

DOLMANS INSURANCE BULLETIN

Welcome to the latest edition of
Dolmans Insurance Bulletin

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If you would like us to examine further, or if you would like to comment upon,
any articles contained within this bulletin, please e-mail the editor:

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REPORT ON

Discontinuance – The Importance of Disclosure in Highways Matters

AS v Merthyr Tydfil County Borough Council

When faced with a claim for compensation for personal injuries following a fall as a result of an alleged defect in the highway, the importance of photographic evidence and accurate measurements cannot be underestimated. Indeed, these are important to a claimant in proving dangerousness, in particular. Such photographs are, however, also important to a defendant Local Authority as they can be as useful in attempting to dispute dangerousness.

Meta data for digital photographs should be available and can provide an insight into the timeline of a claimant's photographs, in addition to any measurements therein.

Such photographic evidence usually comes to light pre-action or within the pleadings, but almost certainly during disclosure.

These issues arose in the case of *AS v Merthyr Tydfil County Borough Council*, in which Dolmans represented the Defendant Local Authority.

Background and Allegations

The Claimant alleged that they were walking along the Defendant Local Authority's footway, when the crutch that they were using became stuck in a defect in the said footway, causing them to fall and sustain personal injuries. The Claimant alleged that the defect was caused by deteriorating tarmac adjacent to a drainage channel, creating a difference in levels of approximately 50mm in the footway.

The Claimant alleged that the Defendant Local Authority was negligent and/or in breach of the Highways Act 1980. In addition, the Claimant also alleged breach of the Occupiers' Liability Act 1957, nuisance and *res ipsa loquitur*, thereby arguing that the fact of the accident was in itself evidence of the Defendant Local Authority's alleged breach of duty. Suffice to say, the Claimant took a somewhat scattergun approach to this litigation, although the only allegations of any relevance were effectively those of negligence and breach of the Highways Act 1980, the relevant footway being part of the adopted highway.

The Claimant pleaded that the evidential burden of proof was upon the Defendant Local Authority to demonstrate that it had taken such care as in all the circumstances was required to ensure that the highway was not dangerous to pedestrians, and it was the Claimant's case that the Defendant Local Authority had not taken such care.



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Burden of Proof

It is useful at this point to remind readers that it was for the Claimant to prove factual causation and that their accident, therefore, occurred in the circumstances alleged. The Claimant also had to prove dangerousness and medical causation. In most highways cases, the defendant Local Authority will seek to rely upon the 'special defence' in accordance with Section 58 of the Highways Act 1980 and the burden of proving this, therefore, switches to the defendant Local Authority. The burden of proof in such civil matters is, of course, on a balance of probabilities.

Defence and Issues

A strong Defence was filed and served on behalf of the Defendant Local Authority.

Both nuisance and *res ipsa loquitur* were denied from the outset as being irrelevant to this particular matter, as was the alleged breach of the Occupiers' Liability Act 1957.

The Claimant was put to strict proof as to the circumstances of their alleged accident. Factual causation was, therefore, disputed. It appeared from the Claimant's medical evidence that they described their alleged accident as a trip, which was inconsistent with their pleaded case. It also appeared that the Claimant did not seek medical attention immediately following their alleged accident. It was argued, therefore, that the Claimant had failed to prove the circumstances of their alleged accident, and factual causation was denied.

It was also argued that the Claimant had failed to prove dangerousness. The Claimant provided various sets of photographs of the alleged defect, some showing measurements of the depth of the said alleged defect. However, these were disputed, especially as the said photographs were taken from above and at an angle. The Defendant Local Authority's Highways Inspector attended the relevant location following notification of the Claimant's alleged accident and measured a maximum difference in levels of 27mm, which was within the Defendant Local Authority's relevant intervention criteria of 30mm. The relevant Highways Inspector utilised appropriate and accurate measuring equipment when taking their said measurements, which were documented and photographed. Again, these were provided at the disclosure stage in the proceedings.



Notwithstanding the above, and after consideration of the parties' disclosure, relevant copy documents suggested that there were issues with the timeline in relation to the Claimant's various photographs and measurements, meta data for which had been requested and provided.

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The relevant Highways Inspector for the area inspected and measured the maximum difference in levels of 27mm on the date that the Claimant made their complaint, being 14 days after the date of the Claimant's alleged accident. This was repaired the same day, as a matter of prudence and as a goodwill gesture in light of the Claimant's alleged accident. The Highways Inspector took photographs of the area to be repaired, which supported their measurements and provided an accurate representation of the location at that time. The Claimant then took additional photographs 2 days following the said repair, which included the Claimant's measurements, and appeared to show that the alleged defect had been cleaned out after the repair was completed.

To summarise, therefore, the Defendant Local Authority's photographs and measurements were taken 2 days before the Claimant's second set of photographs showing the Claimant's alleged measurements, and it was apparent that the alleged defect and surrounding area were much cleaner. This suggested that the area had been cleaned out between the dates of the Defendant Local Authority's photographs and the Claimant's photographs. It was argued, therefore, that this would have affected the accuracy of the Claimant's measurements accordingly and was likely to have overestimated the same.



The relevant Highways Inspector undertook his next scheduled inspection of the footway 5 days later, when he noted the location for repair, and this again was completed the same day.

It was denied, therefore, that the alleged defect constituted a danger and/or foreseeable risk of injury to pedestrians, including the Claimant at the time of their alleged accident.

Section 58 Defence

It was contended that at all material times the Defendant Local Authority had taken all reasonably practicable steps to comply with its statutory obligations.

The location of the Claimant's alleged accident was subject to a regular system of inspection and maintenance on a 6 monthly basis. In addition, the Defendant Local Authority had a reactive system of inspection and maintenance in place. No actionable defects were noted at the location of the Claimant's alleged accident during the last scheduled inspection of the said location prior to the date of their alleged accident.

The Defendant Local Authority had no record of any complaints and/or other accidents in relation to the alleged defect during the 12-month period prior to the date of the Claimant's alleged accident.

The Claimant alleged that they had fallen within the previous 12 months in the vicinity of the location of their alleged accident, but they had not provided any details of the same, and the Defendant Local Authority had no record of any such incident during the 12-month period prior to the date of the Claimant's alleged accident.

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Discontinuance

It should be reiterated that all of the above issues and information were dealt with by way of pleadings and disclosure. Although the Defendant Local Authority's witnesses had been approached and witness statements drafted in readiness for exchange, the Claimant sought to delay such exchange, and it was apparent that there were difficulties within the Claimant's camp.

The Claimant made a relatively late Part 36 offer to settle their claim, and, when this was rejected, the Claimant's solicitors constantly invited proposals for settlement. Likewise, these were refused, and the Claimant's solicitors left in no doubt that the Defendant Local Authority was ready to exchange witness statements and proceed to trial.

It took little time thereafter for the Claimant to discontinue their claim prior to exchange of witness statements.

Comment

Clearly, the Claimant's photographs and measurements in this particular matter, supported by relevant meta data and coupled with the Defendant Local Authority's photographs and measurements, emphasised issues with the Claimant's timeline and threw doubt upon the Claimant's measurements. The Defendant Local Authority was, therefore, able to remain adamant that the Claimant had failed to prove that the relevant location was dangerous, even when faced with the Claimant's Part 36 offer and subsequent invitations to settle.

This stance, along with the factual causation issues and the Defendant Local Authority's alleged Section 58 Defence, undoubtedly resulted in the Claimant's solicitors recommending that their client discontinue their claim.

Given that the matter was concluded following disclosure and prior to exchange of witness statements, the Defendant Local Authority not only saved having to pay any damages to the Claimant, but also the costs of trial and all procedural aspects following disclosure up to trial.

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CASE UPDATES

Costs – Occupational Deafness – Without Prejudice Privilege – Procedural Impropriety

(1) Ian Henderson (2) Jonathan McPherson v Ministry of Defence
[2026] EWHC 2645 (SCCO)

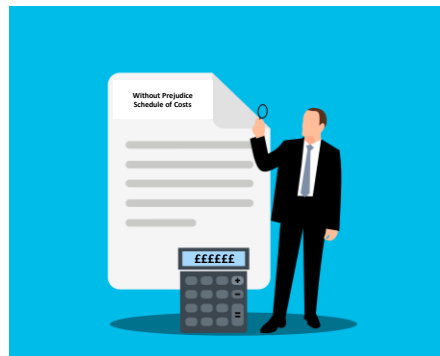
The judgment in this case determined a preliminary point of principle raised in two linked detailed assessments as to whether schedules/breakdowns of costs have the status of without prejudice privilege. If so, the issue was whether the Defendant could demonstrate ‘unambiguous impropriety’ and, accordingly, adduce and rely on those documents at detailed assessment.

Background

The Claimants claimed damages against the Defendant, the Ministry of Defence (‘MOD’), for deafness sustained in the course of their military service. The claims formed part of a substantial cohort of noise-induced hearing loss (‘NIHL’) claims brought against the MOD. Hugh James, the Claimants’ solicitors, had conducted approximately 11,500 such claims.

In around January 2020, Hugh James agreed with the solicitors acting for the MOD an informal protocol for the initial consideration of costs in settled NIHL claims. This involved the Claimant providing the Defendant with a ‘without prejudice’ schedule or breakdown of costs and disbursements, with a view to encouraging an early payment of 50% on account. Ultimately, 300 plus cases were dealt with in this way. Increasingly, as the protocol became established, the MOD utilised the schedules/breakdowns as a basis for negotiating substantive costs settlements. When no such settlement was achieved, the Claimant would serve a formal Notice of Commencement of Assessment of Bill of Costs (N252) exhibiting a certified Bill of Costs.

This informal protocol continued until about August 2024, when the MOD, having noted apparent discrepancies between the sums claimed in the without prejudice schedules and the corresponding bills of costs, accused Hugh James of ‘systematic overcharging’ and claimed that Hugh James had tried to ‘induce the paying party to overpay’ by sending schedules of costs that were much higher than the bills finally produced. As a result, the informal protocol was abandoned and every subsequent claim for costs was progressed by the service of a certified bill.



Hugh James denied any form of unambiguous impropriety – the legal test applied by the Judge – and maintained that the schedules were accurate estimates of all the costs incurred and payable.

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Decision

The Costs Judge accepted there was a difference between the schedules and later bills served by Hugh James, but concluded that the MOD's allegations that schedules included costs not actually incurred was incorrect. The Judge found 'The breakdowns contained no fundamental errors of calculation and there was no misrepresentation' and 'The schedules represented the Claimants' actual incurred costs and any inconsistency in the Claimants' without prejudice and subsequent open positions was a long way short of any form of CPR44.11 misconduct'.

This did not mean that the Claimants' solicitors were without criticism. The Costs Judge held that more could have been done to rationalise the costs outlined in the (fairly detailed) breakdowns served on the MOD. Moreover, when, on occasion, it became evident that the MOD was beginning to utilise the without prejudice breakdowns as the basis for substantive, inter partes costs negotiations, more could reasonably have been done to have alerted the MOD to the likely presence of some duplication and disproportionality. Nonetheless, the breakdowns contained no fundamental errors of calculation and there was no misrepresentation.

It was held that the MOD's case fell a long way short of demonstrating unambiguous impropriety. The Claimants were entitled to maintain the without prejudice privilege status of the breakdowns/schedules, and the MOD was not entitled to adduce and rely on these documents during the part-heard detailed assessment of the final bills.

Part 36 Offers – Date of Offer – Terms of Offer

Essendi UK Hotels 2 Ltd v London Property Co Ltd [2026] EWHC 2501 (TCC)

The Court was required to determine whether it could be informed of the date of a Part 36 offer. It was held that the date on which a Part 36 offer was made was not part of the terms of the Part 36 Offer but was information about the fact that a Part 36 offer had been made. Therefore, under CPR r.36.16(4)(b), a trial judge who had decided part of a case could be told the date on which a Part 36 offer had been made.



Background

The Claimant had been substantially the successful party in a preliminary issues trial. The Defendant had made a Part 36 offer. The Claimant raised the issue of whether it was entitled to inform the Court of the date of the earliest Part 36 offer, with a view to seeking its costs of the proceedings to the date 21 days after the date of that offer. Under r.36.16(4)(a), when part of a case had been decided, a trial judge could be told whether there had been a Part 36 offer in relation to that part of the case, but under r.36.16(4)(b), they could not be told of the terms of such an offer. The question was whether the date of an offer was part of the terms.

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Decision

The starting point of r.36.16(1) was a presumption that a Part 36 offer would, in principle, be admissible when the Court was dealing with costs. However, r.36.16(2) operated as an immediate derogation from that starting point, providing that the fact that a Part 36 offer had been made and the terms of the offer could not be communicated to the trial judge until the case had been decided. All information about a Part 36 offer, therefore, fell either in the category of the terms of the offer or the fact that an offer had been made.

The "terms of a Part 36 offer" are not defined within Part 36. However, r.36.5 identifies certain elements, including the period for acceptance and whether it relates to the whole of a claim and/or counterclaim, which were clearly terms of the offer. In contrast, r.36.7 referred to the time when an offer could be made, showing that Part 36 distinguished between the terms and the date. A similar distinction occurred in r.36.9(1), r.36.14 and r.36.17(5). Those provisions showed that Part 36 offers were intended to operate like a contract, with an offer on terms capable of acceptance or not, with a normal and well-understood difference between the date of an offer and its substantive terms. That explained why the rule committee did not feel it necessary to define what was meant by "the terms of an offer". It followed that the date on which a Part 36 offer is made is not something which can fall within the "terms" of a Part 36 offer.

The date the offer was made was part of the fact that a Part 36 offer had been made. The fact that a Part 36 offer has been made includes all of the relevant facts about that Part 36 offer other than its terms. Disclosing the date of a Part 36 offer did not reveal anything about the terms of the offer.

Held

The Court could be told the date of a Part 36 offer.

Part 36 – Fixed Costs – Late Acceptance

Lintern v Haven Insurance Co Ltd **[2026] EWHC 2478 (KB)**

This appeal was concerned with the interpretation of CPR 36.23(8) in relation to the award of costs where a claimant accepts a defendant's Part 36 offer late in a claim which is subject to fixed recoverable costs and the case has moved on to a later stage. The Judge upheld the first instance decision that a single net fixed costs order is made to the Defendant with no costs order to the Claimant.



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Following a road traffic accident in July 2024, the Claimant claimed damages for car damage, credit hire, storage and recovery (no personal injury). Proceedings were issued on 23 October 2024. On 6 November 2024, the Defendant made a Part 36 offer of £5,000. The relevant period for acceptance expired on 27 November 2024. The offer was not accepted at that time. The claim was allocated to the Fast Track and directions given. On the first day of trial on 7 October 2025, the Claimant accepted the Part 36 offer. The parties could not agree costs, so costs were determined by the Recorder before whom the trial had been listed.

The claim was subject to Fast Track fixed costs. The Recorder made no costs order for the Claimant and ordered the Claimant to pay the Defendant's costs, post expiry of the relevant period, in the sum of £5,007.60. This was calculated, pursuant to CPR 36.23(8), by taking the Defendant's fixed costs at the stage of acceptance (B3/C under Table 12, plus the advocacy fee) and deducting the Claimant's fixed costs for the stage at the expiry of the Part 36 offer (B1 under Table 12).

There was an incorrect addition of a £300 disbursement into this costs award, which both parties accepted was an error, but this was not material to the issues on the appeal.



The Claimant appealed submitting that the Recorder had misinterpreted CPR 36.23(8).

The relevant parts of CPR 36.23(3) provide that where a defendant's Part 36 offer is accepted after the relevant period, a claimant is entitled to the fixed costs in Table 12 for the stage applicable at the date on which the relevant period expired; and a claimant is liable for a defendant's costs in accordance with paragraph (8), which states:

'(8) Subject to paragraph (9) where the court makes an order for costs in favour of the defendant, the defendant is entitled to:

(a) the fixed costs in Table 12 ... for the stage applicable at the date of acceptance;

(b) ..., less the fixed costs to which the claimant is entitled under paragraph (3)(a)(i) or (4).'

Paragraph 9 relates to circumstances where a Part 36 offer is accepted late but the stage applicable at the date on which the relevant period expired and the stage applicable at the date of acceptance are the same, so that paragraph did not apply in this case.

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The Claimant's position was that CPR 36.23(8) is simply a 'quantification' subsection, quantifying the fixed costs to be paid to the Defendant, such that the Defendant was only being paid the fixed costs which arose after the expiry of the Part 36 payment. The Claimant still had to recover fixed costs up until the date of the Part 36 offer under subsection 3. Therefore, the Recorder should also have made an order in favour of the Claimant for fixed costs under Table 12 B1 in the sum of £2,168 plus VAT.

The Defendant submitted that the Recorder had construed CPR 36.23(8) correctly and the words say what they say. If the Rules Committee had wished to write the rule as the Claimant was interpreting it, then instead of the words actually used they would have said words at the end of the paragraph to the effect *'less the fixed costs which the defendant would have been entitled to as at the date of the Part 36 offer'*. That would have quantified the Defendant's costs whilst not excluding a Costs Order for the Claimant. The Defendant's position was that in cases of very late acceptance of a Part 36 offer (where the case has moved on to a later stage), the Court fixes the defendant's costs at the date of acceptance (in this case B3) and takes away the costs that the claimant would otherwise be entitled to under subparagraph 3 (in this case B1) and makes a single costs order in favour of the defendant.

The Judge accepted this was a 'tricky' issue and considered both approaches were wholly within the purposes of Part 36 generally and could have been within the contemplation of the Rules Committee. The Defendant's position punished the Claimant severely. The Claimant had to issue proceedings to get the offer but would not be paid for doing so. However, the Claimant should have taken the offer in time and did not do so. Having accepted very late, the Claimant was being penalised to such an extent that there was no costs award at all. That was a heavy inducement to claimants to carefully consider accepting Part 36 offers in time.



The Judge concluded that they were not prepared to find that the Recorder's interpretation of CPR 36.23(8) was wrong. The words *'say what they say'* and there is no provision expressly in subparagraph 8 for a costs order in favour of a claimant.

Accordingly, the Claimant's appeal was dismissed.

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Pre-Judgment Interest on Costs – CFA

Município De Mariana v BHP Group (UK) Ltd [2026] EWHC 73 (TCC)

The Court of Appeal held that a court had the power to award pre-judgment interest on costs in circumstances where a Claimant's case was funded by way of a Conditional Fee Agreement (CFA).

The case relates to long running proceedings in which some 450,000 Claimants are claiming compensation from BHP for losses allegedly caused by the collapse of the Fundão Dam in Brazil.

At a Stage 1 trial in which liability issues were determined in favour of the Claimants, the Judge made an order that BHP should pay the Claimants (i) 90% of their costs of the Stage 1 trial; (ii) pre-judgment interest at a rate of 1% above the UK base rate on the total recoverable amount of the Claimants' Stage 1 costs from 01.08.23 until 26.01.26; and (iii) £43 million on accounts of costs.

Courts have a general discretion under CPR 44.2(6)(g) to award pre-judgment interest on costs.

The Claimants' legal costs were funded by a CFA pursuant to which the Claimants were liable, upon the success of their claims, to pay their solicitors' base costs together with a success fee. The Court considered that the success fee was intended, at least in part, to compensate the solicitors for the funding costs they had incurred in providing legal services to the Claimants without cost.

BHP appealed the award of pre-judgment interest on the grounds that the Court had no power to award the Claimants pre-judgment interest on costs and, if it did, the Court should not have exercised it in the Claimants' favour. Their position was that pursuant to the amended s.58A(6) of the Courts and Legal Services Act 1990, success fees are irrecoverable and this could not be circumvented by re-categorising the fee (relying on *Hirachand v Hirachand* [2024]). Further, they argued that pre-judgment interest could only be awarded where the Claimants were out of pocket or had borrowed money to fund their costs. Neither applied here.



The Claimants submitted that *Hirachand* was irrelevant to the issue of pre-judgment interest on costs. Whilst accepting that pre-judgment interest could only be awarded where claimants were, in some sense, out of pocket, they submitted that the Claimants were out of pocket because they were contingently obliged to compensate their solicitors for the late payment of their fees through the success fee or part of it.

The Court of Appeal dismissed BHP's appeal.

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The Court found there was nothing in CPR 44.2(6)(g) or elsewhere to suggest that pre-judgment interest could only be awarded if the receiving party had actually expended money on costs or had borrowed money to pay such costs. This would fetter the Court's broad discretion.

The Court held that an award of pre-judgment interest on costs is about compensating one party for the loss of the time value of money. The purpose of the power in CPR 44.2(6)(g) is to compensate the recipient either for having been kept out of its money or for itself being liable to compensate someone else (whether the solicitors providing the legal services themselves, an insurer or a third-party funder) for the fact that legal services have been provided to the recipient on credit.



On the facts of this case, the Claimants could bring themselves within the scope of the power because they were under a liability, albeit through the mechanism of a success fee, to compensate their solicitors for the fact that they had provided the Claimants with their services without payment.

The Court concluded that the fact that success fees and funding costs cannot be recovered in themselves as part of a costs order did not mean that an order for pre-judgment interest on costs was prohibited just because a receiving party had agreed to pay a success fee. This would interfere with the broad discretion under CPR 44.2(6)(g) which will always, in some sense, compensate the cost of funding a litigation.

Hirachand was not relevant and said nothing about the scope of the power in CPR 44.2(6)(g). The order made did not infringe the prohibition in s.58A(6) because it was an order for pre-judgment interest on costs, which was distinct and separate from an order requiring the payment by one party of all or part of a success fee payable. It compensated the Claimants for the loss of the time value of their money.

The Court noted that BHP had not said anything in oral argument in relation to its second ground that the Court should not have exercised the power and concluded that the Judge had been entirely right to exercise the discretion in the way they did.

Appeal dismissed.

For further information on any of the above case updates, please contact:

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