MR JUSTICE SCOTT BAKER : Administrative Court. 14th September, 2001

1. Seven of the eight Claimants are residents of Granby Way, a residential care home owned and run by Plymouth City Council (the Defendants). Sadly the eighth, Douglas Blacksell, has died in the very recent past i.e. since the conclusion of submissions. Their ages vary between 77 and 92 with the exception of Peter Monk who is only 66. They are all frail and in poor health and have lived at Granby Way for differing periods, the longest being about 9 years. They seek judicial review of the Defendants' decision of 5 February 2001 to ratify the decision of its Social Services Committee of 23 January 2001 to close Granby Way. The Claimants all regard Granby Way as their home and are extremely upset at the prospect of having to live elsewhere. It is contended that at least three of the Claimants had a legitimate expectation that Granby Way would be their home for life, following assurances to that effect by employees of the Defendants.

2. The decision giving rise to the present claim emanates from the Defendants' Social Services Committee's need to reduce its projected overspend. It met on 21 July 2000 and approved a pruning of £993,000 from its budget and this included the closure/transfer of service of specified residential units for older people (subject to consultation) of £450,000. The decision was ratified by the full Council on the 11th September 2000, subject to an adjustment of £16,000 that is irrelevant for present purposes. On 21 November 2000 two homes were formally selected for consultation on closure Torybrook and Granby Way. In the meantime on 13 November 2000 a letter was sent to the individual Claimants saying consultation would take place on possible closure but that no decision to close would be made until after full consultation with them and with their relatives. Existing services would be maintained until a decision, after completion of the consultation process, at the full Council meeting on 5 May 2001. In the event of a decision to close Granby Way being taken, individual residents would be involved in selecting a suitable alternative residential home. A similar letter was sent to relevant relatives and care managers.

3. This letter was followed by another letter on 11 December 2000 to Mrs Beresford's son and daughter-in-law and to other relatives saying the consultation process was being put into place and that residents would have their needs reviewed over the following couple of weeks prior to a meeting of the Social Services Committee on 23 January 2001. The councillors would base their decision on the residents' needs and views.

4. Each of the Claimants was seen and a review document completed. The Council was conscious of the need to consider whether any of the residents had been promised a home for life and accordingly they were asked about this. Mr Cross and Mr Blacksell thought that they had. Mr Monk was almost sure that he had been told this and he believed that it would be so. Mrs Downing said she was told: "This is your home now." Mrs Beresford said no one said so but she thought that it would be. Mr Cowl took it to be, but there was nothing in writing. Mrs Ellis didn't know and Mr Heard answered in the negative. Each of the Claimant's interviews is well documented and the documents illustrate that the Defendants were careful to obtain relevant information about them which included their background, health and abilities as well as the most recent care plan. No one reading the documents could be left in any doubt of the Claimants' need to live in a safe and secure environment, their desire to remain at Granby Way and the potential detriment to them of a move.

5. Each of the relatives was sent a questionnaire under cover of a letter of 20 December 2000 requiring a response by 5 January 2001. The letter pointed out that the questionnaire was being sent on legal advice, albeit many relatives had already stated their views. Complaint is made that the timescale was unduly short bearing in mind the time of year. The questionnaire is the same as that which was discussed with the residents themselves. Some relatives have expressed dissatisfaction with the consultation process on the basis that it was inadequate.

6. On the 12 January 2001 the Director for Social and Housing Services produced a report on the future proposals for Torybrook and Granby Way. Its summary runs thus: *"This report outlines the process undertaken and the results of the consultation on the proposal to close Torybrook and Granby residential homes. It details the outcome of the needs assessment completed on each resident. It concludes that all services currently provided to meet the needs of both the residents and other services users could be delivered elsewhere."* It

recommended that the committee resolve, giving due weight to the consultation exercise responses and the result of the needs assessment process:

i) to relocate all residential and non residential services away from Torybrook and Granby to enable revenue budget savings, and

ii) to authorise officers to put into affect a plan to enable the relocation of services in full consultation with residents, services users and their relatives.

7. The report went into some detail with regard to both Granby Way and Torybrook. It referred to the eleven residents of Granby saying that the majority did not understand why it was necessary to close it, they liked being there and were unhappy about moving. Three said they were told it would be a home for life: Two thought it would and the remainder said they had not been told this. Some expressed concern whether a new home would meet their needs.

8. The report recorded at paragraph 6 that the normal assessment tool was used to conduct a full needs assessment of all residents and that this included social and personal care needs as well as, where appropriate, medical and nursing needs. All the needs could be met in other residential homes. On the "home for life" issue the report concluded there was no evidence that a belief Granby would be a home for life was more than an assumption by the residents and their relatives that they would not need to move again. In particular no one had produced anything in writing promising a home for life.

9. The officer's advice was that the case for closing the two homes was made out. No resident needs to live there in order to receive the services he or she had been assessed as requiring. The newly reassessed needs could be readily met in a number of alternative placements. The inevitable disruption that would be caused by moving would be manageable.

10. An updated report followed a meeting with leading counsel, Mr Richard Gordon Q.C, on 19 January 2001. This is to be found at page 134 and following of the Claimants' bundle. This report records that Council had identified a number of issues that were critical in legal terms to the success of the whole process. These included the following.

* the committee had to begin its meeting with an open mind. No decision had yet been taken. The views of all concerned had to be considered;
* that there has been a proper assessment of the needs of all the service users;
* that alternative placements were available to satisfy the needs of every service user;
* that consultation was adequate;
* that no unequivocal promise of a home for life had been made to any resident;
* that the Human Rights Act 1998 is observed;
* that the decision made by the committee is properly made;

11. A number of points from the report bear mention. These are:

* reassessment of the need for services of everyone affected by the possible closures had been carried out following the Government Guidance to Health Authorities on moving frail and elderly patients;
* if risk of an adverse effect on someone's health was identified the Council would have to consider how to overcome it;
* should it be decided to proceed with closure a consultant geriatrician would be asked to advise on risk management to ensure that no one suffered adverse effects on their health as a result of any move;
* in the absence of any compelling evidence to the contrary there was no determinative evidence of a home for life to any resident which would require the Council to maintain residential services at either home. Despite being asked specifically for the evidence on which the residents concerned based their claims, none was forthcoming. The files of all the residents had been inspected but there was nothing in any of them to suppose a "home for life" promise. Paragraph 8.4 states that no one at Granby had made such a claim. This however is incorrect, although it maybe that the reference has to be read in the context of the previous sentence that no one had given the social workers any written evidence of a promise of a `home for life';

* a list of factors that the committee ought to take into consideration that had been set out in the initial report was updated. Miss Richards, for the Claimants, complains that there is still no reference to the need to take into account the residents' psychological needs.

12. On 23 January 2001 the Social Services Committee met with the benefit of both the report and the updated report and resolved as recommended i.e. to close Torybrook and Granby Way relocating the services elsewhere and to put into effect a plan to enable the relocation of services in full consultation with residents, service users and their relatives. The full Council met on 5 February 2001 and confirmed the decision.

13. A letter before action was sent to the Director of Social and Housing Services on 27 April 2001 complaining that the decision to close Granby Way was unlawful, that it should be reversed and that no steps should be taken to implement it in the meantime. The main thrust of the complaint was that:
* removal from the home could have a serious effect on the physical and mental health of the residents some whom might not survive a move;
* the majority of the residents were led to believe that Granby Way would be their settled home and that they would not have to move to another home during their lifetime;
* the residents and staff had come to regard Granby Way as a family home;
* the decision had been taken to close on financial grounds alone;
* there had been no assessment of emotional or psychological needs;
* the consultation process had been inadequate and undertaken within too short a timescale;
* there was a breach of Article 8 of the European Convention on Human Rights (ECHR) which could not be justified under Article 8.2.

14. It is unnecessary at this juncture to recite the response or the subsequent history save to say that the Defendants deny that they have acted unlawfully and that permission to apply for judicial review was granted by Harrison J. on 19 June 2001.

Home for life

15. It is the Claimants' case that at least three of them had a legitimate expectation that Granby Way would be their home for life following express assurances to that effect from employees of the Defendants. It is necessary to examine the evidence in this regard which is a good deal fuller now than it was when the closure decision was made.

16. I have referred earlier in this judgment to the responses of each of the Claimants when they were asked about this at the time of the review in December 2000. There is, off course, a difference between a clear promise being made on behalf of the Defendants to an individual Claimant and a general understanding on the part of one or more Claimants that they would never be moved against their will. Common sense suggests that were any such promise to be made it would be likely to be subject, at the very least, to the resident's health needs being capable of being coped with within the home.

17. There is no documentary evidence to support this claim. The absence of anything in writing is not of course fatal to a legitimate expectation claim but it may be important evidentially, particularly where the person making such a representation intended it to be relied on and have consequences in law. Sheila Bromidge, who has retired but worked for Devon County Council, the relevant predecessor of the Defendants, from 1989 to 1997 as the manager of Granby Way has made a number of statements and refers to a contract that should have been issued to each resident. Although drafts have been produced in evidence no signed document has been unearthed despite a search of all the residents' files. The draft does not in my judgment support the claimed assurance. Clause 5 provides: *"This agreement shall continue in force until terminated by circumstances, or by a written notice given by either party .....weeks before the date of termination."*

18. Clause 10 provides: *"The base unit manager agrees to allocate and the resident accepts, the use of sleeping accommodation in a single room (number .....) from ..... You will not be moved from this sleeping accommodation unless you request it, or your physical or mental health deteriorates and other suitable sleeping arrangements are necessary for your comfort and well being. Prior to any move a full discussion of the situation would be undertaken with yourself, your relatives and your care manager."*

19. The high watermark of the evidence for the Claimants is encapsulated in the statement of Nicola Mackintosh that: *"Given the information from Ms Bromidge, it is clear that at least five residents were given the attached contract and received the explanation that they would not be moved unless a deterioration in their health dictated it, or they chose to move."*

20. She is here quoting from Ms Bromidge's statement of 28 June 2001 (long after the closure decision). The statement is, of course inconsistent with the contents of the draft contract that has been produced.

21. It is true that there is other evidence, for example from Mr Stainton, to support the `home for life' case, but none of it is in my judgment sufficiently clear and precise to form the basis of an actionable representation. Obviously it is very difficult for those of the age and in the circumstances of the Claimants to produce the kind of clear and persuasive evidence for which a court will be looking, but I bear in mind that words of Lightman J in **Phillips and Rowe v Walsall Metropolitan Borough Council** (unreported) 26 April 2001 at Paragraph 8. He pointed out that while it is undoubtedly and legally and factually possible for such an assurance to be given, it must be clear and unequivocal. He said*: "But such an assurance is not readily to be found in view of the very serious legal and practical implications, and careful consideration is required as to the authority of the person or persons identified as having given such an assurance. The evidence must be convincing. There is in this case no documentary or contemporaneous evidence of the assurances alleged or identification of the person or persons alleged to have given the assurances alleged."*

22. This, it seems to me, is entirely consistent with the general law on legitimate expectation that such an expectation requires a firm clear and sound foundation. See **R v Jockey Club ex parte R.A.M Racecourses Ltd** [1993] 2ALLER 225,236 where Stuart Smith L.J referred to a `clear and unambiguous representation'.

23. In **Devon County Council ex parte Baker** [1995] 1ALLER 73 which, curiously, involved an earlier attempt to close Torybrook (the second home that was selected for closure in the present case) Simon Brown L.J picked up the reference of a `clear and unambiguous representation' in the Jockey Club case and said at p.88F: *"These various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by way of a stated policy, this type of legitimate expectation falls into two distinct sub categories: cases in which the authority are held entitled to change their policy even so as to effect the claimant, and those in which they are not. An illustration of the former* ***is R v Torbay B.C, ex p Cleasby*** *[1991] COD 142: of the latter,* ***ex p Khan.*** *([1985] 1ALL E.R.40). (2) Perhaps more conveniently the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. "*

24. As Mr McCarthy Q.C, for the Defendants, pointed out the question of reliance on the expectation is an important factor in deciding whether there has been unfairness and abuse of power. **See R v Barking and Dagenham L.B.C. ex p Lloyd** [2001] CCLR 5 paras 35,36.

25. Mr McCarthy concedes that if such promises have been made on behalf of the Defendants then fairness requires that any Claimant whom such a promise was made should have a chance to say why it should not be withdrawn. The Claimants' difficulty is the evidence does not in my judgment establish any such promise or basis for a legitimate expectation and certainly not at the time of the Defendants' closure decision. The onus, it should be emphasised, rests on the Claimants. In, I think, two instances the questions put to the residents resulted in assertions of a promise of a home for life but neither was supported by any documentation or detail of circumstances in which or the person by whom such a promise was made. The Defendants are criticised for not having made further inquiries

before the closure decision, but I do not think their decision to proceed without searching for more evidence can be stigmatised as irrational. It was one that they were entitled to make.

26. It is true that there is more material now than there was in February 2000, but it still does not in my judgment establish the representation claimed. The Defendants have made an offer, which is to be found in paragraph 42 of the summary grounds for opposing the claims, in these terms: *"Plymouth considers that, given such a confused evidential picture, and the importance of the matter to the residents, it is willing to examine again (via an independent statutory complaints panel) the factual basis of the home for life promise issue in the light of the case now advanced by the claimants. This is developed further in the open letter."*

    It is unfortunate that the offer was not taken up. The material before the court does not establish a *`home for life'* promise on which any of the Claimants can rely and more importantly, at the time of the closure decision it was not irrational of the Council to proceed on the basis that there was no such promise.

    The consultation process

    Local Authorities are inevitably faced with difficult decisions involving expenditure if they are to balance their books. Pruning of budgets can involve agonising questions of priorities. It is not for the courts to interfere with those decisions provided they are made and carried out according to law. Local authorities are answerable to the electorate. What are the obligations when a local authority seeks to close a hospital or old people's home? This is a subject that has been considered by the courts on many occasions in recent years. There are numerous reported decisions, many of which deal with the application of principles to the particular facts of the case rather than with the principles themselves.

27. The two core authorities relevant to closure in this case are *Baker* to which I have already referred and **R v The North and East Devon Health Authority ex parte Coughlan** [2000] 2WLR 622. It is true that *Coughlan* involved closure by a health authority rather than a local authority, but I do not think there is any significant difference in the principles to be applied. They are to be found in the judgment of Dillon L.J in *Baker* at 83(e). These are:

    i) the residents should know of the proposal well before the final decision is made;
    ii) they should have a reasonable time in which to put their objections forward;
    iii) any resident's objection should be considered by the Council.

    Dillon L.J. went on to say: *"I do not believe that each individual resident had an individual right to be consulted face to face by officers or groups of councillors. Consultation can perfectly well be achieved by meetings held by council officers with residents generally at a particular home or by views expressed through the support groups."*

28. The Claimants rely on **R v London Borough of Brent ex parte Gunning** (1986) 84 LGR 168 where rather more extensive criteria are set out, but that case involved a school closure in the context of a particular statutory framework and I prefer the criteria in *Baker.* What is a fair method of consultation will, to some extent, turn on the facts of each case.

29. In **R v Hillingdon L.B.C. ex parte Goodwin** (1984) ICR 800,809E, which was a hospital closure case, Woolf J, as he then was, said: *"Whenever there has to be consultation, there has to be an indication what there is to be consultation about: and, although an authority must enter into consultation without a closed mind, it seems to me that there is nothing objectionable in the authority having decided on a course it would seek to adopt, if after consultation it decided that that is the proper course to adopt."*

30. What, in my judgment, has to be borne clearly in mind is the difference between a decision in principle to close a home involving consultation of the residents and the later implementation of closure involving a detailed and contemporaneous assessment of needs of the individual resident. In this regard, there is a very important passage in the judgment in the Court of Appeal in ***Coughlan*** at 660F: *"In the absence of special circumstances, normally we will expect to be unrealistic and unreasonable on the grounds of prematurity alone, for the health authority in all cases to make assessments of patients and to take decisions on the details of placement ahead of a decision on closure. Neither the statutory provisions nor the*

guidance issued expressly require assessments to be made or decisions on alternative placements to be taken before a decision to close can be lawfully made.

If and when a decision is taken to discharge Miss Coughlan and place her in alternative accommodation, it may be open to her, on the grounds of the alleged shortcomings in the assessment procedures and in consideration of alternative placements, to challenge the lawfulness of those decisions."

31. Those observation apply in my judgment with equal force to the residents of a local authority home as they do to patients under the care of a health authority. Circumstances can change quite quickly with the elderly and infirm. What is needed is for the individual's full circumstances and needs to be assessed close to the time when a move, if there is to be one, is to be made. There is little purpose in carrying out a full risk assessment involving the physical and psychological needs of the Claimants in December 2000 when the home was not going to be closed until months or possibly years later. The Defendants have made it clear that they intend to carry out such an assessment at the appropriate time (see paragraph 5.3 of the report of 23 January 2001).

32. It is necessary to refer briefly to the statutory background that is relevant in this case. Section 47 (1) of the National Health Service and Community Care Act 1990 places a statutory obligation on local authorities to carry out needs assessments for community care services. These include provision of residential accommodation under Section 21 of the National Assistance Act 1948. Thus accommodation at Granby Way falls under this umbrella. It is common ground that once a need for accommodation has been identified it must be met and that the accommodation must be appropriate for the needs of the individuals. Needs can in appropriate circumstances include psychological needs: **R v Avon County Council ex parte M** [1994] 2 FLR 1006. Once community care services are being provided, the local authority must reassess the needs of an individual to whom they are being supplied before changing or reducing them**: R v Gloucestershire County Council ex part Mahfood** [1995] 1 CCR 7.

33. Nor is it disputed that in performing its social services functions a local authority must act in accordance with the Secretary of State's guidance under Section 7(1) of the Local Authority Social Services Act 1970. This I am sure the Defendants will do if they proceed with the closure process.

34. In my judgment the consultation process carried out by the Defendants at the end of 2000 was adequate for what was required at that stage. They received back the message loud and clear that the residents wanted to stay and for the home to remain open. It will also have been clear from what they then knew about the residents that implementing a decision to close would not be likely to be easy because of the age and needs of the Claimants. Many of the Claimants' arguments about what was not done are irrelevant because they are things that would properly fall to be done at a later stage in the process. Nor in my judgment was it necessary for the Council to have considered on a line by line basis the relevant assessments in each of the reviews carried out.

Human Rights

35. It is argued that the decision to close Granby Way infringes the Claimants' rights under the ECHR in particular Articles 2,3 and 8. The claims in respect of Articles 2 and 3, the right to life and not to be subjected to inhuman or degrading treatment really emerge from Doctor Jeffery's evidence which was introduced into the case at a very late stage and in respect of which a number of criticisms are made. I do not propose to deal with any of these. Suffice it to say that the whole question of moving individuals is premature. These are issues that do not fall for consideration until each individual case is considered in the context of a full needs assessment and against whatever alternative accommodation may be available.

36. As to Article 8, it is said that Granby Way is the Claimants' home and that the staff and fellow residents have become their families. The subject was covered by both reports to the committee in the January 2001. As counsel is reported to have pointed out, the ECHR does not give a right to a home. Whilst the Defendants concede that Article 8 may be engaged in a home closure case, Article 8 is one of those rights where a balancing exercise has to be carried out (see Article 8 (2)). Underlying the decision to close Granby Way are financial considerations which are, as I have pointed out, matters for

the Council for which its members are answerable to the electorate. I cannot envisage any circumstances in the present case in which the Council can act compatibly with the common law and its other statutory obligations and yet be in breach of the ECHR whether Articles 2,3 or 8.

Conclusion

37. I have come to the conclusion that the Defendants have not acted unlawfully in any way. The Defendants have properly adopted a staged process with regard to the proposed closure of Granby Way. Eventually community care assessments will involve geriatric assessments and risk management and the Defendants will have to look very carefully at how closure would affect each individual and what alternative arrangements may be viable. That, however, is premature when the closure process is still perhaps two years from completion. The consultation and assessment exercise undertaken at Christmas 2000 was adequate for its purpose. No legitimate expectation is established of a `home for life' and there is no human rights breach.

38. In these circumstances it is unnecessary to consider the issue of an alternative remedy and the exercise the discretion in whether to grant relief. It should, however, be pointed out that since 23 May 2001 the Defendants have openly offered the use of a complaints procedure with an independent chairman. Bearing in mind the conflicts of fact that have developed, particularly on the "home for life" issue it is unfortunate that this offer has not been accepted. Apparently the offer remains open. These are sensitive and difficult cases and there is in my view a duty on those connected with them to be careful not to raise either the temperature or expectations. In my judgement, the Defendants have acted neither unfairly nor in error of law and in these circumstances the claim for judicial review fails.

MR J.S.BAKER *: For the reasons given in the judgment that has been handed down, this application fails.*

MS MORRIS *: My Lord, I appear this morning for the claimants in this matter instead of Ms Richards. My learned friend, Mr McCarthy, who has represented the defendants throughout, is here. My Lord, I have three matters which I seek to raise with the court in the light of your Lordship's judgment.*

MR J.S.BAKER*: Yes.*

MS MORRIS *: The first one is quite short –*

MR J.S.BAKER*: First of all, I should say that there was one correction that was sent in by Mr McCarthy, which seems entirely appropriate. That has been corrected in the draft handed down.*

MS MORRIS *: My Lord, the first matter relates to Mr Blacksell, one of the claimants. He sadly has died in the course of these proceedings. He is assisted by funding from the Legal Services Commission. What we seek to do in relation to him is to withdraw proceedings brought on his behalf, subject to the issue of costs. What I am asked to do on behalf of the public funding agency is to preserve the position on costs pending the outcome of the proposed appeal.*

MR J.S.BAKER*: Yes. Mr McCarthy, what do you say about that?*

MR McCARTHY*: Can I just take instructions (**Pause**). My Lord, that is entirely acceptable.*

MR J.S.BAKER*: Yes. I should add that the judgment had been substantially prepared before I received the note telling me about Mr Blacksell's demise, and I have made, I think, one alteration earlier in the judgment.*

MS MORRIS *: My Lord, I do make an application for permission to appeal. The two broad grounds on which we seek permission relate to the overall merits of our case and, secondly, to its public importance. If I can deal with the second one first, the public importance of this case, and in particular the grant of permission to appeal. Your Lordship will probably be aware of the increasing numbers of home closures throughout the country, particularly those affecting elderly people.*

MR J.S.BAKER*: Yes.*

MS MORRIS *: One might say that it is probably more than a trend, and one that is discernible, quite clearly, from the amount of litigation which this court is asked to consider. The particular difficulty is this: in the light of your Lordship's judgment handed down today, there is now some uncertainty in the way in which local authorities should approach this matter and the grounds on which claimants*

may make application because of the differences between your Lordship's judgment in this case and the judgment of Turner J in the case of ***Bodimeade v London Borough of Camden*** *. That relates, perhaps most particularly, to the point at which detailed needs assessments should be carried out.*

MR J.S.BAKER*: It may be that I dismissed Turner J's judgment without dealing with it, but I did not regard it really as a judgment dealing with principle, it seemed to me it was the facts of that particular case.*

MS MORRIS *: My Lord, if I can put it this way. Certainly, Turner J found that detailed needs assessments were vital and should be before the deciding body, whereas what my Lord has suggested at paragraph 34 is that they be irrelevant, save until a much later stage. In my submission, there is a substantial gulf between those two points of view and –*

MR J.S.BAKER*: I think I followed Lord Woolf's observations in* ***Coughlan*** *, did I not?*

MS MORRIS *: My Lord, although of course there is a dispute about the way in which* ***Coughlan*** *should be analysed and the extent to which that was an obiter judgment on the part of Lord Woolf. In any event, I say where there is such a significant and sizeable public problem, if I can put it that way, which confronts both those who reside in homes, their relatives and local authorities, there should be clarity in the law. There is no sign that the movement to close homes is going to abate. Indeed, it is more likely to continue.*

MR J.S.BAKER*: You were offered an alternative route for resolving the difficulties in this case.*

MS MORRIS *: My Lord, that is right, but it remains the case that, of course, that alternative route could not resolve these points of principle relating to when assessments should be carried out, and, in particular, what should be the content of those assessments, and, further, the points that arise, we say, out of the Human Rights Act. My Lord, I would say that is really the second strand of our application for permission in relation to the merits. What we said about Article 2 and Article 3 in some way are connected with our criticisms with respect of your Lordship's judgment in relation to assessment.*

MR J.S.BAKER*: Yes.*

MS MORRIS *: But there is plainly a well-established strand of authority in cases, such as* ***Osman*** *and* ***Keenan*** *, that there is a positive obligation on the State to protect life and to prevent suffering and indignity arising out of the failure to provide proper health care. In our submission, those matters must be considered at the outset of a decision-making process and not left to some later stage, because we asked the court to consider the practical problems which will arise out of the construction which your Lordship has offered, namely this. If local authorities are entitled to make a decision to close a home in principle, as your Lordship describes it, and then comes to make assessment of frail and elderly people of the type that the claimants are in this case, and then finds that there is clear evidence that a move will lead to fatal consequences, then one wonders how on earth a local authority is then supposed to act. I say that, without resolving this question, a wholly undesirable state of uncertainty will remain.*

Turning then to the issue of Article 8. My Lord has dealt with it by saying that it does not establish a right to a home. However, again, it is well-established with cases such as ***Boxhall*** *and* ***Glarer t****hat Article 8 is not merely a negative right, but a positive one, which imposes a positive obligation which extends as far as physical and psychological integrity. In those circumstances, my Lord, I say that Article 8 cannot be swept away in this case merely by saying, "It does not confer a positive right to a home", because the difficulties confronted by these claimants perhaps go much more deeper, to their very state of health and perhaps their life. In that sense, I say that Article 8 must be engaged.*

The second way in which my Lord dealt with it was by saying there should be a balancing exercise but the question of finances for councils is a matter for them. We say that, with respect, that analysis is perhaps not the proper one, particularly in the light of what Lord Steyn says in ***Daley .*** *There must be a clearly established justification with clear evidence, and we say that that has not*

been addressed in my Lord's judgment. My Lord does not set out precisely what evidence he relies upon, save to say that financial considerations are a matter for the local authority. Secondly, we say that my Lord should have addressed the relative weight that should be accorded to financial considerations and the lives, health and well-being of the claimants.

Finally, my Lord says that if a local authority complies with its statutory obligations under the community care legislation, then one would not anticipate a breach of Articles 8(2) and (3).

***MR J.S.BAKER**: Yes.*

***MS MORRIS** : In my submission, my Lord, that cannot necessarily logically be the case, because plainly, from time to time, with the advent of the HRA it is found that the statute itself may perhaps -- but perhaps more probably, those decisions are taken largely in the exercise of the local authority's statutory discretion, and plainly within that realm of the local authority's discretion, the issues of individual rights, justification (inaudible) are engaged, and that is precisely where those articles of the ECHR must be grappled with. We say because of the public importance of individual rights to health and physical and psychological integrity, there must be a really very substantial financial consideration for them to be subject to those desires to cut costs.*

*Just briefly, we would add to those grounds for permission the elevation, in our submission, of the home for life test to their being a clear and unequivocal promise. We say particularly in the context of disabled people, learning disabled people, elderly, frail, mentally ill people, these are precisely the people who will not be able to produce that type of clear and unequivocal evidence. That, of course, was accepted by Jackson J in the case of **ex parte Perry** . Again, we say that perhaps that is a matter which should be determined by the Court of Appeal.*

*Finally, we would take issue with the adoption of the **Baker** test rather than the **Gunning** test for consultation –*

***MR J.S.BAKER**: There is really not much left that you do not take issue with.*

***MS MORRIS** : My Lord, those are my instructions. That is the basis of our application for permission to appeal. Plainly, we say that the central questions relate to the dichotomy which has been created between the approach of Turner J and the approach of your Lordship, and then the issues arising under the Human Rights Act.*

***MR J.S.BAKER**: Yes. Mr McCarthy, what do you say?*

***MR McCARTHY** : Well, there is a choice in these cases as to how they should be handled. One is to make them extraordinarily complicated, and the other is to consider the essentially practical considerations when welfare considerations are in play, when local authorities are thinking of altering the circumstances of vulnerable people, all of which arrangements, as we have accepted throughout, potentially engage human rights issues. Alongside that consideration is the fact that we have had in this country for some eight years now a statutory machinery that where community care decisions are made there has to be an assessment process. That is well tied together under plenty of case law, community care guidance and policies. Your Lordship's judgment has built into the steps which Plymouth will have to take an acknowledgment of fact that if they are on the point of, or are about to, or shortly about to, move anyone, they have to fulfill their statutory obligations under community care legislation.*

My Lord, the real difficulty that is faced by this application for permission to appeal is it does not acknowledge the fact that the claimants have actually lost on the facts to a significant extent, not just on the homes for life issue, but also on the issue of the point at which Plymouth City Council was going to activate whatever plans it had for the future. Your Lordship may recollect that the local authority's case was that this was to be a staged process preceded by a number of assessments, that there was no pressing hurry about it and people would not be hurried. Your Lordship has recited the stages that were planned in your judgment. As against that, the claimants, as advised, are alleging that they were on the point of being summarily evicted, and it was on that factual basis that a large part of their case was based. On that factual issue they have

lost. Therefore, my Lord, the case looks completely different to the one which my learned friend, Ms Morris, is advocating this morning. That is the first thing I want to say.

The second thing is this. There is, in fact, no inconsistency between your Lordship's judgment and that of Turner J or that of Jackson J in the ***Perry*** *case. I assume Ms Morris has seen the skeleton argument that was before your Lordship –*

MR J.S.BAKER*: I did not go into those because I did not think that there was.*

MR McCARTHY *: If I may very briefly remind your Lordship, in the* ***Perry*** *case, which was the first one, the health authority were proposing to withdraw services utterly from a number of their patients without carrying out any assessment at all. On that basis their decision was quashed. In that judgment the decision of the Court of Appeal in* ***Coughlan*** *certainly was cited and his Lordship's view, understandably, was if there is no assessment at all before you recall the services then that is potentially unlawful. In Turner J's decision, as per his finding, what was proposed by the local authority was a removal from one home to another within a very short period of time of the decision being taken. Although there was some tentative suggestion by the local authority in that case that some assessment process was carried out, as your Lordship may recollect from Turner J's judgment, it was perfectly obvious that he thought that was not what would drive the decisions.*

Your Lordship was addressed on the differences between ***Bodimeade*** *and this case, and although there may have been a difference about what Turner J decided, all parties before the court and the court itself was confronted with the fact that Turner J had not purported to lay down any general guidance at all on the topic. Indeed, he did not even mention Coughlan , which was one of the cases cited before him. So presumably on the facts of that case the facts were so firm it was unnecessary to get into any general matter of principle.*

My Lord, the defendant's submission in relation to ***Bodimeade*** *was that in fact there was an entire consistency between what Turner J decided and what they were proposing. In reality, my Lord, what your Lordship has done in your judgment is to say that it is premature on the facts of this case to reach the conclusion that the detailed community care assessment needs to be carried out. My Lord, that is not contrary to any previous authority. It is entirely consistent with what my Lord, Lord Woolf, said in* ***Coughlan*** *.*

Therefore, although my learned friend, Ms Morris, ventures to suggest that there is some uncertainty about the law, it is only uncertainty that is created by the thought that your Lordship's judgment might possibly be overturned if one could get the Court of Appeal to take a different view. There is no uncertainty in the present state of law because what your Lordship does is set out the merits of the staged process, which one might think, not simply as a matter of law but as a matter of practicality, is the obvious way of going about this.

My Lord, what I have said so far really covers what I have to say about human rights as well. Again, it is a question of the extent to which human rights are engaged, the extent of intrusion and the extent to which justification is necessary. It follows, I would submit, as a result of your Lordship's judgment that if a local authority are on the point of removal or the point of transfer, then, of course, human rights are engaged in a particularly concentrated way, and at that stage common law European Convention justifications would be necessary. But since on the facts, as your Lordship has found them to be, the process is not to be suddenly moved into a transfer or removal, then correspondingly, my Lord, it is perfectly obvious that it is unnecessary to have that extraordinarily pressing justification that the cases justify.

In essence, my Lord, I say this is a decision on the facts. Although it does lay out some helpful guidance for those looking at these cases, that guidance is in no way in conflict with any first instance decision, and since your Lordship follows, really to the letter, the guidance provided by the Court of Appeal, it is a little difficult to see why there is anything questionable about the judgment at this stage.

My Lord, to say it is of public importance, I suppose, in a sense, every case can be turned into a case of public importance, and indeed can be turned into a cause celebre. On the facts of this case,

and on the law, there is, in fact, I would respectfully suggest, nothing arguably wrong about your Lordship's judgment. I would invite your Lordship to take the view that although, clearly, as one sits there and listens to polite criticisms about one's judgment, one must wonder what one's rejection of them may seem. The applicant always has the option of going to the Court of Appeal and saying to the Court of Appeal "You decide. This is a matter of public importance and you decide whether this matter should go to appeal." On that basis, my Lord, I would respectfully suggest permission should be refused.

***MS MORRIS** : My Lord, all I would say in reply is that what Turner J said in **Bodimeade** was that one of the precise failings of decision-makers was they did not have the needs assessments before them when they made their decision. There is, in my submission, a gulf. Plainly it is a matter for your Lordship. I have made my submissions.*

***MR J.S.BAKER**: I am going to refuse permission to appeal. Although some interesting points are raised that might be arguable in some circumstances, it seems to me that in the light of the facts of this case, this is not an appropriate case to grant permission. The claimants can, of course, seek permission from the Court of Appeal. Should they do so, I would urge that that court be provided not only with a transcript of my judgment, which of course they will be, but also of the discussion that has taken place on the present application.*

***MS MORRIS** : My Lord, there is just one other matter which I must raise with the court. In the course of these proceedings the local authority gave an undertaking, before Harrison J, not to do a number of things relating to moving these claimants and moving the permanent staff, and so on and so forth. What we would ask, and I raised this with Mr McCarthy this morning, is that the local authority extend that undertaking until our application for permission to appeal has been determined by the Court of Appeal, otherwise, of course, we will be trying to shut the stable door after the horse has bolted. I understand that Mr McCarthy has said a number of things this morning about the rapidity with which the local authority intend to proceed with the closure of Granby Way, there is a difference between the parties on that point. I do ask that the local authority either give that undertaking or that this court stays any action by the defendant pending the determination of our application for permission to appeal. We certainly will be issuing within the next seven days.*

***MR McCARTHY** : My Lord, I discussed this with my instructing solicitor. I am afraid I do not have a copy of the undertaking with me. May I just take a moment.*

***MR J.S.BAKER**: Yes, please.*

***MR McCARTHY** : (**Pause**) That is certainly acceptable. In saying that, may I make it crystal clear that the basis on which Plymouth City Council are proposing to proceed is precisely reflected by what your Lordship has said in your judgment. May I say that since permission to appeal has been sought, which presumably takes the case down the legal process, that the open offer that was made of an the independent resolution of outstanding issues does still remain in place. My Lord, that has been available since 23rd May. It is now, what, very nearly four months since that happened. We hope at some stage the claimants will be advised, albeit that they wish to enlist legal remedies, to give consideration to that. We understand on this side that they must have been made extremely fearful by these proceedings of what is going to happen, particularly if they were given to understand the evidence showing that they were immediately about to be moved. I have instructions to say in crystal clear terms that that is not the plan of the local authority and has not been.*

***MS MORRIS** : My Lord, can I just ask two other things. In the light of your Lordship's direction that the court should see a transcript of today, firstly, could I ask that that should not limit the grounds on which the claimant seek an appeal, because, as your Lordship knows, I am having to stand in for Ms Richards this morning.*

***MR J.S.BAKER**: No, it is simply that it might be helpful for the Lord Justice who has to consider this case if he can see what Mr McCarthy's answers are to your points.*

MS MORRIS : *Absolutely. Secondly, might we ask that the court directs expedition of preparation of the transcript because we will have to file within seven days. We would not want matters to be delayed.*

MR J.S.BAKER: *Yes, there will be an expedited transcript.*

MR McCARTHY : *Since I have said nothing, I will make explicit what may not be appreciated. We are, of course, not seeking any order as to costs for this application.*

MR J.S.BAKER: *Thank you.*

MS MORRIS : *My Lord, plainly the only other matter that remains is costs. All we can ask for is a detailed assessment.*

MR J.S.BAKER: *You can have a detailed assessment and the undertaking will continue provided that your application for permission to appeal is made promptly.*

MS MORRIS : *I am grateful.*

MR J.S.BAKER: *Thank you very much.*

Miss Jenni Richards (instructed by **Mackintosh Duncan)** for the Claimants.

Mr Roger McCarthy Q.C. (instructed by **Plymouth Legal Practice)** for the Defendants.