



Neutral Citation Number: [2024] EWHC 1370 (Admin)

Case No: AC-2023-LDS-000114

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

Thursday, 6th June 2024

Before:
FORDHAM J

Between:
**THE KING (on the application of
CARE NORTH EAST NORTHUMBERLAND)** **Claimant**
- and -
NORTHUMBERLAND COUNTY COUNCIL **Defendant**

Chris Buttler KC (instructed by David Collins Solicitors) for the **Claimant**
Joanne Clement KC and Aliya Al-Yassin (instructed by
Northumberland County Council) for the **Defendant**

Hearing dates: 17.4.24, 18.4.24, 3.5.24
Draft judgment: 23.5.24

Approved Judgment

FORDHAM J

FORDHAM J:

INTRODUCTION

1. This case is about weekly fees paid by a local authority to care home operators. The Claimant is an unincorporated association of whom 24 of Northumberland's 70 care home operators are members. The case features the interrelationship between the following: (1) a local authority's general statutory duty of promoting diversity and quality in the provision of services (Care Act 2014 s.5) and applicable Statutory Guidance (2014 Act s.78); (2) central Government's statutory power to pay conditional local authority grants (Local Government Act 2003 s.31) and Government documents relating to two such grants; (3) provisions within an agreement ("the 2021 Agreement") between a local authority and a care home operator; and (4) basic public law duties including legally sufficient enquiry and legally adequate reasons. This case also features an important distinction between fee level sufficiency (a) to cover inflationary cost increases and (b) to sustain the efficient and effective operation of a care home market. The case came before me for the rolled-up hearing I directed at [2024] EWHC 184 (Admin). I am grateful to all Counsel for their comprehensive written and oral submissions, and for patiently helping me understand the voluminous documentation to which they were referring me.

The 2021 Agreement

2. The 2021 Agreement was a contract between the Defendant ("the Council") and each relevant care home operator. It is an SP Contract Arrangement as described in the Statutory Guidance (see §11 below). It addresses the relationship between the Council and the care home operator, as to placements of individuals in care homes. It came into effect on 1 April 2021 and governed a three-year relationship: Year 1 (2021/2022), Year 2 (2022/2023) and Year 3 (2023/2024). It has now run its course. There were various banded categories of care home. The focus of this case is on what happened, across all banded categories, with the weekly fees for Year 3.

The Basic Contractual Mechanism

3. The 2021 Agreement included an annual fee revision, applicable for Year 2 and Year 3. The Basic Contractual Mechanism for the annual fee revision of weekly care home rates was set out at clause 17.2 and Schedule 1. The weekly fees had two elements. Element A was staffing costs. Element B was non-staffing costs. The Basic Contractual Mechanism used National Living Wage as an index for the annual increase in respect of Element A. For Element B, it used an index called "CPIH". Specifically, it took the published 12-month CPIH inflation index for the January preceding the start of the relevant financial year. CPIH is the Office for National Statistics (ONS) Consumer Prices Index including owner occupiers' housing costs: see §24 below. Alongside the Basic Contractual Mechanism was provision for a further banding rate uplift (clauses 17.4 to 17.6).

The Clause 17 Decision

4. The Claimant's judicial review claim involves three targets for judicial review. The first target is a decision letter (31.1.23) written by the Council to all providers of care homes for older people in Northumberland, setting out the Council's "intentions" for care home

fees in 2023/24 (from 1.4.23). This was the Annual Fee Review Letter which the Council was contractually obliged to write by clause 17.4 of the 2021 Agreement (§15 below). The second target is a decision letter (22.3.23) by which the Council communicated “details of the specific fees for 2023/4”. The pleaded claim and grounds for judicial review (27.4.23) identify the second target as the principal decision then being challenged. The first and second targets are parts of the Clause 17 Decision. The impugned Clause 17 Decision addressed the fee revision for Year 3 (2023/4). It applied the Basic Contractual Mechanism. It declined to add any further banding rate uplift. By way of background, a January 2022 decision letter (28.1.22), implemented with effect from 1.4.22, had taken the same approach for Year 2 (2022/3). I discuss the legality of the Clause 17 Decision at §§31-52 below.

The MSI Fund Grant Allocation Decision

5. The third target is the Council’s decision (9.5.23) approving the use of a grant called the Market Sustainability and Improvement Fund (the “MSI Fund”) for a top-up fee rate increase. Amended grounds impugning the third target were added, as a benign and disciplined example of “rolling judicial review”. The third target is the MSI Fund Grant Allocation Decision. The impugned May 2023 decision approved the use of £770k of the Council’s MSI Fund grant (£3.56m) for the overall fee rate increase of 1.5% from 1.4.23. When I say “overall” it is because a grant-based increase also applied to Element A (staffing costs). By way of background, an October 2022 decision (11.10.22) had approved the use of £330k from a previous grant called the Market Sustainability and Fair Cost of Care Fund (the “MSF Fund”), for an overall fee rate bump of 2.45% for 4 months at the end of Year 2 (1.12.22 to 31.3.23). I call it a “bump” because it was a time-limited increase. That means the fees reverted to their previous level at midnight on 31.3.23. I discuss the legality of the MSI Fund Grant Allocation Decision at §§53-60 below.

3 Years in the Life of a Banded Fee

6. To help understand the sequence of events, I will take an example. I will use the non-staffing costs (Element B) for a banded category of care home (called Gold Standard Residential with 31-40 registered beds). Tracing this chosen banding rate through Years 1 to 3, here is what happened to it. (1) Under the 2021 Agreement, the fee was £228.31 at the start of Year 1 (from 1.4.21). (2) Applying the Basic Contractual Mechanism of CPIH (4.9% at January 2022) it increased to £239.50 (from 1.4.22). (3) By reason of the October 2022 decision using MSF Fund grant, this was bumped by the overall 2.45% to £245.37 (from 1.12.22 to 31.3.23), reverting to £239.50 (on 31.3.23). (4) By the impugned January and March 2023 decisions, applying the Basic Contractual Mechanism of CPIH (8.8% at January 2023) it increased to £260.57. (5) By the impugned May 2023 decision using the MSI Fund grant, it increased by the overall 1.5% to £264.47 (backdated from 1.4.23).

Sufficiency for a Sustainable Effectively Operating Market

7. I referred at the outset to a distinction between fee level sufficiency (a) to cover inflationary cost increases and (b) to sustain the efficient and effective operation of a care home market. It is the latter – sufficiency to sustain the efficient and effective operation of a care home market – with which the general statutory duty, the Statutory Guidance and clause 17.4 of the 2021 Agreement are concerned.

The General Duty

8. By s.5(1) of the 2014 Act, Parliament imposed the general duty on a local authority to “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 has” three things: (a) “a variety of providers to choose from who (taken together) provide a variety of services”; (b) “a variety of high quality services to choose from”; and (c) “sufficient information to make an informed decision about how to meet the needs in question”. As a general duty (or target duty), this does not confer individual rights, but it nevertheless capable of enforcement in an individual case: R (Care England) v Essex County Council [2017] EWHC 3035 (Admin) at §§6, 50.

The Sustainability Factor

9. By s.5(2)(d) of the 2014 Act, Parliament required a local authority, in performing that general s.5(1) duty, to “have regard ... in particular” to “the importance of ensuring the sustainability of the market”, both “in circumstances where it is operating effectively”, and also “in circumstances where it is not”. This mandatory relevancy (s.5(2)(d)) has been described as the “sustainability factor”: see Care England at §6.

Clause 17.4

10. Clause 17.4 of the 2021 Agreement (§15 below) poses a question about banding rates and whether, when increased using the Basic Contractual Mechanism, they will “be sufficient to sustain the efficient and effective operation of a marketing care home accommodation for older people in Northumberland”. As everyone in this case agrees, there is a clear relationship between this language and s.5(1) and (2)(d).

The Statutory Guidance and SP Contract Arrangements

11. The Statutory Guidance issued under s.78 of the 2014 Act is called the “Care and Support Statutory Guidance”. It recognises (at §4.97) that “contract arrangements” which local authorities make with service providers (which I will call “SP Contract Arrangements”) should be considered to ensure that the SP Contract Arrangement does not have “negative impacts on the sustainability, sufficiency, equality, diversity and value for money of the market as a whole – the pool of providers able to deliver services of appropriate quality”. That includes “framework agreements, spot contracting or any ‘qualified provider’ approaches”. The 2021 Agreement is a SP Contract Arrangement. It uses a ‘qualified provider’ approach (rather than the post-tendering ‘approved list’ used for a framework agreement’: Statutory Guidance §4.39). The Statutory Guidance (§4.97) therefore supports the view that there is a clear relationship between clause 17.4 of the 2021 Agreement and s.5 (with its general duty and sustainability factor).

Sufficiency for a Sustainable Effectively Operating Market

12. Here are some key points made in the Statutory Guidance, about contractual fee levels and a sustainable effectively operating market. They were all considered in Care England (see §§10, 61 and 64):

- i) First, there is the importance of local authorities assuring themselves and having “evidence” that contractual fee levels are appropriate to provide the delivery of agreed care packages with agreed quality of care (Statutory Guidance §4.31).
 - ii) Secondly, there is the importance of local authorities understanding that a reasonable fee level allows for a reasonable rate of return by independent providers that is sufficient to allow the overall pool of efficient providers to remain sustainable in the long term (§4.31).
 - iii) Thirdly, there is the point that local authorities must not undertake any actions which may threaten the sustainability of the market as a whole – the pool of providers able to deliver services of an appropriate quality – by setting fee levels below an amount which is not sustainable for providers in the long-term (§4.35).
13. I was also shown several passages from the MSF Non-Statutory Guidance (24.3.22). The “MS” in MSF Fund stands for “market sustainability”. Here are the key points:
- i) First, there is the point that a sustainable market is one which has a sufficient supply of services but with provider entry and exit, investment, innovation, choice for people who draw on care, and sufficient workforce supply; a market which operates in an efficient and effective way (Glossary, “Sustainable market”).
 - ii) Secondly, there is the point that the broad definition of market sustainability set out in the 2014 Act places a duty on local authorities to assure themselves and have “evidence” that fee levels are appropriate to provide the agreed quality of care (see §12i above), and also enable providers effectively to support people who draw on care and invest in staff development, innovation and improvement (Market Sustainability Plans, Introduction).
 - iii) Thirdly, there is the point that a sustainable care market – which operates in an efficient and effective way – can be indicated by: sufficient supply of services to ensure continuity of care with minimal disruption in the event of providers exiting from the market; a range of high quality services for people to choose from; sufficient investment in its workforce to enable the attraction and retention of high quality care staff; evidence of innovation and service diversity able to evolve and meet changing needs; and being attractive to new market entrants and able to manage and offset the impact of future market changes (Market Sustainability Plans, Defining ‘Market Sustainability’).

The 2021 Agreement: Schedule 1 and Clause 17

14. Schedule 1 to the 2021 Agreement set out the Basic Contractual Mechanism for the revision of banding rates as follows:

These fees are made up of two components, set out in the tables below. Element A of the fees will be uplifted from 1 April in each year in proportion to the percentage increase in the National Living Wage. Element B will be adjusted on 1 April in each year in proportion to the published 12-month CPIH inflation increase for January of the same year. The fees paid in each year will be the sum of these two components as adjusted ...

15. Clause 17 of the 2021 Agreement provided as follows:

17. CHANGES TO THE BANDING RATES

17.1 The Banding Rates which shall apply from the Effective Date shall be as outlined in Schedule 1 (Banding Rates).

17.2 These rates will be adjusted on 1 April each year as set out in Schedule 1, subject to the provisions of clause 17.4.

17.3 The Bandings which will apply to each Provider, will be applied as outlined in Condition 33 (Quality Payments Scheme).

17.4 Before the end of January in each year during the period of this Agreement, the Council will send a letter to the Provider (“the Annual Fee Review Letter”). In this letter the Council will confirm whether it has become aware of any information which suggests that the Banding Rates may not be sufficient to sustain the efficient and effective operation of a market in care home accommodation for older people in Northumberland. If the Council has received by the preceding 31 December a written communication from the Provider which puts forward information which the Provider states is in its view evidence that the Banding Rates are insufficient, the Council must in its Annual Fee Review Letter refer to that information, and set out its view as to its relevance. If in the view of the Council, the balance of all available evidence is that the Banding Rates would otherwise not be sufficient, it must include with the Annual Fee Review Letter a proposed variation whose effect is to increase some or all of the Banding Rates from the following 1 April by more than the uplift set out in Schedule 1.

17.5 A variation proposed under clause 17.4 may not include a proposal to adjust any of the Banding Rates to a level lower than the adjusted figures calculated as set out in Schedule 1. Such a variation may provide either that the uplifted Banding Rates will automatically become the base figures used on 1 April in subsequent years, or that they will be time-limited, or will be reviewed at a later date. If uplifts are to be time-limited or subject to review, the Annual Fee Review Letter must explain why the Council believes that to be appropriate.

17.6 For the avoidance of doubt, the Council will send the same Annual Fee Review Letter, and where applicable offer the same variation to all providers who have signed an Agreement in the same terms.

The MSF Fund and MSI Fund Grants

16. Section 31 of the 2003 Act includes this:

31. Power to pay grant. (1) A Minister of the Crown may pay a grant to a local authority ... towards expenditure incurred or to be incurred by it... (3) The amount of a grant under this section and the manner of its payment are to be such as the person paying it may determine. (4) A grant under this section may be paid on such conditions as the person paying it may determine. (5) Conditions under subsection (4) may, in particular, include— (a) provision as to the use of the grant; (b) provision as to circumstances in which the whole or part of the grant must be repaid...

17. A number of features can be seen from the documents relating to the s.31 grants like the Council’s MSF Fund grant (£1.026m) and its MSI Fund grant (£3.56m). In particular: (1) a Government announcement describing the nature of the grant and indicating quantum; (2) a Government Determination which sets out the grant purpose and conditions; (3) Non-Statutory Guidance to local authorities in relation to the grant; (4) the local authority’s Grant Allocation Decision deciding how to deploy the grant; (5) local authority reporting steps; and (6) Government monitoring functions.

18. Taking the Council’s MSF Fund grant (£1.026m): (1) The Government announcement was on 16 December 2021 (followed by an impact assessment dated 5 January 2022). (2) The Government Determination was dated 24 March 2022 and contained the grant conditions (Annex B) including reporting requirements and a description of monitoring

functions. (3) The MSF Non-Statutory Guidance was dated 29.3.22. (4) The Council's MSF Grant Allocation Decision was made on 11 October 2022. (5) The Council's reporting steps included a care home Cost of Care Report and Draft Market Sustainability Plan (14 October 2022) and a Final Market Sustainability Plan (March 2023). (6) In the context of Government monitoring, the Claimant wrote on 24 March 2023 raising questions and concerns about the Grant Allocation Decision and the Government responded on 24 May 2023.

19. Taking the Council's MSI Fund grant (£3.56m): (1) The Government announcement was on 19 December 2022. (2) The Government Determination was dated 29 March 2023 and contained the grant conditions (Annex B) including reporting requirements and a description of monitoring functions. (3) The MSI Non-Statutory Guidance was dated 29.3.23. (4) The Council's impugned MSI Grant Allocation Decision was made on 9 May 2023. (5) The Council's reporting steps included an Initial Report (24.5.23). (6) In the context of Government monitoring, I was shown a Government letter to local authorities dated 17 October 2023. I was told of no letter from the Claimant to Government.

The MSF and MSI Fund Grant Allocation Decisions

20. The Council's October 2022 MSF Grant Allocation Decision during Year 2 included an allocation of £318,878 for spending associated with fee increases for home places for those aged 65 and over. In the event the spend was £330,905. This part of the MSF Fund grant was spent to fund the time-limited overall bump of 2.45% to fees. The Council's thinking is seen from the report for the Cabinet meeting on 11 October 2022, containing the reasoned recommendation which was accepted. The Council's impugned May 2023 MSI Grant Allocation Decision during Year 3 included the allocation of £770k to fund the overall fee increase of 1.5%. The Council's thinking is seen from the report for the Cabinet meeting on 9 May 2023, containing the reasoned recommendation which was accepted.

Annual Fee Increases: Illustrative Alternatives

21. The Basic Contractual Mechanism in clause 17.2 of, and Schedule 1 to, the 2021 Agreement could have been designed differently. We can illustrate this by turning the clock back from the events with which this case is concerned, to March 2016. At that point the Council had circulated a proposed SP Contract Arrangement for the years starting in April 2016. This draft agreement had contained (at Schedule 2) a contractual mechanism for adjustments made from 1 April each year. There was an apportionment of 20 separate cost items, each with its own portion (percentage) of spend. Each of the 20 separate cost items then had its own index identified as referable to that item. That index would then be used to calculate an appropriate increase for the portion of costs to which it related. For staffing costs (a portion of 43.76%), the index used would be the percentage increase in the National Living Wage. This became the Basic Contractual Mechanism in the 2021 Agreement Element A. For food (a portion of 4.7%) the index used would be the "ONS index-food (CPI 1.1)". For utilities (a portion of 3.5%) the index used would be the "ONS index-Electricity, Gas and Other Fuels (CPI 4.3.2)". I am going to call these "Sub-Indexes". I was told that the 2016 draft agreement was not signed by the Claimant's members. I do not know why, and it does not matter to my analysis.

22. We can also illustrate this by turning the clock forward from the events with which this case is concerned, to February 2024. On 14.2.24 the Council wrote to care home operators concerning the new SP Contract Arrangement to take effect from 1.4.24. By way of a new basic contractual mechanism, in the context of inflationary cost increases it put forward – for responses – a proposed departure from CPIH. This would involve a weighted increase, by reference to portions of a care homes non-staffing costs, using Sub-Indexes for food (CPI 1.1), electricity (CPI 4.5.1) and gas (CPI 4.5.2). I do not know whether the new agreement has been finalised and signed, and again that does not matter to my analysis.

Costs and Pie Charts

23. Think of a circle divided into slices making up the whole. Think of the whole as overall costs. The slices are portions of that whole. If you are using an index like CPIH there will be a CPIH whole, with its own constituent portions. CPIH is designed to be a pie for a typical private householder. The costs of a typical care home operator are not the same as the costs of a typical private householder. A typical care home's overall costs is its own pie with its own portions. An attempt to depict this has been seen in the 2016 draft agreement (§21 above). If you are focusing on a typical care home's non-staffing costs, you would be able to draw a different pie with its own portions. If you compared a typical care home with a typical private householder, you would get some equivalent slices and some different ones. Typical private householders do not have staffing costs or management and administration costs. There is another point. The fee levels within the 2021 Agreement are not only about costs. In particular, there is an element included in Element B (non-staffing costs) which is return on investment. Return on investment is important in terms of market sustainability. But a typical private householder does not have return on investment. In the draft 2016 agreement, return on investment was being pitched as a 10.24% portion of the overall pie. When we are thinking about a typical care home operator's Pie Chart, we could take a pie with, or without, return on investment.

CPIH

24. The Basic Contractual Mechanism uses CPIH for Element B (non-staffing costs). CPIH is a way of measuring the impact of inflation on overall household costs. The typical private householder for CPIH purposes has a relevant Pie Chart. It is also spoken of as being a basket of goods. You start with what the typical private householder is treated as buying. This is your CPIH Pie Chart. It can be adjusted as trends change. Because you know the percentage slices for each item, you can use your ONS Sub-Indexes and do a calculation of how costs, for each portion, have typically changed in the present year. Combine this and you get a CPIH percentage for the Pie Chart as a whole. If your CPIH is 10% and the food Sub-Index was 20%, it means something else within the Pie Chart must have had a Sub-Index below 10%. The point is that it spreads out and evens out, to produce the CPIH. Of course, not all private households are the same. Perhaps few will be a perfect fit. But it is a broadly representative picture of how costs are changing. And you can take a CPIH picture across the last 12 months. You can do that each January. And if you are looking at Element B for Year 3 of the 2021 Agreement, this is the Basic Contractual Mechanism.

Pie Chart Comparisons

25. Suppose you are thinking about costs and costs increases. Suppose you want to compare a typical care home operator with a typical private householder. There are a number of things you could do. But one of them would be to take a typical care home operator's Pie Chart and compare it with a typical private householder's Pie Chart. You could put them side by side. There are always going to be differences in the elements. But there will be parallels. You could take food, energy, medicines and maintenance. You could take a Sub-Index, for example for food or energy. Or you might already have a good appreciation of how food and energy prices have changed. A Pie Chart Comparison will tell you how big the pie slice for food or for energy is, when you are comparing your typical care home with your typical private householder. That can help, if you are thinking about fee level sufficiency to cover inflationary cost increases. It can also help, if you are thinking about fee level sufficiency to sustain the efficient and effective operation of a care home market.

Grants and Inflationary Pressures: the Argument that Fell Away

26. One of the recurrent themes of this legal challenge, up until Mr Buttler KC's oral reply submissions, was an argument whose essence ran as follows. During Year 2 there was the Council's MSF Fund grant (£1.026m). It was the subject of an announcement, a determination, grant conditions and MSF Non-Statutory Guidance. On the proper interpretation of those materials, the Council's MSF Fund grant had never been available for it to use to address inflationary pressures. The statement of purpose in the MSF Grant Determination (24.3.22) said that the MSF Fund purpose was "to support local authorities to move towards paying providers a fair cost of care" and that "where average fee rates are below the fair cost of care, local authorities should use this additional funding to increase fee rates paid to providers ... beyond the level required to cover increases in core costs such as inflation..." In the same Determination, the grant conditions said the grant "must be used" by a recipient authority "to increase rates if its rates are below the fair cost of care". The MSF Non-Statutory Guidance said that local authorities were "required to use all funding to improve sustainability of the 65+ care home and 18+ domiciliary care markets ... and not just cover existing pressures". Accordingly, and on an objectively correct interpretation of these instruments, the MSF Fund could not be used to cover existing inflationary pressures. That was the argument.
27. The Council's MSF Fund Grant Allocation Decision (11.10.22), including £330k to cover the overall 2.45% bump in care home operators' fees in the four months at the end of Year 2, was not a target for judicial review. So how did this argument feature in the present case? The answer lay in the idea of 'replication' of the MSF Fund grant and its purposes, when it came to the MSI Fund grant. I will explain. The MSI Fund Announcement (19.12.22) said the Government was going to "maintain the current levels" of funding under the MSF Fund, "to continue to support the progress local authorities and providers have already made this year on fees and cost of care exercises". The Council's MSI Fund grant included a repeated pot of money (which I will call "Pot A"). It was a repeated £1.026m. It was for replication. That is why the MSI Fund Determination (29.3.23) included a grant condition that Pot A "must be used to continue to support the progress local authorities and providers have already made in 2022-23 on increasing fee rates to move towards paying a fair cost of care". This is why the MSI Non-Statutory Guidance (29.3.23) said of the Council's Pot A (£1.026m) "local authorities must spend their allocation ... on maintaining previously increased fee rates

paid to adult social care providers”. These references to maintaining and continuing were about replication of a previous grant which could never be used to cover existing inflationary pressures. That was how the argument featured.

28. As had been clearly explained in Mr Buttler KC’s skeleton argument, this argument features in the following ways. (1) First, it was a reason why the Council’s reasons in the first target decision (31.1.23) were legally inadequate. The Council in January 2023 misunderstood what the MSI Fund grant could be used for, having misunderstood what the MSF Fund grant could be used for. Grant money was not to be used to cover existing inflationary pressures. (2) Secondly, it was a reason why the MSI Fund grant could not make the challenge to the January 2023 and March 2023 target decisions premature or academic. (3) Thirdly, it was a reason why the Council’s impugned May 2023 target decision was vitiated for misinterpretation of the MSI Fund grant conditions and MSI Non-Statutory Guidance.
29. But the argument fell away. The reasons were these. All the references to grant not being used to cover existing inflationary pressures were describing the position of the 70% of local authorities not already paying “the fair cost of care”. That left 30% of authorities who were already doing this. Fair cost of care was defined as the median actual operating costs for providing care in the local area following completion of a cost of care exercise. The cost of care exercise, required to be conducted by local authorities during 2022 in conjunction with the MSF Fund grants, had led the Council to conclude that it was within the 30%. That conclusion has not been impugned on public law grounds within these judicial review proceedings. This is consistent with the fact that Government monitoring of the Council’s reported spending of the MSI Fund did not lead to adverse conclusions on the part of Government; and the fact that a March 2023 complaint by the Claimant to Government, about the way in which the Council had used the MSF Fund, was not upheld when Government responded in May 2023. All of this was a complete answer, as Mr Buttler KC rightly accepted in his oral reply.
30. There was another dimension to all this. Mr Buttler KC was emphasising that MSF Fund grant had to be used as described in the grant conditions and MSF Non-Statutory Guidance. He was also arguing – and maintained – that the MSI Fund grant conditions and MSI Non-Statutory Guidance involved a duty to ‘replicate’ the spending from the MSF Fund. The logic of this line of argument risked ending up in the following position. The Claimant was saying that neither the MSF Fund grant, nor replication under the MSI Fund, could allow the grant allocation in favour of care home operators to cover inflationary pressures. That would mean the care home operators should not have received the allocations, on the basis on which they were made, of the October 2022 £330k from the MSF Fund (for the four-month 2.45% overall bump at the end of Year 2) and the May 2023 £770k from the MSI Fund (for the 1.5% overall increase in Year 3). They were at risk of talking their own allocations into illegality. And it would not follow that inflationary pressures would need to be addressed through Clause 17.4. That would have involved the error of failing to distinguish between fee level sufficiency (a) to cover inflationary cost increases (the grants) and (b) to sustain the efficient and effective operation of a care home market (clause 17.4).

THE CLAUSE 17 DECISION

31. Mr Buttler KC submits that the 2023 decision to apply the Basic Contractual Mechanism of CPIH (8.8%) for Year 3 (from 1.4.23) – without a clause 17.4 and 17.5 uplift – was

unlawful. He says the Court should quash the decision, or alternatively give a declaration as to its unlawfulness. Three linked grounds for judicial review are advanced. (1) First, that the Council failed to ask and answer the question posed by clause 17.4: see §§41-44 below. (2) Secondly, that the Council failed to make a legally sufficient enquiry into the scale of inflationary pressures faced by care homes: see §§45-49 below. (3) Thirdly, that the Council failed to give legally adequate reasons for the decision: see §§50-51 below. In advancing these grounds for judicial review, reliance is placed on the express terms of clause 17 and on public law principles.

32. Ms Clement KC and Ms Al-Yassin submit that there is no basis for judicial review. This is what they say. (1) Only the first ground (asking and answering the question posed by clause 17.4) is one which can be raised at all by judicial review. That first ground is susceptible to judicial review because of the close relationship between the clause 17.4 question and the general statutory duty in s.5 of the 2014 Act. That falls within the principle in Hampshire County Council v Supportways Community Services Ltd [2006] EWCA Civ 1035 [2006] BLGR 836 at §36. The second ground (legally insufficient inquiry) and third ground (legally inadequate reasons) cannot be raised by judicial review. That is for two reasons. First, because they do not fall within the Supportways principle. Secondly, because they would involve the Court imposing public law duties which have the effect of diluting or altering contractual terms freely concluded, infringing the principle in R (Birmingham and Solihull Taxi Association) v Birmingham International Airport Ltd [2009] EWHC 1913 (Admin) at §41. (2) Only the second and third grounds are pleaded grounds. The first is not pleaded. (3) None of the three grounds, in any event, is made out. In the context of a contractual arrangement, the judicial review Court will adopt a “light-touch” intensity of review, under the principle in R (British Gas Trading) v Secretary of State for Energy Security and Net Zero [2023] EWHC 1193 (Admin) at §168. The principled degree of restraint and latitude is in any event exemplified by Care England and the predecessor to that case and this: R (Care North East) v Northumberland County Council (No.1) [2013] EWCA Civ 1740 [2014] PTSR 758 at §19 and 32. There was no failure to ask and answer the question posed by clause 17; there was no failure of reasonable enquiry; and there was no failure of legally adequate reasons. (4) In any event the claim for judicial review should be dismissed, by reason of the lack of promptness in bringing it; or, independently of the question of delay, by reason of the clear detriment to good administration of having to unravel budget-related decisions with consequences for resources and the imposition of a complex exercise in reconstructing the position of every relevant care home.
33. I will set out some of the key passages on which Ms Clement KC and Ms Al-Yassin rely:
- i) In the passage relied on by the Council from Supportways at §36, the then Neuberger LJ said this:

The fact that a contractual obligation is framed by reference to a statutory duty does not, in my view, render that obligation a public law duty. Of course, where the statutory duty is owed to a contracting party independently of the contractual obligation, he can normally expect to be able to seek a public law remedy by reference to the duty, as well as, or instead of, a private law remedy by reference to the obligation. However in the present case, the Council's public law duty, namely that arising under section 93, was owed to the Secretary of State in relation to the provision of grants. There was, as it seems to me, no question of that duty being owed to providers such as the Company.

The reference was to s.93 of the Local Government Act 2000. It empowered the Secretary of State to pay conditional grants to local authorities towards welfare services expenditure, with statutory guidance.

- ii) In the passage relied on from Birmingham Taxi at §41, Wyn Williams J said this:

In the[] circumstances, in my judgment, a Court should be extremely cautious about imposing public law duties upon the contracting party which have the effect of diluting or altering contractual terms freely concluded.

- iii) In the passage relied on from British Gas Trading at §168, the Divisional Court (Singh LJ and Foxton J) said this:

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

- iv) In the passages relied on from Care North East (No.1), at §§19 and 32 – applied in Care England – Sullivan LJ said this:

it is important to remember that, provided some inquiry into the relevant factor to which due regard has to be paid is made by the decision-maker, it is generally for the decision-maker to decide on the manner and intensity of the inquiry to be undertaken into any relevant factor ...

[to] produce some form of arithmetical calculation setting out the figures attributed to the individual cost elements of providing care, such as: occupancy, staff, operating costs, management and administration, capital values per bed and financing costs ... is one way of having due regard for the actual costs of providing care but it is not the only legally permissible way.

Fees, SP Contract Arrangements and Judicial Review

34. How, then, does judicial review apply in a context such as the present? In Care England, the local authority had commissioned placements of individuals in care homes by framework agreements (§13(1)) and spot contracts (§14). On 22.7.16 the local authority decided to make care home fee rate increases (§§34-35). The 2014 Act general duty (s.5(1)) and sustainability factor (s.5(2)(d)) had come into force on 1.4.15 (§15) and the Statutory Guidance had been promulgated (§§10-11). The impugned decision (22.7.16) declined to uplift care home fees on a “full cost of care” basis (§38). The decision was challenged by judicial review: for breach of s.5(1) and (2) statutory duties; for unjustified departure from the Statutory Guidance; and for public law unreasonableness. All three judicial review grounds were determined on their legal merits (§§48-73). The impugned decision was lawful and reasonable, and consistent with the key points in the Statutory Guidance. The increase in fees did not have to be one “which addressed in financial terms each of the sources of financial pressure experienced by care home providers” (§73(1)). There had been a legally sufficient enquiry as to information about the care home market in the local authority area (§54) and the local authority’s dealing with care home providers and a tendering exercise provided ample evidence of appropriateness of fee levels (§62). What Care England reflects is the following principled position:
35. In the context of local authority care home placements and fee rates, notwithstanding that these rates are included within contracts between the local authority and the care home

provider, conventional grounds for judicial review apply to a decision about fee increases, where sufficiency to sustain the efficient and effective operation of a care home market is legally relevant. This is a public function. Parliament has imposed important statutory duties, in the general duty (s.5(1)) and the mandatory relevancy of the sustainability factor (s.5(1)(d)). Parliament has provided (s.78) for Statutory Guidance for local authorities to follow (absent good reason for departure). That Statutory Guidance itself recognises SP Contract Arrangements (§11 above), and decisions about fee levels in SP Contract Arrangements, as an important means of implementing and discharging the statutory duties.

36. Even prior to the 2014 Act, it had authoritatively been established that conventional judicial review grounds were applicable in the context of local authority fee-setting for care home placements. In R (Bevan & Clarke LLP) v Neath Port Talbot County Borough Council [2012] EWHC 236 (Admin) [2012] LGR 728 the local authority was arranging care home placements pursuant to the National Assistance Act 1948 ss.21 and 26 (§11). Care home fees were paid by the local authority to the care home provider under a contract. There was a consultants’ toolkit (§7), Government guidance (§15) and a local Strategy (§20). The impugned decision (25.3.11) set the rates for 2011/12 and the care home operator claimants sought judicial review on grounds of failing to take account of a relevant consideration, unjustified departure from guidance, procedural unfairness and unreasonableness (§43). Conventional grounds for judicial review were available (§54). In this context, “the setting of a fee under a contract” was not a private act (§48). Local authorities had been given statutory responsibilities to make care home arrangements, discharging functions to which statutory guidance was applicable (§49). In Bevan, Beatson J explained (at §51) that this was consistent with the Supportways case. Supportways was a case where the substance of the dispute was whether or not a contract had come to an end in accordance with its terms, and the complaint was “solely” about whether the local authority had failed to comply with a “purely” contractual obligation.
37. After Bevan, and before the 2014 Act and Care England, there was Care North East (No.1), another case about setting care home fees. In that case, the local authority was arranging care home placements pursuant to the 1948 Act ss.21 and 26, in the context of statutory guidance, through a “relationship” which was “contractual” (§4). The statutory guidance said that due regard should be had to the actual costs of providing care (§6). The impugned decision was the setting of fee levels for 3 years (§1). The judicial review claim alleged an unjustified departure from the guidance by reason of a legally insufficient inquiry (§§8, 18). Referencing Bevan (§19), the Court of Appeal held that there had been no unlawfulness. Like Bevan, this was a judicial review claim on conventional grounds.
38. There is then this question. How does the content of the provisions within an SP Contract Arrangement fit alongside the contextual shape of the conventional grounds for judicial review? In my judgment, the principled position is this:
 - i) The contextual application of conventional judicial review grounds can be informed by the contents of an SP Contract Arrangement. This cuts both ways, where the agreement makes express provision for the local authority’s decision-making approach in setting care home fees. First, the judicial review court may need to ensure that conventional judicial review standards – contextually applied – do not go beyond an express provision for the local authority’s decision-making approach. Secondly, the judicial review court may need to ensure that conventional

judicial review standards – contextually applied – do not fall short of an express provision for the local authority’s decision-making approach. No more; but no less.

- ii) This idea of principled convergence, in certain situations, of public law duties and the contents of an SP Contract Arrangement – as to the decision-making approach – is consistent with the idea behind the Supportways principle. It fits with the Birmingham Taxi principle about a contractually agreed procedure, endorsed in Bevan at §54. The judicial review court may need to be cautious so as not to cut across the contract. The content of conventional judicial review grounds – contextually applied – may match the decision-making approach in the SP Contract Arrangement. In the present case, suppose care home operators had written to the Council in February 2023, supplying their evidence of insufficiency. Would it be procedurally unfair for the Council to decline to consider that material in setting the fee levels from 1.4.23? The contextual application of the conventional judicial review grounds would have regard to the fact that the 2021 Agreement was an SP Contract Arrangement which specified a letter written by the end of December. But equally, it specified a decision by the Council, a response, and – if satisfied that a criterion is met – a further uplift in fees. There is, in my judgment, no reason in principle why this should not – equally – inform the contextual application of the conventional judicial review grounds. There is every reason why it should. SP Contract Arrangements are recognised in the Statutory Guidance, as a means of implementing the statutory duties. They deliver that implementation. They crystallise the position.
 - iii) If a local authority chose a policy or a strategy or a scheme or even wrote letters, if it gave clear and unambiguous and qualified representations as to what it would do, these would inform the conventional grounds for judicial review. Public law recognises the difference that a promise can make, through the principles of legitimate expectations. There are legitimate expectation cases about conduct “equivalent” to breach of contract or breach of representation: De Smith’s Judicial Review §7-021. I accept that, when a clear promise crosses a line to become a concluded contract, that brings into play remedies and enforcement mechanisms of private law. What I cannot accept is that, in crossing that line, the clear promise necessarily and immediately loses any traction in informing the content of conventional grounds for judicial review. What care home operators may need are prompt public law remedies. It would be odd and unsatisfactory if their position as to public law protection was stronger through the contents of clear promises and representations about a decision-making approach, under a policy or strategy or scheme or even a letter; but then suddenly vanished by signing on the dotted line. It would also be odd and unsatisfactory to find the local authority able to defeat judicial review claims by insisting on having it both ways: relying on the SP Contract Arrangement, so as to insist that public law requires no more; and also opposing reliance on the agreement, so as to insist that public law requires less.
39. For these reasons, I accept Mr Buttler KC’s submissions that there is a feature of the present case which distinguishes it from Care England, and Care North East (No.1) before it. That feature is clause 17. It makes provision about a decision-making approach, as to procedure and as to substance. As an SP Contract Arrangement, an implementation mechanism recognised in Statutory Guidance, it contains – in clause 17 – concrete procedural and substantive provision. That concrete provision relates to the application

of important s.5(1) and s.5(2)(d) statutory duties. It informs the conventional grounds for judicial review. Yes, as Ms Clement KC and Ms Al-Yassin submit, I should be cautious about going beyond this as express provision for the Council’s decision-making approach. But I am no less cautious about falling short. The contextual common law duties of lawfulness, reasonableness and fairness can properly be informed by, and consonant with, the contents of the SP Contract Arrangement.

40. There is one further key point. I have repeatedly referred to judicial review grounds as contextual. It is a golden rule of public law that conventional grounds, as Beatson J described them in Bevan, are context-specific in nature and application. The present context does not warrant a ‘close scrutiny’ approach seen in a human rights context. That was also true in British Gas Trading, as the Court explained in the relevant passage (§33iii above). All of those conventional grounds for judicial review which fall within the overarching principle of public law reasonableness must be applied with full recognition of the latitude of the primary decision-maker. This is a supervisory, not a substitutionary, review jurisdiction. And as Beatson J put it in Bevan at §58: “a judicial review court will be particularly circumspect in engaging with the conclusions of the primary decision-maker in relation to complex economic and technical questions”.

Asking the Right Question

41. This is the first ground on which the Claimant challenges the Clause 17 Decision. It invokes a familiar public law duty. The Tameside duty begins with the well-established principle that a decision-maker must ask themselves the right question (Care North East (No.1) at §18). In my judgment, there is a question which the Council needed to ask and answer, on the balance of all available evidence, for Northumberland:

Would the Basic Contractual Mechanism, without an additional uplift, be sufficient to sustain the efficient and effective operation of a care home market?

This is clearly seen in clause 17.4. In asking and answering that question, the Council could – if it thought it was right – confirm that it had not become aware of any information which suggested the contrary. It had to write its Annual Fee Review Letter. It had to respond to information said by a provider to show the contrary. It had to form its view, on this question. But this was the question. The Council accepts that.

42. Here is the essence, as I saw it, of Mr Buttler KC’s argument. The Council wrote the required Annual Fee Review Letter. It responded to the information said by providers to show the contrary. It was a detailed letter, 6 pages long. It touched on the question in the first paragraph. It discussed the points which the Claimant had put forward. It stated the Council’s intentions, to apply the Basic Contractual Mechanism. The letter said:

Overall, it is clear that there has been a cost pressure [from energy price increases] not fully reflected in the CPIH, but less clear what the scale of that pressure is likely to have been – and it is likely that this will have differed substantially between homes. Food price increases have also increased over the past year by more than the CPIH, and account for a higher share of care home expenditure than of the household expenditure used to set weightings in the CPIH.

It went on to say this:

We do not intend to change the way in which base fee levels are calculated for 2023/24, but we think there currently appears likely to be a case for using some of the grant funding which the government has announced for next financial year to give care homes some continuing short-

term additional support, to reflect the specific impact on the sector of energy, food cost and insurance price increases and continuing additional costs associated with Covid. We do not yet have details of the conditions which will be attached to Government grants, and will need to consider these before making decisions about the nature and timing of any additional support.

What is conspicuously absent from all of this is a statement which asks and answers the question. Nowhere does the Council say whether its view is that, on the balance of all available evidence, the Basic Contractual Mechanism would be sufficient to sustain the efficient and effective operation of a market in care home accommodation. The problem is illustrated by Ms Clement KC and Ms Al-Yassin's oscillating submissions in these proceedings, as to how the Council was supposedly answering the question. Sometimes, it is said that the Council's answer was "yes, because we expect to use grant funding". Other times, it is said that the Council's answer was "yes, and in any event we expect to use grant funding". And it is even said that the answer is in an external document, said to be "incorporated by reference" into the decision letter. That is the Council's draft Market Sustainability Plan (14.10.22) to which reference is made at the end of the letter. That is not part of the letter. It is not incorporated by reference. Nor does it ask and answer the clause 17.4 question. That is the argument.

43. I am unable to accept these submissions. It is undoubtedly the case – as Ms Clement KC and Ms Al-Yassin rightly accepted – that it would have been far better if the decision letter had straightforwardly, and expressly, answered the question. This is not a "locked box" case. By that, I mean a case where a contemporaneous document is produced and disclosed which – although not communicated at the time but filed away somewhere – does show that the decision maker was adopting the legally correct approach. I agree with Mr Buttler KC that the draft Market Sustainability Plan (14.10.22) is not incorporated by reference; nor does that document constitute the asking and answering of the question. And, after all, the view had to be formed in light of all the evidence, including the points put forward by the Claimant in a letter of 22.12.22. Mr Buttler KC was right to identify different answers – oscillation – at different times as to what answer the letter was supposedly giving. Notwithstanding these shortcomings and difficulties, I have concluded that the question was being asked and answered. That is for the following reasons.

- i) First, the writer of the January 2023 decision letter was aware of – and thinking about – the express design of clause 17.4, and identified the important test of sufficiency: sufficient to sustain the efficient and effective operation of the care home market. This was the opening paragraph:

As you are probably aware, our current care home contract entitles providers to write to the council by the end of December in each year to let us know of any information which they believe suggests that the formula in the contract for calculating fee uplifts from the following April will not be sufficient to sustain the efficient and effective operation of the care home market, and commits the Council to writing to providers by the end of January to confirm its view about whether it has become aware of any information, including both submissions from providers and information from other sources, which suggests that the formula uplift will not be sufficient.

This passage includes "sufficient to sustain the efficient and effective operation of the care home market" and, in that context, "sufficient".

- ii) Secondly, the decision letter includes a response to the contention of the Claimant, that the Council's fair cost of care survey would have uncovered evidence

“demonstrating the insufficiency of the Banded Rates”. Within the discussion of that topic, the decision letter referred to figures from the survey, as not suggesting a clear need to increase the base fees, and said why the Council’s monitoring was the best way to make an assessment. The letter says:

In our view the best way to assess whether fees are currently supporting a sufficient level of surplus to sustain the market is to monitor the overall health of the sector, rather than to base fees on an arithmetical calculation from any predetermined set of assumptions ...

The importance of this passage is the phrase “sufficient ... to sustain the market”, which reflects the writer having retained the focus from the opening paragraph of the letter.

- iii) Thirdly, although it is right that the letter goes from the response to the evidence put forward, to a statement of the Council’s conclusions, that is a reflection of the design of clause 17.4 itself. The express duties are to refer to the information and set out views as to its relevance, and to include a proposed variation “if” the “view” is that the Basic Contractual Mechanism, without an additional uplift, would “not” be sufficient to sustain the efficient and effective operation of a market in care home accommodation. On a fair reading of the letter as a whole, in context, the question was being asked and answered. The “view” was not the one which required the proposed variation. It was the view which did not. The Council decided not to include a proposed variation. That was communicated in the letter.
- iv) Fourthly, it would in all these circumstances be a strong step for a Court to conclude – as an inference from the reasoning in the letter – that the writer lost sight of the question, failed to ask and answer it, and answered some different question. I have not been given a proper and justified basis for taking that step. The points that are made about the letter really collapse into the question of the legal adequacy of the reasoning; not the failure to ask and answer the question. There is, moreover, the following straightforward ‘reality check’. The decision letter was written on 31.1.23. It was received and read. It was a letter responding to the Claimant’s letter (22.12.22) which had spoken about sufficiency for the purposes of clause 17, and had referred to sustainability of an efficient and effective care home market. Having received and read the decision letter, the Claimant did not write back making the following elementary point: “but you haven’t answered the clause 17.4 question”. Nor was this elementary point made in the letter before claim (6.4.23), where reasonableness and insufficiency of enquiry were raised. This indicates that those who were closest to the ground understood that the question had been asked and answered, negatively. There was strong disagreement as to how it had been answered. But it had been answered. Nobody piped up to say it had not.
44. Before leaving this ground for judicial review, there are two points to add. First, I think Ms Clement KC and Ms Al-Yassin are right to have accepted that this first ground for judicial review would fall within the scope of judicial review. Secondly, I think this first issue was within the pleaded grounds for judicial review. Unlike the letter before claim, the pleaded grounds clearly take the point that the Council “did not answer the question that clause 17 required to be answered”; and “failed to answer the clause 17 question, viz. was a fee that constituted a real term cut ‘sufficient to sustain the efficient and effective operation’ of the care home market”. There has been a full and fair opportunity

to deal with the point. If the point were otherwise a good one in law, I would not have been persuaded that it should be shut out based on the pleading objection.

Legally Sufficient Inquiry

45. The Tameside duty involves the well-established principle that a decision-maker, having asked themselves the right question, must take reasonable steps to acquaint themselves with relevant information to enable them to answer it correctly (Care North East (No.1) §18). Legally insufficient inquiry is a distinct species of public law error, within an overarching principle of reasonableness, whose value as a unifying overarching principle is this. It supplies the constant reminder that there is a contextual built-in latitude for the public authority who is the primary decision-maker. The judicial review Court does not substitute its own view of what inquiry was appropriate. The inquiry must have been legally insufficient, beyond the latitude for contextually reasonable choice. For “it is generally for the decision-maker to decide on the manner and intensity of the inquiry”: see Bevan at §56; Care North East (No.1) at §19; and Care England at §54.
46. Here is the essence, as I saw it, of Mr Buttler KC’s arguments on this aspect of the case. The impugned January 2023 decision letter described the food and energy costs increases not fully reflected in CPIH. It recorded that it seemed clear that energy costs were a larger proportion of the expenditure of the care home than of the average private household. It explained that energy had increased over the past year by more than CPIH. It recorded that food price increases had increased over the past year by more than CPIH. It gave figures for a Pie Chart comparison. It identified the slices of costs attributable to a typical care home for energy (9.2%) and food (14.7%), compared with the slices of costs attributable to a typical private household for energy (2.9%) and food (9.3%) in the typical private householder’s CPIH basket. In doing so, it referred to the ONS Sub-Indexes for food and energy. But it never followed through. It never joined the dots. It referred to “variations” between care homes. It said there were technical difficulties in conducting the Pie Chart Comparison. It said, of energy costs, that the “scale” of the cost pressure not fully reflected in CPIH was less clear than was the fact of the cost pressure. It said, of food costs, that these had created the financial pressure but that the “exact scale” of the impact on the care home sector as a whole was hard to determine. What was missing in all of this was any attempt to use the Pie Chart Comparison and the Sub-Indexes to get to an evaluation of quantification of impact. By emphasising variation, and by emphasising that scale or exact scale was less clear or was hard to determine, the Council ducked the issue. It overlooked the obvious enquiry. It denied itself a calculation. It should have done what Andrews J described in R (Law Centres Network) v Lord Chancellor [2018] EWHC 1588 (Admin) §92 and made an “attempt ...to work out the actual figures”. It should have done what it has done in the February 2024 proposal for the new SP Contract Arrangement. Or (as Mr Buttler KC accepted in his oral submissions) it could have looked at whether there were unfilled spaces within the care home market or whether there was evidenced infrastructure investment. But it needed to do something. It could not simply wash its hands of the question of appreciating the position on the ground, so as to inform the decision it needed to take.
47. In fact, the Claimant had provided an analysis in the letter (22.12.22) to which the Council was responding. That analysis included two Pie Charts with constituent elements, for a typical care home. One Pie Chart left out return on capital. The other included it. These had been produced using published survey data from North Tyneside, because the Council’s own survey data was awaited when the letter was written. The Pie

Chart slices were put at 17.8% for food and 13.0% for energy (when return on capital was excluded); and at 10.7% for food and 7.8% for energy (when return on capital was included). ONS Sub-Indexes were used – and for 5 cost items the CPIH overall rate – to produce a picture of actual costs increases for each of the cost portions, as at November 2022. That gave an overall percentage increase in costs, compared with CPIH at 4.9%. There was a calculation of a real term cost reduction of £58.60 (leaving aside return on capital) and £30.73 (including it). In fact (as Mr Buttler KC accepted in his oral reply) this was a picture which the Council could have used as – of itself – constituting a legally sufficient enquiry, provided that it grappled with the picture and addressed it in the decision letter. That is the argument.

48. I am unable to accept the contention that there was a legally insufficient inquiry. My reasons are as follows.

- i) First, the starting point is clause 17.4 itself. The Council had to receive, consider and respond to information put forward by care home providers. The Council also had to form a view on the “balance of all available evidence”.
- ii) Secondly, the Claimant had provided information on which it relied. It gave its picture of the inflationary pressures and their impact. This was available to the decision-maker. The impugned decision letter refers to it and responds to it. The Claimant also drew the Council’s attention to the fact that the Council had its own survey evidence and cost of care report, as relevant information. This too was available to the decision-maker. The impugned decision letter refers (from page 2 onwards) to this and makes points about it.
- iii) Thirdly, the Council had its survey evidence and cost of care report (14.10.22), and this involved analysis; not simply received information about care homes and their costs. The report had included a section on non-staffing costs, with a table showing inflationary cost pressures for a typical care home. There were 23 categories of costs making up the Pie Chart. For each of those 23 items, the Council had looked at the Sub-Indexes from ONS. It had looked at how the Sub-Indexes had changed, taking an average over 2021/22. It took the Sub-Indexes as at April 2022 and compared them with that average. It took estimates from providers in their survey returns as to their inflationary costs increases described for each of the 23 categories. This work involved a recognition of the way in which inflation operated differently for different items within the typical care home Pie Chart. It involved a recognition of the different Sub-Indexes and the value which they had had up to April 2022. It involved a recognition of what survey returns from care home providers were reporting in terms of inflation uplifts. There were tables including results for a cost of care exercise broken down by elements of cost including food supplies and utilities (electricity, gas and water). The Sub-Indexes were also referenced on the third page of the impugned decision letter. Another part of the picture – available to the decision-maker – was the Council’s draft Market Sustainability Report (also 14.10.22). This had recorded the Council’s estimate, based on the survey, that in April 2022 care homes spent an estimated £24 per week per resident on energy costs; and it was recognised that that figure would have substantially increased since.
- iv) Fourthly, there was further analysis done for the impugned decision and in the decision letter. For example, the letter explained that having considered the survey

returns, some homes were reporting energy costs in 2021/2022 were a slice less than 10% and others were reporting a slice more than 25%. It explained that the survey returns showed large differences in their type of energy used, whether electricity or gas or other fuels. The Council had looked at the Sub-Indexes for liquid and solid fuels, which had increased by less than 50% in the year to December 2022 while the electricity sub-index during that period had almost doubled and for gas had almost trebled. The Council had thought about the technical difficulties in comparing the split (the Pie Chart comparison) between care home costs and CPIH. The Council had thought about the way in which food price increase had also increased over the past year by more than the CPIH and how these accounted for a higher share of care home expenditure than private household expenses are used for CPIH. The council had also thought about insurance rates and their increase. Significantly, the Council had done some own-initiative analysis of the Pie Chart comparison. That is why it was describing survey results as yielding an average of 9.2% (energy) and 14.7% (food), which it compared to the typical private household for CPIH as 2.9% (energy) and 9.3% (food). The Council also had information about the way Sub-Indexes for other elements (eg. repairs and maintenance) had increased by less than CPIH during 2022 (the Claimant's table used a Sub-Index of 14.84%, higher than a CPIH of 14.18%). The Council referred to information about Government support for energy cost increases.

- v) Fifthly, the question was not one of fee level sufficiency to cover inflationary cost increases. The question was one of fee level sufficiency to sustain the efficient and effective operation of a care home market. What was needed was reasonable steps to acquaint the Council with relevant information to enable it to answer that as the relevant question.

49. In the light of all of this, I cannot accept that the Council failed to take reasonable steps to acquaint themselves with relevant information to enable it to answer the relevant question. I add three points. (1) First, the criticisms which are being made are, really, about the reasons that were given. This can be seen in Mr Buttler KC's concession that the Claimant's own analysis would have constituted a legally sufficient inquiry, had the decision letter grappled with it. The inquiry is one thing: it is about the gathering of information and it being available to the decision-maker, for their thinking about and arriving at the decision. The Claimant's analysis was gathered and available. The 'grappling' is about the reasons (there is no unreasonableness challenge). (2) Secondly, for reasons given earlier (§§34-40 above), I accept that this ground for judicial review, contextually applied, is available; and that the Care England case involved no crystallised SP Contract Arrangement question. (3) Thirdly, there was, however, no duty to conduct any particular "arithmetical" assessment – as Mr Buttler KC's submissions ultimately correctly accepted – and on this point there is a parallel with Care North-East (No.1) at §§32 and 37.

Legally Adequate Reasons

50. Here is the essence, as I saw it, of Mr Buttler KC's arguments on this aspect of the case. The impugned January 2023 decision letter needed to include legally adequate reasons – which are proper, adequate and intelligible – as to whether, and if so why, the Basic Contractual Mechanism, without an additional uplift, would be sufficient to sustain the efficient and effective operation of a care home market. That is because conventional

public law standards required legally adequate reasons; or because in public law a decision-maker who chooses to give reasons must give adequate reasons. Here, the reasons are wholly inadequate. They do not explain what the answer is to the sufficiency question. They do not explain why the Basic Contractual Mechanism would be sufficient to sustain the efficient and effective operation of a care home market. Reference is made to a “likely ... case” for using the MSI Fund grant, and that the Council “may be in a position” to use that grant for in-year fee increases. But this is no reason for an answer to the question. It would be deferring the question needing to be answered. The reasons needed to grapple with the information which was provided and available to the decision-maker, explaining the Council’s view on inflationary impacts for typical care home providers over the past year, by comparison with CPIH and a typical private household. Points made about variation and scale did not grapple with the known and recognised fact, that CPIH was inadequate to keep pace with inflationary cost pressures – especially for energy and food – given the different Pie Charts and the higher portions for energy and food for a care home operator compared with a private householder.

51. I am unable to accept the submission that the reasons in the impugned January 2023 decision letter were legally inadequate. Here is why:

- i) First, the starting point is again clause 17.4 itself. I have to be cautious in allowing public law standards to cut across the content of the SP Contract Arrangement. The Council’s express duties were: (a) to confirm whether it had become aware of any information suggesting that banding rates may not be sufficient to sustain the efficient and effective operation of a care home market; (b) to refer to information from providers as evidence that banding rates are insufficient; and (c) to set out a view of the relevance of that information. The fact of writing a reasoned letter – which clause 17.4 requires – cannot of itself be a basis for an expanded obligation. I have explained that the Council needed to ask whether the Basic Contractual Mechanism, without an additional uplift, was sufficient to sustain the efficient and effective operation of a care home market. That arises from clause 17.4. In my judgment, the decision letter – which the Council was required to write and did write – did need to be sufficient so that the recipient could understand what view had been reached and on what basis. But the contextual content of that reasons duty is closely linked to the design of clause 17.4. The reasons would be referring to information suggesting that banding rates may not be sufficient to sustain the efficient and effective operation of a care home market, and then setting out a view of the relevance of that (and other) information, all in the context of the question of sufficiency to sustain the efficient and effective operation of a care home market.
- ii) Secondly, there is what the relevant question was not. The Council did not need to ask and answer the question whether the fee levels, with the Basic Contractual Mechanism, would be sufficient to cover the past year’s inflationary cost increases. The question whether CPIH was sufficient, to cover a typical care home operator’s inflationary cost increases over the past year, was not the clause 17.4 question. There was therefore no necessary duty to ‘grapple’ with that question.
- iii) Thirdly, the Council in my judgment did communicate its answer. The Basic Contractual Mechanism, without an additional uplift, was – in the Council’s view – sufficient to sustain the efficient and effective operation of a care home market. On a fair reading of the letter, it was asking and answering that question (§43 above). The Council then explained in some detail – over the course of the 6 pages

of the letter – what it thought about information suggesting that banding rates may not be sufficient to sustain the efficient and effective operation of a care home market, and its view of the relevance of that and other information. The Claimant could see what was being said. The Claimant also knew that when reference was made to using MSI Fund grant for inflationary pressures, this was in the context of having just used MSF Fund grant for those pressures (the four-month overall 2.45% bump). If the points made in the letter were not a good basis on the merits for an answer, then the Claimant was in an informed position to disagree. If those points were not a reasonable basis for the answer, then the Claimant was in an informed position to challenge the reasonableness of the decision. Whether they were good or bad reasons on the merits, whether they were good and bad as to the substantive reasonableness of the decision, they were clear and intelligible.

- iv) Fourthly, the thrust of the letter was that the Council had a good broad picture of the operation of the market; there were inflationary pressures, which could appropriately be addressed using MSI Fund grant; but that an additional clause 17.4 uplift was not warranted. The letter said it was the Council’s monitoring of the overall health of the sector which was the best way to assess whether fees were currently supporting a sufficient level of surplus. The cost of care survey had produced some quite detailed evidence about breakdown of non-staffing costs in care homes. It acknowledged that energy and fuel costs were a higher proportion of a typical care home provider’s expenditure, than they were for a CPIH typical private householder, though there were difficulties in the comparison, variations between care homes, and the scale of the pressure and its impact were hard to determine. Increases in insurance costs were addressed. The letter acknowledged, looking ahead, that there was a degree of unpredictability as to costs increases, there was the prospect of using Year 3 MSI Fund grant (having used Year 2 MSF Fund grant), and there was the new agreement and contractual mechanism which would be designed for fees from April 2024. But the decision was no. There would be no clause 17.4 uplift. This was not, in my judgment, reasoning below contextually applicable standards of clarity, sufficiency or intelligibility.

Other Issues

52. In light of my conclusions on the three grounds of challenge to the Clause 17 Decision, the question relating to discretionary bars and remedy do not arise. But I will say what I would have concluded, had I been persuaded that the Clause 17 Decision was vitiated in public law terms.
- i) First, I would not – in any event – have granted a quashing order. In my judgment, a claim for judicial review which asks a judicial review Court to quash a decision as to local authority fees, decided as an allocation of local authority resources in the run up to a budget for a new financial year, should be challenged with (a) a high degree of promptness and (b) a request for heavy expedition. Then, if the local authority slows down the process – because of its position in a letter of response or because it insists on a long time for a response or because it insists on a separate permission stage at which it fails to administer a clean knock-out blow – it brings any problems on itself, if the proceedings are delayed. The rule of law applies to budget related decisions. The Administrative Court has mechanisms for expedited cases. Permission for judicial review can be refused in relation to some remedies and not others. A quashing order means the clause 17 decision is set aside and

would need to be retaken. I would have declined that course. I would have done so because the Claimant waited three months to commence the proceedings. There was a reason why the December and January deadlines were designed in clause 17. The financial year starts on 1 April. The budget is set in March. I do not accept that the real target was the letter of 22.3.23. All of the grounds – asking the right question, legally sufficient inquiry and legally adequate reasons – plainly arose out of the January 2023 decision letter. The decision was not a provisional one or a minded-to decision. It was the clause 17 decision. The word “intentions” is because the clause 17 decision relates to a future time (1 April). It is true that the letter of claim was met with the response that the claim was premature because the MSI Fund grant decision was imminent. If prematurity had been a response to a promptly written letter before claim, that might have been different. I accept there is a serious detriment to good administration and the prospect of unravelling the Clause 17 Decision, in the context where the budget has long ago been allocated and spent. But I do not accept the Council’s contention that quashing would, of necessity, result in a bespoke individualised decision involving a complex reconstruction in the case of each care home provider. I will reflect this reasoning in the refusal of permission for judicial review, so far as a quashing order was sought.

- ii) Secondly, none of this means that permission for judicial review would have been refused, so far as a declaration was concerned. I note that the delay objection would not have led to dismissal in Bevan (at §79). It does not appear that there was the utmost promptness in Care North East (No.1). There have been many cases challenging local authority care home fees. A judgment, and declaration, finding and recording that the local authority has acted in a manner contrary to law could be expected to precipitate some form of prospective consideration of appropriate action, without reopening a long-past decision.
- iii) Thirdly, I would not have been persuaded by the Council’s arguments about detriment to good administration, independently of delay. Judicial review remedies are a matter of judgment and discretion. There is a narrow band, within which detriment to good administration could justify the refusal of a remedy – in the context and circumstances – even where a claimant has acted promptly. But, where a claimant has done all that could have been expected, and can show unlawfulness, the court will be extremely circumspect about the blanket denial of any remedy.
- iv) Fourthly, no argument about non-materiality arises on this part of the case. The Council did not contend – if there was a failure to ask the right question and/or adopt a legally sufficient enquiry and/or give legally adequate reasons – that the decision would inevitably have been the same. That is the common law test of materiality. Nor did the Council contend – on the same premise – that the outcome would “highly likely” not have been “substantially different”. That is the statutory overlay.

THE MSI FUND GRANT ALLOCATION DECISION

53. I turn to the Claimant’s challenge to the Council’s decision on 9 May 2023. This is the third target for judicial review. On this part of the case, no delay argument is raised, and no pleading point is raised. This point was promptly added to the claim by clearly-articulated amendment. Mr Buttler KC submits that the Council’s MSI Fund grant

allocation decision of 9 May 2023 was unlawful on a single ground. It was vitiated by a material misinterpretation of the MSI Fund grant conditions or MSI Non-Statutory Guidance.

54. Ms Clement KC and Ms Al-Yassin have multiple answers. (1) Breach of a grant condition cannot be the subject of a claim for judicial review, because any duty to comply with the condition, and the consequences of any failure to do so, are matters for the Secretary of State not public law errors for the Court. As explained in Supportways §36 (§33i above), the duty is owed only to the Secretary of State. Alternatively, judicial review should be refused in any event because complaint to the Secretary of State constitutes an adequate alternative remedy. (2) There was no misinterpretation of the MSI Fund grant conditions or of the MSI Non-Statutory Guidance. And insofar as there was any departure from the grant conditions or the MSI Non-Statutory Guidance, the decision was lawful because the Council had good reasons for that departure (a) identified in the Cabinet Report but in any event (b) permissibly identified in the evidence responding to the judicial review claim (cf. R (X) v Tower Hamlets LBC [2013] EWCA Civ 904 [2013] 4 All ER 237 at §38). (3) Relief should be refused for non-materiality – at common law or statute – because the Council would inevitably have, or is highly likely substantially to have, made the same grant allocation decision absent any misinterpretation of the MSI Fund grant conditions or of the MSI Non-Statutory Guidance.
55. I have described the argument that fell away, about not using the previous MSF Fund to cover inflationary pressures (§§26-30 above). Mr Buttler KC maintained a point – based on the MSI Non-Statutory Guidance §1.25 – about Pot B of the MSI Fund being reserved for increasing local fee rates “beyond planned inflationary fee uplifts”. The argument was that, if a fee increase was, or needed to be, identified in the Clause 17.4 Decision, that would be a “planned” uplift, needing to be underwritten from other sources and not derived from Pot B of the MSI Fund grant, as the May 2023 1.5% overall increase backdated to 1.4.23 was. That would mean Pot B should have been available for other uses, including the prospect of more money for care home operators. The problem with this argument, as he rightly conceded in his oral reply, is that it is parasitic on first showing that in law a fee increase needed to be identified in the Clause 17.4 Decision. I have upheld the lawfulness of that decision. So this point falls away too.
56. What was left was Mr Buttler KC’s submission as follows. The Council’s May 2023 Grant Allocation Decision was required to use Pot A of its MSI Fund grant (£1.026m) to ‘replicate’ the previous spend of the March 2022 MSF Fund grant (£1.026m). The MSI Non-Statutory Guidance clearly said (§1.22) that local authorities must spend their allocation of Pot A on “maintaining” the fee uplift made under the MSF Fund grant. This is a policy document whose objectively correct construction is a hard-edged question for the judicial review Court (see R (JB (Ghana) v SSHD [2022] EWCA Civ 1392 at §67). The objectively correct meaning of the words means ‘replication’ of the previous year’s fee uplifts from the MSF Fund. In Year 2, the Council had given home care agencies an overall uplift bump of 2.45% over 4 months (£175k) and care home operators an overall uplift bump of 2.45% over 4 months (£330k), using the MSF Fund grant. Equivalent funding could be spread over 12 months in Year 3, using the MSI Fund grant. That was the course which the Council’s public law duty of policy-adherence required, absent a contemporaneously identified good reason for departure. However, the Council misunderstood the Non-Statutory Guidance. The Cabinet report (9.5.23) recommended, as being consistent with the MSI Non-Statutory Guidance, uses of Pot A which did not

allocate £175k to home care agencies and did not allocate £330k to care home operators. It recommended, as consistent with the MSI Non-Statutory Guidance, the use of £770k from Pot B to fund the overall 1.5% increase in care home fees for Year 3. Had the Council correctly interpreted the MSI Non-Statutory Guidance, it would have needed to have allocated the grant in a totally different way. Care home operators may have received more than the overall 1.5% increase (£770k).

57. I am unable to accept these submissions. I will assume for now – in the Claimant’s favour – that grant conditions and non-statutory guidance are, in principle, capable of being a basis for judicial review for material misinterpretation and departure without good reason. Starting from that favourable assumption, the claim cannot succeed. Here are the reasons why.

- i) First, this argument suffers from the same vice as the argument which fell away (§§26-30 above). The MSI Non-Statutory Guidance is amplifying the position pursuant to the MSI Fund Grant Conditions. The Pot A Grant Condition speaks of the MSI Fund grant being used to continue to support the progress local authorities and providers have already made in 2022-23 on increasing fee rates to move towards “paying a fair cost of care”. I have explained the Government’s 70/30 conclusion (that 30% of local authorities were already paying fair cost of care) and the Council’s unimpugned self-assessment (as being within that 30%). The premise of the Pot A Grant Condition – with its idea of continuity – was inapplicable to the Council. Neither the Pot A Grant Condition nor the Pot A MSI Fund Non-Statutory Guidance state that Pot A was required to be used to replicate whatever was done the previous year with the MSF Fund, including where it was not used to move towards paying a fair cost of care because the local authority using it was already paying fair cost of care. This is not a ‘departure’ from the Grant Condition or Non-Statutory Guidance, because the text of those documents allows the 30% of local authorities greater autonomy. But if it is seen as a departure, there is self-evidently good reason for it. The premise does not apply.
- ii) Secondly, the MSI Non-Statutory Guidance spoke of Pot A as money to be spent on “maintaining previously increased fee rates paid to adult social care providers”, achieved through sustained fee rate increases “as opposed to non-recurrent fee uplifts”. The problem with this language – given its ordinary and natural meaning – was that the Council’s past use of the MSF Fund had involved two time-limited overall fee bumps: one for the home care agencies (£175k); and the other for the care home operators (£330k). By design, these were “non-recurrent”. They were a temporary 4 month bump after which fee levels reverted to their previous level. This contra-indicated the position for which Mr Buttler KC contends: a re-run from Pot A of an allocation of £330k for care homes.
- iii) Thirdly, the MSI Grant Condition for Pot B spoke of it as to be used to make improvements in at least one of the “target areas”. These included “increasing fee rates” paid to adult social care providers in local areas. The ordinary and natural meaning of those words includes funding to increase fee rates for care homes. Similarly, the MSI Non-Statutory Guidance described Pot A as available to pay increased fee rates to adult social care provided in local areas, including care homes. This means that a fee increase for care homes was – in principle – within the described scope of Pot B.

- iv) Fourthly, in light of all these points, the language of the Grant Conditions and the MSI Non-Statutory Guidance called for an evaluative judgment. As Mr Buttler KC put it in his skeleton argument, it was a question of reading the Guidance in a sensible way that gave effect to the Government's intention. There was no objectively correct interpretation which required the 'replication' of £330k funding for care homes from Pot A; nor the 'replication' of £175k funding for home-care agencies. Nor, in context, would such rigidity make sense. In public law terms, this was ultimately an evaluative judgment in seeking to apply criteria and broad guidance.
- v) Fifthly, the Council's May 2023 Grant Allocation Decision involved such an evaluative judgment, and no misinterpretation. When the Cabinet Report was written, making the recommendation which the Council accepted (9.5.23), the writer was grappling with the MSI Grant Conditions and Non-Statutory Guidance. Cabinet members were told in the Report that the fair cost of care survey for the MSF fund had not demonstrated any gap in terms of paying fair cost of care as defined; that what had been identified was a likely understatement in terms of inflationary cost increases relating to energy, food and insurance costs; that the MSI Fund now provided an opportunity to introduce a one-year increase in recognition of the likelihood that many care homes were facing some financial pressure because of the specific balance of cost which they incur; and that an overall increase of 1.5% was proposed. Within the Report, there was a footnote which grappled with the MSI Grant Conditions and MSI Non-Statutory Guidance. Within it, these points were made: (i) that Pot A was described in terms of maintaining increased fee rates for those authorities moving towards a fair cost of care; (ii) that Pot A was said to be to maintain sustained fee rate increases as opposed to "non-recurrent" fee uplifts; and (iii) that this description was problematic regarding the temporary 2.45% increase applied during the second half of Year 2. It was therefore recommended to Cabinet that Pot A be used for other proposed funding relating (£620k) for the home-care mileage support scheme (£275k having been allocated from the MSF Fund grant for a mileage scheme) and part of the funding for an increase to a wage support scheme for home carers (£1.5m). The remainder of that funding, and the £770k for the one year overall fee increase of 1.5% for care homes was allocated to come from Pot B. There was no material misapprehension in this careful reasoning, whether as to the MSI Grant Conditions or as to the MSI Non-Statutory Guidance.

Common Law Materiality

58. Even if Mr Buttler KC were right about the legally correct interpretation of the MSI Fund Grant Conditions or MSI Non-Statutory Guidance, this is in my judgment a clear case where the common law principle of materiality defeats the claim. This could not have been a permission-stage conclusion: it arises as a clear picture from the full, substantive argument. It is not, in my judgment, about the discretion to refuse a remedy. It is about the absence of any public law flaw. There is no material misinterpretation, because the Court is satisfied – the onus being on the defendant public authority – that the decision would inevitably have been the same. Suppose an objectively correct interpretation of the Grant Conditions or the MSI Non-Statutory Guidance which required £330k to be spent from Pot A for Year 3 on a fee rate uplift for care home fees. It is inevitable that the outcome for care homes would have been the same 1.5% uplift (£770k) that was

allocated from the MSI Fund grant. The reasons are straightforward. The Council plainly decided that the right thing to do was to allocate a 1.5% uplift (£770k). That is more than a ‘replication’ of £330k. The Council would have found £770k from Pot A. Or it would have found £330k from Pot A and £440k from Pot B. The care homes would not have done better than the 1.5% overall increase (£770k). This is obvious, and inevitable, based on the Council’s contemporaneous reasoning and thinking, reflected in the documents. It is not a function of witness statement evidence filed in the proceedings, though there are such witness statements before the Court.

The Statutory Materiality Overlay (HL:NSD)

59. For the same reasons, had it arisen, I would have found – at the substantive stage of remedy – that this is one of those cases where it is “highly” likely that the “outcome” would not have been substantially different. But conversely, had I concluded that there was no clear-cut inevitability about the outcome, I do not think I could then have arrived at a conclusion that the outcome was “highly likely”. That is because the self-same considerations which stood in the way of a conclusion of common law inevitability would have put me into the realms of uncertainty, such that the “highly” likely outcome would have become speculative.

Grant Conditions/Guidance and Judicial Review

60. Thus far, I have proceeded on the basis of assuming – in the Claimant’s favour – that material misinterpretation of a Grant Condition or Non-Statutory Guidance can be a ground for judicial review (see §57 above). Even on that premise, the challenge fails. But is it right? Based on the submissions I heard in this case, and the authorities that were cited, I reach the following conclusions:
- i) The fact that conditions, whose imposition is empowered by a statutory scheme, have been applied to a public authority, does not in my judgment of itself provide a basis for judicial review. Otherwise, whenever any public authority is the recipient of a licence or an authorisation – including a planning permission – there would be the prospect of public law proceedings by an interested individual or group.
 - ii) But I would not exclude the possibility that grant conditions, imposed by Government pursuant to s.31(4)(5) of the 2003 Act, could be a basis for invoking the supervisory jurisdiction of the High Court. Suppose a s.31 grant is specifically conferred for allocation to care home operators in the area, who bring judicial review proceedings on the basis that the local authority has announced grant allocation for an entirely improper purpose. Or suppose the grant-conferring Minister does not consider that enforcement powers are in the circumstances adequate, and wants to secure an immediate quashing order. It is generally unwise in public law to say ‘never’. Unlike licences and permissions, s.31 grants are necessarily only paid to local authorities. There could, in principle, be a legitimate public interest – consistently with the statutory purpose – why the judicial review court’s supervisory jurisdiction may be appropriately needed.
 - iii) In the context of policy instruments, public law has developed a duty of conformity (the duty to “follow ... published policy” absent “good reasons”) and an entitlement of conformity (the “basic public law right” of a person “to have [their]

case considered under [the] policy”). These are seen in R (Lumba) v SSHD [2011] UKSC 12 [2012] 1 AC 245 at §§26 and 35. Linked to them is a public law duty to appreciate any objectively correct meaning of a policy. As with all public law principles, context is everything. I do not think these principles apply – unqualified – to s.31 grant conditions, or associated non-statutory guidance. Nor would they apply, in my judgment, to contractual grant conditions and associated non-statutory guidance. The principal reasons are these. The Minister exercising the s.31 powers is the primary decision-maker with an ongoing function. The Minister must have an autonomy for evaluative judgment as to how the grant is to be spent and is being spent, including the application of grant conditions. The Minister may legitimately be satisfied as to interpretation or application. The principal function of conditions is to govern the relationship between Minister and local authority, and the principal function of non-statutory guidance is to support action consistent with the Minister’s expectations, all in the context of that ongoing autonomy. Neither conditions nor non-statutory guidance have a function of conferring entitlements of conformity, to allow competing would-be recipients to contest local authority grant allocation decisions in the judicial review Court. The present case, in my judgment, powerfully illustrates these points. I would not have accepted that judicial review is a legitimate means of indirect enforcement by a would be grant recipient of the MSI Grant Conditions or MSI Non-Statutory Guidance. It is because, given the nature and content of these Grant Conditions and this MSI Non-Statutory Guidance, they do not give rise to any enforceable public law obligation – or right – of conformity; nor the allied public law duty of objectively-correct interpretation. This fits with the Supportways idea of duties owed to the Secretary of State (§§33i, 54 above). By way of footnote, it may also be why Counsel were unable to find any example of a judicial review claim based on grant conditions or non-statutory guidance.

- iv) This is not – as I see it – because of a discretionary bar, that complaint to the Minister is the would-be grant recipient’s suitable alternative remedy. An alternative remedy generally arises where, in its absence, the judicial review court would apply public law principles and find public law errors. You can test it by positing removal of the alternative remedy, in consequence of which judicial review would become apt. So, an appeal right is available and judicial review is inappropriate. But the appeal right is abolished, and judicial review becomes appropriate. Here, the point is more fundamental. The Lumba duty and entitlement are inapplicable. That means the available route is complaint to the Minister. But if I were wrong about Lumba – if departure from, or misreading of, a s.31 grant condition or of non-statutory guidance is a public law error – then in those circumstances I do not then see how the existence or non-existence of an avenue of complaint to the Minister becomes a public law alternative remedy.

CONCLUSION

61. For the reasons I have given, the claim fails. I will refuse permission for judicial review for the claim seeking a quashing order. In relation to the claim for a declaration, I will grant permission for judicial review. That is because all issues which were maintained crossed the threshold of arguability. But I will dismiss the substantive claim, because none of the grounds has succeeded.

62. Having circulated this judgment as a confidential draft, and because the legal teams faithfully followed my wishes as to use of the time between receipt of that draft judgment and hand-down of this approved judgment, I am able to deal here with consequential matters. That leaves no loose end and allows everything to be addressed in the promulgated judgment, promoting open justice.
63. The following terms of my Order, in light of the judgment, were agreed: (1) Permission to apply for judicial review is refused insofar as the Claimant sought a quashing order; (2) Permission to apply for judicial review is granted insofar as the Claimant sought a declaration. (3) The claim for judicial review is dismissed on all grounds. (4) The Claimant shall pay the Council's costs of the claim on the standard basis, to be the subject of detailed assessment if not agreed. (5) The Claimant shall pay the Council £50,000 on account of costs, to be paid within 28 days.
64. The sole contested consequential matter is permission to appeal. Mr Buttler KC submits that an appeal has a real prospect of success on the basis of: (a) failure to ask the right question or give legally adequate reasons, because it did not answer the market sustainability question in terms and the thrust of the letter, the draft market sustainability plan and some of the written and oral submissions were that market sustainability was subject to the inflation problem; and/or (b) failure to conduct a legally sufficient enquiry (or give legally adequate reasons), where the Council's own-initiative analysis showed such a disparity such that reasonableness required an identification of an overall difference. I am conscious, in dealing with this rolled-up- hearing, that I found the points arguable so as to grant permission for judicial review. But, having analysed these points in detail, I should not grant permission to appeal unless – for my part – I am able now to see a realistic prospect of their succeeding in the Court of Appeal. I have not been able to see that realistic prospect, and so I will add to the Order: (6) The Claimant's application for permission to appeal is refused.