Status: Positive or Neutral Judicial Treatment

The Queen on the Application of Sandra Stewart v The London Borough of Wandsworth, The London Borough of Hammersmith and Fulham, The London Borough of Lambeth

C0/1525/01

High Court of Justice Queen's Bench Division (Administrative Court)

17 September 2001

Neutral Citation Number: [2001] EWHC Admin 709

2001 WL 1346981

Before: Mr Jack Beatson QC (Sitting as a Deputy High Court Judge)

Monday 17th September, 2001

Representation

Mr S Knafler (Instructed by Messrs Flack & Co, Wandsworth SW18 4JQ) appeared on behalf of the Claimant.
Mr N Giffin (Instructed by Wandsworth Borough Council, Town Hall, Wandsworth High Street, London SW18 2PU and London Borough of Hammersmith and Fulham, Legal Services Division, Town Hall, King Street, London W6 9JU) appeared on behalf of the First and Second Defendants (Wandsworth and Hammersmith).
Mr P Oldham (Instructed by Messrs Sternberg Reed Taylor & Gill, Barking IG11 8DN) appeared on behalf of the Third Defendants (Lambeth).

JUDGMENT

THE DEPUTY JUDGE:

1. Can I say before I read the judgment that I received a letter from Ms Stewart today which I have read. She should know that.

2. By section 17(1) of the Children Act 1989:

> "It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> > (a) to safeguard and promote the welfare of children within their area who are in need ..."

3. This case is concerned with the meaning of the words "within their area" and the identity of the authority or authorities subject to the general duty in section 17.

4. The claimant, Ms Sandra Stewart, and her two children currently reside at Unit 15,

Stewart Lodge Hostel, 201 Stewart Road, a hostel owned and managed by Hammersmith and Fulham (hereafter "Hammersmith"), but located in Lambeth. The children both go to school in Wandsworth. The issue before me is within which local authority area or areas are the children for the purposes of section 17. The three possibilities are Hammersmith, Lambeth and Wandsworth. Mr Knafler, on behalf of the claimant, argues that all three are *prima facie* under the general duty in section 17. The claimant, who left her home in Hammersmith in March 2000 and then stayed at a number of temporary addresses in Hammersmith and outside the borough, sought housing assistance from Hammersmith on 7th June 2000. Because she appeared homeless and to have a priority need, pending inquiries pursuant to its duty under section 188 of the Housing Act 1996, Hammersmith accommodated her and the children at Stewart Lodge Hostel. The second possibility is Lambeth because Stewart Lodge is located in Lambeth. The third possibility is Wandsworth where, as I have noted, the children go to school.

5. Following its inquiries, Hammersmith concluded that, although homeless, Ms Stewart was intentionally homeless. It informed her of this in a letter dated 13th October 2000. On this basis it owed her only the limited duty under section 190 of the Housing Act, and it permitted the family to remain in the hostel for a further seven days from 13th October 2000 to give Ms Stewart the opportunity to secure accommodation. She did not leave and, on 17th January 2001, Hammersmith obtained a court order for possession of the premises against Ms Stewart (with effect from 31st January 2001).

6. I turn to her attempts to get an assessment under section 17. Before the court order she had sought an assessment from Kensington and Chelsea which declined on the ground that it had no responsibility. She then applied to Hammersmith. Hammersmith replied on 23rd January 2001 stating that she should apply to Wandsworth where the allocated caseworker mistakenly believed Ms Stewart was residing. The explanation for this mistake is that the hostel was near the boundary between Wandsworth and Lambeth.

7. On 5th February Flack & Co, Ms Stuart's solicitors, applied to Wandsworth for assistance under section 17 in view of the fact that the family was about to be evicted from their accommodation at Stewart Lodge Hostel. The letter stated that the application was made to Wandsworth as the children attended schools in the borough. Wandsworth replied on 8th February 2001 after seeing Ms Stewart stating that since Hammersmith placed her in the accommodation the matter be referred to them. It wrote again on 9th February 2001 stating that Stewart Lodge was in fact in Lambeth, and on 12th February 2001 stating that Ms Stewart's children "are not children in need in the borough of Wandsworth" and that it did not therefore have a duty to assess them under section 17. It appears from Flack & Co's letter of 8th March 2001 to Lambeth that on 20th February Ms Stewart made an application to Lambeth for an assessment as to whether the children were "in need" within section 17 and was told that Lambeth would not carry out an assessment.

8. It is clear that at least one of these authorities is subject to the general duty under section 17. The way Ms Stewart and the children have been treated as a result of the differences between these three authorities is to say the least unfortunate. The reason for what might be described as a "stand-off" is that assessments under section 17 are required to comply in substance with detailed statutory guidance in the Local Authority Social Security Act 1970and because of the possible wider implications of being under a duty to assess. The question whether once a child's needs have been identified upon an

assessment there is a duty to provide those services is currently under consideration by the Court of Appeal in R(A) v Lambeth LBC. The outcome of that case may affect what has to be done by the authority or authorities which have Ms Stewart's children "within their area", but it was common ground before me that it will not impinge upon the identification of the authority or authorities.

9. Letters before action were sent to the three boroughs on 28th February and 8th March. Judicial review proceedings were launched on 18th April, and permission was granted by Harrison J on 5th June 2001. Hammersmith suspended the eviction of the family from Stewart Lodge pending these proceedings.

10. As stated above, section 17 imposed a general duty on every local authority "to safeguard and promote the welfare of children within their area who are in need". The first issue before me is whether "within their area":

(a) has a geographical meaning and requires physical presence;
(b) while having a primarily geographical meaning, also has a secondary purposive meaning, under which one tests the issue by asking whether the child is within the area of responsibility of an authority, or
(c) has a purely purposive meaning.

11. The second issue is whether, if physical presence is a necessary requirement, it is also a sufficient one. On this Mr Giffin, on behalf of Hammersmith and Wandsworth, submitted that while necessary, physical presence was not sufficient to trigger the duty under section 17. He submitted that having established a physical presence, it is then necessary to ask what is the nature and duration of the required physical presence. He submitted that the need for local authority services and the physical presence must co-exist, and that the requisite nature and duration of the physical presence must also depend upon the service which it is thought the child may require.

12. The submissions, however, centred on the first issue. Mr Giffin submitted that the first alternative, physical presence, was a necessary requirement. Accordingly he submitted that Hammersmith was not under the duty in section 17. This was because, as was conceded by Mr Knafler, until 13th October 2001 when Hammersmith determined that Ms Stewart was intentionally homeless the children had no accommodation need because they were being housed at Stewart Lodge.

13. Mr Knafler submitted that, notwithstanding a primarily geographical meaning, the words also have a secondary purposive meaning. He submitted that on a purposive reading of section 17 a child remains within the area of a local authority if it has been living in the local authority's area but has been temporarily housed elsewhere pursuant to statutory authority. Accordingly, he submitted that Lambeth and Wandsworth were *prima facie* under the general duty because of the children's physical presence in the two boroughs; Lambeth where they were temporarily living, and Wandsworth where they are long-term at school and are physically present for the majority of their waking hours. But he also submitted that on a purposive meaning of section 17(1) Hammersmith was also *prima facie* under the general duty. It was his submission that if, as he argued, all three authorities are *prima facie* liable to assess, the decision as to which authority actually assesses is a matter of rationality, and that the rational order of responsibility was Hammersmith, Wandsworth and Lambeth.

14. Mr Oldham, on behalf of Lambeth, submitted that there is no requirement for physical presence, and that the phrase "within their area" tends to a meaning "within their remit" or "within their area of responsibility". His primary submission is that on this approach Hammersmith is liable because Ms Stewart and the children are long-term residents of Hammersmith and have been placed physically in Lambeth's area only through the entirely fortuitous circumstance that one of Hammersmith's tenanted properties is in Lambeth's area. His secondary submission is that if physical presence is necessary, as between Lambeth and Wandsworth, the latter is responsible because the children are at school in Wandsworth whereas Lambeth has not provided the Stewarts with any services in the past. Both purposive approaches in fact look to the authority which is providing services or which has provided services in the past.

15. Mr Giffin's submission that physical presence was a necessary requirement was based on the clear meaning of the statutory words, the scheme of the Children Act, and the need for a simple and clear test that produced certainty, generally with only one authority with responsibility under section 17. Moreover, the words "within the area" in section 24(2) of the Children Act (as it then was) had been interpreted to mean physically present in *R v Lambeth LBC, ex p Caddell [1998] 1 FLR 253* and R v Kent CC, ex p Salisbury & Pierre (2000) 3 CCLR 38.

16. It is convenient to deal with the authority first. The duty under the previous section 24(2) of the Children Act was to "advise and befriend" young persons formerly in care. This duty applied to persons "within the area" of the local authority. R v Lambeth LBC, ex p Caddell and R v Kent CC, ex p Salisbury & Pierre concerned London boroughs which had arranged foster placements in Kent and the disputes were whether, when the foster placement came to an end on the young person's 18th birthday it was Kent or the London borough which became responsible under section 24(2). It was held that at that time the young persons were within the area of Kent not that of the London borough which had placed them in Kent, and that the responsibility lay on Kent. In ex p Caddell Connell J stated (at page 259) that the words of the statute are clear and rejected the argument that the phrase "within the area" of the authority in section 24(2) should be read as referring back to the period when the qualifying person was still a child. This case was followed by Latham J in ex p Salisbury & Pierre.

17. Mr Giffin relied on these cases and submitted that similarly the ordinary and natural meaning of the words "within their area" in section 17 refers to and requires physical presence. He also argued that there are clear indications within the statute that the words refer to a physical or geographical area: see for example section 19(4) which refers to "establishments within their area", section 24(12), and Schedule 2 paragraph 1A(3)(c). There was no reason for giving the same concept used in different provisions of the Children Act a different meaning. With regard to the scheme of the Children Act, Mr Giffin submitted that the Act deploys a number of concepts to describe a child's link with an area, including "ordinary residence" (see sections 20(2), 29(2)) — which can be maintained without physical presence — "living within their area" (section 16(7)) and "within the" or "within their" area. Mr Giffin particularly relied on the fact that Parliament chose not to use the concept of "ordinary residence" in section 17 and suggested that Mr Knafler's approach would in effect introduce it indirectly in respect of section 17.

18. With regard to certainty, Mr Giffin submitted that it is important for the law to be clear

as to the gateway to section 17 and not to require extensive investigations into a number of relevant facts and circumstances. While in some cases a requirement of physical presence might appear to involve some artificiality, he argued that over the course of years the swings and roundabouts principle is likely to even out any seeming disadvantage to an individual authority in a particular case. He relied on the general approach of Thorpe LJ in *Northamptonshire CC v Islington LBC [2000] 2 WLR 193*, at pages 201 and 203, albeit in the different context of section 38 of the Children Act.

19. The arguments concerning certainty in fact cut both ways. Mr Knafler (with whom Mr Oldham agreed) argued that Mr Giffin's approach did not in fact eliminate a purposive approach and some uncertainty. This was because, on Mr Giffin's approach, physical presence is not sufficient and the nature and duration of the required physical presence and whether the need co-existed with the physical presence must also have to be considered. This meant that it would be necessary to apply a purposive construction to determine which authority is subject to the general duty under section 17.

20. I turn to Mr Knafler's and Mr Oldham's positive submissions in favour of a purely or partly purposive approach. These were based on what they regarded as unfair and unreasonable consequences of a purely physical or geographical approach, in particular the need to prevent dumping by one authority of families into the area of another authority as a means of getting rid of their statutory duty under section 17, the undesirability of homeless families being passed from one local authority to another, and indications of a legislative policy to this effect and to promote co-operation. Mr Knafler argued that the Stewarts were a Hammersmith family temporarily housed outside Hammersmith and that it was natural to say they remained within the area while so housed. He stated that it is not uncommon for local authorities to exercise their powers in such a way as to accommodate children in need (temporarily or otherwise) in other local authority areas. This might be in order that the children might have access to specialist services available in such areas or so they could be close to particular relatives. In the present case the reason was said to be a chronic shortage of available accommodation in Hammersmith and the fact that Hammersmith endeavours to place a working household such as the Stewarts in a hostel rather than in bed and breakfast accommodation. Mr Knafler submitted it would be absurd if it became *ultra vires* for the first local authority (here Hammersmith) to provide services for children in such circumstances.

21. He sought support for a purposive interpretation also from the Children (Leaving Care) Act 2000. This reversed the outcome in ex p Caddelland ex p Salisbury & Pierreby enacting a new version of section 24 which introduced the concept of the “local authority which last looked after” a person in such cases. Mr Knafler argued that this showed that the courts had misconstrued Parliament's intention as to the meaning of the words “within the area” in the 1989 Act. He recognised that the difficulty with this was that Parliament had amended section 24 but not section 17, but submitted that this was understandable because legislation on the position of children leaving care had been in prospect for some time. Mr Oldham sought to distinguish the duty to give advice under the old section 24(4) and the decisions in ex p Caddell and ex p Salisbury & Pierre on the ground that it was predicated on other local authority care and connection having ceased. He argued that, where a child needs an assessment under section 17, the child frequently (as in this case) is in receipt of ongoing housing services from an authority.

22. With regard to dumping or "passing the buck", there was no suggestion that Hammersmith had, in the present case, decided to accommodate the Stewarts in Lambeth in order to get rid of any statutory duties it had. It was accepted by Mr Giffin that if it had done so it would have exercised its powers for an improper purpose and in a homelessness case would have been in breach of section 208(1) of the Housing Act 1996. But Mr Knafler submitted that if the purposive approach was rejected there is an increased risk of dumping, and that the prospect of judicial review would not be a deterrent because of the difficulties in mounting a successful challenge. He argued that there is a legislative policy against dumping, pointing to section 105(6) of the Children Act 1989 and sections 198(2) and (4) of the Housing Act 1996. Section 105(6)provides that in determining the "ordinary residence" of a child any period in which he lives in any place while he is being provided with accommodation by or on behalf of a local authority is disregarded. Sections 198(2) and (4) of the Housing Act 1996 restrict the ability of an authority with obligations under that Act from transferring them to another authority. These he submitted showed that a secondary purposive meaning should be given to the words "within their area" in section 17.

23. In my judgment the clear meaning of the words "within their area" in section 17 is, as held in respect of section 24(4) as it then was, by ex p Caddell and ex p Salisbury & Pierre, that physical presence is required. The argument that the Children (Leaving Care) Act 2000 showed that the courts had misconstrued Parliament's intention as to the meaning of the words "within the area" in the 1989 Act is untenable since Parliament amended section 24 but not section 17. In fact the Act of 2000 preserved the concept "within the area" as a residual concept where no local authority had previously looked after the person indicating that concept has a geographical or physical meaning.

24. It was also argued that the duty to give advice under the old section 24(4) and the decisions in ex p Caddell and ex p Salisbury & Pierre can be distinguished from the duty under section 17 on the ground that section 24(4) was predicated on other local authority care and connection having ceased whereas where a child needs an assessment under section 17, the child frequently (as in this case) is in receipt of ongoing housing services from an authority. In my judgment this argument does not justify giving the words "within their area" a different meaning in section 17, and contemplating the possibility of different meanings in the many different places the words are used in the Children Act: see for example sections 18, 19, 24(12), (28)(4)(a); and in Schedule 2.

25. Moreover, this argument does not recognise that such housing services may be given under different statutory provisions, that the nature and extent of the duties under these varies, and that the social services authority may be different from the housing authority. In the present case the limited nature of Hammersmith's duty is important. It was providing accommodation pursuant to its interim duty under section 188 of the Housing Act to do so in cases of apparent priority need pending a decision as to its duty (if any) to accommodate. When Hammersmith notified Ms Stewart that it had determined she was intentionally homeless its interim duty under section 188 of the Housing Act ceased (see section 188(3)) and was replaced by the even more limited and temporary duty under section 190 to provide advice and assistance and to accommodate for such period as they consider will give a reasonable opportunity of securing accommodation. Hammersmith has only been shown to have come under a short-term and limited duty. Until Hammersmith determined that Ms Stewart was intentionally homeless it is accepted that there was no

question of a section 17 duty because there was no need for accommodation. At that time it ceased to be under a duty to accommodate save for the very limited period under section 190. So by the time that the question of the section 17 duty arose, save for what might be called "packing up time", Hammersmith's Housing Actduty had ceased and (leaving aside the question of any section 17 duty) it was under no other duty in respect of Ms Stewart's children. In this sense, as in ex p Caddell and ex p Salisbury & Pierre, the prior duty had ceased and to interpret "within their area" as referring to an earlier time when Hammersmith was under some duty would be to do what Connell J held should not be done in ex p Caddell.

26. The limited and temporary nature of Hammersmith's duty also distinguishes this case from the cases where an authority accommodates children in need in the area of another authority to have access to specialist services or to be close to particular relatives pursuant to a duty which is not so limited and temporary. As Mr Giffin conceded, an authority under a duty to provide services cannot bring that duty to an end by transferring a person to the area of another authority.

27. The argument that there are indications in the Children Act of a legislative policy against a transfer of responsibility in a case such as this, does not take sufficient account of the fact that the provisions of section 105(6) concern ordinary residence and that no similar provisions exists in respect of the duty under section 17. This may be because of the more limited nature of the duty in section 17. The criticism that there would be a mismatch between Hammersmith's obligations under the Housing Act and those under the Children Actoverlooks the safeguard afforded by section 208 of the Housing Act, the temporary nature of the Housing Act obligations in the present case and the fact that the obligations of a housing authority differ from those of a social security authority (see in the context of section 27, Lord Templeman in *R v Northavon DC, ex p Smith [1994] 2 AC 402*, 408–9).

28. Requiring physical presence is a clearer test than a purposive approach under which the nature and duration of the presence, or the responsibilities of the different authorities in the frame are taken into account. While physical presence may, as in the present case, involve more than one authority being subject to the duty, I do not consider that an objection. There are, for example, children who are accommodated for part of the week with one parent and partly with the other parent who lives in a different local authority. As Mr Knafler submitted in reply, the absence of a dispute resolution procedure such as that in section 30 in respect of the "ordinary residence" of a child supports the view that a section 17 duty may lie on more than one authority. In a case where more than one authority is under a duty to assess the needs of a child, there is clearly no reason for more than one authority to in fact assess a child's needs and there is a manifest case for co-operation under section 27 of the Children Act and a sharing of the burden by the authorities.

29. I, however, reject Mr Giffin's submission that physical presence, although necessary, is not sufficient, and that the need must co-exist with the presence. This latter factor may not be apparent when an authority is approached by a person physically within its area and asked to make an assessment and requires further investigation of the sort deprecated by Mr Giffin. Moreover, as Mr Knafler stated, it may exclude a section 17 duty in respect of children of gypsies and travellers, and children on the run. It would also not eliminate the possibility that more than one authority might be under the duty; it would not, for example, do so in the case of children who are partly accommodated with one parent in one borough

and partly with the other parent in a different borough. While consideration of whether the need co-exists with the presence may well be relevant in a case where more than one authority is under a section 17 duty and an assessment has been made, and the issue is which, if any authority might provide a given service, I do not consider it to be a prerequisite for the duty to assess. The duty under section 17 is to assess the needs of the child and "need" in section 17(10)(a) includes situations in which the child is unlikely to maintain a reasonable standard of health or development without the provision of services by "a" local authority. The provision is not restricted to services that would be provided by the authority making the assessment.

30. For these reasons, in my judgment Lambeth and Wandsworth came under a duty under section 17 to assess Ms Stewart's children's needs but Hammersmith did not. If the practice of temporarily accommodating people pending inquiries pursuant to a duty under section 188 of the Housing Act is frequently exercised by doing so in accommodation within the area of another local authority, and if, as ex p Caddell and ex p Salisbury & Pierre suggests was the case as between London Boroughs and Kent in the case of fostering, the traffic is all one way, there may well be a case for an amendment to section 17 as Parliament considered was needed in respect of section 24. There is no evidence before me that the traffic is in fact all one way and in any event this is a matter for Parliament and not this court.

31. The next question is whether either Lambeth or Wandsworth have failed to do something they were under a duty to do. Wandsworth's position, as I have stated earlier in this judgment, was that notwithstanding the children's physical presence at Wandsworth schools, they were not in need in Wandsworth and therefore it was not under a section 17 duty. Mr Giffin submitted that since the children were accommodated in Lambeth it was not Wednesbury unreasonable for Wandsworth not to provide accommodation, and it was not therefore in breach of its duty under section 17. This, however, goes to the content of the duty and what needs to be done by the authority with the children within its area and what services need to be provided by it rather than to the identification of the authority with a duty to assess. As noted, the content of the duty is the subject of the appeal in R(A) v Lambeth LBC. In the present case Wandsworth, for the reasons given above, came under a duty under section 17 to assess Ms Stewart's children's needs but did not undertake such an assessment in accordance with the statutory guidance.

32. Lambeth took what was described by Mr Knafler as a Sphinx-like silence in relation to the issues until recently. It has adduced no evidence in these proceedings. On 10th September Lambeth apparently prepared an initial assessment of the children. This is exhibited to Mr Flack's second statement. No reliance was placed on this by Mr Oldham and it was not referred to by any of the parties at the hearing, although it is suggested in Mr Knafler's supplementary skeleton argument that it is unlawful on a number of grounds. The case was argued before me on the basis that there was no assessment by Lambeth and this judgment proceeds on that basis. Accordingly, Lambeth has failed to carry out the assessment, which it was under a duty to do.

33. For these reasons I make a mandatory order requiring Lambeth and Wandsworth to assess the needs of the claimant and her children according to law. I have referred to the provisions of section 27 of the Children Act and the fact that, in a case such as this, I consider there is a manifest case for co-operation pursuant to that provision between the

authorities making the assessment. I would hear counsel as to the form of any further relief which must be on the basis of the findings that I have expressed.

MR KNAFLER: My Lord, I do not think we seek any further relief, save in relation to the costs.

THE DEPUTY JUDGE: Yes.

MR KNAFLER: And we would seek an order requiring Lambeth and Wandsworth to be jointly and severally responsible for our legal costs between themselves on a 50/50 basis, and we would ask for a detailed assessment of Ms Stewart's publicly funded costs, unless Hammersmith sought an order for costs against us, which may be unlikely. That is really all I want to say about the costs.

THE DEPUTY JUDGE: I am grateful, Mr Knafler.

MR GIFFIN: My Lord, may I just apologise that due to ....

THE DEPUTY JUDGE: I did not mention it at the beginning on the ground that dealing with it with courtesy would just take more time and delay the next case further.

MR GIFFIN: My Lord, on behalf of Wandsworth I think I cannot resist Mr Knafler's costs application. I do not think it really matters whether — since one hopes that both Wandsworth and Lambeth are solvent — I do not think it matters whether we are ordered to pay half each or the whole lot jointly and severally with split between us. 50/50 seems — I would suggest that we are ordered to pay half each, it is easier.

So far as Hammersmith and Fulham are concerned, they have succeeded in this litigation and have been here as a consequence of those parties who argued that physical presence was not a requisite, namely the claimant on the one hand and Lambeth on the other. Wandsworth, of course, made no such argument, that is why there was common representation. I therefore seek on behalf of Hammersmith and Fulham, as against the claimant, the usual order against a legally aided party, that is an order for costs with the assessment of any liability postponed. But more materially, in practical terms I seek Hammersmith's costs against Wandsworth, which is an entirely normal order.

THE DEPUTY JUDGE: You mean Lambeth?

MR GIFFIN: I am so sorry.

THE DEPUTY JUDGE: Your Chinese wall is starting to fall down.

MR GIFFIN: I am grateful to your Lordship. Hammersmith's costs against Lambeth, which is an entirely normal order where a claim is being brought against two defendants, each of them, as it were, blames — it is the Sanderson order, more familiar in other contexts. There is no reason why, having been brought here just as much — that argument having been advanced just as much by Lambeth, we should not have our costs against Lambeth, indeed Mr Knafler made it entirely clear in argument, as did his solicitors before proceedings commenced, that ultimately, so long as they were got an assessment from someone they were not too concerned who it was. In other words, if Lambeth had not persisted in the argument against Hammersmith, Hammersmith would not have been here. My Lord, that is my submission on costs.

I would also be seeking permission to appeal on behalf of Wandsworth. Does your Lordship wish to hear briefly now why I would seek that or finish costs first?

THE DEPUTY JUDGE: Let me deal with costs first.

Mr Oldham.

MR OLDHAM: My Lord, on the question of claimant's costs, through lack of instructions I am not in a position to make any submissions on matters at all. So I leave that matter in you Lordship's hands. Plainly, however, if your Lordship were minded to make the defendants pay the costs, then I would suggest it is 50/50 rather more on Lambeth, for the reasons my learned friend suggested in respect of Wandsworth.

As regards Hammersmith, I would suggest that as a matter of discretion and these factors should weigh, my Lord, in my submission in your discretion such as not to order us to pay Hammersmith's costs. First of all, we are not the reason for Hammersmith being here at all. Hammersmith are joined by the claimant, nothing to do with us.

Secondly, my Lord, there is something of an initial reluctance, at least for the court to order parties to pay two sets of costs in most cases and, taking a step back and lastly, my Lord, we are now found to have the obligation under section 17 with possible financial—

THE DEPUTY JUDGE: Why is two — oh two sets of costs, i.e. the claimant's and ... yes.

MR OLDHAM: And another defendants, my Lord.

And, as I say, taking a step back we have the obligation, as your Lordship has found under section 17, with the possible financial consequences to follow. Hammersmith do not. If we have to pay Hammersmith's costs then that simply adds an extra burden on an already strained position as far as resources are concerned.

My Lord, unless I can assist you further on costs, that is all I am going to say.

I too seek permission to appeal.

THE DEPUTY JUDGE: I—

MR KNAFLER: Does my Lord need any reply in relation to Hammersmith's application for costs, because that certainly is very strenuously resisted.

THE DEPUTY JUDGE: Then I do need—

MR KNAFLER: As the Form N461 and the skeleton both state, it mattered little to Ms Stewart which local authority was ultimately found responsible. In the pre-action correspondence and in the acknowledgement of service all three local authorities sought to place the burden of responsibility on the other local authorities in a perfect circularity. The only thing that any claimant can properly do in those circumstances is to issue proceedings in such a way as to bring all the relevant local authorities before the court so they can argue the matter out.

As far as concerns argument on the day in terms of the skeleton, we became involved partly because of Lambeth's complete silence in the run up to the litigation, but on the day simply to give assistance to the court, taking points mostly against Lambeth, for obvious reasons, but also making appropriate concessions in relation to Lambeth, in particular the

concession that clearly no duty arose under section 17 prior to—

THE DEPUTY JUDGE: You mean Hammersmith.

MR KNAFLER: Hammersmith, prior to the actual homelessness. We did simply what we had to, bring the substantively (inaudible) parties before the court so they can slog it out. And therefore, in my respectful submission, the claimant should not be held responsible for Hammersmith's point, because the real point was between Hammersmith, Lambeth and Wandsworth.

THE DEPUTY JUDGE: Well, the claimants are entitled to their costs against Lambeth and Wandsworth, each should bear half the costs.

With regard to the application by Hammersmith and Wandsworth for its costs against the claimants and for costs against Lambeth—

MR GIFFIN: My Lord, I am sorry, it was just an application by Hammersmith.

THE DEPUTY JUDGE: I am grateful. All Chinese walls are dropping.

With regard to the application by Hammersmith for Hammersmith's costs against the claimants and for its costs against Lambeth, this was a case in which it might be said, as Mr Knafler has, that the three potential authorities all sought to place the burden elsewhere and that the claimant had no choice but to proceed against all of them. On the other hand, Hammersmith's arguments have prevailed.

In this case I believe that Hammersmith's costs should be borne in part by the claimant, on the usual terms for a legally assisted party, and in part by Lambeth, who also maintained that physical presence was not required and on which basis, indeed, they have resisted the duty all along and that it would be right for these costs to be borne on an equal basis.

So the order is that 50 per cent of Hammersmith's costs be borne by the claimant, on the usual terms for a legally assisted party, and 50 per cent of them be borne by Lambeth.

Mr Giffin, you want to apply for permission to appeal.

MR GIFFIN: My Lord, yes. So far as the — it is really the question of whether physical presence is a sufficient as well as a necessary condition. I say simply that it is an arguable point which is of some general importance. Your Lordship has heard the argument. It may also be that depending on exactly what the Court of Appeal says in A about the nature of section 17 duties, that may impact upon the matter and it would be right for Wandsworth to be able to consider whether it would wish to take this matter to the Court of Appeal, having had the opportunity perhaps to consider that outcome. That is really all I would say.

THE DEPUTY JUDGE: I am grateful.

Mr Oldham.

MR OLDHAM: My Lord, I can only add that it is obviously a matter that is of concern countrywide and it is particularly a matter of (inaudible) areas.

THE DEPUTY JUDGE: Wandsworth and Lambeth have applied for permission to appeal. I think you must both go to the Court of Appeal for this.

In the case of Lambeth the appeal would be on the challenge to the necessary of physical

presence which I do not think is arguable on the authorities as they are and for the reasons I have given in the judgment.

In the case of Wandsworth it is on the question of whether physical presence is sufficient as well as necessary. I consider that in view of the decisions in the earlier cases, Caddelland Salisbury & Pierre, and the meaning of the phrase in the various provisions that it appears in the Children Act, that this is also not an arguable point.

I am grateful to all of you.

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