Case No: A03CL266
SCCO reference: CL 1607001

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas Moore Building
Royal Courts of Justice
London WC2A 2LL

Date: 8/1/2018

Before:

MASTER LEONARD

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Between:

Carla Douglas	**Claimant**
- and -	
(1) Ministry of Justice	**Defendants**
(2) Care UK	

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Anthony Whittaker (instructed by **Bindmans LLP**) for the **Claimant**
Sian Reeves (instructed by **The Government Legal Department**) for the **Defendants**

Hearing date: 9 October 2017

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Judgment Approved

Master Leonard:

1. This is the assessment of the costs of the Claimant, payable by the Defendants under the terms of a consent order dated 22 March 2016.

2. The Claimant is the mother of Imran Douglas, who died on 13 November 2013 at the age of 18. In October 2013, Mr Douglas had received a life sentence, with a tariff of 18 years, for murder. Following sentencing, Mr Douglas had been transferred to HMP Belmarsh. On 13 November he was found by a prison officer hanging from a bed sheet in his cell. He was declared deceased at 9.51 a.m.

3. The Prisons and Probation Ombudsman ("PPO") undertook an investigation into Mr Douglas' death. His report was published in September 2014. The PPO found that Belmarsh was not an appropriate allocation for Mr Douglas, who should, following sentencing, have been returned to Feltham Young Offenders Institute. The PPO's report listed, in detail, a number of institutional failings that led to Mr Douglas' death, notably failure to implement appropriate transition plans; inadequate communication about Mr Douglas' allocation; an inadequate response at Belmarsh to a suicide self-harm warning form about Mr Douglas: a failure to open an ACCT care planning system for Mr Douglas; inadequate arrangements for vulnerable prisoners such as Mr Douglas; and an inadequate emergency response.

4. The first Defendant, the Ministry of Justice, employed the prison officers at HMP Belmarsh. The second Defendant, Care UK, employed the healthcare staff there. In November 2014, the Claimant instructed solicitors with a view to bringing a claim against both Defendants.

5. Bearing in mind limitation issues, a claim was issued on 11 November 2014 against both Defendants. The stated value of the claim was between £15,000.01 and £50,000. The claim form was endorsed in these terms:

> "The Claimant seeks a declaration and damages for breaches of Articles 2, 3 and 8 of the European Convention of Human Rights, as incorporated by the Human Rights Act 1998, and/or damages for negligence arising from the death of Imran Douglas…"

6. Articles 2 and 8 protect the right to life and the right to respect for private and family life, home and correspondence. Article 3 prohibits torture and inhuman or degrading treatment or punishment.

7. On 15 January 2015, the Claimant's solicitors wrote to the Defendants via the Treasury Solicitor (subsequently the Government Legal Department) notifying them that proceedings had been issued and suggesting that once service had been effected, the parties agree to stay the claim until four months after the inquest had concluded. The Treasury Solicitor agreed and accepted service on behalf of the first Defendants: BLM acted for the second Defendants, though the Treasury Solicitor took the lead in subsequent negotiations.

8. The inquest into Mr Douglas' death was lengthy and, given the importance of the concerns raised by his death, of significant public interest. The following narrative is, as regards the inquest itself, taken from the Claimant's bill of costs and her Replies to the Defendants' Points of Dispute.

9. Pre-inquest reviews took place on 27 April 2015, 17 July 2015 and 18 September 2015 in which the Claimant's solicitors and counsel actively participated in a continuing process of identifying the scope of the inquest and of disclosure and witness evidence.

10. Their involvement extended, for example, to the making of submissions following which the coroner determined that an accident in which Mr Douglas had been involved in April 2012, and in the course of which he had sustained a brain injury, would not fall within the scope of the inquest; agreed that disclosure should be made of various records including the deceased's prison and GP records; and directed that evidence be obtained from appropriate witnesses.

11. According to the Claimant, all of the work undertaken on those pre-inquest matters assisted in investigating the civil claim. According to the Defendants (and judging from the information before me about the scope of the inquest itself, this must I think be correct) all of this process, including disclosure, involved a large number of interested parties, not just the Defendants. For example, the Defendant says, the accident of April 2012 was considered on the basis that the Metropolitan Police might have some responsibility for Mr Douglas' death. Further, say the Defendants, the

Coroner's power to order disclosure, which will reveal the detail of events, should lessen the work to be done by the interested parties at the inquest itself.

12. On 8 October 2015 the Government Legal Department, on behalf of both Defendants, wrote to the Claimant:

> "The first and second Defendants admit full liability on a joint basis...We would welcome the opportunity to explore terms of settlement."

13. The Claimant responded on 9 October 2015. The letter was addressed jointly to the Government Legal Department and to BLM.

14. The Claimant's letter said:

> "…In order for us to properly advise our client and to be in a position to explore settlement, please confirm the following…The basis on which your clients are admitting liability, namely which failures do your respective clients accept:
>
> (a) Were negligent;
>
> (b) Were a breach of Imran's human rights including setting out which Articles of the ECHR your clients accept were breached;
>
> (c) Were a breach of our client's ECHR rights…"

15. On the same date the Treasury Solicitor replied by email:

> "… My client does not consider it appropriate to address specific failings until the inquest has concluded. I can confirm that an apology in general terms will be forthcoming in due course, the precise wording of which is currently being finalised…"

16. On 10 October 2015 BLM responded:

> "In order to assist you I can confirm that I have not recommended to my client that the basis on which liability is admitted be fully set out. A full admission as to liability has been made on the basis of what has been set out in the claim form.…"

17. On 12 October 2015, the jury was empanelled and matters in relation to disclosure were addressed. The Claimant says that without the disclosure requested by counsel, the extent of liability in the claim would have remained unclear. It was not clear whether full prison and secure estate records had been disclosed. Submissions were made on the use of medical evidence and substantial disclosure was requested from the London Borough of Tower Hamlets, the extent of whose responsibility was at the time unclear, as was the extent to which the risk that Mr Douglas posed to himself had been communicated to prison staff by the London Borough of Tower Hamlets.

18. The inquest commenced on 13 October 2015 and continued until 3 November 2015. According to the bill of costs, on that date the jury returned a lengthy and highly critical narrative conclusion. This included findings that Mr Douglas' death had been

contributed to by a lack of transition planning on his transfer to HMP Belmarsh. In relation to the failure of management and staff at Feltham to draft a transition plan, the jury noted that the Head of Young People at Feltham had ordered the preparation of a transition plan, but nothing was done to bring it about and neither the Head of Young People nor Mr Douglas' Offender Supervisor had taken responsibility for seeing that it was done. Assessments by the second Defendant's agents of Mr Douglas' mental health were found to have been perfunctory. It was noted that no-one had considered opening an ACCT despite almost every staff member having confirmed, when questioned, that one should have been opened.

19. The Claimant has supplied a summary of the matters addressed at the inquest from 12 October to its conclusion, with comments from counsel upon the significance of each day's hearing.

20. As to 13 October (day 1), counsel says that important medical evidence was heard going to the heart of medical liability for Mr Douglas' death, and crucially, to the responsibility of Bluebird House and Doctor Hill who were, according to the note, "not part of" the second Defendant. (I understand that Bluebird House is a specialist, secure mental health inpatient unit run by the Southern Health NHS Foundation Trust). The extent to which Doctor Hill might have failed in his duties, and to which that might have impacted on the actions of the Second Defendant's staff, was (as on subsequent days) explored in detail, including the extent to which the second Defendant's staff could have mitigated against what is described as "a flow of misinformation" by Doctor Hill.

21. Between 14 and 16 October (days 2 to 4), evidence was heard which, says the Claimant, was relevant in establishing systemic and individual failures, including in planning and communication and access to records systems. The evidence, says counsel, went to the heart of liability in the civil claim and understanding the clear conflict of responsibility between the Youth Justice Board and the prison service. A number of limited admissions were made in evidence, but not of systemic failure by the prison service, whose witnesses attempted to lay blame at the door of the Youth Justice Board. Detailed exploration of policies was undertaken to establish contributory system failure.

22. Counsel describes 19 October (day 5) as a key day in understanding the role, responsibility and liability of the London Borough of Tower Hamlets, which, she says, adopted a combative attitude and sought to defend defective and adequate care plans, documentation and bad communication. All of this, she says, helped clarify where civil liability lay. It also assisted in establishing the extent of the failures by prison reception staff to properly assess risk and put in place adequate protections.

23. Counsel describes 20 October as another crucial day identifying the workings of the system and how they failed. Failures in medical care were, she says, identified, but it was important to question medical witnesses to understand where liability might lie and whether it extended back to Bluebird House. The extent to which liability could extend to the London Borough of Tower Hamlets, as opposed to remaining with HMP Belmarsh, was also explored.

24. On 21 October (day 7) counsel states that specific failures and systems at HMP Belmarsh were explored and individual failures exposed. The prison service took

issue with many criticisms raised by the family as regards systemic failure, a contributory factor in the civil claim.

25. The court did not sit on 22 October, but counsel says that 23 October (day 8, misdescribed in the Claimant's note day 9) was taken up with complex evidence on policy matters going to the apportionment of liability between the Youth Justice Board, Tower Hamlets and the Ministry of Justice, who did not have an agreed position: counsel for the Ministry of Justice was, says counsel for the Claimant, clearly attempting to deflect some responsibility for the death onto the Youth Justice Board.

26. 26 October was, says counsel, taken up with hearing the last of the key medical evidence. Legal submissions and summing up took place on 28 October. 29 and 30 October and 2 November were spent by counsel waiting for the jury. On 3 November counsel attended with her instructing solicitor to hear the jury's verdict.

27. On 21 January 2016, Mr Richard Vince of the National Offender Management Service wrote to the Claimant a letter of condolence and apology which included the following words:

> ""as you know, the jury at the inquest into Imran's death considered that opportunities to prevent his death were missed and that the arrangements that were in place at the time for transferring young men, such as Imran, between HMYOI Feltham and HMP Belmarsh failed. On behalf of both prisons, I apologise for this. In light of the circumstances surrounding Imran's death, the Service admitted liability in respect of the claims for negligence and breaches of the Human Rights Act 1988 and I would like to assure you that we take any admissions of liability very seriously.…"

28. On 7 March 2016, the Claimant accepted the Defendants' Part 36 offer of £13,500 in settlement of the claim. Particulars of Claim were never served.

The Matters in Issue

29. In the narrative to the bill of costs, the Claimant states that having regard to the importance, following *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, of ascertaining the precise nature of the Defendants' breaches of Mr Douglas' right to life under Article 2 and/or their duty of care, it was considered necessary to represent the Claimant at the inquest hearing in order to determine the nature of those breaches and accordingly the remedies, including the level of any damages, to which the Claimant was entitled.

30. In their Points of Dispute, the Defendants take issue with the costs of attending the inquest, which according to the Defendant come to between £83,241 and £85,829.40 excluding pre-inquest costs; between 56% and 58% of the total. These figures, I understand, are broadly agreed.

31. The Defendants, having jointly admitted liability by letter dated 8 October 2015, argue that *Rabone* at paragraph 72 shows that for the purposes of establishing both negligence and the breaches of the HRA complained of by the Claimant, no more specific admission was required. Liability had been admitted in full, so attention

should have turned to quantum. Whilst the cost of attendance at the inquest might in principle be recoverable, on the facts of this case little if any of the evidence at the inquest touched on quantum, so (the Defendants submit) on the facts of this case any costs of attendance should be claimed against the Legal Aid Agency, not the Defendants.

32. Further, the Defendant relies upon the judgment of Master Rowley in *Lynch v Chief Constable of Warwickshire & Others* (SCCO 14 November 2014, unreported, discussed below) in arguing that the costs of attending pre-inquest hearings are not recoverable.

33. In her reply, the Claimant argues that paragraph 72 of *Rabone* (Lord Dyson JSC) is irrelevant, concerning as it did the question of whether the defendant in that case had admitted a breach of Article 2 by admitting negligence and if so, whether they had thereby deprived the claimants of victim status, which is not in issue in this case.

34. The point, says the Claimant, is that the remedy for a breach of convention right under the Human Rights Act 1998 is "just satisfaction". In order to determine what constitutes just satisfaction, and therefore adequate redress, it is necessary to understand the nature of the breach of the relevant convention right. Lord Dyson in *Rabone*, at paragraph 85, confirms that if a breach is particularly egregious, or of the authority's response to it particularly distressing to the victims, it will warrant a higher award.

35. The Defendants, say the Claimant, had merely admitted liability without admitting whether there was a breach of the ECHR at all, much less the nature of it. The Claimant's solicitors had therefore no basis upon which to assess the quantum of the claim and to attempt settlement. In order to properly advise on quantum they needed to ascertain the extent of the Defendants' failings, which were investigated at the inquest, and to consider the extent of the Defendants' response to the inquest, which included admitting particular failings. Those admissions had not previously been forthcoming.

36. Further, says the Claimant, not only quantum remained in issue. Paragraph 80 of *Rabone* acknowledges that the level of damages in cases such as this is an ancillary consideration. At least as important in this case, arising from the death of the Claimant's son, was achieving recognition of the specific failings that led to his death.

37. The purpose of attending the inquest, says the Claimant, was to gather evidence, make representations to the court in respect of it, seek specific admissions and obtain a legally sound verdict which would bolster the Claimant's case in the civil claim. The Claimant's solicitors were able to obtain and examine evidence of central relevance to the matters in issue in the litigation (not defined by Particulars of Claim), namely the nature of the Defendants' breaches of the European Convention on Human Rights and of their duty of care. The Claimant argues that her representatives' active participation in the inquest assisted in obtaining admissions of particular failings, which the Defendants had previously refused to make. The attendant costs are, accordingly, of and incidental to the civil claim. Had the Defendant simply set out the basis of their admission of liability, the civil claim could, says the Claimant, in all likelihood have been settled without the need to investigate the circumstances of the Claimant's death further.

38. As for pre-inquest hearings, the Claimant responds to the effect that attendance at those hearings did not exceed what was required to make representations in relation to the issues to be addressed in the evidence that would be needed. This assisted with the civil claim by ensuring that all material evidence was obtained and all material issues addressed, preventing the need to obtain further evidence following the conclusion of the inquest. That work ultimately helped to obtain admissions of particular failings and to ensure that the matter could be settled expeditiously following the conclusion of the inquest.

39. The Defendants also take issue with the recoverability of the costs incurred by the Claimant in reviewing the findings of the PPO, which says the Defendants have no status in the civil claim as a civil court might not necessarily come to the same conclusions. The outcome of the investigation, argues the Defendant, could not and did not determine any legal liability or breach of Article 2.

40. The arguments set out above address the question of recoverability in principle, given that (as is common ground) under the principles identified in *Re Gibson's Settlement Trusts* [1981] 1 All ER 233, the work for which the Claimant seeks to recover the cost must have been (a) of use and service in the claim; (b) relevant to the matters in issue in the claim; and (c) attributable to the Defendants' conduct. All three tests must be passed.

41. Mr Whittaker, in submissions, suggested that depending upon the facts of the case the third of the Gibson tests might carry less weight than the others. I am unable to agree: each seems to me to be of equal significance.

42. The Defendants have also taken issue with the proportionality and reasonableness of the costs claimed.

The Issues to be Addressed in this Judgment

43. One of the most important authorities upon the recoverability of inquest costs, *Roach & Anor v The Home Office* [2009] EWHC 312 (QB) puts some emphasis upon the need for such costs to be proportionate in amount. Since *Roach* (and the other decisions referred to below) was decided, the test for proportionality has changed. The post-March 2013 proportionality test, which applies to this case, is set out at CPR 44.3(5):

> "Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party; and
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance".

44. CPR 44.3(5) is prescriptive, in that (having regard to all the circumstances, as provided for by required by CPR 44.4) it provides that costs are proportionate if they bear a reasonable relationship to the specified factors. The rules also provide, at 44.3(2)(a), that costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred. As a result, it is I believe widely accepted that the test of proportionality should be applied at the conclusion of a detailed assessment hearing, once individual items have been assessed on grounds of reasonableness. If appropriate, the figure so derived will then be reduced to a proportionate total.

45. For that reason, I suggested at the outset of this detailed assessment that the proportionality test should be applied to the Claimant's costs overall once the extent to which the "inquest costs" are, in accordance with the *Gibson* principles, recoverable have been identified, and the Claimant's recoverable costs have then been assessed as reasonable in amount and reasonably incurred.

46. Neither party having objected to that approach, the purpose of this judgment is to address the parties' submissions on the extent to which, on the principles identified in *Gibson*, the Claimant may recover the cost of attending the inquest into Mr Douglas' death. The detailed assessment hearing has been adjourned for that to be determined, following which the remaining issues will be disposed of at a further hearing.

Precedent

47. I have been referred to *Ross v The Owners of the Ship "Bowbelle"* [1997] 2 LL.Rep. 196 (also referred to as *The Marchioness*); *Stewart & Anor v Medway NHS Trust* [2004] EWHC 9013 (Costs) (Master O' Hare); *King v Milton Keynes General NHS Trust* [2004 EWHC 9007 (TCC) (Master Gordon-Saker); *Wilton v Youth Justice Board* [2010] EWHC 90188 (Costs) (Master Campbell); and, as mentioned above, *Roach & Anor v The Home* Office and the judgment of Master Rowley in *Lynch v Chief Constable of Warwickshire Police*.

48. In *Bowbelle*, a collision between two ships on the Thames had caused 51 people to lose their lives. The Defendant admitted negligence and established a fund to provide compensation to a large number of claimants. A Steering Committee of law firms representing the claimants attended and participated in the inquest through junior counsel. The inquest was limited to identification of the deceased, where they were found, and the causes of death. A forensic pathologist was called in the case of each of the deceased and questioned by Junior Counsel instructed on behalf of the Steering Committee.

49. Clarke J found that, negligence having been conceded, no costs relating to the cause of the collision could be regarded as incidental to the civil proceedings contemplated at the time. However the inquest dealt with identification of the deceased, where they were found and the causes of death. The judge upheld Master Hurst's finding that it was reasonable for the steering committee to arrange for counsel to attend the inquest, so as to help establish what pre-death pain and suffering had been endured by those who had lost their lives. That evidence was potentially relevant to the loss of life claims.

50. In *Stewart*, the claim lay under the Fatal Accident Act and arose from clinical negligence. Referring to *Bowbelle*, Master O'Hare took the view that (notwithstanding that legal aid had been granted only for the purposes of a noting brief) the costs of playing a larger role, making submissions and cross-examining witnesses, were recoverable. It was reasonable for the claimants to have a full say in the findings of the coroner's court.

51. In *King*, Master Gordon-Saker considered the costs of a similar claim for death arising from clinical negligence. The claimants' solicitor attended the inquest on behalf of the estate and participated fully, questioning witnesses and making submissions orally and in writing. Master Gordon-Saker found that, subject to the tests of reasonableness and proportionality, the costs of inquest attendance were recoverable if the material purpose of the attendance was to obtain information or evidence for use in civil proceedings. That applied to the taking of notes and questioning of witnesses, but not to work done to persuade the coroner to reach a particular verdict.

52. The facts of *Roach* were similar to the facts of this case. The claimants were the parents of a man who had committed suicide in prison. They instructed solicitors and counsel to attend the inquest into his death and subsequently brought a claim against the Home Office for damages in negligence and under the Human Rights Act 1998.

53. Davis J dismissed the suggestion that the costs of one set of proceedings (the inquest) could never be recoverable as costs "of or incidental to" another set of proceedings. As to the recovery of the inquest costs, he had this to say (at paragraphs 48 and 60):

> "… I consider that the approach taken by Clarke J in Ross v Owners of Bowbelle (Note) [1997] 2 Lloyd's Rep 196 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 *In re Gibson's Settlement Trusts* [1981] Ch 179, 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) … *(Counsel for the claimants)* … 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…
>
> …There may well be cases…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. …"

54. In *Wilton*, the defendant had agreed that work falling within the ambit of "evidence gathering" for the civil claim was potentially recoverable, and that that included hearing the evidence of witnesses, observing their demeanour, considering what they had said, undertaking cross examination and otherwise obtaining information or evidence for a proposed claim. The defendant argued, however, that matters such as

legal argument, submissions and the verdict, questions to the jury, the ruling of the coroner, his summing up and the verdict itself did not fall into that category, so that the cost of attending for those purposes was irrecoverable.

55. Master Campbell did not agree. Questions to the jury would, in his view, be influenced by submissions made by interested parties attending. Similarly, a properly obtained verdict was more likely to be of assistance to a subsequent civil claim than one quashed on judicial review, so work undertaken with a view to ensuring that the coroner did not, in summing up, fall into error was also recoverable. The verdict itself was relevant, and remaining at the court to deal with that verdict was, in his view, also recoverable, given that it was not known how long that process would take: it could be anywhere between hours and days.

56. In *Lynch*, the claimant was the estate of a woman killed by her former partner. Multiple failings by the police, local authorities and the NHS were alleged. Recognising (paragraph 3) that the fact that, following the coming into force of the Coroners (Inquests) Rules 2013, disclosure had become a regular part of the inquest process moved costs issues into "uncharted waters", Master Rowley took account of the defendant's argument to the effect that significant pre-inquest disclosure had disposed of the need for the claimants to attend the inquest in order to obtain sufficient evidence in support of the civil claim.

57. Applying *Roach*, Master Rowley accepted that, depending upon the facts of the particular case, the costs of attendance at the inquest could be justified as recoverable for the purposes of gathering evidence for the civil claim, subject to satisfaction of the *Gibson* principles.

58. Taking a very different approach from Master Campbell, Master Rowley found that, in principle, the costs of attendance during the evidence of witnesses was recoverable. Time spent, however, attending during pre-inquest reviews, the opening of the inquest, the coroner's summing up and his questions to the jury, was disallowed. So was time spent waiting for the jury, attending the reading of witness statements, attending whilst the court address procedural matters and time spent on "client care" matters.

59. *Rabone* concerned the avoidable suicide of a young woman who suffered from depression. Her parents made a claim against the responsible NHS foundation trust in negligence, and also for breach of duty under article 2 of the ECHR to take reasonable steps to protect her from the risk of suicide. The negligence claim was settled, but the High Court held that there had been no breach of duty under article 2 and the Court of Appeal and dismissed the parents' appeal.

60. On appeal to the Supreme Court, Lord Dyson JSC took note (at paragraph 80) of the fact that the real purpose of the appellants was not to claim damages, but rather to achieve a public recognition of the serious errors that led to their daughter's death. He rejected the suggestion that settlement of the negligence claim could in itself prevent an individual from pursuing a claim for compensation for breach of article 2 of the European Convention of Human Rights ("ECHR"). Nor, he found, (paragraph 62) was the compensation already paid, in the circumstances of the case, adequate redress.

61. At paragraph 85 of his judgment Lord Dyson noted that the range of awards for breaches of article 2 was, whilst fairly modest, nevertheless wide (up to €60,000):

> "…This is not surprising, because Strasbourg does not award a fixed conventional figure for this head of loss. One would expect the court to have regard to the closeness of the family link between the victim and the deceased, the nature of the breach and the seriousness of the non-pecuniary damage that the victim has suffered. Factors which will tend to place the amount of the award towards the upper end of the range are the existence of a particularly close family tie between the victim and the deceased; the fact that the breach is especially egregious; and the fact that the circumstances of the death and the authority's response to it have been particularly distressing to the victims. Conversely, factors which will tend to place the award towards the lower end of the range are the weakness of the family ties, the fact that the breach is towards the lower end of the scale of gravity and the fact that the circumstances of the death have not caused the utmost distress to the victims... …"

62. His analysis of the issue of quantum, at paragraph 82-85 and 92 of his judgment, emphasises that there is no parallel to be drawn between the principles of compensation in tort and of compensation for breaches of the ECHR: the principles are quite different, and the potential difference in quantum quite substantial.

63. As to admission of liability, at paragraph 72 he said this:

> "…. In the present case, the trust admitted that they had negligently caused Melanie's death and they paid compensation to reflect that admission. There is a considerable degree of overlap between the claim in negligence and the article 2 claim. The essential features of the case against the trust were that: (i) Melanie was a vulnerable patient in the care of the trust at the material time; (ii) she was known to be a suicide risk; (iii) the trust acted negligently in failing to take reasonable steps to protect her; and (iv) their negligence caused her death. In substance these features formed the basis of the claim in negligence and the claim for breach of the article 2 operational duty. Had it been necessary to decide the point, I would have held that the trust in substance acknowledged their breach of the article 2 duty…"

64. *In Ashley & Anor v Chief Constable of Sussex Police* [2008] 1 AC 962 the House of Lords considered the case of James Ashley, who was shot dead by a police officer on 15 January 1998. Members of Mr Ashley's family took legal proceedings against the police, the success of which depended upon tortious liability (in particular assault and battery) being established against one or more police officers.

65. Whilst maintaining a denial of liability in tort, the Chief Constable accepted liability in damages for all consequential damage caused by the shooting. The court recognised, in the words of Lord Bingham (at paragraph 4), that

> "Success in establishing this claim will bring the claimants no additional compensation and may expose them to financial risk. But it is ordinarily for the claimant, properly advised of the litigation risk, to decide what claim, being arguable and legally unobjectionable, he wishes to pursue…"

66. The court nonetheless recognised the vindicatory purpose of continuing with the claim and refused to accept that it would be inappropriate for it to proceed. Lord Rodger (at paragraph 72) observed:

> "of course, this does not mean that the respondents can litigate the claims for battery irresponsibly but with impunity. The usual safeguards apply. Once the evidence has been heard and the arguments have been presented, the trial judge has a wide discretion in awarding costs and may use it to reflect his or her view of the substantial merits of the claimants' insistence on pursuing the claims in battery…"

The Defendants' Submissions

67. The Defendants submit that the decisions referred to above have established that in principle, "inquest costs" may be recoverable as costs "of and incidental" to the Claimant's claim, within the meaning of section 51 of the Senior Courts Act 1981, subject to important qualifications, in particular the *Gibson* principles. The extent of the recoverability of such costs will depend upon the specific facts of each case. Only in *Bowbelle* had any admission being made prior to the inquest, and the recoverable costs related only to matters in respect of which no admission had been made.

68. Expanding on the points already made in the points of dispute, the Defendants rely upon Master Rowley's emphasis upon the importance of a concession of liability in identifying the limit of recoverability, as well as its findings in relation to specific categories of cost.

69. The Claimant's approach, says the Defendant, runs contrary to the expectation in *Roach*, repeated by Master Rowley in *Lynch* that a pre-inquest admission of liability should avoid or reduce a defendant's potential liability for a claimant's inquest costs.

70. By the time of the inquest, the only live issue, say the Defendants, was quantum. A claimant in a civil claim would not be permitted to run a claim to a full-blown hearing exploring specific failures of duty when liability had already been admitted, and would be heavily penalised in costs for so doing.

71. The Defendant's admission of liability was made in response to the claim as put in the claim form. It was not qualified. Both defendants accepted liability in respect of the negligence and human rights claims. The second Defendant, through BLM, said as much in the email of 10 October 2015 to the Claimant's solicitors: a full admission of liability had been made on the basis of what was set out in the claim form. In those circumstances it was not necessary to admit specific failings, and, specific breaches not having been pleaded, there were no specific failures or breaches for the Defendants to admit.

72. By the time of the inquest, say the Defendants, the Defendants' failings were known and capable of being assessed by the Claimant. So much was evident from the PPO report, with its detailed and highly critical findings following interviews with relevant prison staff and access to extensive prison documentation. That was supplemented by extensive pre-inquest disclosure. The Claimant was clearly able, say the Defendants, to identify sufficient prospect of proving breaches of duty by the Defendants to justify

issuing the claim in November 2014, by which point she was in receipt of the PPO report.

73. Much of the subject matter of the inquest concerned the conduct of parties other than the Defendants, and issues arising from the conduct of other parties fall outside the third *Gibson* principle. Interested Person status was granted to multiple parties and organisations apart from the Defendants, including the Claimant's father, the Claimant herself, the London Borough of Tower Hamlets, the Youth Justice Board and Serco. The Metropolitan Police Service was also represented by counsel.

74. The Defendants argue, by reference to paragraph 85 of *Rabone*, that it would have been clear at the relevant time that the damages recoverable by the Claimant in the civil claim would always be limited, given that the Claimant had for some time been estranged from her son.

75. In summary, the Defendants argue that the cost of attending the inquest in this particular case are not incidental to the civil claim, and not recoverable at all; alternatively, that they are incidental to the claim only to the limited extent of quantum; that attendance and participation by the Claimant at the inquest to play a larger role does not satisfy the *Gibson* Principles; and that it was in any event not reasonable for the Claimant to attend and participate in the inquest to fully explore all the specific or potential failures in the face of an admission of liability.

The Claimant's Submissions

76. Mr Whittaker for the Claimant pointed out that whilst, at paragraph 48 of his judgment, Davis J indicated that the paying party might seek to avoid or minimise potential liability for costs by admitting liability, he did not give any indication of how effective such an admission might be. Nor could he, given that each case will turn on its facts. One must consider the nature of the admission in the circumstances in which it was made.

77. Here, the young man committed suicide whilst in the care and custody of the Defendants and his bereaved mother sought damages. A year after the PPO reported, and one week before the opening of the inquest, an admission of liability was made. However, when asked for confirmation of the basis of that admission, the Defendants declined to give it.

78. As in *Ashley*, argues Mr Whittaker, a broad non-specific admission was not sufficient to meet the legitimate vindicatory purpose of the Claimant's action, which in a case of this kind was of crucial significance and in the pursuit of which the Claimant's representatives legitimately played a key role in the formulation and testing of the evidence considered at the inquest. Compensation was not the key point of the proceedings: one cannot compensate for the loss of a son. In any case, quantum was still to be established, and still very much in issue, which was not the case in *Ashley*.

79. An apology, which would address the application for a declaration, was due: the outstanding, and crucial question was what it was that the Defendants were apologising for. Insofar as an admission in such general and broad terms as that of 8 October 2015 could be construed as an apology at all, it could not be construed as a

sincere one. The real apology was forthcoming only after the inquest, with the active participation of the Claimant's legal representatives, established the facts.

80. Mr Whittaker strongly rejected the suggestion that only quantum remained in issue by the time the inquest started. Referring to *Rabone*, he argues that in a case of breaches of the ECHR, liability and quantum are inextricably linked**.**

81. The Defendant expressed a willingness to enter into negotiation, but pending the inquest they did not make any offer themselves, and they declined to make any admissions that would provide a framework within which such discussions could take place.

82. Mr Whittaker argued that the cost of attending the inquest would compare favourably with the full costs of pursuing civil proceedings, going through the process of disclosure and witness evidence, and establishing the facts in that context. The right evidence was uncovered, and the right disclosure was given. It incorporated the disclosure, as directed by the Coroner, of evidence which the Claimant had previously requested but which the Defendants had not disclosed.

83. The hearing of 18 September, said Mr Whittaker, went to the issue of causation, referring as it did to the brain injuries sustained by Mr Douglas in 2012. Liability was still an issue at that point. As for the involvement of other parties, it all had a bearing upon the nature of the Defendants' breaches, in particular of the ECHR: all of that was of use and service in the civil claim. For example, the records of social services, in relation to Mr Douglas, who had just turned 18, would have a bearing on what the Defendants ought to have known.

84. As to the value of the PPO report to the Claimant at the time of the inquest, Mr Whittaker refers me to general point 6 in the Points of Dispute in which the Defendants argue that the findings of the PPO have no status in the civil claim. Whilst contesting the suggestion that the costs of considering the PPO report are not recoverable, he points out that the Defendants are right about the fact that it would not in any way bind a civil court (or for that matter a jury at an inquest). They cannot, he says, say that and at the same time rely on the PPO report to say that attendance at the inquest was unnecessary. If the PPO report was in fact sufficient to establish the Claimant's case in its entirety, the Defendants could themselves have admitted to specific failings, rather than advising that they would await the outcome of the inquest.

85. In summary, he says, the Claimant's advisers, at the time of the inquest, had to establish the quantum of damages, the nature of breaches and of the apology due, and secure vindication for the Claimant. All of these would have been undermined without the damning findings of the inquest jury. Before the inquest, the Claimant had only a bland, non-specific admission with no acceptance of any of the pertinent, specific failings. There was no proper evidential basis for assessing damages: it was effectively impossible to settle. By attending the inquest the Claimant's advisers secured within four months of the inquest the apology, the admissions, the vindication and the damages to which the Claimant was entitled.

Conclusions as to The Recoverability of Costs on the *Gibson* Principles

86. To put the issues in their proper context, it is necessary to resolve the dispute between the parties as to the nature and extent of the joint admission made by both Defendants on the 8 October 2015. In my view, read in context it was a full, unqualified admission of liability to every claim endorsed on the claim form, including all of the specified breaches of the ECHR and the Claimant's right to declaratory relief. To the extent that the unqualified and complete nature of the admissions made might have remained in doubt, BLM's letter of 9 October 2015 should have been sufficient to remove it.

87. As Ms Reeves submits, the Defendants could not realistically have been expected to offer detailed admissions against an unparticularised case, but they did decisively dispose of any issue of liability in relation to the breaches of duty and of the ECHR referred to in the Claimant's claim form.

88. This left the question of the amount of damages to which the Claimant was entitled. The Defendants say that that was the only issue left. The Claimant would say that there was also the question of vindication.

89. I am not persuaded that for the purposes of applying the *Gibson* principles (as opposed to, say, considering proportionality) the distinction is material. Full identification of the Defendants' specific failings would allow the Claimant to present a fully pleaded case, would (for the reasons given by Lord Dyson in *Rabone* at paragraph 85) provide a full and detailed basis for measuring an appropriate award of damages and would provide the vindication that she sought.

90. I have no difficulty in accepting that the inquest, as contributed to by the Claimant's representatives, provided details about those failings additional to those identified in the PPO report. I have had more difficulty in identifying the extent to which, on the facts of this case, it ultimately made, or might have been expected to make, any material difference to the Claimant's case on quantum, or her right to vindication.

91. The PPO report had already demonstrated that the breaches admitted by the Defendants on 8 October 2015 lay in a combination of systems failure and individual error or neglect. That report seems to me, self-evidently, to have been a document of great significance for the Claimant's case, and I regard the Defendant's suggestion that it was effectively irrelevant to be insupportable.

92. The inquest was able to provide further evidence in relation to the nature and extent of the Defendants' failures, but given the information already available there does not seem, at the time of the Defendants' admission of liability, to have been any basis for expecting that anything would emerge from the inquest that would materially change what was likely to be, on the facts of this case, a relatively modest award of damages.

93. As for vindication, the apology offered to the Claimant on 21 January 2016 referred back to the admissions already made in October 2015. Apart from a broad acceptance of the inquest's findings there seems to me to be little in it that could not have been offered before the inquest.

94. For those reasons I am unable to accept Mr Whittaker's submission to the effect that it was not possible, prior to the inquest, to settle the claim. I appreciate that the Claimant still sought details of specific failings by the Defendants but it seems to me that there

was a perfectly sound basis for exploring settlement, on the basis of what was already known, as soon as the Defendants made an unqualified, full admission of liability. The Defendants were evidently willing to initiate a discussion immediately, but the Claimant was not.

95. Mr Whittaker's suggestion that one can favourably compare the cost of attending the inquest with the cost of preparing and trying a case (not, I emphasise, accepted by the Defendants) is weakened by this. It is akin to arguing that it was necessary to incur costs comparable to trial costs before the Claimant could settle.

96. Having reached those conclusions, the next question in my mind was whether it would be right to conclude that the Claimant's participation in the inquest procedure fails the *Gibson* tests in that it did nothing to contribute, in any material way, to the formulation and settlement of her case. In my view it would be wrong to disallow all time spent at the inquest on that basis. The new evidence of failures by the Defendants that emerged in the course of the inquest may not have added much to the quantum of damages, but it was not irrelevant. In any case one must not use hindsight in applying the *Gibson* principles. So, for example, the cost of preparing witness evidence will normally be recoverable as part of the cost of a successful claim even if that claim settles before the witness evidence is ever needed.

97. It seems to me to follow that in principle the Claimant should, in relation to inquest costs, be entitled to recover the reasonable and proportionate costs of gathering the evidence that would allow her to present (and if necessary plead) her case against the Defendants. The conclusions I have summarised above may have a bearing upon the issues of reasonableness and proportionality that remain to be determined, but they do not offer a sound basis for disallowing the inquest costs in their entirety.

98. That conclusion does however have to be qualified in the following respects. First, the Defendant on 8 October 2015 made (as I have found) an unqualified, complete admission of liability to every breach of duty and of the ECHR alleged by the Claimant. The Claimant's case is that her costs of attending the inquest should be allowed as if no such admission had ever been made. That is not to my mind a workable proposition. For the period from 8 October 2015, the Claimant's case would have been based upon the admissions the Defendants had already made.

99. Second, the work undertaken should have sufficient connection to the claim against the Defendants to justify recovery of the cost against them. The Claimant seeks the cost of full, active participation in an inquest process designed to identify all of the systematic and individual failures that led to the avoidable death of Mr Douglas. That includes the cost of obtaining evidence of failures on the part of individuals and bodies for which the Defendants have no responsibility.

100. The Defendants had their own procedures, their own records, and their own witnesses. To the extent that (for example) they might not have been supplied with pertinent information, so much will have been apparent from the records and the evidence of their witnesses. Evidence of the failures of individuals and bodies other than the Defendants will have added nothing material to that.

101. For those reasons my general conclusions on recoverability on the *Gibson* principles (subject to arguments on reasonableness and proportionality) are as follows.

102. The costs of attending the inquest will be recoverable insofar as they involve participation in the securing of disclosure from the Defendants and the obtaining of witness evidence from the Defendants. Seeking disclosure, for example, from the London Borough of Tower Hamlets, and enquiring into its possible failures, is not to the point.

103. Nor would work undertaken in relation to the possible apportionment of liability between the Defendants and other parties meet the *Gibson* tests. Even before liability was admitted in full on 8 October 2015 the evidence to be considered, for the purposes of preparing a claim against the Defendants, was evidence of the Defendants' failings, not those of others.

104. Participation in the inquest's general procedural and "housekeeping" matters does not to my mind qualify under the *Gibson* principles and must be excluded, with one exception. I find myself agreeing with Master Campbell and disagreeing with Master Rowley in this respect: if one accepts (as I do) that the cost of attending the inquest to obtain evidence that would support the Claimant's case against the Defendants is recoverable, then it would follow that the cost of making submissions designed to secure a verdict that would assist the Claimant's case is also recoverable.

105. I would not however extend that to attendance at the Coroner's summing up, which is a matter for the Coroner and not in any respect attributable to the preparation of the Claimant's case. Nor would I consider time spent waiting for the jury's verdict to be recoverable, at least in this case: attendance at the giving of the verdict was not in itself essential given that a record of the verdict would be available. Waiting (between 29 October and 2 November) for the verdict to be given would have added nothing whatsoever to the preparation of the Claimant's case.

106. Given however that a representative of the Claimant did in fact attend the giving of the verdict on 3 November, I can accept that the attendant cost is recoverable on *Gibson* principles, just as I would accept (subject to any arguments about duplication etc.) that a review of the verdict after the event would be recoverable. The verdict supported the Claimant's case and, if the matter had not settled, would no doubt have been relied upon by the Claimant.

107. As regards the remainder of the inquest proceedings, the question will be the extent to which the work done on a given day meets the limited criteria I have identified: participation in the securing of disclosure from the Defendants and the obtaining of witness evidence from the Defendants.

108. Ms Reeves for the Defendants has suggested that if I were not to exclude the inquest costs in their entirety, it might be necessary to undertake a line-by-line analysis of the work undertaken in order to identify the work undertaken by the Claimant, in the course of the inquest, that meets the *Gibson* tests.

109. I agree with that to the extent that such an exercise can be managed in a practicable and proportionate way. One might, for example, review a transcript of the entire proceedings to pick through those items of work that are recoverable and those that are not, but that could be a disproportionate exercise, especially where the reasonableness and proportionality of the costs claimed is already subject to a serious challenge.

110. On circulating this judgment in draft form, I invited the parties to consider and discuss the way in which recoverable work on the inquest can be identified. A short directions hearing may be needed to address that.