Case No: AGS 1707378

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 10/07/2018

Before :

MASTER GORDON-SAKER

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Between :

(1) CLARIS POWELL (acting in her own capacity and as Co-Adminstratrix to the estate of MIKEY POWELL) **(2) SHARON POWELL** **(3) HALDIN THEOPHOLOUS POWELL (who proceeds by his daughter and Litigation Friend, Judith Powell)** **(5) MARCIA WILLIAMS (acting in her own capacity and as Co-Administratrix of the estate of MIKEY POWELL)** **(6) RIO WILLIAMS-POWELL (7) DELON WILLIAMS-POWELL** **(8) TYLER ALDEN WILLIAMS-POWELL (who proceeds by his grandmother and Litigation Friend, Esther Williams)**	**Claimants**

- and –

THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE	**Defendant**

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Mr Martin Westgate QC (instructed by **Deighton Pierce Glynn**) for the Claimants
Mr Nicholas Bacon QC (instructed by **Clyde & Co**) for the Defendant

Hearing date: 11th June 2018

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Judgment Approved

Master Gordon-Saker :

1. Pursuant to a consent order dated 9th February 2016 the Claimants are entitled to their costs of a claim for damages in the Queen's Bench Division, arising out of the tragic and appalling death of Mr Mikey Powell, the son of the First Claimant, brother of the Second Claimant, partner of the Fifth Claimant and father of the Sixth, Seventh and Eighth Claimants.

2. This judgment follows a hearing of preliminary issues on the detailed assessment of the Claimants' costs and addresses:

   i) The proportionality of the costs claimed.

ii) The recoverability of the costs claimed for attending the prosecution of the Defendant's officers in the Crown Court, attending the Inquest into the death of Mr Powell and pursuing a complaint to the Independent Police Complaints Commission.

iii) The reasonableness of the hourly rates sought by the Claimants' solicitors.

The remainder of the detailed assessment is listed for August 2018.

The background

3. Mr Powell was 38 years old when he died whilst in the custody of the Defendant's officers. Just after midnight on 7th September 2003 Mr Powell's mother called the police after she became concerned about a deterioration in his mental health. She believed that the police would take him to hospital as they had on previous occasions. The police officers arrived in a marked vehicle. As Mr Powell approached them, they drove off, turned around and then deliberately drove at him. Mr Powell was hit by the car and rolled on to the bonnet and then the roof before falling on to the road. He was then sprayed with CS gas and struck with a baton before being restrained on the ground, handcuffed behind his back and put in a van. Initially he was placed on his side in the van but by the time that he reached the police station he was on his front and positioned in a small space. Sadly by that time he was either dead or nearly dead.

4. The death was investigated first by the Defendant and then by Northamptonshire Police under the supervision of the Police Complaints Authority (subsequently the IPCC). Ten police officers were charged with offences arising out of the events leading up to Mr Powell's death. The charges included dangerous driving, assault in relation to the use of the CS gas and baton, excessive restraint and failing to respond to the deterioration in Mr Powell's condition (the latter being framed as misconduct in a public office).

5. The trial took place in the summer of 2006. The officers were acquitted, either following submissions of no case to answer or by the jury failing to reach a majority verdict.

6. Following the criminal proceedings, the IPCC decided not to pursue disciplinary charges. The inquest then resumed in November 2009. On 18th December the jury concluded that, on a balance of probabilities, Mr Powell had been transported in the police van on his side and then on his front, that he died in the police van from positional asphyxia and that he had been rendered more vulnerable to death from that cause by being struck by the police car, being sprayed with CS gas, being struck with a baton, being restrained on the ground while suffering psychosis and by extreme exertion.

7. In 2005 the First to Fourth Claimants instructed Deighton Guedalla (subsequently Deighton Pierce Glynn), a firm of solicitors based in central London. Proceedings were commenced in the Central London County Court but were held in abeyance until after the criminal trial. The Fourth Claimant was a friend of Mr Powell who had suffered his own injuries in the course of the incident.

8. Separate proceedings were commenced in 2006 in Birmingham County Court by solicitors acting for the Fifth Claimant. Those proceedings were discontinued in 2010. Separate proceedings on behalf of the Fifth to Eighth Claimants were commenced in

2012 by Deighton Guedalla. In February 2013 an order was made that both claims be tried together, the claims having been transferred to the Birmingham District Registry.

9. Although the Defendant denied liability, contending that the officers had used no more force than was reasonable, in February 2014 he offered to settle the claims [redacted]. The claims were eventually settled in November 2015 on terms that the Defendant would pay damages [redacted], that the Defendant accepted the verdict of the jury at the inquest and apologised unreservedly, and that the Defendant published a 96 page document of lessons learned. The Defendant agreed also to pay the Claimants' costs of the claims "notwithstanding any orders of the court to the contrary".

10. The bill lodged for the detailed assessment of the costs of the Claimants (other than the Fourth Claimant) is in the total sum of £1,603,380. Although the Claimants generally had the benefit of legal aid throughout the proceedings, no costs are sought in the bill from the Legal Aid Agency.

Legal Aid and retainers

11. By the points of dispute the Defendant requested disclosure of the legal aid certificates. That was not pursued at the hearing by Mr Bacon QC, but he did ask the court to satisfy itself that there had been no breach of the indemnity principle.

12. A legal aid certificate was granted to the First Claimant on 11th April 2005 in respect of a claim for damages against the Defendant. Limited work was done before that date under Legal Help. A legal aid certificate was granted to the Second Claimant on 15th May 2006, again in relation to the damages claim. Again limited work was done before that date under Legal Help.

13. A legal aid certificate was granted to the Third Claimant on 5th September 2006 (an emergency certificate was granted the day before). Again that was in relation to the claim for damages against the Defendant.

14. The Fifth Claimant retained the solicitors privately from 22nd October 2013. The letter of retainer records that the agreement had "been backdated to commence on 18 November 2010". A conditional fee agreement was entered into on 27th February 2014.

15. In respect of the Sixth Claimant, a legal aid certificate in respect of the claim for damages against the Defendant was issued on 30th January 2013. Although the certificate states that work can commence on the date of the certificate, the Claimant's solicitors state that there was an oral agreement made with the Legal Aid Agency that the certificate would be effective from 23rd November 2011. The certificate was discharged on 16th March 2015 following a reassessment of the Sixth Claimant's means. I am satisfied that a private retainer was then entered into with agreed hourly rates of £350 for partners, £270 for assistant solicitors and £140 for other assistants.

16. In respect of the Seventh and Eighth Claimants, the legal aid certificates in respect of the claims for damages against the Defendant are dated respectively 29th November 2012 and 27th June 2012. Again it is said that there was an oral agreement that the certificates should be effective from 23rd November 2011.

17. On 20th March 2007 exceptional funding was granted by the Legal Services Commission to allow representation at the inquest. The solicitors had acted under Legal Help from 4th October 2006.

18. If any issues arise from this, they can be addressed at the adjourned detailed assessment hearing.

Proportionality

19. Proceedings were commenced before 1st April 2013 and it is not in issue that the test of proportionality which applied before that date applies. CPR 44.4(2), as in force before 1st April 2013, provided:

> Where the amount of costs is to be assessed on the standard basis, the court will –
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> (a) only allow costs which are proportionate to the matters in issue; and
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> (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

20. CPR 44.5, as in force before 1st April 2013, provided:

> (1) The court is to have regard to all the circumstances in deciding whether costs were –
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> (a) if it is assessing costs on the standard basis –
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> (i) proportionately and reasonably incurred; or
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> (ii) were proportionate and reasonable in amount, or
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> …..
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> (3) The court must also have regard to –
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> (a) the conduct of all the parties, including in particular –
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> (i) conduct before, as well as during, the proceedings; and
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> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
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> (b) the amount or value of any money or property involved;
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> (c) the importance of the matter to all the parties;
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> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

> (e) the skill, effort, specialised knowledge and responsibility involved;
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> (f) the time spent on the case; and
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> (g) the place where and the circumstances in which work or any part of it was done.

21. In *Home Office v Lownds* [2002] 1 WLR 2450 (CA), Lord Woolf said:

> 31. … what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This is turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.
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> 32. The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.
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> …..
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> 36. Based on their experience costs judges will be well equipped to assess which approach a particular case requires. In a case where proportionality is likely to be an issue, a preliminary judgment as to the proportionality of the costs as a whole must be made at the outset. This will ensure that the Costs Judge applies the correct approach to the detailed assessment. In considering that question the costs judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether

> unnecessary experts had been instructed and the other matters set out in Part 44.5(3). Once a decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item.
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> 37. Although we emphasise the need, when costs are disproportionate, to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty. When a practitioner incurs expenses which are reasonable but not necessary, he may be able to recover his fees and disbursements from his client, but extra expense which results from conducting litigation in a disproportionate manner cannot be recovered from the other party.
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> 38. In deciding what is necessary the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being uncooperative he can increase costs. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary.

22. In the present case, the particularly relevant factors are the amount of money involved, the importance of the matter to the parties and the specialised knowledge involved. This was not, it seems to me, a particularly complex case. There were no difficult issues of law. While there were issues in relation to the expert medical evidence, that was not unduly complex; and no more complex than a clinical negligence case where there is an issue between the experts. Essentially this was largely a case about what happened factually and what should have happened. There was a considerable amount of disclosure following the inquest and I was told that it ran to about 20,000 pages. That may explain some of the time spent, but it does not I think add to the complexity.

23. The obvious factor of this case which stands out was the importance to the parties and the public importance. The Claimants' case was that Mr Powell was killed as the result, at least in part, of the direct intentional use of force by the police. This was against a background where there was cause to believe that racial stereotyping played a part in

the way that the officers had reacted to him, failed to listen to his mother and conducted an inadequate investigation after the event.

24. I accept the submission by Mr Westgate QC, on behalf of the Claimants, that the claim achieved far more than a financial settlement. The police accepted the verdict of the jury and publicly acknowledged the lessons that had been learned. This will have had an impact on future policing. However it also vindicated the Claimants' position; and that seems to me to be of significant importance particularly in view of the acquittal of the officers at trial.

25. Had the officers been convicted, vindication (at least in part) may have been obtained earlier. In order to obtain that vindication, in the light of the acquittals, it was necessary for the Claimants to take an active role in the inquest as well as pursuing the civil claim.

26. However £1.6m is, on the face of it, a huge sum for the costs of a claim which resulted in an agreement to pay damages [redacted] and which did not go to trial. Large parts of the costs relate to attending the criminal trial and attending and participating in the inquest. On behalf of the Defendant, Mr Bacon QC identified the costs of attending the criminal trial at about £138,000 and the costs of attending the inquest at about £300,000. In addition disbursements of about £350,000 were incurred in relation to the inquest, most of which is counsel's fees. These figures exclude VAT.

27. Excluding VAT the total profit costs claimed in the Claimants' bill are £942,850 and the total disbursements are £429,563. If one takes off the costs of attending the criminal trial and the inquest, the profit costs reduce to £504,850 and the disbursements to £79,563. The figure for profit costs includes £103,238 for drafting and checking the bill. So the profit costs for the claim, excluding the costs of attending the criminal trial and inquest and excluding the costs of drafting the bill, would be about £400,000.

28. On behalf of the Claimants, Mr Westgate QC submitted that it would be unfortunate if the court found the costs to be disproportionate by reason of the costs incurred in attending the criminal trial and inquest and then disallowed all or a large part of those costs on the basis that they were not recoverable in these proceedings. The test of necessity should be applied only to the balance, he submitted, which may not of itself have been disproportionate.

29. However it seems to me that the court has to adopt the two-stage approach identified by Lord Woolf. The first stage is to decide "whether *the total sum claimed* is or appears to be disproportionate". If the test were to be applied after decisions had been taken to reduce the costs, for whatever reason, the logical conclusion would be that the test should be applied only at the end of the line by line assessment. If, for example, the costs of attending the criminal trial were to be disallowed and not then taken into account in considering proportionality, why should not any other costs disallowed on the basis that they were unreasonable not then be taken into account?

30. The Claimants' solicitors have chosen to include the criminal trial and inquest costs as part of the costs of the civil proceedings and the court cannot, I think, hide or disregard those costs when considering the proportionality of the total. They are part of the total.

31. That said, by the same token it seems to me that when considering the proportionality of the total, one should have regard to the work that made up that total, including

attending the Crown Court and the inquest, whether or not those costs end up as being recoverable.

32. The pre-2013 test of proportionality, like its successor, did not have any formula for deciding what figure would be proportionate built into it. The test suggested by Master Hurst[1] of whether a client of adequate means would be prepared to pay that level of costs out of his own pocket, may be helpful in some cases. However it is likely to be less helpful in a case which raises issues of public importance, such as the present, where the award of damages may not be the most significant factor driving the litigation. Essentially therefore whether the costs claimed appear to be disproportionate is one of judgment and feel based on the experience of the costs judge deciding the question.[2] It probably goes without saying that, in deciding that question, a costs judge in 2018 must put out of mind the more stringent test of proportionality which has been in force for the last 5 years.

33. Despite the importance of this matter to the Claimants and the public importance, I cannot conclude that costs of over £1.3m (excluding value added tax) appear to be anything other than disproportionate under the pre-2013 test. I take into account that those costs include attending the Crown Court trial and participating in the inquest, each of which lasted about 6 weeks. But I also take into account that they do not include the costs of a trial in the civil proceedings. Had the costs of the estimated 19 day trial and trial preparation been incurred along the same trajectory, the total costs may well have exceeded £2m excluding value added tax.

34. Accordingly, on the item by item assessment, only those costs which would have been necessary had the case been conducted proportionately, will be allowed.

The costs of attending the Crown Court proceedings

35. The general principle is not I think in issue. The costs of attending the Crown Court proceedings were not costs of those proceedings. Whether and to what extent they are recoverable as costs in the civil claim will depend on whether they were reasonably and necessarily incurred.

36. The civil claim would depend on findings of fact made as to the conduct of the Defendant's officers. That very conduct was the subject matter of the criminal proceedings. As I asked of Mr Bacon QC during submissions, what competent solicitor instructed to bring a civil claim arising out of a death in custody would not attend the criminal trial of the officers involved where the prosecution arose out of their treatment of the deceased in the hours prior to his death?

37. It seems to me that the costs of attending the criminal trial fulfil all three strands identified in *In re Gibson's Settlement Trusts* [1981] Ch 179: the note of the evidence was (at least potentially) of use and service in the action, it was relevant to the issues and it was attributable to the conduct of the Defendant's officers.

38. Mr Bacon QC submitted that it was not necessary or reasonable to attend because a transcript of the trial was obtained in any event. In fact the transcripts that were obtained

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[1] *King v Telegraph Group Ltd* [2005] EWHC 90015 (Costs) at para 54
[2] *Ross v Stonewood Securities Ltd* [2004] EWHC 2235 (Ch) at para 27 per Lewison J.

(items 750 and 751 in the bill) were limited to the evidence of only certain witnesses on a total of 7 days out of the 44 days of the trial. The Claimants' solicitors were able to identify the days of evidence of which they needed a transcript only because they had somebody present throughout the trial.

39. Given the nature of the case and the direct relationship of the evidence that would be given in both the criminal and the civil proceedings, in my view it was both reasonable and necessary for the solicitors to attend the criminal trial. Not only did they obtain a note of what was said by the witnesses, the fee-earner attending would also be able to report back on what happened at the trial and the demeanour of the witnesses; aspects which would not come across from a transcript alone. The notes that were taken were fairly full, but they were not of course a verbatim transcript.

40. I do not however think that it was either reasonable or necessary to have anybody other than one junior fee earner present to take a note. It may also be the case that a note could have been obtained more economically by instructing a local agent or junior barrister in a local chambers. But as a matter of principle, I would allow the attendance of one junior fee earner.

41. Some time has been claimed for corresponding with the Crown Prosecution Service, particularly in relation to the charges which should be brought. It seems to me that in principle at least correspondence with a prosecuting authority about the charges to be brought might fall within the *Gibson's* strands on the basis that, as a conviction can be relied on in subsequent civil proceedings, the actual offence charged may be very relevant. In principle this work might be both reasonable and necessary, but whether individual items were reasonable and necessary would have to await the item by item assessment.

The costs of the complaint to the Independent Police Complaints Commission

42. In general terms, the costs of a complaint to the IPCC are unlikely to fall within the *Gibson's* strands and are unlikely to be either reasonable or necessary. That is because, generally, the only product of the complaint will be the decision, which is unlikely to be of any assistance in the civil proceedings.

43. On behalf of the Claimants, Mr Westgate QC submitted that the Commission's decision would be admissible in the civil proceedings and he relied on the decision of the Court of Appeal in *Rogers v Hoyle* [2015] QB 265 where it was held that a report of the Air Accident Investigation Branch of the Department of Transport would be admissible in civil proceedings arising out of an aeroplane accident. The report would contain statements of fact and expert opinion, rather than findings, and so avoid the rule that the findings of courts, tribunals and inquiries were generally inadmissible in subsequent proceedings. (A statutory exception to that rule is made in the case of convictions by criminal courts.)

44. An IPCC report however would contain findings based on its investigation. While the expertise of the investigators would not be in doubt, its conclusions would be an analysis of the evidence obtained in its investigation, rather than an expert opinion. In my judgment the report of the IPCC in the present case would probably not be admissible; but, even if it were, it would carry little weight given that the task of the court would be to make a similar analysis but of the evidence given at trial.

45. In her witness statement in support of the Claimants' position, Ms Deighton explains at paragraph 116 that the IPCC obtained, at its expense, transcripts of the evidence given by the Defendant's officers at the inquest and a forensic examination of the CCTV footage at the police station, which were made available to the Claimants' solicitors. I accept that this may have been of some benefit to the Claimants and it seems to me that the costs of requesting copies should, in principle, be recoverable.

46. In my view the costs of pursuing the complaints, on behalf of the First Claimant, are not recoverable. The complaints and the outcome were not of use and service in the civil claim or relevant to it. That by-products of the complaints, the transcripts and CCTV examination, may have proved of use does not justify the work done on the complaints. Those by-products were not inevitable consequences of the complaints. The IPCC may well not have chosen to obtain them.

47. Further it seems to me that the work done on the IPCC complaints was not necessary, in a *Lownds* sense. If I am wrong on relevance, I would in any event have disallowed these costs on the ground that they were not necessary.

The costs of attending and participating in the inquest

48. This is fairly well trodden ground and I was referred to a number of authorities. Those which are binding on me are the decision of Clarke J (as he then was) in *The Bowbelle* [1997] 2 Lloyd's Rep 196 and the decision of Davis J (as he then was) in *Roach v Home Office* [2010] QB 256. It is clear from those decisions that the costs of attending an inquest may be recoverable as part of the costs of subsequent civil proceedings if they fall within the principles identified in *In re Gibson's Settlement Trusts*. The other decisions to which I was referred are of Costs Judges and Deputy Costs Judges as they attempted to grapple with these principles.

49. The area of dispute between the parties is perhaps not that great. On behalf of the Defendant, Mr Bacon QC accepted that the costs of attending the inquest were recoverable in principle provided that a material purpose was to obtain evidence for the subsequent proceedings. However where the purpose of the attendance related to a wider public interest or to obtaining a Rule 43 report, the costs could not be recovered as part of the civil proceedings. Mr Bacon QC submitted that, in broad terms, I should follow the approach taken by Master Rowley in *Lynch v Warwickshire Police* (unreported, 14 November 2014).

50. At the relevant time rule 43 of the Coroners Rules 1984 enabled a coroner who believes that action should be taken to prevent other deaths in similar circumstances to make a report to the appropriate person.

51. In *Lynch* Master Rowley divided the categories of work that had been carried out in relation to the inquest and, in broad terms, indicated that he would allow the costs of attending to hear the witnesses give evidence, but would not allow the costs of attending to hear witness statements being read out or for "housekeeping" matters.

52. A different view was taken by Master Campbell in *Wilton v The Youth Justice Board* (unreported, 23 December 2010). He allowed the costs of making submissions to the coroner and of attending during the jury's deliberation. He thought that it would be unreasonable for the Claimant's legal team to have to "pack their bags" when the

evidence concluded and that it would be reasonable to work towards ensuring that the jury reached a proper conclusion. In that case a verdict of unlawful killing would have been overwhelmingly more helpful in obtaining an admission of liability than a finding of accidental death.

53. In *Douglas v Ministry of Justice* [2018] EWHC B2 (Costs), Master Leonard trod a line between *Lynch* and *Wilton*, and allowed the costs for attending for the evidence and obtaining disclosure from the Defendants, but also the costs of making submissions designed to secure a verdict that would assist the Claimant's case. He did not allow the costs of participating in the procedural and housekeeping matters, attending the coroner's summing up or waiting for the verdict.

54. A particular feature of the present case is the amount of costs claimed for attending the inquest – about £650,000 excluding value added tax. That is partly a function of the length of the hearing – 29 days. But the level of attendance was also high: two senior junior counsel (both of whom went on to take silk) and a senior and a junior fee earner.

55. Mr Westgate QC explained that counsel had complementary skills. Mr Menon was particularly skilled at cross-examination while Ms Hill was particularly skilled at analysing the schedules of evidence. As Ms Deighton explained at paragraph 59 of her statement, the disclosure by the Defendant came at the last minute. It was necessary for the senior solicitor to be there so as to coordinate the strategic approach to the witnesses as well as providing support to the Claimants.

56. In relation to the work done to secure the verdict, Mr Westgate QC submitted that the verdict would be an important element in achieving a settlement of the civil claim and work done in negotiating a settlement is generally recoverable. He also submitted that it would not necessarily be open to the Defendant to go behind the article 2 verdict as that might lead to the state reaching different conclusions as to the cause of death. However the decision of the House of Lords in *R(Amin) v Home Secretary* [2004] 1 AC 653, on which he relied, does not I think support that submission as there the deficiency was the absence of adequate investigation rather than duplication of investigation.

57. It seems to me that the court has to take a fairly broad, realistic, approach to the questions of (1) whether the inquest work proved of use and service in the civil claim, was relevant to issues in the civil claim, or was attributable to the Defendant's conduct and (2) whether the work was necessary and reasonable. I bear in mind in particular the emphasis placed on *relevance* by Davis J in *Roach*.

58. It seems to me that the costs of attending the inquest to hear the evidence, to cross-examine the non-family witnesses and to obtain disclosure from the Defendant all easily fall within the *Gibson's* strands and are, in principle, recoverable. Insofar as work was done which was ancillary to that evidence gathering, it is also in principle recoverable. I have in mind corresponding with the coroner or attending a pre-inquest review if that was necessary to avoid limitation of the evidence that would be given.

59. I do not think that work done in securing a particular verdict is recoverable. I am not persuaded that the verdict would be relevant to the civil proceedings. Any impact that it might have on settlement would be speculative. That the terms of settlement that were agreed included the Defendant accepting the verdict cannot justify the work done to secure the verdict, without hindsight. Accordingly housekeeping and procedural work

done in relation to the inquest would not be recoverable save insofar as it was necessary for the obtaining of evidence.

60. The answer in the present case to Master Campbell's concern that the Claimants' solicitors would unrealistically have to pack their bags at the end of the evidence, is that they would have been there anyway under the exceptional funding granted for representation of the family at the inquest. The task that the court faces is identifying which parts of that representation were relevant to the civil proceedings as well. The work that was not relevant will still be remunerated by the state.

61. The reasonableness of that work which was relevant will have to await the line by line assessment. However I am firmly of the view that it was not necessary, for the purposes of the civil proceedings, to instruct 2 counsel. In my view only one senior junior can be justified. Competent senior juniors should be adept at both cross-examination and the analysis of documents. In respect of the solicitors' attendance, it would be reasonable and necessary to have a junior fee earner present to take a note of the evidence throughout the hearing (even if a transcript was obtained subsequently) and it would be reasonable and necessary for the senior conducting fee earner to be present during important parts of the evidence. Client care and providing comfort or support to the family was not relevant to the civil proceedings and should be remunerated under the exceptional funding which was granted for that purpose.

The hourly rate

62. The Defendant contends that the Claimants' decision to instruct a firm of solicitors in Central London was unreasonable. The First Claimant lives in Birmingham and the hourly rates that should be allowed are those which would have been allowed for a national firm with an office in Birmingham and which undertakes this type of work. Mr Bacon QC gave as examples Slater & Gordon and Irwin Mitchell.

63. The rates claimed throughout the bill are £350 for Grade A, £226 for Grade C and £138 for Grade D. This covers an 11 year period as the work started in 2005 and concluded in 2016. The 2005 guideline rates for Band 1 (which includes Birmingham) were £184 (A), £137 (C) and £100 (D). The 2010 guideline rates are £217 (A), £161 (C) and £118 (D). However this is obviously a case where rates higher than the guideline rates are justified. Mr Bacon QC suggested an uplift on the guideline rates of no more than 20 per cent, to reflect the heavy involvement of counsel.

64. At paragraph 10 of her statement, Ms Deighton explained that the family had originally instructed a local firm who specialised in criminal defence work. However they did not have experience of this sort of work and lost the trust and confidence of the family. Deighton Guedalla was recommended to them by Ruth Bundey, a solicitor in Leeds, and the charity Inquest.

65. Mr Westgate QC reminded me that the First Claimant was 70 years' old and that it was unlikely that she would be able to make an extensive search. He told me that there were no specialists in police deaths in Birmingham and no Birmingham civil rights litigators were mentioned in the Legal 500 or Chambers. It was not clear that Irwin Mitchell had anybody in Birmingham in 2005 capable of doing this work and Russell Jones & Walker, the predecessor of Slater & Gordon, famously represented the Police Federation and so would not have been able to act.

66. In *Wraith v Sheffield Forgemasters Limited* [1998] 1 WLR 132, the Court of Appeal approved a passage in the judgment of Potter J. (as he then was) at first instance in which he said:

> In relation to the first question 'Were the costs reasonably incurred?' it is in principle open to the paying party, on a taxation of costs on the standard basis, to contend that the successful party's costs have not been 'reasonably incurred' to the extent that they had been augmented by employment of a solicitor who, by reason of his calibre, normal area of practice, status or location, amounts to an unsuitable or 'luxury' choice, made on grounds other than grounds which would be taken into account by an ordinary reasonable litigant concerned to obtain skilful competent and efficient representation in the type of litigation concerned... However, in deciding whether such an objection is sustainable in practice the focus is primarily upon the reasonable interests of the plaintiff in the litigation so that, in relation to broad categories of costs, such as those generated by the decision of a plaintiff to employ a particular status or type of solicitor or counsel, or one located in a particular area, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded plaintiff, a reasonable choice or decision has been made. If satisfied that the choice or decision was reasonable, it is the second question 'what is a reasonable amount to be allowed?' which imports consideration of the appropriate rate or fee for a solicitor or counsel of the status and type retained. If not satisfied the choice or decision was reasonable, then the question of 'reasonable amount' will fall to be assessed on the notional basis of the costs reasonably to be allowed in respect of a solicitor or counsel of the status or type which should have been retained."

67. Mr Bacon QC relied on a passage in a recent speech by Lord Thomas of Cwmgiedd in which, having referred to *Wraith*, he pointed out that it will rarely be truly the case that a party will need to instruct lawyers in London in preference to those elsewhere. As a generality that is of course true. Firms outside London, and in particular the national firms, have developed greater specialisation and experience especially in commercial litigation and transactional work. But that is a generalisation and for present purposes we need to look at the particular case.

68. Mr Bacon QC also relied on the decision of Teare J in *A v Chief Constable of South Yorkshire* [2008] EWHC 1658 (QB). The Claimant brought a claim against the South Yorkshire Police for malicious prosecution. The claim was settled for £300,000. On detailed assessment the Defendant challenged the Claimant's decision to instruct London solicitors. Deputy Master Rowley (as he then was) concluded that the Claimant should reasonably have instructed solicitors in Sheffield. The appeal against that decision was dismissed. Mr Bacon relies on these passages in the judgment:

> 34. Finally, one comes to the question of fees and what the claimant might reasonably be expected to know of the fees likely to be charged by Bhatt Murphy compared with a firm in

Sheffield. The Deputy Costs Judge does not specifically address the knowledge that the claimant could reasonably be expected to have of the comparative fees in London and Sheffield. It was submitted that it was unreasonable to expect the claimant to have an awareness of such matters. In assessing whether the reasonable litigant might reasonably have been expected to be aware of the comparative level of fees it seems to me that one must put to one side the fact that this particular claimant was legally aided and assume that the reasonable litigant is funding his legal representation himself. Otherwise the question of cost would not feature in the analysis of what a reasonable litigant would have done. Such a litigant would clearly inquire into the level of fees charged by Bhatt Murphy before instructing that firm. He would also compare that level of fees with the level of fees charged by a Sheffield firm with experience of bringing actions against the police. Indeed, the attendance notes manifest the claimant's concern with the comparable charges because he was anxious to know how much his contribution to his legal expenses would be. The reasonable litigant would make himself aware of the comparative charges by consulting the Sheffield firm and the London firm. He would have appreciated that there was a substantial difference in rates. The rates approved by the Deputy Costs Judge were £190 per hour and the rates claimed by Bhatt Murphy were £265 per hour. It is agreed that the choice of Bhatt Murphy has led to a difference in the final bill of £50,000 (£195,000 compared with £145,000).

35. A reasonable litigant might well consider it advantageous and beneficial to instruct a solicitor such as Ms. Murphy with the three-fold experience of actions against the police, claims for psychiatric damage and of the significance of racist action in the causation of psychiatric harm. However, a reasonable litigant would not necessarily require such a solicitor. There is no evidence that the claimant had identified (or that a reasonable litigant would have identified) that three-fold experience as something which he needed. His letter of instruction to Bhatt Murphy indicated that he did not want Peel and Co. because Mr. Peel was a "general practitioner who does not specialise in litigation against the police". He wanted "appropriate specialist counsel to maximise the potential for the success of my case against the South Yorkshire Police." For the reasons already given, and as found by the Deputy Costs Judge, the case could have been brought to a satisfactory conclusion by instructing a solicitor in Sheffield with experience of bringing claims against the police who would be able to instruct counsel with experience of proving psychiatric damage and causation. Such a solicitor would satisfy the requirements indicated in the claimant's letter of instruction. Moreover, he would be available at substantially less expense than Bhatt Murphy. The reasonable litigant would inevitably consider whether, in those circumstances, it was

> reasonable and proportionate to instruct Ms. Murphy. In my judgment he would have considered that it was not, because of the added substantial cost of doing so.

69. In my judgment the present case is obviously different. A reasonable litigant, in the position of the First Claimant, would have appreciated that there was a difference between the rates that would have been charged by a firm in Birmingham in 2005 and the rates that are now claimed for work done in 2005 by the Claimants' solicitors. But in the circumstances of this case I do not think that reasonable litigant would have concluded that it was not reasonable and proportionate to instruct Deighton Guedalla.

70. Unlike *A v Chief Constable of South Yorkshire*, the present case arose out of a death in custody. There were therefore the most serious allegations of misbehaviour by the police officers involved. While there was in both *A* and in the present case, a belief that the victims were the subject of racial discrimination, the belief in the present case was far more significant because of the outcome. As Ms Deighton explains in paragraph 28 of her statement: "It was their gut sense from what Claris Powell and Sharon Powell had witnessed and how they had been treated that Mikey Powell died in part because of his colour".

71. It is also relevant that initially the family had instructed a solicitor locally who does not appear to have had the required expertise. Perhaps more significantly, I am not persuaded that there was a solicitor in Birmingham who had the experience to pursue this case. None has been identified.

72. Accordingly in my opinion it was reasonable and necessary (in a *Lownds* sense) for the Claimants to instruct a firm of solicitors in Central London with experience of this type of case, despite the higher hourly rates that would be charged.

73. That does not however mean that the rates claimed are reasonable. Whatever the postcode from which the Claimants' solicitors practised, it seems to me that this was neither City work nor Outer London work. The guideline hourly rates for solicitors in Central London in 2005 were £276 (A), £171 (C) and £110 (D). For 2010, the rates were £317 (A), £196 (C) and £126 (D). Of course the guideline rates are just that, guidelines for the assistance of judges carrying out summary assessment. But for detailed assessment they have been described both as a starting point and as a cross-check.

74. This was a case of public importance, significant importance to the parties, of not insignificant value but not of particular complexity. The public importance and the importance to the parties outweigh the other factors. This required handling by specialists but, as against that, there was significant input from counsel.

75. Taking these factors into account and having regard to my experience of similar cases, dissimilar but comparable cases and the costs of litigation generally since 2005, the rates claimed are too high to be reasonable.

76. Given the period that the bill covers and the number of parts that it contains, it would be both sensible and practical to allow average rates to cover a number of years and to reflect the fact that rates did increase within those periods. For Sections 1 and 2 of the bill (broadly 2005 to 2011) I would allow as reasonable £315 for the Grade A fee earner,

£205 for the Grade C fee earner and £120 for the Grade D fee earners. For the remainder of the bill, I would allow £335 for the Grade A fee earner, £220 for the Grade C fee earner and £130 for the Grade D fee earners.

77. Had I concluded that a national firm, with a Birmingham presence, of the kind identified by Mr Bacon QC should have been instructed I would have allowed for Sections 1 and 2, £230, £180 and £115 and for the remainder of the bill, £250, £200 and £120.