Neutral Citation Number: [2025] EWHC 2898 (Ch)

Case No: BL-2023-BRS-000024

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 7 November 2025

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) EJW BUILDERS LIMITED **Claimants**
(2) EAMMON JOSEPH WYNNE

- AND -

Defendants

(1) AUDREY ELIZABETH MARSHALL
(2) EDWARD JOSEPH MARSHALL
(3) PAUL WOOD
(4) NEIL VINNICOMBE
(as Joint Trustees in Bankruptcy of AUDREY MARSHALL and EDWARD JOSEPH MARSHALL)

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Jessica Powers (instructed by **Contract Answers Solicitors**) for the **Claimant**
Rory Brown (instructed by **Morgan Lewis & Bockius UK LLP**) for the **Defendants**

Costs assessment on paper

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This judgment was handed down remotely at 10:30 am on 3 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archive.

HHJ Paul Matthews :

Introduction

1. This claim was tried by me on 30 September 2025 and 1 October 2025. At the end of the trial, I gave judgment *ex tempore* dismissing the claimants' claim (see [2025] EWHC 2765 (Ch)). I also ordered the claimants to pay costs in respect of the first and second defendants' representation *pro bono* by counsel and solicitors to the Access to Justice Foundation. These costs were to be summarily assessed on the standard basis if not agreed. They have not been agreed, and I must therefore assess them. For this purpose, I have had the benefit of a costs schedule for the first and second defendants' costs, and written submissions from both sides. This written ruling contains my assessment. Although the first and second defendants' trustees in bankruptcy were technically also defendants to this claim, they played no part in the trial. So, when I refer hereafter to "the defendants", I am referring to the first and second defendants alone.

2. The claim itself was begun by claim form issued on 27 June 2023. It alleged a partnership, or at least a joint venture agreement, between the parties in relation to the redevelopment of a former hotel (owned by the first and second defendants) in Trowbridge, Wiltshire, into four townhouses, to be sold at a profit. The claimants claimed a one third share of the profit. I held that there was neither a partnership nor a joint venture agreement between the parties, and that the claimants' only entitlement was to be paid £825,000 in accordance with a JCT contract under which the claimants were the building contractor. The claimants' own valuation of the development was up to £3.2 million. In fact, the four townhouses realised a total of £2,540,000. Although £438,000 was transferred to the defendants by their solicitors after the sales had completed, the defendants say that these funds were used to pay other debts, and that, in fact, there were no profits of the redevelopment. But I am not concerned with that issue now.

Pro bono costs orders

3. The order that I made was one under section 194 of the Legal Services Act 2007. Such orders are often, if inaccurately, referred to as "*pro bono* costs orders". Section 194 relevantly provides:

> "(1) This section applies to proceedings in a civil court in which—
>
> (a) a party to the proceedings ('P') is or was represented by a legal representative ('R'), and
>
> (b) R's representation of P is or was provided free of charge, in whole or in part.
>
> […]
>
> (3) The court may order any person to make a payment to the prescribed charity in respect of R's representation of P (or, if only part of R's representation of P was provided free of charge, in respect of that part).

(4) In considering whether to make such an order and the terms of such an order, the court must have regard to—

(a) whether, had R's representation of P not been provided free of charge, it would have ordered the person to make a payment to P in respect of the costs payable to R by P in respect of that representation, and

(b) if it would, what the terms of the order would have been.

[…]

(7) Rules of court may make further provision as to the making of orders under subsection (3), and may in particular—

(a) provide that such orders may not be made in civil proceedings of a description specified in the rules;

(b) make provision about the procedure to be followed in relation to such orders;

(c) specify matters (in addition to those mentioned in subsection (4)) to which the court must have regard in deciding whether to make such an order, and the terms of any order.

(8) 'The prescribed charity' means the charity prescribed [under section 194C].

[…]

(10) In this section—

'legal representative', in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party's behalf;

['civil court' means—

[…]

c the High Court,

[…]

'free of charge' means otherwise than for or in expectation of fee, gain or reward.

[…]"

I add only that the charity prescribed for the purposes of subsection (8) is the Access to Justice Foundation.

4. CPR rule 46.7 relevantly provides:

> "(1) Where the court makes an order under section 194(3) of the 2007 Act –
>
> […]
>
> (b) where Part 45 does not apply, the court may assess the amount of the payment (other than a sum equivalent to fixed costs) to be made by the paying party to the prescribed charity by –
>
> (i) conducting a summary assessment; or
>
> (ii) making an order for and conducting a detailed assessment,
>
> of a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge.
>
> (2) Where the court makes an order under section 194(3) of the 2007 Act, the order must direct that the payment by the paying party be made to the prescribed charity.
>
> (3) The receiving party must send a copy of the order to the prescribed charity within 7 days of receipt of the order.
>
> (4) Where the court considers making or makes an order under section 194(3) of the 2007 Act, Parts 44 to 47 apply, where appropriate, with the following modifications –
>
> (a) references to 'costs orders', 'orders about costs' or 'orders for the payment of costs' are to be read, unless otherwise stated, as if they refer to an order under section 194(3);
>
> (b) references to 'costs' are to be read as if they referred to a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge; and
>
> (c) references to 'receiving party' are to be read, as meaning a party who has pro bono representation and who would have been entitled to be paid costs in respect of that representation had it not been provided free of charge."

5. In addition, paragraph 4 of CPR PD 46 says:

> "Where an order is sought under section 194(3) of the Legal Services Act 2007 the party who has pro bono representation must prepare, file and serve a written statement of the sum equivalent to the costs that party would have claimed for that legal representation had it not been provided free of charge."

6. Paragraph 2 of the order that I actually made reads as follows:

> "The Claimants shall on a joint and several basis pay costs in respect of the First and Second Defendants' pro bono representation to the Access to Justice Foundation (The Access to Justice Foundation, 7 Bell Yard, London WC2A 2JR), such costs to be summarily assessed on the standard basis if not agreed and paid within 14 days of the assessment or agreement as applicable."

7. Accordingly, what I *may* assess under CPR rule 46.7(1)(b) is:

> "a sum equivalent to all or part of the costs the paying party would have been ordered to pay to the party with pro bono representation in respect of that representation had it not been provided free of charge".

And, for this purpose, CPR Parts 44-47 apply with modifications to take account of the fact that in fact no costs were incurred by the represented party, as the representation was provided free of charge.

8. In the previous paragraph I used the words "*may* assess" advisedly. First of all, that is the phrase used in the rule itself. But there is also the decision in *Manolete Partners plc v White (No 2)* [2025] 1 WLR 1094, CA. There, a *pro bono* costs order had been made under section 194, against a litigation funder. The funder sought a conditional order that would allow it to set off the amount due under the order against a sum due to it from the represented party. The Court of Appeal refused to make that order.

9. In the course of his judgment, Snowden LJ (with whom Asplin and Green LJJ agreed) said this:

> "17. The first point to make is that the power to make an order under section 194(3) is discretionary. Although, under section 194(4), the court is obliged to 'have regard to' the order it would have made if 'P' had not been represented *pro bono*, contrary to Manolete's submissions, this does not amount to a requirement that the court make an order in favour of the AJF that exactly, or even so far as possible, corresponds to the costs order it would have made in the absence of *pro bono* representation.
>
> […]
>
> 19. Thirdly, although often called a '*pro bono* costs order', an order under section 194 is not a conventional order for costs made under section 51 and CPR 44. It does not, for example, conform to the indemnity principle that underlies conventional costs orders. As such, while section 194(4) in effect requires the court to have regard to the principles that apply to such costs orders, the power to make an order under section 194 must also be exercised having regard to the legislative purposes behind the enactment of that section.
>
> 20. The legislative purposes of section 194 are relatively easy to see. Before the introduction of section 194, a privately funded party who was litigating against a person who was represented *pro bono* had the tactical advantage that they were not exposed to the usual risks of an adverse costs order. The

> introduction of section 194 was designed to put the parties on a more equal litigation footing by exposing the privately funded party to a similar risk of adverse costs. In addition, the identification of a charity as the beneficiary of an order under section 194 and the designation of the AJF makes clear the intent that orders under the section should provide a source of funding to support organisations involved in the provision of free legal help to a wider cross-section of the public who might be in need.
>
> […]
>
> 27. In these circumstances, I would adopt a broad brush which errs on the side of caution. The order sought is for just over £120,000. I would make an order under section 194 that Manolete pay £85,000 to the AJF."

(See also *Mahmoud v Glanville* [2025] EWHC 2395 (Fam). [14]-[19].)

The defendants' legal representatives

10. As I have said, the defendants were represented at the trial pro bono by Rory Brown of counsel and Morgan Lewis & Bockius UK LLP, solicitors. They have been acting for the defendants only since 15 December 2024 and 10 January 2025 respectively, *ie* just over nine and eight months before the trial. Before January 2025, the defendants acted in person. Their services were allocated to the defendants by the legal charities Advocate and Law Works respectively, and were not chosen by the defendants themselves. Mr Brown was called to the Bar in 2009, and has a chancery commercial practice based in well-known specialist chambers in London. Morgan Lewis Bockius UK LLP is an international law firm headquartered in the USA, with offices round the world. The London office is situated in Blackfriars, in the City of London.

11. There are no longer any guideline rates for the fees of barristers, as there are for solicitors. For the purpose of ascertaining solicitors' guideline hourly rates, Morgan Lewis Bockius UK LLP would fall within either London 1 or London 2 band, depending on whether the work done was "Very heavy commercial and corporate work" (which is necessary to fall within the scope of London 1). In my judgment, this case is not within that description, and so cannot fall within London band 1. If it is to be a London band, it will be London band 2. On the other hand, had this work been done by a firm based in Bristol (where the claimants' solicitors are based, and where the claim was issued and the trial took place) that firm would have fallen within national band 1.

The costs schedule

12. I turn to consider the costs schedule filed by the defendants' solicitors. According to the schedule, four fee-earners worked on this case, two partners a solicitor and one other fee-earner. Both partners are claimed as grade A, that is, more than eight years' experience as a solicitor. The other fee-earners are grade B (more than four years' experience as a solicitor) and D (trainee solicitors and paralegals). The hourly rates claimed are £1,205 for one partner (A), £860 for the other partner (B) and one of the other fee-earners (C), and £350 for the other (D). The total notional profit costs shown in the schedule are £334,829,

including £232,390 in respect of work done on documents. Notional counsel's fees for Mr Brown are shown as £32,500 for advice, and £26,000 for the two-day hearing. The grand total is £393,329. (No VAT is payable.)

The claimants' challenges

Guideline hourly rates

13. The claimants challenge the notional fees of the solicitors first of all on the basis that the court should not assess the notional costs by reference to the guideline rates for a London based firm. They say that it would not have been reasonable for a paying client to instruct a firm such as Morgan Lewis & Bockius UK LLP in relation to this claim and expect to recover the higher costs that would be charged to such a client by comparison with, say, a Bristol firm. The claimants rely on *Truscott v Truscott* [1998] 1 WLR 132, CA (also known by the name of the other case decided at the same time, *Wraith v Sheffield Forgemasters Ltd*). In that case, Mr Truscott lived in Tunbridge Wells, but, being dissatisfied with MFC, a local firm of solicitors, instructed ATC, a small London law firm, which was successful for him in his litigation. The judge held however that he could recover his costs only at a provincial rate. The Court of Appeal reversed the judge's decision.

14. Kennedy LJ (with whom Waite and Auld LJJ agreed) said, at 141B-F:

> "Instead of asking himself whether Mr Truscott had acted reasonably when he instructed ATC and seeking to answer that question having regard to all relevant considerations the judge answered it by applying one simple and in my judgment inappropriate test, namely a comparison between the rates charged by ATC and the rates charged by firms in the locality of the court and the locality in which Mr Truscott lived. The following are matters which, as it seems to me, the judge should have regarded as relevant when considering the reasonableness of Mr Truscott's decision to instruct ATC :-
>
> '(1) the importance of the matter to him. It was obviously of great importance. It threatened his home.
>
> (2) the legal and factual complexities, in so far as he might reasonably be expected to understand them. Due to the incompetence of MFC the matter had taken on an appearance of some complexity.
>
> (3) the location of his home, his place of work and the location of the court in which the relevant proceedings had been commenced.
>
> (4) Mr Truscott's possibly well-founded dissatisfaction with the solicitors he had originally instructed, which may well have resulted in a natural desire to instruct solicitors further afield, who would not be inhibited in representing his interests.
>
> (5) The fact that he had sought advice as to who to consult, and had been recommended to consult ATC.

> (6) The location of ATC, including their accessibility to him, and their readiness to attend at the relevant court.
>
> (7) What, if anything, he might reasonably be expected to know of the fees likely to be charged by ATC as compared with the fees of other solicitors whom he might reasonably be expected to have considered'."

15. This decision is reflected in (and cited by) paragraph 30 of the *Guide to the Summary Assessment of Costs*, 2021, which begins:

> "In a case which has no obvious connection with London and which does not require expertise only to be found there, a litigant who unreasonably instructs London solicitors should be allowed only the costs that would have been recoverable for work done in the location where the work should have been done … "

The focus there is on whether it was *unreasonable* of the litigant to instruct London solicitors.

16. Assuming that it were right in the present case to ask whether the defendants acted reasonably, it does not follow that the factors identified by Kennedy LJ in *Truscott* would necessarily be the same today. The legal services market itself has changed enormously, over the last three decades, since *Truscott* was decided. There is much more choice of provider than there was then, and much more choice of funding agreement, including conditional fees, ATE insurance, and commercial litigation funding. Advanced technology is also eroding both distance and sense of place. Many firms have multiple offices in different parts of the country, including one in London, as well as large provincial centres. Some fee-earners work in more than one office. Specialisation is ubiquitous. A nimble-footed, highly specialist niche London firm, for example, may charge a higher hourly rate than a high-street provincial firm, but may do the same job more efficiently and quickly, so eroding the latter's headline cost advantage. What it is reasonable for a paying litigant to do today in seeking legal services may therefore not be the same as at the time of *Truscott*. It all depends.

17. But, in any event, and as the claimants themselves accept in their written submissions, asking whether it was reasonable of the defendants to instruct a London firm rather than a provincial one would be an artificial exercise in the present case. This is because the defendants were *allocated* the services of this firm by Law Works, and had no real choice in the matter. If they wished to be represented free of charge by legal professionals, they would have to accept this firm. In my judgment, it is not appropriate to approach this matter by asking simply whether it was reasonable for the defendants to instruct Morgan Lewis & Bockius. As Snowden LJ made clear in *Manolete*, the power to make a pro bono costs order must be exercised having regard to the legislative purposes behind section 194, which include not only levelling the tactical playing field, but also funding legal services for those who cannot afford to pay for them.

18. All that said, I accept that this case was not legally or factually complex, and could have been handled by a local firm. But I do not accept that the case was not important to the defendants, or that it would have no personal financial

impact on them. Apart from anything else, if the claimants had succeeded, there would probably have been an order for costs made against the defendants (albeit with the benefit an argument as to whether it was provable in their bankruptcy: *cf Re Nortel Companies* [2014] AC 209, [89]). The claimants' final costs budget, dated 14 May 2025, was in the sum of £182,848.65 (excluding VAT). That is a significant potential liability for most people, and particularly for people of modest means beginning their retirement. In my judgment, it was reasonable for the defendants, unable to finance their defence by professional lawyers, to accept the offer of free representation by Mr Brown and Morgan Lewis & Bockius. I will therefore apply London band 2 hourly rates to the solicitors' notional costs, rather than National band 1.

Claimed rates exceed the guidelines

19. The next point of challenge is that the rates claimed exceed the guideline rates for London band 2. Two of the fee-earners are grade A, and for London band 2 since 1 January 2025 the guideline hourly rate for such fee-earners is £413. The rates claimed are £1,205 and £860 respectively. One of the fee-earners is grade B, and the London band 2 guideline hourly rate for such fee-earners since 1 January 2025 is £319. The rate claimed is £860. The other fee-earner is grade D, for which the London band 2 guideline hourly rate is now £153. The rate claimed is £350. Accordingly, the rates claimed for all the four fee-earners are in excess of the guidelines. Of course, they are just that, guidelines, and are not set in stone. But. as the Court of Appeal said, in relation to the 2021 guideline rates, in *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, [6], "If a rate in excess of the guideline rate for solicitors' fees is to be charged to the paying party, a clear and compelling justification must be provided". This point was reiterated in *Athena Capital Services SICAV v Secretariat of State for the Holy See* [2022] EWCA Civ 1061, [6]. It has been applied in many other decisions at first instance since. In the present case, no justification was advanced for the excessive rates claimed. I can see none. Accordingly, I will reduce the notional profit costs to take account of this.

Excessive attendances

20. The next point taken is that the attendances on the defendants and on their opponents are excessive, at 89.3 hours for the former and 31.9 hours for the latter. (These figures do not include time spent on documents, which is dealt with below.) Given the relatively limited time for which the solicitors were instructed before trial, these figures seem too high for the work which would have needed to be done. I also note that they do not include as much delegation by partners to less expensive fee earners as I would have thought appropriate in a case of this sort, which requires litigation experience, but not of any particular specialist kind. For both these reasons, I consider that the notional profit costs should be further reduced.

Work done on documents

21. Some 263 hours is claimed for work done on documents. This includes 43 hours "reviewing core contractual documents", when the only significant contractual document was the JCT contract. It also includes 37 hours "reviewing all court

documents", although the statements of case and court orders run only to 43 pages. It includes 43 hours "reviewing Defendants documents", and 25 hours carrying out "Disclosure tasks". It appears that the defendants' disclosure amounted to 23 documents, but the claimant's disclosure ran to 2671. Some 80 hours are claimed in respect of "Preparing witness statements". The defendants in fact produced three witness statements, running to some 32 substantive pages. 30 hours are claimed for "Reviewing Claimants witness statements". Those witness statements ran to 12 pages of substantive evidence. Lastly, five hours are claimed in respect of "Bundle Preparation", although the substantive burden of preparing the trial bundle fell upon the claimants, not the defendants.

22. All these figures seem to me to be extraordinarily high in the context of this relatively straightforward claim. And I am the more concerned, because *all* of this work on documents was done by the two partners, and none at all by the two associates. I would have expected it to be the other way round, with only a small amount of partner input as supervision of more junior colleagues. For all of these reasons, a further reduction will have to be made in the notional profit costs.

Counsel's fees

23. As to counsel's fees, no issue is taken by the claimants with the fee of £26,000 for trial, including trial preparation. However, the figure of £32,500 for "advice/conference/documents" is criticised as excessive, on the basis that counsel had no involvement in preparing statements of case, and the defendants had solicitors dealing with disclosure and witness statements. The defendant's counsel says that the total figure of £58,500 was in fact an understatement as a result of an administrative error. He says that the sum sought covers all the advisory work in the time that counsel has represented the defendants, the trial and two interlocutory hearings. I can well understand that that could have been significant, and I am not prepared to go behind what counsel says, *ie* that it does represent work done by him on this case. The real problem is that, if there is significant reliance by solicitors on counsel in the run-up to trial, that reduces the scope for solicitors' profit costs, and vice versa.

Discussion

24. I am not going to attempt to rewrite the schedule of costs in the light of what I have said above. This is not a line by line scrutiny, but instead a "broad brush approach": see *eg Football Association Premier League v The Lord Chancellor* [2021] EWHC 1001 (QB), [20]. Looking at the various categories of work done, I will allow 60 hours for attendances on the defendants, 20 hours for attendances on opponents and 17 hours for attendance at the hearing. I will allow a total of 117 hours for work done on documents, split between the seven categories set out in the schedule of work done on documents. In each case, I will allow some of the time for supervision by a partner, the bulk of the time by the grade B fee earner (associate C) and some of the time by the grade D fee earner (fee earner D). The rates allowed for the solicitors' work will be the guideline rate appropriate for the particular fee earner. Taking matters broadly, I will therefore allow £17,000 for attendances on the defendants, £6,000 for attendances on the claimants, and £5,500 for attendance at the hearing. I will

allow £30,000 for work done on documents. That makes a total of £58,500. This is, coincidentally, the same amount as that claimed in respect of counsel. As it happens, I can see no good reason to interfere with that sum.

Conclusion

25. Accordingly, if I had been summarily assessing the costs payable by the claimants to the defendants, I would have assessed them at £117,000. Instead, however, I am assessing the payment to be made by the claimants to the prescribed charity in respect of the free representation of the defendants by Mr Brown and Morgan Lewis & Bockius. But CPR rule 46.7(3)(b) requires me to apply CPR Parts 44-47 as if the word "costs" referred to "a sum equivalent to the costs that would have been claimed by, incurred by or awarded to the party with pro bono representation in respect of that representation had it not been provided free of charge". In *Manolete*, the Court of Appeal made clear that the power to make an order under section 194 was discretionary, and that there was no "requirement that the court make an order in favour of the [prescribed charity] that exactly, or even so far as possible, corresponds to the costs order it would have made in the absence of *pro bono* representation." Moreover, in assessing the figure, the court "err[ed] on the side of caution."

26. It is accordingly clear from that case that, having decided to make an order under section 194, and having now to assess the amount, I am not bound to read across from the figure that would be produced by a summary assessment to the figure representing the amount which the claimants have to pay to the charity. Nevertheless, bearing in mind the double legislative purpose of section 194, as set out in the judgment in *Manolete*, I consider that £117,000 does indeed represent the appropriate amount of the payment to be made by the claimants to the Access to Justice Foundation, and I will so order.