Case No: CL1705825

Neutral Citation Number: [2018] EWHC B10 (Costs)
IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 12/06/2018

Before:

MASTER LEONARD

- -

Between:

Jonathan Whale	**Claimant**
- and -	
Mooney Everett Solicitors Ltd	**Defendant**

- -
- -

Ian Simpson (instructed by **Checkmylegalfees.com**) for the **Claimant**
Robert Marven QC (instructed by **Mooney Everett Solicitors Ltd**) for the **Defendant**

Hearing date: 12 March 2018

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Judgment Approved

Master Leonard:

1. This is an application for the delivery of documents under section 68(1) of the Solicitors Act 1974. It should be read in conjunction with my judgments in *Green & Ors v SGI Legal LLP* [2017] EWHC B27 (Costs) and *Riaz v Ashwood Solicitors Ltd* [2018] EWHC B5 (Costs), in which I addressed many (though not all) of the arguments put to me for the purposes of this application.

2. An appeal against my decision in *Green* is, I understand, to be heard in early July, together with an appeal against the judgment of Master James in *Hanley v JC & A Solicitors Ltd* [2017] EWHC B28 (Costs). It is to be expected that those appeals will, as anticipated by Master Brown when he came to rather different conclusions in *Swain v JC & A Ltd* [2018] EWHC B3 (Costs), yield some definitive guidance on the appropriate response to the many delivery-up applications currently being received at the Senior Courts Costs Office.

3. I did however feel constrained to reject, at the hearing of this application, the Claimant's further application (strongly opposed by the Defendant) for adjournment pending the outcome of those appeals. My primary reason (apart from the fact that the parties were both represented and ready to proceed) was that, as Mr Marven for the Defendant pointed out, there would appear to be a number of issues to be resolved on this application which may not be addressed on those appeals.

The Retainer

4. The Defendant acted for the Claimant in recovering damages following a road traffic accident on 26 October 2015. As to the circumstances in which the Defendant was instructed by and acted for the Claimant there are significant conflicts between the evidence of the Claimant, who signed a witness statement on 16 January 2018, and of Mr John Mooney, who signed a witness statement for the Defendant on 2 February 2018.

5. The Claimant says that he first spoke to someone at the Defendant firm in October 2015, when they called him and asked him whether he had been in an accident that was not his fault. When they discussed payment of legal fees, he was told that if he won, he would lose 25% of any compensation recovered from his opponent, but that he would not pay anything towards his own legal fees. He did not know that his solicitor would also be recovering costs from his opponent's insurer.

6. The Claimant says that he was sent funding documents to sign and return through the post. He did that, but was not sent a copy to keep for his own records. Because he relied on his solicitors' advice he did not ask for a copy of the funding agreement. The claim, he says, settled about a year before he instructed his current costs lawyers, so he is having some difficulty in recalling everything.

7. The Claimant had assumed that he had been charged correctly, but he then received from the Defendant a letter dated 15 August 2017 refunding the sum of £165 for an ATE premium. He says that he did not understand what it was for, but was worried that if he had been refunded any part of their charges, he might be owed a refund in respect of other deductions from his damages.

8. The Claimant says that he has looked through all his emails from the time that he instructed the Defendant and that he does not have any correspondence from the Defendant other than that of 15 August 2017. He does not give any evidence as to the amount at which his claim settled, but his claim form indicates that he believes it to have been £5000. He does not, and evidently cannot, state the amount deducted from that sum to meet the Defendant's costs.

9. Mr Mooney, who has given evidence by reference to the Defendant's records, says that the Claimant's account is inaccurate in a number of important respects. First, the Claimant did not speak to anyone at the Defendant firm in October 2015. Their first conversation with the Claimant was on 6 April 2016. On that date, he was sent a Conditional Fee Agreement by email for electronic signature. At the same time, he was sent a hard copy by post together with supporting notes, a funding questionnaire, the Defendant's terms of business and a client questionnaire.

10. The Claimant returned the Conditional Fee Agreement, electronically signed, by email on the same day. He did not return anything by post. The Defendant, through April and May 2016, pursued the Claimant for the return of the hard copy documents. Eventually the Defendant had to ask the Claimant whether he wished to proceed, as he had not confirmed a medical appointment, causing it to be postponed. The Defendant had also received correspondence from third party insurers stating that they had heard from two other firms of solicitors in the matter, and asking who was actually acting for the Claimant.

11. On 30 June 2016, the Claimant advised the Defendant that he did not believe that he had instructed other solicitors but that he had been getting a lot of calls at that time. The Defendant explained to him that he could not have three firms of solicitors acting for on the same case, and 13 July 2016 the Claimant emailed the Defendant confirming that he wanted the Defendant act. He also stated that he had misplaced the hard copy documentation sent to him in April 2016 and asked the Defendant to re-send it, which the Defendant did on 22 July 2016. The Claimant returned the signed funding questionnaire and client questionnaire on 28 July 2016.

12. On 5 September 2016, the Defendant wrote to the Claimant with a claim valuation and advice regarding the making of a Part 36 offer. The advice mentioned the Defendant's success fee and an ATE premium of £164.25, both of which would be deducted from the Claimant's damages in the event of success. The Claimant returned a signed authority to make a Part 36 offer which confirmed those figures. The Defendant repeated its costs advice on confirming to the Claimant, on 17 October 2016, that the Part 36 offer had been made.

13. On 27 October 2016, the Defendant wrote to the client to tell about a counter-offer received from the opponent's insurer, and advised him to proceed to a Stage 3 Portal Hearing. On 30 November, the Defendant advised the Claimant that as an interim payment had not been received, he should issue Part 7 proceedings. The Claimant however said that as Christmas was coming, he wanted to settle the claim. The Defendant wrote to the Claimant on the same day, telling him what he would receive if he accepted the insurer's offer after deduction of a success fee and ATE premium. The Defendant advised rejection of the offer on the basis that it was too low. The Claimant however instructed the Defendant by email, on the same date, to accept the offer.

14. The Defendant duly advised the Claimant of acceptance of his offer, and the amount that he was due to receive after deduction of its success fee and the ATE premium. The Claimant's damages were sent to him under cover of a letter dated 19 December 2016, with a bill of costs attached. He had however changed address, so the cheque was cancelled and a bank transfer arranged instead on 6 January 2017.

15. Subsequently, the Defendant's accounts team identified an outstanding balance due to the claimant. ATE cover had been requested by the Defendant on behalf of the Claimant but never actually incepted. Accordingly, there was no proper charge to be made to the Claimant in respect of the ATE premium. This had been noticed by the file handler at the time of settlement, but the ATE premium had erroneously been included in the Defendant's bill. Once the error had been identified, a refund of the amount that had been deducted from his damages in respect of the ATE premium was sent to the Claimant on 15 August 2017.

16. As the parties' evidence conflicts on some significant matters, I need to state that I prefer the evidence of Mr Mooney to that of the Claimant. Mr Mooney has the obvious advantage of access to the relevant file records. The Claimant's recollection appears to be vague, unreliable and in material respects inaccurate. It would appear that he talked to several potential representatives in relation to the pursuit of his potential claim, and he seems to have confused his dealings with the Defendants with his dealings with other organisations. He also seems to have made little effort to manage and retain much of the important information he now seeks from the

Defendant through this application, including his record of the amount he was actually charged by the Defendant.

17. I should refer here to the Claimant's contention, in the submissions before me, that the Defendant's ability to refer to a detailed file record illustrates the Claimant's need for the order sought, so that the Claimant can consider his statutory right to an assessment of the Defendant's costs. Mr Simpson for the Claimant argues that there would be an obvious "information/resources/record imbalance" even if the Claimant had retained every document sent to him and kept a record of every letter, email or telephone call received from the Defendant.

18. I am unable to agree. If as the evidence indicates the Claimant was, during and on the conclusion of the retainer, sent sufficient information to take any necessary advice on applying for the assessment of the Defendant's costs, then no imbalance exists in any material sense. It is not suggested that the Claimant was in some way incapable of keeping an adequate record. He just did not do so.

19. On his evidence, the Claimant did not become concerned about the Defendant's charges until the Defendant refunded to him, in August 2017, an amount representing the cost of his ATE premium. As Mr Mooney points out, however, there was a straightforward explanation for the refund. The Claimant could have sought any necessary clarification from the Defendant before instructing new solicitors to demand copies of the Defendant's papers. The Defendant was at fault in initially failing to ensure (albeit in unusual circumstances) that no charge was rendered for the cost of the ATE premium, but that does not offer any real basis for supposing that the Claimant was overcharged in any other way.

The Pre-Action Correspondence and the Issued Claim

20. On 29 August 2017, two weeks after the Defendant had refunded to the Claimant the amount previously deducted from his damages for the ATE premium, the Claimant's Costs Lawyers wrote to the Defendant by email. Their letter, insofar as material, read as follows:

> "We have been instructed by…" (The Claimant) … "to advise on the viability of an assessment of your legal fees pursuant to Section 70 of the Solicitors Act…
>
> Although we are entitled to take possession of all documents relating to your former client's claim, we would be prepared at this stage to take possession of a substantially reduced number of documents in order to reduce the administrative burden on you… Please therefore provide…
>
> All funding documents prepared by you in relation to this claim… Correspondence demonstrating the amount offered and accepted on settlement of the substantive claim for damages… Correspondence demonstrating the amount paid to Mr Whale in settlement of this claim… Any correspondence between your firm and in the other party relating to the negotiation of settlement of Mr Whale's legal costs relating to the legal

> work done on their behalf… Copies of any fee invoices created by your firm whether or not previously delivered to your former client… A copy of the matter office and client account ledgers…
>
> We understand that you have been paid in full for the work that you have done for your former client, and therefore we are entitled to take possession of the original papers without you raising any further charge… The final date for provision of the client's file is 12/09/17…
>
> If the papers are not provided within that timeframe, and we have not agreed an extension, we will make an immediate application to the court pursuant to Section 68 (1) of the Solicitors Act 1974 for an order to compel you to provide the papers requested, including a provision for payment of the costs of the application… We apologise for the short timeframe however, as you will be aware, the time limits under s.70 Solicitors Act 1974 are very short. We are completely amenable to reasonable requests to extend time for you to comply with our request, subject to you agreeing a reciprocal extension to any time limit under the Act that may be jeopardised as a result."

21. Time for the Defendant's response was extended by agreement to 19 September 2017. On 11 September the Defendant responded in these terms:

> "You will be aware of the Law Society Practice Note and the documents to which the former client is entitled pursuant to a file request… There is therefore no entitlement to most of what you ask for. To the extent to which we will respond, distinguishing between the material to which your client is entitled and that to which he is not… Our terms of business contain the following clause…
>
> > 'Following the conclusion of your case the firm will retain the papers for such period as it shall consider appropriate in its absolute discretion. Where stored papers, wills, deeds securities are retrieved from storage by the firm than a minimum charge of £30 plus VAT will be raised. However the firm reserves the right to make any administration charge necessary based on time spent in retrieval, perusal, engaging in correspondence, or any other work necessary to comply with such instructions given by or on behalf of a client or former client for whom such papers etc have been stored'…
>
> Our charges will be £337.50 plus VAT, £405 inclusive… Please therefore now provide a cheque payable to this company and that amount… Upon clearance of such cheque we will then be in a position to release the appropriate papers…
>
> There are however additional concerns. The bulk of the material you are now seeking from us will already be in the hands of your client, as originals or copies. An examination of them would be sufficient to demonstrate whether your client has any prospect of achieving any significant deduction in our costs. It would inevitably follow as a matter of logic that either you have failed to obtain adequate instructions, together with the papers which

> would normally expect the client to provide, or the decision has been deliberately made to solicit instructions on the basis that you will seek to impose all demands for information upon us, and that the approach you have made to us is entirely speculative, based on the belief that you might be able to make some kind of complaint without any proper basis for believing that there might be a reasonable possibility of achieving a significant reduction in costs, which is the claimed basis for your letter… Should it be necessary we reserve the right to argue that this is not a proper use of the civil justice system."

22. The existence of the contractual term relied upon by the Defendant does not appear to be in dispute, but the Claimant disputes the fee sought by the Defendant. He is willing to pay the specified minimum fee of £30 plus VAT, along with any reasonable copying charges, for the documents sought by him, but no more than that. As to reasonable copying costs, Mr Simpson refers me to authorities on the appropriate means of providing copies and the amount of reasonable copying costs payable under CPR 31.15, which (for example where documents have already been scanned) may be quite limited.

23. The claim was issued on 31 October 2017. The remedy sought by the Claimant is put in these terms:

> "The Defendants do deliver to the Claimant, within 7 days, any original documents in its possession, custody or power, relating to the Road Traffic Accident in which they acted for Mr Jonathan Whale … which belong to the Claimant, together with originals or copies of such other documents of the court may consider reasonably necessary to enable the Claimant to consider his rights under section 70 Solicitors Act 1974…"

24. As to the charges that the claimant wishes to make for delivery of documents, the Claim Form says:

> "The Defendant, by letter dated 11/09/17 has requested a fee of £405 inclusive of VAT for provision of the papers. This is unreasonable, particularly as the Defendant has already refunded direct to the claimant by letter dated 15/08/17… the sum of £165 for ATE insurance which it acknowledges was incorrectly deducted. Without the full file of papers (but especially the invoices detailing the success fee deduction) the Claimant cannot know whether or not any other charge was incorrect or unreasonable…"

25. I have to decide two matters. The first is the nature and extent of the documentation which the Claimant is entitled to receive from the Defendant. The second is whether the Defendant is entitled to rely upon the terms of its retainer with the Claimant so as to levy a charge for providing documents to which the Claimant is, in principle, entitled.

The Claimant's Submissions

26. It is common ground, subject only to the dispute over the Defendant's right to rely upon its retainer terms to make a charge of £337.50 plus VAT, that the Defendant

must supply to the Claimant documents which are the property of the Claimant. (There is also a dispute as to which documents do belong to the Claimant; I will come to that.) As in *Green* and *Riaz*, however, the Claimant also seeks copies of documents that are the property of the Defendant.

27. Mr Simpson argues that the Claimant is entitled to all funding documents, and if already sent, to copies of those documents, subject to payment of a charge. That includes copies of invoices and any correspondence demonstrating the amount paid to the Claimant in settlement of his claim. The Claimant also has, he argues, a proprietary right in correspondence demonstrating the amount offered and accepted in settlement of the substantive claim for damages. That includes any correspondence between the Defendant and any other person relating to the negotiation or settlement of the Claimant's legal costs. On that basis the Claimant asserts the right, subject to payment of what the Claimant considers a reasonable charge, to copies of the other documents referred to in the Claimant's Costs Lawyers' letter of 5 September 2017.

28. Mr Simpson argues that the court has at least two relevant jurisdictions upon which the Claimant can rely in seeking an order to that effect. The first is the court's inherent jurisdiction, described by Christopher Clarke LJ (offering a comprehensive review of the relevant authorities) in *Assaubayev v Michael Wilson and Partners Ltd* [2014] EWCA Civ 1491 as "punitive and disciplinary", over solicitors as officers of the court. This, says Mr Simpson, is codified at section 50 of the Solicitors Act 1974:

> "(1) Any person duly admitted as a solicitor shall be an officer of the Senior Courts;
>
> (2) Subject to the provisions of this Act, the High Court, the Crown Court and the Court of Appeal respectively, or any division or judge of those courts, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Senior Courts were constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act 1873 in respect of any solicitor, attorney or proctor admitted to practise there.…"

29. Most of the arguments relied upon by the Claimant in support of my exercising that inherent jurisdiction to make an order for delivery of the documents sought, do not differ materially from those put to me in *Riaz*. I am referred, as I was in that case, in particular to *Assaubayev* and to the fiduciary duties owed by a solicitor to a client.

30. The Claimant does refer, in relation to fiduciary duty, to one authority in particular not put to me in *Riaz*. That is the judgment of Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1, in which he considers the nature and extent the fiduciary duty owed by a solicitor to a client:

> "…A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may

> conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary…
>
> … I have left out of account the situation where the fiduciary deals with his principal. In such a case he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction. Even inadvertent failure to disclose will entitle the principal to rescind the transaction. The rule is the same whether the fiduciary is acting on his own behalf or on behalf of another.…"

31. Based on this authority the Claimant argues that it is for the Defendant to show that its dealings with the Claimant were fair. This, I understand, is relied upon in respect of both the application for delivery of documents which the Defendant is not willing to supply, and the Claimant's refusal to pay the charge sought by the Defendant for the documents which the Defendant is willing to supply.

32. The second jurisdiction relied upon by the Claimant is described as a statutory jurisdiction under section 68 of the Solicitors Act 1974, in particular subsection (1):

> "The jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs, and for the delivery up of, or otherwise in relation to, any documents in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the High Court…".

33. Mr Simpson does not (as I understand it) contend that section 68 changed the nature of the High Court jurisdiction to which it referred. It only extended the category of cases in which that jurisdiction could be exercised. The argument as I understand it is that the jurisdiction referred to in section 68, considered properly in the context of section 68 itself, supports the Claimant's case. In particular, the words "or otherwise in relation to" (says the Claimant) encompass an existing jurisdiction to make an order to the effect that the Defendant supply to the Claimant copies of documents which are not the Claimant's property.

34. In this respect the Claimant relies upon *Re Thomson* (1855) 20 Beav 545, *Re Wheatcroft* (1877) 6 ChD 97, the judgment of Deeny J in the High Court of Justice in Northern Ireland in *Mortgage Business plc and Bank of Scotland plc v Thomas Taggart and Sons* [2014] NICh 14 and the judgment of Master Brown in *Swain v JC & A Ltd* [2018] EWHC B3 (Costs).

35. In *Green* the defendant relied successfully upon *Leicestershire County Council v Michael Faraday and Partners Ltd* [1941] 2 KB 205, in which Goddard LJ, at page 217, observed:

> "There is no claim against professional men for the documents which they prepare to enable them to carry out the work which they are employed to do."

36. Mr Simpson argues that this principle applies only to the very limited categories of documents that remained in issue in that case, such as memoranda and notes jotted upon scraps of paper. In any case, he says, there is a distinction to be drawn between the role of the rating valuers in that case and the role of a solicitor, whose duties to a client are strictly defined and who is subject to the court's supervisory jurisdiction.

37. Mr Simpson argues that the provisions of the Solicitors' Accounts Rules concerning receipt, handling, transfer and record-keeping in respect of monies received or held on behalf of the client have a bearing upon the prospective exercise of any rights under section 70 of the 1974 Act for assessment of the Defendant's costs, and insofar as any invoices have been paid, whether directly, or by deduction otherwise, by the Claimant, they should be provided to the Claimant.

38. He also argues that the Claimant has a right to a cash account under CPR 67(2)(1)(a), and that the most convenient method of providing the information that would otherwise be incorporated in the cash account is likely to be the provision of copies of the source documents.

The Defendant's Submissions

39. I do not need to repeat the Defendant's submissions at any length, because it will be evident from the conclusions I have drawn that I agree with most of them. I do need however to mention that the Defendant asserts a proprietary right over its copies of its communications sent to (but not received from) third parties, resisting on that basis the Claimant's application for delivery up of the Defendant's own letters relating to the negotiation and settlement of his claim.

Conclusions on the Court's Inherent Jurisdiction and Fiduciary Duty

40. I should say that I approach with some caution the distinction made by Mr Simpson between the court's "inherent" and "statutory" jurisdiction, if only because it is accepted that section 68 did not create a new High Court jurisdiction, but only extended the range of cases in which the court's existing jurisdiction could be exercised. My understanding is however that the Claimant refers to two aspects of the same jurisdiction. The Claimant's point is that the aspect of the court's jurisdiction referred to in section 68 of the 1974 Act stands to be identified by reference to the wording of that section and in the context of the powers referred to in part III of the Act, in particular section 70, along with the existing authorities in relation to delivery-up of papers.

41. There are, accordingly, two distinct threads to the Claimant's argument, which overlap to some extent but which can be analysed separately.

42. As for the first of those threads, it seems to me that the Claimant's arguments based upon the jurisdiction referred to in *Assaubayev* must fail for the reasons I gave in *Riaz*. As in *Riaz* there is no evidence of any conduct on the part of the Defendant that might make it appropriate for the court to exercise that jurisdiction. The Claimant has

not identified either a fiduciary duty which obliges a solicitor to supply to a client copies of documents which do not belong to the client, or a breach of any other fiduciary duty.

43. Nor does *Mothew* seem to me to impose any burden upon the Defendant to prove that its dealings with the Claimant were fair, or to provide disclosure to that end. Such obligations would arise only where, as Millett LJ made clear, a solicitor with a fiduciary duty has entered into a transaction with the client to whom that duty is owed.

44. As Mr Marven says, the only transaction entered into between the Claimant and the Defendant was a contract of retainer. The solicitor's fiduciary duties will be defined by reference to the terms of the contract of retainer, but the solicitor owes no fiduciary duty to the client in entering into the contract of retainer itself.

45. For those reasons, I do not accept that fiduciary duties assist the Claimant either in seeking delivery up of documents that do not belong to him, nor in resisting payment of what would otherwise be a reasonable contractual charge for delivery of those documents that do belong to him.

Conclusions on the Court's Section 68 Jurisdiction

46. The Claimant relies upon the authorities to which I have already referred and to the conclusions reached by Master Brown in *Swain*. I reached different conclusions in *Green* and in *Riaz*, and as I have mentioned we can expect definitive guidance when the appeals in *Green* and *Hanley* have been heard.

47. In the meantime, I remain unpersuaded by the arguments advanced by the Claimant. Whilst accepting that section 68 of the 1974 Act does not in itself confer any jurisdiction upon the court, the Claimant nonetheless argues that it is a "gateway" to an assessment under section 70 of the Act, furnishing the court with a free-standing basis for ordering disclosure of documents which do not belong to the Claimant. The reason for exercising that jurisdiction would be that having examined the disclosed documents, the Claimant might wish to issue proceedings under section 70.

48. There seems to me to be an inconsistency in that reasoning. Given that section 68 did not change the nature of the court's jurisdiction, the wording of the section is of limited assistance in identifying it. As Mr Marven says, the words "or otherwise in relation to" could reasonably be understood to refer to orders that might be made in exercising the delivery-up jurisdiction, for example to prevent the destruction of the relevant documents. They do not in themselves offer a sufficient basis for concluding that the court has a free-standing jurisdiction to make what, in effect, would be an order for pre-action disclosure when neither party can say whether any action will ever follow.

49. One must look to the reported authorities to identify the court's jurisdiction in relation to the delivery up of documents, and for the reasons I gave in *Green*, I do not accept that the authorities establish the jurisdiction contended for by the Claimant. I do not agree with Mr Simpson's argument to the effect that the court's decision in *Leicestershire County Council v Michael Faraday and Partners Ltd* was limited to the particular categories of documents which remained in issue in that particular case. It

referred to principles of general application, based upon proprietary rights, and for those purposes there is no distinction to be drawn between solicitors and other professionals. Nor does it seem to me that the Solicitors' Accounts Rules have any bearing on the matter.

50. In my view, the delivery-up jurisdiction is founded on the proprietary rights of the client. Mr Marven is right to say that the court's jurisdiction is to compel a solicitor to give to a client that which belongs to the client. It is not some sort of free-standing jurisdiction to order pre-action or other disclosure.

51. The Claimant, in submissions, relied heavily upon the overriding objective at CPR 1.1, the responsibility of parties, under CPR 1.3, to further the overriding objective and the responsibilities placed upon parties by the Practice Direction on Pre-Action Conduct and the Pre-Action Protocols. Mr Simpson argued that those provisions reflected a public policy in favour of the Claimant's application. He suggested that a new Protocol may have to be devised to meet cases of this kind, and argued that to refuse the Claimant's application would result in his incurring the costs of two separate applications, under section 68 and section 70.

52. The costs argument seems to me to beg the question of whether the Claimant's application under section 68 has merit. It is also inconsistent with the Claimant's case to the effect that he does not know whether he should make an application under section 70, and needs to make this application in order to find out. In effect the Claimant is saying that he ought to incur two sets of costs.

53. That aside, the pre-action provisions of the Civil Procedure Rules are designed for use by parties where a real dispute has been identified. Hence, for example, the importance of a Letter of Claim in setting the protocol process in motion. The purpose of the provisions is to facilitate the quick and cost-effective resolution of that real dispute. They are not intended to apply where the parties have no idea whether there is any dispute to be resolved.

54. I agree with Mr Marven when he argues that the true policy of the Civil Procedure Rules in relation to speculative applications for disclosure is reflected by CPR 31.16, which, insofar as pertinent, reads:

> "(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started…
>
> …The court may make an order under this rule only where–
>
> (a) the respondent is likely to be a party to subsequent proceedings;
>
> (b) the applicant is also likely to be a party to those proceedings;
>
> (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
>
> (d) disclosure before proceedings have started is desirable in order to –
>
> (i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

55. The rule itself expressly applies where a pre-action disclosure application "is made to the court under any Act…" Normally, a pre-action disclosure application would be made under the Senior Courts Act 1981, section 33, or the County Courts Act 1984, section 52, but the rule does not limit itself to those statutory provisions. It would seem to apply to any application for pre-action disclosure made under any statutory provision.

56. Mr Simpson has taken care to make it clear that this is not intended to be a pre-action disclosure application under CPR 31.16, but it occurred to me in the course of preparing this judgment that arguably, the rule would be engaged where any claimant seeks pre-action disclosure under the jurisdiction expressly conferred on the High Court by section 68 of the 1974 Act, where (as here) no business has been done by the solicitor in the High Court.

57. If it did apply, the rule would expressly prevent me making the order sought by the Claimant, because it requires that the parties are likely to be parties to subsequent proceedings, which the Claimant cannot say.

58. Neither party however suggested that CPR 31.16 has any direct application, and (given the other conclusions I have reached) I do not need to reach any conclusion on that point. Mr Marven argued only that Mr Simpson's submissions as to the policy behind the Civil Procedure Rules do not sit well with the provisions of CPR 31.16.

59. On that, I agree with Mr Marven. CPR 31.16 identifies calibrated thresholds for pre-action disclosure, which this application does not meet. On the contrary, it seems to me that the Claimant is arguing that the court can and should under section 68 of the 1974 act, exercise a wider disclosure jurisdiction, where the parties do not know whether they have a dispute, than the Civil Procedure Rules confer where the parties do know that they have a dispute. I do not think that that conclusion can be justified on the grounds that one of the parties is a solicitor.

60. I note that no reference was made, in *Mortgage Business PLC v Taggart*, to any equivalent to CPR 31.16 in the rules governing procedure in the High Court of Justice in Northern Ireland. That may well have some bearing upon the conclusions reached in that case by the learned judge.

Conclusions on the Ownership of the Correspondence with Third Parties

61. I have been referred to professional guidance offered by the Law Society (as at March 2017) on the ownership of documents from a solicitor's file. That document, whilst not in itself authoritative, does seem to me to offer a useful and accurate summary of the relevant principles. The guidance distinguishes between documents which come into existence during the retainer where the solicitor is acting as professional adviser, and where the solicitor is acting as an agent of the client. On the normal principles of agency and subject to specific contractual arrangements made between client and

solicitor, the second category of documents, which will include correspondence with third parties sent or received on behalf of the client, will (the guidance says) belong to the client.

62. In *Thomson* the Master of the Rolls made it clear that letters written to a solicitor by third parties, relating exclusively to the client's business, have been received by the solicitors as the agent of the client, who is in consequence entitled to have them delivered up. He did not mention copies of letters written by the solicitor to third parties, but it seems to me that Mackinnon LJ addressed the point in *Leicestershire County Council v Michael Faraday and Partners Ltd*:

> "If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over…"

63. Given that he went on to say that "the present case is emphatically not one of principal and agent", this observation may have been obiter, but it is at least persuasive. It seems to me that in principle there can be no distinction between the agency principles applicable to letters received by the solicitor as agent for the client and to copies of letters sent to third parties by the solicitor as agent for the client. The client, subject to the terms of the solicitor's retainer, will have a proprietary right to both.

Conclusions on the "Cash Account" Argument

64. The Claimant has not, in his claim, included any application for the delivery of a cash account. No reference was made to a cash account until Mr Simpson provided his skeleton argument, which left the Defendant with no opportunity to respond. Nor has the Claimant offered any authority for the proposition that he is entitled to a cash account as of right, which I do not accept.

65. I would not consider it appropriate to make an order of the delivery of a cash account, had such application been made. A cash account is normally ordered, in accordance with Practice Direction 46 paragraph 6.6(b), in the course of detailed assessment between solicitor and client, together with a detailed breakdown of the solicitor's costs. Its purpose is (in conjunction with the solicitor's bill) to show exactly what monies were received and expended by a solicitor on the client's behalf. That information, on the evidence, has already been provided to the Claimant, albeit in a different form. It would not strike me as appropriate to order the Defendant to provide that information again simply because the Claimant did not retain it.

66. In fact the Claimant is not really pressing for a cash account. He is, rather, arguing that the provisions of CPR 67(2)(1)(a) support his claim for disclosure of the records behind the information that would be incorporated in such an account. That does not seem to me to follow.

Conclusions on the Defendant's Charges for Supplying Documents

67. The position here seems to me to be quite straightforward. The Claimant and the Defendant entered into a contract by reference to which the Defendant is entitled to render an administration charge for the supply of documents that remain the property

of the Claimant. I do not accept that the charge operates, as Mr Simpson argues, as a fetter upon the Claimant's exercise of his statutory rights. The Claimant was given all the information he needed to exercise his statutory rights, and it is not the Defendant's fault that he did not retain it. It is not suggested (nor could it sensibly be suggested) that the agreement itself is in some way contrary to public policy, so as to free the Claimant from the contractual obligations which he accepted upon choosing to instruct the Defendant.

68. There is nothing manifestly excessive about the Defendant's proposed charge, which as Mr Marven says is consistent with the cost of a certain amount of time at a junior level in identifying the papers to which the Claimant is entitled, and a lesser amount of time at a more senior level checking what has been done. Given that the Defendant, upon previously supplying copies of documents pursuant to a similar request, subsequently found itself embroiled in litigation as a result, it is understandable that a certain amount of care would be taken in identifying the documents to be supplied to the Claimant.

69. CPR 31.15 applies to the inspection and copying of documents disclosed by parties in litigation, and has no bearing upon the Defendant's contractual rights. If the Claimant wishes to obtain the documents that belong to him, he must pay the charge required by the Defendant in accordance with his agreement with the Defendant.

Summary of Conclusions

70. For the reasons I have given, my conclusion is that upon payment of the fee required by the Defendant under the terms of its retainer, the Claimant is entitled to receive from the Defendant the correspondence entered into by the Defendant on his behalf with third parties, whether sent or received by the Defendant. That would include any such correspondence recording the amount offered and accepted on settlement of the substantive claim for damages or relating to the negotiation and settlement of the Claimant's legal costs.

71. I do not accept that I have jurisdiction to order the Defendant to deliver any of the other documents sought by the Claimant. If I did have such jurisdiction, I do not accept that it would be appropriate for me to exercise it on the grounds offered by the Claimant. In particular, I do not accept that it would have been appropriate to order the Defendant to supply to the Claimant copies of the Defendant's internal records or further copies of funding documentation already sent to him on more than one occasion.