

IN THE ADMINISTRATIVE COURT

BETWEEN

THE QUEEN

On the application of CARE NORTH EAST

Claimant

And

NORTH TYNESIDE COUNCIL

Defendant

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

A. INTRODUCTION AND SUMMARY OF CLAIM

1. The Claimant is an association of care home operators who provide nearly 10,000 care home beds in the North East of England.
2. The Defendant is a local social services authority which is responsible for making care home placements in accordance with its statutory community care functions. The Defendant also has a specific statutory duty to promote the efficient and effective operation of a market for care home places. Pursuant to those duties, it must periodically determine the fees that it is willing to pay for care home placements.
3. On 15 July 2019, the Defendant published a proposed pricing strategy for care home fees and a consultation document which invited views on the proposed strategy.

4. The central proposal in the proposed pricing strategy was to pay the following fees for care home beds in 2019/20:

	Proposed weekly rates for ordinary care	Proposed weekly rates for dementia care
Grade 1	£590.57	£612.42
Grade 2	£554.35	£574.86
Grade 3	£519.38	£538.60
Grade 4	£490.24	£508.38

5. Those rates were calculated using a computer model called the CareCubed Care Fund Calculator Model (“**the CareCubed Model**”).
6. In the consultation document, the Defendant stated that the pricing strategy would be set through the following procedure:
- 6.1. It would consult on the proposed pricing strategy. This would result in a report, to be prepared by the Defendant’s officers.
- 6.2. The report would be presented to the Defendant’s Cabinet. The decision on the final pricing strategy would be made by the Cabinet, rather than by officers.
- 6.3. The pricing strategy would then be used “*to formally make the decision regarding any review of rates*” (consultation document [B36]).
7. That procedure conferred important safeguards for the benefit of care home providers before any new rates were imposed on them:
- 7.1. First, care home providers would be afforded an opportunity to make informed representations on the proposed pricing strategy, which the Defendant would conscientiously consider.
- 7.2. Second, the pricing strategy would be subject to Cabinet scrutiny.

8. Those procedural safeguards were particularly important given that the Defendant was discharging a public function which engages a strong public interest, and in light of the Defendant's dominant position as a customer in the care home market and the potential tension between its interest in securing low prices and its interest in maintaining the supply of care home places.
9. On 6 July 2021, the Defendant published its new care home rates (“**the Fees Decision**”)¹. This adopted the figures in the proposed pricing policy (as set out at para.4 above). However, extraordinarily:
 - 9.1. The Fees Decision was taken before the consultation responses on the proposed pricing strategy had been analysed; and
 - 9.2. The Fees Decision was taken by officers before the Cabinet had considered the proposed pricing strategy.
10. The Defendant's position is that the Cabinet will still consider the proposed pricing policy, but that offers cold comfort when the Fees Decision has already been taken (applying the proposed pricing policy).
11. There is a further, striking feature of the case. The figures generated by the CareCubed Model (which dictated the figures in the proposed pricing policy and the Fees Decision) were significantly lower than the actual costs (excluding profit) of providing care home places, as evidenced by data from 90.27% of the occupied beds in the Defendant's area. The Claimant sought to understand the shortfall and asked the Defendant to explain how the model operated. For example, the actual data showed that the costs of employing non-administrative support staff average £66.46 per bed per week (comprising the costs of cooks, kitchen assistants, domestics, laundry assistants etc.) whereas the CareCubed Model generates a figure of £19.93 per bed per week for non-administrative support staff. The Claimant asked the Defendant, among other things, whether the CareCubed Model includes

¹ The Defendant contends that the Fees Decision was taken on 22 June 2021. Nothing turns on this because the claim has been issued within 3 months of 22 June 2021.

any provision for the cost of cooks, kitchen assistants, domestics, laundry assistants etc. The Defendant's answer was that it did not know. It applied the model blindly.

12. In those circumstances, the Fees Decision was vitiated by three clear errors of law:

12.1. Ground 1: the procedure for taking the decision was flawed in that the Defendant applied the proposed pricing policy before analysing the responses to the consultation exercise on the proposed pricing policy and without the approval of Cabinet.

12.2. Ground 2: it was irrational for the Defendant to make the Fees Decision through the blind application of the CareCubed Model and/or it was procedurally unfair to deny the Claimant enough information about the CareCubed Model to be able to make informed representations about the appropriateness of the Defendant's reliance on the model in preference to the data on actual costs.

12.3. Ground 3: the Defendant failed to give adequate reasons for the Fees Decision. It was clear that the fees were determined by applying the CareCubed Model, but the Defendant did not explain why (indeed, did not know why) the CareCubed Model had generated those figures or why it preferred the CareCubed figures to the actual costs data.

13. The Claimant seeks an order quashing the Fees Decision.

14. The remainder of this document is structured as follows:

14.1. Section B – the statutory framework.

14.2. Section C – the relevant facts.

14.3. Section D – grounds for judicial review.

14.4. Section E – relief sought.

B. STATUTORY FRAMEWORK

15. Section 5 of the Care Act 2014 provides:

5 Promoting diversity and quality in provision of services

(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 that 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 in 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 (because, 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).

- (6) In cases where a local authority performs the duty under subsection (1) jointly with one or more other local authorities in relation to persons who are in the authorities' combined area—
- (a) references in this section to a local authority are to be read as references to the authorities acting jointly, and
 - (b) references in this section to a local authority's area are to be read as references to the combined area.
- (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.

16. Subsection 78(1) of the Care Act 2014 provides that “*A local authority must act under the general guidance of the Secretary of State in the exercise of functions given to it by this Part or by regulations under this Part*”. The Secretary of State has issued the “Care and support statutory guidance” (“**the Guidance**”) under that provision. Chapter 4 of the Guidance is headed “*Market shaping and commissioning of adult care and support*” and the introduction to the chapter states that it provides guidance on section 5 of the Act.

17. The Guidance provides:

“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. The tools referenced may be helpful as examples of possible approaches”.

“4.35. Local authorities should consider the impact of their own activities on the market as a whole, in particular the potential impact of their commissioning and re-commissioning decisions, and how services are packaged or combined for tendering, and where they may also

be a supplier of care and support. The local authority 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”.

C. RELEVANT FACTS

18. The evidence in support of this claim is set out in Keith Gray’s witness statement [B1], which the Court is asked to read alongside this statement of facts and grounds.

C.1 The Proposed Pricing Strategy and the Consultation Document

19. On 15 July 2019, the Defendant published two documents: its “Proposed Pricing Strategy for Older Person’s Residential Care 2019/20” (“**the Proposed Pricing Strategy**”) [B49] and an accompanying document which described how the Defendant would consult on the Proposed Pricing Strategy (“**the Consultation Document**”) [B33].

20. The Consultation Document stated that the Defendant sought the views of care home providers and other interested parties to inform its decision on the weekly rates to be paid for residential and nursing home services in 2019/20. It made clear that the consultation exercise would inform “*the decision regarding any review of rates*” [B36].

21. The Consultation Document explained that the Proposed Pricing Strategy “*proposes a new methodology for the calculation of care home fees*” and that the Defendant would provide care home providers “*All the information that is known and legally permissible to be shared to aid your understanding of the issue*” [B37].

22. The Consultation Document provided that: “*Given the important and strategic nature of this decision making process, it is proposed that any new Pricing Strategy will be agreed by the Authority’s Cabinet. Following this Consultation process and the consequent analysis, a report will be drafted and presented to the Authority’s Cabinet. This will seek a decision on the Pricing Strategy for older person’s residential care services*” [B37].

23. Thus, as set out at section A above, the Consultation Document promised two important safeguards for care home operators that would apply before new fee rates were set: (1) the opportunity to make informed representations on the proposed new methodology; and (2) a Cabinet decision, which would be informed by a report on the consultation responses.
24. The Consultation Document indicated that officers would aim to present the matter to Cabinet on 14 October 2019 [B38]. As matters stand, the matter has still not been presented to Cabinet.
25. The first consultation question asked was: “*Has the Authority taken into account all of the relevant costs of delivering residential care in North Tyneside?*” [B38]. To answer that question, consultees self-evidently needed to understand how the new methodology calculated the cost of delivering residential care.
26. The Proposed Pricing Strategy began: “*This Proposed Pricing Strategy sets out the proposed arrangements for determining the price the Authority will pay to external providers for older people’s residential care provision*” [B52].
27. The Proposed Pricing Strategy stated that the Defendant had agreed, pending the completion of the Pricing Strategy, to make payments according to interim rates from 1 April 2019 onwards. The Claimant makes no complaint about the payment of interim rates or the level at which those interim rates were set. The Proposed Pricing Strategy continued: “*The purpose of this Proposed Pricing Strategy is to propose draft fee levels from 1 April 2019 and provide evidence to support this*” [B57].
28. The Proposed Pricing Strategy provided for the assessment of the quality of care home provision, pursuant to which care homes would be given a quality rating from grade 1 (the highest) to grade 4 (the lowest), with higher grade placements attracting higher fees [B58]. The Claimant makes no complaint about this grading system.
29. The Proposed Pricing Strategy noted that “*There are a number of different pricing models or organisations that can undertake a care cost exercise based on care home information*”

[B61]. It noted the models produced by Laing & Buisson and ADASS, but did not place any weight on those models in the formulation of the proposed prices. Instead, the Proposed Pricing Strategy recorded: “*Care Fund Calculator Model. This is the tool the Local Authority has used in order to arrive at the draft proposed rates in this Draft Pricing Strategy for 2019/20*” [B63]. It was stated that: “*The care fund calculator model uses a range of service and staffing inputs to calculate a cost range for care home provision. The model takes account of a range of cost indices to ensure that the costs used in the model are specific to the locality / area*” [B63].

30. The Proposed Pricing Strategy stated: “*Information from 30 older person’s homes in North Tyneside has been received and analysed as part of this review work*” [B63]. The Proposed Pricing Strategy gave the impression that this included local data of staff costs (including care staff, management staff, support staff) and non-staff costs [B63]. In fact, as disclosed by the Defendant at subsequent meetings, the Defendant had not obtained any costs data from local care homes. All that it had was data from a “dependency tool”, which indicated the number of care hours (*cf.* care costs) required by residents. The only costs data that informed the Proposed Pricing Strategy was the national data contained in the CareCubed Model. This included £8.49/hour for care staff, £9.26 for senior care staff, £10.08 for administrative staff, £12.10 for deputy managers and £21.14 for managers [B64]. No figures were identified for support staff such as cooks, cleaners and laundry workers.

31. The Proposed Pricing Strategy recorded that “*The tool also takes account of local cost indicators and markets*” [B64], but did not explain how it did so. Despite numerous meetings and correspondence, it remains entirely unclear to the Claimant how the CareCubed Model took account of local cost indicators and markets (if, indeed, it actually did so).

32. The Proposed Pricing Strategy stated that the CareCubed Model generated a figure of £572.60/week for ordinary residential care. All other figures in the Proposed Pricing Strategy were based on that figure, as follows:

32.1. The Defendant applied an uplift to that figure of 3.7% to arrive at a figure for dementia care.

32.2. The Defendant distributed the figure across the four grades of care homes, using the formula for that distribution that had been used prior to 2019 [B65]. This generated the figures which are reproduced at paragraph 4 above.

32.3. The Defendant proposed that for future years, the figures would either be updated for inflation or the CareCubed Model would be rerun [B68].

33. The explanation of the methodology for the CareCubed Model was set out at appendix 4 to the Proposed Pricing Strategy [B73]. The breakdown of the £572.60/week figure was set out at appendix 5 [B77].

34. From the figures in the Proposed Pricing Strategy and the appendixes, it was possible to discern the way in which some components of the £572.60/week figure had been arrived at. For example, a figure of £176.60 was given for daytime care costs, using only basic grade care staff. It could therefore be deduced that the £176.60 figure was based on 16.56 hours (using an hourly rate of £8.49 plus on-costs of employment of £2.17). However, it was not possible to identify how other components of the £572.60/week figure had been arrived at. For example, the breakdown of costs identified a figure of £19.93/week for “support staff – other care” [B77]. Nothing in the Proposed Pricing Strategy or the methodology at appendix 4 explained how that figure had been arrived at.

35. As Mr Gray explains, the CareCubed Model is understood to be a tool used as a cross-check (not an end-point) when formulating individual care packages (not blanket fee rates) for adults under 65 with learning disabilities (not elderly persons without learning disabilities) (para.67 [B28]). The Proposed Pricing Strategy did not explain why the authors of the strategy considered that the CareCubed Model was an appropriate tool for setting fees for elderly care home placements.

C.2 The Consultation Response

36. The Claimant submitted a formal consultation response on 24 September 2019 [B87] (“**the Consultation Response**”). It was supported by a report prepared by Costing Care Limited,

which set out the actual costs incurred by local providers (“the Cost of Care Report”). The Cost of Care Report was based on data from 90.27% of the occupied beds in the Defendant’s area (Gray, para.36.1 [B11]).

37. The Cost of Care Report identified the cost to providers (excluding any element of profit) of providing an ordinary residential care bed as £639.72/week and the cost for a dementia care bed as £716.61/week [B117]. According to this data, the figure generated by the Carecubed Model would result in a £67.12/week loss to providers for an ordinary residential care bed and more for a dementia care bed.

38. Unlike the Carecubed Model, the Cost of Care Report provided an explanation of each of the component costs borne by care providers. Thus, for example, in respect of non-administrative support staff, it provided:

Chefs / cooks	£14.60
Kitchen / catering assistants	£12.66
Domestics	£18.05
Laundry assistants	£13.85
Other staff (including handymen)	£7.30
Total:	£66.46/week

39. In the Consultation Response, the Claimant explained that it was unable to understand how the Carecubed Model had generated a figure of £572.60/week and that “*Until we fully understand the source of the information used by the Council and how it was obtained, it is impossible for us to formulate a definitive response which addresses the accuracy of the information*” [B95].

40. As described at section D [B14] and section G [B24] of Mr Gray’s witness statement, the Claimant continued to press the Defendant for information about the basis for the figures generated by the CareCubed Model. The Defendant was unable to answer those questions. For example, the Defendant’s officers did not know on what basis the CareCubed model generated a figure of £19.93/week for “support staff – other care” or whether the model made any allowance for cooks, catering assistants, domestics, laundry assistants or other

staff. Thus, it is possible that a significant part of the disparity between actual care costs and the figure generated by the CareCubed Model is that it omits to make provision for certain costs.

C.3 The Fees Decision

41. On 6 July 2021, the Defendant published its decision on care home fees for 2019 onwards [B238]. The appendix to this Fees Decision specified a schedule of rates [B240]. The rates for 2019/20 were a direct application of the Proposed Pricing Strategy (save for an unexplained 20 pence difference for band 1 placements), as follows:

Residential Care - general		
	Proposed Pricing Strategy	Letter of 6 July 2021
Band 1	£590.57	£590.37
Band 2	£554.35	£554.35
Band 3	£519.38	£519.38
Band 4	£490.24	£490.24

Residential Care - dementia		
	Proposed Pricing Strategy	Letter of 6 July 2021
Band 1	£612.42	£612.21
Band 2	£574.86	£574.86
Band 3	£538.60	£538.60
Band 4	£508.38	£508.38

42. Mark Longstaff (the Defendant’s Director of Commissioning and Asset Management) subsequently confirmed that “*The offer reflects the figure the model produced*” and “*The data was fed into the model and [the offer] was the figure that the model kicked out*” [B273].

43. The fee levels for 2020/21 and 2021/22 used those figures, as uprated for inflation.

44. Thus, the Fees Decision was an application of the Proposed Pricing Strategy. However, remarkably:

44.1. It was taken before the consultation exercise on the Proposed Pricing Strategy had concluded. The Defendant had not analysed the consultation responses.

44.2. It was taken by officers, before the Cabinet had considered the Proposed Pricing Strategy.

45. Had the Defendant decided to abandon its consultation exercise and determined that the Pricing Strategy should be set by officers rather than the Cabinet? No. As the Defendant put it in its pre-action protocol reply:

“Paragraph 70 of the Letter before Claim sets out that it is believed that the Council has failed to follow the process as set out within the Consultation Document, insofar as the Consultation Document informed interested parties that notwithstanding delegated authority, it would refer any decision regarding fee setting to Cabinet. It is accepted that this did not happen and the decision regarding fee setting was authorised by the Head of Health, Education, Care and Safeguarding using delegated authority. It was considered that the decision regarding fee setting may require Cabinet approval and this was communicated with the Consultation Document; the Council wished to be transparent with interested parties that such a decision may be required. However, due to the relatively small change within the fees being set, it was considered that such a decision was not required, and it was appropriate to be made using the appropriate delegated authority. The overall Pricing Strategy will be considered by Cabinet. It is not accepted that the use of delegated authority instead of Cabinet approval insofar as the decisions regarding fee setting amounts to a failure to consult appropriately or to follow the process as set out in the Pricing Strategy document” (emphasis added) [B279].

46. Thus, the Defendant contends that it has not departed from the procedure specified by the Consultation Document. The Cabinet will still determine the Pricing Strategy, based on an analysis of the consultation responses.

47. However, the Defendant has not identified any logical basis for setting the fee levels based on the Proposed Pricing Policy before determining whether the Proposed Pricing Policy should be adopted (in light of the consultation responses). The contention in the pre-action

reply that it was legitimate to take the Fees Decision “*due to the relatively small change within the fees being set*” is circular – the change in fees is only relatively small if the Proposed Pricing Policy is applied.

D. GROUNDS FOR JUDICIAL REVIEW

D.1 Ground 1: it was procedurally unfair to take the Fees Decision based on the Pricing Strategy before the consultation on the Pricing Strategy had been completed and the Cabinet had made on a decision on the Pricing Strategy

48. As set out above:

48.1. The Pricing Strategy was intended to be used to set care home fees for 2019-2022.

48.2. The procedure for setting the Pricing Strategy (and therefore setting care home fees) was accompanied by two safeguards: (1) a consultation exercise; and (2) a decision by Cabinet.

48.3. The care home fees for 2019-2022 were set applying the Proposed Pricing Strategy, before the two procedural safeguards had been complied with.

49. To apply the Proposed Pricing Strategy to set the 2019-2022 fee levels before the conclusion of the consultation exercise and before the Cabinet had considered the Proposed Strategy was clearly unfair. It would render nugatory the Cabinet’s decision on whether to approve the Proposed Pricing Strategy.

50. This also constituted a breach of the fourth of the four consultation requirements set out under ground 2(a) below.

D.2 Ground 2: using the CareCubed model to take the Fees Decision was (a) unfair when the Claimant had not been afforded an effective opportunity to make representations on the model and/or (b) irrational when the Defendant did not know how the CareCubed figure was derived or why it differed from the local costs data

(a) Unfair

51. There are four essential requirements of a fair consultation process (*R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 [2014] 1 WLR 3947, para.25, *per* Lord Wilson):

51.1. First, the consultation must be at a time when proposals are still at a formative stage.

51.2. Second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.

51.3. Third, adequate time must be given for consideration and response.

51.4. Fourth, the product of consultation must be conscientiously taken into account in finalising any proposals.

52. Those requirements apply both where there is a duty to consult and where a consultation is embarked on voluntarily (*R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, para.24, *per* Richards LJ).

53. The Defendant breached the second consultation requirement by failing to give the Claimant sufficient information about the CareCubed Model, on which it proposed to base the Pricing Strategy, to permit of intelligent consideration and response.

54. The failure in this case is analogous to the failure identified by the Court of Appeal in *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438. The National Institute consulted the claimant on its decision whether to recommend the use of a drug in the NHS. It provided the claimant with a copy of the model it used, which the

claimant could run, but which did not permit changes to be made to the inputs or assumptions (para.14). The Court found that the National Institute's failure to disclose a fully executable version of the model prevented the claimant from testing its weaknesses, which was "*a matter on which consultees may properly have something to say*" (para.45). The consultation exercise was therefore held to be unfair.

55. The error in this case was more egregious. The Claimant's complaint is not merely that the Defendant failed to disclose a copy of the CareCubed model that would enable the Claimant to test its validity, but that the Defendant failed even to explain how the model generated the figures which the Defendant relied on. For example, the Defendant wholly failed to explain how the figure of £19.93 per bed for non-administrative support staff was arrived at. This deprived the Claimant of an effective opportunity to make informed representations on the appropriateness of relying on the CareCubed model in preference to the actual costs data.

(b) Irrational

56. As Saini J explained in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), paras.31-34:

"31. A modern approach to the Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational?"

32. A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.

33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?"

34. *This may in certain respects also be seen as an aspect of the duty to give reasons which engage with the evidence before the decision-maker. An unreasonable decision is also often a decision which fails to provide reasons justifying the conclusion.*”

57. Here, the only discernible reasoning for the Fees Decision is that this “*was the figure that the model kicked out*” (see para.42 above).

58. That reasoning could not justify the Fees Decision because the Defendant did not adequately understand why the model had “kicked out” those figures. The model was, to a significant extent, a black box which the Defendant had applied blindly.

59. Moreover, the Defendant could not rationally prefer the model to the actual fees data in the Cost of Care Report when it did not fully understand the model. For example, why should the model’s figure of £19.93 per bed for non-administrative support staff be preferred to the costs data of £66.46, when the Defendant had no idea how the £19.93 figure had been derived?

D.3 Ground 3: inadequate reasons

60. As Maurice Kay LJ put it in *R (Savva) v London Borough of Kensington and Chelsea* [2010] EWCA Civ 1209 [2011] PTSR 761, para.19:

“This is not a case in which the statute or the regulations impose a duty to provide reasons for the decision of the panel. Nor does any of the guidance refer in terms to the provision of reasons. The question is whether the context is one in which the common law requires reasons to be given. It does so where fairness requires it and there is a recognised trend in the direction of requiring reasons: see Stefan v General Medical Council [1999] 1 WLR 1293, 1300F, per Lord Clyde and De Smith’s Judicial Review, 6th ed (2007), p 413.”

61. Savva’s case concerned a local authority’s calculation of the costs of meeting an individual’s community care needs. The Court of Appeal held that reasons were required for the decision:

“20. ...If a local authority were entitled to notify a bald figure without any explanation, the recipient would have no means of satisfying himself or herself that it was properly calculated. ...Or, to put it the other way round, an absence of explanations may make it impossible to mount such a challenge, whether by way of complaint or by way of litigation.

21. In many cases, the provision of adequate reasons could be achieved with reasonable brevity. In the present case, I would consider it adequate to list the required services and assumed timings (as was actually done in the FACE assessment), together with the assumed hourly cost. That would not be unduly onerous. I appreciate that some recipients require more complicated arrangements which would call for more expansive reasoning but if that is what fairness requires, it must be done.”

62. It follows that the Defendant was under a common law duty to give reasons for its Fees Decision in this case. If there is a common law duty to give reasons for the sum of money a local authority is prepared to allocate in an individual case then *a fortiori* there must a duty to give reasons for the sum a local authority is prepared to allocate in a whole class of cases.
63. The purpose of the duty is to enable those affected to understand whether the Fees Decision was lawful. As Hickinbottom LJ put it in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] Civ 2098 [2018] 4 WLR 168, para.122(iii): “*The rule of law requires effective access to justice. Therefore, generally, unless (eg) excluded by Parliament, there must be a proper opportunity to challenge an administrative decision in the court system. As a consequence, unless rendered impractical by operational requirements, sufficient reasons must be given for an administrative decision to allow a realistic prospect of such a challenge. Where the reasons given do not enable such a challenge, they will be legally inadequate*”.
64. Here, the only explanation for the 2019/2020 fees contained in the Fees Decision was that it “*equates to approx. 4.6%*” increase above 2018/19 fees [B238]. However, as Mr Longstaff made clear on 26 July 2021, the Fees Decision for 2019/20 fees was not based on a percentage uplift on previous fees. Rather, “*The offer reflects the figure the model produced*” [B273].

65. The Claimant's complaint is not that Mr Longstaff's explanation was not recorded in the decision letter, but rather that the reason given ("*The offer reflects the figure the model produced*") was not legally adequate. The Claimant was left in the dark as to whether the Defendant had (in applying the model) had regard to matters raised in the Claimant's consultation response, such as local costs data or the costs of employing cooks and cleaners or washing laundry.
66. The Claimant does not contend that this explanation had to be incorporated into the body of the Fees Decision: a public body's analysis of consultation responses would ordinarily be contained in a consultation response; and an adequate explanation of the model could have been included with the consultation proposal or on the Defendant's website (just as, in Savva's case, the Court of Appeal held that "*Recipients and their advisers are entitled to know about the RAS [the resource allocation model at issue in that case] but, as the association's guidance recommends, this can be achieved by publishing the RAS on the local authority's website in a user-friendly format*" (para.21). The problem is that the Claimant has been left unable to discern (from any source) why the Defendant preferred the figure "*kicked out*" by the model to the actual costs data (taken from 90% of occupied beds in the Defendant's area) that was submitted by the Claimant. For example, why did the Defendant prefer the figure of £19.93/week for non-administrative support staff to the actual costs data of £66.46 per bed per week?

E. RELIEF

67. The Claimant seeks an order on the papers for permission to apply for judicial review, together with standard directions. The permission threshold (which is designed to keep out weak and vexatious claims – *R v Secretary of State for Trade and Industry, ex p. Eastaway* [2000] UKHL 56; [2000] 1 WLR 2222, 2227H, *per* Lord Bingham) is plainly surmounted. The Claimant's time estimate is 2 days. Given the importance of the claim, the Claimant asks that the substantive hearing be listed to be heard by a full-time High Court judge.
68. At the substantive hearing, the Claimant will seek:

- 68.1. The grant of judicial review.

68.2. An order quashing the Fees Decision.

68.3. Such further or other relief as is necessary to give effect to the judgment of the Court.

68.4. Costs.

F. CONCLUSION

69. For the reasons set out above, the Claimant seeks permission to apply for judicial review, the grant of judicial review and relief in the terms set out above.

CHRIS BUTTLER QC
MATRIX
20 SEPTEMBER 2021