Neutral Citation No. [2022] EWHC 2848 (SCCO)
Case No: SC-2021-APP-000412

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 10/11/2022

Before:

COSTS JUDGE ROWLEY

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Between:

MR JAMES BROWN	**Claimant**
- and -	
JMW SOLICITORS LLP	**Defendant**

- -
- -

Robin Dunne (instructed by **Clear Legal Ltd**) for the **Claimant**
Benjamin Williams KC (instructed by **Kain Knight Costs Lawyers**) for the **Defendant**

Hearing date: 24 October 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. The claimant commenced Part 8 proceedings on 24 September 2020 for an assessment under s 70 Solicitors Act 1974 of an invoice delivered to him on 9 July 2020 in the sum of £14,378.00. By virtue of s 70(6), the claimant limited the challenge in respect of that bill to the base profit costs element of £12,428.50 plus VAT and the success fee of £3,125 plus VAT, subject to a contractual cap.

2. The proceedings were commenced in the Sheffield District Registry. District Judge Bellamy made an order on 11 January 2021 for the assessment sought by the claimant. Standard directions were given regarding a breakdown of costs, points of dispute and replies and those documents were produced before the parties agreed to the transfer of these proceedings to the Senior Courts Costs Office by an order dated 24 March 2021.

3. The claimant wished to apply for an order for replies to his Part 18 request following the transfer. The original intention was for that application to be heard at the same time as another case which had been transferred to the SCCO. However, that did not occur and the claimant's application for an order came before me on 24 October 2022. In the intervening period, I had heard the application in the other case (Raubenheimer v Slater & Gordon UK Limited) involving a similar Part 18 request and that decision had been successfully appealed before Ritchie J in the King's Bench Division ([2022] EWHC 1091 (QB)).

4. The claimant in this case seeks to rely upon Ritchie J's judgment as being a binding authority for the proposition that Part 18 requests of the sort served in this case should be answered prior to any detailed assessment taking place. The defendant says that the facts in Raubenheimer can be distinguished from this case and that as such Ritchie J's judgment is not binding upon me. Furthermore, the defendant says that the threshold required by Part 18 has not been met. But if I consider that it has, I should still not order the Part 18 request to be answered based on other authority.

Background

5. The defendant was instructed by the claimant to pursue a claim for damages for personal injury. As part of the funding arrangement for the claim, an After The Event ("ATE") insurance policy was taken out. According to a Demands and Needs statement enclosed within the bundle for the application, the solicitors recommended obtaining a policy from ARAG for £575 plus Insurance Premium Tax. Rather oddly, the same document also indicates that an ATE policy had in fact already been taken out on behalf of the client but nothing turns upon the timing of the inception of the insurance. According to the cash account served in this case, the ATE premium, inclusive of IPT, amounts to £644. A key facts document, seemingly produced by ARAG, provides information in respect of ARAG Plc as well as Brit Syndicate 2987 at Lloyds.

6. According to Mr Dunne, who appeared on behalf of the claimant, the insurance arrangements in respect of the ATE policy are less than clear. It is common ground that although ARAG provide the ATE policy, they are not the insurer. Based upon his instructing solicitor's interactions with ARAG on other cases, Mr Dunne indicated that ARAG are not prepared to provide any information regarding the insurance

arrangements because they are not providing a "customer facing" product. The defendant has been asked for a copy of the policy which it took out on behalf of the claimant and for which payment has apparently been made according to the cash account, but that request has been refused. In Mr Dunne's submission therefore, the claimant is unable to establish exactly with whom he was insured under the policy taken out by the Defendant on his behalf.

7. Mr Dunne submitted that this was a remarkable situation and had left the claimant with no option but to serve a Part 18 request to obtain information in respect of the identity of the insurer and to obtain a copy of the policy documentation. That combination of information forms the first request in the Part 18 request.

8. The second request concerns the identity of any intermediaries involved in addition to the defendant. The third request concerns payment of the premium to the insurer or to any other party. The fourth request queries whether any commission or remuneration has been made directly or indirectly (including by way of any other financial benefit) to the defendant by the insurer or any intermediary.

9. There was no witness evidence produced in respect of this application from either the claimant or anybody employed by the defendant. There was therefore a complete absence of any evidence as to whether the claimant received any documentation when the ATE policy was taken out. If there had been any information provided, there was similarly no evidence as to the form in which that information had taken.

10. Mr Williams KC, who appeared on behalf of the defendant, did not attempt to justify any shortcoming on the part of the defendant that there may have been in respect of providing such information. In respect of the specific refusal to provide a copy of the policy by the defendant's costs lawyers during the course of these proceedings, Mr Williams was content to adopt a similar approach to the costs lawyers in saying that the policy documentation was irrelevant for the purposes of the s 70 proceedings. The claimant, or his legal representatives, could have requested a copy of the policy outside of these proceedings if he or they had wished to do so. Instead, a Part 18 request had been served upon the defendant without any prior warning. In Mr Williams' forthright submission, the reason for taking this approach was to claim the costs of making the enquiry via the medium of these proceedings. The claimant could not otherwise seek to recover the costs of pursuing the documentation from the defendant.

11. Mr Dunne was equally forthright in his description of the claimant having no option but to serve the request in the absence of any voluntarily provided information by either the defendant or ARAG. But it seems to me that he protested too much in this respect. Both the defendant and ARAG are regulated organisations. I have no doubt whatsoever that if a complaint was made to those regulators about a policy being taken out on the claimant's behalf but about which he could obtain no policy documentation, then either or both regulators would come to the claimant's aid. I do not accept Mr Williams' submissions that the service of Part 18 requests without any warning is necessarily some form of costs building exercise. It seems to me that an assumption has been made that Ritchie J's decision in Raubenheimer simply entitles a claimant to serve such a request and expect it to be dealt with by the defendant. It is only when a defendant has challenged this approach that the claimant has contemplated the need to demonstrate his entitlement to an order under Part 18. The claimant only requested a copy of the policy after the Part 18 request had been served. He has not produced any evidence of

an unsuccessful approach to bodies such as the Solicitors Regulation Authority or the Legal Ombudsman. There is nothing to suggest that any such avenues of assistance have been explored. As such, I do not accept the claimant's argument that he had no option but to serve a Part 18 request to obtain information about the ATE policy.

12. The parties were agreed that the consequence of the decision of the Court of Appeal in Herbert v HH Law [2019] EWCA Civ 527 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." (para 71)

13. The effect of this is that any challenge to the ATE premium will not appear in the Part 8 claim form nor, it seems, in the points of dispute. That is certainly the situation in this case and so it might be thought that there was no dispute about the ATE policy before the court.

14. However, once the detailed assessment of the solicitor's invoice in the s 70 proceedings has been completed, the costs judge's task, according to paragraph 6.19 of the Practice Direction to Part 47 is, amongst other things, to *"determine the result of the cash account."* The claimant says that where there is a dispute in respect of the cash account, the costs judge needs to resolve that dispute before the cash account can be determined. Since the claimant disputes the cash account entries regarding the ATE premium, this opens the door to challenges regarding the extent of the premium that should properly be in the cash account. In particular, the claimant says that any "secret commissions" or other payments of which he is currently unaware would need to be taken into account.

15. It would be possible for the issues raised in the claimant's Part 18 request to be ventilated at the point that the cash account was being determined. (Indeed, it seems to me that they could be put in the points of dispute to flag up such issues in the same way that interest is often challenged in points of dispute even though, strictly speaking, interest is not an item in the bill.)

16. However, Mr Dunne submitted that raising the disputed items only when determining the cash account would be an approach which had two specific disadvantages. The first is that the claimant has no knowledge of the insurance arrangements as things stand, but the defendant no doubt does. There is therefore no level playing field in making submissions about the appropriate figure for the premium. In order to place the parties on an equal footing in accordance with the overriding objective, the defendant would have to answer the requests served by the claimant. This would inevitably lead to the second disadvantage which is the likelihood of there being further delay in the completion of the s 70 proceedings overall. In order to enable the claimant to be able to put forward his arguments properly – both in terms of knowledge of the insurance arrangements and at the time the costs judge is determining the cash account – the Part 18 request needs to be answered prior to the detailed assessment taking place. Hence the current application.

17. In support of this approach, Mr Dunne relied squarely upon Ritchie J's judgment in Raubenheimer. That judgment dealt with a number of appeals to decisions that I had made in respect of several cases (Edwards & Others v Slater & Gordon UK Limited),

including Raubenheimer, which had been selected as test cases. The relevant sections of the judgment start at paragraph 219 as follows:

> [219] Here I consider that the Judge fell into error. In my judgement the Cash Account cannot be signed off in the S[olicitor and] O[wn] C[lient] A[ssessment] and no order can be made by the C[osts] J[udge] for sums to be paid to or by the Defendant or the Claimants unless the items in the Cash Account are accurate and certified by the CJ. If they are in dispute, that dispute must be resolved before the final SOCA order can be made between the parties.
>
> [220] The Judge ruled (para. 37) that a challenge to the ATE premium should be determined in the Chancery Court.
>
> [221] I reject the Claimant's clever, but ultimately faulted submission, that assessment of the ATE premium can occur in a SOCA through the back door route of it being listed in the Cash Account in the wrong sum and assessed there. A challenge to the quantum of the ATE premium is usually more of a Chancery matter. However *secret commissions* may or may not be solely for Chancery. If the solicitor has complied with the SC rules, full disclosure of the commission will make the situation clear on paper. A simple paper trail may determine whether the commission is owed to the client or not. If evidence is required, the CJ will need to consider how much and where the best forum for determination is.
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> …
>
> [223] Taking into account what I have set out above about hybrid hearings and transferring parts of part 8 claims to the Chancery Division for determination if that is necessary, I do not consider that the right way to go forwards in these claims was or would be to require the Claimants to issue 150 or less part 7 claims relating to the alleged *secret commissions*. These commissions were very small sums. The issuing fees alone would be substantial. The better way for these issues to be dealt with would be to consider the correct Judge/transfer to the Chancery Division, at the next case management hearing after disclosure has been provided and the part 18 answers have been provided, certified by a statement of truth, and to determine the scope of the SOCA orders at the same time. The issues may involve quantification of the ATE premiums or the proof of the existence of and reason for the alleged *secret commissions*.
>
> [224] I consider that the Judge fell into error when refusing to order the Defendant to answer the part 18 requests relating inter alia to the alleged *secret commissions.*

> [225] I rule that, properly to facilitate the efficient handling of the next case management hearing, the part 18 requests should be answered so that the Judge can get a proper grasp of the issues, the Claimants can determine whether there is anything to worry about, or whether it is all a storm in a teacup, and the Defendant can consider whether to fight or settle the claims for alleged *secret commissions.*
>
> …
>
> [227] Once the part 18 requests are answered and the Defendant provides disclosure the Raubenheimer claim, it will go with the other lead claims in Edwards, for determination of where, when and by whom the alleged *secret commission* issues will be tried (or assessed).

18. Mr Dunne submitted that the Part 18 requests needed to be answered so that I could determine the appropriate forum for resolving the dispute regarding the ATE premium. Once the "simple questions," as Mr Dunne described them, had been answered, the claimant could confirm whether he wished to pursue matters any further. That might involve an assessment by a costs judge if something akin to a "simple paper trail" was established, or it might mean transferring matters concerning the ATE premium to the Chancery Division as in fact I considered appropriate in the Edwards & Others / Raubenheimer cases. Mr Dunne suggested that it would in fact be difficult for his client to go any further if there was a signed Part 18 response saying that no commission had been received.

19. Mr Dunne also relied on Raubenheimer to demonstrate that solicitors do participate in arrangements with insurers which involve commissions or remuneration. There was nothing disproportionate in asking questions of the defendant in this respect which it could simply have answered rather than spending thousands of pounds in objecting to having to do so.

20. In response, Mr Williams submitted that there was no evidence whatsoever before me to suggest that ARAG paid anyone any commissions and that there were numerous cases where the ARAG model had been upheld. In particular, Mr Williams referred to the report produced by Kerr J and Costs Judge Leonard for the Court of Appeal in West v Stockport NHS Foundation Trust [2019] EWCA Civ 1220.

21. Mr Williams relied upon various authorities to put forward the proposition that Part 18 requests were not appropriate for parties to request information which might help them pursue different claims between themselves. Furthermore, by analogy with a pre-action disclosure application, there had to be some evidence of an arguable case against the party from whom the information was requested before it would be appropriate for the court to order such information to be provided.

22. It was Mr Williams' submission that, absent Ritchie J's decision in Raubenheimer, the claimant's application was untenable. In Raubenheimer, the claimant's representatives had obtained information from the ATE insurer's administrators to show that payments had been made to an affiliate company to the defendant. Such evidence was before the court. There was a complete contrast between that situation and the circumstances of

the case here. Accordingly, Raubenheimer could be distinguished on the facts. Furthermore, it did not appear that Ritchie J had been taken to the various authorities regarding the threshold test for ordering Part 18 requests and as such his decision was per incuriam in any event.

23. If I were against Mr Williams on that argument, then he submitted that the claimant had failed to show that the requests would clarify any matter in dispute in the proceedings or give additional information in relation to any such matter as required by CPR 18.1. The ATE policy could not be dealt with in the s 70 proceedings which were before the court. As such, information regarding that policy could not be a matter in dispute. The claimant knew that the policy had been taken out with ARAG and that he had been charged £644 for it. There was no argument put forward by the claimant as to why that figure was disputed in the cash account.

Discussion and decision

24. Both Mr Dunne and Mr Williams referred to the order of Warby LJ dated 24 June 2022 when refusing permission to appeal Ritchie J's judgment to the Court of Appeal. It is, as both counsel said, not any form of authority as such, but it does seem to me that the nub of the issue before me is highlighted by Warby LJ's comments as follows:

> "6. The claimant suspects that S&G received secret commissions from the ATE insurers they engaged in this case. There is evidence to support such suspicions. The Judge made an order under CPR Part 18 compelling S&G to disclose whether they did. S&G wish to challenge that order on appeal.
>
> 7. I do not consider this appeal raises an important point of principle or practice. It is a case-specific issue of an unusual nature…"

25. In Raubenheimer, the claimant was able to rely upon evidence specifically obtained by his legal representative following discussions with the administrator to the ATE insurer. Such evidence, as Warby LJ said, supported the claimant's suspicions. The solicitor's defence was that the payment described as a commission was in fact a "legitimate claims handling fee for services payable to a separate group company" appointed by the insurer to provide claims handling services and to manage the claims fund. There was therefore no dispute that payments from the ATE premium were paid to a third party and the dispute was whether that payment amounted to a secret commission which had been paid to the defendant.

26. At paragraph 212 of his judgment, Ritchie J concluded that the defendant's position raised a number of further questions and the fact that the quantum of an ATE premium was a matter outside section 70 proceedings was not the point. He then concluded, from the paragraphs I have set out at paragraph 17 above, that requiring the defendant to answer the Part 18 requests would provide further information to enable future conduct to be considered at the next case management hearing.

27. As I understand it, Ritchie J thought that the combination of the disclosure which had been ordered and the response to the Part 18 requests might well illuminate matters to the point where the parties would be clear whether any commission was owed to the

client. Whilst he does not explicitly say so, the tenor of Ritchie J's judgment, in my view, suggests he considered the evidence before the court would be difficult for the defendant to dispute. But if matters were more complicated than he suspected, then the proceedings might need to be sent, at least in part, to the Chancery Division.

28. Warby LJ described the issue in the Raubenheimer appeal as being "of an unusual nature". The evidence obtained by the claimant's lawyers must, it seems to me, be unlikely to be obtained in most cases. The fact that the insurer had gone into administration meant that a third party was answering the claimant's lawyer's questions rather than the insurer itself. The commercial arrangements between an ATE insurer and other parties would be confidential where the insurer was a going concern and, as such, less likely to be discussed with external law firms.

29. Mr Dunne sought to argue that the claimant's entitlement to Part 18 requests being ordered at this point in proceedings could not depend on whether the claimant was fortunate enough for the insurer to be insolvent so that information came to light which might not otherwise have been the case. But in the absence of such information, the effect of Mr Dunne's submission is that any claimant can obtain an order for Part 18 answers from a defendant without needing to have any evidence whatsoever. Mr Dunne suggested that the questions posed were simple ones and therefore could easily be answered. In this way, he sought to minimise the obligation on the defendant to provide information notwithstanding the claimant having put forward no positive case about commissions, secret or otherwise.

30. I have come to the conclusion that Mr Dunn's arguments, though persuasively put, must be rejected. It is a basic tenet of litigation that he who asserts must prove. In the situation before me, the claimant's position is that he does not even need to assert let alone prove a commission may be in issue. He simply has to say that the premium is disputed without putting forward any grounds for doing so. Mr Dunne described the claimant as being trapped in a Catch-22 situation. He needed information from the defendant in order to be able to put forward his case: however the defendant refused to provide that information without the claimant's case having been set out.

31. But, in my judgment, there must be many situations where a party considers that an opponent has possibly caused him some loss but has no evidence as such. In the absence of any proof to support that suspicion, then proceedings cannot get off the ground. As indicated above, a pre-action disclosure application would need to have evidence of an arguable case and that must be the sort of threshold to apply in respect of Part 18 requests.

32. I am not convinced that the requests themselves are simple questions. But if they are essentially binary in nature, I am not at all sure that a negative response would be the end of the matter. As I put to Mr Dunne, the Part 18 responses in the Edwards & Others cases denied that any commission had been received by the defendant but that had not caused the claimants to decide against pursuing matters further. It may be that in those cases, the evidence of the insurer's administrators was sufficient to persuade the claimants that an arguable case remained. But if that decision is based on the evidence obtained by the claimants' lawyers, then it simply highlights the difference between that case and the present one.

33. It seems to me that the circumstances in Raubenheimer are, if not unique, then sufficiently unusual to limit the effect of Ritchie J's decision to the facts in that case. In the rather more usual circumstances in this case – where there is no evidence before the court that any commissions are paid by the insurer – in my judgment it would be inappropriate to require the defendant to answer generic Part 18 questions. In the absence of any stated suspicion, let alone any evidence to support it, the general questions posed are a paradigm example of a fishing expedition.

34. It is no answer for the claimant to suggest that commissions are paid by insurers as can be demonstrated by the evidence in Raubenheimer. It is no secret, in my view, that insurance companies, and Lloyd's syndicates in particular, have a wide variety of arrangements to deal with claims handling on behalf of the insurer. But that circumstance does not seem to me to go anywhere near far enough to require a party to answer questions in the absence of any evidence in an individual case.

35. Similarly, I do not think that Mr Dunne is assisted by his argument that some of the Edwards & Others cases involved a different insurer from Elite (and against whom there was no evidence.) Ritchie J's judgment and my case management decision to refer the cases to the Chancery Division were squarely based upon the evidence obtained regarding Elite. There was no submission to my recollection about any of the other policies. It would have been unwieldy to say the least for different ATE insurance to be looked at by different courts, but the issue was never raised. I do not think therefore that it can be material to the decision I need to make in this case.

36. Furthermore, I am required by the overriding objective to deal justly with the case and at proportionate cost. I am mindful of the limited sum involved in respect of this ATE premium and the undesirability of hiving off part of the detailed assessment so that it could be dealt with by a Chancery Division judge. This would be the likely course of action if there was anything in the claimant's dispute following the defendant having answered the Part 18 request. In my judgment, before embarking on such a course of action, the claimant must provide some evidence of an arguable case notwithstanding the practical difficulties that might impose.

37. Accordingly, I dismiss the claimant's application for an order that the defendant responds to the Part 18 request that has been served by the claimant.

Costs said to be thrown away

38. As I indicated at the outset of this judgment, the application was originally going to be heard with what eventually turned out to be the Raubenheimer case. The parties' representatives and I were involved in some email communications in April 2021 when a date of 11 June 2021 for the hearing was pencilled in.

39. However, no court notice was ever sent out to the parties and the first indication that the hearing was due to go ahead appears to have been a Microsoft Teams' invitation sent out by my clerk. It appears that it only reached the defendant's representative, but it came to the attention of the claimant's representative on 7 or 8 June 2021. By that time. I had reserved judgment in Raubenheimer.

40. The claimant's representative, Mr Carlisle, suggested by email that if there was in fact a hearing on 11 June, then it should be adjourned so that Raubenheimer could be handed

down. This would also avoid difficulties with Mr Dunne's attendance on 11 June for the application. From the emails it appears that Mr Dunne had been pencilled in but not formally booked for that hearing. By the time it became apparent that a Teams' hearing was due to take place, he was committed to be elsewhere.

41. The defendant's then representative, Mr Courtney, communicated that he had retained Mr Williams to attend on 11 June. He said that it would only have taken a call to the court to check whether the hearing was due to go ahead before releasing Mr Dunne. The defendant's counsel's clerk had contacted the court on 7 June and that was when it became clear that the court was expecting a hearing to go ahead.

42. Having considered the parties' 8 June communications to the court, I asked my clerk to inform the parties that I expected to circulate the Raubenheimer decision on 10 June and that in the circumstances the hearing listed for 11 June should be adjourned. I also indicated that I would address the issue of costs by email but unfortunately that did not occur.

43. This matter now comes before me in respect of Mr Williams' abated brief fee which it is said has been thrown away because of the claimant's request for an adjournment. In Mr Williams' submission, the hearing would otherwise have gone ahead on 11 June, notwithstanding the handing down of the Raubenheimer decision, since the facts of the two cases were so different.

44. In Mr Dunne's submission, there had never been a hearing actually listed and there was no more than an indication that 11 June would be convenient for a hearing. In any event, the court adjourned the hearing, at least in part, because of the circulation of the Raubenheimer decision. If the defendant had checked the true position with the court before briefing counsel, then no brief fee would have been incurred.

45. I have sympathy with both parties in respect of this issue. It seems to me that both parties' approach to retaining counsel were reasonable ones in the absence of anything formal from the court. A degree of informality had crept into communications between the court and parties given the lockdown complications caused by COVID 19. Quite reasonably, in my view, the parties could take different views as to how likely a hearing referred to in April emails would take place in June without any formal court notice.

46. Matters are further complicated by the handing down of the Raubenheimer decision. It may be that the hearing would have still taken place notwithstanding the handing down, but, as my clerk's email indicated to the parties, it was certainly my view at the time that any hearing should be adjourned. The prospect of an appeal against my decision in Raubenheimer was always a likely outcome and a further first instance decision in this case on the same issue would not have been an attractive use of court time.

47. My decision to adjourn together with the lack of any formal notice to the parties of the hearing leads me to conclude that the claimant's conduct was no more blameworthy than the defendant's and cannot be said to be the cause of the defendant's abated brief fee. Equally, a fee has been incurred in reasonable circumstances and I do not consider that an order for there to be no order for costs would be appropriate. Consequently, I am going to order that costs should be in the case. For the avoidance of doubt, I consider that to be the appropriate wording rather than costs in the application since, in my view, the costs form part of the proceedings overall rather than the application itself.