IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE COURT
MR JUSTICE BEATSON
CO41022003

Royal Courts of Justice
Strand, London, WC2A 2LL

27th August 2004

B e f o r e :

LORD JUSTICE BROOKE
Vice-President of the Civil Court of Appeal
LORD JUSTICE CHADWICK
and
LORD JUSTICE WALL

Between:

The Queen on the Application of Goldsmith **Appellant**

- and -

The London Borough of Wandsworth **Respondent**

Miss Jenni Richards (instructed by Messrs Hereward & Foster) for the Appellant
Miss Elisabeth Laing (instructed by D M H Solicitors) for the Respondent

Lord Justice Wall:

Introduction and overview

1. Mrs. Louisa Goldsmith (the Appellant) is a widow now aged 95. She was born on 13 January 1909. Since December 1996, she has been living at Mary Court in Battersea in South London. This is registered residential care accommodation managed by an organisation called Servite Houses (Servite). Her placement at Mary Court has been partly funded from her benefits and partly by the Defendant, the London

Borough of Wandsworth, in the exercise of its powers under Part III of the National Assistance Act 1948 (the 1948 Act). The Defendant (to which I shall also refer as Wandsworth during this judgment as the context requires) is the local social services authority responsible for the provision of community care services for the Appellant.

2. On 25 May 2003, the Appellant had a fall at Mary Court. She suffered what is described in the documentation as a fractured right neck of her femur and a fractured right clavicle. She was admitted to the Chelsea and Westminster Hospital for treatment. By 9 June 2003, she was medically fit for discharge. However, whilst she was in hospital, Wandsworth formed the view that Mary Court was no longer a suitable or safe environment for the Appellant, and that she needed full time nursing care. Mary Court is not registered to provide nursing care. Wandsworth accordingly decided that, on discharge from hospital, she should not return to Mary Court, but should be placed in a nursing home.

3. Through her daughter and litigation friend Linda Goldsmith, the Appellant challenged that decision by way of judicial review. Proceedings were issued on 21 August 2003 and, after two adjournments, came on for hearing on 24 November 2003 before Beatson J, sitting in the Administrative Court. In a reserved judgment handed down on 5 December 2003, the judge granted the Appellant permission to apply for judicial review, but dismissed her application for an order quashing the Defendant's decision. She now appeals to this court, with permission granted by Brooke and Jonathan Parker LJJ at an oral hearing on 17 March 2004.

4. There are several features of the case, which render it difficult to confine the issues it raises within the proper framework of CPR Part 54. The first is that is has been extremely difficult, even in this court, to tease out Wandsworth's decision-making processes and to ascertain precisely when, how and by whom the decision not to allow the Appellant to return to Mary Court was made.

5. Secondly, the decision itself has become something of a moving target. The judge, quite properly, identified two dates on which the decision under review was taken. He held that the initial decision was taken on 13 August 2003 and that it was confirmed on 6 October 2003. The latter date, of course, was well after proceedings had been instituted. Moreover, the position on the ground on 29 November 2003, the date of

the hearing, was that through the energetic and determined efforts of Linda Goldsmith (whom the judge described as "a devoted daughter") and pursuant to an interim order made by Jackson J on 14 October 2003, the Appellant was in fact back living at Mary Court. In paragraph 3 of his judgment, the judge neatly summarised the history of the proceedings in the following way: -

> The application for permission came before Burton J on 25 September 2003. Burton J ordered the application for permission to be heard with the substantive hearing, and adjourned it to 14 October to enable the parties to discuss the nature and extent of the Claimant's needs. A meeting attended by (Linda Goldsmith), a friend of hers, Mr. Vincent Kelly, the Defendant's social work manager responsible for this case, Dr. Cottee, a consultant geriatrician at the Chelsea and Westminster Hospital, legal representatives and an employee of the Defendant's took place on 6 October. (Linda Goldsmith) sought to persuade the Defendant that her mother could remain in the residential home but was unsuccessful. On 14 October the matter came before Jackson J. It was again adjourned on the following basis. First, that (Linda Goldsmith) and the Defendant agreed to meet with other relevant parties to discuss possible nursing home placements and levels of care and facilities for the Claimant. Secondly, that she should return to (Mary Court) on an interim basis with her daughter arranging and funding the provision of 24 hour nursing care for her and the Defendant paying the weekly contribution to her residential charges. She returned to (Mary Court) on 20 October 2003.

6. At the hearing on 29 November 2003, the judge admitted what those advising the Appellant would describe as up to date (and which the Defendant would call last minute) evidence as to the Appellant's progress and current needs, including two reports, one from a consultant psychiatrist, Dr. Robin Powell, who had assessed her at Mary Court; and the second from the BUPA nurses for whose services Linda Goldsmith had been paying pursuant to Jackson J's order of 14 October 2003. Both reports challenge Wandsworth's decision that the Appellant needs nursing care and should leave Mary Court. The judge was, therefore, in effect being invited not only to quash the decisions of 13 August and 6 October, but also judicially to review Wandsworth's decision not to reconsider its decision of 6 October in the light of the latest evidence.

7. This difficulty has persisted. The judge made an order on 5 December 2003 restraining the Defendant from removing the Appellant from Mary Court pending the determination of her application for permission to appeal. On 17 March 2004, that order was continued until the determination of the appeal by Brooke and Jonathan Parker LJJ when granting permission to appeal. The Appellant thus continues to live at Mary Court. Miss Elisabeth Laing, for the Defendant, accepted in argument before us that Wandsworth had a continuing duty to keep its decision about the Appellant's care and accommodation under review, and told us that such a review was currently being undertaken. Finally, although no application was made to admit it as fresh evidence (and no submissions were addressed to us on it) Linda Goldsmith has made a further statement dealing with the current position.

8. There are of course cases, for example in the field of asylum, where changing external events and developments require the Immigration Appeal Tribunal to take account of events which post-date (and sometimes render academic) the decision under appeal: see the decision of this court in ***E v Secretary of State for the Home Department*** [2004] EWCA Civ 49. Equally, in appeals relating to children, this court readily recognises that events do not stand still between first instance hearing and appeal, and a liberal attitude to the admission of evidence and information relating to the changing factual sub-stratum of a case is often adopted.

9. However, such an approach does not easily fit with the strict discipline of judicial review. In my judgment, this court's task in the instant case is to decide whether or not the judge made an error of law in refusing to quash the defendant's decision that the appellant required access to full time nursing care in a nursing home. I therefore propose to consider the case on the same basis as the judge, namely that the decisions by the Defendant which are subject to challenge are those of 13 August and 6 October 2003. I do not propose to consider, unless it is absolutely necessary to do so, whether or not the judge was correct to decide, as he did, that the up to date / last minute information placed before him did not alter the position.

The legislative framework

10. This is relatively complex, but not in dispute. It is fully set out by the judge, and Miss Jenni Richards, for the Appellant, has provided a

succinct summary in her skeleton argument, which I gratefully adopt. Section 47(1) of the National Health Service and Community Care Act 1990 (the 1990 Act) imposes upon a local social services authority duties in relation to the assessment of community care needs in the following terms:

> … where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –
>
> (a) shall carry out an assessment of his needs for those services; and
>
> (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.

11. Section 47(3) of the 1990 Act provides that:

> If at any time during the assessment of the needs of any person under subsection (1)(a) above, it appears to a local authority –
> (a) that there may be a need for the provision to that person by such Primary Care Trust or Health Authority as may be determined in accordance with regulations of any services under the National Health Service Act 1977 …
> the local authority shall notify that Primary Care Trust [or] Health Authority … and invite them to assist, to such extent as is reasonable in the circumstances, in the making of the assessment; and, in making their decision as to the provision of the services needed for the person in question, the local authority shall take into account any services which are likely to be made available for him by that Primary Care Trust [or] Health Authority …'

12. Section 46(3) of the 1990 Act defines 'community care services' as services provided under various enactments. These include Part III of the 1948 Act, the material provisions of which are sections 21 and 26. Section 21 provides as follows:

> (1) Subject to and in accordance with the provisions of this Part of this Act, 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 18 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 …'

13. Section 21 of the 1948 Act thus imposes a duty on Wandsworth to provide a person such as the Appellant with residential accommodation. It is common ground between the parties that section 21 creates a duty owed to an individual (not a general or "target" duty) to provide accommodation, which is suitable for the needs of that individual.

14. Section 26 of the 1948 Act allows local authorities to comply with their duty under section 21 by arranging for accommodation for individuals in private or voluntary sector homes (rather than in homes managed by the local authority). Thus section 26(1) provides that:

> (1) Subject to subsections (1A) and (1C) below, arrangements under section 21 of this Act 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 with subsection (1)(a) or (aa) of that section, and
> (b) the arrangements are for the provision of such accommodation in those premises.

15. Section 26(1A) stipulates that arrangements under section 26 for the provision of accommodation together with nursing or personal care can only be made where the organisation or person managing the home is registered under the Care Standards Act 2000. Section 26(1C) provides that:

> Subject to subsection (1D) below, no arrangements may be made by virtue of this section for the provision of accommodation together with nursing without the consent of such Primary Care Trust or Health Authority as may be determined in accordance with regulations.

16. Under the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 the local authority is required to arrange for care in the accommodation of the person's choice, provided that it is suitable in relation to the person's assessed needs and it does not cost the authority

more than it would usually expect to pay for someone with the individual's assessed needs.

17. Section 49 of the Health and Social Care Act 2001 (the 2001 Act), upon which particular reliance was placed by the Defendant, provides that:

> (1) Nothing in the enactments relating to the provision of community care services shall authorise or require a local authority, in or in connection with the provision of such services, to –
>
> (a) provide for any person, or
>
> (b) arrange for any person to be provided with,
>
> nursing care by a registered nurse.
>
> (2) In this section 'nursing care by a registered nurse' means any services provided by a registered nurse and involving –
>
> (a) the provision of care, or
>
> (b) the planning, supervision or delegation of the provision of care,
>
> other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse'.

18. Statutory guidance has been issued by the Secretary of State under the Local Authorities Social Services Act 1970 in relation to local authorities' exercise of their powers under the 1990 Act. This is guidance with which local authorities should comply (see ***R v LB Islington ex p Rixon*** (1998) 1 CCLR 119) and it provides, materially, at paragraph 3.24 that:

> the objective of ensuring that service provision should, as far as possible, preserve or restore normal living implies the following order of preference in constructing care packages:
>
> - support for the user in his or her own home …
> - a move to more suitable accommodation …
> - a move to another private household …
> - residential care;
> - nursing care;
> - long-stay care in hospital.'

19. Paragraph. 3.16 of the guidance states that:

> ***The individual service user and normally, with his or her agreement, any carers should be involved throughout the assessment and care management process. They should feel that the process is aimed at meeting their wishes.*** (my emphasis)

The statutory criteria as applied by Wandsworth

20. The judge dealt with this aspect of the matter in the following way in paragraphs 17 to 23 of his judgment:

> 17. As well as National Guidance and Directions, in March 2003 the South West London Strategic Health Authority and a number of London Borough Councils, including the Defendant, entered into an agreement entitled "NHS and Local Authority Responsibilities for meeting Continuing Care Needs". This agreement was made pursuant to the Department of Health's Guidance on Nursing Care and Residential Accommodation. Miss Richards, on behalf of the Claimant, described this agreement as containing the Defendant's policy. Miss Laing, on behalf of the Defendant, submitted that the Defendant followed and properly applied the criteria in it.
> 18. The agreement states that the Guidance in it is to assist in the promotion of better practice in assessing the health and social care needs of people who need care support from the NHS and social service departments. It is part of a programme which aims to achieve a number of objectives, including "***that decisions about how needs are met and how risks to health are addressed are made as far as possible in full partnership with the people concerned, their carers and relatives where appropriate***" (my emphasis).
> 19. Section 1.3 of the agreement states that all patients requiring continuing care will fall into one of three categories. Level 1, which is not relevant in the present case, concerns 100% NHS funding care. Level 2, "continuing health and social care" is "a package of care which both NHS and social services contribute to. The NHS input may include registered nursing care contributions for those people in a care home with nursing, plus in all settings other NHS services…". Level 3 is local authority funded care, applicable where the local authorities responsible for the totality of the care package and there are no additional health care needs

input, apart from the usual access to primary care and health services as required.

20. In the present case the issue is whether the Claimant should be assessed at Level 2 or at Level 3 and if at Level 2, whether her particular circumstances require her to be placed in a registered nursing home.

21. The agreement contains tables indicating in respect of Levels 2 and 3 the care characteristics and criteria, the services available, and the care options. It is stated that those requiring health input as part of a level 2 package of care may, for example, have: a progressive medical condition that is likely to result in an increase of dependency; mobility needs requiring the skilled assistance of more than one person for the majority of transfers; single or double incontinence which is controlled / managed by the use of drugs, toileting regimes catheterisation, or incontinence pads; and cognition impairment or lack of motivation which places them at risk of self-harm, neglect or exploitation. It is clear from the agreement that the services available as part of a level 2 package include health care input to people resident in care homes and in their own homes as well as those who are in nursing homes.

22. The care characteristics at Level 3 include people who need help with washing, dressing, toileting and means but who are able to transfer from a wheelchair with or without assistance of one another; who are occasionally incontinent or whose incontinence (single or double) is manageable using incontinence aids; and who have a degree of cognitive individual supervision arising from extreme behavioural disturbance.

23. Part 2 of the agreement contains guidance on the process and implementation of the criteria, including assessments. It is stated in section 2.2 that there should be a single assessment process. Section 2.3 describes the joint health and social services continuing care panel. It recommends that completed continuing NHS health care assessment to be read at the panel should be co-ordinated by one central point within the primary care trust so that the assessments can be checked for completeness before being forwarded to the decision making members of the panel. It is said that it is important that the panel has a balanced representation of social services and primary care trust members and that each carried the delegated authority of their respective organisations to agree the assessed level of care and individual needs. ***Paragraph 2.4 states: "decisions on levels of care should be based on fully***

completed assessment materials, this should include either: a single assessment document or full community care needs assessment and nursing needs assessment together with the completed medical report and relevant therapy reports". It also states "all decisions at panel should be minuted and in addition recorded on their pro forma…. which outlines the rationale for the decision against the criteria. All parties must be informed in writing of [the decision]. (my emphasis)

21. Although I have only highlighted part of paragraph 18 and the reference to paragraph 2.4 of the guidance set out in paragraph 23 of this extract from the judgment, the guidance identifies the following good practice in paragraph 2.3: -

> Whilst it is recognised that individual PCT and Local Authorities may have varying operational policies and procedures, it is considered good practice for each panel to have identified terms of reference which give the following details: -
>
> - Confirmation that the panel has been established to provide a forum for receiving and agreeing assessments of an individual's needs and confirming which level of care they are eligible to receive.
> - The terms of reference should identify membership of the panel and the roles and responsibilities of each member including delegated powers. The terms of reference should also include the venue and frequency of meeting. The chair of the panel should be agreed by Primary Care Trusts and Social Services Departments.
> - It is important that there is balanced representation of Social Services and Primary Care Trust members and that each carries the delegated authority of their respective organisations to agree the assessed level of care an individual meets.
> - That both Primary Care Trusts and Boroughs are comfortable with level of representation from each organisation.

It is manifest from the facts of the instant case, to which I will now turn, that there were several, and in my judgment serious, breaches by Wandsworth of the guidance (which I shall call "the local guidance") contained within the Agreement.

The relevant facts

22. At the time of her move to Mary Court in December 1996, the Appellant was given qualified assurances by Servite that Mary Court would be her home for life unless her health deteriorated to such an extent that she required specialist-nursing care. In 1999, however, Servite decided to close Mary Court as a residential care facility. The Appellant, through Linda Goldsmith and along with another resident, challenged that decision by way of judicial review. Wandsworth was a party to those proceedings.

23. On 12 May 2000, Moses J upheld the Appellant's claim that she had received assurances about remaining at Mary Court, but concluded that Servite was not amenable to judicial review. He granted permission to appeal to the Court of Appeal, which in turn granted mandatory interim relief requiring the home to remain open pending the determination of the appeal. However, the appeal was subsequently compromised in July 2000 by a Consent Order which recorded the following terms: -

> 1. Subject to (Wandsworth's) continued compliance with paragraph 3 hereof (Servite) agrees to continue to provide residential accommodation with board and care at Mary Court to the Appellant(s) until the earlier of the respective Appellant's death or the event set out under paragraph 2 below.
> 2. (Servite's) obligation to provide residential accommodation with board and care at Mary Court to each of the Appellants will cease 28 days after receipt by Servite of a lawful local authority community care assessment stating that the respective Appellant's assessed needs can no longer be met at Mary Court and / or that nursing care is required such that it would not be lawful for the respective Appellant to remain at Mary Court.
> 3. (Wandsworth) agrees to provide funding pursuant to its obligations under Part III of the National Assistance Act 1948 in respect of the first and second Appellants respectively at such rates as may be agreed between (Servite) and (Wandsworth) from time to time.

24. At all times after December 1996, the cost of the Appellant's placement at Mary Court was, as I have already stated, funded partly by Wandsworth under Part III of the 1948 Act and partly from the Appellant's benefits. The evidence of Linda Goldsmith, which is uncontradicted, is that from 1996 the Appellant continued to live contentedly at Mary Court where she has her own accommodation, and where the standard of care she receives is excellent.

25. Prior to 25 May 2003, the Appellant had been admitted to hospital on two occasions. Of these the more relevant is the occasion in mid-2001 when she fell seriously ill with a virulent infection from which she was not initially expected to recover. Indeed, on this occasion, Linda Goldsmith agreed that if the situation arose, the Appellant should not be resuscitated. However, she survived the infection and was discharged home to Mary Court in a very vulnerable state. Additional care was bought in; the community nursing service provided nursing care, and back in what Linda Goldsmith describes as the familiar environment of Mary Court she slowly recovered.

26. The current dispute was precipitated by the Appellant's fall on 25 May 2003 described in paragraph 2 of this judgment, and her consequential admission to hospital. Following a ward meeting on 12 June 2003 (by which time the Appellant was medically fit to be discharged) Wandsworth decided to refer the Appellant's case for consideration by the Local Continuing Care Panel (LCCP), the joint health and social services panel identified in paragraph 23 of the judge's judgment, which I have recited at paragraph 20 above. The panel met on 8 July 2003.

27. The decision to refer the Appellant's case to the LCCP can, I think, be taken for the purposes of this appeal as marking the beginning of Wandsworth's decision-making process. Although Linda Goldsmith's understanding of the outcome of the ward meeting on 12 June 2003 was that it had been agreed the Appellant's needs were for social, not nursing care, that was not Wandsworth's perception, and no criticism has been, or could in my judgment be made of the initial decision to involve the LCCP. It is, however, from this point that Wandsworth's decision-making process needs to be subjected to careful scrutiny.

28. The judge deals with the meeting of the LCCP and events immediately following it in paragraphs 33 to 35 of his judgment. These read as follows: -

33. The Continuing Care Panel met on 8 July and considered reports prepared in June and early July by social services, the hospital and the primary care trust. From the hospital there were medical, nursing, night nursing, physiotherapy and TO reports. From the primary care trust there was a physiotherapy report and a nursing needs assessment. These described the claimant as needing two people on a bad day to help her to transfer and assistance three or four times during the night. There are references to cognitive problems, disorientation and confusion. The Panel also had before it a document by (Linda Goldsmith) and her sister, expressing their views as to what should happen and their disappointment at not being permitted to attend the meeting of the panel.

34. The Panel concluded that the claimant had nursing care needs at Level 2 and recommended that they should be met in a nursing home. Mrs. Linda Goldsmith was notified of the decision by telephone later the same day. She had asked to attend the meeting but was informed by Mrs. Graham (the social worker then dealing with the Appellant's case on behalf of Wandsworth) that she could not attend as the Panel was considering clinical evidence only. As a result, the claimant's solicitors wrote to Wandsworth (on 14 July 2003) stating that the decision, taken on observations made in the first few weeks of the claimant's hospitalisation and without an up-to-date Community Care Assessment, was unlawful. They asked that the decision be withdrawn and that the claimant be returned to her home with extra care provided to help her manage while her hip was mending. They informed Wandsworth that failing a satisfactory response, judicial review proceedings would be instituted.

35. On 17 July 2003 a community care assessment was undertaken by Ann Forster, one of Wandsworth's social work team managers. Miss Forster met the claimant and Linda Goldsmith. Her report stated that the claimant needed supervision and all support of one person with all activities of daily living. There is a detailed assessment of needs in section 9 of the report in which the designated action in many of the fields is "to seek to provide this case in her present residential setting if practical and safe in all other aspects of her care". The overall conclusion was that the claimant had "made a good recovery from her injuries and

> surgery and would appear to me when I saw her on 16 July 2003 to be "residential care fit". She noted the conclusion of the panel a week earlier that the claimant's clinical nursing needs indicated she required nursing care but stated that should her clinical situation remain as it was on the day she saw her the Chair of the panel should review the decision.

29. The document prepared by Linda Goldsmith for the LCCP made a number of pertinent points accurately summarised by Miss Richards as including the following: (i) the Appellant had previously been discharged home to Mary Court with greater health and care needs than currently; (ii) the Appellant had improved and recovered once back in her familiar home environment; (iii) the Appellant would be likely to improve further if returned home now; and (iv) her current and future needs should be assessed on the basis of her presentation once settled back at home rather than on the basis of how she presented in hospital.

30. Mrs. Jean Graham set out Wandsworth's 'reason for presentation to panel' in a document dated 3 July 2003, the terms of which I set out at paragraphs 73 and 74 below. This document was before the panel but was not shown to Linda Goldsmith, and was provided to her representatives only in October 2003.

31. On 25 July 2003 Wandsworth replied to the letter before action written on 14 July 2003. The letter referred to the panel's view that the Appellant had nursing needs at level 2 (medium) which the panel recommended should be met in a nursing home. Having referred to Ann Forster's assessment the letter continued as follows:

> At the present time therefore further assessment and consideration is being given to the Appellant's changing needs and how to meet them appropriately in order to ensure a safe discharge from hospital. This includes careful consideration by staff from Mary Court registered care home as to whether her current assessed needs can be safely met in that environment or not."

32. In fact, as Miss Richards points out, Servite had already arranged for its own re-assessment of the Appellant on 21 July 2003, and on 23 July 2003 Servite confirmed that it was clear from the assessment that it could meet the majority of the Appellant's current care needs at Mary Court. However, Servite expressed concern at what it considered to be

the Appellant's high risk of falling and indicated that it would require additional funding in order to provide extra care to address this risk.

33. At a meeting on 29 July 2003 between Linda Goldsmith and Vincent Kelly, the latter maintained Wandsworth's view that the Appellant's needs could no longer be met at Mary Court. However, on 1 August 2003 Wandsworth indicated that 'in order to clarify the position as to Ms Louisa Goldsmith's current needs' it had arranged for the hospital to undertake a further nursing needs assessment. In response to a request for clarification of the basis on which it considered that her needs could not be met at Mary Court, Wandsworth asserted in a letter dated 4 August 2003 that 'it is clear from the assessment report that Ms Louisa Goldsmith requires constant supervision, which is not available at Mary Court'.

The instruction of Dr. Cottee

34. The judge records two developments taking place on 11 August. These were: -

> First, Servite indicated that it could accept the claimant back if additional resources were provided. Secondly, the further Nursing Care Needs assessment was initiated by a letter from Mrs. Graham to Dr. Cottee, a consultant geriatrician at the hospital. The reason for writing to Dr. Cottee was that Dr Coles, the consultant in geriatric medicine who chaired the Panel was on leave. Dr. Cottee responded on 12 August.

35. The judge summarises Mrs Graham's letter to Dr. Cottee. I propose, however, to recite it in full. Mrs. Graham's letter must have been given to Dr. Cottee by hand, since it does not bear a postal address and does not appear to have been sent by facsimile. The letter reads: -

> Dear Dr. Cottee,
> Re Louise Goldsmith
> I have enclosed up to date reports in respect of the above woman who is currently in Chelsea and Westminster Hospital and has been on the delayed discharge list for some weeks.
> Mrs. Goldsmith ordinarily lives at Mary Court and the current view of the professionals involved is that her needs are too high for her to return there. Her daughter, however, is adamant that she

should return there. There is a long history and it was Mrs. Goldsmith's daughter who took up the fight for her mother to remain in Mary Court when its status was changed from residential to sheltered accommodation.
I will be grateful if would will consider these recent reports in respect of Mrs. Goldsmith and confirm to us that the previous decision made at the Continuing Care panel on 8.7.03 is still accurate i.e. that she meets the criteria of Band 2 medium. Since following the decision, Mrs. Goldsmith's daughter believes that her mother has improved to the extent that she could return to Mary Court. Miss Goldsmith has taken legal advice and we are advised that a judicial review may be sought.
It will be greatly appreciated if you will kindly let us know as soon as possible whether you consider that the previous banding is still appropriate.
With thanks,
Yours sincerely,

36. The letter does not identify the "up to date reports" enclosed, nor does Dr. Cottee do so in his reply on the following day, which I set out below. For the reasons I give later in this judgment, I do not regard Mrs. Graham's letter of 11 August 2003 as an appropriate letter of instruction in the context of the decision which Wandsworth was required to make about the Appellant's future care and housing needs.

37. Dr. Cottee replied very promptly the next day, 12 August 2003 (a fact on which the judge commented). As Dr. Cottee's role in the decision making process assumed a major importance in the case, I propose to set out his response in full. He wrote:

> I write to advise my assessment of the recent reports sent to me in respect of the above-named
> The reports indicate that Mrs. Goldsmith's needs are consistent with level 2 medium nursing care i.e. she meets the criteria:
>
> > (b) single or double incontinence which is managed by the use of drugs, toileting regimes, catheterisation or incontinence pads / sheaths, with occasions significant contact of skin with urine and / or faeces.
> > (c) Stable drug regime requiring registered nurse supervision of administration and occasional GP review

> (f) cognitive impairment, lack of motivation or moderate degree of behavioural disturbance, which places the individual at risk of self-harm, or neglect.
>
> Due to her cognitive impairment and the variability of her condition, Mrs. Goldsmith should have access to a nurse on a daily basis and may need access to a nurse at any time. Mrs. Goldsmith's condition needs to be monitored on a daily basis in order to determine whether she may be having "a bad day" or whether she may be unwell. This requires the knowledge and skills of a trained nurse.

38. Having summarised this letter, the judge notes Linda Goldsmith's complaint that: -

> …. she was not informed of the reference to Dr. Cottee, to this letter, or to his views and not given any opportunity to make representations or to provide further information to him. Moreover, Miss Forster's Community Care Assessment was not one of the reports sent to him.

To this Miss Richards adds that Dr. Cottee had neither seen nor assessed the Appellant.

Wandsworth's decision of 13 August 2003

39. The judge records that on 13 August 2003 Linda Goldsmith was invited to a further meeting with Mr. Kelly. She was informed that Wandsworth considered that her mother's needs could not be met at Mary Court, and she was handed a letter dated 13 August and a care plan. The latter stated that the service to be provided by Wandsworth was '*care in a nursing care unit to be agreed with your representative Linda Goldsmith*'. This is the meeting at which the judge found the initial decision, which is subject to challenge, was taken.

40. It is, I think, worth noting that the letter, which is signed by Mrs Graham, is a standard, pro forma letter, to which the care plan is attached. It is addressed to the Appellant c/o Linda Goldsmith. The opening paragraph reads: -

> Following your recent assessment by Social Services under section 47 of the (1990 Act) I am sending you the attached summary of your needs and details of the services that we hope

will meet them. This care plan will give you the relevant information you need regarding the cost of your services and how to get in touch with the service provider.

41. The next two paragraphs deal with the recipient's financial contribution to the cost of care. There are then four bullet points, the first of which reads: "Your care plan will be routinely reviewed to ensure that it is satisfactorily meeting your needs". An unidentified telephone number is provided "Should you have any concerns about the Care Plan or need further advice". A telephone number is also given for an organisation called "CareLine Information Centre for Wandsworth" a local telephone helpline service providing "information on health and social care services that are available to people who live in Wandsworth. CareLine can provide up-to-date information and leaflets on all these services".

42. The aims of the care plan are described thus: -

> To provide a practical and safe response to all aspects of personal care, to include assistance with washing, dressing, feeding, assistance with medication and personal hygiene.
> To provide a practical and safe living environment which enables the assistance of one person and at times the assistance of two people for help in mobilising and transferring. This environment also to provide supervision to minimize the risk of accidental falls.
> To provide an environment where your emotional as well as your health care needs are met.
> To enable access to a qualified nurse so that any fluctuations in your ability to manage can be monitored appropriately and the appropriate assistance provided.

43. Under the heading: SUMMARY OF ASSESSED NEED, the following bullet points are set out:
    - Assistance of one person, and sometimes two people, with washing dressing, foods /fluids, using the toilet
    - Help with managing urinary incontinence
    - Assistance of one person, and sometimes two people, with transfers and mobilising. Supervision at all times due to your history of falls.
    - Need for prompting and encouragement with medication.
    - Assistance with all domestic tasks

- Assistance with managing money.
- Consistent care from people who understand your needs and have a positive relationship with you as an individual
- In view of your cognitive impairment and variability of your condition, access to a qualified nurse on a daily basis so that your condition can be monitored and appropriate assistance offered.

Following discussions with your current care provider, Servite Houses, and a review of your current health and social care needs, the above care needs cannot be made within Mary Court.

On going care should now be provided in a registered nursing care home.

44. On 15 August 2003 Wandsworth wrote to Servite giving notice to terminate the Appellant's placement on the basis that 'she requires care which can only be provided in a registered nursing home'

The meeting with Dr. Cottee on 6 October 2003

45. Proceedings for judicial review were issued on 21 August 2003. On 24 September 2003 the permission application came before Burton J. He adjourned it to 14 October 2003 on the parties agreeing to use their best endeavours to convene a meeting to be attended by Dr Cottee (or Dr Coles), Linda Goldsmith and legal representatives on both sides (and a note-taker) "for the purpose of discussing (inter alia) the nature and extent of the claimant's needs; and thereafter, if necessary, to convene a meeting between representatives of the claimant, the Defendant and Servite Houses…".

46. The meeting with Dr Cottee took place on 6 October 2003. We have two records of this meeting: I have used the fuller, excellent note taken by Mr. James Cornwell, counsel instructed by Wandsworth. As this was the occasion on which the judge held that the decision under challenge was confirmed, I shall need to examine it in a little detail.

47. The meeting was attended by Dr Cottee, Linda Goldsmith, Mr. Malcolm McKenzie (a friend of Linda Goldsmith), the Appellant's solicitor, Louise Arthurs, who was delayed and did not arrive until the meeting had been in progress for a little over half an hour, Mr. Kelly, Janice Billingdon from Wandsworth's social services department, who was present as a note-taker, and Mr. Cornwell.

48. The first part of the meeting was taken up with a discussion between Dr Cottee and Linda Goldsmith. Dr Cottee made it clear at the outset, that "his only role was to assess the information provided by the professionals and assess that against Wandsworth's agreed criteria". This was a theme to which he returned several times during the meeting.

49. The limited role taken by Dr. Cottee is demonstrated by his reaction to the first subject raised by Linda Goldsmith, namely her mother's incontinence. Linda Goldsmith is recorded as saying:

> The first was that her mother was not incontinent on any accepted definition as she could tell you that she wanted to go to the toilet and asked you to go with her. She said that she never asked nurses for help in taking her mother to the toilet and took her on her arm. She said that he mother passed urine on the toilet, that she had never been doubly incontinent expect when she had suffered from infections, and her incontinence was manageable.
> Dr Cottee said that Linda Goldsmith had precisely put her finger on the matter as a regular toileting regime fell within the criteria. He said that he could only assess on the basis of the nursing reports he had before him. Linda Goldsmith's mother was not incontinent so long as she had a toileting regime. Linda Goldsmith said everyone knew that continence is managed regularly in residential care. Dr. Cottee said that it was a Level 2 criterion.
> Linda Goldsmith asked Dr. Cottee if he made his assessment on the basis of other people's assessments and how this could be relevant to what her mother was like in Mary Court. Dr. Cottee said that he did not know what Linda Goldsmith's mother was like in Mary Court and that the agreed process was being followed.

50. This exchange is paradigmatic of the whole discussion. When Linda Goldsmith described the stability of the Appellant's drug regime at Mary Court, the failure of the nurses to maintain it in hospital, and the fact that the Appellant's general practitioner had discussed her drug care with Linda Goldsmith and the Mary Court management, Mr. Kelly intervened to say that Dr. Cottee "could not make any comment on Mary Court and that the assessment was not to do with whatever regime was available at Mary Court. He said it was impossible to ask Dr. Cottee to judge the

impact of Mary Court on Linda Goldsmith's mother. Linda Goldsmith said that was a flaw in the whole system…"

51. On the Appellant's cognitive impairment, there was no real point of dispute between Dr Cottee and Linda Goldsmith: -

> Dr. Cottee said there was no evidence of behavioural disturbance but there was evidence of lack of initiative and repeated references in the reports to the need for constant prompting. Linda Goldsmith said she accepted this but said it was irrelevant, as her mother's cognitive function had not changed.

52. When Dr. Cottee referred to the Appellant's prognosis, Linda Goldsmith made what reads as a somewhat emotional statement, but which nonetheless clearly reflected her position, and which in my judgment is relevant both to the discussion which was taking place and, more importantly, to the decision which Wandsworth had to take. She is recorded as saying: -

> There were a whole lot of other medical conditions that had not manifested in the last two years because her mother had done so well. She said it was entirely meaningless to say that her mother required high levels of care. Her mother had the highest possible level of care in the country at Mary Court and she asked the meeting to consider this. She said that all that mattered was the quality of her mother's life and the quality of her death. She wanted her to die at Mary Court. She said that if there was somewhere that could care for her mother to a higher level she had not yet found it. She said that the nurse managers in the hospital said they could not give her mother care.
> Mr. Kelly said the meeting was to discuss the type of care, not its location. Location would be the purpose of a second meeting and he was trying to keep the meeting on that discussion.

53. In the context of 6 October 2003 being the occasion on which the decision under challenge was confirmed, I regard Mr. Kelly's intervention as significant for reasons I will develop later in this judgment.

54. Dr Cottee then repeated his view that the Appellant required "Level 2" care, although he could not say where that was to be delivered. When Linda Goldsmith sought to discuss the quality of care given in a residential home, Dr. Cottee repeated that his job was to allocate the appropriate band. He was not looking at location, nor, it seems from the note, context.

55. Linda Goldsmith then put to Dr Cottee that whilst she accepted that he had had to make his decision based on clinical information, there was a risk that by causing the Appellant to lose her home there was a danger of imposing a greater risk on the Appellant than the one Wandsworth were trying to protect her from. Dr Cottee's response was that he had to accept the professional judgment of his colleagues. The note refers to "a checking process in that the reports might clash and that would be investigated". Dr. Cottee said, however, that in this case the reports were very professionally done and were consistent. This observation was challenged by Ms Arthurs (who had arrived by this stage) and Linda Goldsmith. There was further discussion relating to the reports and to the process.

56. The part of the meeting which involved Dr. Cottee terminated in the following way:

> Mr. Kelly said the he would not take the meeting further. The understanding was for Linda Goldsmith to have a conversation with Dr. Cottee. The meeting with Dr. Cottee had ended, and he did not intend to continue the meeting. Linda Goldsmith said that Dr. Cottee had argued his case very clearly but it demonstrated that the system was flawed because it took too little account of context. She said that it alarmed her that the panel looked at things out of context. She said that she appreciated the way Dr. Cottee had reached his conclusion and that it was crystal clear. She said that it intrigued her that her mother could be put in a banding level that she does not perfectly fit.
> Malcolm McKenzie said that the judge had ordered the meeting to reach agreement out of court. Linda Goldsmith said that the judge had also said that one of the biggest disagreements was the failure to accept the level of care. She said there was no disagreement about the level of care needed but that saying it was level 2 set a rigid boundary.

Dr Cottee then left to attend another engagement.

57. What happened next is also, in my judgment, significant. The note continues: -

> Mr. Kelly asked if Linda Goldsmith wanted to continue the meeting. Linda Goldsmith asked if Wandsworth would blindly follow Dr. Cottee's recommendation. Mr. Kelly said that Dr. Cottee had explained the reasons for his decision and had said that Linda Goldsmith had reinforced his view of her mother's care need. Dr. Cottee was not going to change his assessment that Level 2 (Medium) was required. He said that he was quite happy to discuss location, but it was quite clear that care could not be provided at Mary Court. Linda Goldsmith said that Dr Cottee left out the context. Mr. Kelly said that Dr. Cottee based his assessment on clinical judgments from the hospital. Linda Goldsmith said that Dr. Cottee accepted he could not look at the context. The court order required Wandsworth to show that her care needs had changed. Mr. Kelly said that Linda Goldsmith's mother's assessed care needs were for nursing care and that the current assessment of care needs required that to be in a nursing environment. Linda Goldsmith said that no one challenged that it was appropriate for her mother to stay at Mary Court at the time of the court order. James Cornwell said that the order made no reference to change in her condition and simply stated that she should live in Mary Court provided she did not need nursing care. Linda Goldsmith said that a lot was at stake and Wandsworth were placing her mother in a life-threatening situation. She had lots of written evidence to support the view that her mother's needs had not changed.

58. There was then further discussion, during the course of which the following exchange occurred:

> Malcolm McKenzie said that all the things Dr. Cottee was concerned about were open to negotiation and asked if it was possible to negotiate about containing these anxieties. Mr. Kelly said he could not talk about it, as Mary Court could not take her back.
> Linda Goldsmith asked if they could talk about the fact that Mary Court had provided care for the last seven years. She said that the

care plan at Mary Court would require only minor tinkering. She said it was Mary Court that had identified the are needs years ago and the risks they faced were no higher… Mr. Kelly said that he was not sure what scope there was for negotiation as Linda Goldsmith was asking them to look at what could be tweaked but he was saying that the assessment said that her needs could only be served in a nursing environment. He said that Servite could not do it because of its registration. Linda Goldsmith said that this was negotiable and asked what about her mother's best interests and her human rights

Mr. Kelly stated that he did not have a place (by which he plainly meant a nursing home) in mind for the Appellant, as they had not started that discussion. Linda Goldsmith said that she was surprised by this. She asked if everyone could agree to the principle that professionals should not intervene in a way that would harm a patient's best interests. Mr. Kelly said that he would have to think about this before agreeing.

59. Mr. Kelly's final contribution was to say, in answer to Malcolm MacKenzie, that he was not in a position to negotiate care, which went "slightly beyond the call of duty". He then asked if the meeting was finished. Linda Goldsmith asked about the appeals procedure against the LCCP's decision and made the point that she had not seen any written decision. Mr. Kelly said that the LCCP did not provide written decisions, and that he would provide details of the appeals process, which was through the primary care trust.

Events after 6 October 2003

60. In the light of Mr. Kelly's answers in the second part of the meeting on 6 October, it is unsurprising that no second meeting occurred, as envisaged by Burton J's order. However, on 10 October, Dr. Cottee wrote a further report, in which he says that he had "recently" been asked to re-review the Appellant's case, and had been provided with "updated versions of all the reports", including what he identifies as "the Easy Care Assessment" produced by Wandsworth. The report confirms the views he expressed at the meeting on 6 October.

61. The case was re-listed for hearing before Mr Justice Jackson on 14 October 2003, but was again adjourned, this time on the basis set out in the extract from the judge's judgment, which I have recited at paragraph

5 above. The Appellant returned to Mary Court on 20 October 2003, and has remained there to date. In the light of the view which I expressed in paragraph 9 of this judgment, however, I do not propose to relate the detail of the events which have occurred since 6 October 2003

62. Before leaving the facts, I should record that the judge both identifies the reports which Dr. Cottee had seen prior to the meeting on 6 October, and describes the meeting itself in a single paragraph: -

> At the meeting (Linda Goldsmith) put her points to Dr. Cottee. He stated that the extra information she had given him confirmed and reinforced his view that Level 2 medium care was required. He also said that his role was to assess the information provided by the professionals against the Defendant's agreed criteria. He could not say where the care was to be delivered. Mr. Kelly took little part in the discussion at that stage but after Dr. Cottee had left he stated that the Claimant's assessed care needs were nursing care and the current assessment of care needs required her to be in a nursing environment. Dr. Cottee had made the point that there was a need for immediate access to nursing carers and this could not be provided in the residential home. In his report dated 10 October, Dr. Cottee stated that "the need to continuously monitor [the Claimant's] oral fluid intake and the variability of the required dosage of analgesia …. should ideally be overseen by qualified nursing staff" and noted that she had an abbreviated mental test score of 0/10, the lowest score possible. He considered that she had failed to make any significant improvement despite many physiotherapy and occupational treatments.

The judge's assessment of Wandsworth's decision-making process

63. In his conclusions, the judge finds that prior to the meeting on 6 October, there were "undoubtedly procedural flaws with the approach to assessing what care the claimant would need after her discharge from hospital". He identifies the following in paragraph 73 of his judgment: -

> The requirements of paragraphs 2.3 and 2.4 of the agreement between the Defendant and the South West London Strategic Health Authority "NHS and Local Authority Responsibilities for meeting Continuing Care Needs were not complied with. The Panel did not have a full community care needs assessment when it met on 8 July 2003. Miss Forster's report was indeed not

> undertaken until after the Panel's decision and the complaint made on behalf of the claimant. Neither those representing the Claimant nor the court have seen a minute of the panel's decision outlining its rationale as the agreement requires. The Claimant's litigation friend was not informed of the decision in writing, as is also required by the agreement, although she was informed of the substance of the decision.

64. The judge then continues:

> 74. I do not, however, accept the submission that at that stage paragraph 3.16 of the statutory guidance had not been followed. (Linda Goldsmith) attended the ward meeting on 12 June; her views were in the family submission before the Panel; and she met Mr. Kelly on 29 July. I do not consider that the Guidance entitled her to attend the Panel meeting. By the middle of July the Claimant's solicitors were involved and the Defendant informed them on 1 August that they were arranging a further Nursing Care Needs Assessment. They were not, however, informed of the terms of the reference to Dr. Cottee and when he was initially asked to review the Panel's recommendations he was not informed of Miss Forster's community care needs assessment and does not appear to have had the family's views before him. The reference to Dr Cottee, moreover, asked him to "confirm to us" that the decision of the Panel was still accurate and he did this within 24 hours of the reference to him. Accordingly, the reference to him did not cure the flaws and indeed there appears to have been less input from the family before him than there had been at the Panel. For these reasons, I have concluded that at the time Linda Goldsmith launched these proceedings there were at least arguable grounds for challenging the decision and thus for permission to be granted.

65. The question which the judge then posed himself was "whether things changed as a result of the meeting on 6 October, and if so how." He then continued: -

> Is it correct, as is submitted on behalf of the Defendant, to see that meeting as one at which the views of the Claimant's representatives were fully and fairly considered so that the Defendant's conclusion after it that the Claimant's needs required care in a nursing home setting was one it was entitled to reach and which is not impugnable on public law grounds? Miss Richards

submits that this is not correct and that at the meeting there was no review by the Defendant of its decision and no consideration of the points advanced then and previously by (Linda Goldsmith). But the focus of the Claimant's challenge to the decision in the light of that meeting concerned the decision to place her needs in band 2 and the consequences of it; i.e. whether the Defendant assumed that the banding decision automatically meant that the care should be delivered in a nursing home setting.

76. Was the Defendant only going through the motions so that the meeting was in effect a sham? Prior to it, Dr. Cottee was sent up to date nursing reports and Miss Forster's community care needs assessment. At the meeting the points made in Dr. Cottee's report of 12 August were taken up by (Linda Goldsmith). They discussed incontinence, the drug regime and which required the supervision of nurses, the extent of cognitive impairment and deterioration, and the prognosis. I have concluded that the meeting of 6 October was not a sham. The recent nursing reports and Miss Forster's assessment were considered by Dr. Cottee. The Claimant's care needs and (Linda Goldsmith's) concerns about the banding decision and the method of assessment and the fact that she did not consider there had been a deterioration were discussed openly. The result was, however, that Dr. Cottee's view that the claimant needs nursing care was reinforced by what she said to him. The Defendant's conclusion expressed by Mr. Kelly at the meeting was that this nursing care must be provided in a nursing home.

77. The first and second of the individual grounds of the claimant's challenge "defective process" and "failure to apply own policy" primarily apply to the period before the meeting on 6 October. (Linda Goldsmith) and her representatives participated fully at the meeting and the Defendant and Dr. Cottee were fully aware of Miss Forster's assessment. It was, indeed, the reason the issue was referred to Dr. Cottee. In so far as these grounds are advanced with respect to the meeting, I do not think they have been made out.

Discussion

66. With great respect to the judge, whose expertise in the field of administrative law I am the first to acknowledge, I am wholly unable to accept his analysis of Wandsworth's decision-making process. In my judgment, it was seriously defective throughout. It was not "cured" by

the meeting with Dr. Cottee on 6 October and its deficiencies are sufficiently serious to vitiate the decision under review.

67. I preface my discussion of Wandsworth's decision-making process by repeating the difficulty, which has remained with me from my initial reading of the papers until the conclusion of submissions. The judge has provided the answer to the question: when? But two other questions abide. Who was the decision maker? And how was the decision made?

68. I began my recitation of the history by acknowledging that Wandsworth could not be criticised for referring the question of the Appellant's care needs to the LCCP. Indeed, it was a perfectly logical first step in the decision making process. But what was the membership of the LCCP? And what were its specific terms of reference (see paragraph 2.3 of the local guidance set out at paragraph 20 below)? We know that the meeting on 8 July was chaired by Dr. Coles, and in his second witness statement, Mr. Kelly tells us that apart from Dr. Coles and Mrs. Graham, the panel included a registered nurse manager at a nursing home and a nursing home authorising officer, both of whom he identifies by name. However, we have no written record of its discussions or its conclusions. I have to say that, quite apart from it being a plain breach of the local guidance recorded by the judge in paragraph 23 of his judgment (recited at paragraph 20 above) I find it both unacceptable and extraordinary that such a body does not keep minutes of its meetings, or produce reasons or any other form of record of its discussions and recommendations.

69. What we do know about the LCCP is that it made its recommendation without having before it a clearly critical piece of information, namely the community care assessment undertaken by Ann Forster on 17 July 2003, the conclusions of which plainly contradicted the reported views of the LCCP. That, in my judgment, is sufficient of itself to vitiate any conclusion it reached or any recommendation it made. The LCCP was meant to be a multi-disciplinary body. I simply do not understand how it could embark on its assessment without an up to date community care assessment.

70. In a judgment which I have already overburdened by citation from the documents, I am reluctant to cite extensively from Ann Foster's assessment. In stark contrast to many of the other documents in the case, however, it impresses by two aspects in particular: first, its comprehensiveness, and secondly its direct involvement of the person

with most knowledge of the Appellant, Linda Goldsmith. Every relevant issue addressed in a document which stretches over some 40 pages and covers every aspect of the Appellant's care, has a space for the comments of both the assessor and the carer, in this instance Linda Goldsmith.

71. It will be recalled that one of the objectives which the local guidance recorded by the judge in paragraph 18 of his judgment (again recited at paragraph 20 above) aimed to achieve was that "decisions about how needs are met and how risks to health are addressed are made as far as possible in full partnership with the people concerned, their carers and relatives where appropriate". That (whether its conclusions are right or wrong) is precisely what Ann Foster's assessment does.

72. By contrast, several of the documents which were before the LCCP dealt historically with the Appellant's condition in hospital, albeit that they were written at a time when she was medically fit for discharge. The Home Assessment Report, which is dated 20 June 2003 carefully, balances the pros and cons of nursing care against a return to Mary Court. Whilst the former would be "the safest environment" the ideal situation would be a return to her own familiar environment with additional support. A microenvironment could be set up for her there. Mary Court staff would be willing to rearrange furniture to set this up in the living room.

73. In her representations to the LCCP, Mrs. Graham reported Linda Goldsmith's view that the Appellant should return to Mary Court in order to provide a familiar environment and staff to enable her mother to rehabilitate more successfully. She continues: -

> The opinion of the doctor, OT, physio and ward staff at Chelsea and Westminster Hospital is that in order for this to happen, extra care would be needed at Mary Court to provide 24 hour supervision for Mrs. Goldsmith's safety.

74. Mrs. Graham's report concludes: -

> **ISSUES**
> Mrs. Goldsmith currently appears to need a higher level of care than can be provided by Mary Court.
> Her daughter believes that, given extra input, her mother will rehabilitate at Mary Court.

> The view of the professionals at Chelsea and Westminster Hospital and supported by OT is that Mrs. Goldsmith's ability to participate in and benefit from rehabilitation is very limited. In order for Mrs. Goldsmith to return to Mary Court, additional funding would be required in order to keep her safe and given the attached medical reports it appears that this could be an ongoing cost and not one which could be time limited as on the previous occasion.

75. What was Mrs. Graham's role at the LCCP? Was she Wandsworth's advocate, or was she both advocate and decision maker? If she was the decision maker, she had plainly made up her mind in advance of the LCCP meeting. Furthermore, we were assured by counsel that resources had not played a part in Wandsworth's decision. The final paragraph of Mrs. Graham's submission to the LCCP therefore introduces an irrelevant issue, particularly for a body apparently convened to discuss "clinical" issues.

76. Against this background, I have to say that I do not agree with the judge's finding that Linda Goldsmith had no right to attend the LCCP meeting on 8 July 2003. The judge gives no reason for that conclusion, apart from stating that he did not consider the Guidance entitled her to attend. The reason put forward by Wandsworth, namely that the LCCP was discussing "clinical" issues does not to my mind bear examination. Although we do not know the identity of everyone who was present, the LCCP is a joint health and social services panel. I very much doubt if most social workers or social work managers would welcome being described as clinicians. But in any event, if the LCCP was discussing the Appellant's care needs, that was manifestly a matter on which Linda Goldsmith had a contribution to make. If the matters to be discussed were purely clinical, what was the materiality of her written representations?

77. In my judgment, therefore, any conclusions reached by the LCCP on 8 July 2003 are vitiated for the reasons I have identified in the preceding paragraphs. Questioned by the court, Miss Laing submitted that the LCCP was not the decision maker. Its role was advisory. The decision to move the Appellant from Mary Court was not one for the LCCP: it was for Wandsworth. That, in my judgment, is clearly correct. Wandsworth had, accordingly, received defective advice based on inadequate

information. The question thus becomes whether or not subsequent events remedy the position. In my judgment, they do not.

78. The judge found that the decision under review was first taken on 13 August 2003. That decision must be considered in the light of the opinion of Dr. Cottee given on the preceding day, 12 August 2003.

79. I have set out the terms of the letter of instruction to Dr. Cottee at paragraph 35 above. I do not regard the manner in which Dr. Cottee was instructed as acceptable. Particularly in the light of Mrs. Graham's submission to the LCCP, it is clear that Dr. Cottee was not being asked to exercise his judgment to provide an independent second opinion: he was being asked to confirm the decision of a panel of which he had not been a member, and once again on written material which did not include Ann Forster's assessment. Furthermore, the letter misrepresents the position. Its second paragraph gives the impression that Linda Goldsmith is a lone voice unreasonably standing out against unanimous professional opinion. This is far from the case, as the history I have recorded demonstrates.

80. In my judgment, the only proper interpretation which can be put upon Dr. Cottee's involvement (and one he was at pains himself to emphasise at the subsequent meeting on 6 October) is that he was undertaking a very limited role. He was reviewing the documents presented to the LCCP and expressing his opinion on whether or not they demonstrated that the Appellant fell within level 2 or level 3 of the Agreement. The important point, in my judgment, is that if this was Dr. Cottee's role, then manifestly it was not determinative of the decision which Wandsworth had to make. It was one factor – possibly an important factor – but only one, which had to be weighed by Wandsworth against a number of others.

81. I have set out the details of Mrs. Graham's letter of 13 August 2003 and the care plan in paragraphs 39 to 43 above. Both are signed by Mrs. Graham. If she is the decision maker on 13 August 2003 when the decision was communicated to Linda Graham, that decision, in my judgment, is manifestly flawed. It is not just the juxtaposition of the dates, and the rapid sequence of events from letter to Dr. Cottee to completed care plan. Mrs. Graham had plainly made up her mind prior to the flawed meeting on 8 July, and her decision, as communicated via the care plan, is exclusively based on her perception of the LCCP

assessment as "confirmed" by Dr. Cottee. There is no evidence that she took into consideration or communicated to Linda Goldsmith any of the factors relating to the Appellant's overall well-being as identified by the Mary Court assessment, Linda Goldsmith's representations and Ann Forster's report, and – as her submission to the LCCP panel demonstrates - she was clearly concerned about the financial implications of the decision. In short, the decision of 13 August (if it was hers) was, in my judgment, a decision which was pre-determined, taken in the context of a manifestly flawed process and without a full and proper consideration of all the relevant considerations. If and in so far as the decision was Mr. Kelly's, there is nothing to suggest that he took a different view.

82. That takes us to the meeting on 6 October. Here it is said by Miss Laing that Mr. Kelly is the decision maker. I have set out the note of the meeting ***in extenso*** because it is manifest to me that Mr. Kelly went into the meeting with an entirely closed mind, and that the judge's analysis of the meeting as a "reconsideration" by Wandsworth of its decision is, with all possible respect, simply wrong. It was nothing of the kind, as the interventions by Mr. Kelly, which I have cited, demonstrate.

83. However, even if Dr. Cottee's determination of the Appellant as "Level 2" is acceptable, it does not, for the reasons I have already given at length, salvage Wandsworth's position. Dr. Cottee was at pains to explain the limitations of his remit. The decision whether or not to move the Appellant from Mary Court was not one for Dr. Cottee to make: he could not consider context: he did not know what the Appellant was like at Mary Court (see the paradigm exchange, which I have recorded at paragraph 49 above). The decision was for Wandsworth to make. The level 2 analysis of Dr. Cottee was only one aspect of the decision. Self-evidently, many other factors needed to be weighed in the balance.

84. I do not propose to rehearse the attitude of Mr. Kelly as demonstrated by the extracts, which I have cited earlier in this judgment. It is manifest that the only factor which weighed in Mr. Kelly's mind was Dr. Cottee's opinion that the Appellant needed nursing care. There is no evidence, to take just one example, that on 6 October he gave any consideration to the effect on the Appellant of a move into nursing accommodation. There is no evidence that he gave any proper consideration to the real possibility that arrangements could be made at Mary Court to meet the Appellant's needs. Indeed, the evidence is to the contrary: he was plainly deaf to

Linda Goldsmith's arguments, and made no attempt to give her any reasons for not accepting them.

85. Of course Mr. Kelly was entitled to give weight to Dr. Cottee's views. But as I have already said too often, Dr. Cottee's views, even on his own account, were limited to one aspect of the case. Thus if 6 October is to be considered the occasion on which the decision not to allow the Appellant to return to Mary Court was taken, and if Mr. Kelly is the decision maker, it is manifest to me that the decision was taken without full and proper consideration of all the implications, and that as communicated to Linda Goldsmith, it was on the basis of Dr. Cottee's opinion alone.

86. In my judgment, therefore, Miss Richards has made out her submission that Wandsworth treated Dr. Cottee's opinion as determinative. Indeed, in her able submissions when responding to the appeal, Miss Laing seemed to me, in reality, not to dissent from that proposition. Her argument was that this was a rational stance for Wandsworth to take; that Wandsworth was bound to be guided by Dr. Cottee, and that in the language of judicial review, Wandsworth's decision could not be impeached. For the reasons I have given, I cannot, speaking for myself, accept that submission. Wandsworth were under a duty to take a rounded decision, which took into account all relevant factors. It was under a duty to articulate that decision clearly to those advising the Appellant. In my judgment it failed to do both, and as a consequence its decision cannot stand.

87. I feel obliged to comment that Wandsworth has, in my judgment, brought this unhappy state of affairs upon itself. Nothing in this judgment is intended to doubt the good faith of either Mrs. Graham or Mr. Kelly. If the decision of the LCCP had been properly minuted, and reasons given for its conclusion; had Mrs. Graham and Mr. Kelly properly weighed up all the relevant considerations and communicated Wandsworth's reasoned and balanced decision to Linda Goldsmith it is unlikely that the decision would have been susceptible to judicial review. I am prepared to accept that it is Wandsworth's genuine opinion that the Appellant's best interests may be best served by nursing care. But that is not the issue. Judicial review is about process, and in my judgment the process here has been manifestly defective.

Article 8 of the European Convention on Human Rights

88. This analysis, in my judgment, is sufficient to dispose of the appeal. However, the judge accepted a submission made on Wandsworth's behalf that whilst Article 8 was engaged in relation to the Appellant's right to respect for her private life, if the decision was otherwise lawful, Article 8 added nothing to the debate. That was because Wandsworth's interference was both in accordance with the law and necessary in a democratic society to safeguard the Appellant's physical and psychological integrity. Speaking for myself, I an unable to accept that submission when applied to the circumstances of this case.

89. It is trite law that in addition to being in accordance with the law and necessary in a democratic society for the protection of the Appellant's health, any interference by the State with her right to respect for her private life must be proportionate. There is no evidence, in my judgment, that Wandsworth gave any consideration to the principle of proportionality.

90. This is particularly marked in the meeting on 6 October. I have already set out in paragraph 52 above what can only be regarded as Linda Goldsmith's practical, albeit emotional, expression of the Appellant's Article 8 rights. I have recorded Mr. Kelly's response. It is apparent to me that at no point in the meeting is there any evidence that either Mr. Kelly or any other Wandsworth decision maker had addressed their minds either to Article 8 itself or to the proportionality of Wandsworth's response.

91. These are not academic considerations. It is not in dispute that a change to a strange environment for a person of the Appellant's frailty could have serious if not fatal consequences. The proportionality of the response is, therefore, of the utmost importance. In my judgment it is not good enough for Wandsworth, after the institution of proceedings, to produce evidence that this was a factor in its mind when it made the decision (whenever that was). In my judgment, the court has to look at the decision at the time it was made and at the manner in which it was communicated to the person or persons affected by it. And in that process, I find a complete absence of any suggestion that Wandsworth had addressed the Appellant's Article 8 rights.

92. It is, in my judgment, and for all the reasons I have already rehearsed at length, no answer to this point for Wandsworth to suggest that this was not the point of the meeting on 6 October, which was to discuss Dr.

Cottee's conclusions. Dr. Cottee was not the decision maker, Wandsworth was. It is unexceptionable for Dr. Cottee to express his professional opinion, but it is for Wandsworth to conduct the overall balancing exercise, which gives weight to Dr. Cottee's opinion in the wider context of the Appellant's needs and rights. The point was put to Mr. Kelly point blank by Linda Goldsmith at the meeting, and his answer, in my judgment, is clear.

93. I would therefore, for my part, quash Wandsworth's decision that the Appellant either should not be returned to alternatively should be removed from Mary Court. I would direct Wandsworth to reconsider its position with an open mind and on all the material available at the date of the fresh decision. I would expect the process of decision making to be transparent and the reasons for its decision to be clearly articulated in writing.

94. The merits of the decision are not a matter for this court. Given the history of this case, however, I nonetheless express the hope that what is left of the Appellant's life can be lived out with the maximum of dignity and the minimum of psychological harm.

95. For these reasons, no doubt expressed at excessive length, I would allow this appeal.

Lord Justice Chadwick:

96. I agree.

Lord Justice Brooke:

97. I agree, and I am only adding a few words because we are differing from a judge with great experience of administrative law.

98. When Jonathan Parker LJ and I granted permission to appeal we did so because it appeared to us at any rate arguable that Wandsworth regarded Dr Cottee's views as determinative, whereas they were but one factor (albeit an important one) which Wandsworth was bound to take into account when performing its own obligation to provide accommodation which was suitable for Mrs Goldsmith's needs.

99. As I listened to the excellent argument at the substantive hearing it became more and more clear to me that our initial concern had been

justified. Wandsworth disavowed any suggestion that financial considerations had dictated its decision, and in those circumstances the fact that Mrs Goldsmith chose to live in St Mary's Court surely placed a duty on the decision-maker (whoever that was) to balance the information contained in the community care assessment report and in her daughter's representations against the doctor's assessment that she had level 2 nursing needs, and to see whether a viable solution could be found of a reasonable kind which would enable her to continue to live in the place where she was so happy. This is what respect for a person's home is all about, and Wandsworth had to show that its decision to move her was a proportionate response in all the circumstances.

100. There is no evidence that this balancing exercise was ever performed by Wandsworth's decision-maker (whoever that was). I therefore agree that its decisions must be quashed.

101. I should add that counsel agreed that we should treat the October 2003 decision as susceptible to judicial review in these proceedings even though it was made over six weeks after the proceedings were initiated. I express no view at all about the procedural propriety of that agreement, but it led to a most undesirable volume of new evidence being exchanged almost immediately before the judicial review hearing took place, with busy people being asked to comment on complex new evidence without having a proper opportunity to do so. Much more careful timetabling would have led to a more satisfactory procedure for the exchange of evidence, and it is unfair for a public authority to be subjected to the time pressures that assailed Wandsworth in the days immediately before the hearing. Fortunately, these procedural mishaps did not in my judgment significantly affect the outcome of this case.

102. I, too, would therefore allow this appeal.

Order: Appellant's order against Beatson J's order of 5th December 2003 dismissing her claim for judicial review set aside and appeal allowed; respondent's decisions taken on 13th August and 6th October 2003 quashed; local authority to pay appellant's costs for the claim for judicial review, to be assessed if not agreed; detailed assessment of the appellant's funding costs; if respondent wishes to seek permission to appeal, it may do so by way of written submissions, to be filed with the court by 28th September 2004.

(Order does not form part of approved judgment)