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Case No: QB/2008/APP/0401
QB/2008/PTA/0173

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SUPREME COURT
COSTS OFFICE
PTH/0801034

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2009

Before :

THE HONOURABLE MR JUSTICE DAVIS
Sitting with Assessors (Master Wright and Mr Robert Carter)

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Between :

GERALD LAURENCE ROACH (1)	
- and -	**Claimants**
JEAN ROACH (2)	
- and -	
THE HOME OFFICE	**Defendant**
- and -	
FRANCES MATTHEWS	**Claimant**
- and -	
THE HOME OFFICE	**Defendant**

- -
- -

Mr Andrew Post (instructed by **Hodge Jones & Allen**) for the **Claimants (Roach)**
Mr Martin Westgate (instructed by **Bhatt Murphy Solicitors**) for the **Claimant** (**Matthews)**
Mr Jeremy Morgan QC and Mr Benjamin Williams (instructed by **The Treasury Solicitor**) for the **Defendant (The Home Office)**

Hearing dates: 3 and 4 December 2008

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Judgment

Mr Justice Davis :

Introduction

1. These are two costs appeals and one cross-appeal. Each case raises a point of principle as to whether costs of attending an inquest can be recovered by way of costs in subsequent civil proceedings. The paying party in each case (the Home Office) says that they never can be so recovered. The receiving parties say that they can be.

2. The background facts giving rise to these appeals and cross-appeal can be relatively shortly stated for present purposes.

Roach

3. Craig Roach was arrested for shoplifting on 16 January 2004. He was taken to Yeovil police station. He was a heroin addict and informed the police of this. He was examined by the force medical examiner and prescribed medication. He appeared before the Magistrates Court on the morning of 17 January 2004 and was remanded in custody. He was taken to HMP Exeter at around 1.30 p.m. His last dose of medication had been provided at the police station at around 8.00 a.m. He was prescribed different medication by a prison doctor, administered at around 4.00 p.m. His condition deteriorated and at around 5.00 p.m. he was found to have harmed himself by cutting his wrists, his cellmate having alerted prison staff. He was taken to a health care unit where his wound was treated. He was eventually moved to another cell, at around 7.30 p.m., his cellmate having complained about his behaviour. When there he rang repeatedly asking for more medication. He was told that there was no further medication due. He was then at around 0.40 a.m. placed in a single cell, with video monitoring and 30 minute watches. He continued to ring the bell but was told that there was no entitlement as there was no medical emergency. At around 5.00 a.m. on 18 January 2004 he was found to have hanged himself from his bed, using bed sheets as a ligature. He was declared dead at 5.55 a.m., all attempts at resuscitation having failed.

4. The inquest into his death was not held until 5 March 2007. It lasted some 14 days. The jury delivered a narrative verdict on 27 March 2007. Included in the narrative verdict were findings that Craig Roach was suffering psychologically from the effects of withdrawal at the time he was placed in the single cell and that prison staff were not specifically trained in dealing with prisoners who were detoxifying from drugs and alcohol.

5. The parents of Mr Roach approached a charity which was involved, among other things, with issues relating to deaths in custody. The charity recommended them to consult a firm of solicitors (Hodge Jones and Allen). Those solicitors instructed counsel to attend the inquest. Exceptional funding was obtained from the Legal Services Commission with effect from 17 January 2005, the family being required to make a contribution. Solicitors and counsel were present throughout the inquest; counsel had also attended a number of pre-inquest hearings directed by the coroner. It is common ground that the remuneration payable under legal aid would be in a significantly lesser amount than that recoverable (if allowed) for the same work if claimable as costs of and incidental to civil proceedings.

6. In December 2004 the Home Office had been put on notice of a proposed civil claim. An extension of the limitation period was agreed to 3 months after conclusion of the inquest. After the inquest a formal and detailed letter before claim dated 12 April 2007 was sent. That asserted, among other things, that the defendant's failure to provide adequate safeguards had caused unnecessary suffering. There was no substantive response and proceedings were issued on 22 June 2007 in the Central London County Court by Craig Roach's parents, Gerald Roach and Jean Roach: Gerald Roach being expressed to sue both on his own behalf and as personal representative of Craig Roach deceased. A Conditional Fee Agreement was made on 22 August 2007, with a success fee of 100%.

7. Craig Roach had no dependants. The claim form sought damages of not less than £5,000 but not more than £15,000. Damages were claimed not only under the Law Reform (Miscellaneous Provisions) Act 1934 but also under Sections 7 and 8 of the Human Rights Act 1998 (by reference to Articles 2, 3 and 8 of the Convention); and for negligence.

8. In due course an offer of £10,000 was made and it was accepted in September 2007. A Consent Order was made in the Central London County Court on 3 October 2007, providing for payment of the £10,000 and including an order that the defendant pay the claimants' reasonable costs, to be assessed if not agreed.

9. The Bill of Costs in due course submitted by the claimants' solicitors was in the sum of £67,126.85. The great proportion of that (some 90%) was attributed to the attendance of counsel and solicitors at the inquest. The defendant challenged the reasonableness of such bill. Amongst various points of objection there was objection to the claimed costs and disbursements in the form of costs of (London) counsel and solicitors attending the inquest on behalf of Mr and Mrs Roach. A proposal by the Home Office of £450 per day for counsel's attendance only, by way of watching brief, was made: this was disputed by the claimants, as receiving parties.

10. In the event the matter came before Master Hurst, the Senior Costs Judge. He gave his decision on 29 May 2008. It will be necessary in due course to refer to aspects of his judgment. He decided that the receiving parties should have one-half of the inquest costs, subject to reduction thereafter in respect of certain items.

11. Permission to appeal was granted by the Senior Costs Judge to both parties on 29 May 2008, limited to the issue of whether and to what extent the costs of and incidental to the inquest were recoverable as costs of and incidental to the civil claim.

Matthews

12. Anna Baker (the daughter of Frances Matthews) was remanded in custody and placed in HMP Styal on 1 November 2002. She was known to be addicted to drugs. On arrival at prison, she was assessed as posing a relatively low risk of self-harm. She was placed on the prison's relevant withdrawal detoxification programme. This was, however, terminated on 8 November 2002. She was then prescribed antidepressants but in due course these too were withdrawn. Her behaviour deteriorated from 9 November 2002.

13. On 7 November 2002, a cellmate had reported that Anna Baker had tried to hang herself. She was relocated to a secure cell and then to an ordinary cell. Her behaviour was unpredictable. On 25 November 2002 she requested the supports of a "listener"; also on that day she wrote to her boyfriend implying that she was feeling suicidal. She was reassessed as posing a high risk of self-harm; but notwithstanding that was placed in an ordinary cell, with bunk beds.

14. She was subject to hourly checks. She was also taken to the segregation unit for adjudication. She was returned to her cell. At 12.30 on 26 November 2002 she was given a letter from her boyfriend. Her cell was not checked again until 13.50: she was found hanging by a ligature made of strips of towel, attached to the upper bunk. She was pronounced dead at 14.25. It was said that she was one of 14 women to die at HMP Styal in 2002.

15. The claimant (Mrs Matthews) entered into a Conditional Fee Agreement with her retained solicitors, Bhatt Murphy, on 19 January 2004, with a 90% success fee. In due course exceptional funding was obtained from the Legal Services Commission on 17 March 2004 for attendance at the inquest. Counsel and a fee earner from the solicitors attended the inquest throughout: it lasted from 8 to 17 November 2004. The jury returned a narrative verdict: this among other things recorded failings on the part of the prison service, including a "total lack of awareness and staff training" in the management of persons at risk of self-harm and suicide.

16. On 9 December 2004 a very detailed letter of claim was sent to the defendant, asserting a claim in negligence and also asserting breaches of Articles 2 and 3 of the Convention.

17. Liability was in due course conceded. A protective claim form was issued in the High Court in November 2005, Mrs Matthews suing both on her own behalf and as personal representative of Anna Baker. A consent order, in Tomlin form, was lodged on 10 May 2006 and pronounced on 26 May 2006. This provided for payment of £20,000 by the defendant. In addition it was ordered that the defendant pay the claimant's costs, to be subject to a detailed assessment if not agreed.

18. In due course the claimant's solicitors lodged their Bill of Costs. A total of £91,952.09 (inclusive of VAT) was claimed. Of this £43,573 (+ VAT) related to the costs and disbursements involved in counsel and a fee-earner attending the inquest (the amount allowed for that under the exceptional legal aid funding had been £17,742 + VAT). As in the Roach case, the defendant (paying party) in its points of dispute held the position that no more than the cost of briefing local counsel on a noting brief at the inquest should be allowed: although this thereafter seems to have hardened into an objection to any costs of attending at all being allowed.

19. That issue was decided as a preliminary issue by Deputy Master Rowley on 19 November 2007. He decided in principle that the claimant was not precluded from recovering costs of her representation at the inquest as part of the costs of her subsequent civil claim; and he also decided that the fact that the claimant had been publicly funded, by way of exceptional funding, for the inquest did not alter that.

20. Permission to the defendant to appeal was granted by Henriques J on 24 April 2008.

The Law

21. It was common ground before me that there was no power available to the coroners to make an award as to costs of those inquests. So far as the civil proceedings are concerned, the position is governed by section 51 of the Supreme Court Act 1981 (as amended). That, in the relevant respects, reads as follows:-

> "S.51 Costs in civil division of Court of Appeal, High Court and county courts
>
> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in:
>
> a) the civil division of the Court of Appeal;
>
> b) the High Court; and
>
> c) any county court,
>
> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives [or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs].
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.
>
> … ."

It was accepted in the cases before me that the orders for costs made in the proceedings were to be taken as including costs of and incidental to the proceedings, the assessments being on the standard basis. By CPR 44.4(1), it is to be noted, costs will not be allowed "which have been unreasonably incurred or are unreasonable in amount".

22. Mr Westgate, on behalf of Mrs Matthews, submitted, correctly, that the wording in section 51 is wide. He submitted that Parliament has deliberately conferred a broad discretion on the court; and for that reason alone it is not permissible for there to be an absolute exception to, or restriction on, the operation of the section of the kind advocated by the paying party (the Home Office) here. It is correct that, as stated by Lord Goff in Aiden Shipping Company Limited v Interbulk Limited [1986] AC 965 at p.975H, 980H, it is difficult to accept that a limitation can be implied into these statutory provisions. But Lord Goff also observed at p.975 E-G dealing with the statutory provisions in their then form:-

> "In these circumstances, it is not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms. The subsection simply provides that 'the court shall have full power to determine *by whom* … the costs are to be paid'. Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised."

Mr Jeremy Morgan QC (who, with Mr Benjamin Williams, appeared on behalf of the defendant paying party) was thus entitled to invite the court to have regard to legal authorities to the extent that they lay down principles which bear on this issue.

23. There is no doubt at all that costs incurred prior to proceedings are capable in principle of being recoverable as costs in the proceedings. That has long been established. The principle has been widely stated to this effect:-

> "… there is power in the Master to allow costs incurred before action brought and if the costs are in respect of materials ultimately proving of use and service in the action, the Master has discretion to allow these costs."

See Société Anonyme Pêcheries Ostendaises v Merchants' Marine Insurance Company [1928] 1KB 750 at p.757 (per Lord Hanworth MR); Frankenburg v Famous Lasky Film Service Limited [1931] 1 Ch.428.

24. Mr Morgan placed reliance on Wright v Bennett [1948] 1 KB 601. In that case, a barrister had been given a noting brief at the trial of an action. In that capacity, he was supplied with copies of documents, the costs of which were in the event disallowed by the taxing master. There was an appeal on the substantive issues decided at trial: on the appeal, the barrister who had had the noting brief at trial was instructed as junior counsel on the appeal (being led by trial counsel who had since taken silk). The same documents were used for the purposes of the appeal. On appeal, the Court of Appeal disallowed the costs of those documents. Somervell LJ (with whom Scott LJ and Asquith LJ agreed) stated at p.606, applying a previous authority and interpreting the then Rules, that:-

> "The wording of that rule … shows that one has to treat proceedings below as a separate proceeding, for this purpose, from the proceedings here … [Counsel] has a strong case for saying, applying that decision, that these costs were incurred in respect of the proceedings below and therefore, cannot be recovered under the order of the Court of Appeal as to costs."

25. Mr Morgan sought to rely on that decision as binding authority for the proposition that costs incurred in a prior proceeding can never be recovered in a subsequent

proceeding. But I do not think he can stretch the decision in Wright v Bennett so far for present purposes. The position there was that the documents had come into existence for the purpose of the lower court proceedings. That lower court had power to make an order as to the costs of those documents and had done so, expressly disallowing the costs of the documents. But it was held that no fresh disbursement was needed for those documents to be used on appeal and that the cost of those documents had not been incurred for the purpose of the appeal itself: hence they were not recoverable as costs of the appeal as ordered by the Court of Appeal. That is a much narrower outcome than the very broad principle which Mr Morgan advances would suggest.

26. In Department of Health and Social Security v Envoy Farmers Limited [1976] 1 WLR 1018 the position was in some respects rather closer to the present cases. There civil proceedings were instituted. In the course of those proceedings, an issue was identified which, under the provisions of the National Insurance Act 1965, could only be determined by the Minister. The Act gave no power to the Minister to award costs of determining such matters. The litigation was stayed in order to obtain the Minister's decision. That decision proved to be favourable to the defendant, which in consequence went back to the court and asked for the stayed action to be dismissed with costs. The Master did so, ordering the Department to pay the costs "to include the costs of and incidental to the inquiry held pursuant to a reference to the Secretary of State for Social Services of a question for determination".

27. Jupp J reversed that costs order. He referred to the statutory provisions in question and concluded (p.1021G):-

> "In my judgment, therefore, whilst the costs of getting the matter referred are costs incidental to the court proceedings the costs of the fresh proceedings then taken, that is to say the inquiry before the Secretary of State, are not incidental to the court proceedings. They are, as indeed the order under appeal itself stated, incidental to the proceedings before the Secretary of State … ."

He went on to refer to contrasting situations arising under the court's own procedures and said (p.1021 H):-

> "In this case, by contrast, the machinery is set up by Act of Parliament independently of the courts, and the proceedings have to be taken by means of that machinery because the court's jurisdiction is excluded."

28. Mr Morgan submitted that is likewise the case here. The inquest here was required to take place by reference to the Coroners Act 1988 and would have done so irrespective of any civil claim. It is not a court proceeding and Parliament has not given coroners power to award costs. The costs incurred were incidental to the inquest but not to the civil proceedings; and the courts cannot, in consequence, make an order for their recovery as costs of and incidental to the subsequent civil proceedings. I shall have to come back to that submission.

29. Next I was referred to the well known case of re Gibson's Settlement Trusts [1981] 1 Ch.179. This is an important case because it seeks to marshall a number of relevant authorities and to set out some principles or guidelines (since widely followed) to be applied in assessing whether costs incurred for work done prior to any civil proceedings being commenced may be recoverable as costs of and incidental to the proceedings. In the course of his judgment, Sir Robert Megarry VC referred to a number of cases, including Pêcheries Ostendaises; Wright v Bennett (which the Vice-Chancellor explained at p.185D); and Envoy Farmers. His review of the authorities led him to conclude that there were at least three "strands of reasoning" to be applied: that of proving of use and service in the action; that of relevance to an issue; and that of attributability to the [paying parties'] conduct (p.186 H). He then helpfully explained that at some length.

30. There was then cited to me Aiden Shipping Company Limited v Interbulk Limited (to which I have already made reference). That case is, of course, best known for the decision by the House of Lords that section 51 of the 1981 Act confers jurisdiction on the court, in its discretion, to make orders for costs against persons who are not party to the proceedings in question. But Mr Morgan's principal purpose in his citation of this authority was in reliance on the decision of the Court of Appeal reported at [1985] 1 WLR 1222. In that case, shipowners made a claim against charterers. The charterers in turn made a claim against their sub-charterers. The claims went to arbitration. In due course, the owners sought by legal proceedings to widen the scope of the remission in the head charter arbitration; the charterers in consequence brought like proceedings to widen the scope of the remission in the sub-charter proceedings (it being in due course held that the charterers were, as a practical matter, "bound" to take this similar action to protect themselves: p.1225B). The two sets of legal proceedings were, all the same, separate proceedings which were not ordered to be consolidated. In due course the owners failed in their legal proceedings to widen the scope of the remission, and consequently the charterers failed in their own legal proceedings against the sub-charterers. The judge at first instance made an order requiring the shipowners to pay the charterers' costs "such costs to include any costs paid by the charterers to the sub-charterers in the sub-charter proceedings". It was held in the Court of Appeal that he had no power to do so, on the true interpretation of section 51. As put succinctly by Sir John Donaldson MR at p.1226 B-D:-

> "Section 51 of the Act of 1981 is the source, and the only relevant source, of any jurisdiction which the court may have to make the order for costs impugned in this appeal. The wording is extremely wide, but is subject to two inter-related limitations. The first, which is expressed, is that the costs concerned are 'of and incidental to' proceedings in the High Court. The second, which is implied, is that the court does not have an unlimited jurisdiction to order any citizen to pay the costs of a successful litigant, regardless of whether that citizen has any connection with the proceedings in which the costs were incurred. The charterers were ordered to pay the sub-charterers' costs 'of and incidental to' the proceedings in respect of the sub-charter award. The owners were not party to those proceedings. The charterers' liability was indeed *consequential upon* the proceedings in respect of the head charter award, to which the

> owners were parties, but it was not part of the costs of or incidental to *those* proceedings."

The House of Lords, while reaching a different conclusion (interpreting section 51 as empowering a court to make an order for costs against non-parties), agreed that the costs ordered to be paid by the charterers to the sub-charterers could not be regarded as costs "incidental" to the shipowners' legal proceedings against the charterers: see at p.1061 G-H (per Lord Mustill).

31. Then I was referred to the unreported case of Contractreal Limited v Davies [2001] EWCA Civ 928, a decision of the Court of Appeal. The facts were very different from the present cases. In that case, there were proceedings under section 81 of the Housing Act 1996. By the terms of the section the appellant landlord could not seek to forfeit in respect of unpaid service charges unless (among other things) the amount was agreed or determined by the court. It was said that the costs of legal proceedings to determine the service charges were recoverable as costs "incidental to" the forfeiture proceedings. One submission made by the respondents – amongst many others – was to the effect that costs in one set of proceedings could not be incidental to the costs of other proceedings; reliance being placed on the Court of Appeal decision in the Aiden Shipping case (see paragraph 30 of the judgment). So a proposition corresponding to that of Mr Morgan in these cases was being deployed. Arden LJ reviewed the various authorities and at paragraph 41 said this:-

> "41. So those authorities show that the expression 'of and incidental to' is a time-hallowed phrase in the context of costs and that it has received a limited meaning, and in particular that the words 'incidental to' have been treated as denoting some subordinate costs to the costs of the action. If [counsel for the landlord] was right in this action it would mean that the costs of some very substantial proceedings would be treated as costs of and incidental to other proceedings."

32. The final reported case, on this aspect of the argument, to which I was referred was the decision of Clarke J (as he then was), sitting with assessors, in The Bowbelle [1997] 2 LL.Rep. 196: the report as placed before me containing neither headnote nor list of cases cited. That case involved a review of costs arising out of the tragic collision in the River Thames in 1989 between the Bowbelle and the Marchioness, in which 51 people died. One of the items claimed was the costs of attending the inquest. Clarke J at p.207 referred to re Gibson's Settlement Trusts and to the three strands of reasoning (described as "three prongs") there set out. Clarke J rejected an argument on behalf of the paying parties that no costs of the inquest were recoverable. Clarke J did hold that not all the costs of attending the full inquest could fairly be regarded as of and incidental to civil proceedings against the shipowners: because negligence had by then been conceded. Likewise, he said that no costs relating to the cause of the collision (which the claimants wished to be investigated with a view to possible criminal proceedings) could be regarded as costs of and incidental to the proceedings against the shipowners. Clarke J went on, however, to say this:-

> "However, it does not follow that no costs of attending the inquest are recoverable. In the event, when the inquest was opened, the Director of Public Prosecutions delivered a notice

> of intention to prosecute the master of *Bowbelle* so that the coroner did not proceed with an inquiry into the causes of the collision. The inquest which took place at that time dealt with identification of the deceased, where they were found and the causes of death. The steering committee attended the inquest through Counsel, who was Mr Haddon-Cave. Master Hurst held that it was reasonable for the steering committee to take that step in order to help to establish what pre-death pain and suffering had been endured by those who lost their lives. A forensic pathologist was called in the case of each of the deceased and he was cross-examined by Mr Haddon-Cave on behalf of the steering committee. Master Hurst held that it was reasonable for the steering committee to co-ordinate the claimants, to instruct Counsel and to attend the inquest. I agree. That evidence was potentially relevant to the loss of life claims. It follows that, unless there are particular costs which are not fairly referable to the attendance at the inquest for that purpose, reasonable costs of attending the inquest are in my judgment recoverable. At present there is no basis for holding that Master Hurst's approach to the figures was in any way wrong."

33. This is, as Mr Morgan accepted, authority directly against the proposition for which he was arguing. But his submission is that such decision was per incuriam (the Court of Appeal decisions in Wright v Bennett and, in particular, Aiden Shipping apparently not being cited to Clarke J); and at all events he submitted that it was wrong and I should not follow it.

The judgments under appeal

34. Both Costs Judges gave detailed reasoned judgments.

(1) Roach

35. In the case of Roach, the Senior Costs Judge set out the underlying facts. He referred to various authorities, including The Bowbelle. He also referred to two other decisions of costs judges: that of Master Gordon-Saker in King v Milton Keynes General NHS Trust (13 May 2004: SCCO Ref. AGS 04000350) and Master O'Hare in Stewart v Medway NHS Trust (6 April 2004: SCCO Ref. HQO 2X03849). In both cases the costs judges, after fully reviewing the authorities, decided that costs of attending an inquest were (subject to reasonableness) capable of being incidental to a subsequent civil action. As stated by Master Gordon-Saker after a review of the authorities:-

> "28. In each of these cases the costs were disallowed because they were not 'incidental to' the proceedings before the court. I do not read any of these decisions as identifying a principle that the costs of one set of proceedings cannot be recovered as costs 'incidental to' another set of proceedings if they are in fact 'incidental to' those proceedings.

> 29. It seems to me that the costs of attending an inquest (and asking questions) can be recoverable as costs incurred in the subsequent proceedings if the purpose – or material purpose – of attending is to obtain evidence for the subsequent proceedings."

Master O'Hare's reasoning in the Stewart case was to like effect. He stated that the "true rule" was demonstrated by the decision in the Bowbelle and that costs of an inquest can be of and incidental to another action.

36. The Senior Costs Judge went on to express his conclusion on this point in these terms at paragraph 25:-

> "Mr Post argued that the approach in *King* [was] inconsistent with that in the *Bowbelle*, and he pointed out that in this case liability had not been admitted prior to the inquest, nor were the family attempting to achieve a criminal prosecution. He argued that the purpose of attending the inquest was purely inquisitorial in nature and undertaken solely for the purpose of obtaining information and evidence for use in subsequent civil proceedings. I cannot accept this last submission, since it is clear that both Hodge Jones & Allen and Mr Brown were instructed with the benefit of exceptional funding from the LSC and it is clear to me that the role of the legal representatives at the inquest can fairly be said to fall in to two equal parts, namely assisting the coroner at the inquest; and secondly obtaining the evidence necessary to pursue the civil claim. I accept Mr Post's submission that the subject matter of the inquest and of the civil claim was virtually identical. The inquest costs should therefore be divided equally."

He proceeded also to conclude, however, that it was not reasonable for the attendance of London solicitors and counsel for an inquest held in the West Country and reduced the rates accordingly. He also reduced the success fee. He considered proportionality but indicated in paragraph 41 of his judgment that, given his decision that only half of the inquest costs could be recovered (and given also his further reductions of charging rates for representation and the success fee), his conclusion was that the resultant costs were not disproportionate; and accordingly that a test of reasonableness was applied.

37. The claimants as receiving parties appeal against the decision to award only half the inquest costs (before further deduction). The Home Office, as paying party, raises by way of Respondent's Notice, for which I gave leave out of time, its challenge by way of point of principle as to whether the Senior Costs Judge had jurisdiction to award *any* costs of attending the inquest as costs of and incidental to the civil proceedings.

(2) Matthews

38. In the case of Matthews, the Deputy Costs Judge also fully reviewed the relevant authorities. He said this at paragraphs 22 and 23:-

> "22. I respectfully agree with Clarke J and Masters O'Hare and Gordon-Saker, that costs incurred in respect of an inquest are, as a matter of principle, potentially recoverable against a defendant in subsequent claims for damages subject to the relevance and reasonableness of the individual items. Otherwise it would seem that a witness, for example the officer who investigated the death, could be interviewed at length by the claimant's solicitors in their offices and no argument would be raised by the defendant when the cost of that attendance was subsequently claimed. But if that evidence was provided at an inquest the claimant could not seek recovery of those costs notwithstanding the fact that the defendant would probably save money in the concentrated nature of the evidence being given before the coroner and which might otherwise take a considerable time to be amassed by the claimant's solicitors.
>
> 23. Accordingly I find in relation to issue 1 that costs in relation to the inquest are recoverable as costs of and incidental to these proceedings. I make no decision as to the individual items claimed in the bill in relation to their reasonableness and proportionality or indeed whether any specific item is relevant for the purpose of pursuing that claim."

39. As to the relevance of public funding at the inquest he said this at paragraph 37:-

> "37. Whilst the public funding was for the assistance of the coroner it was inevitable in my judgment that one of the purposes for the attendance at the inquest was to gather evidence for a potential civil claim. It may not be the coroner's function to produce evidence relating to fault when seeking to find facts for questions he needs to answer. Nevertheless all interested parties keep an eye out, and indeed ask questions, for purposes outside those of the coroner."

And he also went on to say at paragraph 51:-

> "51. Does this then lead to the conclusion that there is an overlapping between the LSC and private funding arrangements? In my judgment it does not. The agreements abut each other to ensure that no costs reasonably incurred fall through the gap between them. If the costs can be properly ascribed to furthering the civil proceedings then they are claimed against the defendant. If they cannot, they are claimed from the Commission. The fact that the costs claimed against the defendant in respect of the inquest are claimed without a success fee is simply a bonus to the defendant."

He thus concluded that costs were recoverable whether or not they had also potentially been recoverable under a public funding certificate.

The Submissions

40. Mr Morgan advanced his proposition of principle in these terms. The rule, he said, is that the costs of one set of proceedings – although he did not offer a definition of "proceedings" for this purpose - are *never* recoverable as costs of and incidental to another set of proceedings. That, he submitted, was the rule and there was no exception. Accordingly, he said there was no jurisdiction to award such costs. (It may, in passing, be noted that such a rule would seem to preclude the Home Office itself from claiming any costs of attending an inquest as costs incidental to subsequent civil proceedings in a case where the Home Office succeeded in such civil proceedings with an order for costs in its favour.) The receiving parties, through Mr Post and Mr Westgate, disputed that there was any such rule. It is, however, to be noted that they disclaimed any assertion of any contrary "rule". They did not seek, for example, to argue that such costs are always so recoverable. On the contrary, they said there is no rule as such and it all depended on the circumstances of each case: and it was therefore a matter for the assessment of the Costs Judge in each individual case. That indeed, they said, was in fact the safeguard to the paying party. Further, they submitted that Mr Morgan's approach would have unsatisfactory implications in acting as a potential deterrent and thus as a limit on access to justice: which Parliament is to be taken as not having intended.

41. It is, as I see it, impossible to extract such a rule, as argued for by Mr Morgan, from the wording of section 51 itself. On the contrary, the wide wording of the section, as set out in subsections (1) and (3), is inimicable to there being such a rule or such a fetter on the court's powers. Of course, in jurisdictional terms, I accept that the costs must be "of and incidental to" the civil proceedings to be recoverable at all. However, as Mr Morgan was constrained to accept, the existence of such a so called "rule" was inconsistent with the concession made by the Home Office in the Roach case before the Costs Judge that the costs of a noting brief could be allowed – a concession which Mr Morgan (who did not himself appear below) made clear that he did not seek to retract.

42. Mr Morgan's asserted rule gives rise to yet further difficulties. He accepted that, where a solicitor did not attend the inquest, such solicitor, on behalf of his client, might well be able to claim as costs incidental to civil proceedings – and at all events was not precluded in principle from claiming – the costs of the solicitor prior to commencement of proceedings of interviewing and obtaining relevant proofs of evidence from witnesses who had given evidence at the inquest. But if that is so, then – as Deputy Costs Judge Rowley noted - there seems no reason in sense or in logic why the costs of instead attending the inquest to note the evidence (and, it may be, also to assess the witnesses) should be incapable of being allowed as incidental costs. Indeed one can readily envisage that in many cases such a course may be cheaper, and more useful, than the cost of proofing such witnesses afterwards. To assert, therefore, as Mr Morgan did, that the inquest had "nothing to do" with the civil claim cannot, as a general proposition, be correct. It may be that can in some respects be said of the purpose of an inquest ("who? when? where? how?") taken on its own. No doubt too it can be said that an inquest would have occurred even if civil liability had been admitted prior to the inquest. But that tells one nothing conclusive where civil proceedings follow after an inquest and tells one nothing of the purpose or relevance of attendance at the inquest to the subsequent civil proceedings. The purpose of an

inquest is not to be equated with the purpose (or relevance) of attendance at an inquest.

43. I therefore find it difficult to see any convincing rationale for Mr Morgan's asserted rule. I can well see that where in one set of proceedings a court having power to order costs in terms declines to do so then such order cannot necessarily be trumped by seeking the self-same costs in subsequent proceedings as, purportedly, costs "of and incidental to" the subsequent proceedings. Wright v Bennett (supra) can be taken as an illustration of that. But that is not a situation comparable to these instant cases.

44. Mr Morgan, however, submitted that such a conclusion was dictated by the decision of the Court of Appeal in the Aiden Shipping case. But one only has to look at the facts of that case, and to the statements of Sir John Donaldson MR, to see that that cannot be right. The sub-charter proceedings were *separate* proceedings. As the Master of the Rolls pointed out (at p.1226 C-D) the owners were not party to the sub-charter proceedings. The charterer's liability to the sub-charterers was *consequential* upon the head charter proceedings but was not *incidental* to those proceedings.

45. That I think reflects also the approach taken in the Envoy Farmers and Contractreal cases. In Envoy Farmers the costs of the inquiry before the Secretary of State could not be assessed as "incidental to" the legal proceedings because it was the inquiry itself which was (if I may put it this way) the dominant proceeding: in view of the issue raised, the inquiry was paramount. That, I think, is what Jupp J was saying in his remarks at p.1021 F-G. It is also borne out by his subsequent observations (at p.1022 B-D). If the department, as it could have done and perhaps should have done, had referred the matter to inquiry first the company could have got no costs of the inquiry. It would have been anomalous for the company to get the costs of the inquiry as "incidental" costs simply because the department had (fruitlessly) first issued a writ.

46. The same approach, in effect, was, as I see it, taken in the Contractreal case and explains why Arden LJ stated that, if the costs of the proceedings in respect of the service charge were recoverable as costs of and incidental to the proceedings for recovery of the rent arrears, it would be a case of "the tail wagging the dog" (paragraph 36): the costs were not "subordinate" to the costs of the action (paragraph 41). I appreciate that in some passages Arden LJ possibly refers to the quantum of costs so claimed as indicative of whether or not such costs might or might not be "incidental". But I do not think Arden LJ was seeking to set out any general rule to the effect that where costs of prior proceedings are very great compared to the sum of money claimed in or costs of subsequent proceedings to which they are said to be incidental, then such costs, or part of them, can *never* be recovered as "incidental" costs purely on quantum grounds alone. Moreover, it may be repeated that in that case one of counsel's arguments was that costs in one set of proceedings could never be "incidental to" costs of other proceedings (relying in particular on the Court of Appeal's decision in Aiden Shipping). If that proposition – which in essentials is that now of Mr Morgan – was correct, it would have been a short route to the Court of Appeal's conclusion. But self-evidently, by its reasoning, the Court of Appeal did not adopt that proposition. Thus Contractreal was, as was Envoy Farmers, a decision by reference to its own facts.

47. Accordingly, I am not bound by authority to accept the proposition for which Mr Morgan argued; and I do not think the general principle for which he argued can be extracted from the cases. Since I can see no other convincing rationale for such a proposition, I can see no other basis for restricting the operation of the wide language of section 51 itself and the extent of the Court's jurisdiction. Nor does this leave a paying party without protection in such a case. On the contrary, the paying party has the protection of the evaluative assessment powers conferred by the statute and subordinate rules on the Costs Judge.

48. It follows that, in agreement with the Cost Judges in each of these cases, I consider that the approach taken by Clarke J in the Bowbelle was correct. Costs of attendance at an inquest are not incapable of being recoverable as costs incidental to subsequent civil proceedings. Nor does this give rise to any unprincipled approach – because the relevant principles, as conveniently set out in Gibson, are available to be applied by Costs Judges in a way appropriate to the circumstances of each case. It may also be remembered that Clarke J in fact disallowed some of the costs relating to the inquest claimed as costs incidental to the civil proceedings (the overall approach illustrating just how important the factor of *relevance* is). Mr Westgate in fact was, I think entitled to observe – as he did – that it was open in the instant case to the Home Office likewise to seek to avoid or minimise any potential liability for such costs here by admitting liability prior to the inquest. He and Mr Post were also entitled to observe that the inquests here in practice seem to have had the effect of causing the civil proceedings thereafter relatively speedily (and thereby in a way saving of some costs) to be compromised.

49. As to Mr Morgan's wider submission that Parliament (in his words) "had decided that there should be no costs in coroners' proceedings" and therefore (it was said) such costs are not recoverable in subsequent proceedings, since to do so would defeat the parliamentary intention, there are, I think, two related answers. First, Parliament has *not* so decided: rather, Parliament has decided that a coroner has no power to award costs of and incidental to an inquest. That is different from Mr Morgan's formulation. Second, Parliament *has* decided, by section 51 itself, that costs of and incidental to civil proceedings can be recoverable.

50. I did hear argument as to whether the damages subsequently recovered could be the subject of a statutory charge to repay the costs of attendance at the inquest for which legal aid had been granted. Mr Post and Mr Westgate submitted that they could be and thus, they asserted, this was a further reason for concluding that costs of attending an inquest were in principle capable of being claimed as costs of and incidental to civil proceedings: otherwise, they said, all or most of the damages could be swallowed up in discharging the statutory charge. Mr Morgan on the other hand disputed that such a charge would arise. Since the Legal Services Commission was not a party present to argue the point, and since a decision on such a point would not be necessary to my conclusion, I express no view on this. What I would record is that the parties before me agreed that there is no question of the solicitors obtaining double payment (that is, retaining both the legal aid funding for attendance at the inquest and also the assessed costs of attendance at the inquest allowed as incidental to the civil proceedings): because the solicitors would, under the relevant regulations, be required to reimburse pro tanto the Legal Services Commission. I would also state my view that no question of impermissible "topping up" can arise in the

circumstances of these two present cases. Indeed, as at present advised I think that the fact that in these two cases exceptional legal aid funding was granted for the purposes of the inquests is of no relevance to the point of principle I have been asked to rule on.

51. It also follows that to the extent that it was sought to be argued on behalf of the Home Office that the costs of attending the inquest could not be recovered as costs of and incidental to the civil claim by reason of the legal aid exceptional funding – an argument deployed before the Costs Judge in Matthews but which was not argued in Roach – I consider that cannot be right: in essentials for reasoning corresponding to that set out above. Whatever the purpose of the LSC in granting that funding, it is not to be equated with the purpose of the parties' attendance at the inquest – or, I might add, with the relevance and utility of such attendance for the conduct of the subsequent civil proceedings. I do not in fact see why the existence of legal aid funding for attendance at the inquest should give rise to any different outcome as compared to attendance at the inquest being (say) privately funded. In my view, Deputy Costs Judge Rowley – who also found as a fact at paragraph 43 of his judgment that there was here one overall retainer in relation to the circumstances of Anna Baker's death - adopted the right approach; and was entirely justified in his conclusion that the public funding certificate had no bearing on the recoverability of the costs relating to the inquest as costs of and incidental to the civil claim.

52. Mr Morgan did also suggest that even if costs of actual attendance at an inquest are capable of being allowable – and the researches of Mr Westgate and those instructing him would suggest that that has been stated as a general rule (with the salutary proviso "where necessary") in Butterworth's Costs Encyclopaedia as far back as 1951 – then at all events no such costs are allowable once there is actual *participation* in the inquest. I can see no justification for this. If there is participation, it still remains a matter for the Costs Judge's evaluation and assessment to decide what amount of costs (if any) are allowable as costs of and incidental to the civil proceedings.

<u>The appeal in Roach</u>

53. I turn to the appeal in the case of Roach. I think I can take things relatively shortly, since ultimately Mr Morgan, on the premise that his primary argument failed (as I conclude it has), conceded that the approach of Master Hurst in dividing in the particular way that he did the costs of the inquest equally (before going on to assess the reasonableness of various items) could not stand. In fact, such concession is, I think, really a logical consequence of his primary argument.

54. Numerous authorities were cited to me, which I need not set out here, which illustrate the distinction between "division" of costs and "apportionment" of costs; although in some of the cases the distinction, in terms of strict language, is not always observed. It can be accepted that a trial judge, in disposing of proceedings and making an order as to costs, can by order apportion costs as between parties. But in the ordinary way apportionment of costs, as such, is not open to a Costs Judge in assessing costs: although it is of course open to a Costs Judge to divide costs on an assessment, or to exclude costs, where reasonable to do so.

55. In paragraph 25 of his judgment, Master Hurst ordered that the costs of the inquest be divided on a 50/50 basis. The language of "division" is not incorrect; but, with all respect, in my view the means of reaching such a conclusion were incorrect.

56. The Master considered that the role of the lawyers in attending the inquest on behalf of Mr and Mrs Roach fell into "two equal parts": assisting the coroner and obtaining evidence necessary to pursue the civil claim. He also went on, however, to hold that "the subject matter of the inquest and of the civil claim was virtually identical": the Master made no finding that any parts of the inquest were of no sufficient relevance to the civil proceedings.

57. Purpose no doubt will be a relevant consideration, but I do not see how in this context it can be decisive: and there are good reasons why it should not be. Take, for example, the case of a parent attending an inquest with lawyers, with no purpose at all of initiating subsequent civil proceedings and being motivated solely by a desire to help reveal the true position for the purposes of the inquest. If such a parent is so disconcerted by what emerges at the inquest as thereafter to change his or her mind and to start civil proceedings, there can be no reason at all, in my view, for thereafter entirely precluding a claim for costs of attending the inquest, as being incidental to the civil proceedings, simply because at the time of the inquest there was no purpose of obtaining evidence to assist the civil proceedings. Conversely, suppose the case of a parent or other relative whose sole purpose in attending, with lawyers, the inquest is with a view to obtaining evidence to assist in contemplated civil proceedings. There can, in my view, be no reason for such a person subsequently to claim to be entitled to 100% of such costs, as incidental to the civil proceedings, simply because that was his or her sole purpose at the time. (It is in fact rather difficult to see how a division in percentage terms can be made solely on an assessment of a split purpose – what percentage, for instance, can be ascribed to a "predominant" purpose?). At all events, such an approach, as I see it, would not be consistent with the objective language of section 51 itself. Here too it is also necessary to distinguish the purpose of an inquest from the purpose of a party's attendance at an inquest.

58. It is further essential, applying the Gibson principles, to have regard to considerations of *relevance* where the costs of attendance at an inquest are claimed, in whole or in part, as costs incidental to the subsequent civil proceedings. But that did not happen here: and I do not think that a dual "purpose", as identified, can of itself be a justifiable basis for the division the Master made here. I should add that I was informed that neither counsel appearing before the Master had made such a suggestion of an equal division on such a basis.

59. I therefore think that the appeal of the receiving parties in the Roach must be allowed. It does not at all follow, however, that the receiving parties in the Roach case are entitled to 100% of their inquest costs, subject only to deduction in respect of the specific items subsequently dealt with by the Costs Judge. On the contrary, the Costs Judge concluded at paragraph 41 of his judgment that the amount of resultant costs he had allowed was not disproportionate given (amongst other things) "my decision in relation to costs of this claim, i.e. that only half the costs of the inquest are recoverable". The implication is that a different view may perhaps otherwise have been taken. It thus may be that, ultimately, the overall conclusion of the Costs Judge as to the amount of costs recoverable can be justified, whether on reasonableness grounds or proportionality grounds or both. But with all respect I consider that his

means of getting there as revealed in this judgment cannot be sustained: and the matter will thus have to be restored before him for his further consideration.

60. I would however wish to add an observation on the question of proportionality. There may well be cases (I think it better to say nothing myself as to whether either of these two cases do or do not fall into such a category: it was and is a matter for the Costs Judge) where the costs of 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. This situation is provided for in the Rules by CPR 44.4(2)(a) (and also Rule 44.5). If an assessment of disproportionality is made then costs will only be allowed if they were necessarily incurred and reasonable in amount. The observations of the Court of Appeal in Lowndes v The Home Office [2002] 1 WLR 2450 will need to be borne in mind in this context. So here too there is another safeguard for paying parties.

Conclusion

61. The appeal of the claimants in the Roach case is allowed. The cross-appeal of the Home Office is dismissed. The appeal of the Home Office in the Matthews case is dismissed.

62. I should add that Mr Morgan at the close of his submissions invited me, whatever my conclusions in this case, to lay down guidelines for, as he suggested, the assistance of Costs Judges and of those who practise in this field. By way of example, he suggested guidance as to when or the extent to which costs should (or should not) be allowed where a party has actively participated in a preceding inquest, as opposed to merely attending by way of observation. On reflection, and having had the particular assistance on this point of my two assessors (whose assistance to me generally I would like to acknowledge), I think that this would be unhelpful and I decline the invitation. It seems to me that the discretionary regime available to Costs Judges in this context, and the application of section 51 and Rule 44, will not be advantaged by further guidelines (so called): each case should properly be decided by reference to its own circumstances. I am fortified in this view by the suggestion, as to which I express no opinion, that what is decided in these cases (which relate solely to inquests preceding a subsequent resolution of civil proceedings) may also be relevant in other contexts: for example, attendance prior to civil proceedings at a criminal trial involving death by dangerous driving or a criminal trial involving Health and Safety issues. Better, I think, to leave it to Costs Judges to decide each case on its own facts by reference to section 51 and the subordinate statutory rules and having regard to the principles indicated in Gibson.