Case No: C42YM827

IN THE COUNTY COURT AT MANCHESTER

Neutral Citation No: [2020] EWHC 2550 (Comm)

Date: 25th September 2020

Before:

HIS HONOUR JUDGE PEARCE

On appeal from Deputy District Judge Harris

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Between:

GREATER MANCHESTER FIRE AND RESCUE SERVICE — **Appellant/First Defendant**

- and -

SUSAN ANN VEEVERS — **Respondent/ Claimant**

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Mr ROGER MALLALIEU QC (instructed by **BERRYMANS LACE MAWER LLP**) for the **Appellant/First Defendant**

Mr NICHOLAS BACON QC (instructed by **THOMPSONS SOLICITORS LLP**) for the **Respondent/Claimant**

Hearing date: 26th August 2020

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JUDGMENT

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives and release to Bailii. The date and time for hand-down is deemed to be 12.30pm on 25th September 2020.

Introduction

1. In this action, Mrs Veevers (hereafter "the Respondent") sought damages pursuant to the Law Reform Miscellaneous Provisions Act 1934 and the Fatal Accident Act 1976 flowing from the death of her son, Stephen Alan Hunt ("Mr Hunt"). The claim was brought against the Greater Manchester Fire and Rescue Service ("the Appellant") and Paul's Hair World Limited ("Paul's Hair World").

2. Mr Hunt was a firefighter employed by the Appellant who was tragically killed in the course of his employment in a fire at the premises of Paul's Hair World on Oldham Street, Manchester on 13th July 2013. He died of hypoxia and heat exhaustion. The pleaded case against the Appellant was that it failed to take reasonable care to ensure that Mr Hunt's use of breathing apparatus and full personal protective equipment did not exceed a maximum of 20 minutes and/or that a proper watch was kept on him whilst using such equipment.

3. Within the proceedings, the Appellant admitted liability and compensated the Respondent for her losses. It also agreed to pay her reasonable costs. Those costs were referred for assessment.

4. During the assessment process, an issue arose as to whether the Respondent was entitled to recover the costs of preparing for and attending the inquest into Mr Hunt's death. Those costs are substantial, about £141,000 out of a total bill of just over £334,000.

5. In a judgment handed down on 11th May 2020, Deputy District Judge Harris, sitting as the Regional Costs Judge for Manchester, held that the costs are in principle recoverable, subject to the detailed assessment of those costs. The Appellant appeals that decision with permission of His Honour Judge Platts granted on 10 July 2020.

The Relevant History

6. The Respondent instructed Thompsons Solicitors to investigate the cause of Mr Hunt's death and to quantify the consequent losses. Their investigations were described by Judge Harris as follows:

"*2. Extensive investigations were undertaken, witnesses contacted and statements taken when possible and there was correspondence entered into with the* (Appellant), *the coroner, the health and safety executive and the police in order to try and establish a case and obtain details of the events leading to Mr Hunt's death and reasons for his death.*

3. As information was obtained it was discovered that there may be a criminal prosecution against two females as it was alleged that they had started the fire and in addition there was to be an inquest into the death of Mr Hunt. Both sets of proceedings were, it is pointed out it to me, of vital importance to the Claimant and the dependents' case as the outcome of each would have a bearing on the identity of the potential Defendants and also on establishing liability against the Defendants. Whilst criminal proceedings were commenced in January 2015 against the two young women they were later dropped and only the inquest remained for the conducting solicitor to obtain the information needed in order to bring a claim for the family. The coroner provided disclosure in advance of the inquest which included a schedule of witnesses and DVDs of CCTV footage. The inquest was prepared and commenced. Extensive witness evidence was heard during the inquest and representatives for the (Respondent) *attended in order to obtain information for the civil claim and to establish that there was a case for the* (Appellant) *to answer.*"

7. On 4th February 2016, solicitors for the Appellant wrote to solicitors for the Respondent in these terms:

"*We act on behalf of Greater Manchester Fire and Rescue Service ("GMFRS") and their Insurers Travelers in respect of the incident on 13 July 2013.*

We are sure that you will be aware that the investigation by the Health and Safety Executive, the Police and the Fire Brigades Union have been conducted in an open and collaborative fashion from immediately following the tragic death of Stephen Hunt at Paul's Hair World on Oldham Street in Manchester.

As the inquest approaches we have, like you, been supplied with a large number of reports and witness statements which in various way challenge in minute detail the events which unfolded that day. GMFRS in consultation with their insurers Travelers

are acutely aware of the stress and strain which will be placed upon the family members of Stephen Hunt up to and including the inquest itself. GMFRS family liaison officers have been in touch with the bereaved family and will continue to support them.

Our clients have made no assessment of the potential for liability to the estate and dependants of Stephen Hunt but they have instructed us to set out their position in relation to any potential claim which may be brought for the family of the deceased.

Our clients are not in a position to consider an admission of liability and we have not undertaken a detailed forensic analysis of the potential for liability in any civil claim on their behalf.

The purpose and objective in making the comments which we make directly below is to attempt to remove any additional stress from the family during and immediately after the inquest.

As you are aware from previous comments and undoubtedly aware generally our clients take their responsibilities very seriously where tragic incidents such as this occur. Our clients are meeting simultaneously with the handing over of this letter to you to inform the family of Stephen Hunt that any claims that will be pursued by you on behalf of their deceased family members will be met in full.

We set out below in formal legal terms the basis on which our clients are prepared to meet any claim should one be pursued.

We act on behalf of Greater Manchester Fire and Rescue Service and their insurers Travelers.

We write in open correspondence in order to advise that our clients are willing to compensate the estate and dependents of Stephen Hunt pursuant to the Fatal Accidents Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934, for any loss which they may prove to be attributable to the incident on 13 July 2013 together with payment of their reasonable costs.

It is not our client's intention to allege contributory negligence or to seek any reduction of damages in this regard. We confirm that our clients will deal with the claims on a full basis."

8. Solicitors for the Respondent replied on 16th February 2016 in a letter stating:

"*Thank you for your letter of 4 February 2016.*

I have discussed your comments with my clients, and they understand the sentiments with which they were made.

In light of your letter it will take instructions from my clients with a view to making a claim within 28 days, based upon the current evidence that has been provided as part of the coroner's disclosure, and subject to any evidence that may come out at the inquest. A schedule of loss will be provided.

I would be grateful if you confirm in writing whether there will be any claim by GMFRS for apportionment in respect of any potential liability of other parties, for example Paul's Hair World.

I will be inviting the (Appellant) *to admit liability upon receipt of the letter of claim because as you are aware the intention to pay compensation to the estate and dependents could be withdrawn at any time.*

We confirm that we will continue to prepare for the inquest as part of our liability investigations until such time as liability is admitted or my clients' claims are settled…."

The letter goes on to deal with issues of disclosure relating to the quantification of the claim.

9. Solicitors for the Appellant replied to this letter by email of 4 March 2016 stating, amongst other things:

"*In terms of your letter there is no need to prepare a letter of claim on behalf of the estate or dependents. If there are any other claimants however then please let me know and I will consider the position. Obviously our earlier correspondence makes it plain that the claims by the dependents and estate will be met without reduction. I also confirm I am increasing the focus of my enquiries in respect of Paul's Hair World and that they will be pursued separately by GMFRS."*

10. The Respondent's solicitors replied on 9th March 2016, stating in respect of this issue:

"I am happy not to send a letter of claim based on your offer to deal with any claim for compensation without reduction for contributory negligence."

11. In the event, the Respondent attended the inquest with legal representation during the period 4th April 2016 to 18th May 2016 on dates set out in the Respondent's Bill of Costs and seeks to recover the costs associated with that attendance.

12. Following the inquest, proceedings were issued in July 2016 and served in November 2016. Paragraph 11 of the Particulars of Claim pleaded the allegations of negligence against the Appellant as summarised above and also pleaded reliance on the Appellant's letter of 4th February 2016.

13. The Appellant served a defence admitting its liability to compensate the estate and dependents of the deceased for "*damages and consequential losses*", presumably intended to mean damages caused by Mr Hunt's death and losses consequential upon it. The damages claim against the Appellant was settled in the agreed sum of £80,000.

14. In its points of dispute, the Appellant stated that it had admitted culpability by letter dated 8th October 2015 (this seems to be an erroneous reference to the letter of 4th February 2016) and that this admission had been pleaded and relied upon in the Particulars of Claim. The Appellant asserts that, in light of the decisions in The Bowbelle, and Roach (both referred to in greater detail below), the costs of attendance at the inquest should not be recoverable.

15. In the Respondent's Reply to the Appellant's points of dispute on the cost's assessment, the following justification for the recovery of the costs of attendance at the inquest appears, apparently drafted by Mr Martin Seaward, who was counsel for the Respondent at the inquest and was instructed on her behalf in the civil claim:

"(1) One of the main issues was whether the deceased had followed his brief or gone off on a frolic of his own. In the letter of 4.2.16 (I have no record of the one dated 8.10.15) (the Appellant's solicitors) *wrote '...our clients are not in a position to consider an admission of liability and we have not undertaken a detailed forensic analysis of the potential for liability for any civil claim on their behalf...' There was therefore some equivocation and* (the Respondent) *could not solely rely on the admission.* (The Appellant) *might have resiled from it in light of the evidence given to the inquest and the Senior Coroner's conclusions, particularly on the issue of contributory negligence.*

(2) The particulars of negligence could not have been pleaded without the family's attendance at and participation in the inquest which caused questions to be asked which elicited the relevant evidence...

(3) After many months of preparation and attendance at pre-inquest hearings the inquest was just about to begin when (the Appellant's) *letter of 4.2.16 was received. Our team could not properly pull out and leave the bereaved family without representation at the inquest.*

(4) The deceased's family was throughout the inquest considering the possibility of also suing Paul's Hair World, for sealing off one of the fire exits and blocking another and thereby creating a hazardous environment with such a heavy fireload. It was reasonable to explore this possibility at the inquest which might have reduced or extinguished the liability of GMFRS."

The Issue

16. It is the Appellant's case that the costs of preparing for and attending the inquest were nor properly recoverable as being of and incidental to the claim for damages and/or could not be considered reasonable and/or proportionate in light of the communications between the parties on the issue referred to at paragraphs 7 to 10 above. The Appellant collectively calls these communications "*the Letters*" and for the sake of clarity I adopt the same terminology.

17. The Respondent contends that those statements were ambiguous such as to render preparation for and attendance at the inquest both a cost of and incidental to the civil claim arising from Mr Hunt's death and, in principle, reasonable and proportionate.

18. It should be noted that the quantification of reasonable and proportionate costs is not in issue in this appeal and that it will need to be remitted to the Costs Judge if the Appeal is unsuccessful. In any event, the assessment of the remainder of the costs of the action remains outstanding.

The Relevant Law

19. The power to award costs arises by virtue of Section 51 of the Senior Courts Act 1981, which provides:

> "*51. Costs in civil division of Court of Appeal, High Court and county courts.*
>
> *(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—*
>
> *(a) the civil division of the Court of Appeal;*
>
> *(b) the High Court; and*
>
> *(c) the county court,*
>
> *shall be in the discretion of the court."*

20. Sir Robert Megarry V-C reviewed the authorities on the issue of whether costs incurred before action were "*of and incidental to*" to a civil claim in Re Gibson's Settlement Trusts, Mellors v Gibson [1981] 1 Ch 179. Citing Pecheries Ostendaises (Soc Anon) v Merchants' Marine Insurance Co [1928] 1 KB 750 (an insurance case relating to the loss of a trawler at sea), he stated at page 186D of his judgment in Re Gibson, "*It would, indeed, be most unfortunate if the costs of obtaining evidence while it was fresh after an accident could not be allowed, even if litigation seemed probable, merely because no writ had then been issued."* At page 186H he identified three strands of reasoning in the cases in which such pre-action costs had been allowed :

(a) That incurring the costs proved of use and service in the action;

(b) That the costs incurred were of relevance to an issue; and

(c) That the costs were attributable to the Defendant's conduct.

21. The recoverability of the costs of an inquest as a cost of and incidental to subsequent civil proceedings where the cause of death of a person is in issue has been considered several times. The leading case is Ross v The Owners of the Ship 'Bowbelle' [1997] 2 Lloyd's Rep 196, a case decided by Clarke J (as he then was) on review of the taxation of the costs of the Claimant by Chief Taxing Master Hurst. The litigation arose from the infamous collision between the Bowbelle, a dredger, and the Marchioness, a pleasure boat, on the Thames on 20 August 1989. A party was taking place on board the Marchioness at the time. In all, 51 people died, and many others were injured. A series of claims were made in respect of those injuries.

22. On the issue of the recoverability of the costs of attending an inquest into the deaths, Clarke J considered a letter sent on behalf of the owners of the Marchioness and the Bowbelle dated 13th October 1989 which contained the following passage:

"*Our respective clients, namely the Owners of the "MARCHIONESS" and the Owners of the "BOWBELLE" jointly and severally agree by way of concession that, in respect of any claims for loss of life or personal injury caused by the collision between the two vessels on 20th August 1989, although they do not make any admissions whatsoever as to liability, they are prepared to deal with the Claimants (as hereinafter defined) without requiring them to prove negligence on the part of either or both vessels…"*

There were various caveats to the concession, which was stated to be *"made entirely without prejudice to our clients' rights against the other whether in respect of apportionment of liability for the collision on 20th August 1989 or otherwise."*

23. Clarke J agreed with Master Hurst that the letter contained a concession that "*was of real significance. It meant that a claimant with a potentially valid claim needed to do no more than to issue a writ and to rely upon the admission in order to obtain judgment on liability."* He went on to hold that further work thereafter referable to "*the cause of the casualty"* could not fairly be regarded as relevant to the issue of liability and therefore recoverable as a cost of and incidental to the subsequent civil claim.

24. As to the costs of the resumed inquest in April 1990, Clarke J said at page 209:

"*While I can understand that the Claimants were anxious that a full enquiry should take place into the disaster, I do not think that by the spring of 1990 all the costs of attending a full inquest could fairly be regarded as costs of or incidental to the contemplated*

proceedings against the shipowners. By that time negligence had been conceded … in so far as the claimants wished to investigate the cause of the casualty with a view to the institution of criminal proceedings, the costs of such an investigation could not fairly be regarded as the costs of or incidental to contemplated proceedings against the shipowners…"

25. Like Master Hurst, he considered it reasonable for the costs of attendance at the inquest to be recovered in so far as they related to the pre-death pain and suffering of those who had died, since that was relevant to the quantification of damages.

26. In Roach v Home Office [2010] QB 256, various arguments were raised as to why the costs of attendance at an inquest were not recoverable in principle as costs incidental to subsequent civil proceedings. Davis J rejected those arguments and followed Clark J in Ross v Bowbelle in finding such costs to be potentially recoverable, subject to the facts of the case. He drew attention to the need to consider carefully issues of proportionality and accepted the observation of counsel for one of the Claimants in that case that the Defendant could have avoided or minimised any liability for such costs by admitting liability prior to the inquest.

27. My attention was drawn to various cases in which Costs Judges have ruled that the costs of attendance at inquests are in part or in whole recoverable.

(a) Stewart v Medway NHS Trust [2004] EWHC 9013. Master O'Hare held that it had been reasonable for the Claimant to cross examine witnesses and to make submission to the inquest, in a case where liability was not admitted and the facts investigated at the inquest were relevant to establishing liability in the subsequent civil claim.

(b) King v Milton Keynes General NHS Trust [2004] EWHC 9007. In a case where liability had not been admitted, Master Gordon-Saker held that the reasonable and proportionate costs of attendance at an inquest were recoverable if a material purpose of the attendance was to obtain information or evidence for use in a subsequent civil claim.

(c) Lynch v Chief Constable of Warwickshire Police, SCCO, 14.11.14, unreported. Master Rowley considered the substantial costs claimed for attendance at an inquest on behalf of the Claimant, the mother of the deceased, in circumstance where the deceased had been killed by her former partner, for which death it was alleged the Defendant was liable. The Defendant had not admitted liability before the inquest. The Claimant was represented by a substantial legal team and in all the costs of preparation and attendance were put at £750,000, around

40%-50% of the total bill which was being assessed by the Costs Judge. In a careful judgment applying the judgment of Davis J in Roach v Home Office, Master Rowley considered which aspects of the inquest proceedings could be said to be incidental to the civil claim and what were the reasonable costs for those aspects.

(d) Douglas v Ministry of Justice, SCCO reference CL1607001, [2018] Inquest LR 71. The Defendant in this case had, on the Costs Judge's findings, admitted liability for both negligence and breaches of the Human Rights Act leading to the death of a young man, who had committed suicide whilst in custody. The admissions were made prior to the inquest and hence by the time of the inquest, the only remaining issue in the potential civil claim was the quantum of damages. Nevertheless the Judge, Master Leonard, found that the costs involved in participating in the securing of disclosure from the Defendants and of obtaining witness evidence from them was recoverable, given that the extent and gravity of Article 2 breaches was relevant to the quantification of the claim.

28. In considering the nature and effect of admission, it is relevant to have regard to CPR Part 14. Rule 14.1A, provides:

"Admissions made before commencement of proceedings

14.1A

(1) A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission').

(2) Paragraphs (3) to (5) of this rule apply to a pre-action admission made in the types of proceedings listed at paragraph 1.1(2) of Practice Direction 14 if one of the following conditions is met –

(a) it is made after the party making it has received a letter before claim in accordance with the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol; or

(b) it is made before such letter before claim has been received, but it is stated to be made under Part 14.

(3) A person may, by giving notice in writing, withdraw a pre-action admission –

(a) before commencement of proceedings, if the person to whom the admission was made agrees;

(b) after commencement of proceedings, if all parties to the proceedings consent or with the permission of the court.

(4) After commencement of proceedings–

(a) any party may apply for judgment on the pre-action admission; and

(b) the party who made the pre-action admission may apply to withdraw it.

(5) An application to withdraw a pre-action admission or to enter judgment on such an admission –

(a) must be made in accordance with Part 23;

(b) may be made as a cross-application.

29. The amendment to the CPR creating rule 14.1A arose following the decision of the Court of Appeal in Sowerby v Charlton [2005] EWCA Civ 1610, where it was held that the previous version of Part 14 did not apply to admissions made before the commencement of proceedings. It had previously been considered at least arguable that part 14 did encompass pre-issue admission.

30. Following Sowerby v Charlton but prior to the amendment to the Civil Procedure Rules, the Court of Appeal again considered the question of pre-action admissions of liability in Stoke on Trent City Council v Walley [2006] EWCA Civ 1137, holding that the court had a power to strike out a defence under CPR 3.4 which might be exercised where the withdrawal was shown to be an abuse of the process of the court (which would usually involve showing that the Defendant had acted in bad faith) or that it obstructed the just disposal of the proceedings (usually because the Claimant could show some kind of prejudice, for example where evidence was lost that might have been preserved but for reliance on the admission). This approach was broadly consistent that taken by the Court of Appeal prior to the coming into force of the Civil Procedure Rules in Gale v Superdrug [1996] 1 WLR 1089.

31. As regards the power of the court on appeal, this is an appeal against a decision of a Costs Judge and is subject to the principles set out in CPR 52.21, specially:

"*(1) every appeal will be limited to a review of the decision of the lower court, unless …*

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing…

(3) the appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the lower court."

32. The Appellant does not contend that the decision should proceed by way of rehearing rather than review. Further, no procedural irregularity is raised. Accordingly, this court is limited to reviewing the decision of Costs Judge Harris and will allow the appeal if, but only if, the decision was wrong.

33. In his skeleton argument, Mr Bacon QC described the judgement of the court below as involving the exercise of a discretion. He cited the judgement of Stuart-Smith LJ in Roache v News Group Newspapers Ltd [1998] EMLR 161 at p.172: "*Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."*

34. In further discussion during the hearing, it was common ground that the decision of the Costs Judge on the question as to whether the costs of attending the inquest were in principle recoverable in the civil claim was not strictly speaking the exercise of a discretion but rather an example of an evaluative judgment of the type that the appeal court should be cautious before overturning (see the detailed review of the authorities in In Re Sprintroom Ltd [2019] EWCA Civ 932 and, in the costs context, the decision of the Court of Appeal in Surrey v Barnet and Chase Farm Hospitals NHS Trust [2018] EWCA Civ 451). The proper approach in such an appeal is almost indistinguishable from the category of decision referred to by Stuart-Smith LJ in Roache and, either way, if the judgement shows some identifiable flaw in the assessment, the court may find the decision to be wrong.

The Judgment of Judge Harris

35. Having described the circumstances of Mr Hunt's death and the nature of the claims against the Appellant and Paul's Hair World, the Judge noted the letter of 4 February 2016 and summarised the Appellant's case as being that "*that letter and in particular the final paragraphs put beyond doubt any question of liability that on that basis, attendance at the inquest, which he noted is in essence a fact-finding exercise, was a cost that cannot be recovered between the parties by seeking to justify it as 'of and incidental to the Claimant's civil claim' which, from that point onwards, related to an assessment of quantum."*

36. The Respondent's case was that the letter of 4 February 2016 was no more than an offer and that such an offer could be withdrawn. There was a risk of this, in light of the investigation during the inquest as to whether Mr Hunt had followed his instruction or gone off on a frolic of his own. That situation meant that the Respondent's team reasonably perceived a risk that the offer could be withdrawn and that therefore attendance at the inquest was reasonably necessary in order to ensure that liability issues were properly probed.

37. At paragraph 14 of his judgement, the Judge spoke of the letter of 4 February 2016, the reply of 16 February 2016 and the further emails of 4 and 9 March 2016, in the following terms: "*It is difficult not to construe that these exchanges envisaged the situation that has now arisen … I am satisfied* (that the Appellant was) *attempting to pre-empt payment of inquest costs. The* (Respondent) *in* (her) *response also appears to have this issue in mind…"* A little later he quotes Mr Seaward description of the letters as *"a costs game."*

38. Having considered the authorities, the Judge concluded that an admission of liability prior to an inquest was "*an important factor to be taken into account as to whether or not incurring the costs of the inquest are justifiable/recoverable*." He also acknowledged that, on the facts of this case, the Respondent was contending that liability had not been admitted whereas the Appellant's case was that whilst there was no formal admission of liability, "*what they have said in correspondence is tantamount to that position and that it would be impossible for the Appellant to resile from that position."*

39. However, on the facts of this case, he found that there was no admission of liability by the Appellant. In those circumstances, the case did not fall into that category where the court would be likely to find that the costs of attending an inquest were not of and incidental to the subsequent claim. He accepted that the Respondent was entitled to perceive a risk that the Appellant might resile from their statement that they would compensate the estate and dependents of Mr Hunt and that in those circumstances, the cost of attending the inquest were recoverable. He noted at paragraph 36 of his judgment that, "*The widow* (sic) *of the deceased would be placed in a most horrendous position if she were forced to attend an inquest where there had been no formal admission of liability, that there was no agreement as to the evidence, that witnesses were to be called and cross-examined, that she was to be engaged in a complex and distressing legal process without representation when the Defendants quite properly turn up at such proceedings with barrister."*

The Appellant's Case

40. Mr Mallalieu QC for the Appellant starts his submissions with an acknowledgement that this is a tragic case. He points out that, following a death, an inquest may take place when liability enquiries are at an early stage and, as here, the prospective claimant is not able to particularise allegations of negligence. The prospective defendant, especially a public body such as the Appellant, may as he put it, *"have no desire to cause any further anguish to the family of the deceased or to wish to put them to the hurdle of establishing breach of duty and causation against that body…In such circumstances, a responsible public body, such as* (the Appellant), *may wish to openly and plainly state that, whatever the investigations turns up, whoever may turn out to be ultimately responsible and whatever the position as between the various parties who may be said to be liable, it intends to fully satisfy any claim for damages the family may make in respect of that claim."* He described this as a practice to be supported and encouraged.

41. The Appellant draws the following principles from the authorities:

(a) There is no general entitlement on the part of a claimant to the costs of preparing for and attending an inquest merely because it deals with facts related to a civil claim;

(b) The costs are only recoverable if they are (i) of and incidental to the civil claim and (ii) reasonable and proportionate;

(c) In considering whether the costs satisfy these tests, the court should have regard to the nature of the civil claim and what the claimant is or is likely to be seeking in such a civil claim;

(d) If what is sought in the civil claim is damages, an admission by the proposed defendant that it will pay such damages is likely to be highly material and possibly determinative of the question of whether the attendance at and preparation for the inquest remains a recoverable cost;

(e) If there are additional factors to be addressed in the civil proceedings, such as whether a breach of Article 2 of the ECHR occurred or the extent of such a breach, this may justify the recovery of such costs even if they would not otherwise be recoverable;

(f) Even if the costs of the inquest are found to be of and incidental to the civil claim such as to justify an order in principle for their recovery, the court should closely scrutinise them to determine whether the costs claimed were reasonable and proportionate.

42. The Appellant makes the additional point that Part 3 of the Coroner's Inquest Rules 2013 contains rules requiring a coroner to disclose documents to an interested party. That duty of disclosure by the coroner may narrow the scope of recoverability of reasonable and proportionate inquest costs.

43. As to the nature of the statements in this case, Mr Mallalieu QC contends, that, read properly, the Appellant's clear and unequivocal position before the inquest set out in the Letters was that, whatever any investigations might throw up, the Appellant would fully meet the claim without raising any issue of contributory negligence or any argument that the Respondent should not recover in full because of the involvement of a third party. This avoided the need for her to incur costs, for example by instructing lawyers to attend an inquest for the purpose of investigating liability for the civil claim. In such circumstances, the inquest costs could not be said to be "*of and incidental to*" the later civil claim.

44. Moreover, the Appellant contends that the court should be cautious in looking at why the costs of the inquest were incurred. The function of a civil claim is to determine rights to compensation, not (usually at least) broader issues such as what steps might be taken to avoid future such incidents. It might be considered highly desirable that the families of deceased people should be represented at inquests, but it is not the responsibility of a defendant to a civil claim to meet such costs where those costs cannot properly be said to further the resolution of matters in issue in the civil claim.

45. In oral submissions, Mr Mallalieu QC noted sub-paragraph 3 of the points made by Mr Seaward recorded at paragraph 15 above and the passage to similar effect at paragraph 36 of the judgment of Judge Harris (cited at paragraph 39 above). Understandable as it might be to have concerns about the position of the family of a deceased person who have been expecting lawyers to represent them at an inquest but find that the lawyers are unwilling to act on their behalf where judgment is admitted and recovery of the costs of attendance might no longer be justified, the judge should not allow the recovery of costs in such circumstances other than in accordance with established rules and principles.

46. The Appellant criticises the Judge's findings on several grounds:

    (a) The Letters contained open acceptance of a liability to pay damages in full, a matter accepted by the judge at paragraph 29 of his judgment;

    (b) The letters were sent at a time when the Respondent could not particularise her claim, so the Appellant had no specific allegations of breach to which it could respond;

(c) The Respondent accepted that this was an admission in the passage apparently drafted by Mr Seaward and cited at sub-paragraph (1) in the passage quoted at paragraph 15 above.

(d) The letters were something of value that were at least equivalent to an admission if not actually amounting to an assertion that could be relied on to enter judgment. Had the Appellant wished to resile from them, it would have had to apply pursuant to CPR Part 14,

(e) If there was any doubt arising from the letter of 4 February 2016, that was laid to rest by the letter of 4 March which made clear that no letter of claim was required, a position accepted by the Respondent in the reply to that letter dated 9 March 2016.

(f) The Appellant states that letters were "*open statements to pay compensation in full."* If the Respondent did not accept them as statements on which reliance could be placed, the onus lay on her to raise those concerns. In fact, she did accept them as statements on which reliance could be placed, as demonstrated by the letter of 9 March 2016.

47. From this analysis, the Appellant draws the following grounds of appeal:

(1) The Judge was wrong to construe the letters as only constituting an "*offer*" to satisfy the claim, rather than an open statement by a public body that any claim would be satisfied without any dispute (at least as to liability).

(2) The Judge was wrong to conclude that, absent an admission of liability, the letters were irrelevant to the question of costs.

(3) The Judge erred in failing to treat the letters as an admission of liability to compensate, given that he referred to the letter of 4th February 2016 as containing the "*irrefutable fact*" that any claims would be met in full.

(4) The Judge's conclusions were inconsistent with the position taken by the Respondent in the points of dispute that the letters amounted to an admission that could be withdrawn.

(5) The Judge was wrong it conclude that no or no material weight could be put upon the letters because there was a risk that the Appellant might resile from the statement that compensation would be paid in full.

(6) The Judge was wrong to attach weight to the email of 4 March 2016 and the reply to that document.

(7) The Judge failed to give any or any proper weight to the fact that, if any doubt remained about the position of the Appellant after the Respondent's email of 9 March 2016, the onus lay on the Respondent to raise those doubts, whereas in fact she agreed not to send a letter of claim, which is inconsistent with any such doubts

(8) The Judge was wrong to attach any weight to the description of the letters as a "*costs game."* The making of an admission was a legitimate effort to minimise the stress on the deceased's family as well as to keep costs down. Both are proper reasons for the Appellant's conduct.

48. The Appellant rejects the argument that a distinction can be drawn between the kind of letter written in this case and an admission of liability. As Mr Mallalieu QC said, the letter relied on in The Bowbelle referred to at paragraph 22 expressly states that no admission "*whatsoever"* is made as to liability. He contends that the situation here is the same.

The Respondent's case

49. The Respondent starts by noting an apparent change in position by the Appellant. Whereas, before the lower court, the Appellant argued that all of the costs relating to preparation for and attendance at the inquest ought to be disallowed save any that preceded the Appellant's (alleged) admission, as can be seen from paragraph 42 of the skeleton argument field for that hearing, the Appellant now by paragraph 8(iv) of its Grounds of Appeal contends for an order that "*the costs relating to preparation for and attendance at the inquest are not recoverable in general save in so far as they are reasonable and proportionate costs incurred prior to the sending of the Letters and/or are established to be properly of and incidental to and reasonable and proportionate in relation to issues of the quantum of the civil claim."*

50. Mr Bacon QC contends that the result of this is that the court is now being invited to approach the question of the recoverability of the inquest costs on an entirely different basis than the lower court, a course of action that it should not permit.

51. On the substantive issue, the Respondent contended that the Costs Judge's decision was well within the ambit of the reasonable judgment on the material before him:

(a) The letter of 4th February 2016 cannot be properly described as having admitted liability. This is clear from its fifth paragraph which expressly states that the Appellant is " *not in a position to consider an admission of liability."*

(b) An open offer to compensate the estate for "*any loss which they may prove to be attributable to the incident"* raises but leaves open the issue as to whether the Appellant was in fact liable for any loss caused in the incident.

(c) The Letters did not deal with questions of causation and/or contribution to the losses.

(d) When the Respondent replied that she would continue to prepare for the inquest until an admission was received, it was open to the Appellant to confirm that liability was admitted yet it declined to do so.

(e) The later letter of 4 March 2016 was no more an admission of liability than was the letter of 4 February 2016. Having been invited to make an admission of liability, the Appellant responded in terms that were not an admission of liability.

Discussion

52. I deal first with the preliminary point taken by the Respondent as to the ambit of the appeal. The Respondent is right to say that the court should be careful to restrict an Appellant from taking a point not taken below. But the distinction between the position argued below and that advanced in the Appeal Notice is a relatively fine one. No one has suggested that any significant amount of the inquest costs related to preparation for the quantum of the civil claim. If I allowed the appeal to the extent of remitting the issue of the reasonableness and proportionality of those costs to the Costs Judge, I would not significantly be adding to the burden of this case on either the court system or the parties, since the question of assessment needs to be dealt with in any event, as identified above.

53. In my judgment, it would be unduly technical to dismiss the appeal based on a slight change in how the argument is put when that will not materially affect the path that the litigation would have taken in any event. If the appeal were to be allowed on this limited ground, it would be open to the Respondent to argue that the costs of the appeal could have been avoided had the point been conceded below and she is thereby protected from any prejudice due to the minor change of case. For these reasons, I do not dismiss the appeal on that ground.

54. I turn then to the central issue in this case, that is the recoverability of inquest costs where the prospective defendant has indicated a willingness to settle any claim but has not admitted liability.

55. Having regard to the decisions referred to above, the law in respect of the recovery of the costs in a civil claim for the preparation for and attendance at an inquest, in so far as those costs relate to the establishing of liability in a subsequent civil claim, can be summarised as follows:

(a) Inquest costs may be recoverable in so far as reasonable and proportionate, so long as they can properly be said to be incidental to the civil claim;

(b) Such costs will not be recoverable if liability is no longer in issue between the parties, since the costs are simply not incidental to something in issue in the civil claim;

(c) In determining whether liability is in issue, the court must look at all the circumstances of the case, but the central issue is likely to be whether the prospective defendant has admitted liability or otherwise indicated a willingness to satisfy the claim;

(d) Liability will not be in issue if it has been admitted since such an admission is binding unless the court subsequently permits it to be withdrawn pursuant to CPR 14.1A.

(e) However, the Costs Judge is entitled to look with care at anything less than an unqualified admission to see whether the prospective defendant's position is one from which it may resile or which leaves matter in issue between the parties.

(f) In particular, if the defendant's position is not one of unqualified admission in circumstances where such an admission could have been made, the Costs Judge may be entitled to find that the failure to make an unqualified admission justified the conclusion that the defendant might exercise its right to resile from the admission and that therefore the costs of the inquest could properly be said to be incidental to the civil claim.

(g) If the costs can be justified upon these principles, the mere fact that there are other reasons why the family of the deceased should wish to be represented at an inquest, most obviously to avoid the inequality of arms between unrepresented family members and a represented public body does not mean that the costs are not recoverable. It is enough that the attendance to secure relevant evidence in relation to matters in issues was a material purpose for the attendance.

56. The first four of these propositions are uncontroversial. The fifth and sixth flow from the distinction to be drawn between an admission on the one hand and some other more equivocal stance on the other. That such a distinction exists is clear from the terms of CPR Part 14.

57. The seventh point, which follows the reasoning of Master Gordon-Saker in King v Milton Keynes General NHS Trust, is consistent with the general approach of the common law to the issue of causation where multiple causative factors are in play.

58. As I have noted, Mr Mallalieu QC seeks to draw parallels between the correspondence in this case and that in The Bowbelle, stating that in both cases no admission of liability was made. However, there are two clear distinctions between the position in The Bowbelle and that here:

(a) It is clear from the judgment of Clarke J that he interpreted the communications as amounting to an admission at the very least of breach of duty if not of liability. As he said in the passage cited at paragraph 23 above, by Spring 1990 *"negligence had been conceded."*

(b) In contrast, in this case, it cannot be said that either negligence narrowly (if that means breach of duty) or liability broadly (if that incorporates both breach of duty and causation) had been conceded. The Appellant's position here was that, in response to a letter inviting an admission of liability, it declined to do so.

59. A further consideration arises as to the effect of the Appellant's letters. The result of the amendment introduced by CPR 14.1A is to create a procedural scheme by which a binding admission can be made. The letters sent by the Appellant cannot be equated to an admission of liability within the scheme – their very terms are to admit nothing. That being so, the Respondent could not have taken advantage of the procedural code to enter liability based upon the Appellant's communications. To that extent, I reject the Appellant's argument that it would have been open to the respondent to enter judgment on the Letters as an admission pursuant to CPR 14.1A.

60. The Respondent, in her Particulars of Claim, pleaded reliance upon the Letters and, had the Appellant declined to concede liability in the civil claim, it might have been open to the Respondent to argue that the change of position amounted to an abuse of process of the kind considered in Stoke on Trent City Council v Walley and Gale v Superdrug. However, given the establishment of a procedural code for giving effect to admissions, there must be some uncertainty as to how the courts would deal with statements that do not amount to admissions.

61. It follows that, whatever the position was on the facts of The Bowbelle, the position here is somewhat different. The Respondent declined to make an admission in circumstances where, had one been made, it would have been binding, subject to the provisions of CPR 14.1A.

62. I accept that the Respondent's reply to the email of 4 March 2016, essentially accepting (or perhaps it would be better said acquiescing in) the position taken by the Appellant is part of the factual matrix that must be taken into account. In an appropriate case, a paying party who could show that it had acted to its detriment in reliance upon such a statement might persuade the court that, notwithstanding the fact that no admission had been made, it was not reasonable for it to meet costs that would have been avoided had the receiving party raised at the time the issue that it now takes.

63. For example, the Appellant here might have raised the argument that, but for the Respondent's acquiescence in the communication of 9 March 2016, it would (or at least may) have made a formal admission of liability, thereby putting beyond doubt the question of the recoverability of the inquest costs, but that it did not do so because of the stance taken by the Respondent. Had the court been persuaded of this, it might have taken the view that any costs of attending the inquest to investigate liability issues, even if arguably costs incidental to the civil claim, were not in fact reasonably incurred because they could easily have been avoided by the Respondent making its position on the admission clear. However that is not a position that has been advanced by the Appellant. In any event, the tone of the Letters is that the Appellant had a fixed position that it would not admit liability, rather than that it was induced not to do so by the stance taken by the Respondent.

64. Turning to the Appellant's grounds of appeal, I conclude:

    (1) Whilst the description of the letters as constituting an "offer" may not strictly be accurate within the technical meaning of that term, there is nothing to suggest that the Judge did not treat them exactly as the Appellant says they should have been treated, namely as an open statement by a public body that the claim would be satisfied without dispute (at least as to liability for or causation of Mr Hunt's death).

    (2) The Judge did not treat the Letters as decisive of the issue before him. It is not however correct to say that he considered that they were irrelevant to the question of costs. Rather, he found that, absent an admission of liability, the Respondent was entitled to treat the open statement as capable of

withdrawal. This is consistent with authority (and indeed procedural law) and shows no error of law.

(3) Whilst the Judge referred to the letter of 4 February 2016 as containing the "*irrefutable fact*" that the claim would be met in full, the Appellant's interpretation of that finding is misguided. The "*irrefutable fact*" to which he was referring was that the letter said that, not that compensation would be made. Any other interpretation is unsustainable since: (i) the statement that compensation will be paid is not a statement of "*fact*" at all, but rather one of intention; and (ii) his acknowledgement that the statement could be withdrawn is any event inconsistent with him finding that payment of compensation itself was an "*irrefutable fact*" in the sense that the Appellant was unconditionally bound to compensate the Respondent.

(4) It is correct that Mr Seaward appears to have described the letter of 4 February 2016, either alone or together with the Letters generally, as an "*admission"* in his first point in response to the Appellant's "General Point 1" in the Points of Reply. However, that is not a description repeated by those instructing him, who say in response to "General Point 2" that they dispute that the Appellant had admitted liability. In any event, in my judgment, the Appellant's position cannot be properly be described as an Admission of Liability – as the Appellant itself expressly made clear, it was not admitting liability.

(5) It is incorrect to say that the Judge gave no weight to the letters. However he treated them as less weighty and was entitled to do because they did not contain an admission.

(6) As I have indicated above, I do not consider it correct to say that the Judge failed to attach any weight to the email of 4 March 2016. However, the weight attached was limited because it did not contain an admission, whether taken on its own or together with the letter of 4 February 2016 This is not only a conclusion that he was entitled to reach, but one that is clearly correct.

(7) The Respondent's email of 9 March 2016 was a relevant part of the history. It is not referred to in the judgement below, but equally the skeleton argument for the Appellant in the lower court itself does not refer to this email, the emphasis instead being placed on the letter of 4 February 2016. It has never been suggested, whether at first instance or on appeal

(assuming that such a point could have been taken on appeal when not taken below) that the Appellant relied on the position taken in the email of 9 March 2016 and in consequence failed to make a formal admission. I see no reason to conclude from this that the Judge failed to have adequate regard to the email.

(8) I am not satisfied that the Judge did in truth attach any weight to the description of the letters as a "*costs game*" or it formed any meaningful part of his reasoning. The simple fact is that a defendant in the position of this Appellant is entitled to admit liability and thereby avoid liability for the costs of attending an inquest in so far as those costs relate to investigating liability issues. The Judge acknowledged this to be so Whether one calls that a "*game*", rather than, for example, a sensible strategy in litigation may be a matter of taste, but at no point did the Judge depart from this line of reasoning.

65. In coming to these conclusions, I have borne in mind the argument advanced by Mallalieu QC that a responsible public body in the position of the Appellant may wish to make clear that it will make payment of compensation to a person at an early stage and without admission of any particular basis of a claim. It is indeed true that responsible discharge of the powers and duties of a public body my lead to such a wish. But the argument that in some way a statement in such circumstances that is not in form an admission should have the same weight as an admission is in my view not sustainable:

(a) If the public body is ultimately going to admit liability in the litigation or at least consent to judgment being entered against it, there is no reason not to make such an admission at early stage. An appropriately worded admission would put the Appellant in no different position to that which it is when judgment is entered against it (whether on admission or otherwise). The benefit to the Appellant in not admitting liability in general terms at an early stage is that it can subsequently resile from its position without having to apply under CPR 14.1A;

(b) CPR 14.1A sets out a clear procedure for making a formal admission. It would be undesirable if uncertainty were created by giving equal effect to other communications that do not satisfy that description. If the defendant chooses to make a communication which is not a admission within the meaning of the CPR, that document will be one factor in the case, but the availability of a route

to making a formal admission that puts liability beyond argument will mean that the court is entitled to place less weight on it in the overall conclusion.

66. I have also had regard to the criticism that Mr Mallalieu QC takes of the approach of the Respondent, referred to at sub-paragraph 3 of the points made by Mr Seaward recorded at paragraph 15 above. Those comments, and the comments of the Judge referred to at paragraph 39 above, might be suggestive of a view that the costs of the inquest should be recoverable because it would be unfair for the Respondent's lawyers to leave her without representation. I agree with the Appellant that, whilst it might be considered desirable for funding to be more widely available for representation of families at inquests, that is not a reason to order that such costs ought to be paid inter partes in circumstances such as these. The question of the funding of representation at inquests is a controversial topic but one that cannot be solved be a Judge-led solution that imposes those costs on tortfeasors in civil litigation in circumstances where the inquest did not relate on matters in issue in the civil proceedings.

67. However, whilst Judge Harris recorded a concern about the position of the respondent were she to have been left unrepresented at the inquest, I can see no basis for concluding that this influenced his judgment on the central issue identified above.

Conclusion

68. It follows from the above that I see no error in the judgment of District Judge Harris sufficient as to justify this court interfering with his judgment. On the contrary, he carried out a balancing exercise on the facts of the case and reached a conclusion that lay well within the proper ambit of the exercise of his evaluation of the facts. In those circumstances, costs of preparing for and attending the inquest are costs "*of and incidenta*l" to the instant claim and are in principle reasonable and proportionate is a conclusion that he was entitled to reach, and the appeal is dismissed.

69. I emphasise that, beyond this point of principle, the question of whether the amount of those costs is reasonable and proportionate remains a matter for assessment by the Costs Judge in dealing with the remainder of the assessment process, to which the usual principles apply.

70. The parties have agreed a consequential order, having seen the terms of this judgment in draft. I make an order in those terms.