[2019] IEHC 774

THE HIGH COURT

[RECORD NO. 2019/15JR]

BETWEEN

SILVERGROVE NURSING HOME LIMITED T/A SILVERGROVE NURSING HOME

APPLICANT

AND

CHIEF INSPECTOR OF SOCIAL SERVICES AND HEALTH INFORMATION AND QUALITY AUTHORITY

RESPONDENTS

Written judgment of ex tempore ruling of Ms. Justice Ní Raifeartaigh delivered on 31st day of July, 2019

Nature of the case

1. This case concerns a nursing home and a "notice of cancellation" which was issued to the nursing home by the Chief Inspector of Social Services. The applicant seeks to quash the notice of cancellation and to obtain a number of related declarations.

Silvergrove Nursing Home Limited

2. The most recent certificate of registration for the applicant entity is dated 7th October, 2016. In the normal course, this certificate would have been due to expire on 7th October, 2019. It describes both the registered provider and the designated centre as "Silvergrove Nursing Home Limited".

3. On 18th June, 2018, the Chief Inspector gave notice of a proposed decision to cancel in accordance with s. 53 of the Health Act, 2007. This was followed on the 17th October, 2018 by a notice of decision to cancel registration under s. 55 of the Act. The decision to cancel is the decision impugned in these proceedings.

Relevant legislation

4. The Health Act 2007 ("the Act of 2007") established the Health Information and Quality Authority ("HIQA") as well as the position of Chief Inspector of Social Services ("the Chief Inspector"). It also provided for a scheme of registration and inspection of residential services in respect of various sectors. This included the registration and inspection of nursing homes. The office of the Chief Inspector was dealt with under Part 7 of the Act of 2007. The Chief Inspector's remuneration, expenses, period of office and terms of office were placed under the control of HIQA subject to the approval of the Minister for Health (and with the consent of the Minister for Finance). It provided that HIQA may dismiss a Chief Inspector for any of the reasons set out in s. 40(6) of the Act of 2007.

5. Section 41 of the Act of 2007 set out the functions of the Chief Inspector which included the establishing and maintaining of one or more registers of designated centres, and of registering and inspecting designated centres.

6. Section 43 provided that HIQA may, in accordance with the terms of the appointment of HIQA employees under s.26, appoint "inspectors of social services" to assist the Chief Inspector in his or her functions.

7. Section 46 of the Act of 2007 provided that it would be a criminal offence to carry on a designated centre unless registered under the Act.

8. Part 8 of the Act of 2007 dealt with applications for registration and renewals of registration. Central to the decision in this regard is that the Chief Inspector is satisfied of the fitness of the registered provider and of the persons who participate in the management of the designated centres.

9. An appeal to the District Court from a decision to cancel registration is provided for by s. 57 of the Act of 2007.

Chronology of events relevant to these proceedings

10. The relevant chronology of events may be summarised as follows. On 7th October, 2013, the applicant nursing home obtained a certificate of registration as a designated centre. On 7th October, 2016, it obtained a subsequent certificate of registration.

11. A number of inspections were carried out at the nursing home over a period of time. These inspections occurred on 2nd February, 2016; 16th June, 2016; 23rd January, 2018; 11th April, 2018; and 31st May, 2018. The pattern was as follows: the inspections took note of various shortcomings in the running of the home; recommendations were made as to how these shortcomings should be addressed; and the response of the applicant on each occasion was not to dispute the findings in terms of their accuracy but to seek some time to address the shortcomings that had been identified.

12. On 18th June, 2018, a notice of proposed decision to cancel was issued to the applicant. The applicant was invited to make representations in accordance with the procedure envisaged under section of 54 the Act of 2007. On 15th July, 2018, the applicant submitted written representations which, again, did not dispute the factual findings in respect of the state of affairs at the nursing home but stated that it was committed to addressing the concerns and gave various detailed assurances in relation to the matters raised.

13. On 3rd August, 2018, an unannounced inspection was conducted. A further unannounced inspection was conducted across 8th and 9th October, 2018.

14. On 17th October, 2018, a meeting was held between HIQA and the Chief Inspector of Social Services.

15. On 18th October, 2018, a notice of decision to cancel registration issued to the applicant. I will discuss this document further below.

16. On 7th November, 2018, a letter was sent by the applicant's solicitors referring to steps which had been taken since the meeting, including the appointment of a re-configured senior management team. The letter requested that the Chief Inspector withdraw the notice in order to afford the company a reasonable period of time within which to address the matters without the necessity to engage valuable court time. The letter also complained about errors on the face of the notice itself and set out in detail the correct statutory provisions which should have been referred to, and attached a Schedule of "anomalies" within the notice of cancellation.

17. A response from the Chief Inspector refusing this request was received on 9th November, 2018. This letter pointed out that the first page of the notice had set out that the cancellation was based on s.51(2)(b) of the Act of 2007 and the letter then quoted it as follows: "that, in the opinion of the chief inspector, the registered provider or any other person who participates in the management of the centre is not a fit person to be the registered provider of the centre or to participate in its management". It went on to say that the Schedule to the notice contained detailed particulars regarding "the fitness of your client broken down in to six separate headings".

18. A notice of appeal was filed in the District Court in accordance with the statutory procedure set out under s.57 of the Act of 2007 on 13th November, 2018.

19. On 10th December, 2018, there was a further unannounced inspection, and a follow-up report acknowledged some "recent improvements" and that there had been "decisive action to change the management structure in the centre". However, the report noted that the new structure was "still in its infancy with roles and responsibilities not clearly defined" which had contributed to the "repeated non-compliances" identified in the inspection.

20. Leave to bring judicial review proceedings was granted by the High Court (Noonan J.) on 14th January, 2019.

21. A further unannounced inspection was conducted on 26th March, 2019, the report of which stated that the applicant's nursing home was deemed to be "compliant" or "substantially compliant" in 15 of the 17 areas assessed.

Reliefs sought and grounds pleaded

22. The reliefs sought were as follows:-

    (i) An order of certiorari quashing the decision in the notice of cancellation dated 17th October, 2018.

    (ii) A declaration that the first and/or second named respondent failed to specify or sufficiently specify the grounds/reasons for its decision in the notice of cancellation.

    (iii) A declaration that the first and/or second named respondent failed to comply with the principles of basic fairness of procedures and natural and constitutional justice in grounding its decision in the notice of cancellation on issues of non-compliance identified in February 2016 when the first and/or second named respondent acknowledged in June 2016 that such issues had been "satisfactorily addressed within the agreed timelines".

    (iv) A declaration that the first named respondent was not entitled to rely on the following reports of inspection conducted by the second respondent in its decision in the notice of cancellation: 10th December, 2018; 8th and 9th October, 2018; 3rd August, 2018; 31st May, 2018; 11th April 2018; and 23rd January, 2018.

(v) An order of certiorari quashing the reports of inspection identified above and/or the regulatory judgments therein and/or the decision to publish the said reports.

(vi) A declaration that the first respondent had no registration and/or inspection function (or 'register') under section 41(1)(b) and (c) of the Health Act 2007 in respect of "designated centres" and/or "registered providers" until the Health Act 2007 (Commencement) Order 2017 (S.I No. 429 of 2017) or, in the alternative, had no such functions and/or 'register' at all.

(vii) A declaration that the Notice of Cancellation was invalid, ineffective and/or unenforceable as it sought to cancel the registration of an entity which was not the "designated centre" and/or the "registered provider" identified in the opposition papers and/or in the 2016-2019 Certificate of Registration.

(viii) An order extending time for judicial review of some of the reports insofar as this would be necessary.

(ix) A stay on the decision in the notice of cancellation taking effect until the hearing of the application.

(x) A stay on the appeal of the decision in the notice of cancellation to the District Court until the hearing of the application.

(xi) Such further order as the Court may deem fit.

(xii) The costs of the proceedings.

23. The grounds upon which the above reliefs are sought were as follows:-

(a) The grounds and reasons relied upon to cancel the registration of the applicant were identified under a legislative provision which did not exist. In particular, the decision in the notice of cancellation was grounded on s.52(1)(b) of the Health Act 2007 which does not exist.

(b) Ground number 1(1) in the notice of cancellation was grounded on an allegation that the applicant "does not have adequate understanding of its regulatory responsibilities under the Health Act 2017, and the Regulations and Standards made thereunder." No such Act exists nor do such regulations and standards exist.

(c) The decision in the notice of cancellation was grounded on issues of non-compliance identified on 2nd February, 2016 when the first and/or second named respondent acknowledged on 16th June, 2016 that "the failings found on [2nd February, 2016] had been satisfactorily addressed within the agreed timelines."

(d) The minutes of a meeting held on 17th October, 2018 prepared by the second respondent state that the grounds for the proposal to cancel the registration "centred on the fitness of the registered provider and that the findings of last

week's inspection [8th and 9th October, 2018] reiterated the lack of fitness of this entity." The latter ground found no expression in the notice of cancellation.

(e) The first respondent had no registration and/or no inspection function (or 'register') under section 41(1)(b) and (c) of the Health Act 2007 in respect of "designated centres" and/or "registered providers" until the Health Act 2007 (Commencement) Order 2017 (S.I. No. 429 of 2017). Further or in the alternative, the first respondent had no such functions and/or 'register' at all. The first respondent cannot by the notice of cancellation lawfully cancel a registration which it has or had no function to register.

(f) The notice of cancellation was invalid, ineffective and/or unenforceable as it seeks to cancel the registration of an entity which is not the "designated centre" and/or the "registered provider" identified in the opposition papers and/or in the 2016-2019 certificate of registration.

The notice of decision to cancel registration

24. The notice of decision to cancel registration was signed by the Deputy Chief Inspector, Susan Cliffe, and consisted in total of a 7-page document. The opening section of this notice was as follows:-

> "Office of the Chief Inspector of Social Services
>
> Section 51(1)(a) and Section 55(1)(c) of the Health Act 2007 as amended ("the Act"
>
> Notice of Decision to Cancel Registration of a Designated Centre issued pursuant to Section 51(1)(a) and Section 55(1)(c)(i) of the Act
>
> To: Silvergrove Nursing Home Limited, 5 Main Street, Leixlip, Co. Kildare
>
> Company Number: 518366
>
> Having its registered office at: 5 Main Street, Leixlip, Co. Kildare
>
> Being the registered provided of: Silvergrove Nursing Home, Main Street, Clonee, Co. Meath
>
> Decision to Cancel the Registration
>
> You are hereby given written notice that the Chief Inspector has decided to cancel the registration of Silvergrove Nursing Home as a designated centre on the grounds specified in Section 51(2)(b) of the Health Act 2007 as amended, particulars of which grounds are set out in the Schedule to this Notice. This Notice is given by the Chief Inspector pursuant to Section 51(1)(a) and in compliance with the obligation to give written notice under Section 55(1)(c)(i) of the Act."

The notice then informed the applicant in some detail of its right of appeal to the District Court. In the top right-hand corner of the front page of the notice was written “Office of the Chief Inspector of Social Services”, underneath which featured the logo of, and words; “Health Information and Quality Authority”. I do not intend to set out the entire remainder of the 7-page notice in full, for obvious reasons, and hope that the following description will suffice for present purposes.

25. The sole ground for cancellation was set out as follows:

> “Ground Number 1 for Cancellation of Registration –
>
> > That in the opinion of the chief inspector, the registered provider is not a fit person to be the registered provider of the designated centre and to participate in its management: Fitness of the registered provider – *Silvergrove Nursing Home Limited.*
> >
> > *Silvergrove Nursing Home Limited* is not a fit person to be the registered provider of the designated centre for older people due to its failure to govern and manage the designated centre in a safe manner than ensure the welfare of residents in *Silvergrove Nursing Home.”*

26. Certain detailed particulars then followed, which were:-

(1) “Failure to demonstrate that it has the knowledge, understanding and ability to fulfil its obligations under the Act and Regulations and Standards made thereunder. This lack of knowledge has been brought to the attention of the registered provider by and on behalf of the Chief Inspector on 13th February 2018 without improvements being made and sustained.

[…]

(2) Failure to put in place a robust governance system and a clearly defined management structure that supports the delivery of safe care for residents.

[…]

(3) Failure to put in place a responsive quality assurance and risk management process that supports the delivery of safe care for residents.

[…]

(4) Failure to put in place effective management systems and processes to ensure it is competent to provide a service to residents that is safe, appropriate, consistent and effectively monitored.

[…]

(5) Failure to put in place actions and improvements identified in the monitoring inspection reports of 23rd January 2018 and 11th April 2018 and where improvements were put in place, the registered provider demonstrated inability to sustain these improvements to ensure that the designated centre is in compliance with statutory requirements under the Act, Regulations and National Standards.

[…]

(6) The registered provider has not demonstrated that it is competent or capable of carrying on the business of the designated centre in compliance with the requirements of the Health Act 2007, and the Regulations and Standards made thereunder."

27. Further details were set out within each of (1) to (6) above. The second last page of the notice contained a table in which different columns set out the precise regulations and standards deemed to have been breached and which inspection reports had notified those breaches. The last page of the notice contained a list of "relevant documentation" which included reports of inspection of 2nd February, 2016, 16th June, 2016, 23rd January, 2018, 11th April, 2018 and 31st May, 2018. No reports of the inspections subsequent to that of 31st May, 2018 were referred to.

The submission that the inspection powers of the Chief Inspector were removed by legislation in 2013

28. This far-reaching ground of challenge was added to the judicial review proceedings subsequent to its commencement and was set out in the amended Statement of Grounds dated 25th March, 2019. The applicant submitted that by virtue of a particular provision within the Child and Family Agency Act 2013 (the "Act of 2013"), the Chief Inspector *ceased to have any power at all to carry out inspections of nursing homes* under the Health Act, 2007 during certain dates in the period 2014-2017. During oral argument, counsel for the applicant accepted that if his argument were correct on this point, this would logically render invalid not only the decision on cancellation but also the registration of the nursing home in the first place, as well as the registration and inspection of other nursing homes.

29. The inspection function in respect of nursing homes was conferred by the Health Act, 2007 and was discussed in *Packenham v. Chief Inspector* [2018] IEHC 715.

30. The applicant is correct in identifying a problem caused by the Act of 2013. It effected a re-numbering of certain sections and sub-paragraphs in the Act of 2007 and thereby created a situation where the Health Act (Commencement) (No. 2) Order 2009 (which commenced the registration and inspection function with regard to nursing homes) no longer corresponded to the same legislative provision as it had done prior to 2013. This arose in the following manner.

31. Section 2(1)(b) of the Health Act, 2007 provides that a "designated centre" means an institution which includes a nursing home. The Health Act 2007 (Commencement) (No. 2) Order of 2009 (S.I. No. 237 of 2009) then commenced with effect from 1st July, 2009: (i)

the definition of a "designated centre" provided for under s. 2(1)(b) of the Act of 2007 *and* (ii) the functions of the Chief Inspector as provided for under s. 41(1)(b) and (c) of the Act of 2007 "in so far only as the functions under those paragraphs are performable in relation to a designated centre to which paragraph *(a*)(iii) or *(b*) of the definition of "designated centre" in section 2 applies". Thus, from 1st July, 2009, the Chief Inspector's functions in respect of the registration and inspection of nursing homes came into effect.

32. However, the Child and Family Agency Act 2013 re-numbered the paragraphs within section 2 of the Health Act, 2007 such that nursing homes were moved from the old s.2(1)(b) to a newly created s.2(1)(c). The Act of 2013 was commenced by the Child and Family Agency Act 2013 (Commencement) Order 2013 (S.I. No. 502 of 2013) with effect from 1st January, 2014. The applicant submitted that from this date, 1st January 2014, the Inspector ceased to have an inspection function because the commencement order of 2009 no longer applied to the legislative provision dealing with nursing homes.

33. The now-faulty cross-reference as between the 2009 commencement order and the amended statutory provision, whatever its legal nature or effect, must have been noticed by the authorities sometime between 2014 and 2017, because the problem was addressed in the latter year by the Health Act 2007 (Commencement Order) 2017 (S.I. No. 429/2017). This commenced the functions under s.41(1)(b) and (c) "insofar as the functions under those paragraphs are not already performable" with regard to nursing homes (I have not reproduced the precise cross-referencing of subparagraphs here in full as it is cumbersome, but it is clear that it was intended to ensure that the inspection function with regard to nursing homes was commenced "insofar" as it was not already commenced); thus, in my view, it sought to remain neutral on the question of the functions that were in force/commenced/performable or not prior to and as of the new commencement in 2017. The applicant of course submitted that this legislative amendment underscores the fact that there was indeed a lacuna and that the inspection function with regard to nursing homes had *ceased* to be in force prior to the new commencement date in 2017. However, the applicant's counsel also accepted that the registration and inspection functions stood or fell together in this respect, and that if there had been, during a particular period, a gap in the law with regard to the inspection function, there had been a similar gap with regard to the registration function. On this view, all registration certificates issued between the relevant dates in 2014 and 2017 would have been and would remain invalid.

34. Even if the applicant were technically correct in his submission with regard to the re-numbering of the legislation, I would exercise the discretion the Court has in judicial review proceedings against granting the relief sought, which was a cancellation of its notice of cancellation on the ground that it was based on inspection reports that were legally invalid. In my view, there is no trace in the Act of 2013 of any legislative intent whatsoever to remove the Chief Inspector's functions with regard to the registration and inspection of nursing homes, and the problem is much more likely to have been created as a result of inadvertence. Secondly, there would be serious implications for third parties who were not before the Court if the Court were to reach the conclusion that the Chief

Inspector's functions with regard to nursing homes had been removed, insofar as all the registrations of such third parties during the relevant period of 2-3 years would be invalid, which would most certainly not be in the public interest. Thirdly, if the applicant's submission is correct, the logical implication would be not only that the cancellation notice was invalid but also that applicant itself had no legal right to run the nursing home in the first place because his registration certificate was invalid. Of course, the applicant seeks to have the benefit of his submission (the quashing of the cancellation notice) because it would suit him, without the logical corollary of it (the quashing of his registration certificate), which would not suit him. However I do not see why, if the Court were to go down this road and grant relief, it should limit itself to quashing the notice of cancellation and not quash the registration itself. In all of those circumstances, I would have declined to grant the relief sought even if I were convinced of the merits of the argument as a matter of statutory construction.

35. However, and perhaps more importantly, I am not persuaded in any event, as a matter of statutory construction, that where a legislative provision conferring powers on a designated person or body has been validly commenced at a particular point in time, it can somehow be 'un-commenced' at a later point in time simply by virtue of a subsequent re-numbering of provisions in a statute, particularly when there is no evidence in the later legislation demonstrating any intention to remove those powers from the designated person or body. I agree with the submission on behalf of the respondent that the commencement of a statutory provision conferring powers in this manner is a once-off event which cannot be 'rolled back' by this mechanism and that the only way to remove the already commenced inspection and registration functions of the Chief Inspector would have been by enacting a clear and unequivocal legislative amendment. I am not persuaded that the present situation is similar to the more usual kind of repeal or substitution of a statutory provision or Directive (as was in issue, for example, in *O'Flynn Construction Co. Ltd v. An Bord Pleanála* [2000] 1 IR 497, relied upon on behalf of the applicant).

36. I therefore refuse to grant the reliefs insofar as they are based on this ground.

The submission relating to errors on the face of the notice of cancellation

37. The applicant identified a number of errors on the face of the notice of cancellation which, it was submitted, rendered the notice invalid by reason of errors on the face of the record. These included:

- Reference to the wrong section of the legislation with regard to the ground for cancellation and/or reference to a section of the Health Act 2007 which did not exist in this regard;
- References to Regulations and Standards which did not exist;
- References to a Health Act, 2017 which did not exist;

- References to an entity which is not the designated centre and/or registered provider (in this regard, the applicant submitted that the notice refers to Silvergrove Nursing Home whereas the designated centre and registered provider is Silvergrove Nursing Home *Limited*).

38. The applicant relied on the following authorities in support of its argument in connection with errors on the face of the record: *Bannon v. Employment Appeals Tribunal* [1993] 1 IR 500; *State (O'Reilly) v. Delap* (Unreported, High Court, Gannon J., 20th December 1985); *Wu v. Minister for Justice* (Unreported, High Court, Smyth J., 25th January 2002), [2002] IEHC 163; *ABM v. Minister for Justice* (Unreported, High Court, O'Donovan J., 23rd July 2001), [2001] IEHC 110; and *EC v. Clinical Director of the Central Mental Hospital* (Unreported, High Court, Hogan J., 5th April 2012), [2012] IEHC 152.

39. The respondent submitted that the errors in question were clerical errors which did not warrant the quashing of the order and which did not mislead or prejudice the applicant in any way. It was submitted that while the notice did contain some errors as described by the applicant, it also correctly recorded the section of the Act relied upon in other locations in the notice as well as the terminology of the correct section. Further, the applicant's solicitor in his own letter of response to the notice had drawn attention to and identified the errors in the decision and therefore was clearly not misled in any way. Regarding the name of the nursing home (i.e. the absence of the word "Limited"), the respondent submitted that Silvergrove Nursing Home is the trading name of the registered provider (and had indeed been used by the applicant itself in the title of these proceedings – "Silvergrove Nursing Home Limited t/a Silvergrove Nursing Home"). In all of the circumstances, it was submitted that no question of any unfairness, prejudice or misleading could possibly arise simply by virtue of the absence of this particular word (the word "limited"). The respondent also pointed to the analysis of errors on the face of the record engaged in by the Court of Criminal Appeal (O'Donnell J.) in the case of *The People at the Suit of the Director of Public Prosecutions v. Mallon* [2011] 2 IR 544 which concerned errors on the face of search warrants in criminal cases, and submitted that the errors identified in the present case were errors of a type which, even on the Mallon analysis, would not render the document invalid; and that there could be no more rigorous analysis than that employed in cases involving search warrants in criminal cases. It was further submitted that the notice of cancellation was a relatively lengthy document which must be read in context of the previous ongoing engagement between the parties and therefore, again, the applicant would not have been in any way misled having regard to the overall context of the document.

40. It is true that on the third page of the notice, where the "Ground and Reasons for Cancellation" were being set out, there was an error regarding the statutory provision concerning the 'fitness' ground for cancellation; it refers to s.52(1)(b) when it should have been s. 51(2)(b). On the other hand, the *first page* of the document *did* refer to the correct section containing the 'fitness' ground, namely s. 51(2)(b) of the Health Act 2007 (I note also that when the applicant's solicitor complained about this aspect of the notice, the respondent's letter of 9th November, 2018 in reply set out with complete clarity that

the ground relied upon was s. 51(2)(b) of the Act of 2007 and that it was the "fitness" ground). Further, the document made several references to the correct statutory source of the power to cancel (namely s. 51(1)(a) and s. 55(1)(c) of the Act of 2007). Also, the document contains much detail and there could be no doubt whatsoever that the complaint was about fitness based upon the findings in the inspection reports listed. There were references to a Health Act, 2017, although one might assume this was a typographical error. There were indeed references to regulations and standards, of which there are apparently none. I can only deprecate what might be described as a considerable lack of care in the drafting of the document. However, the effect, if any, of those errors upon the validity of the notice is a different matter.

41. I agree with the submissions on behalf of the respondent in this regard and I am satisfied that the errors would have passed the test of validity even on the *Mallon* criteria; bearing in mind that the criteria in respect of search warrants are among the most rigorous criteria in the legal system regarding errors on face, concerning as they do errors in a document which purports to authorise the search of a dwelling which attracts a high degree of constitutional protection. In *Mallon*, O'Donnell J. (delivering the judgment of the Court of Criminal Appeal) distinguished between (a) situations where a statutory precondition had not been fulfilled or the warrant itself did not show that the preconditions had been satisfied and (b) errors in the body of the warrant. With regard to the latter, he said:

> "It is now clear that a mere error will not invalidate a warrant, especially one which is not calculated to mislead, or perhaps just as importantly, does not mislead" (para 40)
>
> "It is now quite clear that although a warrant should be prepared with care, not every error will lead to invalidation of the warrant. In particular, where the substance of the warrant as opposed to the form is not open to objection, invalidity will not necessarily arise. In such cases, the nature of the error or omission must be scrutinised to see if it is of a fundamental nature. Among the factors which may be taken into account are whether the error is a mere misdescription and whether it is likely to mislead" (para 41).

He also said:-

> "…even in those cases where the Courts appear to take a strict approach to errors which may be grammatical, syntactical or in the completion of a standard form, the test is not simply whether there has been an error, but rather whether the error makes the warrant unintelligible".

42. In the present case, no submission was made that any statutory precondition to the cancellation notice had not been satisfied; rather the complaint about the notice of cancellation was about the matters set out at paragraph 23 above. The errors on the face of the notice do not, in my view, satisfy even the *Mallon* test(s). In any event, the present case does not concern any document in a criminal context and the document in question

was created against a backdrop of an ongoing relationship between the parties such that the addressee of the document could have had no doubt whatsoever what legislation was being invoked, that this was a notice of cancellation provided for under the legislation, and what the reason for the cancellation was. The errors were contained in a lengthy 7-page document, most of which was entirely correct and appropriate. Errors such as the absence of the word "Limited" seem to me to be trivial, especially in circumstances where the company number and two relevant addresses were given. The addressee's solicitor wrote in response to the Chief Inspector pointing out the errors in the document, and the Chief Inspector replied, setting out the correct statutory provision and the "fitness" ground without any ambiguity. Such interactions simply do not arise in a criminal context; the present one is an entirely different context. In all of the circumstances, I am satisfied that the document did not mislead the applicant in any way. While I would criticise the lack of care in the drafting of certain parts of the notice, in short I do not think the Court should approach this document as if it were a search warrant or a criminal charge; but even if it did, I do not think the document would fail the tests applied even in criminal cases in deciding upon its validity.

The submission that any inspections were carried out by HIQA (rather than the Chief Inspector) and were therefore invalid because HIQA has no statutory function in monitoring standards in respect of nursing homes

43. The applicant submitted (as an alternative to his first submission that the Chief Inspector had ceased to have the inspection function by virtue of the Act of 2013, discussed above) that the evidence before the Court suggested that inspections of the nursing home were in fact carried out by HIQA, which has no inspection function under the Act of 2013, rather than by the Chief Inspector, who was clearly intended to have the function under the legislation (*Packenham v. Chief Inspector* [2018] IEHC 715). This submission was based upon the appearance of the physical documents upon which the inspection reports were produced, together with the absence of any averment in the affidavits on behalf of the respondent that the inspections were in fact carried out by or on behalf of the Chief Inspector. The inspection reports all bore the HIQA logo and had other evidence of connection with HIQA.

44. I am satisfied that there is no merit in this argument and that the inspections were, as a matter of fact, carried out by inspectors within the office of the Chief Inspector and that the reports (which bear the names of the inspectors in question) were prepared by those inspectors. The fact that the HIQA logo appeared on their inspection reports does not somehow taint their reports nor does it convert their inspections into HIQA inspections. I have set out earlier the provisions of the Act of 2007 which show the clear relationship between the Chief Inspector and HIQA, and there was nothing improper, invalid or misleading in the fact that the inspector's reports were produced on HIQA letterheaded paper. I am quite satisfied to draw the inference from the inspection reports bearing the names of individual inspectors that those inspectors did in fact carry out the inspections themselves on behalf of the Chief Inspector and I do not think that the absence of a

positive averment on behalf of the respondent stating this fact establishes the opposite proposition on the balance of probabilities.

Submission that the decision to cancel was unfair because it was based on historical problems which had been addressed and rectified by the applicant

45. It was submitted that the decision to cancel was improperly based upon events in the past which had been rectified long before the notice to cancel; in particular, it was submitted in this regard that the nursing home's shortcomings as identified in 2nd February, 2016 report had been satisfactorily addressed by the 16th June, 2016 and that it was therefore unfair and improper for the Chief Inspector to rely on the shortcomings identified in February 2016 as one of the reasons for reaching the decision to cancel. The inspection report of February 2016 was one of the reports listed in the notice of cancellation as having been taken into account.

46. The respondent pleaded that there was nothing improper in such reliance; that "particular 5" of the decision set out the applicant's inability to *sustain* improvements; that it was clear that the improvements made by June 2016 had not been sustained; and that evidence of poor practice had re-emerged (namely, the repeated non-compliances observed during 2018). It submitted that the Chief Inspector was perfectly entitled to have regard to the overall history for the purpose of assessing fitness.

47. I agree with the respondent in this regard and take the view that a decision-maker who is tasked with making an assessment of fitness is entitled to have regard to the overall pattern emerging from a series of inspections when reaching his or her decision. Here, the class of persons the decision-maker is entrusted with protecting is an elderly and vulnerable population. Repeatedly, shortcomings in the nursing home had been found and communicated, promises to improve had been given, and then further shortcomings had been found. A person in charge of a nursing home is not somehow entitled as a matter of right to continue in operation on the basis of repeated promises to improve; the monitoring body is well within its statutory remit to take the view that, having regard to the overall pattern, there comes a point when there has been too much postponement and not enough compliance. He or she is entitled to have regard to the entire period of what might be a series of peaks and troughs with regard to the institution and to take an overall view. I would see the Court's function as very limited in second-guessing the decision-maker's view in this regard; only if there was some manifest irrationality, such as a clear divergence between the picture presented by the inspection reports and the ultimate decision to cancel, should a Court consider intervening. This was not the case here. While the applicant was anxious to point to the large number of areas where there had been compliance on the occasion of each inspection, it was apparent that particular areas of difficulty were also identified on each occasion. The decision-maker, who has an overview of standards across the board in relation to nursing homes within the State, is much better placed than the Court to decide when there is a serious issue about fitness of a particular home based upon the overall pattern of problems, promises, compliance and non-compliance.

The submission that the decision to cancel had been based on unexpressed reason

48. The applicant's complaint in this regard is that the minutes of a meeting between HIQA (Ms. Susan Cliffe, Ms. Angela Ring and Ms. Evony Potter) and representatives of the registered provider (Dr. Louise Boyd and Ms. Mary Boyd) of 17th October, 2018 states that the grounds for proposal to cancel centred on the fitness of the registered provider and a recent inspection of 8th and 9th October, 2018 in circumstances where the recent inspection had not been mentioned in the notice of cancellation and the applicant had no opportunity to address that inspection in his written submissions.

49. Again, I not persuaded by this argument. The applicant concedes that it does not dispute the findings made during the October 2018 inspection. It was accepted on its behalf that the sole purpose of being allowed to make submissions in relation to this inspection would have been to seek to persuade the decision-maker that more time was needed to address the shortcomings identified. This is not the kind of 'new information' that was in issue in the authorities where it has been held that a decision was invalid by reason of the decision being based upon a matter in respect of which the applicant had no opportunity to make submission to the decision-maker. Further, it might be different if, for example, the October 2018 inspection had found everything to be perfectly in compliance and therefore a departure from the previous pattern. However, on the contrary, the inspection continued to report negative features. Finally, even if I am wrong that the applicant should, strictly speaking, have been given an opportunity to address the October inspection issues, I would exercise discretion against granting relief in circumstances where the applicant accepts that the factual findings were not in dispute and that its response would have in any event been limited to persuading the Chief Inspector to give it more time to comply.

The issue of the existence of an alternative remedy

50. Section 57 of the Act of 2007 provides for an appeal of a decision to cancel registration to the District Court. In the present case, an appeal was lodged on 13th November, 2018 to Trim District Court. Leave to bring judicial review proceedings was obtained on 14th January, 2019. The respondent pleaded that the application for judicial review should be refused on the basis that the applicant has or had available to it an alternate and adequate remedy which has not been exhausted.

51. With the exception of the legislative point, which was added to the judicial review at a later stage, all of the points raised in the present proceedings could been raised in the District Court. Further, the Court was informed that the practice in such appeals is to consider the position of any appellant *as of the date of the appeal*; therefore, if a nursing home has made serious efforts since the date of the notice of cancellation, this can be taken into account at the appeal. In the course of this judicial review, the applicant sought repeatedly to emphasise that it had always done its best to co-operate and comply with the recommendations arising out of inspections; that the reports were more positive than negative; and that it merely needed more time. Ironically, this position, which focuses on the future rather than the past, would have much more resonance within a

District Court appeal than it has in a judicial review, the latter being limited in scope to issues such as the procedures leading up to the issuing of the notice and its form. The appeal process seems to me to be much more of an appropriate forum in which substantive issues relating to the registration and the fitness of the provider should be explored. On this ground also, therefore, I would take the view that the substance of the case was about matters which were more suitable to the alternative avenue available to the applicant (i.e. the District Court appeal).

Final comment on discretion

52. Overall, the application in this case seems to me to have involved an applicant entity making highly technical complaints about a process, and set of documents regarding a process, where there was fundamentally no want of natural justice in that process and in circumstances where there was in existence a perfectly adequate mechanism to challenge the cancellation of registration under a cheap and efficient statutory procedure, which would have been better able to focus on the substantive merits of the applicant's fitness to run a nursing home. From this point of view alone, I would exercise the discretion which the Court has in judicial review proceedings to refuse relief even if I were to be legally incorrect in respect of any of the very technical legal aspects of the submissions made on behalf of the applicant.