

- (1) Party: Claimant
- (2) Witness: K Gray
- (3) First Statement
- (4) Exhibit: KG1
- (5) Date: 16.09.21

CLAIM NUMBER:

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

BETWEEN:

THE QUEEN
on the application of

CARE NORTH EAST

Claimant

And

NORTH TYNESIDE COUNCIL

Defendant

FIRST WITNESS STATEMENT OF KEITH GRAY

I, KEITH GRAY of 97 Miller Close, Newcastle upon Tyne, NE12 9ET state as follows:

1. I am the Chairman of Care North East. Care North East is an association which represents the interests of care home providers who operate care homes in the North East of England. I am a certified accountant by profession and a Fellow of the Association Chartered Certified Accountant (FCCA). I joined the board of CNE in 2004 and assumed the position of Chairman in 2013.

2. CNE's membership is made up of care home operators amounting to nearly 250 care homes across the North East, who in total account for near 10,000 care home beds. One of CNE's functions is to represent its members in discussions and engagement with the local care home commissioners; these are the respective local authorities and clinical commissioning groups ('**CCG**').
3. Throughout the remainder of this witness statement, I will refer to Claimant (Care North East) as '**CNE**' and to the Defendant (North Tyneside Council) as 'the **Council**'.
4. I make this statement in support of CNE's application for permission to proceed with a judicial review against the Council and in support of the substantive proceedings in the event that permission is granted.
5. Unless stated to the contrary, the facts and matters contained within this witness statement are within my own knowledge.
6. Throughout this statement, I will refer to the bundle of documents contained within the exhibit marked KG1 which are introduced with this statement. 'Enclosure' references are references to the corresponding enclosure within exhibit KG1.
7. I will begin by setting out at sections A and B below some general background information regarding the types of care homes and how care home fees are currently funded in England:

(A) Types Of Care Homes

8. Principally there are two categories of care homes; one providing care to individuals under the age of 65 years (i.e. to adults who are of working age), and one providing care to individuals over the age of 65 years (i.e. elderly care). The Claimant's membership is made up of care homes who provide elderly care. Within this category, there are two types of care home. Firstly, there are those that simply provide accommodation and personal care, most commonly referred to as 'residential care homes'. Should residents within these homes require treatment from a nurse then, unless they are admitted to hospital, the treatment must be provided by a District Nurse as residential homes are not registered with the CQC to provide nursing care. Secondly, there are care homes that, in addition to being registered to provide accommodation and personal care, are also registered to

provide nursing care. The term 'care home' covers both residential and nursing homes. Of course, there are those care homes that offer and provide both residential care services and nursing care services, and are accordingly registered with the CQC to provide both of these categories of service.

9. I should also mention that residential care homes and nursing care homes both provide (or at least, may provide) services to individuals who suffer from dementia. Dementia is on occasions still referred to as 'EMI' or 'Elderly Mentally Infirm'.

10. Care homes are heavily regulated. In addition to being subject to the provisions of the Health & Social Care Act 2008, care home operators are also subject to the provisions of the Care Quality Commission (Registration) Regulations 2009 and the Health & Social Care Act 2008 (Regulated Activities) Regulations 2010. Given their relevance to question of care home costs/funding, I draw particular attention to the following regulations regarding the need for a provider to remain financially viable and to ensure that suitably trained staff are deployed in sufficient numbers at all times:

- Regulation 13(1) of the Care Quality Commission (Registration) Regulations 2009 requires a care home operator *"to take all reasonable steps to carry on the regulated activity in such manner as to ensure the financial viability of the carrying on of that activity"* for the purpose of ensuring compliance with the 2009 and 2010 Regulations.
- Regulation 12 of the Health & Social Care Act 2008 (Regulated Activities) Regulations 2014 requires care home providers to ensure that *"care and treatment"* are provided in a safe way. This is stated to include *"ensuring that persons providing care or treatment to service users have the qualifications, competence, skills and experience to do so safely"*.
- Regulation 18 of the Health & Social Care Act 2008 (Regulated Activities) Regulations 2014 requires care home providers to ensure that *"sufficient numbers of suitably qualified, competent, skilled and experienced persons"* are deployed at all times. There is some overlap with this requirement and that of regulation 12.

(B) The Funding Of Care Home Fees

11. Care home fees are funded in a number of ways.
12. If an individual's primary care need is health related which gives rise to a need for nursing care (rather than arising from social care needs), the individual's responsible Clinical Commissioning Group is required to meet the whole of the individual's care home fees. This method of funding is referred to as Continuing Health Care ('**CHC**'). CHC is not means tested. This case is not concerned with CHC funding.
13. If nursing care is not an individual's primary care need (i.e. they are not eligible for CHC) and they have capital of over £23,250, the individual is required to meet the full cost of their care from their own personal resources. If, however, an individual has capital of between £14,250 and £23,250, they are expected to contribute to the care home fees from their capital resources as well as from their income. The level of their contribution will depend upon the extent of their means between £14,250 and £23,250. The balance of the fees will be met by their local authority up to the maximum fee rate that the local authority is prepared to pay. Local authorities usually have more than one maximum fee rate in order to cover the different categories of care. Ordinarily there will be different fee rates for residential care, residential dementia care, nursing care and nursing dementia care, on the basis that the latter forms of care are more expensive to provide than the former. Some authorities may also have different rates within each of these care bands; the rate payable usually being dependent upon the local authority quality rating/banding for the care home.
14. Even if an individual is not eligible for CHC, they may have ancillary nursing needs. Local authorities are prohibited under the provisions of section 22 of the Care Act 2014 from commissioning nursing care, unless they are acting as a commissioning agent for their local CCG. Any provision that a local authority may make within its fee rates for nursing care, does not therefore cater for the costs of providing nursing care. Those costs are instead met by a national fixed rate 'Funded Nursing Care' ('**FNC**') payment, which is paid separately by the local CCG on top of the local authority's fee in those cases where an individual has ancillary nursing needs. However, local authorities may set a higher rate for placements at which ancillary nursing care is provided, to reflect the fact that individuals with ancillary nursing needs (which qualify them for the FNC payment) will ordinarily also have higher social care needs.
15. Personal budgets were introduced by the Care Act 2014. Having assessed an individual as having care and support needs for which the local authority is responsible, the authority

is now required to prepare a care and support plan for the individual, which must include a personal budget. The personal budget must specify: (a) the cost to the authority of meeting the individual's needs which it is required or decides to meet; (b) the amount which, on the basis of a financial assessment, the individual must pay towards that cost; and (c) the amount the local authority must pay towards that cost. The amount of the local authority's payment will ordinarily be determined by what the local authority has set as its fee rate.

16. If there is a shortfall between the fee charged by a care home and the local authority's fee rate, this shortfall will have to be met by what is referred to as a 'Third Party Top-Up'. This is usually paid for by a relative of the individual receiving care home services. Chapter 11 of the Care Act Guidance addresses these Top-Up payments and personal budgets. It provides:

(1) *"The personal budget must always be an amount sufficient to meet the person's care and support needs, and must include the cost to the local authority of meeting the person's needs which the local authority is under a duty to meet..."* (paragraph 11.10)

(2) *"...there may be cases where a person or a third party on their behalf is making an additional payment (or a "top-up") in order to be able to secure the care and support of their choice, where this costs more than the local authority would pay for such a type of care. In these cases, the additional payment does not form part of the personal budget, since the budget must reflect the costs to the local authority of meeting the needs."* (paragraph 11.14)

(3) *"Local authorities should ensure that the method used for calculating the personal budget produces equitable outcomes to ensure fairness in care and support packages regardless of the environment in which care and support takes place, for example, in a care home or someone's own home. Local authorities should not have arbitrary ceilings to personal budgets that result in people being forced to accept to move into care homes against their will."* (paragraph 11.22)

(4) *"Regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency";* the following statement being made with regards to sufficiency - *"The amount the local authority calculates as the personal budget being sufficient to meet the person's needs which the local authority is required to meet under section 18..."* (paragraph 11.24)

(5) *“The Act states the personal budget must be an amount that is the cost to the local authority of meeting the person’s needs. In establishing the ‘cost to the local authority’, consideration should therefore be given to local market intelligence and costs of local quality provision to ensure that the personal budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget.”* And further, the personal budget should be based *“on the cost of quality local provision”*. (paragraph 11.25)

17. If an individual has capital of less than £14,250, they will not have to make any contribution to the care home fees beyond their pension. There may of course still be a need for a Third Party Top-Up.

18. If a local authority is responsible for meeting all or part of the care home fees because an individual’s capital is below £23,250, the local authority will enter into a contract with the care home in question, under which the local authority will commission the whole of the care services. This is typically done through a framework agreement under which the local authority will then place individual residents.

19. As an individual’s capital diminishes over time, it is not uncommon for them to move from being privately funded to being funded (in whole or in part) by their responsible local authority. This is not something over which a care home has any control and can create situations where a care home may move from providing care under a private contractual arrangement with the resident, to a contractual arrangement with the responsible local authority.

20. I will turn now to the Council’s arrangements for funding care home placements.

(C) The Consultation Document, the Proposed Pricing Strategy and CNE’s response

21. On 15 July 2019, the Council produced its ‘Pricing Strategy For Older Person’s Residential Care 2019/20 Consultation Document’ (‘the **Consultation Document**’); a copy of which appears at KG1 enclosure 1, page 33. The Council sent the Consultation Document to care home owners on 22 July 2019 marking the commencement of the Council’s consultation on care home fee rates.

22. The ‘Introduction’ on page 2 of the Consultation Document provided:

“The Authority is proposing to review the weekly rates paid for residential and nursing home services 2019/20 for older people (and other client groups as appropriate) and wishes to consult with the care home in North Tyneside on its proposals. Whilst the decision will ultimately be made by the Authority, the Authority seeks the views of care home providers and other interested parties, to inform its decision making process.

This document sets out how this consultation will take place and the subsequent decision making process that will follow, in order for the Authority to formally make the decision regarding any review of rates.

The Consultation should be read alongside the Proposed Pricing Strategy document dated 15 July 2019. A copy of this document is part of this Consultation.” (emphasis added).

23. I therefore understood that the Council would complete the consultation exercise and determine the Pricing Strategy before setting revised rates.

24. Under the heading ‘Consultation Process’ on page 2 and 3 of the document, the Council informed the reader that “Adult Social Care has a set of engagement standards that set out how [the consultation] should take place”. The document went on to state the following:

“The Proposed Pricing Strategy proposes a new methodology for the calculation of care home fees for older people for 2019/20 and beyond. This Consultation offers local providers and other interested parties the opportunity to have their say about this and to enable the Authority to consider your views on our proposals, alongside those of others. As part of Adult Social Care’s Engagement Standards, we will give:

- Sufficient notice and opportunity to get involved*
- All the information that is known and legally permissible to be shared to aid your understanding of the issue*
- Advance information on what decisions have already been made and why those decisions have been made and then what parts of the issues or decisions you can still influence*
- Include details of the issues raised and responses in the decision making process.”*

25. I therefore understood that the Council would provide all the relevant information of which it knew (subject to it being legally permissible to do so) to local care providers and other interested parties.

26. As stated within the above extract from the Consultation Document, the 'new methodology' referred to was set out within the Proposed Pricing Strategy ('the **Proposed Pricing Strategy**'), a copy of which the Council appended to the end of the Consultation Document. On page 13 of that document under the heading 'Care Fund Calculator Model', the Council stated:

"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.

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."

27. Accordingly, the Council confirmed that its proposal was to adopt "a new methodology [i.e. the Care Fund Calculator] for the calculation of care home fees for older people for 2019/20 and beyond". The proposal was to use the Care Fund Calculator to actually set the fees the Council would pay to care home providers, rather than to use the Care Fund Calculator as one indicator (among others) that would inform the Council's decision on fee rates.

28. As detailed on page 14 of the Pricing Strategy, the Care Fund Calculator costing model generated a single fee rate (which the Council refers to as a 'blended rate') of £572.60 per care home resident per week. A breakdown of this figure is contained in a table on page 14 of the Pricing Strategy, with a more detailed breakdown appearing within Appendix 5 of the Pricing Strategy.

29. Page 15 of the Pricing Strategy provided:

"The blended rate can then be used as a basis for the calculation of the rates for each of the grades. This is done on the basis of the proportion of current costs and placement numbers across the homes / placements in North Tyneside.

This is set out as follows:

Residential Care		2019/20 Proposed	Blended Rate
	Grade 1	£590.57	£572.60
	Grade 2	£554.35	
	Grade 3	£519.38	
	Grade 4	£490.24	

The rates for dementia care can be further increased by 3.70%, this is the current differential in general / dementia rates. This is further set out as follows:

	No. of Care Homes	2019/20 Proposed	Proposed Weekly Price - dementia care
Grade 1	19	£590.57	£612.42
Grade 2	7	£554.35	£574.86
Grade 3	3	£519.38	£538.60
Grade 4	1	£490.24	£508.38

30. Thus, the 2019/20 rates proposed in the Proposed Pricing Strategy were a straightforward application of the rates that were generated by the Care Fund Calculator model.

31. On page 6 of the Consultation Document and following, the Council posed 7 "consultation questions" of which:

- Question 1 asked, "Has the Authority taken into account all of the relevant costs of delivering residential care in North Tyneside? If not, please detail what other costs, in your view, should be considered and why."
- Question 2 asked, "The draft Pricing Schedule links the costs of dementia / EMI care to the baseline residential care cost. In your view, is this an appropriate method of calculating the costs of dementia/EMI care? If not, please explain why, and set out what you believe to be a more appropriate methodology, and explain why in your view, this is more appropriate."

32. Accordingly, as part of the consultation process, the Council sought responses which specifically addressed the costs contained within the model it had used to calculate the

fee rate proposals for 2019/20 and what costs may not have been considered by the Council. The second consultation question also raised the issue of the appropriateness of the Council's approach to calculating dementia care.

33. As to the decision-making process, page 3 of the Consultation Document provided:

“Decision Making Process

The Authority's power to set care home fees is delegate under the Authority's Constitution, to the Head of Health, Education, Care and Safeguarding. Given the important and strategic nature of this decision making process, it is proposed that the any [sic] 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.

It is planned at this stage that the report will be presented to the Cabinet meeting on 14 October 2019. From this date there is a 5 day call-in period. Following the call in period, it is proposed that the Authority will publish the decision and the formal Pricing Strategy as soon as possible.

If there are a substantial number of responses to this Consultation and / or the responses are sufficiently complex in nature, the decision report to Cabinet may need to be delayed to a later meeting, ie November 2019.”

34. I therefore understood that CNE would be afforded two procedural safeguards. First, Pricing Strategy (which would be used to set fee rates) would not be finalised until the consultation exercise had been completed. Second, the decision on the Pricing Strategy (which would be used to set fee rates) would be taken by the Cabinet, rather than by the officers who formulated the Pricing Strategy.

35. Following an agreed extension of time, CNE submitted a detailed written response to the Consultation Document ('**CNE's Consultation Response**') on 24 September 2019. A copy of this response appears at KG1, enclosure 2, page 33.

36. As part of CNE's Consultation Response, CNE relied on a Cost of Care Report prepared by Costing Care Limited ('the **Cost of Care Report**') and provided an update of the costs contained within that report so as to take account of the increase in the National Living Wage in April 2019. A copy of the Cost of Care Report appears at KG1, enclosure 3, with its Appendices at enclosure 4 and the National Living Wage update enclosure 5, page 121. As to this:

36.1. The Cost of Care Report was prepared by me in my professional capacity as an accountant; I am a director of Costing Care Limited. The Cost of Care Report undertook a detailed analysis of the costs of providing elderly care home services in North Tyneside. The data obtained for these purposes was taken from 18 care homes of which 10 were care homes providing residential care services and 8 were care homes providing nursing services. These 18 care homes were spread over 12 separate care providers operating within North Tyneside. There were a total of 812 registered beds within the participating care homes (that is approximately 70% of the total number of registered beds in North Tyneside), of which 733 were occupied beds. This equated to 90.27% of the occupied care beds within North Tyneside. A detailed breakdown of this figure across the respective care categories is set out on page 4 of the Cost of Care Report, a copy of which appears at KG1, enclosure 3, page 110.

36.2. As detailed on page 8 of the Cost of Care Report under the heading 'Provider Profit', no provision was made for profit within the actual costing calculations contained in the report. As the report states:

"However, typical profit margins from various sources indicate a range of 6-10% on costs. For your information, we have provided a table at appendix 3 showing the typical profit margin percentages and the impact they would have on these costings."

36.3. The Cost of Care Report also set out data on total weekly fee income, taken from surveys that providers had completed and submitted. That income related to local authority funded placements, CHC funded placements, out of area placements funded by other local authorities outside of North Tyneside, private funded placements and third-party top-ups. As stated within the 'Conclusion' to the report, the information contained within it was based on actual cost figures and minimal assumptions. It also used actual occupancy levels, which at that time were 90.27% rather than the 87.5%

used by the Council within its cost calculations¹. Using a higher occupancy level (as the Cost of Care Report did) would serve to reduce the costs figure generated, because the total costs would be averaged across a larger population.

36.4. The detailed findings of the Cost of Care Report are contained within Appendices 1 to 4 to the report, a copy of which appear at KG, enclosure 4, page 117. As detailed within Appendix 4 to the Cost of Care Report, the local evidence shows that there is a shortfall between the total income received by care homes in North Tyneside and their costs of providing the services. Also shown in Appendix 4 is the significant shortfall between the fee rates paid by the Council and the costs of providing the care home services it commissions. The lowest shortfall is £54.25 per resident per week for non-dementia care and the highest shortfall is £132.06 per resident per week for dementia care services. It is important to bear in mind that these shortfalls are pre-profit. In other words, the figures do not merely indicate an absence of profit, they indicate an absolute loss. Some care home owners are able to bear such losses on a short-term basis by offsetting the loss against profits from care homes in other areas. However, it is clearly not commercially viable to operate a loss-making care home in the longer term.

37. These matters are all addressed in more detail within CNE's Consultation Response at paragraph 19 and following of that document.

38. Within CNE's Consultation Response at paragraphs numbered 24 to 31, CNE set out its response to the first of the Council's consultation questions which I have referred to above at paragraph 31 of this witness statement².

39. I could not understand how the Care Fund Calculator Model had generated figures that were so much lower than the actual costs of care. By way of example, the Care Fund Calculator Model (now referred to as CareCubed) used by the Council generated a figure

¹ Although the Council does not expressly refer to its use of an occupancy level of 87.5% within the Consultation Document, it can be calculated by reference to the stated 1,486 beds of which 1,286 are stated to be occupied on page 6 of the Pricing Strategy. The use of the occupancy level of 87.5% has not been disputed by the Council and was confirmed by them in a meeting with CNE which I attended on 12 March 2021. A copy of the slides used by the Council at that meeting in which the figure of 87.5% is confirmed, appear at KG1, enclosure [20], page [.].

² i.e. "Please consider the Proposed Pricing Strategy and in particular the information used by the Authority in order to arrive at the potential rates. Has the Authority taken into account all of the relevant costs of delivering residential care in North Tyneside? If not, please detail what other costs, in your view, should be considered and why."

of £19.93/week for support staff (other than administrative staff). By contrast, the Cost of Care Report showed that the actual cost to care homes of a non-dementia bed include non-administrative support staff costs totalling £66.46 (comprising the costs of cooks, kitchen assistants, domestics, laundry assistants and other staff such as handymen) (see Appendix 1 to the Cost of Care Report). It was wholly unclear to me whether and, if so, how the Care Fund Calculator Model had made allowance for the costs of cooks, laundry assistants *et cetera*. CNE therefore needed further information from the Council about how the Care Fund Calculator Model operated, in order to understand how the Council had produced the figures in its Proposed Pricing Strategy.

40. CNE raised a number of concerns in its Consultation Response based on the information the Council had provided (paragraphs 27 to 30 of CNE's Consultation Response - exhibit KG1, enclosure 2, page 94). As can be read there, amongst the concerns raised by CNE, the following 3 fundamental questions were put to the Council regarding the fee rate proposals it had set out within Pricing Strategy:

- *"On p.13 of the Pricing Strategy, the Council says that the information it obtained included dependency tool information. Insofar as the answers to the above questions do not already address this point, please confirm whether the Council obtain actual information regarding actual staffing levels, and what (if any) enquiries did the Council make so as to ascertain the actual levels and costs of agency staff within these staffing levels.*
- *On p.13 of the Pricing Strategy, the Council refers to certain costs which it says were included within its analysis. Of each of the cost heads analysed by the Council, please identify which contain actual costs taken from care homes within North Tyneside (stating which period(s) those costs relate) and which were analysed by reference to national data, identifying the precise source of that data.*
- *On p.14 of the Pricing Strategy, the Council states: "The Care Fund Calculator tool takes account of the effective and efficient operation of care home provision and includes cost indicators based on information sourced from services and provisions around the country. The tool also takes account of local cost indicators and markets. This is used to arrive at one weekly cost – the 'blended rate'." How the Council has done this is opaque. 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 the Council has used and its relevance to the costs of delivering care in North Tyneside."*

41. CNE suspected that national costs data had been used which did not accurately reflect the actual local costs in North Tyneside and/or costs had been omitted and/or the data used was stale and/or the calculations by the Council were inaccurate. It struck CNE as

being reasonable to request this information, not only because (as I have state above) the Council within the Consultation Documentation said it would provide all information that was known and the fact that the Council had expressly invited (within the first of the consultation questions) responses on whether all relevant costs had been taken into account, but also because this information was critical to understanding the reason(s) why the Council's fee proposals within the Pricing Strategy were so far below what the local evidence was demonstrating regarding the fees that care homes in North Tyneside required in order to meet theirs costs and operate sustainably.

42. As to CNE's response to the second consultation question which I have referred to above at paragraph 31 of this witness statement³; within CNE Consultation Response (at paragraph numbered 32 and following) we raised the question/concern as to why the Council had considered it necessary to calculate the actual costs of residential care home services and pay a fee rate based on those costs, but it had not considered it equally necessary to calculate the actual costs of providing dementia services. In doing so, we pointed to the evidence contained within the Cost of Care Report which demonstrated a shortfall in the Council's proposed dementia care fees of £76.89; again, this figure being the net figure before any consideration is given to profit. As set out within paragraph 35 of the Consultation Response, the Council had only made provision within the Care Fund Calculator for 2 hours of care for dementia residents, whereas the evidence within the Cost of Care Report taken from care home providers in North Tyneside, was that those residents suffering with dementia required 7.21 hours of care more than those residents with general residential care needs.

(D) The absence of information about the Care Fund Calculator Model

43. The Council did not provide the information requested within CNE's Consultation Response, so I wrote to Mr Scott Woodhouse of the Council on 12 November 2019 to chase a response. This email and the subsequent attempts I made to elicit this information are referred to within the Judicial Review Pre-Action Protocol Letter sent by David Collins Solicitors to the Council on 15 July 2021 (KG1, enclosure 38, page 241). In an attempt to reduce the Court's reading time, I do not propose to duplicate what is set out at paragraphs 34 to 61 of the Pre-Action Protocol Letter LBA. Rather, I confirm I have read those

³ i.e. "The draft Pricing Schedule links the cost of dementia/EMI care to the baseline residential care cost. In your view, is this an appropriate method of calculating the costs of dementia/EMI care? If not, please explain why, and set out what you believe to be a more appropriate methodology, and explain why in your view, this is more appropriate."

paragraphs and that their content is true to the best of my knowledge and belief. Those paragraphs summarise my persistent attempts to obtain information from the Council regarding the costs data and calculations contained within the Council's Care Fund Calculator, including at meetings with the Council, and the inadequate responses/answers from the Council. I would like to draw particular attention to the following:

43.1. As noted at paragraphs 39 and 40 of the Judicial Review Pre-Action Protocol Letter, progress with the Council's fee rates stalled from April 2020 to November 2020 due to the onset of the Covid-19 pandemic.

43.2. During the meeting I had with Ms Heslop of the Council on 12 March 2021 (as referred to within paragraph 45 of the Pre-Action Protocol Letter), Ms Heslop informed me that "the Council did not accept the CNE Model". I asked why, but she was unable to give an explanation, then or subsequently. I should also say the Cost of Care Report is not a costs model per se; i.e. it is not a costing toolkit taken off the shelf into which certain data is inputted, with underlying assumptions contained within it. Rather and as I have said above, the Cost of Care Report contains assimilated cost calculations taken from actual care home costs in North Tyneside. Even in respect of Return On Capital Employed figures, the Cost of Care Report uses actual rent paid by care home providers in North Tyneside, actual build costs in North Tyneside and actual interest rates paid by providers in North Tyneside.

43.3. Within the Council's letter of 15 March 2021, the Council informed me that "If there are mathematical errors [in the CFC], then they will be amended" and "... the Authority is willing to review any elements in calculating the fee which have been incorrectly calculated ...". See paragraph 47 of the Pre-Action Protocol Letter and also paragraph numbered 3 of the Council's letter to CNE dated 24 August 2021 (KG1, enclosure 43, page 286).

43.4. In the intervening period since the Council published the Consultation Document, the Council paid interim fee rates. These fees are set out below:

Residential	Interim	2019/20	2020/21
Rates Paid			
Grade 1		587.09	616.44
Grade 2		551.09	578.64

Grade 3	516.32	542.14
Grade 4	487.35	511.72
Dementia		
Grade 1	607.93	638.33
Grade 2	574.14	602.85
Grade 3	536.89	563.73
Grade 4	503.00	528.15

43.5. The Council continued to pay these rates until a matter of days ago, when it started to implement the uplifts and back payments as per the fee rates set out within its decision letter of 6 July 2021. However, the Council has not amended those figures to address the arithmetical errors I refer to in paragraph 54 (vi.) below.

43.6. During a meeting with the Council on 26 March 2021 (as detailed at paragraph 52 of the Pre-Action Protocol Letter) it was agreed that the Council would focus on answering 10 questions raised by CNE. These were:

1. *Staffing Costs – The only actual data used by the CFC model was that of obtaining staffing ratios/hours from the dependency tool supplied by the Council which covered only care/nurse hours. The Council were to supply how the CFC arrived at “Other Care – Support Staff Costs” as this was much lower than L&B/ADASS/NTCHOA models.*
2. *Blended Fee Rate – The CFC has only produced a blended fee rate (Res + EMI). The Council were to supply the % splits so the Association could compare the rates to other CoC*
3. *Agency Costs – The council were to provide answers as to why there was no allowance for agency costs within the CFC model.*
4. *Maintenance of Capital Expenditure – This cost appears to be omitted. The Council were to clarify where this cost has been included.*
5. *ROCE – The Council would supply further information on ROCE as the information received so far is limited and when looking at rental costs and simple ROCE calculations, the allowance in the CFC model is wholly insufficient.*
6. *One to One Hourly rate – The Council were to supply how they arrived at this rate*
7. *Dependency tool information used – We have now requested members send me the information it supplied to the Council in April 2019. Some members have informed me that they did not send any information while others have sent limited information. There doesn't seem to be any uniformity on the information supplied. We would ask that the Council provide the information it received from our members. We will seek authorisation from members if you require. We would expect this information to cover the majority of the 30 homes your report covers.*
8. *Period Covered – Please provide the period to which the dependency tool information relates? We do not believe that this question has been answered.*

9. *Actual Costs – We have requested that the Council inform the members for each of the cost heads analysed by the Council, identify which contain actual costs taken from care homes within North Tyneside (stating which period these costs relate) and which were analysed by reference to national data, identifying the precise source of that data. We do not believe the Council have provided this information and it is not available on page 13 of the pricing strategy as stated by the Council. We would ask for this information to be provided.*
10. *New Cost in new Contract – Although the Council have stated they believe there are no major changes to the new contract, it does not state if it believes there are any cost implications in the new contract. We would request the council to clarify whether the new contract any new cost implications for providers?*

43.7. The Council provided its response to these questions within an email on 7 April 2021 from Mr Woodhouse (KG1, enclosure 25, page 188). However, as stated at paragraph 53 of the Pre-Action Protocol Letter:

- *“The Council failed to answer what staff costs fall within the Council’s allowance of £19.93 within its CFC calculations for ‘Other Care’ costs outside of carer costs.*
- *The Council’s CFC calculations produced a blended cost of care and fee rate of £572.60 which included costs for residential and EMI. The Council failed to provide the percentage split it had applied between residential and EMI in arriving at this blended rate.*
- *The Council confirmed that no provision had been made for agency costs, notwithstanding (a) the Claimant’s evidence that agency costs ran at £37 per resident per week; being a cost which the Council did not dispute were being incurred by providers due to staff shortages; and (b) the Council’s allowance (albeit in part only) for agency costs in the provision of 1:1.*
- *The Council’s answer regarding the maintenance of capital expenditure was and continues to not be understood.*
- *The Council answered by saying that the issue of ROCE “...is not seen as an area for the Council to involve itself” and that “The appropriateness of the approach to ROCE used has been benchmarked against other Council’s and been found to be generating a value consistent with other Councils”.*
- *The Council failed to identify which of its actual costs information was taken from care homes operating in North Tyneside and which of its information was taken from national data and identifying the source of that national data.”*

43.8. As referred to at paragraph 55 of the Pre-Action Protocol Letter, I sent an email to the Council on 9 April 2021 (in advance of a meeting with Ms Heslop, Mr Woodhouse and Mr Gulliver of the Council) within which I set out CNE’s concerns regarding the Council’s approach to Return On Capital Expenditure within its Care

Fund Calculator model. Those concerns were as follows (I have added footnotes to identify the source of the figures referred to in the email):

“... please find below my understanding on how the ROCE was calculated within the Council calculations and how it differs to the CNE Cost of Care.

For ease of reference, please find below the extract from the “Proposed Pricing Strategy”:

3.5 Property costs (ROCE) For residential cases, the return on capital employed (ROCE) calculation uses a 3-year rolling average of house prices per local authority district and property type. We have updated the calculation to use the most recent year’s data as follows:

For England and Wales using Land Registry data to Dec 2018.

For Scotland, using Registers of Scotland data to Nov 2018.

A ROCE rate of 13% has been used in the Care Funding Calculator. This rate is applied to the value of the property as defined above. This is a blended rate based on an assumption that the provider organisation will have financed the purchase of the property through a combination of 20% commercial investment and 80% mortgage. The 20% investment assumes a requirement for a 15- 20% return, the 80% mortgage, a requirement for an 8% return. This methodology was recommended following research commissioned from the University of West England (UWE).

A weighting has been applied to Land Registry data on which the ROCE is calculated of 55% of average for cost group 1, 60% of average for cost groups 2, 3 and 4. This decision is based on 2 factors: i. research with providers whose median stated costs for ‘mortgage’ or ‘rent’ plus ‘profit’ was usually lower than the amounts indicated by the average costs using random test locations.

ii. an expectation that providers of services will seek cost-efficient properties in an area from which to deliver services. These properties are likely to be below average value compared to the district as a whole.

The ROCE is divided equally between the number of service users in the home. ROCE replaces the elements of ‘profit’, ‘mortgage’ and ‘rent’ where these have been used in other costing model

Issues we had with methodology

1) The methodology used by CFC uses a weighting of house prices from the land registry. This has nothing to do with care homes build or rental costs?

2) Maintenance of Capital Expenditure - As mentioned at our meetings, there is no allowance for maintenance of capital expenditure (whether that be building, fixtures, plant or vehicles) in these calculations. We don't believe this was mentioned in the op costs, so it is fair to point out that it is not included in either.

3) At our meetings, Nathan mentioned that if you total up the op costs and capital costs together, the Council model and the Association actual costs are not that far away. This is incorrect. The total can be analysed as follows:

Op Cost Total: £159.42

ROCE total: £63.98 (this includes a return for profit)

TOTAL: £223.40⁴

Association Model: (using lowest possible figures)

Op Cost Total: £137.02

MoCE: £14.36

ROCE total: £100.40 (not including profit – shown separately in CoC)⁵

Profit: £37.13⁶

TOTAL: £288.91

4) Rental Costs - As demonstrated in the Association cost of care, care homes which are leased are showing a cost in excess of the ROCE provided⁷

5) L&B and ADASS Models - As previously mentioned, on page 12 of the Council Pricing Strategy, it shows ROCE being used for both the ADASS and L&B models as £63.08. I'm not sure why the Council would use this figure when the actual figure or methodology of those models should be used. I presume this is because the CFC figure is much lower.

I would hope the Council look further into the rationale of the methodology being used."

43.9. As detailed at paragraph 61 of the Pre-Action Protocol Letter, so as to try and further assist the Council's understanding of the concerns held by CNE regarding the Council's Care Fund Calculator cost calculations, I sent a detailed note to the Council on 7 May 2021, restating our concerns about the approach to other staffing costs in the Care Fund Calculator Model. As stated within with Pre-Action Protocol Letter, my note highlighted:

"... the provision within the CFC of £19.93 to cover the costs of a chef, kitchen staff, domestic cleaners, laundry assistants and other staff falls significantly

⁴ These figures were taken from the final section of the table at Appendix 5 (p.27) of the Proposed Pricing Strategy.

⁵ These figures were taken from Appendix 2 to the Cost of Care Report.

⁶ This represents a profit margin of 6% and is taken from Appendix 3 to the Cost of Care Report.

⁷ This is set out in Appendix 1 to the Cost of Care Report.

below the actual costs. This compares with the actual cost data collected by the Claimant which demonstrated the cost to be £66.46 in March 2019. The only explanation for this is that either the Council has omitted costs from its calculation of £19.93 and/or its conclusion is arithmetically wrong (for example, it has made an error in uplifting the Living Wage costs). Hence why the Claimant has pressed so much for the Council to disclose the specific staff costs that it has taken into account in arriving at this figure. Notwithstanding, this information has still not be provided.”

44. The correspondence summarised at paragraphs 34 to 61 of the Pre-Action Protocol Letter appears at KG1, enclosures 11 to 32, pages 139 to 214.

(E) The Decisions Under Challenge

45. On 6 July 2021, the Council sent a letter to all care home providers operating care home services for the elderly in North Tyneside. Within that letter the Council announced the following:

- the Council’s decision setting care home fees (retrospectively) for the year 1 April 2019 to 31 March 2020;
- the Council’s decision setting care home fees (retrospectively) for the year 1 April 2020 to 31 March 2021; and
- the Council’s decision setting care home fees for the year 1 April 2021 to 31 March 2022 (retrospectively in respect of the period 1 April to 6 July 2021).

46. A copy of the Council’s letter of 6 July 2021 appears at KG1, enclosure 37, page 238.

47. The fee rates previously paid by the Council during 2019/20, 2020/21 and since 1 April 2021 were based upon interim rates, which I set out later in this statement. As is detailed within the Council’s letter of 6 July 2021:

- The interim fee decision of the Council had been to increase care home fee rates from 1 April 2019 by 4% above pre-April 2019 rates. The decision of 6 July 2021 was to increase the pre-April 2019 rates to the rates set out in the Council’s Proposed Pricing Strategy (set out above). This equated to an increase of 4.6%.

- The interim fee decision of the Council for the year 1 April 2020 had been to increase fees by 5% above the rates set out in the Council's Proposed Pricing Strategy.
- The Council's decision for 2021/22 was to increase fees by 2.16% above the new 2020/21 rates, backdated to 1 April 2021. The 2.16% increase was said to have been derived by reference to the 2.18% increase in the National Living Wage and the 2.10% increase in the Consumer Price Index.

48. Within an email dated 19 July 2021 to David Collins Solicitors (acting on behalf of CNE), the Council stated that its decisions set out within its letter of 6 July 2021 were made on 22 June 2021 (KG1, enclosure 53, page 326). Within its Response to the Judicial Review Pre-Action Protocol Letter on 30 July 2021, the Council stated again that this was the date of the decisions (KG1, enclosure 41, page 277).

49. As I mentioned above, it is common for local authorities to pay different fee rates depending on the category of care in question; these categories being residential, residential with dementia, nursing and nursing with dementia. The position in North Tyneside is that the Council operates different fee rates for each of these care categories, with each category itself having different fee rates depending on the banding rate into which each individual care home is assigned by the Council banding scheme. These various fee rates payable by the Council following its decisions of 22 June 2021 were detailed within 'Appendix 1' enclosed by the Council with its letter of 6 July 2021 and are reproduced below for ease of reference:

Residential Care - general	2019/20	2020/21	2021/22
Band 1	£590.37	£619.89	£633.28
Band 2	£554.35	£582.07	£594.64
Band 3	£519.38	£545.35	£557.13
Band 4	£490.24	£514.75	£525.87

Residential Care - dementia	2019/20	2020/21	2021/22
Band 1	£612.21	£642.82	£656.71
Band 2	£574.86	£603.60	£616.64
Band 3	£538.60	£565.53	£577.74

Band 4	£508.38	£533.80	£545.33
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50. Save for two tiny differences, the 2019/20 figures in the 6 July 2021 letter are identical to those at p.15 of the Proposed Pricing Strategy (which were the product of the Care Fund Calculator):

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

51. At a meeting between CNE and the Council on 30 June 2021, Mark Longstaff (the Council's Director of Commissioning and Asset Management) 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" (KG1, Enclosure 40, page 272).

52. Within its letter of 6 July 2021, the Council informed care providers:

"In considering the above percentage increase in 2021/22, the Authority is mindful of other additional support and resources coming into the social care market and provision to deal with COVID-19, specifically there are:

- *Additional grant funding that is being made available to support providers with COVID-19 relate cost pressures, particularly aligned to Infection Control and*

Testing arrangements across a range of service areas (currently available to 30 September 2021), and

- *Continued access to free PPE through the National PPE Portal for CQC registered providers or via the Local Resilience Forum route for other providers. These are available until March 2022.*
- *In addition to this, the Authority is more than willing to have a specific 1:1 conversation with any care home provider that is experiencing financial hardship.”*

53. As at the date of this witness statement, 30 September 2021 remains the date on which grant funding for COVID-19 related costs pressures will cease. Examples of these additional cost pressures are seen in the need for increased staffing levels and increased reliance on agency staff to help cover these increased levels as well as increased staff absences; increased infection control measures; decreased occupancy and therefore decreased income, but without a corresponding fall in costs and so on. As Covid-19 appears here to stay, at least for the medium term, these costs will continue at the very least throughout 2021/22.

(F) The decision-making process

54. As I explained at paragraph 34 above, the Council had led CNE to understand that the decision-making process would be accompanied by two procedural safeguards: first, that the Pricing Strategy would not be finalised until the consultation exercise had been completed and, second, that the decision on the Pricing Strategy would be taken by the Cabinet, rather than by the officers who formulated the Pricing Strategy. I was therefore surprised to receive the letter of 6 July 2021, which recorded that the prices had been set even though the consultation on the Pricing Strategy had not concluded and the Pricing Strategy had not been put before the Cabinet for decision.

55. This point was raised in the Judicial Review Pre-Action Protocol Letter sent by David Collins Solicitors to the Council on 15 July 2021 (KG1, enclosure 38, page 248). In its Response to the Pre-Action Protocol Letter dated 30 July 2021 (KG1, enclosure 41, page 279), the Council stated:

“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.”

56. I confess that I do not understand what point there would be in the Cabinet considering the Pricing Strategy document after it has been implemented by officers through the decisions recorded in the 7 July 2021 letter. As the Consultation Document explained, the Proposed Pricing Strategy would determine the rates set by the Council. This was reiterated on 29 January 2021, when Mr Woodhouse wrote to me stating:

“... I was clear at the Provider Forum that the application of the quality monitoring process and how it fed into fee levels was an area that was part of the fee setting and the consultation that had recently been undertaken. This would be subject to a Cabinet report and I would not pre-empt the outcome of that report and the decision that Cabinet might or might not take.”

(G) Further attempts to understand the Care Fund Calculator methodology

57. The Council contended within its Response to the Pre-Action Protocol Letter dated 30 July 2021 (a copy of which appears at KG1, enclosure 41, page 279) that: “All questions and queries raised by [CNE] in relation to the original response to the Pricing Strategy have been responded to ...”. This was simply not correct.

58. In an attempt to try to resolve this, I wrote to the Council on 9 August 2021. A copy of that letter appears at KG1, enclosure 42, page 284. Within that letter:

- I again sought clarification as to which costs used within the Care Fund Calculator were based upon national data and which were based upon local data.
- I referred to CNE’s concerns that there were arithmetical errors in how the Council had applied the uplifts referred to in its decision notification letter of 6 July 2021 to the interim rates.

- I repeated CNE's request that the Council identify what it did not agree with in the Cost of Care Report.
- I requested a copy of the Council's impact statement for when occupancy support is withdrawn; i.e. the support being provided to care homes due to the fall in their occupancy levels as a result of the Covid-19 pandemic.

59. Within its letter of reply dated 24 August 2021 (KG1, enclosure 43, page 286), the Council:

- Restated its belief that it had responded to all CNE queries, but stated that if there were any further queries, they must be put to the Council within 5 working days.
- Said it would need to clarify which costs within the Care Fund Calculator were based on national data and which were based on local data, following which it would revert.
- Said it had set a sustainable fee by "recourse to the model used" and that "there was no obligation to take into account factors in other models which may be available in the market".
- Said that "... the information received from providers and fed into the model was based on whole home information and was not split by care type, i.e. general or dementia care. The Authority recognised the need to include and maintain the current fee differential for dementia care and this is included within the fees determined".
- Said that the impact statement I had requested for when occupancy support is withdrawn "is irrelevant to the setting of the care fee".
- Provided the care home bed occupancy figures for the months of April to July 2021.

60. As requested by the Council within its letter to CNE dated 24 August 2021, CNE wrote to the Council on 1 September 2021 (KG1, enclosure 44, page 290) addressing (amongst other things) the information CNE had since the Consultation Document been seeking from the Council and which had not been provided, despite the Council's claim that it had done so. I broke this information down into the following 6 categories:

- (1) Other Care - Support Staff ('OCSS')
- (2) Dependency Tool Information
- (3) National/Local Data Used
- (4) Agency Costs
- (5) Maintenance of Capital Expenditure
- (6) Return On Capital Employed (ROCE)

61. In respect of each of these information categories, I prepared and enclosed a document entitled 'Document 1', within which I detailed the dates when CNE had made the requests for information under each of the heads. I further explained why the provision of the information was so important. A copy of 'Document 1' appears at KG1, enclosure 45, page 294.

62. In response to the Council's request contained in its letter of 24 August 2021 for the submission of any further queries, the following queries were put to the Council within CNE's letter of 1 September 2021:

(i.) Please provide the above information that we have (as outlined above and detailed within Document 1) requested on countless occasions and which has still not been provided.

(ii.) Please confirm exactly what costs (for example, chefs/cooks/kitchen etc.) and their amounts have been taken into account in the make-up of the OCSS. This is important so we can identify which costs are missing. If this is not possible, because you do not know what the costs details are which make-up the OCSS, then please confirm in clear terms that you do not know.

(iii.) In relation to the above noted OCSS cost headings (i.e. Chefs/cooks, kitchen/catering assistants, domestics, laundry assistants, other staff (including handyman)), please confirm that if these costs are not included within the OCSS costs, they are not taken into account elsewhere within the CFC. If they are taken into account elsewhere, please be clear as to where and precisely how they are taken into account and what costs are attributed to each of these heads.

(iv.) Please provide a copy of the actual dependency tool used by the Council to collect dependency information from care home providers. As I have previously stated, the feedback we have received is that there was no consistent approach taken in gathering this information. If you are not able to provide this information directly, please could you forward this directly to the provider and confirm when this has been completed.

(v.) In request 2d, we asked for you to "identify costs within the model where you hold no information", i.e. where the Council does not hold any local information or any information at all. Your statement "All relevant information was provided and input into the model as appropriate ..." fails to answer this request. Please answer the request properly by identifying all costs within the model where you hold no information.

*(vi.) In response to request 3, you say that "fees will be reviewed and any mathematical errors corrected at this time ensuring there is no detriment any Provider". Please confirm what errors the Council has now identified. To assist you in this exercise, I have calculated the errors within the attached document (**Document 5 - 'North Tyneside Rates Differential'**). **By 4pm on 6 September 2021**, please confirm these corrections will be made and the necessary re-*

adjustments and back payments will be made to care home providers and by when.

(vii.) In response to request 4, you say “there is no obligation to take into account factors in other models which may be available in the market”. The costs information provided to the Council by CNE does not derive from ‘another model available in the market’. This is not a dispute about models per se, but about the accuracy of the Council’s cost calculations and the Council’s failure to use local rather than national data, and its failure to engage with local care home providers on the actual local costs data they have provided. It is clear from the judicial review proceedings brought by EMCARE against Leicester City Council in 2011, that the Council is required to engage with the detail of the evidence CNE and its members have produced, that evidence being local data regarding providers’ actual costs and which is highly relevant to the presence of errors within the Council’s calculations, the extent of its enquiries and the sufficiency of its fee rates. Accordingly, we again request that as the Council has said it does not accept the costs evidence submitted by CNE, the Council identifies precisely what parts of that evidence it does not accept and why. The Council is required to provide this considered response.

(viii.) In your response to request 7, you say that the impact statement for when occupancy support is withdrawn is “irrelevant to the setting of the care fee”. This is a surprising statement given the obligation the Council has under section 5 of the Care Act 2014 to ensuring the sustainability of the market, even in circumstances where that market is not operating effectively. Regardless of whether you consider such an impact statement to be relevant, please confirm if such an impact statement was undertaken and if so, when. If one was prepared, please provide a copy of it.

(ix.) As I understand it, the CFC was designed for use during standard reviews of placements in cases which relate to the placement of people with learning disabilities, typically under the age of 65 years. In these cases, the CFC was designed to operate on a bespoke basis for each individual review to assist in negotiations to determine the fee of individual care packages and to assist local authorities to save money. The CFC is not generally regarded as being appropriate for use in the case of older people’s services, let alone to determine a sustainable market wide fee rate for those services. Further, I understand that the CFC has not been updated since 2013 and indeed, is no longer used by iESE who designed it. They have since 2013 developed the ‘CareCubed’ to replace the CFC. In light of this, please explain the basis upon which the Council considered the CFC to be appropriate for use in the calculation of providers’ actual costs of delivery care to the over 65s in North Tyneside. Please confirm what enquiries the Council made into the suitability of the CFC for this purpose prior to its decision to use it. Insofar as any reports or internal documents were produced for these purposes, please provide a copy of them.

63. As noted within query (vi.), I produced and enclosed a schedule (labelled ‘Document 5’) referred to in ‘Document 1’ enclosed with my letter of 1 September 2021 which detailed the errors made by the Council in applying the uplift increases referred to in its decision notification letter of 6 July 2021, to the interim rates for 2019/20, 2020/21 and 2021/22. To

the best of my knowledge, as at the date of this statement, the Council has still not amended these errors, or explained why it does not believe any errors to have been made. A copy of Document 5 appears at KG1, enclosure 49, page 310.

64. The Council replied by letter on 6 September 2021 (KG1, enclosure 50, page 312). Within that reply:

64.1. In response to the queries raised by CNE at paragraphs numbered (i.) to (i.x) within its letter of 1 September 2021 (see paragraph 54 above), the Council stated:

64.1.1. In response to query (ii) (support staff) – the Council stated that it “has no further information” as to how the Care Fund Calculator generated a figure of £19.93/week for support staff (other than administrative staff).

64.1.2. In response to query (iii) - that it “has no further information” as to whether providers’ costs in connection with chefs, cooks, kitchen/catering assistants, domestics, laundry assistants, and other staff (such as handymen) are accounted for anywhere within the Care Fund Calculator.

64.2. In light of these responses from the Council, I understand that the Council simply does not know how the figures in the decisions of 6 July 2021 were generated. To use Mr Longstaff’s term, the figures were simply “kicked out” by a black box.

65. On 7 September 2021, CNE sent a letter in reply to the Council’s letter of 6 September 2021 (KG1, enclosure 52, page 324). I asked if the Council would be prepared to provide CNE with a fully executable copy of the Care Fund Calculator, so that CNE could at least try to work out for itself how the figures were generated.

66. In response, the Council has merely provided me with a link to IESE Limited’s website, which is the company that designed the Care Fund Calculator (now called the Care Cube). This link does not give CNE access to the electronic version of the model used by the Council and does not enable me to understand how the figures used in the 6 July 2021 decision were generated.

67. I would make one further observation about the Care Fund Calculator. As I pointed out in CNE’s letter to the Council of 1 September 2021, I understand that the Care Fund Calculator was designed by IESE for use by local authorities in their negotiation with care

providers over fees for residential care and supported living placements in the case of adults under the age of 65 years (i.e. adults of working age) who suffer from learning disabilities ('LD'). To the best of my knowledge, LD care packages are not ordinarily commissioned at a pre-determined market rate under broader framework agreements as happens in the case of adults over the age of 65 years. Rather, LD packages are commissioned on a bespoke basis, with fees being determined by reference to the actual needs of the adult in question. I have looked at IESE's website (following the link the Council has provided to me) and I see there that they describe the CareCubed as being "... a secure online tool that helps calculate the fair cost of specialist care placements". This reference to specialist care placements affirms that the calculator was not designed for use in care for the elderly, particularly with a view to setting a rate for the entirety of that market with a view to its sustainability, as opposed to bespoke packages of care for individuals. At KG1, enclosure 54, page 332, I append a copy article published in CommunityCare about the Care Fund Calculator. Although the article is from 2012 it speaks to the use of the Care Fund Calculator's function in the field of LD placements and that it was "not recommended for older people's services". Given this ordinary use of the Care Fund Calculator/CareCubed, the Council has not explained why it consider it suitable as a model for setting its market care home fee rates for the elderly. The obvious question that CNE wishes to explore is whether the differences between the figures "kicked out" by the model and the evidence of local providers' actual costs is because the model caters to LD placements rather than elderly care home costs.

68. The Council's response in its letter of 6 September 2021 was that *"The Authority deems the model fit for purpose"*. Given that the Council does not understand why the model generates the figures it "kicks out", this appears to be blind faith on the Council's part.

Statement of Truth:

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed.....

Dated: 16 September 2021

KEITH GRAY FCCA