to their confidential information. That, in the event of a conflict between the achievement of the CQC's statutory purposes and a desire to maintain the confidentiality of provider information, the former is likely to outweigh the latter, appears to me to be an unremarkable statement which reflects the statutory framework.

Conclusion

74. For these reasons I conclude that Advinia is correct in relation to Ground 1, but that Grounds 2 and 3 fail. I will make appropriate declarations and the Revised Guidance will be quashed to the extent necessary to reflect my conclusion on Ground 1.