Neutral Citation Number: [2025] EWHC 18 (Admin)

Case No: AC-2024-BHM-000238

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

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 27th January 2025

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

THE KING
(on the application of SARCP)

Claimant

- and -

STOKE-ON-TRENT CITY COUNCIL

Defendant

- -

Philip Rule KC (instructed by **Anthony Collins Solicitors)** for the **Claimant**
Timothy Straker KC and **Jasraj Sanghera,** instructed by and for the **Defendant**

Hearing dates: 13th December 2024 and 10th January 2025

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JUDGMENT

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ TINDAL:

Introduction

1. This case concerns vulnerable older people in care homes. But it takes the form of a dispute between a local authority and some care home providers about a below-inflation rise in standard rates the authority pays the care homes for their residents. However, it affects those residents and those families directly because the less the authority pays the provider, the more the provider may ask the resident and their families to pay in 'top-up' fees, so the care home can remain economically viable. After all, like the residents and their families, the care homes and the authority itself are also all trying to cope with the financial squeeze of a 'Cost of Living Crisis'.

2. In 2021, the Stoke-on-Trent City Council, which I shall refer to as 'the Defendant', agreed a standard contract (which I will call 'the Contract') with care home providers. Some of those providers were represented by a trade organisation, 'SARCP' (formerly known as the 'Staffordshire Association of Registered Care Providers') a company limited by guarantee, with Mr Oliver Bull a director, founding member and Honorary President. I shall refer to SARCP as 'the Claimant'.

3. The Contract was originally for a period of two years but has been extended by a further year twice, but its current period expires in March 2025 and a new contract will then have to be negotiated. This claim is part of the ongoing battle between the Claimant (and its members) and the Defendant. Key to this claim is Clause 18.3 of the Contract setting out a mechanism for annual adjustment of standard rates the Defendant paid 'providers' (i.e. care homes) for different categories of residents ('residential', 'nursing' etc), which are defined as 'the Price'. Clause 18.3 states:

> "The Price shall be subject to annual indexation at a rate to be determined by the Council following consultation with the Provider. The rate shall be no less than 1.4% per annum. The first application of the indexation to the Price shall take effect on 1st April 2022."

4. In April 2024, that 'annual indexation' was up for review once again. The original March decision of the Defendant's Cabinet due to the financial conditions of the Defendant, was no increase in standard *residential* fees (particularly affecting care homes like the Claimant's members), with the budget focussed on increases for *nursing* fees (often but not always in nursing homes). When the Claimant pointed out that was inconsistent with Clause 18.3, the Defendant withdrew that decision and began a consultation proposing increase in residential fees of the (below-inflation) minimum of 1.4% in Clause 18.3. Despite consultation responses from the Claimant suggesting the effects of inflation and other factors in costs of care suggested a 9% increase, on 4th July 2024, the Defendant decided the increase should only be 1.4%. I shall refer to that as 'the Decision' challenged by this claim.

5. The six grounds of challenge in the Statement of Facts and Grounds ('SFG') drafted by Mr Rule KC for the claim issued on 25th September 2024 are similar to the Claimant's pre-action letter dated 22nd August 2024 (to which the Defendant's Director of Adult Social Care, Mr Tomlin, responded on 4th September). They are:

   (i) Ground 1: Inadequate consultation not properly considered in the Decision;

   (ii) Ground 2: Failure to consider material considerations;

(iii) Ground 3: Breach of the Public Sector Equality Duty;

(iv) Ground 4: Failure to follow statutory guidance;

(v) Ground 5: Breach of the Art.8 ECHR rights of residents;

(vi) Ground 6: *Wednesbury* Unreasonableness.

6. In the Summary Grounds of Defence ('SGD') drafted by Mr Straker KC, the Defendant denied these allegations and suggested some were not permissible grounds of review classically categorised by Lord Diplock in his landmark speech in *CCSU v MCS* [1985] AC 374 (HL): illegality, procedural impropriety or irrationality. Mr Straker also (relatively briefly) argued the claim was not in public law but in private law under the Contract and queried the Claimant's standing. The Claimant's Reply answered the SGD, including on the public/private law issue.

7. On 4th November 2024, I granted permission on all grounds, but invited the parties to focus on Grounds 1, 3 and 4, since I considered Grounds 2, 5 and 6 added little. However, I also said the Defendant could raise the public/private law issue at the expedited hearing which I listed before myself on 13th December 2024. I also made directions and in response the parties both filed statements: from Mr Tomlin on 14th November to which Mr Bull responded on 20th November, to which Mr Tomlin in turn responded on 3rd December. I give permission to rely on all these statements.

8. Before the hearing Mr Rule's Skeleton Argument maintained the arguments set out at greater length in the SFG but narrowed the focus of the claim to Grounds 1, 3 and 4 as I had encouraged, without abandoning Grounds 2, 5 and 6. However, he also alleged breach of the Defendant's duty of candour in failing to disclose documents concerning internal decision-making and invited adverse inferences. Mr Straker and Mr Sanghera's Skeleton Argument took issue with that but also maintained denial of the grounds, particularly focussing on Ground 1. However, they also invited relief to be refused as a matter of discretion because of the impact of quashing the Decision on third parties and alternative remedy in private law under the Contract. But principally, their Skeleton focussed on the 'public/private' point: arguing that it was a private law claim under the Contract masquerading as a public law one. The Defendant also applied for a non-party costs order against Mr Bull personally.

9. At the start of the hearing, I referred Counsel to the recent Supreme Court decision of *In Re McAleenon* [2024] 3 WLR 803 on factual issues in and alternative remedies to Judicial Review. Given that we were already relatively tight for time with a day's hearing, Counsel agreed debates about the duty of candour would not assist and I should simply decide the case on the evidence I have. They also agreed these issues:

    a. Whether the Claimant had an alternative remedy under the Contract;

    b. Whether there is a 'sufficient public law element' in the whole claim;

    c. Whether each ground of challenge is within the 'scope of review';

    d. Whether each ground succeeds, focussing on Grounds 1, 4 and 3;

    e. Whether relief should be refused as a matter of discretion.

    I shall consider those issues in that order (although I will take (b) and (c) together), after setting out the factual background and legal framework.

Factual Background

10. Contrarily, I will start the factual background with the correct approach in law to factual disputes, confirmed by Lords Sales and Stephens in *McAleenon* at [40]-[42]:

> "40 Judicial review is directed to examination of whether a public authority has acted lawfully or not. This means that the general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it. This may include examination of whether the authority should have taken further steps to obtain more information to enable it to know how to proceed: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065 (Lord Diplock). Accordingly, it is for the public authority to determine on the information available to it the facts which are relevant to the existence and exercise of its powers, subject to review by a court according to the usual rationality standard. The court has a supervisory role only….
>
> 41 Judicial review is supposed to be a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise. A public authority is subject to a duty of candour to explain to the court all the facts which it took into account and the information available to it when it decided how to act.
>
> 42 Given the nature of the legal question to be determined by the court and the duty of candour, the usual position is that a judicial review claim can and should be determined without the need to resort to procedures, such as cross-examination of witnesses, which are directed to assisting a court to resolve disputed questions of fact which are relevant in the context of other civil actions, where it is the court itself which has to determine those facts. In judicial review proceedings the court is typically not concerned to resolve disputes of fact, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for acting."

In *McAleenon* itself, the Northern Ireland Court of Appeal had rejected a claim by someone living next door to a waste disposal site for judicial review of a regulator's failure to stop statutory nuisance because the nuisance was disputed in fact by the site which was not a party (and due to alternative remedy, considered later). But the Supreme Court disagreed, as the focus of judicial review was whether the regulator had behaved lawfully on the information it had (or should have had under *Tameside*), not whether there was *actually* a nuisance from the waste disposal site.

11. In the present case, unlike in *McAleenon*, there was a dispute about whether the Defendant has complied with its duty of candour. Certainly, in a bundle over 1000 pages (mostly statutory guidance much of which is totally irrelevant), there are precious few documents about the Defendant's internal decision-making. However, rather than getting bogged down in the duty of candour and adverse inferences, it is preferable simply to decide the case on the information the Defendant actually had (and has provided to the Court), just like in *McAleenon*. If there is a lack of detail from the Defendant justifying the Decision, the Claimant can and has relied on that. I will focus on the context, the Contract and the relevant events of 2024.

Care Home Fees

12. Local authorities like the Defendant have duties to people in need of care under the Care Act 2014 ('CA') that I discuss later. One group of people owed those duties is older people who are unable to live at home due to frailty or disability and who need to live in care homes, but do not need the enhanced level of nursing care typically provided by a nursing home such as a dementia unit. (Of course, some residents of care homes have nursing needs, so the boundary is quite porous, but many care home residents will not have true nursing needs). Traditionally, authorities ran their own care homes, but over recent decades have tended to contract out to privately-run care homes owned by individuals or companies, such as Mr Bull himself previously and the current members of the Claimant. As Mr Straker says, the use of such contracts by local authorities is a good thing because it enables there to be more provision for people who need it than the local authority itself could organise; and the contractual parties to assess and agree their risks and rewards themselves.

13. Under the legal framework I discuss below, local authorities have responsibilities to promote the effective and efficient operation of the market for services for care and support in its area, including care homes (and ultimately to step in to support an individual if a resident's provider folds). For that reason, authorities will often negotiate standard contracts with care home providers in its area setting out standard fees it will pay for particular categories of resident placed in the care homes. As Mr Straker put it, such 'provider contracts' (like the Contract in this case) give providers 'first dibs' on placements of individuals assessed as needing residential care by authorities. They can be distinguished from residents who by themselves or through their families pay all their own fees (known as 'self-funders'), who often not only *fund* but *find* placements at care homes themselves. However, the residents assessed and funded by authorities can also be charged (i) a 'contribution' to those fees by the funding authority (depending on their means) and often (ii) a 'top-up' fee by their care home provider. Such 'top-ups' mean providers are not just reliant on the authority standard fees. However, because such 'top-ups' significantly increase the costs of care to residents, authorities may regulate them by having a standard three or four-party agreement between themselves, the provider, the resident (and any 'sponsor', like a family member or charity, who is paying the top-up in their place).

14. Just before the Care Act came into force in 2015, there were a series of Judicial Review cases (some discussed below) about local authority standard fees in care home provider contracts, including *R(Bevan) v Neath CBC* [2012] ACD 62 I consider later. They were underpinned by a requirement on local authorities in statutory guidance (which I quote below) in calculating standard (or 'usual') costs to have 'due regard to the actual costs of providing care and other local factors' but also to 'Best Value requirements' (in other words, obligations on local government on central government – which part-funds it - to ensure cost efficiency and value for money but also appropriate quality of services). As discussed in *R(Bevan)* and other cases, to strike this balance, many authorities used an economic 'toolkit' for calculating standard care costs based on using standard items and weighting of cost, but specific items calibrated to local costs. This is why in 2011, the Defendant's standard provider contract provided a set formula for the annual uplift in 'usual costs': 70% on staff costs, 4% on food, 3% on utilities, 1% on insurance, 1% on

medical supplies, 4% on general expenses, 3% on capital maintenance and 13% profit.

The 2021 Provider Contract

15. However, the Contract in this case did not adopt the same model for 'usual cost' increases. As quoted above, Clause 18.3 adopted an indexation model which would be subject to consultation with a floor of 1.4%. As Mr Rule pointed out, 1.4% was close to the inflation rate in April 2021: 1.5% on the Consumer Prices Index ('CPI') and 1.4% on the Owner-Occupier Housing Costs ('OOH'), with the combined rate (the 'CPIH') at 1.6%. Therefore, it is a reasonable inference, not least from the repeated references to 'indexation' in Clause 18.3, that 1.4% represented inflation. I was taken to several provisions of the Contract, although it will be unnecessary to quote many provisions in it other than Clause 18.3. I gratefully adopt this summary by Mr Rule, that I have augmented with other provisions mentioned by Mr Straker.

16. The Contract recites that it governs discharge of the Defendant's responsibilities under the Care Act 2014 and that it will co-operate with Providers in the provision of the services to the residents. The recital also refers to Best Value requirements, which are defined as a duty under Part 1 of the Local Government Act 1989 to continuously improve its services having regard to economy, efficiency and effectiveness and the guidance of the Secretary of State. Clause 2.1 sets the term of the Contract for two years, but it is extendable by the Defendant by a total of two years. Therefore, the Contract cannot be extended beyond 2025. There is an 'entire agreement' provision in Clause 5 which specifically states that the Individual Placement Agreements for residents are not inextricably linked to it and survive any later agreements between the Defendant and providers. Clause 25 states this:

> "Any person who is not a party to the Agreement (including without limitation any employee, officer, agent, representative, or sub-contractor of either the Council [i.e. the Defendant] or the Provider), save for Residents and Sponsors, shall not have any right to enforce any term of the Agreement. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act."

Dispute Resolution provisions in Cl.58 require the parties to attempt in good faith to negotiate a settlement to any dispute about the Contract and then to go to mediation unless either party disagrees. Subject to that, litigation is not inhibited.

17. The obligations under the Contract on the named 'Provider' are as follows. Clause 13.1 requires it to provide the services (i.e. caring for residents) with appropriate skill and care in accordance with the specification, requirements of the CQC, and best practice in the industry. The Provider also warrants that any staff possess necessary qualifications, skill and experience (Cl 15.1). The Provider must also not unlawfully discriminate (Cl. 24.1); and comply with health and safety obligations (Cl. 26.3). Furthermore, if there is a breach of a resident's human rights (to which I return in Ground 5), the Provider must indemnify the Defendant against any claim for loss (Cl. 28); and any loss from any other breach of duty by the Provider, which must have insurance (Cl. 47). The main obligation on the Defendant is to pay the contractual price, which is set out in elaborate provisions summarised by Mr Rule as follows. Clause 17.1 requires the Defendant to pay the price under Clause 18, subject to a 'change in law' under Clause 21, which can be allowed for in annual

price increases (Cl.21.2) or if 'fundamentally affecting the cost of the service', is subject to variation under Cl.40 (not alleged here). Clauses 18.2 – 3 and 20.1 state:

> "18.2..[T]he Price shall be inclusive of all costs expenses and disbursements incurred by the Provider arising out of or in connection with full and proper performance of the Service and the Price shall not be amended to reflect any increase in…such costs expenses or disbursements, save for any amendments made in accordance with this Agreement and approved…
>
> "18.3 The Price shall be subject to annual indexation at a rate to be determined by the Council following consultation with the Provider. The rate shall be no less than 1.4% per annum. The first application of the indexation to the Price shall take effect on 1st April 2022….
>
> 20.1 Subject to Clause 18.3 above the Price shall remain fixed for the Term subject to adjustment in accordance with the 'Annual Price Adjustment' as detailed at P14 of the Pricing Schedule."

In the event of a variation the Price may also be varied as appropriate [Cl.40.3]. That Pricing Schedule recognises the Defendant's duty to facilitate a diverse and 'sustainable high quality' market [P1 Schedule]. P5.1 also acknowledges that:

> "The weekly price to be paid for an individual's care ['Banded Guide Price'] is based on their care and support needs and the input required from the care home in order to effectively and safely meet these needs. As the input required from the care home increases as does the price to be paid…"

The 'Banded Guide Prices' in P5 are standard weekly prices for four categories: (1) 'Residential', (2) 'Residential Enhanced', (3) 'Nursing' and (4) 'Nursing Enhanced' (many care home residents, without nursing needs, would be in the first two). P14.1 of Schedule 2 sets out the 'Annual Price Adjustment' provisions:

> "The weekly price payable by the Council for each Banded Price Guide (as detailed at P5) will be reviewed during the first quarter of each calendar year and the Council will determine the rate it will pay for each band in the subsequent financial year and if applicable will adjust the Price paid for Residents already in the Premises. The Weekly Price is adjusted annually in accordance with clause 18.3 of the main body of this Agreement.
>
> a) The effective date of any proposed change to the Prices will be upon the date when the Department for Work and Pensions annual revision of benefit levels comes into force (…normally the first two weeks of April each year)…
>
> b) Any adjustment to the Total Care Price under this section shall be payable by the Council and there shall be no adjustment made to the Statutory Contribution under this section.
>
> c) Where the Total Care Price is in excess of the Council's Banded Price Guide and there is a Third-Party Top-up payment from a Sponsor, the following price review arrangements shall apply.
>
> > i. From the date of this Agreement, where the Sponsor is a body external to the Council, for example a Health body or a voluntary organisation, their contribution will be adjusted in accordance with their nominated annual inflationary increase… In years where the

> Council adjusts its price review by more than the index used by the Sponsor [they] can be requested to match this price review. If the request is not agreed the adjustment remains at the Sponsor's index.
>
> ii. In the case of any Individual Placement Agreement entered into after the Commencement Date of this Agreement at the time of the annual review any contribution made by an individual Sponsor for example a relative, friend or representative of the Resident will be adjusted in accordance with indexation provisions set out in the Individual Placement Agreement.
>
> iii. In the case of any Individual Placement Agreement entered into after the Commencement Date of this Agreement at the time of the annual review any contribution where the Council is a Sponsor of the Resident will be adjusted in accordance with clause 18.3 in the main body of this Agreement."

There is also an Annexe or Appendix to the Pricing Schedule. This sets out non-exhaustive 'Factors' to be considered in looking at the annual price review, like accommodation, staff and business overheads/running costs, similar to those in the 'toolkit', albeit there is no set percentage weighting as in the 2011 provider contract. Once the resident enters a care home the Defendant issues an Individual Placement Agreement ('IPA'). As noted, this is an (up-to) four-party contract between the Defendant, the provider, the resident (and any sponsor). The standard IPA specifies a start date for the residential placement. Following an initial six-week trial period, the notice period for the termination of the IPA is four weeks. The 'indirect impact' of the Decision on residents is partly due to Clause 8 of the standard IPA:

> "If a top-up payment is being paid by the Sponsor this will be adjusted by inflation each year. The revised top-up payment will apply from April each year. This inflation adjustment is calculated based on the actual changes in the cost of providing a resident's care…"

So, even if the Defendant gives *providers* a below-inflation fee rise under Clause 18.3 of the Contract (as it did in the Decision), providers will pass on the true impact of inflation in actual costs of care to *the resident or sponsor* if they pay 'top-ups'.

18. According to Mr Tomlin, in the negotiation of the 2021 Provider Contract, negotiations began in 2019 and all care homes (including, presumably, all the Claimant's members) were invited to a 1:1 meeting with the Defendant, as well as large group meetings. 74% of care homes in the Defendant's area engaged in the process. Implementation was delayed by the Pandemic, but the Contract finally came into force in July 2021. 124 providers signed it and 133 signed extensions in 2023. I was not given the 2023/24 uplift, but in comparing the P5 of the Pricing Schedule and 2023/24 fees in Mr Tomlin's March report, it is not clear it was more than 1.4% (and may have been less).

The 2024 Price Increase

19. As I said, this case concerns the circumstances of the price uplift under Clause 18.3 of the Contract by the Defendant in 2024, the final Decision being on 4th July to uplift by the minimum of 1.4%. To put that in context, according to the Office for

National Statistics inflation figures, in the 12 months to April 2024, the CPI rose by 2.3%. The Decision was to increase fees by less than *any* current inflation measure.

20. To put that in context, it is fair to explain the Defendant's financial position, from Mr Tomlin's statement and some other data unearthed by the Claimant. The Defendant is a unitary authority covering an area of almost 100 km^2 with just over 250,000 inhabitants in Stoke-on-Trent and around. The Defendant's overall budget has shrunk by almost £100 million between 2010/11 and 2023/24, equating to an almost 30% cut in real terms. The main reason – as for local authorities nationally – has been the precipitous fall in central government funding over the last decade: the Defendant's Revenue Support Grant has fallen from 42% of its budget in 2013/14 to 10% in 2023/24. However, because the Defendant's area is not wealthy, its Council Tax receipts have only risen over the same period from 30% to 38% and its drawings on reserves in its Collection Fund have risen from 27% to 38% of its budget. The Defendant had significant budget gaps in 2023/24 and 2024/25, so had to borrow £44.7 million from central government, which will need to be repaid with interest.

21. Turning to Adult Social Care for which Mr Tomlin is responsible, the Defendant is being squeezed by growing demand with which its budget cannot grow to keep up. The Defendant has increased its investment by 10% and of the nearly 5% increase in Council Tax overall, 2% has been ring-fenced for Adult Social Care. The central government Social Care Grant for the Defendant in 2024/25 is £29.7 million, an increase of 7.5%. However, the Defendant spends more than £100 million every year on Adult Social Care. Therefore, the increase in that budget by £4.9 million this year is relatively modest. Moreover, the Adult Social Care budget does not all go to fees to care and nursing homes, but also to Direct Payments for disabled adults, Extra Care settings, Home Care, Supported Living and Working Age Adults' units. Even for older people, like those looked after by the Claimant's members, the budget is split between care homes and nursing homes. Frankly, at times, how this case has been presented by the Claimant, focused solely on its members' interests, has failed to acknowledge, or even to understand, the complexity of the position.

22. In fairness, in his public report to the Defendant's Cabinet meeting on 26th March 2024, Mr Tomlin recommended *increasing* Adult Social Care fees to providers by £2.1 million and to delegate spending of that to his department but also to lobby central government for support. He noted the increase in the National Living Wage ('NLW') by 9.3% from £10.42 to £11.44 from April 2024. Of course, this would affect a significant part of that approximately 70% of care home budgets spent on staffing costs, as noted back in 2011, whether or not a 'change in law' under Clause 22.2 of the Contract. Mr Tomlin's report also noted that in a January 2024 survey, the average proposed uplifts by authorities across the West Midlands was 6.2%. But he noted three local councils actually paid less than the Defendant currently did. In his recommendation, he accepted there could be a flat increase of 2% across all services, but this would not address the differentials in capacity in different services. He proposed to address those individually given the Defendant's duty under the Care Act to have due regard to the sustainability of the care market overall. So, he proposed: (i) a 9.8% uplift on Direct Payments only to ensure compliance with the NLW; (ii) a 5% increase on individual (typically working age) 'Supported Living' fees to reflect growing demand and a modest increase on group Supported Living

to equalise that; (iii) no uplift for working age adult residential care as there was enough capacity; (iv) a 4.48% uplift for Care at Home to maintain that market; and (v) no uplift for Extra Care Housing (specialist 'sheltered accommodation' for older people) as there were no capacity issues yet, albeit it was due to expand.

23. On the relevant issue of older people's residential and nursing care, Mr Tomlin said:

> "There is currently an oversupply of general residential provision in the City, due to our strategic direction to support people to remain in their own homes and/or be supported in Extra Care Housing rather than residential care, the proposal is to not uplift the residential rate in 2024/25. In addition, there are currently no issues with sourcing residential enhanced at the current contract rate, therefore the proposal is to again hold the rate at the same level for 2024/25.
>
> By comparison, nursing and nursing enhanced is becoming increasingly difficult to source at the current rates, especially when competing with neighbouring Councils and the [NHS Integrated Care Board] who pay more. It is therefore proposed that the rates for both nursing and enhanced nursing are increased for 2024/25. Uplifts will only be applied to placements at or below the proposed fee rate, any placements above the proposed rate will not receive any uplift in fees."

So, Mr Tomlin recommended an increase of 5.47% in the 'Nursing Care' band and 4.87% for the 'Nursing Enhanced' band, but no increase for the 'Residential' and 'Residential Enhanced' bands – i.e. no increase for (many) of the residents of care homes (such as those of the Claimant's members) as opposed to nursing homes. Under Equality issues, Tomlin simply suggested that an Equalities Impact Assessment was not required. His recommendations were adopted by the Cabinet.

24. It appears from his later May report that Mr Tomlin had originally thought the 1.4% minimum uplift in Clause 18.3 of the Contract had been varied (which may explain why the 2023/24 increase was no more and may have been less than 1.4%). However, when 'the 0% decision' was announced by the Defendant to care home providers at a meeting on 16th April 2024, the Claimant's representatives stated this breached Clause 18.3 (as the Defendant now recognises had not been varied) and providers were concerned they too would be affected by wage increases and some would leave the market as they might consider it commercially unviable. The Defendant's representatives apologised, but explained budgetary constraints and their objective to increase Extra Care Housing rather than use of care homes.

25. On 24th April, Mr Bull for the Claimant wrote to the Defendant's Chief Executive alleging the Defendant's decision was unlawful as Clause 18.3 required a minimum uplift of 1.4% and consultation which had not occurred (as the Defendant also accepts). Mr Bull specifically stressed the effect of the National Living Wage increase and that the Defendant had failed to give proper consideration to disability equality issues and the effect on residents of restricting their providers' overheads. Mr Tomlin suggests only 22 care providers out of 185 care homes (not providers) objected and many of the objectors were not providing services in the city anyway.

26. Nevertheless, on 26th April the Defendant indicated it would change its decision to 1.4% as noted by Mr Bull in a letter dated 30th April 2024, who suggested that was

still inadequate and insisted on consultation before the rate was set. On 1st May 2024, Mr Tomlin and colleagues had a meeting with Mr Bull and various providers. There is a difference in recollection of precisely what Mr Tomlin said which cannot be resolved in Judicial Review proceedings and frankly does not make any difference. The Defendant's minutes state that:

> "[Mr Tomlin] outlined the City Council's financial position and that one of the key pressures was due to the high number of children in the City who are in care: over 1,000. The City Council had been predicting a £10m overspend for 23/24, increasing to £30m 24/25. The Leader of the City Council and City Director had been in early conversations with Central Government regarding the potential risk of the City Council having to declare a s.114, effectively declaring the City Council bankrupt. The City Council were informed in March 2024 that Central Government had agreed a £42m loan for the City Council. Whilst this is positive, it is a loan and needs to be repaid and with interest. As the biggest pressure facing the City Council is Children's Social Care, very little of the £42m will be available to support pressures in adult social care. [Mr Tomlin] explained that as a result the Adult Social Care department is therefore having to make difficult decisions with the limited funds available, including the fees paid to care providers. Peter stressed that the City Council wants to work together with care providers both in terms of the financial challenges facing both the City Council and care providers but also to jointly redesign social care services locally. [Mr Tomlin] was clear that the way the funding is allocated from central government and the reduction in funding local government over many years has left the council in a very difficult position."

Mr Tomlin's colleague then explained the Adult Social Care department's future commissioning plans. In a question-and-answer session following the presentation, Mr Tomlin and his colleagues confirmed they had offered a 1.4% increase to care home providers but they would be pausing the '0% decision' to enable consultation and would look at the actual cost of care, including past cost of care assessments. One provider even suggested that the Defendant should 'pay the true cost of care even if it means going 'bankrupt' to highlight to central government they did not have enough money': I am afraid hardly a constructive or realistic attitude.

27. After that meeting, on 7th May 2024, the Defendant wrote to the Claimant that implementation of the Cabinet decision of 26th March would be paused and that a report would go back to the Cabinet that month. It explained the previous proposal had been based on advice that the Contract had been varied so as to remove the 1.4% floor in Clause 18.3 which had been incorrect. So, the 1.4% increase would now be applied to all residential placements to avoid any breach of contract and apologised for the error. Importantly, the letter then referred to consultation and *R v Brent LBC exp Gunning* (1985) 84 LGR 168. In *Gunning*, Hodgson J approved four characteristics of fair consultation proposed by Mr Stephen Sedley QC (later Sedley LJ): (i) that consultation must be at time when proposals are still at a formative stage; (ii) that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; (iii) that adequate time must be given for consideration and response and (iv) that the product of consultation must be conscientiously taken into account in the decision. The Defendant's letter said:

> "There will be a period of consultation when reviewing the pricing structures that will be reasonable, proportionate and fair where SARCP will be able to make submissions and within the *Gunning* principles."

(Mr Rule relies on that as a 'clear and unambiguous promise' that the Claimant would be involved in the Defendant's consultation exercise with providers. I should add that Mr Straker disputes that and argues the only consultation was contractual).

28. The following day, 8th May 2024, the Defendant sent to all residential care providers (not strictly to the Claimant, although it saw the letter) its consultation letter proposing a timetable where the consultation would end on 19th June and a decision would be communicated in the first week of July (as in fact happened). It said:

> "Whilst the City Council is legally required to consult on any change to residential care fees for 2024/25, the City Council also has a legal duty to ensure a balance budget is achieved. Any uplifts must be sustainable within the context of overall affordability. The City Council's commissioning intentions continue to be focused on keeping people in their own homes for as long as possible and supporting people to maintain their independence. The 2024/25 fee strategy is aimed to target the limited funding available on care services which are considered to be areas of growth. *As a result, the proposed fee increase offered for band 1 and band 2 residential placements for 2024/25 will be 1.4% and suggested to be applied to both existing and new placements at the current band rates*.
>
> *This proposal is being placed before Cabinet for their consideration and comment/ approval within the month*. Please can you consider the proposed increase and respond to by 5pm Wednesday 19th June 2024. If you would like to have a one to one with a member of the commissioning team regarding the proposal or the impact this may have on your business please contact the team …" (my italics)

This was not a happily-drafted letter (by the same Council officer who took the Decision in July 2024, whom I shall not name). On one hand, it set out a timetable for consultation responses by mid-June and a decision by early July (as happened). On the other, it created misunderstanding by suggesting the 1.4% rise proposal 'would be placed before Cabinet for their comment/approval within the month', suggesting Cabinet would vote on the 1.4% rise *before* the consultation deadline.

29. However, what the Defendant's letter actually meant becomes clear with the public recommendation by Mr Tomlin to the Cabinet meeting of 21st May 2024 ('within the month' of that 8th May letter). What he was recommending was not the *adoption* of the 1.4% increase before the end of the consultation period, but rather:

> "[1] That Cabinet agrees to pause the implementation of the residential care component of the 2024-25 Adult Social Care Fee Strategy for residential care provision placements at the 2023-24 band rates and enter into a six-week period of consultation with those residential care providers.
>
> [2] That Cabinet delegates responsibility for finalising and the implementation of the strategy at the end of the consultation period to the Director of Adult Social Care…in consultation with the Cabinet Member for Adult Services."

In other words, what was being 'placed before Cabinet for their consideration and comment/ approval within the month of May' was *not* the 1.4% increase itself. It was the proposal to pause implementation of the Cabinet's decision of 26th March to make no increase, to enable a 6-week consultation period on 1.4% and delegate the final decision to Mr Tomlin himself in consultation with the Cabinet member for Adult Social Care. This was because Mr Tomlin and his colleagues could not themselves pause the Cabinet's previous decision, only Cabinet itself could do so.

30. Nevertheless, Mr Tomlin's reasons for this recommendation are instructive. Having summarised the history I have set out, he suggested the previous recommendation and Cabinet decision of a nil uplift for residential care in care homes (my italics):

> "…could result in a legal challenge from care providers in respect of both breach of contract and Judicial Review proceedings. Pausing the current approach and entering into a period of consultation will mitigate the risk…
>
> "There will be no negative financial implications in delaying the current implementation strategy for a further period of consultation. *While the service is confident that it can absorb a 1.4% increase, any fee increase agreed over and above that amount will cause a resulting pressure [and] will need to be reported in the current financial position, as no further funding is available.* By entering into a further consultation period, Stoke Council look to maintain a good working relationship with external providers and effectively manage the market, whilst striving for best value for money for the residents of Stoke-on-Trent. Risk still remains that providers will reject proposals requesting higher fee increases. Any such cases will need to be addressed on a case-by-case basis…..
>
> To agree to maintain the conditions in respect of the current Contract with Residential Providers will negate the threat of litigation proceedings in respect of Breach of Contract. This in turn will allow a review and consultation of pricing structures for the relevant services to be implemented and will allow certainty that we are compliant with s.5 of the Care Act in relation to the provision of these services. This will also help to negate the possibility of any Judicial Review proceedings being initiated following the outcome of the proposed review."

As with his earlier Cabinet report, Mr Tomlin suggested that an Equality Impact Assessment was not required. Again, the Cabinet adopted his recommendation.

31. Whilst according to Mr Tomlin only 3 providers responded individually, on 11th June 2024, the Claimant on behalf of its members submitted a 15-page consultation response. It is unnecessary to address it in detail, but the relevant points (in a different order) were as follows. Firstly, the Claimant relied upon the contract, both Clause 18.3 and the Pricing Schedule mechanism, including 'factors' such as staffing costs. Second, it said that statutory guidance required the Defendant to 'have due regard to the actual costs of providing care' which 1.4% did not do, as it was an 'arbitrary ceiling' contrary to guidance. Third, it said the Defendant had wrongly focussed on its own budget, rather than the guidance, its statutory duties and Art.8 ECHR. Fourth, it pointed out inflation had got to over 9% in October 2022 and 7.8% in April 2023 (although actually by May 2024 the CPI had come down to 2.3% for CPI and OOH to 6.6%). It added the National Living Wage ('NLW') increased by 9.8% would affect 70% of care home costs. Fifth, it said

squeezing costs would make it more difficult for providers to comply with CQC requirements and impossible for them to improve standards. Sixth, it said there was inadequate information in the consultation exercise and no reasoning why providers could not have the actual cost of care. Seventh, it said other local councils applied higher uplifts, including neighbouring Stafford at 6.25% and even Birmingham which was in financial crisis was offering 9%. The Claimant encouraged the Defendant to consider the actual costs of care including the NLW and adopt an uplift of 9%.

32. Faced with the detail of that consultation response, the Defendant's Decision of 4th July (not written by Mr Tomlin) is remarkably brief. So far as material, it stated:

> "Following a review of the responses, the City Council will be going ahead with the proposed 1.4% increase for placements at the band 1 and band 2 rates ['Residential' and 'Residential Enhanced']…- backdated to the 8th April.
>
> During the next 12 months we will be developing a package of support for care home providers, such a moving to payment on gross, removing restrictions on uplifting third party contributions, reviewing of training offer and developing our new care home contract in partnership with yourselves. We will be looking at how we can utilise Care Cubed [an updated economic tool for care costs] to inform and benchmark future fee uplifts.
>
> I want to stress again, that whilst the City Council's commissioning intentions are to support people to remain in their own homes for a long as possible, we do not want to lose any provision from the local market and I am happy to discuss our commissioning intentions with any provider on an individual basis to explore options for future working."

To anticipate some of my legal conclusions below, it may be helpful to 'flag up' some straightforward observations about this Decision. Firstly, it did not refer to any statutory guidance, still less explain how it considered a 1.4% uplift was consistent with that guidance in any material respect. Secondly, it did not mention or consider any actual costs of care, including inflationary pressure or the NLW. Thirdly, it did not refer to the Public Sector Equality Duty, Art.8 ECHR, or indeed even care home residents *at all*. Fourthly, it did not explain how it had considered any consultation responses and why it disagreed with them. Fifthly, it did not even seek to justify the Decision by reference to the Defendant's difficult financial position, or even its view that there was sufficient capacity in residential care so that an uplift was not required, as Mr Tomlin had done in his March and May Cabinet reports and at the meeting on 1st May. Instead, the Decision simply confirmed the original proposal without any reasoning, other than to reassure providers that whilst the Defendant's main objective was to keep people in their own home, it wanted to keep providers in the market too and over the next year would roll-out a package of support for them aside from the annual uplift. Whilst complaints are made about the consultation *process* in Ground 1, even part of it and the whole focus of Grounds 2-6 are the suggested failings in the *Decision*.

33. Nevertheless, according to Mr Tomlin, the vast majority of care homes have not objected to the Decision. In his latest witness statement (that I directed after circulating the draft judgment) Mr Tomlin suggested that out of the 181 care homes

as at April 2024 with which the Defendant placed its 814 funded residents, as at January 2025, 99 Care Homes have signed and returned the 2024 contract extension and a further 57 have agreed to it. Those Care Homes who have accepted the Decision constitute 94% of the 166 care homes accommodating 771 residents within Stoke-on-Trent or Staffordshire. Mr Tomlin suggested only 10 care homes had formally refused to sign the contract extension, supporting only 99 out of the 771 care home residents funded by the Defendant. Moreover, Mr Tomlin suggested out of those 10 refusing care homes, 4 have negotiated new rates with the Defendant and a further 2 have ongoing negotiations. He suggested that only 4 care homes were objecting outright (3 of which were owned by one provider) accounting for only 62 residents out of the 771 funded by and accommodated within the area of the Defendant. Indeed, Mr Tomlin suggested of those 62 residents, only 33 are funded at rates affected by the Decision (the rest being funded on separate rates as having nursing needs or being working age adults etc). The Defendant's position is that the Claimant is effectively a 'noisy minority' which does not speak for the 'silent majority' of care home providers who have not objected to the Decision, many indeed being perfectly happy with it and who would be disadvantaged were the Decision declared unlawful, especially if quashed.

34. Indeed, throughout the litigation, the Defendant has been trying to flush out which providers and care homes the Claimant actually represents. On 11th December 2024, the Claimant's solicitors disclosed the names of five providers who support its challenge, but insisted that this is only a small sample who 'bravely agreed to volunteer their identities' out of a much larger group. Indeed, in Mr Bull's latest statement in response to Mr Tomlin's statement (both after circulation of the draft judgment) Mr Bull insisted that the Claimant represents 128 providers who run 170 care homes providing 33% of the all the care home beds in Stoke and that it is wrong to equate an absence of objection to assent to the Decision. Nevertheless, I struggle to understand why the Claimant is being so coy about precisely which providers support its challenge. Indeed, its suggestion that the five providers disclosing their identities were 'brave' is slightly absurd – they are businesses who contract with the Defendant, not local villagers taking on a multinational company. Unfortunately, this typifies a bad-tempered correspondence, including accusations of breach of the duty of candour generating more heat than light. For example, after I invited in my draft judgment 'short witness statements (no more than 4 or 5 pages)' evidencing the effect on third parties of making a quashing order, Mr Tomlin provided a 10-page statement and Mr Bull a 7-page one, but only after his solicitors had sent a 3-page letter with multiple interrogatories of Mr Tomlin's statement more akin to cross-examination; and the Defendant in turn objected to a short extension of time for Mr Bull's statement. Nevertheless, I must do my best on the information I have. Ultimately, as explained in *McAleenon*, the focus of judicial review is the Defendant's decision-making on the information it had or reasonably should have had on the *Tameside* principle. The actual *evidence* from Mr Tomlin is that only 10 care homes have refused to sign the contract extension, out of 181 with whom the Defendant places residents. The Claimant has not provided *evidence* suggesting a larger number has objected, nor *evidence* that the majority who have assented have done so unwillingly – that is no more than Mr Bull's assertion. Therefore, I will proceed on the basis that only a small minority of care homes have actively objected to the Decision. However, that goes more to relief if the claim succeeds rather than

whether it should succeed,:as Mr Straker accepted *if* the Decision was unlawful, I must uphold the claim even if many third parties actively *welcome* it.

Legal Framework

35. The legal framework is not substantially in dispute and I adopt Mr Rule's detailed exposition of it in the SFG, albeit with some adjustments of my own. Indeed, rather than starting with the National Assistance Act 1948 ('NAA'), I start with the Care Act 2014 ('CA') which has superseded it. The CA imposes these relevant duties:

    a. s.1 - The general duty of a local authority ('LA'), in exercising a function in the case of an individual, is to promote that individual's well-being. This includes suitability of living accommodation. The LA must have regard to an individual's wishes and need to protect people from abuse and neglect. The 'wellbeing principle' is the adult analogue to the 'welfare principle' for children in s.1 Children Act 1989 (although is not 'paramount' as that is).

    b. ss.2-3 – s.2 requires the LA to provide or arrange the provision of services preventing needs for care and support. s.3 requires the LA to integrate them with health services. These duties run together because they are 'target' duties not owed to individual people, but rather to the area generally.

    c. s.5 – Another 'target' duty to promote diversity and quality in provision of services (set out more fully below and called the 'market-shaping duty').

    d. s.6 - Duty of co-operation. A local authority must co-operate with 'a person who provides services to meet adults' needs for care and support, services to meet carers' needs for support or services, facilities or resources'. This would include care home providers like the Claimant's members.

    e. s.18 – Most importantly, the LA has a duty to meet an individual's assessed needs for care and support. It must first determine whether: (i) the individual is eligible under the LA's eligibility criteria set under s.13 CA; and (ii) whether they are liable to charge under s.14 CA under the LA's means criteria under s.17 CA. If eligible, under s.18 CA the LA must meet the individual's needs for care and support falling within its eligibility criteria. This is typically (but not exclusively) if the individual is ordinarily resident in the area and is either exempt from charge; or if liable asks for services or lacks mental capacity to do so. If either under a duty to meet an individual's needs under s.18 LA or exercising its power to meet their needs under s.19 CA, the LA must under s.24 CA prepare a 'Care and Support Plan' (defined by s.25 LA), setting out how those needs will be met. Under s.8 CA, a LA may do so by providing a service itself, arranging for another person (like a care home provider) to provide it, or making a Direct Payment to the individual to 'buy-in' the service themselves. 'Services' include care at home or (under s.8(1)(a) CA) 'accommodation in a care home or in premises of some other type'. The Care and Support Plan includes the individual's 'personal budget' under s.26 CA setting out (i) the cost to the LA of meeting the needs in that Plan; and (ii) any charge to the individual for doing so (their 'contribution'). This is the statutory underpinning to the practical system described above where LAs contract with care home providers for them to 'provide a service' for assessed individuals, whether or not they are liable to make a 'contribution' to the LA. However, this does not prevent providers

outside the statutory scheme levying a 'top-up' from residents or third party sponsors like family or charities. Those legal relationships are regulated by the 3 or 4-way individual placement agreement (or 'IPA').

36. However, particular IPAs relating to particular individuals operate against the context of the framework 'provider contract' between the provider and authority, like the Contract in this claim. The most relevant statutory duties to such provider contracts are ss.2-6 summarised above and in particular s.5 CA, which I italicise:

> "(1) A local authority must promote the *efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring* that any person in its area wishing to access services in the market — (a) has a *variety of providers* to choose from who (taken together) provide a variety of services; (b) has a *variety of high quality services* to choose from; (c) has sufficient information to make an informed decision about how to meet the needs in question.
>
> (2) In performing that duty, a local authority must have regard to the following matters in particular: (a) the need to ensure the authority has, and makes available, information about the providers of services for meeting care and support needs and the types of services they provide; (b) *the need to ensure that it is aware of current and likely future demand for such services and to consider how providers might meet that demand*; (c) the importance of enabling adults with needs for care and support, and carers with needs for support, who wish to do so to participate in work, education or training; (d) *the importance of ensuring the sustainability of the market (in circumstances where it is operating effectively as well as circumstances where it is not)*; (e) *the importance of fostering continuous improvement in the quality of such services and the efficiency and effectiveness with which such services are provided and of encouraging innovation in their provision; (f) the importance of fostering a workforce whose members are able to ensure the delivery of high quality services (..for example, they have relevant skills and appropriate working conditions).*
>
> (3) In having regard to the matters mentioned in subsection (2)(b), *a local authority must also have regard to the need to ensure that sufficient services are available for meeting the needs for care and support of adults in its area* and the needs for support of carers in its area.
>
> (4) *In arranging for the provision by persons other than it of services for meeting care and support needs, a local authority must have regard to the importance of promoting the well-being of adults in its area with needs for care and support* and the well-being of carers in its area.
>
> (5) In meeting an adult's needs for care and support or a carer's needs for support, a local authority must have regard to its duty under subsection (1)...
>
> (7) 'Services for meeting care and support needs' means— (a) services for meeting adults' needs for care and support, and (b) services for meeting carers' needs for support.
>
> (8) The references in subsection (7) to services for meeting needs include a reference to services, facilities or resources the purpose of which is to contribute towards preventing or delaying the development of those needs."

The Care Quality Commission ('CQC') has oversight of the entire market under ss.53-57 CA. Under different legislation and guidance that I need not cite, the CQC requires (i) care homes to meet its various care quality standards (assessed in regular inspections); and (ii) to be and remain financially viable.

37. Speaking of guidance, s.78(1) CA states that 'A local authority must act under the general guidance of the Secretary of State in exercise of functions' under the CA. The Department of Health and Social Care ('DHSC') has issued the *Care and Support Statutory Guidance* ('the CA Guidance'), containing 'Annex A: Choice of accommodation and additional payments', providing guidance that (my italics):

> "**Suitability of Accommodation**
>
> 8) In exercising a choice, a local authority must ensure that the accommodation is suitable to meet a person's assessed needs and identified outcomes established as part of the care and support planning process.
>
> 9) People are able to express a preference about the setting in which their needs are met through the care and support planning process….
>
> **Cost**
>
> 11) *The personal budget is defined as the cost to the local authority of meeting the person's needs which the local authority chooses or is required to meet.* However, the local authority should take into consideration cases or circumstances where this 'cost to the local authority' may need to be adjusted to ensure that needs are met. For example, a person may have specific dietary requirements that can only be met in specific settings. *In all cases the local authority must have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions*. This should also reflect other factors such as the person's circumstances and the availability of provision. In addition, *the local authority should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care.* Guidance on market shaping and commissioning is set out in Chapter 4. Local authorities must also have regard to the guidance on personal budgets in Chapter 11….
>
> **Price increases**
>
> 34) Arrangements will need to be reviewed from time to time, for example in response to any changes in circumstances of the cared for person, the person making the 'top-up' payments (if this is different from the cared for person), local authority commissioning arrangements *or a change in provider costs***.** However, these changes may not occur together and a local authority must set out in writing how these changes will be dealt with.
>
> 35) The local authority must clearly set out in writing to the person or persons concerned its approach to how any increased costs may be shared. This should also include details of how agreement will be reached on the sharing of any price increases. This should also state that there is no guarantee that these increased costs will automatically be shared evenly should the provider's costs rise more quickly than the amount the local authority would have increased the personal budget…and there is an alternative option that would be affordable within that budget.

> *36) A local authority may wish to negotiate any future prices rises with the provider at the time of entering into a contract. This can help provide clarity for adults and providers and help ensure that the top up remains affordable."*

Also relevant within the CA Guidance (indeed referred to at para.11 of Annex A as just quoted) is the guidance in Chapter 4 on the authority's 'market-shaping' duty under s.5 CA, especially paras 4.31 and 4.33-5 (but also later paras. 8.8 and 8.13):

> "4.31 When commissioning services, local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed care packages with agreed quality of care. This should support and promote the wellbeing of people who receive care and support and allow for the service provider ability to meet statutory obligations to pay at least the national minimum wage and provide effective training and development of staff. It should also allow retention of staff commensurate with delivering services to the agreed quality and encourage innovation and improvement. Local authorities should have regard to guidance on minimum fee levels necessary to provide this assurance, taking account of the local economic environment. This assurance should understand that reasonable fee levels allow for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term. [Economic] tools may be helpful as examples of possible approaches…
>
> 4.33 Local authorities must work to develop markets for care and support that - whilst recognising that individual providers may exit the market from time to time - ensure the overall provision of services remains healthy in … sufficiency of adequate provision of high-quality care and support…..
>
> 4.34 Local authorities should understand the business environment of the providers offering services in their area and seek to work with providers facing challenges and understand their risks. Where needed, based on expected trends, local authorities should consider encouraging service providers to adjust the extent and types of service provision. This could include signalling to the market as a whole the likely need to extend or expand services, encourage new entrants to the market in their area, or if appropriate, signal likely decrease in needs – for example, drawing attention to a possible reduction in care home needs, and changes in demand resulting from increasing uptake of direct payments…..
>
> 4.35 Local authorities should consider the impact of their own activities on the market as a whole…. [It] may be the most significant purchaser of care and support in an area, and therefore its approach to commissioning will have an impact beyond those services which it contracts. *Local authorities must not undertake any actions which may threaten the sustainability of the market as a whole, that is, the pool of providers able to deliver services of an appropriate quality, for example, by setting fee levels below an amount which is not sustainable for providers in the long-term."*
>
> 18.8 The success of a policy by a local authority to delegate its functions to a third party will be determined to a large extent, by the strength and quality of the contracts the local authorities make with the delegated third party…..

> 18.13 Since care and support functions are public functions, they must be carried out in a way that is compatible with all of the local authority's legal obligations. For example, the local authority would be liable for any breach by the delegated party, of its legal obligations under the Human Rights Act.. Local authorities should therefore draw up its contracts so as to ensure that third parties carry out functions in a way that is compatible [with that]…"

38. In *R(Care North East) v Northumberland CC* [2024] PTSR 1593 (*'R(CNE')*), Fordham J recently considered a similar care home association challenge. That authority had decided to apply basic indexation under its (rather more sophisticated) provider contract (namely the National Living Wage for staff costs and CPIH for other costs) rather than a higher discretionary uplift. Understandably, Counsel have addressed me in detail about *R(CNE)*. For the moment, I simply note Fordham J's helpful summary at [12] of *R(CNE)* of paras.4.31-5 of the CA Guidance (building on *R(Care England) v Essex CC* [2017] EWHC 3035 (Admin)):

> "(i) First, there is the importance of local authorities assuring themselves and having 'evidence' that contractual fee levels are appropriate to provide the delivery of agreed care packages with agreed quality of care (para 4.31).
> (ii) Secondly, there is the importance of local authorities understanding that a reasonable fee level allows for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term (para 4.31). [Lavender J in *R(Care England)* at [6] called this and s.5(2)(d) CA 'the sustainability factor']
> (iii) Thirdly, there is the point that local authorities must not undertake any actions which may threaten the sustainability of the market as a whole - the pool of providers able to deliver services of an appropriate quality - by setting fee levels below an amount which is not sustainable for providers in the long term (para 4.35)."

Both Fordham J in *R(CNE)* and Lavender J in *R(Care England)* focussed on the CA Guidance as they (like the present case) were challenges to local authority decisions after the Care Act and the CA Guidance had come into force in 2015. Neither case cited the earlier guidance relating to the predecessor legislation – s.21 NAA - called 'Local Authority Circular (2004)20' ('LAC (2004)20'). That had been issued in 2004 under s.7 Local Authority Social Services Act 1970. However, when the Care Act 2014 came into force in 2015, s.7 of the 1970 Act was amended to specify s.78 CA applies instead of s.7 for functions under Part 1 CA (including social care). Moreover, in R*(Torbay Care) v Torbay Council* [2018] PTSR 923 (CA), Beatson LJ (who dissented) suggested at [4] that the Care Act 2014 and CA Guidance had 'replaced' LAC (2004)20, but he declined to comment on whether the decision in that case on the old guidance would continue to have relevance to the new guidance.

39. Nevertheless, Mr Rule continued to rely on alleged failure to follow guidance in LAC (2004)20 and Mr Straker did not object. In my judgment, LAC (2004)20 is no longer extant guidance required to be followed under s.78 CA, but I will still set out three key paragraphs for three reasons. Firstly, whilst they are pleaded in Ground 4 as guidance the Defendant wrongly did not follow, as Mr Rule accepted, Ground 4 overlaps with Ground 2: 'failure to take into account relevant considerations'. As I will explain below, the 'considerations' in those paragraphs of LAC (2004)20 may still be 'relevant', at least to the extent they reflect factors expressly or impliedly

required to be considered by s.5 CA itself ('statutory factors'). Secondly, as I will explain next, those three paragraphs of LAC (2004)20 are relevant context to the interpretation of the subsequent CA Guidance. Thirdly, as I will also explain, the case-law on those three paragraphs of LAC (2004)20 remains relevant to the approach to the CA Guidance and s.5 CA generally. But before paras. 2.5.4, 2.5.7 and 3.3 of LAC (2004)20, I start by noting they all relate to an individual's choice of accommodation and para 1.3 defines 'usual cost' as what the council would usually expect to pay for accommodation for someone with the individual's needs:

> "2.5.4 One of the conditions associated with the provision of preferred accommodation is that such accommodation should not require the council to pay more than they would usually expect to pay, having regard to assessed needs (the 'usual cost'). This cost should be set by councils at the start of a financial or other planning period, or in response to significant changes in the cost of providing care, to be sufficient to meet the assessed care needs of supported residents in residential accommodation. A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different. *In setting and reviewing their usual costs, councils should have due regard to the actual costs of providing care and other local factors. Councils should also have due regard to Best Value requirements under the Local Government Act 1999…*
>
> 2.5.7 *Councils should not set arbitrary ceilings on the amount they expect to pay for an individual's residential care.* Residents and third parties should not routinely be required to make up the difference between what the council will pay and the actual fees of a home. Councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third-party contributions did not exist…
>
> 3.3 *When setting its usual cost(s) a council should be able to demonstrate this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services they could reasonably expect*… if the possibility of resident and third-party contributions did not exist."

40. My second reason for quoting those paragraphs is as relevant context in interpreting para.11 Annex A CA Guidance. The key sentence in para 2.5.4 was 'In setting and reviewing their usual costs, councils should have *due regard to the actual costs of providing care and other local factors*' and in para 2.5.7 was '*Councils should not set arbitrary ceilings* on the amount they expect to pay for an individual's residential care'. These are both reflected in para 11 Annex A of the current CA Guidance: 'In all cases the local authority must have regard to *the actual cost of good quality care* in deciding the personal budget to ensure that the amount is one that reflects *local market conditions*… [It] *should not set arbitrary amounts or ceilings* for particular types of accommodation that do not reflect a fair cost of care'. It is true para.11 Annex A focuses on an individual's 'personal budget' not 'usual cost' as under paras 2.5.4 and 2.5.7 of LAC (2004)20. But a 'personal budget' is a new concept under s.26 CA which was not in the old legislation and is defined by para.11 Annex A not dissimilarly from how 'usual cost' was: as 'the cost to the authority of meeting the person's needs'. Moreover, Annex A covers standard fees for care homes as seen in paras.34-36 quoted above. In reality, an authority's standard fee decision for each 'band' (e.g. 'residential' and 'residential enhanced') will inevitably decide part of the 'personal budget' of residents in those categories

for what *the authority* is paying (as opposed to their potentially different 'top-ups'). This is why similar expressions as in paras.2.5.4 and 2.5.7 LAC(2004)20 have been 'pulled through' into the new CA Guidance at para.11 Annex A, but in the new CA scheme linked to the 'personal budget'. Indeed, those factors are also consistent with paras. 4.31/4.35 CA Guidance as summarised in *R(CNE)* quoted above. So, whilst not its only effect, the effect relevant to this case of para.11 of Annex A is still to require authorities in setting standard fees to 'have regard to the actual cost of good quality care' and 'not set arbitrary ceilings not reflecting fair cost of care'.

41. My third reason for quoting LAC (2004)20 was the ongoing relevance of the case-law about it, both the interpretation of those similar expressions as in the old guidance in the new para.11 Annex A CA Guidance and generally. I was referred to various first instance decisions (and will refer to some on other issues), but on para 2.5.4 they were described as turning on their own facts in *R(Care North East) v Northumberland CC* [2014] PTSR 758 (CA) (which I call '*Northumberland*' to distinguish it from *R(CNE)* which was a sequel to it a decade later). Nevertheless, *Northumberland* itself and four other cases on the old guidance remain relevant and some were cited in the cases on the new guidance: *R(CNE)* and *R(Care England):*

    a. In *R(Forest Care) v Pembrokeshire CC* [2011] ACD 58, Hickinbottom J (as he was) set aside an authority's standard fee, but partly on its concession. Other than comments on the status of guidance and on Art.8 ECHR which I will mention later, of continuing present relevance, he said at [142]-[144]:

> "142…As well as in the decision as to which the persons it should extend [accommodation to under] s.21 [NAA], the Council is entitled to take into account its own financial position when exercising its discretion as to the manner in which and the standard to which such assistance is given, provided that the minimum requirements of s.21 are met. That is clear as a matter of principle….In [R(B*irmingham Care Consortium) v BCC* [2002] EWHC 2188 (Admin) Stanley Burnton J] said (at paragraph 31): "… [A]ffordability is in general a highly relevant consideration to be taken into account by any local authority in making its decisions on rates to be offered to service providers, subject to the local authority being able to meet its duties at the rates it offers." With that, I respectfully agree.
>
> 143. However, when exercising its discretion in a manner which is adverse to an interested party – e.g. in this context, a provider or resident – the Council's own financial position is of course not necessarily determinative. It is bound to take into account and balance all relevant factors; and in particular bound to balance such matters as the quality of the service it provides and the need to maintain stability in the care services sector on the one hand, against the resources with which it has to provide that service on the other. The interests and rights of residents are of particular weight in that balance. The…. guidance makes them so, as does Article 8.
>
> 144. In my judgment, the Council was fully entitled to take into account its own financial position when determining the level of accommodation and care services upon the minimum required by section 21, and in setting the fee rate for those who provide those

> services. However, it erred in law in failing properly to take into account other factors which I have identified in this judgment, such as the potential adverse consequences of the decision for providers and residents, which it was required to balance against the constraints on its own resources. The manner in which the Council dealt with capital costs for the purposes of setting the rate was simply methodologically wrong; but the other sub-grounds succeed, because the Council failed to take into account matters other than its own financial resources in a proper and lawful way."

b. In *R(Bevan) v Neath CBC* [2012] ACD 62, Beatson J (as he was) dismissed a challenge to an authority standard fee relying on para 2.5.4 LAC (2004)20 and held it had 'due regard to the actual costs of providing care'. In doing so, Beatson J held the fee decision was amenable to judicial review (as discussed below). At [55], Beatson J agreed with Hickinbottom J in *R(Forest Care)* at [50] that it was inappropriate to use judicial review to challenge merits of an authority's 'usual cost' decision, adding at [56]-[58]:

> "A public law decision-maker must know or be told enough to ensure that nothing that is necessary because it is legally relevant for him to know is left out of account. However, sifting by the decision-maker's officials is acceptable. They are not bound to bring to the attention of the decision-maker all the minutiae relating to the matter….Provided that which it is legally relevant for the decision-maker to know is brought to its attention, it is generally for the decision-maker to decide upon the manner and intensity of the inquiry to be undertaken into any relevant factor…A related principle is that provided the decision-maker has regard to a factor that is legally relevant for it to take into account, the weight given to it is a matter for the decision-maker. Absent *Wednesbury* unreasonableness or …'irrationality', it is not a matter for the court….[A] court will be particularly circumspect in engaging with conclusions of the primary decision-maker [on] complex economic and technical questions."

c. In *R(South West Care Homes) v Devon CC* [2012] ACD 108, Singh J (as he was) found an unlawful failure of consultation but refused relief (both of which I discuss later) but held the authority's fee decision had 'due regard to the actual costs of providing care' based on the careful analysis of such costs in detailed statements from the decision-maker. On the latter point, Singh J followed Beatson J's approach in *R(Bevan)* and elaborated at [25]:

> "It will frequently be the case and is undoubtedly the case in the present context, that the relevant factors to which the decision maker must have regard do not all point in the same direction. They may well pull in different directions and a balance will have to be struck. This is quintessentially a function of the public authority concerned, subject always to judicial review on the ground of irrationality."

d. In *Northumberland*, Sullivan LJ upheld Supperstone J's decision that an authority fee decision had 'due regard to the actual costs of providing care' even without an arithmetical breakdown of all those costs (as had been suggested in some first-instance cases). Sullivan LJ noted 'due regard' also

appeared in s.149 Equality Act 2010, but said at [16] and [18] that case-law on s.149 (see below in Ground 3) could not be 'read across' and at [17] that

> "The circular contains guidance. It is not to be equated with a statutory duty….and as would be expected in the case of guidance, it does not prescribe any particular methodology, whether 'structured' or otherwise, which local authorities must adopt in order to have had 'due regard' to the actual costs of providing care."

Instead, he approved the observations in *R(Bevan)* and *R(South West Care)* to how the Court on judicial review should analyse the authority's decision.

e. Finally, in *R(Torbay Care) v Torbay Council* [2018] PTSR 923 (CA), after implementation of the Care Act but relating to a 2014 decision on the old law and para 5.2.4 LAC (2004)20, another fee decision was upheld as having 'due regard to the actual cost of care' by a majority (Beatson LJ, as he had become, dissenting). King LJ interpreted para 2.5.4. in the wider context of paras 1.3 and 3.3 LAC (2004)20 and that 'usual cost' (i.e. what the council would usually expect to pay for accommodation' was different from 'actual cost' to the provider in para 2.5.4. As she said at [78]:

> "In my view, the figure fixed upon by the council (that is to say, the usual cost) does not necessarily have to be, and almost certainly will not be, synchronised with the actual cost to the provider…."

King LJ also held at [79]-[83] that para 3.3 LAC (2004)20 did not prevent an authority from taking into account other sources of provider income such as 'top-ups' in setting its usual rate under para 5.2.4. But she added at [76]:

> "[O]ne topical example which may lead to a council revising its usual cost…might be a substantial, unexpected, increase in the national minimum wage with the consequence that the 'usual cost' becomes untenable and no longer realistically a sum the council could properly expect to pay for accommodation [and] contrary to best value."

42. Whilst those cases all considered para 2.5.4 LAC (2004)20 which is now old guidance, in my judgment those observations in those cases remain relevant not just to interpreting the new CA Guidance, but also to authorities' duty to follow the new CA Guidance and indeed the approach of the Court on Judicial Review:

    a. Firstly, those authorities on LAC (2004)20 assist in the interpretation of the new CA Guidance at paras.11 Annex A that 'In all cases the local authority must have regard to the actual cost of good quality care… [and] should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care'; and para 4.31 that: 'When commissioning services, local authorities should assure themselves and have evidence that…fee levels…are appropriate to provide….agreed care packages with the agreed quality of care'. Just like paras 2.5.4, 2.5.7 and 3.3 of LAC (2004)20, as explained in *R(Torbay)*, paras.11 Annex A and 4.31 of the current CA Guidance do not require an authority's fee levels to 'synchronise with the actual cost to the provider' and the authority may take into account other sources of provider income (e.g. resident 'top-ups') in assessing the 'fair cost of care'. Moreover, as stated in *R(Forest Care)*, the authority is also entitled to take into account its own resources, provided its fees do not

set an 'arbitrary ceiling', especially if that ceiling undermines the provider's ability to provide the agreed care packages with the agreed quality of care.

b. Secondly, those authorities on LAC (2004)20 indicate the weight an authority must attach to the current CA Guidance more generally. There is no material difference in the legal status of guidance made under s.78 CA and LAC (2004)20 under s.7 of the 1970 Act. Whilst guidance is not a statute, as Sullivan LJ said in *Northumberland*, as Beatson LJ added in *R(Torbay)* (albeit dissenting) and Hickinbottom J said in *R(Forest Care)* at [28], guidance must still be taken into account by an authority as described by Sedley J (as he was) in *R v Islington LBC exp Rixon* [1997] ELR 66, 71:

> "In my judgment Parliament… did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of statutory guidance on a par with the many forms of non-statutory guidance issued by departments of state . . . In my view Parliament by s.7(1) has required local authorities to follow the path charted by the…. guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, *but without freedom to take a substantially different course.*"

Sedley J's last few words I have italicised have been questioned in later cases (including *R(Forest Care)* at [29] and *R(Care England)* at [59]). In my judgment it is preferable simply to state that authorities are free to depart from the CA Guidance if there is 'good reason to do so'. This would align with the modern approach to the status of an authority's internal policies in *Mandalia v SSHD* [2015] 1 WLR 4546 (SC) at [31], where Lord Wilson also emphasised the interpretation of policy or guidance was a matter for the Court, not the authority. Certainly, the status of DHSC guidance under s.78 CA, such as the CA Guidance here cannot be less: s.78 states that a local authority *must* act under the DHSC guidance in exercising its functions under the CA. But I do not accept there need be 'cogent reasons' for departure in the sense in *Munjaz v Mersey NHS* [2006] 2 AC 148 (HL) by Lord Bingham at [2], [21] and Lord Hope at [68]-[69]. *Munjaz* was concerned with a statutory Code of Practice laid before Parliament: more like legislation than government guidance (as Sullivan LJ differentiated in *Northumberland*). In any event, in the present context in *R(Forest Care)* at [28], Hickinbottom J equated 'good reasons' with the approach in *Munjaz*.

c. Thirdly, the Court's approach Beatson J described in *R(Bevan)* followed by Singh J in *R(South West Care)* and approved by Sullivan LJ in *Northumberland* is in essence what Fordham J in *R(CNE)* at [32] (citing *Northumberland*) called a 'light touch review'. That is of relevance not just to Grounds 4 and 2 like the last two points, but to all the Grounds, which is one reason I have addressed LAC (2004)20 and the authorities now. Indeed, it is relevant to the Courts approach to review generally, as I will explain.

43. Finally, there is ss.6-7 Human Rights Act 1998 ('HRA') and Art.8 ECHR itself:

> "Art.8(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

> Art.8(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

I will return to Art.8 itself when dealing briefly with Ground 5, but of wider importance to this whole case, especially the 'public/private' issue, are ss.6-7 HRA:

> "6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (3) In this section 'public authority' includes— (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature…
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private….
>
> 7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may — (a) bring proceedings against the authority under this Act in the appropriate court or tribunal…but only if he is (or would be) a victim of the unlawful act."

In *R(South West Care)* at [38] Singh J pointed that only a 'victim' of a breach of Art.8 ECHR can bring proceedings against an authority under s.7 HRA. That could include a resident of a care home at risk of losing their Art.8 'home' if a provider closed because it ceased to be economically viable due to below-inflation authority fees. But it does not on the face of it include the provider itself (they have a right to property under Art.1 Protocol 1 ECHR: *Jain v Trent SHA* [2009] 1 WLR 248 (HL) but that is not pleaded here and in any event justification under it is rather broader). Hickinbottom J was not referred to this point in *R(Forest Care)* on Art.8 ECHR at [42]-[44], nor was the judge in the case to which he referred at [44] in suggesting care home providers could be Art.8 claimants for those in their care (a defamation case: *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958(QB)). In any event, this case is one step further removed, as the Claimant is not a care home provider, but a trade organisation: a point I analyse further in a moment. Therefore, Ground 5 is an Art.8 claim at two steps removed and I only deal with it very briefly below.

44. The definition of 'public authority' in s.6 HRA is material to the 'public/private' issue, as whilst the Defendant is obviously a 'public authority' under s.6(3) HRA, the central debate in this case is now whether the Contract and the Decision relating to it were acts sounding only in *private* law for the purposes of judicial review. There is a clear analogy with s.6(5) HRA, as recognised in the leading case on amenability to review of local authority 'usual cost' and care home fee decisions: *R(Bevan)*, where Beatson J (as he then was) said:

> "46. The question whether a particular function is a public function has been the subject of considerable analysis and differences of approach by courts: see for example *YL v Birmingham CC* [2008] AC 95… and *R (Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363. In those cases the context was whether the bodies were public bodies within [s.6 HRA]. *Weaver* considered whether, when terminating a tenancy, a registered social

> landlord, a 'hybrid' rather than a 'core' public body…was subject to s.6 and to public law principles.
>
> 47. It is clear that, because the purpose of attaching liability under [s.6 HRA] is different to the purpose of subjecting a body to public law principles, 'it cannot be assumed that because a body is subject to one set of rules it will therefore automatically be subject to the other': Elias LJ in *Weaver* at [37]. However, the approach taken by the majority of the court in *Weaver's* case to [s.6 HRA] is in its broad thrust, of analogical assistance in the present context. Elias LJ (at [83]) indicated that he agreed with the Divisional Court's view that the landlord's decision to terminate a tenancy was governed by public law principles and susceptible to judicial review on conventional public law grounds…..
>
> 48. [In *R(Weaver)*] for Elias LJ (at [55] and [57]) the starting point is 'to focus on the nature of the act in the context of the body's activities as a whole'. The act in the present case is the fee-setting decision of the Council. In respect of that decision, the wider context is the function of a local authority under the [NAA] in providing care or making arrangements for others to provide care for those who need it. That is a public function. While the fee-setting function of the Council is less closely regulated than those of a registered social landlord, the statutory and regulatory framework shows that a Council does not have the freedom that a private individual would have to use its bargaining power to drive down the price as far as possible. The mere fact the decision concerns the setting of a fee under a contract does not mean it is to be characterised as a private act. In *Weaver*.. Elias LJ (at [76]) distinguished acts necessarily involved in the regulation of what is a public function, which he considered to be public acts, from those which are purely incidental or supplementary to it. The decision in this case cannot be characterised as purely incidental or supplementary to the function of making arrangements for the provision of care in care homes operated by third party providers for those who qualify under the [NAA]."

I should add that in *YL*, which Beatson J mentioned in *R(Bevan)* at [46], the Lords decided by a majority that a privately-run care home accommodating residents placed by a local authority was not exercising 'public functions' under s.6(3) HRA. However, the result in *YL* was reversed by Parliament in s.145 Health and Social Care Act 2008, which has now been effectively re-enacted in s.73 CA, to provide that a registered care home providing nursing or personal care arranged and (at least part-)funded by an authority under the CA also exercises public functions under s.6(3) HRA. However, this simply means the Claimant's member providers are also 'public authorities' under the HRA, not that an authority's fee decision relating to a contract with them is amenable to judicial review. However, by analogy to s.6(5) HRA, Beatson J in *R(Bevan)* found that a fee-setting decision by a local authority was amenable to judicial review (albeit as Mr Straker says, it was to set fees under prospective 'IPA' contracts, rather under a 'framework provider contract' as here). I return to *R(Bevan)* and the 'public/private' issue after dealing with 'alternative remedy'.

Does the Claimant have an alternative remedy to Judicial Review?

45. As Mr Straker observed, the principle that Judicial Review is a 'last resort' is one of long pedigree as the Court of Appeal said in another case with a local connection, albeit on very different facts: *R v Birmingham CC ex p Ferrero* [1993] 1 All ER 530. Lord Sales in the Supreme Court in *McAleenon* recently restated the principles at [50]-[59]:

> "50 The forms of relief available in a claim for judicial review are discretionary (albeit the ambit of the discretion may in the event be very small or non-existent in the circumstances of a particular case). The availability of the judicial review procedure is likewise discretionary. A court may refuse to grant leave to apply for judicial review or refuse a remedy at the substantive hearing if a suitable alternative remedy exists, but the claimant has failed to use it. As stated in *R(Glencore) v HMRC* [2017] 4 WLR 213, para 55, 'judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective'…If other means of redress are conveniently and effectively available, they ought ordinarily to be used before resort to judicial review: *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 30…
>
> 51 Where Parliament has enacted a statutory scheme for appeals in respect of certain decisions, an appeal will in ordinary circumstances be regarded as a suitable alternative remedy in relation to such decisions which ought to be pursued rather than having resort to judicial review: *Glencore*…paras 55-58… Otherwise, use of judicial review would undermine the regime for challenging decisions which Parliament considers to be appropriate in that class of case….
>
> 55….As a matter of principle, in civil litigation it is for a claimant to choose which form of claim to assert and against which party to assert it. The court then rules upon that claim; it has no role to say that the claimant should have sued someone else by a different claim. The question of whether a claimant has a suitable alternative remedy available to them falls to be addressed by reference to the type of claim the claimant has chosen to bring and what relief they have sought against the particular defendant….
>
> 59 Judicial review is a comparatively speedy and simple process, involving significantly less time and cost than would be likely to be required for a trial in a private prosecution or in a civil claim in nuisance. Those procedures would involve calling witnesses and extended cross-examination which take time and involve cost and which are not necessary in judicial review. There is no good reason why Ms McAleenon should be expected to take on the additional burden [of] such proceedings, in place of the comparatively less expensive course of bringing the judicial review claim she chose to bring against the…regulators."

Lord Sales therefore found the claim for judicial review against regulators for failing to stop a nuisance should not be refused on the basis that either a private prosecution of or a civil claim against the polluter for nuisance was an alternative remedy and nor was a complaint about the regulators to their Ombudsman.

46. There are three potential 'alternative remedies' here, but two can be disposed of very shortly *in this case*. The first is a complaint to the Defendant under its statutory

complaint procedure. However, the availability of complaint to an Ombudsman - does not generally affect the right to claim judicial review (*McAleenon* at [63], likewise *R v Devon CC exp Baker* [1995] 1 All ER 73 (CA) on external complaints). So, an *internal* complaint can hardly do so. In any event, the Claimant set out a detailed pre-action protocol letter on 22nd August 2024 setting out essentially the same allegations as in the grounds of challenge, so it is unrealistic to expect the Claimant to pursue an internal complaint as an 'alternative remedy' to Judicial Review. The second 'alternative': dispute resolution under Cl.58 of the Contract was also not pressed by Mr Straker. Typically, the Court will expect parties in litigation about social care to pursue Alternative Dispute Resolution, as said as long ago as *R(Cowl) v Plymouth CC* [2002] 1 WLR 803 (CA). The intervening years have only reinforced that, as now reflected in the Overriding Objective in CPR 1.1(2)(f) following *Churchill v Merthyr Tydfill CBC* [2024] 1 3827 (CA). However, in the context of care home fees challenges, the Courts have also stressed the importance of what Fordham J in *R(CNE)* at [52(i)] called 'heavy expedition' (which I have tried to achieve). It is unrealistic for a claimant in this sort of case to pursue ADR and simultaneously expedite their Judicial Review claim.

47. However, Mr Straker does submit, in tandem with his submission that the present claim is one in private law under the Contract masquerading as public law, that an orthodox private law claim under the Contract is a suitable alternative remedy to Judicial Review. Mr Straker and Mr Sanghera submitted in their Skeleton that:

> "[A]lternative remedies will ordinarily, whether sought or not, preclude judicial review. A contract, as here, between two legal persons will necessarily, as here, include remedies, which the parties have agreed to seek as appropriate. It has, of course, been stated that judicial review is a remedy of last resort, and this plays a role in determining, as a matter of discretion, that judicial review in an individual case should not be available. Further, the existence of an alternative remedy must strongly influence a decision that a matter is one of private law rather than public law. The law will always seek to avoid the possibility of conflicting decisions."

48. I will consider Mr Straker's distinct submission that the present claim is one in private law masquerading in public law below, but *the Claimant* certainly does not have an *alternative remedy* under the Contract. As Mr Straker himself pointed out, Clause 25 of the Contract, as already partly quoted above, provides that (my italics):

> "The Contracts (Rights of Third Parties) Act 1999
> Any person who is not a *party* to the Agreement (*including… any …representative*…of either the Council *or the Provider*), save for Residents and Sponsors, shall not have any right to enforce any term of the Agreement. *This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act*."

s.1 of the 1999 Act enables a non-party to enforce a contract if either it expressly provides that they may by name or as a member of a class (as with residents and sponsors), or the term purports to confer a benefit on the so-identified non-party unless on proper construction the parties did not intend to confer that benefit on him (see the recent analysis of the Supreme Court in *DEFRA v PCSA* [2024] 3 WLR 1059 (SC)). The Claimant, as already explained, is not a *party* to the Contract, which was made between the Defendant and individual providers – the Claimant is the

representative of some providers. Clause 25 clearly excludes *the Claimant* having a contractual remedy under the Contract, since it is neither a resident nor a sponsor. Mr Straker could submit that the Claimant could arrange for individual disgruntled *providers* to sue the Defendant (e.g. for a prohibitory injunction restraining reliance on the 1.4% uplift, or indeed damages for breach of contract on the basis that the Defendant's contractual exercise of its discretion to increase fees under Clause 18.3 was irrational: see *Braganza v BP* [2015] 1 WLR 1661 (SC)). However, just as Lord Sales said in *McAleenon* at [55] the alternative remedy principle did not require *the same claimant* to use *different means* to challenge *different defendants*, nor would it here require *different claimants* to use *different means* to challenge the *same defendant*. Moreover, even if it did, as Mr Rule noted, Lord Sales in *McAleenon* at [59] also said it was relevant to consider that Judicial Review was a quicker way of achieving particular relief than an ordinary civil action. As already pointed out, Fordham J said in *R(CNE)* that challenges to care home fees decisions should be expedited and one of Mr Straker's other strings to his bow is a submission that relief should be refused because of detriment to good administration. That in itself shows why an ordinary civil action – even if the Claimant could bring it – would not be a suitable alternative remedy to the much speedier quashing order that it seeks.

49. Nevertheless, in fairness to Mr Straker, this conclusion brings me back to a point he raised in the Summary Grounds of Defence which I perhaps rather peremptorily dismissed when giving permission: the issue of the Claimant's *standing*. Why does the Claimant have standing to claim Judicial Review when its member providers could claim or pursue a contract claim ? The Defendant's concern is exacerbated by the circumspection of the Claimant to state how many providers it represents in this claim, since the Defendant is concerned that the Court is being asked to quash its decision by a 'noisy minority' when the 'silent majority' of providers are content. I understand this has been recently addressed in correspondence I have not seen (but not before the Defendant made a non-party costs application against Mr Bull). The Lords in *R v IRC exp National Federation of Small Businesses* [1982] AC 617 stressed lack of 'standing' could be a reason to refuse leave (as permission in those days was called) for Judicial Review, but it could also be considered at the hearing if inter-related with other issues. As Lord Diplock said at 642H-643A and 644E-G:

> **"**The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived…..It would, in my view, be a grave lacuna in our system of public law if a pressure group… were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

Moreover, the standing of pressure groups has been increasingly recognised in the intervening decades and it is notable that in *R(Bevan)* at [52] Beatson J held that a group of care home operators had standing to claim Judicial Review and standing was not doubted in similar claims to this by trade organisations in *Northumberland*

in the Court of Appeal, or recently *R(CNE)* in the High Court (which as I shall discuss was also all about a provider contract). Therefore, even on reflection I maintain my view the Claimant has standing to claim Judicial Review, although I return to the Defendant's concerns about the views of third-party providers (indeed residents) not involved in the claim at the end of my judgment. However, in one minor respect the Defendant's standing point does succeed – in relation to Ground 5 and the alleged breach of Art.8 ECHR. As explained above at paragraph 44, Ground 5 can only succeed if the Claimant is a 'victim' under s.7 HRA. It plainly is not – indeed not even its member providers are, only their residents: *R(South West Care)* at [38]. The most that can be said is the level of fees *might* cause residents to lose their Art.8 ECHR 'home', but there is no evidence of that risk before me at all. However, as Singh J also discussed in *R(South West Care)* at [40]-[42], if an authority fails to pay any regard to the undoubted Art.8 rights of residents at all in a decision, this might be unlawful on orthodox principles of public law as a failure to take into account a relevant consideration. Similarly, it may also be relevant to whether the Defendant had 'due regard' to any discriminatory impact on residents under the PSED in Ground 3 (but not as a separate ground) and I touch on it again there. However, both are different types of challenge than Ground 5 where the Claimant alleges *breach* of Art.8 ECHR by the Defendant. I dismiss Ground 5.

Does this claim have a 'sufficient public law element' for Judicial Review ?

50. CPR 54.1(2) defines Judicial Review as 'a claim to review the lawfulness of …a decision….in relation to the exercise of a public function'. The key submission of Mr Straker and Mr Sanghera in their Skeleton Argument is that this claim is not:

> "One can test whether this is a public or private law case by looking at the decision sought to be reviewed, and the relief sought. The former…refers to a decision of 4 July 2024, which was undoubtedly a contractual decision. It was the determination, under Cl.18.3, by the Council, as required by the contract, following consultation with the Provider, of an annual indexation. It plainly arises in the light of all the detailed provisions of the contract.
>
> By way of relief the Claimant seeks an order that the Council, i.e., the other contracting party, should undertake a lawful consultation. This is not defined by the Claimant but must mean a consultation pursuant to the contract, which is, at length, recited in the statement of facts and grounds. If it means consultation other than pursuant to the contract, then the Administrative Court is being invited to be party to a breach of contract.
>
> Accordingly, the function sought to be performed is a contractual one, but it is wholly illegitimate to do so by way of judicial review…If it be asserted the function being performed is not contractual then the Claimant is simply exposed as seeking to litigate in circumstances liable to create a conflict between the supposed public law position and the contractual relationship.
>
> In *Supportways v Hampshire CC* [2006] EWCA Civ 1035 Neuberger LJ said (at paragraph 38) that the fact a party alleged to be in breach of contract is a public body cannot transform a private law claim into a public law claim. If the claim is fundamentally contractual in nature and involves no allegation of fraud or improper motive or the like against the public body it would, in the absence of very special circumstances, be right as a matter of principle to limit a claimant to private law remedies. At paragraph 43

> Neuberger LJ said it was wrong in principle for a person who would otherwise be limited to a private law claim to be entitled to base his claim in public law merely because private law does not afford him a sufficiently attractive remedy. It can be noted that in *R (Birmingham Taxi Association) v Birmingham Airport* [2009] EWHC 236 Wyn Williams J said a court should be extremely cautious about imposing public law duties which have the effect of diluting or altering contractual terms freely concluded…"

51. As Mr Straker and Mr Sanghera go on to quote, only the week before the hearing, in *R(Shashikanth) v NHS Litigation* [2024] EWCA Civ 1477, Lewis LJ said:

> "43. Judicial review is only available against a body exercising public functions. There are, broadly, two approaches to the question of whether a person or a body is exercising a public function. First, if a person or body is exercising power derived from statute (or the prerogative, if the matter is justiciable), the person or body is generally assumed to be exercising public functions. The courts have recognised that there are cases where a power may be derived from statute but the nature of the decision is such that it does not involve the performance of a public duty to the individual in the particular circumstances of the case….
>
> ….(See, for example, *R (Tucker) v Director-General of the National Crime Squad* [2003] ICR 599 where a decision to terminate the secondment of a police officer did not involve a public function). Furthermore, even if a decision is amenable to judicial review, the available grounds of challenge in public law may be more limited in certain contexts, such as in a commercial context (see, for example, *The State of Mauritius v The (Mauritius) CT Power Ltd.* [2019] UKPC 27 and *Mercury Ltd v Electricity Corporation* [1994] 1 WLR 521).
>
> 44. Secondly, the courts may have regard to the nature of the function being performed to determine whether that function has a sufficient public element such as to make it amenable to judicial review. A number of considerations may be relevant which include, but are not limited to, the extent of government or other public authority involvement in the function, whether and to what extent the exercise of the function is performed against a background of statutory powers, and the nature and importance of the function. As it was expressed by Sir John Donaldson MR at page 381E-F of *R v Take-over Panel, ex parte Datafin Plc* [1987] 1 QB 825: "Possibly, the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."
>
> 45. Judicial review is also only available against public law bodies in respect of public law matters. Judicial review is not available to enforce purely private law rights such as rights derived from contract or tort. Such rights are enforceable by way of claims in the civil courts, not a claim for judicial review in the Administrative Court as explained in *R v East Berkshire Area Health ex p. Walsh* [1985] Q.B. 152."

52. Lewis LJ's summary in *R(Shashikanth)* helpfully draws together the different strands of principle on the 'public/private law divide' in Judicial Review. However,

in some cases (and in my view this is one), it can be helpful to tease apart those strands and consider each one in turn. I suggest there are three relevant strands, all of which serve a slightly different role in policing the 'public/private law divide':

a. The first strand is *the 'amenability' to review of the defendant's decision*. This was the issue in *R(Shashikanth)* where the defendant unsuccessfully argued a decision of a statutory adjudicator, resolving a dispute between a GP and a NHS Clinical Commissioning Group over the terms of a contract between them, was not amenable to Judicial Review. Lewis LJ considered that since the adjudicator was exercising statutory functions, there was a presumption their decision was amenable to review, as he said at [43]. He concluded that presumption was not rebutted merely because the adjudicator was deciding private law rights under the disputed contract. In other words, the adjudicator was exercising public functions, not private ones like the suspension in *R(Tucker)*. That is analogous to the purely 'private act' of a 'public authority' under s.6(5) HRA considered in *R(Weaver)* noted in *R(Bevan)* (to which I return). Another context in which 'amenability' of a defendant's decision arises is whether an ostensibly *private* body is actually exercising *public* functions as in *ex p Datafin*, which obviously does not arise in this case as the Defendant is plainly a *public* authority.

b. The second strand is the one relied on by the Defendant here –whether *the 'substance' of the Claimant's challenge is in private law even if its 'form' is public law*. That is exemplified by *Walsh*, where a nurse was dismissed for misconduct and claimed Judicial Review to quash the dismissal decision for procedural unfairness. Unsurprisingly, his claim was refused, not least as May LJ observed, he had an alternative remedy in unfair dismissal. But the main basis for the Court's decision was there was no 'public law element in the complaint to give rise to any entitlement to public law remedies', as Sir John Donaldson MR said at pg.166B. Likewise, at pg.173F, Purchas LJ said the issue was whether there was an 'abuse of process' adding at pg.178G in the 'obverse' sense to *O'Reilly v Mackman* [1983] 2 AC 237 where the Lords struck out a private law action as an abuse of process which should have been brought as a claim for Judicial Review with its procedural safeguards (e.g. the time limit). Purchas LJ observed at p.g178D-E:

> "[T]he inquiry ought to be directed towards the rights alleged to be infringed and the remedies sought, rather than the status enjoyed, qua contract or appointment, by the applicant….If the remedy sought is a purely private contractual remedy, then it is difficult to see how such a remedy could attract the supervisory powers of the court…."

Interestingly, in *R(Tucker)*, involving a Judicial Review challenge to the termination of a (quasi-)employee police officer's national secondment, Scott Baker LJ distinguished *Walsh* and preferred to analyse whether there was a 'sufficient public law element' in *the defendant's decision* rather than in *the claimant's challenge*. However, the principle in *Walsh* that Judicial Review is not available to enforce a purely private law contractual challenge remains, as recently recognised in Lewis LJ in *R(Shashikanth)* at [45].

c. The final strand in the 'public/private law divide' referred to by Lewis LJ in *R(Shashikanth)* at [43] applies even if the Defendant's decision is amenable to Judicial Review and the Claimant's challenge is legitimately one in public

law, but nevertheless the context *narrows the scope of the Court's review*, as in *Mercury* where Lord Templeman in the Privy Council said at pg.529B:

> "It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of Judicial Review in the absence of fraud, corruption or bad faith.'

As Lewis LJ noted in *R(Shashikanth)*, this principle was more recently reaffirmed by the Privy Council in *Mauritius Power*, where a public authority's decision not to enter into a contract to build a power plant was not an abuse of process given a pending claim for damages (see [39]) and was amenable to judicial review (see [43]), but failed on the narrowed scope of review explained in *Mercury* (see [66]). As Beatson J said in *R(Bevan)* at [54], this 'narrowed scope for review' in relation to public authority decisions whether to enter or terminate contracts can be a particular issue in the field of public procurement (I attempted to pull together the key cases there in *Dukes v Breckland* [2023] 210 Con LR 223 at [108]). This point was touched on in *Supportways*, the main authority relied on by Mr Straker, although as I will explain, *Supportways* itself was akin to *Walsh*: the substance of the claim was private law, even though its form was (partly) public law.

53. I turn first to the amenability to review of the Defendant's *Decision* in this case. In *R(Bevan)*, Beatson J at [45] described the defendant's submission was that a fee-setting decision was not amenable to Judicial Review because 'although the Council is a public body, the function it exercises when setting a fee under contracts with providers is a private law function', which Beatson J went on to reject. I accept the facts in *R(Bevan)* were slightly different: there was a general fee-setting decision for prospective individual placement contracts. Here, in their Skeleton (quoted above), Mr Straker and Mr Sanghera describe the Decision here as 'undoubtedly a contractual decision' on the fee increase in Clause 18.3 of the Contract and say 'to present it as a non-contractual decision would create a conflict between the contractual relationships and the 'supposed public law position'. However, as Beatson J said in *R(Bevan)* at [48] by analogy to the s.6 HRA case of *R(Weaver)*, it is necessary to 'focus on the nature of the act in the context of the body's activities as a whole'. Beatson J at [48] considered the fee decision in *R(Bevan)* was a public function which was not purely incidental or supplementary to the authority's statutory functions under (then) the NAA and 'the mere fact that the decision concerns the setting of a fee under a contract does not mean that it is to be characterised as a private act'. Likewise, here the Decision operates on two levels:

    a. The first level, as Mr Straker and Sanghera say, is in exercise of a contractual discretion under Clause 18.3 of the Contract, affecting all the contracts in that form between the Defendant and the various providers.

    b. However, the second level of the Decision is partly exercise of the Defendant's 'market-shaping duty' under s.5 CA to promote efficient and effective operation of the local market in care provision. The Decision affected the providers, not just under the Contract for that year, but as it acknowledged, their future sustainability, which is why the Decision stressed that the Defendant 'did not want to lose any provision from the local

> market' and it proposed a package of support for providers outside the fee. Moreover, the Decision affected residents (and their families) in providers' care, since as Beatson J added in *R(Bevan)* at [52], the level of the standard fee would have an effect on the level of any 'top-up' providers charged.

54. Therefore, whilst the facts are not on all fours with *R(Bevan),* in my judgment the result is the same. As Lewis LJ said in *R(Shashikanth)* at [43], where the decision-maker derives their power from statute (as the Defendant did here on the 'public law level' even if they were also exercising a contractual discretion on the 'private law level'), they will generally be exercising public functions, even if there is a 'private law element' in their decision, as indeed he found in *R(Shashikanth)* itself. Here, the Decision may have exercised *private law rights* under the Contract, but it *also* exercised *public functions*: the discharge of the Defendant's 'market-shaping duty' in s.5 CA. Indeed, *R(Bevan)* pre-dated s.5 CA, which has only increased the 'public law element' of a fee-setting decision. The hybrid nature of the Decision explains the central fault-line between Mr Straker and Mr Rule in submissions. Mr Rule focussed on the 'public law level' of the Decision and says he framed the Claimant's challenge accordingly targeting that level. Mr Straker focused on the 'private law level' and suggested Mr Rule's focus on public law was a case of public law form over private law substance. While I agree with Mr Rule that *the Defendant's Decision* was amenable to Judicial Review, I must now turn to Mr Straker's submission *the Claimant's challenge* in substance is in private law.

55. The Defendant's 'substance not form' argument relies heavily on *Supportways*, in which Mr Straker himself successfully appeared for the local authority. It was a challenge to a local authority decision under the 'Supporting People' scheme under the Local Government Act 2000. s.93 of that Act enabled central government to pay grants to local authorities who were required to administer those grants consistently with its guidance. That included a standard template contract between local authorities like the defendant Hampshire CC and welfare service providers such as the claimant Supportways, who contracted together. The council was required by guidance as well as the contract to undertake periodic service reviews. Its review of Supportways concluded the fees it received were too high and declined to renew the contract unless it accepted lower fees. Supportways refused and claimed Judicial Review but also specific performance of the original contract (which it claimed had not been properly reviewed in accordance with its terms). Therefore, Supportways' challenge was a mixture of private and public law claims and remedies. The Judge held the contract had effectively terminated in private law, but the review was in breach of contract and he ordered specific performance of another review and further found it was unlawful in public law. The Court of Appeal allowed the appeal against specific performance, holding there was no contractual right to another review, but also held there was an insufficient public law element in the claim to give rise to remedies in Judicial Review. Neuberger LJ (as he was) said (my italics):

> "[35] In my judgment, *the basis of the company's case* was not in public law, but only in private law. *The company's complaint* was that the council had failed to comply with the agreement, and the company accordingly was seeking to enforce the council's compliance….[S]uch a complaint and such enforcement would appear to me respectively to involve a private law claim and a private law remedy, both of which are contractually based…

> [36]… The fact that a contractual obligation is framed by reference to a statutory duty does not, in my view, render that obligation a public law duty. Of course, where the statutory duty is owed to a contracting party *independently* of the contractual obligation, *he can normally expect to be able to seek a public law remedy by reference to the duty, as well as, or instead of, a private law remedy by reference to the obligation*. However, in the present case, the council's public law duty…under s 93, was owed to the Secretary of State in relation to the provision of grants. There was…no question of [it]….being owed to providers such as the company.
>
> [37] [Counsel for the company] next relied on the fact that the nature of the agreement, involving as it did the council performing public administrative functions, was such that *a claim brought under it would be a public law claim*. That cannot, I think, be right. Virtually any contract entered into by a local authority, almost by definition, will involve it acting in such a way, as otherwise it would be acting ultra vires. Yet, it is clear that…in the case of alleged breaches of many such contracts, a private law claim is the only type of claim which can be brought.
>
> [38] Thus, the mere fact that the party alleged to be in breach of contract is a public body plainly cannot, on its own, transform what would otherwise be a private law claim into a public law claim. There are, of course, circumstances where, in a contractual context, a public body is susceptible to public law remedies…
>
> *However, where the claim is fundamentally contractual in nature, and involves no allegation of fraud or improper motive or the like against the public body, it would, at least in the absence of very unusual circumstances, be right [in] principle, to limit a claimant to private law remedies*.
>
> [42] *However, it cannot be right that a claimant suing a public body for breach of contract, who is dissatisfied with the remedy afforded him by private law, should be able to invoke public law simply because of his dissatisfaction, understandable though it may be*…[I]t would place a party who contracts with a public body in an unjustifiably more privileged position than a party who contracts with anyone else, and a public body in an unjustifiably less favourable position than any other contracting party.
>
> [43] Equally importantly, it appears to me that it would be wrong in principle *for a person who would otherwise be limited to a private law claim to be entitled to base his claim in public law merely because private law does not afford him a sufficiently attractive remedy.* It is one thing to say that, because a contracting party is a public body, its actions are, in principle, susceptible to judicial review. It is quite another to say that, because a contracting party is a public body, the types of relief which may be available against it under a contract should include public law remedies, even where the basis of the claim is purely contractual in nature…"

56. In *Supportways*, as Neuberger LJ had anticipated in the sentence I have italicised in [38], he went on at [45] to quote Lord Templeman in *Mercury*'s observation at pg.529B (quoted above at paragraph 53(c)) about the narrow 'scope of review' (i.e. fraud, corruption or bad faith) of a public authority decision to enter or determine a

contract. However, importantly, Neuberger LJ at [45] then quoted another observation by Lord Templeman in *Mercury* at pg.429F where he later said:

> "The causes of action based on breach of statutory duty, abuse of a monopoly position and administrative impropriety are only relevant if the causes of action based on contract are rejected. If the causes of action based on contract are rejected, the other causes of action will only constitute attempts to obtain, by the declaration sought, specific performance of a non-existing contract. The exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged."

Whilst *Walsh* was not cited in either case, both this point made by Lord Templeman in *Mercury* at pg.429F and the consistent theme of Neuberger LJ's analysis in *Supportways* at [35]-[43] which I have italicised above are focussed not on *the defendant's decision* in either case (as in *R(Shashikanth), Datafin, R(Tucker)* or indeed *R(Bevan)*), but on *the claimant's claim or remedy sought*, just as in *Walsh*. Neuberger LJ's observations that it would be wrong to use public law to get round an absence of remedies in private law, or to improve upon them, chimes with *Walsh*. Moreover, whilst Mummery LJ in *Supportways* at [52] described the issue there as one of 'amenability' to Judicial Review, he noted at [54] that Mr Straker had not suggested the mere presence of a contract made it 'non-amenable' (which would have been inconsistent with *Mercury* where Lord Templeman specifically said at pg.526D the decision to terminate a contract there *was* amenable to judicial review). Mummery LJ at [62] concluded the claim was 'essentially for breach of contract', just as Mr Straker again argues in this case: he once again focusses on *the claim*.

57. However, as Beatson J pointed out in *R(Bevan)* in analysing *Supportways* at [51]:

> "In …*Supportways…*the substance of the dispute was whether or not a contract between the Council and Supportways had come to an end in accordance with its terms… Mummery LJ at [60]. Supportways's complaint was 'solely based on the contention that the Council failed to comply with its (purely contractual) obligation…': Neuberger LJ at [40]."

Supportways was distinguished on a similar basis by Fordham J in *R(CNE)*. It concerned, as Mr Straker says, a 'provider contract' of a kind similar to the one here (which Fordham J called 'the SP Contract Arrangement'), but with a specific clause not present here: a timetable for annual indexation consultation. Holding that contractual clause was relevant 'context' to a conventional *Tameside* challenge, but holding the decision was lawful, Fordham J summarised the authorities at [33]:

> "(i) In…*Supportways*, at para 36, the then Neuberger LJ said this:
>
> > "The fact a contractual obligation is framed by reference to a statutory duty does not….render that obligation a public law duty. Of course, where the statutory duty is owed to a contracting party independently of the contractual obligation, he can normally expect to be able to seek a public law remedy by reference to the duty, as well as or instead of a private law remedy by reference to the obligation…"
>
> (ii) In *Birmingham Taxi* [2009] LLR 727, para 41, Wyn Williams J said:
>
> > "….In my judgment, a court should be extremely cautious about imposing public law duties upon the contracting party which have the effect of diluting or altering contractual terms freely concluded."
>
> (iii) In *British Gas* [2023] EWHC 737 at [168], the Divisional Court said:

> "The commercial context is important because the context is one in which the court is called upon to perform a relatively 'light touch' intensity of judicial review. This is far from a context such as that concerning, for example, the liberty of the individual, in which a more intensive scrutiny would be called for."

(iv) In *[Northumberland]* paras 19 and 32…Sullivan LJ said:

> "It is important to remember that, provided some inquiry into the relevant factor to which due regard has to be paid is made by the decision-maker, 'it is generally for the decision-maker to decide on the manner and intensity of the inquiry to be undertaken into any relevant factor' … [to] produce some form of arithmetical calculation setting out the figures attributed to the individual cost elements of providing care, such as: occupancy, staff, operating costs, management and administration, capital values per bed and financing costs … is one way of having 'due regard for the actual costs of providing care' but it is not the only legally permissible way."…..

36 In *Bevan*, Beatson J explained…*Supportways* was a case where the substance of the dispute was whether or not a contract had come to an end in accordance with its terms, and the complaint was 'solely' about whether the…authority had failed to comply with a 'purely' contractual obligation.

38…How does the content of the provisions within an SP Contract Arrangement fit alongside the contextual shape of the conventional grounds for judicial review? In my judgment, the principled position is this:

(i) The contextual application of conventional judicial review grounds can be informed by the contents of an SP Contract Arrangement. This cuts both ways, where the agreement makes express provision for the local authority's decision-making approach in setting care home fees. First, the judicial review court may need to ensure that conventional judicial review standards—contextually applied—do not go beyond an express provision for the local authority's decision-making approach. Secondly, the judicial review court may need to ensure that conventional judicial review standards —contextually applied—do not fall short of an express provision for the local authority's decision-making approach. No more; but no less.

(ii) This idea of principled convergence, in certain situations, of public law duties and the contents of an SP Contract Arrangement—as to the decision-making approach—is consistent with the idea behind the *Supportways* principle. It fits with the *Birmingham Taxi* principle about a contractually agreed procedure, endorsed in *Bevan* [at] para 54. The judicial review court may need to be cautious so as not to cut across the contract. The content of conventional judicial review grounds—contextually applied— may match the decision-making approach in the SP Contract Arrangement…"

58. Mr Straker made three submissions about *R(CNE).* I shall return at the end to his third submission about what Fordham J said about relief had he upheld the claim. I agree with Mr Straker's second submission that *R(CNE)* is distinguishable from this case (although for rather different reasons, as I shall explain). However, with full acknowledgment for Mr Straker's huge experience and authority in public law (as typified in *Supportways*), I respectfully disagree with his submission that Fordham

J's approach in *R(CNE)* is inconsistent with *Supportways*. As the quotation above makes clear, Fordham J was careful to distinguish *Supportways,* on a similar basis as had Beatson J in *R(Bevan)*: that neither case involved a claim solely based on the contract, but only one where a contract was part of the context (to differing extents) of a conventional public law challenge of a decision amenable to Judicial Review. In my respectful judgment, that was an entirely legitimate basis for distinction.

59. In my view, *Supportways*, *Walsh*, *Mercury*, *R(CNE)* and *R(Bevan)* can be seen as at different points along a spectrum of a mixture of public and private law elements, rather than in separate watertight categories. At one end of the spectrum is *Supportways*, where in essence the whole basis of the claim was a contract between the claimant and defendant. Indeed, Supportways *in the same claim* sought private law remedies, with public law remedies effectively in the alternative. In *Walsh*, the employee sought only public law remedies (in modern language, a quashing order) but where the Court considered the substance of his claim was really in private law (which also afforded an alternative remedy). In *Mercury*, there was another mixed public/private law claim but the Privy Council preferred to dismiss it on a narrowed scope of review rather than on the same basis as the Court later did in *Supportways*. (Indeed, in the more recent similar case of *Mauritius Power*, even a parallel private law claim for damages alongside the Judicial Review claim did not mean the latter was an abuse of process). In *R(CNE)*, the terms of the contract were central 'context' to a conventional *Tameside* public law claim which again failed on its merits. Finally, in *R(Bevan)*, the claim was entirely *independent* of the contract (to use Neuberger LJ's word in [36] of *Supportways*), as it pre-dated particular placement contracts, but where the decision clearly did *impact on* those contracts.

60. The real question is where on that spectrum the present case is - and whether it is either independent of the Contract like *R(Bevan)*, or the Contract is only its context like *R(CNE)*. I agree with Mr Rule that the claim *is* independent of the Contract and unlike *Supportways* has a 'sufficient public law element' for five reasons:

    a. Firstly, the claim impacts on third parties. This is one of the Defendant's own submissions: that quashing the Decision would unsettle arrangements with many providers who have accepted it. I return to that at the end of this judgment. Likewise, the Claimant also says its claim affects third parties, not only providers (whether or not content with the Decision), but also residents. As in *R(Bevan)* at [52], they may be asked to pay more in 'top-ups' for the providers to remain viable (since the IPA Cl.8 is indexed based on the actual cost of care). Indeed, some residents' Art.8 ECHR rights may be engaged if their providers close particular care homes. As I will also emphasise at the end of the judgment, all these effects are asserted more than proven on current evidence, but it is not disputed the claim will have a direct impact on third parties, which makes the case different than *Walsh*.

    b. Secondly, unlike *Walsh*, *Supportways* and indeed *Mercury*, whilst the claim does involve a contract, the Claimant is not the contracting party. This is not just an issue of the Claimant's (alternative) remedies, as I discuss next. After all, the Contract gives a contractual remedy to residents or sponsors even though they are not parties, under Clause 25 and the Contracts (Rights of Third Parties) Act 1999. More fundamentally, the Claimant's third-party status illustrates that its challenge does not rely on its private law rights, as

it has none. Indeed, a similar challenge theoretically could have been made by anyone, subject to standing: *R v IRC exp NFSB* (which I have already resolved in the Claimant's favour, save on Ground 5). As with its impact on third parties, that is characteristic of a 'sufficient public law element'.

c. Thirdly, as I found earlier, the Claimant does not have an alternative remedy in contract, again unlike *Walsh*, *Supportways* and *Mercury* (and indeed *Mauritius Power* where the claimant had even brought a private law claim for damages). Moreover, in this case, the Claimant does not seek damages (available in Judicial Review providing it is not the only remedy sought: CPR 54.3(2)), or any other classic private law remedies like specific performance as in *Supportways*. Here, the Claimant only seeks classic public law remedies in the Claim Form 'remedy box' and the SFG 'prayer':

> "…(i) A quashing order for the decision of 4 July 2024;
> (ii) A declaration of the unlawful conduct of the Defendant; and/or
> (iii) An order the Defendant shall undertake a lawful consultation and thereafter shall lawfully reconsider the fees it sets for residential care homes paying proper regard to the relevant considerations."

Whilst Mr Straker and Mr Sanghera's Skeleton Argument suggests the 'lawful consultation' would have to be pursuant to the Contract (or it would breach it), that presupposes there is no other lawful basis for consultation. The SFG at para.60 asserts a contractual duty to consult, but also a Common Law one, which I address under Ground 1. Mr Rule's Skeleton says the object of this claim is for the Defendant to revisit its unlawful decision-making and arrive at a lawful decision by a lawful and fair process, not for the Court to fix the fees at a particular level or award particular damages.

d. Fourthly, the Claimant's claim, unlike in *Supportways*, *Walsh*, *Mercury* and even *R(CNE)*, is truly *independent* of the Contract. As Mr Rule pointed out, in his SFG *Grounds* themselves as opposed to the *background*, the Contract is only *mentioned*, let alone *relied on*, (i) in the asserted contractual duty to consult in Ground 1 at para.60 and in passing at para 67(b). (ii) in Ground 2 at SFG paras. 73(i) and (xi). This is why this case is distinguishable from *R(CNE)*, where Clause 17.4 of the contract there was *central* to the claim. This claim has less of a 'private law element' than *R(CNE)* and is further away on the spectrum from *Supportways*. However, that is not to prioritise form over substance, as Mr Straker complains of Mr Rule's submissions. As I said earlier, their different perspectives on the case reflect their different focus on the two levels of the Decision: Mr Straker focusses on its 'private law level' as an exercise of a contractual discretion under Clause 18.3 of the Contract, Mr Rule on its 'public law level' as an exercise of the Defendant's 'market-shaping duty' under s.5 CA. The truth is that the Decision was *both*. However, *the Claimant's challenge* essentially targets its 'public law level'. By contrast to what Neuberger LJ said in *Supportways* at [36], the Claimant here can - indeed *must* – (it has no private law rights) rely on statute and guidance 'instead of' the Contract; and by contrast to what he said at [42]-[43], here it does not seek to supplement its (non-existent) private law rights.

e. Finally, unlike *Supportways*, *Walsh*, *Mercury* and even *R(CNE)*, the present claim raises five (remaining) classic public law grounds of challenge. Ground 1 is failure to consult (which as I shall explain, is independent of the

> Contract notwithstanding the way it was initially put at para.60 SFG). Ground 4 alleges failure to take into account statutory guidance and Ground 3 alleges breach of the Public Sector Equality Duty, neither of which have anything whatsoever to do with private law generally, still less the Contract. Nor did Ground 5, although I have dismissed that based on standing. Ground 2: the failure to take into account relevant considerations, at least insofar as those considerations are expressly or impliedly required by statute, is a classic public law challenge. Ground 6 is a conventional public law complaint, albeit one that could also be made in breach of contact: *Braganza*. However, Grounds 2-5 do not sound in private law *at all*.

For those reasons, I conclude there is a 'sufficient public law element' to the claim and I reject the central submissions of the Defendant on this issue.

61. Nevertheless, that last point about Ground 6 leads me to return to the 'scope of review' in the sense discussed in *Mercury*, since after all this is another case featuring a commercial contract, even if it is less central in this case than in *Mercury*. As discussed in *Mercury* and reaffirmed in *Mauritius Power*, a public authority's decision *not to enter or renew or to determine* a commercial contract is only amenable to judicial review on a limited basis, as in the procurement field. However, the present context is a public law-challengeable decision about fees that *also* takes effect through a commercial contract. That is another basis of distinction with *Mercury* along with Beatson J's point in *R(Bevan)* at [51] that *Mercury* did not involve any restriction in statute or guidance on the decision-maker, by contrast to a decision in relation to care home fees. Indeed, as noted, s.5 CA has since *R(Bevan)* added another layer of statutory regulation to that decision. Accordingly, at [52]-[53] Beatson J largely rejected a *Mercury*-style 'narrow scope of review':

> "52. [The Council submitted] in the light of the contractual context, the scope of review is narrow (see *Mercury…)* and normally confined to fraud, corruption or abuse of power. It is said to be common ground that none of those exists in the present case. This may certainly be true as far as fraud and corruption are concerned. But 'abuse of power' is an umbrella term that is often used... to refer to the conventional grounds of failure to take account of relevant considerations or to exclude irrelevant considerations, propriety of purpose and perversity, *Wednesbury* unreasonableness or irrationality. The claimant…rel[ies] on a number of these.
>
> 54. Subject to two qualifications, in a case such as this the scope of review in principle extends to all the conventional public law grounds. The first qualification is the caution expressed by Stanley Burnton J in the *Birmingham Care Consortium* case at [31] - [32] about the court interfering in a process in which the local authority is in effect engaged in a contractual negotiation with providers, who may wish to improve their contractual negotiating position by recourse to public law principles….[The other relates to public procurement contracts]…"

Whilst Lord Carnwath in *Gallaher Group v CMA* [2018] 2 WLR 1583 (SC) at [41] suggested the phrase 'abuse of power' 'adds nothing to the ordinary principles of Judicial Review' such as legitimate expectation and irrationality, as Mr Straker himself pointed out, it was the traditional basis for Judicial Review (see e.g. [69] of *R v North East Devon Health Authority exp Coughlan* [2001] QB 213 (CA).

Beatson J in *R(Bevan)* was making a similar point not on *the current role* of 'abuse of power' as a concept, but what Lord Templeman in *Mercury* over a decade earlier had *meant*. One can debate whether Lord Templeman did indeed mean 'abuse of power' to mean all 'the conventional grounds' of Judicial Review. Certainly, Lord Sales in *Mauritius Power* at [66] in reaffirming Lord Templeman's approach in *Mercury* at pg.429A-B quoted above called it 'the limited scope for a judicial review challenge'. However, the real point is not that '*Mercury*-style review' permits all the conventional grounds of review, but rather that the present context is *different* from *Mercury*, for the reasons Beatson J explained in *R(Bevan)*. Therefore, it is unnecessary in this case to adopt the narrowed scope of '*Mercury*-style review'.

62. Nevertheless, that does not mean in the present context that 'anything goes'. In *R(Bevan)* at [55]-[58], as quoted above at paragraph 41(b) of this judgment, Beatson J went on to stress the caution required with challenges (i) that in substance if not in form were really to the merits of the decision; (ii) of 'failure to take into account relevant considerations' as it was for the decision-maker to decide on the intensity of inquiry into a given factor; (iii) to the weight given to a relevant factor actually taken into account, that is for the decision-maker subject to irrationality; or (iv) which engaged with a decision-maker on complex economic and technical questions. Moreover, as quoted above at paragraph 41(c) of this judgment, in *R(South West Care*) at [25] Singh J pointed out the 'relevant factors' may well point in different directions (especially I would very respectfully add since an authority's resources are relevant as Hickinbottom J said in *R(Forest Care)* quoted at paragraph 41(a) above). As Singh J then added, the balance to be struck is a matter for the authority subject to irrationality. These principles were then endorsed by Sullivan LJ in *Northumberland* and were summarised by Fordham J in *R(CNE)* along with other cases he cited at [33] (which I quoted at paragraph 57 above) at [40]:

> "I have repeatedly referred to judicial review grounds as contextual. It is a golden rule of public law that conventional grounds, as Beatson J described them in *Bevan* are context-specific in nature and application. The present context does not warrant a 'close scrutiny' approach seen in a human rights context.....All of those conventional grounds for judicial review which fall within the overarching principle of public law reasonableness must be applied with full recognition of the latitude of the primary decision-maker. This is a supervisory, not a substitutionary, review jurisdiction."

63. It seems to me such 'light touch review', as a case cited by Fordham J in *R(CNE)* at [33] had called it, has implications for some of the Grounds of challenge in this case, although only by way of confirmation to observations I made when I granted permission. At that stage I suggested Grounds 2, 5 and 6 added little to Grounds 1, 3 and 4 on which I encouraged the parties to focus - and I am grateful they have. Nevertheless, having heard full argument, I can take those preliminary observations on the case further. I have already dismissed Ground 5 (breach of Art.8 ECHR) due to the Claimant's lack of standing (strictly, that it is not a 'victim' under s.7 HRA) but said that residents' Art.8 rights may be of relevance to Ground 3: the Public Sector Equality Duty under s.149 Equality Act 2010 ('EqA'). Moreover, whilst irrationality is an available ground of review in the present context as in Ground 6, as confirmed by *R(Bevan)*, *R(South West Care)* and *R(CNE)*, it still risks trespassing into the merits of the impugned fees decision, which will typically involve not only commercial considerations but budgetary ones and understanding of the whole

nature of the market for which the authority is responsible under s.5 CA. Whilst of course the Court is constitutionally competent to consider the rationality of such a decision, I acknowledge, as Beatson J did in *R(Bevan)* at [58], that the Court's institutional competence and expertise is not the same as the authority which should be afforded respect. Overall, in my view, it will take a very clear case of irrationality, having made full allowance for that respect, to justify interference with an authority's decision on standard fees for care homes. So, I do not dismiss Ground 6, but it adds little, save the point in paragraphs 88-89 SFG relying on Saini J's analysis in *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) at [31]-[34], namely that the Decision would be irrational if there is an unexplained evidential gap failing to justify the conclusion: and so inadequate reasoning. I consider that with Ground 3.

64. I take a similar approach with Ground 2: failure to consider relevant considerations. As with irrationality, this often-used but rarely-successful ground of challenge risks impermissibly trespassing into the merits of a decision. The present case is an example: various alleged 'relevant considerations' are said not to have been considered, but many of them are simply the 'considerations' the Claimant thinks 'relevant', not necessarily considerations that a decision-maker would act unlawfully in not taking into account, especially in a 'light-touch' context like the present. However, that problem is avoided if the focus remains not considerations the Claimant asserts to be relevant, but considerations *the statute* (in particular s.5 CA) expressly or impliedly *requires to be considered* (which is also consistent with binding authority, as I shall explain). That ensures 'light touch review' and avoids any impermissible substitutionary approach, since I can only scrutinise the Decision for *unlawfulness*, which is always a matter for the Court to assess and determine. Since Ground 2 overlaps substantially again with Ground 4, I will consider it there. However, first I will address Ground 1: inadequate consultation.

Ground 1: Did the Defendant fail to consult adequately with the Claimant ?

65. I phrase the essential question in Ground 1 as whether the Defendant failed to consult adequately with the Claimant, because the latter cannot bring a claim on behalf of a provider for inadequate contractual consultation under Clause 18.3. As I have said, the claim is independent of the Contract and the Claimant has no remedy under it, so it follows that if Ground 1 is to succeed, the Claimant must establish: (i) a right to consultation at common law, rather than under the Contract; (ii) inadequate consultation at common law on the *Gunning* principles (as quoted above but repeated below); and (iii) that inadequate consultation requires a *public law remedy* (since this is not and could not be a claim for breach of Clause 18.3).

66. The leading case of *Moseley v Haringey LBC* [2014] 1 WLR 3947 (SC) was about a *statutory* public consultation about reducing Council Tax support, that Lord Reed, Lady Hale and Lord Clarke said made it different than common law consultation due to legitimate expectation, as with residents over closure of their care homes in *R v Devon CC exp Baker* [1995] 1 All ER 73. In *Moseley*, Lord Reed said at [35]:

> "35. The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common

> law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v SSHD* [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by…*Baker* and *R v North East Devon Health Authority exp Coughlan* [2001] QB 213 with which the *BAPIO* case might be contrasted."

67. Here, there was no statutory duty to consult the Claimant (or indeed providers) in relation to the fee decision and as I have said, *the Claimant* (as opposed to its member providers) cannot rely on the Contract. The question is whether it had a legitimate expectation of consultation by (i) promise; *or* (ii) established practice of consultation, as Simon Brown LJ (as he was) explained in *Baker* at pg.89(4) and Singh J recognised in *R(South West Care)* at [43] As to the 'promise', Sales LJ (as he was) in *R(Gerber) v Wiltshire CC* [2016] 1 WLR 2593 (CA) at [40] said there must be a 'clear and unambiguous promise' of such consultation. In my judgement there was, in the letter from the Defendant to the Claimant of the 7th May (my italics):

> "There will be a period of consultation when reviewing the pricing structures that will be reasonable, proportionate and fair where *SARCP* will be able to make submissions and within the *Gunning* principles."

As Mr Rule says, this was a clear and unambiguous promise *to the Claimant*, not just its member providers (who had a distinct right to consultation under Clause 18.3 of the Contract in any event). Even if not a 'promise', this statement reflects the long-established prior practice, which Mr Bull describes in his statement and is not disputed, of the Defendant consulting the Claimant about contracts and fees, which accordingly had a 'legitimate expectation' it would consult with it this time. I do not agree with Mr Straker that the Defendant's common law duty to consult the Claimant diluted, altered or 'cut across' its contractual duty to consult providers (c.f. *Birmingham Taxi* quoted in *R(CNE)* at [33(ii)] and at paragraph 57 of this judgment above). On the contrary, the different duties to consult were in harmony with each other because they fed into one consultation exercise with the providers *and* the Claimant. Moreover, the Defendant obviously did not think its promise to consult the Claimant undermined its duty to consult providers under the Contract.

68. Furthermore, as the Defendant's letter of 7th May stated, this consultation with the Claimant would be on 'the *Gunning* principles', approved for common law consultation in *Baker* by Simon Brown LJ at pg.91G-J:

> "First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and… fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Those four '*Gunning* principles' were in turn approved by Lord Wilson in *Moseley* at [25], who stressed at [23] that however a duty to consult is generated, the same common law duty of fairness and *Gunning* principles apply. Whilst Lord Reed at

[36]-[38] of *Moseley* doubted that with a *statutory* consultation, as noted he differentiated common law consultation as in *Baker* and *Coughlan* where the Court of Appeal at [108] made the same point as Lord Wilson later did. As the present case also involves common law consultation, the *Gunning* principles apply - as indeed the Defendant promised the Claimant that they would. I consider each one.

69. On the first *Gunning* criterion, Mr Rule submits 'the consultation was not at a time when the proposal was at a formative stage', on the contrary it was an after-thought after the Defendant had already decided not to increase the annual fee at all: breaching the Contract with providers not just in going below 1.4% but also in failing to consult them. If there had not been a subsequent process, there would have been a wholesale failure to consult, as Singh J found in *R(South West Homes) (No.1)* as I now call it to differentiate it from the challenge to the next year's fee decision found lawful in *R(South West Care) v Devon CC (No.2)* [2012] EWHC 2967. I recognise this case is different, but those cases invite focus on *the particular consultation under challenge*. This is the May 2024 proposal of 1.4%, not the earlier '0% rise' plan and the requirement was to consult on *the 1.4% proposal* 'at a formative stage'. If the '0% rise' plan could never be 'cured', there would be a disincentive to correct a failure to consult. In reality, the '0% rise' became a 'discarded option' and whilst fairness may require consultation about 'arguable but discarded alternatives', as Lord Wilson said in *Moseley* at [27]-[28]), the '0% rise' option was not 'arguable'. It was also rightly 'discarded' as it should never have been proposed in the first place, especially without consultation – providers were only told weeks afterwards on 16th April 2024. However, by 10 days after that on 26th April, the Defendant had back-tracked and floated a 1.4% rise with providers instead. Whilst it did not formally start consultation until 8th May, there was earlier informal discussion (including the promise on 7th May to consult the Claimant) and at that stage the Defendant's proposal of 1.4% was still a 'formative' idea. In my judgement, there was no breach of the first *Gunning* criterion on the 1.4% proposal.

70. It is convenient next to consider the third *Gunning* criterion: 'that adequate time must be given for consideration and response'. The Claimant's complaint relates to the consultation letter of 8th May, which on one hand proposed a timetable where consultation would end on 19th June, but on the other hand said (my italics):

> "This proposal is being placed before Cabinet for their consideration *and comment/ approval within the month*. Please can you consider the proposed increase and respond to by 5pm Wednesday 19th June 2024..."

Mr Rule complains that this letter gave inadequate time' as it stated 'the proposal' would go back to Cabinet 'within the month' i.e. by the end of May. If that had indeed been the timetable, there may well have been 'inadequate time' to respond (although much longer than the few days in *Baker*). But on a fair reading of a (badly-drafted) letter, what was being said (as happened with Mr Tomlin's report for Cabinet on 21st May discussed above at paragraph 30) was the Defendant's 'proposal' to delay implementation of the earlier Cabinet approval of 0% to allow consultation on the new proposal of 1.4%. That is why the 8th May letter specifically set a timetable for responses by 19th June. Had there been any real doubt due to the unfortunate wording, the Claimant could have clarified with the Defendant and I note it was able to submit an extremely detailed consultation response on 11th June. Whilst the Claimant also complains the consultation did not include residents, there

is no evidence they had a 'legitimate expectation' of consultation. Although, as I said, it had an impact on them: it was not a proposal to close their home like *Baker* and *Coughlan*. Therefore, I find the third *Gunning* criterion was not breached.

71. I return to the second *Gunning* criterion: 'the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response'. Three points relevant to this principle emerge from *Moseley, Baker* and *Coughlan*. Firstly, in *Moseley* at [26] Lord Wilson suggested 'the degree of specificity may be influenced by the identity of the consultees'. Secondly, at [26] he also endorsed Simon Brown LJ's observation in *Baker* at pg.91 that 'demands of fairness may be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit'. Thirdly, in *Moseley,* both Lord Wilson at [25] and Lord Reed at [39] endorsed what the Court of Appeal had said on the second *Gunning* principle in *Coughlan* at [112]:

> "[C]onsultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The SFG makes three distinct complaints here: omission of relevant considerations like actual cost of care etc; undue focus on resources; and failure to propose alternatives as in *Moseley*. However, *Moseley* was a public consultation, here the Claimant was an expert who knew full well the relevant considerations and prepared a very detailed response addressing all of them. It also had Mr Tomlin's explanation of the Defendant's position (including the budgetary and capacity issues) at the earlier meeting on 1st May and Mr Tomlin's public reports. It was perfectly able to suggest alternatives and did. The second *Gunning* criterion was not breached.

72. Finally, I turn to the fourth *Gunning* criterion: 'the product of consultation must be conscientiously taken into account in finalising any proposals'. This principle focusses not so much on the consultation *process*, but on its *outcome*. It was not considered in any detail in *Moseley, Baker* or *Coughlan*, but the principles were cited by Ouseley J in *R (Buckinghamshire CC) v SoST* [2013] EWHC 481 (Admin): about public consultation on the HS2 Rail Route (later upheld by the Supreme Court but without consideration of the consultation point: see [2014] 1 WLR 324). One of the few challenges Ouseley J upheld was that the Transport Secretary had not taken consultation responses on the compensation scheme into account conscientiously and could not rely upon officials' knowledge unless they had informed him of relevant matters. As Ouseley J summarised at [830]

> "[I]t is the Minister's conscientious consideration of the response which matters: [*NAHS v Department of Health* [2005] EWCA Civ 154]. The extent of the consideration given by officials is only relevant to the extent to which they were sufficiently informed to present the relevant material to the Minister for decision…."

(I cannot resist the observation that, as Ouseley J noted at [821], the judgment in *NAHS* was by Sedley LJ - who as counsel had coined the *Gunning* criteria in the first place - and who rejected at [37] the idea that an ignorant Minister could rely

on the knowledge of officials as 'The Law according to Sir Humphrey Appleby'). An example of the fourth *Gunning* criterion not being met in the present context (which I referred to in the permission decision) is the judgment of HHJ Raynor QC in *R(Sefton Care) v Sefton Council* [2011] EWHC 2676 (Admin). It was described by Sullivan LJ in *Northumberland* at [34], without criticism, as turning on its own facts. However, it is a useful example of an authority's failure properly to consult, including not conscientiously considering responses. HHJ Raynor said at [89(c)]:

> "The Defendant did not engage with the Claimants on the concerns they expressed, including the contention the basic fee was set at a level 'far below the price necessary to allow a viable sector' and at a rate which did not reflect the actual costs of providing care. The[ir] concerns regarding the future were simply discounted, with no attempt being made by the Defendant to obtain substantiation of th[eir] contentions. There is no evidence whatsoever the claimants' views and concerns were taken into account either 'conscientiously' or at all…when the ultimate decision was taken by the Council. Indeed, it does not appear that those concerns and expressions were ever communicated to the Cabinet or Council."

73. The present case is not quite as clear-cut as *R(Sefton)*, which was a wholesale failure to consult, including a failure to consult at a formative stage or to engage in any dialogue. Nevertheless, HHJ Raynor's criticism of failure conscientiously to consider consultation responses in *R(Sefton)* resonates in the present case. The Claimant had submitted an extremely-detailed 15-page consultation response, which as I summarised at paragraph 32 above, did not just mention the Contract and pricing schedule, but the need to consider 'the actual costs of care' rather than just the Defendant's budget, inflation and National Living Wage increases, the impact of squeezing costs on standards and comparable authorities adopting higher increases. The Decision acknowledged none of these factors. It effectively ignored them, let alone 'considered them conscientiously'. Instead, it sought to reassure the Claimants with mitigating support measures. I repeat the key part of the Decision for ease (with my italics):

> "*Following a review of the responses, the City Council will be going ahead with the proposed 1.4% increase for placements at the band 1 and band 2 rates ['Residential' and 'Residential Enhanced']...backdated to 8th April.* During the next 12 months we will be developing a package of support for care home providers, such a moving to payment on gross, removing restrictions on uplifting third party contributions, reviewing of training offer and developing our new care home contract in partnership with yourselves. We will be looking at how we can utilise Care Cubed [a updated economic tool for care costs] to inform and benchmark future fee uplifts. I want to stress again, that whilst the City Council's commissioning intentions are to support people to remain in their own homes for a long as possible, we do not want to lose any provision from the local market and I am happy to discuss our commissioning intentions with any provider on an individual basis to explore options for future working."

I have italicised the only 'reason' for (as opposed to mitigation of) the Decision to raise fees only by 1.4%, which simply baldly stated that the original proposal had been adopted, without explaining why by reference to the Defendant's own justification in Mr Tomlin's reports, let alone by 'conscientious consideration' of

the Claimant's very detailed consultation response, indeed even the stand-out points in it like inflation and the National Living Wage. If the Decision had referred to Mr Tomlin's Cabinet reports and the 1st May meeting to explain the below-inflation rise and even very summarily replied to all the major headings in the Claimant's response, that would have sufficed. But as it is, unlike Singh J in *R(South West Care)*, I have no statement from the decision-maker to explain what they knew (and Mr Tomlin's knowledge or reasoning cannot be attributed to them: *NAHS* - even if they were less senior than him as it appears), or how they 'conscientiously considered the consultation', even if that had been admissible to amplify their reasoning: c.f. *R v Westminster CC exp Ermakov* [1996] 2 All ER 302 (CA). Therefore, I have no hesitation in concluding the fourth *Gunning* criterion was clearly breached.

74. However, that does not inevitably mean the Decision must be quashed, the consultation exercise must be re-run and the decision must be re-made. In *Moseley* at [33], Lord Wilson held that whilst the claimant was entitled to a declaration that consultation had been unlawful, it would not be proportionate on the facts to order the defendant to re-undertake the consultation process which had been in place for two years. Of course, that was a statutory consultation, which is not the same as the common law as Lord Reed said in *Moseley*. But similarly in *R(South West Care) (No.1)*, Singh J found at [45]-[50] there had never been meaningful consultation and granted a declaration in those terms at [61]-[62], yet declined at [52]-[60] to quash the resulting decision because of delay by the claimant in that case and detriment to good administration if the fee decision were disturbed. However, there is a difference between declining to quash a decision if its only unlawfulness was a failure to consult as in *R(South West Care) (No.1)* and the position on relief if it was unlawful in other ways. Therefore, I will deal with the other grounds of review, but more briefly (as Mr Straker did), as the clear failings of the Decision I have found on Ground 1 are reflected in my conclusions on the other grounds. I turn next to Grounds 4 and 2 together; then consider Grounds 3 and 6 together (and mention Ground 5 again in passing); before I finally deal with relief and Singh J's analysis of that in *R(South West Care) (No.1)* in the final section.

Grounds 4 and 2: Failing to follow guidance or consider relevant statutory factors

75. The statutory duty to follow statutory guidance under s.78 CA is subject to 'good reasons' for departure, as I explained at paragraph 42(b) above. But as Mr Rule pointed out, it is not suggested by the Defendant there were good reasons to depart from guidance applicable to the Decision. However, as I explained at paragraph 39 above, the predecessor guidance under LAC (2004)20 is no longer applicable. Nevertheless, as I explained at paragraphs 40-42 above, that previous guidance and the case-law on it remains relevant to Ground 2 which I discuss below and as context to the new Care Act 2014 ('CA') Guidance that I focus on in Ground 4. The Claimant's case on that was set out in SFG paras.82 and 83(v) (which I would emphasise relies in no way whatsoever on the Contract, still less Clause 18.3 itself):

> "82 [The Care Act 2014 ('CA') Guidance] at… "Annex A: Choice of accommodation and additional payments" is clear also that:
> "…4) Local authorities should also be mindful of their duties under Section 1 of the Care Act 2014 to promote individual wellbeing'…

> 11) In all cases the local authority must have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions… In addition, the local authority should not set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care. Guidance on market shaping and commissioning is set out in Chapter 4..
> 34) Arrangements will need to be reviewed from time to time, for example in response to …a change in provider costs……."
> 83(v) In departure from [the CA Guidance], [the Defendant failed] to have regard to the actual cost of good quality care; and/or set...arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care, or change in provider costs."

76. As I explained at paragraph 40 above, interpretation of para.11 Annex A in the context of the scheme of the CA and the old guidance at paras.2.5.4 and 2.5.7 LAC (2004)20 shows para.11 Annex A 'pulled through' similar considerations as in that former guidance but adapted it to the new statutory scheme of 'personal budgets'. Accordingly, fee decisions must 'have regard to the actual cost of good quality care' and 'not set arbitrary ceilings not reflecting the fair cost of care'. However, it follows those expressions in para.11 Annex A should be interpreted consistently with the case-law on similar expressions in LAC (2004)20 summarised at paragraph 42 above: *R(Forest Care)*, *R(Bevan)*, *R(South West Care) (No.1)*, *Northumberland* and *R(Torbay Care)*. Therefore, in setting standard fees, authorities should have regard to 'the actual cost of good quality care' and avoid 'arbitrary ceilings'. But those are only two factors alongside others, which may pull in different directions (like the authority's resources and other sources of provider income like 'top-ups'), the balancing of which is for the authority not the Court subject to irrationality; and remembering what the authority pays will rarely 'synchronise' with actual cost of care to the provider. That is also consistent with the new market-shaping duty under s.5, especially s.5(2)(d)-(e) CA requiring an authority *to have regard to* '(d) the importance of ensuring the sustainability of the market; and (e) fostering continuous improvement in the quality of services and efficiency and effectiveness with which they are provided', as well as the new guidance in paragraphs 4.31 and 4.35 CA Guidance Fordham J summarised in *R(CNE)* at [12] which I repeat for convenience:

> "(i) First, there is the importance of local authorities assuring themselves and having 'evidence' that contractual fee levels are appropriate to provide the delivery of agreed care packages with agreed quality of care (para 4.31).
> (ii) Secondly, there is the importance of local authorities understanding that a reasonable fee level allows for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term (para 4.31). [Lavender J in *R(Care England)* at [6] called this and s.5(2)(d) CA 'the sustainability factor']
> (iii) Thirdly, there is the point that local authorities must not undertake any actions which may threaten the sustainability of the market as a whole - the pool of providers able to deliver services of an appropriate quality - by setting fee levels below an amount which is not sustainable for providers in the long term (para 4.35)."

77. Quite simply, the Decision utterly failed to take into account any of this relevant CA Guidance, even leaving aside the Claimant's consultation response discussed

under Ground 1. The Decision did not refer to any statutory guidance expressly or impliedly, still less explain how it considered a 1.4% uplift was consistent with it. This is reflected in five quite separate failures to follow guidance, any one of which individually would have vitiated the Decision, but together plainly do so:

a. Firstly, in setting a fee increase of 1.4%, the Decision did not expressly or implicitly 'have regard to' the actual cost of good quality care' under para.11 Annex A (or what evidence it relied on for that under para.4.31 CA Guidance), if only to explain how that was outweighed by other factors such as over-capacity in the residential care home market or the Defendant's budgetary constraints, as Mr Tomlin's Cabinet reports had done.

b. Secondly, the 1.4% minimum uplift in Clause 1.4% effectively acted as an 'arbitrary ceiling' on the Decision rather than a 'contractual floor', since it reflected inflation of 1.4% three years earlier and lacked justification as to its consistency with having regard to 'the actual cost of good quality care'.

c. Thirdly, the Decision did not just 'take into account' the contractual minimum uplift in Clause 18.3, it appeared to focus exclusively on the contractual dimension of the relevant Decision rather than the *duty* under s.78 CA to have regard to the statutory guidance. Like the Defendant's argument on 'the public/private law divide', it focussed on the contractual dimension to the exclusion of the statutory and guidance dimension.

d. Fourthly, whilst the Defendant 'did not want to lose any provision from the local market' and mentioned potential packages of support, it failed to acknowledge that a *reasonable fee level* (as opposed to other mitigating measures) allowed for a reasonable rate of return to allow efficient operators to remain sustainable in the long-term as required by para.4.31, or at least explain why that factor was outweighed by others such as budgetary ones.

e. Fifthly, the Decision implicitly recognised that the sustainability of the market was at risk by acknowledging the risk of loss of provision and by offering support. However, it failed to recognise that the decision to limit fee uplift to 1.4% was the action threatening that sustainability, again if only to explain how it was outweighed by countervailing factors like budget.

Therefore, I uphold Ground 4 as the Decision failed to follow the CA Guidance.

78. I turn to Ground 2. As I said at paragraph 64 above, I will focus only on considerations that the statute, in particular the 'market-shaping duty' in s.5 CA, expressly or implicitly required to be taken into account (albeit by linking the statutory provisions to pleaded points in Ground 2). It is often overlooked, that is the correct approach to 'relevant considerations' challenges, as Lord Carnwath (repeating his own summary in an earlier case) explained in the planning case of *Samuel Smith Brewery v North Yorkshire CC* [2020] PTSR 221 (SC) at [30], although his guidance is of general application to such 'relevant considerations' challenges:

> "30. The approach of the court in response to…an allegation [of failure to take into account relevant considerations] has been discussed in a number of authorities. I sought to summarise the principles in *Derbyshire Dales DC v SSCLG* [2010] 1 P & CR 19... [which concerned alternative sites] I said:

> "17. It is one thing to say consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.
>
> "18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide…[and] that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker… On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

31 I referred to the discussion of this issue in a different context by Cooke J in the New Zealand Court of Appeal, in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of Lords in *In re Findlay* [1985] AC 318, 333–334 [original emphasis]:

> "26. [Cooke J] took as a starting point the words of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 228… 'What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough it is one that may properly be taken into account, nor even that it is one many people, including the court itself, would have taken into account if they had to make the decision …'
>
> "27. In approving this passage, Lord Scarman noted that…'[I]n certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.' (*In re Findlay* at p 334.)
>
> "28… Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

79. For convenience, I will set out and italicise the material parts of s.5 CA again:

> "(1) A local authority *must* promote the *efficient and effective operation of a market* in services for meeting care and support needs with a view to *ensuring* that any person in its area wishing to access services in the market — (a) has a variety of providers to choose from who (taken together) provide a variety of services; (b) has a variety of high-quality services….
>
> (2) In performing that *duty*, a local authority *must have regard to the following matters in particular*…(d) the importance of *ensuring the sustainability of the market…*; (e) the importance of *fostering continuous improvement in the quality of such services* and the efficiency and effectiveness with which such services are provided and of encouraging innovation in their provision; (f) the importance of *fostering a workforce*

> *whose members are able to ensure the delivery of high quality services* (e.g. they have relevant skills and appropriate *working conditions*).
>
> (4) In arranging for the provision… of services for meeting care and support needs, a local authority *must have regard to the importance of promoting the well-being of adults in its area with needs for care and support…*"

In my judgment, even if I am wrong on Ground 4, the Decision's lack of 'due regard to the actual cost of care' and 'the need to avoid setting arbitrary cost ceilings' in the sense in paras.5.2.4 and 5.2.7 LAC (2004)20 are *implicitly* 'statutory factors' to be taken into account under s.5(2)(d) and (e), which the Defendant failed to do. Alternatively, the Decision failed to take into account *expressly* statutory factors:

a. Firstly, the Decision failed to take into account its duty under s.5(1) to promote the efficient and effective operation of a market with a view to ensuring a variety of providers and high-quality services (compare paras.73(vi) and (vii) SFG).

b. Secondly, whilst the Decision acknowledged the risk of some providers leaving the market and so the impact on market sustainability, it failed to take into account under s.5(2)(d) the importance of *ensuring* the market remained sustainable, e.g. by setting fees at sustainable level, not just offering other support. (Compare the pleading at paras 73(v) and (vi) SFG).

c. Thirdly, the Decision failed to have regard under s.5(2)(e) to the importance of fostering continuous improvement in the quality of care services and indeed the ability of providers to comply with CQC standards and improve quality given the pressures on overheads by low fees (compare paras.73(vii) and (xii) SFG).

d. Fourthly, the Decision failed to have regard under s.5(2)(f) to the importance of fostering a workforce able to deliver high-quality care, in particular by failing to have regard to how a 1.4% rise in fees could absorb a 9.8% rise in the National Living Wage when staff costs were typically c.70% of actual costs of care (compare paras.73(x) and (xi) SFG) that in *R(Torbay)* at [76] King J suggested may justify increasing standard fees (but I place no reliance on Cl.21 Contract).

e. Finally, the Decision failed to have regard under s.5(4) of the importance of promoting the well-being of care-home residents due to the 'indirect impact' on them of Defendant fees not covering the provider's actual costs of care, either inhibiting providers from meeting all their needs and/or leading them to increase the level of 'top-ups' from residents or their families (compare p.73(viii) SFG).

Therefore, insofar as it adds anything to Grounds 1 and 4, I also uphold Ground 2.

Grounds 3 and 6: Public Sector Equality Duty and Irrationality

80. Given my findings already on Grounds 1, 2 and 4, in this section of my judgment, I will deal only briefly with Grounds 3 and 6 (and make passing mention of Ground 5 which I have already dismissed on standing grounds). In my judgment, what links together Grounds 3 and 6 (and indeed linked 5 as well) is that last point at paragraph 80(e) above: not so much the impact of the Decision on *providers*, including the Claimant's members, but the impact on their existing *residents*.

81. As illustrated by *R(South West Care) (No.2)*, the sequel to Singh J's decision on the previous year's fee in *R(South West Care) (No.1)*, even a rational fees decision preceded by fair consultation can still be unlawful for breach of the Public Sector

Equality Duty ('PSED') under s.149 Equality Act 2010 ('EqA'), which relates to 'protected characteristics', such as the age and any disability of residents and states:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to— (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it…
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to— (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic…different from the needs of persons who do not share it
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities….
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by…this Act"

82. The predecessor of s.149 EqA for disabled people was s.49A Disability Discrimination Act 1995, recognised in *Pieretti v Enfield LBC* [2011] HLR 3 (CA) to be applicable in public authority decisions about individuals (including as in *Pieretti*, whether they are 'disabled' in law), as well as 'strategic' decisions such as the Decision in this case. However, with 'individual' decisions about specific disabled people, as Lord Brown said in *McDonald v KCLBC* [2011] PTSR 1266 (SC) at [24]:

> "Where, as here, the person concerned is [by definition] disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section…The question is one of substance, not of form. This case is wholly unlike *Pieretti*…"

Likewise in *Powell v Dacorum BC* [2019] HLR 21 (CA) at [44], McCombe LJ differentiated cases about 'strategic' decisions from those involving individuals.

83. With appropriate caution, as it was about an individual (and in a very different context: asylum support for a pregnant woman), the recent decision of Mr Bowen KC in *R(DXK) v SSHD* [2024] 4 WLR 46 at [133] contains a useful and up-to-date summary of law on the PSED. So far as relevant, it states (citations omitted):

> "….(iv) The duty to have 'due regard' applies both to the formulation of policy and its implementation in individual cases
>
> (v) The duty is a continuing one:

> (vi) [T]he PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of [it].
>
> (vii) The duty is not simply to 'have regard' to the relevant aims. The regard must be 'due'. This requires 'a proper and conscientious focus on the statutory criteria'…. What constitutes 'due regard' is, however, context-specific. The greater the relevance and potential impact, the higher the regard required by the duty. Thus, where large numbers of vulnerable people, very many of whom fall within one or more of the protected groups, [are affected] the due regard necessary is very high. The same will be true if the adverse impact of the policy is very high albeit it affects a smaller group of people. The duty is a flexible one….What is 'due regard' in one case will not necessarily be 'due regard' in another. It will vary, perhaps widely, according to circumstances: for example, the subject-matter of the decision being made, the timing of that decision, its place in a sequence of decision-making to which it belongs, the period for which it will be in effect, the nature and scale of its potential consequences, and so forth.
>
> (viii) A decision-maker must have due regard to the need to obtain relevant information in order for him properly to discharge his section 149 duty,
>
> (ix) A decision-maker should be able to evidence the discharge of the duty
>
> (x) A Policy Equality Statement ('PES') [or 'Equality Impact Assessment' ('EIA')] can evidence compliance with the PSED… but it must do so in substance. The mere existence of a PES is not enough.
>
> (xi) The question whether a decision-maker has had 'due regard' to the relevant aims is for the court to determine for itself on judicial review….[P]rovided the decision-maker has had 'due regard' to the relevant aims, the weight which he attaches to any relevant factors, including any countervailing factors, and his assessment as to what specific steps to take to achieve those aims, may only be challenged if [irrational]."

84. In the present context of care home fee decisions, *R(Sefton)* where no breach of the PSED was found, can be contrasted with *R(South West Care) (No.2)* (in which Mr Straker again appeared) where the PSED was found breached. In *R(Sefton)*, HHJ Raynor QC suggested that if the 'usual cost of care' was otherwise lawfully determined, the PSED would only be relevant to individual needs assessments. However, in *R(South West Care) (No.2)*, HHJ Jarman QC held at [43]-[44] a 'usual costs' fee decision engaged the PSED. I respectfully agree. As shown by *McDonald*, when specifically contemplating a particular disabled person, the PSED may add little. It is precisely such 'strategic' decisions affecting groups of unidentified disabled people that really call for 'due regard' to the considerations in the PSED.

85. In my judgment, the Decision had no 'due regard' as required by s.149 EqA to the need to eliminate discrimination (e.g. the duty to make reasonable adjustments under s.20/21 EqA, if necessary treating disabled people more favourably: see s.149(4) and (6)), or to advance equality of opportunity by removing or minimising disadvantages to disabled (and older) people and take steps to meet their needs. I recognise that it is not a 'tick box' exercise and – for example – the decision of Mr Tomlin not to have a separate Equality Impact Assessment in his reports to Cabinet

would not matter if the decision-maker had complied with the PSED in substance rather than form even if the Decision did not specifically cite it (c.f. *McDonald*). However, there is no evidence the decision-maker relied on Mr Tomlin's assessment as Mr Straker suggested or indeed considered existing residents (who were not mentioned), or the potential discriminatory impact on them of the Decision in terms of only increasing fees at less than the rate of inflation, inhibiting the ability to providers to meet residents' needs or requiring some of them to pay more in 'top-ups' for the same care. After all, this was a large group of vulnerable people across the whole City of Stoke who are affected to some extent and possibly a significant number of them affected to a substantial extent. Either way, the due regard necessary is high. But the residents were simply not mentioned at all in the Decision, nor were they apparently even considered. I therefore uphold Ground 3 as well.

86. I reach that conclusion irrespective of my decision that the Claimant lacks standing to complain of Art.8 ECHR. The risk to residents' homes is hardly as acute as with a planned closure as in *Coughlan* (or prior to the HRA *Baker*), or even a possible closure as in *R(South West Care) (No.2)*. Nevertheless, the lack of reference to residents or their Art.8 ECHR rights of respect for their 'home' add some weight to this conclusion on the PSED (although Art.8 by itself adds little to Art.3 ECHR with positive duties of welfare support, as Lord Brown said in *McDonald* at [18]-[19]).

87. Finally, I can deal with Ground 6 – irrationality – shortly and as I said at paragraph 63 above with a very 'light touch review' applying a test of a 'very clear case' of irrationality as befits the commercial context as stated in *R(Bevan*). I do not consider the case turns on the Decision's balancing of factors, as I have explained in upholding Grounds 1-4 above.

88. However, even on that basis, I consider this is a very clear case of irrationality by an unexplained evidential gap failing to justify the conclusion and inadequacy of reasons: *R(Wells)*. As I have said, the Decision did not give any reasons *at all* for selecting the increase of 1.4 %, still less weigh the interests of the providers and more importantly the residents. Indeed, it did not even explain the significance of the budget. It simply confirmed the original proposal of a 1.4% rise without any reasoning, other than to reassure providers that whilst the Defendant's main objective was to keep people in their own home (which perhaps implicitly might explain why the budget had been focussed elsewhere), it wanted to keep providers in the market too and over the next year would roll-out a package of support for them aside from the annual uplift. In that way, it adopted an objective of 'keeping people in their own home' by not considering its duties to people who were already residents and unlikely to return to their homes. That was irrational. Therefore, I also uphold Ground 6 as well.

89. Consequently, the Decision was unlawful on multiple grounds. The Defendant did not suggest that it was highly likely the outcome would not have been substantially different if the conduct complained of had not occurred under s.31(2A) Senior Court Act 1981 ('SCA'). Indeed, on my findings that would not be a tenable submission to make. It is not a case like (for example) *R(Gathercole) v Suffolk CC* [2021] PTSR 359 (CA) of a 'technical breach' of the PSED where the Court can be confident that a short paragraph in the decision showing 'due regard' under s.149 EqA would have highly likely (if not inevitably) led to the same decision. Here there were overlapping failures to take into account consultation responses, s.5 CA and

statutory guidance, the PSED and residents' interests. Notably, in his statement on relief that I permitted after my draft judgment, Mr Tomlin himself did not say that it was 'highly likely' that the result would be the same if the decision were retaken (which is a slightly different, but analogous, point): only that there would be a 'significant likelihood' that it 'may not alter', which is different from 'highly likely' in s.31(2A) SCA (which is itself different from 'no difference': *R(Gathercole)*). Consequently, the claim must be upheld on Grounds 1, 2, 3, 4 and 6 with Ground 5 dismissed. This then leads to the question of relief.

Relief and Consequential Orders

90. As I have explained at paragraphs 33-34 above, the evidence before me suggests most local care homes have not objected to the Decision: 94% out of the 166 care homes in Stoke-on-Trent or Staffordshire for whom the Defendant funds residents have either expressly signed the contract extension or agreed in principle. As I explained at paragraph 60(a) above, one reason I found the claim had a 'sufficient public element' was because of its impact on third parties: both providers and residents (the latter being central to my upholding Grounds 3 and 6). Therefore, at the end of my draft judgment, I said: 'it is appropriate is to give both parties not just the chance to make submissions on a quashing order now they have my conclusion that the Decision was unlawful and that I will declare it as such, but also a limited and tightly constrained opportunity to file short witness statements (no more than 4 or 5 pages) actually evidencing the impact (or lack of it) on third parties of making a quashing order'. As I mentioned at paragraph 34, in fact both the statements of Mr Tomlin and Mr Bull were in excess of that and there was some bad-tempered correspondence from both sides: the Claimant cited 'the duty of candour' and asked detailed questions of Mr Tomlin's statement akin to cross-examination (which is not what the Duty of Candour is for) and from the Defendant objecting to a brief time extension for Mr Bull's statement. Both statements mutter apocalyptic warnings: Mr Tomlin that if I quash the Decision that 'all local authorities' (not just the Defendant) will change the way they contract with care homes; Mr Bull that if I do not quash the Decision, 62 residents funded by the Defendant and placed with the 10 providers refusing to accept the Decision 'are liable to be forced to move out'. Neither of these hyperbolic warnings is properly evidenced, in any way convincing, or indeed helpful. As I started this judgment by saying, referring to *McAleenon*, Judicial Review is not usually act for disputed issues of fact and I will do my best to proceed on the 'undisputed facts about what information the authority has and its reasons for acting'.

91. In summary, the evidence I have from Mr Tomlin and Mr Bull, together with the other evidence they have annexed or supplied and my factual findings at paragraphs 10-34 above) support the following points:

    a. Firstly, the minimum uplift of 1.4% in Clause 18.3 adopted in the Decision probably reflected the rate of inflation in April 2021 around the time the 2021 Provider Contract was concluded. However, in the 'Cost of Living Crisis' which has ensued since, inflation has been far higher: in the 12 months to April 2024 the CPI rose to 2.3% and there has been an increase of 9.8% in the National Living Wage (bearing in mind under the old costs model, wage costs constituted 70% of care home costs). Mr Bull gave some examples of the financial pressures care home providers are under in the

present financial year, including substantial rises in staffing and utility costs etc. For one provider with three care homes, the total costs rose by up to 18.5% in 2023/2024. Yet in 2024/25, the Defendant has only increased its fees by 1.4%.

b. Secondly, despite that, out of the 181 care homes accommodating the 814 residents funded by the Defendant, 99 have specifically signed the contract extension with the 1.4% rise, whilst another 57 have effectively agreed to it, as I said 94% of the 166 care homes in Stoke-on-Trent and Staffordshire the Defendant funds (and 86% of its total care home placements). The Claimant has only named five providers who positively support this claim and I am not prepared to assume that is the tip of the iceberg, or that most of the 156 care homes who have positively agreed with the Decision did so because they thought they had no choice. The evidence suggests the Claimant speaks for a small minority of care homes. The majority of others with whom the Defendant deals do not actively oppose the Decision (whether or not they are happy about it).

c. Thirdly, this may be because many providers recognise that just as they are under financial pressure, so too are local authorities. As I have explained, the Defendant's overall budget shrank by about 30% in real terms between 2010/11 and 2023/24 and in particular the Adult Social Care budget has been squeezed. According to a table Mr Tomlin has provided, whilst the Defendant pays less than some other Midlands local authorities including Staffordshire (the Defendant is a City Authority), but its fees are higher than some nearby comparable City Authorities like Wolverhampton and Walsall. The cost challenges are universal. However, providers' pragmatism about the Decision may also be because, as Mr Rule pointed out, Mr Tomlin's own evidence suggests the Defendant already pays on average more than the set standard rate of £600 per week reflected in the 1.4% rise in the Decision. Moreover, Mr Tomlin also mentioned some providers had refused to accept the Decision but had negotiated bespoke fee rates themselves.

d. Fourthly, whilst Mr Tomlin issued dire warnings about the effect of a quashing order on the Defendant's budget, on other local authorities and even on delaying the hospital discharge process in a time of acute need in the NHS (indeed at its busiest time of year), those all seem rather speculative. Quashing the Decision and re-taking it does not necessarily entail a different outcome and even if it did, on Mr Tomlin's own evidence, a 0.1% increase in residential care home fees would cost the Defendant £17,000 on current expenditure, not a large sum in the context of a £4.9 million rise in the Adult Social Care budget for 2023/24. Likewise, given Mr Tomlin's evidence also suggests there is a great variability in the rates different authorities pay (and the Defendant is towards the bottom of the table in terms of fees paid), it seems unlikely that quashing its decision to pay a contractual minimum reflecting inflation in 2021 is likely to have a significant impact on other authorities. Finally, the effect of a quashing order on hospital discharges seems to be extremely tenuous. Whilst I am equally unimpressed with Mr Bull's Dickensian warnings if the Decision is not quashed of vulnerable old people being evicted at the height of winter (the Care Act imposes a duty on the Defendant to step in anyway), he also makes a fairer point that increased fees can be off-set to a certain extent by

increases in residents' pensions year-on-year. Further, since the Defendants' fees can be supplemented by residents' or sponsors' 'top-ups', re-making the Decision does not necessarily entail reaching a different result.

e. Finally, however Mr Tomlin makes a stronger point about the impact of a quashing order on pending negotiations with providers on fees for 2025/26 and beyond. The Decision comprises the last of the rates set under the 2021 Provider Contract which cannot be extended beyond 2025. Just before Christmas 2024, the Defendant began negotiations with providers (and it hopes to include new providers now the bidding process has been simplified by the Procurement Act 2023) for a new 'provider contract' as part of wider consultations for the fee-setting process for 2025-26 for Adult Social Care generally. (It supports 13,000 citizens of Stoke-on-Trent, not just the 814 residents it funds in care homes). For the new Provider Contract negotiations, the Defendant has organised on-line and one-to-one meetings with providers to discuss proposed uplifts (not now to be governed by the 1.4% 'floor' in the 2021 Provider Contract). Mr Tomlin promises a report to Cabinet reflecting that consultation process, consideration of the challenges providers currently face and the Defendant's duties under the PSED and Care Act. Doubtless he will also be keen to avoid a repetition of the confusion and delay in the Defendant's 2024 process. I accept Mr Tomlin's concern that its wider consultations on Social Care generally and specifically the new negotiations for a Provider Contract from 2025 would be skewed and confused by in parallel re-opening the consultation process under the 2021 Provider Contract for the 2024/25 fee uplift. The Defendant's budget is not elastic – the more money it must spend on the re-opened 2024/25 fees, the less in the pot for the new contract fees. That creates a tension between different providers: those like the Claimant pushing for increased 2024 fees and more pragmatic existing providers or even new providers who would not welcome that. That would risk conflict, distraction and muddle in the negotiations for the 2025 contract, which is in no-one's interests. For the reasons Mr Tomlin gives, I accept the majority of providers, who do not actively object to the Decision, would prefer the Defendant to focus on fair and sustainable rates for fees from 2025 going forward. However, such potential disruption would not be a risk if all the Defendant was doing was simply re-making the Decision, conscientiously considering the Claimant and others' previous consultation responses, its duties under the Care Act, its related guidance and the PSED for residents. That re-made decision, potentially by Mr Tomlin himself, could be prepared within a couple of weeks without interfering in any way with the new consultation about the new contract. Indeed, the re-taken decision would not have any real impact on third parties at all unless it changed the rate, which might well itself be a relevant consideration for the decision-maker in deciding whether the rate should change in the first place.

92. There was no dispute from Mr Straker with the principles Mr Rule set out on relief, although I will supplement them slightly. The starting-point is that it is axiomatic that relief on judicial review in respect of an unlawful decision is discretionary, but the discretion must be exercised judicially. That discretion is partly governed by statute, as with the Senior Courts Act 1981 ('SCA'). Since 2022, s.29A SCA has provided that:

> "(1) A quashing order may include provision— (a) for the quashing not to take effect until a date specified in the order, or (b) removing or limiting any retrospective effect of the quashing..
>
> (8) In deciding whether to exercise a power in subsection (1), the court must have regard to— (a) the nature and circumstances of the relevant defect; (b) any detriment to good administration that would result from exercising or failing to exercise the power; (c) the interests or expectations of persons who would benefit from the quashing of the impugned act; (d) the interests or expectations of persons who have relied on the impugned act; (e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act; (f) any other matter that appears to the court to be relevant.

Moreover, it has long been the case that if there has been 'undue delay' by the claimant, the relief discretion is qualified by s.31(6) SCA:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant…(b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Whilst there have as yet been very few examples of deferred or prospective quashing orders under s.29A SCA, there are many examples of 'undue delay' under s.31(6)(b) SCA, including in the present context Singh J's judgment in *R(South West Care) (No.1)* where he refused to quash a care home fees decision (which was unlawful only by reason of inadequate consultation) on grounds of delay and good administration at [53]-[60]:

> "53…[J]udicial Review, quite apart from the questions of delay is always discretionary. One of the factors that the court will have to regard to in its discretion is the interests of good public administration (see *R v Monopolies & Mergers Commission ex parte Argyll Group Plc* [1986] 2 All E R 257, at 266) in the judgment of Sir John Donaldson MR (as he then was) where he said: "Good public administration requires decisiveness and finality unless there are compelling reasons to the contrary."
>
> 54. On the facts of the present case I accept the defendant's submissions and, in the exercise of the court's discretion, would not quash the decision which is under challenge. My reasons, in brief, are as follows: first, the relevant financial year has ended…It is obvious that many transactions…such as Tax Returns will have been concluded and submitted on the understanding that the defendant authority's budget was as had been finalised in March and April of 2011 and would not be reopened now.
>
> 55. Secondly, there is a more specific type of detriment to others to which the defendants can point. [In their defence] "A grant of relief in the present case, if it resulted in increase in care home fees for 2011/12 would cause a further and more specific detriment to good administration and hardship to third parties. At the suit of a small number of providers the defendant would have to find a very large sum overall, a windfall to those providers who

> appear to have been content with a decision. This in turn could necessitate recovery of the unpaid part of the increased fee from those who pay the full cost of their care through the local authority or from the relatives of those who have died in the interim. The alternative would be to place the burden on council tax payers ... the potential for hardship and distress as well as administrative inconvenience and expense is obvious."
>
> 58. As I have said, even if one puts to one side questions of delay, I have had regard to the principle in the *Argyle* case and accept the defendant's submissions that it would be detrimental to the interests of good administration to grant a quashing order in this case….
>
> 60. For the claimants it was submitted that they do not seek a mandatory order requiring the court to order the defendant authority to increase the fees in question. The claimant submits that such an order would usurp the role of a public authority in making the relevant decision: so they submit the court should not hesitate to grant a quashing order. In my view, this argument is a little disingenuous, since the claimants wish there to be consultation with a view to achieving a real change in practice and not for academic reasons. If there is a real prospect of a change in practice then, in my view, for the reasons I have already given, there would be detriment to good public administration and, in the exercise of the court's discretion, I would not grant a quashing order."

93. However, there has been no undue delay by the Claimant in this case: it acted expeditiously in challenging the Decision and bringing the claim, which the Court has expedited. The only real 'delay' was by the Defendant between its initial non-consulted decision in breach of the Provider Contract in March 2024 and the Decision under challenge in July 2024, albeit it was following a consultation process, which I have held to be lawful until the decision itself (which again points to the scope of a quashing order being the re-taking of the *decision*, rather than the re-running of the *consultation*). Nevertheless, even without 'undue delay' by a claimant, relief is still discretionary, as again in the present context, Fordham J acknowledged in *R(CNE)* at [53(iii)]:

> "I would not have been persuaded by the Council's arguments about detriment to good administration, independently of delay. Judicial review remedies are a matter of judgment and discretion. There is a narrow band, within which detriment to good administration could justify the refusal of a remedy – in the context and circumstances – even where a claimant has acted promptly. But, where a claimant has done all that could have been expected, and can show unlawfulness, the court will be extremely circumspect about the blanket denial of *any remedy*."

I emphasise 'any remedy', as Fordham J said in *R(CNE)* at [52(ii)], a declaration is a significant remedy in itself, quite aside from a quashing order. To like effect, in *R(South West Care No.1)*, Singh J said at [62]:

> "[A declaration] would vindicate the rule of law….Granting a declaration can serve a valuable function in guiding future conduct. A declaration is a flexible and proportionate remedy: it can be tailored to fit the facts of the particular case before the court and to reflect the particular breach of public law which the court has identified."

Whilst Fordham J in *R(CNE)* at [53(iii)] did not mention specific authority for the 'narrow band' for refusing relief without undue delay, he doubtless had in mind the leading authority quoted in other cases in this field (e.g. *R(South Tyneside)* and *R(Torbay)*) and in his own book '*Judicial Review Handbook*' (7th Ed) at para.24.3.14, namely: *R(Edwards) v Environment Agency* [2009] 1 All ER 57 (HL), where Lord Hoffmann said at [63]:

> "It is well settled that 'the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary' (Lord Roskill in *IRC v National Federation of Self Employed and Small Businesses* [1981] 2 All ER 93 at 116). But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So, in *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897 it was conceded, and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. …[However,] the speeches in *Berkeley* need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered."

Indeed, in *Edwards* itself, Lord Hoffmann distinguished *Berkeley* and refused a quashing order since the flaw in the planning decision in *Edwards* was much more limited and the ground for not quashing was entirely different: since the unlawful decision, new information had shown a different position and it would be pointless to re-open consultation on out-of-date data. Similarly in *Moseley*, the Supreme Court agreed it would be disproportionate to re-run a consultation exercise which had been running for two years. Another example in the Supreme Court, albeit not cited to me, is *Hunt v North Somerset Council* [2015] 1 WLR 3575, where the Court of Appeal had held a reduction of a budget for youth services had breached the PSED but refused to quash it because it would be detrimental to good administration to re-open the decision as by that time the financial year had closed and the budget would have to be re-opened (not the same as 'undue delay'). The Supreme Court rejected the appeal for a declaration instead of quashing, since whilst it would 'usually' be appropriate where other orders were not made, in that case it had not been sought. In my judgment, the common law discretion to refuse relief (including a quashing order outright) if it would cause detriment to good administration even in the absence of undue delay survives Parliament's modest intervention with s.29A SCA and 'deferred' and 'prospective' quashing orders. Indeed, detriment to good administration is one of the statutory factors in s.29A(8) SCA and the others are consistent with the focus in *Edwards:* on the nature of the unlawfulness and the reason for refusing relief, including the impact of refusing or granting it on third parties.

94. In the present case, the key factors on whether I should grant a quashing order and/or a declaration are: (a) the nature of the unlawfulness in the Defendant's Decision; (b) the Defendant's suggested reason to refuse relief: (i.e. detriment to good administration in its negotiation of social care fees, but not undue delay); and (c) the impact on third parties (providers, residents and sponsors) of either granting or refusing relief.

a. The nature of the unlawfulness in the present case is exclusively the Decision itself for the reasons I gave when upholding Ground 1 (in part), but also Grounds 2, 3, 4 and 6. On one hand, that is much more extensive than the limited failures in consultation in *R(South West Care No.1)* where Singh J refused relief (and there was also there undue delay by the claimant), or indeed the limited failure to disclose information to consultees in *R(Edwards)*. On the other hand, under Ground 1, I found there was no unlawfulness in the consultation process leading up to the Decision. Therefore, the Claimant's preferred remedy that the Decision should be quashed and the consultation process be re-opened (rather than the Decision simply being re-made) actually goes further than necessary to correct the unlawfulness that I have found.

b. The detriment to good administration in the present case is also more limited than in *R(South West Care No.1)* where (as in *R(Hunt)*) the financial year had closed and quashing the decision would require re-opening the local authority's budget. By contrast in the present case, due to the expedition of the claim, we are still only three-quarters of the way through the financial year. So, if the Decision is re-taken and changes, any change in fees can be dealt with within the present year's budget (and the extent of fee increase obviously influenced by that to the extent of £17,000 per 0.1% increase). For the reasons I have given, any detriment to the Defendant's good administration is limited to the disruptive effect of the Claimant's proposal to re-open the consultation process for the 2024 fees on the current contract negotiations for the new 2025 contract, which is another reason not to accede to the Claimant's suggestion of re-opening the consultation process. By contrast, if the Decision is simply quashed and re-taken within a few weeks, there would be no detriment to good administration at all, at least unless it was decided to increase the fees. However, that is not a good reason not to quash the decision, because Mr Tomlin says himself that there is a significant likelihood the outcome may not differ if the decision were to be retaken and I accept that, providing the new decision takes in account the existing consultation responses, the Care Act duties and guidance and PSED and reaches a rational decision and complies with the various legal requirements I have explained in this judgment.

c. Likewise, the effect of quashing on third parties depends on whether (i) the consultation process re-opens and (ii) the fee is increased in the re-made decision. I accept that were the consultation process to be re-opened, there would be a detrimental effect on other providers seeking to negotiate rates in the new contract (especially new providers who do not stand to gain from any increase in the 2024 fees), but if it were not re-opened, it would have no effect on third parties unless the fee changed. The Claimant argues that other existing providers, residents and sponsors would only stand to gain from an increase in the 2024 fees and there is considerable force in that, although the Defendant will be entitled to reach its own conclusion (which also takes into account its own budgetary pressures) providing it does so lawfully. Contrarily, I have rejected Mr Tomlin's unevidenced warnings about the effect on residents and hospital discharges if the decision is re-made and any *evidenced* risk on those grounds can be a relevant factor in the new decision.

95. For those reasons, I consider by reference to *R(Edwards)* (and the other authorities to which I have referred) that it would not be a proper exercise of my discretion to refuse to quash the Decision and to require it to be re-taken, but likewise it would also not be a proper exercise of my discretion to go further than the unlawfulness I have found established and to require the consultation process itself to be re-started. Therefore, the terms of my quashing order will simply be that the Decision of 4th July 2024 will be quashed and the decision re-taken within 28 days of my order. I add that requirement because I accept Mr Rule's point that there should be some time-limit on producing the re-taken decision, allowing some time to at least calculate if not implement any correction to 2024 fees before the end to the financial year in March and the ongoing negotiations for the new contract from April 2025. It follows that I would amend the proposed paragraph 3 of Mr Rule's proposed draft order to the effect I have said, but will not include the consultation provisions in the proposed paragraph 4.

96. Reference to Mr Rule's draft order next takes me to the issue of his proposed declaration in paragraph 1 (and reciting of the successful and unsuccessful grounds in paragraph 2) of his proposed draft. Whilst I also have a discretion in relation to a declaration, even though I am also making a quashing order (c.f. *Hunt*), I agree with Mr Rule that a declaration is appropriate in this case in order to record the unlawfulness found and guide the Defendant's future conduct (c.f. *R(CNE)* and *R(South West Homes No.1)*). This is not least because Mr Straker's proposed draft declaration focused on unlawful *consultation*. That would not be appropriate both because my findings of unlawfulness went beyond inadequate consultation in Ground 1 (as Mr Rule pointed out), but also did not uphold all the complaints of inadequate consultation in Ground 1 (as Mr Straker pointed out). Therefore, as Mr Rule says, a declaration making clear the basis of my decision is appropriate, especially in guiding the re-taking of the Decision I am quashing. Mr Rule proposed in effect a declaration summarising the basis upon which I upheld Grounds 1, 2, 3, 4 and 6. Whilst his proposed summaries are perfectly fair, I agree with Mr Straker that the risk of such summaries is that I end up 'glossing' my own judgment, which should speak for itself. However, rather than Mr Straker's suggestion of simply referring to the terms of the judgment as a whole, it seems to me the terms of a declaration can adopt the clarity in paragraph 2 of Mr Rule's proposed draft in stating that the Decision of 4th July 2024 was unlawful for the reasons stated in the judgment under Grounds 1, 2, 3, 4 and 6 but not 5. If the Claimant would prefer, it can also refer to paragraph numbers, but that may be unnecessary. That would helpfully guide any interested reader to the correct part of this judgment where I explained why I considered the Decision was unlawful (for example, the reader need not be directed to my doubtless over-long analysis of the 'public/private divide', as that was a preliminary issue not a finding of unlawfulness in the Decision).

97. Nevertheless, Mr Straker's application for permission to appeal was directed to my analysis of the 'public/private law divide' and in particular my suggestion of a 'spectrum' at paragraph 59 above which I repeat for ease:

> "In my view, *Supportways*, *Walsh*, *Mercury*, *R(CNE)* and *R(Bevan)* can be seen as at different points along a spectrum of a mixture of public and private law elements, rather than in separate watertight categories. At one end of the spectrum is *Supportways*, where in essence the whole basis of

> the claim was a contract between the claimant and defendant. Indeed, Supportways *in the same claim* sought private law remedies, with public law remedies effectively in the alternative. In *Walsh*, the employee sought only public law remedies (in modern language, a quashing order) but where the Court considered the substance of his claim was really in private law (which also afforded an alternative remedy). In *Mercury*, there was another mixed public/private law claim but the Privy Council preferred to dismiss it on a narrowed scope of review rather than on the same basis as the Court later did in *Supportways*. (Indeed, in the more recent similar case of *Mauritius Power*, even a parallel private law claim for damages alongside the Judicial Review claim did not mean the latter was an abuse of process). In *R(CNE)*, the terms of the contract were central 'context' to a conventional *Tameside* public law claim which again failed on its merits. Finally, in *R(Bevan)*, the claim was entirely *independent* of the contract (to use Neuberger LJ's word in [36] of *Supportways*), as it pre-dated particular placement contracts, but where the decision clearly did *impact on* those contracts."

I went on to explain at paragraph 60 of this judgment that the present claim's point on that 'spectrum' was that it had a 'sufficient public law element' for Judicial Review to lie. Mr Straker submitted by reference to the test for permission to appeal in CPR 52.6 that my 'public/private law divide' analysis was arguably wrong or that there was some other compelling reason for the Court of Appeal to consider this issue, given its wider implications for care home fee decision-making by local authorities. It seems to me the latter issue is best considered by the Court of Appeal itself if the Defendant appeals, especially given its very recent judgment in *R(Shashikanth)*. Likewise, the Court of Appeal will have its own view on whether my 'public/private law' analysis was arguably wrong (I consider it was not for the reasons I gave). Therefore, I refuse permission to appeal, but extend time for appealing to 28 days from the date of my order, aligning the time to appeal with the time I have given the Defendant to re-take the Decision. This is because the re-taken Decision may affect whether the Defendant wishes to pursue an appeal, rather than forcing it to appeal simply to preserve its position pending the re-taken Decision, which would not be a productive use of public money and time (especially in a period when I am requiring the Defendant to focus on re-taking an unlawful Decision and producing a lawful one).

98. Since I am not only upholding the Claimant's claim (except Ground 5, which was always rather a makeweight) and granting a quashing order and declaration, Mr Straker pragmatically did not resist an order that the Defendant should pay the Claimant's reasonable costs in full subject to detailed assessment if not agreed. In my judgment, that was entirely correct, since as the Supreme Court said in *R(Hunt)*, a successful claimant is generally entitled to their reasonable costs even if relief is technically refused, let alone if it is granted as it has been here. However, Mr Straker did resist the Defendant being required to make a payment on account of costs, at least at the level of 70% of the Claimant's estimated costs (some £65,000). CPR 44.2(8) requires the Court where ordering detailed assessment to order the paying party to pay a 'reasonable sum on account of costs' unless there is a good reason. Yet the only reason Mr Straker suggested was the inconvenience in the Defendant paying an amount of costs and having to recover that if it successfully appealed. However, the answer to that risk is yet again to align the date for the payment on

account to the same date to which I have extended time to appeal (and required a re-taken decision) – 28 days after my order. If the decision is re-taken more quickly and it is decided to pursue an appeal, that gives enough time for the Defendant to submit an appeal to the Court of Appeal with a request to stay my order for a payment on account of costs. If it does not do so, or the Court of Appeal does not grant the stay by the 28 days, the Defendant will have to pay the Claimant its payment on account. As to its level, I agree with Mr Straker that 70% of costs is too high when (i) there has been no costs budgeting; and (ii) some of its arguments did not succeed e.g. Ground 5 and part of Ground 1. (That does not mean only a proportion of the Claimant's costs will be awarded under CPR 44.2(6)(a), but it may be relevant on detailed assessment to whether particular costs were reasonably incurred). However, on the other hand, the Claimant's costs schedule is otherwise not out of proportion to the Defendant's own and it seems to me that the figure of £50,000 is a reasonable payment on account for a public body within 28 days of my order.

99. Whilst it was not possible for me to hand-down my judgment at the consequential hearing on 10th January because it was preferable simply to complete my written judgment to include my decision on relief, the fact that I have now resolved all disputed issues between the parties means there need not be a further hearing. I invite Counsel to agree a draft order reflecting what I have decided in this amended draft judgment and to submit it for approval, which I can do and hand-down the judgment in the absence of the parties. Since the various deadlines I have discussed run from the date of my order, the sooner that Counsel can do so, the better (and I would also be grateful for a short note if there are any typographical errors in the 'relief and costs' section of my judgment)

100. Indeed, speaking of Counsel, may I end on paying tribute to the very high quality of the submissions orally and in writing of Mr Rule and Mr Straker (the latter ably assisted by Mr Sanghera) and the hard work and skill of those that instruct them. It is true this litigation has not always been conducted harmoniously between the parties. But it has been conducted skilfully and efficiently, which has enabled me to reach a conclusion within the same financial year in the interests of everyone affected by this decision and the ongoing negotiations for the new contract, above all the vulnerable residents who should be at the centre of everyone's minds.
