Neutral Citation Number: [2026] EWCA Civ 1204

Case No: CA-2025-001717
CA-2025-002144

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Sweeting
[2025] EWHC 1605 (KB)
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
Costs Judge Rowley
[2023] EWHC 2721 (SCCO)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/09/2026

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ANDREWS
(Sitting with COSTS JUDGE WHALAN as an assessor)

- -

Between :

MR STEPHEN TURNER	**Claimant/ Respondent**
- and -	
COUPLAND CAVENDISH LIMITED (trading as GOWING LAW)	**Defendant/ Appellant**

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- -

Erica Bedford and Thomas Mason (instructed by **Kain Knight (North & Midlands) Ltd**) for the **Appellant**
Robin Dunne and Priya Gopal (instructed by **JG Solicitors Ltd**) for the **Respondent**

Hearing date: 29 July 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 September 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. This case arises in consequence of the refusal by the Appellant firm of solicitors ("the Solicitors") to answer questions sent on behalf of the Respondent, their former client ("Mr Turner"), to whom they indisputably owed fiduciary duties, about whether they had received a commission or introduction fee from insurers from whom they had purchased after the event ("ATE") insurance for him.

2. ATE insurance is designed to protect the position of a claimant who would otherwise be exposed to paying legal costs, fees and disbursements in the event that their claim proves unsuccessful. It is commonly used alongside conditional fee agreements ("CFA") or damages-based agreements ("DBA") in claims for damages for personal injury.

3. Solicitors will often arrange the ATE insurance for their clients; those who regularly carry out this type of work will sometimes procure a master policy, to which clients can be added as the insured as and when the need arises. An ATE premium is payable by the client to the insurer pursuant to the contract of insurance to which they are the parties. Although it is common for the solicitor to make the payment on behalf of the client, it is not a solicitor's disbursement, and therefore it cannot be included in the solicitor's bill of costs. It will appear instead as an item on the solicitor's cash account. The amount of the premium therefore cannot be challenged through what Sir Terence Etherton MR described as "the convenient mechanism" of a Solicitor and Own Client Assessment ("SOCA") of the solicitor's bill of costs under s.70 of the Solicitors Act 1974 ("the 1974 Act"): see *Herbert v HH Law Ltd* [2019] EWCA Civ 527; [2019] 1 WLR 4253 ("*Herbert*") at [65] to [71].

4. It is common ground that it is incumbent on a solicitor to inform the client if they obtain a commission or some other financial reward from the ATE insurer: see *Tankard v John Fredericks Plastics Ltd* [2008] EWCA Civ 1375; [2009] 1 WLR 1731, and rule 16.1 of the SRA Financial Services (Conduct of Business) Rules.[1] In the light of this, the natural inference to be drawn from a solicitor's silence on the topic is that they did *not* receive such a payment. However, that inference is not necessarily reliable. Despite the obligation to tell the client, there have been some cases in which payments by the ATE insurers to solicitors or their affiliates, which clients were not informed about, have come to light fortuitously.

5. In the course of the hearing, I described the Solicitors' refusal to tell the client whether they received a commission from the ATE insurer (irrespective of whether they were obliged to do so) as "unattractive". I might have added "unwise". If they did not receive a commission, it would be simple enough to give the client express confirmation if they ask for it. Refusing to do so simply reinforces suspicion, and, on the face of it, would justify the client in seeking an account (for which the Solicitors might end up having to pay the costs, since their refusal to answer could well be considered unreasonable).

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[1] Moreover, Rule 5 of the SRA Financial Services (Conduct of Business) Rules obliges a solicitor to keep records of the amount of any such commission and of how they have accounted to the client for it.

6. However, the Solicitors' unedifying behaviour provides no justification for the device which Mr Turner's new legal representatives have used in this and other cases to try and avoid taking proceedings for an account. They sought an order, in the context of Part 8 proceedings under CPR 67.3 for the assessment of the Solicitors' bill of costs, that the Solicitors provide answers to 18 questions in a Request for Further Information ostensibly served under CPR Part 18, which included the following:

> "was any direct payment (whether by way of commission, discount, rebate, referral or marketing fee or otherwise) received by you from the ATE insurer or an insurance intermediary (or any associate of theirs)?"

Costs Judge Rowley ("the Costs Judge") refused to make the order. Sweeting J ("the Judge") reversed that decision. The question whether he was wrong to do so comes before this Court by way of second appeal.

7. As Lewison LJ observed when granting the Solicitors permission to appeal, this appeal raises important questions about the role of the cash account in the assessment of costs; a client's ability to interrogate that account; the impact of a solicitor's fiduciary duties on a costs assessment; and the correct threshold for the application of CPR Part 18. It has also exposed a possible deficiency in the rules of civil procedure that it may be appropriate for the Rules Committee or Parliament to address in due course.

8. However, the costs of resolving those questions far outweigh any benefit to the former client that might have resulted from a decision in his favour. In this case, the ATE premium was £245. Given that, even if it could be established that a commission had been paid to the Solicitors for which they would be obliged to account to the client, the commission would be no more than around 10% of the premium, the amount potentially in dispute in this case is unlikely to be more than £25.

9. Therefore, just as Sir Geoffrey Vos MR observed in *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387; [2023] 1 WLR 1043 ("*Belsner*") at [98], the client has never had any real or economic interest in the pursuit of this costly litigation. The only people who stand to gain from it are those who have made an industry out of challenging solicitors' costs. This is not a new phenomenon. Over 20 years ago, in *Burstein v Times Newspapers Ltd* [2002] EWCA Civ 1739; [2003] 1 Costs LR 111, Latham LJ observed at [29] that satellite litigation about costs had become a "growth industry, and one that is a blot on the civil justice system". He added that costs judges should be astute to prevent such proceedings from being protracted by allegations that are without substance.

10. The Costs Judge in this case (who is now the Senior Costs Judge), recognising that there was no particular reason to suppose that the Solicitors had received a secret commission, was plainly trying to do just that. He is to be commended for it. If there is a genuine widespread problem about solicitors flouting their professional obligations and concealing commissions on ATE premiums, this was not the way to go about solving it.

11. The fact that the fiduciary happens to be a solicitor rather than, say, a broker, and that the amount at stake is likely to be a tiny fraction of the fees and costs which would have to be expended, at least initially, by the client in seeking an account by the means prescribed by CPR Part 7 or Part 8, Part 40, Part 67.1 and PD 40A, do not justify seeking

to introduce a process for taking an account into the prescribed procedure for an assessment of the costs as between solicitor and client.

12. For the reasons set out in this judgment, I have concluded that the Court had no power to make the order that was sought, and that this appeal must therefore be allowed.

Background

13. In August 2019, Mr Turner instructed the Solicitors, who traded under the name “Gowing Law”, to act for him under a CFA in a claim for personal injury arising out of a road traffic accident. Sadly, it is not unusual for the claimant’s costs of pursuing a low-level claim of this nature to exceed the sums recovered under a settlement. In around October 2020, the claim was settled on terms which resulted in the payment of damages of £3,000, plus a modest sum in respect of Mr Turner’s party and party costs. Those costs were capped, because no proceedings had been commenced and the matter therefore fell to be treated as “non-contentious” business.

14. On 11 March 2022, the Solicitors delivered a statutory bill of costs in respect of their work. This indicated that their profit costs, inclusive of VAT, were £7,944 (more than twice the damages recovered, and almost four times the amount of costs recovered under the settlement). The success fee was £750 inclusive of VAT (exactly 25% of the damages, the percentage at which it was capped). The total disbursements (on two medical reports) were £700 plus VAT – they are uncontroversial. The success fee was deducted from Mr Turner’s damages. It was paid not to the Solicitors, but to an associated company registered in Gibraltar named AJG Ltd, apparently pursuant to a separate DBA entered into with Mr Turner.

15. Mr Turner exercised his right to have the bill of costs subjected to a detailed assessment by issuing proceedings within a month of its delivery. On 29 March 2022, his new solicitors, JG Solicitors (who do a lot of this type of work), issued a Part 8 claim form, as prescribed by CPR 67.3, seeking an order pursuant to s.70(1) of the 1974 Act that there be an assessment of the bill. The claim form requested that the assessment be restricted to (a) the profit costs and (b) the success fee elements of the bill.

16. CPR 46.10 sets out the procedure to be followed in a SOCA. Among other matters, it requires the solicitor to serve a breakdown of costs within 28 days of the order for costs to be assessed. PD 46 para 6.6 provides, inter alia, that:

> “The breakdown of costs referred to in rule 46.10 is a document which contains the following information –
>
> …
>
> (b) in applications under section 70 of the Solicitors Act 1974, a cash account showing money received by the solicitor to the credit of the client and sums paid out of that money on behalf of the client *but not payments out which were made in satisfaction of the bill or of any items which are claimed in the bill*.” [Emphasis added].

The practice direction therefore defines the ambit of a “cash account” in the context of a SOCA.

17. Para 6.7 of PD 46 requires the solicitor to serve with the costs breakdown copies of the fee notes of counsel and of any expert in respect of fees claimed in the breakdown, and written evidence of any disbursement claimed in excess of £250. Para 6.10 prescribes the form of request for a hearing and what documents must accompany that request. Para 6.14 provides that unless the court gives permission, only the solicitor whose bill is being assessed and parties who have served points of dispute may be heard, and only items specified in the points of dispute may be raised.

18. Para 6.19 provides that:

> "After the detailed assessment hearing is concluded, the court will:
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> a. complete the court copy of the bill so as to show the amount allowed;
>
> b. determine the result of the cash account;
>
> c. award the costs of the detailed assessment hearing in accordance with Section 70(8) of [the 1974 Act]; and
>
> d. issue a final costs certificate."

There is no provision for any further hearing after the detailed assessment hearing is concluded. On the face of it, by that time the costs judge will have heard all the arguments on the matters in dispute in the assessment, and will have been provided with all the material necessary to carry out the four tasks adumbrated in para 6.19.

19. There is no definition of a "cash account" in the 1974 Act. However, s.32(1)(b) makes provision for rules to be made as to "the keeping by solicitors of accounts containing particulars and information as to money received or held or paid by them for or on account of their clients." At the time of the retainer in this case, those rules were the SRA Accounts Rules[2], rule 29 of which provided that the solicitor is obliged to keep accounting records properly written up to show their dealings with:

> i) Client money received, held or paid by the solicitor, including client money held outside a client account; and
>
> ii) Any office money relating to any client or trust matter.

All dealings with client money must be appropriately recorded in a client cash account, or in a record of sums transferred from one client ledger account to another, and separate records must be kept for each client.

20. In simple terms, therefore, it should be possible to see, by looking at the cash account, how much money has come into the account and how much has gone out, and what (if any) balance is held to the credit of the client at any given time. As the Judge said in his judgment [2025] EWHC 1605 (KB) at [8]:

[2] Since replaced by the SRA Standards and Regulations, but there is no material difference.

> "The cash account constitutes a comprehensive record of all monetary transactions conducted by a solicitor on behalf of a client during the course of a retainer. Its fundamental purpose is to provide the client with a transparent overview of how their funds have been managed, and to ascertain any outstanding balance upon the termination of the professional relationship."

Unlike the bill of costs, there is no requirement in the 1974 Act for the solicitor to sign the cash account. Nor is there any such requirement in the relevant rules and practice directions.

21. The client does not need to wait until there is going to be a SOCA before seeking to see the cash account: CPR 67.2(1) confers a power on the court to make an order against the solicitor on the application of the client (or former client) to deliver a cash account, and to pay or deliver up any money which the solicitor has in his possession or control on behalf of the applicant. The application is made under CPR Part 8 or, if made in existing proceedings, by issuing an application notice under CPR 23.

22. On 18 July 2022, JG Solicitors sent the Solicitors a document entitled "Request from the Claimant to the Defendant for further information pursuant to CPR Part 18" ("the Request"). The Request was stated to be served within the Part 8 SOCA proceedings. Among other matters it said that "the information that the Claimant seeks should be disclosed as part of the Defendant's fiduciary duty to the Claimant and pursuant to the SRA Code of Conduct." The Request included questions, one of which I have quoted at [6] above, about whether the Solicitors had received a commission, directly or indirectly, from the ATE insurers, or any other financial benefit for brokering or recommending the policy.

23. Although at that stage Mr Turner and his legal advisers had not yet seen the Solicitors' cash account, the Request was said to arise because the Solicitors had deducted a sum in respect of the ATE premium from funds held on Mr Turner's behalf and:

> "The Claimant's *lawful liability to pay that sum is required to be determined by the Court as part of the exercise to determine the result of the Cash account* if it is contained (or is likely to be contained) within the Cash Account as a debit entry; *it is therefore a matter in dispute in the proceedings herein.*" [Emphasis added].

As I shall explain, both the statements I have highlighted were incorrect.

24. The Request was not answered. There was never any formal application made within the SOCA proceedings for an order directing service of replies to the Request.

25. On 29 September 2022, a consent order was signed agreeing to stay the Part 8 claim for an assessment behind two other cases, *Belsner* (above), a decision of this Court, and *Edwards and others v Slater and Gordon UK Ltd* [2022] EWHC 1091 (QB); [2022] Costs LR 861, ("*Edwards*") a decision of Ritchie J. The stay was lifted after the judgment in *Belsner* was handed down. *Belsner* does not directly concern any of the issues in this appeal, but one aspect of the decision in *Edwards* does.

26. *Edwards* concerned a number of appeals against decisions taken by Costs Judge Rowley in a group of cases raising the same or similar issues. In one of those appeals, *Raubenheimer*, Ritchie J overturned the Costs Judge's decision refusing to order the solicitors in that case to answer a Part 18 request concerning commissions arising from the taking out of ATE policies, in circumstances where the ATE insurer had gone into administration and the administrators had revealed that payments had been made by the insurer to an affiliate company of the solicitors. I shall return to consider that judgment in due course.

27. In the present case, following a directions hearing in the Senior Courts Costs Office ("SCCO") on 17 February 2023, the Costs Judge gave directions for a detailed assessment. His order stated that on making the detailed assessment:

> "the court will also assess the costs of these proceedings and certify what is due to or from either party in respect of the bill and the costs of these proceedings."

He ordered a breakdown of the costs, including a cash account, to be served; an electronic copy of the Solicitors' file to be provided to Mr Turner; and the service of points of dispute and a reply.

28. The cash account, which was served on 10 March 2023, has very few entries, beginning with the £3,000 damages received on 26 October 2020. The next entries are the deductions for the success fee and the ATE premium respectively, and the payment out to the client of the balance of the damages (£2,005). The next credit entry is on 29 October 2020 for costs received (under the settlement) of £2,090.72. The account then itemises various deductions which, to the extent that they are payments in respect of solicitors' disbursements, should not have been included, though nothing turns on this. The balance is shown as zero.

29. There was some further delay before any hearing took place, but it is unnecessary to go into the detail of why that occurred. Suffice it to say that the Points of Dispute originally served on behalf of Mr Turner were set aside by the Costs Judge on 13 July 2023, and Mr Turner was ordered to serve fresh Points of Dispute by 4 August 2023 and the Solicitors to serve their replies by 25 August 2023.

30. The final document setting out the issues for the Costs Judge to determine and the parties' rival positions runs to 34 pages. The relevant part of it appears on the second page, in which it was said that [Mr Turner] "disputes the Cash Account because he is not satisfied that there has been full and accurate disclosure of the position in relation to (a) undisclosed commissions and/or other secret profits and (b) disbursement of legal fees" (a reference to the success fee). There was no dispute in respect of any of the other entries in the cash account. Reference was made to *Edwards*, and it was alleged that the SOCA could not conclude unless this "dispute" was resolved:

> "The Claimant invites the Defendant to respond to the Part 18 Request that has already been raised (on 18th July 2022) and to adjust the Cash Account to reflect any receipts or payments that may have been omitted. Once the Defendant has responded the Claimant will be in a position to take stock and, if the cash account remains in dispute, to propose suitable directions to resolve the point."

31. The Solicitors replied as follows:

> "The Part 18 request on 18/07/2022 was another fishing expedition and required no response. The Cash Account is an accurate representation of the monies received and paid."

32. The assessment was listed for hearing by the Costs Judge during the period 13 to 15 September 2023, as part of a group of SOCAs then being handled for the claimants by JG Solicitors which raised similar issues, although Mr Turner's was the only assessment involving these Solicitors. The hearing in Mr Turner's case took place on 14 September 2023, but the time was taken up with preliminary issues and the assessment was adjourned, with further directions being given.

33. A "consolidated skeleton argument", served on behalf of all the claimants in this group of assessments on 11 September 2023, three days before the hearing of Mr Turner's case, was the first indication that the Costs Judge was going to be asked to make an order requiring responses to the Request. The submissions in the skeleton argument relied heavily on the decision in *Edwards*. The Request itself was not in the bundle for the hearing, but the skeleton argument stated that the questions in it were "all but identical to the questions ordered to be answered in *Edwards.*" It was submitted that the cash account was a matter in dispute in the proceedings, and that although it was not part of the detailed assessment of the bill, a dispute about the cash account had to be resolved before a final order could be made in the claim. These submissions were developed by Mr Turner's then advocate in the course of oral argument.

The decision of the Costs Judge

34. The Costs Judge reserved his judgment, which was handed down on 31 October 2023, [2023] EWHC 2721 (SCCO). He dealt with the application for an order directing answers to the Request at [36] to [59]. At [37] he expressed concern that the Request itself was not before him, so that he could not consider its scope. He said it seemed odd to him, but seemingly not to the parties. His concern was unsurprising: it is, to say the least, unorthodox to ask the Court to make an order of this nature when it has not seen the questions to which it is being asked to mandate an answer. Indeed PD 18, para 5.2, specifically requires an application for an order under Part 18 to set out or attach the text of the order sought, and to specify the matter or matters in respect of which the information is sought. The concern of the Costs Judge was reinforced by the fact that he had heard submissions in response to the application indicating that the Request was not confined to questions about the ATE insurance and any undisclosed commissions.

35. At [38] and [39] the Costs Judge observed that "ostensibly" these requests arose out of a contention that the cash account is in dispute. He said that since the ATE premium will be found in the cash account, a practice had grown up of stating that the cash account is in dispute as a means by which to interrogate the circumstances in which the ATE policy was taken out. It had previously appeared that this meant the possible reduction of the premium to take account of any undisclosed commissions but, as Mr Turner's advocate had made clear in oral submissions, "such lack of disclosure may open the gateway to all manner of relief and remedies via provisions such as the Financial Services and Markets Act 2000." This demonstrates that the Costs Judge was alive to the fact that the alleged "dispute" as to the cash account was a device to enable

those acting for the clients to obtain information which would enable them to dig deeper into the circumstances surrounding the payment of the ATE premium.

36. The Costs Judge then quoted from his decision in *Brown* v *JMW Solicitors LLP* [2022] EWHC 2848 (SCCO), ("*Brown*") a case in which he had distinguished, and refused to follow, *Edwards*. The distinction he drew was that in *Brown* there was no evidence before the Court regarding alleged commissions which would justify Part 18 Requests being answered. He then observed at [41]:

> "In this case I not only have a complete lack of evidence regarding alleged commissions but… no part 18 request to consider in order to see what questions have been posed in any event."

37. The Costs Judge refused the application at [59] partly because the Request was not before the Court, stating "it fails procedurally for the absence of any evidence, including documents in support such as the requests themselves". He said that the claimant had no entitlement to "wide ranging access to the defendant's records in the absence of the claimant putting forward a positive case in support of the Part 18 Requests that have apparently been served."

The decision of the Judge

38. Mr Turner sought permission to appeal to the High Court in respect of various aspects of the Costs Judge's decision. He was granted permission on two matters: (i) the refusal to order the provision of replies to the Request and (ii) the Costs Judge's refusal to order disclosure of the number of the Gibraltar company which received the success fee. The latter point has become academic because the information sought has been provided, and I need say no more about it.

39. So far as the refusal to direct the Solicitors to serve replies to the Request was concerned, the grounds of appeal were that the Costs Judge was bound by the decision in *Edwards,* which it was alleged "decided that where there was in the course of proceedings for assessment under the Solicitors Act 1974 a dispute over items in the cash account, that dispute must be resolved." It was also argued, in reliance on *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency* Ltd [1995] QB 174 that as a former client, Mr Turner was entitled to information from the solicitor as agent in relation to transactions undertaken in his (the client's) name. That may well be so, but it does not establish that a Part 18 request in SOCA proceedings is a legitimate means by which to extract that information if it is not provided voluntarily.

40. The appeal was heard on 23 October 2024. The Request was put in a supplementary bundle for that appeal, to which the Solicitors objected, since the Costs Judge had not seen it, and the fact he had not seen it was a reason for his decision to refuse the application. The Judge took the pragmatic approach of allowing the Request to be adduced in evidence, but heard counsel's submissions on the question of whether the Costs Judge was right to refuse to make the order as a matter of case management, in circumstances where he had not seen the Request and it appeared that there was a dispute about its scope. Ms Gopal, who appeared for Mr Turner on that occasion, submitted that although the Costs Judge had expressed concerns about not seeing the Request, he did actually address the merits of the application and refused it because

there was no evidence to back the client's suspicion that a commission had been received. She said that in substance, the Costs Judge knew the nature of the questions, having been involved in many of these cases, and he had been told that they were in essence the same as the questions ordered to be answered in *Edwards*.

41. It appears from the transcript that, at the time of the hearing, the Judge was not persuaded by those submissions. He indicated to Ms Bedford, counsel for the Solicitors, that he was minded to rule that the Costs Judge was entitled to deal with the matter on what the Judge then described as "an obvious procedural basis, as he did", which would mean dismissing the appeal. However, envisaging that a fresh application would then be made in the SCCO curing the procedural deficiencies, the Judge also said he thought there was no point in sending the matter back to the SCCO, and that the issue could be dealt with afresh on a re-hearing of the application. The High Court had all the necessary material to do so, and the benefit of knowing how the Costs Judge would have dealt with the application if the Request had been before him. Ms Bedford did not seek to persuade him against adopting that approach.

42. Notwithstanding this, by the time he came to hand down his judgment some 9 months later, on 26 June 2025, [2025] EWHC 1605 (KB), the Judge had changed his mind and allowed the appeal. He quoted what the Costs Judge had said at [37] of the judgment at first instance, and then criticised the Solicitors for not taking a procedural objection at the hearing, seemingly disregarding the fact that it was the Costs Judge himself who had decided at [59] of his judgment that he was not prepared to make an order in respect of the Request when he did not have the questions before him. That was, in my judgment, an unimpeachable case management decision, and the first appeal should have been dismissed on that basis. The approach which the Judge initially proposed was the correct one, though if he had taken it, the matter would have still come before this Court. The Judge would have been entitled to decide the application afresh with the benefit of the Request before him, and it is clear that he would have ordered the Solicitors to answer the Request.

43. The Judge recorded in his judgment at [45] that it was submitted in the Appellant's written and oral argument that whether the Part 18 questions should be answered turned on two key tests; first, whether the cash account is a matter in dispute in the proceedings, and secondly, whether the Court has jurisdiction within these proceedings to either approve or adjust the cash account based on the Respondent's answers and the subsequent resolution of any dispute. It was submitted that the second test had been conclusively answered in the Appellant's favour by the decision on the *Raubenheimer* appeal in *Edwards*. At [48] the Judge recorded the argument advanced by Ms Gopal that the need to "certify what is due" under s.70(7) of the 1974 Act requires the Court to be satisfied that the information provided in the cash account is accurate and necessitates resolving disputes within the cash account, an approach which Ritchie J's judgment in the *Raubenheimer* appeal in *Edwards* supports.

44. At [61] the Judge said that the Costs Judge appeared to have treated the threshold for a Part 18 request as being equivalent to establishing an arguable case of the sort that would be needed for pre-action disclosure, and to have decided the issue before him on that basis, and by reference to the observation at [38] of his judgment about the practice of stating that the cash account is in dispute as a means of interrogating the circumstances in which the ATE policy was taken out. The Judge said that most of the questions (in the Request) were aimed at direct or indirect commissions or

remuneration, and that even if there was a practice of the type described by the Costs Judge, "there was equally recognition of a practice of [solicitors] receiving commissions either directly or through an entity in common ownership". He appeared to have based this on *Raubenheimer* and on *Bendriss v Nicholson Jones Suttons Solicitors* [2024] EWHC 1100 (SCCO), which indicated that answers given voluntarily to a Part 18 Request served in a SOCA had revealed the possibility that such a commission was paid to the solicitors concerned.

45. The Judge pointed out at [65] that where there may have been a "secret" commission the client will most likely be unaware of whether or not any sum has been paid. He said there was no suggestion that the arrangement which surfaced in *Raubenheimer* was in itself so unusual or extraordinary that ordering further information to be provided would be unnecessary or disproportionate in other cases. He concluded at [67] that there was no threshold for a Part 18 request beyond the condition that the information sought must relate to a matter in dispute in the proceedings, and there is no requirement on the claimant to "prove" something which is not within their knowledge, especially when it lies within the exclusive knowledge of the other party. It was wrong to equate the threshold for a Part 18 request with the more stringent requirements for specific disclosure or pre-action disclosure. He then said that it is, and always has been, incumbent on the solicitor to satisfy the Court as to the accuracy of the cash account, not for the client to disprove it, and that queries raised by the client or the court itself placed the account in dispute. He directed the Request to be answered in its entirety.

46. The Solicitors sought and obtained permission to appeal on seven grounds, although six were acknowledged to be points which supported the principal ground, Ground 1, namely, that the Judge was wrong in law and fact to order the answers to the Part 18 requests within the confines of a SOCA assessment under s.70 of the 1974 Act. Grounds 6 and 7 contended that the Judge was wrong to find that the cash account was placed in dispute in the proceedings because of queries and requests for clarification, and that he incorrectly approached the interpretation of s.70(7) of the 1974 Act and the "duty to certify" what is due to or by the solicitor in respect of the bill and the costs of the assessment.

The Respondent's preliminary objection

47. A statement was filed under PD 52C para 19 objecting to the grant of permission to appeal, but that document was not included in the appeal bundles. In it, Mr Turner opposed the grant of permission inter alia on the basis that the question of whether a matter was "in dispute," so as to meet the threshold test under CPR 18.1, was quintessentially one of fact. No jurisdictional objections were raised. When permission was granted on all grounds, no Respondent's Notice was served. Despite this, Mr Dunne (who appeared in this appeal with Ms Gopal on behalf of Mr Turner) argued that it was not open to the Solicitors to contend that there was no dispute as to the cash account. Nor could they argue that the duty to certify what was due under s.70(7) of the 1974 Act did not confer jurisdiction on the Costs Judge to determine disputes about the cash account, including disputes about whether the sums in the cash account were too high or too low.

48. Mr Dunne alleged that the Solicitors were seeking to run a new case which had not been argued in the lower courts. He objected to the citation of authorities that had not been cited to the Costs Judge or the Judge, and contended that the only question that this

Court was required to determine was whether the Judge was right to find that there was no more stringent threshold test of the type contemplated by the Costs Judge. Mr Dunne said that if the Solicitors had wished to raise arguments about any other matters, they should have served a Respondent's Notice in answer to the first appeal.

49. I cannot accept those submissions. As was pointed out by Ms Bedford (who appeared with Mr Mason on behalf of the Solicitors), the interpretation and ambit of s.70(7) of the 1974 Act and of the obligation of the Court in PD 46 para 6.19 to "determine the result of the cash account" after the detailed assessment hearing is concluded, was plainly a matter in issue before the Costs Judge and in the first appeal. The consolidated skeleton argument served on behalf of Mr Turner on 11 September 2023 contained a section headed "Is the Cash Account a Matter in Dispute in these proceedings?" which contained detailed submissions as to why it was, and ended by saying this:

> "what neither Court nor Defendant can do however is to ignore the fact of a disputed Cash Account in the hope that it goes away. That will not happen. If the Claimants are not satisfied that the unverified Cash Accounts are correct, they will remain in dispute, and those disputes will need to be resolved."

50. An email was sent by Mr Turner's then advocate to the Costs Judge on 14 September at 4.37pm, attaching the appellant's skeleton argument in the appeal before Ritchie J in *Edwards* and making further lengthy written submissions about it. This was apparently sent in response to a request by the Costs Judge for a copy of that appeal skeleton to support an oral submission made at the hearing that what was meant by a s.70(7) "certification" was a matter that had been raised before Ritchie J. After an initial protest, there was then a detailed response from the Solicitors' then advocate. The Costs Judge politely acknowledged both sets of submissions, describing them as "exceeding his expectations," and said that if he felt he would benefit from any more submissions he would ask for them.

51. It is equally clear from examining the way in which Mr Turner's case was argued before the Judge that the question of the Court's jurisdiction was raised in that appeal fairly and squarely on behalf of Mr Turner himself, initially in the grounds of appeal by submitting that *Edwards* had decided that disputes about the cash account must be resolved in the course of the Part 8 proceedings, then in the skeleton argument at para 28, and finally in his counsel's oral argument, as recorded by the Judge at [45] of the judgment, referred to at [43] above.

52. The Solicitors' skeleton argument on the appeal to the Judge took issue with the appellant's reliance on *Edwards* as settling the issue of jurisdiction, criticising the submissions made on behalf of Mr Turner as a mischaracterisation of what Ritchie J actually decided. They specifically contended at [49] that:

> "wide ranging arguments as to secret commissions based on allegations of breach of fiduciary duties with potential relief and remedies under the Financial Services and Markets Act 2000 are not matters which fall under a s.70 assessment."

Reliance was placed on the decision of Johnson J in *Lisa Jones v Richard Slade and Company Ltd* [2022] EWHC 1968 (QB) ("*Jones v Slade*") for the proposition that general issues concerning breach of fiduciary duty that result in equitable remedies other than resolving whether an item was reasonably incurred are issues which fall outside the jurisdiction of a costs judge on a s.70 assessment.

53. In those circumstances, I am satisfied that there is no need for the Solicitors to rely on the principles adumbrated in *Singh v Dass* [2019] EWCA Civ 360 at [15] to [18]; these are not new points which were not raised in the lower courts. However, even if they were, they are matters of law which require no further fact-findings or evidence; they do not take the opposing party by surprise, as significant notice has been given; and although Mr Dunne claimed that his client had suffered prejudice, when asked to identify what the prejudice was, he was unable to do so.

54. Moreover, and in any event, the issue is one of jurisdiction, which the Court is bound to consider for itself irrespective of whether one of the parties raises it or has raised it before. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, which concerned a claim for passing off, the appellants, Chobani, (the defendants in the court below) sought to raise an issue about the court's jurisdiction to grant injunctive relief which had not been argued before Briggs J. Chobani's counsel frankly conceded that the points were not argued because they were overlooked. However, he contended that the points needed to be raised to prevent the Court from proceeding on a false legal basis and in a manner contrary to EU law, and that the Court of Appeal should therefore permit Chobani to amend at that late stage. Permission was granted.

55. Lewison LJ identified at [150] that there are limited exceptions to the principle that a party is not entitled to raise on appeal a point which could have been raised in the lower court. One is where it emerges on appeal that neither the lower court nor the Court of Appeal has jurisdiction to grant the relief sought. He illustrated this by reference to earlier authorities:

> "152. … *Davies v Warwick* [1943] KB 329 concerned the rent recoverable under a tenancy protected by the Rent Restriction Acts. A new point, not taken at trial, was raised in the Court of Appeal. Goddard LJ said:
>
> > "The cases cited show that the effect of s. 3 of the Act of 1933, which restricts the power of the court to grant orders for possession, is not to afford a statutory defence to a party, but to limit the jurisdiction of the court. If the court of trial or the Court of Appeal finds that the case is one in which it is debarred from granting an order for possession, it is the duty of the court to refuse it, even though the statute is not raised by the defendant, because there is no jurisdiction to grant it, but that, in my opinion, is all that the cases quoted establish."
>
> 153. This observation was applied by Morton LJ in another Rent Act case, *Sharpe v Nicholls* [1945] KB 382, but in a dissenting

judgment. However, it was approved (together with Morton LJ's own approval of it) in *Snell v Unity Finance Co Ltd.*[3]

154. It seems to me that the point that Chobani seeks to raise is one that potentially goes to the jurisdiction of the court… If, therefore, we are satisfied that all relevant facts have been found, we should allow the point to be taken, even though it is raised for the first time on appeal."

56. For all those reasons, I am satisfied that this Court is entitled to consider whether there was power to make an order of the nature sought by Mr Turner.

Was the cash account a matter in dispute in the proceedings?

57. CPR Part 18 provides, inter alia, as follows:

"18.1(1) The court may at any time order a party to-

a. Clarify any matter which is in dispute in the proceedings.

b. Give additional information in relation to any such matter."

As I have already mentioned, PD 18, para 5, provides that an application notice for an order under Part 18 should set out or have attached to it the text of the order sought, and in particular should specify the matter or matters in respect of which the information is sought. That indicates an intention that before such an order is made, the judge should know precisely what is being requested and why. Those requirements were simply ignored in the present case.

58. The information sought must relate to a matter which is in dispute in the proceedings. As Vos J observed in *Trader Publishing Ltd v Autotrader.com Inc* [2010] EWHC 142 (Ch) at [16]:

"It is not part of the function of Part 18 to enable claimants to ask questions so as to elicit information which might give them claims against other defendants or indeed further separate claims against the Defendants that have been sued."

The Request itself, which the Costs Judge did not see, made it clear that the cash account was said to be disputed because the client was not satisfied that there had been full and accurate disclosure of the position in relation to undisclosed commissions and/or other secret profits. Two points emerge from this. First, this was in substance an attempt to obtain disclosure without making an application for disclosure, rather than an attempt to obtain clarification or further information about something already in issue in the proceedings. Secondly, there was no dispute about the accuracy of any of the figures appearing in the cash account. The concern was that items for which the Solicitors would be liable to account to the client had not been included in the cash account. But

[3] [1964] 2 QB 203

as *Jones v Slade* established, it is not permissible to make a claim for the disgorging of secret profits within a SOCA.

59. The oral submissions of Mr Turner's advocate to the Costs Judge about the Solicitors' lack of disclosure opening up "all manner of relief and remedies via provisions such as the Financial Services and Markets Act 2000" suggested that the Request was intended for purposes extraneous to the assessment. That is plainly impermissible. However, as Mr Dunne pointed out, that was not the basis on which the Costs Judge considered and refused the application. Mr Dunne submitted that a dispute as to the cash account is a matter in dispute in the proceedings.

60. The first task, therefore, is to identify what is meant by "the proceedings". The application for a SOCA is governed by CPR 67.3, which requires the applicant to issue a Part 8 Claim Form. The subject-matter of the Part 8 proceedings is the Solicitors' bill. Mr Turner is seeking an order under Part III of the 1974 Act for an assessment of the bill pursuant to s.70(1), which empowers the Court to order that no action be commenced on the bill "until the assessment is completed." The proceedings will resolve how much (if any) money remains due and owing to the solicitor from the client in respect of the solicitor's recoverable costs: that sum will then be an actionable debt.

61. As Lord Hamblen JSC said in *Menzies v Oakwood Solicitors Ltd* [2024] UKSC 14; [2024] I WLR 4245 ("*Menzies*") at [40]:

> ".. section 70 is concerned with the right to assess solicitors' bills of costs. *It is focused on the proper amount to be charged by way of costs, having regard to whether they have been reasonably incurred and are reasonable in amount.* The right to seek assessment, and any assessment carried out by the court, involves *a dispute as to the amount of costs claimed and is directed at the specifics of the bill of costs*." [Emphasis added].

He explained at [43] that:

> "… the requirements that bills of costs be delivered, that the bills comply with statutory conditions, and the right to have those bills assessed are concerned with the protection of the interests of the client – the consumer of solicitors' services. The court's power to assess costs exists to ensure that excessive costs are not claimed from the client."

That makes it clear that the particular aspect of consumer protection with which the statutory scheme for assessment is concerned is protection against overcharging for the solicitor's services.

62. S. 70(5) of the 1974 Act provides that:

> "An order for the assessment of a bill made on an application under this section by the party chargeable with the bill shall, if he so requests, be an order for the assessment of the profit costs covered by the bill."

S. 70(6) provides that:

> "Subject to subsection (5), the court may under this section order the assessment of all the costs, or of the profit costs, or of the costs other than profit costs, and where part of the costs is not to be assessed, may allow an action to be commenced or to be continued for that part of the costs."

S.70(12) makes it clear that "costs" includes disbursements. It defines "profit costs" as:

> "costs other than counsel's fees or costs payable in the discharge of a liability incurred by the solicitor on behalf of the party chargeable."

63. As noted at [15] above, Mr Turner's claim form requested assessment of the profit costs and the success fee only. He did not seek any remedies in respect of the cash account. The Part 8 proceedings were proceedings for an assessment, pursuant to a self-contained statutory scheme, limited to those two items on the bill, and the costs of the assessment. They were not proceedings for an account to be taken as between solicitor and client. A dispute about costs is not a dispute about whether the cash account is accurate or complete.

64. The proceedings do not come to an end when the hearing of the assessment of the bill has been carried out, and the amount that the Solicitors were entitled to charge for their services has been ascertained, because of s.70(7). This provides that:

> "Every order for the assessment of a bill shall require the costs officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the assessment."

On the face of that subsection, leaving aside the costs of the assessment, the costs judge's task is to assess the costs claimed by the solicitor in the bill (or such of those costs as the client has requested to be assessed) and then certify what is due to or by the solicitor *in respect of the bill*. The costs judge is not engaged in an inquiry into what may or may not be due from solicitor to client (or vice versa) in respect of matters other than the bill or the costs of the assessment. PD 46 para 6.19, quoted at [18] above, which sets out the costs judge's four tasks after the hearing has concluded, is consistent with this. Certification is the point at which the assessment is "completed" for the purpose of releasing the statutory embargo on proceedings to recover what is due. The amount of the debt will be the figure certified. The proceedings come to an end when the certificate is produced.

65. It would make no sense for the Court to certify an amount as "due" to the solicitor in respect of the bill if the solicitor has already been paid that amount. The jurisdiction of the Court conferred by s.70(7) after the assessment has taken place is to compute and certify the final amount or balance owing and to whom in respect of the bill and the costs of the assessment, having regard to any payments on account of the costs that may already have been made, and the balance (if any) the solicitor is holding to the credit of the client in the cash account. The costs judge adds up those items, compares the total with the assessed amount of the bill and the costs of the assessment, and certifies the balance. On the face of it, that is a purely arithmetical exercise, in keeping with the summary nature of the procedure. No further hearing is contemplated either by the 1974 Act, or by the relevant provisions of the CPR and the accompanying practice directions.

66. The cash account is something separate from the bill, and cannot form part of the assessment, as confirmed in *Herbert*. Its function in the context of a SOCA assessment is to provide financial accounting information to enable the costs judge to certify the final amount to be paid to or by the solicitor in respect of the bill and the costs of the assessment. If the client has paid more on account than the amount which the costs judge has determined on the assessment was reasonably incurred and charged for the solicitor's services, the solicitor will be obliged to refund the surplus. When the practice direction refers to the costs judge determining the result of the cash account, it means no more than ascertaining whether there is any balance credited to the client which must be set off against the sum due to the solicitor under the assessed bill.

67. It therefore seems to me to be self-evident that in looking at the cash account for the purposes of certifying what is due to or by the solicitor in respect of the bill, the costs judge will be concerned *only* with those entries which identify how much the solicitor has already been paid towards the bill, and with the amount of money, if any, that is currently held to the credit of the client in the account. Other entries in the cash account, or alleged omissions of sums that should have been credited to it (other than payments on account of the bill) are irrelevant to the task the costs judge is performing.

68. It is no part of that task to certify the cash account. If the balance on the cash account shows an amount held to the credit of the client, then (save to the extent that the figure is misstated, e.g. because of a mathematical error or the mistaken transposition of two figures) the costs judge is not concerned with how it was arrived at or whether it should have been higher or lower. All the costs judge needs to know, in order to carry out the Court's task, is what the figure is. He or she does not need to undertake any inquiries about, let alone resolve disputes about, payments made on the client's behalf or moneys that should have been credited to the client, including in respect of secret commissions that may or may not have been received by the solicitor or an affiliate. If the client believes that the solicitor has not fully accounted to them, the remedy lies elsewhere.

69. I agree with the Judge that the only threshold condition for a Part 18 request is that the information sought must relate to a matter in dispute in the proceedings, and that it would be wrong in principle to equate that threshold with the more stringent requirements for specific disclosure. However, a party cannot use Part 18 as a means of circumventing those more stringent requirements when the application is in reality an application for disclosure. The Part 18 threshold *must* be crossed: see *Al Saud v Gibbs* [2022] EWHC 706 (Comm); [2022] 1 WLR 3082. That means there must be a genuine dispute in existence at the time when the request is made. Moreover, the request must be necessary and proportionate; if it appears to be a fishing expedition aimed at obtaining information which is not directly relevant to the proceedings in hand, the Court may refuse to order that it be answered as a matter of discretion.

70. What, then, would constitute a "matter in dispute" in the SOCA proceedings? It seems to me that a "matter in dispute" is something in issue in the proceedings that the Court will be required to resolve or determine in those proceedings if the parties are unable to resolve it themselves. In Part 7 proceedings, identifying what is in issue is likely to be a simple matter of looking at the statements of case, to identify (a) what is actively contentious and (b) what is required to be proved (either of which would qualify). However, there are no statements of case in Part 8 proceedings. The question then is what are those proceedings designed to achieve, and what issues must be resolved in order to achieve it?

71. The overarching matter in dispute between the client and the solicitor in a SOCA is how much the solicitor should be paid for their services. This in turn will involve disputes about whether the costs claimed by the solicitor are reasonable in amount and whether they have been reasonably incurred. Accordingly, one would expect a "matter in dispute" in the proceedings to relate to those issues. Consistently with that, CPR 47.9 is concerned with the service of points of dispute about the bill. CPR 47.9(1) provides that:

> "The paying party and any other party to the detailed assessment proceedings may dispute *any item in the bill of costs* by serving points of dispute on
>
> a. the receiving party and
>
> b. every other party to the detailed assessment proceedings."

[Emphasis added].

CPR 47.9 does not envisage the service of points of dispute in respect of the cash account or any item on the cash account. Nor does any other procedural rule.

72. PD 47 sets out at para 8 the requirements of points of dispute served pursuant to CPR 47. It requires that they be short and to the point, that they should follow Precedent G in the Schedule of Costs Precedents annexed to PD 47, that they should identify any general points or matters of principle which require decision before the individual items in the bill are addressed, and that they should identify specific points, stating concisely the nature and grounds of dispute. The practice direction does not expand the scope of what may be disputed in the points of dispute to cover something which is not, and cannot be, an item in the bill of costs.

73. CPR 47 and the related practice direction are therefore purely concerned with disputes regarding items in the bill of costs, which are the matters that the costs judge is going to be scrutinising. It follows that a request may be made under Part 18 for information concerning any issue the costs judge may be called on to resolve regarding such items, e.g. "why was so much time spent on a particular task?" or, "why was this matter handled by a partner instead of by someone more junior?" A request of that type may help to resolve or narrow issues that the costs judge has to decide in the assessment. However, these provisions provide no support for the contention that a dispute about the cash account or any item in it is "a matter in dispute in the proceedings". If anything, they tend to suggest the contrary.

74. Mr Dunne characterised this as a lacuna in the rules. However, if it had been intended that a costs judge should embark on a wide-ranging investigation of the constituent elements in the cash account, (deciding, for example, if the ATE premium was lawfully charged to the client) before certifying their accuracy, I would have expected there to be some rule or at the very least a practice direction relating to that process. It would not be possible to use the Court's general case management powers under CPR 3.1 to fill the gap; those powers can neither be used to circumvent the requirements of a specific rule or practice direction, nor to extend the ambit of a Part 18 request to something that is not a matter with which the SOCA proceedings are concerned.

75. Para 6.6(b) of PD 46 (set out at [16] above) merely prescribes what the cash account should contain. It does not permit the costs judge to carry out a merits-based review of the items in the cash account, as opposed to an arithmetical review subsequent to an assessment of the bill of costs (which review might encompass, for example, determining whether the solicitor had mistakenly overlooked a payment made on account of costs by the client). That was the fourth ground of appeal in *Herbert*, which the Court of Appeal left open in that case because it did not need to decide it.

76. However, the Court did decide in *Herbert* that it was not possible to challenge the amount of the ATE premium in the assessment. The notion that the client could nevertheless contend that the ATE premium was too high, and therefore there was a dispute about the amount that had been debited to the cash account in respect of the premium, which would need to be resolved before the costs judge could certify what was due in respect of the bill, runs contrary to that decision. If that were possible, the solution proposed by the Master of the Rolls in *Herbert* of taking steps to bring the ATE premium within the ambit of the bill of costs, would have been completely unnecessary.

77. No doubt in recognition of this, Ritchie J accepted in *Edwards/Raubenheimer* that it was not possible to resolve a dispute about the amount of the ATE premium, as he put it, "by the back door" via an alleged dispute about the cash account. If that is right, as I consider it is, then no distinction can be drawn between a dispute about how much should have been *debited* to the account in respect of the ATE premium, and a dispute about whether a sum should have been *credited* to the account in respect of a commission on the ATE premium. The SOCA proceedings are simply not concerned with matters of that nature. Even if a mere inquiry about the computation of a figure on the credit or debit side of the cash account is enough to constitute a "dispute", which I doubt, a dispute as to whether the solicitor received a secret commission is not, and never could be, a dispute *in the proceedings*.

78. I am fortified in that conclusion by *Jones v Slade* (above). A dispute about a breach of fiduciary duty which it is unnecessary for the costs judge to resolve in order to determine whether items in the bill were reasonable in amount or reasonably incurred cannot be introduced into the assessment itself. That being so, just as with the computation of the ATE premium, it would make no sense to be able to introduce such an issue into the same proceedings at the later stage between assessment and certification, by reference to an item on the cash account which has no bearing on the question of how much the solicitor has been paid towards the amount due as a result of the assessment.

79. Ms Bedford drew our attention to two authorities which had not been cited previously in this case, nor shown to Ritchie J in *Edwards*. Both are consistent with what I consider to be the natural interpretation of s.70(7). The first case is *Jones v James* (1839) 1 Beav 307. A Master, when taxing (assessing) a solicitor's bills under an order for taxation which was in materially identical terms to the standard order for assessment which is now made under the statutory scheme, found that there were two sums held by the solicitor, Mr Thomas, in respect of business transactions he had conducted on behalf of his client, for which he was liable to account, and set those sums off against the taxed costs. The Court of Appeal found that the Master was entitled to do so, because it was accepted that there had been an agreement between the parties that Mr Thomas could appropriate those sums towards the payment of his bills.

80. Lord Langdale MR said this at pp 960–961:

> "Upon this order, it is clear, that the Master had something to do beyond taxing the bills of costs; he had to tax the several items of the bills of costs; and if he found that they had been paid, certain things were to be done; and if he found that Thomas had been overpaid, then something else was to be done; for Thomas was in such case to refund what had been overpaid. It was, therefore, necessary for the Master to do something in addition to the taxation of the costs. I quite agree, that upon such an order, the Master *has no authority to take an account of pecuniary matters between the parties which are quite foreign to the bills of costs*; but the question here is whether the transaction amounted to payment or appropriation." [Emphasis added].

81. This case established that it was permissible for the Master, when deciding and certifying what was payable, and by whom, after assessment of the bill, to take into account not only those payments made by the client for the express purpose of paying the solicitor's bill, but also moneys received by the solicitor for the client and shown on the cash account, which the parties had agreed would be appropriated or used towards satisfaction of the solicitor's bill. However, the scope of the order did not extend to the taking of a general account as between solicitor and client. On the contrary, the Master had no authority to take an account of any pecuniary matters which were "foreign to the bills of costs."

82. *Jones v James* was approved and followed in *Cooper v Ewart* (1847) 2 Ph 362; 41 ER 983. As in *Jones v James*, the issue was whether the Master had properly discharged his duty in obedience to the order for taxation. The Lord Chancellor, Lord Cottenham, referred to a direction in the order that "in case the Master found the solicitors to have been overpaid, they shall refund." He observed that it would not be possible to ascertain that, without "enquiring what sums of money the solicitors have received on behalf of their clients applicable to such payment." The duty of the Court was to inquire into whether the bills had been paid or overpaid, and for that purpose it was proper to enquire whether the solicitor had in his hands money applicable to the payment of the bills, and which he had the right to retain for that purpose "independently of any express agreement or appropriation". He gave the following example at [365]:

> "Suppose, for instance, a solicitor gets a sum of £500 out of Court under an order; he has a right to retain it until his bill be paid …Then, is the client first of all to be called upon to pay £100 on the bill of costs, and then get, if he can, his £500 out of the solicitor's hands? If a proposition so extraordinary were founded on an Act of Parliament, or were the result of decisions of this Court, I should be compelled, however reluctantly, to follow it. But I find no such proposition laid down anywhere. I find the Court continually involved in difficulties, in saying what is or what is not to be taken into account in the exercise of its summary jurisdiction in these cases; but I find it nowhere laid down that the money of the client coming to the hands of the solicitor in his character of solicitor are not to be [a] matter of enquiry before the client is called upon to pay the amount of his bill."

83. Both cases concerned taxations which took place before the Solicitors Act 1843, which introduced the first statutory scheme for assessment, although *Cooper v Ewart* was decided after it was enacted. A useful summary of the history of the various statutory provisions leading up to the current statutory scheme is to be found in *Menzies* at [49] to [57]. To the extent that the statutory scheme involves the Court, post-assessment of the bill, considering how much the solicitor has been paid towards the costs, and how much money he is holding on behalf of the client, and then working out what is due and to whom in respect of any balance, it appears to reflect the law and practice which pre-dated the 1843 Act and was consolidated by that statute. Mr Dunne did not suggest the contrary; nor did he submit that *Jones v James* and *Cooper v Ewart* were no longer binding authority.

84. Ms Bedford submitted that the cash account ensures that full regard is had to any moneys previously paid by, or treated as paid by, the client in respect of the statutory bill under assessment. Otherwise, there may inadvertently be overpayments or failures to refund. I agree. The breakdown of costs and the cash account together provide a full record of receipts by the solicitor of moneys that by agreement or by law, may be used to satisfy the solicitor's bill, which enables the court to ascertain and certify what is finally due and payable in respect of the bill that it has assessed. This is all part and parcel of the statutory aim to ensure that the solicitor is not overpaid. The cash account may include items that are extraneous to the bill, because it is intended to be a full and transparent record of sums received by the solicitor from or for the client, and paid out to third parties on the client's behalf, but those items and disputes about them (whether existing or hypothetical) have no relevance to the SOCA proceedings.

85. I accept Ms Bedford's submission that "certification" does not entail enquiring into contentious items unconnected with payment of the bill. Nor does determining the result of the cash account. The inquiry is limited to ascertaining how much the solicitor has received on account of the bill or is entitled to set off against it. Certification therefore entails doing two things:

i) Ascertaining that all *relevant* credits and debits appear correctly and in the correct amount within the cash account, and

ii) Resolving any dispute as to whether the amount of the bill as assessed has been paid or partially paid by the client.

86. So far as the latter aspect is concerned, Ms Bedford relied on a third case, *Re Lee, ex parte Neville* (1868) LR 4 Ch App 43, which post-dated the 1843 Act, as authority for the proposition that the burden falls on the client to show that he has made payment, if a disputed payment on account of costs does not appear in the cash account. The solicitor in that case had died. The taxing Master had required a cash account, but there were insufficient materials for the solicitor's executor to provide one, and two attempts to do so proved unsuccessful. The Master taxed the solicitor's bill and certified the amount of the costs, but then found that nothing was due because the executor was unable to render any proper account, and was therefore unable to prove that there was anything due from the client. The Master of the Rolls reversed that decision, and directed that the bill of costs as taxed must be paid. That decision was affirmed by the Court of Appeal in Chancery.

87. It had been the practice of the solicitor and client in that case that the solicitor would take his fees for transactions raising money for the client on mortgages or bills from the money so raised, and account to the client for the balance on each such transaction without sending him a bill of costs. Sir William Page Wood LJ held that there was no onus on the solicitor to prove that his costs in respect of *other* legal business done for the client (the subject of the taxed bill) had not been paid, merely because he had kept no cash account detailing what had been received in respect of each of those discrete transactions. Selwyn LJ, in his concurring judgment, remarked that no presumption that professional business had been paid for could be raised from the client's "vague affidavit" that he had paid various sums on account of costs, not specifying when, nor showing any reason why he cannot prove the amounts.

88. In the light of this, the Judge's observation at [67] that:

> "it is and always has been incumbent upon the solicitor to satisfy the Court as to the accuracy of the cash account, not for the client to disprove it. Queries raised by the client or the Court itself place the account in dispute"

is wrong. The cash account is presumed to be accurate unless there is a good reason to suppose that it is not. If the client contends that he paid an amount on account of the bill, which should have resulted in a credit entry on the cash account, it is incumbent on him to prove it.

89. With those three older cases and *Herbert* in mind, I turn to the decision of Ritchie J in *Edwards/Raubenheimer.* I have already set out the factual background at [26] above. The claimant, armed with the information from the administrators that "commissions" had been paid by the ATE insurers (subsequently said to have been arrangement fees) made a Part 18 request about the receipt of secret commissions, which the defendant resisted on the basis of *Herbert.* The Costs Judge refused to make the order on the basis that there was no room or jurisdiction for a costs judge in a SOCA to consider the composition or adequacy of the ATE premium (or any other item shown on the cash account). He said that the remedy of the client if the moneys paid out had in some way been in error, would be to bring proceedings against the solicitor for breach of duty, and that he could see no reason to distinguish between the ATE premium and any other cash account payment in this respect.

90. Ritchie J dealt with this issue at [219] to [225]. He considered that the Costs Judge was wrong to say that there was no possibility of the court in SOCA proceedings enquiring as to the adequacy of any sum of money shown on the cash account as paid out by the solicitor on the client's behalf. He held that the cash account could not be signed off in the SOCA, and no order could be made for sums to be paid to or by the defendant or the claimants, unless the items in the cash account were accurate and certified by the costs judge. If they are in dispute, the dispute must be resolved before the final SOCA order can be made between the parties.

91. However, as I have already mentioned, Ritchie J then rejected the submission by the claimant that assessment of the ATE premium can occur in a SOCA through being listed in the cash account and assessed there. He said that a challenge to the quantum of the ATE premium is usually more of a Chancery matter. Secret commissions may or may not be solely for Chancery. If the solicitor complied with the rules on commissions,

then a "simple paper trail" may determine whether the commission is owed to the client or not, but if evidence is required it would be for the costs judge to consider how much (evidence) and where the best forum for that determination is. Ritchie J therefore envisaged that there would be a further case management hearing after the Part 18 requests were answered, at which it could be decided what the proper venue for resolving any disputes would be, and that the Part 18 requests should be answered to better facilitate that hearing by enabling

> "the judge to get a proper grasp of the issues, the claimants to determine whether there was anything to worry about, or whether it is all a storm in a teacup, and the defendant [to] consider whether to fight or settle the claims for alleged secret commissions."

92. Ritchie J's approach was plainly driven by the overriding objective, recognising as he did at [223] that requiring the claimants to issue Part 7 proceedings in respect of the commissions would be disproportionate, bearing in mind the likely size of the issuing fees and the small size of the commissions. I have a degree of sympathy with his desire to find a practical solution to that problem in a case in which there was evidence that payments had been made by the insurers to the solicitors or an affiliate, and the nature of those payments was in issue; but unfortunately it was not open to him to do so by conferring a jurisdiction upon the costs judge which does not exist. There was no justification for ordering a Part 18 Request about extraneous matters to be answered in order that the costs judge could then decide, at a subsequent case management hearing not envisaged by any rule or practice direction, whether to determine a dispute about such matters himself, or to send them off to the Business and Property Division or the County Court.

93. Even if the matter were free from authority, I would have concluded that *Raubenheimer* was wrongly decided. *Jones v James* puts the matter beyond doubt, and shows, moreover, that through no fault of Ritchie J, it was decided *per incuriam.* The Costs Judge's decision in *Edwards/Raubenheimer* was right, for the reasons that he gave.

94. I do not consider that, when justifying his refusal to accede to applications for orders that solicitors answer Part 18 Requests of this nature in the present case and other SOCA cases such as *Brown*, the Costs Judge was setting some different, higher threshold for Part 18 Requests akin to that required for specific disclosure. The point he was making was that a dispute does not exist simply because someone says that there is a dispute. Save where the opposing party is being put to proof of a matter which they must establish, there must be a reason for taking issue with whatever the allegedly contentious matter may be. It is not enough, as the Judge in the present case thought it was, for the client to say that he was not satisfied that the cash account was accurate, without explaining the respects in which it was alleged to be inaccurate. Raising the hypothetical possibility that there has been a failure to account for a secret commission is not good enough.

95. It should be relatively straightforward to be able to explain why it is contended that an item in the bill may be unreasonable in amount, or why a figure entered in the cash account as a payment on account of costs is arguably mathematically incorrect. It is not open to the client or their representatives to assert without further explanation that there is a dispute about the cash account or about the balance shown on it, and then use this purported dispute as a vehicle for making the costs judge conduct a full account which

is not (and never was expected to be) part of the proceedings for an assessment. Still less is it open to them to use those means, as envisaged in *Edwards*/*Raubenheimer*, to procure that the certification of the bill, which is supposed to be a summary process, is put on hold until another judge has taken the account.

96. The only items on the cash account which the costs judge is entitled to take into consideration when working out the balance due in respect of the assessed bill are (a) payments on account of costs made by or on behalf of the client and (b) sums received by the solicitor for the client which it has been agreed he may appropriate towards payment of his costs or which (such as a credit balance) he is entitled to retain until he is paid.

97. Theoretically, at least, there could be disputes about those matters which, if the parties are unable to resolve them before the assessment, the costs judge will have to resolve, e.g. a dispute over an alleged payment on account which does not appear in the cash account, or a dispute about the mathematical accuracy of the figures, or a dispute about whether solicitor and client had agreed that a sum received by the solicitor acting in a different capacity could be appropriated towards payment of the solicitor's fees. To that extent I agree with Ritchie J that, despite what CPR 47.9 says, there could be a "matter in dispute in the proceedings" which is not about the amount of the bill or its individual components.

98. However, it seems unlikely that a Part 18 request would ever be needed to help to resolve matters of this nature. They should be capable of identification well in advance of the assessment, once the cash account has been delivered, and in most cases are likely to be capable of resolution without the need for a judicial ruling. If the client made a payment on account which was inadvertently overlooked, or mistakenly recorded in the cash account, there would almost certainly be some contemporaneous record of it, and some correspondence. One of the advantages of requiring service of the cash account with the bill of costs is that it allows time for such inaccuracies or oversights to be identified, and hopefully addressed to everyone's satisfaction, before the assessment. We were advised that in practice that is what usually happens on the rare occasions that issues of this nature arise.

99. It is not necessary, nor indeed permissible, for the costs judge to resolve issues about items on the cash account, or items which (if they existed) should have appeared on the cash account, which cannot be treated as payments made towards the costs which have been assessed. A dispute concerning an item in the cash account which is irrelevant to the determination of how much the solicitor has already received in respect of his assessed costs is not a "matter in dispute in the proceedings" nor is it something that the costs judge has the power to adjudicate upon as part of the certification process following assessment.

100. It follows that in this case:

i) Regardless of whether the cash account was truly in dispute, the Request was not in respect of a "matter in dispute in the proceedings"; it was therefore illegitimate and there was no power to direct a response to it.

ii) The Costs Judge had no power to carry out any inquiries into the accuracy, let alone the lawfulness of any items on the cash account which were neither payments on account of the bill nor amounts received on behalf of the client which could lawfully be used to pay it;

iii) There was no obligation on the Costs Judge to resolve all disputes (or prospective disputes) in respect of the cash account before certifying what is due to or by the solicitor in respect of the bill and the costs of the assessment under s.70(7) of the 1974 Act.

iv) Even if the Request had been legitimate, the Costs Judge was entitled to refuse to order a response in circumstances where no formal application had been made for such an order and the questions to which a response was sought had not been placed before him.

Conclusion

101. As matters currently stand, for a client who suspects that their former solicitor has received secret commissions on an ATE insurance policy, there is no shortcut to commencing proceedings for an account, or complaining to the Legal Ombudsman if the solicitor refuses to answer questions on the subject. They cannot compel the solicitor to tell them by the device of seeking a SOCA, claiming there is a dispute about the cash account (particularly when there is no reason to suppose that any of the entries in the account is inaccurate) and then making a Part 18 request in those proceedings.

102. Nevertheless, as a fiduciary, the solicitor ought to tell them if they ask. If they refuse to do so, there appears to be no easy and cost-effective means of countering such recalcitrance, particularly given that the amounts of any recoverable commission are likely to be much lower than the costs of starting proceedings for an account. The Judge was right to identify the unfairness of requiring the client to produce evidence that a commission was paid in order to obtain the evidence they need to prove it, especially when all the evidence is likely to be in the hands of the solicitor. However, it is not for this Court to propose a solution. I merely flag it up as something which others who are in a position to make changes to the rules or to the law may wish to consider.

103. Before concluding this judgment, I should acknowledge with gratitude the advice that we have received from Costs Judge Whalan, who sat with us on this appeal as an assessor.

104. For the reasons I have set out, I would allow this appeal.

Lord Justice Phillips:

105. I agree.

Lord Justice Lewison:

106. I also agree.