

Illuminating judgments

Dominic Regan explores three key rulings relating to agency fees, abuse of process and AI



AGENCY FEES

Senior Costs Judge Rowley has handed down judgment in *YXX v Archibald* [2026] EWHC 630 (SCCO) after a four-day hearing last November (see also page 10).

It will be recalled that the issue was whether a medical reporting organisation (MRO) should be obliged to give a breakdown of the two component parts of every invoice rendered; namely, what the expert charged, and what it was billing for its services. Uncertainty has lingered on for more than two decades without ever troubling the High Court.

Senior Costs Judge Rowley has on previous occasions – in arguably less than subtle terms – intimated that he would love someone, anyone, to run this upstairs on appeal. Indeed, in his 140-paragraph judgment, he says he imagines one or possibly both sides might want to appeal him in pursuit of a determinative decision. His wish might yet come true.

There were three groups of claimants, with Roger Mallalieu KC for various defendants. Ben Williams KC, Nick Bacon KC and Rob Marven KC each represented a claimant.

Despite having the benefit of their submissions, the learned judge decided that he ought not to accept any solution proposed. Instead, he concluded it was best to stipulate that a simple maximum 25% mark-up on the fee charged by the agency be recoverable. This will be a big disappointment for Premex, which has been applying an uplift of 35% or 45%, and MAPS, where 53% was most commonly applied

within a spectrum of 20% to 104%. One key advantage is that the percentage can easily be stated on the MRO invoice. There will be no effort wasted on seeking to gauge the value of the work performed by the agency.

The learned judge was bewildered by the absence of historical data about charging regimes, saying it was ‘a considerable surprise to me’. Forensic accountant Richard Forth, who knows this market inside out, thought it likely that the various players would have been concerned about disclosing commercially sensitive information.

The claimants had served 27 witness statements, 27 more than the defendants.

An appeal is possible. While it is not unknown for a judge to properly reject contending submissions, the application of what one claimant described as an arbitrary percentage conjured up out of thin air was surprising. However, the lack of empirical evidence could easily leave another court to say that, on the material before him, the judge took a pragmatic approach in all of the circumstances. A medical reporting agency confronted by a reduction of 50% in income might well regard an appeal as a worthwhile investment.

ABUSE OF PROCESS

In *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015, the Court of Appeal intimated that a breach of protocol could amount to an abuse of process. This develops *JSCVTB Bank v Skurikhin* [2020] EWCA Civ 1337, where at paragraph 51, Phillips

LJ said: ‘... proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct.’ The *White Book* commentary is found at 3.4.3 onwards.

‘Abuse of process’ is not defined anywhere in the CPR. The categories of abuse ‘are many and are not closed’ is the accurate statement in the *White Book*. The then LCJ Lord Bingham in *Attorney General v Barker* [2001] 1 F.L.R. 759 considered it to arise when ‘using the process for a purpose or in a way significantly different from its ordinary and proper use’.

In the final hours of the action brought against Gerry Adams by three victims of IRA bombs last month, an unexpected point was raised by the judge, Swift J. Of his own initiative, he indicated that he wanted to consider whether this action was an abuse of process. Edward Craven KC took the hint and described the true purpose of the claims, which were limited to £1 in vindictory damages, as being to secure a ‘public inquiry style examination’ of alleged IRA activities by the defendant over many years. Counsel noted that the evidence adduced amounted to irrelevant allegations that had no bearing on the three bombing incidents.

This turn of events terrified the claimants. They had proceeded on the basis that personal injury claimants are protected by qualified one-way costs shifting, so that if they lost, a costs order could not be enforced against them. However, that protection vanishes if proceedings are struck out as an abuse of process. Given that the judge had raised the issue, it must have been something that he thought was at least arguable.

Facing massive adverse costs liabilities, the claimants threw in the towel and agreed to a drop-hands offer made by the defendant, so each party paid their own costs.

The public inquiry reference rang a distant bell in my head. In *Baroness Lawrence v Associated Newspapers Limited* [2025] EWHC 1716 (KB), Nicklin J said:

‘(b) Civil litigation not a public inquiry

‘At the first CMC, I set out what I believed to be the proper parameters of this litigation: “[T]his is civil litigation, it’s not a public inquiry. And, as with all actions, the case management directions the court is going to make will be aiming to confine within manageable and proportionate bounds the scope of the litigation... The court strives to ensure that this litigation will not descend into an uncontrolled and wide-ranging investigation akin to a public inquiry. That is not the purpose of civil litigation, where that is not necessary to determine the issues that are between the parties”’.

All litigators need to be alert to the possibility of an abuse of process argument being advanced. It applies equally to claimants and defendants right across the litigation spectrum.

ARTIFICIAL INTELLIGENCE

AI is not going away, nor are the inherent problems that it brings. The Civil Justice Council has just recommended a rule change for all witness statements. It proposes a declaration be included confirming that AI has not been used for the purposes of generating the content of the statement (including by way of altering, embellishing, strengthening, diluting or rephrasing the witness’s evidence).

It brings with it problems relating to client confidentiality, privilege and the threat of professional misconduct charges.

In *UK and R (on application of Munir) v Secretary of State for the Home Department (AI hallucinations)* [2026] UKUT 00081 (IAC), firm guidance was given about the use of AI by those handling cases before the Upper Tribunal, which is a superior court of record enjoying the same powers and authority as the High Court.

The claim form by which judicial review is sought in the Upper Tribunal has now been amended so as to require a legal representative to confirm by a statement of truth that any authority cited within the form or in any documents appended to it (a) exists; (b) may be located using the citation provided; and (c) supports the proposition of law for which it is cited.

‘It would be easy to think that this is a case about the naïve use of generative AI, but it is not merely about that; it is principally about supervision and the obligation to ensure that the tribunal is not misled.

‘It matters not how such citation errors come about. Whether they are inserted by a hapless trainee or by ChatGPT is really neither here nor there; the point is that the qualified legal professional with conduct of the matter is expected to ensure that such documents are checked, that errors are identified, and that only accurate documents are sent to the tribunal.

‘To fail to conduct such checks is wasteful of the tribunal’s time. It is also wasteful of an opponent’s time, thereby potentially leading (in judicial review proceedings) to larger awards of costs. None of that is in the interests of justice or, importantly, in the interests of clients who are often ill-equipped to fund contested judicial review proceedings.

‘In our judgement, a supervisor who fails to ensure that the work of a more junior fee-earner does not contain false cases or citations is likely to be more culpable than a lawyer who fails to ensure that his own work is free from such “hallucinations”. An individual in the latter camp fails the tribunal, the public and his lay client, whereas an individual in the former camp fails, in addition, to aid the development of more junior lawyers.

‘We also observe that to put client letters and decision letters from the Home Office into an open source AI tool, such as ChatGPT, is to place this information on the internet in the public domain, and thus to breach client confidentiality and waive legal privilege, and thus any regulated legal professional or firm that does so would, in addition to needing to bring this to the attention of their regulator, be advised to consult with the Information Commissioner’s Office. Closed source AI tools which do not place information in the public domain, such as Microsoft Copilot, are available for tasks such as summarising without these risks.’

I am indebted to *Civil Procedure News* issue 3 /2026 for the following nugget of wisdom: in a pre-trial in *United States v Heppner*, No. 25 Cr. 503 (S.D.N.Y.) (17 February 2026), US District Judge Rakoff considered ‘discussions’ that a party to the proceedings had had with Claude AI. The judge noted that any communication between the party and the AI tool was not between lawyer and client, and was not confidential, given the nature of the AI tool’s privacy policy. The communications were not carried out for the purpose of obtaining legal advice, and so were not subject to privilege.

Dominic Regan is director of Frenkel Topping’s Knowledge Hub