

First-tier Tribunal Care Standards

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

[2022] 4583.EA

Neutral Citation Number: [2023] UKFTT 8 (HESC)

Hearing held on 29 and 30 November 2022 at the Royal Courts of Justice
Deliberation held on 5 December 2022

BEFORE

Ms S Brownlee (Tribunal Judge)
Ms Marilyn Adolphe (Specialist Member)
Dr David Cochran (Specialist Member)

BETWEEN: -

Home Angels Healthcare Service Ltd

Appellant

-v-

Care Quality Commission

Respondent

DECISION

The Appeal

1. This is Home Angels Healthcare Services Ltd's ('the Appellant') appeal against a decision of the Care Quality Commission ('CQC' and 'Respondent') to refuse an application to vary a condition of its registration by adding a new location to carry on as a service provider in respect of the regulated activity of 'personal care' at a new location of 'Home Angels Reading, 400 Thames Valley Park Drive, Reading, Berkshire RG6 1PT'. The appeal was brought by Mr Quays Irby, the nominated individual and director of Home Angels Healthcare Service Ltd, on behalf of the Appellant, Home Angels Healthcare Ltd. Mr Irby appeals the Respondent's decision of 28 April 2022 pursuant to section 32 of the Health and Social Care Act 2008 ('the Act') to the First-tier Tribunal.

The Hearing

2. The hearing took place on 29 and 30 November 2022 as a face-to-face hearing in the Royal Courts of Justice. The parties and all witnesses attended to provide oral evidence.
3. The documents that we were referred to are in the electronic hearing bundle

provided in advance of the hearing (370 digital pages). Some participants were working from hard copy bundles and some from digital bundles. We received a hard copy of additional documents to be added to the hearing bundle. The hard copy hearing bundle supplemented the electronic hearing bundle, with a significant number of documents which had been added to the electronic hearing bundle. The Tribunal panel had been provided with an earlier version of the hearing bundle which did not contain the additional documents. This appears to have happened as a result of a further telephone case management hearing on 9 November 2022 at which Judge Khan permitted the parties to submit further evidence. As a result of the oversight, the Tribunal panel took some time on the morning of the first day of the hearing to read the additional documents. For the sake of completeness, the hard copy hearing bundle contained the following additional pages of documentary evidence (A40-41, C95-102, D216-502). The Tribunal also had the benefit of skeleton arguments from both parties.

4. During the course of the hearing, it became apparent that documentary exhibit HA/33 (attached to Mr Irby's witness statement dated 8 November 2022) was missing from the hearing bundles. An electronic copy as provided to the Tribunal.

Attendance

5. Mr Irby was represented by Ms Laura Herbert, instructed by Ms Laura Hannah of Stephenson Solicitors LLP. Mr Quays Irby gave oral evidence and called one witness, Mr Peter Cook, finance manager. The CQC was represented by Ms Mary-Teresa Deignan, instructed by Ms Georgia Deacon of Mills & Reeve Solicitors LLP. The Respondent called three witnesses: Mrs Tracey Sefton, registration manager, Dr Emma Boger, head of registration (at the time, now deputy director of operations) and Ms Louise Drew, registration manager.

Preliminary Issues and late evidence

6. Ms Herbert clarified the approach to fact finding in the appeal. The Tribunal panel agreed that the burden on an appeal of this kind rests with the Appellant, who must discharge it to the standard of 'more likely than not'.
7. By way of additional evidence, to which there was no objection, an updated version of the statement of purpose was provided electronically to the Tribunal panel during the hearing.
8. The Tribunal requested that Ms Herbert submit proposed conditions of registration to the Tribunal panel, in light of the alternative position set out in the Appellant's skeleton argument, which were provided to the Tribunal for consideration at part of its deliberation.
9. During the course of the hearing, Mr Irby submitted an email from the Respondent's registration department to Mr Charles Whent, dated 28 November 2022, which confirmed the issuing of his DBS certificate and an ID verification service document issued by the CQC regarding Mr Joseph

Elsemaid. There was no objection to the admission of the documents, and we considered they were relevant to our decision. They were admitted.

10. During the course of the hearing, a relevant issue developed regarding the CQC's current risk rating for Home Angels Healthcare Services Ltd and Yes Care Limited. Dr Boger produced a two-page summary on 29/30 November 2022, which was admitted by the Tribunal as the evidence was clearly relevant to our decision and there was no prejudice, given that Dr Boger made herself available to be recalled for any additional questions arising out of the document.
11. The Appellant sent an electronic copy of an email exchange between Mrs Sefton and Mr Irby, dated 10 March 2022. Again, there was no objection to the admission of the document, and we considered it was of relevance to our decision. It was admitted.
12. Finally, the CQC's enforcement policy (dated February 2015) was sent electronically to the Tribunal during the hearing.

Background

13. The Appellant is currently registered to provide the regulated activity of 'personal care' with the condition that the regulated activity may only be carried out at one location, namely 'Home Angels Healthcare Services Ltd, Suite 26, Innovation House, Molly Millars Close, Wokingham, Berkshire RG41 2RX'. Mr Irby is the nominated individual, and the registered manager is Ms Rachael Phiri. Mr Irby bought Home Angels Healthcare Services Ltd in July 2019. At that time, the Appellant provided regulated activities from three locations: Wokingham, Swindon and Newbury. At some point in February 2020, the Swindon location ceased to operate. The Appellant continued to be registered to provide the regulated activity from Newbury and Wokingham. On 21 October 2021, the Appellant applied to the Respondent to vary the conditions of registration by removing the location at an address in Newbury, and, at the same time, in a separate application, to add the location at an address in Reading. The Appellant is a domiciliary care agency, providing personal care to people living in their own houses and flats – the personal care consists of help with tasks to personal hygiene and eating. The service provides personal care to older people and younger adults who may have dementia, a physical disability or a sensory impairment. Mr Irby took over the service in approximately July 2019. At the time of the most recent CQC inspection, on 1 December 2021, there were ten adults using the services of the Appellant.
14. On 14 January 2022, the application to remove the location at an address in Newbury was accepted, on the basis that the Respondent had confirmation that the location had been dormant for some time. It was clear to the Respondent, at that point, that the Appellant intended to provide 'personal care', as a regulated activity, from the address in Reading. At the time of the application to vary the registration to add the Reading location, Mr Irby was the nominated individual for the Appellant and Ms Phiri was the registered manager at the Wokingham location. In addition, Mr Irby was and continues to be the nominated individual for a second registered service provider, 'Yes Care Limited'. Ms Phiri is also the registered manager for 'Yes Care Limited'.

Care Limited' provides the regulated activity of personal care to one person in their home.

15. The Appellant and 'Yes Care Limited' currently have an overall CQC inspection rating of 'requires improvement'. This means that both service providers were not fully complying with the regulatory requirements at the time of their most recent inspections.
16. 'Yes Care Limited' had been inspected by the Respondent on 18 November 2019 and received an overall rating of 'requires improvement' (rated as 'requires improvement' in four of the five domains and 'inadequate' in one). It was inspected again on 14 September 2020 and rated as 'requires improvement' in relation to the domain which had previously been rated as 'inadequate'. The other domains were not rated. Home Angels Healthcare Ltd was inspected on 14 September 2019 and received an overall rating of 'good' (rated as 'good' in four of the five domains and 'requires improvement' in one). It was inspected again on 1 December 2021 and received an overall rating of 'requires improvement' (rated as 'good' in two domains and 'requires improvement' in three domains). Since 2019, the domain of 'is the service well-led?' has not been at the level of 'good' or above at either service provider.
17. On 2 February 2022, as part of the Appellant's application, the Respondent received an updated statement of purpose and followed it up with virtual assessment interviews, on 22 February 2022, with Mr Irby and Ms Phiri. A further statement of purpose was received on 4 February 2022. On 28 March 2022, the Respondent issued its notice of proposal to refuse the application to vary the conditions of registration. After the notice was issued, on 26 April 2022, Mr Irby requested additional time to respond as he had secured legal representation after some delay. The request was refused, and the notice of decision was issued (having received no written representations from the Appellant) on 28 April 2022. Mr Irby filed an appeal to the First-tier Tribunal on 28 May 2022.

Legal Framework

18. Section 2 of the Health and Social Care Act 2008 ('the 2008 Act') invests in the Respondent registration and review and investigation functions. By virtue of section 3(1) of the 2008 Act, the Respondent's main objective is to protect and promote the health, safety and welfare of the people who use the health and social care services. Section 3(2) empowers the Respondent to fulfil its functions for the general purpose of improving health and social care services, 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 the efficient and effective use of resources in the provision of health and social care services.
19. Section 4 of the 2008 Act sets out the matters to which the Respondent must have regard, including the views expressed by or on behalf of the members of the public about the health and social care services, experiences of people who use the health and social care services and their families and friends and the need to protect and promote the rights of people who use health and social care services. Any action taken by the Respondent is proportionate to the risks

against which it would afford safeguards and is targeted only where it is needed.

20. Section 19(1)(a) of the 2008 Act provides for a service provider to apply to the Respondent to vary or remove any condition for the time being, other than a registered manager condition required by section 13(1) of the 2008 Act.
21. Under section 20 of the 2008 Act, the Secretary of State is empowered to make regulations in relation to the regulated activities by way of regulations. The Regulations made under this section are the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936 ('the Regulations') and The CQC (Registration) Regulations 2009.
22. Sections 26, 27 and 28 of the Act set out the procedural requirements in relation to notification of the Respondent's decision.
23. Section 32 of the Act provides for a right of appeal to this Tribunal against a decision to refuse the registration of a service provider in relation to a regulated activity. The Tribunal may confirm the decision or direct that it is not to have effect. Under section 32(6), the Tribunal also has power to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates. A 'discretionary condition' means any condition other than a register manager condition required by section 13(1).
24. Part 3 of the Regulations sets out the Fundamental Standards that registered providers must comply with when carrying on a regulated activity, which includes Regulation 12 (safe care and treatment) and Regulation 17 (good governance).
25. The Respondent applies its Enforcement Policy (in effect from 1 April 2015) ('the policy'). At page 20 of the policy, the use of conditions is explained as follows:

'Imposing, varying or removing conditions of registration is a flexible enforcement process which we can use in a variety of different ways to ensure that providers comply with their legal obligations and hence ensure that people who use regulated services are kept safe and receive an acceptable standard of care. For example, we may use a condition to stop a regulated activity at one location but allow the provider to continue providing services at their other locations. We can then remove the conditions once our specific concern has been addressed. Conditions may be applied across a whole provider or targeted to specific locations, or to services and activities at one location'.

At page 32, in relation to appeals:

'CQC offers providers that are rated, the opportunity to request a review of their ratings. That review is not a statutory right of appeal, but a matter of CQC's policy. It is separate to the procedures for representations and appeals on enforcement and registration decisions'.

26. The Appellant bears the burden of persuading the Tribunal that, at the time of the hearing, the Regulations are being complied with and will continue to be

complied with, including 'by having regard to' guidance issued under section 23 of the 2008 Act. The findings of fact are made on the basis of whether or not the Tribunal is satisfied as to the facts on the balance of probabilities.

27. The Tribunal is required to determine the matter afresh and make its own decision on the merits and evidence as of the date of hearing. Subject only to relevance and fairness, this can include new information that was not available or presented at the time when the decision under appeal was made. The fresh determination in this appeal includes consideration of the detailed documentary evidence provided by both parties, as well as the oral evidence, subject to questioning over the two-day hearing. We have considered all of the evidence and the written submissions before us, even if we do not mention every point of it in our decision. We refer only to the parts of the evidence which were of particular importance in reaching our findings.

The Decision under Appeal

28. The CQC adopted the notice of proposal and refused the application on the basis that the manner in which the regulated activity would be provided, were the application granted, would not be compliant with the requirements of the Regulations, in terms of Regulations 12, 15 and 17 and Regulation 12 of the Care Quality Commission (Registration) Regulations 2009. It is agreed that Regulation 15 is no longer in issue, in light of the Appellant satisfying the Respondent as to the suitability of its Reading premises.

29. From the notice of proposal, Regulation 12 (1) and (2)(a),(b) and (c) states:

'Safe care and treatment

12(1) Care and treatment must be provided in a safe way for service users'.

30. Regulation 17(1) states:

'Good governance

17(1) Systems or processes must be established and operated effectively to ensure compliance with the requirements in this Part.'

31. Regulation 12 of the Care Quality Commission (Registration) Regulations 2009 states:

'Statement of purpose

12(1) The registered person must give the Commission a statement of purpose containing the information listed in Schedule 3.

(2) The registered person must keep under review and, where appropriate, revise the statement of purpose.

(3) The registered person must provide written details of any revision to the statement of purpose to the Commission within 28 days of any such revision'.

32. Schedule 3 requires the following information to be included in the statement of purpose to include the aims and objectives of the service provider in carrying out the regulated activity, the kinds of services provided for the purposes of the carrying on of the regulated activity and the range of service users' needs which those services are intended to meet, the full name of the service provider and of any registered manager, together with their business address, telephone number and, where available, electronic mail addresses, the legal status of the service provider and details of the locations at which the services provided for the purposes of the regulated activity are carried on.

Issues

33. The key question for the Tribunal is whether, as of today's date, the decision to refuse the Appellant's application to vary its registration conditions by adding a location in Reading should be confirmed or directed to cease to have effect. We should ask ourselves – does the decision remain a reasonable, proportionate and justified one as of the date of the hearing?
34. We had comprehensive skeleton arguments from both parties, which we considered in advance of the hearing and as part of our deliberation, as well as the oral closing submissions made by both parties, which effectively emphasised the key points set out in the skeleton arguments.

The Appellant's position

35. From the Appellant's appeal application and skeleton argument, it was contended that:
- (a) The Respondent's conclusion that the Appellant was not complying with its regulatory requirements was based on out-of-date information, given that the most recent inspection of 'Yes Care Limited' had occurred in September 2020 and for the Appellant, in December 2021.
 - (b) The Respondent failed to take into account the entire regulatory history for the Appellant, including the inspection history of the Newbury location.
 - (c) The Respondent did not pay sufficient regard to the improvements made at the Wokingham location. The Appellant has now provided updated evidence demonstrating compliance with the regulatory requirements at the Wokingham location.
 - (d) The statement of purpose now meets all the requirements of Schedule 3, with a proposed registered manager in place and the service user bands correctly set out.
 - (e) The CQC did not adhere with the Enforcement Policy, specifically in relation to extending time for the Appellant to provide written representations to the notice of proposal.

The Respondent's position

36. The Respondent contends that the decision to refuse to vary registration to add the Reading location was and continues to be a reasonable one, in light of the following:

- (a) The Appellant's regulatory history, based, in particular, on the most recent comprehensive inspection with an overall rating of 'requires improvement'.
- (b) The numerous iterations of the statement of purpose do not demonstrate an intention to comply with the regulatory requirements.
- (c) The proposal to appoint Ms Phiri as the registered manager of the Reading location, in light of her other responsibilities and the regulatory history of the Appellant and 'Yes Care Limited'. In the alternative, the proposal to appoint Mr Whent and/or Mr Elsemait as registered manager of the Reading location.
- (d) The suitability of Mr Irby to provide management oversight and supervision, in light of his regulatory history.

Evidence

37. We considered all the evidence that was presented in the complete hearing bundle and submitted during the hearing. We have summarised the evidence insofar as it relates to the relevant issues for the Tribunal. What is set out below is not a reflection of everything that was said or presented at the hearing or in the documentary evidence. Each witness who attended to give oral evidence adopted their witness statements and provided further oral evidence.
38. **Mrs Sefton** confirmed that she had reviewed the additional documents submitted by Mr Irby and nothing she had read had changed her view from that set out in her witness statement. She continued to have a concern with the statement of purpose, the sixth version, submitted by Mr Irby in advance of the hearing (and sent to the Tribunal electronically). She observed that it had taken six attempts to secure a statement of purpose which was compliant with Schedule 3, apart from the references to registered managers who had not applied to become registered managers as of yet. Mrs Sefton accepted that the Newbury location had been inspected on 12 September 2019 and received an overall rating of 'good'. She received an application to remove the Newbury location in October 2021 and proceeded to remove it – it was a compliant, but dormant site. She accepted that there was no issue with the Newbury location taking on care packages and it could have gone ahead and provided the service. She did not accept that the application to remove Newbury was linked to the application to add Reading – all add and remove applications are subject to a registration assessment and she chose to assess them separately as that is the way in which she approached all applications of this kind. The registered manager for Newbury confirmed that it could be removed as it was dormant. Mrs Sefton accepted that if the Appellant had used the Newbury location to provide personal care, bearing in mind it had been dormant for some time, there would have been no issue with that.
39. She accepted that from the point when Mr Irby took over ownership of the Appellant in July 2019 until the inspection of 20 November 2019 (Wokingham location) was not a significant amount of time to improve issues. She observed that there had been multiple breaches of the regulations identified during the September 2019 inspection and by the point of 1 December 2021, there remained breaches. The service (Wokingham location) had remained as 'requires improvement' for over two years. Mrs Sefton explained that

registration decisions are not based on one course of information and the Respondent's risk platform, which is refreshed monthly, helps the Respondent to identify where there is risk and emerging risk. Mrs Sefton would not accept that significant progress had been made to improve the Appellant or 'Yes Care Limited' as not enough improvement had been made to lead to either regulated provider being rated as overall 'good' from their most recent inspections.

40. Mrs Sefton accepted that the Appellant had made changes to its statement of purpose for the Reading location and its intention with regards to the registered manager. She explained that the current statement of purpose was compliant apart from the registered managers needing to apply. She explained that the need to clarify information about service user bands did not make it non-compliant, but she would need to discuss the service user bands with the registered manager. She explained that the Respondent had concerns about Ms Phiri's capacity to be a registered manager at a third location, when the other two locations required improvement. She accepted that the recruitment of a new manager to run the proposed Reading location would be sensible and that it would be sensible to have more than one registered manager at the location, given that Ms Phiri would be overstretched if not. Mrs Sefton clarified that it the proof of good governance was 'in the pudding' and that systems and processes are only as effective as the people who operate them.
41. After rearrangement of the time at Mr Irby's request, the registration interview took place on the phone and Mrs Sefton thought Mr Irby was driving at the time. She did not accept that Mr Irby discussed conditions with her at the meeting. Mrs Sefton pointed out that the CQC will only use conditions where it believes that the individual can rectify the issues in a timely manner to the point where the service will provide safe, good and effective care. She accepted that the statement of purpose is a remediable issue and she indicated that she was not saying that the service does not have the ability to remedy the requirements, but repeated 'requires improvement' over a number of years was of relevance to the decision. She explained that the Newbury location's regulatory history was not taken into account as it was a dormant location by the time of the decision. She explained that her remit is whether the service provider has an intent to provide regulated activity to the level required and if it cannot evidence that intent, then the Respondent must refuse the application to vary. From her perspective, the 'good' rating of a dormant service provider could not 'negate' the regulatory history of the Wokingham location and 'Yes Care Limited'.
42. Mrs Sefton explained that the enforcement Policy relates more to inspections than to registrations and that there was no such thing as 'conditional approval' of a location. She clarified that the fact that a proposed location has been successful in a tendering process with a local authority is not a high priority.
43. **Dr Boger** explained that the sixth version of the statement of purpose cannot be looked at in isolation and should be considered alongside the full application. From her perspective, it does not change the decision. She explained that Mr Whent and/or Mr Elsemait's applications to become registered managers would be considered as individual application and judged holistically. Her concern with the current statement of purpose was that it did not reflect the registered managers as the Respondent had not yet had an opportunity to assess their

applications. Dr Boger stated that in the last two to three years, around four to five per cent of registration applications are refused. She further clarified that an address at a Bracknell location has never been registered to provide regulated activities. She explained that the statement of purpose currently reflects what the registered provider proposes, and it would need to be looked at, as part of its assessment, alongside the regulatory history, the service provider's interview and other information. She accepted that the statement of purpose included the range of information that is required by Schedule 3, apart from the proposed registered managers, whose individual applications are yet to be assessed. Dr Boger indicated that she had made the decision as to whether to extend the deadline for Mr Irby to provide written representations. She did not consider exceptional circumstances were engaged and took the view that Mr Irby could make a new application at any point.

44. Dr Boger accepted that it is not usual to not have a more up to date inspection of the Appellant (Wokingham location) and 'Yes Care Limited', but she strongly caveated that, she said, with the impact from the pandemic on the inspection regime and what the CQC was being asked to prioritise. Dr Boger explained that one option for a registered provider would be to submit a new application and another option would be for the Respondent, as part of an appeal to the First-tier Tribunal, to agree a stay to reassess if improvements had been made.
45. Upon recall, Dr Boger confirmed that the risk profiling comes from an automated, internal system and the risk profile is updated monthly. The risk profiling may trigger an inspection or a monitoring call, if it is felt necessary. She confirmed that the inspection and registration teams know that an inspection of the service provider is due. She clarified that service providers cannot request inspections; that is not how it works. Dr Boger stated that if the application was granted, as of today, on the basis of proposed registered managers, the service would immediately be in breach of the Regulations and the CQC cannot grant an application to put a provider in immediate breach. She did not consider the proposed conditions from the Appellant to be appropriate as if the CQC has any doubt about ability to comply with the Regulations, then it cannot admit onto the register.
46. **Ms Drew** explained that the Respondent advised Mr Irby of its proposed decision on 15 March 2022, so he was aware of the Respondent's intention by that point. Ms Drew considered that Mrs Sefton took the right approach, in taking into account the regulatory history of the service provider. She explained that the regulatory history included the Newbury location but the fact that it had been dormant since 2019 meant it was not operational and the relevant services were actually the operational services, providing a service-to-service users. Ms Drew's focus was on good care and she considered if of relevance that there was one dormant service and then two services which required improvement. She explained that there were breaches which led to the rating and she could only comment on what was stated in the previous inspection reports. Ms Drew stated that when looking at registration assessments, the team is inspecting the service provider's intent to provide good care. In order to provide good care, the team wants to see a good service, not one with repeated breaches. She explained that the registration assessment process also considers the suitability of the registered manager and the nominated

individual.

47. Ms Drew accepted that there had been some improvement in the Appellant, but it was still rated overall as 'requires improvement'. The assessment process did not establish that the service provider intended to comply with the regulatory requirements. She did not accept that the CQC must inspect after 12 months where a service is 'requires improvement'. She stated that the pandemic had been an interesting time and she did not run the 'requires improvement' protocol. She accepted that 'Yes Care Limited' had last been inspected two years ago, but that was the history and the data the registration team had to work from. Ms Drew was not able to comment on the approach to scheduling inspections. She accepted that as part of the assessment process, she did not directly check whether Mr Irby had complied with the conditions set out in the consent order from March 2020, but if there had been identified concerns with compliance, they would have been set out in the notice of proposal.
48. Ms Drew did not wish to comment on proposed registered manager applications. As she observed, the only 'in-flight' application for the Reading location listed Ms Phiri as the registered manager. She explained that conditions are an exception and business as usual applications would not impose conditions of the kind suggested by the Appellant. The principle is that the day the registration application is approved, the intent to comply has been demonstrated and the CQC is indicating that it is a good service, ready to operate.
49. Ms Drew stated that inspection colleagues' input is integral as they have a relationship with the service provider, so their knowledge is key. She noted that under normal circumstances, an application of the kind made by the Appellant would be accompanied by a registered manager application and with the current application, on appeal, there is an application to vary registration conditions, with two proposed registered managers and no updated information on them. The fundamental difference between registration and inspection is that registration looks at intent to comply and inspection looks at operational compliance. She explained that in assessing the registration application, as in the Appellant's case, the registration team looks for evidence of intent to comply so that at the first point of inspection, the service will receive a good rating.
50. **Mr Irby** confirmed that the contents of his three witness statements dated 6 and 15 September 2022 and 8 November 2022 were all correct. He clarified that he had updated the email address in version 6 of the statement of purpose for the Reading location. He explained that the issues with training, which led to a breach in the most recent inspection of the Wokingham location had not been rectified as the training has been provided. He explained that he saw the Newbury location as moving to the Reading location because the service provider had been successful in a contract tender process with Reading Council and the Council required a CQC registered address in the Reading area. He explained that the listing of additional offices in the signature of the service's emails is because their agreement with Regus allows the service to use other office spaces, but none of the offices were claiming to be CQC registered. He explained, from his email exchange of 10 March 2022 with Mrs Sefton that he felt so frustrated at the time as he felt that the CQC had already made up its

mind and if any content in the email was unsuitable, he apologised for it. He wanted to know what to do and he would do it. He didn't accept that the email had been intimidating but wished to apologise if there was inappropriate content in it. Mr Irby had concerns with the way in which the CQC approached its most recent inspection of the Wokingham location and considered the breaches to be remediable and minor.

51. Overall, he considered that the most recent rating for the Appellant was wrong as he was slowly improving things. He accepted the ratings for 'Yes Care Limited'. He accepted that the Newbury location was last operational in November 2019 and he indicated that there was one staff member to transfer to Reading – Ms Phiri. He accepted that he had made an application to vary registration by adding a new location, but his view was that the CQC knew he was transferring the location from Newbury to Reading. He explained that there should have been a level of communication from the CQC to let him know how to complete the application as he was trying to work with the CQC on a daily basis. He felt that he has been treated harshly in the whole process, including the decision not to extend time to provide written representations.
52. Mr Irby confirmed that when he applied to Reading and Bracknell Councils as part of the tendering process for services, he supplied the CQC report from Newbury rating it as 'good' in 2019 and told Bracknell and Reading Council that he would be applying to transfer the Newbury location to a Reading location. He explained that the Newbury location was still active at the time when he applied to the tendering process and did not accept that he misrepresented that Newbury was an active location; the application never asked whether Newbury was dormant.
53. He did not consider that the breaches identified in the most recent inspection of the Wokingham location were serious – the service is safe. He considered that the entire regulatory history of the Appellant should have been taken into account and it would have demonstrated that overall, it was in a good position.
54. He was of the view that Ms Phiri would now be suitable to be listed as a registered manager at both the Wokingham location and the Reading location as she would have the assistance of an additional registered manager at each location, in the form of Mr Elsemait and Mr Whent.
55. He did not accept that there had been any suppression of safeguarding incident internally. The incident which occurred involved a staff member who was raising matters which were not safeguarding matters and a social worker had flagged the actions as unprofessional. As such, Mr Irby wanted the individual to inform her manager first of all and for the manager to take it forward, in order to ensure it was a genuine safeguarding issue. Mr Irby's concern was the need for staff to provide the best care by working with professionals rather than going against them on a minor issue. The process used now was that carers should raise any concerns with their manager in the first instance and the manager decides on raising a safeguarding issue. He explained that CQC inspectors are all different and so the learning that comes from CQC officers is different.
56. Mr Irby explained that he completed the remove and add location forms and

expected them to be considered together. The CQC had raised concerns about capacity and that is why he had brought in the new system of having a registered manager at each location, providing support to Ms Phiri. He explained that if the application to vary to add the location in Reading was not allowed, he would lose the contracts for personal care with Reading Council. He considered that the CQC was not working with him and was blocking him from any hope of improvement.

57. **Mr Cook** explained that his role had been extended to compliance manager, but they quickly realised that this was not realistic on resources, so someone else has now taken on the day-to-day compliance and Mr Cook is an internal auditor of compliance since 1 October 2022. He audits the carers' records rather than the service users' records.

The Tribunal's conclusions with reasons

58. For the reasons set out below, the Tribunal has concluded that the appeal shall be allowed because the Appellant has established, on the balance of probabilities, that he will be able to comply with Regulations 12 and 17 of the Regulations.
59. In considering the proportionality of the decision, we considered that the fresh determination we are required to undertake, as at today's date, allowed us to carefully consider the points made by the Appellant about the CQC's decision making, including the application of the Enforcement Policy and the decision not to extend time to allow Mr Irby to send written representations through his legal representative. Any perceived unfairness or procedural concerns raised by the Appellant have been effectively dealt with, in our view, by the fresh determination that we have completed. In further considering proportionality, we took into account the public interest in the promotion of the health, safety and welfare of the people who use health and social care services, and the Respondent's ability to fulfil its registration functions. With that in mind, in making the decision afresh, we considered it relevant to take a holistic approach, as endorsed by the CQC's witnesses.
60. Firstly, as accepted by the Respondent, one of the breaches it identified in its notice or proposal has fallen away – the premises is now considered acceptable to meet the requirements of Regulation 15.

Regulation 12 of the Care Quality Commission (Registration) Regulations 2009: the statement of purpose

61. The notice of proposal made it clear that the statement of purpose submitted at the time of the application was considered inaccurate, as there was wrong information about the service users' bands, an incorrect address for the location and by making reference to an intention to provide nursing care – for which the service provider is not registered. The three issues listed above have now been rectified. By the time of the hearing, the only outstanding issue with the statement of purpose was the reference to a registered manager who is proposed, but yet to be subject to assessment by the CQC as part of a completed application to become a registered manager for the service provider, namely Mr Joseph Elsemait, as a full-time manager with support from Ms Phiri

as a manager for 2.5 days per week.

62. We reminded ourselves of the issue with Ms Phiri's capacity to provide registered manager oversight to three locations, at the time of the application being made in 2021. At that time, it was intended that Ms Phiri would be the registered manager, on her own, at the Reading location, in addition to her duties with 'Yes Care Limited' and the Wokingham location of the Appellant. Given that it is now intended that Ms Phiri will be a registered manager of the Reading location, with full time support from Mr Elsemait, the Tribunal concluded that the issue of the registered manager structure no longer caused an immediate concern for the Respondent to such an extent that it presented as a breach of the regulatory requirements. None of the Respondent's witnesses concluded that Ms Phiri, as a registered manager, with full time support from one other proposed registered manager, would represent a breach of the regulatory requirements, or put another way, an intention not to comply with the Regulations.
63. Looking to Mr Elsemait's application, we received evidence which demonstrated that on 11 November 2022, Mr Elsemait paid a fee to the Post Office to verify his identity as part of his registered manager application to the CQC. In addition, we reviewed Mr Elsemait's CV, which set out a professional history of a number of roles as a registered manager in domiciliary/home care between August 2017 and January 2022. We cannot conclude that he will be approved as a registered manager by the CQC, but the evidence presented to us led us to conclude that he appears suitable to undertake the role. We carefully considered the issues raised, at various points, with the content of the statement of purpose for the Reading location. We understand why the Respondent had concerns, both at the time of the application and due to the number of versions presented by Mr Irby. However, by the time of the hearing, the only issues with the statement of purpose were its reference to a proposed as opposed to approved registered manager and the need to check the service users' bands – a point that Mrs Sefton confirmed could be checked with the registered manager. We did not conclude that these outstanding issues with the statement of purpose were of such a level of seriousness that they supported a conclusion that the Appellant does not intend to comply with its regulatory requirements.

Regulation 17(1): good governance

64. The Respondent stated that it took into account the regulatory history at Home Angels Healthcare Services Ltd as part of its registration assessment. We did not accept Mr Irby's point that the CQC did not take into account the entire regulatory history for the Wokingham location. It is quite clear from the notice of proposal that the Respondent looked at the inspection ratings from the first inspection in November 2016 to the most recent inspection in December 2021. In our view, the Respondent was entitled to attach little weight to the regulatory history of the Newbury location, which had been rated 'good' but had ceased to be operational in November 2019, some 11 months before the application to vary to add the location of Reading. It must follow, as a matter of common sense, that the CQC assesses current risk when it comes to a regulatory decision such as adding a new location from which to provide a regulated

activity. The fact that a registered provider's location has ceased to operate and been dormant for a period of 23 months, is not a relevant indicator as to the registered provider's ability to comply with the Regulations at the time of the application and in the future. We also noted that the Newbury location was last inspected and rated as 'good' some 23 months before the application to vary was submitted by Mr Irby. The domain of 'well-led' was rated as 'requires improvement', but all other domains were rated as 'good'. The rating of a dormant, closed business was of limited to no relevance in deciding the application to add a new location. Furthermore, we did not consider it reasonable for the CQC to view the application to remove Newbury and the application to add Reading as being in some way intrinsically linked. The CQC was entitled, as the Regulations require, to view the application to vary to add a new location as separate and distinct from the application to remove the Newbury location. The CQC has to be able to assure itself of intention to comply with the Regulations in all changes to the registration conditions of a service provider's delivery of regulated activities.

65. However, we found it significant that by the time of the hearing, the CQC's most recent inspections for the Wokingham location and 'Yes Care Limited' had taken place some 11 months and 26 months before respectively. We found that the decision to conclude that the Appellant did not demonstrate an intention to comply with the Regulations was based on inspection outcomes which were some time out of date. It was accepted during the hearing that no urgent procedures were undertaken in relation to either of the registered providers as a result of their most recent ratings. Furthermore, there was no evidence before the Tribunal to suggest that Mr Irby had not complied with the conditions set out in the consent order relating to an appeal to the First-tier Tribunal regarding an application to become a registered manager in relation to 'Yes Care Limited', noting, of course, that an inspection took place in September 2020 which resulted in a rating of 'requires improvement'.

66. We received evidence from Dr Boger that the risk profile for the Appellant was 'high' from November 2020 to January 2022, 'medium' from February 2022 to September 2022 and 'high' as of 1 November 2022. Crucially, the Tribunal had no information as to what was meant by a 'medium' or a 'high' risk and it was made aware that the assessment was made by an automated system. Finally, Dr Boger indicated, in the additional information that she provided to the Tribunal, that the risk profiling was used to inform decisions about further regulatory activity, such as an inspection or a monitoring call. We had no information before us to demonstrate that further regulatory activity was carried out for the Appellant, beyond a general acceptance that the service was due an inspection.

67. We examined the nature of the breaches of the Regulations from the most recent inspection report for the Appellant at the Wokingham location, noting that it had taken place after the Appellant's application and before the notice of proposal was issued. We were acutely aware that our decision must be proportionate, bearing in mind the statutory function of the Respondent and the impact on the Appellant. We considered it important to look at the nature and degree of the breaches of the Regulations, which led to the service provider requiring improvement in relation to the domains of 'safe', 'effective' and 'well-

led'. The service provider was in breach of Regulations 17 and 19. As to Regulation 19, the service provider was able to ensure compliance with regards to the DBS check for one member of staff and some gaps in the recruitment process used. It was notable that after the inspection, the registered manager and nominated individual provided information about actions taken to gain the necessary information and ensuring the missing information was then placed on the staff files. In our view, this demonstrated remediation of the issues with Regulation 19. We also noted that the service had been in breach of Regulations 18 and 12 at the previous inspection and was found to be no longer in breach.

68. As to Regulation 17, the service was still in breach as the registered manager had not operated an effective system consistently to enable them to assess, monitor and improve the quality and safety of the service provided and to enable them to ensure compliance with their legal obligations and the regulations. We reviewed the material submitted by Mr Irby to demonstrate compliance with Regulation 17 as of today. Ms Drew made the point, during her oral evidence and in her second witness statement, that the proof would be in the pudding and the action plans for the Wokingham location and 'Yes Care Limited' would need to be tested at inspection to demonstrate their effectiveness. We kept this in mind in assessing the Appellant's intent to comply with the Regulations, with emphasis on the word 'intent'. We considered the improvements made to the Wokingham location – noting that Mr Cook is now involved in auditing the records of the carers across the two providers. Furthermore, we carefully reviewed the documentation submitted by Mr Irby, demonstrating that he has implemented a new recruitment process, a new complaints procedure, regular spot checks, supervisions and quality assurance visits. The service now has a daily audit policy and audit check lists in place, as well as weekly management meetings and a safeguarding log. In addition, a compliance officer is now in place, working alongside Mr Cook, along with action plans for both registered providers. The work undertaken has been overseen by a specialist care consultant. In our view, these improvements, all undertaken since the previous inspection at the Wokingham location, are indicative of significant improvements to the service to such an extent that we concluded that it was more likely than not that the registered provider will comply with the regulatory requirements of Regulation 17 at the Wokingham location and at the Reading location.

69. We did not agree with the characterisation of the improvements to the Wokingham location being minimal, as set out in the notice of proposal. We noted that a number of the system improvements made by the registered provider have taken place since the notice of proposal was issued, taking into account that Mr Irby did not make any written representations before the notice of decision was issued.

Regulation 12(1): safe care and treatment

70. The notice of proposal based its decision as to intent to comply with this Regulation on the decision of the registered provider to propose Ms Rachael Phiri as the registered manager, with Mr Irby providing management cover when Ms Phiri was not available. The CQC's concerns with this arrangement

were shared by the Tribunal as it was clear that the arrangement would mean Ms Phiri would be a registered manager across two services rated as 'requires improvement' and a third, new service at the Reading location. Furthermore, the Tribunal understands that Mr Irby wishes, in due course, to apply to become a registered manager, following on from the completion of the conditions of Mr Irby withdrawing his appeal (as per the consent order from 5 March 2020) in relation to 'Yes Care Limited'. However, the proposals for the registered manager structure at the Wokingham and Reading locations did not appear to pose a fundamental and insurmountable difficulty to the Respondent, subject to Mr Elsemait and Mr Whent's applications being approved.

71. However, it is clear, and again, we must examine the intent of the registered provider to comply with the Regulations, that the updated arrangements, as set out in the sixth version of the statement of purpose, demonstrate that both the Reading location and the Wokingham location will have full-time registered managers (who have signed contracts of employment and are currently securing their compliance checks for registration applications) who will be supported by Ms Phiri. None of the Respondent's witnesses were critical of this proposal but continued to have concerns about the fact that the two registered managers (Mr Elsemait and Mr Whent) are not currently registered so to grant the current application to vary the conditions of registration of the Appellant to add a new location in Reading would automatically place the service provider in breach of the requirements of Regulation 12 of the Care Quality Commission (Registration) Regulations. We do not accept this. The key question is about intent to comply with the regulatory requirements. We concluded that the Appellant had provided sufficient evidence to demonstrate that it intends to comply and will comply with the regulatory requirements of Regulation 12 in respect of providing safe care and treatment through its updated register manager proposals for Wokingham and Reading, services providing domiciliary personal care only.
72. We carefully considered the proportionality and necessity of placing conditions on the registered provider's registration, in adding the location in Reading. We concluded that there were no practical and measurable conditions which were required to meet the low level of risk with regards to regulatory compliance.
73. We wish to stress that we found all of the Respondent's witnesses to have been credible, diligent and helpful to the Tribunal in making its assessment afresh. At the time when the decision was made by the Respondent, we have little doubt that it was a proportionate one, in light of the significant concerns about the registered manager arrangements and the lack of reassurance around the service provider's ability to comply with Regulation 17, in particular. However, we have concluded that the steps undertaken since the decision was made in April 2022 and the changes to the proposals for the registered management structure, the suitability of the premises and the improvements made at the Wokingham location, in particular, demonstrate that the Appellant intends to comply with its regulatory requirements at the location in Reading.
74. Finally, we wish to take this opportunity to remind Mr Irby that as the Respondent's witnesses each indicated – it is not for the CQC to instruct Mr Irby as to what i.e. required for a service provider to demonstrate compliance

with the Regulations. Mr Irby accepted that the content of his correspondence with the CQC in March 2022 betrayed his frustration at the process and the apparent lack of direct instruction and assistance from the CQC. We are reassured that Mr Irby now understands that it is for the registered provider, through its registered managers, nominated individuals and leadership staff, to plan, deliver and demonstrate regulatory compliance.

Decision

The appeal is allowed.

The CQC's decision of 28 April 2022 shall cease to have effect.

Judge S Brownlee

First-tier Tribunal (Health, Education and Social Care)

Date issued: 04 January 2023