Neutral Citation Number [2025] EWHC 3136 (Admin)

Case No: AC-2025-LDS-000092

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

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BG

Date: 09/12/2025

Before :

UPPER TRIBUNAL JUDGE WARD
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

THE KING on the application of

BRENDA HUGHES **Claimant**
(by her litigation friend, Adrian Pygott)

- and -
KIRKLEES COUNCIL **Defendant**

- -

Peter Mant KC and Tom Tabori (instructed by **Irwin Mitchell**) for the Claimant
Peter Oldham KC and Jack Anderson (instructed by **Ward Hadaway**) for the Defendant

Hearing date: 25th September 2025 (with post-hearing submissions between 13th and 30th October 2025)

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be at 10:00am on 17 December 2025

Upper Tribunal Judge Ward:

Introduction

1. The Claimant seeks to challenge a decision by the Defendant (also "the Council") to transfer the ownership of what are described as two specialist dementia care homes to a private provider ("the Decision"). The Claimant is a resident of one of the homes in question, Castle Grange. What constituted the Decision is in dispute and I return to that below in the context of the Defendant's submission that the Claimant has failed to act promptly in bringing these proceedings and/or that there has been undue delay for the purposes of Senior Courts Act 1981 s.31(6). Although it might be considered logical for the issue of "promptness" to be considered at the outset, I merely record here that I am rejecting the Council's submission on that point and proceed to the substantive issues in order to avoid disrupting the flow of this judgment. A full discussion of the promptness/s.31(6) issue can be found below.

2. The structure of this judgment is as follows:

Chronology

3. The chronology is as follows:

   a. 26 September 2023: The Council's Cabinet considered a report on "Proposed Closure of Castle Grange and Claremont House residential care homes" ("the Homes") ("the September 2023 Report").

   b. 4 October 2023 and 3 January 2024: The Council held a consultation on closure of the Homes.

   c. 12 March 2024: A further report was presented to Cabinet on "Future arrangements for the council-run long stay dementia care homes" ("the March 2024 Report"), accompanied by an Integrated Impact Assessment ("the first IIA") dated 17 July 2023, and recommending that the Council explore the possibility of transferring the Homes to the independent sector. In accordance with the recommendations of the March 2024 Report, Cabinet approved the proposed exploration of potential opportunities to transfer the Homes to an independent sector provider.

   d. 8 October 2024: Cabinet received a further report "To advise on the progress of identifying potential new operators for the two homes for older persons and to consider how to progress further" ("the October 2024 Report"), recommending consultation on the proposed transfer. The proposal to consult was approved by Cabinet.

   e. 10 October 2024 to 21 November 2024: The second consultation ran for six weeks.

   f. 10 December 2024: Cabinet received a report titled "Future of Council Operated Dementia Care Homes Provision (Castle Grange and Claremont House)" ("the December 2024 Report"), presenting options to Cabinet of (1) "do nothing" and "continue operation the homes as is, recognizing that they cost significantly more to operate than the income generated through fees charged"; (2) transfer the homes to a private operator; or (3) close both the Homes. It was accompanied by an IIA,

dated 21 November 2024 ("the second IIA"), addressing the proposed transfer of ownership. At the meeting on 10 December 2024 Cabinet gave approval to pursue transfer of the Homes as a going concern.

g. 17 December 2024: That decision was called in by the Council's Health and Social Care Scrutiny Panel ("the Scrutiny Panel").

h. 10 January 2024: The Scrutiny Panel resolved that the decision to transfer ownership of the Homes should be referred back to Cabinet with a recommendation of further analysis and reconsideration.

i. 11 February 2025: A further report titled "Long Stay Dementia Residential Homes" was presented to Cabinet ("the February 2025 Report"), again identifying three options in the same way as the December 2024 Report. Appended to this report was a 5-year summary of actual direct and net direct costs of operating the Homes. In accordance with that recommendation, on the same day, Cabinet resolved to progress with the sale and business transfer of the Homes. Part of its resolution stated the following:

> "(4) That authority be delegated to the Executive Director for Adults and Health, in consultation with the Cabinet Member for Adult Social Care, the Service Director - Finance, and the Service Director – Legal, Governance & Commissioning, to select and finalise negotiations and agree the terms of the freehold transfers and Business Transfer Agreement with a preferred bidder.
>
> (5) That pursuant to (4) authority be delegated to the Service Director - Legal, Governance and Commissioning to execute and enter into all necessary documentation to effect the transfer of the care homes as going concerns."

j. 18 February 2025: the preferred bidder and unsuccessful bidders were notified of the Best and Final Offer process.

k. 27 January 2025 – 10 April 2025: The parties engaged in extensive pre-action correspondence.

l. 8 May 2025: The claim was filed.

m. 21 May 2025: The claim was issued.

n. 13 June 2025: The Defendant filed an acknowledgment of service and summary grounds of resistance.

o. 8 July 2025: HHJ Saffman gave directions for a rolled up hearing.

p. 22 September 2025: Ms Blackburn, a resident of Claremont House, (by her litigation friend) was added as Second Claimant (by her litigation friend) and permitted to make corresponding amendments to the pleadings. Sadly, she has died since the hearing and has since been removed as a party under CPR 19.2(3).

Pleading issues

4. Mr Oldham KC objects that the grounds of challenge as now put forward have diverged from what was pleaded and submits that the Claimant should be confined to her pleaded case, citing *R (Talpada) v SSHD* [2018] EWCA Civ 841 and my own decision in this court in *R(NAA) v An Independent Review Panel* [2025] EWHC 1845.

5. CPR54A PD requires a statement of the facts relied upon and a clear and concise statement of the grounds for bringing the claim.

6. Mr Mant KC submits that where a claim is drafted prior to receiving full disclosure, there will inevitably be some evolution and the requirement for procedural rigour is not to be applied wholly inflexibly. In his submission, the Claimant's grounds have not changed and have merely evolved. He cites the remarks of Fraser LJ in *ASY v Home Office* [2024] EWCA Civ 373 that

> "It may be, in any case, that logical consideration of points during

> submissions to the court will lead to an evolution, or development, of the principles being contended for by any particular party in any particular case."

7. Similarly, in *R (Anaesthetists United Limited) v General Medical Council* [2025] EWHC 2270, there was a complaint that a ground – in that case, process rationality – had not been pleaded so that the court should not permit that point to be raised. Lambert J did permit it, giving a number of reasons at [117] why she did so. These included (at (a)) that although "Many of the claimants' submissions both in writing (in the pleaded claim) and oral submissions are not tied to any particular legal issue", looking at the content of the Statement of Facts and Grounds

> "The Council could not have been in doubt that the challenge it faced in this judicial review was to the outcome of its reasoning process but also that the challenge extended to how it had arrived at that conclusion given its approach to regulation generally and the body of evidence of patient safety risk."

At (c), the judge distinguished *R (Bibi) v Secretary of State for the Home Department* [2025] EWCA Civ 622 (which cited *Talpada*), on the basis that the case before her was

> "not a case (such as *Bibi)* in which a wholly new ground of challenge is advanced in the absence of an application to amend or in which the case at hearing bears no relationship with the pleaded case."

8. The position here is different from that in *NAA* where NAA had initially indicated that his complaint related to the lack of relevant communication between the local authority and the school but then sought, at a late stage and without having obtained permission, to introduce numerous unrelated further claimed shortcomings on the part of the local authority, which the authority was not in a position to address adequately.

9. In the present case, the central thrust of the complaints has been maintained throughout, albeit with some refinements and changes in response to material

disclosed by the Council. The Statement of Facts and Grounds ("SFG") raised (in para 2) the overarching point that the Decision was

> "predicated on financial savings yet its basis involves multiple gaps in the reasoning and consideration on this issue. It therefore involved irrationality in [its] procedural aspect (as [summarised] by Chamberlain J in *R (KP) v SSFCA* [2025] EWHC 370 at §56.[])]"

10. Among the "multiple gaps" alleged in the SFG were:

    a. presenting and maintaining an artificially low price for what the Council would be paying a private provider following sale contrary to evidence of the actual local market rate;

    b. maintaining an unnecessarily low price at the Homes;

    c. failing to consider the option of retaining the Homes in the Council's ownership but not (as put in certain of the Council's reports) "doing nothing";

    d. treating sale as the inexorable consequence of there being an overspend;

    e. uncertainty over whether the amount of capital expenditure that the homes would require (put at £1.4 million) had been communicated to a prospective purchaser and its affordability if it had been;

    f. the factor relied upon of an excess of operating costs being attributable to the Council itself by reason of its unbudgeted use of agency staff;

    g. failure to address why the asserted operating deficit of the Homes in the Council's hands would not be repeated in the hands of a private sector operator; and

    h. calculating on the basis of full occupancy when the Homes had been historically under-occupied.

11. All except (b) can be found in the Grounds section of the SFG in some form. As regards what will prove to be the central feature of this case, namely the rate

used for comparison purposes, I consider that the Ground at [28b] of the SFG that "when calculating the external cost to the Defendant post-sale the rate per week used by the Defendant was erroneous, at odds with the empirical facts established by local market evidence" is sufficiently apt to encompass both the suitability of the rate used for this cohort of residents and any error caused by being two financial years out-of-date. Both would be relevant to assessing a comparison with the evidence as to the local market rate given by Avalon Rawlings, who has been supporting the Claimant's litigation friend in seeking to keep the Homes in Council ownership.

12. As regards Ground 2, the SFG suggested the Council was required (among other things) "to obtain and use an accurate picture of the external costs". I consider that sufficient to raise the question of costs that were up-to-date and which accurately reflected residents' needs.

13. I note that at the time of the hearing the Council's principal witness, Saf Bhuta, now its Service Director (Strategic Commissioning, Partnerships and Provider Services) and previously Head of Service for In-House Care Provision, had provided three witness statements addressing the issues and has since provided a fourth having been directed to do so. In paras 16-17 of his second witness statement (dated 25 July 2025), Mr Bhuta is clearly alive to the possibility that the Claimant's Reply might be raising the point that the average rate used was insufficient because all the residents at the Homes have advanced dementia. Mr Oldham met, under protest, both what he regarded as the pleaded and the unpleaded part of the case and there is no sense in which the Council has been taken by surprise or placed in difficulty by the contents of the Claimant's skeleton argument.

14. I therefore approach the case on the basis of the grounds as now expressed in the skeleton argument for the Claimant, which I consider to be sufficiently consistent with the SFG.

15. This is a convenient point at which to address the post-hearing evidence and submissions I invited about a number of financial aspects. Mr Oldham is concerned that by the formulation of that invitation I might be intending to go

beyond the Claimant's pleaded case and in effect to descend into the arena. That was not and is not my intention and the Claimant will be held to her pleaded case, as I have concluded it to be in the light of the discussion above. The context is that the five year financial figures, which were key to the Cabinet's decision, were only provided to me in legible form in the course of the hearing (that is not intended as a criticism). The one day time estimate for the case was extremely tight, further exacerbated by a late start to allow all the public wishing to attend to gain access to the courtroom. The hearing was conducted at pace with the assistance of all counsel, concluding at around 5pm. Because of the urgency and the wide public interest, it would plainly have been inappropriate for the case to have been adjourned part-heard if that was avoidable. With more time, the questions I put could have been put during the hearing. It may be, as Mr Oldham submits, in some cases without disagreement from Mr Mant, that at least some are not in fact relevant to the pleaded grounds but that is a distinct issue from whether it is appropriate to seek to understand what is being shown by the material on which a party is seeking to rely. Finally, my notes suggest that in each of the broad areas in which I asked post-hearing questions, counsel had offered to provide further evidence, should the court require it.

16. The Council submits that none of the grounds is arguable and that permission should be refused. Further, permission should be refused on the ground of delay and/or under sections 31(3C)-(3D) and (2A) of the Senior Courts Act 1981. Alternatively, if permission is given, the claim should be dismissed. The Council also previously had raised an objection to Ms Hughes's standing to bring the case insofar as it relates to Claremont House. The order joining the late Ms Blackburn as Second Claimant had made this objection academic but following her death and ceasing to be a party, the issue once again arises.

Grounds 1 and 4: irrationality/material error of fact

a. presenting and maintaining an artificially low price for what the Council would be paying a private provider following sale contrary to evidence of the actual local market rate

17. Section 18 of the Care Act 2014 creates a duty on local authorities to meet a person's needs for care and support where certain conditions are met. Section 8 provides that such needs may be met by ways including through accommodation in a care home. Section 8(2) envisages that a local authority may arrange for a person other than it to provide a service or may itself provide a service.

18. Under section 5, a local authority has wide-ranging duties for promoting diversity and quality in provision of services. By sub-section (1):

> "(1) A local authority must promote the efficient and effective operation of a market in services for meeting care and support needs with a view to ensuring that any person in its area wishing to access services in the market—
>
> (a) has a variety of providers to choose from who (taken together) provide a variety of services;
>
> (b) has a variety of high quality services to choose from;
>
> (c) has sufficient information to make an informed decision about how to meet the needs in question."

19. There are 59 care homes in the Council's area providing residential care for people over 65, of which 44 are registered to provide care for people with dementia. However, the impact of dementia varies and some homes only provide for people who have the condition to a lesser degree.

20. The fees payable by residents are means-tested. While those who have capital over £23,250 will pay the fee in full ("self-funders"), those who do not will be liable to pay only an assessed contribution.

21. The standard rate the Council paid in 2023/4 was £693.05 (all rates stated are for a single en-suite room). This rate was the rate applicable to homes participating in the Council's optional Workforce Related Uplift Scheme ("WRUS") which was then in force. That was a scheme designed to put more money into the pockets of low-paid care workers, to which the vast majority of providers signed up; the rates payable to homes not in the WRUS were around £18 lower. However, the rates the Council pays to secure accommodation at 23 of the homes includes a "dementia premium" because those homes offer specialist dementia care. The rate payable to homes in the WRUS in 2023/4, including the dementia premium, was £737.35.

22. The rates charged from April 2025 (i.e. in the financial year 2025/6) are £766.17 for a single en-suite room where the dementia premium is not payable and £816.47 where it is. (The WRUS no longer exists).

23. The evidence indicates that some residents in care homes in private ownership may be required to top up the amount paid by the Council. There are several reasons why this might be so, including the extent of a resident's needs and the facilities at a particular home. There is no evidence before the court of the number of residents subject to such top-ups, nor of their amount. While among the concerns expressed by family members was the possibility that top-up payments may come to be required from residents of the Homes or their supporters, the Council's rationale for its decision is based on the cost to the Council of a bed in a private care home. The evidence does indicate, however, that the Council is seeking to limit the fees charged to existing residents post-transfer for a five year period, which provides a limited degree of protection against top-ups.

24. The Council does not operate an internal market in respect of the Homes. It sets off income received from residents against the cost of operating them. In most cases, this is in respect of residents' contributions under the charging regime, but in the case of residents whose financial circumstances mean they are self-funding, it will be the full charge levied by the Council to residents of these homes. In 2024/5, this was £820.

25. In September 2023, when the Cabinet was considering a proposal to close the Homes, a comparison was made between the gross expenditure budget for 2023/4 and the cost of alternative placements. The figure given for the latter can be calculated as being £867.79 per week. Mr Bhuta's evidence explains that this was based on the amounts paid by the Council in respect of all individuals with dementia. It follows that it included the rates paid in respect of residents in homes which did not receive the dementia premium and the rates paid in respect of those for whom the impact of dementia was less as well as those for whom it was greater.

26. In March 2024, following consultation on earlier proposals to close the Homes, the Council turned to exploring the alternative of transferring them to the private sector. The rate adopted for comparison purposes as the anticipated cost of securing equivalent accommodation from the private sector was £852.69 per week, being an average of the sums paid by the Council to accommodate all people with dementia in January 2024 – even though the average cost to the Council at the time of writing the March report was known to be £865.32. The specialism of the home, or the degree of a resident's disability arising from dementia, was once again not relevant.

27. There was a 4% increase in rate payable to providers of dementia care from April 2024. A further increase with effect from April 2025 took the standard rate payable for a dementia bed to £816.47. However, the figure of £852.69, calculated in 2023/4 when rates were lower, continued to be used up to and including the report to Cabinet in February 2025, which approved the transfer of the Homes to the private sector, following a comparison of the cost of purchasing the accommodation post-transfer using the figure of £852.69 with the budgeted cost of continuing in-house provision for 2025/6.

28. The Claimant says there are two things wrong with the use of this rate:

    (a) the figure, being based on the amounts paid by the Council in respect of all residents with dementia, is an unreliable proxy for the cost of purchasing care for the residents of the Homes; and

(b) a figure first adopted in March 2024 was being used for making a comparison in relation to the position in 2025/26. A local authority financial year begins on 1 April, thus the figures were two financial years out of date.

29. Mr Mant submits that I should apply an approach of "anxious scrutiny" in the sense in which the term is used in authorities such as *R (Hillingdon London Borough Council) v Lord Chancellor* [2008] EWHC 2683 (Admin). The standard of review applicable to a judicial review case varies "depending on the importance of the interests affected by it or, to put the point another way, the gravity of its potential consequences"; per Chamberlain J at paragraph [76] of *KP*. While most commonly applied in cases involving human rights, the "anxious scrutiny test" is not so limited. *R(Evans) v Care Quality Commission* [2025] EWHC 2015 (Admin) was a challenge to decisions relating to the provision of hormone treatment to 16 and 17 year old children by a private gender dysphoria clinic. Eady J was prepared to apply the test and noted at [80] that "In the context of a process irrationality challenge, applying a heightened standard of review means that the court will subject the decision to "more rigorous examination, to ensure that it is in no way flawed"; see *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, HL, per Lord Bridge at p 531."

30. Factual comparisons are not generally constructive but I do not see a reason to apply the test to, without more, the proposed transfer of care homes from public to private ownership. Fears that the potential outcome may be deteriorating standards are countered by the monitoring there would be by the Council's contract team and the Care Quality Commission and (for existing residents) by the contractual provision which the evidence suggests is likely to be secured, while fears that the outcome could be closure, with the potential for serious consequences for residents, are speculative.

31. As to issue (a) (the "unreliable proxy" point), the Claimant argues that the needs of the residents of the Homes are at the upper end of the range and so that the charges for meeting those needs in the private sector will be higher than the figure used by the Council. The three key pieces of evidence to consider are (a)

the second IIA, (b) the evidence of Ms Rawlings and (c) the evidence of the care needs of the Claimant and the late Ms Bradburn.

32. The second IIA is dated 21 November 2024 and first accompanied the report to Cabinet in December 2024. In preparing it, the managers at both Homes were consulted and residents' care plans were considered as part of those discussions. The IIA records under the heading "Age - Impact on residents or service users":

> "Level of impact: High
>
> Type of impact: Negative
>
> Comments:
>
> All service users have advanced dementia.
>
> Residents would remain in the care home that they are currently residing in however there could be a transfer of the care provider. A transfer to alternative provider will ensure continuity of care, but the change could also have a negative impact on existing residents due to their complexity of need."

The same comments are repeated under the heading of "Disabled individuals – impact on residents or service users", save that (without explanation for the different rating) "Level of impact" is assessed as "Medium".

33. Ms Rawlings has provided a witness statement setting out, among other things, the outcome of research she undertook in 2023 when the Council was considering closing the Homes and which she attempted to refresh in 2025. She refers to the residents as all having "moderate to advanced dementia". She acknowledges the limitations on her research: that it was based on what she could establish over the internet or by phone calls to the homes concerned and that not all homes she approached were willing to provide their rates over the phone. The gist of her research is that of the 33 private sector homes she refers to, she regarded nine as a reasonable comparison with the Homes House, the others having no, or insufficient, dementia specialism or being subject to a variety of regulatory concerns. The average weekly charge made by those nine

homes was £1,053.56. (By way of comparison with the charge made by the Council at the Homes, it will be recalled that the rate charged to self-funders in 2024/5 was £820.)

34. Ms Rawlings also cites evidence from websites showing that the average weekly cost of a care home place in the Council's area is variously stated as £1,063 and £1,081 and that the UK average for dementia care is £1,306.

35. The submission comes down to an assertion that the needs of the residents of the Homes are materially greater than those of the generality of residents with dementia in the Council's area and so could not be met in the future at the rate used by the Council for comparison purposes.

36. The evidence given by the Claimant's son and litigation friend, Adrian Pygott is that:

> "Brenda's emotional needs are to be met as Brenda can become upset and unsettled. This requires a lot of patience and reassurance from staff. Staff are to provide Brenda with small comforts when she is experiencing such anguish. This includes taking the time to talk about happy memories and hand holding.
>
> Brenda spends a lot of time in her care chair. This chair is to be maintained and cleaned daily with suitable cleaning products to prevent infection.
>
> Senior staff are to administer the covert medication agreement in place, as approved by Brenda's GP. This includes concealing medication in her food.
>
> Two support workers are to assist with all transfers, including from hoist to bed and the bed to care chair. Brenda is to be repositioned every 2 hours when in her care chair to prevent the skin breaking down."

37. To similar effect, Donna Mallinson, daughter and previously litigation friend of the late Ms Blackburn, explains what her mother's care needs were in consequence of her advanced dementia:

> "Aside from feeding at mealtimes and providing fluids, my mother requires two carers for all care including personal care intervention. This is incredibly time consuming for the staff who deliver this care so diligently and patiently.
>
> Elaine needs hoisting to move her from her bed, which is carried out multiple times a day to transfer her to the communal lounge to ensure her social and emotional wellbeing is met.
>
> My mother cannot do anything for herself and relies solely on the care of the staff for all aspects of her survival. This includes, washing, dressing, toileting, administering medication and fluid intake."

38. I am prepared to accept that needs will tend to increase in the later stages of dementia. Mr Oldham submits there is no evidence on this. Mr Mant says evidence should not be needed, so by implication is inviting me to conclude as a matter of judicial notice were I not to be satisfied by Ms Rawlings' evidence that comparable homes are more expensive.

39. Mr Oldham submits that while the behaviour of some people with advanced dementia may be challenging, others may be quiescent. The submission is not based on evidence.

40. To the extent necessary, the court takes judicial notice that advanced dementia may affect a variety of a person's physical functions as well as their brain and a person may be disturbed and behave in ways which can be difficult to manage. While no doubt there may be differing presentations of advanced dementia in different people, the evidence cited in the above paragraphs is indicative of, and consistent with, an understanding of the effects of the condition in the generality of cases.

41. It is unlikely that the compiler of the second IIA who, as noted above, had discussed the IIA with the managers of the two Homes, including consideration of care plans, was lightly stating that all residents have advanced dementia. Ms Rawlings refers to "moderate to advanced dementia": she may be being guarded, given that there is no indication that she has personal access to

residents, their diagnoses and care plans. Even this, the lowest description of the condition of the residents, suggests that, taken as a whole, their needs are likely to be above the average level of the needs of the totality of care home residents with dementia in the Council's area.

42. Ms Rawlings's evidence on charges at what she regards as homes making comparable provision to the provision made at the Homes for this cohort of residents involves subjective elements and is (as she acknowledges) incomplete (being limited to homes prepared to provide her with their rates over the phone). It is however consistent with the comparison rates cited from her internet research. It is the only evidence on the point before the Court. The Council, which has access to details of available private sector places via the "Capacity Tracker" program and the ability to inform itself by reference to the care plans of residents, has not filed any in this regard.

43. The figure of £852.69 used by the Council for comparison purposes represented a mark-up of 15.6% over the 2023/4 bed rate paid by the Council with the dementia premium (£737.35). The Council may have been paying for a few residents not in homes which attracted the WRUS but on the evidence, the number is likely to have been minimal. It may have been paying for some residents with dementia in homes that did not attract the dementia premium; I cannot reach a view as to the number but, given the number of homes which do attract the premium, it is not immediately obvious why a person with dementia or their relatives would choose one of the others. It follows that a comparatively small number of residents supported by the Council may have been in accommodation for which the Council was paying less than £737.35 - in the case of those in non-dementia premium homes, around £40 a week less.

44. It follows that the figure of £852.69 when adopted had within it "headroom" of not less than the 15.6% mark-up in which instances of higher costs paid by the Council in respect of residents with (presumably) higher needs were reflected. I am being asked to infer that the £852.69 figure, even though it reflected to a reasonably sizeable extent the fees payable in respect of residents with higher needs, was an unsuitable proxy for this particular cohort of residents, to the point that it represents "an unexplained evidential gap or leap in reasoning which fails

to justify the conclusion" (see *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) at [33]). However, I cannot say at what point on the spectrum of higher level of need, the residents of the Homes fall. Ms Rawlings's evidence is necessarily subjective and lacking in detail. The court is being asked to adopt a rather narrow, somewhat mathematical, approach i.e.

(a) the average rate, paid in respect of service users with all levels of dementia, is £X;

(b) the cohort of residents in the Homes have higher than average levels of need, liable to result in increased costs;

(c) therefore, £X cannot represent the true figure.

45. I consider that that approach does not succeed for the following reasons:

(a) the court is not concerned with whether one approach is better than another. The question is whether adopting the approach taken was unreasonable;

(b) it is also relevant that there is insufficient evidence about the care needs of the cohort to enable what I have described as the mathematical approach to be applied and (as I will go on to hold) no obligation to obtain it;

(c) indeed, it is far from clear that, even were that evidence available, it could yield sufficiently accurate results to support such an approach and it is noteworthy that Mr Mant's skeleton argument is vague as to what evidence should have been sought ("some assessment of the needs of residents and appropriate comparators");

(d) I have to give some weight to the institutional competence of the Council flowing from, for instance, the discharge of its responsibilities under section 5 of the 2014 Act. In his skeleton argument, Mr Mant suggests that 'deference' and 'margin of appreciation' questions are irrelevant to the process rationality alleged on this ground (as opposed to the 'range of reasonable responses' aspect to reasonableness review) but I am doubtful that is correct: certainly it is not evident from reading paras 32 and 33 of

Wells, on which he otherwise relies. It may be a question of terminology: in any event I have to bear in mind the distance of the court from operating the process of contracting for residential beds "on the ground", which gives the Council an awareness that the court cannot have. Then Mr Mant says that deference applies only where the decision-maker has turned their mind to an issue and exercised judgment; however, the Council did so (note for instance, the reference in the February report that the rate represented "equivalent external provision");

(e) the cohort of residents with dementia paid for by the Council is a fluctuating one; and

(f) as noted above, the average rate contained a substantial element attributable to those with higher needs.

46. Therefore, even if the amount to be paid in respect of these residents (or indeed future residents who might or might not have similar levels of need) would be likely to exceed the Council's comparator figure, that would in my view not render the rate chosen an irrational choice.

47. It is not for the court to say whether a better comparison rate could have been found. I am being asked to conclude that there is "an unexplained evidential gap or leap in reasoning which fails to justify the conclusion." As regards the validity of selecting a figure by reference to the totality of payments made by the Council in respect of persons with dementia, for the above reasons, there is neither.

48. Point (b) in [28] (the out-of-date rate point) is a shorter one. As noted above, the standard rate payable by the Council in respect of residents with dementia (with the WRUS) in 2023/4 was £737.35 and in 2025/6 is £816.47, an increase of 10.7%. (Because so few homes were not part of the WRUS, I am satisfied that 10.7% is the appropriate figure rather than the 13.5% for which the Claimant had contended.) Even if, as I have concluded, it was open to the Council to select a rate for private sector provision by reference to sums paid in respect of the totality of residents with dementia, was it open to it to adopt a rate that was two years out of date when rates were significantly rising?

49. As to this, the Council says:

    (a) it was not a point that was originally pleaded;

    (b) rates from April 2025 were not set until after the decision which is now challenged; and

    (c) it does not undermine the Council's case that there were substantial cost savings to be made from transferring the homes, because (among other reasons) the actual costs of running the homes were greater than the budgeted cost and the comparison was based on a 90% level of occupancy of homes which exceeded the level that has in fact been achieved.

50. I have addressed the Council's point on pleadings above and proceed to consider this issue on its merits.

51. Cabinet was asked to approve the transaction on the basis of budgeted costs for 2025/6. There is no reason to conclude that the Council's budgeted costs for continuing to operate the homes in 2025/6 were not accurately stated so far as was then known, and therefore they will have reflected the sort of inflationary pressures on the Council which also led to the 10.7% increase in the rate paid to private sector providers, compared with the rates in 2023/24.

52. Even if the exact amount of the increase in that rate was not ratified until after the date of decision, a report presenting the comparison fairly would have needed to draw attention to the fact that the £852.69 figure was two financial years old, referred to the 2024/5 increase and said whatever could be said in February 2025 about the projected increase for 2025/6.

53. The increase which did in fact transpire provides the best guide as to what it is likely would have been said – even if at that point still subject to formal ratification. A 10.7% increase in the notional cost of alternative provision would have taken it to £3,543,784. This, compared with budgeted costs, would have reduced the projected saving to £524,761.

54. Adoption for the purpose in question of the figure which was two years out of date without addressing it does in my view constitute a "logical error or critical

gap" as contemplated by *R(KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin).

55. I accept that the points at [49(c)] may properly be relied on by the Council. For the fact that actual costs exceeded budgeted costs may properly be relied upon by the Council see, [60]-[63]; for the effect of applying a 90% level of occupancy, see [75].

b. maintaining an unnecessarily low price at the homes

c. failing to consider the option of retaining the homes in the Council's ownership but not (as put in certain of the Cabinet reports) "doing nothing"

d. treating sale as the inexorable consequence of there being an overspend

56. It is convenient to consider these three elements together. The complaint is that because it was the view of officers that the gap between income and expenditure could not be bridged in full (see the March 2024 report) strategies based on retaining the Homes in local authority ownership by making changes were not considered, even though (in a passing reference in the December 2024 report) officers acknowledged that there was "some potential to make savings, by staffing changes and by increasing fees from self-funding residents." The October 2024 report had referred to an option expressed as "Do nothing – continue as is".

57. If the Council had increased the price at the Homes, the only people who would have to pay it would be the self-funders. At the time, there were seven self-funders. Clearly, as the Council, having done the analysis, realised, increasing the charge to those seven would not result in the Homes breaking even. Nor would any increase likely to be realistically achievable to the fees paid by those seven have made more than a minimal contribution to reducing the cost disadvantage of in-house provision. Further, it is likely that those who are self-funding (which involves paying out over £40,000 per annum) would, sooner or later, find their assets depleted so that they became eligible to pay only a proportion of the charges. While it is possible that other self-funders might emerge, it is not immediately possible to understand why they would be more

likely to do so once the Council had increased the price than had done so previously, when the price was lower. The suggestion, which I consider speculative, could at most be a contributor as a small part of a package of steps aimed at reducing the deficit.

58. I do not read the statement "Do nothing – continue as is" as indicating that the Council had its face set against any change in the Homes which might have saved costs. It reads more naturally as referring to the status quo i.e. the Council running the Homes, rather than closing them or selling them off. Although the Claimant suggests there were steps that could be taken short of selling off the Homes, no positive alternative plan was put forward, nor has been since. Reference has been made to reducing reliance on agency staff and it may be that could have been done but permanent staff also have to be paid and no costings have been put forward as to how much might be saved.

59. I do not consider that failure to consider an alternative proposal that was more or less unformulated at the time of the Decision can give rise to grounds for judicial review on the ground of process irrationality. The time for formulating such a proposal if there was to be one was in the consultation and other political processes and it is not for the court to make good that (so far as appears from the evidence) this was not done.

e. the factor relied upon of an excess of operating costs being attributable to the Council itself by reason of its unbudgeted use of agency staff

60. This factor was relied upon in the February 2025 Cabinet report among the "Reasons for Recommendations" in the following terms:

> "The running costs have been higher, and the real terms benefit would therefore be higher with the following additional factors included: avoidance of the overspend against budget…"

61. The figures supplied to Cabinet showed that while in 2019/20 there had been a budget line for agency staff at both homes, in all subsequent years no such budget line had been included. The amounts spent on agency staff between

2020/1 and 2023/4 had been substantial, varying from £123,107 in 2021/22 to £397,461 in 2023/4 and projections for 2024/5 were higher still.

62. There is a difference between the parties as to whether this amount of expenditure was avoidable; in particular, whether there were people who could have been recruited as employees on terms which would have been less expensive than using agency staff.

63. It seems to me that that is a difference without consequence for this case. The Council's primary justification for the Decision rests on savings in respect of its budgeted costs. If the Council had budgeted for agency staff – or for replacing them in whole or part with additional employed staff – the budgeted costs would have increased and the projected savings been greater, even if the amounts concerned are unknown.

d. uncertainty over the amount of capital expenditure that the Homes would require and the affordability of such amount to a private sector purchaser

f. failure to address why the asserted operating deficit of the Homes in the Council's hands would not be repeated in the hands of a private sector operator

64. Both these sub-grounds raise, in essence, whether the Council's decision-making sufficiently addressed whether the Homes would be likely to be viable in the hands of the private sector going forward, when they are not considered viable in the hands of the Council. If they were not viable and had to close, the concerns as to the effects of a closure on the residents, which had contributed to the Council changing its original plans from closure to sale as a going concern, would resurface.

65. Officers' response to this issue in the reports was limited. The March 2024 report recorded that there had been "informal dialogue with providers who are interested in taking over the running of the homes as a going concern." Officers requested "Cabinet to approve for Officers to formally explore the Commercial Partnership model to work with a private provider (or with a range of providers) as the delivery partner(s)." The minute recorded "That authority be given to explore potential opportunities to transfer the dementia care homes to an

independent sector provider." That is somewhat different from the officers' request, but it is reasonable to infer that whether the externalisation route would be workable was something which they were aware needed to be addressed.

66. The October 2024 report set out how discussions with potentially interested parties had progressed, including the indicative terms on which the Council would look to transfer the Homes as a going concern. It reported that of seven organisations who had initially expressed interest, some had had other plans, but the Council intended to progress discussions only with those who had indicated interest in taking on the Homes as a going concern. It provided a brief summary of some key factors bearing on private sector costs, including TUPE, but indicating that the staff would not have the right to retain membership of the Local Government Pension Scheme or broadly comparable scheme in perpetuity.

67. In evidence, Mr Bhuta explains:

> "TUPE was considered in the Cabinet reports of October 2024, December 2024 and February 2025. The Council believes that TUPE will apply to the sale of the Homes and the preferred bidder agrees. The Council's higher costs structure and financial constraints make it challenging to operate the Care Homes at break-even. The independent sector's ability to manage costs differently allows them to operate care homes more cost effectively.
>
> Costs differences can include (for example) lower overhead costs, the ability to negotiate better terms with suppliers, and the flexibility to adapt to market demands. As to staff, any new or replacement staff would be recruited on the buyer's (usually more cost efficient) terms and conditions. Further, private providers can also have a greater focus on efficiency and profitability, potentially leading to streamlined operations and reduced costs. As I noted to the Scrutiny Panel:
>
> "This is why the vast majority of residential care in England is delivered via independent sector organisations.""

68. The December 2024 report explained:

> "Six private providers/potential operators expressed an interest in potentially acquiring the homes. Of these, one provider has since withdrawn leaving five who are interested in acquiring both homes – officers have received initial bids from all five providers. The next stage is now to evaluate the proposals. This will be by an initial meeting with each supplier whose proposals are considered to be credible. After this, an assessment of various criteria will be undertaken with a view to identifying those suppliers who are likely to be most suitable as purchasers of the businesses. Best and final offers will then be sought from these suppliers and will be evaluated in accordance with pre-determined quality and financial criteria. Evaluation will weight quality greater than price and be subject to minimum quality criteria as part of the design of the best and final offer stage.
>
> The quality criteria will take account of bidders' experience of managing care homes and assess their ability to continue to deliver high quality care services for people with dementia in the future."

69. The matter was also addressed in responses given to the Scrutiny Panel.

70. The February 2025 Cabinet Report added that:

> "Families have also been advised that the Council is only progressing talks with providers who are interested in and have a good track record in providing dementia care therefore we do not anticipate any change to the service focus. They have also been advised of the confidential nature of the BAFO bidding process and that a limited amount of information can be shared with them at this time. Additionally, the Council intends to impose a 20-year overage period on the properties and restrict the use of the properties to certain social care services for a period of 5 years from point of sale which further mitigates risk."

71. It is important to note part of the terms of the Cabinet resolution:

> "3) To re-affirm the decision made by cabinet at its meeting on 10 December 2024 to progress with the sale and business transfer of Castle Grange and Claremont House as going concerns.

> 4) That authority be delegated to the Executive Director for Adults and Health, in consultation with the Cabinet Member for Adult Social Care, the Service Director - Finance, and the Service Director – Legal, Governance & Commissioning, to select and finalise negotiations and agree the terms of the freehold transfers and Business Transfer Agreement with a preferred bidder.
>
> 5) That pursuant to (4) authority be delegated to the Service Director -Legal, Governance and Commissioning to execute and enter into all necessary documentation to effect the transfer of the care homes as going concerns."

72. Mr Bhuta states that the BAFO process included questions (of which he gives more detail) about such matters as the bidders' proposed business model, funding arrangements and cashflow. He points out that the BAFO stage was a competitive one with four bidders and suggests that "it is the potential buyer who is best placed to determine the financial viability of the Care Homes as independent/private concerns." Mr Mant submits that the weighting given at BAFO to questions bearing on bidder viability was only 6%. However, those weightings were for the purpose of scoring a competitive exercise between bidders and that figure cannot be taken as indicating that the Council would be giving a low importance to bidder viability in its negotiations with the preferred bidder.

73. The evidence contains a number of different figures for capital expenditure said to be required. Mr Bhuta has provided a fourth witness statement setting out what each of the figures represents. The degree of science with which the various figures were compiled appears variable and in some cases questionable, but in the context of this sub-ground, I do not consider that it matters. It is the successful bidder who will have a plan for the premises, which may require catch-up expenditure, expenditure on items imminently falling due or expenditure designed to facilitate their future plans. That plan will be based on their perception of what is needed, the Council's own figures being relevant to the Council's own perception of what it might save through an externalisation.

74. In my view, this sub-ground is unrealistic. It is expecting to see reflected in reports down to February 2025 a justification of the commercial viability of actions to be taken by a preferred bidder which would only emerge subsequently through the competitive process (which was paused at that time) and which would depend on matters of detail to be assessed by the officers to whom the February Cabinet delegated authority. Mr Mant replying submitted that the direction to officers made no reference to ensuring viability but in my view that level of detailed instruction to professional officers in a Members' resolution is not reasonably to be expected. It is clear from the material set out above that questions of bidder viability were in the mind of Mr Bhuta, the writer of most of the reports, and addressed insofar as they could be as the process was taken forward.

h. reliance on a 90% occupancy level which exceeded what had been achieved

75. That the costs were based on a 90% level of occupancy which exceeded that which has in fact been achieved does not assist the Claimant. In the hypothetical situation where a reduction in occupancy would be reflected to an equal extent in the cost of in-house provision and the cost of purchasing from the private sector, as the figure for the Council's costs of in-house operation is higher, applying the same percentage to it would effect a slightly greater reduction and thus a small narrowing of the gap (which would be to the detriment of the Council's position). However, the flaw in this from the Claimant's perspective is that it requires the major assumption that a reduction in occupancy levels would achieve a reduction to an equal extent in both costs. Consideration of the budget heads for the Homes suggests that that is highly unlikely, as does the lack of significant fluctuations in the amount of costs over the previous five years, at times when occupancy levels varied. If the cost of running the Homes with reduced occupancy remained much closer to the £4,068,545 in the Cabinet report, the lower cost of purchasing a reduced number of bedspaces from a private provider would increase the amount of cost savings the Council would obtain in a calculation based on lower occupancy levels and that in my judgement is by far the more probable outcome in such a scenario.

Ground 4

76. Ground 4 does not materially add to the issues to be considered. For the use of the £852.69 figure to be an error of fact falling within *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, the error must be both uncontentious and objectively verifiable. Any alternative figure (even one reflecting the passage of time since the figure of £852.69 was adopted) is neither, not least since the parties were not in agreement as to the appropriate rate of such an increase.

Ground 2 – Breach of *Tameside* duty of enquiry

77. Mr Mant submits that the Council failed in its *Tameside* duty in four respects: to model non-sale options for remedying the overspend, to analyse the Council's own contribution to the overspend, to obtain and use an accurate picture of the 'external' costs, and to assess the closure risk if the financial situation calculated by Council were transferred to a private provider.

78. He accepts the formulation of the *Tameside* duty in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [99]-[100]:

> "(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R (Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).
>
> (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).
>
> (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose

that the inquiries they had made were sufficient (per Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R (Khatun) v Newham LBC* (supra) at paragraph [35]).

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in *R (London Borough of Southwark) v Secretary of State for Education*).

(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

79. Mr Mant submits that this is not a case of the Council making a considered judgment to prefer one line of enquiry over another, but rather a failure to provide information on mandatorily relevant considerations. That submission depends on what, if any, considerations were "mandatorily relevant".

80. Mr Oldham prefaces the defence to this Ground by reliance on *R(Samuel Smiths Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] UKSC 3 at [32]: the question is whether consideration is required as a matter of statute or policy or whether on the facts of the case something is "so obviously material" as to require consideration. I note that, although a planning case, it is evident from the citation of *In Re Findlay* [1985] AC 318 in [31] that the principle is not confined to the planning context with its particularly wide range of potentially material considerations.

81. As to the claim that alternative (non-sale) options should have been modelled, I do not consider that *R(Law Society) v Lord Chancellor [2024] EWHC 155* (Admin) assists the Claimant. In that case, an independent review had concluded that fees payable for criminal legal aid work should be increased by 15%. The

Lord Chancellor increased them by 11%. The court held that he was required to re-run the model which the review had applied to show the effects of a lower increase than 15%. I note that that failure meant that the Lord Chancellor had failed to model the effect of the decision he in fact took.

82. The Council's officers having acknowledged in the October 2024 report that there was "some" scope for change, could have provided outline figures for savings (as regards the possibility of increasing charges, that was done to an extent). However, it is consistent with the decision-taking structure of local government that officers must up to a point be able to sift out material which they consider to be not realistically viable before presenting proposals to members. Save for the out-of-date figure used, the Council was entitled to consider that the enquiries it made were sufficient for the decision in fact taken. Even if (contrary to my view) the Council were to be required as a matter of law to have made further enquiries about the financial consequences of alternative options, in this case, as noted, there was no alternative option put forward other than sale as a going concern or continued operation by the Council.

83. As to the claim that the Council ought to have analysed its own contribution to the overspend, as the decision relied primarily on budgeted savings, it was not Wednesbury unreasonable to fail to inquire into the causes of the overspend when to do so would only have increased the amount of savings through externalisation.

84. As to whether assessment of the needs of residents was required, Mr Oldham refers to *R(AB) v Slough Borough Council* [2022] EWHC 1772 (Admin). At [111] the judge stated:

> "There is no principle in law to the effect that before a local authority changes the way it delivers services provided to many people it has to assess the needs of each service user and match those needs to available alternative service providers."

85. I do not consider that that principle can be applied uncritically to the present case. The Slough case concerned a proposal to close a facility altogether and commission alternative services (hence the reference in the above quotation to

matching service users' needs to available alternative service providers). In the present case, by contrast, the intention was that the services would continue to be provided to service users, albeit in a home with different ownership. However, cases such as *R(Robson) v Salford CC* [2015] EWCA Civ 6 support the view that an assessment is not required where, as here, it is not a case of a service being withdrawn.

86. If there be a need for further enquiries, it arises not out of a requirement to match a person's needs to a suitable alternative provider, but to get an accurate grasp of the costs of alternative provision, on which the case for externalisation primarily rested. For the reasons I have given, when the £852.69 figure used is compared with the Council's rates, I do not consider that – leaving aside that it was two financial years out of date – it was irrational to adopt it. Accordingly, it was open to the Council not to engage in a process of assessment which might have led to a different rate being adopted. Even were it to be that an assessment of the needs of residents might have enabled refinement of the figure that was used, that would not be a basis for the court to intervene: see the points at (3) and (4) in the quotation from *Plantagenet Alliance* (above). I agree with the Claimant that the comparison figure adopted in March 2024 required updating, but that does not add to the conclusions I have reached on Ground 1 in that regard.

87. I do not accept that there was a failure to undertake any analysis of the risk of closure. As set out at [65]–[72], material appropriate to the stage which decision-taking and the competitive procurement had reached was provided. Thereafter, such matters were delegated to the relevant officers, a step which in my view was legitimate.

88. I therefore reject Ground 2.

Ground 3 – The Public Sector Equality Duty ("PSED")

89. Equality Act 2010, s.149 materially provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—

> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities."

Both "age" and "disability" are "relevant protected characteristics" for this purpose: sub-section (7).

90. It is accepted by both parties (though the Council's acceptance is qualified as appears below) that relevant principles are to be found in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), where Elias LJ said:

> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in [*R (Baker & Ors) v Secretary of State for Communities and Local Government* [2008] EWCA 141] (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

91. Mr Anderson, who addressed the court for the Council on this aspect, draws attention to the remarks of Lord Neuberger in *Hotak v Southwark LBC* [2016] AC 811 at [74] that what was required by the "due regard" duty was entirely fact-sensitive. He submits that as a result "it is misconceived to treat the principles in cases such as *Hurley* as fixed principles or universal requirements." However, there is no getting away from the fact that *Hurley* was endorsed in *Hotak* at [75] and the proviso on which the courts will leave matters of weight to the decision-taker is that there has been "a proper and conscientious focus on the statutory criteria" (per *Hurley*).

92. The "Decision Summary" of the February 2025 Cabinet meeting makes no reference to the Second IIA nor in any other way to equalities issues. In the

report however, Cabinet was asked to "Note the contents of the Integrated Impact Assessment including mitigating actions." The "Legal implications" section referred to s.149 and indicated that "An Integrated Impact Assessment will be required on the proposed sale of Council care homes and members must consider its findings before taking any decision." It is not suggested that they did not do so. It is thus evident that the second IIA was seen as a significant part of how the Council would comply with the s.149 duty. It did not follow that it would necessarily be the exclusive means by which it would do so.

93. Contrary to Mr Anderson's submissions, it is not a sufficient answer that the PSED is a duty of consideration and that as the Council considered the second IIA (indeed two IIAs) that is an end of the matter. There is still the question of whether such consideration met the principles in *Hurley*.

94. Nor do I consider that he can rely here on *R (McDonald) v RB Kensington and Chelsea* [2011] UKSC 33 to argue that the impact on a person with a protected characteristic is so obvious that no separate consideration of the PSED should be required. That case concerned the form of provision to be made to an individual service user with a disability, under statutes focusing on the needs of that person. It is inappropriate to apply it here, to a decision raising much wider issues across a greater number of service users, merely because those affected were said to be "ex hypothesi both old and disabled". Such an approach would significantly weaken the protection afforded by s.149.

95. Mr Anderson is on firmer ground in his reliance on the decision of a Divisional Court in *R (Hollow) v Surrey CC* [2019] EWHC 618, which at [83] said, of "the duty of consultation said to be inherent in the PSED duty", that

> "In our view this is indeed no more than the conventional *Tameside* duty of inquiry. The Council's obligation to comply with its statutory duties is not in question. However, what is required by way of compliance must depend on the nature of the decision in question. The starting point must be that it will only be unlawful for a public body not to make a particular inquiry if it was irrational for it not to do so; and further, that it is for the public body, not the court to decide on the manner and intensity of any inquiry."

96. Mr Tabori, who addressed the court for the Claimant on this issue, submits that one of the reasons why "due regard" was lacking is that there was an inconsistency between the Cabinet report which stated that the sale would involve "minimal disruption" whereas the second IIA had said the impact on the elderly would be "high" .

97. The second IIA is vague here: it may have meant, as was submitted on behalf of the Council, that all those affected would be elderly people, but one cannot know. The principal reason why I do not accept Mr Tabori's submission on this aspect is because I consider it has insufficient regard to the terms of the report as a whole: the reference to "minimal disruption" is contained within a summary of three options, of which one was the option, rejected because of the disruption to residents it risked causing, of closing the Homes altogether. It follows shortly after a lengthy list of concerns expressed by family members through the consultation process and of the steps proposed by the Council, so far as it was then in a position to do so, in response. They were a partial rather than a complete answer to all the families' concerns. Those reading the report as a whole would understand that, notwithstanding what was said in the summary of options, there were at least potential matters of disruption affecting the elderly residents requiring to be addressed (as they have been through such matters as the terms of the Best and Final Offer process and the contract negotiations).

98. Mr Tabori seeks to make something out of a comparison between the detail contained in the first and second IIAs respectively. Since the first IIA was prepared for a different purpose, I am not persuaded that is a valid approach and prefer to focus on what the second IIA does, or does not, say. He notes, correctly, that it states that sale "could also have a negative impact" but without stating what those impacts were, how severe, how likely, how they might arise and be averted or mitigated. This, he submits, means that the decision-maker (i.e. the Cabinet) was not (as *Hurley* requires) "clear precisely what the equality implications are when he puts them in the balance" and could not have "proper appreciation of the potential impact".

99. As a preliminary, I note that the wording quoted by Mr Tabori is followed by the words "of the decision on equality objectives and the desirability of

promoting them." The focus of Mr Tabori's criticisms appears to me not to be directed at equalities aspects as set out in sub-section (1)(a) –(c) but rather at the lack of additional detail about the potential impact of the proposed transaction on the residents, which is not necessarily synonymous with the equalities aspects as identified above, even as ss.(1)(b) is amplified by ss.(3). That more might have been said on that aspect does not mean the Council was thereby in breach of s.149.

100. I would add that *Hollow* at [80] indicates that:

> "We start by observing that what constitutes 'due regard', will depend on the circumstances, particularly, the stage that the decision-making process has reached, and that the nature of the duty to have 'due regard' is shaped by the function being exercised, and not the other way round."

As noted above, the decision of the February Cabinet left a lot to officers to whom authority was delegated. It was not possible to know answers which could only emerge from the commercial negotiations which would thereafter be ongoing. Mr Bhuta's third witness statement sets out details of covenants, agreed in principle with the preferred bidder and extending over a five year period, protecting existing residents against increases in charges above the higher of CPI or the annual increase in the Council's fees payable for residential care and against other material changes to their terms and conditions including in relation to the nature and scope of services provided to them. A further clause seeks to protect the continuity of services, including through a requirement to maintain appropriate staffing.

101. In my view, the aspects in which Mr Tabori criticises the IIA as lacking are matters which the Council could properly take the view that they were important matters of detail, but ones which could only be developed through the negotiating process continued under delegation following the February Cabinet meeting. There were infelicities in the drafting of the second IIA but in its decision-making as a whole, the Council was evidently aware of the potential adverse impact on service users, was actively considering steps to meet the needs of such persons and to eliminate, reduce or mitigate such impact. To the

extent that these matters fall within the scope of s.149(1) (see the discussion at [99]), the duty was complied with.

Ground 5: Consultation

102. The Claimant's case is that the Council's consultation was insufficient in that it failed to mention the option of addressing the viability of the homes without selling them and how it could be addressed.

103. I remind myself that in the December 2024 report to Cabinet officers had indicated that "there is the potential to make some savings, by staffing changes and by increasing fees for self-funding residents, although the cost disadvantage the Council faces versus the private sector on staffing is likely to make operating such facilities on a cost neutral basis almost impossible." However, there is no evidence of any worked-up proposal which would enable the deficit to be reduced to a level which might have been acceptable.

104. Mr Tabori relied principally on *R(Moseley) v Haringey LBC* [2014] 1 WLR 3947, as demonstrating that fairness required that option to have been included within the consultation. At [27] Lord Wilson observed:

> "Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options."

At [40] Lord Reed observed:

> "That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions… .To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal. The case of *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice*

> [2011] EWHC 1532 (Admin) is an example of a case where such information was not considered necessary, having regard to the nature and purpose of that particular consultation exercise, which concerned the proposed closure of a specific court. In the present case, on the other hand, it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed."

Mr Tabori submits that *Vale of Glamorgan* was a "black and white" case, unlike *Moseley* (and the present case).

105. Further, it was submitted, the vulnerability of the residents strengthened the case why the further option should have been consulted upon. In default of such consultation, it was submitted that consultees were denied the opportunity of intelligent consultation and response though not being able to present a case based on the Council retaining the homes and taking steps to address the financial situation.

106. Mr Anderson, addressing this issue for the Council, cites Andrews J in R *(L) v Buckinghamshire County Council* [2019] EWHC 1817 (Admin):

> "If it is alleged that a consultation process is unfair, clear unfairness must be shown. The error must be such that there can be no proper consultation and that "something has gone clearly and radically wrong": *Royal Brompton* at [13], approving the formulation by Sullivan J in *R(Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) at [62]-[63].
>
> 40. The Council was entitled to consult on the proposals which it had approved for consultation, rather than on something it did not propose: see *Bailey and others v London Borough of Brent* [2011] EWHC 2572 (Admin) at [90]."

The judge then went on to refer to the observations of Lord Reed in *Moseley* (above).

107. In *R(AA) v Rotherham MBC* [2019] EWHC 3529, Jefford J, reviewing the authorities (including, in some detail, *Moseley*), held (at [83]):

> "(i) It is not necessary in all cases where a particular proposal is the subject matter of a consultation to set out alternatives including those that may have been rejected or explain why they have been rejected.
>
> (ii) Fairness requires that to be done where it is necessary to allow informed or intelligent responses. That is sometimes the case as Lord Wilson said at paragraph 27 of this speech.
>
> (iii) Whether that is necessary, and correspondingly whether the consultation is a fair one, is a broad question in answering which the matters that fall to be considered include the purpose of the consultation, the nature of the proposal being consulted on, and what consultees can be reasonably taken to know about the proposal and its context."

The judge went on at [90] to note that "the court should not place itself in the position of retrospectively micromanaging the process" and at [93] that the authorities show that the court should only intervene "where something has gone clearly and radically wrong".

108. In the Council's submission, *Rotherham* demonstrates that the approach in *L v Buckinghamshire* remains good law notwithstanding *Moseley*.

109. As regards the Claimant's reliance on *R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 583 at [32] to establish that it is for the court to decide what is or not fair, the court in this context is not concerned with fairness at large but with fairness in the context of what is to be expected of a consultation exercise.

110. In considering this ground, I note that *Moseley* concerned the situation where there was to be a cut in Government subsidy for relief from council tax, which would lead to a significant shortfall in the local authority's budget, on which there was a statutory duty to consult. Haringey decided to address that via one particular route: making all adults of working age make a contribution

to their council tax bill. Other options existed, such as raising council tax or of reducing the funding of Haringey's services or of applying its deployable reserves of capital, but were not referred to in the consultation. Some other local authorities had responded to the cut in subsidy by adopting one or other of these options and an authority following a similar approach to Haringey had found a way to consult very briefly, but adequately, on its non-preferred alternatives.

111. I do not see that there is tension between the *Buckinghamshire*, *Rotherham* and *Haringey* cases: rather, they all reflect that the scope of a consultation duty is highly fact-sensitive.

112. In my judgment the inclusion of information about the possibility of retaining the homes in local authority ownership but making savings is not "necessary in order for the consultees to express meaningful views on the proposal(s)" (i.e. the proposal to transfer the homes to the private sector.) How to deal with a reduction in Government subsidy in relation to relief from council tax was a technical area, with a variety of options in existence. By contrast, there were no developed options in existence for addressing the financial position while retaining the homes in the Council's ownership in this case.

113. Further, on a more general level the idea that if something is costing more to run than is received in income, some combination of increasing income and reducing expenditure is required is a commonplace of managing any budget, including small-scale ones such as those of individual households, so would not have been a difficult point to make as a consultation response.

114. I do not consider that the vulnerable nature of the residents and the nature of their disabilities increased the obligation on the Council: in reality, it would be their relatives and other supporters who would be the respondents to a consultation exercise.

115. As the Council's skeleton argument puts it:

> "If consultees wished to put forward claims that the Council's proposed action of selling the homes should not be taken by the Council because the cost of running the homes could be mitigated, then it was open to them to

> do so. There was no reason why that had to be set out as a distinct "option" as a matter of law, and it [i.e. the failure to do so] did not render the consultation exercise unfair or otherwise unlawful."

Lack of promptness under CPR54; undue delay under SCA s.31(6)

116. The Council submits that time runs from 10 December 2024, the date of the December Cabinet meeting which initially approved the transaction, and that the call-in by the Scrutiny Panel did not stay or alter the decision taken at that meeting. However, it is submitted that whether time runs from then or from 11 February 2025 (the date of the February Cabinet), the Claimant has failed to comply with both the above provisions. When regard is had to the relevant provisions of the Local Government Act 2000 regarding the establishment and operation of scrutiny committees, there is no analogy with the "internal review" situation referred to in *Inclusion Housing CIC v Regulator of Social Housing* [2020] EWHC 346 (Admin) (see [118] below).

117. The Claimant says that time runs from 11 February 2025. The Scrutiny Panel had resolved that the decision be referred to Cabinet with a recommendation that

> "the decision be put on hold and that Cabinet be provided with the full, multi-year financial analysis in a further report and reconsider the decision on the basis of that information."

That recommendation was acted upon and reflected in the terms of the February Cabinet report. The recommendation to Cabinet included that it note the outcome and recommendations from the Scrutiny Panel call-in; note the detailed financial analysis provided; and that it reaffirm the decision made by Cabinet at its meeting on 10th December 2024 to progress with the sale/business transfer of the homes as going concerns.

118. In the Claimant's submission, had the Claimant issued proceedings on 17 December 2024, the Council would have been entitled to say the application was premature. Contrary to the Council's position, *Inclusion Housing* does provide an analogy. Chamberlain J said at [69]:

> "A decision-maker is under no obligation to reconsider a final decision once it has been communicated. If, having received Inclusion's letter of 31 January 2019, the regulator had written back to say 'We have made our decision and will not be reconsidering it', time would run from the date of the earlier decision. A claimant cannot in general start time running again by writing a letter asking the decision-maker to reconsider and then treating the refusal to reconsider as a new decision. But where a decision-maker, in response to a request to reconsider, chooses to conduct an internal review – and, as here, tells the requester that it is holding off publishing its final decision while it gives 'serious consideration' to the points made – the position is different. The matter can be tested by asking what would have happened if, having received the regulator's email of 1 February 2019, Inclusion had issued a judicial review claim. The regulator would, surely, have been entitled to respond that the claim was premature because there was an internal review underway. The internal review could presumably have resulted in a different outcome. The internal review was, on the regulator's evidence, not complete until 8 February 2019 and not communicated until 12 February 2019, when the regulator sent Inclusion the final version of the [regulatory judgement]. In these circumstances, the final [regulatory judgement] was a separate, challengeable decision; and time to challenge it began to run at the earliest on 8 February 2019. The claim form was filed within 3 months of that date."

That position is submitted to apply a fortiori here, where the Scrutiny Panel's request was effectively pursuant to statutorily underpinned governance arrangements.

119. I consider that the Claimant is correct. Section 9F(2)(a) of the Local Government Act 2000 ensures that a local authority's overview and scrutiny committee has power "to review or scrutinise decisions made, or other action taken, in connection with the discharge of any functions which are the responsibility of the executive". Section 9FE(3), which applies (subject to certain exceptions, none of which are relevant here) where an overview and

scrutiny committee of a local authority makes a report or recommendations to the authority or the executive, provides that:

> "(3) The overview and scrutiny committee must by notice in writing require the authority or executive—
>
> (a) to consider the report or recommendations… ."

120. The statutory intention thus appearing from the statutory framework is reflected in what happened on the facts. The matter went back to Cabinet with very detailed figures, covering a five year period, something which had been lacking before, and it is on those figures that the Council relies in support of its case. This was indeed, as the Claimant submits, an internal re-taking of a decision based on fresh evidence and fresh consideration.

121. The fact that a pre-action letter was sent on behalf of the Claimant on 27 January 2025 (it appears that it was on 10 February that Rebecca Chapman, the Claimant's solicitor, learned the matter was to go back to Cabinet on 11 February) does not alter that. There may have been an operative decision in December 2024 had not first the Scrutiny Panel and then the Cabinet responded as they did, but they did.

122. Accordingly, I take 11 February 2025 as the date from which time starts to run.

123. The Council submits that this was a decision of a type local authorities routinely take; that the Claimant's pre-action correspondence was excessive and unfocussed and such correspondence does not stop time from running in any event; that the Claimant knew from well before December 2024 that the decision-making process had been going on and should have been particularly alert to issues of delay and prejudice; and that the delay was detrimental to good administration and the rights of others, including the delay in the Council achieving the proposed cost savings, the rights of other residents of the Council's area for whose benefit the savings could be applied and the rights of the bidders. Mr Bhuta gives evidence of his serious concerns that further delay increases the risk that the bidder may withdraw, a risk to which the delay in

issuing proceedings has contributed. A six week delay in issuing proceedings is estimated to have cost the Council £107,000. The primary requirement is promptness, with 3 months being a longstop: *Mauritius Shipping Corp Ltd v Employment Relations Tribunal* [2019] UKPC42 at [8]. Mr Oldham submits that the courts have placed more emphasis on the requirement for promptness in recent years, citing *R(BC) v Surrey County Council* [2025] EWHC 719 at [16-18].

124. Mr Mant submits that once time started running the Claimant expeditiously sought further information and to detail the apparent illegalities to the Council. Even the Council's own Scrutiny Panel had recognised that a complex decision was involved, the reasons for which were opaque. The questions raised were reasonable and proportionate. It is unremarkable and consistent with the purpose of pre-action correspondence that some of the questions related to matters eventually not pursued.

125. As to prejudice, he submits that the decision is not time-critical; the bidders had known the process was potentially liable to be challenged but had proceeded anyway; the passage of time had no material impact on other residents; and whether there is financial loss to the Council depends on consideration of the merits of the claim.

126. He relies on *R(A1 Veg Ltd) v Hounslow LBC* [2003] EWHC 3112 (Admin) as indicating that when claims are brought within the three month period, there is a "rebuttable presumption that they have been brought promptly" and on *R(Faisaltex Ltd) v Crown Court at Preston* [2009] 1 WLR 1687 (DC) at [34] as indicating that the explanation for the date of filing and any delay involved is key. *R(Young) v Oxford County Court* [2002] EWCA Civ 990 at [43] observes that the requirement to act promptly should not

> "oust the countervailing consideration that it is undesirable for a litigant to proceed blindly towards challenge of a decision in relation to which he suspects a fault or omission susceptible of review in a case where, for the purposes of clarification, he reasonably requires further information from

the decision−making body so that he can consider in an informed manner whether proceedings are justified or worthwhile."

127. Ms Chapman, having learnt on 10 February about the Cabinet meeting on 11th, emailed the Council on 12th requesting access to certain documents and asking a number of questions, all of which in my view were reasonable, to facilitate a better understanding of the decision and a sharper focus when considering whether it contained properly arguable errors of law.

128. The Council indicated that a response to these questions was only likely to be provided in the week commencing 24 February. When by 27 February it had not been, Ms Chapman sent an appropriately phrased chasing email. The Council replied on 4 March. On 5 March Ms Chapman emailed further questions, to which the Council replied on 21 March. On 26 March (three working days later) Ms Chapman sent a letter before action. The letter ran to 10 pages and contained a request for information on 23 points. A reply was sought by 2 April. Ms Chapman chased on 10 April and the Council replied the same day. Ms Chapman sought instructions, then went on leave for Easter week. Easter Sunday was on 20 April, thus 18 and 21 were Bank Holidays. On 23 April she informed the Council that proceedings were to be issued and inviting the Council to consider putting the sale on hold. On 25 April the Council replied, declining to do so. The Council was provided with a copy of the judicial review application nine working days later, on 8 May 2025.

129. Between 12 February and 26 March, I consider that everything was done which possibly could be to progress pre-action correspondence. Ms Chapman's emails of 12 February and 5 March were sent at the earliest opportunity. She chased up the lack of a timely reply on 27 February.

130. It can, with hindsight, be questioned whether it was necessary to raise all the 23 further points in the lengthy letter of 26 March, but even if a few could have been omitted, that does not materially impact on the time needed to complete the task. It is possible that it may have taken the Council longer to reply in consequence, but there is no evidence to that effect.

131. A little over two weeks elapsed before the Council's reply was received on 10 April. That was a Thursday. Ms Chapman, due to go on leave the following week, sought instructions that day or the next. We do not know when instructions were given and whether a colleague in her substantial firm could have taken any steps in her absence if they had been asked to do so (which we do not know). However, at most four working days were lost at this point. The letter of 23 April was sent on the second day after the Bank Holiday. Nine working days does not appear an excessive interval between receipt of the Council's letter of 25 April and supplying it with a copy of the judicial review application.

132. I accept that there was potential financial loss to the Council through the passage of time and that that is relevant to the need for promptness. I also consider that promptness is particularly important where third party interests are involved, although I qualify that up to a point by the fact that the preferred bidder has progressed with negotiations following the issuing of proceedings with its eyes open. I therefore seek to apply a reasonably demanding approach to the issue of promptness and one which is consistent with the observations in the *Surrey* case. I place limited weight on what is said in *A1 Veg* both because the words relied upon by Mr Mant are merely said to be a starting point and because of the age of the decision.

133. The decision under challenge in this case is indeed one of some complexity. I accept that local authorities do frequently take decisions about the externalisation of services but what makes this more complex are the assumptions, in a complex market affecting vulnerable service users with complex needs, underpinning the financial case on which the Council relies. Though one may disagree on the need for individual points which she elected to raise, Ms Chapman's approach was fundamentally consistent with what is said in *Young*.

134. It is fair to observe that a substantial proportion of the time which elapsed was when the ball was in the Council's court. This included the periods between 12 February and 4 March, 5 March and 21 March and between 26 March and 10 April.

135. The only point at which it might be suggested that the matter could have been progressed more expeditiously was during the period when Ms Chapman was on leave, but it is not reasonable to expect that the Claimant's litigation friend, with an elderly mother with dementia in a care home, would have been in a position to give instructions more or less instantaneously. At other times Ms Chapman acted very promptly (more than once the following day) and chased up replies when none were forthcoming.

136. I therefore conclude that the proceedings were commenced promptly and without "undue delay".

Standing

137. Mr Oldham submits that the Claimant, a resident of Castle Grange, lacks standing to bring the claim in relation to Claremont House. The point became substantially academic (subject to issues of promptness) when shortly before the hearing Ms Blackburn, a resident of Claremont House, was joined as Second Claimant. After Ms Blackburn's death and removal as a party under CPR 19.2(3) the point is once again live. The parties have indicated they are content to rely on their written submissions in this regard.

138. In the case of the Council, this is limited to the point which opens the preceding paragraph. No authority is advanced in support.

139. The Claimant submits that the decision was in every respect a single decision. In my view, Mr Oldham's response - that judicial review is about substance not form - does not meet the point as the decision was both in form and substance a single decision about two care homes.

140. Mr Oldham also resists the Claimant's analogy with school closure cases where a parent still has standing though their child attends just one of a number of schools involved, submitting that schools form an interdependent organisational group in a way that care homes do not. I accept the analogy may be imperfect, but that does not detract from the fact that what is challenged is a single decision.

141. Nor do I accept there would be any lack of fairness to residents of Claremont House. These proceedings are widely known about locally and it would have been possible for a resident of Claremont House who wished the home to be transferred to have applied via a litigation friend to be joined as an Interested Party.

142. Section 31 of the Senior Courts Act 1981 provides:

> "(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers

that the applicant has a sufficient interest in the matter to which the application relates."

143. Standing is context-specific, so matters such as the decision challenged, the grounds of challenge and the subject-mater affected may all be relevant. In the present case, the decision challenged was a single decision in respect of both the Homes, the Council's reasoning applied to both, the grounds are the same in respect of both the Homes and the outcome will affect both. It is inevitable that any decision in relation to the Claimant's claim will also impact upon Claremont House and I am aware of no authority, nor can see any sensible basis, for splitting the court's decision or any relief given so as to apply differently to each.

144. I therefore conclude that the Claimant has standing to challenge the decision in its application to both Homes.

Section 31 (3C) and (2A) SCA

145. Thus we arrive at the position where the Claimant has standing in relation to both the Homes, there was no lack of promptness in bringing her claim but the only ground in which it potentially stands to succeed is in the Council's failure to update the figures used for the projected cost of purchasing the services from a private sector provider.

146. As noted at [53], a 10.7% increase in the notional cost of alternative provision would have taken it to £3,543,784. This, compared with budgeted costs, would have reduced the projected saving to £524,761.

147. Although the Council's decision primarily relied upon the savings in the revenue budget which were claimed to result, other factors also played a part. The report to Cabinet also refers to avoidance of the overspend against budget, avoided obligations of capital investment, as well as the benefit of the potential capital receipt to the Council.

148. I accept the relevance of avoiding the overspend against budget: if the matters which are the subject the overspend had been budgeted for, the projected saving would have been greater.

149. Turning to capital investment, in the February 2025 report, it was estimated that £1.4 million would be needed for capital improvements over the next five years. Although said to have been "calculated based on Vendor Surveys for both care homes as well as information the Council holds on the fabric, condition and defects of corporate properties" the same figure had appeared (for the first time) in the October 2024 report where, much more vaguely, the items said to be likely to require such expenditure "are not captured in any analysis but could amount to a further £1.4 million over the next 5 years".

150. The £1.4 million figure contrasts with indicative cost figures presented to the Scrutiny Panel (£73,500 for Claremont House and £148,550 for Castle Grange) and £550,000 in the March 2024 report. In his fourth witness statement, Mr Bhuta explains that the figure of £550,000 was compiled through the work of three identified teams internal to the Council and represented the cost of carrying out specific works identified as being necessary to be carried out in the 2024/5 financial year. The lower figures presented to the Scrutiny Panel arose from third party surveys which were not intended to address future remedial works beyond the very short term. The parameters of the third party surveys indicate that they were based on visual inspection only, that certain matters were excluded and the figures had not been tested through tendering, the aim being to provide indicative cost estimates only.

151. With the benefit of Mr Bhuta's fourth witness statement, I accept that the various figures for capital expenditure were prepared for different purposes and addressing different timescales. Nonetheless, the evidence does not suggest that the £1.4 million figure was a robust one, if the expenditure merely "could" amount to a further £1.4 million and the items said to give rise to it "were not captured in any analysis".

152. Whether there would be a capital receipt at all was unknown at the time of the report, so obtaining one (and if so, its amount), and the ability to pay down the Council's debt in consequence, was at that point in the realm of speculation.

153. Section 31 materially provides:

> "(2A) The High Court—
> (a) must refuse to grant relief on an application for judicial review, and
> (b) may not make an award under subsection (4) on such an application,
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
> (2B) The court may disregard the requirements in subsection (2A)(a) and
> (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.
> …
> (3C) When considering whether to grant leave to make an application for judicial review, the High Court—
> (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and
> (b) must consider that question if the defendant asks it to do so.
> (3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.
> (3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.
> (3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.
> …

(8) In this section *"the conduct complained of"* , in relation to an application for judicial review, means the conduct (or alleged conduct) of the Council that the applicant claims justifies the High Court in granting relief."

154. In *R (Bradbury) v Awdurdod Parc Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority)* [2025] EWCA Civ 489 the Court of Appeal at [72] re-affirmed the Court's discussion of s.31(2A) in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214:

"272. The new statutory test modifies the Simplex test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of 'exceptional public interest'. Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely 'highly likely'. And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant.

273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old Simplex test and

> the new statutory test, 'the threshold remains a high one' (see the judgment of Sales LJ, as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin); [2018] ICR 269, para 89)."

155. Mr Oldham refers me to, in particular, para 74 of *Bradbury* where the Court indicated:

> "The section emphatically does not require the court to embark on an exercise where the error is left out of account and the court tries to predict what the public body would have done if the error had not been made. Approaching section 31(2A) in that way would run the risk of the court forming a view on the merits and deciding if it thinks the public body would reach that view if it had not made the error. Rather, the focus should be on the impact of the error on the decision-making process that the decision-maker undertook to ascertain whether it is highly likely that the decision that the public body took would not have been substantially different if the error had not occurred."

156. How one is to conduct the exercise in the final sentence in the above paragraph without straying into the impermissible territory of predicting what the public body would have done if the error had not been made is far from easy. The Council's decision was based on cost savings calculated on a basis which I have found to be legally erroneous. For the error not to have occurred would have required the Council to use a figure which would reduce the savings figure by some £350,000. Nonetheless, the saving, which let it not be forgotten is an annual figure, would still be in excess of £500,000 against budget. I note from Mr Bhuta's evidence that it was the view of officers that the 4% increase in rates for the 2024/5 year would not have had a material impact on the overall financial analysis. It is not readily possible to see why the further increase for 2025/6 would have done so either.

157. As the court has to focus on "the impact of the error on the decision-making process that the decision-maker undertook", arguably one should ignore any reservations about the possibility of a capital receipt and the avoidance of capital

expenditure, but even if one were to disregard the possibility of a capital receipt as essentially speculative and (at least in part) the avoidance of capital expenditure as insufficiently evidenced, there would also be the avoidance of unbudgeted expenditure, meaning that there would still be a substantial financial advantage to the Council.

158. While Mr Mant criticised the approach of the Council's officers in reports of not pursuing savings on the basis that they could not possibly lead to a cost neutral position, there is no evidence before me of a position in which the reduced amount of savings might have made continuing operation by the Council more attractive.

159. It is in my view also relevant that it will have been when taking the decision, and would be in the context of the exercise mandated by the relevant parts of s.31, in the institutional memory of the Cabinet, that they were taking a decision against the background of (a) having previously decided against achieving savings by the more draconian option of closing the Homes altogether, (b) of the Council's financial position having deteriorated since the earlier decision was taken and (c) of the need for the Council to use its limited resources to focus on areas of social care provision where there are fewer alternative providers than is the case for long stay residential care.

Conclusion

160. For the reasons in the preceding section of this judgment, I conclude that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred. I am therefore required by s31(3D) of the 1981 Act to refuse leave.

161. The Claimant's case is that the condition for applying that provision is not met, not that having found it to be met, I should disapply it relying on s.31(3E) on the basis of "reasons of exceptional public interest". I do not for my part consider that the public interest there undoubtedly is in ensuring that a decision to sell off care homes as a going concern is taken on the basis of legally sound material can be regarded as "exceptional". As Mr Oldham submitted in a different context, transactions of this type are regularly undertaken by local

authorities. Nor do the proposed arrangements for existing residents, insofar as they are in evidence, cause such concern as to provide reasons to override s.31(3D).

162. I record my thanks to all counsel for their submissions and for their assistance to the court in enabling the hearing to be completed within one day.