First-tier Tribunal Care Standards

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

Heard on 13-28 March 2023 and 20 April 2023

At Havant Justice Centre and remotely by video conference (V Kinly)

[2021] 4413.EA
Neutral Citation number: [2023] UKFTT 434 (HESC)

Before

Judge Clive Dow

Mrs Libhin Bromley (Specialist Member)

Mr John Hutchinson (Specialist Member)

Between:

Bluewater Care Home Limited

Appellant

V

Care Quality Commission

Respondent

DECISION AND REASONS

The Appeal

1. This is an appeal by Bluewater Care Home Limited (the Appellant) brought under Section 32 of the Health and Social Care Act 2008 (the Act) against decisions of the Care Quality Commission (CQC or Respondent):

    a. On 20 August 2021, to cancel the Appellant's registration as a provider of residential care at Bluewater Care Home, Portsmouth because the service is in breach of Regulations made under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the 2014 Regulations); and

    b. On 25 January 2022, to impose a condition that the Appellant may not admit any new resident (including a resident returning from hospital) to Bluewater without the Respondent's agreement.

The Hearing

2. The Appellant business, Bluewater Care Home Limited, has a single director, David Sheppard. The nominated individual is Carmen Aquilina-Sheppard. The Appellant was represented by Kawabena Owusu (Counsel).

3. David Sheppard, David Chase (Registered Manager), Philip Chapman (former Registered Manager), Hayley George (former Acting Manager), Aisha Englefield (Head of Care), Patricia King (Consultant), Ann Butts (Consultant) and Donald Boddy (Consultant) all gave oral evidence for the Appellant.

4. James Harrison (Counsel) instructed by Hill Dickinson LLP, represented the Respondent. The Respondent's oral witnesses were Amy Jupp (Head of Inspection), Rebecca Bauers (former Head of Inspection), Kay Puddle (Inspection Manager), Charlotte Snow (Inspector), Kerrie Hill (Inspector), James Maunsell (Inspector), Teresa Baldwin (Inspector), Steve Crawford (Assistant Inspector) and Malcolm Irons (Pharmacist Specialist), all employees or former employees of the Respondent and Sophie Lyon, (adult care social worker) of Portsmouth City Council.

5. We considered written statements by Isaac Theopholis, Scott McMurray, Jackie Taylor, Peter Adams, Angela Wilde and Lorraine Grieve given on behalf of the Appellant and by Neil Cox, Katy Greenslade, Leslie Salter and Emma Ashman on behalf of the Respondent.

6. The documents that we were referred to are in the electronic hearing bundle provided in advance of the hearing (comprising 9067 digital pages) and those we admitted as late evidence (detailed below). We also considered the Respondent's skeleton argument, which was submitted on 10 March 2023 and a floor plan of Bluewater Care Home, provided by Mr Sheppard at our request on 16 March 2023.

Preliminary Matters

7. At the start of the hearing the Appellant was given leave to renew its application for postponement of the final hearing, by way of review of two previous decisions by different judges not to grant a further postponement. The application was advanced on grounds that the Appellant had been afforded insufficient opportunity to prepare for the final hearing owing to Mr Sheppard's ill-health, coupled with the onerous expectations to complete the Scott Schedule, respond to the Respondent's most recent draft inspection report following inspection visits on 5 and 11 January 2023 and complete further witness statements related to the same, alongside the normal requirements to interact with the Respondent and other agencies and run the care home effectively. The Respondent opposed the application for the same reasons it had done previously and in particular on grounds that there was no good reason for non-compliance given the Appellant has been legally represented throughout the appeal proceedings and because of the impact of further delay. Both parties provided written submissions in support of their positions.

8. The application was allowed to the extent that the taking of witness evidence was delayed for two days in order for Mr Owusu to conclude proofs of evidence

in relation to developments since the previous evidence deadline on 20 January 2023 and to finalise responses to the Scott Schedule which related to the January 2023 inspection, which Mr Owusu indicated were already in a mature draft form. The Tribunal decided it could fairly determine other issues without the assistance of detailed responses to other allegations included in the Scott Schedule by the Respondent. The Tribunal proceeded on the basis that other allegations within the Schedule were denied. As part of its ruling, the Tribunal said it would keep an open mind in relation to applications to submit late evidence, particularly in relation to the January 2023 inspection and would deal with any application to admit a statement or document on its own merits.

9. Applying Rule 15 of the Tribunal's Procedure Rules and determining in each case that the document was relevant, its admission caused no obvious prejudice to the other party and would assist us in reaching a fair determination of the issues, we admitted the following documents as late evidence in the course of the hearing:

    a) For the Respondent:
        i. A draft inspection report dated 21 February 2023, following inspection visits on 5 and 11 January 2023;
        ii. The Appellant's factual accuracy response dated 3 February 2023 together with eight supporting documents and photographs;
        iii. The Respondent's completed factual accuracy report dated 13 October 2022, following an inspection visit on 7 June 2022; and
        iv. A statement of the conditions which applied to the Appellant's service between February and December 2019.

    b) For the Appellant:
        i. The Appellant's responses to items 1-35 of the Scott Schedule;
        ii. CCTV of a 'near miss' fall by a Service User and an informal feedback session by the Respondent's inspection team on 9 Jun 2022;
        iii. A further witness statement by Aisha Englefield dated 20 March 2023;
        iv. A further witness statement by Hayley George dated 20 March 2023 and Exhibit HG1;
        v. A witness statement by Jackie Taylor dated 21 March 2023;
        vi. A further witness statement by David Sheppard dated 22 March 2023; and
        vii. A further witness statement by David Chase dated 23 March 2023 and Exhibits BWA 1-33.

10. The Tribunal visited Bluewater Care Home on the morning of 16 March 2023. A record of our questions and the answers provided by Mr Sheppard and Mr Chase in the course of our visit was kindly taken by Georgia Deacon, paralegal, and shared with the parties. We are grateful to her for agreeing to undertake that role.

11. Final submissions were made in writing and orally on 20 April 2023 in accordance with directions attached to an adjournment notice dated 30 March 2023. The Panel deliberated on 20 April and 17 May 2023.

12. The parties and all the oral witnesses attended in person with the exception of Ms Bauers who gave evidence remotely via video link. In her case, we took into account that her role and range of responsibilities made it impractical for her to attend in person, that no prejudice was likely to arise if she gave evidence remotely and that it was in the interests of justice to move forward with the hearing efficiently. As it was, the remote link worked correctly, Ms Bauers' evidence was relatively brief and to the extent it was disputed, the weight we placed on it did not depend on an assessment of her demeanour. Ms Jupp also gave evidence by video link when she was briefly recalled by us at the conclusion of the Respondent's case. Again, there were no difficulties with her giving evidence in that way.

13. We note that the Appellant would have wished to have the opportunity to cross-examine Lesley Salter (Inspector) and Katy Greenslade (Inspection Manager) neither of whom was available to attend the hearing. The Respondent wished to have the opportunity to cross-examine Isaac Theopholis (Director of Outstanding Care Homes) and Scott McMurray (Regional Director of Delphi Care Solutions) in relation to the inspections they had carried out at the Appellant's requests in 2021 and 2022. Neither was available to attend the final hearing.

14. Where relevant to our determination of the issues, we comment on the weight we were able to place on the evidence of these witnesses in our findings and conclusions below.

15. The Appellant also wished to cross-examine Keith Day, the Respondent's inspector who had assessed health and safety matters in the inspection of March 2021. The Appellant's request that the Respondent should be required to secure Mr Day's attendance had been refused by the Tribunal's Deputy Chamber President at an earlier case management hearing. However, we allowed Mr Owusu to renew the request because it was related to the request for postponement. Mr Owusu submitted that Mr Day had contributed judgements to the inspection report which were disputed and which may have been made in bad faith.

16. Mr Day had not made a statement and Mr Harrison explained that the digital notes he had made in the course of the inspection were not available because they had been corrupted. Although we took into account that the overall conclusions of the March 2021 inspection were not accepted and that allegations of bad faith made by the Appellant were likely to extend to Mr Day personally, we did not consider it necessary or proportionate to require the Respondent to call him, bearing in mind that we had the written evidence of Ms Salter and Ms Hill in relation to the March 2021 inspection. We also recalled our direction to the parties that we did not intend to embark on a forensic analysis of older inspections, instead examining more recent inspections in a relatively detailed way in order to inform our view about whether previous inspections were likely to be flawed and whether we could rely on their findings in relation to breaches of the 2009 and 2014 Regulations and ratings.

17. In this decision, references to specific Regulations are references to the 2014

Regulations unless otherwise stated.

Background & Chronology

18. Bluewater Care Home is a large residential care home in Portsmouth, Hampshire. It was registered in accordance with the terms of the Act on 2 September 2014 to provide accommodation for up to 60 persons requiring personal care. Although Bluewater has been known previously as a 'nursing home', it has never provided nursing care within the statutory definition of that term.

19. Between registration and the Notice of Proposal to cancel the Appellant's registration, the Respondent inspected Bluewater Care Home on nine occasions. The summary below sets out the breaches of Regulations identified in those inspections and changes in the overall rating:

    a) 25 February 2015: an unannounced inspection identified failure to comply with Regulations 11 (need for consent) and 12 (safe care and treatment;

    b) 27-28 October 2015: a comprehensive inspection identified ongoing breaches of Regulations 11 and 12 and further breaches of Regulations 9 (person-centred care), 10 (dignity and respect) and 17(1) (good governance). Bluewater Care Home was rated 'Inadequate' overall by the Respondent and special measures imposed, including by the imposition of warning notices and requirement notices;

    c) 6-14 April 2016: a further inspection identified ongoing breaches of Regulations 9, 10, 11, 12 and 17. Breaches of Regulations 13 (safeguarding), 18 (staffing), 19 (fit and proper persons employed) and 20(A) (display of performance assessments) were also identified. The service remained 'Inadequate' and a Notice of Proposal to cancel the Appellant's registration was issued;

    d) 19-20 October 2016: follow-up inspection to confirm action taken resulted in identification of ongoing breaches of Regulations 9, 11 and 17. The service was rated 'Requires Improvement' overall but was no longer in special measures and the Notice of Proposal was withdrawn;

    e) 28 July 2017: a follow-up inspection identified no breaches of Regulations. Rating remained 'Requires Improvement' overall;

    f) 31 October and 4 December 2017: a comprehensive inspection identified breaches of Regulations 9, 11, 12, 17 and 18. The service was rated 'Inadequate' overall and returned to special measures. Notices of Proposal and Decision to cancel the Appellant's registration were issued;

    g) 31 July 2018: follow up inspection identified ongoing breaches of Regulations 12, 17 and 18. Conditions were imposed including that the Service must have a registered manager, that the Registered Person

must send monthly performance reports and a limit on the number of service users that could be admitted to the Service without the Respondent's approval. The Notice to cancel the Appellant's registration was withdrawn but the service remained rated 'Requires Improvement';

h) 19 September 2019: a comprehensive inspection identified ongoing breach of Regulation 17. However, the Respondent acknowledged improvements in domains other than 'well-led'. Conditions were removed. The overall rating of the service remained 'Requires Improvement';

i) 12 and 24 November 2020: a focussed inspection on 'safe', 'effective' and 'well led' domains identified breaches of Regulations 11, 12 and 17 and failure to comply with Regulation 18 of the Care Quality Commission (Registration) Regulations 2009 (notification of incidents). The overall rating remained 'Requires Improvement'. The Respondent required an action plan from the Appellant; and

j) 25 March, 8 and 14 April 2021: an urgent inspection identified breaches of Regulations 10, 11, 12, 14, 17, 19 and 20.

20. Following the April 2021 inspection, the Respondent issued a Notice of Proposal to cancel the Appellant's registration on 26 May 2021. The Appellant made representations. A further un-announced inspection targeting areas of concern was carried out on 1 August 2021. The Respondent's concerns were not allayed. The Respondent issued a Notice of Decision to cancel the Appellant's registration on 20 August 2021.

21. On 27 August 2021 the Respondent proposed imposing a condition that:

> *"The registered person must not admit any new service user to Bluewater Nursing Home…without the prior written agreement of the Care Quality Commission. This includes on a permanent or respite care basis. The term "admit" included re-admission of any service user who has been resident at the home at any time whatsoever. This includes service users returning from hospital."*

22. The Appellant made written representations against the imposition of the condition including about the conduct of previous inspections. The Respondent carried out a further inspection on 4, 5 and 16 November 2021. The Respondent's Notice of Decision in relation to the condition was made on 25 January 2022.

23. The Appellant now appeals both decisions.

24. Since the appeal proceedings were commenced, the Respondent has carried out two further targeted inspections following its key lines of enquiry into the 'safe', effective' and 'well led' domains. The inspection on 7 June 2022 found breaches of Regulations 9, 11, 12, 17, 18 and 19. The 'safe' domain was rated as 'Inadequate', 'effective' as 'Requires Improvement' and 'well-led' as 'Inadequate, leading to an overall 'Inadequate' rating.

25. A further inspection on 5 and 11 January 2023 was in draft form at the time of the final hearing. The draft report identifies improvements in some areas but finds new or ongoing breaches of Regulations 11, 12, 17, 18 and 19 and 20A and provisionally rates the 'safe' and 'effective' domains as 'Requires Improvement' while 'well-led' is assessed as 'Inadequate'. We were told at the 20 April 2023 hearing that the Respondent has finalised its report and these findings, which means at the time of our decision the rating for the Service is now 'Requires Improvement'.

26. Since the first Notice of Decision to cancel the Appellant's registration, the Appellant has itself commissioned inspections by private consultants. Inspections by Delphi Solutions resulted in assessments of 'Good' in the domain of 'safe' in September 2021, October 2021 and March 2022. The same inspections assessed the 'well-led' domain as 'Requires Improvement' in September 2021, 'Good' in October 2021 and 'Requires Improvement' in March 2022. An inspection by Outstanding Care Homes in April 2022 resulted in an overall rating of 'Outstanding' and a further inspection by SRG group in October 2022 resulting in an assessment of 'Good' in each of the domains 'safe', 'effective' and 'well-led'.

27. It should also be noted that the Local Authority, Portsmouth City Council, in whose area Bluewater Care Home is located, imposed a 'No Purchase Order' in March 2021, meaning that while the Order is in place, the Local Authority will not seek to place any new Service Users at Bluewater Care Home. In response to safeguarding concerns raised to it, the Local Authority's Multi-Agency Safeguarding Hub (MASH) team initiated a Large-Scale Enquiry on 26 March 2021 which, at the time of the hearing, remains open.

The Law

28. The Respondent regulates the Service provided by the Appellant in accordance with Sections. 2 & 3 of the Health and Social Care Act 2008 (the Act).

29. S.17(1)(c) of the Act provides that the Respondent may cancel a Registered Person's registration as a service provider in respect of a Regulated Activity *"on the grounds that the regulated activity is being, or has at any time been, carried on otherwise than in accordance with the relevant requirements."*

30. Relevant requirements include:

    c. Conditions imposed by or under Chapter 2 of the Act;
    d. Requirements of any other enactments which appear to be relevant to the Respondent, i.e. those made by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the 2014 Regulations) or the Care Quality Commission (Registration) Regulations 2009 (the 2009 Regulations).

31. The power of the Respondent to grant or refuse the registration of a service provider is set out in s.12(5) of the Act, which permits the Respondent to *"impose any additional condition"* at any time.

32. Since the Respondent 'may' exercise such a power, it follows that the power is discretionary. As such, the Respondent (or the Tribunal which decides the matter afresh in the circumstances pertaining at the time of its decision) must exercise such a power fairly and proportionately.

33. In appeal proceedings, the burden of proof rests with the Respondent to prove, on balance, that its decision was justified. The burden of proof rests with the Respondent throughout.

The Issues

34. The Appellant advances the appeal in relation to cancellation on five overlapping grounds:

35. First, the Respondent made material errors in its inspection findings and reports, which were repeated and relied on in its notice of proposal and notice of decision and in its resistance to the appeal.

36. Second, the Respondent misdirected itself as to the grounds for upholding the Notice of Proposal by considering only whether the Appellant's written representations demonstrated (or otherwise) whether the Respondent's concerns about breaches of the 2009 or 2014 Regulations had been addressed;

37. Third, the Appellant is, in fact, compliant with all relevant Regulations;

38. Fourth, the Respondent has failed to consider the impact on the Service Users if the Service were closed, that because of the Service Users' vulnerabilities, they would be at risk of harm and any legitimate concerns about the Service could be dealt with proportionately by conditions.

39. Fifth, the decision is not reasonably necessary because the Respondent's reasoning is flawed and fails to account for the improvements the Appellant has made, including in the course of the appeal, or is capable of making.

40. Although the Appellant also appeals the decision to impose conditions for broadly the same reasons as it resists the decision to cancel registration, the Appellant argues that if the Tribunal finds the Appellant remains in breach of relevant Regulations, it would be proportionate to impose such conditions as the Tribunal sees fit as an alternative to cancellation.

41. The Respondent resists the appeal on the basis that its approach to the Appellant has, at all times, been transparent and procedurally fair, its decisions have been based on fair and accurate reporting and that cancellation is ~~a~~ proportionate to the Appellant's ongoing and long-term breaches of Regulations. The Respondent rejects the proposition that the Appellant's Service is compliant with relevant Regulations or should attract at least a 'Good' rating across all domains. The Respondent avers that while on the basis of the latest inspection in isolation, the Respondent would not seek to cancel Registration, any improvements to the Service have only been achieved in response to a very high level of engagement by the Respondent and other

external agencies including the Local Authority. The Respondent submits that the Appellant cannot sustain any improvement without continuing support or at all and does not have the capacity to further improve to provide a 'Good' service across all domains within a reasonable period.

Oral Evidence

42. The evidence we heard was recorded and it is not necessary to reproduce or extensively summarise it in this decision. As a result, this decision is somewhat shorter than would be expected in a case of its length and relative complexity. The oral and written evidence is referred to only as necessary to explain our findings and conclusions.

Findings and Conclusions

43. For the reasons set out below, we uphold the Respondent's decision to cancel the Appellant's registration and dismiss both appeals.

How our decision is set out

44. Although the Appellant's and Respondent's respective closing submissions are set out with differing structures, each to some extent consolidating or conflating (albeit differently) the grounds of appeal and response in relation to both appeals, we have approached our task by considering the Appellant's grounds of appeal in relation to cancellation first because, if we conclude that the Respondent's decision should be upheld, then the appeal in relation to the imposition of conditions falls away.

45. Our analysis and findings follows the same structure as the Appellant's grounds of appeal because they are reasonably logical (if somewhat overlapping) and because Mr Owusu confirmed in both opening and closing that these grounds remain the basis of the Appellant's case. Although we have followed this structure, we have kept in mind that the grounds of appeal were drafted some 18 months before the final hearing date and that there have been three further inspections by the Respondent since the appeal was made. Naturally, both parties' positions have evolved. It is the Tribunal's role to make the decision afresh, based on the information available at the time of the final hearing. While we frame our findings around the Appellant's grounds of appeal, the burden of proof remains with the Respondent throughout.

General observations

46. Although we explain below our reasons for dismissing the appeals, it is important to emphasise that we do so applying the relevant law. In this case and not meaning to detract from Mr Owusu's skilful advocacy and helpful submissions on the law, the Appellant's appeal was, at its core, an appeal to the heart. We acknowledge Mr Sheppard's personal belief that he has done the best he can as owner and sole director of Bluewater Care Home. We commend him for endeavouring to show us the best that Bluewater Care Home has to offer, including its excellent facilities, its caring and responsive staff, its commitment to creating a dementia-friendly environment and providing a range

of stimulating activities and its compassion for those approaching the end of their lives. We also accept, and take into account, so far as is commensurate with our duties, the considerable resources, time and effort Mr Sheppard and Mrs Aquilina-Sheppard have personally contributed to ensure the home continues to operate despite its precarious regulatory position, and their willingness to invest substantial resources in experienced managers and consultants in order to overcome the concerns of the Respondent and other external agencies. We acknowledge the impact those efforts must have had on their own family life. However, none of those matters were in dispute as such. They go principally to the question of whether it is proportionate, in all the circumstances, to uphold the Respondent's decision to cancel the Appellant's registration. We turn to that question below, having first addressed the other limbs of the Appellant's appeal.

Ground 1 – Errors in Inspection Reports

47. In the grounds of appeal, the Appellant submitted that it disputed a significant number of the findings made by inspectors and challenges the reasonableness of the judgements reached. The Appellant asserted that inspectors had failed to undertake inspections in accordance with the Respondent's guidance and policies, failed to review relevant evidence that was available, misinterpreted evidence, failed to corroborate evidence and conducted themselves in an unreasonable manner, rendering findings from the inspections unreliable.

48. In pleadings, the Appellant did not set out which findings were specifically disputed. However, disputes were apparent from the factual accuracy check returns completed by the Appellant in successive inspections. The Respondent had, so far as practicable, sought to reflect these disputes in 118 allegations within the Scott Schedule. As we set out above, and in the absence of detailed pleadings by the Appellant, we did not consider it necessary or proportionate to review and attempt to make factual findings about all of these issues. Instead, we concentrated on those disputed factual findings which had been identified from the most recent inspection, as well as those other allegations which the Appellant said arose from bad faith on the part of the Respondent's inspectors in the course of the inspections in November 2021 and June 2022. We deal with the issue of bad faith and unreasonableness first, before turning to the factual disputes arising from the January 2023 inspection and the Appellant's other submissions that the Respondent's approach to inspections failed to take into account available evidence, misinterpreted evidence or was factually wrong.

Did the Respondent act in bad faith or otherwise unreasonably in the conduct of inspections?

49. We are satisfied that, on balance, the Respondent did not act in bad faith. We are satisfied that no individual inspector acted in bad faith.

50. The Appellant's witnesses identified several instances of what they considered to be lies or fabrication of evidence which the Respondent's inspectors used, or would have used if not challenged, in order to support critical findings. Although Mr Sheppard and Ms Englefield in particular alleged that fabrication had been a feature of earlier inspections, the most clearly stated allegations of fabrication

relate to the inspections in November 2021 and June 2022.

51. In the November 2021 inspection, the Appellant alleges that the inspectors' finding of a broken window restrictor on the third floor of the home must have been fabricated because (a) the Appellant could not or did not provide appropriate detail about the specific window said to open past its designed limit; (b) the Appellant's consultant, Mr Boddy, had inspected the windows in the days before the inspection and found no defects; and (c) the Appellant's subsequent inspection could not identify any broken or malfunctioning window restrictor.

52. We do not accept these factors lead to an inference, even on balance of probabilities, that this incident was fabricated.

53. First, we take into account Mr Boddy's concession that he had not inspected every window for the function of its restrictor. Second, we take into account that the window was photographed by Mr Maunsell and we were able to review the photograph. The photograph clearly shows the window open more than its designed limit of 100mm and at such an angle that it was able to pivot on both axes. Third, accepting Mr Sheppard and Mr Boddy's own evidence that the window restrictors were designed to be very difficult, if not impossible, to overcome either by manipulation or force, we do not consider it realistic to suppose that an inspector could have done so without using very considerable force or ingenuity. We consider it unlikely, given the limited time and opportunity to do such a thing, that an inspector could break or overcome a functioning restrictor, particularly without causing obvious damage. Fourth, we could not see why there would be a reason to fabricate such an incident. By Ms Snow's evidence, we are satisfied that an open window on the unoccupied third floor was, by itself, a relatively trivial matter so far as patient safety was concerned. We are sure that all the inspectors would have known this. Therefore, even if seeking to manipulate an unfavourable outcome (which we do not find was the case) there was comparatively little to be gained in fabricating evidence compared with the risk of serious professional consequences if discovered to have done so. To the extent that the finding was described in the Respondent's final report following the November 2021 inspection, it was clearly a relatively trivial matter among far more serious safety shortcomings, such as the lack of a recorded plan to manage one service user's challenging behaviour.

54. We place no significance on the inspectors' inability to provide photographic evidence on the day of the inspection. As Mr Maunsell explained, and we accept, the battery on his laptop device ran out before the photograph could be shown and the inspectors did not consider it such a serious issue that the Appellant needed to address that day because the room (and indeed the whole floor) was not accessible to service users. For the same reason, we place no weight on the fact that none of the inspectors were able to take Mr Sheppard or Mr Chapman to the specific room on the day. We acknowledge that the inspectors were busy and that there are many rooms on the 3rd floor, with several sharing the same aspect and which to the less-experienced visitor, will have appeared quite alike.

55. In June 2022, Ms Snow included in a draft report that the weight setting for a mattress, designed to relieve pressure for a service user who was largely

confined to bed, was set incorrectly. Ms Snow photographed the setting of the machine but did not present any finding or concern to staff at Bluewater on the day of the inspection. Ms Snow's evidence, which we accept as credible and reliable, is that she did not reset the dial or report the issue immediately because she did not know what the correct setting was, without checking against the care plan. She checked the correct setting some days after the inspection on the basis of care records provided by the Appellant. At that later time, she assessed that the weight setting she observed and photographed was considerably above the recorded weight of the service user.

56. The Appellant alleged that Ms Snow or another inspector must have adjusted the setting deliberately in order to find fault. The Appellant relies on records that carers had checked the setting was correct some hours before and after Ms Snow said she observed the setting being incorrect and that there was no reason for anyone else to adjust the dial.

57. We cannot say with any certainty why the setting was incorrect at the time Ms Snow observed it. We do not need to make any positive finding about that. An obvious possibility is that the dial was accidentally knocked from its correct setting by a service user, staff member, inspector or visitor. We accept, but place no weight on, the Appellant's assertion that the setting was recorded correctly later because any staff member might have noticed and reset the dial to the correct setting at some time before the evening recording (assuming, that is, that the setting was being carefully checked when recorded as correct).

58. Again, we note that this incident did not form part of the published report. While the Appellant invited us to conclude the omission of this incident from reports was an admission that inspectors had been 'caught out', we reflect that removing any reference in the final report was a reasonable response because it was not clear how the dial had come to be set incorrectly and it was unfair to criticise the Appellant without such clarity.

59. In our finding, the evidence did not support an inference that Ms Snow or another inspector changed the setting deliberately in order that they could then record a concern.

60. The Appellant's allegations of bad faith or unreasonable conduct were not, however, limited to these two incidents. The allegations extended to the conduct of inspections generally, including the three inspections led by Ms Snow between November 2021 and January 2023, as well as other inspections led or participated in by Ms Hill or Ms Salter from 2016 onwards. These allegations included that Ms Snow lied or exaggerated her account of a 'near miss' fall during the June 2022 and that Ms Hill, at different times was inappropriate in her behaviour towards members of staff, including (but not limited to) by stating on one occasion that she and other CQC inspectors could *'go where they want and do what they want'*, on another occasion threatening Mr Sheppard with prison for obstructing the inspectors' work, by turning her back on Mr Sheppard on another occasion and by attempting to countermand Mr Shepard's instructions to Ms Englefield to leave an inspection debrief in August 2021 in order to gather evidence to rebut a criticism Ms Hill had made about the cleanliness of service users' fingernails.

61. In relation to the 'near miss fall' on 7 June 2022, we had the benefit of reviewing CCTV of the incident, Ms Snow's informal feedback about it at the end of the inspection day and a transcript of the formal feedback session led by Ms Snow on 5 July 2022. We are quite satisfied that in describing the incident, both in the feedback sessions, in her written statement and her oral evidence, Ms Snow has done her reasonable best to describe what happened accurately and without deliberate exaggeration. We do not criticise her for saying that she and Ms Ashman were on the brink of intervening. Although with the benefit of CCTV, which Ms Snow had never viewed before giving her evidence (because it had never been disclosed by the Appellant) we were able to see that the inspectors did not rush forward as Ms Snow recalls, it is abundantly clear from the CCTV that there was not really time for them to physically react before the service user sat down. Both Ms Snow and Ms Ashman were alarmed by what they saw and relived that an accident was avoided. They were correct to say that no member of staff was nearby or reacted quickly following the near-miss fall. We find no evidence of bad faith in Ms Snow's account of that event. On the basis of the CCTV and transcript respectively, we are fully satisfied by the conduct of the inspectors during both the informal feedback session on 7 June and formal feedback session on 5 July.

62. We can find no reason at all why Mr Sheppard should, with the benefit of having seen the CCTV himself (and without giving Ms Snow the opportunity to review it) accuse her of lying about it in the formal feedback session on 5 July 2022. The extent to which he repeats that accusation during the course of the session and his focus on it, to the extent that the discussion is effectively derailed, is deeply concerning. We also find it concerning that even having viewed the CCTV in open hearing and accepting that the incident clearly showed a near-miss fall with potentially very serious consequences for the service user, Mr Sheppard was not prepared to withdraw the accusation of lying altogether, instead characterising it as an exaggeration on Ms Snow's part.

63. So far as Ms Hill is concerned, both she and Mr Sheppard accepted there was an unhappy professional relationship between them. For her part, Ms Hill accepted there had been occasions during inspections when she had cause to remind Mr Sheppard of her duties and powers, although she denied that she had ever shouted at staff or threatened them or Mr Sheppard with prison. She also accepted that there had been an occasion on 1 August 2021 where she had refused to speak to Mr Sheppard, which she said had been in response to his unprofessional behaviour towards her. She further accepted that she had sought to countermand Mr Sheppard's instruction to Aisha Englefield to go and take pictures of service users' nails during a feedback session. On each occasion, she said that her conduct had been in response to Mr Sheppard's obstructive, antagonistic or otherwise unprofessional behaviour, as she saw it. Ms Hill and Ms Snow were at some pains in their evidence to clarify that only Mr Sheppard had exhibited such behaviour and that in their view, other members of the care home staff were uncomfortable with how he behaved.

64. Ms Hill accepted that she had raised a query about whether the proposed replacement for Ms George as manager was working across two homes in 2021. She denied she had done this to be vindictive but because COVID

guidance in place at the time advised that carers should not work across more than one site.

65. Ms Hill accepted that she had made demands of Ms George in the conduct of her inspections, including by asking her to provide considerable amounts of documentation for review in the July/August 2021 inspection. Ms Hill said she asked, and would have preferred, to have access to the care home's electronic files so as to reduce the demand on Ms George. However, since that request was refused, she had no alternative but to ask for the files because the focus of the inspection was the content of care plans and records.

66. For his part, Mr Sheppard accepted that at times he had become frustrated with the conduct of inspectors, including Ms Hill. However, with the exception of one incident where he swore while walking away from Ms Salter, Mr Sheppard denied that he or any member of staff had ever behaved unprofessionally towards Ms Hill or any other inspector, and he re-asserted that his behaviour, including his decision in June 2022 to require all inspectors to be accompanied by a staff member throughout the inspection and his behaviour in the 5 July feedback session, had been in response to the lies, unjustified criticisms or otherwise high-handed behaviour of inspectors. Mr Sheppard accepted in evidence that in November 2021, he had decided not to take any part in the inspection and left shortly after inspectors arrived and had taken a very minor role in the January 2023 inspection because he was unwell.

67. In determining whether any or all of the Respondent's inspections were carried out in bad faith, we consider it unnecessary to make specific factual findings about any of the incidents involving Ms Hill or any other inspector, with the exception of the near-miss fall which we describe above. In relation to the incident where Ms Hill instructed Ms Englefield to ignore Mr Sheppard's instruction to go and gather rebuttal evidence during inspection feedback, we consider Ms Hill acted reasonably. We also find that her decision to raise a concern about Ms George's proposed replacement as manager working across two homes was reasonable in the circumstances and not done out of malice, as was her demand for documentation. On the basis of the evidence before us, we cannot be confident about precisely what happened on other occasions. We place no weight on the fact that Mr Sheppard made a complaint about Ms Hill because we have not seen the substance of that complaint nor have the benefit of the Respondent's investigations.

68. However, in order to decide whether we could be confident in the findings of inspections led by, or involving Ms Hill, we accept we must reach an overall finding about whether her inspection findings are rendered unreliable by bad faith or an otherwise unreasonable approach.

69. While we would anticipate that Ms Hill should seek to preserve her professional reputation generally, we found her answers were reasonably frank and reflective. We found her a credible and reliable witness. Albeit her oral evidence could not be corroborated by the oral evidence of any other inspector who had been in the home at the same time, we were able to triangulate her evidence with other inspectors including Ms Salter, and the oral evidence of inspection manger Ms Puddle, which did not disclose any criticism or concern about Ms

Hill's approach to inspections or that her judgement appeared to be negatively impacted by any difficulty in the personal relationship with Mr Sheppard or any other member of staff at Bluewater. We observe that the most positive inspection outcome that Bluewater achieved was in September 2019, where Ms Hill was the lead inspector.

70. Ms Englefield and Ms George corroborated Mr Sheppard's account in general terms, in that they felt uncomfortable during some inspections and that they felt the inspectors' behaviour toward them was overly demanding compared with what they expected. Ms George described her first inspection as manager, in late 2017, as *'oppressive and a very difficult experience'*. Ms George cited the CQC's approach to inspection as the central reason for her relinquishing the role of registered manager in May 2021. Both denied it was either the number of concerns being raised, or Mr Sheppard's reaction to perceived criticism that had made them feel uncomfortable. Both gave evidence that Ms Hill in particular, and to some extent Ms Salter, had sometimes appeared rude toward Mr Sheppard. We are sure that was the case. However, we were not persuaded that any rudeness on her part was as a result of bad faith, rather than in response to Mr Sheppard's challenging behaviour.

71. Although Ms George and Ms Englefield denied that Mr Sheppard was challenging, we could not place full weight on Ms George or Ms Englefield's answers on that point because they both readily expressed their personal loyalty to Mr Sheppard. We reduce that weight further because, contrary to our clear view, neither considered Mr Sheppard's conduct on 7 June and 5 July 2022 to be rude, unprofessional or otherwise unreasonable. We are sure Ms George's explanation that her apology to Ms Snow on the morning of 7 June 2022, following Mr Sheppard's accusations of a 'blitzkreig' inspection and of her falsifying evidence, was because of Mr Sheppard's behaviour, rather than for anything Ms George herself had said or done.

72. We also weigh in the balance that both Ms Englefield and Ms George said that on most occasions, their individual relationship with inspectors had been constructive, albeit Ms George described in her evidence an instance where an inspector, Ms Ktomi, had said '*if we find anything, you will go to prison.'* We could not reach any firm finding about that incident because no other witness had been present.

73. Further, both Mr Chapman and Mr Chase said that there had been a professionally courteous approach by the inspectors in the inspections carried out during their tenure in November 2021 and January 2023 respectively. Albeit those inspections did not involve Ms Hill's presence (she supported remotely), we consider it is significant that these were inspections in which Mr Sheppard himself played a relatively small part. To the extent that Mr Chapman described the atmosphere at Bluewater as 'quite oppressive' and with a 'sense of hopelessness', we do not infer those feelings arose from the unreasonable conduct of inspectors, rather as a natural corollary to the poor performance of the home during successive inspections and the prospect of closure.

74. We could place no particular weight on Mr Sheppard's written and oral evidence about any inspector's bad faith or unreasonable approach because, in our

finding, he has himself behaved rudely or unreasonably on a number of occasions, none of which we accept was a justified or reasonable response to the inspectors' behaviour toward him or his staff. That behaviour includes by repeatedly pressing inspectors to give positive feedback about the home, or to agree that the service is 'Good' overall (such as in the feedback meeting following the August 2021 inspection), rather than listen and reflect upon the reasonable concerns raised by inspectors or even to challenge them in a measured and professional way.

75. The clearest example supporting our view is Mr Sheppard's conduct toward inspectors on 5 July 2022. The transcript of that meeting, which was not challenged, fully supports Ms Snow and Ms Puddle's account that Mr Sheppard was angry, confrontational, and unwilling to be diverted from repeating accusations (which were obviously unfounded on the basis of the CCTV he had viewed) that inspectors were lying about the near-miss fall. We also considered other aspects of Mr Sheppard's behaviour to be unreasonable, including that in 2015 he had sought to pursue a complaint having been told by an inspector, Mrs Fortnum, to take down a clearly misleading quote attributed to an assistant inspector following a highly critical inspection. We were also concerned that Mr Sheppard had considered it appropriate to write to Ms Salter at her home address to complain about her inspection findings (albeit the contents of the letter were neither threatening nor offensive).

76. Our broader concern regarding Mr Sheppard's difficulty in accepting even moderate criticism about the home or staff performance is illustrated by Mr Sheppard relaying to Ms Taylor, Mr Maunsell's evidence about her knowledge of IDDSI requirements, and thereby initiating her written statement in rebuttal. We could find no good reason why Ms Taylor should summarise Mr Maunsell's evidence (which she did not hear in person) as suggesting that she *'did not know about diets and in effect had no idea what I was doing'* or why she should describe herself as having cried when his evidence was described to her. The only reason we could infer was that Mr Maunsell's oral evidence (which in our view was balanced, couched in professionally courteous terms and not especially critical of Ms Taylor personally) had been substantially misrepresented to Ms Taylor by Mr Sheppard.

77. Finally, we were concerned about Mr Sheppard's ready resort to the allegation that another person is lying. For example, even in the relatively trivial instance that there was a disagreement about the precise number of times Ms Hill had visited Bluewater Care Home, Mr Sheppard accused her of lying about it, without apparently considering whether there was any possibility that either she or the Appellant's witnesses might be mistaken about it.

78. Our purpose in setting out these concerns is not to criticise Mr Sheppard personally. That is not our role. However, cumulatively, these matters leave us unable to conclude with any confidence, that any aspect of the conduct of the Respondent's inspectors, including Ms Hill, Ms Salter, Ms Fortnum, Ms Taggart Ms Darr or Ms Ktomi, was as a result of bad faith on their part, rather than a reasonable attempt to carry out their statutory duties in the face of what we find was, at times, inappropriately challenging behaviour toward them by Mr Sheppard, and by his deliberately fostering within his staff a mistrustful

relationship toward the Respondent.

79. Even if we are wrong about Ms Hill or any other inspector involved before November 2021 and their conduct was unreasonable or else tainted by bad faith, we would not conclude that undermined the findings of later inspections, including the November 2021 inspection. Four of the inspectors involved in the November 2021, June 2022 and January 2023 inspections were cross examined at some length. In each case, the evidence was credible, reliable and balanced. Ms Snow, Mr Maunsell and Mr Irons readily acknowledged the improvements made between the June 2022 and January 2023 inspections.

80. We discount the possibility that Ms Snow's approach, findings, conclusions or recommendations for enforcement action are the result of 'groupthink' or any contamination of her views by previous inspectors including Ms Hill. Her answers in oral evidence demonstrated a clear independence of mind and an objective approach to evidence or concerns raised with her by other inspectors. From the totality of her oral and written evidence, including our review of her extensive notes taken in the course of inspections, the recording of the initial feedback session on 9 June 2022 and the transcript of the formal feedback session on 5 July 2022, we are satisfied that her approach was honest, fair and transparent and that her concerns were invariably evidentially based. As we set out below, we are satisfied that where concerns were not clearly supported by available evidence or else other evidence provided by the Appellant brought her findings into doubt, she was willing to revisit them and amend her draft findings accordingly.

Did the Respondent make other material errors of facts in its inspection reports, such as failing to review relevant evidence that was available, misinterpreting evidence or failing to corroborate evidence?

81. The Respondent, in an abundance of caution, set out in the Scott Schedule 118 allegations relating to its inspection findings which, it appeared to the Respondent, the Appellant denied or disputed in some way. By the start of the final hearing and for the reasons set out above, the Appellant had not set out detailed pleadings in relation to the findings it disputed or submitted any answer to the allegations in the Scott Schedule. For the reasons set out above, we decided it was in the interests of justice to allow the Appellant a short additional opportunity to enlarge on this ground of appeal. We made it clear to the parties at the outset of the oral hearing that we did not consider it necessary or proportionate to hear evidence or make factual findings about many of these allegations. We directed the Appellant to respond to each of the findings of the most recent inspection report, which were set out at allegations 1-35 of the Scott Schedule and to cross examine the Respondent's witnesses, particularly Ms Hill and Ms Puddle, about any other material errors in older inspections which the Appellant wished to rely on in support of this ground.

82. We adopted this approach bearing in mind our role is to consider matters afresh and as they are at the time of the hearing. Therefore, albeit our determination includes the historical performance of the home (and whether we can rely on the Respondent's findings in earlier inspections) we considered it of primary importance to determine whether the Respondent's draft findings in its most

recent inspection could be relied on.

Are the draft findings of the January 2023 inspection reliable?

83. We are satisfied that the findings of the January 2023 inspection are reliable.

84. Although we narrowed our focus for factual findings to the January 2023 inspection, we do not find it necessary to set out our conclusions on each of the 35 allegations relating to that inspection in the Scott Schedule because some of those allegations were admitted by the end of the oral evidence, albeit with caveats. In most cases, the caveat was either a complaint that the allegation was not raised in the course of the inspection or the allegation is in some way disproportionate because the Appellant disputes that the issue should be afforded the significance the Respondent has placed on it. In other cases, the Appellant's response can be summarised that the particular issue should not be considered a breach or concern because the Appellant has since addressed it.

85. Our analysis below considers only those allegations which arise from the Respondent's own findings and not those which arise from safeguarding or 'whistleblowing' concerns raised by third parties through the Local Authority and relayed to the Respondent.

86. In relation to staff being unsure of diabetic service users' safe blood-sugar levels (allegation 6 of the Scott Schedule), we agree and adopt the Respondent's position. We note the inspectors' focus on this issue followed previous breaches in recording information and an incident on 21 December 2022 (Allegation 3) when a member of staff reported a dangerously low blood-sugar level (around 1 mmols/L) to a District Nurse but did not appear to recognise that such a level would be dangerously low or require a very urgent response. We agree with the Respondent that while the incident on 21 December 2022 did not actually require a blue-light response (because the Count measured by the District Nurse was 3.2 mmols/L), the service user was still at risk of harm if no urgent action was taken. In light of that incident, the Appellant should have sought immediate medical clarification, updated the care plan and promulgated the resulting information to staff. We do not accept the Appellant's contention that the safe levels were unclear or that it was sufficient to address any uncertainty by asking District Nurses to complete an entry in a book in the service user's room.

87. While we also accept the Appellant's evidence that they have updated the relevant service user's care plan since the blood-sugar issue was raised by inspectors on 5 January 2023 and that they have raised the issue with external agencies in multi-disciplinary meetings, these factors in no way negate the Respondent's inspection findings. We reject the proposition, which the Appellant appears to rely on in this case and others that its actions in response to inspection findings should displace the inspectors' findings at the time of the inspection, particularly the concern that they had not immediately acted following the serious incident on 2 December 2022.

88. We observe that this breach is particularly significant because the same issue (lack of recorded information on hypoglycaemic levels) constituted a breach of

Regulation 12 in the September 2019 inspection.

89. In relation to the allegations relating to re-positioning less mobile service users (allegations 7 & 8 of the Scott Schedule), we agree and adopt the Respondent's finding that re-positioning charts do not indicate whether service user A was being re-positioned, that service user A may not have been re-positioned, and that the Appellant's auditing system had failed to identify an issue with re-positioning. Having reviewed the relevant records in the course of the hearing, and accepting Ms Englefield's admissions on the point, we find there were significant gaps in the relevant record for service user A and no explanation in many cases why service user A had not been placed in a different position to that recorded in the previous entry.

90. Although we took into account the evidence of Ms Englefield that re-positioning was occurring during personal care or through service user A independently re-positioning herself, that does not displace the importance of recording when re-positioning has taken place or why any decision to leave the service user in the same position for more than four hours was not explained in their care record. We acknowledge that service user A has not suffered a significant pressure sore since taking up residence at Bluewater in 2020. However, she has suffered at least one moisture lesion. We do not accept the Respondent has made an error in its factual finding or that its reliance on these findings is in any way disproportionate, particularly given recording of re-positioning has been a consistent concern of the Respondent at every inspection since at least August 2021.

91. The provision of a footstool to service user H (allegation 10) was admitted by Mr Chase. Although we accept that there had previously been some lack of clarity from external professionals about using a footstool, we are satisfied that by 13 December 2022 this uncertainty had been resolved and service user H's care plan recorded that a footstool was not to be used. While this did not put service user H at imminent risk of harm, we are satisfied that this issue was significant because either the information was not sufficiently clear in the care plan, staff did not read the care plan or else staff decided to carry on using the footstool in spite of professional advice. We are satisfied this was factually accurate and that there was no procedural unfairness in it.

92. In relation to allegations on diet (Allegations 14, 15 and 21 of the Scott Schedule) we again find no fault in the Respondent's findings in relation to the two relevant Service Users (A and L).

93. We accept and adopt the Respondent's position that service user A was discharged from hospital on an IDDSI Level 6 diet, which the Appellant should have observed until clear advice was obtained that it was no longer required. We find that Service User A's care plan did not identify any exceptions to the Level 6 diet. By the Appellant's own submissions in the Scott Schedule, that advice was not received until 22 February 2023, some weeks after the Respondent's inspection and observation that service user A was being offered a diet which contravened IDDSI level 6 requirements.

94. In relation to service user L, the Appellant accepts that their care plan recorded

that a Level 6 diet was required. We take into account, but do not necessarily accept, the Appellant's response that this was an 'incorrect recording' issue when a speech and language therapist (SALT) had advised by telephone on 1 December 2022 that a restricted diet was no longer required. We do not necessarily accept this was a recording issue because the Appellant concedes that a further telephone call with the SALT was required on 13 January 2023 (after the inspection) and no letter confirming the SALT's advice was received before 2 February 2023. However, even if it was a recording issue, that does not preclude the Respondent from relying on that shortcoming together with other examples (of which there were many) to support a finding that the Appellant was in breach of Regulations 12 and/or 17. We accept and adopt the Respondent's position that poor recording impedes a provider (and the Regulator) in assuring safe practice and good governance.

95. In relation to record keeping (allegation 26), we rely on our findings in previous paragraphs and the evidence of Mr Chase, Ms George, Ms Englefield, Ms King and Mrs Butts, which in general terms admitted to an ongoing training and culture challenge with staff in relation to record keeping. While we take into account and place weight on Mr Chapman's observation that gaps in records are far easier to identify with electronic record keeping, such as the Personal Care System (PCS) used by Bluewater Care Home, we do not consider that gaps in records or poor record keeping were either isolated or so insignificant in relation to the number of entries made. The Respondent was entitled to rely on such errors as it found to support findings that breaches had occurred. Bearing in mind the consistent concerns raised by the Respondent in previous inspections about the Appellant's recording of care events or incidents throughout its regulatory history, we do not criticise the Respondent for a *'forensic approach'* (as Mr Chapman described it in his evidence) to its analysis of care records in January 2023 or in any preceding inspection.

96. We are satisfied that the Respondent's criticisms of the Appellant's understanding of the auditing requirement (allegation 29 on the Scott Schedule) is properly evidenced and justified. We find the Appellant's response in the Scott Schedule is largely irrelevant to the criticism being made. While we accept that the Appellant was carrying out audits at least in recent years, the assertion that audits were functioning 'perfectly well' is unsustainable based on the number of shortcomings across all domains identified by both the Respondent's inspectors and the Appellant's own privately commissioned assessors between at least 2020 and January 2023. That audits were neither detailed enough nor sufficiently rigorous is borne out by the number of concerns which were not addressed at all or were found to be repeated in similar circumstances from one inspection to the next. While we accept that the audit templates provided to us in late evidence are sufficient, we could place almost no weight on them in rebuttal of the Respondent's allegation because it was not clear whether they had been implemented at the time of the January 2023 inspection. In any event, they were blank and so told us nothing about the way, or the level of detail, auditing has been carried out.

97. Allegations about shortcomings in the Respondent's application of Mental Capacity Act 2005 (MCA) assessments (Allegations 30-33) were accepted partially in the Appellant's response to the Scott Schedule and fully by Mr Chase

in oral evidence. We can find nothing to criticise in the Respondent's reliance on those findings.

98. We are satisfied, based on Ms Snow and Mr Maunsell's evidence that the allegation (34 of the Scott Schedule) in relation to recruitment checks is made out on the basis of the information available to the inspectors at the time. Even if, which we accept, the record that a staff member had been dismissed from previous employment was done in error by the Appellant's staff, the subsequent failure to check and correct this issue before it was pointed out by inspectors is, of itself, a substantial concern, particularly in light of previous breaches of Regulation 19 as a result of failing to properly check staff credentials or secure DBS clearance.

99. We have not attempted to address every allegation arising from the January 2023 inspection in this decision. It would not be proportionate to do so. However, we conclude that while Ms Snow, Mr Maunsell, Ms Baldwin and Mr Irons were all tested at some length in cross examination about their findings, we can find nothing in either their answers or in the responses to the allegations which would lead us to conclude either that the inspectors themselves made material errors or that the draft report of the inspection on that day is in any way unreliable. We should add that we reach this global conclusion even where the allegation was not itself based on the inspectors' own experiences but rather drawn from information provided by external agencies including the Local Authority.

Earlier Inspections and the factual accuracy check process

100. For the reasons set out above, and excepting the allegations of bad faith discussed above, we did not attempt to reach detailed findings about factual disputes arising from earlier inspections. We are satisfied by our analysis above, and by our general review of the draft reports, factual accuracy checks and responses and final reports of the March 2021, July/August 2021, November 2021 and June 2022 inspections which were provided to us that the Respondent's factual findings are reliable, taking into account the evidence available at the time of the inspection and as provided for review at the lead inspectors' request. We are also satisfied that the Respondent consistently sought and took into account relevant submissions and further evidence supplied by the Appellant either during the inspection or as part of the factual accuracy check process.

101. The question of relevance was, in our view, key. It is clear that in response to each inspection (and the Notice of Proposal which preceded the Notice of Decision which is the subject of this appeal), the Appellant submitted a large volume of documents. We set out above our finding that many of the submissions made in disputing the factual accuracy of the findings made in the January 2023 inspection do not actually go to the inspection finding (rather than to irrelevant or peripheral issues or to show that the Appellant has since addressed the concern identified). Our review of the factual accuracy check process in the 2021-2022 inspections leads us to the same conclusion in relation to earlier inspections. Put simply, the majority of the submissions made or documents submitted did not actually address, let alone undermine, the

inspection findings. We are satisfied that where evidence provided by the Appellant did call inspection findings into question, for example in relation to the mattress setting, the concern was removed from the final inspection report.

Were the Respondent's inspectors incompetent?

102. The Appellant's criticism of Mr Crawford, in his health and safety inspection in November 2021, was that either he was unreasonably zealous in his recording of concerns or else lacked competence to understand whether what he was witnessing should be recorded as a concern. Examples included that he recorded a concern about the safety of the decking in the garden area, where Mr Boddy had concluded there was none, and in the number of potential fire-safety concerns he recorded and relayed to Ms Snow. In that case, the Appellant arranged a follow-up inspection by the Hampshire Fire and Rescue Service which resulted in a letter of compliance with fire safety standards. While we take the view that Mr Crawford was somewhat pedantic in his identification of concerns, we do not accept that he was not appropriately skilled or experienced for his role, or that his approach was unreasonable. We cannot conclude, on the basis of the available evidence, that his concerns were misplaced, entirely or at all, because (a) we have not been provided with the Hampshire Fire Safety Report; (b) we do not know what the Appellant did to address the concerns raised by Mr Crawford before the fire service inspection; and (c) the Respondent's considerations for fire safety are not necessarily the same as the Fire Safety Officer.

103. Conversely, we are satisfied that Mr Crawford's concerns at inspection in relation to fire safety or the safety of the decking in the garden area, were reviewed by Ms Snow and Ms Puddle in light of the additional information supplied by the Appellant and the final report was amended to remove or appropriately qualify the concerns raised.

104. Since we are satisfied, on the balance of probabilities, that the Respondent's findings were not based on material errors, it follows that we are confident the Respondent's reliance on these findings in its Notice of Proposal was reasonable.

Were the Respondent's inspectors unreasonably 'forensic' in their approach?

105. We understood from Mr Owusu's questioning of the Respondent's witnesses, and Ms Snow in particular, that the Appellant's case is that her approach personally, and which she encouraged in other inspectors, was to examine documents in a level of depth which was unwarranted and unreasonable. This criticism was put to her in particular in relation to her examination of care plans and records in all three inspections that she led.

106. Mr Chapman described the November 2021 inspection as 'forensic' in its approach. He commented that at least some of the criticisms made of recording and care plans would not have occurred had the home not employed technical solutions such as PCS because it would not have been possible to record such a volume of information otherwise and because it would not have been possible to identify errors in the same way in paper records. Ms King and Mrs Butts

raised concerns in similar terms in their evidence. All three said in similar terms that other homes they had been involved with had not been subject to the same degree of scrutiny as during Ms Snow's inspections. The Appellant also relied on the apparent discrepancy between the more critical findings of the Respondent's inspections led by Ms Snow compared with the Appellant's privately commissioned assessments during the same period, to demonstrate that the Respondent's approach was unreasonably pedantic.

107. While we would agree with the Appellant that Ms Snow's written and oral evidence reflects a meticulous approach in her consideration of records, and indeed in her approach to inspections generally, we can find no reason to criticise her for it. For the reasons we describe above, the Respondent was entitled to undertake a focussed inspection of areas in which there were abiding concerns. As Mr Chapman himself conceded in answer to our questions: *'given the scrutiny the home was under, I understand that may require a higher degree of evidence'.* With this factor in mind, we are unsurprised that Mr Chapman, Ms King and Mrs Butts should observe that Bluewater Care Home may have been subject to a greater degree of scrutiny than other homes, particularly in more recent inspections.

108. For reasons we explain in relation to Ground 3 below, we do not consider we should prefer the approach of the privately commissioned assessments or that their findings undermine those of the Respondent's inspections.

Does Ms Snow's use of the word 'pushback' show that she and other inspectors dismissed the Appellant's concerns and evidence, or otherwise failed to comply with the Respondent's published policies?

109. It was a recurring theme in the evidence of the Appellant's witnesses that in successive inspections, the Respondent's inspectors refused to consider evidence of good practice when offered by Bluewater's managers and staff. Further, it was asserted that the Respondent's inspectors dismissed the Appellant's comments during feedback sessions, or evidence submitted by the Appellant in the factual accuracy process.

110. So far as accepting evidence of good practice during inspections, we observe the Respondent's role is, by its nature, to assure itself and the public that care is being delivered safely and effectively so that residents are not at a risk of harm. While the Respondent's duty is to be balanced in its approach, it is not carrying out a balancing exercise – it is not required to balance good practice in one area against poor practice in another. Further, we accept the Respondent's position that where a service has a poor history of compliance with Regulations resulting in a risk of harm and an apparent inability to sustain a 'Good' standard of service across all domains, the Respondent is entitled to focus on specific areas of concern during its inspections. We also accept that the Respondent has limited time and resources and must be able to prioritise, according to its own concerns, what evidence it considers in the course of an inspection. For these reasons, we do not consider it unreasonable or in conflict with the Respondent's policies or inspection framework to decline to consider evidence which the Appellant offers, unsolicited, in the course of an inspection. Even where such evidence is offered to rebut a concern raised by an inspector,

the lead inspector must have a discretion to defer consideration of it until the factual accuracy check process.

111. In the course of her evidence, Ms Snow used the word 'pushback' to describe a provider's challenge to inspection findings. She said, in response to Mr Owusu's questions that it was not unusual for people to become defensive when receiving feedback. When asked about the term in cross examination in the course of their evidence, Ms Bauers and Ms Jupp, said that they would not themselves use the word 'pushback' and that the word is not found in, or does not reflect the Respondent's policies.

112. In closing submissions, Mr Owusu sought to persuade us that Ms Snow's description of a provider's representations as 'pushback' reflected an admission on her part that she had not properly considered any submissions put forward by the Appellant as part of the factual accuracy process in relation to the inspections she had led, or to the Appellant's responses to the Scott Schedule and that this also applied to the findings of other inspectors.

113. We do not consider that Ms Snow's use of the word 'pushback' in her oral evidence reflects or demonstrates that she or the Respondent more generally was dismissive of the Appellant's written representations. We consider Ms Snow's use of that term to have been colloquially descriptive, or shorthand for a provider's challenge to concerns or factual findings. In the context of the extensive evidence about the Appellant's (or more specifically Mr Sheppard's) routine rejection of the Respondent's concerns, including at feedback sessions and through the extensive dispute of factual findings, we find that term to be reasonably appropriate, or at least acceptable shorthand. To the extent that Ms Bauers and Ms Jupp distanced themselves from the term, we do not consider their evidence taken in context as amounting to any admission or persuasive evidence that Ms Snow or any other inspector must have dismissed or failed to give necessary weight to the Appellant's position or the documents put forward by the Appellant. As we set out above, we are satisfied further documents provided by the Appellant were considered and, where relevant and persuasive, accepted, to the extent that draft reports were modified with findings either removed, amended or with caveats added.

114. Nor can we find any support for the proposition as set out in the grounds of appeal and advanced by Mr Owusu in the course of the hearing, that the Respondent was required to, or should have, undertaken any greater enquiry of the Appellant than it did, whether during inspection or during the factual accuracy check process.

115. For all these reasons, we accept the Respondent's evidence about the factual accuracy of its inspections and the reliability of its judgements. We dismiss this ground of the appeal.

<u>Ground 2 – Did the Respondent misdirect itself as to the grounds for upholding the Notice of Proposal to cancel the Appellant's registration?</u>

116. In the original grounds of appeal, ground 2 was argued on the basis that the

Respondent's stated reason for upholding the Notice of Proposal was flawed i.e. that it was not reasonable or proportionate to make a decision based on whether the Appellant's representations themselves demonstrated that the Appellant was in compliance with any or all Regulations. The Appellant argues this was not a reasonable or proportionate course to take because (a) the Respondent gave the Appellant no guidance or direction as to the matters on which it required clarification or representation; (b) the Respondent failed itself to make requests for further information or explanation about the actions the Appellant had taken; and (c) the Respondent anyway failed to take into account the Appellant's representations or supporting documents.

117. Grounds (a) and (b) were not advanced with any rigour during the hearing or in final submissions, and we reject them in any event for the following reasons.

118. In relation to (a), the purpose of the Notice of Proposal was (and is) to invite the Provider to make representations which might cause the Respondent to revisit the basis for the preliminary conclusions which are set out in that document. The Notice of Proposal signed by Rebecca Bauers on 26 May 2021 sets out at considerable length the matters on which the Respondent was relying. Under the heading, 'Your Right to Make Representations', the Appellant was explicitly invited to make representations if it disagreed *"with any or all of these reasons or any other matter relating to this notice"*. We do not consider it was necessary, or indeed helpful, to give any greater direction or guidance than contained within that statement because to do so could have fettered the Appellant's freedom to raise matters it considered were important.

119. We also take into account that although the Appellant did apparently encounter some difficulty in marshalling and prioritising the information it wished to rely on within the 28 days provided by the Notice of Proposal, the Appellant did engage legal representation and submitted professionally drafted representations and over 200 supporting documents. We are satisfied that the Appellant itself, on the advice of its professional representatives, was best placed to assess what representations it should make and that no prejudice arose because the Respondent did not guide them as to the matters on which it required representations. The Respondent adopted a flexible approach, accepting and reviewing documents relating to the Appellant's representations more than 70 days after the Notice of Proposal was issued.

120. In relation to (b), we remind ourselves that the purpose of the Notice of Proposal is to set out the Respondent's provisional conclusions based on the evidence available to it. It follows that the Respondent should only issue such a Notice where it has completed its enquiries and in reliance on inspection findings which it has already assured itself are reliable, following the factual accuracy process and the Respondent's own internal checks and balances.

121. Based on the evidence of Ms Bauers and Ms Jupp, we are satisfied that the Respondent followed its internal processes in accordance with its published policies, including the 'Decision Tree' framework.

122. We reject the Appellant's submission that the Respondent's duty to have

regard to all relevant matters includes an active duty to revert to the Appellant and require further explanation or clarification if the Appellant's representations did not provide reassurance that it was now in compliance. Such an approach would lead to the undesirable (and perhaps absurd) outcome that unless a provider accepts the Notice of Proposal, the Respondent and provider would remain in a cycle of representation, response and reply until such time as the Respondent was 'reassured' and would effectively neuter the Respondent's power to cancel the Provider's registration.

123. In relation to (c), we accept that if the Appellant's representations undermined the Respondent's conclusions (for example by demonstrating that the Appellant is now in compliance with the Regulations which it is said to have breached) then the Respondent would be required to reconsider its decision, including perhaps by further engagement with the Appellant about the substance of its representations. However, the Respondent was clear in its Notice of Decision that it did not consider the Appellant's representations or supporting evidence did demonstrate compliance with Regulations or in any way caused the Respondent to reconsider its decision. Although the Appellant's appeal implied that its representations were compelling and should have led to the Respondent withdrawing its notice, there was nothing put before us in evidence that persuaded us why that should be the case. We are satisfied that the Respondent received, reviewed and took into account the Appellant's representations. We can find nothing to criticise in its approach

124. In fact, although it was not required to, the Respondent did continue to test its conclusion that the Appellant remained in breach of Regulations by continuing to carry out focussed inspections after the Notice of Proposal and indeed after its Notice of Decision. We do not consider it amounted to an error by the Respondent that the inspectors on those occasions declined to engage with the unsolicited evidence the Appellant sought to put forward about previous factual disputes, good practice in other areas of the service or other irrelevant matters. For the reasons set out, the Respondent was reasonably entitled to review its conclusions by carrying out inspections according to its own methodology, examining the evidence it considered to be relevant and which provided a further 'snap shot' of the Respondent's compliance with the relevant Regulations.

125. To the extent that the Respondent was required to consider whether the Appellant had the capacity to improve in order to attain compliance within a reasonable time, that duty was fulfilled by the Respondent's commitment to continuing with focussed inspections after issuing both the Notice of Proposal and after the Appellant elected to appeal against the Notice decision.

126. For these reasons, we dismiss this ground of appeal.

Ground 3: Is the Service in compliance with Regulations?

127. The Appellant's position was that the Service is compliant with Regulations. The Appellant relied on the evidence of its own staff, including Mr Sheppard, Mr Chase and Ms Englefield, the opinions of its former manager Mr Chapman, and consultants including Ms George, Ms King and Mr Boddy, who have been

engaged with the Appellant for many years, as well as Mrs Butts, who is now consultant to the home.

128. In particular, however, the Appellant relied on the finding of inspection reports undertaken by Delphi Care Solutions on 10 September 2021, October 2021 and March 2022, which identified no breaches of Regulations, the conclusions of Outstanding Care Homes inspection in April 2022 which again identified no breaches of Regulations and finally a report by SRG Care Consultancy, which again identified no breaches of Regulations in an inspection on 2-7 October 2022.

Should we rely on findings of the privately commissioned inspection reports, the views of consultants or Mr Chapman over the Respondent's findings?

129. We were provided with copies of all reports and statements from the report writers Isaac Theopholis for Delphi Solutions, Scott McMurray for Outstanding Care Homes and Ann Butts for SRG Care Consultancy.

130. We heard oral evidence from Mrs Butts, who was the inspector on behalf of SRG Group and now working with the Appellant as a consultant. Although we took into account Mrs Butts' considerable experience as both a care provider and inspector, the weight we could place on her findings was limited because: (a) she has not been an inspector since leaving the CQC in 2014 or 2015; (b) she had limited (if any) experience of applying the Respondent's current inspection methodology, including the 'Key Lines of Enquiry' (KLOE) at the time she left; (c) her inspection was the result of a private commission and she retains an interest in the home because she is a consultant employed for four days per week; (d) her inspection was carried out with notice; (e) she carried out the inspection alone and she was able to consider a more limited range of documentary evidence than an equivalent inspection team sent by the Respondent; (f) she did not appear to factor in the service's poor compliance history in establishing whether good practice was consistent or embedded; and (g) when challenged in cross examination about the evidence she had relied on to form her judgements, she accepted that she had identified errors, omissions and shortcomings in the Service's record keeping which others might reasonably have judged to have amounted to breaches of Regulations.

131. We were also concerned that Mrs Butts appeared to attribute a great deal of weight to the caring and responsive attitude of the staff as mitigation for the identified shortcomings in safety, oversight and governance. We were concerned, for example, that she did not consider it particularly important that shortcomings she had identified in her own report had not been rectified, or in some cases addressed, by the time the Respondent inspected in January 2023.

132. We did place some weight on the other reports because it is clear they were carried out in good faith by experienced inspectors who had themselves in the past been employed by the Respondent or elsewhere within the sector and carried out inspections according to the Respondent's own current criteria. However, the weight we could place on these reports was somewhat limited because we could not hear from the inspectors or test their evidence. We anticipate that had we done so, at least some of the limitations we identify above

in relation to the methodology and judgement of Ann Butts in her report would have applied. In any event, none of the reports reflected the level of rigour of the Respondent's inspection reports, such that we would prefer them to the Respondent's own findings or conclusion.

The evidence of staff and consultants

133. We could place no particular weight on the views of Ms Englefield or Ms George that the service is in compliance with Regulations because it is their competence to lead a safe and effective service and their capacity to recognise breaches of Regulations during their time in post which is central to the issues in dispute.

134. Mr Chase did not concede that the Service was in breach of Regulations at the time of the January 2023 inspection or the time of the hearing. However, in both his written statement and in his oral evidence, he acknowledged that *'there is work to be done'*. With that position in mind, we consider his evidence more fully under Ground 5 and the question of whether the service is likely to attain compliance within a reasonable period.

135. We place greater weight on Mr Chapman's view that in his tenure as Registered Manager between October 2021 and April 2022, he considered the Service was not in breach of any Regulations and ought to have earned at least a 'Good' rating across all domains. We do so because we accept that he is an experienced care home manager, including managing and improving homes which were previously under-performing. We also note that although previously employed, he does not appear to have any direct interest in the Appellant's business. We found his evidence measured and balanced. However, we could not accord such weight to it so as to displace the Respondent's findings because (a) he cannot comment on the position of the home since his departure in April 2022; (b) he has no experience as an inspector; and (c) and we note that even within his short tenure, both the Respondent and the Appellant's own privately commissioned consultant inspectors found that concerns over the good governance of the home endured. As a result, even the more favourable privately commissioned Delphi Care Solutions report judged the 'well-led' domain as 'Requires Improvement' in March 2022 (and so a step-back from the 'Good assessment in October 2022). In each case, concerns raised included the effectiveness of auditing and the robustness of the action or service improvement plan. These were the tools which Mr Chapman should have been relying on to inform his own view.

136. We could place no significant weight on Mr Boddy's evidence outside his own limited area of expertise, nor any on Ms King's evidence because, despite her considerable experience in the care sector, she has no experience as an inspector for the Respondent and her views were not, or did not appear to be, formed with the Respondent's inspection framework or key lines of enquiry in mind. As a result, we found her opinions were impressionistic rather than supported by robust evidence. Although Ms King described having reviewed care plans and records, staff records, audits and the service improvement plan, we could not reconcile her views about the overall good standard of such records with the errors, omissions and scanty quality of many of the documents

in written evidence. We were also concerned that Ms King's longstanding relationship with the Appellant and her focus on the positive attributes of the service, including its excellent facilities, activities, and caring and responsive staff, limited her appreciation of the Respondent's concerns. Her criticisms of the Respondent's approach to inspections, and Mr Sheppard and Mrs Aquilina-Sheppard personally, were not based on first-hand experience because she had not been present for any inspection.

137. Given the relatively limited weight we could attach to the privately commissioned reports, individually or cumulatively, and given our confidence in the Respondent's findings as we set out above, we prefer the Respondent's evidence to that of the privately commissioned consultants or Mr Chapman. We are persuaded that at the time of the January 2023 inspection, the service was in breach of Regulations as set out in the Respondent's draft inspection report and the evidence of Ms Snow.

Has the service improved since the January 2023 inspection so that it is now in compliance with Regulations?

138. We accept and place weight on the acknowledged position that the Appellant's service has improved between the June 2022 and January 2023 inspections. We accept the Appellant's evidence, through its response to the Scott Schedule, and in the written and oral evidence of Mr Sheppard, Mr Chase, Ms Englefield and Ms Butts, that the Appellant has continued to take action in response to the draft findings of the January 2023 inspection. Although the Respondent made no admission on this point, we were persuaded by the Appellant's evidence overall that by the time of the hearing, the Appellant had probably taken sufficient action to address the specific concerns outlined in relation to Regulations 11, 18, 19 and 20A.

139. However, on the basis of the limited evidence before us and without the benefit of a contemporaneous inspection, we could not reach a firm conclusion about whether those specific breaches have been remedied Further, and taking into account in particular the ongoing culture of minimising the significance of risks to safety, a resistance to accepting the importance of complete record keeping and the missed opportunity to demonstrate a robust auditing process (through the submission to us of completed audits – which we made clear we would be likely to admit even as very late evidence), we were not persuaded that the Appellant is now compliant with Regulations 12 and 17. In particular, we remain sceptical, that the Appellant's oversight mechanisms are sufficiently robust to ensure that further breaches of these Regulations, most particularly Regulations 11 and 12, do not occur.

140. As Mr Irons put it eloquently in his evidence:

> *"I accept that some of the points I identified were remedied on the spot….the issue is the inability to apply learning and to anticipate these issues…I accept there is a learning cycle. A person will start off unconsciously incompetent but will advance from there to being consciously competent and then things become instinctive. I'm not sure where the provider is on that journey."*

We adopt that view as our own.

141. For the reasons above, we find that the findings and conclusions of the January 2023 inspection are reliable. We accept and adopt Ms Snow's conclusions that the Service has improved since its last inspection but that it remains in breach of Regulations 12 and 17.

142. We consider the Appellant's capacity to attain compliance with Regulations, and its capacity to make and sustain improvement so as to attain a 'Good' rating from the Respondent as a component of Ground 5 below.

Ground 4: Does the potential impact on service users mean that cancellation is disproportionate?

143. In the grounds of appeal, the Appellant submitted that the Respondent had failed to carry out any engagement with the Service Users or their family or properly take into account the impact closing the service will have on the service users. The Appellant set out that because many of the service users are living with dementia and that a change of environment can have a detrimental impact on their wellbeing, service users are to be regarded as especially vulnerable and so should be regarded as at significant risk of harm if forced to move. The Appellant submitted that closing the service should be a decision of last resort.

144. This ground of appeal was not advanced in cross examination or in the Appellant's closing submissions. However, we have considered it because Mr Owusu confirmed at the close of the oral hearing that the Appellant relies on all of the grounds set out in the appeal as submitted and because we agree that the impact on service users is a factor to be weighed in deciding whether cancellation is proportionate.

145. In written closing submissions, Mr Harrison conceded that the Respondent had not itself carried out an assessment of the impact of cancellation on individual service users. He clarified, in response to our questions, that the Respondent had considered the overall impact on service users when deciding whether it was justified in deciding to cancel the Appellant's registration.

146. We do not consider that the Respondent was required either by its statutory duties, or by the general requirement to behave reasonably and proportionately, to carry out an assessment of the impact on individual service users in order to determine whether the decision to cancel was justified. That is not the role of the Respondent and to require the Respondent to carry out such an exercise would be to place an unreasonable burden on it. Instead, we consider the Respondent's role was to determine, on the basis of the evidence available, including the information about the service users as a group whether the impact on service users would be disproportionate to the risk of harm they face while the Appellant remains (and is likely to remain) in breach of Regulations and providing less than a good service across all domains.

147. We cannot say with confidence to what extent the Respondent did carry out such an exercise in detail. We observe that in both its Notice of Decision, in its

Response to the appeal and throughout the hearing, the Respondent addressed this issue only to the extent of making a bare assertion that it always considers the impact any enforcement action it takes may have on the service users residing at the location subject to the action. However, to the extent the Respondent can be criticised for failing to set out how it had gone about that exercise in greater detail, any defect in its approach is overtaken by our responsibility to consider the issue afresh.

148. In our determination, the relevant factors to be borne in mind are that while all of the service users are elderly and (by Mr Sheppard's evidence) eight of them are living with early-stage dementia, that some of the service users have been living at Bluewater for many years and while we accept that the general experience of the service users is positive, bearing in mind the comfortable, comforting (and appropriately dementia friendly), caring and responsive environment, there was no evidence that the impact on them individually or as a class would be any greater than for any other group of residents in long term care. By contrast, we were satisfied by the evidence of Sophie Lyon (and indeed the Appellant's own case – albeit advanced for different reasons) that the Local Authority has in hand detailed assessments in order to determine the best interests of the remaining service users for whom they have a duty of care.

149. On that basis, we do not consider the impact of closure would be so great as to render the decision to cancel the appellant's registration disproportionate because:

a. Although all of the service users are elderly and at least eight of the service users are living with early-stage dementia, there was nothing specific in the evidence to alert us to a particular impact which such a condition could have if the service user were to move home;

b. We are satisfied that the Local Authority has plans in train to support service users to move to new accommodation in the event of Bluewater Care Home closing; and

c. Taking into account our findings about ongoing breaches of Regulations, the likelihood of further breaches of Regulations (as described below), we conclude that the risk of harm which attaches to such ongoing breaches or new breaches outweighs the impact the closure of the home would have had on the service users residing there.

Ground 5: Is it reasonably necessary to close the Service?

150. We conclude that this ground, as drafted in the Appellant's grounds of appeal and argued in the Appellant's closing submissions, is misconceived. To the extent that it relies on assertions that the Respondent's reasoning is flawed and fails to take into account improvements, it is repetitive of Grounds 1-3, which we have dismissed for the reasons given.

151. We accept that cancellation ought to be a last resort, inasmuch as the provider must be afforded sufficient opportunity to improve, demonstrate compliance with Regulations and that it can attain and maintain at least a 'Good'

service overall. However, cancellation may be justified in circumstances where there is no imminent risk of serious harm (which would otherwise justify urgent cancellation). Such circumstances arise where ongoing breaches of Regulations leaves residents at some risk of harm and where it is no longer proportionate for the Respondent to be expected to expend time and resource in inspecting with little or no prospect that the Service will achieve and sustain a good service.

152. As set out in its Notice of Decision, response to the appeal, Ms Jupp's evidence and in closing submissions, the Respondent maintains that the Appellant has been given an extended opportunity to demonstrate its capacity to comply with Regulations and, having never achieved a 'Good' rating overall, it is no longer proportionate to require the Respondent to expend time, effort and resource to regulate a Service which has no realistic prospect of demonstrating that it can achieve and maintain a 'Good' standard in the safe, effective or well-led domains.

153. However, we approached this question with an open mind. Taking into account the impact on service users and the Appellant's business and its staff, and the considerable effort and investment the Appellant has made in good faith to try and demonstrate compliance, we consider that it would be disproportionate to cancel the Appellant's registration if we could be confident that within a reasonable period, the Appellant will be in compliance with all relevant Regulations, will reach a good standard across all domains and, other things being equal, would be expected to maintain that standard.

154. We consider a reasonable period to be the time until the next scheduled inspection while the Service remains in special measures, which Ms Jupp confirmed would be July 2023.

155. Our starting point is our finding that as of January 2023, the Respondent accepts that the Service had improved since previous inspections, such that the domains of 'safe', 'effective' would earn ratings of 'requires improvement', rather than 'inadequate' as assessed at the previous inspection, while the domain 'well-led' would remain inadequate. Despite the improvements noted in the draft report, we also accept and take into account the Respondent's finding that the Service remained at that time in breach of Regulations 11, 12, 17, 18, 19 and 20A and our own finding that even on the most favourable view, the Appellant remains in breach of Regulations 12 and 17 at the time of our determination.

156. We took careful account of the Appellant's witnesses and particularly Mr Sheppard, Ms Englefield, Ms George, Ms King and Mrs Butts, all of whom were clear in their view that the Service is in a strong position to consolidate the improvements made and to make further improvements. However, we cannot place much weight on these views because in each case, their primary position was that the service is not in breach of Regulations at all and has always, or nearly always, operated a 'Good' service overall.

157. With this in mind, the key witness as to improvement was Mr Chase. We recognised the possibility that with a fresh perspective and insight garnered from his experience in other care settings, he may be the person to drive

forward urgently the improvement within the Service and reset the Appellant's relationship with the Respondent.

158. We were satisfied to some extent that Mr Chase has already started to build a more constructive relationship with the Respondent through his leadership of the service through the January 2023 inspection. We also note that although Mr Chase himself was pivotal in the drafting of the Appellant's comprehensive challenge to the Respondent's findings in that inspection through the factual accuracy response and the response to the Scott Schedule, he was measured in his oral evidence and his answers to questions put to him about specific allegations were frank and balanced. He sought to emphasise misunderstanding or incomplete information as a cause for any disputed fact, rather than apportion blame to the Respondent for its approach to the inspection. Ms Snow's evidence supported a conclusion that Mr Chase was a positive influence on the staff's engagement with the inspection team in the course of the January 2023 inspection.

159. While we also acknowledged that there were occasions when Mr Chase had himself initiated meetings with the multi-disciplinary team we were concerned to note Ms Lyon's evidence that engagement with the Local Authority over safeguarding issues remained limited. We did not find Mr Chase's reasons for missing recent scheduled meetings with the Local Authority compelling and we were concerned at his admission that one meeting had been terminated at Mr Sheppard's insistence. That admission somewhat undermined Mr Chase's assurance that he manages the home independently of Mr Sheppard's day-to-day involvement.

160. In his written statement and oral evidence, Mr Chase described actions and improvements he had initiated since arriving in post in September 2022. He described how he had reviewed CQC reports, care plans and risk assessments. He said he had taken a decision to streamline training and reduce what he saw as a records system which had become cumbersome in an attempt to meet the Respondent's concerns. He exhibited a service improvement plan and audit template forms, although he conceded these had been created, at least in their current format, after the January 2023 inspection. He explained how, with Mrs Butts' support, and with Ms Englefield taking on a more-office based management role, he is seeking to embed more robust systems in order to monitor performance and compliance.

161. However, it was concerning that even with the benefit of the service improvement plan and with the verbal assurance that auditing is taking place in accordance with the new system put in place by Mr Chase, none of the Appellant's witnesses could say, beyond broad generalisations about record keeping, what further improvements need to be made in order to bring the service to a good standard across all domains. We found it particularly concerning that as consultants specifically employed to help the Appellant reach the required standards, Ms King and Mrs Butts did not appear to be taking the constructively critical approach necessary to drive forward improvement. Similarly, we were concerned that while Mr Chase brings with him considerable experience and success in managing care, and while we do not doubt his interpersonal skills or people management skills, he was unable to demonstrate

in his written or oral evidence the degree of insight or urgency required so that the service would be likely to have addressed the identified breaches of Regulations and achieve a good rating in the domain of 'well led' if it were inspected in July 2023, in accordance with the Respondent's normal arrangements for six monthly inspections of Services in special measures.

162. As we have already observed, the auditing forms we admitted as late evidence were blank. Mr Chase said he could have exhibited completed forms but elected not to. He could not explain the reason for that choice. Similarly, he could not plausibly explain why he had not shared any service improvement/action plan with the Respondent or the Local Authority when first asked for it, except that he considered it to be 'in draft' and so not ready to be shared. While we accept that the plan must have existed in some form, we were concerned that to have a 'draft' plan of this kind was to misunderstand its purpose in existing as a living document in order to identify, prioritise, resource and account for each new risk or concern as it is identified.

163. Our review of the service plan reflected that concern. We do not criticise the plan for incorporating the Respondent's concerns so far as it does but we were concerned to read that it only incorporates those issues identified at the most recent inspection and not any other issues identified by previous inspections. While we accept that it is not entirely reactive, there were relatively few lines which appeared to have been prompted by concerns identified by Mr Chase, Mrs Butts or any other member of staff as part of the audit process or in any other way. To that extent, we were not assured that the plan reflects the requirement that the service should be able to proactively identify issues and address them, which would be a pre-requisite for sustaining improvement in the absence of the current level of external agency support.

164. We noted that new issues had been added some high or medium risk items had already passed their target completion date without apparent review, explanation or comment, which reflected a lack of urgency and de-valued the plan as a tool for offering assurance to external agencies including the Respondent.

Conditions

165. We carefully considered whether the Respondent's condition of admission (which is the subject of the second appeal) or imposing further conditions of our own device, would provide the framework to manage the current level of risk and help drive the urgent and sustained improvements necessary to avoid cancellation. Conditions we considered included those conditions requiring monthly reporting imposed in 2019 and which did appear to drive improvement, as well as conditions on the maximum number of residents or the rate at which the Service could accommodate new residents, which might help manage the current level of risk. We anticipated that these conditions may be of some help, and may even drive some further improvement, we concluded that where conditions had been insufficient to embed improvement after 2019 and where the service, under the same directorship and with many of the same senior staff and consultant advice, and with the benefit of further consultant advice and a change of management had failed to make the level of progress one might

anticipate with such resources, we concluded that it was not a proportionate call on the Respondent's resources to maintain the Appellant's registration in the mere hope (rather than confident expectation) that conditions would lead to compliance and a good service across all domains.

166. Each of these measures did have some positive impact, to the extent that by the time conditions were lifted, the Respondent concluded that the Appellant was not at that time in breach of any Regulations and had made qualitative improvements across the 'safe', 'effective' and 'well-led; domains. However, subsequent inspections, which for the reasons already given we are sure we can rely on, found that these improvements were not sustained. By December 2020 each of the domains 'safe', 'effective' and 'well-led' were rated as inadequate and further breaches of Regulations had been identified, including repeats of previous breaches. We agree and adopt the Respondent's position that enforcement measures are temporary measures designed to bring about a Provider's compliance with Regulatory requirements. If it had been the case that the Appellant had sustained improvements for a substantial period before lapsing again below good or into breach of a small number of Regulations, then we might have considered it proportionate to impose conditions for a second time. However, where we find that the Appellant was unable to sustain improvement in 2019 and where, with the exception of the change in Registered Manager, the senior leadership at Bluewater is essentially unchanged, it is not proportionate to expect the Respondent or other external agencies to expend substantial resources regulating, or otherwise supervising and supporting the Appellant with no likelihood of it returning to compliance or establishing a good service across all domains.

167. For these reasons, we dismiss the final ground of appeal.

Conclusion on the First Appeal

168. We are satisfied that the Appellant's breaches of Regulations are as stated by the Respondent in successive inspection reports since Bluewater Care Home was registered in 2014. We are satisfied that at the time of our determination, the service remains in breach of at least Regulations 12 and 17.

169. On the basis of such an extensive history of persistent poor compliance with Regulations and in particular Regulations 12 and 17, and considering the Appellant has never reached a 'Good' standard of service across all domains, and remains unable to bring and sustain the service to a good standard in the domains 'safe', 'effective' and 'well-led', and further taking into account the significant safeguarding concerns which continue to arise, we conclude that the service users at Bluewater Care Home may be exposed to an ongoing risk of serious harm. That risk is not fully mitigated by external agency support, including from the Respondent and the Local Authority. Nor is it reasonable or proportionate for that support to continue indefinitely. Despite considerable investment in outside assistance and evidence of recent improvement, we conclude that the Appellant does not have the capacity to bring the Service into compliance with Regulations within a reasonable period. nor to sustain such compliance.

170. Having balanced the impact of the decision on service users and the Appellant against the desirability that any Service should fully meet all regulatory requirements, including relevant Regulations, we are satisfied that the decision to cancel the Appellant's registration is fair and proportionate.

The Second Appeal

171. Since we have decided to uphold the Respondent's decision to cancel the Appellant's Registration, the appeal in relation to the imposition of conditions falls away and is dismissed accordingly.

Decision

172. The appeals are dismissed.

Judge C S Dow
First-tier Tribunal (Health Education and Social Care)

Date Issued: 19 May 2023