Neutral Citation Number: [2026] EWHC 2312 (Comm)

Claim No: CC-2025-MAN-000052

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

SHORTER TRIALS SCHEME

7 September 2026

BETWEEN:

(1) 3173 BIDCO LIMITED

(2) DALRIADA TRUSTEES LIMITED

Claimants

-and-

(1) CHRISTOPHER JAMES ROBERTS
(2) CJR PENSIONS LIMITED

Defendants

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JUDGMENT ON COSTS OF EARLY NEUTRAL EVALUATION

This judgement is handed down at 2.30pm on 7 September 2026 by distribution to the parties and uploading to the National Archive.

HIS HONOUR JUDGE PEARCE

INTRODUCTION

1. In this claim, the Claimants sought damages and injunctive and declaratory relief against the Defendants. The First Defendant had been employed in the Claimants' business (which involves providing professional trustee services to pension schemes) pursuant to a service agreement dated May 2023. His employment terminated and the parties agreed a settlement agreement pursuant to which it was agreed that his employment came to an end on 31 December 2024 and the First Defendant

became entitled 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.

2. The Claimants contended that the First Defendant breached covenants within the services agreement through his work at the Second Defendant, such breaches being procured by the Second Defendant. As well as seeking damages for past breaches of the service agreement and injunctive relief to prevent further breaches, the Claimants sought restitutionary relief in respect of sums paid to the First Defendant under the settlement agreement. The First Defendant counterclaimed for sums which he asserted were due to him under the settlement agreement.

3. At the case management conference held on 27 November 2025, His Honour Judge Halliwell transferred the case to the Shorter Trials Scheme, allocated himself as the designated judge and gave directions through to trial, which took place in July 2026. His directions provided for the exchange of witness statements by 8 May 2026 and for Early Neutral Evaluation ("ENE"). The relevant order in respect of ENE provided:

> "*Subject to the approval of the Judge in Charge, by 4pm on 15 May 2026 this matter shall be referred for Early Neutral Evaluation and pursuant to paragraph G .2 .5 of the Commercial Court Guide, the Judge in Charge shall nominate a Judge to undertake an Early Neutral Evaluation of the proceedings and the nominated judge shall give directions for the conduct of the ENE.*"

The order of HHJ Halliwell made provision for costs consequential upon the amendment of statements of case and otherwise directed that the costs be in the case.

4. Henshaw J, the relevant Judge in Charge, approved the order for ENE and nominated me to be the judge. On 14 January 2026, I gave directions for the conduct of the ENE in an order which stated at paragraph 5, "*costs in the case.*"

5. The ENE took place on 21 April 2026 before me. It will be noted that this took place earlier than the date that HHJ Halliwell anticipated in his order at the case management conference and, indeed, predated the date by which the parties were under an obligation to file witness statements. The ENE was unsuccessful in circumstances that I deal with in greater depth below. I adjourned the ENE part heard, though it appears likely that one or more parties, most likely the Claimant, would not consider that it was worth continuing with the process. The parties agreed an order which gave effect to my view that there should be a mechanism for the ENE hearing to be reinstated before me but which also left open costs issues. The parties did not agree the costs aspect of the order, and I made an order in the following terms to deal with their dispute:

> "*The costs of and occasioned by the ENE shall be reserved to His Honour Judge Pearce, to be dealt with at the further hearing listed at paragraph 2 above* [that is to say in accordance with

process to be followed if the ENE was reinstated] *or by way of written submissions in such manner as shall be directed following any notification under paragraph 3 of this order* [that is to say, in accordance with the process that the parties were to follow if they were not agreed that the ENE should be reinstated].

6. In the event, the Claimants exercised the right that I had given to both parties to decline to engage in further ENE. The parties wished to argue costs issues further and as a result I gave directions for the Claimants to file written submissions, with responsive submissions from the Defendants and submissions in reply from the Claimants. Those submissions have now all been filed. My directions went on to provide that the costs issue would be dealt with without a hearing.

7. In the meantime, HHJ Halliwell has tried the substantive claim, giving judgment under neutral citation number [2026] EWHC 2300. The consequence of his judgment was that the First Claimant obtained judgment on the claim against the First Defendant for nominal damages in the sum of £100, but otherwise the claim and counterclaim were dismissed.

THE ENE

8. For the purpose of the ENE, I was provided with a bundle of relevant statements of case, orders, relevant disclosed documents and relevant correspondence. The parties had not exchanged witness statements so no such statements were contained in the bundle. Counsel for both sides produced written submissions.

9. As the pleaded case stood at the time of the ENE, this was a relatively typical employment dispute of its kind, in which the employer sought to enforce non-competition covenants and the employee argued that the covenants were unenforceable and that he was not in breach of them in any event. There were two mildly unusual features, the first that the group of companies of which the Claimants were part had an unusually complex structure, the second that the First Defendant contended that he had been open with the Claimants about what he was doing.

10. However, during the ENE, counsel for the Defendants advanced a previously unheralded argument that, even on the Claimant's own case, the First Defendant was not operating in competition with it. In simple terms this was because the Claimant's business was to provide the services of a corporate trustee and trust management company, whereas the First Defendant (through the Second Defendant) was competing in a different market where the customer wanted an individual trustee, not a corporate body and/or trust management services. The initial stance taken by counsel for the Defendants was that it was unnecessary to plead this case, seemingly because the distinction between the two types of trustee was one that must have been apparent to the Claimants (who know the pension trustee business well). On further reflection, counsel accepted that it was arguable that amendment was required.

11. The Claimant's position was that this was not an argument that could be advanced without amendment of the Defence. This seemed to me to be unquestionably the case. Furthermore, it seems to me that it was not realistic to carry out the ENE in circumstances where the Defendants were advancing a previously unheralded and unpleaded case (so that neither the Claimants nor I had had the time to reflect upon its implications) and where an application to amend was by no means bound to succeed. (In the event, the application to amend was successful.) I was particularly concerned that the court was being asked to express a view on the prospects of success of a defence without knowing whether that defence could in fact be advanced, but also without knowing what any reply the Claimants might want to advance to it. It was unfortunate that the ENE preceded the exchange of witness statements, since even without an application to amend, such statements would have given the parties and the court a better view of where the battlelines lay.

THE POWER TO ORDER COSTS

12. The Claimants argue that the Defendants should pay the costs of the fruitless ENE on an indemnity basis; the Defendants contend that those costs should be costs in the case. Thus neither party is arguing that I have no power to make an order in respect of those costs. Nevertheless, given the somewhat unusual nature of the issue that arises here, it seems to me that there is value in identifying the proper basis for making an order.

13. Where parties agree to engage in ENE, whether before the issue of the claim or after the claim has been issued, it is in my experience common for them to agree a provision as to the costs of the ENE, typically that the costs will be borne by the party incurring the costs themselves in the first instance but ultimately will be treated as part of the costs of the case. Indeed, where, as here, ENE occurred after the court had made an order, that order might have included expressly within it a provision that the costs of the ENE were costs in the case. The order that the parties agreed following the CMC did not deal with the issue so I am not on the face of it bound by any other order or agreement between the parties.

14. As I have noted, both in respect of the directions hearing before HHJ Halliwell and the directions hearing before me, costs were ordered to be in the case. However on both occasions the costs to which that order related were clearly costs incurred in preparation for the relevant hearing and order.

15. It follows that I am satisfied that I have the power to deal with the costs of the ENE in accordance with the general discretion in CPR Part 44 and am not bound (for example) by whatever order HHJ Halliwell may make in respect of the costs of the case generally.

16. The exercise of that discretion (both as to whether costs are payable and as to the amount of those costs) is governed by CPR 44.2, in particular:

> *"(2) If the court decides to make an order about costs –*

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

…

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue;

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim; and

(e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution."

17. It has not been suggested to me that the ultimate outcome of the claim is a pointer to what costs order I ought to make. Indeed, HHJ Halliwell has not yet determined the costs issue relating to the costs of the claim itself.

THE BASIS OF THE ASSESSMENT OF COSTS

18. As the Claimants correctly identify, CPR part 44 gives the court a general discretion as to the basis of costs. The well-known test to be applied is that established in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston* [2002] EWCA Civ 879, namely that, "*before an indemnity order can be made, there must be some conduct or some circumstances which takes the case out of the normal*." That is not to say that the party seeking indemnity costs must show some lack

of probity or conduct deserving of moral condemnation of the paying party. It suffices to show "*something outside the ordinary and reasonable conduct of proceedings*" (*Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 at [25]).

THE CLAIMANTS' CASE

19. The Claimants contend that an award of costs on the indemnity basis against the Defendants is justified on the following grounds:

(1) The Claimants were always doubtful as to the likely efficacy of ENE. Drawing on submissions that he made to HHJ Halliwell, Mr Malam says in written submissions: "*to give a proper indication of the merits of the case, even if just limited to the enforceability of the covenants, the judge, whomever, would have to seek the party's written evidence to give an explanation as to why our business requires covenants of this type… Whilst the enforceability of the covenant is obviously a central issue, it is not the only issue. Because if one is to assume for the moment that we are successful in persuading the judge or the expert, whomever, that these covenants are enforceable, then that would still leave the defendant scope to say, even assuming he accepted that point, that he does not accept that there has been a breach and he may not accept that the relief which we seek flows even if the breach has been demonstrated. So the real risk is that we have an early neutral evaluation of the cost of that, where the likely saving is pretty limited and there may not be any saving at all*."

(2) Against this, the Defendants were enthusiastic about ENE, not necessarily accepting that the exchange of witness statements was a necessary precursor to it taking place.

(3) The ENE was adjourned because the Defendants sought at the hearing on 21 April 2026 to raise arguments that the Defendants were not competing with the Claimants (and therefore not in breach of any restrictive covenants even if those covenants were enforceable) because the distinction between the Defendants' business and the Claimants' business meant that the First Defendant's business differed from that of the Claimants. This is a point that should have been raised earlier. It must have been known to the First Defendant throughout. In reality it was the Defendants' conduct which was the sole cause of the wasted costs.

(4) The Defendants' response to the complaint that they needed to re-amend their defence to highlight this new argument was to complain that ENE had become a mini trial and to note the problems inherent in conducting the ENE before witness statements had been exchanged. But, even after the ENE was adjourned, the Defendants prevaricated on this central issue then subsequently effectively conceded that amendment was necessary by making application to do so at the pre-trial review.

20. The Claimants contend that all of these arguments apply with equal force to their claim for costs on the indemnity basis.

THE DEFENDANTS' CASE

21. The Defendants' case is that any order other than for costs in the case would be inappropriate:

(1) The Claimants' application amounts to satellite litigation and is to be discouraged.

(2) The making of any order for costs, in particular an order for costs on the indemnity basis, in respect of the conduct of ADR/NDR risks undermining the ethos of such processes.

(3) In fact, it was the Claimants who undermined the efficacy of the ENE process by declining to resume the ENE hearing before me after the adjournment.

(4) Insofar as the Defendants are criticised for the late change of case, this itself was a consequence of a change in the Claimant's case on service of the Amended Reply which was in excess of what had been permitted on the grant of permission.

(5) If there is to be criticism of the parties proceeding to ENE before the exchange of witness statements, that is a criticism that is at least as potent against the Claimants as it is against the Defendants. HHJ Halliwell had anticipated the exchange of witness statements before the ENE. In fact, the date of the ENE was proposed in the directions of HHJ Halliwell because of the Claimants' availability. At the very least, they have no one to blame but themselves for the fact that witness statements have not been exchanged prior to the ENE.

(6) The ENE cannot be said to have been wholly unproductive because it allowed each party to hear the other side's case and to understand it better.

DISCUSSION

22. My first consideration is whether the court should apply any specific considerations to the making of court orders consequent upon failed attempts at ENE. In my judgment, there are 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.

23. First, there is strong judicial support for the use of Alternative Dispute Resolution ("ADR") – see for example the judgment of Dyson LJ as he then was in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [8]. Judicial ENE is one of the tools of ADR, referred to with approval by the Court of Appeal in *Lomax v Lomax* [2019] EWCA Civ 1467 at [29]. So-called FHDRAs (First Hearing and Dispute Resolution Appointments) have been common in private law children cases for some time and similar hearings, called FDR hearings in Manchester, often take place in Inheritance Act claims. The use of ENE in other claims, for example, disputes relating to trusts (especially of residential property) and neighbour disputes is increasingly common. Whilst the court has powers to

require such engagement, the ethos of ADR is the encouragement of cooperation and the routine making of costs orders against one or other party to a failed ENE would be liable to discourage parties from engaging in such processes.

24. Second, whilst there may be cases where the court can confidently predict what would have happened but for the conduct of a particular party during ADR, there are likely to be many more where the court cannot do so. In most cases, it will not be possible for the court to reach any secure conclusion on whether wasted costs have flowed from the conduct of the party who is being criticised. Of course, a causative link between the conduct complained of and the identifiable incurring of costs is not a necessary pre-requisite for the making of a costs order based on the conduct of a party because such orders may be intended to have penal consequences rather than being strictly compensatory in nature – see in the context of an alleged unreasonable failure to engage in ADR, the judgment in *Halsey v Milton Keynes* at [25], where the Court of Appeal says, *"the question whether the mediation had a reasonable prospect of success will often be relevant to the reasonableness of A's refusal to accept B's invitation to agree to it. But it is not necessarily determinative of the fundamental question, which is whether the successful party acted unreasonably in refusing to agree to mediation."* But the absence of a demonstrable link between the conduct of A and the costs incurred by B inevitably weakens B's argument that A should pay its costs.

25. Third, the exploration of why ENE was unsuccessful may involve the detailed consideration of a variety of factors, both about the merits of the case and the conduct of the litigation. This case demonstrates that point, as is apparent from the issues raised by both parties in their written submissions. The court must avoid allowing the appearance of complexity to be a reason not to explore those issues but the truth is that the issues here do not uniformly point in one direction and some are matters that I am not in a position to resolve, as I note when dealing with the factors in the particular case below.

26. Fourth, the material available for the conduct of an ENE is likely to vary greatly depending on when in the litigation process it takes place. An ENE conducted before the issue of proceedings is likely to involve the parties advancing far less developed cases than should be the case when, as here, the ENE is conducted close to trial. There is a risk that, if costs orders on failed ENEs reflect the degree of preparation of the parties, one might incentivise parties to engage in ENEs at an early stage, when it will be harder to criticise lack of preparation but reduce the incentive to enter into an ENE late on, as in this case, when an underprepared party might risk an adverse costs order on the ground that they should have been better prepared.

27. Fifth, as the Claimants' submissions summarised above demonstrate, there is a significant risk that an argument as to the incidence of costs in respect of a failed ENE will turn into an inquiry as to whether the ENE should have been held in the first place and, if not, why this circumstance came about. In this

case, the Claimants are contending that the ENE was never likely to succeed, an implicit criticism of the Judge for making the order for ENE.

28. Sixth, the costs orders which are available in the event of a failed ENE may well be limited by the circumstances in which the ENE has taken place. For example, an ENE before issue proceedings might have been conducted on the express basis that the cost of each side would form part of their costs in the case. Equally, in my experience, where ENE is ordered during the course of litigation the court or parties might be persuaded that an order to the like effect should be made. But it is undesirable that one type of ENE, judicial ENE during the course of litigation, should operate under a different costs regime than ENE in other circumstances.

29. I accept that a contrary point to all of the argument raised above is that the use of a costs regime allows the court to deal on a case-sensitive basis with those whose lack of preparation is not to be blamed and on the other hand with those whose preparation is impeccable. But the risk to a litigant, especially one who, as here, has not instructed solicitors and has employed counsel by way of direct access, is that an apparently adequately prepared case may be judged not to be so with a consequent costs penalty. This is likely to be a disincentive to engaging in ENE. That would be a substantial disincentive to parties to engage in ENE.

30. Drawing the threads together, whilst the sixth point raised above might suggest that the court should never maker an adverse costs order for failed ENE, that would be to take matters too far since it would protect even those who attend EME without having any attention to engage in resolving the dispute. 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. That said, in my judgment 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.

31. I reject the argument that, on the facts of this case, that the Defendants should pay the Claimants' costs of the abortive ENE for the following reasons:

(1) Whilst I accept that the immediate cause of the failure of the ENE was the Defendants' failure to plead their case fully, it is less clear to me whether the failure to do so might to some extent be said to be a consequence of the Claimants' own late amendment of their case beyond that which was permitted by the order granting permission to amend. An investigation into that issue risks a disproportionate exercise which is outside the ambit of that which it is otherwise necessary to determine in order to resolve the case. In particular, I do not see that the judgment of HHJ Halliwell provides me with an easy answer to the Defendants' criticism of the Claimants.

(2) In part, the Claimants' case is based on the submission that the ENE should never have occurred at all. That submission goes behind the fact that one was ordered by HHJ Halliwell. Further, it is weakened by the fact that, with the agreement of both parties, the ENE took place before exchange of witness statements, creating the very problem that the Claimants had anticipated when resisting an order for ENE.

(3) This is not a case where the Claimants can say that, but for the default of the Defendants, the ENE would have been successful and/or that costs would have been saved. The best that the Claimants can argue is that the Defendants should not have gone to ENE at all (and that the Claimants would not have attended) had the Defendants' true position on the enforceability of covenants been known. But this of course was not voluntary ENE. Judge Halliwell had ordered it. If the Claimants had failed to attend an ENE that had been ordered by a Judge, they would have been at risk of an adverse costs order. So it cannot obviously be said that different conduct on the part of the Defendants would have resulted in the saving of costs.

(4) This court is not in a position to judge whether the ultimate failure of ENE was a consequence of the Defendants' failure to plead their case fully at an early enough point. Other factors include the timing of the ENE (before the exchange of witness statements). In any event, the failure of the parties to come to terms after the ENE and the fact that the ultimate judgment of HHJ Halliwell was a complex and nuanced one in which it is by no means clear who the winner is leads me to the conclusion that I could not safely reach any conclusion about what the outcome of ENE would have been but for the defendants failure.

32. It follows that I am not persuaded that I ought to make a costs order other than one for costs in the case. For the sake of completeness, the arguments above apply with equal if not greater force in respect of the argument that any costs ought to be assessed on the indemnity basis.

A STING IN THE TAIL?

33. The sting in the tail in this case is that the Defendants contend that the Claimants should not have sought their costs and that accordingly the Claimants should pay the Defendants' costs of preparing submission on the costs issue. Putting aside the quantum of those costs (which would be a separate issue), I am not persuaded that I want to make such an order. It is of course open to the Defendants to contend (just as the Claimants have contended) that the court's powers to award costs can be an encouragement to the efficient conduct of litigation, but it would be a particularly strange result of the Claimants' application that, following a finding that the immediate cause of the ENE was the conduct of the Defendants, the Defendants nevertheless recovered their costs of resisting an application for costs. This is not a case in which it can be said that the claimant's application for costs is itself out of the norm so no question of indemnity costs will arise, but in any event it would be perverse to penalise

the Claimants by requiring them to pay the Defendants' costs in the particular circumstances that have arisen here.

34. Had the Claimants succeeded in their argument as to the recovery of the costs of the failed ENE, those costs would have included their costs of preparing their submissions. In the event, my order for costs supersedes any such order..

CONCLUSION

35. It follows that:

(1) I order that the costs of the failed ENE be costs in the case.

(2) I dismiss the Defendant's application for the costs of and occasioned by the Claimants' application for costs.