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2 July 2013

Jo Davidson
Director for Peoples Services
Herefordshire Council
Brockington
35 Hafod Road
Hereford HR1 1SH

And by email: jdavidson@herefordshire.gov.uk

Dear Ms Davidson

PROPOSED CLAIM FOR JUDICIAL REVIEW

I write to you in accordance with the Pre-Action Protocol for Judicial Review, in relation to a proposed claim against Herefordshire County Council ("the Council"), in particular its Cabinet.

The decision under review

The decision made by the Council's Cabinet on 20 June 2013 in relation to changes to the weekly fees paid in relation to nursing and residential care homes for older people for 2013/14 and in relation to how fees will change for the next three years prior to a further review of costs. The decision made by Cabinet ("the Decision") was:

"THAT:

- a) the Open Book Review approach that has been used, including evaluation of the alternative options and methodology for evolving the Herefordshire model be noted;
- b) the proposed Maximum Usual Price (MUP) (as set out in paragraph 11.2, table 1 of the report) for older people's residential and nursing care purchased by the council, be approved as the preferred option for further consultation with providers and the involvement of the Health and Social Care Overview and Scrutiny Committee; and
- c) delegated authority be given to the director for people's services, in consultation with the cabinet member Health & Wellbeing, having due regard to the outcome of the further consultation, to finalise the MUP and undertake a formal procurement exercise. This procurement exercise shall include the introduction of a new outcome based contract and framework approach, and an annual



indexing process, with a view to implementation of this MUP, effective from January 1st 2014, and a further review scheduled for 2017.”

Table 1 at paragraph 11.2 of the report referred to is as follows:

	Residential care (weekly)	Nursing care (weekly)
Hereford cost model (base rate)	£380	£579
Profit @ 5%	£19	£29
Return on capital @ 2.5%	£35	£37
Less FNC & Incontinence		£113
Cost of care	£434	£532
Current Fees	£468	£572
Variance / Saving	£34	£40
% Saving / Increase	7%	7%

* Profit is based on market rates. Return on capital is based on the best available bank rate”

The Decision has not been ‘called in’, and is effective from 27 June 2013.

The Claimants also challenge the ‘further consultation’ referred to under paragraph b) of the Decision (“the Further Consultation”) in terms of the manner in which it is being undertaken since 20 June 2013.

The Proposed Claimants (“the Claimants”)

The Claimants will be:

- (i) *Ashberry Healthcare Ltd* (company no. 04886239) which owns and operates
 - a. Holmer Court Residential Home, a 33 bed home providing accommodation and specialist dementia care (known as ‘EMI’ or ‘elderly mentally infirm’ care) at Attwood Lane, Hereford HR1 1LJ; and
 - b. Broomy Hill Nursing Home, a 41 bed home providing accommodation and EMI nursing care at 43 Breinton Road, Hereford HR4 0JY; and
- (ii) *Claridge Nursing Homes Ltd* (Company No. 07220902), which owns and operates
 - a. Lynhales Hall Nursing Home, a 73 bed home providing accommodation, nursing and EMI nursing care at Lyonshall, Kington, Herefordshire, HR5 3LN; and
 - b. Hampton Grange Nursing Home, a 42 bed home providing accommodation, nursing and EMI nursing care at 48-50 Hampton Park Road, Hereford, Herefordshire HR1 1TH; and
- (iii) *Dreamcare Homes Ltd* (Company No. 06490121), which owns and operates Dovecote Care Home, a 15 bed home providing accommodation and EMI residential care at Llangarron, Ross on Wye, Herefordshire HR9 6PB; and



- (iv) *Evendine Care Ltd* (Company No. 04267777) which owns and operates Evendine House Residential Home, a 20 bed home providing accommodation, residential and EMI residential care at Evendine Lane, Colwall, Malvern, Worcestershire WR 13 6DT; and
- (v) *Garth Care Services (the partnership of Alan Prior and Patricia Prior)*, which owns and operates The Garth Care Home, a 30 bed home providing accommodation and nursing care at The Square, Kington, Herefordshire HR5 3BA; and
- (vi) *Hazelhurst Nursing Home Ltd* (Company No. 02110787), which owns and operates Hazelhurst Nursing Home, a 44 bed home providing accommodation and nursing care at Bishopswood, Ross On Wye, Herefordshire HR9 5QX; and
- (vii) *Herefordshire Care Homes (the trading name of Karen A Rogers)*, which owns and operates
 - a. Whitegates, a 37 bed home providing accommodation, residential and EMI residential care at 25 Hereford Road, Bromyard, Herefordshire HR7 4ES;
 - b. Highwell House, a 34 bed home providing accommodation, nursing and EMI nursing care at 32 Highwell Lane, Bromyard, Herefordshire HR7 4DG;
 - c. Coldwells House, a 33 bed home providing accommodation, residential and EMI residential care at Coldwell's Road, Holmer, Hereford, Herefordshire HR1 1LH;
 - d. Charnwood Country Residence, a 22 bed home providing accommodation and residential care at Much Dewchurch, King's Thorn, Hereford, Herefordshire HR2 8DL; and
 - e. Dulas Court, a 31 bed home providing accommodation and residential care at Dulas, Ewyas Harold, Hereford, Herefordshire HR2 0HL; and
- (viii) *Heritage Manor Ltd* (Company No. 01305956), which owns and operates West Eaton Nursing Home, a 33 bed home providing accommodation, nursing and EMI nursing care at West Eaton House, Worcester Road, Leominster, Herefordshire, HR6 0QJ; and
- (ix) *Narendra Nauth and Sheila Nauth* (a partnership), who own and operate
 - a. Manor Rest Home, a 23 bed home providing accommodation, residential and EMI residential care at Lower Bullingham Lane, Hereford HR2 6EP; and
 - b. Credenhill Court Rest Home, a 35 bed home providing accommodation, residential and EMI residential care at Credenhill Court, Hereford HR4 7DL; and
- (x) *Pencombe Hall Ltd* (Company No. 07136435), which owns and operates Pencombe Hall, a 32 bed home providing accommodation, residential and EMI residential care at Pencombe, Bromyard, Herefordshire HR7 4RL; and
- (xi) *Stretton Care Ltd* (Company No. 05164130), which owns and operates Stretton Nursing Home, a 50 bed home providing accommodation, nursing and EMI nursing care at Manorfields, Burghill, Hereford, Herefordshire HR4 7RR; and
- (xii) *The Weir Nursing Home Ltd* (Company No. 03092958), which owns and operates The Weir Nursing Home, a 35 bed home providing accommodation, nursing and EMI nursing care at Swainshill, Hereford, Herefordshire HR4 7QF; and



- (xiii) *Advent Estates Limited* (Company No. 03523926) which owns and operates Field Farm House Residential Home, a 65 bed home providing accommodation, residential and EMI residential care at Hampton Bishop, Hereford, Herefordshire HR1 4JP.

Reference details

Officers within the Council who have been involved in this matter are:

- Helen Coombes – Assistant Director, Peoples Services (“Ms Coombes”)
- Glyn Morgan – Accountant (“Mr Morgan”)
- Kathy McAteer – Social Worker (Ms McAteer”)

The legal background

1. By section 21(1) of the National Assistance Act 1948 (“the Act”) the Council, as a local authority:

... may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing –

- (a) Residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them....

2. In March 1993 that power was converted into a duty by Paragraph 2(1)(b) of Circular LAC (93)(1).

3. By section 26(1) of the Act arrangements under section 21(1):

may include arrangements made with a voluntary organisation or with any other person who is not a local authority where –

- (a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a)... of that section, and
(b) the arrangements are for the provision of such accommodation in those premises.

This is the statutory origin of the system under which local authorities fund the care in privately-run establishments of persons who cannot themselves meet the fees charged there.

4. In the exercise of its social service functions, a local authority is required to act in accordance with such directions as may be given by the Secretary of State under section 7A(1) of the Local Authority Social Services Act 1970. An authority must also, by section 7(1) of the same statute, “act under the general guidance of the Secretary of State.” Both directions and guidance have been promulgated in relation to the statutory provisions referred to above.

5. The relevant directions are contained in the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, issued on 23 December 1992 (“the Directions”). By paragraph 3 of the Directions the local authority:

shall only be required to make or continue to make arrangements for a person to be accommodated in his preferred accommodation if

- ...(b) the cost of making arrangements for him at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs; ...



The cost which the authority usually expects to pay, referred to in (b), is commonly referred to as 'the usual cost.' There is no provision in the Directions for a 'maximum' usual cost.

6. Statutory guidance was given by the Department of Health in local authority circular, LAC (2004) 20, issued on 14 October 2004 ("the 2004 Circular"). The cost referred to in the Directions is dealt with in paragraph 2.5.4 of the 2004 Circular:

"One of the conditions associated with the provision of preferred accommodation is that such accommodation should not require the council to pay more than they would usually expect to pay, having regard to assessed needs (the 'usual cost'). This cost should be set by councils at the start of a financial or other planning period, or in respect to significant changes in the cost of providing care, to be **sufficient to meet the assessed care needs** of supported residents in residential accommodation. A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different. In setting and reviewing their usual costs, **councils should have due regard to the actual costs of providing care and other local factors**. Councils should also have due regard to best value requirements under the Local Government Act 1999".

[emphasis added]

7. And at paragraph 3.3 of the 2004 Circular:

"When setting its usual cost(s) a council should be able to **demonstrate** that this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services that they could reasonably expect to receive **if the possibility of resident and third party contributions did not exist**".

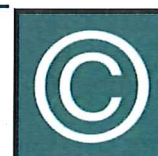
[emphasis added]

8. Directions given under section 7A(1) of the Local Social Services Act 1970 are mandatory. Statutory guidance under section 7(1) is not mandatory, but an authority can depart from it only for good reason and following a considered and cogently-reasoned decision. In R v London Borough of Islington ex parte Rixon [1997] ELR 66 Mr Justice Sedley said:

'While "guidance" does not compel any particular decision ...especially when prefaced with the word "general", in my view Parliament by section 7(1) has required authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without the freedom to take a substantially different course.'

9. Besides formal statutory guidance, the Secretary of State can also issue general or non-statutory practice guidance, to which a local authority is also required to have due regard: any departure from such guidance must be justified. This proposition was confirmed by Lord Justice Moses in R (Kaur) v London Borough of Ealing [2008] EWHC 2062 Admin which was quoted with approval by His Honour Judge Raynor QC in R (Sefton Care Association) v Sefton Council [2011] EWHC 2676 (Admin) as follows:

"Formal guidance issued under section 7(1) of the 1970 Act is to be distinguished from general practice guidance issued by the Secretary of State (see Cross on Local Government Law, paragraphs 21-02, 03). However a local authority is obliged to have due regard to non-statutory guidance and would have to justify any departure from it (see R (Kaur) v Ealing LBC [2008] EWHC 2062 (Admin) at paragraph 22 per Moses LJ.) For reasons which will appear, I



am satisfied that the distinction between formal statutory guidance and general practice guidance is of no significance in this case."

10. There is also non-statutory guidance in the form of a document entitled *Building Capacity and Partnership in Care*. It was issued in October 2001 by the Department of Health, with the subsidiary title *An Agreement between the statutory and the independent social care, health care and housing sectors*. *Building Capacity* contains several references to the need for consultation and collaboration between commissioners and providers of care. The setting of fees is dealt with specifically in paragraph 6.2:

"Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to providers nor the inevitable reduction in the quality of service provision that follows. This is short-sighted and may put individuals at risk. It is in conflict with the Government's Best Value policy. And it can destabilise the system, causing unplanned exits from the market. **Fee setting must take into account the legitimate current and future costs faced by providers as well as the factors that affect those costs**, and the potential for improved performance and more cost effective ways of working. Contract prices should not be set mechanistically but should have regard to providers' costs and efficiencies, and planned outcomes for people using services, including patients." [emphasis added]

By paragraph 6.7 commissioners should ensure that they have in place:

"fee negotiation arrangements that recognise providers' costs **and what factors affect them** (as well as any scope for improved performance) and ensure that appropriate fees are paid." [emphasis added]

11. In the *Sefton* case (paragraph 9, above), the Judge also warned against using other local authorities' fees as evidence of adequacy or actual costs. At paragraph 75 of the judgment:

"Whilst it is true that [Sefton's] fees are not out of line with those of other authorities, that does not mean that the fees are adequate, or indeed that these other authorities had due regard to the actual cost of the provision of care."

12. In a judgment handed down on 28 June 2013, Her Honour Judge Belcher ruled as follows in *R (on the application of South Tyneside Care Home Owners Association and others) v South Tyneside Council [2013] EWHC 1827 (Admin)*:

"22... The financial constraints on local authorities are well known and very real. They can, indeed must, be taken into account by local authorities in informing their decision making processes provided that the process is proper in all respects. As the Council concedes, the financial constraints cannot be used in isolation to justify cuts in the fees in this case."

"56 ... In my Judgment return on capital is a real cost for care homes and, therefore, is a cost which the Council must have due regard to under Paragraph 2.5.4 of the [2004] Circular."

13. When undertaking a formal consultation, a public authority is required to comply with the duties summarised by the Court of Appeal in the case of *R v North and East Devon HA, ex p Coughlan [2001] QB 213*:

"F. Consultation



108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken **at a time when proposals are still at a formative stage**; it must include **sufficient reasons for particular proposals** to allow those consulted to give intelligent consideration and an intelligent response, adequate time must be given for this purpose, **and the product of consultation must be conscientiously taken into account when the ultimate decision is taken**: *R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168.* [emphasis added]

14. On the issue of disclosure of calculations, Judge Belcher rule in the *South Tyneside* judgment, above:

“103 In my judgment the issue here is whether the Council has conducted a full fair and proper consultation notwithstanding its refusal to disclose documents supporting its methodology and analysis of financial information. In my judgment it has not. Disclosure of [the information provided by certain homes to the Council and used by the Council to calculate the financial impact on providers] would, in my judgment, have enabled the Claimants and other providers to challenge errors on the face of the document (such as the 95% assumed occupancy rate), to do their own calculations to show that the Council’s statement that profitability and viability of homes would be unaffected was incorrect, and to point to the failure to address EMI costs as a separate issue.”

15. By section 149(1) of the Equality Act 2010 the Council, as a public authority:

- (1) ... must in the exercise of its functions, have due regard to the need to –
- (a) eliminate discrimination ...
 - (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.

16. By virtue of section 149(7) of the 2010 Act, age, disability and gender are among the “protected characteristics”.

17. the Council is joint signatory to “Herefordshire’s Equality and Human Rights Charter 2010-2013”, which is stated to underpin seven “Priorities for Hertfordshire”. One of these priorities is:

“Economic development and enterprise: We aim to create an environment for enterprise to thrive and enable business growth and prosperity for all.”

The details of the matter being challenged

18. There are around 45 care homes for the elderly in Herefordshire, providing just under 1,600 beds across the various categories of care: residential, residential EMI, nursing and nursing EMI. Many homes provide for more than one category. The Claimants’ homes account for 737 beds, or just over 46% of the total Herefordshire beds.

19. In 2010, the Council introduced a new fee structure which had three levels:

- a top level, for providers who gave undertakings to adhere to 6 areas of high standards;



- a 2% increase for providers who were only willing to undertake adherence to some of those standards; and
 - No increase for other providers.
20. No fee increase was made by the Council in 2011, despite inflationary and other increases in actual costs incurred by providers. In 2012, the Council increased fees by just 1.83%, which was around half the rate of inflation.
21. In April 2012, the Council and NHS Herefordshire issued the "Herefordshire Market Position Statement for Adult Social Care" ("the MPS"), which set out the authorities' wish "to stimulate a diverse active market where high quality and innovation flourish", against the background of an "expected increase in the number of self-funders and increasing demand". The MPS also includes the following commitments:
- "The People's Services Directorate [of the Council] is determined that all services are of a high quality and where they are regulated, that they **meet or exceed all required standards**" (page 9)
- "It is expected that alternatives to care home provision will gradually affect the admission rates to care homes over the next five **years with the exception of specialist nursing care longer-term and residential dementia services.**" (page 11) [emphasis added]
22. A table on page 21 of the MPS projects that between 2009 and 2020, the number of people over 65 in Herefordshire with moderate or severe dementia will increase by around 40%, with a further 40% increase on the 2020 figure by 2030.
23. Against this background, in November 2012 the Council appointed Mr Morgan and Ms McAteer "to complete an Open Book Review of residential and nursing home fees for older people." Mr Morgan and Ms McAteer were given written Terms of Reference which included the following:
- "An open book review is based on the principles of fairness and **transparency** ..."
- "The desired outcomes of the exercise are to:
- Arrive at a better understanding and resolution of price issues ...
 - **To identify any key risk areas relating to the financial viability of service provision**
 - Establish whether current fee levels are appropriate
 - Ensure clear links between fee levels and bandings of dependency
 - Enable decisions on the need to uplift current fees to be taken on an informed and **transparent** basis to ensure quality, value for money and sustainability of service."
- "Funding decisions must be based on equity and ensure that some service users are not discriminated against due to funding differentials. To ensure this, **the model will be subject to an Equality Impact Assessment.**" [emphasis added]
24. The Terms of Reference set out a timetable which included:
- "July 2012-October: Planning and preparation - ... develop questionnaire and **methodology using Laing & Buisson** and examples from other LAs ..."
- ...



“22nd April-31st May (6 weeks) – Complete analysis of findings, benchmark and considers [sic] implications; **align to outcome of work on quality standards; Complete Equality Impact Assessment ...**”

June - ... Cabinet approval for new pricing framework ...”
[emphasis added]

25. On 16 November 2012, Mr Morgan and Ms McAteer wrote to providers:
- “As you will be aware, Hereford Council have agreed to undertake a review of the fees paid for residential and nursing home care for older people and to develop a new pricing framework based on the Open Book methodology developed by the Rowntree Trust and Laing & Buisson.”
26. The letter went on to invite providers “to attend a workshop to consult with you on the Open Book Review methodology and process.” The Terms of Reference (above) were enclosed.
27. At the workshop held on 4 December 2012, Mr Morgan confirmed a number of times that they would be using the Laing & Buisson 2012 report and toolkit (“L&B”), including specifically the return on capital methodology of 7% return on accommodation and 10% operator's profit with a floor and ceiling based on quality. (The Laing & Buisson toolkit was originally commissioned in 2002 by the Joseph Rowntree Trust.) Providers, including the Claimants, in taking part in the consultation and continuing to take Council-funded residents, relied upon the commitment to using the L&B model, which they knew to be a coherent and comprehensive model.
28. For the avoidance of doubt, the Claimants consider the Terms of Reference and the approach which Mr Morgan and Ms McAteer said they were going to adopt (as above) to be a reasonable approach to ascertaining actual current and future costs, and the factors that affect them. Further, the Claimants consider the questionnaire (below) used by Mr Morgan and Ms McAteer was reasonable and appropriate, save that it was misleading in relation to asking about additional costs for EMI residents.
29. Over the course of the next three or four months, 22 providers (including some of the Claimants) completed the Council's questionnaire and answered further questions about their finances, thereby fully participating in the ‘Open Book Review’. Mr Morgan calculated each home's care costs. For instance, in an email dated 12 March 2013 to Robert Evans of the First Claimant, Ashberry Healthcare Limited (“Mr Evans”), Mr Morgan wrote:
- “I have completed my review of [Holmer Court's] care costs and I have a figure between £559 and £626.”
30. Mr Morgan and Ms McAteer then wrote an undated report to the Council (“the Morgan-McAteer Report”). They stated that their review was “based on the model developed by the Rowntree Trust and Laing & Buisson (L&B)”, and made extensive references to L&B in the report. The Morgan-McAteer Report proposed four options for the Council to consider:
- a. “Do nothing – continue to pay current fee rates.”
 - b. Revise the rates as per findings of review of care homes in Herefordshire.
 - c. Revise the rates as per benchmarking of West Midland and comparator authorities and as a result of the local market.



- d. Remove the quality impact which increased fees in 2010.”
31. The Morgan-McAteer Report makes clear that its authors did not assess actual profit in Herefordshire homes. Instead, they proposed to adopt an average of rates said to have been cited by BUPA, working out at 5%. They did, however, assess the other component of return on capital:
- “Return on land and buildings has been **assessed** at 7% for the Herefordshire cost model” [emphasis added]
32. In discussion the four options, the Morgan-McAteer Report discarded Option A. None of Options B, C or D equate to the table referred to in the Decision (see top of page 2 of this letter).
33. Around late May 2013, Mr Morgan gave details on his LinkedIn profile of his role as Interim Project Manager / Accountant (Adult Social Care) for the Council. He boasted:
- “Key Achievement: highlighting savings of £600k in older people [sic] care homes by completing open book review.”
- “After successfully completing work on the review of adult social care expenditure, Herefordshire Council asked me to carry out additional tasks including ... Working with procurement and commissioning colleagues to identify further savings ...”
34. At a presentation to providers on 24 May 2013, the rate included for the return on land and buildings had been reduced to 2.5% without any explanation. In a subsequent email to Mr Evans, Mr Morgan stated that the reduction was “in view of the current economic climate and the council’s financial position”. The presentation also set out, for the first time, the figures adopted by Cabinet in the Decision.
35. Mr Evans wrote repeatedly to Ms Coombes and Mr Morgan, asking for the calculations behind the fees proposed. Mr Morgan eventually sent him the summary of fees for residential homes (“the Residential Spreadsheet”), but no detailed breakdown and no equivalent information for nursing homes, despite ongoing requests.
36. Mr Evans has made enquiries of other providers who submitted data to the Council. As a result of these enquiries, he has been able to identify the homes listed in the Residential Spreadsheet and has made the following calculations:
- There are 5 EMI homes included in the Residential Spreadsheet. Their average cost of care before return on capital is £440.83, compared with £303.65 for the ‘non EMI’ homes. This means that Mr Morgan’s own calculations show an extra cost of £137.18 for an EMI Residential home in Herefordshire.
 - Mr Morgan calculated that for two homes, the Old Vicarage and Whitegates, the weekly staff costs per resident were £184.67 and £167.36 respectively. These figures are clearly incorrect, given the size of the home and the number of staff needed to provide safe and legally compliant 24 hour care, domestic support and administration. The owners of both homes have confirmed to Mr Evans that they were not told by Mr Morgan that these were his calculated staffing costs, and so they were not able to correct them.
37. Ms Coombes wrote the report for the Cabinet meeting on 20 June 2013 (“Ms Coombes’ Report”). She set out a section 11 the table referred to at the top of page 2 of this



letter. In addition, Ms Coombes reported as follows:

- That this is a 'Key Decision' (section 2)
 - There are no Alternative Options (section 6)
 - Under 'Reasons for Recommendations' (section 7), prominence is given to the Council's limited resources and benchmarking against other local authorities
 - "Inflation has been considered so this exercise does not have to be completed for a further 3 years" (section 8)
 - "Enhanced payments for dementia – National research identifies that costs within nursing homes do not vary for residents with dementia, but do vary because of the impact of staffing levels within residential homes" (section 8)
 - That the proposal complies with the general equality duty (section 10)
 - That "Using cost model rates will result in an annual saving of £467k."
38. At paragraph 12.3 of her Report, Ms Coombes advised, referring to the Sefton case (see paragraphs 9 and 11, above):
- "... it may now be unlawful to contract out services to operators, based on arbitrary funding agreements, without showing due regard to the actual cost of care and the impact that changes in provision could have on the individuals concerned."
39. Ms Coombes' Report concluded as follows:
- "The decision to use the rates offered by providers rather than go with benchmarked rates shows Herefordshire's commitment to quality care and providers receiving a fair fee."
40. However, on the day of the Cabinet meeting, two minutes before it was due to start, those attending (including members of the public) were given an amended Recommendation which was based on, but different from the recommendation set out at section 5 of Ms Coombe's Report. In turn, this amended recommendation was further amended during the Cabinet meeting, because of representations made by one or more members of the Scrutiny Committee who were also present.
41. On 24 June 2013, Mr Morgan and Ms McAteer wrote to providers by email:
- "We will be holding a further consultation event with providers on 3 July as agreed at the Cabinet meeting on 20 June 2013. Please find attached the final report and a survey for your completion. Providers are invited to both complete and submit the survey and to attend the meeting. The purpose of the meeting will be to offer feedback on the review, answer questions, discuss the **4 options presented to the Council** and allow you to feedback on any issues regarding **the Council's decision on a Maximum Usual Price** which will be fed back to the Council." [emphasis supplied]
42. The documents attached to this email do not make clear that the MUP has not yet been set by the Council. There are references to the Council having already 'established' or made a decision about the MUP, and that the further consultation is about implementation and the review in 2017. There is no indication of any 'live'



option other than the MUP approved by Cabinet on 20 June 2013.

43. On 26 June 2013, Ms McAteer led a 'workshop' with providers in relation to the proposed 'outcomes based quality specification' (i.e. the new contract). She made it clear that not only was the MUP presumed as having been set, but that the Council will then be seeking further reductions as a result of the proposed tender process.

Why the Council has acted unlawfully

44. The Council has failed conscientiously to take into account the original consultation responses in that it did not present to Cabinet on 20 June 2013:
- a. the actual costs of capital, as ascertained by Mr Morgan and Ms McAteer;
 - b. credible averages of staffing and other direct costs; and
 - c. increased costs for EMI homes, compared with non-EMI homes.
45. The Council has not ascertained, and in consequence has not taken into account, the actual care costs, capital costs and profit incurred by and necessary to Herefordshire providers.
46. Ms Coombes' report wrongly represented to Cabinet that:
- a. The recommendation derived from the Morgan-McAteer Report;
 - b. 5% profit and 2.5% return on land and buildings represented "the rates offered by providers rather than go with benchmarked rates"; and
 - c. Inflation to 1 January 2014 (when the fees were due to come into effect) had been taken into account in the recommended fees.
47. Ms Coombes' Report did not inform Cabinet, as it should have done, that a deduction for affordability had already been incorporated (by person/s unknown) into the figures recommended, in particular (but not limited to) the reduction in return on land and buildings from 7% to 2.5%.
48. In taking the Decision, the Council has:
- a. taken a partial decision prematurely;
 - b. failed to assess the consequences for providers, staff, residents and local communities (including people with protected characteristics) of setting a fee which fails to take account of actual costs of Herefordshire providers and which is in turn a reduction of 7% on the previous year's fees; and
 - c. approved a fee prior to the new contract specification being finalised and costed. This is *Wednesbury* unreasonable.
49. The Council has pre-determined the outcome of the further consultation, by designating the 'preferred option' and failing to make provision for the possibility that the consultation will reveal that this option is inappropriate. The proposal being put to providers is plainly not at a formative stage, but virtually finalised.

Disclosure Urgently Requested

50. In the light of the above concerns, and the further consultation now under way, the documents listed at paragraph 53 (below) appear to be highly relevant in order for the



Claimants to understand the Council's proposal and thereby give intelligent consideration to it in response (*Coughlan*: third element).

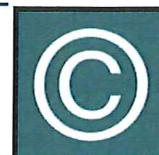
51. In addition, the contents of the documents at paragraph 53 (below) are critical to the decision made by the Council's Cabinet on 20 June 2013. Without sight of that material, the Claimants are left to speculate as to the full reasons for the decision, and whether there are cogent grounds for challenging that decision by way of judicial review. Although the documents listed below are likely ultimately to be disclosed by the Council during the course of any judicial review proceedings under its obligations to give standard disclosure, there is no doubt that the provisions of CPR 31 providing for pre-action disclosure extend to judicial review proceedings – see *Tweed v Parade Commission* [2007] 1 AC 650 where Lord Brown stated:

“That the court has power to make disclosure and inspection orders under Part 31 is not of course in doubt, whether orders for standard disclosure under rule 31.6 or for specific disclosure or inspection under rule 31.12 or for inspection of individual documents mentioned in, for example, an affidavit under rule 31.14(1)(d).”

52. Further, there is no doubt that the court would order disclosure of the documents below as part of standard disclosure if for some reason the Council did not disclose them voluntarily. Disclosure by the Council of the documents listed below is fair and will save costs as the Claimants will not have to make a decision to issue judicial review proceedings without sight of key documents underlying the relevant decision and then, if they do so issue, be in a position where they may have to seek to amend their case later.

53. The documents requested are:

- a. Mr Morgan's calculations for residential and nursing care costs (anonymised, other than where the Claimants' homes are involved), to include all 22 homes and showing details e.g. hours, rates, finance structures.
- b. Comparator figures from the 15 authorities referred to in Ms Coombes' Report.
- c. Documents showing who made the decision to reduce the 7% return on land and buildings to 2.5%, when and on what basis/evidence.
- d. Any market analysis undertaken by the Council (or by Mr Morgan or Ms McAteer) of the 45 homes as to size, quality, location and occupancy levels.
- e. The Council's fortnightly vacancy figures during 2013 to date.
- f. The Council's analysis of the financial impact of the preferred option on the income of the 45 homes.
- g. The calculation which resulted in Cabinet being informed that there would be a £467k annual saving.
- h. A breakdown of the £600k saving referred to by Mr Morgan on his LinkedIn profile.
- i. Correspondence between the Council and Mr Morgan and / or Ms McAteer with regarding the review, including draft reports and minutes of meetings (including the meetings held on 4 December 2012 and 24 May 2013).
- j. The BUPA report/s referred to in the Morgan-McAteer Report, concerning profit levels.



- k. Relevant extracts from the Council's Constitution or Standing Orders, showing that Cabinet has the power to delegate this Key Decision to you, and that you have the authority to take this Key Decision.

Action which the proposed Defendant is expected to take

54. The Council is required to:
 - a. Quash the decision taken on 20 June 2013 of its own volition; and
 - b. Supply the documents requested above at paragraph 53.
 - c. Consult afresh on the fees and methodology set out in the Morgan-McAteer Report, including the effect on providers, residents/families and staff, tied in with the contract and indexation consultation.
 - d. Agree to refer the fees decision back to Cabinet, in conjunction with the contract specification and the indexation i.e. as one package.
55. Failing such quashing, disclosure and agreement by **4.00 pm on Tuesday, 16 July 2013**, the Claimants may issue proceedings for Judicial Review (including any application for pre-action disclosure) without further reference.

The address for reply and service of court documents

Alison Castrey Limited, 22 South Croft, Henleaze, Bristol BS9 4PR.

Yours sincerely

Alison Castrey

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