

CO/1110/2006

Neutral Citation Number: [2006] EWHC 1105 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 27 April 2006

B E F O R E:

MR JUSTICE GIBBS

ESSEX COUNTY COUNCIL

(APPELLANT)

-v-

SENDIST (1) & S (2)

(RESPONDANT)

Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

MR OLIVER HYAMS (instructed by Essex County Council) appeared on behalf of the Appellant.

MR SAM GRODZINSKI (instructed by Douglas Silas Solicitors) appeared on behalf of the 2nd Respondent.

J U D G M E N T
(Approved by the Court)

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1. MR JUSTICE GIBBS: This is an appeal brought by Essex County Council, the local education authority, against the decision of the first respondent, Special Educational Needs and Disability Tribunal, dated 11 January 2006. The decision was to the effect that a Part 4 statement of special educational needs of a 12 year-old girl known as C should be amended.
2. The second respondent, Miss S, is the mother of C. C has a statement of special educational needs maintained by the appellants. C was born on 16 April 1994. Her special educational needs are a consequence of the difficulties experienced as a result of pre-mature birth. This has given rise to health complications and delay in her development of language skills. She also experiences difficulties with gross motor skills and other skills, as well as having a short attention span. She is a pupil at CSS, a special school for children with moderate learning difficulties maintained by the appellants and has been since 1999. The appellants provide and fund transport between C's home and her school, which is approximately a mile away.
3. In April 2005 C's mother asked that Part 4 of her statement be amended to name another school known as ES, which is also maintained by the appellants as a special school similar in nature to her present school. The appellants agreed in principle with such a transfer but only on condition that C's mother was responsible for the extra transport costs. ES is approximately 12 miles away from C's home.
4. On 12 December 2005 C's mother appealed against the appellants' decision to the Tribunal. Her reasons for wanting her daughter to move to a different school were and remain that C is very unhappy at school and has been for some two years, and that she has experienced increasing isolation. She suffered further problems in that she says that she has experienced racial abuse and has felt in a negative way about being a black girl. All these difficulties, so her mother says, has made her reluctant to attend school. Her mother also says that the personal difficulties experienced at her present school have hindered her academic progress.
5. The appellants resisted C's mother's appeal on the basis that the extra costs of transport taking C to ES constituted an inefficient use of resources. It has not been contended, and is not now contended, that ES is unsuitable for C.
6. On 11 January 2006 the Tribunal issued its decision, allowing the mother's appeal and ordering the local education authority, the present appellants, to amend C's statement to name ES. The present appeal is against that decision.
7. Between the time of that decision and the hearing of this appeal, an application for judicial review was filed by the second respondent, but I need not trouble either with the cause or the outcome of that application.
8. The statutory framework governing the decision about the change in the statement of special educational needs is contained in the Education Act 1996 Schedule 27 at paragraph 8. So far as material to this appeal, it provides as follows:

"(1) Sub-paragraph 2 applies where -

(a) the parent of a child for whom a statement is maintained which specifies the name of a school or institution asks the local education authority to substitute for that name the name of a maintained school specified by the parent, and

(b) the request is not made less than 12 months after -

(i) an earlier request under this paragraph

(ii) the service of a copy of the statement or amended statement under paragraph 6, ... or

(iv) if the parent has appealed to the Tribunal under section 326 or this paragraph, the date when the appeal is concluded, whichever is the later.

(2) The local education authority *shall comply* with the request unless -

(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or

(b) *the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources.*

...

(4) On the appeal the Tribunal may -

(a) dismiss the appeal, or

(b) order the local education authority to substitute for the name of the school or other institution specified in the statement the name of the school specified by the parent..."

In the present case subparagraph (2) applied because C's mother asked the appellants to substitute the name of the school, E, for the name of the school, C.

9. The only exception relied upon by the appellants under subparagraph (2) is the second limb of subparagraph (2)(b). It is not suggested that ES is unsuitable; nor is it suggested that the attendance of C at that school would be incompatible with the provision of efficient education for the other children at that school.
10. The decision of the Tribunal, in so far as material to this case, reads as follows:

"5. Ms S's reasons for wishing C to move schools were that: (a) C was extremely unhappy at school and had been for some two years; (b) she has experienced increasing isolation in school; (c) C seemed to have suffered some racial abuse and was expressing negativity about being a black girl; (d) C has been reluctant to attend school. It was Ms S's case that this had resulted in C making little significant academic progress in the last two years.

6. In their case statement, the LEA maintained that C was appropriately placed at CS and the cost of school transport for C to attend ES would be an extra £4,615 per year. The LEA's view was that this constituted an inefficient use of resources and would override Ms S's expressed reference.

7. At the hearing, Ms S expanded on her concerns about C continuing at CS. Mrs Clift said that C presents as really happy in school, her conversation is getting better and her confidence growing, although she accepted that there had not been progress 'across the board'. In speaking and listening C had not moved up a whole p-level. Nevertheless, Mrs Clift felt that there had been progress in using language in a social context.

8. Mrs Clift emphasised the collaboration between C and the four other MLD schools in Essex, which includes E. She stated that C and E are more alike than ever and that the education on offer at E would 'not be vastly different'.

9. In response, Ms S described C's behaviour as having changed over the last two years in that she tends to speak to herself loudly much more. C's

mother said that she finds C noisy and boisterous and she had been the victim of verbal racial abuse at an assembly. C's godmother, Mrs C added that she had been concerned about C's general behaviour over the last two years and it was her view that C was not flourishing, but was nervous and anxious as if 'something specific had shaken her up a couple of years ago'.

10. In regard to the issue of transport costs, Mr Clancy initially explained that the figures in the case statement were incorrect and the accurate figure for C's current annual transport cost is £2,503.44. He explained that all school transport is arranged on an annual contract for which Essex invites tenders. The re-tendering process takes place each summer. We then adjourned to give Mr Clancy an opportunity to make further enquiries with the transport department so that more informed and accurate figures could be provided to us.

11. When resuming, Mr Clancy told us that if C were to stop using the school transport to C, there would be a saving of £2 per day on the current contract, totalling £380. A taxi already takes a child from Billericay to ES and the cost of extending this journey to collect C from Wickford would be £29 per day, a total of £5,510. On the LEA's case the extra expenditure would therefore be £5,130 (ie £5,510 - £380). There are two other taxis currently taking children to E from the general direction of Wickford, but these were likely to cost the same amount to extend and may involve greater travelling times. One child already travels from Wickford to E, but is transported by his/her parents. Two children also travel to E from Langdon Hills. If C had to be transported on her own by taxi, the cost would be about £12,000 per year.

12. In closing submissions, Mr Clancy reiterated the LEA's views that C continues to be appropriately placed at CS and that she is not outside the pupil profile. It was not suggested that C was more appropriate than E, rather they are of similar character. He told us that we have to be convinced that C is not just less appropriate but actually inappropriate.

...

Our conclusions are:

A. Schedule 27, paragraph 8 of the Education Act 1996 deals with requests by a parent to change a school named in a statement of special educational needs. If the substitute school requested is a LEA maintained school then the LEA must comply with the request unless they can establish one of the 'defences' in paragraph 8(2). In C's case the LEA maintains that her attendance at E, with the additional transport costs, would fulfil the last of these 'defences' - incompatibility with the efficient use of resources.

B. Ms S's case is that not only is the additional cost insufficient to justify the LEA's refusal to change the named school, but that C is no longer able to provide adequately for C and ES should thus be named in the statement regardless of cost.

C. It is therefore necessary for us to consider this appeal in two stages. First, whether the LEA has established that the extra costs involved in transporting C to ES make the placement incompatible with the efficient use of resources. If we find that the LEA has established this, then we would need to go on to the second stage and consider whether C continued to make adequate provision for C's special educational needs.

D. The evidence is clear that the only additional claim on the LEA's resources for C to attend ES is the cost of school transport. In the circumstances, one might have expected that the LEA would have provided us with clear and accurate figure upon which to base the necessary calculations. What we were in fact presented with by the LEA - even after providing an opportunity for further enquiries - was three widely divergent figures for the cost of C's transport to C - the lowest being £380 and the highest being £2503.44.

E. As to the figure of £380, this was what the existing transport firm said they would give by way of discount to the LEA if C were no longer using their transport. What we must bear in mind is that contractually the firm may not be required to give any discount at all as they tendered on the basis that C was included and this cannot be put to us as being the true cost of C's transport, against which we would make comparisons. Of course, we are not only concerned with the academic year but indeed with future years as well and we are satisfied that after the next round of tendering, it is likely that the reduction in cost to the LEA on this journey will be considerably more than currently suggested.

F. The other end of the equation attracts, in our view, the same analysis. Whilst we accept that for the balance of this academic year, the cost of transporting C to ES will likely be £29 per day, the re-tendering process over the summer will give the LEA an opportunity to reduce this cost. There is a variety of permutations of pupils from the county to the east of Brentwood for this to be achieved. On the evidence before us, there is no basis to suggest that C would have to be transported alone and we reject the figure of £12,000 accordingly.

G. Having carefully considered the additional cost to the LEA of C's attendance at ES, we have come to the conclusion, as we must in the absence of any reliable projected figures from the LEA, that it is likely to amount to between £2,000 and £4,000. On this basis, we do not consider the extra cost to be of such magnitude so as to make it incompatible with the efficient use of the LEA's resources. The appeal therefore succeeds at the first stage and it is unnecessary for us to reach any conclusion about

the appropriateness or otherwise of CS.

H. In the absence of establishing any 'defence' to Ms S's request under Schedule 27 paragraph 8, the LEA must now comply with that request and amend Part 4 of C's statement accordingly. For the avoidance of doubt, the effect of this decision is that the LEA will be responsible for the cost of C's transport to and from school. We make it clear that this is a consequence of our decision and we do not purport to exercise any direct jurisdiction over the issue of transport and associated costs."

11. It is submitted that the Tribunal erred in three respects set out in the grounds of appeal and amplified in the appellants' skeleton argument and in careful submissions made by Mr Hyams, on behalf of the appellants, with reference to a number of authorities. Ground 1 is critical of the approach of the Tribunal to the question of incompatibility under subparagraph (2)(b).
12. It is common ground between the parties that there is no direct judicial decision on the point in question. But it is submitted that the Tribunal failed to conduct the sort of balancing exercise which the authorities imply should be conducted in such cases. Particular reliance is placed on F v Special Education Needs Tribunal [1998] EdCR 1 and C v Lancashire County Council [1997] ELR 377. In the latter decision, to which I have been referred in detail, Popplewell J said that a balancing exercise was required when deciding, pursuant to what is now subparagraph (3) of Schedule 27, whether it would be incompatible with the efficient use of resources to send a pupil to the parent's choice of school rather than the LEA's choice of school. Popplewell J, it is argued, indicated that the total costs of an LEA's preferred school should be compared with the total costs of the parent's preferred school when carrying out any required balancing exercise. Mr Hyams submits that the effect of the judge's judgment in that case was that educational gain or otherwise, which was to be made by sending the child to the chosen school, should also be included in the consideration.
13. The case of F was decided by Moses J (as he then was). He interpreted the judgment in C as being less than confident about the necessity to carry out a balancing exercise. But, submits Mr Hyams, Moses J himself came to a firm conclusion on the topic. Reliance is placed on Moses J's assertion that "the Tribunal must weigh in its conclusion the disadvantages of an inefficient use of resources against the advantages of compliance with the preference"; and this, says Mr Hyams, must include the educational advantages in order for sense to be made of the balancing exercise.
14. Mr Hyams criticises paragraphs D to G of the Tribunal's conclusions, which I have already set out in this judgment. He argues that it is plain that the Tribunal went no further than to calculate transport costs as support for its conclusions. He submits that the Tribunal fell into error by not considering or analysing the educational advantages of one school, as compared with the other; and that that error vitiates the Tribunal's decision. Mr Hyams' second ground criticises the Tribunal for failing to consider the transportation costs in the context of the total costs of educational provision for C.

15. Mr Clancy, on behalf of the appellants, in a statement subsequent to the Tribunal's decision, has said that the costs for the present school are £7,372, and for the chosen school £7,606. No reliance is placed on the slight difference between the costs of the two schools. However, it is argued that when one sets the transport costs in the context of the overall costs, one can see the substantial percentage that the transport costs would constitute as part of the total overall costs. Mr Hyams conceded in the course of argument that if ground 2 were to be the only successful ground of appeal he would not argue that the decision of the Tribunal should be quashed. He acknowledges that the receipt of further evidence after the Tribunal's decision is a matter of the court's discretion. But he invites the court to exercise its discretion in favour of admitting the further evidence and to go further and say that, in the light of further evidence, the Tribunal's decision on compatibility cannot be sustained.
16. Ground 3 criticises the Tribunal in its approach to assessing the transport costs involved in the case and, in particular, in assessing the probable increase in costs involved in placing C in the school chosen by her mother. It is criticised in two main respects. First, it is submitted by Mr Hyams that it is wrong in principle, and/or in the context of this particular case speculative, for the Tribunal to have arrived at a costs estimate of transport beyond the current year. He says that the Tribunal should not have done that, but should have restricted its assessment to the known costs or extra costs involved in the current year.
17. The second basis upon which Mr Hyams criticises the Tribunal's approach is based on observations of Sedley LJ in Oxfordshire County Court v GB [2002] ELR 8. In particular, reliance is placed on a passage which reads as follows:

"In cases like the present, the parental preference for an independent school over an available state school, while perfectly reasonable, may have difficult cost implications for the LEA. In that event it is for the LEA, or on appeal the SENT, to decide whether those cost implications make the expenditure on the independent school unreasonable. This means striking a balance between (a) the educational advantages of the placement preferred by the parents and (b) the extra cost of it to the LEA as against what it will cost the LEA to place the child in the maintained school. In cases where the state system simply cannot provide for the child's needs, there will be no choice: the LEA must pay the cost. In cases where the choice is between two independent schools, it is accepted on all hands that the second criterion is simply the respective annual fees, whatever the comparative capital costs or other sources of income of the two establishments: for example, the one with lower fees may have private or charitable funding, but this will have no bearing on the quantum of public expenditure involved in a placement there."
18. Reliance is placed further on R(W) v SENDIST [2005] EWHC 1580 Admin and [2005] ELR 599 paragraph 22. This was a decision of Stanley Burnton J. It concerns transport costs. He said:

"The appropriate basis for the comparison of costs to be incurred by an

LEA as between two different educational establishments is a marginal or additional cost basis; that is to say, if, for example, there is already a vehicle travelling between the vicinity of J's address and [the claimant's school] with three children and the cost of that transport is £20,000 a year, and there is no additional cost for taking a fourth child, the cost of the transport to [the claimant's school] for the purposes of the tribunal's decision is zero. It follows that to take in such a case a quarter of the cost of the transport is an error."

That passage in Stanley Burnton J's decision is used by Mr Hyams as grounds for criticising a passage in the Tribunal's decision concerning the way in which it dealt with the fact that C, if she changed schools, would no longer need to travel in the bus provided to take the children to the existing school.

19. Mr Grodzinski submits as to ground 1 that the appellants' argument is entirely misconceived. He submits that there is undoubtedly a two-stage process, but that the first stage should not involve weighing the respective educational advantages of each of the two relevant schools. That, he says, is a matter for consideration at the second stage of the process, if indeed that second stage is reached. He submits that the second stage is not reached unless one of the exceptions to the concept of implementing parental choice is established. He relies heavily on R v Commissioner for Local Administration ex parte Croydon London Borough Council [1989] 1 All ER 1033, a decision of the Divisional Court, leading judgment being given by Woolf LJ (as he then was). Woolf LJ cited extensively and with approval the judgment of Forbes J in R v South Glamorgan Appeals Committee ex parte Evans (unreported) 10 May 1984. This is at page 1039 and at 1040. I do not need to set out the cited extracts from that judgment in this judgment, but I have read the relevant parts of the case in full.
20. Mr Grodzinski submits first, that the Croydon case, although it was interpreting provisions slightly different from those in the present case and relating to mainstream school provision rather than special needs school provision, is a decision based on matters not materially different from those in this case. The decision, he says, demonstrates that the balancing exercise which takes into account relative educational advantages only arises if there has been a prior finding in relation to the use of resources in the local education authority's favour.
21. Mr Grodzinski also submits that it is clear that not all amounts by way of additional costs incurred by a local education authority will give rise to a conclusion that compliance with parental preference means that there is prejudice to or, in the present case, incompatibility with, the efficient use of resources. He submits that the cases of F and C, to which I have already referred, support, rather than rebut his contentions. In the result, he submits, the Tribunal proceeded entirely correctly and was entitled to find that the extra transport costs did not approach the threshold of incompatibility with the efficient use of resources. He submits that the scheme of the 1996 Act gives prominence to parental choice and does not simply provide that the expression of such preference is no more than a gateway to a comparative exercise balancing respective education advantages. In other words, it is entirely intentional that parental choice is given primacy in the legislation.

22. As regards ground 2, Mr Grodzinski submits that the appellants should not be entitled to raise it, not having raised the point before the Tribunal.
23. As to the third ground, Mr Grodzinski submits that the Tribunal was entitled to approach the question of transport costs in the way that it did, having regard to the way in which the appellants produced the material relating to those costs. He points out that on any view there were inadequacies in the evidence provided by the appellants and the Tribunal was entitled to do its best to make a decision in the light of that material. The Tribunal cannot, says Mr Grodzinski, properly be criticised as having made any error of law in its approach to that exercise.

My conclusions are these:

Ground 1.

24. As it seems to me, the nub of the appellants' submission on ground 1 is this. In deciding the question of whether paragraph 8(2)(b) applies to this case, the Tribunal should have taken into consideration the relative educational advantages and disadvantages of the two schools in question. It should have done so in the context of deciding whether attendance of the child at the school chosen by the parent was incompatible with the efficient use of resources. Viewed in isolation, this submission is an attractive one. The question of whether resources have been efficiently used may sensibly be said to depend on the use to which they are being put. If extra resources are being expended on a school placement, which would not be in the child's interest for example, is a local education authority compelled to exclude that factor from the equation in considering whether the expenditure is an efficient use of resources simply because an expression of parental choice exists in favour of such a placement? Yet the matter is not, in my judgment, to be viewed in isolation. There is the statutory framework, to which I have already referred. Certain principles are implicit in that framework:

(1) Subject to the conclusions in subparagraphs (2)(a) and (b), compliance by the local educational authorities with parental wishes is mandatory. This demonstrates the great importance that Parliament attaches to the expression "parental wishes".

(2) The statutory framework itself provides for consideration of the appropriateness in educational terms of the chosen school for the child (see subparagraph 2(a)).

25. In the present case, as the Tribunal were told, the chosen school is at least equally suitable for C as her present school. That, as I have said, is not in dispute and was conceded by the appellants at the Tribunal.

(3) The statutory framework goes further and requires the local education authority to consider the effect of the placement on other children at the chosen school, (subparagraph (2)(b), first limb). That limb, it is agreed, does not apply in the present case.

26. It follows from these points that the scheme ensures, and sensibly ensures, that parental wishes need not prevail unless the chosen placement is suitable both for the child in question and for the other children with whom he or she would be placed.
27. There remains, therefore, the issue in this case; namely, that of an efficient use of resources and whether the attendance of the child would be "incompatible" with it. In most, if not all, conceivable cases, that means in plain terms: will the costs be so high as to be incompatible with the efficient use of the LEA's resources? From now on, in order to summarise that proposition, I shall use the word "disproportionate".
28. I accept Mr Grodzinski's submission that this provision goes substantially beyond saying that any increase in costs, even any increase which goes beyond the merely trivial, is incompatible with the efficient use of resources.
29. Mr Hyams has fairly and helpfully demonstrated, with the assistance of Oxford English Dictionary definitions, that the word "incompatible" is a strong term. Mr Grodzinski has not sought particularly to rely on any difference between the expression "prejudicial to" and the expression "incompatible with". But, if anything, the latter expression may be stronger than the former. Nothing, I would add, turns on any distinction between the expressions in this particular case.
30. In my judgment, it would be a matter of fact and degree whether any proven increase in costs is so substantial as to be incompatible with the efficient use of resources. I am told that there is no direct authority on the nature of the test to be applied under paragraph 8 in so far as it concerns the situation in this case. I have found some help in the dicta of Kay J (as he then was) in Surrey County Council v P and P, a decision in this court on 16 July 1996; and of Popplewell J in the C case. I find, however, that the passage referred to in the latter case does not enunciate entirely clear principles. I also derive assistance from the Croydon case and the case of F, albeit that they are based on somewhat different statutory provisions.
31. In so far as those decisions do assist they show, in my judgment, that a two-stage test must be applied; that is, unless it can be shown that one of the exceptions in paragraph 8 applies, parental wishes must be followed. Only if one or more exceptions do apply should the local education authority or the Tribunal, in the case of an appeal, carry out the sort of broad balancing exercise which would weigh the amount of resources involved in maintaining the child at a particular school, the relative merits of possible schools for the child and a broad range of relevant educational factors.
32. That finding does not, however, conclude the matter, as it does not follow that the first stage in itself requires anything other than a balancing exercise. In my judgment, the first stage, namely consideration of possible exceptions, does involve a balancing exercise. It is important to define the nature and limits of that balancing exercise. In my view it should consist (in this case) of a judgment about whether in given circumstances any extra expense in fulfilling parental wishes is, in the sense I have defined it, disproportionate. The Special Educational Needs and Disability Tribunal is a specialist tribunal which is well equipped to judge that issue. The local education authority is a well-qualified body, capable of providing facts and figures necessary for

that determination relating to expenditure. In this case probing questions were put to it on C's mother's behalf before and during the hearing about such expenditure. The Tribunal was well placed to judge the appellants' response and make up its own mind on the issue. There is no doubt, because the facts were recited by the Tribunal, that it had well in mind the absence of any suggestion that subparagraph (a) or the first limb of subparagraph (b) applied. The parental wishes expressed were, on the face of them, both rational and well grounded. The only issue was transport costs. As I have said, the distance to the preferred school was 12 miles; to the existing school, about a mile. It would, there is no doubt, cost the appellants more to have the child taken to the preferred school rather than the present one. But subject to ground 3, to which I shall come next, the Tribunal was entitled to find that the extra expenditure was in no way disproportionate when balanced against the effect of refusing the parent's reasonable wishes.

33. I come, therefore, to ground 3, in which it is suggested that the Tribunal fell into error in rejecting or misinterpreting figures provided by Mr Clancy on the appellants' behalf. In my judgment, the reality here is that the Tribunal was confronted with a series of different figures from the appellants. Those differences could be accounted for in part by changes in the basis of calculation by the local education authority and in part by sheer inconsistency and/or lack of clarity. At the very least the Tribunal, as a tribunal of fact, was entitled so to find. Under those circumstances it was also entitled to apply its own experience and expertise to the task of deciding on the available material what would be the probable extra cost of the 12-mile journey to school. It was entitled to look, not just at the current term, in my judgment, but at the following year. Indeed, that was the only realistic and sensible approach. It was entitled to have regard to the probability that the appellants would take sensible steps when the opportunity arose to keep the joint and several travel costs of the children going into their preferred school to a minimum. I can detect nothing in the Tribunal's approach which could amount to an error of law or principle.
34. I come, finally then, to ground 2, which, as already mentioned, it is conceded should not in itself lead to a quashing of the Tribunal's decision. I would simply repeat in substance what I said in the course of Mr Grodzinski's submissions. The total cost of each placement would have been admissible before the Tribunal, had the appellants chosen to adduce it. It was not, in my judgment, incumbent on the Tribunal itself, even having regard to its investigatory rather than adversarial role, to require the appellants to provide such details of total costs. The reason the evidence would have been admissible was because it was capable of being relevant to the issue of efficient use of resources, and the Tribunal could, if it had chosen to do so, have had regard to it if it had been adduced. However, the general principle is that appellants are not normally allowed to re-open matters of fact by adducing further evidence. Exceptionally they may be allowed to do so; for example, an unrepresented and disadvantaged litigant before the Tribunal may fail to spot a good point which would have been dependent on evidence and may, therefore, at the appellate stage, be entitled to put that right. It is not suggested that any such situation arises here.
35. I need I think say no more about ground 2. Even if it were to be argued as a sole ground it would not, in my judgment, prevail. Accordingly, the appeal is dismissed.

36. MR HYAMS: My Lord, I accept that costs must flow from the decision and if there is any need for that I know my learned friend will be asking for detailed assessment for public funding purposes, I suspect, and for the order to be granted.
37. I rise to my feet, my Lord, just to ask for permission to appeal. The points are by no means easy, my Lord. Your Lordship has come to what I would put as a genuinely - when I say genuinely - very illuminating conclusion. My Lord, what I ask for permission to appeal on is both grounds 1 and 3; ground 3 in particular, because in my submission your Lordship's approach, while illuminating, if I may say -- on one view realistic, is inconsistent with the approach of the Court of Appeal in the Oxfordshire case. Albeit that your Lordship has concluded that it was open to the Tribunal to come to the conclusion that it did on the facts, in my submission the substance of the Tribunal's decision was contrary to the Oxfordshire case.
38. As far as ground 1 is concerned, my Lord, I ask for permission to appeal on the slightly different basis, and that is on the basis that the conclusion to which you have come is consistent with the submissions which I made, and your Lordship's conclusion rests upon an interpretation of the decision of the Tribunal which, in my submission, is less than obvious. I would say that this is something which --
39. MR JUSTICE GIBBS: Interpretation of the Tribunal's decision in this case?
40. MR HYAMS: Yes, my Lord, if only because there is such a lack of reasoning. My learned friend took the point and your Lordship considered whether or not there could have been a reasons challenge. My submission is, and your Lordship appeared to be thinking in accordance with this, that this was not really a reasons challenged case; the question was whether or not the Tribunal had carried out a proper balancing exercise. Your Lordship has concluded that it did. My submission is that the Court of Appeal might come to a different view and there might be a difference in the point. Certainly on ground 3 I would ask for permission to appeal in relation to this ground as well.
41. MR JUSTICE GIBBS: Thank you. Do you wish to make any observations on that, Mr Grodzinski?
42. MR GRODZINSKI: Dealing with ground 3, nothing in the Oxfordshire and the GB decision is in any way inconsistent with the approach of the Tribunal in this case. Nothing in that decision says that the Tribunal cannot, doing the best it can with the evidence before it, decide what the costs is going to be not just now, today, but in a foreseeable period of time thereafter. So there is nothing respecting ground 3.
43. In ground 1, your Lordship has applied an established line of authority that relates to paragraph 3(3) of Schedule 27, which is in identical terms to paragraph 8(3) of Schedule 27. So although I respectfully concur with my learned friend's characterisation of your Lordship's judgment as illuminating, it does not, with respect, give rise to any difficulty in terms of its consistency with previous decisions. His point now appears to be that the Tribunal could not have carried out a balancing exercise at ground stage 1, because there is no reasons given. Well that is, with respect, an entirely new point, one which was not argued in his grounds, not argued in the skeleton, not

argued in his oral submission before your Lordship, but raised now after your Lordship's judgment. He is essentially saying you have agreed with it. Well, your Lordship will have your own view on that. If this matter is worthy of consideration by the Court of Appeal then I say the Court of Appeal should decide that for itself, there is nothing in your Lordship's judgment that leads to the, unusual these days, conclusion that leave should be granted.

44. MR JUSTICE GIBBS: Thank you. I am certainly not of the view that permission should be granted to appeal on ground 3. If there is any incompatibility between anything in this case and the Oxfordshire decision, it is incompatibility between one of several mutually inconsistent approaches to costs adopted by the appellants themselves. And it was that mutual inconsistency, as I hope the judgment I just given makes clear, that entitled the Tribunal to make its own assessment of the probable extra costs.
45. So far as ground 1 is concerned, that prompts more thought, but my view is that my decision on ground 1 is essentially consistent with the authority that has been cited to me about the nature of the two-stage process and as that is, in my view at any rate the case, in my judgment I should refuse permission to appeal and the appellants will, if so advised, have to take the matter further.
46. MR GRODZINSKI: I rise just to deal with a couple of consequential matters, firstly to confirm that we do seek our costs of the appeal and of the case in general. Your Lordship will see from page 33 of the bundle, that in relation to costs of the application for a stay the judge ordered at paragraph 5 that costs be in the case, and your Lordship, I anticipate, will order that we get our cost of the appeal.
47. MR JUSTICE GIBBS: Yes.
48. MR GRODZINSKI: I also confirm that we ask for detailed community legal services.
49. MR JUSTICE GIBBS: I do not think either of those are contested and I do grant those.
50. MR GRODZINSKI: The only other matter are these. First of all, consistently with the general anonymity given to these cases, could I ask that the second respondent be called S and that the two schools be called C and E respectively?
51. MR JUSTICE GIBBS: Yes.
52. MR GRODZINSKI: I am grateful. Finally, can I say this --
53. MR JUSTICE GIBBS: I have no doubt that the shorthand writer will observe that.
54. MR GRODZINSKI: Can I just emphasise this. The only order your Lordship needs to and can make is to dismiss the appeal. Can I record this in open court. C's mother, Miss S, fervently hopes that C can start at E's school forthwith, Monday if necessary. She remains unhappy at her current school. No application at the moment lies, and I would fervently hope it is not made for yet another stay of the effect of your Lordship and the Tribunal's judgments. Therefore we simply express in open court the wish that the matter not be delayed any further.

55. MR JUSTICE GIBBS: Yes, thank you.