Essex CHAMBERS

3+9=Costs

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Introduction

Shaman Kapoor
Call **1999**

EDITOR



Welcome to the 14th Edition of 3 + 9 = Costs.

I can report recent adventures and enjoyment in the *Pan Nox Emissions Group Litigation,* which provided an opportunity for an outing of much of the costs Bar and costs professionals before the Honourable Mrs. Justice Cockerill as she then was, days before her elevation to Lady Justice. It was a superb demonstration of the Bench grappling with the complexities of the substantive issues to first make orders as to costs before then working through complex elements to ensure that the future assessment of costs would have a clear framework. I have also had the privilege of speaking at the Costs Law Reports seminar in September where I spoke about *Mazur*, AI (or super-I if you really like) and regulation more generally. Incidentally, it seems the Honourable Mr. Justice Sweeting has permitted recovery of an AI subscription to a litigant in person in *Foster v Hitchens v Wargrave on Thames Housing Association Ltd* [2026] EWHC 3000 (KB). Well, that's going in the White Book Costs and Funding supplement for 2027!

Many of you will have seen that Lady Justice Cockerill attended this month at the Association of Costs Lawyers Conference in London. There, the Senior Costs Judge repeated the outlook he first reported at the ACL roundtable hosted by 39 Essex Chambers on 15 September 2026, namely that the Precedent S Bill of Costs should be the subject of review with an eye to considerable simplification. Met with the backing of Lady Justice Cockerill (also the Deputy Head of Civil Justice), the hope is that a more appropriate balance can be struck between the need for detailed analysis and the need for proceedings to be conducted efficiently and without delay.

Interesting times lie ahead with a Civil Justice Council ("CJC") consultation currently under way as to the introduction of Guideline Hourly Rates for Barristers. First recommended in 2023 by the now newly appointed Master of the Rolls, Sir Colin Birss, the Bar Council accepts (perhaps inevitably) their introduction. But I wonder whether the bold step taken by Baker McKenzie to move away from an hourly rate model to a value pricing model, will similarly cause the Bar to consider moving more so towards the "brief fee" model? In the meantime, the CJC's work on the Solicitors Act 1974 is apparently in draft review and we are expecting it to trigger a consultation before the end of the year. As mentioned also at the roundtable, the CJC proposals contemplate the Legal Ombudsman ("LeO") becoming the primary forum for resolving disputed legal bills under £50,000. It will be interesting to see if this recommendation carries traction. It has already been suggested that there is a lack of expertise at LeO and that the fees likely to be charged for the process will be disproportionate. It could also be the trigger for costs-ADR to be further embraced. Let's see!

Enough of the gossip. In this edition, we have much to offer you by way of recent analysis.

For her debut in this newsletter, and hot off her return from working as a Judicial Assistant at the Supreme Court, **Dana McGibbon** takes us through the judgment of CJ Whalan in *Henderson v Ministry of Defence,* grappling with the principles of privilege, when the veil can be lifted, and the high threshold to overcome in order to engage the exception of 'unambiguous impropriety' together with its potential interplay with CPR r.44.11 misconduct. What an entrance!

Christopher Moss examines the High Court decision in *Bidco Ltd v Roberts,* which determined the costs outcome of a failed Early Neutral Evaluation process. It confirmed that the starting point should be costs in the case but acknowledged the power to make a different order remained a significant tool for encouraging efficient and proper conduct. A 'but for' causation

argument of conduct causing increased cost seems to have exercised the Court.

Daniel Kozleko analyses the costs decision of the High Court in *R (AYA) v Secretary of State for the Home Department,* in a judicial review case involving multiple claimants and multiple grounds of review. The Court was concerned that the losing party should not have to pay multiple sets of costs where challenges could have been made by one set of representatives, and the Court demonstrated essentially an issues-based order in relation to the individual grounds.

Daniel Laking explores the demands of a client in a solicitor/client dispute which sought further information as to commissions, rebate, referral fees and the like that might have arisen from the ATE insurer. In *Turner v Coupland Cavendish,* the Court of Appeal considered the threshold of a genuine dispute that might properly trigger Part 18 Requests, the jurisdiction of a Costs Judge and the relevance of any disputes in relation to the cash account in Detailed Assessment proceedings.

Finally, **Niraj Modha** evaluates the conundrum of two prescribed codes colliding with one another: Fixed Costs and Part 36. He considers the frills but then goes on to consider the 'doors to more' in the Fixed Costs regime, through exceptional circumstances (r.45.9) and vulnerability (r.45.10). He examines the applicable stage when work is done in between stages of the regime, and the scope and extent of enhanced interest.

It seems there is plenty here for your Christmas stocking, if you can't get to it before! Enjoy reading, and wishing all of you greetings for the Season if we do not speak sooner.



Henderson v Ministry of Defence [2026] EWHC 2645 (SCCO): lifting the veil of 'without prejudice' privilege, to uncover 'unambiguous impropriety' beneath

Dana McGibbon
Call **2024**



Introduction

In this judgment, Costs Judge Whalan determined a dispute which arose as a preliminary issue in the course of two detailed costs assessments. Ahead of the detailed costs assessment hearing, the paying party (the Ministry of Defence) sought permission to adduce and rely on without prejudice costs schedules, in order to support a pleading of misconduct engaging the first limb of CPR 44.11. The receiving parties (the Claimants, Ian Henderson and Jonathan McPherson) asserted without prejudice privilege over the schedules. The case provides an interesting application of the 'unambiguous impropriety' exception to without prejudice privilege and demonstrates the high threshold for engaging the exception.

Facts

This case arises against the backdrop of 'noise induced hearing loss' (NIHL) claims brought against the Ministry of Defence by service personnel, in which many claimants have recovered damages for deafness and hearing loss sustained in the course of military service.

The two Claimants in this case were represented by solicitors from Hugh James. Hugh James have conducted over 11,500 military NIHL claims. Many NIHL claims settle.

In around January 2020, Hugh James and the MOD's solicitors agreed to an informal protocol for the initial consideration of costs in settled NIHL

claims. Pursuant to the informal protocol and in order to encourage early payment on account of costs, the claimant would provide the defendant with a 'without prejudice' schedule or breakdown of costs and disbursements. Over 300 cases were dealt with in line with the informal protocol.

As the informal protocol became more established, the MOD began to use the 'without prejudice' schedules provided by Hugh James as a basis for negotiating substantive costs settlements.

However, by August 2024, the MOD had begun to notice discrepancies between the sums recorded in the 'without prejudice' schedules and the actual bills of costs which were produced in cases which did not settle. The MOD accused Hugh James of 'systematic overcharging.' In essence, the MOD's complaint was that Hugh James had produced inflated without prejudice schedules, with a view to inducing the MOD to use those as a basis for negotiating settlements and thus to overpay costs.

Hugh James argued that the purpose of the informal protocol was simply to facilitate and encourage negotiation of payment on account, and that they had made no representation as to substantive entitlement or inter partes recoverability.

Legal principles

CPR 44.11

The MOD sought to adduce and rely on the without prejudice schedules in order to make an allegation of improper conduct within the scope of CPR 44.11. The second limb of CPR 44.11(1) provides that the court may make an order under the rule where *"it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper."* Where this limb is engaged, the court may;

a) disallow all or part of the costs which are being assessed, or
b) order the party at fault or that party's legal representative to pay costs which the party or representative at fault has caused the other party to incur.

On the agreed basis that the schedules had the status of without prejudice documents, in order to adduce and rely on them the MOD faced an initial hurdle of establishing that an exception to the without prejudice rule was engaged.

The without prejudice rule

The general without prejudice rule is well-established and reflects the weight given to the public interest in promoting settlements. The rule prevents a party from adducing or relying on statements made in the course of settlement negotiations. The underlying rationale for the rule was summarised by Oliver LJ in Cutts v Head [1984] Ch 290 at 306: *"the rule rests, at least in part, on public policy… in that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations… may be used to their prejudice in the course of proceedings."*

'Unambiguous impropriety' as an exception to the without prejudice rule

The rule is not, however, without exceptions. In this case, the MOD sought to rely on the 'unambiguous misconduct' exception as a basis for lifting the veil of without prejudice privilege. The leading authority on this exception to without prejudice privilege is *Motorola Solutions Inc v Hytera Communications Corp* [2021] EWCA Civ 11, in which Males LJ observed at [57] that *"although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional."* At [61], Males LJ went on to hold that *"even when something said without prejudice is contrary to a party's open position, that will not be enough to allow the without prejudice statement to be adduced in evidence unless the statement demonstrably constitutes an abuse of process."*

The main question for Costs Judge Whalan in the present case was therefore whether the Claimants'

solicitors' conduct met the high threshold of 'unambiguous impropriety', such that the without prejudice rule would not bar the MOD from adducing and relying on the informal schedules, thus allowing the MOD to make their allegations of misconduct and seek an order under CPR 44.11 at detailed assessment.

The submissions

The MOD argued that there was a *"stark"* disparity between the cost's schedules and the bills, and that the delivery of schedules which *"contain significantly higher costs than are justifiable to induce the paying party to overpay"* is a clear example of unambiguous propriety. The MOD characterised the breakdowns as being *"inflated schedules which cannot be justified,"* and submitted that the assertion of without prejudice privilege was simply a mechanism *"to avoid scrutiny of their conduct in seeking costs which were never properly recoverable."* [11]-[12].

The Claimants' solicitors denied any form of unambiguous impropriety and asserted the privileged status of the without prejudice schedules. They pointed out that the schedules were not certified and did not purport to be bills: if the MOD had chosen to use them for the purpose of substantive negotiations, that was the MOD's election and did not entail impropriety on their part [13]-[15].

The judge's decision

Having referred to the authorities which establish that the threshold of 'unambiguous impropriety' is high, Costs Judge Whalan found that there was no such conduct in this case.

He was satisfied on the balance of the evidence that the informal schedules claimed only costs which the claimants had actually incurred, and that they were served primarily to support applications for interim payments. He acknowledged that the MOD had sometimes used the breakdowns as a starting point for substantive cost negotiation and settlement but did not accept that it was the Claimants' intention to induce final settlements, let alone settlements at over value [16].

In terms of why the without prejudice schedules were consistently higher than the formal bills of costs, Costs Judge Whalan's conclusion was that this was because the costs lawyers when compiling the bills would reduce the sums claimed as part of their exercise of anticipating challenges on assessment and attempting to narrow the scope of possible disputes [16].

The judge therefore concluded that there were no fundamental errors of calculation, and no misrepresentation. There was no 'unambiguous impropriety' which would justify lifting the veil of without prejudice privilege. He further concluded that the inconsistencies between the schedules and the bills was a long way short of unreasonable or improper conduct for the purposes of CPR 44.11 [17].

Costs Judge Whalan distinguished the case from *McNamee v LB Brent* [2025] EWHC 2612 (SCCO), in which unambiguous impropriety had been identified. In that case, the degree of misrepresentation as to costs actually incurred by the receiving party had been *"considerable,"* representing more than 60% of the paying party's maximum liability [17].

Despite finding that the high bar of unambiguous impropriety was not met, Costs Judge Whalan was not uncritical of the Claimants' solicitors. He said that more could have been done to rationalise the costs in the without prejudice schedules, and that more could have been done when it became apparent that the MOD was using those schedules as a basis for substantive negotiations to alert them to the fact that the sums that would be certified in any eventual bill were likely to be lower [17].

Key reflections

The case provides a helpful rearticulation of the important policy basis for the without prejudice rule. Although the rule is not absolute, Costs Judge Whalan's decision serves as a useful reminder that the exceptions to the rule are true exceptions and that the threshold for engaging them is necessarily high.

Bidco Ltd v Roberts [2026] EWHC 2312 (Comm) The costs of Early Neutral Evaluation

Christopher Moss
Call **2021**



Introduction

In *Bidco Ltd v Roberts* [2026] EWHC 2312 (Comm) HHJ Pearce considered the costs that should follow from Early Neutral Evaluation ("ENE") that failed after the Defendants advanced a new argument at ENE that had not been pleaded. He determined that the presumptive stating point is costs in the case and that on the facts this was the appropriate order.

Background and facts

The Claimants operated a business which involved providing professional trustee services to pension schemes, the First Defendant had been employed in this business pursuant to a service agreement. The First Defendant left the Claimants' employment on 31 December 2024 following a settlement agreement which also entitled him to certain sums. In early 2025, the First Defendant and his wife incorporated the Second Defendant as a vehicle for the provision of services to the pensions industry.

The Claimants brought proceedings seeking damages and injunctive declaratory relief against the Defendants on the basis that the First Defendant had breached covenants within the services agreement through his work at the Second Defendant. The First Defendant counterclaimed for sums which he asserted were due to him under the settlement agreement.

At the first case management conference, HHJ Halliwell ordered ENE and gave directions to trial. HHJ Pearce was nominated to be the judge conducting the ENE which took place on 21 April 2026, before the exchange of witness statements. During the ENE the Defendants advanced a new argument which the Claimants and HHJ Pearce considered required an amendment to their defence. A realistic evaluation of the case could not proceed, and the ENE was adjourned part heard. HHJ Pearce ordered that the costs of and occasioned by the ENE would be reserved to him. The Claimants sought their costs of the failed ENE on the indemnity basis whereas the Defendants sought costs in the case.

Judgment

HHJ Pearce held that earlier orders had not dealt with the costs of the ENE and that he was satisfied that he had the power to deal with the costs in accordance with the general discretion in CPR 44 [12]-[17].

With respect to the costs, the Judge held that there were *"powerful arguments for the proposition that the court should start from a presumption that costs will be in the case in the absence of compelling alternative factors"* [22], drawing from the strong judicial support for alternative dispute resolution in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and *Lomax v Lomax* [2019] EWCA Civ 1467. Routine adverse costs orders following a failed ENE *"would be liable to discourage parties from engaging in such process"* [23], as would too readily penalising inadequate preparation [29].

HHJ Pearce made clear that he was not stating an adverse costs order should never be made following failed ENE, indeed the *"power to make adverse costs orders is a significant tool for encouraging litigation to be conducted efficiently and properly and to avoid that kind of conduct"* [30]. Nonetheless, he went on to state:

> *"I should be very cautious in circumstances such as the present to make an adverse costs order, having regard to the risk that dealing with an application for costs will draw the court into satellite litigation in respect of issues which it is not well judged to determine and will risk discouraging parties from entering into ENE,*

especially once litigation is commenced."

On the facts of this case, the appropriate order was costs in the case. He set out the reasons for this at [31], in short:

- Whilst the immediate cause of the ENE's failure was the Defendants' new argument, it could not be safely and proportionately determined whether the new argument was attributable to a disputed late amendment by the Claimants.
- Both parties had agreed to ENE taking place before witness statements were exchanged, this created the very problem the Claimants had anticipated.
- The Claimants could not demonstrate that but for the Defendants' conduct the ENE would have been successful or that costs would have been saved. The highest the Claimants could argue was that the Defendants should not have gone to ENE at all, and that the Claimants would not have attended. This was, however, not voluntary ENE and it could not be obviously said that different conduct on the part of the Defendants would have resulted in the saving of costs.
- Overall, HHJ Peace could not safely reach a conclusion as to whether the ultimate failure of ENE was a consequence of the Defendants' conduct, or what the outcome would have been but for that conduct.

At [32] he also noted that the indemnity costs threshold was not met and that the factors set out in [31] *"apply with equal if not greater force"* in respect of this argument.

Lastly, HHJ Pearce refused to grant the Defendants their costs of successfully opposing the Claimants' costs application. The Claimants' application was not out of the norm, and it would be *"particularly strange"* to award the Defendants' their costs following a finding that their conduct had been the immediate cause of the ENE's failure [33].

Comments

Judicial encouragement of ADR is a well-established feature of litigation in England and Wales, and the courts are keen to avoid making costs awards that would discourage parties engaging in it. HHJ Pearce's decision, in particular his dicta at [22] that "costs in the case" is the starting point following an unsuccessful ENE, continues that trend. Nonetheless, as noted at [30], adverse costs orders remain a powerful tool to encourage litigation to be conducted effectively which may include penalising a party's conduct during ADR. Such an argument will also be strengthened if you can demonstrate, as the Claimants here could not, a causative link between the conduct complained of and the identifiable incurring of costs.

Costs in multi-party and multi-ground judicial review claims: *R (AYA) v Secretary of State for the Home Department* [2026] EWHC 2411 (Admin)

Daniel Kozelko
Call **2018**



Introduction

The question of how costs should be awarded in judicial review claims where there are both multiple successful claimants and multiple grounds of review can be a tricky one. The AYA case is a useful recent example of the level of detail into which the Court might descend to achieve costs orders that are just.

The AYA case concerned multiple claimants affected by the UK Government's treaty with France for the return of people who arrive in the UK in "small boats". In each of the claimants' cases, they had received a negative trafficking decision from the Secretary of State for the Home

Department ("Secretary of State"), and due to a guidance change were not entitled to request reconsideration of that decision. That change to the guidance, and their resultant refusal of a reconsideration, was challenged by each of the five claimants.

Save for AYA who did not participate in the substantive hearing, all of the claimants succeeded at trial, albeit each failed on at least one ground of judicial review. It was argued by the Secretary of State that a global costs order should be made in this case as "the Court should be content to do broad justice if an attempt to do exact justice is likely to involve the parties and the costs judge in complicated attempts to attribute what are essentially common costs" (para 4). The High Court (Sheldon J) rejected this, considering it "too blunt a tool" not reflecting the fact that different parties were more successful than others, and noting that the matter had been heard at a rolled-up hearing. He also noted the injustice here where the claimants' barristers were legal-aid practitioners. The Judge rejected the suggestion that "the making of individualised claims will be complex for the costs judge on assessment" (para 5).

As the claim could be split into essentially two parts: (1) a challenge to the guidance in general; and (2) a challenge to the specific decisions in each claimant's case, the Judge accepted that a 50:50 issue split was acceptable. In doing so, he rejected the suggestion that there should be a winner takes all approach (para 7).

Multiple parties

The first issue the Judge considered was the general challenge to the guidance. Each of the claimants successfully advanced a challenge to the guidance in broadly similar terms, but each also lost on one ground. Importantly, though, the Judge noted: "there is some unfairness to the Secretary of State in having to pay the costs of four claimants when the challenge to the Guidance amendment could have been made by one set of legal representatives". As a result, he awarded 40% of the claimants' costs on this issue rather than the full 50% (para 8).

This approach has some resemblance to the principle in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176 that, often, an interested party in a planning claim before the High Court will not recover their costs of the substantive hearing: "Where there is multiple representation, the losing party will not normally be required to pay more than one set of costs, unless the recovery of further costs is justified in the circumstances" (p1178). While Bolton has been the subject of some judicial reshaping (see *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36), the fairness of that principle still holds, and is something that multiple claimants should be wary of in cases similar to *AYA*.

Multiple grounds

The second issue in *AYA* was the approach to costs where claimant advances multiple grounds in a judicial review but only succeeds on (say) one. The Administrative Court Judicial Review Guide offers guidance on this at para 25.1.6:

> "Where a party has succeeded on only part of its case a judge will ordinarily require the losing party to pay costs only insofar as they relate to the parts of the claim that have succeeded or pay only a percentage of the winning party's costs. Nevertheless, the court retains a broad discretion in relation to costs and may make a different award taking into account all the circumstances."

In offering that guidance, the Guide refers to *R (A) v North Central London ICB* [2025] EWHC 2881 (Admin). In that case MacDonald J had regard to the principle that real weight should be given to the fact that a party was successful overall, and that there is no automatic rule calling for a reduction in costs if a party wins but loses on some issues: "in almost every case, even the winner is likely to fail on some issues" (para 34). MacDonald J noted the importance of characterising the grounds of judicial review (one ground was, in

reality, a distinct argument about remedy) and also understanding the overlap in factual matrix even in relation to distinct decisions (para 38-42). On the facts, the Court did not adopt an issue-based approach, whereby costs of specific grounds were carved out and refused, but rather looked at the issue in a broad-brush manner.

This might be contrasted with cases of judicial reviews where the grounds overlap significantly. In *R (Cherkley Campaign) v Mole Valley DC* [2013] EWHC 3558 (Admin) the unsuccessful grounds were overlapping, closely related to the ground that was ultimately successful, and not unreasonably pursued. As a result, costs of all the grounds were ordered, notwithstanding the partial success (para 9).

In *AYA* the Court conducted an individual review of each of the grounds advanced by each of the claimants, similar to the approach in A. That included considering what aspects of the claims were successful, and the relative importance of the grounds that were successful. While for some claimants there was considerable factual overlap between grounds, an approach like *Cherkley Campaign* was not adopted. This resulted in quite a detailed analysis of each claim, and an adding up of percentages to reach the appropriate order for costs.

Comment

AYA is a useful example of selective approach a court might take when faced with a multi-party and multi-ground judicial review case. While it may go against the instincts of practitioners, staying claims awaiting the outcome of a challenge to a general legal decision (such as guidance in this case) may be better than all claimants pursuing their claims in parallel. It does not take five claimants to challenge the lawfulness of guidance, even if the underlying facts differ. *AYA* also provides a helpful reminder that a scattergun approach to grounds in judicial review may not only make a claim look weak, but may also have significant costs consequences.

Turner v Coupland Cavendish [2026] EWCA Civ 1204: the extent of the Costs Judge's jurisdiction on Solicitor Own Client Assessments and the relevance (or not) of a Cash Account

Daniel Laking
Call **2015**



Introduction

This case answers important questions about the role of the cash account in the assessment of costs; a client's ability to interrogate that account; the impact of a solicitor's fiduciary duties on a costs assessment; and the correct threshold for the application of CPR Part 18. It is crucial reading for any practitioner facing or bringing a Solicitors Act assessment.

Facts

Mr Stephen Turner instructed the defendant firm of solicitors in August 2019 to pursue a PI claim arising out of a road traffic accident under a CFA. The claim settled in approximately October 2020, with Mr Turner receiving £3,000 in damages, together with a modest contribution towards his legal costs. The solicitors subsequently delivered a statutory bill of costs on 11 March 2022, claiming profit costs of £7,944 inclusive of VAT, a success fee of £750 inclusive of VAT, and disbursements of £700 plus VAT for two medical reports. The success fee was deducted from Mr Turner's damages and paid to an associated Gibraltar-registered company, AJG Ltd, apparently pursuant to a separate damages-based agreement.

Mr Turner instructed new solicitors, JG Solicitors Ltd, who commenced proceedings on 29 March 2022 under section 70 of the Solicitors Act 1974, seeking a detailed assessment of the solicitors' profit costs and success fee, and sought a cash

account in the usual way. On 18 July 2022, JG Solicitors served a Request for Further Information under CPR Part 18, asking, amongst other things, whether the solicitors had received any commission, rebate, referral fee or other financial benefit from the ATE insurer or an associated intermediary in connection with arranging the insurance policy. The request was not answered. The client maintained that the information was necessary to establish whether the cash account was complete and accurate. The Defendant solicitors opposed the request on the basis it was a fishing expedition.

The solicitors' cash account was subsequently served on 10 March 2023. It recorded the receipt of Mr Turner's damages, deductions for the success fee and ATE insurance premium, payment of the remaining £2,005 in damages to Mr Turner, and the receipt and distribution of costs recovered under the settlement. The account showed a nil balance. Mr Turner nevertheless disputed the account on the basis that it might omit undisclosed commissions or other secret profits received in connection with the ATE insurance policy. He sought to have the defendant solicitors compelled to answer the Part 18 request within the existing costs assessment proceedings.

The Decisions of the SCCO and the High Court

On 31 October 2023, Costs Judge Rowley refused to order the solicitors to answer the request, noting, among other things, the absence of evidence supporting the allegation of undisclosed commissions and the fact that the request itself had not been placed before the court (nor any formal application made). Mr Turner appealed, and on 26 June 2025 Sweeting J allowed the appeal and directed the solicitors to provide answers.

The defendant solicitors then appealed to the Court of Appeal. The central issue was whether questions concerning potential undisclosed commissions and the completeness of the cash account could properly be pursued through a solicitor-and-own-client costs assessment under section 70 of the Solicitors Act 1974.

Reasoning of the Court of Appeal

The Court of Appeal allowed the solicitors' appeal, holding that the costs judge had no jurisdiction to order answers to the Part 18 request within the Solicitors Act assessment. The purpose of those proceedings was to determine the amount the client owed for the solicitor's costs, not to conduct a general account of all financial dealings between solicitor and client (and more widely). The question about whether there was an undisclosed commission was not, therefore, a matter which was "in dispute in the proceedings" under Part 18. Although the court may consider payments relevant to whether the assessed bill has already been paid, a potential claim for an undisclosed commission was a separate matter.

The costs judge had no power to carry out enquiries into the accuracy of any items in the cash account which were neither payment on account of the bill nor amounts received on behalf of the client.

The Court held that a client cannot create a relevant dispute simply by asserting that the cash account may be incomplete. There must be a genuine dispute relating to an issue the court is empowered to determine in the assessment. A request for information cannot be used to circumvent the rules on disclosure or to investigate a potential claim for secret profits. The cash account is presumed accurate unless there is a proper reason to challenge it, and the client must identify the alleged inaccuracy.

There was no obligation on the Costs Judge to resolve all disputes in respect of the cash account before certifying what was due to the solicitor under the assessment.

The Court acknowledged that solicitors have fiduciary duties to disclose commissions received in connection with ATE insurance, and that clients may face practical difficulties obtaining information about undisclosed payments.

However, those duties did not extend the costs judge's jurisdiction. A client seeking an account of alleged secret commissions must pursue separate proceedings or consider a complaint to the Legal Ombudsman.

Key Takeaways

A Solicitors Act assessment cannot be used as a vehicle to investigate alleged commissions or the solicitors' wider financial dealings. The costs assessment process is not the correct vehicle for those enquiries. However, solicitors still owe a fiduciary duty and that involves disclosing a relevant commission. This judgment does not overturn that fundamental principle.

Interaction or Counteraction? Part 36 and the Fixed Recoverable Costs (FRC) regime in Section VII of Part 45

Niraj Modha
Call **2010**



Introduction

What happens when two costs regimes collide? The manner in which the CPR is modified to cater for the FRC creates unresolved anomalies that run counter to the aims of Part 36.

This article considers three particular issues that arise when assessing costs on the intermediate track against the backdrop of a relevant Part 36 offer. These relate to the availability of non-fixed costs for vulnerable parties or in exceptional circumstances, benchmarking of the calculation of the applicable uplift, and the scope of enhanced interest.

Part 36 is a "self-contained code" that is as old as the CPR itself.[1] It benefits from a mature body of jurisprudence. Fixed costs is also a well-established concept. However, the FRC regime in Section VII of Part 45 is a recent innovation.[2] There are as yet few appellate cases. At present the most viable way of resolving tension between the regimes is by adopting a purposive approach to interpretation.

Summary of the FRC regime

The FRC regime is best approached by a close reading of its provisions.[3] For cases on the intermediate track, Part 45 provides for the recovery of a fixed amount of costs depending on the procedural stage at which the litigation concludes.[4]

The central aim is predictability. The intention under the FRC regime is that the parties' costs entitlements maybe ascertained definitively by reference to a table and a calculator. Where there is a relevant Part 36 offer, unfortunately the position becomes more complicated. The rules do not mesh neatly.[5]

What costs fall within the scope of the 35% uplift?

The key difference in approach to FRC regime cases where Part 36 is a live issue is the substitution of an uplift of costs of 35% in place of indemnity costs following the expiry of the relevant period (the **RP**). Does this exclude costs payable under rr45.9 and 45.10?

Rule 45.9 permits a Court to consider a claim for an amount of costs *"which is greater than the fixed*

1 CPR r36.1(1); *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081 at [5] per Moore-Bick LJ. But that is not to say it is unaffected by common law contractual rules, for example the doctrine of mistake. See *O'Grady v B15 Group* [2022] EWHC 67 (QB)

2 The FRC was implemented on 1 October 2023. Some of the discussion in this article is equally relevant to the FRC regime more widely i.e. Sections VI and VIII of Part 45

3 Sections I-II and VII of Part 45 (rr45.1-45.23 and 45.49-45.51) in particular, and PD45 Table 14 with corresponding notes; see also **Costs & Funding in Practice: Questions & Answers** (12th edn), Ch 7 esp.

4 See Table 14 of PD45

5 See in particular Section II of Part 36

recoverable costs… where there are exceptional circumstances making it appropriate to do so". Similarly, r45.10 provides for the Court's discretion to consider claims for amounts in excess of FRC where *"a party or witness for the party is vulnerable",* this has required additional work to be undertaken, and by reason of that additional work the claim for costs *"is at least 20% greater than the amount of [FRC]"*.

Rules 36.23-24 expressly provide for the recovery of *"the fixed costs"* set out in the relevant table in PD45 and *"any applicable additional fixed costs"*.

These provisions jar with each other. If Part 36 is a self-contained code, there should be no room for the award of excess sums in rr45.9-10. Rules 36.23-24 are clear.

A receiving party could deal with this incongruity by arguing that costs under rr45.9-10 should be sought and applied before considering Part 36 consequences. It seems unfair to penalise a vulnerable party or witness for the perhaps arbitrary reason of track allocation. That party could adapt the argument that Part 36 is not *"hermetically sealed",* so there is no reason why its consequences should prevent prior consideration of vulnerability/exceptionality in accordance with the overriding objective.[6]

What is the applicable stage for determining the benchmark?

Where the RP expires mid-stage (or in between stages) what is the appropriate reference point when calculating the 35% uplift?

Working out the relevant stage (S) is important. Where an offer is accepted within the RP, the claimant is entitled to the fixed costs *"for the stage applicable at the date on which notice of acceptance was served…"*.[7] Where a defendant's offer is accepted late, the claimant is entitled to the fixed costs *"for the stage applicable at the date on which the [RP] expired"* [8] and is liable to pay certain of the defendant's costs.[9]

The effect of a claimant beating its own good offer is provided for in r36.17(4). If, for example, judgment against a defendant is at least as advantageous to a claimant as its Part 36 offer, and the RP for that offer expired **following** witness statements (S5, Table 14) but **prior** to the date of the PTR (S6, Table 14), which stage is relevant as the benchmark from which to calculate the uplift? Should the 35% uplift apply to the difference between S5 and judgment or S6 and judgment? In a valuable claim within a higher Complexity Band, the difference in calculation could be significant.

Claimants seeking to maximise recovery should argue for the last completed stage as the benchmark. Costs under the FRC regime are only considered incurred, and become payable, once each stage is completed. In the example above, if the defendant had accepted the claimant's offer within the RP, the claimant would not have been entitled to its costs up to and including S6, since that stage had not been completed. The claimant would have been entitled only to its fixed costs up to and including S5.[10] It is contrary to the general purpose of Part 36, which is to reward offers (and early offers/acceptance, at that) and sanction disengagement (and delay), to use the base costs for a later stage as the benchmark when calculating the uplift. Defendants should argue that *"the stage applicable"* is the current (not completed) stage. There is no justification for reading in additional wording. That is a matter for the Civil Procedure Rules Committee (**CPRC**), not the Courts.

Enhanced interest on all costs or only the uplift? Where a claimant beats its own offer, this engages

6 See *O'Grady* (cited above) at [24] per Master Thornett, in a different context

7 CPR r36.23(1)(a)

8 CPR r36.23(3)(a)(i)

9 CPR rr36.23(3)(b) and 36.23(8), subject to netting-off, which the Court of Appeal shall consider in more depth in the fast-track case of *Lintern v Haven Insurance* [2026] EWHC 247 (KB)

10 CPR r36.23(1)

r36.17(4). But is enhanced interest available on **all** post-RP costs to which it the claimant is entitled or only on the uplift?

One might have thought that enhanced interest should be available on all post-RP costs, meaning base/ordinary costs in Table 14 and the 35% uplift. Enhanced interest is available on all post-RP costs in a typical Part 36 case. But the language of r36.17 (as modified by r36.24) is ambiguous.

For a successful FRC regime claimant, r36.24(4) replaces the costs on the indemnity basis that would otherwise be available under r36.17(4)(b). Post-RP the FRC claimant is entitled to an uplift equivalent to 35% of the difference between (i) the fixed costs for the stage when the RP expired and (ii) the fixed costs for the stage applicable at the date of judgment. That seems straightforward and neat, subject to working out the relevant stage.

It is important to note that r36.17(4)(c) in its unmodified form provides for *"interest on those costs at a rate not exceeding 10% above base rate"*. The reference to *"those costs"* is to the costs mentioned in the prior sub-paragraph (r36.17(4)(b)). Since a non-FRC regime claimant who has beaten, its own offer is entitled to indemnity costs following the RP, there is no problem in applying enhanced interest to all post-RP costs.

If, under the FRC regime, *"interest on those costs"* is interpreted literally, as referring only to the costs referred to in the sub-paragraph that immediately precedes r36.17(4)(c), enhanced interest would only be payable on the uplift in r36.17(4)(b). The problem is that r36.24(4)-(5) do not either refer to enhanced interest or modify the wording of r36.17(4)(c).

An FRC regime claimant seeking enhanced interest on all post-RP costs should invite the Court to adopt a purposive interpretation and 'read in' this entitlement. Plainly it is possible for enhanced interest to amount to a substantial sum. If it were payable only on the uplift and not on all fixed costs, this would represent a material disadvantage to a FRC regime claimant. It seems tolerably clear that the CPRC did not intend to disallow enhanced interest on post-RP costs for a FRC regime claimant.

Conversely, a defendant in this position might note that r36.24 is expressed as modifying r36.17(4), but for RTA or EL/PL Protocol cases r36.30 expressly provides for enhanced interest on *"the fixed costs"* (i.e. all of the costs). The absence of such wording in Section VII of Part 45 – or in Section II of Part 36 – means that r36.17(4)(c) should be interpreted as limiting enhanced interest.

Conclusion

There is tension between Part 36 and Section VII of Part 45, as these examples show. There is yet further debate over a number of other matters outside the scope of this article. Is the uplift of 35% should too low? Do the consequences of a defendant promptly accepting an offer, or a case moving out of the FRC, operate unfairly on a claimant?
The CPRC/Ministry of Justice may address these issues imminently.[11] However, the date for the Post Implementation Review following the CPRC's stocktake on the FRC has been postponed once already. It may be some time before the rules are amended. In the meantime, there is likely to be satellite litigation which will centre on the competing literal/purposive approaches to interpretation.

11 https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#fixed-recoverable-costs-frc-interim-implementation-stocktake

CONTRIBUTORS

Shaman Kapoor

Call **1999**



Shaman specialises in costs and litigation funding together with a broader practice in commercial and common law litigation and group action work. He appears regularly in the High Court and the Senior Courts Costs Office, often involved in appellate work or complex points of principle and injunctive relief. His recent involvement in group action work includes the claims against the regulatory bodies in the sport of rugby in the concussion litigation and the civil claims arising out of the Grenfell Tower tragedy. He has experience of representing professional sports players in anti-doping proceedings and has contributed to the editorial work towards the regulation of British Wrestling. He is a Fellow of the Chartered Institute of Arbitrators, having specialised in international arbitration, and receives instructions domestically and internationally. He is a frequent speaker at key seminars on the costs and funding calendar and a contributing editor to Thomson Reuters' *"Costs & Funding following the Civil Justice Reforms: Questions & Answers"*, The White Book. He is a Lead Advocacy Tutor for Lincoln's Inn and has been ranked by the Directories as a leading junior for many years. He is the editor of our bi-annual Costs Newsletter (*3+9 = Costs*) and is joint-head of Chambers' Costs Group. He is appointed as a member of Chambers' Management Board and separately appointed as a school Governor. He is a qualified Mediator and is an appointed Deputy District Judge.

shaman.kapoor@39essex.com

Niraj Modha

Call **2010**



Niraj is a property, commercial, and construction law specialist. His cases frequently involve issues relating to and crossing over with civil fraud, insolvency, professional negligence, and disputes between shareholders, partners, and joint venturers. He acts for a range of clients, including property developers, landowners, investors, local authorities, contractors, employers, and multinational conglomerates.

Niraj appears as sole counsel in trials and application hearings in the Business and Property Courts (Chancery and King's Bench Divisions) and in the appellate courts. He also acts as counsel in international arbitration proceedings (both institutional and ad hoc) and represents clients at mediation..

niraj.modha@39essex.com

CONTRIBUTORS

Daniel Laking

Call **2015**



Daniel has a broad civil practice, and specialises principally in the fields of personal injury and clinical negligence, insurance fraud, costs, inquests and inquiries, and health and safety. In his costs law practice he has been instructed in cases dealing with a wide range of costs issues such as the recoverability of ATE premiums and joint/several liability. He is familiar with the law in respect of both pre- and post-LASPO costs and is available to advise on tactics and procedure in relation to Detailed Assessment Hearings and related applications. He is also available to assist in cases where he specialisms overlap, for example recovering costs of inquest proceedings in subsequent civil litigation. As a personal injury specialist, Daniel is familiar with all aspects of costs as they relate to PI and clinical negligence cases. He is frequently instructed in Costs and Case Management Conferences as well as costs applications that arise in civil proceedings. He has a full understanding of the exceptions to Qualified One-Way Costs Shifting and has been successful in recovering costs under both CPR r44.15 and CPR r44.16 in bespoke applications. He has also been instructed in applications for wasted and indemnity costs as well as in relation to Part 36 offers. He is currently instructed as junior counsel to the Grenfell Tower Inquiry alongside his court practice.

daniel.laking@39essex.com

Daniel Kozelko

Call **2018**



Daniel accepts instructions in a variety of costs matters, and regularly appears in the County Court in cases raising costs issues. His costs practice also reaches across various areas of Chambers practice, including costs disputes in planning and regulatory matters. While a Judicial Assistant at the Supreme Court, Daniel worked on a number of costs cases including *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36. Daniel has also recently been involved in providing costs training to medical defence insurers.

daniel.kozelko@39essex.com

Christopher Moss

Call **2021**



Christopher accepts instructions in a variety of costs matters. He currently works one day a week with the costs team of a National law firm advising on, and drafting pleadings and witness statements in relation to costs and funding disputes. He assisted Nicola Greaney KC, acting for the successful *Class Representative in Alex Neill Class Representative Limited v Sony* [2023] CAT 73, the first decision to address the validity of a PCR's funding arrangements following the Supreme Court's judgment in Paccar. Christopher also recently acted for APIL, led by Katherine Apps KC, in a judicial review of elements of the new fixed costs regime which concluded by consent following concessions by the Government. Christopher regularly appears in the County Court on a variety of costs matters and has also been instructed to appear in the Senior Courts Costs Office, and Family Court where he successfully opposed the making of a non-party costs order.

christopher.moss@39essex.com

CONTRIBUTORS

Dana McGibbon

Call **2024**



Dana commenced practice in September 2026 following a year working as a Judicial Assistant at the UK Supreme Court, where she assisted Lord Sales and Lord Burrows. She is building a broad practice across Chambers' specialisms, including public law, civil liability, commercial, construction, planning and environmental law. Dana holds an undergraduate law degree and Masters (BCL) from the University of Oxford, in which she obtained First Class Honours and a Distinction respectively. She was awarded various scholarships during her studies, most notably the Roche Scholarship to fund her studies on the BCL and a Queen Mother Scholarship (Middle Temple) to fund her Bar Course. Alongside her practice, Dana is a non-stipendiary lecturer in Tort law at New College, Oxford. She has previously taught Land law at New College and at UCL.

dana.mcgibbon@39essex.com

Chief Executive Officer: **Lindsay Scott**
Director of Clerking: **Andrew Poyser**

39essex.com
020 7832 1111

London
81 Chancery Lane
London
WC2A 1DD
DX: London/Chancery Lane 298
+44 (0)20 7832 1111

Dubai
Dubai International Financial Centre (DIFC)
Innovation Hub
Gate Avenue
Zone D – Level 1
AL Mustaqbal St
UAE

Singapore
28 Maxwell Road
#04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
+65 6320 9272

Kuala Lumpur
#02-9
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
+60 32 271 1085

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