Case No: JR 1305127

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 14/11/2014

**Before:**

**MASTER ROWLEY, COSTS JUDGE**

**Between:**

**Amelda Helen Lynch (Representative of the Estate of Colette Lynch) and Others**

**Claimants**

**-and-**

(1) **Chief Constable of Warwickshire Police**
(2) **Warwickshire County Council**
(3) **Coventry and Warwickshire NHS Trust**

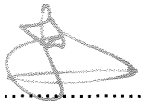
**Defendants**

Martin Westgate QC (instructed by Deighton Pierce Glynn) for the Claimants
Nicholas Bacon QC and Georgina Wolfe (instructed by Wansbroughs, Hill Dickinson and Weightmans) for the Defendants

Hearing dates: 15 to 17 September 2014

# Approved Judgment

I direct that pursuant to CPR PO 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.



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MASTER ROWLEY, COSTS JUDGE

**Master Rowley:**

Introduction

1. This judgment concerns the costs of the legal representation of the Claimants at the inquest touching upon the death of Colette Lynch in 2005. To what extent are they recoverable in the civil claims brought against the Defendants?

2. The general answer to this question was considered by Davis J. in Roach v Home Office [2009] EWHC 312 (QB). In principle, 'inquest costs' are recoverable as costs 'of and incidental to' the civil proceedings. The extent of the recoverability of those costs depends upon the specific facts of each case. In Roach, Davis J. expressly declined the Defendant's request to lay down any general guidelines on when specific elements of costs may be recoverable stating that it was better 'to leave it to costs judges to decide each case on its own facts by reference to Section 51 [Senior Courts Act 1981] and the subordinate statutory rules and having regard to the principles indicated in In re Gibson's Settlement Trusts [1981] Ch 179.'

3. There have been a number of decisions at first instance by costs judges which have put these principles into practice. This decision is simply a further examination of a particular set of circumstances. The factor which takes this decision into seemingly uncharted waters is the issue of disclosure which took place prior to the inquest. The coming into force of The Coroners (Inquests) Rules 2013 on 25 July 2013 means that disclosure is now a regular part of the inquest process. That was not the case when the inquest to be considered here took place. It is not for me to lay down any form of general guidelines and the conclusions in this judgment relate to this case alone. But I appreciate that this issue may be of sufficient importance for the parties to take it further to seek authoritative guidance and that is, at least in part, why I decided to hand down a reserved judgment.

Background

4. Colette Lynch was killed by Percy Wright, her former partner and the father of one of her children. The Defendants in these proceedings were all aware of the mental health problems of Mr Wright which were deteriorating over time. Following Colette Lynch's death, the Defendants were sued by her mother, Helen Lynch, on behalf of the estate; by her brother and by her children. The Claimants eventually settled their claims against the Defendants and obtained an order for the costs of bringing the claims.

5. The inquest with which this judgment is concerned was opened on 18 February 2005, a fortnight after Colette Lynch's death. It would be four years before the inquest hearing actually took place. Before then, criminal proceedings were brought against Percy Wright and an Independent Police Complaints Commission report was produced which led to public disciplinary proceedings against two officers of the First Defendant and which only concluded at the end of 2008. Protective court proceedings were commenced on 11 February 2008 but were stayed until after the inquest had concluded.

6. The Coroner started to move the inquest proceedings at the end of 2008. There were two further pre-inquest hearings in 2009 before the inquest hearing started on 5 October 2009. It ran until 18 December 2009 when a verdict of unlawful killing was delivered. The Coroner, with the assistance of the jury, concluded that the death was contributed to by failures on the part of three Defendants as emanations of the State.

7. In April 2010 the Claimants' solicitors asked the court to list a case management conference for the civil claim. Particulars of the Claimants' claims were drafted and served before a joint settlement meeting took place in May 2011. That meeting was unsuccessful but the parties made various offers during the year and settlement was eventually agreed at a mediation hearing on 31 May 2012. An approval hearing for the infant Claimants took place on 20 July 2012.

Representation at the Inquest

8. The Claimants were represented at the inquest by a team comprising Karen Monaghan QC; Rajeev Thacker of counsel; Sarah Ricca, a partner at the Claimant's solicitors; and a trainee at the firm. Ms Ricca dealt with this long running case at three firms-- Hickman Rose; Deighton Guadella and Deighton Pierce Glynn. For simplicity I will refer to the Claimants' solicitors as 'Deightons' throughout.

9. The First Claimant, as the representative of Colette Lynch's estate, instructed Deightons privately in this case. The Second to Fifth Claimants instructed Deightons via public funding. For the inquest, a grant of Exceptional Funding was made.

10. Ms Monaghan QC appeared on 23 days at the inquest. Mr Thacker appeared on 38 days. Ms Ricca attended on 31 days and the trainee solicitor attended on 38 days to take a note. The extent of the attendances were determined by the team with at least one eye on what would be paid for by the Legal Aid Authority. The costs of these attendances have been claimed in the bill of costs for the civil claims. The costs of attending the inquest are in the region of £600,000. According to the Defendants, those costs are over £750,000 if pre-inquest preparation is taken into account. These figures represent between 40% and 50% of the total bill of £1.5m.

11. Leading counsel prepared a note for the detailed assessment on a number of matters. At paragraph 23 she deals with the team as follows

*"The burden of work...required leading and junior counsel and a senior solicitor. It can be noted that the legal team acting for the Claimants in the Inquest broadly matched in size and seniority those acting for each of the Defendants. The workload, given the complexity and weight of the case and the importance of the issues at stake, was too great for junior counsel alone. Further, leading and junior counsel were chosen because of the different complementary areas of specialist knowledge Ijunior counsel was a specialist in actions against the police and Inquests; leading counsel was an expert in human rights law, gender equality and issues pertaining to Domestic*

*Violence.) The same work was carried out by leading and junior counsel only where strictly necessary (reading into the case etc.) Otherwise witnesses were split as between leading and junior counsel depending on the issues that were to be explored through the particular witness and the importance of the witness the case overall."*

The Defendants' general submissions

12. The general thrust of the Defendants' position is set out under the heading 'Conclusions' in the points of dispute. Whilst the Defendants' accept that, for the purpose of gathering evidence, attendance at the inquest may be justified, it needs to be of benefit to the civil claim (as per the Gibson test). But, the Defendants contend:

*"For the purposes of gathering evidence, the Claimants' solicitors have gone too far. There* was *absolutely no need to have leading and junior counsel, senior solicitors, and supporting Grade D fee earners (who are there presumably only to take notes) all in attendance at the same time."*

13. The approach taken is said to be unnecessary and disproportionate. In order to arrive at a proportionate figure, the points of dispute propose:

*"...that for the purposes of the civil claim there was no need for leading counsel or a senior solicitor to attend. For the purposes of the civil claim there should have been somebody in attendance not only to take notes but also with sufficient experience to identify witnesses who may have been useful within the civil claim and form an assessment of their quality and credibility. The role of those in attendance was not to chaperone the Claimants or witnesses but to gather evidence.*

*Accordingly the paying party submits that in respect of each day of the inquest a fee, to be assessed, should be allowed equivalent to either junior counsel or a Grade C fee earner at Court rates..."*

14. In the alternative, the points of dispute suggest a more 'forensic' approach might be required. In other words, looking at each day of the inquest to see what matters were in issue and which witnesses were in attendance. From that examination, the court could consider the level of attendance required for that particular day.

15. In his submissions, Mr Bacon rowed back from the offer set out in the first alternative since, for reasons he developed, the Defendants' offer of an experienced attendee on all days was too generous.

16. The key plank of Mr Bacon's argument was based on the issue of disclosure which was mentioned at the outset of this judgment. At the beginning of the hearing Mr Bacon took me through the Claimants' Particulars of Claim which were served after the inquest had taken place. The Particulars had been annotated to demonstrate, according to the Defendants, that virtually all of the matters set out there were covered by pre-inquest disclosure. The Particulars of Claim are a lengthy document and demonstrating the Defendants'

argument by reference to various documents took some time to carry out. queried early on whether it was necessary to take me through all of the documents to make a point which was not necessarily contested as such. (Indeed Mr Westgate did not challenge the essential thrust of this point when he responded to Mr Bacon.) But the process did have the benefit of being a way into the case as a whole and did clearly make the point that the disclosure had been extensive.

17. From this demonstration, Mr Bacon's central point was that the Claimants did not need to attend the inquest in order to plead their case. Consequently, the court should be cautious in allowing representation at the inquest for the purpose of the civil claim to be claimed in the manner that often occurs at inquests where there has been no disclosure or previous investigatory proceedings. Mr Bacon did not suggest that all of the inquest costs were irrecoverable in the civil claim. But they ought not, in his submission, to be allowed in the way that has occurred in previous cases. The appropriate sum, if any, to be allowed for representation depended on what was being done at any particular time in the inquest. Mr Bacon's specific submissions begin after I have set out the countervailing arguments of the Claimants to the Defendants' central point.

The Claimants' general submissions

18. Mr Westgate QC's overarching submissions concentrated on the relationship between the inquest and the civil claim as well as the team required to attend the inquest for the purpose of the civil claim.

19. What role, Mr Westgate queried, does the inquest process play in bringing this case to a successful conclusion? By the evidence given, the documents obtained, the 'collapse' of the Defendants' evidence and the jury's verdict all leading to the successful conclusion to the civil claim in Mr Westgate's submission. If there had been no inquest, the Defendants' threat to strike out the proceedings would have gone ahead. They had been extremely robust in their defence and had resisted the stay of the proceedings pending the inquest because of the intention to seek a strike out of the claims.

20. If the Claimants' team's attendance had only been a passive 'noting' brief, the other parties would have been in control of the proceedings. This would have meant no, or fewer, documents were disclosed before the inquest, disclosure orders would not have been made at the inquest and the Defendants would, not unreasonably, have sought to shut down areas of challenge or criticism.

21. As it was, the Claimants' team's active participation in the inquest had achieved results which led to the jury's findings which were favourable to the Claimants' case. This had broken the will of the Defendants to defend the claim and so the inquest could quite properly be seen as the key to the civil claim. Mr Westgate gave me four examples of evidence from the Defendants' witnesses which had been significantly challenged or found wanting at the inquest as a result of the Claimants' team's combined efforts.

22. In paragraph 12 of Ms Ricca's second witness statement she describes the importance of the inquest to the settling of the claim in this way: *"What would the inquest provide? The Defendants will have their own answer to this question, given the change their stance before and after the inquest, from 'particulars then strike out' 'particulars then settlement' after it."*

23. Mr Bacon informed me on instruction from his clients that they did not accept the implication of Ms Ricca's comments or the categorisation of the Defendants' resolve in Mr Westgate's submissions. The Defendants had private and confidential reasons for settling which were outside the jury's verdict.

24. Ms Ricca's second witness statement discusses the merits of the claims against the various Defendants in the novel area of claims under Article 2 of the European Convention on Human Rights. At paragraph 19 she says that:

> *"It* was *clear to me therefore that the only realistic way to secure an outcome in the civil claim* was *to* use *the inquest to explore and expose those failings, fill in the gaps in terms of the narrative of events, give* us *a chance to* assess *the quality of the Defendants' witness evidence and seek findings from the jury that would make settlement of the claim likely."*

25. At paragraph 22 Ms Ricca continues:

> *"It* is a*lso the* case *that it* was *not an option to litigate the* case *without an inquest ...The inquest* was *going to happen in any event and the Defendants would be liable for at least* some costs *of it,* as *they accept. If we had treated the inquest* as *other than the key to the civil claim, then the Defendants would have had to bear the* costs *of a fully litigated civil claim* as *well* as *the inquest. The reality* is *that the inquest represented the best chance that the Claimants could secure sufficient information to plead a sufficiently strong* case *on the facts and the law to secure settlement. This strategy proved highly effective, securing a very favourable settlement indeed in a difficult and novel* case *without having to take further* steps *in the litigation beyond service of the particulars."*

26. In similar vein, Ms Monaghan's note refers to the witness evidence and disclosure obtained through the inquest proceedings to consider the merits of an Article 2 claim. She says, at paragraph 20, that:

> *"These were matters that would be central to any civil action and, but for the Inquest, this information would not have been available to the Claimants until disclosure and exchange of witness statements had taken place in the civil proceedings (and* some *of the evidence revealed through examination would not have been available until trial, but for the Inquest.)*

27. Ms Monaghan continues in the next paragraph to conclude that:

> *"Given the litigation risks arising from the uncertain legal context. .., establishing the factual* basis *for any claim that* was *to be formulated* was *especially important. The fact that the evidence* was *fully explored and tested*

*at the Inquest (and an assessment of the reliability **/** credibility of witnesses could be made) meant that the claims could be economically formulated and* a *very early settlement achieved."*

28. In relation to the composition of the team, Mr Westgate referred toMs Ricca's second witness statement which in turn refers to her letter to the Legal Services Commission and to Ms Monaghan's note as partly set out at paragraph 11 above. The different specialisms of the instructed counsel are set out in that note.

29. As far as Ms Ricca's own role is concerned, she describes the need for her to deal with matters arising during the inquest which she describes as being a very dynamic form of hearing with evidence being adduced unexpectedly. Keeping an eye on issues running through the inquest, keeping track of the documentation and feeding questions to counsel are described. So too was pressing for disclosure of items during the inquest itself. Finally, Ms Ricca describes her role as partly being to provide assistance and support for the family so that they could play a full role in the proceedings. Reference is made to junior counsel finding it difficult to concentrate on the evidence being given when Ms Ricca was not present because of concerns about the effect the evidence was having on the family at various points.

The parties' submissions on the individual categories

30. Mr Bacon set out 7 categories on which he invited me to make a ruling that there was no need for any attendance by the Claimants' team. For the remaining time, the work to be done was an evidence gathering exercise which should mean that a note-taker was the only attendee required. Counsel to the inquest would be asking questions on behalf of the Coroner and that would be sufficient for most of this remaining time. On some occasions there would also be the need for junior counsel to attend in addition. But at no point was there any need for leading counsel's attendance in respect of the civil claim.

31. Mr Westgate described the use of a Grade D fee earner to attend and then type up the notes taken as being a false economy. Those notes would undoubtedly lead to questions by Ms Ricca and the barristers. It was much more effective to send 'the civil team' in the first place.

32. Whilst Mr Westgate's main argument in respect of representation was of a more general hue as set out already, he also responded to the categories as drawn up by Mr Bacon. I have set out the respective submissions on each category below.

Category 1 -Time spent that was irrelevant to the civil claim

33. The work here was essentially grouped under the heading 'assisting the coroner.' The first activities challenged related to the pre-inquest hearings which were all, in the Defendants' view, matters which would assist the Coroner but would not provide evidence for the civil claim. Similar points applied to the opening of the inquest and the various procedural

housekeeping matters such as swearing in the jury. At the end of the inquest, the time spent dealing with the summing up, questions to the jury, waiting for the verdict and the verdict itself were said to be entirely related to assisting the Coroner. This would amount to all of the time from day 38 onwards.

34. On the latter aspects, Mr Bacon relied on Master Gorden-Saker's decision in King v Milton Keynes General NHS Trust (13 May 2004) in which he decided that

*"...the* cost *of work done to persuade the Coroner to reach a particular verdict* is *not, in my view, recoverable. While the verdict reached may have brought a speedy settlement, such work* was *not done with the purpose of obtaining information or evidence for the proposed claim."*

35. In response, Mr Westgate argued that witness evaluation was seen as part of the evidence gathering process. Choosing those witnesses was part of that process and so the time spent doing it at the pre-inquest hearings must also be recoverable. Time spent considering which witnesses to choose would be recoverable if it were outside the inquest process. The Claimants should not be penalised for claiming it within that process.

36. The purely procedural aspects at the beginning of the inquest were the tail wagging the dog according to Mr Westgate. They were minor periods of time which ought to be recoverable unless they were divisible and in which case some of the time would be disallowed.

37. Mr Westgate did not accept that the time claimed in relation to the Coroner's Rule 43 report was properly categorised as assisting the Coroner. Its terms might be more forward looking than, say the verdict, but it was still likely to affect the path of settlement and its recommendations could also form part of the relief sought by the Claimants under Article 2.

38. Mr Westgate was particularly firm in his repudiation of the summing up and verdict being only of assistance to the Coroner. Although he accepted that the verdict could not subsequently be pleaded, it would undoubtedly help a settlement if suitably damning. Mr Westgate relied on Master Campbell's decision in Wilton v The Youth Justice Board & Anor (23 December 2010) where he said

*"In my judgment it* is *unreasonable to suppose that at the moment the last witness completes his or her evidence, a guillotine falls and that an interested party's legal team (such* as *the Claimant's here) must then pack its bags and leave Court for good. Several* reasons *for reaching this conclusion immediately arise;* so *far* as *questions to go to the jury are concerned, whilst this* is *a task for the Coroner, in all likelihood he will first* ask *counsel if they have any submissions before actually putting the questions. It follows that* as *the representatives of interested parties are permitted to make submissions, they will need to be prepared to do* so *in respect of the questions that are to go to the jury and from which the jurors will reach their verdict. Second,* so *far* as *the summing up* is *concerned, the Coroner must be legally correct in undertaking this task, lest otherwise his decision will be susceptible to Judicial*

*Review. Whilst I accept that it* is *arguable that making sure he* does *not fall into error* comes *within the classification 'assisting the Coroner' I do not consider it can be said that counsel for an interested party such* as *the Claimant here can have no role in this task. In my opinion, ensuring that the jury reaches a conclusion that* was *properly obtained,* is *more likely to be of* assistance *to* a *subsequent civil claim, than* a *verdict that* is *quashed on judicial review. So far* as *remaining at the Coroner's Court during the time that the jury* is *out* is *concerned, likewise I do not understand why this should fail* as a *matter of principle* as *the Defendant* has *contended. When the jury* goes *out, it* is *not known how long it will take to reach its verdict. It could be* a *matter of hours, but juries* sometimes *go out for* days, *in addition to which they may* ask *questions during the course of their deliberations which may require input from an interested party's legal team. So far* as *the verdict* is *concerned, I do not agree with the submission that this* is *likely to be irrelevant to the civil claim. In the present* case, a *verdict of unlawful killing would in all likelihood be overwhelmingly more helpful in subsequently obtaining an admission of liability in* a *civil claim, than* a *finding of accidental death, the Coroner's decision here. That point* is *of particular significance in this* case *in view of the earlier finding by the Police investigation into the* deceased's *death that no fault lay with the officers or any other party. It follows in my judgment that the verdict* is *likely to be relevant to the civil claim, albeit that I* also *recognise that it* is *not binding."*

39. Mr Westgate pointed out that, unlike Master Gordan-Saker's decision in King, Master Campbell's judgment in Wilton had the benefit of the guidance of Davis J. in Roach. As such, Mr Westgate suggested that it was Master Campbell's approach that I should follow rather than Master Gordan-Saker's more restrictive view.

40. Having made submissions on the principle, Mr Westgate then addressed the proportionality aspect of the post-guillotine period to paraphrase Master Campbell's description. After 30 days or so of evidence being given, was it worth a few days' more legal representation to make sure that a damning verdict was obtained? In Mr Westgate's submission it would in fact be unreasonable not to do so given that the right verdict would almost certainly achieve settlement of the civil claim.

Category 2 - where the witness's statement is read out

41. . The Defendant says that it is disproportionate to sit in court listening to statements that have already been disclosed being read into the court record. The Claimant accepts that this is so but says that it is a non-issue because it never lasts the whole day. Assuming that other time spent on that day is recoverable, the whole day should be allowed unless a division of the time can be made.

Category 3 - where the Claimants' own witnesses were giving evidence

42. The Defendants say that the rationale for costs being recoverable is that they are for evidence gathering. That cannot be the case where the solicitor's own

clients are giving evidence. They can be interviewed at any time and no doubt had been already.

43. The Claimants' response is that the Defendants are taking too narrow a view. These are factual witnesses and so are likely to be cross examined by the other parties and that evidence needs to be obtained. The Claimants also argued that a presence was required so that further examination of the client / witness could take place if the advocate needed to 'repair the damage.'

44. Furthermore, 'fact finding' includes the demeanour of the witnesses. Just as a poor performance by the Defendants' witnesses would strengthen the civil case, so too would a strong performance by the Claimants when they gave evidence.

Category 4 – where witnesses are called but the Claimants' team asks no questions of them

45. In his submissions on proportionality, Mr Bacon had various points to make regarding the costs of the inquest. To illustrate some of these points he took me to the Defendants' table of events for 10 November 2009. On that day, Percy Wright's brother Barlow and sister, June were called to give evidence. No questions were asked of them by the Claimants' team. There was no need to attend given the previous provision of their witness statements. This was not the only day on which witnesses were asked no questions but it was the most striking example of the point.

46. Mr Westgate described the Defendants' approach of determining whether attendance was required by looking at the number of questions raised was to view it from the wrong end of the proverbial telescope. The witnesses were asked questions by the Coroner and his counsel to the inquest as well as by other advocates. There was no way of knowing whether all matters would be covered by other advocates and so the need for preparation and attendance was required even if it transpired that others had already asked the questions on the day.

47. The one exception to this, Mr Westgate conceded, was in respect of the interviewing of Percy Wright's brother and sister. The team took the decision not to ask any questions to avoid antagonising the family. Nevertheless, someone still needed to be there. That person needed to be capable of asking questions if necessary and who, in Mr Westgate's words 'had the confidence of the family.'

Category 5 – witness evidence which was said by the Coroner to be given by witnesses who were not directly involved

48. This is a limited category which appeared to relate solely to the evidence of the call handlers. According to the note taken by the Defendants, the Coroner was asked for guidance by the advocates on 13 October 2009, whilst the jury was out. The note taken of his comments says that

*"With call handlers hope everyone takes the view of course they said things they shouldn't but actually had no executive decision-making so can't really have contributed. May have contributed to picture as in this passage. Couple as bad as each other but this was not the case."*

49. On the basis of this comment, Mr Bacon submitted that there was no need for any representation by the Claimants' team because the evidence being given was not relevant to the civil claim.

50. The Claimants' note of the proceedings does not record the exchange between the Coroner and the parties' counsel. It simply notes the evidence given of the witnesses before and after the exchange. Mr Westgate therefore made submissions on the basis of the Defendants' note. The derogatory comments made by the call handlers were key building blocks to the discrimination claim the Claimants were proposing to mount since it was the start of the 'misinformation' about Colette Lynch, as the Coroner subsequently put it, in his summing up to the jury. Accordingly, it was simply incorrect to say that the evidence of the call handlers was irrelevant.

Category 6 -'Systems' witnesses

51. In the course of his submissions, Mr Bacon detached this category from Category 1 regarding work that was to assist the Coroner and was irrelevant to the civil claim. From day 32 onwards, the witnesses who gave evidence did so to assist the Coroner with the formulation of his Rule 43 Report. The Defendants' note of the inquest records the Coroner as saying "we have effectively finished the evidence on the facts of the history, the rest is the systems witnesses who were not directly involved, primary purpose is to help me with my task to see if there are general system reports I should make, depends on you and you will find that it has relevance but primarily for me." The Claimants' note, though briefer, records much the same information. Mr Bacon said that it was simply wrong for the Defendants to have to pay for days of such work.

52. Mr Westgate said there were two reasons why the evidence of these witnesses ought not to be disallowed as a matter of principle. The first was that there was in fact no real divide between the liability witnesses and the systems witnesses. One of the best ways of considering past conduct is to look at what changes were made and why those changes had not been implemented earlier. Secondly, the evidence regarding systems was relevant to the pleading of the Article 2 claim.

53. In any event, Mr Westgate continued, the systems witnesses also dealt with the evidence of the liability witnesses. One of the examples he gave to me was Inspector Pritchard's evidence which criticised the Custody Sergeant's evidence regarding whether Percy Wright would have been detained after arrest in the absence of any complaint from Colette Lynch. The Coroner thought this to be sufficiently important to refer specifically to it in his summing up.

Category 7 - witnesses who had previously given evidence to the IPCC / disciplinary hearing

54. Following the IPCC report, two of the officers were subject to disciplinary proceedings which included a 5 day public hearing. Ms Ricca attended for 3 days and a trainee solicitor attended throughout. At the hearing before me, I allowed the cost of a GradeD fee earner to take a note of what was said. The parties' submissions on this category were therefore tailored to that earlier finding.

55. Mr Bacon indicated that there were 10 witnesses called at the inquest whose evidence had been before the disciplinary proceedings previously. Of the 10, most were police officers or otherwise employed by the First Defendant. The others were neighbours who had witnessed events. Mr Bacon's point was simply that these witnesses had been seen giving evidence and their statements had been provided to the Claimants by the time of the inquest. There was nothing of an evidence gathering nature that the Claimants' team could reasonably achieve by a further attendance let alone the opportunity for examination.

56. Mr Westgate argued that this categorisation of the evidence failed to take into account the dynamic nature of an inquest. He referred to one of the instances alluded to earlier in this judgment at paragraph 22 concerning the evidence of PC Cottingham. At the inquest, Ms Ricca managed to obtain a copy of the tape of radio traffic which, when originally transcribed, had been marked as 'inaudible' in places. Having listened to the tape, Ms Ricca persuaded the Coroner and the interested parties of what PC Cottingham had said over the radio; and which PC Cottingham accepted was correct. Ms Ricca describes this in her witness statement as being 'one key gap in the claim against the police filled.'

57. Mr Westgate said that the evidence was relevant both to the inquest and the civil claim and it could not be reasonable simply to read through the transcripts or send a note taker. Contrary to the Defendants' position, the more times a witness gave evidence, the more often it altered. In any event it was clearly of use and benefit to obtain a witness's unhelpful evidence as well as the helpful evidence.

Discussion on the general approach

58. When reserving this judgment I assumed that I would essentially be giving rulings on the appropriate representation, if any, for the 7 categories identified by Mr Bacon as well as the appropriate representation for the other work carried out in respect of the inquest. As set out earlier, this decision relates to this specific case and not to anything wider. Nevertheless, I have come to the conclusion that in order to deal with the more specific areas I first have to deal with what I have described as the 'general approach' of the parties to these issues.

59. I have set out a number of passages from the witness statement of Ms Ricca and the note from Ms Monaghan. They give a flavour of the approach clearly

taken by the Claimants in this matter. The case law regarding Article 2 claims was being developed during the life of this long running case. The trend was in the Claimants' favour but it was clear that the prospects of pursuing some or all of the potential Defendants were uncertain. In those circumstances, it is hardly surprising that the use of the inquest proceedings to their fullest extent was considered the best strategy by Ms Ricca and her instructed counsel. If the evidence was unfavourable, the civil claim need not be pursued. The opportunity to put all parties' witnesses through their paces, and to seek a damning verdict, would afford an opportunity to try to persuade the Defendants of the need to compromise.

60. But it is quite a leap in my view, to describe that strategy as meaning that the claims would be *"economically formulated and a very early settlement achieved."*

61. In Roach Davis J. cautioned costs judges to consider the proportionality of the approach adopted by Claimants in each inoividual case. He said, at paragraph 60, that *"there may well be cases ...where the costs of the antecedent proceedings claimed as incidental costs are so large by reference to the amount of damages at stake and/or the direct costs of the subsequent civil proceedings, if taken entirely on their own, that a costs judge will wish to consider very carefully the issue of proportionality."* If the costs are considered disproportionate then only those necessarily incurred and reasonable in amount would be allowed.

62. Earlier in his judgment, Davis J. referred to the use of the inquest to gather evidence rather than to do so by taking witness statements outside the inquest process. He could *"readily envisage that in many cases such a course may be cheaper, and more useful, than the cost of proofing such witnesses afterwards."*

63. The theme of these two passages is the efficient and cost-effective method of evidence gathering for the purpose of the civil claim. The second quotation makes the point that concentrating the witnesses into a hearing may be much better than tackling them individually. But the first quotation warns against the possibility that the hearing may create costs that are disproportionate to the damages at stake or the saving to be made in the subsequent proceedings.

64. In this case the agreed damages were unusually high for an Article 2 claim, reflecting the other heads of loss that were established on the particular facts here. Notwithstanding that figure, I have already ruled that I consider the costs claimed by the Claimants to be globally disproportionate and as such need to apply the necessity test as promulgated in Lownds v Home Office [2002] EWCA Civ 365. If the damages at stake had been at the level normally recoverable in Article 2 Claims the £600,000 to £750,000 of 'inquest costs' previously mentioned would be all the more starkly disproportionate.

65. If this case were to be commenced now, it would be one to which the costs management regime would apply. It is inconceivable, in my judgment, that the approach adopted by the Claimants in this case would be upheld as a proportionate method of bringing these claims to a civil hearing. No case

managing judge would allow sums of the magnitude claimed here to be spent in the working up of the claim before the close of pleadings in the court proceedings.

66. ! entirely appreciate that the costs management regime had not begun when the Claimants brought these proceedings. But the concept of dealing with cases proportionately was firmly established. Cases involving long running inquests invariably stand the evidence gathering approach referred to in Roach on its head. Instead of it being a cost effective method of gathering evidence, it becomes a disproportionately expensive way of doing so. In no attendance outside an inquest would leading and junior counsel, a senior solicitor and trainee solicitor simultaneously spend time with the same witness taking their evidence. But, on 10 days of this inquest the full team attended. Even where there were only some of the team present, a senior solicitor or experienced counsel (or both) would not usually require a note taking assistant in addition to one or both of them when taking evidence from a witness: but that is the effect of gathering evidence at the inquest in the manner claimed in this Bill.

67. There is a further aspect to the general approach to the recoverability of inquests costs that needs to be considered. The Defendants' categorisation of various categories of work does not always fall neatly into blocks of one day. I queried how the Defendants say I should deal with circumstances where, on their own case, there was a need, say, for attendance in the morning but no need to be in attendance in the afternoon. Given the accepted need for a partial attendance on the day, could it be unreasonable to attend for the entire day? Mr Bacon told me I would be falling into the trap of not rigidly allowing only the time that was required for the civil claim if I were to do so.

68. Mr Westgate's response to this was that I was being asked to apply hindsight to the costs incurred rather than looking at what was reasonable (or necessary) as it appeared to the solicitor at the time. He also argued that the Defendants' test of there needing to be a 'direct benefit' in the attendance was a misapplication of the Gibson 'of use and benefit' test. It is noteworthy, in my view, that in the Societe Anonyme Pecheries Ostendaises v Merchants' Marine Insurance Company [1928] KB 750 case referred to in Gibson, the Taxing Master allowed the work done because it had proved useful in the action and Lord Hanworth MR referred to costs being allowed in respect of materials ultimately proving of use and service in the action. Whilst, Gibson considers it 'obvious' that the test did not actually require proof of utility in the sense of being tested in court, the well spring of this test is redolent of hindsight being applied.

69. Earlier in this judgment, I set out a passage from Master Campbell's judgment in Wilton. It seems to me that the comment regarding the coming down of a guillotine once the evidence has been given encapsulates the difference in approach urged upon me by the parties. The Claimants' approach is to take events as they happened and, as long as they were of some use and benefit in the civil claim, then they must be recoverable. The Defendants' approach is to cut out periods of time which can be said to be incidental to the civil claim

from the overall inquest process. Although categorised as such by the Claimants, I do not think that the Defendants' approach is really any more retrospective than looking to see if the work proved to be of use and benefit as described in the Pecheries Ostendaises decision.

70. In this case, there was never any prospect of the Claimants' team walking out once the evidence had been given in the manner described in Wilton. The team was being funded to represent the family in an Article 2 inquest in accordance with the State's obligation to provide funding where necessary for such proceedings. That representation would run from the pre-inquest hearings until the verdict was pronounced. There is no reason necessarily to think that all of those activities would also be of use and service to the civil claim. Equally, it is certain that some of the activities would be beneficial. My task is very much as contended for by the Defendants. I need to extract from the overall inquest proceedings those aspects which are of and incidental to the civil claim and to allow the reasonable costs for those aspects. Whilst this may border on the use of hindsight, it follows in my judgment the reasoning of the courts from the Pecheries Ostendaises decision onwards.

71. Having decided what work is recoverable in principle, I then need to consider what representation was necessary to carry out that work. In considering necessity, I need to have in mind the 'sensible necessity' test of the Court of Appeal in Lownds at paragraph 37.

Application of the *Gibson* Test

72. In Ross v Owners of Bowbelle and Another [1997] 2 LLR 196 Clarke J. referred to Sir Robert Megarry's judgment in Gibson where Sir Robert had:

*"identified three strands of reasoning ...namely that of proving of use and service in the action, that of relevance to an issue and that of attributability to the defendants' conduct. The three [strands] overlap, but in short the costs must be of at least potential benefit to the claimant, relate in some way to the issues which arise or are likely to arise in the proceedings concerned and be attributable in some way to the defendant. In a case of this kind the issues will include issues relating to liability, issues relating to limitation of liability and issues relating to quantum. There may be others."*

73. In Roach, Davis J. accepted the entitlement of Mr Westgate (as counsel for the Claimant in that case) to observe that the Defendant could seek to limit its potential liability for such costs by admitting liability prior to the inquest. This echoed the decision of Clarke J in Bowbelle that since negligence had been admitted, the costs of attendance at the inquest for that issue would not be recoverable.

74. The three strands are said to overlap rather than being strictly conjunctive or disjunctive in their application. In any event, it seems to me that all of the costs of an inquest in a case of this sort come within the description of 'attributable to the Defendants.' The origins of this test come from cases considering pre-proceedings costs. It appears that there was a concern that such costs needed to be limited to those relating to the proposed Defendants.

That limiting aspect does not, in my judgment, shed much light on the situation here where there is an inquest in the middle of the civil proceedings.

75. The other two strands – work potentially beneficial to the Claimants and relevant in some way to the issues – are widely drawn. Where, for example, liability is conceded the boundary is clear. But where, as in this case, the issues are live but (on the Defendants' argument) already evidenced by previous disclosure and evidence giving, the limits of these two strands are much less clear.

76. For the reasons set out in the following paragraphs I have come to the conclusion that the work carried out in all the categories except Categories 1 and 2 can come within these strands. Categories 3 to 6 should be grouped together and category 7 falls between the other two groups. For categories 3 to 7 I have gone on to consider the extent of the representation at the inquest necessary for the furtherance of the civil claim.

Categories 1 and 2

77. I doubt that my conclusion in respect of Category 2 is contentious. There is no greater benefit to be gained by listening to a witness statement being read out at the inquest that by reading it in the solicitor's office. The parties were not really apart on this, other than in terms of how the work should be divided from other work. I was told during the hearing that it is possible to calculate the time spent in relation to such witnesses. Such time is not recoverable. If there are uncertainties as to how this is achieved in practice or there are consequential issues, such as, perhaps the effect on the need to travel on a particular day, these matters can be dealt with at the detailed assessment hearing.

78. My decision in relation to Category 1 requires more explanation. The 'housekeeping' aspects at the beginning of the inquest cannot, in my judgment, be described as evidence gathering in any way. I take the same view in respect of the pre-inquest hearings. Arrangements regarding the length of the hearing and its venue or the running order of witnesses are self-evidently of the same order as the housekeeping aspects of the opening of the inquest hearing itself. The only aspects that might conceivably be of potential benefit are the choice of the witnesses and the disclosure to be provided. I am sure that these two aspects were very important for the running of the inquest itself but I have concluded that, in the context of the civil claim, the opportunity to have input into these items was of insufficient benefit to justify the work claimed. If, as Mr Westgate contended, there was less, or no, disclosure in the absence of the team's representations, that would be remedied by disclosure in the civil proceedings themselves. Similarly, if there were fewer witnesses who gave evidence at the inquest, and such witnesses were material, they would be required to give evidence in the civil proceedings.

79. Whilst I entirely understand the Claimants' view that they should make the fullest use of the inquest possible in terms of witness evidence and disclosure, it does not seem to me to be the answer to what is the reasonable and proportionate amount of costs to be claimed in the civil proceedings. It would

always be desirable to obtain all the evidence and to test it in a quasi-court room atmosphere before embarking on a claim. But that cannot be the correct measure of what is necessary to bring proceedings.

It is rarely the case, in my view, that parties have every last piece of evidence to hand before embarking on proceedings. There are usually gaps to some extent which are filled as the case progresses. The case here could essentially be pleaded without any of the evidence from the inquest itself. If some of the evidence, as Ms Monaghan suggests, would not have been available until after pleadings had closed and disclosure or exchange of evidence (or even examination at trial) had taken place, that would not put these Claimants at any disadvantage compared with any other litigant.

81. In relation to the later part of the proceedings, I have said above that I think there is a false aspect to the notion of a guillotine coming down at the end of the evidence gathering phase. The Claimants' representatives would be in attendance for the remainder of the inquest proceedings since they have private and public funding to do so. It seems to me that the post-evidence gathering aspects – the summing up, questions to the jury and the verdict – are only recoverable if those aspects fall within the Gibson criteria themselves. I take the view that they do not do so.

82. The concept of use and benefit, in my judgment, must be viewed in respect of the proceedings themselves and not any negotiations outside those proceedings. As far as the proceedings are concerned, the verdict and all the matters that go immediately before it, are irrelevant. I do not accept the Claimants' argument that, in the absence of the full participation of the Claimants' team, including the securing of a helpful verdict, there would inevitably have been a fully contested civil trial as Ms Ricca suggests. But, if the Defendants had decided to defend this case, the verdict reached would not have prevented the Defendants from going to a fully contested trial.

83. The benefit of a positive verdict to the Claimants is entirely in the possible crumbling of the Defendants' resolve to defend the claim. The verdict might have had this effect in bringing the Defendants to the settlement table as the Claimants suggest. It may be that the Defendants had an entirely different reason for doing so as Mr Bacon informed me was the case. It might simply have been that, having considered the evidence that was available to the parties from the various proceedings, the Defendants wished to compromise without risking the further expense of a trial. Such a conclusion would be based on the evidence rather than the verdict. It cannot be said for certain what the cause of the settlement was. Therefore, even if, contrary to my view, work done can be of use and benefit towards negotiation rather than evidence gathering for the court proceedings, I do not see how the Claimants can prove the utility of the verdict in the absence of any confirmation of the Defendants in why the case settled.

84. Mr Westgate suggested that it was a reasonable and proportionate approach to ensure a damning verdict was achieved. It seems to me that it was anything but that approach in relation to the civil claim. Putting aside the fact that counsel for the inquest was able to assist the Coroner with the legal aspects in any event,

the Claimants' approach would incur virtually £50,000 for the period from 9 December 2009 when the Coroner began his summing up until 18 December when the Verdict was delivered. At no point during that period was any evidence gathered; it was simply the view of the jury and the Coroner on evidence that , if necessary, have to be tested again at a trial.

85. Accordingly, I prefer the approach of Master Gordan-Saker in King rather than Master Campbell in Wilton in relation to the post evidence gathering phase of the inquest.

Categories 3 to 6

86. These categories relate to witness evidence from witnesses

- Who instructed the Claimants' team
- Who were asked no questions by the Claimants' team
- Who were said by the Coroner not to be directly involved
- Whose evidence related to the systems of the three Defendants

87. In relation to all of these categories I prefer the Claimants' position to a great extent. It seems to me to be entirely artificial to consider whether any questions were asked of the witnesses called at the inquest to decide whether the attendance was necessary to benefit the civil claim. For the reasons given by Mr Westgate it could well be pot luck as to whether any questions in fact needed to be asked.

88. Indeed, it is my view that such attendance was reasonable even if it was thought likely that no questions would need to be asked. As was said on a number of occasions, gathering evidence includes gathering adverse evidence as well as helpful evidence. Interviewing witnesses outside an inquest hearing often involves sifting through the evidence a witness can give to find the valuable parts on which to concentrate. In a case where the systems and operations of the Defendants are going to be scrutinised, it seems to me to be too high a test to try to distinguish which witnesses are going to produce the golden nuggets and not to allow any attendance in respect of those whose prospects of finding gold look poor. I am also mindful of the fact that the Claimants will not necessarily be well placed to investigate who can give relevant evidence from the respective Defendants. If the Coroner considers the listed witnesses are relevant it seems to me to be reasonable for the Claimants to hear what they say and be in a position to cross examine them as necessary.

89. The prior provision of any witness statements does not in itself, in my view, render attendance unnecessary. Nor does the fact that the solicitor might have the opportunity to ask further questions outside the inquest. Whether a witness makes a good impression is obviously of use in the potential claim and that applies to the Claimants' own witnesses as well as the Defendants'. No amount of statement taking at the solicitor's office will give a clue about a witness's performance in the witness box.

90. Furthermore, it is often the questions based on the statements that provide relevant evidence. Those questions might be posed by the Coroner or any of the advocates, not just the Claimants' team. Indeed, if the witness was interviewed outside the inquest process upon the contents of their statement, that time would undoubtedly be allowed in principle.

91. Who then should attend? In certain situations costs judges are asked to consider the employment of 'hypothetical' solicitors, generally where the solicitors are distant from the client. It seems to me that the concept of a hypothetical attendee at the inquest for the purposes of the civil claim provides a focus on what is required. An experienced advocate whose brief was solely to gather evidence for a potential civil claim would be able to follow the witnesses' evidence and ask questions if no-one else had done so. That is akin to the 'watching' or 'noting' brief that is sometimes referred to in previous decisions. But that is usually a very junior barrister and that would not be sufficient here.

92. In my judgment there needs to be someone present who can ask questions where the need arises. I do not think that it is realistic to consider that a trainee solicitor, or Grade D fee earner, is sufficiently experienced for such a task. It could be a more senior solicitor or junior counsel. I do not think that it would be necessary for leading counsel to attend.

93. I have considered whether it is reasonable for the trainee solicitor to attend as a note-taker in addition to the solicitor or counsel attending. I have taken the view that it is not necessary in the Lownds sense to do so. If there had been no previous disclosure, I consider that taking a note throughout of the evidence being provided in such a long inquest and also asking questions may well prove to be too much for one person. But where, as here, the witnesses' evidence is literally to hand before the examination by the various advocates, I do not think that it is in fact asking too much.

94. This leaves me with the choice of either allowing in principle the time of Ms Ricca or the fees of Mr Thacker as an hourly rate / brief fee for a hypothetical attendee. I do not think that it would have been reasonable, let alone necessary, for a partner to carry out the task of attending for seven weeks or so for the purpose of the civil claim. As Mr Thacker was part of the civil team, it seems to me to be appropriate to use his fees as the starting point for the relevant periods, subject to any arguments there may be on quantum.

Category 7

95. This category relates to witness evidence from witnesses who had previously given evidence at the disciplinary hearing. It might have been the case that those witnesses would say something different from previous statements and / or their testimony at the earlier hearing. Consequently, I think that attendance would be required (unlike categories 1 and 2). But having their statements and having seen them give evidence already, I consider that there was only a need to take a note of what was said (unlike categories 3 to 6). Therefore, in relation to category 7, I consider the attendance of the trainee solicitor is all that was appropriate for the civil claim.

Uncategorised work

96. In respect of the inquest costs which do not fall into any of the 7 categories, I consider that they should be dealt with in the same way as for categories 3 to 6 the attendance junior counsel.

Client care and Counsels' travel costs

97. Finally, there are two general matters on which I was addressed, namely client care aspects of attending the inquest, described in shorthand as 'hand holding' and the travelling fees of counsel to and from the inquest. Ms Ricca refers to a part of her role at the inquest as being to provide assistance and support for the family in her witness statement and I have precised her evidence on this at paragraph 29 above.

98. Mr Westgate referred to a quotation from Bowbelle namely, *'That function in* essence *involves the work of protecting claimants from what may be unwelcome pressure from different parts of the media after* a *catastrophe. Such assistance may well give real comfort to those in distress and can fairly be regarded* as *satisfying'* the Gibson tests. From that authority Mr Westgate drew the general proposition that client care at the inquest can be recoverable.

99. The passage quoted by Mr Westgate in his skeleton is immediately prefaced with a comment by the judge in Bowbelle that "in my judgment care has to be taken before the costs of publicity are permitted on an inter partes basis." He then draws a distinction between work which satisfies the tests and work which does not. It is, in my judgment, altogether too thin a branch to bear the weight of Mr Westgate's general proposition regarding client care. Understandably, the family were ·upset at various points in the inquest as the evidence came out. But it seems clear to me that this work is part of the representation of the family covered by the Exceptional Funding and has nothing to do with the civil claim. The only one of the Gibson strands that this may fall under is the attribution to the Defendants' conduct and for the reasons I have previously given, I do not think that is sufficient in these circumstances. To the extent that the client care relates to Helen Lynch, and therefore the estate, I consider it falls on the part of the private retainer regarding attending the inquest and not pursuit of the civil claim.

100. As far as counsels' travelling expenses are concerned, I was not asked to make any final decision on them. They are undoubtedly a matter for the detailed assessment. Nevertheless on the basis that an indication about such items might assist I will say that I would have expected the travelling time and expense to be included within the refresher fee for each day rather than being claimed separately. Given the decisions already made in this judgment it would seem relatively simple to deal with travelling on this basis for Mr Thacker based on sums allowed for a daily refresher. It may be that the Claimants would wish to reconsider the sums claimed in the bill for the refresher and travelling items and to put forward a composite figure for each day's attendance so that it can be considered in the usual way.