Neutral Citation Number: [2009] EWHC 323 (Admin)

Case No: CO/10078/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2009

Before:

GERALDINE ANDREWS QC (SITTING AS A JUDGE OF THE HIGH COURT)

Between:

R (on the application of MICHAEL WOODS)	**Claimant**
- and -	
ROCHDALE METROPOLITAN BOROUGH COUNCIL	**Defendant**

Sam Karim (instructed by **Pannone**) for the Claimant
Jonathan Butler (instructed by Legal & Democratic Services, Rochdale Borough Council) for the Defendant

Hearing date: Friday 30th January 2009

Approved Judgment

Geraldine Andrews Q.C.:

1. This is an application for permission to apply for judicial review of the Defendant's alleged failure to comply with its obligations under the National Health Service and Community Care Act 1990 ("the 1990 Act") to assess the needs of the Claimant for Community Care services, and to provide the resources to meet those needs. It comes before the Court in somewhat unusual circumstances, in that doubts have been raised about the Claimant's knowledge of and wish to bring these proceedings, and about his capacity to do so.

Background

2. The Claimant, Michael Woods, was born on 26th December 1983. He has suffered from serious allergies since childhood and is equipped with an epipen to protect him against anaphylaxis. He is also said to have an acquired brain injury resulting from complications due to liver failure in June 2006, although the evidence of Elizabeth Thorpe, an Adult Care Service Manager for the Defendant, is that whilst it was initially believed that he had suffered brain damage, he was later assessed not to have any brain injury. In the absence of any clear medical evidence that issue remains unresolved.

3. Following a liver transplant, Mr Woods was sent to a specialist neuro-rehabilitation unit, the Floyd Unit at Birch Hill Hospital in Rochdale, in October 2006. Whilst he was there, he was examined on three occasions by a consultant neuropsychiatrist, Dr Hackett. After the last of those examinations, Dr Hackett wrote a letter to Dr Walton, a consultant in rehabilitation medicine, dated 5th July 2007.

4. Dr Hackett concluded that there was no convincing evidence that Mr Woods was suffering from a psychiatric illness or cognitive impairment, that he had the abilities to live independently and that he had the capacity to take decisions. Dr Hackett made it clear that he was using the word "capacity" both in the legal sense, as defined by the Mental Capacity Act 2005, and in the sense of being able to take responsibility for his own actions. Dr Hackett believed that Mr Woods' behaviour should be understood "in terms of his anxieties, his personality and his relationships".

5. In November 2007 Mr Woods was discharged from hospital into accommodation in a flat in Rochdale, supported by a community care and housing package provided by the Defendant. Mr Woods not only has to avoid certain foods to which he is allergic; he also has to take regular medication, including medication to prevent the rejection of his new liver. Prior to Mr Woods' discharge, the Defendant had completed two community care assessments pursuant to its statutory obligations under section 47 of the 1990 Act. At the time of discharge the initial assessment, which led to a Care Plan dated 17th July 2007, had already been superseded by a fresh Care Plan dated 11th October 2007, which is exhibited to Ms Thorpe's first witness statement.

6. The Care Plan was devised with flexibility in mind from the outset. Visits to ensure that Mr Woods took his medication had to be made at set times because of the identified risks if he failed to do so, but the days and times of other visits for such matters as shopping and cleaning were left flexible, to fit in with Mr Woods' own wishes. After the plan was implemented, the records show that Mr Woods felt he was being given too much help. Following Mr Woods' expressions of dissatisfaction with

the number of visits to his home by care workers (who were sometimes not admitted by him), the situation was again reviewed and a fresh Care Plan provided on 12th December 2007. This is also exhibited to Ms Thorpe's first Witness Statement.

7. There have been three further reviews, in January, April, and July 2008. The notes of the reviews make it clear that the Defendant's aim is to support Mr Woods to live a fully independent life in his own home, and to help him to manage his anxieties. In July 2008, the Defendant concluded that the service was not meeting Mr Woods' needs and that it needed to be changed. Mr Woods had expressed the view that he "felt like a prisoner in his own home" and did not want someone there all the time. The Defendant assessed Mr Woods as requiring 20 hours of "flexible" care and assistance per week. This was in line with the Defendant's Service Delivery Agreement with a care agency called Roots, which has been responsible for providing care to Mr Woods on behalf of the Defendant since January 2008.

8. It is common ground that Mr Woods is not receiving 20 hours' care and assistance each week. On average he receives about 7 hours' help. However, the Defendant contends that it has always been ready, willing, and able to offer him the full level of support, and that Mr Woods only receives less because he has made it clear by his words and actions that he wants fewer hours' input than those provided for in his current Care Plan. Indeed there have been times when Mr Woods has been resistant to any form of assistance at all, and has been abusive to those who have tried to provide it.

9. A Judicial Review Claim Form was issued on 22nd October 2008 naming Mr Woods as the Claimant, claiming that the Defendant was in breach of statutory duty in failing to provide community care services and assistance pursuant to the very first assessment made back in July 2007. The application is supported by a witness statement from Mr Woods' mother, Mrs Ruth Thornton, dated 12th October 2008. In that statement, Mrs Thornton referred to a deterioration in her son's physical and mental health (though no medical evidence of any such deterioration was provided, and Mr Woods has not been diagnosed as suffering from any mental illness.) She expressed concern for his safety and wellbeing, and complained that despite various requests that she had made, nobody from Social Services had contacted her or her son to carry out a review Assessment.

10. The impression given by Mrs Thornton's witness statement is that there had been no reviews carried out since January 2008, despite her frequent requests. Mrs Thornton was complimentary about Mr Woods' regular support worker from Roots, Mr Shaughnessy, but said she did not feel that the support her son was getting was sufficient. She said that she and his grandmother were having to provide him with support on a daily basis, which was indicative of the fact that he was not getting the care he needed from the Defendant. Michael was phoning them up at all times of the day and night asking for help and assistance, as he could not manage by himself.

11. The evidence of the Defendant, supported by the contemporaneous documentation, demonstrates that Mrs Thornton's evidence is in many respects inaccurate, and that it does not tell the whole story. For example, Mrs Thornton refers to two incidents which occurred soon after Mr Woods was first discharged from hospital, a road traffic accident in which Mr Woods ran in front of a car and broke his leg, and an incident where Mr Woods drank some milk (to which he knew he was allergic) and brought on

an anaphylactic reaction. Mrs Thornton gives the misleading impression that Mr Woods was put in a dangerous position through the Defendants' lack of implementation of a proper care plan. The first witness statement of Elizabeth Thorpe shows that the care plan was in place, Mr Woods was being unco-operative, and that the care workers could have done nothing to prevent either incident. Indeed, Mr Woods deliberately drank the milk in front of a care worker and then tried to stop her from calling an ambulance. Fortunately there were no further incidents of a similar nature.

12. Far from failing to carry out periodic reviews of Mr Woods' needs, the Defendant has always done so, and has tried to balance respect for his wishes for greater independence with provision of the services that it has assessed he needs. It is also clear that, contrary to the impression created by her witness statement, the Defendant has not been ignoring Mrs Thornton or her concerns. It has involved Mr Woods' family in the review process wherever possible. The notes of the July 2008 review, which is not mentioned by Mrs Thornton, indicate that Mrs Thornton was invited to attend that review, but declined the invitation.

13. A letter from Roots to Mr Woods' current social worker, Wendy Turner, dated 21st October 2008 (the day before the issue of the claim form) recorded that Mr Woods had refused to accept help from another member of staff when Mr Shaughnessy was on annual leave, and that he had even refused "pop in" visits during that time. That refusal is mentioned in Mrs Thornton's witness statement. However, the author of the letter, Lesley Harrison, goes on to say "*during that period I spoke with his mother Ruth, who contacted the office and raised her concerns regarding his refusal to accept support. Ruth stated that it was her view that he should be made to accept the support and that he was not capable of making a choice. I advised that we had to respect Michael's wishes, but that if he changed his mind we would accommodate him*" (emphasis added). There is no reference to that discussion in Mrs Thornton's witness statement.

14. Mrs Thornton also said, in paragraph 14 of her witness statement, that she had now resorted to contacting a solicitor to act on behalf of her son, implying that this was a recent step. In truth, the solicitor in question, Ms Ruth Hardaker of Pannone, was first instructed by Mrs Thornton several months previously, in January 2008, which was not long after Mr Woods' discharge from hospital. It appears from Ms Hardaker's witness statement that she has never had any direct dealings with Mr Woods. However, after his mother made the initial contact, Ms Hardaker received a written authority signed by Mr Woods, and dated 17th February 2008, authorising Pannone to act on his behalf on all matters relating to "complaint made by my mother Ruth Thornton". It was only after receiving that written authority that Pannone approached the Legal Services Commission for funding to bring a claim against the Defendant. Since then, Pannone appear to have taken all their instructions on behalf of Mr Woods from Mrs Thornton.

15. The Defendant's solicitors have had a long-standing difficulty in establishing whether the true source of Pannone's instructions was Mr Woods himself or his mother. As Ms Thorpe put it in paragraph 30 of her first Witness Statement, "*because it had never been in doubt that the Claimant had sufficient mental capacity to instruct a Solicitor and because he was telling both our Service and other Agencies that he wanted less, not more, social care input, it was baffling to us that this litigation was*

being brought in his name". Those concerns were exacerbated when Wendy Turner visited Mr Woods on 29th October 2008, a week after the claim form was issued, and he told her that he did not want a care package at all. On the same occasion, Mr Woods told Mrs Turner that he was unaware that a complaint had been made against the Defendant for not providing the 20 hours of care.

16. The confusion about who was driving the litigation is largely attributable to Ms Hardaker of Pannone, who referred to Mrs Thornton as Mr Woods' "litigation friend" in correspondence addressed to the Defendant's legal services department which began in February 2008. Mrs Thornton has not been appointed as Mr Woods' litigation friend. In April 2008, Pannone wrote to the Defendant describing Mrs Thornton in those terms, and enclosing a copy of an authority signed by her ostensibly instructing them to act on behalf of Mr Woods. They asked for "a full set of our client's social services records including any assessments" to be sent to them as a matter of urgency. The Defendant, not surprisingly, asked for written confirmation of the appointment of Mrs Thornton as litigation friend. The letter stated that the Defendant was instructed that Michael Woods had mental capacity and that it was not at liberty to disclose his personal data to a third party without his written consent.

17. Ms Hardaker did not respond to the request for written confirmation of Mrs Thornton's status, nor did she provide the Defendant with a copy of Mr Woods' original signed authority dated 17th February 2008. Instead, she sent out a "Letter before Claim" in May 2008 which again referred, inaccurately, to Mrs Thornton as Mr Wood's "litigation friend". The Defendant did not receive that letter, and therefore did not respond to it. Ms Hardaker has offered no explanation as to why she continued to refer to Mrs Thornton as a "litigation friend" in correspondence despite the fact that she believed Mr Woods had full capacity to give instructions at all material times until she received the recent report of Dr Garvey, to which I refer later in this judgment.

18. A further letter from Pannone, dated 22nd September 2008, which was received by the Defendant, omitted all reference to Mrs Thornton and referred to Mr Woods as Pannone's client. In response to this, the Defendant's legal department referred to the previous correspondence, noted that Pannone now appeared to be representing Mr Woods not by a litigation friend, asked again for Mr Woods' signed consent to disclose his medical case notes to Pannone, and said that it would clarify the Authority's position in respect of Mr Woods' care plan. The solicitor who wrote the letter explained that Mr Woods' case manager was currently on leave, asked Pannone to contact her on the telephone if they wished to discuss the matter, and ended by saying "*in the circumstances I assume that litigation will not be commenced against the Authority pending further enquiry and a response from yourselves in respect of consent issues.*"

19. Although this was a measured response, and a reasonable assumption, Pannone wrote back on 7th October 2008 without answering any of the issues raised by the Defendant, and stated in fairly trenchant terms that they were going to commence proceedings for Judicial Review. This letter reverted to describing Mrs Thornton as Mr Woods' litigation friend. The Defendant's legal representatives wrote back on 13th October, and asked yet again for clarification of Mrs Thornton's status. The letter informed Pannone that a reassessment and review of Mr Woods' needs was already underway and due to be completed in a month's time. The Defendant pointed out that

"*the unpredictable nature of Mr Woods' willingness or otherwise to interact with those who attempt to interview and assess him has an impact on the speed at which such reassessment and review can progress.*" The letter also referred to the fact that Mr Woods was declining the assistance that the Defendant and Roots were offering him. Surprisingly, it was not included in the correspondence exhibited to the Grounds and Statement of Case.

20. Mrs Thornton gave Ms Hardaker a handwritten and rather jumbled letter from Mr Woods dated 14th October 2008 outlining his existing problems. That letter contains no complaint about the amount of care he is or is not receiving, but outlines certain difficulties he experiences, particularly at night. Ms Hardaker understood (presumably from Mrs Thornton) that Mr Woods' instructions were that he wished to have more care than he was currently receiving, and therefore went ahead and issued the Judicial Review Claim Form.

21. Given this background, and in particular the behaviour of Mr Woods at his meeting with Mrs Turner a week after the claim form was issued, it was not at all surprising that when the Defendant acknowledged service it raised concerns about whether Mr Woods was truly aware of what was going on and consented to the litigation being brought in his name. The summary of grounds for contesting the claim stated that Mr Woods did not lack the requisite mental capacity to instruct a solicitor, but noted that the address given for him in the Claim Form and in the "Grounds and Statement of Case" was not Mr Woods' address, but that of his mother. The summary continued:

> "Upon enquiry Mr Woods has indicated to the Defendant Local Authority that he was unaware that it was being asserted on his behalf that his care package should be as per the 17th July 2007 Care Plan and he appears unaware of these proceedings in his name. Mr Woods, far from demanding the level and frequency of input provided for in the 17th July Care Plan, has for many months prior to the issue of these proceedings been stating that he wants <u>less</u> input than is being offered. He has, at times, been resistant to having any input at all. Mr Woods' willingness or otherwise to interact with those trying to engage him in the reassessment and review of his needs has varied and been hard to predict."

That, I find, is an accurate reflection of the state of affairs with which the Defendant was and is faced.

22. On 28th December 2008 Mrs Justice Black directed that the application for permission to bring an application for judicial review be listed for an oral hearing. As she observed on that occasion:

> "... even without the Acknowledgement of Service, there were obvious questions concerning the capacity/wish of the claimant to bring these proceedings, particularly as the witness statement in support of the claim is from his mother and not from himself. The Acknowledgment of Service underlines these concerns as it indicates that he does not wish to have the care assessed as necessary by the Defendant".

23. Following that direction by the court, an independent Psychiatrist, Dr Timothy Garvey, was instructed by Pannone and interviewed Mr Woods in his present flat. Dr Garvey is not a neuropsychiatrist, and therefore, unlike Dr Hackett he is not a specialist in the assessment, management and treatment of persons with acquired brain injury. However, he does carry out assessments of capacity for persons with a variety of mental health problems including acquired brain injury. Dr Garvey proceeded on the assumption that Mr Woods is suffering from an acquired brain injury although, as I have already indicated, that assumption may be incorrect. Dr Garvey ascribes Mr Woods' behaviour to that injury, and not to any form of mental illness.

24. Dr Garvey's report, which is dated 28th January 2009, concludes that Mr Woods does not have the capacity to litigate, secondary to the cognitive defects caused by his acquired brain injury. He said that the injury had impaired Mr Woods' concentration and memory to an extent that his capacity to litigate was impaired.

25. However it is not clear from Dr Garvey's report that he was addressing the legal test set out in the Mental Capacity Act, to which no reference is made. Section 2(1) states that for the purposes of the Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

26. Forgetfulness and a lack of insight, which seem to be the main reasons for Dr Garvey's diagnosis, are insufficient in themselves to amount to a lack of capacity. Section 3 of the Mental Capacity Act sets out the criteria by which to evaluate whether a person is able or unable to make a decision for himself. He has to be able to understand the information relevant to the decision, retain that information, use or weigh it as part of the process of making the decision, and communicate the decision. The fact that a person is able to retain the information relevant to making a decision for a short period only does not prevent him from being able to make that decision. Moreover, under section 1 of the Mental Capacity Act a person is not to be treated as unable to make a decision merely because he makes an unwise decision. It may be that Dr Garvey did have regard to these criteria and failed to spell it out in his report, and I have no reason to doubt Dr Garvey's professionalism or independence. However there are other aspects of his report that causes me some unease about accepting his conclusions at face value.

27. Dr Garvey attributes what he diagnoses as a lack of capacity purely to the (assumed) brain injury and not to any mental illness or impairment, and yet he accepts that Mr Woods' condition had improved, rather than deteriorated, since the time of the original brain injury. This is curious, because Dr Hackett, the consultant neuropsychiatrist who evaluated him during the earlier period, and expressly applied the correct legal test, came to the conclusion that he did have capacity. It is difficult to understand how these two views can be reconciled unless there has been deterioration in Mr Woods' condition or a new, and entirely different, cause of mental impairment has arisen in the intervening period.

28. Dr Garvey also said that he did not feel that Mr Woods was at present able to make rational decisions about his care and housing needs. He referred to the fact that when his regular support worker was away for a week, Mr Woods had tried to cope by himself and believed that he could, but his mother and grandmother had found that he

had forgotten to attend appointments and to get new supplies of his essential medication. When his care worker returned, Mr Woods had told him that matters had gone well and that he had experienced no major problems. With respect to Dr Garvey, that may be a perfectly reasonable conclusion, but it is plainly not an assessment by reference to the criteria for capacity in section 3 of the 2005 Act. At most, it demonstrates a lack of insight by Mr Woods into the consequences of a decision to try and cope unaided that others may (with justification) regard as unwise.

29. Dr Garvey has very fairly made it clear in his report that despite his assessment of Mr Woods' capacity (or lack of it) he accepts that care cannot easily be delivered to Mr Woods unless he is willing to accept it. He states that any appropriate care package would need to take into account Mr Woods' wishes. He expresses the view that direct contraventions of those wishes should be kept to an absolute minimum, as such interventions erode trust and in the longer term are often counterproductive. One wonders, therefore, what difference if any it would make to the practical decisions to be taken by the Defendant in terms of his care, if Mr Woods did lack capacity.

30. I appreciate that even if capacity appears to be uncontentious, the Court has a duty to investigate the question wherever there is any reason to suspect that it may be absent. At present, I find that the evidence that Mr Woods lacks capacity either to litigate or to make decisions about the amount of care he wishes to accept falls short of establishing on the balance of probabilities that he does lack capacity. On the other hand, his behaviour does give rise to cause for concern, and the Court does not have enough information to form a fair conclusion at this juncture. Before it could do so, the question whether he has or has not suffered from a brain injury would need to be definitively settled, and Mr Woods would need to be assessed by reference to the statutory criteria, preferably by a neuropsychiatrist.

31. I observe that in the course of reassessing his current needs, those responsible for his medical care may also consider it appropriate to revisit the question whether he is or is not suffering from a mental illness (regardless of whether or not any such illness impairs his capacity). That may already be in hand, as the review in July 2008 suggested that his GP was going to be spoken to for further advice about certain aspects of his behaviour.

What should happen to the application for permission?

32. Mr Karim accepted that, in the light of Dr Garvey's report that Mr Woods lacked the mental capacity to litigate, the proceedings for Judicial Review could not go ahead, at least until the issue of his capacity had been determined. He submitted that the Court should stay the application for permission, pending a possible application to the Court of Protection.

33. Mr Butler submitted that the evidence that Mr Woods lacked capacity to litigate was unpersuasive, and that the Court should proceed on the assumption that he does have capacity to litigate and determine his application on the merits. However, even if the Court was reluctant to form a definitive view about his capacity (or lack of it), the Court should not stay the application for permission to bring an application for judicial review but should dismiss it. The issue of capacity was a red herring, since

i) the Defendant's obligations to provide care for Mr Woods remain the same, regardless of whether or not he has the capacity to litigate or to make decisions about the amount of care he wishes to receive, and

ii) the Court would be in no better position to evaluate the merits of the claim for judicial review after the issue of capacity had been determined and a litigation friend appointed, if necessary.

34. The obligations of a Local Authority to a vulnerable adult are set out in paragraph 19 of the judgment of Hedley J. in Re Z: an adult (capacity) [2004] EWHC 2817. That case predates the Mental Capacity Act 2005, but is entirely consistent with the statutory approach to deciding what is in the "best interests" of someone lacking capacity, set out in section 4 of the 2005 Act. In summary, it is incumbent on the local authority to ascertain, so far as possible, the true position and intention of a vulnerable adult such as Mr Woods, and to consider whether he is legally competent to make and carry out any decisions or intentions that he has expressed. Faced with the contents of Dr Garvey's report, whatever this Court decides, the Defendant will have to reconsider Mr Woods' current position and reassess his needs in the light of the fresh medical evidence, and that is what it will do. It is possible that further inquiries will lead to the Defendant itself making an application to the Court of Protection, regardless of any application that may be made by Mrs Thornton.

35. Mr Butler contended that whether the claim for judicial review was pursued by the Claimant or by a litigation friend acting on his behalf, it was doomed to failure. Whoever brings the claim could not get over the threshold for permission, since there is no real prospect of persuading the Court that the Defendant was acting in breach of statutory duty by refusing to assess Mr Woods or to provide him with care that he is both assessed as needing, and wishes to receive. He referred to the case of R (on the application of Heffernan) v Sheffield City Council [2004] EWHC 1377 (Admin), which concerned a claim by a severely disabled claimant for judicial review of a local authority's care plan for him.

36. The claimant in that case was paid an amount to enable him to get care for the number of hours considered appropriate. Within those parameters, he had to decide when and for how long he should have carers attend him. The claimant complained that he needed more hours than those that were being provided to him. Mr Justice Collins observed that the amount of care was not at all generous, but pointed out that it did not need to be: it must be adequate to meet the particular needs. He decided that in the light of certain errors he had identified in the local authority's approach to its assessment, there would have to be reconsideration by that authority of the claimant's needs. However, he could not say that the reconsideration would inevitably result in more hours of care, or that the Care Plan was perverse. Finally, the learned Judge observed that this Court is not the best tribunal to decide what are essentially issues of judgment based upon a factual assessment. That is an observation with which I wholeheartedly concur.

37. This is not a case like Heffernan, because nobody has suggested that there is anything wrong with the Defendant's current assessment of the number of hours of support that should be provided, if Mr Woods were willing to accept it. The Defendant says that it is not legally obliged to provide those hours, because Mr Woods does not want that level of support. Mr Karim submitted that the evidence was not as clear-cut as all that,

and that Mr Woods appeared to be saying one thing to his mother and quite another to his care worker and social worker. He pointed out that there was no witness statement from Wendy Turner, and that the only account of the conversation between Mrs Turner and Mr Woods on 29th October 2008 is in Ms Thorpe's first witness statement. However, I have no reason to doubt the accuracy of Ms Thorpe's evidence, which is generally supported by and consisted with the contemporaneous documentation.

38. In the light of Dr Garvey's evidence about Mr Woods' forgetfulness and inability to concentrate, it seems highly likely that when he spoke to Mrs Turner on 29th October 2008, Mr Woods had forgotten giving his mother the written authority in February 2008. There is no evidence, even from Mrs Thornton, that he knew what sort of complaint she was going to be making, and of course back in February 2008 the situation was different. Pannone were asking the Defendant to carry out a Community Care Assessment on the assumption that one had not been carried out, when the Defendant had only just completed its fourth assessment. At that point there was no threat of Judicial Review.

39. It is also probable that by the time he spoke to Dr Garvey, Mr Woods had forgotten writing the letter of 14th October 2008. There is no evidence that when he wrote it, he knew it was going to be shown to a solicitor. I have very serious doubts about whether Mr Woods was ever fully conscious of the proceedings that were being brought in his name, or that he has ever complained to anyone that the Defendant is not providing him with enough care.

40. Although I cannot altogether rule out the possibility that Mr Woods keeps changing his mind, and has been telling his mother that he is not receiving enough assistance from the Defendant, and telling his care worker exactly the opposite, it does seem improbable, given the consistent pattern of Mr Woods refusing help that emerges from the Defendant's evidence. The more likely scenario appears to be that Mr Woods is (at best) prepared to put up with the current amount of help he is getting from the Defendant, but that Mrs Thornton thinks (according to Dr Garvey, with good reason) that he is not the best person to judge the amount of help he needs. However, it is not the function of this Court to ascertain what level of care Mr Woods should be receiving, bearing in mind his current state of health. That is the function of the Defendant, taking into account the wishes of Mr Wood and the extent to which he has sufficient insight into his situation to make rational decisions.

41. The evidence that Mr Woods does not want the level of support that the Defendant is prepared to offer seems to me to be overwhelming. Even Mrs Thornton's witness statement generally corroborates the Defendant's evidence that he has been refusing help from the Defendant. The fact that he may have been ringing his family and asking them for help is not inconsistent with his wish not to be provided with that help by social services. Mr Woods' letter of 13th October 2008 tends to support Dr Garvey's view that Mr Woods may have an inflated or unrealistic idea of his own ability to cope unaided, but it is not inconsistent with Mr Woods telling the care workers and social workers that he can manage without them (and believing that to be the case).

42. There is no direct evidence from Mr Woods himself that he wants 20 hours' care to be provided to him by the Defendant, and the evidence from the Defendant makes it clear that if Mr Woods wanted more assistance (up to the 20 hours) he would get it.

Indeed in the week of 14th December 2008 he received 19.5 hours' care, although that seems to be an exceptional and isolated instance. There is no reason for the Defendant not to provide Mr Woods with the amount of help it has assessed him as requiring, and Mr Karim was unable to suggest why the Defendant should not be giving Mr Woods additional help if he had made it clear to them that he wanted it.

43. The real complaint in this case appears to be that the Defendant is not forcing Mr Woods to accept further assistance when he is unwilling to receive it. This is entirely consistent with what Mrs Thornton said to Wendy Turner on 21st October 2008, immediately before the Claim Form was issued. That complaint does not emanate from Mr Woods but from his mother, who is understandably concerned that he is acting against his own interests. Whatever his capacity, the Defendant is not acting in breach of its duties by taking Mr Woods' wishes into account, and trying to persuade him to accept more help when he appears resistant. The Defendant is not obliged to force him to accept that help against his will, even if he lacks capacity (which, on the present evidence, I am not satisfied he does).

44. This Court can only interfere by way of judicial review if the Defendant is not carrying out its statutory obligations. There is no evidence of any failure by the Defendant to take into account relevant considerations in reaching its assessments; the Defendant is carrying out regular reviews, and it is engaging Mr Woods and his family in dialogue to try and produce a flexible care plan with which he will co-operate. Thus the Defendant is doing exactly what it is obliged to do. If Mr Woods continues to be uncooperative and if a further medical assessment indicates, by reference to the proper statutory criteria, that he is incapable of making decisions about his care, there may come a time when Mrs Thornton, the Defendant, or both of them, have to enlist the help of the Court of Protection. Even then, there may be limits to the extent to which that Court can make a practical difference – but that is a matter for the future.

45. In my judgment, there is nothing to be gained by staying the application for permission to bring proceedings for judicial review until Mr Woods' capacity has been determined either by this Court or the Court of Protection, as there is plainly no substance in the complaint that the Defendant is failing to carry out its statutory obligations and the application for judicial review is bound to fail, whether it is brought directly or by a litigation friend acting on Mr Woods' behalf.

46. In saying this I should stress that the Court has considerable sympathy with Mrs Thornton's concerns, which are obviously genuine and may be well-founded. It is clear that she is doing everything she can to look after her son's best interests. However, the Defendant is also acting in his best interests, to the extent that it is being allowed to do so. This is not a case of a local authority abrogating its statutory responsibilities, quite the contrary. It may well be that Mr Woods is not the best judge of his own ability to cope without additional assistance, but the fact remains that it is very difficult, if not impossible, for the Defendant to provide him with additional care if he is not prepared to co-operate. If, as the evidence overwhelmingly suggests, the only reason that Mr Woods is not regularly getting the 20 hours of care and support that the Defendant has assessed he ought to be getting is because Mr Woods has refused to allow the Defendant to provide it, there is no prospect of a successful claim for judicial review. For these reasons I dismiss the application for permission.

47. As the Claimant has assistance from the Legal Services Commission, any application by the Defendant for costs against the Commission will have to be dealt with by a Costs Judge or District Judge after the prescribed formalities have been completed. It is hoped that this can be dealt with in a court that is local to the parties. This is a case in which, if it accedes to such an application, the relevant court may consider it appropriate to order not just the payment of the costs of acknowledgement of service but all the costs expended by the Defendant in resisting the application for permission, including the costs of attendance at the oral hearing. The evidence supporting the application was incomplete, inaccurate, and misleading in material respects; the litigation was being driven not by the Claimant but by his mother, who was pursuing her own agenda, and in my judgment it was unreasonable for the Claimant or his mother to have persisted in making the application in the teeth of the evidence served by the Defendant.

48. The Defendant made an application that Pannone should show cause why a wasted costs order should not be made against them. Mr Butler referred me to the judgment of Mr Justice Munby in R (on the application of B by her litigation friend MB) v London Borough of Lambeth [2006] EWHC 639 (Admin) and the warning given in it about the inappropriateness of using judicial review proceedings as a means of attempting to get the Court to substitute its own decision about what should be done for the claimant for that of the local authority. Mr Justice Munby pointed out that it is not the function of this Court to monitor and regulate the performance of public authorities, but to review their decisions, action or failure to act in relation to the exercise of a public function. That criticism could well be levelled at this claim, though it was presented as a public law challenge to the alleged failure by the Defendant to carry out a further assessment.

49. However, there is a distinguishing feature. In those cases to which Mr Justice Munby was alluding, the claimant was trying to get the Court to revise or depart from the assessment of the local authority. In the present case, there is no quarrel with the assessment (or, if there is, it was not the issue being put before the court). It was common ground that the decision made on the assessment was not being implemented, and the only issue was whether or not there was a legitimate excuse for the Defendant departing from it without making a fresh assessment. That turned on the evidence as to why the Defendant was not providing the full care package; and it does not seem to me to be the fault of the solicitors that Mrs Thornton did not give a full explanation of what was really going on or what her true objective was.

50. Whilst I agree with Mrs Justice Black that it did not need the acknowledgement of service for questions to be raised about the capacity and wish of the Claimant to bring these proceedings, it is difficult to castigate Pannone's failure to investigate his capacity at an earlier juncture as "improper, unreasonable or negligent". They had a written authority signed by him. Nor is there any evidence that an earlier investigation into his capacity would have resulted in any saving of costs by the Defendant.

51. Mr Butler criticised the description of Mrs Thornton in correspondence as a "litigation friend", and the confusion this inevitably caused, which was compounded by the failure by Pannone to clarify the position when asked to do so on more than one occasion. I agree that Ms Hardaker's conduct of the matter left a great deal to be desired. All she had to do was to produce the original letter of authority from Mr

Woods, and confirm that Mrs Thornton had not been appointed as a litigation friend but was merely the conduit for his instructions. It should not have been difficult for her to obtain instructions to do this, and she does not say that she was unable to do so. In fact, she gives no excuse at all.

52. However, I am not persuaded that the application for judicial review or the costs of defending it would have been avoided if Ms Hardaker had behaved more sensibly, and told the Defendant that she had authority from the Claimant to receive his instructions via his mother. Nor am I persuaded that Pannone's persistence with the application for permission in the face of the evidence served by the Defendant was improper, unreasonable or negligent. The instructions given by Mr Woods in February 2008 were not withdrawn, and nor was the support of the Legal Services Commission. This is not an appropriate case for the exercise of the wasted costs jurisdiction.