

*The Delivery of a Client File
Recent Caselaw and Trends*

Introduction

What do you do when faced with a file request from a disgruntled former client? For many solicitors and their insurers, this triggers alarm bells. Despite popular client belief, they are not simply entitled to the entirety of their solicitor's file. The Law Society's practice note "*Who owns the file?*" remains the best guidance for solicitors in assessing the documents to which clients are entitled. In essence, the following documents belong to the client:

1. Original documents sent to the firm by the client;
2. Documents sent or received by the firm as the agent of the client (for example, the firm's communications with third parties);
3. Final versions of documents, the production of which was the object of the retainer (for example, agreements); and
4. Final versions of documents prepared by a third party, during the retainer and paid for by the client (for example, Opinions from Counsel).

In contrast, the following documents belong to the firm:

1. Documents prepared for the firm's own benefit or protection, or prepared by the firm in the discharge of its function (for example, file copies of letters written to the client or notes regarding time taken);
2. Copies of internal emails and correspondence created during the retainer;
3. All emails and correspondence written by the client to the firm; and
4. Accounting records, including vouchers and instructions.

Despite this guidance, the ownership of a file continues to be a live issue for most firms and their insurers. In recent months, the Courts have seen a surge in applications for the delivery of a solicitor's file by claimants seeking to challenge billed costs and/or deductions from awarded damages. Due to this rush in applications, several recent cases have emerged which provide support and guidance for solicitors and their insurers.

Case Law

In *Hanley v JC & A Solicitors [2017] EWHC B28 (Costs)*, the claimant sought an order for delivery of the client file over which he had no proprietary rights. In her judgment, Master James referred to the Law Society's practice note, which maintains that there are many papers on a client file, which belong to the solicitor and do not need to be handed over to the client. Master James refused to order disclosure and expressed concern that to allow this application would be to open the "*floodgates*" for satellite litigation and allow for fishing expeditions.

Similarly, in *Green v SGI Legal LLP [2017] EWHC B27*, Master Leonard ruled on an application by a claimant for the delivery of a file for reasonable costs. In dismissing the application, Master Leonard held that it was for the client to prove he was entitled, by right, to receive copies of what is inherently the solicitor's property. Where the client no longer held documents which the solicitor had previously provided, the solicitor was not required to provide further copies. Similar to the position in *Hanley*,

Master Leonard emphasised that to allow such an application could open the floodgates for unwarranted litigation.

The Court took a different view in *Swain v JC & A Ltd [2018] EWHC B3 (Costs)*. Like the facts in *Hanley* and *Green*, the defendant law firm refused to provide certain documents in the client file on the basis that the claimant had no proprietary rights. In granting the application, Master Brown held that the Court had discretion to order the provision of the documents sought “*whether or not a proprietary right in the relevant documents has been established*”. The requested documents were necessary to assess the status of the fee earner in conjunction with their chargeable rates and had to be disclosed.

Although the Master acknowledged the prospect of satellite litigation brought by disgruntled clients, he added “*transparency will improve the prospect that any dispute as to the defendant’s costs can be resolved without the need for the court’s further intervention*”.

While Master Brown’s judgment in *Swain* appeared to be more sympathetic to the client’s position, the Court quickly reverted to its stance in *Hanley* and *Green*. About a month later in *Riaz v Ashwood Solicitors Ltd [2018] EWHC B5 (Costs)*, the claimant sought the solicitor’s VAT invoices for costs, disbursements and all correspondence and any ATE documents. The claimant’s arguments were premised on the assertion that the defendant had overcharged the claimant, which would be a breach of fiduciary duty.

The Master eventually dismissed the application, on the basis that the Court’s inherent jurisdiction over solicitors was to address cases where the conduct of the solicitor was in question. Here there was no evidence of misconduct. The claimant had failed to identify a fiduciary duty, which obliges a solicitor to supply certain documents, which do not belong to the client.

Conclusion

Despite the ruling in *Swain*, the Courts are continuing to resist the various emerging practices to obtain delivery of the client file. For the moment, only in cases where there have been genuine issues in questions such as hourly rates, will the Courts likely exercise a different view. While it is arguable that these judgments may reduce the number of file requests, it remains to be seen whether they would reduce the number of claims relating to deduction of costs from damages. These two issues for now have proven to be linked.

In terms of risk management, firms should preserve as much of their client files as possible, especially documents which the client is entitled to. Firms are also encouraged to include a paragraph on document retention in their client care letters.

To avoid unnecessary litigation, it is advisable that solicitors follow the SRA Code of Conduct, specifically O 1.13 and ensure clients receive the best possible information about the overall cost of their matter, both at the time of engagement and when appropriate as their matter progresses. IB 1.13 specifies that solicitors should clearly explain their fees and if they are likely to change.

It is not yet clear if the recent judgments will stop satellite litigation. Therefore, solicitors and insurers are encouraged to keep their eyes on the Courts for further judgments and guidance in the coming months.

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