



NCN: [2023] EWHC 2886 (SCCO)  
Case No: SC-2021-BTP-000184

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

Thomas More Building,  
Royal Courts of Justice  
London, WC2A 2LL

Date: 15/11/2023

**Before:**

**COSTS JUDGE ROWLEY**

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**Between:**

**David Richardson and 223 Others**  
**- and -**  
**Slater & Gordon UK Limited**

**Claimants**

**Defendant**

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**Roger Mallalieu KC** (instructed by **JG Solicitors**) for the **Claimants**  
**Robert Marven KC** (instructed by **Slater & Gordon UK Limited**) for the **Defendant**

Hearing date: 30 October 2023  
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**Approved Judgment**

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

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**COSTS JUDGE ROWLEY**

## **Costs Judge Rowley:**

### Introduction

1. This judgment concerns the future conduct of the case of Mr David Richardson and 223 other individuals who have brought proceedings pursuant to section 70 Solicitors Act 1974 against the defendant. There are apparently a further 351 similar claims where proceedings have not as yet been issued and an extension of time for doing so has been agreed.
2. The 224 claimants' claims have been stayed for most of the time since their respective proceedings were issued. First, pending the Court of Appeal's decision in Cam Legal Services v Belsner [2022] EWCA Civ 1387 and then subsequently pending this court's decision in other claims brought against the defendant and whose lead claimant's name was Edwards. (As is the case with Mr Richardson, the choice of Mr Edwards as lead claimant was no more than administrative. It provides the court with a reference number against which documents could be filed and it avoided the repeated use of the phrase "various claimants.")
3. The Court of Appeal's ruling in Belsner did not prove determinative of the issues in these cases. The cases led by Edwards were resolved by the parties without reaching a final hearing. Consequently, the stays in respect of the current proceedings, which were recorded in five orders in February 2023, have come to an end and further directions are required.
4. Leading counsel appeared on both sides at the directions hearing on 30 October 2023. I had not expected to give a decision in writing but there was a lot of ground for the advocates to cover and their submissions took up the allotted half day hearing. Therefore, I have set out in this judgment the approach I consider should be taken to these proceedings in the light of the parties' submissions.
5. The extent to which it would be helpful to repeat the approach taken in Edwards was a question which was interwoven in both counsel's arguments. It seems to me to make sense to start this judgement with a description of what happened procedurally in that case.

### Edwards & Others v Slater & Gordon

6. The proceedings in Edwards were brought by claimants who had all instructed Clear Legal Limited trading as checkmylegalfees.com. Following a case management conference in April 2021 I directed 10 cases to be heard together. They had been chosen by the parties nominating five cases each of the 150 or so cases which had been either issued in the SCCO or transferred to it.
7. I directed that Mr Edwards was to file and serve a statement of claim and that the remainder of the claimants were either to adopt that statement of claim or to provide their own statements. The defendant was to file and serve a statement of reply to that statement (or statements) of claim.

8. The directions also made provision for a further CMC to occur three months later and at which any applications regarding disclosure or security for costs were to be considered.
9. At the CMC in July 2021, I dismissed the defendant's application for the claimants' statement of claim to be verified by a statement of truth. I reserved my decision in respect of applications concerning disclosure and security for costs. I handed down that decision in September 2021, which required the defendants to provide disclosure by list of documents and refused its application for security for costs against the claimants.
10. One of the 10 claimants, Ms Piper, had settled her claim and so it was substituted by the case of Mr Raubenheimer. In June 2021, I had given a decision in Mr Raubenheimer's case in which I refused to order the defendant to answer Part 18 requests made in respect of the taking out of an ATE policy.
11. The defendant appealed my decisions in Edwards and Mr Raubenheimer appealed my decision in his case. Both cases were heard by Mr Justice Ritchie and he gave a decision in May 2022 in the case of Edwards ([2022] EWHC 1091 (QB)) which dealt with all issues given that, by this time, Mr Raubenheimer's case had been joined into the Edwards' proceedings in any event.
12. I do not need to rehearse Ritchie J's findings in respect of disclosure, security for costs or the answers to the Part 18 requests. Whilst it may be too much to hope that the parties are entirely ad idem in respect of the appropriate scope of these issues in these proceedings, they do not bear directly on the approach to be taken which is the crux of this decision. The crucial part of Ritchie J's judgement for these purposes was his guidance in dealing with issues surrounding the ATE policy and in particular the suggestion of either hybrid hearings or the transfer of some issues to the Chancery Division if appropriate.
13. He required the defendants to answer the Part 18 requests and considered that, in the light of those answers, I would be better informed as to the extent of the dispute regarding the ATE policies. As a result, at the next CMC, I would be able to conclude whether or not some transfer of issues to the Chancery Division would be appropriate. When that CMC did take place, I decided that a transfer of certain issues was appropriate and made the relevant order in September 2022.
14. The remaining issues were due to be dealt with by me in June 2023 following a five-day hearing at which it was expected evidence would be given by the claimants and the defendant. However, as I have indicated above, the parties compromised those cases and indeed essentially the remainder of the cases brought by checkmylegalfees.com prior to the June 2023 hearing taking place.
15. There were a number of procedural skirmishes between September 2022 and May 2023. I do not need to describe the issues involved and I mention it solely to record that I asked the parties how the Chancery proceedings were going whilst dealing with those other matters. It appeared to me, and this was not gainsaid at the hearing in this case, that no steps had been taken to obtain a directions hearing or take any other procedural step following the order for transfer.

Mr Carlisle's evidence in Edwards

16. Before getting to the parties' submissions, I need to outline some evidence put before myself and Ritchie J in the Edwards' proceedings which led to the discussion and guidance regarding the possibility of transferring some or all of the issues in those proceedings to the Chancery Division.
17. In support of the application in Raubenheimer for the answering of Part 18 requests, the claimant relied upon evidence from Mark Carlisle of checkmylegalfees.com following telephone discussions he had had with the administrators of the ATE provider whose policies had been taken out in most of the claims that had been brought. That evidence concerned what he described as being potentially secret commissions received by the defendant and not disclosed to the claimants in accordance with the defendant's various duties.
18. Whilst this evidence was not formally before me in these proceedings, it was referred to in the claimants' skeleton argument and Mr Carlisle is still able to give that evidence in this case just as much as he was in Edwards. I take the view that it would be unhelpful for me to disregard the existence of that evidence. It is clear from Ritchie J's judgment that he was concerned by the possibility of a breach of fiduciary or other duty by the defendant based upon the evidence of Mr Carlisle.

The essence of the parties' submissions

19. These are Solicitors Act proceedings and I am going to start with the submissions of Robert Marven KC, on behalf of the defendant, because he was contending for directions which essentially follow the standard directions for such proceedings.
20. The bills that have been provided by the defendant to the claimant in each case set out the work done in detail. They may well be sufficient in themselves to amount to the "breakdown" that is usually ordered by the court to amplify the bill that has been rendered. Mr Marven sought an opportunity for his clients to consider whether they wished to rely upon the breakdown in the bills or to provide a stand-alone document. In either eventuality, the defendant would provide a cash account at the same time, if so ordered.
21. He submitted that the claimants should then be given a period of time in which to inspect the defendant's file before serving points of dispute. Those points should be limited to the profit costs and success fee challenged in the Part 8 Claim Form and recorded in the subsequent order made on the application for a Solicitors Act assessment.
22. The defendant would then be expected to provide replies to those points of dispute and, at that point, Mr Marven suggested that it would probably be helpful to have a further CMC in order to give directions regarding the issues raised by the points of dispute and replies.
23. Roger Mallalieu KC, on behalf of the claimants, accepted that the directions proposed by Mr Marven were ones which I could give, but that was not his clients' primary position. In his skeleton argument, Mr Mallalieu set out the nature of the legal issues the claimants intended to bring in these proceedings. Most of them related to the taking out of the ATE policy and which, for simplicity, he described as the "commission issue".

24. It was this issue which had persuaded Ritchie J that the Chancery Division might well be the appropriate destination for the determinative hearing. The arguments had evolved since then and the nature and scope of the remedies potentially available to the claimants were more wide-ranging. In Mr Mallalieu's submission, the decisions made in respect of these issues may well be dispositive of the entire proceedings. If they were not, then any "assessment issues" that remained could be dealt with in this court. The defendant was well aware, in Mr Mallalieu's submission, of the arguments that would be brought by the claimants. As such, it made sense to transfer the proceedings at this stage so that the judge in the Chancery Division could mould the proceedings to suit those issues rather than taking over the proceedings comparatively late in the day as occurred in Edwards.

#### Discussion and decision

25. From this description of the core of the parties' submissions, it can be seen that no one actually wants to replicate the Edwards procedure in full. The first direction in Edwards was for the claimants to produce a statement of case so as to bring some precision to the arguments being raised. Mr Marven does not contend for a similar order in these proceedings. He clearly considered the statement of claim in Edwards to have led Ritchie J to decide that issues had been raised regarding the ATE policies which had to be resolved. It had in fact been Mr Marven's position that the ATE issues did not need to be resolved because they did not fall within the Solicitors Act proceedings. That proposition flowed from the Court of Appeal's decision in Herbert v HH Law [2019] EWCA Civ 527 where, at paragraph 71, the court said:

"This decision is based on the evidence before the District Judge. I appreciate that the consequence is that the client will not be able to challenge the amount of an ATE insurance premium through the convenient mechanism of an assessment under the Solicitors Act 1974 s. 70. That is not, however, a good reason to decline to apply the principle which is clearly binding on us, in the light of the limited evidence before us, and so create a precedent which both undermines the coherence of the principle and may have unforeseen implications in other and different cases. No doubt, if this outcome is considered unsatisfactory within the profession, the Solicitors Regulation Authority and the Law Society can consider what could be done to bring an ATE insurance premium within the principle as to what is a solicitor's disbursement."

26. Ritchie J, at paragraph 215 of his judgment in Edwards, said that the quantum of ATE premium is a matter outside a Solicitors Act assessment, following the Court of Appeal's ruling in Herbert, but that this was not the point raised in Edwards. I confess that I remain a little unsure as to Ritchie J's meaning in this paragraph. It does not seem to me to be likely that he meant that, for example, a commission issue could be dealt with in Solicitors Act proceedings but not if it is merely a matter of quantum that is challenged. Traditionally, the latter would appear to be a challenge more usually expected in such proceedings rather than the former.
27. Mr Mallalieu submitted that the guidance to be taken from Ritchie J's decision was that the determination of the cash account, as required by paragraph 6.19 of PD46, was not

always simply matter of arithmetic. Where the client had indicated that there was a dispute as to the cash account, then that dispute had to be resolved before the final figures could be determined. It was not, as I had concluded in Edwards, that the constituent elements of payments made on behalf of the client (in the cash account) would not be anxiously scrutinised.

28. It seems to me that this argument runs close to being contrary to paragraph 221 of Ritchie J's judgment where he rejected the argument that the ATE premium could be challenged in a Solicitors Act assessment "through the back door route of it being listed in the Cash Account in the wrong sum and assessed there." The claimants are essentially saying that the sum charged is the wrong amount whether that is because of commissions that should not have been charged or any wider remedies that may be available. But that is for another day. I accept that, to the extent that the commission issue can be brought in these proceedings, the place to do so is the point when the cash account is being determined. It clearly cannot be dealt with in the assessing of the bills themselves since it is not included within the bills (in accordance with Herbert) and so does not form part of the Solicitors Act assessment as ordered.
29. The chronology of a Solicitors Act assessment is usually for the exchange of a breakdown of costs, points of dispute and replies. The parties then request a detailed assessment hearing in order to go through the challenges raised. Once they have been decided, the amount allowed will be calculated and the costs of the proceedings awarded in accordance with s70(9) and (10) of the Solicitors Act. These later steps are recorded in paragraph 6.19 PD46 along with the need to determine the cash account and issue a final costs certificate.
30. The defendant's approach to the directions required therefore follows the first stages of the standard directions. The claimants' primary position is the complete opposite. The dispute in respect of the cash account should be dealt with first by sending it off to the Chancery Division and staying the service of a breakdown, points of dispute etc. It is only to this extent – the bifurcation of the commission issue and the assessment issues – that the claimants suggest I should follow the approach in Edwards.
31. Mr Mallalieu's skeleton sets out seven reasons why the claimants' approach should be adopted. In essence, they are that the commission issue has been recognised previously as being more suited to the Chancery Division and so that course should be adopted again. It would be better to do so at the beginning of the proceedings for ease of case management. The findings required and the remedies sought in this issue are wide ranging and may limit or eradicate the need for a detailed assessment. They are more likely to lead to an early settlement than determination of the assessment issues. The seventh reason is set out as follows:

"Seventhly, it may be artificial now to seek to delineate with too great a precision what are Chancery Division issues and what are assessment issues. The best course is likely to be for the transfer to the Chancery Division issues relating to the cash account. Once those issues are then pleaded and suitably particularised in the Chancery Division, that court, as part of its case management powers, can identify whether it considers any of those would be better addressed there or here."

32. I have set this reason out because it seems to me to demonstrate the difficulty with the claimants' approach. As things stand, there is no description of the commission issue points which are said to be "substantial and potentially wide ranging" other than in Mr Mallalieu's skeleton argument. Indeed, it may be said that the length of his skeleton (16 pages) to Mr Marven's (3 pages) is, to some extent, required by the need to give the court some idea of the arguments the claimants will wish to raise in the future.
33. As Mr Marven pointed out, there is nothing currently to transfer to the Chancery Division other than an order for detailed assessment of the profit costs and success fees. Such a transfer would be rather puzzling, I imagine. Mr Mallalieu's seventh reason elegantly describes the artificiality of delineating the issues between the commission and assessment issues and suggests that the Chancery Division should send back any elements that should be addressed here. This is a stark description of the complete lack of any particularisation of any of the issues as things stand. The seventh reason suggests that the pleading out of the commission issue will tease out the delineation so that assessment issues will become plain. But why they would be raised in the commission issue is not apparent if they can clearly be identified as assessment issues. The issues that might be identified, in my view, are more likely to be those which may bear on both the commission and assessment strands.
34. During the submissions, I commented that I did not favour following the Edwards' path. Part of the problem there was that the attempt to crystallise the challenges to be made distorted the Solicitors Act proceedings by requiring a positive case to be put forward. The language used in points of dispute is largely negative in disputing the recoverability of, for example, the amount of time spent. Any reply is usually explanatory in nature.
35. The challenges regarding the commission issue, however, requires a positive case to be put forward so that the defendant can respond to it. Essentially, if the claimants wish to say that there is a dispute regarding the cash account, then they will need to explain why.
36. Although cash accounts are invariably ordered in Solicitors Act assessments in accordance with the practice direction, they are almost never in issue at the end of the assessment. Indeed, in my experience, no formal determination is required in the great majority of cases. In the context of the generally modest personal injury cases here, there will be no money received from the client by the solicitor to pay disbursements. The only money received will be from the tortfeasor or their insurers for damages and between the parties' costs. The only item paid for outside the solicitors' bill is likely to be the ATE policy. The need for a cash account in order to decide who needs to pay what to whom is barely made out. The claimants' desire for a cash account is, to all intents and purposes, driven by the wish to run their arguments about the taking out of the ATE policy. As Mr Marven pointed out in a number of ways, the ATE policy is not the subject of the Solicitors Act assessment. The dispute regarding this one item is tangential at best to that assessment.
37. Having listened to the parties' arguments and reflected upon the proceedings in Edwards, I have come to the conclusion that a different approach is required. These proceedings currently relate to challenges to the profit costs and success fee. Those challenges can be dealt with by the usual method of a breakdown, points of dispute and replies. The proceedings in Edwards suffered from a continued evolution of arguments that might be raised. That evolution came partly from outside the litigation e.g. the

Belsner decision and also partly from within the litigation, most particularly Mr Carlisle's discussions with the ATE provider's administrators. The effect of this was to prevent much headway being made.

38. It seems to me that if the challenges to the profit costs and success fee are dealt with first, the scope for evolution is relatively limited and a timetable can be set which envisages assessment of the bills within a reasonable amount of time. At that point, the claimants will be afforded the opportunity to set out their positive case as to the dispute regarding the cash account. Whilst in Edwards I decided to transfer the proceedings, I take the view that this is not something I should pre-determine. Once I have seen the scope of the issues raised and both sides' pleadings, I will be in a position to determine whether transfer is appropriate of any of these proceedings.
39. In Edwards I thought it was plain that the suggestion of a transfer was predicated on the basis that there were hundreds of cases involved and that would justify the costs of effectively two sets of proceedings. However, I have subsequently been met with the submission on individual cases that this bifurcation, as I have described it, is appropriate in any individual case. That seems to me to be an approach which fails to deal justly with the case at a proportionate cost and merits a re-consideration at least to see if there is a method by which the overriding objective can be achieved.
40. I also bear in mind the decisions of the then Senior Costs Judge in the Claims Direct and Accident Group Test Cases where premiums were "deconstructed" following evidence being given by numerous witnesses. Those decisions were appealed and there was no suggestion, to my recollection, that it had been inappropriate to deal with the issues in the SCCO initially.
41. None of this is to suggest that I definitely intend to deal with the commission issue but I do think, on reflection, I should consider the possibility of it being dealt with at first instance in the SCCO given the guidance of Ritchie J in making a decision once a proper grip of the case and issues had been established. That cannot be done, in my view, until the exchange of commission pleadings at the earliest.
42. This leads to the possibility of these pleadings being prepared at an earlier stage than once the assessment has otherwise been completed. But I do not favour that for three reasons:
  - i) To the extent that there are overlapping issues, the evidence etc provided in respect of the profit costs and success fee assessment, may well be relevant to how the case is put.
  - ii) Similarly, earlier pleading will lead to the submission that transfer (if appropriate) should occur earlier and therefore risk parallel proceedings.
  - iii) There will inevitably, in my view, be a temptation for the parties to lose their focus on the profit costs and success fee challenges if other issues are being pleaded at the same time rather than being "parked."
  - iv) Although the arguments are said to be wide-ranging, I do not think that this can be considered until the rest of the case has been decided. To the extent that the



claimants consider their cases will inevitably be substantial, it is open to them to bring separate proceedings at this point in the Chancery Division.

43. In relation to this last point, I queried with Mr Mallalieu as to whether it would be better for the claimants to bring Part 7 proceedings in the Chancery Division regarding the commission issue so that pleadings, disclosure and evidence would follow in that order. Subsequent case law has supported the bringing of a single claim rather than a separate claim for each claimant which had removed one of Ritchie J's concerns about the bringing of separate proceedings. Mr Mallalieu pointed out that these claimants already have proceedings on foot and the decision of Ritchie J which suggests that transfer of part or all of the proceedings is appropriate. As such, why should the claimants be required to bring even one set of further proceedings?
44. Nor did Mr Mallalieu accept an analogy with professional negligence proceedings. Where such proceedings are brought, any detailed assessment is conventionally stayed pending the resolution of those negligence proceedings. Mr Mallalieu submitted that the reason parties are sometimes required to commence separate professional negligence proceedings by a costs judge is because the case law makes clear that such allegations do not form any part of a Solicitors Act assessment. By contrast, all of the issues raised here could be dealt with inside the Solicitors Act assessment. Whilst that submission was made on the basis that the so-called "professional negligence" element i.e. the commission issue would be dealt with in the Chancery Division, it does in my view lend some support to the idea that dealing with all of the issues in these claims might occur in this court.
45. Should the claimants decide that they do not wish to await the conclusion of their assessment issues before getting to the commission issue, then they plainly could commence proceedings in the Chancery Division now. Any judgments given there would obviously feed into the dispute regarding the cash account. That might ultimately mean the delaying of the determination of the cash account and therefore the formal conclusion of the assessment. But the solicitors have already been paid for their work and any delay after a conclusion about the reasonableness of those fees had been reached would be less significant, in my view, than if everything remains in issue.
46. In the light of these comments, I consider that the defendant should serve cash accounts, whether or not separate breakdowns are to be provided. But the purpose of the cash account at this stage is no more than to provide figures for the claimants to contemplate the drafting of any positive case they want to bring either here or anywhere else. I do not expect to be dealing with any interim issues concerning them at this stage. I will express the preference for the cash account to include the figures for the statute bill so that the figures balance, albeit I appreciate the description in the rules does not appear to expect this.
47. Finally, I would make one further observation which is relevant to the claimants' legal team, even though I do not consider this forms part of my reasoning for the decision I have reached. As they know, there are several hundred other cases awaiting some judicial advancement. It is extremely likely that they will involve the same or similar arguments in respect of the assessment issues. If these cases were stayed, as the claimants contended, those issues would have to be pursued via other cases and so the claimants' legal team would be running parallel cases, but involving different claimants, in any event. The commission evidence would not apply to those cases and

so there would be no grounds for suggesting that they ought to be stayed pending a Chancery Division ruling.

### Next Steps

48. I consider that directions regarding the choosing of test cases followed by breakdowns (including cash accounts), inspection, points of dispute and replies are required. My provisional view is that Mr Marven's suggestion of fixing a CMC to review progress and provide further directions thereafter is more useful than trying to fix a complete timetable. But I appreciate that counsel may wish to have dates fixed in their diaries as early as possible.
49. Hopefully the parties will be able to agree the wording and dates for such directions so that an order can be sealed at the time the judgment is handed down. But if not, and on the assumption that more than 30 minutes would be required, the judgment can be handed down in the parties' absence and the hearing adjourned, with time extended for any consequential applications. In that case, the parties should confer and submit time estimates and dates to avoid for the adjourned hearing.