Neutral Citation Number: [2016] EWCA Civ 26

Case No: C1/2015/1079

IN THE COURT OF APPEAL (CIVIL DIVISION)
Sitting at the Swansea Civil Justice Centre
ON APPEAL FROM THE QUEEN's BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE HICKINBOTTOM
CO/2015/1079

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2016

Before:

LORD JUSTICE LAWS
LORD JUSTICE ELIAS
and
LORD JUSTICE LLOYD JONES

Between:

Forge Care Homes Ltd & Ors	**Respondent**
- and -	
Cardiff & Vale University Health Board & Ors	**Appellant**
- and -	
Cardiff City Council & Ors	**Interested Parties**
- and -	
The Secretary of State for Health	**Intervener**

Mr Mathew Purchase (instructed by Alison Castrey Ltd) for the **Respondent**
Ms Fenella Morris QC and Mr Benjamin Tankel (instructed by Blake Morgan) for the **Appellant**
Mr Richard Gordon QC, Ms Emily MacKenzie and Mr Tom Pascoe (instructed by **Ceredigion County Council**) for the **Interested Parties**
Mr Clive Sheldon QC and Ms Sarah Wilkinson (instructed by The Government Legal Department) for the **Intervener**

Hearing date: 12 November 2015

Approved Judgment

LAWS LJ:

INTRODUCTION

1. This is an appeal, with permission granted by Longmore LJ on 13 July 2015, against the decision of Hickinbottom J given in the Administrative Court on 11 March, by which he quashed determinations of the seven appellants (all NHS local health boards - LHBs - in Wales) as to the rate at which they would pay for the provision of nursing care to certain residents in care homes. The claimants (respondents in this court) are owners and operators of care homes in Wales. 22 local authorities in Wales and the Welsh Ministers were named as interested parties. At the core of the case is the proper construction of s.49 of the Health and Social Care Act 2001 (the HSCA) to which I shall come shortly.

2. There are three classes of residents in care homes which I should distinguish. (1) There are those who are entitled to "NHS Continuing Health Care" (CHC): the whole of these residents' care in the care home is fully funded by the NHS. They are persons with the highest level of need, including 24-hour nursing care. (2) Residents who require some nursing care, but nursing is not their primary need. In this case the nursing element is called "NHS Funded Nursing Care" (FNC). (3) Lastly, there are those having the lowest level of need, whose care in the care home is funded entirely by the local authority, or (subject to means) by themselves.

3. This case concerns the extent of the liability of the NHS (through the LHBs in Wales) to fund the care of the second class: FNC residents. The appellants say that they are only obliged to fund the provision of nursing care – that is, clinical or medical care – by a registered nurse, and not the provision of other services by way of social care, such as help with washing or eating, even if that social care is in fact provided by a nurse. They say that funding the provision of social care is the responsibility of local authorities. Hickinbottom J held that the appellants were required to fix the rate at which they pay for the provision of FNC upon the footing that the NHS is responsible for the whole cost incurred by the home in employing a nurse to attend full time, whether or not she (I will use the feminine pronoun, as it has been used in the skeleton arguments) spends part of her time providing social care as opposed to nursing (medical) care.

THE STATUTES

4. In introducing the case I have used the terms "nursing care" and "social care", but to some extent, as I shall show, the contrast between these expressions begs the central question as to the proper interpretation of s.49 of the HSCA. The section provides:

> "(1) Nothing in the enactments relating to the provision of community care services shall authorise or require a local authority, in or in connection with the provision of any such services, to—
>
> (a) provide for any person, or
>
> (b) arrange for any person to be provided with,

nursing care by a registered nurse.

(2) In this section 'nursing care by a registered nurse' means any services provided by a registered nurse and involving—

(a) the provision of care, or

(b) the planning, supervision or delegation of the provision of care,

other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse."

5. Until 2001 local authorities were responsible for the full cost of a place in a care home including the cost of nursing care. The provision in that regard (being an "[enactment] relating to the provision of community care services" within the meaning of s.49(1)) to which reference was made in the argument is s.21 of the National Assistance Act 1948. S.21(1) provides in part:

> "Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—
>
> (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them…"

S.21(8):

> "… [N]othing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 1977."

6. As for the NHS in Wales, s.3(1) of the NHS (Wales) Act 2006 provides:

> "The Welsh Ministers must provide throughout Wales, to such extent as they consider necessary to meet all reasonable requirements—
>
> (a) hospital accommodation,
>
> (b) other accommodation for the purpose of any service provided under this Act,
>
> (c) medical, dental, ophthalmic, nursing and ambulance services,

> (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as they consider are appropriate as part of the health service,
>
> (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as they consider are appropriate as part of the health service,
>
> (f) such other services or facilities as are required for the diagnosis and treatment of illness."

7. S.49 did not itself impose any new obligation on the NHS; rather it limited the obligations of local authorities by relieving them of all pre-existing statutory duties and discretions (in connection with the provision of community care services) to provide for nursing care by a registered nurse as that expression is defined by s.49(2). In doing so it altered the balance of responsibility between central and local government as regards the provision of such care in Wales, since to the extent that the local authorities were no longer responsible, all reasonable requirements for such care fell to be met by the Ministers pursuant to s.3(1) of the NHS (Wales) Act 2006.

8. Given the direction of the argument before us, I should also note these provisions to be found in Regulation 18 of the Care Homes (Wales) Regulations 2002:

> "(1) The registered person [sc. essentially the manager] shall, having regard to the size of the care home, the statement of purpose and the number and needs of service users—
>
> (a) ensure that at all times suitably qualified, competent, skilled and experienced persons are working at the care home in such numbers as are appropriate for the health and welfare of service users;
>
> (b) ensure that the employment of any persons on a temporary basis at the care home will not prevent service users from receiving such continuity of care as is reasonable to meet their needs;…
>
> (3) Where the care home—
>
> (a) provides nursing to service users; and
>
> (b) provides, whether or not in connection with nursing, medicines or medical treatment to service users;
>
> the registered person shall ensure that at all times a suitably qualified registered nurse is working at the care home."

9. The central debate in this case is whether, in fixing the rates they will pay for nursing care by registered nurses in care homes, the LHBs are entitled to make a distinction between nursing care properly so called, and other activities undertaken by nurses in care homes but which do not in truth amount to nursing care: activities which as I

have foreshadowed have been referred to by the shorthand expression "social care". The distinction is said to be justified by the excepting words at the end of s.49(2): "other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse". With that in mind I may turn briefly to the factual background.

FACTS

10. After s.49 came into force the Welsh LHBs developed a practice for deciding how to fund the care of FNC residents (who it will be recalled require some nursing care, but not as their primary need: they also of course require various forms of "social care"). I should acknowledge a passage at paragraph 13 ff of Ms Fenella Morris QC's skeleton argument for the appellants, which I have adapted in the summary description of the LHBs' practice which follows.

11. Given that each resident entitled to FNC has different nursing needs which fluctuate over the period of his or her residence, it is not practicable to arrive at a precise calculation of every individual's requirements and make a payment on that footing. Accordingly the LHBs determined a flat rate payment made to care homes on a per person per week basis tailored to reflect the estimated cost, inevitably approximate, of the nursing element (properly so called, as the appellants would have it) of the care required by each FNC resident. Though their responsibility was individual, the LHBs in fact set a single rate across the whole of Wales.

12. In order to establish this practice on a properly informed basis, in 2012 and 2013 the LHBs undertook investigatory work which culminated in a survey carried out by Laing & Buisson, independent healthcare consultants. The consultants published their report on 8 July 2013 and suggested a FNC rate to include payments for what the LHBs considered to be nursing care within the meaning of s.49(2). (We are told that their calculation involved very slightly more time attributable to "medical" nursing than an earlier estimate made by the Welsh government.) Costs which were deemed attributable to time spent by nurses on activities which the LHBs considered did not constitute nursing care were excluded. These comprised, to adopt Ms Morris' skeleton (paragraph 16), such matters as routine personal care – help with washing, dressing and eating where there is no nursing or medical dimension involved; social care – support in everyday living and social activities; time spent receiving clinical or management supervision unrelated to direct care; general home management and administration; time spent on "stand-by", when the nurse is not engaged in any activity during day or night shifts; time spent on paid breaks.

13. Ms Morris concedes, as she did before the judge, that stand-by time should have been included in the calculation of the FNC rate because the nurse's being available for nursing tasks if needed is a nursing service which only a registered nurse can provide. There has been some controversy in the course of argument as to the reach of Ms Morris' concession (or concessions), and I will return to that.

14. The appellants' decisions under challenge, taken in performance of their duty under s.3 of the NHS (Wales) Act 2006, were made between 1 July and 20 August 2014 and took into account the Laing & Buisson report. They adopted an inflationary mechanism for uplifting the FNC rate annually for the following five years.

15. Ms Morris acknowledges that in practice it is difficult to draw the line between nursing and social care. So much has been recognised in this court in *Ex p. Coughlan* [2001] QB 213 at paragraph 40; see also *Grogan* [2006] EWHC Admin 44, 2006 BLGR 491 at paragraph 97 *per* Charles J. This difficulty is not simply a casual feature of the case. As I shall show, the respondent care homes (represented by Mr Purchase) and the interested parties (represented by Mr Gordon QC) submitted that it is not merely a difficulty; in the legal and factual context of the case it was wrong in principle to make such a distinction.

THE APPELLANTS' CONCESSIONS

16. Before addressing counsel's submissions I should consider the concession or concessions made by Ms Morris. At paragraph 103 the judge noted her concession "that, in calculating 'nursing care by a registered nurse' within the meaning of section 49, the LHBs erred in law in excluding stand-by time". He continued at paragraph 104:

> "But the concession concerning stand-by time was part of a broader raft of concessions which, upon being pressed further, the LHBs made during the course of Miss Morris' submissions. Miss Morris conceded that having a registered nurse working on site at all times as specifically required by regulation 18(3) of the 2002 Regulations is a reasonable requirement for 'nursing care', that particular requirement of course only being capable of being fulfilled, by definition, by a registered nurse. Miss Morris also conceded that, as this service fell within 'nursing care by a registered nurse', NHS Wales (through the LHBs) were responsible for providing that service. She did not seek to argue that the LHBs had a residual discretion to avoid responsibility for that care. However, she made no concession other than in respect of a single nurse working on site at all times, as required by regulation 18(3)."

These concessions were somewhat refined in Ms Morris' skeleton, and it appeared, as I have indicated, that there might be some dispute about it. I do not however think it fruitful to pick over what exactly she did or did not accept; our duty is to find the true interpretation of the statute. It is clear, and now common ground, that the presence of a nurse at a care home at all times (as required in Wales by Regulation 18(3) of the 2002 Regulations) constitutes a service within the meaning of "nursing care by a registered nurse" in s.49(2).

THE ARGUMENTS

The Appellants

17. It does not follow, however, that the LHBs are liable for the full cost of the nurse's 24-hour presence. Ms Morris submits that her clients are bound only to pay for part of it. In the course of her shift the nurse will likely provide other services which, by force of the excepting words at the close of s.49(2), do not constitute "nursing care by a registered nurse". Ms Morris' argument is that in order to reflect that fact the LHBs are entitled to discount the cost to the extent that they judge to be right in fulfilling

their function under s.3(1) of the NHS (Wales) Act 2006. This position is reflected in the judge's account of Ms Morris' submission at paragraph 106 of the judgment:

> "Following those concessions, Miss Morris realigned the focus of her submissions from the services which fell within the LHB's responsibility to provide, to the cost in terms of price the LHBs should pay for the provision, in respect of which (she submitted) the LHBs had a substantial discretion… In assessing how much it would be reasonable to pay for FNC, she submitted that the LHBs could properly take into account the way in which the providers' businesses are run and the businesses' other sources of income. In particular, they could take into account the fact that the local authorities did in fact bear the costs of registered nurses' time when they (for example) provided personal care, because all personal care costs were borne by those authorities. The LHBs were entitled to reduce the FNC rate to take into account that fact, to avoid care home providers being paid twice for the same nurse time. This, she submitted, justified the exclusion of those elements of registered nurses' work from the FNC assessment."

18. That reflects the substance of Ms Morris' case. She submits (1) that some content must be given to the excepting words in s.49(2) ("other than any services…"). (2) The language of the provision, not least the plural "services", requires a distinction to be made between different services which are as a matter of fact provided by registered nurses. (3) Thus the exception has to be interpreted, at least in part, by reference to the kind of tasks (services) which nurses actually perform. The LHBs are only liable for the cost of nursing services properly so called: that is, nurses' services "other than… services which… do not need to be provided by a registered nurse". (4) Practical difficulties in drawing a distinction between these classes of service are a matter for the judgment of LHBs in their fulfilment of the duty cast upon the NHS in Wales by s.3(1) of the NHS (Wales) Act 2006. In that context it is perfectly lawful (and practically sensible) for the LHBs to develop reasonable and informed estimates as they did following the Laing & Buisson report. (5) Unless this approach is followed, the responsibility for funding the care of FNC residents becomes virtually indistinguishable from that relating to CHC patients, and that cannot have been intended by the legislature. (6) The concession as to stand-by time (and/or the presence of a nurse at a care home at all times) does no more than reflect the requirements in Wales of Regulation 18 of the 2002 Regulations (in practical terms, irrespective of specific legislative provision, there are like requirements in England: we are not called on to go into that).

19. In her skeleton Ms Morris sought to advance an argument over and above her submissions on the construction of s.49(2). This was to the effect that her clients enjoyed "a general discretion as to the rate at which to pay care home providers who provide FNC to residents…" (skeleton paragraph 64). The argument was not developed, since it appeared to the court that the point was not a free-standing one. If Ms Morris was right as to the construction of s.49(2), then indeed her clients had a judgment to make (not, I think, a discretion properly so called) as to what funds they should allocate for the nursing element, as they saw it, involved in FNC care. But if

she was wrong as to the interpretation of the statute, her clients would under s.3(1) of the NHS (Wales) Act 2006 have to proceed consistently with Hickinbottom J's conclusion (judgment paragraph 124) that in principle the LHBs are liable for "[all] the costs of registered nurses working as such in a care home". There might be an argument as to whether the costs claimed were excessive, but none based on the proposition that in principle the LHBs were liable only for *part* of the cost of the nurses' employment.

20. The true place of s.3(1) in Ms Morris' argument is that it provides the statutory base for the judgment the LHBs must make as to the portion of the cost of nursing care in care homes attributable to nursing care properly so called as opposed to services which in the words of s.49(2), "do not need to be provided by a registered nurse".

The Secretary of State

21. The Secretary of State for Health intervened in the appeal with my permission and was represented by Mr Clive Sheldon QC. The Secretary of State was concerned at the implications of this case for NHS costs in England; at paragraph 3 of his skeleton argument Mr Sheldon observed that s.49 is "substantially mirrored" in England by s.22 of the Care Act 2014. At the hearing Mr Sheldon supported Ms Morris' appeal. His skeleton argument contains a critique of the reasoning of the judge below, and I shall draw on some of his points in setting out my conclusions.

The Respondents and the Interested Parties

22. I said earlier that to assume a contrast between the terms "nursing care" and "social care" is liable to beg the central question in the case as to the proper interpretation of s.49. The reason is that the respondents and the interested parties submit that such a distinction has no part at all to play in the section's construction. Their case is that neither the words of the statute, nor the exigencies of the care homes' administration, require all the tasks which nurses perform to be individuated or "atomised" (Mr Gordon's word): quite the contrary. Mr Purchase submitted that the term "services" in s.49(2) is broader than "task" or "activity", so that the excepting words ("other than any services which…") refer to a service being provided as a whole, and so apply, for example, to the case where a registered nurse is the manager of the home and spends her working time on management tasks. Mr Purchase also submitted that the excepting words might cover a case of overmanning, where nurses whose employment was not necessary for the home's nursing requirements might be carrying out other tasks. I shall return to these points.

23. Mr Gordon for the interested parties (save Cardiff County Council, which did not participate in the litigation) adopted Mr Purchase's submissions. He insisted that "the case is not about atomising the tasks carried out". He was in particular at pains to emphasise the difficulties in what he called a "task-based" approach to s.49(2). In support of that position he relied on various materials. I will set out his citations from the Conclusions and Recommendations in Laing & Buisson's July 2013 report.

> "The complexity of the analysis which has had to be undertaken, together with areas of potential unreliability for the future, beg the question as to whether this approach [sc. the

> "task-based" approach] is sustainable, as the basis of updating time and costs over time, within an appropriate process…
>
> However, it should be recognized that to meet the exacting definitional requirements of the interpretation of the legislation, in splitting nurses time and costs in so much detail, is always likely to prove challenging. Even with greater clarification, the ability of nurses to analyse their activities accurately 'in real time', whilst supporting urgent resident needs is likely to be limited…
>
> If social care and any other time continue to be excluded, and local authorities are reluctant to pick up responsibility for paying for any or all of these elements, then nursing homes may even be inclined to minimize nurses' participation in providing holistic and integrated nursing and social care support for residents. This could be divisive and run counter to the whole government agenda for improving the integration of care and providing good person-centred nursing, as well as good social care outcomes for residents…
>
> Time spent by nurses includes time spent on social care as well as on nursing, which is currently being excluded from the FNC payment consideration. However, equally, there is considerable time spent by care assistants undertaking nursing tasks, which has to be covered currently by local authority social care budgets. Would it not be a lot simpler just for the NHS to pay for the full direct salary cost of registered nurses, rather than argue about the split between nursing and non-nursing care? If this extra funding cost can be properly estimated, across all nursing homes for the future, and a suitable vote transfer effected, then uncertainty, on-going debate, and future disagreement could be substantially reduced."

24. Mr Gordon says that considerations of this kind demonstrate the real difficulties inherent in the appellants' construction of s.49(2). His argument on construction chimes with the observation of the judge below at paragraph 128(i) that "[t]he proper interpretation does not require such an exercise". Towards the end of his submissions at the hearing he posed the rhetorical question, "how many nurses have to be there to meet health care needs? It's as simple as that".

25. Mr Purchase and Mr Gordon also rely on the government's response to the report in March 1999 of the Royal Commission which had been established to consider the issue of the long-term care of those with chronic conditions. The report's main recommendation was that all reasonably required nursing *and* personal care should be available free of charge to those who need it. But two Commissioners entered a Note of Dissent on the issue of whether personal care should be provided free of charge – they said it should not. However the Commissioners were unanimous in considering that *nursing* care should be provided by the NHS free of charge. The government responded to the report in July 2000 (*The NHS Plan: The Government's Response to the Royal Commission on Long Term Care*). It rejected the majority recommendation

that personal care should be universally free; but it accepted the unanimous recommendation that the anomalous situation of the minority of people in care homes paying all or part of their nursing costs should cease. The government said:

> "2.11 In the future, the NHS will meet the costs of registered nurse time spent on providing, delegating or supervising care in any setting. This is a wider definition of nursing care than proposed in the Note of Dissent to the Royal Commission report, which suggested it should include those tasks that only a registered nurse could undertake.
>
> 2.13 Therefore people identified as needing nursing home care will no longer have to meet any of the costs for the registered nurses involved in their care, or for specialist equipment used by these nurses. Instead, the NHS will meet these costs. People who can afford to do so will still have to make a contribution towards their personal care and accommodation costs while in a nursing home."

26. Mr Purchase and Mr Gordon submit that the position taken by the government in that document prefigures the construction of s.49(2) advanced by them.

THE JUDGMENT IN THE COURT BELOW

27. Hickinbottom J's judgment is detailed, careful and painstaking. Here are his conclusions on the construction issue:

> "123 Miss Morris submitted, correctly, that an LHB provides nursing services to a care home resident pursuant to section 3 of the 2006 Act. That imposes a duty on the LHB (through the Welsh Ministers) to meet reasonably required nursing care needs. As *Coughlan* emphasized..., an LHB can only refuse to meet such needs if it comes to a tenable judgment that it is not necessary to do so. Because of regulation 18(3) of the 2002 Regulations and the recognition by the Defendants of such needs in fact, Miss Morris accepted, rightly, that an LHB could not properly have concluded that it was not necessary to meet care home residents' needs to have a registered nurse on site at all times, to deal with specific nursing and medical requirements that might arise from time-to-time. To meet such needs was necessary. They could only be met by having a registered nurse working on site at all times. The relevant LHB is responsible for providing (and, if provided by the care home itself, paying for) such a nurse. That responsibility is not diminished simply because the nurse may not be performing all of the time specific tasks which only a registered nurse can perform.
>
> 124 I appreciate that some registered nurse time may be used in caring for CHC residents and, of course, any FNC rate calculation has to avoid double counting; but that does not

> affect the principle that the relevant LHB must pay the costs of registered nurses working as such in a care home, one way or another. None of their costs should fall on residents themselves or, because of their section 21 responsibilities, on the relevant local authority in the shoes of residents.
>
> 125 Where the reasonable needs of residents are such that more than one registered nurse is required to satisfy them, again the relevant LHB cannot properly conclude that it is not necessary to provide those additional services. They are required both in practice, and as a result of regulation 18(1)(a) of the 2002 Regulations; and the relevant LHB will be liable to pay for the whole of those additional nurses' services and thus time. However, they will be liable only where, and insofar as, it is *necessary* to have more than one registered nurse working on site. If it is not necessary, then the LHB does not have to provide them under section 3 of the 2006 Act: and they fall within the exception in section 49, because any services provided by such a nurse 'having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse'. If and the extent to which such additional nurse services and thus time are necessary are essentially matters of judgment for the LHB."

And so the judge concluded that the appellants' construction of s.49(2) was erroneous and the LHBs' decisions on funding FNC care were unlawful. Moreover it appears that the judge was influenced by the government's response to the Royal Commission report. He stated at paragraph 31 that "[i]t is clear… that, in respect of 'nursing care' to be provided free of charge to residents in care homes, the Government intended to include more than 'those tasks that only a registered nurse could undertake'".

28. In my judgment the lynch-pin of the judge's reasoning rests on the propositions articulated in the respondents' (and interested parties') submission set out by Hickinbottom J at paragraph 96(vii), which it is clear he accepted:

> "For services provided by a registered nurse in a care home, a vital circumstance is that a nurse is in practice required to be present and working at the home all of the time, because residents require the working presence of a registered nurse at all times to be available for any specific tasks for which only a nurse is competent, as and when such tasks might arise. That practical need is reflected in the requirement of the statutory scheme that a care home must have a registered nurse working on site at all times (regulation 18(3) of the 2002 Regulations). Therefore having a registered nurse present and working on site at all times must be a reasonable (and, indeed, necessary) nursing care requirement within the meaning of 'nursing care by a registered nurse', for which the LHB is responsible."

CONCLUSIONS

29. In my judgment the language of the excepting words at the end of s.49(2) – "other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse" – require a distinction to be drawn between different services provided by a nurse or nurses at a care home. The provision plainly contemplates that some services need to be provided by a registered nurse and some do not. The distinction is drawn by reference to two matters: the nature of the services, and the circumstances in which they are provided. The *nature* of the services invites attention to the contrast between clinical or medical tasks which by their nature need to be provided by a nurse, and social or personal tasks which do not; though certainly the latter may be performed by a registered nurse. The *circumstances* in which the services are provided invites attention to the fact that circumstances may dictate whether a particular task needs or does not need to be provided by a nurse. Mr Sheldon gives the example (skeleton paragraph 39) of a nurse taking a patient to the lavatory, a task or service which the nurse may need to carry out in order to monitor the patient's mobility, communication or continence; in other circumstances there may be no such clinical element.

30. This distinction between different services is effectively unrecognized in the reasoning of the judge below, or in the submissions of the respondents and interested parties. The reason for this, it seems to me, is that the judge has taken the accepted fact that there must be a nurse on the premises the whole time as meaning that everything the nurse does on duty is to be treated as a service which "need[s] to be provided by a registered nurse". Indeed Mr Purchase submitted in terms that the cost of every nurse who is in the care home by force of Regulation 18(1)(a) or (3) must be met in its entirety by the NHS whatever she is doing. He also submitted that if the nurse is on duty in the care home though her presence is *not* required under Regulation 18(1)(a) or (3), then the local authorities must pay even though some of her work is clinical or medical.

31. But the respondents' case and, with respect, the judge's conclusion rest upon a *non sequitur*. It does not follow from the fact that a nurse needs to be on call at all times that everything she does on duty is to be treated as a service which "need[s] to be provided by a registered nurse". Indeed for reasons I have given the statutory language expressly requires the contrary. It is a matter of fact whether this or that task performed by the nurse does or does not "need to be provided by a registered nurse".

32. The respondents' essential position brings other difficulties in its wake as regards the content to be attributed to the excepting words at the end of the subsection. In cases where a nurse's whole employment is taken up with non-clinical work – for example where she manages the care home and (perhaps unlikely) does no clinical work – the position is straightforward: plainly what she is doing falls within the excepting words. But that is only because, given the *nature* of the service she provides and the *circumstances* in which she provides it, the service is manifestly not of a kind which "need[s] to be provided by a registered nurse". This, however, is itself an acknowledgement of the very proposition which the respondents seek to repudiate – that the touchstone for the application of the excepting words is the actual work being done by the nurse.

33. Mr Purchase's other contender to fill the space given by the excepting words – overmanning: a nurse employed surplus to requirements – is also telling. His submission, as I understood it, was that her services would fall within the local authority's responsibility whether or not she carried out clinical tasks: the *nature* of the tasks she performed is neither here nor there. I am unable to see how such a scenario can be made to fit the statutory language. The reality is that the closing words of s.49(2) can only be sensibly applied upon the basis, as I have stated, of a distinction drawn between different services provided by a nurse or nurses at a care home.

34. The government's response to the Royal Commission report does not, in my judgment, assist the respondents. Material of that kind cannot in principle be deployed to support a strained construction of a statutory provision whose ordinary meaning is unproblematic; and the excepting words in s.49(2), whose parent was clause 48 of the Health and Social Care Bill, do not in my judgment reflect the government proposal ("the NHS will meet the costs of registered nurse time spent on providing, delegating or supervising care in any setting").

35. Finally I would emphasise that the excepting words do no more than invite attention to a factual question: do this nurse's activities in the care home need to be provided by a registered nurse? Mr Gordon has rightly underlined the practical difficulties in finding an answer. His doing so only serves to emphasise the truth that the question is one of fact, not law. It involves the application of ordinary English terms, to which the statute attributes no special meaning, to factual circumstances which are various and changing. The question's resolution is to be found in the reasonable judgments of the LHBs carrying out the duty imposed on the NHS in Wales under s.3(1) of the 2006 Act. I said earlier that the true place of s.3(1) in Ms Morris' argument is that it provides the statutory base for the decisions the LHBs must make as to the portion of the cost of care by nurses in care homes which should be attributed to nursing care properly so called. The fault in the respondents' argument is that it seeks to replace this practical process with an appeal to legal definitions.

36. I would allow the appeal.

LORD JUSTICE ELIAS:

37. The issue in this appeal is whether the seven Welsh Local Health Boards (LHBs) have lawfully fixed the level of funding with respect to the nursing care provided by registered nurses to residents of care homes who require some nursing care, but for whom that is not a primary need. This is known as "NHS funded nursing care" ("FNC").

38. I gratefully adopt the facts as summarised by Laws LJ and for the most part I will not set out again the relevant statutory provisions. An important feature of the facts is that a registered nurse recruited by a care home to provide nursing care, in the sense of medical and clinical care, will typically also provide care of a kind which does not depend upon the skills and experience of a registered nurse. This is care of a nature which can be provided by non-specialist care workers. Like Laws LJ, I will use the language of nursing care and social care to distinguish the two types of care.

39. The appeal turns in large part on the proper construction of section 49(2) of the Health and Social Care Act 2001. Although I broadly agree with the construction of this section adopted by Laws LJ, I respectfully disagree as to the implications of that construction for the outcome of this appeal.

The decisions under challenge

40. As Laws LJ has explained, although the Welsh Ministers have overall responsibility for the health service in Wales, their functions have largely been delegated to the seven LHBs. Each LHB has set an FNC rate for the year 2014 and thereafter for the following five years based on increasing the 2014 rate by an inflation formula. Each LHB has fixed the same rate which was determined after co-ordinated action between them.

41. An account of the circumstances in which the rate was determined is set out in some detail by Hickinbottom J in his judgment below: see paras. 43-74 in particular. The following points emerge from that analysis:

a) An FNC Review Group was set up by the LHBs to make a recommendation as to the appropriate FNC rate. It was the Group's view that LHBs should only have to pay for nursing care provided by a registered nurse as defined in section 49.

b) The Group's understanding of section 49 was that LHBs should pay only for the time spent by a registered nurse on nursing care as opposed to social care. Accordingly, they should not pay the full costs of providing the registered nurse. The Group considered that pursuant to section 49, responsibility for paying for the social care element should rest with the local authorities (or the resident if he or she has adequate resources).

c) The Group sought the assistance of Laing and Buisson, independent health care consultants, to carry out an investigation to discover what proportion of time was spent by registered nurses performing the duties of a registered nurse and what proportion was spent providing social care.

d) The objective of the exercise was set out by one of its members, Robert Mahoney, then Senior Finance Manager of the Cardiff and Vale University Heath Board, in a witness statement:

> "[W]e were not trying to assess the time spent by registered nurses, but were trying to assess the time spent by registered nurses providing the care they were obliged to deliver either themselves (direct care) or, where they were able to delegate properly, those to whom they delegated (indirect care) …

> ... [I]t was the physical task based elements requiring registered nurse skills alone that were supported by the FNC payment."

e) The terms of reference also required that apart from time spent on providing social care itself, in determining what could properly fall within the remit of "nursing care", Laing and Buisson should not include time spent on stand-by (i.e. when the nurse is present but not performing any tasks at all); time spent receiving clinical supervision unrelated to direct nursing care to individual patients; meal breaks within shifts; and other unspecified time including time spent on general management and administration: see paras 58-59 of the judgment of Hickinbottom J. This was in accordance with the Group's understanding of what section 49 required.

f) Laing and Buisson expressed reservations as to whether their remit was "sustainable", given the difficulty in practice of drawing clear lines between time spent on pure nursing tasks as opposed to social care tasks. They did, however, provide answers to the question posed, relying on information provided by some 61 care home providers in response to detailed surveys.

42. The rate subsequently fixed was based upon the assessment of tasks carried out by Laing and Buisson. However, Ms. Morris, counsel for the LHBs, conceded before Hickinbottom J that time spent on stand-by should be included in the costs to be met by the LHBs. In my judgment she was plainly right to make that concession. To that extent, therefore, the rate originally fixed will need adjustment upwards whatever the outcome of this appeal.

The structure of the care provisions

43. The duty to ensure an efficient health service in Wales falls on the Welsh Ministers. Section 3(1) of the NHS (Wales) Act 2006 imposes a duty on them to provide, inter alia, nursing services "to such extent as they consider necessary to meet all reasonable requirements." It is an exercise of judgment for the Welsh Ministers – and in practice to the LHBs who are exercising their powers – to decide what requirements are reasonable; what staff are needed to meet those requirements; and to determine a fair reward for the services of those staff.

44. In exercising that judgment, the LHBs will have to have regard to the fact that a care home is obliged to ensure that a suitably qualified registered nurse is working at the care home to provide nursing to patients and medicines and medicinal treatment: regulation 18(3) of the Care Home (Wales) Regulations 2002. The significance of this duty is that even though the registered nurse will be spending some of her time performing social rather than nursing care, at least one qualified registered nurse (and possibly more depending upon the requirement for nursing services) will need to be in the care home at all times to cater for nursing needs as and when they arise.

45. The issue in this appeal is whether the LHBs were acting lawfully in fixing their rates in accordance with the Review Group's belief that, as a consequence of section 49, they were only required to pay for the nursing care and not the social care element of the duties of the registered nurse. This depends on the proper analysis of that section.

Section 49

46. This is as follows:

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

47. The following points should be noted. First, the principal purpose of the section is to identify a concept of nursing services which the local authority is not even permitted to provide (or, therefore, to pay for). The cost of such services must be borne in Wales by the LHBs. It is true that the section does incidentally, by virtue of the exception, define which services performed by a registered nurse a local authority can lawfully provide, although it is not obliged by the section to provide such services. Second, the concept of nursing services is not identical with the concept of nursing care by a registered nurse. It is a wider concept and includes anything which involves the provision of nursing care, as well as the planning, supervision and delegation of such care. Third, a local authority cannot even provide nursing services indirectly since they cannot be provided even "in connection with" such community care services as the local authority can lawfully provide. In my view the section is clearly designed to ensure that all aspects of nursing care as defined fall outside the responsibility of the local authority; the cost of such care must be borne wholly by the LHBs.

48. Laws LJ has taken the view, in line with the submissions advanced by the LHBs, that "services" means the agglomeration of tasks in fact carried out by registered nurses.

However, whilst the first part of section 47(2) includes all services involving the provision of care which a registered nurse carries out, that section is qualified by the exception so as to exclude tasks which "do not need to be provided by a registered nurse." Laws LJ considers that this will exclude the social care element of the nurse's duties, those tasks which can be performed by a carer with no qualifications as a registered nurse. The local authority is therefore empowered to pay for the social care element, even when it is done by a registered nurse, and the LHBs are entitled to refuse to pay the cost of those tasks and to impose that burden upon the local authorities.

49. The care homes, supported by the local authorities as interested parties, submit that this approach is misconceived, advancing an argument which found favour with Hickinbottom J below. They submit that section 49 is not anticipating that the services of a registered nurse will be individualised in that way; the focus is on the service provider. The section envisages that all the services of a registered nurse involving the provision of care fall within the concept of nursing care as defined, whether they can only be performed by a registered nurse or whether they are of a non-specialist nature. The exception in section 49(2) is not intending to restrict the concept of services for which the LHBs are liable so as to limit them to tasks which only a registered nurse can do; rather it is intending to ensure that the health boards only pay for the services of such registered nurses as are needed to meet the nursing requirements. The LHB must pay for the cost of all registered nurses needed to provide such nursing services as are reasonable, but if the care home employs more registered nurses than are needed for that purpose, the LHB will not have to bear any of the costs of those surplus nurses. All the services provided by a registered nurse who does not need to be employed by the care home will be borne by the local authority, even if it is nursing as opposed to social care.

50. All parties agree that it is for the LHB to exercise its own judgment as to the scope of nursing services required, and that judgment will only be challengeable on traditional judicial review grounds. The difference between the parties is that whilst the care homes and the local authorities say that the sole question is how many registered nurses are needed to provide the requisite nursing services, the LHBs say that there is an additional consideration, namely the proportion of the tasks performed which constitute nursing as opposed to social care and which only a registered nurse can provide.

51. There are cogent reasons why, as a matter of policy, either construction might have been adopted. The LHBs can fairly suggest that there is every reason why, putting the matter broadly, nursing functions should be the financial responsibility of the health authorities and social care functions should be the responsibility of local authorities, whoever provides them. Their construction gives effect to that policy. However, the care homes and the local authorities can point to the fact that the exercise of distinguishing between nursing and social care tasks is in practice, as Laing and Buisson recognised, a highly artificial one. Indeed, the Laing and Buisson report observed that it would be a lot simpler for the LHBs to provide the full salary cost of registered nurses rather than arguing about the split between nursing and non-nursing care (see the passage cited by Laws LJ at para. 23 above).

Discussion

52. I confess that I do not find section 49 happily drafted. If the definition of nursing services is merely intending to embrace those services which only a registered nurse is qualified to perform, it has adopted an unnecessarily convoluted way of saying it. But in my view the alternative construction sits even less happily with the terms of the excepted words. Even if a registered nurse is surplus to requirements, if she is in fact providing services which only a qualified nurse can perform, it would not be right to say that these were services which "having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse." They plainly do. It may be true to say that the *particular* registered nurse would not need to provide those services because there are enough other registered nurses to perform them, but they would still be services which a registered nurse would need to perform.

53. I therefore respectfully agree with Laws LJ that the section is not capable of being construed in the way suggested by the care homes and local authorities, a construction which Hickinbottom J accepted. Section 49 is in my view envisaging that there will be some care services which a registered nurse provides (described in this judgment as social care) which will not fall within the definition of "nursing care by a registered nurse." The question is how this construction bears upon the funding obligations of the LHBs and local authorities.

54. In my judgment, the starting point is section 3 of the NHS (Wales) Act 2006 which places the obligation on the LHBs to provide the required nursing services. It is not disputed that the effect of regulation 18(3) of the Care Homes (Wales) Regulations 2002 is that this obliges the LHB to provide at least one registered nurse to be in attendance at all times and in some cases, depending upon the number of residents in the care home, the need will be greater than that. For reasons I have given (para. 47 above), in my judgment the effect of section 49 is that none of the cost of providing those services can be borne by the local authority, even if that cost is incurred in the context of providing the care services which the local authority is empowered or required to provide.

55. The difficulty in this case is created by the fact that suitably qualified nurses have to be present in the care home even when the nursing skills which only the registered nurse can provide are not being called upon. It is necessary to secure their presence as part of the arrangements for providing nursing care. As John Milton put it in his sonnet "On His Blindness", "they also serve who only stand and wait." They need to be on duty and ready for action even if when they are doing nothing. Indeed it is now accepted, as a result of the concession by Ms Morris before Hickinbottom J, that where they are truly on stand-by in that sense, as they may be at some periods during the night when no care tasks at all are required of them, the LHB must foot the bill for securing their presence. Does the position change because they are in fact carrying out social care tasks for part of their time?

56. Hickinbottom J did not think that it did. He concluded (para.123) that the responsibility for providing and paying for the registered nurse "is not diminished simply because the nurse may not be performing all of the time specific tasks which only a registered nurse can perform." Although it is true that he adopted the care homes' view of the proper construction of section 49, this conclusion seems to me to have been reached irrespective of his analysis of that section, and simply by focusing

on the duty of the Health Authority under section 3 particularly when read with regulation 18(3) of the 2002 Regulation.

57. I agree with Hickinbottom J that the LHB must pay the full cost of nursing care, but I do not accept that it is immaterial that the registered nurse also provides social care. It seems to me that the LHB is obliged to pay for the cost of providing all the arrangements which are needed to secure the necessary number of registered nurses. In my view, it follows that the LHB must pay not only for stand-by duty (as is now conceded) but also for meal breaks, supervision relating to all aspects of strict nursing care (whether direct or not), and any managerial or administrative tasks connected with it. To the extent that the FNC rate has been fixed without regard to these matters (see para.4(e) above), the assessment was in error. The LHB is in effect requiring the local authority to contribute towards the cost of nursing care, something the local authority is not empowered to do.

58. However, I would accept that in so far as the costs of a registered nurse are increased because she also provides social care, that is not a service for which the LHB should pay. If it be the case – and we had no evidence about this – that the cost of a registered nurse is greater than it would otherwise be because she carries out social care tasks in addition to the nursing care tasks, I would accept that the local authority could properly be required to pay the difference. It would not then be contributing towards the nursing care costs but would be paying only for the care element of the services. I appreciate that it is likely that the distinction between the two rates (if there be any distinction at all) may be difficult to identify and is likely to be small. I also recognise that it can be said that the local authority is then paying far less than the commercial rate for the social care services which the residents are receiving from the registered nurses. But it seems to me that the structure of the legislation compels this conclusion, notwithstanding that the result in funding terms is to render the exception in section 49(2) of limited significance.

59. It follows that I differ from Laws LJ as to the significance of section 49 in relation to the fixing of the FNC rate. The fact that a local authority is empowered to pay for the social care provided by a registered nurse does not in my view entitle the LHB simply to apportion the costs of a registered nurse by reference to the proportion of their time spent on nursing and social care functions respectively. And it certainly does not entitle the LHB to assess and pay for the cost of the time spent the nursing care tasks themselves (which seems to me to have been the approach of the LHBs, but subject now to the concession relating to stand-by duties) and to expect the local authorities to pay for the remainder, which will include some of the overheads of securing nursing staff. In my view, either of these approaches requires the local authorities (or the residents if they have sufficient funds) to contribute towards the funding of nursing care, which the authorities cannot lawfully do.

Conclusion

60. I therefore neither uphold the appeal as advanced, but nor do I entirely reject it. I accept the appellant's submission that section 49 does draw a distinction between the different kinds of task performed by a registered nurse, and that it does not justify the conclusion that the LHB must be obliged to bear the full cost of employing a registered nurse. But this does not, in my view, affect the principle that the LHB must make, and pay for in full, all the arrangements necessary to secure the provision of the

requisite nursing care by registered nurses. To the extent that any additional cost is incurred by the fact that the registered nurse also provides social care, that is a financial burden which the LHB is not required to bear, and it will have to be borne by the local authority or, where financial resources are sufficient, by the individual resident.

61. It follows that in my view the LHBs have not adopted a lawful approach in fixing the FNC rate.

LORD JUSTICE LLOYD JONES:

62. I agree with the judgment of Laws LJ but as the members of the court are not in agreement on all issues I add this short judgment.

63. The central question in these proceedings is whether Local Health Boards in Wales ("LHBs") are under an obligation, when paying for NHS funded nursing care by registered nurses in care homes, to meet the cost of activities undertaken by such nurses which do not amount to nursing care. The answer turns on the interpretation of section 49, HSCA which seeks to allocate responsibility between LHBs and local authorities for the provision of care in Wales by limiting the responsibilities of local authorities. It relieves local authorities of all pre-existing obligations and removes all pre-existing powers to provide or arrange for the provision of "nursing care by a registered nurse" as defined in that section. The definition in section 49(2) identifies a category of "any services provided by a registered nurse and involving (a) the provision of care, or (b) the planning, supervision or delegation of the provision of care", but the final words of the subsection remove from this category "any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a registered nurse."

64. Subsection 49(2) draws a distinction between two groups of services which may be provided by registered nurses at care homes. To my mind, the natural meaning of the words used indicates that regard must be had to the particular tasks which are performed and a conclusion drawn as to whether, in each case, they need to be provided by a registered nurse. Furthermore, they require that regard be had to the nature of the services and the circumstances in which they are provided. It was, however, submitted on behalf of the respondents and the interested parties that such a process - characterised by Mr. Gordon QC in his submissions on behalf of the interested parties, as a process of "individualisation" or "atomisation" – is not required. In their submission section 49(2) proceeds at a more general level. The fact that it refers to "services" indicates, they submit, that regard must be had to the service provided as a whole. On this basis, they say that it is only necessary to ascertain how many registered nurses are required to perform the necessary nursing care. Once it is established that the service provider is a registered nurse, all of the care services provided by that individual are to be regarded as nursing care subject to an exception in the case of over-manning. However, I can find no basis for such an approach in the language of the subsection. On the contrary, the references to the nature of the services and the circumstances in which they are provided are inconsistent with such an approach and are a strong indication that a detailed consideration of the various tasks performed is required. During the hearing before us the latter approach was referred to as a task-based approach.

65. The need to follow a task-based approach in the application of section 49 to any given factual situation is demonstrated, in my view, by the fact that an approach at a higher level of generality simply does not work. The excepting words at the end of subsection 49(2) have to be given some meaning and effect. Mr. Purchase, on behalf of the respondents, submits that they would operate to exclude the case where a registered nurse's whole employment is taken up with non-clinical work (for example, managing the care home) and the case where a nurse is employed surplus to requirements. However, as Laws LJ points out (at [33], [34] above) these exclusions are explicable only by reference to the nature of tasks performed and the circumstances in which they are performed.

66. I accept that the reading of section 49 which I favour will involve detailed consideration of the services provided by registered nurses in order to ascertain whether they constitute social care or nursing care. The difficulties of such a process have been identified in the Laing and Buisson report and are, no doubt, considerable. Clearly, it would be much simpler for the LHBs to provide the full salary cost of registered nurses employed to provide care in care homes thereby avoiding any need to argue about the split between nursing care and social care. However, in my view a task-based approach is required by the governing statutory provision and the fact that another approach might be more convenient cannot justify a departure from it. (In this regard, I should add that I accept the submission of Ms. Morris QC on behalf of the appellants that it would not be possible to proceed by reference to the particular needs of each individual patient and that it is, therefore, both lawful and practically sensible for the LHBs to employ reasonable and informed estimates, provided they do not depart from a task-based approach.)

67. Furthermore, I consider that Mr. Gordon's reliance on the government's response to the Royal Commission on Long Term Care (The NHS Plan: The Government's Response to the Royal Commission on Long Term Care, July 2000) is misplaced for the reasons given by Laws LJ at [34] above.

68. For these reasons I agree with Laws LJ and Elias LJ that section 49 is not capable of being interpreted in the way contended for by the respondents and the interested parties, the interpretation which the judge accepted. Clearly, there will be some care services provided by a registered nurse which will not fall within the definition of "nursing care by a registered nurse". This will therefore require an apportionment in respect of the services provided by registered nurses in care homes. To this extent the members of this court are in agreement.

69. How such an apportionment is to be carried out in the light of Regulation 18(3) of the Care Homes (Wales) Regulations 2002 is, however, an issue on which we are not in agreement.

70. Elias LJ takes as his starting point section 3(1), National Health Service (Wales) Act 2006 which imposes on the LHBs the obligation to provide the required nursing services and the proposition, which he says is not disputed, that "the effect of Regulation 18(3) of the Care Homes (Wales) Regulations 2002 is that this obliges the LHBs to provide at least one registered nurse to be in attendance at all times…". I am unable to agree. The obligation imposed by Regulation 18(3) is an obligation on the registered person, who is, in effect, the manager of the care home. The fact that the registered person is required to ensure the presence of a registered nurse at all times

does not necessarily mean that the services provided by such a nurse are nursing services which are the responsibility of the LHBs.

71. I consider that in the proceedings before the Administrative Court Regulation 18 was permitted to influence the issue of the interpretation of section 49 in a manner which was not justified. The fact that a registered nurse is required to be present has been taken as leading to the conclusion that her presence, without more, makes this the provision of nursing care which is the responsibility of the LHBs. This, in turn, has been taken as lending support to the view that the distinction drawn by section 49 must be approached at the general level contended for by the respondents and interested parties which emphasises the identity of the service provider as opposed to the services provided. This seems to have coloured the whole approach to the interpretation of section 49. However, it is, in my view, an incorrect approach.

72. First, section 49 and Regulation 18 are distinct provisions and the meaning of the former, an item of primary legislation, cannot be dictated by the latter, an item of subordinate legislation of a later date. The tail should not be permitted to wag the dog.

73. Secondly, as Laws LJ points out at [30], the judge has derived from the requirement that there must be a nurse on the premises at all times the conclusion that everything a nurse does on duty is to be treated as a service which needs to be provided by a registered nurse and is therefore the responsibility of the LHBs. This is, however, a non-sequitur which results in no account being taken of the distinction drawn by section 49 between the different categories of services.

74. When a registered nurse is present in that capacity the obligation of the care home under Regulation 18 is discharged. However, it does not follow from the fact that her presence is required to meet the care home's obligation that throughout the period she is present she is providing nursing care for which the LHBs are liable to pay. That will depend on what she does while she is there. The following examples may assist.

(1) If the registered nurse spends the whole time actually providing nursing care to patients, that is nursing care the provision of which is the responsibility of the LHBs under section 49.
(2) If she spends the whole time performing administrative duties or providing social care, these services do not need to be provided by a registered nurse and the case will fall within the final excluding words of section 49(2).
(3) If she is simply there on stand-by in order to meet the requirement that there be a registered nurse on the premises, as may be the case during the night when there are no care tasks for her to perform, I would accept that she is there in her capacity as a registered nurse and by her presence she is performing a service that can only be provided by a registered nurse. This is, moreover, now common ground among the parties as a result of a concession made by Ms Morris QC before Hickinbottom J.
(4) However, if a registered nurse whose presence meets the obligation on the care home also provides during her presence social care or administrative services, the totality of the services provided are not services which needed to be provided by a registered nurse. There is a need for an apportionment of her services into the different categories, just as if another registered nurse were present at the relevant time, thereby meeting the care home's obligation under

Regulation 18. (Whether in this apportionment some allowance should be made in such circumstances for the fact that her presence also meets the Regulation 18 obligation is not a matter which was argued before us and, therefore, I express no view on it. However, it does not follow that the LHBs should be liable to meet the full cost of her presence.)

75. There is in my view nothing in section 49 which supports the conclusion favoured by Elias LJ. It is correct that section 49(2) defines a category of services in wide terms which include not just the provision of nursing care by a registered nurse but also the planning, supervision or delegation of the provision of such care. However, this does not mean that any services whatsoever provided by a registered nurse while her presence meets the manager's obligation under Regulation 18 are to be taken to be nursing care by a registered nurse for which the LHBs are responsible.

76. Furthermore, the approach adopted by Elias LJ in relation to presence in compliance with Regulation 18 is, in my view, inconsistent with the approach to the interpretation of section 49 on which the members of this court are agreed. That requires an apportionment to be made by distinguishing between two categories of services having regard to the nature of the services and the circumstances in which they are provided. I consider that the approach of Elias LJ fails to have regard to that distinction and reverts to the construction which found favour before the judge which is founded on the identity of the service provider as opposed to the nature of the services provided.

77. Finally, the approach of Elias LJ to the Regulation 18 issue is inconsistent with the policy underlying section 49. This is that the provision of nursing care should not be the responsibility of local authorities. In Wales this responsibility falls on LHBs. However, the LHBs have no responsibility for the provision of social care. Despite its rather convoluted form, section 49 is intended to establish and give effect to this distinction. If the LHBs are liable to meet the entire cost of the presence of a registered nurse who by her presence discharges the care home's duty under Regulation 18, notwithstanding the fact that while she is there she provides services which do not need to be provided by a registered nurse, this policy would be defeated.