Neutral Citation Number: [2018] EWHC 1286 (Admin)

Case No: CO/372/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2018

Before :

LORD JUSTICE SINGH
and
MRS JUSTICE WHIPPLE

- -

Between :

R (Adath Yisroel Burial Society and Mrs Ita Cymerman)	**Claimants**
- and -	
HM Senior Coroner for Inner North London	**Defendant**

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Mr Sam Grodzinski QC and Mr Benjamin Tankel (instructed by **Asserson Law Offices**) for the **Claimants**
Ms Bridget Dolan QC and Ms Briony Ballard (instructed by **London Borough of Camden**) and then **Mr Jonathan Glasson QC** (instructed by **Withers LLP**) for the **Defendant**

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Approved Judgment on Costs

Singh LJ and Whipple J:

Introduction

1. This is our decision on costs in light of the judgment handed down on 27 April 2018. It should be read alongside that judgment (the "main judgment").

2. The Claimants apply for an order that their costs of the claim for judicial review should be paid by the Defendant subject to detailed assessment. We understand that the costs at issue were in fact incurred by the First Claimant and that the Second Claimant, who was added as a claimant late in the day, did not incur any costs on her own account. The Defendant resists the application. The Interested Party takes no part.

3. The Claimants' costs submissions are dated 25 April 2018. The Defendant's response is dated 8 May 2018. The Claimants lodged a reply dated 11 May 2018. After receiving our draft judgment, which was due to be handed down on 24 May 2018, the Claimants indicated that they would seek a payment of costs on account pursuant to CPR 44.2(8) and the Defendant raised an objection to paying the Claimants' costs of the application for costs and sought more time to take instructions on the Claimants' application for an interim payment. With reluctance, we adjourned the hand down of the costs judgment, and on 24 May 2018 gave directions for further submissions to be filed on those last two points, namely (i) costs of the application for costs; and (ii) interim payment on account of costs.

4. We understand that on 25 May 2018 or thereabouts the London Borough of Camden ("Camden"), which is the local authority responsible for the Defendant, indicated for the first time that it was minded not to indemnify the Defendant for any adverse costs order which might be made against her. Up to that point, all parties had proceeded on the basis that the statutory indemnity under Regulation 17 of the Coroner Allowances, Fees and Expenses Regulations 2013, made pursuant to section 34 of and Schedule 7 to the Coroners and Justice Act 2009, would extend to any such costs order.

5. In light of this development, Counsel initially instructed by Camden to represent the Defendant in relation to costs (Ms Dolan QC and Ms Ballard) ceased to act for her and she instructed Withers LLP and Jonathan Glasson QC. On 1 June 2018 we received written submissions from Mr Glasson which concentrated on the consequences of Camden's change of stance in relation to the indemnity; he invited us to revisit the whole question of costs in light of that development. We suspended the timetable for further submissions and indicated we were minded to hold a further hearing if matters, including the indemnity, could not be agreed.

6. In the event, on 8 June 2018, Camden confirmed that it would, after all, indemnify the Defendant in respect of any adverse costs order. It is not necessary for us to rehearse in detail the reasons given for that decision, save to note Camden's suggestion that there appears to be a drafting error in Regulation 17, in which no reference appears to a coroner's liability for costs. The Chief Coroner (who had seen the correspondence and submissions relating to the indemnity issue) and the Claimants have written to the Court separately, and those parties agree that the Regulations are defective in this respect. The point plainly needs to be considered and resolved. Coroners must have

certainty about the scope and extent of the indemnity to which they are entitled under the legislation.

7. Camden, the Defendant and the Claimants now invite us to proceed as we had intended to before the indemnity issue arose, and to hand down a final judgment on costs, proceeding on the basis that any costs we order the Defendant to pay will in fact be met by Camden pursuant to the statutory indemnity. We are content to do that. In line with our initial directions, we have proceeded without a further oral hearing.

8. We are grateful to all counsel for their written submissions on costs, and in particular, for the speedy consideration and analysis of the indemnity issue.

Approach

9. It is agreed that the court has a discretion on costs, pursuant to CPR 44.2. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the position in relation to judicial officers such as coroners is not necessarily subject to that general rule. The leading authority on costs against coroners is *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207; [2004] 1 WLR 2739. The position is summarised in the following passage from the judgement of Brooke LJ:

> [47] It will be apparent from this judgment that the answers to the questions I posed in para 3 above are: (1) the established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declined or neglected to sign a consent order disposing of the proceedings; (2) the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event; (3) if, however, an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like, the established practice of the courts was to treat it as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application; (4) there are, however, a number of important considerations which might tend to make the courts exercise their discretion in a different way today in cases in category (3) above, so that a successful applicant, like Mr Touche, who has to finance his own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting his rights after a coroner, or other inferior tribunal, has gone wrong in law, and [where] there is no other very obvious candidate available to pay his costs.

Defendant's role

10. The Defendant's contribution to and stance in this litigation fall to be assessed by reference to pre-action correspondence, documents filed with the Court in the course of the litigation, and the hearing itself. The relevant exchanges and events are as follows:

    i) The First Claimant's pre-action protocol letter was dated 19 December 2017. The Defendant answered it by a pre-action protocol response letter dated 3 January 2018.

    ii) A meeting took place between the First Claimant, representatives of the Board of Deputies of British Jews and the Defendant on 19 January 2018, but it was not possible to agree an outcome.

    iii) The Claim Form was then issued on 25 January 2018, attaching a statement of facts and grounds and relying on various witness statements. The Defendant served Detailed Grounds in response to the Claim Form on 28 February 2018. In that document, the Defendant maintained her position, in terms similar to those set out in her letter of 3 January 2018.

    iv) Holman J joined the Chief Coroner as an interested party and gave case management directions on 31 January 2018, which were later varied by Singh LJ on 8 February 2018. On 23 February 2018, the Chief Coroner filed his Detailed Grounds, drafted by leading counsel. Those Detailed Grounds did not refer to the Defendant's Detailed Grounds and it is not clear whether the Chief Coroner had by that stage seen a draft of the Defendant's Detailed Grounds (which were in fact then filed a few days later). But he had certainly seen the pre-action correspondence, so was well aware of the Defendant's response to the Claimants' challenge. The Chief Coroner's position was that the Defendant's policy was unlawful on a number of grounds, some of which had been relied on by the First Claimant, but another two of which were new.

    v) In the light of the position taken by the Chief Coroner, the Claimants invited the Defendant to withdraw her policy, by letters dated 4 March 2018 and 9 March 2018. In response to the Chief Coroner's intervention, on 8 March 2018 the Defendant in fact filed Addendum Detailed Grounds (undated). She did not have permission to file this document, although she sought it retrospectively, and service of it necessitated a change to the strict timetable which had otherwise been laid down in the directions made by Singh LJ. She sought to explain her policy and questioned some of the Chief Coroner's submissions. The Chief Coroner lodged his Response to the Defendant's Addendum on 11 March 2018, maintaining his position that her policy was unlawful.

    vi) The claim was heard on 27 and 28 March 2018. The Claimants, the Defendant and the Chief Coroner each filed skeleton arguments in advance of that hearing. The Defendant's skeleton set out her arguments to counter the Claimants' and Chief Coroner's grounds. She invited the Court, if it was not supportive of her policy, to provide guidance about who should be prioritised and when.

vii) The Claimants and Chief Coroner were represented by counsel at the hearing. The Defendant was not represented. She was a "litigant in person". She made brief submissions in person to the Court after the other parties had finished their submissions, including the Claimants' reply. This then prompted the Claimants' counsel to make a further brief reply.

Claimants' submissions

11. The Claimants contend that they are entitled to their costs of the action on a number of grounds based on *Davies* which can be summarised as follows:

    i) The Defendant has not acted neutrally because she has actively sought to defend her policy.

    ii) The Defendant unreasonably declined to withdraw her policy or sign a consent order.

    iii) The case is distinguishable from *Davies* because the Defendant in making her policy was not making a judicial decision.

    iv) It is manifestly unjust that the Claimants should have to bear the costs of bringing and pursuing these proceedings.

12. The Defendant resists each one of those grounds. We shall deal with her arguments as part of our analysis of each of the Claimants' grounds.

Ground iii): Judicial or Administrative Act

13. We deal first with the Claimants' third ground, which logically precedes the others. The Claimants argue that *Davies* applies only where the challenged act of the coroner can properly be characterised as a judicial act, which in most cases will render the coroner *functus officio,* which will in turn necessitate intervention by the High Court to correct any defect. By contrast, they say, the act under challenge in this case was not judicial at all, rather it was the formulation of a policy which was administrative in nature. They argue that this case is distinguishable from the other cases involving coroners considered in *Davies,* and from *Davies* itself. Moreover, they argue, the formulation of policy is routinely undertaken by public authorities which do not have any immunity for costs if they defend a policy which subsequently is found to be unlawful and this coroner should not be put in a preferential position.

14. The Defendant rejects that analysis arguing that she was acting in a judicial capacity throughout and *Davies* applies.

15. We are satisfied that the policy formulated by this Defendant was judicial in its nature. By that policy, the Defendant directed herself and her staff about the order in which decisions would be taken about deaths, including decisions about whether and when to release the body. Such decisions are plainly judicial in nature. In our main judgment we explained in more detail the statutory and common law functions which

were governed by the policy and also explained why those functions cannot be delegated to the coroner's officials because they are judicial acts and not administrative ones. Therefore, we consider that *Davies* applies.

Grounds ii) and iv): Unreasonable Conduct

16. The Claimants argue that the Defendant was unreasonable to maintain her policy in light of the Chief Coroner's intervention by his Detailed Grounds. This argument is advanced under the first and fourth limbs of *Davies.* The Claimants accept that this was not a "flagrant instance of improper behaviour" but they assert that this is a case where the Defendant "unreasonably declined or neglected to sign a consent order" which would have been reasonable once the Chief Coroner had intervened, within the first limb. Alternatively, they submit that in all the circumstances of this case it is unreasonable for the First Claimant, a charity funded by donations, to have to bear legal costs which could have been avoided if the Defendant had taken a more reasonable stance, so that the costs order should be made under the fourth limb.

17. In opposition, the Defendant argues that the first limb cannot apply at all because there has been no unreasonable behaviour. Before being made liable for costs, a coroner has to do something more than simply lose the case. Further, the coroner based her policy on her understanding of the law, which was supported by the Chief Coroner's guidance, which was extant at the time. She ran a draft of her policy by the new Chief Coroner, who approved it at the time. The case has brought important clarification of the law. By declining to revoke her policy, even after the Chief Coroner had intervened, the Defendant was not acting unreasonably and there was no equivalence with those cases where a coroner unreasonably refuses to sign a consent order. Further, it would be inappropriate to award the Claimants their costs where the First Claimant is an organisation, not an individual.

18. Plainly, the fact that a coroner loses a case is an insufficient basis, in and of itself, on which to make an adverse costs order against him or her. Further, it is correct as a matter of fact that no consent order was ever proffered for signature in this case, because there never was consent as to the outcome. We agree with the Defendant that the first limb of *Davies* is inapposite.

19. However, it is difficult to understand why the Defendant did not reconsider her position once the Chief Coroner had indicated his view that her policy was unlawful (as he did in his Detailed Grounds and Response, with detailed reasons). The Defendant's Addendum stated as follows:

> "[21] If the Chief Coroner had told me that in his opinion my approach was unlawful, then of course I would have reconsidered immediately. However, he did not."

She made a similar point in her Defendant's skeleton (see [11]).

20. So far as an account of the past goes, it is clear that the Defendant discussed her policy with the Chief Coroner in advance of its issue, and understood from him that he agreed with it (the Chief Coroner has since raised an issue about the basis on which

he thought he was giving his agreement, but that is not material for present purposes and we do not need to go into it). By his Detailed Grounds, the Chief Coroner unequivocally rejected the Defendant's case. From that point on, it did not matter what might have been said in the past; nor was it relevant what the former Chief Coroner's guidance to coroners might have suggested; the fact was that the Chief Coroner was not supportive of the Defendant's case. But the Defendant did not reconsider. The Defendant knew, or should have realised, that the Chief Coroner's view, articulated by leading counsel, was likely to carry considerable weight with the Court.

21. The receipt of the Chief Coroner's Detailed Grounds provided the Defendant with an opportunity to reconsider her position. She did not take that opportunity. Instead, she lodged her Addendum. This was a robust restatement of her position.

22. The Defendant did not take the opportunity following the receipt of the Chief Coroner's Detailed Grounds to review her position and reconsider the basis on which she was defending it. Her failure to do that was not flagrantly improper behaviour, nor was it akin to refusing to sign a consent order. But it is an "important consideration" for us in the exercise of our discretion under the fourth limb of *Davies.* That limb requires the court to consider where in fairness the costs should fall when a coroner has gone wrong in law and when there is no other very obvious candidate available to pay the claimant's costs.

23. We stop short of saying that the Defendant acted unreasonably. This is not the way the Claimants put their arguments, and it is not necessary for us to reach any conclusion on the point. But further and on reflection, we do not consider that we have sufficient information available to us to reach a judgment on the point. We note that the Defendant was acting in person at this stage of the litigation, but we do not know why that was. This was a claim brought by way of challenge to a policy she implemented in the exercise of her functions as Coroner and the challenge raised sensitive and difficult issues. The outcome might have been different if she had had the benefit of legal representation.

Ground i): Loss of Neutrality

24. The Claimants submit that the Defendant has not been neutral in her stance. They argue that she actively sought to defend her policy as lawful. They rely on the second limb of *Davies.* The Defendant resists that, saying that she has done nothing more than seek to assist the Court on matters of fact or procedure, maintaining a neutral position.

25. The Court in *Davies* accepted that a coroner who merely assists the court on questions of jurisdiction, procedure, specialist case law and such like would normally be treated as remaining neutral (see [47] cited above, third limb). The Court added:

> "[49] Needless to say, if a coroner, in the light of this judgment, contents himself with signing a witness statement in which he sets out all the relevant facts surrounding the inquest and responds factually to any specific points made by the claimant in an attitude of strict

> neutrality, he will not be at risk of an adverse order for costs except in the circumstances set out in para 47(1) above. In those circumstances the court may be obliged to request the assistance of an advocate to the court, as Simon Brown LJ suggested in *Touche's* case [2001] QB 1206."

26. In an earlier passage which offers some assistance on where the line lies between neutrality and active participation, Brooke LJ had said:

> "[43] … In my experience it has always been perfectly possible for counsel instructed by a tribunal to take a neutral role in an effort to assist the court on relevant aspects of law and procedure, and the cases in Lord Goddard CJ's and Lord Parker CJ's time made a clear distinction between the situations in which the inferior court or tribunal played an active part in the *lis* by arguing the correctness of the decision under challenge, and those in which it did not."

27. That approach has been applied in many cases subsequently, including recently in *R (Gudanaviciene) v Immigration and Asylum First Tier Tribunal* [2017] EWCA Civ 352; [2017] Inquest LR 154.

28. The Defendant has asserted that her interventions (written and oral) were neutral. But neutrality is a matter of substance and not form. We have therefore looked to see whether the Defendant at any stage crossed the line from merely seeking to assist the court on relevant aspects of law and procedure into arguing the correctness of the decision under challenge. That is the acid test, directed in *Davies.*

29. The Defendant's pre-action protocol response letter and Detailed Grounds provided a detailed explanation for her policy. We consider these two documents to be consistent with the Defendant's assertion within them that she remained neutral. She was entitled to explain the background facts and her process of thinking leading to the policy. She did touch on issues of law in these documents but that was no more than was necessary to answer the First Claimant's challenge to the policy. The tenor of these documents remained neutral.

30. By her Addendum Detailed Grounds in response to the Chief Coroner's intervention by his Detailed Grounds, the Defendant suggested that the Chief Coroner had misunderstood her position, not least because he had at first supported it (she went into detail on the support for the policy which he had given at an earlier stage); she again set out the reasons underlying her policy; she introduced a new distinction between assistance which she did give to families in her district and prioritisation which she would not permit; she raised certain practical considerations consequent on the Chief Coroner's view; importantly, she disputed the Chief Coroner's view that her policy was over-rigid ("nothing could be further from the truth", [44]) or that she had unlawfully fettered her discretion ("I am not fettering myself…" [57]). Read as a whole, this document argued the Defendant's case. It asserted, in the face of a reasoned counter-argument by the Chief Coroner, that her policy was both reasonable and flexible, which was to dispute the two additional grounds for unlawfulness raised by the Chief Coroner. This was written advocacy, seeking to justify the policy and thereby challenging the Chief Coroner's case.

31. That remained the Defendant's stance up to and including the hearing. That stance is reflected in the Defendant's skeleton argument for the hearing which maintained the Defendant's arguments, now on two fronts (against both the Claimants and the Chief Coroner). We do not believe that the Defendant's submissions to the Court at the hearing have much, if any, bearing on our conclusion - the Defendant said nothing to us which had not already appeared in writing - but that intervention was at least consistent with the Defendant's by now defensive stance in the litigation.

32. We repeat the point made above, in this context. The Defendant was representing herself and did not have any legal assistance to help her to determine where the line between neutrality and active participation lay. Objectively judged, and with the benefit of hindsight, we conclude that she crossed the line into active participation, but this line is not set in black and white, and it may have seemed indistinct to the Defendant at the time. We lack the information needed to make any sort of judgment about whether she acted unreasonably in conducting the litigation in this way.

Conclusion on Costs

33. There are two related bases on which we conclude that the Claimants must succeed, at least in part, in this application, applying the *Davies* approach:

    i) First, the Defendant's failure to reconsider her policy in light of the Chief Coroner's intervention. This is an important consideration when considering where, in fairness, the Claimants' costs should fall (the fourth limb of *Davies*).

    ii) Secondly, her Addendum Detailed Grounds, filed in answer to the Chief Coroner's detailed grounds, mark the point at which she ceased to be neutral in stance (second limb of *Davies*). By them and from that point she advocated the correctness of her policy. She was no longer simply giving information to the court.

34. For either or both of these reasons, we conclude that the Defendant, indemnified by Camden, must pay the Claimants' reasonable costs from the date she filed her Addendum, such costs to be the subject of detailed assessment if not agreed. From that date onwards, fairness requires that the costs should not fall on the Claimants' shoulders; alternatively, from that date onwards, the Defendant ceased to be neutral.

35. The costs order we make against the Defendant includes the Claimants' costs of making the application for costs. We see no reason to depart from the ordinary rule: the Claimants claimed, and have secured, an order for costs in their favour and they are entitled to their costs of making the application. We are not persuaded that the fact that they failed on ground iii), or that the costs order only runs from 8 March 2018, should result in non-recovery of any of the costs of making the application. In addition, a large amount of costs will doubtless have been spent in dealing with the indemnity issue, which was raised and then abandoned by Camden and for that further reason it is appropriate for the Claimants to recover their costs of making the application in full.

36. We confirm that we make no costs order prior to 8 March 2018. That is consistent with *Davies* and the principle that a coroner who remains neutral should not ordinarily be liable for costs. That principle in and of itself envisages what some may regard as unfairness, because it will leave a successful claimant having to bear their own costs of a successful action. But there are, up to the point when the Addendum was entered, no particular considerations or factors which cause us to exercise our discretion in the Claimants' favour by awarding costs to them. For the reasons we have given, the position changes from the point that the Addendum was lodged.

37. We direct that the Defendant is to pay £68,000 on account of costs within 21 days. We received no submissions from the Defendant or Camden to suggest that this was resisted.