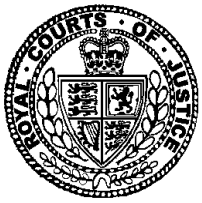
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Neutral Citation Number: [2026] EWHC 2525 (KB)

Case No: KB-2023-001663

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 October 2026

Before:

ANDREW KINNIER K.C.
(Sitting as a Deputy Judge of the High Court)

Between:

JBX
(Suing by DBX, his Mother and Litigation Friend)

Claimant

- and –

FRIMLEY HEALTH NHS FOUNDATION TRUST

Defendant

David Tyack K.C. (instructed by **Lime Solicitors**) for the **Claimant**
Claire Toogood K.C. (instructed by **Capsticks LLP**) for the **Defendant**

Hearing date: 16 September 2026
Draft judgment circulated to the parties: 1 October 2026

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Approved Judgment

This judgment was handed down remotely on 5 October 2026 at 10.30 a.m. by circulation to the parties or their representatives by email and released to the National Archives.

ANDREW KINNIER K.C.

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ANDREW KINNIER K.C. sitting as a Deputy Judge of the High Court:

Introduction

1. This judgment concerns costs. It should be read with my judgment [2026] EWHC 2294 (KB) (dated 4 September 2026) ("**the judgment**") and it adopts the abbreviations previously used.

2. Following hand-down of the judgment, I listed a consequential hearing on 16 September 2026 and made directions for the preparation of a draft order (to be agreed if possible), the exchange of skeleton arguments and other matters. The parties duly complied.

3. A hearing bundle was also lodged by the Trust's solicitors which contained an agreed draft order (bar costs), the parties' correspondence and their various offers. The Claimant served witness statements from DBX, his mother, and Ms Melanie Minter, the solicitor who now has care and conduct of the claim, on the question of the ATE insurance premium. The latter confirmed that no success fee would be demanded and so only the premium fell to be paid. Further materials from Mr Richard Cropper, the Claimant's independent financial adviser, were also provided which considered the proposed periodical payments and the terms and effect of the proposed reverse indemnity. Mr Tyack provided a confidential advice (dated 15 September 2026) in which he advised that the proposed payments to the Claimant's parents in respect of their gratuitous care and assistance, the ATE insurance premium and the reverse indemnity were reasonable and commended them to the court. Having regard to the materials before me and, in particular Mr Tyack's advice, I approved the agreed parts of the draft order.

4. The contentious point was costs. Counsel made detailed submissions on the facts of the case and cited numerous authorities. I reserved judgment to allow me to consider both the Trust's bundle and the case-law relied upon by the parties.

PART 1: the parties' correspondence, offers and agreement of quantum

Correspondence

5. The hearing bundle contained the parties' open and without prejudice save as to costs ("**WPSAC**") correspondence sent between October 2025 and May 2026. Three principal points emerge from the correspondence: first, in relation to the Claimant's future care and accommodation claim, Capsticks (the Trust's solicitors) repeatedly said that they wished "to work collaboratively with [the Claimant's solicitors] regarding [the Claimant's] future accommodation need". Although Capsticks suggested Inspire as a possible alternative and had described the question of accommodation as "atypical", it was not until the Trust served its Counter Schedule and expert evidence on 13 February 2026 that its opposition to domiciliary care was made clear.

6. Secondly, following service of the Counter Schedule and the Trust's expert evidence, on 17 February 2026, Lime (the Claimant's solicitors) wrote to Capsticks about various matters ("**the 17 February letter**") including the joint settlement meeting on 17 March

2026 ("**the JSM**"). Lime proposed retaining the JSM in the diary even though the experts may not have discussed the case by that stage but "it will be on the basis of how our client's future accommodation claim is being made. A settlement cannot be achieved on the basis of our client remaining in residential accommodation after he leaves Tadworth Court." Nonetheless the JSM went ahead on 17 March 2026 but the claim was not settled.

7. Thirdly, as set out below, the parties made offers in the run-up to trial and continued to negotiate quantum and the text of the reverse indemnity. On 26 April 2026, Capsticks sent Lime a copy of the PDOC Guidelines and said that Ms Toogood intended to cross-examine on the basis of the advice at pp. 79 and 80 which was quoted at para. 73 of the judgment.

Offers

8. None of the parties made any offers under CPR Part 36 ("**Part 36 offers**"), valid or otherwise. Various offers were made in counsel-to-counsel exchanges between 20 April and 5 May 2026, that is to say, in the fortnight before the trial started on 6 May 2026. In summary:

   (a) On 20 April, the Claimant made what was described as a "partial offer" under which he would accept a settlement on basis of an unquantified lump sum payment supplemented by periodical payments. The offer was made on the understanding that it was reasonable for the Claimant to receive domiciliary care. The offer letter also sought to address the Trust's concerns said to have been raised at the JSM: first, the settlement sum would not be spent on purchasing and adapting a home for the Claimant; secondly, the prospect of double recovery would be addressed by a reverse indemnity drafted on the basis of a judicially approved text.

   (b) On 29 April, in a counsel-to-counsel e-mail exchange, the Trust offered to compromise the claim on the basis of a lump sum payment of £4M (gross of interim payments, CRU and interest); periodical payment for care and case management starting on 15 December 2028 of £713,063.40 (ASHE 6115 80th percentile); a periodical payment in respect of deputyship costs of £9,810.24 starting on 15 December 2028 index linked to RPI and a reverse indemnity in the terms attached to the e-mail. Both periodical payments would be subject to their first variation on 15 December 2026.

   (c) Ms Toogood's e-mail also suggested an alternative. If the parties could not compromise on the basis of the Trust's proposal, she proposed seeking to agree quantum on the basis of four potential scenarios all of which assumed the Claimant would live at Tadworth Court until his 19th birthday after which new care arrangements would start, namely: (i) the Claimant would be cared for in his own home subject to a regime run by Libertatem; (ii) the Claimant would live at Bagshot Park; (iii) the Claimant would live in his own home but cared for under a regime operated by Harmony (another care agency); (iv) the Claimant would live at home but care would be provided by staff from Bagshot Park.

   (d) On 30 April at 5.20 p.m., Mr Spencer Ley wrote to Ms Toogood to confirm that he was able to agree almost all the figures given in the four proposed scenarios. He

also said that, if the figures could be agreed, oral evidence from the experts other than in the disciplines of neurology, neuropsychiatry, care and physiotherapy would not be needed. The Trust's offer was impliedly rejected.

(e) At 7.09 p.m., Ms Toogood sent an e-mail to Mr Tyack and Mr Spencer-Ley in which she said that she did not have instructions to settle on the lump sum basis proposed in the previous day's e-mail. An amendment was made to the sum offered for the lost years claim from £1.225M to £600,000.

(f) On 5 May, the eve of trial, Mr Tyack confirmed the terms of a final offer which seems to have been discussed with Ms Toogood earlier in the day. Essentially, the Claimant offered to settle on the basis of a lump sum payment of £6.5M (gross of CRU); periodical payments of £950,000 from December 2028 subject to a reverse indemnity which required repayment from any periodical payment of any sum not spent on care or case management. The offer was rejected but the parties continued to discuss the wording of the proposed reverse indemnity.

Agreement of quantum

9. As recorded in Part 6 of the judgment, the parties agreed quantum on the basis of the seven scenarios they considered were available to the court. I was told that the figures for the first six scenarios were agreed on 2 May 2026 and the final one on 5 May 2026. The figures were confirmed to me on Sunday 10 May 2026. The parties had also agreed the reverse indemnity by the end of the hearing.

PART 2: Costs

The parties' positions

10. The Claimant, represented by Mr Tyack KC, submitted that the Trust should pay his costs on the standard basis to be subject to a detailed assessment if not agreed. In support, Mr Tyack made the following principal points:

(a) The Claimant is the successful party: he has secured damages supplemented by an advantageous reverse indemnity and so costs should follow the event as CPR 44.2(2)(a) anticipates.

(b) Relying upon paras. 36, 48, 62 and 63 of Jackson LJ's judgment in *Fox v. Foundation Piling Limited* [2011] EWCA Civ 790, if a defendant fails to make any or any sufficient Part 36 offer, it cannot expect to secure costs protection. The Trust has failed to protect itself by a Part 36 offer. It was fully aware of the Claimant's case on future care and accommodation from 28 April 2025, the date on which his Schedule of Loss and Damage was served. It could and should have made a valid and timely offer under CPR Part 36 whether in relation to the whole claim or any issue. The Trust has not done so and it cannot therefore expect to receive the advantages of what Mr Tyack described as a non-standard costs order, i.e. one under which the Claimant does not recover all his reasonable costs. The Trust has made only one offer which was made in counsel-to-counsel correspondence on 29 April 2026, less than seven days before trial, which was not a valid or timely offer for the purposes of CPR Part 36 or acceptable. Importantly, the offer was beaten.

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(c) If the court is prepared to consider a non-standard costs order, the Trust's conduct is relevant for the purposes of CPR 44.2(4)(a). Three principal points are relied upon: first, the Trust's position on future care and accommodation had not finally crystallised to the extent that it was said that domiciliary care was inappropriate or unsafe until its solicitors indicated that it intended to rely upon the PDOC Guidelines on 26 April 2026. Before then, the Trust had not fully "closed the door" on domiciliary care. Secondly, the Claimant made an offer on 20 April 2026 (which is accepted not to be a Part 36 offer) which sought to answer what was thought to be the Trust's twin concerns about double recovery and whether a domiciliary regime would in fact be set up. Thirdly, the Claimant made a second offer on 5 May 2026, which was described as an "all-in" offer of a lump sum, periodical costs and a reverse indemnity. In the circumstances, Mr Tyack submitted that it would be unfair to criticise the Claimant's conduct and to penalise him in costs for indicating, in his solicitor's letter of 17 February 2026, that he would not settle on any basis other than domiciliary care.

(d) The Trust did not attempt to settle the claim before the trial costs had been incurred. In particular, quantum was not finally agreed until the eve of trial.

(e) Even if the Claimant had conceded future care and accommodation, the saved costs would have been minimal. In particular, the earliest point at which the Claimant could have conceded the point was 13 February 2026 by which time the costs of the experts' reports had been incurred. In any event, conceding future care and accommodation would not have avoided a trial. The reverse indemnity was not agreed until trial; there were continuing cost in relation to other heads of loss and there was no prospect of compromising the lost years claim. If the court is minded to make some deduction, it should be limited to no more than five per cent of the Claimant's costs.

(f) Finally, the 17 February letter caused no costs to be incurred. Significantly, the Trust still attended the JSM on 17 March 2026. The costs position would have been no different if the letter had not been sent. The Trust would still have made its offer of 29 April 2026 and the claim would still have gone to trial.

11. The Trust, represented by Ms Toogood KC, contended that the Trust should pay 75 per cent of the Claimant's costs to 17 February 2026 but thereafter there should be no order as to costs. The Trust's primary arguments were as follows:

(a) As to the relevant principles, the Trust acknowledged the broad extent of the court's costs discretion and the general rule that the unsuccessful party will be ordered to pay the successful party's costs but the court may make a different order. The Trust particularly relied upon three decisions: *Pigot v. The Environment Agency* [2020] Costs LR 275 in relation to the principles that should inform the court's approach to costs where a party has succeeded overall but has lost on one or more issues; *McKeown v. Langer* [2021] EWCA Civ 1792 in relation to Green LJ's conclusion that a "salutary" general rule is that costs should follow the issue rather than the event; and *Hullock v. East Riding of Yorkshire Council* [2009] EWCA Civ 1039 in which the defendant lost the principal point on which the outcome of the proceedings depended which was reflected in the costs order.

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(b) Although it was accepted that the Claimant had been successful in securing an award of damages, application of the general rule would be unjust given the Trust's success on the principal disputed question of future care and accommodation. Three particular points were advanced: first, all the evidence at trial was directed to the issue of the Claimant's future care and accommodation and the Trust's expert evidence was accepted; secondly, the bulk of the trial was devoted to future care and accommodation; thirdly, on any reasonable view, the Trust was successful at trial.

(c) In relation to the circumstances of the case, the Trust relied upon the following matters: the Claimant received substantially less than he had offered to accept; the 17 February letter gave the Trust no alternative but to go to trial; all other heads of loss were agreed and an offer of £600,000 was made in respect of the lost years claim which the Claimant secured at trial; if the claim for future care and accommodation had been conceded by the Claimant, the trial would not have been needed; the Claimant's conduct of the litigation was subject to criticism. On that point, Ms Toogood relied upon various matters including the Claimant's unsatisfactory disclosure exercise and the consequential problems; DBX's failure to include references to her visits to neuro-residential units in her witness statements; DBX's refusal to engage with the Trust's experts; the deficiencies of Mrs Evans' evidence and her failure to discharge her obligations as well as those of Dr Igboekwu and Dr Prasad's silence on the question of future care and accommodation in his first two reports.

The relevant law

CPR 44

12. CPR 44.2 materially provides that:

> "**Court's discretion as to costs**
>
> **44.2**
>
> (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (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.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead."

The authorities

13. Although no Part 36 offers have been made in this case, Jackson LJ's judgment in *Fox v. Foundation Piling Limited* [2011] EWCA Civ 790 provides a useful summary of the approach to CPR Part 44 in the context of personal injury litigation. The following extracts from his judgment are apposite:

> "36. A large number of authorities have accumulated around the provisions of Part 36 and their interrelationship with rule 44.3 [now 44.2]. This is not a welcome development, since Part 36 is intended to provide a clear and simple framework within which parties can settle litigation …
>
> 48. In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v. Bennett UK Limited* [2008] EWCA Civ 1658. For example, a claimant may succeed on some of the pleaded particulars of negligence but not on others. Indeed the fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v. UPS*. A defendant who has obtained video surveillance evidence is perfectly well able to protect his position on costs by making a modest offer under Part 36.
>
> …
>
> 62. There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3(2)(a) [now 44.2(2)(a)] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.
>
> 63. I hope that the forthcoming amendment to rule 36.14 will point the way to a more clear cut approach to the costs rules in future. In the context of personal injury litigation where the claimant has a strong case on liability but quantum is inflated, the defendant's remedy is to make a modest Part 36 offer. If the defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure costs protection …"

14. In *Welsh v. Walsall Healthcare NHS Trust* [2018] 5 Costs LR 1025, Yip J (as she then was) considered *Fox* and approved and applied five principles identified by editors of the White Book, derived from the authorities, which should guide the court's consideration of an issue-based costs order, namely:

> "1. The rules themselves impose no requirement to the effect that an issue-based costs order should be made only 'in a suitably exceptional case', and none is to be implied, although 'there needs to be a reason based on justice' for departing from the general rule, and that the question of the extent to which costs of a particular issue are to be disallowed should be left to the evaluation and discretion of the judge, 'by reference to the justice and circumstances of the particular case' …

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> 2. The reasonableness of taking failed points can be taken into account, and the extra costs associated with them should be considered …
>
> 3. Where the circumstances of the case require an issue-based order in the form of an order expressed by reference to the costs of the issue, that is what the judge should make; however, generally, because of the practical difficulties which this causes, the judge should hesitate before doing so and, where practicable, the order should be expressed as a percentage or with reference to a distinct period of time …
>
> 4. There is no automatic rule requiring an issue-based cost order in the form of a reduction of a successful party's costs if he loses on one or more issues … The mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based order …
>
> 5. The courts recognise that in any litigation, especially complex commercial litigation but including personal injury litigation, any winning party is likely to fail on one or more issues in the case (possibly issues on which the losing party could have taken steps to protect himself, at least to some extent, to costs liability) …"

15. Ultimately, when considering the exercise of the discretion under CPR Part 44, each case will turn on its own circumstances but the court should be trying to assess who in reality is the successful party and who has been responsible for the fact that costs have been incurred which should not have been: *Welsh*, para. 13.

Discussion

16. The agreed starting point is that the Claimant is the successful party because he has secured a substantial award of damages. Including interim payments of £950,000 and allowing for CRU payments, the Claimant's damages were assessed in the sum of £4,341,302.86 as well as substantial periodical payments. Applying the general rule, the Trust should therefore pay the Claimant's costs. The question is whether the court should depart from that position because the Claimant did not persuade the court to accept his proposed domiciliary care arrangements otherwise known as option 1.

17. The courts have consistently acknowledged in relation to all forms of complex litigation (including personal injury and clinical negligence claims) that although the successful party may not win on all issues, such an outcome is not usually a sufficient reason to deprive the winner of part of his costs.

18. The position, however, may be different where the claimant lost the principal argument at trial on which the outcome of the proceedings substantially turned. Here, the primary question was whether option 1, as favoured by the Claimant, met his reasonable needs. The greater part of the eight-day trial, the factual and expert evidence and submissions were concerned with that question. In contrast, the lost years claim required only a half-day or so. In the result, the Trust won the future care and accommodation point and the Claimant won the lost years claim.

19. In exercising the discretion under CPR Part 44, the court is required to consider all the relevant circumstances. To that end, five points are relevant: first, the Claimant's future care and accommodation was not unambiguously contentious until 13 February 2026

when the Trust, after some delay, served its Counter Schedule and expert evidence. Considerable expert-related costs (except those of the without prejudice discussions, preparation of joint statements and attendance at trial) would have been incurred by that stage. As para. 58 of the Counter Schedule pleaded that residential, not domiciliary, care best met the Claimant's complex needs, I do not accept Mr Tyack's submission that the Trust's case on future care and accommodation was not clear until Capsticks circulated the PDOC Guidelines on 26 April 2026.

20. Secondly, the Trust made much of the 17 February letter but I am not persuaded that it had any costs consequences at all. The parties attended the JSM on 17 March 2026 so, presumably, the letter was not thought to be an insurmountable obstacle to negotiations or settlement. After a hiatus of four weeks after the JSM, the parties made their various offers. Again, the 17 February letter was no impediment to the parties' continuing negotiations and discussions about quantum and the reverse indemnity. The evidence is therefore inconsistent with Ms Toogood's submission that the letter gave the Trust no alternative but to go to trial.

21. Thirdly, while Mrs Evans' evidence was the foundation of the Claimant's case on option 1, it did not rest exclusively on it. Although his letter of 28 April 2026 was ambivalent, domiciliary care was supported by Dr Prasad in the neurologists' joint statement and in his oral evidence. Dr Igboekwo also commended it in his report and letter of 29 April 2026. In these circumstances, it cannot be fairly said that it was unreasonable for the Claimant to run option 1 to trial or that it should have been conceded before trial.

22. Fourthly, although future care and accommodation was the primary battleground, it is relevant that quantum of the other heads of loss was not agreed until shortly before the hearing and the lost years claim was disputed until the end. Given my conclusion that it was reasonable for the Claimant to take option 1 to trial, the need for lay and expert evidence could have not been reduced more than it was.

23. Finally, the Trust made no Part 36 offer to protect its position. On this point, Jackson LJ's observation, at para. 63 of *Fox*, continues to hold true. Although I accept that the Trust's offer of 29 April 2026 was closer to the final result than the Claimant's offer of 5 May 2026, nonetheless Part 36 provides the mechanism by which a defendant should protect its position but the Trust took no steps to do so. The Trust's various offers were also made less than a fortnight before trial by which time the bulk of the costs had been incurred. Set in this context, there is some force in Mr Tyack's submission that the Trust is now seeking to gain the advantages of Part 36 without ever making a Part 36 offer.

24. To the extent that they have not already been addressed, the parties' many criticisms of each other's conduct carry little weight because none had any or any meaningful costs consequences. Even the deficiencies of the Claimant's disclosure had no or no real effect on increasing costs or, at least, none that the Trust has satisfactorily identified. In any event, the late-disclosed documents were at best peripherally relevant to the much-narrowed questions before the court.

Conclusion

25. In deciding costs, a balance needs to be struck between various competing factors. Although the Claimant is the successful party because he secured a substantial award

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of damages, he lost the principal battle on future care and accommodation yet won the lost years claim. The other relevant factors considered in paras. 19-24 above should also be weighed in the balance. Given these considerations, as the courts have long recognised, the exercise necessarily requires a broad-brush approach. In my judgment, the appropriate order is that the Trust pays 85 per cent of the Claimant's costs on the standard basis to be subject to a detailed assessment if not agreed.

26. There is no application for a payment on account which Mr Tyack anticipated could be resolved by agreement and so no further order is necessary.

27. I should be grateful if the parties could settle the order and send it to me for approval. Finally, I should thank Mr Tyack and Ms Toogood for their assistance.