Care Standards

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

Heard on 29 October to 2 November 2018
At the Royal Courts of Justice

[2018] 3315.EA

BEFORE
Ms Siobhan Goodrich (Judge)
Ms Libhin Bromley (Specialist Member)
Ms Jane Everitt (Specialist Member)

B E T W E E N:

SHC Rapkyns Group Limited & SHC Clemsfold Group Limited (jointly t/a Sussex Health Care)

Appellant

and

CARE QUALITY COMMISSION

Respondent

DECISION AND REASONS

Representation:
The Appellant: Mr Ruffell, counsel, instructed by Ridouts Professional Services plc
The Respondent: Ms Clare Hennessey, counsel, instructed by Ward Hadaway.

The Appeal

1. This is an appeal brought under section 32 (1) of the Health and Social Care Act 2008 (the Act) against the decisions made on by the Care Quality Commission (the CQC) on 28 March 2018 by which three provider wide conditions on registration were imposed.

Restricted Reporting Order

2. The names of service users had been anonymised in preparation for, and throughout, the hearing. Consistent with this the panel makes a restricted reporting order under Rule 14(1)

(a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or any matter likely to lead members of the public to identify the service users in this case, so as to protect confidentiality and privacy.

The Parties

3. The Appellant, formed of two legal entities, is currently the registered provider of 18 locations, most of which have been registered with the CQC since 31 October 2014. The Appellant trades under the name Sussex Health Care. The registrations allow the Appellant to carry out three regulated activities, namely:
   a. accommodation for persons who require nursing or personal care;
   b. treatment of disease, disorder or injury;
   c. diagnostic and screening;
   at a number of registered locations.

4. Sussex Health Care (SHC) is the largest provider of care for people with profound and multiple learning disabilities and complex physical disabilities in the county of Sussex. A number of the service users in the Appellant's care have learning disabilities, autism and physical disabilities as well as sensory impairments. As matters currently stand SHC provide care for about 454 individuals, most of whom are funded by local authorities. All of the service users are vulnerable adults.

5. The Respondent is the Care Quality Commission (CQC) and is the independent regulator in whom powers are vested by parliament under the Health and Social Care Act 2008 ("the Act"). The Respondent's main objective as set out by statute is to protect and promote the health, safety and welfare of people who use health and social care services (see section 3 (1) of the Act).

6. We will refer to the parties as the Appellant and the Respondent but on occasions we will use the abbreviations "SHC" or "CQC".

The History

7. The basic background and chronology is as follows:
   i. The CQC was advised in October 2016 that there was going to be a serious adults review (SAR) into injuries (fractured femurs) sustained by two service users at Beech Lodge in March/April 2015. In the event no prosecutions were undertaken.
   ii. In April 2017 CQC was made aware of several new and historical safeguarding concerns across a number of locations operated by SHC. The information, received from West Sussex County Council safeguarding teams and the West Sussex Clinical Commissioning Groups, was to the effect that at least eight deaths at SHC services between January 2016 and April 2017 were involved, amidst allegations that these may have been avoidable and a direct result of poor quality care.
   iii. Sussex Police were alerted to the deaths. This led to the police searching and seizing records at nine SHC locations. The investigation, which was widened to include 13 deaths across six Sussex Health Care locations, is ongoing.
   iv. An SAR report commissioned by West Sussex County Council Safeguarding Board (WSCCSB) was published on 17 April 2018. The issues of concern included lack of detailed care plans around pre-existing conditions and a lack of guidance around the risk presented, concerns over the staff response to the injuries, delays in calling an ambulance and lack of oversight of agency staff.
   v. A number of CQC inspections were undertaken between May 2017 and June 2018, the results of which are set out in the Scott Schedule.

vi. On 5 January 2018, pursuant to section 26 of the Act, the CQC issued Notices of Proposals (NOPs) to impose conditions in respect of both legal entities. The core rationale for the conditions was that these were necessary for the provider to demonstrate how systems and processes are operated effectively to ensure robust quality monitoring, mitigation of risk and that the provider was taking proactive steps to respond to risk and quality concerns.

vii. Representations were made by SHC on 2 February 2018 pursuant to section 27 of the Act. (We will not set out the detail here as the matters raised are those set out below in the Notice of Appeal.)

The Decisions under Appeal

8. On 29 March 2018 the CQC, having considered the representations made, issued Notices of Decisions (NODs), pursuant to section 28 of the Act, to impose conditions across registration as a service provider in respect of "Accommodation for persons who require nursing or personal care," and "treatment of disease, disorder or injury".

9. The conditions under appeal are as follows:

"The registered provider must submit to the Care Quality Commission, on the fifth working day of each month, a written report:

a) analysing all incidents that have resulted in harm to service users at each registered location in the preceding calendar month, and setting out the action taken (or intended to be taken) as a result of each incident. Provide a report on how incidents and notifiable events have been reported appropriately to the local authority and [the] CQC.

b) analysing all unplanned hospital admissions and all service user deaths at each registered location in the preceding calendar month, evaluating the actions taken by staff leading up to the admission or death and setting out the action taken (or intended to be taken) as a result of it.

c) ….[deleted from the Notices of Proposal following representations]

d) Setting out the steps taken to assess the sufficiency of staff deployed (including agency staff) and the skills and competence of those staff to support service users' needs. Provide the details of your plans for the following month for staff training, competency checks and supervision of staff deployed."

The Appeal

10. Section H of the appeal application form is very lengthy and runs to some 25 pages. In brief summary the core matters raised were that: the conditions should not be imposed because they are not necessary to drive improvement; the Appellant is continuing to improve and strengthen its systems and processes; the conditions lack clarity: for example, there is no definition of 'harm', 'notifiable events', or 'incidents.' The NOP referred to a significant amount of historical information and the Respondent has not presented any contemporaneous evidence to support its position. Since January 2018, the Appellant has made a significant number of changes to its governance structure (as further outlined) and has further strengthened systems and processes. The management structure has changed to facilitate a more robust and centralised governance system to enable effective organisational oversight. There are systems in place to enable effective reporting of incidents, information sharing, the analysis of data and identifying trends. The Respondent has other powers available to it that could achieve the desired result of encouraging improvement, which would not be overly burdensome to the Appellant. It is clear that the Appellant was, and is, continuing to make improvements, so as to make the

conditions unnecessary. By making aspects of Regulation 17 a condition of registration, the Respondent is elevating a non-prosecutable regulation into one that is, which clearly indicates a misuse of the Respondent's powers. The concerns identified by the Respondent relate to a small number of locations therefore imposing provider-wide conditions is a disproportionate burden for the Appellant, when weighed up against the number of locations which are compliant with the Regulations.

The Hearing

11. Prior to the hearing we received and had considered six lever arch files which included a large number of witness statements, supported by documents.

12. At the start of the hearing considerable time was allowed to enable instructions to be taken in relation to the Scott Schedule which, in general terms, had not resulted in admissions of any breaches. The vast bulk of the matters identified by the Respondent in the schedule related to breaches found on various inspections at different locations between May 2017 and June 2018. These related, in the main, to alleged breaches of various parts of the Health and Social Care Act (Regulated Activities) Regulations 2014. In broad summary, alleged facts/breaches were not admitted but the Appellant's response referred to steps taken to effect improvement.

13. In the course of the hearing we received further documents which included:
    - The Respondent's summary re current inspection ratings/pending reports.
    - The Appellant's schedule of inspections
    - A diagram of the SHC Senior Leadership and Management Teams.
    - Letter dated 10 October 2017 from CQC to SHC regarding possible Enforcement Action (Clemsford House)
    - Letter dated 12 July 2017 to Sir David Behan (CQC CEO) re recent inspection of Rapkyns Care home and the CQC Response dated 11 August 2017.

14. When the hearing began it appeared that the parties intended that we would receive oral evidence from some 13 witnesses. In the event as the result of sensible cooperation between counsel, for which we are grateful, it was agreed that the panel need only hear oral evidence from:

For the Respondent:
Amanda Stride, CQC Head of Inspection
Clare Robbie, CQC Head of Representations
Elizabeth ("Eddie") Hoult, CQC Inspector
Shirley Dayton, Specialist Advisor for the Respondent
Lois Tozer, Specialist Advisor for the Respondent

For the Appellant:
Amanda Morgan-Taylor, CEO of SHC
Deborah Fox, Director of Quality, Compliance and Service Improvement at SHC
Steve Whittingham, Chief Operations Director at SHC.

We received written statements for the Respondent from CQC inspectors: Annabel Forbes, Valerie Mc Kenzie and Hannah Cooper.

15. There was an issue about the evidence of Wendy Shepherd, the Coastal Operations Manager of Adult Services at West Sussex County Council. In short, this statement was

obtained after initial exchange of witness statements because of issues raised by the Appellant regarding the views of WSCC. In the event, various reasons were put forward by Mr Ruffell as to why the statement should not be received, and why Ms Shepherd should not give evidence. In summary, after a brief adjournment, it was agreed between the parties that for practical reasons it was not necessary for the panel to hear or take into account the evidence of Ms Shepherd. Amongst other considerations, the contextual matters covered by her evidence were referred to in the statements of Amanda Stride, amongst other documents, in any event.

16. The parties agreed at the end of the hearing that the panel need not concern itself with the statement of Ms Uddin, the Appellant's solicitor, and bundles 5 and 6.

The Legal Framework

17. Amongst other matters Section 2 of the Health and Social Care Act 2008 (the Act) invests in the CQC:

(a) "registration functions under Chapter 2,

(b) *review and investigation functions…."*

18. Section 3 provides that:

"(1) The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services.

(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 care services."

19. Section 4 sets out:

"Matters to which the Commission must have regard

(1) In performing its functions the Commission must have regard to—

(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 Act 1983, of persons who are deprived of their liberty in accordance with the Mental Capacity Act 2005 (c. 9), and of other vulnerable adults),

(e) the need to ensure that action by the Commission in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it 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 and consistent)…"

The Regulated Activity Regulations

20. The regulations made under section 20 of the Act include the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936 (the Regulations). Part 3 contains various provisions under the heading "Fundamental Standards" which include regulations regarding:
    - *9 Person-centred care*
    - *10 Dignity and respect*
    - *12 Safe care and treatment*
    - *13 Safeguarding service users from abuse and improper treatment*
    - *17 Good governance*
    - *18 Staffing*

21. A range of enforcement measures is available to the Respondent in seeking to discharge its functions under the Act. This appeal concerns the imposition of conditions on registration under section 28(3).

The Published Guidance

22. The CQC has issued guidance in a document entitled "Enforcement Policy", the latest version of which was published in February 2015. In terms of the power to impose, remove or vary conditions this states, amongst other matters:

"Imposing, varying or removing conditions of registration is a flexible enforcement process that 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 condition 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." (page 20)

*"**Deciding when to use conditions, suspension or cancellation***

We will consider using conditions, suspension or cancellation where we assess that people receiving regulated services:

• Have suffered harm or are at risk of harm because a registered person is failing to comply with legal requirements or
• Are receiving care services that substantially fail to meet the standards set out in the regulations.

We will consider imposing conditions on the provider's registration if we assess that by imposing a condition it is likely to result in the provider addressing the matters of concern within an acceptable timescale."

(page 22)

Our powers on appeal

23. An appeal against a decision lies under section 32(1)(a) of the 2008 Act. On consideration of the appeal the panel may confirm the decision or direct that it is not to have effect (section 32(5) of the Act). Under section 32 (6) the panel 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 registered manager condition required by section 13(1)).

The Burden and Standard of Proof

24. In so far as any past facts are relevant and/or in issue the Respondent bears the burden of proof and the standard is the balance of probabilities.

25. The burden rests with the Respondent to show, on the balance of probabilities, that each of conditions proposed are necessary and proportionate. The ultimate issue involves a judgement as to the existence and significance of any risk, as viewed today, on the basis of all the material before us, including any findings we may make in relation to past facts.

Submissions

26. We received written submissions from both counsel which we have considered carefully. We summarise the oral submissions below.

27. Ms Hennessy reminded us that two recent notices of proposal to remove the registration of two of the Appellant's service locations had been served. Generally, whilst it was not sensible or pragmatic to examine all of the current evidence in its entirety, it was evident that concerns remain and there had been no material cross examination regarding breaches. Enforcement action was necessary to protect the public. There was no intention to attack the integrity of the provider. The CQC was not expecting overnight change. If the situation was hopeless the CQC would not be seeking conditions. Despite some improvements the picture was one of overall deterioration. Ms Stride had stressed in her evidence the need for analysis. There was a difference between analysis and full investigation. It cannot be realistically suggested that the proposed conditions do not make sense or are onerous. When considering the themes, the new governance structures were not evidenced to be working, as yet. It is not a question of what is in place now, but what is embedded and working. Assurances were not sufficient. Ms Morgan-Taylor accepted that improvement needs to be driven. Conditions will assist in driving improvement.

28. Mr Ruffell submitted that:

    a) It was important to focus on those matters that shed light and not heat. SHC has offered to provide the CQC with the same or similar material as that suggested under the conditions. Ms Morgan-Taylor had explained that by this she meant evidence from the auditing processes and analysis where it existed. She accepted that the Respondent's concerns are evidence based but disputed the approach taken. In January 2018 the CQC was effectively *"jump-starting"* SHC into carrying out the analysis. SHC had equally recognised the same problems. SHC did not need to be jumpstarted anymore because it has a new engine, a new leadership and management structure and was doing the work already. Is it now necessary and proportionate to impose conditions? Are the conditions workable and measurable?

b) Ms Stride had accepted that SHC had responded to all requests for information between January 2018 to August 2018 in an appropriate manner. There was no need to impose conditions as a coercive measure. SHC had offered to provide documents but the CQC has never asked for them. A consensual approach has never been tried. Ms Morgan-Taylor was a CEO *"on top of her game"* and did not shy away from the issues. The work that is being done encompasses all that is sought by the CQC. The only difference is that the reports are not being prepared for the CQC. The CQC do not challenge that the work is being done. The only benefit involved in duplication of the process is to satisfy the CQC. Ms Morgan-Taylor is concerned about the amount of time and resources that will be absorbed with potentially harmful effect. The conditions will require analysis of matters that are not so serious, but will take up time. The inspection process has been extensive and almost continuous: it has had an effect on the corporate body to be constantly under the microscope. To have to prepare reports for the CQC with the potential for further communication arising causes trepidation. The reputational impact was disproportionate. The conditions will have an effect on parts of the business which are rated as good.

c) It is accepted that conditions a) and b) are workable and the concern about d) is a practical one given that the new IT system is not yet operative. When that happens condition d) will be practicable. However, the conditions were not measurable although they may be measurable to a degree. There was also a grave danger that the imposition of conditions would drive SHC backwards in that the progress that is being made will be impeded.

Our Consideration and Findings of Fact

29. We have considered the statements of all of the witnesses (save those of Ms Shepherd and Ms Uddin), the oral evidence of those called to give evidence, and all the documents on which reliance is placed by both parties.

30. It is common ground that we are required to determine the matter de novo and make our own decision on the evidence as at today's date. This can include new information or material that was not available when the decision under appeal was made. It is, for example, open to any appellant in any given case to rely on evidence to show that the evidence underpinning the decision made was factually incorrect and/or that the opinions underpinning the reasons for the decision made were flawed or unjustified and/or that the issues have since been addressed.

31. The redetermination in this appeal includes consideration of the more detailed evidence provided by both sides in this appeal as well as oral evidence which has now been subjected to cross examination over the course of four days within a five day hearing. We have considered all the of evidence and submissions before us. If we do not refer to any particular aspect of the evidence/submissions it should not be assumed that we have not taken this into account.

32. It has to be said the nature of the case advanced in the statement of Ms Morgan-Taylor was such that there had been considerable scope for having to resolve issues about the conduct or motivation of the CQC and its inspectors. Several legal arguments were also raised in objection to the conditions. In the event the issues were very considerably, and sensibly, narrowed between the parties as the evidence developed. There was also no real challenge to the overwhelming majority of the alleged breaches of the Regulations set out in the Respondent's evidence. The Appellant accepts that there was evidence that

formed the basis for the concerns raised by the CQC that supported the NOPs on 5 January 2018 regarding the analysis of incidents, unplanned hospital admissions and the training and deployment of staff, including agency staff, and that those concerns were based on a fair analysis of some of the inspection reports from some homes prior to the NOPs being issued**.** It is not therefore necessary for us to set out the evidence of the witnesses as to events before January 2018 in detail, but we will refer to parts of it as appropriate when giving our reasons.

33. The core thrust of the Appellant's case before us was that, whatever had happened in the past, there is a new management structure in place that is looking at the themes across the services. In very simple summary, the Appellant's case is that it is actively committed to addressing the issues of concern. In this context, conditions are not necessary or proportionate and could damage or impede progress, or cause reputational damage.

34. We have considered all of the evidence in the round. It is important to address the current position. By way of overview:
    (i) The CQC took urgent action to remove Horncastle House from the provider's registration following inspection in April 2018. This has led to the service closing voluntarily but we take on board that strategic decisions regarding the *model* of care in that particular location were involved.
    (ii) WSCC is not currently making referrals to any of the (now) 18 services.
    (iii) As shown by the Respondent's table, inspections at various locations have continued since the NOPs were issued in January 2018. Ms Stride's evidence is that [post appeal] inspections at Wisteria Lodge, The Laurels, Forest Lodge and Orchard Lodge have all found concerns around staff not responding to incidents and health needs appropriately, inconsistencies in the management of risks, staff not receiving training needed to support the needs of service users and a lack of effective quality assurance and governance arrangements to identify and address these issues. Her further evidence was that *"inspections continue to find similar themes and trends and this is reflected in the consistent breaches of regulations. WSCC and SPFT have also commented on the variability of improvements and that learning is not consistently implemented across locations."*
    (iv) Some inspection reports are in draft and/or are subject to the factual accuracy process.
    (v) The Sussex Partnership Foundation Trust (SPFT), provides NHS specialist health learning disability services to people with a learning disability, their families and providers in Sussex. In August 2018 the SPFT provided a report which raised a number of concerns regarding the quality of care provided by SHC. This included concerns about: the nurses not appearing to know service users well; clinical follow up forms or requests for information not being completed or sent on; monitoring charts not being completed; response to risks and a failure to recognise risk until visiting professionals raised a concern; a lack of understanding amongst some staff around behaviours that may challenge and positive behavioural support; a lack of monitoring and/or a lack of translating monitoring into action when there is a deterioration; an increase in referrals; poor outcomes for people and an overall lack of engagement.

35. It is not necessary in this appeal to dwell on detail. We find that there are significant issues that need to be addressed to ensure the improvement of services so that risks to vulnerable service users are mitigated. It is clear the themes involved in the conditions are interlinked and complementary. We consider that, in principle, provider wide conditions

are wholly logical and rational where, as here, there is a system of centralised leadership and management and where, as matters stand, the vast majority of the published ratings of individual service locations are currently rated as "requires improvement".

36. It is appropriate to record our overall impression of the witnesses from whom we heard evidence. Ms Stride was a very impressive witness who, in our view, demonstrated that she had given a great deal of care and considered thought to the conditions which she considers are necessary to protect the health, safety and welfare of service users. Her schematic overview of the linked issues was impressive as was her rationale for the imposition of conditions at provider level. She and other CQC witnesses gave their opinions regarding the issue of risk. We find that the CQC witnesses were measured, conscientious and thoughtful professionals who did their level best to provide an open and honest account of the issues as they saw them.

37. Ms Hoult was involved in a large number of inspections at SHC locations between July 2017 and May 2018 (i.e. including some conducted since the NOPs and NODs). She has also held the locations portfolio from November 2017 which means that she managed the overview of information from partner agencies and the statutory notifications received from the Appellant. In her statement she said this:
"I have led on ten inspections and found evidence of the quality and safety of care deteriorating. I have found continued breaches on return inspections and new areas of risk. Not one service has shown improvement or maintained a consistent good quality of care. I have found evidence of potential risk to service users using and living in the Appellant's services."

38. Ms Hoult's command of detail was impressive. Her approach was conscientious and thoughtful. She accepted in answer to one query by the panel that one particular incident may have been misunderstood in context, or may bear a different interpretation. She agreed that there could be a different view of that particular incident. This did not, however, detract from the strength of her concerns overall which were clearly evidence based and cogent. In short, she has seen repeated themes in the 10 inspections in which she was involved that, in her view, posed risk to the health and well-being of service users. We accept her evidence. The written evidence of Ms Forbes, Ms Mc Kenzie, and Ms Cooper was to similar effect.

39. We accept that Ms Amanda Morgan-Taylor is plainly very experienced and able. She has specific experience in helping providers of residential care to recover from crisis. By way of overview it appears to us that in January 2018 she inherited an extremely difficult position where SHC was in crisis. In her own words the Board did not understand what had gone wrong. In January 2018 she set about organising and recruiting for a new and comprehensive leadership and management structure, which separated quality issues from operational responsibility. It is notable that the post of Safeguarding Lead has been created. The revised structure was put in place reasonably swiftly but is still relatively new. We noted that the appointment of a Director in Human Resources is imminent.

40. It seems to us that one of the issues relevant to the mounting concerns was that each service location had been treated as an entity in itself, with little or no effective overarching management strategy or real leadership. It was apparent to us that to some extent this culture of seeing each service location as a "silo" may persist, and also at ground level, although we noted the measures by which Ms Morgan-Taylor is seeking to lead and manage a change in attitudes and a culture of learning across the organisation. She is to

be commended for that. We agree also that she does not shirk from hard truths or hard choices.

41. We noted also that Ms Morgan-Taylor plainly, and rightly, has the full support of the Board of SHC which, at her request, agreed to devote considerable additional resources for the provision of the much more comprehensive leadership and management team. That is only to be expected given that SHC has a very large number of vulnerable service users whose care is largely funded at very significant cost to the public purse. The "bottom line" is that SHC provides specialist care to some of the most vulnerable members of society. All service users are entitled to appropriate standards of care. By and large the evidence shows that there have been serious deficits in the standards of care in the vast majority of the service locations. In our view reliable evidence suggests that, although there has been some improvement in some aspects regarding the delivery of appropriate care in some locations, real concerns persist in the vast majority of the locations with which we are concerned. It is, of course, inevitable that time is needed to effect improvement. We find that recovery is underway but improvement is far from complete and is not embedded. Ms Morgan-Taylor accepted this. That concession was wholly sensible and realistic and was in line with the evidence of Ms Fox and Mr Whittingham.

42. The overarching issue is whether enforcement action is necessary and proportionate in order to protect and promote the health, safety and welfare of people who use health and social care services and to protect and promote the rights of vulnerable service users (see section 4 (1) (d) and (e) of the Act in particular). In considering the issues we must take into account the views expressed by or on behalf of members of the public about health and social care services (see section 4 (1) (a)). In this case this includes the concerns of SPFP and WSCC (although we disregard the matters set out in Ms Shephard's statement).

43. In our view there is good reason to hope that the management team and the senior leadership team put in post since January 2018 will ultimately succeed in reversing the pattern shown by the inspections. We find that, although there have been some signs of improvement within some locations, the overall pattern is one of deterioration. We entirely accept that there is no lack of will or ability or energy to effect change. Ms Morgan-Taylor's basic position is that she and her team should be given the opportunity to address the issues raised in the inspections, and that the imposition of conditions that had first been conceived by the CQC in August 2017 is no longer necessary. However, on her own evidence the signs of recovery across the service are still *"green shoots".* It is notable that in her past experience recovery in a similar situation had taken up to four years.

44. Ms Morgan-Taylor described that SHC was not at the 'tipping point' (re improvement) but was starting to see some positives. She recognised that systems need to be embedded. She considered the systems SHC is putting in place were having some impact. She recognised the need to *'close the loop'* and said that they are noticing trends. The team was "*drilling down, we are not there yet".*

45. Ms Morgan-Taylor's evidence about the information currently collated and her willingness to share this with the CQC did not inspire confidence in us. She said the conditions are burdensome and not positive to take services forward because *"It is not how we collate information'*. Her willingness to share analysis was qualified: *'We are analysing data and we are willing to share this with CQC – the way we analyse it."* She said in effect that she was willing to share that which was collated *"where it exists."*

46. Ms Morgan-Taylor's evidence regarding the NEWS (National Early Warning Signs) system was also of concern. The need for a common system of measuring/assessing when a service user's health has deteriorated from a baseline had been evident from various inspections. In section H of the notice of appeal much emphasis had been placed on the introduction of the NEWS system to SHC. This was said to be a positive improvement that had, effectively, been already rolled out across the organisation. It was positively put forward as a means of reassurance to the panel that the NEWS system was now in place as an effective means to monitor deterioration. However, in her evidence Ms Morgan-Taylor cast doubt upon the usefulness of the NEWS system. Her evidence created the very strong impression that the NEWS system has been adopted as a reaction. She may or may not be right in questioning the benefit of the NEWS system as an appropriate baseline measurement. The point is that she was unable to say what the alternative was or how it might look like in the organisation given that a variety of staff, with variable skills and/or knowledge of the individual service user, might be involved in making important decisions as to whether there has been a deterioration and/or as to whether referral to a GP or hospital is required. The alternative postulated was "knowing your patients". That is, of course quite right but that is precisely the concern: there remains concern that staff do not know their patients and have not always recognized deterioration in a timely fashion.

47. We note that emphasis was placed on the fact that there had been some 170 requests for further information arising out of inspections between January and March 2018. Ms Morgan-Taylor was aware of these because she had asked to be copied in to every request, a situation that is, perhaps, unusual for a CEO but we can understand why she did so given that her role currently encompasses the role of Nominated Individual. (Whether it is wise that this should continue is a matter for the Board given the significant workload she already carries as the CEO). Our understanding is that these were largely requests for information arising out of safeguarding incidents which are notifiable under section 64 of the Act. This is very different from the request for high level analysis which is at the core of the conditions that the CQC wish to impose. Further, if and in so far as it is suggested that the requests made were unreasonable or unjustified this has not been substantiated. However, we take on board that Ms Morgan-Taylor has concerns that the conditions will generate more work. In our view they need not do so but even if they do, it is necessary work. Ms Stride made it very clear in her evidence that what is required is *analysis.* She referred to the need for *analysis* in her evidence in cross examination on about 15 occasions. The Appellant's basic position is that analytical work is being undertaken. Whilst this may well be so, despite the very extensive documentary evidence before us, it has not been clearly shown to us what is being done effectively addresses the focussed conditions that the CQC seek to impose.

48. We do not agree that any of the conditions will impede the journey on which SHC has embarked under Ms Morgan-Taylor's leadership. We can see why Ms Morgan-Taylor and SHC would prefer not to have conditions imposed but that is not the issue.

49. We are unimpressed by the suggestion that the CQC could have asked for the analysis and/or that it was always on offer but not pursued by the CQC. It is simple common sense that if a provider is doing voluntarily that which is suggested is necessary by way of proposed conditions, then it is open to the provider to demonstrate this by producing the same to the Regulator. In our view there is a clear distinction to be made between the collection of data - as opposed to the focussed analysis of data which then gives rise to focussed plans or strategies. We searched in the documents before us for evidence of analysis/plans/strategies in the specific areas covered by the conditions, but it was lacking.

What we can and do accept is that the provider appears to now appreciate the analysis that is sought, and appears willing to provide it *in principle.* However, it is argued that the coercive element involved in the imposition of conditions is not necessary or proportionate. The Appellant has offered undertakings but we noted that Ms Morgan-Taylor was effectively offering to provide analysis *"where it exists".*

50. We consider that much of the evidence of Ms Fox was forward looking and spoke to recent meetings or planned meetings. We find that the analysis she provided to the Board (see D51 for example) is the start of gathering data but does not provide evidence of the focussed analysis sought by the Respondent.

51. As we have said, in the event, the issues between the parties were considerably narrowed in cross examination and the core issue underpinning the Appellant's case was that the panel can be confident that improvements would continue to be made and conditions were therefore not necessary to drive improvement. In our view the issue of "driving improvement" is a secondary aspect to the core issue which is the assessment of risk.

52. Ultimately the assessment of risk as at today's date falls to the panel to decide. We find that in the light of the pattern shown by the inspections conducted and the overall concerns held by the CQC, (amongst other public bodies), about the quality and timeliness of the care provided to vulnerable service users in the services provided by SHC are fully justified. In our view some form of action is required to seek to mitigate the ongoing risk to service users. This does not mean that the power to impose conditions at provider level should necessarily be exercised. We have a discretion which must be exercised in accordance with the principle of proportionality.

53. For the avoidance of any doubt, we set out the matters relevant to our evaluation. The matters found on inspection that gave rise to the imposition of the conditions were serious. Some improvements have been noted, in some areas and in some locations, on recent inspections, but there are still serious concerns about the services provided at the vast majority of the locations. In our view the concerns are real, entrenched and current. In our view it is surprising that some of the legal arguments in section H of the Appeal about whether terms within the conditions were clear, or sufficiently defined, were put forward. There is no real substance to them. Similarly, the original argument that the conditions elevate matters to prosecutable offences had no real substance and has not been pursued. Fortunately, the approach at the hearing was injected with a degree of realism and so we need not dwell on this aspect in further detail. In the event it was effectively agreed in cross examination, and also in submissions, that conditions at a) and b) were workable and practicable, although some adjustment regarding timing might assist.

54. We are mindful that some of the services at individual locations have been rated overall as "Good" (Upper Mead on 22 May 2017) and Beech Lodge as of October 2018. Part of the Appellant's argument is that it is unfair and disproportionate that services rated as Good should be subject to a provider wide condition. Whilst we can see some force in that, the rationale underpinning the conditions is that the quality of services overall should be *sustained* and this can only be assisted by thematic overview. We agree that the proposed conditions can only assist in maintaining positive outcomes and will provide protection against the risk of deterioration in each of the service locations, including the small minority where there is no current concern.

55. The point was taken in submissions that the conditions are not measurable. We disagree. Firstly, as became apparent in the evidence, the Appellant, by its witnesses, subscribes fully to the need to improve the standards of care by analysing key themes across the individual services. Its position is that it is doing this work already. It would surely not be seeking to do so if it was thought that analysis was not needed and/or would not reveal useful information. Secondly, we consider that improvement in services (and sustained improvement) is measurable. First and foremost, the success of the conditions can be measured by fewer breaches of the regulations in future. Analysis and steps taken should result in improvement i.e. fewer incidents that result in harm to service users at the registered locations; fewer admissions to hospital in situations where the same might have been avoided by timely recognition of deterioration and intervention; improvement in the quality of care because of high level consideration of the sufficiency of staff deployed (including agency staff,) and their skills and competence to support service users' needs.

56. We do not accept that the conditions will have a detrimental impact on the Appellant's ability to improve. In our view the proposed conditions will assist in ensuring that proper focus is given to analysis of core themes at provider level and in demonstrating that steps are being taken by the provider in a thematic way to seek to mitigate the risks posed in relation the provision of safe care. We accept that the CQC has no wish for the provider wide conditions to carry on indefinitely. Conditions can be reviewed and removed by the CQC once they are no longer needed. An application to remove conditions can be made by the Appellant when sustained and consistent progress can be demonstrated. Although on a human level it is perfectly understandable that the Appellant and its staff have concerns about the prospect of additional scrutiny, it is clear to us that the main reason for the reluctance to positively embrace the conditions arises from a fear that this will cause further reputational damage. In our view even if the conditions imposed were to have an adverse impact on the Appellant's reputational interests, the conditions are nonetheless necessary in the public interest. It is, in our view, also necessary that conditions are imposed in order to maintain confidence that the CQC, the national regulator, is able to effectively monitor the means by which the Appellant is seeking to reduce or mitigate risk to vulnerable service users. We recognise, of course, that there are other means by which standards will be monitored because inspections will continue. The provider wide conditions would not, of course, preclude other conditions at specific location level in future if appropriate. However, in our view, it is wholly sensible that thematic positive conditions are imposed at provider level because they address common themes which go to the very core of improving, and *sustaining,* the delivery of safe care across the organisation.

57. In our view the conditions that the CQC seeks to impose should be viewed in a positive light. In line with the Respondent's enforcement policy they are an expression that the Appellant's organisation has the capacity to improve. On a positive note we record our own views that, from what we have seen and heard, the leadership team now in place under the command of Ms Morgan-Taylor has the clear capacity to effect and consolidate change but this should not be mistaken as an endorsement that conditions are not necessary or proportionate. Some change has already been effected in the services where concerns have been raised, but improvement to date is not consistent or sustained and the evidence before us does, not in our view, provide the necessary level of assurance that change will be addressed in a thematic way as the result of analysis across the services. In our view these conditions, if fully embraced, will help improve standards (or maintain standards where currently achieved) and thereby mitigate risk to the health, safety and well-being of vulnerable service users.

58. Although not addressed in this way by counsel, for the avoidance of any doubt, we address the issues by reference to ordinary principles in the context of the Appellant's interests. We are content to assume that the Appellant's business interests are such as to merit the protection of Article One of Protocol One of the ECHR.

59. The Respondent has satisfied us that the decision taken was, and remains, in accordance with the law. We are also satisfied that each of the decisions regarding conditions are objectively justified and necessary in order to uphold the public interest in the protection of the safety and well-being of service users and to maintain and promote public confidence in the system of regulation.

60. In reaching our decision on the issue of proportionality, we took into account that the impact of the imposition of conditions and all of the concerns expressed by the Appellant. We do not accept that the conditions are unduly onerous or burdensome. The conditions are, in our view, a reasonably "light-touch" means of seeking to ensure that core themes are effectively analysed at provider level to effect improvement (and/or to sustain any progress to that end).

61. We recognise that alternatives to the imposition of conditions should be considered when assessing proportionality. We reminded ourselves of the need to ensure that action by the CQC in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed (see section 4 (1) (d) of the Act). We do not consider that any form of undertaking would be an appropriate way to address the risks against which safeguards should be afforded. In our view it is in the public interest that conditions are formalised by way of enforcement action in line with the Respondent's published Enforcement Policy. It is notable that the imposition of conditions is at the lower end of the enforcement measures available to the Respondent. The only other lesser measure available would be to issue warning letter(s) but we agree that this would be inappropriate in the context of the police investigation which is still open. Warning letter(s) would also be a negative enforcement action whereas positive provider wide conditions demonstrate that the CQC has reason to believe (as do we) that the provider has the capacity to improve and/or sustain improvement in the provision of services across the board. In our view each of the conditions are required in the public interest as an appropriate and positive enforcement measure and should be seen by SHC and by the public in that context.

62. Our task is to confirm the decision to impose conditions or to state that any or all of the conditions imposed shall have no effect or should be varied. We have considered the issues of necessity/justification and proportionality by reference to other measures available to the Respondent in the exercise of its regulatory powers. We uphold the decision to impose conditions. We do consider, however, that the conditions can be varied by way of minimal adjustment so as to provide more time for analysis. We set out the variation in bold and have also renumbered the conditions, (deleting reference to the previous c)) for the sake of clarity:

*"The registered provider must submit to the Care Quality Commission, on the **15th** working day of each month, a written report:*

a) analysing all incidents that have resulted in harm to service users at each registered location in the preceding calendar month, and setting out the action taken (or intended to be taken) as a result of each incident. Provide a report on how incidents and notifiable events have been reported appropriately to the local authority and the CQC.

b) analysing all unplanned hospital admissions and all service user deaths at each registered location in the preceding calendar month, evaluating the actions taken by staff leading up to the admission or death and setting out the action taken (or intended to be taken) as a result of it.

c) Setting out the steps taken to assess the sufficiency of staff deployed (including agency staff) and the skills and competence of those staff to support service users' needs. Provide the details of your plans for the following month for staff training, competency checks and supervision of staff deployed."

63. We considered the point taken regarding how c) (as above) would be more practicable when the new IT system is in place/embedded. (This had been intended to be operational in October but we were told by Mr Whittingham that it is now expected to be rolled out in December 2018). The effect of our decision will be that the Appellant has to comply with c), as well as a) and b), on the 15th working day of December 2018. (In practical terms this means on 21st December 2018). The fact that the new IT system, when in place, (and we recognise that this might not be embedded for some time), will make compliance with condition c) easier, is not, in our view, a sufficient reason to defer the imposition of condition c). The condition is necessary and it is wholly reasonable and proportionate to require the Appellant to do that which is necessary to meet it, even if the technical means of making the task easier is not currently operative.

Conclusion

64. We have balanced the impact of the decision upon the Appellant's interests against the public interest. We consider that, having balanced all the points in the Appellant's favour against the public interest, the facets of the public interest engaged far outweigh the interests of the Appellant. In our view the decision to impose each of the conditions above on the provider is reasonable, necessary and proportionate to the legitimate public interest.

Decision

65. The decision to impose conditions on registration, as varied above, is confirmed and the appeal is dismissed.

Tribunal Judge Siobhan Goodrich
First-tier Tribunal (Health Education and Social Care)
Date: 12 December 2018