IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Case No. 1705871

Royal Courts of Justice,

Date: 31 January 2018

Before Master Brown
Between:

PHILIP SWAIN **Claimant**

- and –

J C & A LIMITED **Defendant**

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Mark Carlisle, Costs Draftsman, for the Claimant
David Dunne, Counsel, for and instructed by the Defendant

Hearing dates: 14 December 2017
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JUDGMENT APPROVED

Master Brown:

Introduction

1. The Claimant is the former client of the Defendant solicitors. He retained the Defendant in respect of a claim he made for damages for personal injuries arising out of a road traffic accident on 24 June 2013. That claim, which was pursued with the benefit of a conditional fee agreement and ATE insurance, settled on or about 26 October 2015. The Claimant thereafter received £1,915.75, the sum of £891.25 having been deducted from the damages which were agreed in the sum of £2,807. By his claim form, issued on 20 October 2017, he now seeks an order for delivery up of documents in the possession of the Defendant. The stated purpose of the application is to see whether the deduction made from the Claimant's damages was fair and in accordance with the funding arrangements and whether there are any grounds for him to seek an assessment under Part III of the Solicitors Act 1974 ('the 1974 Act') of the sums payable by him in respect of the Defendant's fees and expenses.

2. A large number of similar applications have been made in the SCCO. As I understand it, whilst many are substantially resolved by the parties, there are significant differences in approach to the issue of the Court's jurisdiction to make the orders sought. Although I have

set out my views on this issue (at greater length than I had intended) it does seem to me that authoritative guidance on the point may assist.

Background

3. The Claimant's claim for damages was initiated in the MOJ portal liability on or about 2 July 2015. Liability was not disputed and on 5 October 2015 the Stage 2 settlement pack was served leading to settlement shortly thereafter; £2,750 was agreed for General Damages, the balance being a sum for the costs of physiotherapy treatment. If account is given for the sums paid by the insurers for the MOJ portal costs in addition to the deduction from damages, the Defendant will have received £1,707.25 by way of costs in respect of the claim.

4. On 4 July 2017, some two years later, a request for the Defendant's file was sent by the Claimant's new solicitors to the Defendant; it was accompanied by an authority, apparently signed by the Claimant, authorising his new solicitors to take delivery of the file. The Defendant Solicitors responded to the request by writing directly to their former client seeking clarification as to whether the signature on the authority was his. In the same letter they indicated that they had been involved in a number of similar matters with the Claimant's current solicitors; they asserted that the application was defective and that it was necessary for them to contact him directly to confirm that he had given instructions to pursue the request and that he was aware of "*what is being done purportedly in* [his] *name*". They indicated that if the application were pursued, the Claimant's costs liability to his current solicitors could be "*between £4,000 and £7,000*".

5. On 5 October 2017 the file of papers had not been delivered up and an application was made to the Court. The Part 8 Claim Form stated that the Claimant sought delivery up of such parts of the Defendant's file over which the Claimant has proprietary rights and delivery up of copies of such other parts of the file over which the Claimant did not have proprietary rights (an offer having been made to pay photocopying costs in earlier correspondence). The certificate on the Claim Form, signed by a solicitor, confirmed his authority to proceed with the application.

6. By a letter dated 20 October 2017 (the same day that proceedings were issued), the Defendant Solicitors sent to the Claimant, again directly, what they assert is a statute bill (that is to say, one on which they are entitled to sue: see section 69 of the Solicitors Act 1974 ['the 1974 Act']). The bill ('the October bill') is in the sum of £2,634.75. In the letter they say that "*after one calendar month has passed and you have not sought an assessment of the bill - we shall seek an assessment*".

7. The October bill gives credit for sums already paid but appears to assert that a further sum of £927.50 is due from the Claimant. The document is substantially redacted (for reasons which have not been explained) such that details of the fee earner have not been provided. The hourly rate claimed is £250 per hour. Attached to the October bill are earlier 'bills' dated 14 October 2015, 26 October 2015 and 27 October 2015; the first two are addressed to the RTA insurer (against whom the damages claim was brought) and seek £500 plus VAT (in total); the bill of 27 October 2015 asserts a right to a client contribution for profit costs in the sum of £577.08 plus VAT and a deduction in respect of an ATE premium in the sum of £198.75 (the total of this bill being £692.50).

8. The Claimant does not accept that the October bill amounts to a statute bill. However as Mr. Carlisle, on behalf of the Claimant asserted, if the bill were to be construed as a statute bill and the further sum claimed in it were added to the costs already paid and set against the General Damages award, the Claimant would be left with the sum of £931.25 - being approximately one-third of the sum agreed for this head of claim.

9. On 31 October 2017 a further letter was sent to the Claimant, again directly, enclosing a bundle of papers in respect of his claim. The Defendant described the bundle as consisting of "*other papers you have* [the] *right to*". I should add that a number of the documents enclosed in this bundle are also redacted, obscuring details of the fee earner/s who handled the claim. This bundle of documents has been cross referred by the Claimant's current solicitors with the October bill and I understand that, save for certain documents which are now sought, the Defendant's file has now been disclosed (or at least substantially so).

10. The Claimant seeks production of a letter to the ATE insurance provider which is referred to in the October bill. In addition, whilst copies of part of the conditional fee agreement between the Claimant and the Defendant (the CFA) have been disclosed, the Claimant says that part of the CFA has been withheld and seeks disclosure of four schedules which are referred to in the disclosed part of the CFA together with any other document which may form part of the retainer or the client care documentation. The schedules would appear to deal with various matters such as the Claimant's liability to pay a success fee, the calculation of the basic charges and expenses (including, I would assume, the hourly rate/s chargeable), details of the right to cancel the agreement (presumably under the relevant consumer provisions, being the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 or its predecessor) and what are referred to as the Law Society Conditions (including, as I understand it, a section setting out the meaning of the terms used in the agreement). The October bill makes reference to the Claimant having been sent what is referred as a 'client care pack'. Clarification is sought by the Claimant as to whether the CFA together with the schedules comprise the entirety of the funding arrangement and the client care pack and, if it does not, production is sought of any other documents comprising the pack, including client care letters.

The parties' contentions

11. In argument the Defendant conceded the Claimant's entitlement to the letter (or letters) sent to the ATE insurance provider on behalf of the Claimant. According to the October bill the Claimant was charged for the production of such a letter and I understand that it is agreed that the Claimant has established a proprietary right to such a document. I do not therefore need to determine this element of the application.

12. The Claimant's case in oral argument was not put in quite the same way as it had been put in the skeleton argument dated 8 December 2017 served on his behalf. In particular it was said in the hearing that he is entitled to delivery up of schedules which form part of the CFA as he has a proprietary right in the original copies held by the Defendant as he had not been given a signed copy of the whole of the CFA. It was also argued, as it has been from the skeleton argument, that in any event the Court has the power to order the provision of copies of the documents sought subject to the payment of the reasonable costs of the Defendant of providing copies and should exercise such powers in this case (such documents no longer being available to him). Further and alternatively it was argued that having disclosed part of the CFA the Defendant had impliedly waived its right to withhold the rest of the document.

The Defendant Solicitors object to an order requiring him to deliver up or produce the documents asserting that as a matter of law the Claimant is only entitled to such an order if he can establish a proprietary right in them; they assert that he has not done so. They also say that the application is merely a fishing expedition and is disproportionate; they had the right to make deductions from the Claimant's damages and, relying on documents they say were in the client care pack, assert that they complied with the provisions of relevant regulations.

Discussion and decision

13. In my judgement the Court has the discretion to order the provision of copies of the documents sought whether or not a proprietary right in the relevant documents has been established and that it would be appropriate in this case for that discretion to be exercised in the Claimant's favour.

14. As to the existence of such a power the Claimant relies upon section 68 (1) in Part III of the 1974 Act and the inherent jurisdiction of the Court. Section 68 provides as follows:

> ***Power of court to order solicitor to deliver bill, etc.***
>
> *(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*.

15. Mr. Carlisle contends that the powers referred to in section 68 derives from the inherent jurisdiction of the court over solicitors as officers of the court. That the power is not limited in the way the Defendant contends is apparent, he says, from the express terms of Section 68 which refer to powers to make orders for the delivery up of "*or otherwise in relation to any documents*".

16. The nature of the inherent jurisdiction to which Mr. Carlisle refers is considered in *Harrison and Another Appellants v Tew* [1990] 2 A.C. 523 [see 529D to 531G] and *Kanat Shaikhanovich Assaubayev & 6 Ors v Michael Wilson & Partners* [2014] EWCA Civ 1491 [see para. 22 to 31]). In *Fox v Bannister King & Rigbeys* [1988] QB 925 (cited in *Kanat*) Donaldson MR described the jurisdiction as being "*extraordinary"*; it was one to which the solicitors are "*amenable because of their special relationship with the court*" and; "*is designed to impose higher standards than the law applies generally*".

17. In *In Re Thomson* (1855) 20 Beav 548 Sir John Romilly MR was concerned with an application by a former client against his solicitor for the production of certain letters. He held:

> "*The copies made by the solicitor of letters written by him to third parties, on his client's business, were made for his own benefit and protection and were neither charged for by him, nor paid for by his client. If therefore the client requires copies, he can only have them on the terms of paying for them*".

18. The difficulty with taking such a passage as an authoritative determination of the extent of the jurisdiction in respect of applications of this sort, is that the solicitors in that case had conceded that they would provide copies of the relevant documents on the condition that the client paid for them. However, the Master of the Rolls did go on to say that his decision that

the client was entitled to delivery up of other letters (written to the solicitors by third parties and relating exclusively to the client's business) was "*not founded on any question of copyright or qualified ownership*".

19. In *Mortgage Business v Taggart* [2014] NICH 14 an order was sought before Mr. Justice Deeny, a judge of the High Court in Northern Ireland, for the delivery up of files held by the solicitors in respect of various properties on which the applicants held mortgages. The delivery up was resisted on the basis of the decision in *In Re Wheatcroft* (1877) 6 Ch D 97, on the same or similar grounds relied upon by the Defendant now. Deeny J held as follows:

> [*6] ……. The exchange of correspondence between the parties to these proceedings is of its essence not confidential between the two parties. They came into existence because plaintiffs as clients instructed the defendant as solicitor. As a general principle it seems to me that the client should be entitled to ask copies of this correspondence, if it has lost the same. It maybe that that is also the case if it is unsure if it has a full set of correspondence. It could therefore ask to inspect the correspondence file and take copies of any correspondence which did not. However, this right of a client is qualified by the fact that the originals of the correspondence from the solicitors will have been sent to plaintiffs and the plaintiffs should have retained copies of any of any replies they have gave to the Defendants. They are therefore putting their former solicitor to trouble and expense in completing lacunae or possible lacunae in the plaintiff's' own management of its records and affairs. It seems to me therefore the plaintiffs, if they aver that their own files are believed to be incomplete, are entitled to see and copy these but would have to pay professional fees of a solicitor to the extent that a solicitor has to spend time checking the files and of clerical assistance to the extent to which it is required in the course of furnishing copies.*
>
> *[7] Mr Gowdy resists the approach I have outlined above on the basis of the judgement of Jessel M.R in <u>In Re Wheatcroft</u> (1877) 6 Ch D 97. In that case the applicant, who was the legal personal representative of a deceased estate, had employed Mr Wheatcroft as a solicitor in business connected the administration of the testator's estate until October 1876 when she ceased to employ him, paid him his bill of costs, and transferred the business to other solicitors, to whom Wheatcroft handed over the deeds, books, papers and writings relating to the same business. The question arose whether Wheatcroft was entitled to obtain certain original letters written to him by the applicant in connection with the business, and also copies of his own letters in his own letter book. In a splendidly succinct judgement Jessel M.R. held that the solicitor was entitled "to retain letters from the client and copies of his own letters in his letterbox as such letters and copies were his own property". I respectfully accept the decision of Jessel M.R. but I do not think it assists the defendant here. The solicitor's own letter book would indeed be his own property. As the very word implies it would consist of the letters that are coming to him, presumably in any particular case, and copies of his replies. In the unhappy event of any legal dispute it might be of assistance to have the physical letter book show that a reply was written to a particular letter I can well see that that book would remain the property of the solicitor. But that does not preclude the plaintiff' whose records are incomplete from asking to have copies of the correspondence with his former solicitor, subject to paying the necessary costs involved. In case there is a dispute about the authenticity of an original letter from the plaintiffs to the defendant should be entitled to retain such originals; likewise with original copies if they exist although in this day and age they mainly only exist*

electronically. Wheatcroft does not seem to me good authority against the former client having access to copies of the correspondence and I so rule.

20. Even accepting that the decision is not binding on me, the decision of a judge of the High Court of Northern Ireland must, to my mind, be highly persuasive authority as to the nature of the jurisdiction; and, for the reasons given in this judgement, I do not think the decision *In Re Wheatcroft* assists the Defendant in this case.

21. There appears to be no dispute that the Court would have the power to order the inspection of copies of the relevant documentation in proceedings for an assessment under section 70 of the 1974 Act. Such inspections are commonly ordered prior to the preparation of Points of Dispute and are not limited to documents in respect of which a client can establish a proprietary right; it would be odd if they were limited in this way as it would undoubtedly frustrate the ability of the parties to resolve any dispute in advance of an assessment; indeed it would risk substantially lengthening any assessment. The power to make such orders on an application for an assessment would appear to be same as that which is acknowledged in section 68.

22. That such a power is exercisable prior to the issue of any proceedings for an assessment appears to be clear from the terms of section 68; the section acknowledges a power to order the solicitor to serve a bill of costs before any application for an assessment, presumably as a prelude to such an assessment. The section is not subject to CPR 31.16 which is concerned with applications for pre-action disclosure in respect of intended proceedings in which there would be a right to standard disclosure.

23. To my mind Section 68 should also be seen in the context of other powers relating to the charging arrangements of solicitors in Part III of the 1974 Act (including powers to set aside business agreements, see section 57 and 61). Set alongside such provisions, and the considerations which underlie them (including the imbalance in the relationship between solicitor and client in the negotiation of charging arrangements; see *Harrison* p529) I do not think the Section 68 powers can be read as being restricted in the way contended for by the Defendant. It seems to me that the jurisdiction contemplated is complementary to the other powers in Part III; and the inclusion of the words "*or otherwise*" was intended to make clear that there was no such restriction.

24. I would add, respectfully, that the decision of Deeny J in *Taggart* appears to me to be consistent with relevant practical considerations. I doubt whether many clients (particularly those bringing relatively low value personal injury claims) would appreciate the need to retain documents they had been provided with in the course of a claim for any length of time. Indeed, I would expect many clients to assume that if they were to lose or mislay the papers for any reason their solicitor would provide them copies on request.

25. Whether or not the Claimant in this case had initially been provided with a full signed copy of the CFA, the witness statement served on the Claimant's behalf describes the documents as now missing, a matter which was confirmed in the course of the hearing. He no longer has the schedules and other documentation which he seeks; further, to my mind it is clear that the Claimant now reasonably requires these documents as he is at a substantial disadvantage without them.

26. Section 6.4 of Practice Direction 46 provides that if any application for an assessment concerns a conditional fee agreement, a copy of that conditional fee agreement must

accompany the claim form. Whether or not the Court might issue proceedings notwithstanding a failure to append such an agreement to the Claim Form, the Practice Direction clearly acknowledges the importance of considering such an agreement in advance of an application for an assessment.

27. Further, quite apart from any concern as to the reasonableness of the fees generally and the necessity of expenses claimed in the bills in this case, it seems to me that there is a particular need to consider the status of the fee earner and the rates that were agreed for the fee earners (*Pilbrow v Pearless de Rougmont & Co.* [1999] 3 AER 355). In a letter dated 1 October 2015 the Claimant was told that a Legal Executive would be handling his claim but as I have recorded above the details of fee earners have been obscured in the documents disclosed. The rate of £250 per hour is perhaps a rate one would normally associate with a substantially higher-grade fee earner in a matter of significantly greater complexity and value. I would expect details as to the charging arrangements to be set out in the schedules to the CFA and I think it would be necessary to consider these prior to an application for an assessment in the context of a general consideration of the reasonableness of the funding arrangements and the charges.

28. I note also that in the October bill the Defendant charged for work done before return of the CFA by the Claimant and work done in respect of their own funding arrangements. The amount of such fees are small but significant in relation to the total sum claimed. Whilst in principle it may be possible, subject to the client's agreement, to charge for work undertaken prior to entry into the CFA (*Birmingham City Council v Forde* [2009] 1 WLR 2732) I would anticipate that the schedules to the CFA would set out in terms whether such a charge could be made; they would need to be considered. Similarly, when drafting their own funding arrangements and negotiating their own charges solicitors are generally regarded as acting for themselves not for the potential claimant who is at that stage a prospective client (see *Motto v Trafigura* [2012] 1 W.L.R. 657, para. 108), a matter which might call into question the charges made by Defendant in respect of work done on their own charging arrangements.

29. I should perhaps add that the bills generated in 2015 do not state whether and, if so, what element of the charges consist of a success fee. Nor does the October bill assert any charge for a success fee. However, according to the Claim Notification Form the CFA provided for a success fee and as such the agreement would appear to be subject to the requirements of section 58 (4B) of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2013 (no 689). The relevant information required by these provisions should be in the first of the schedules to the CFA.

30. Neither party has required me to determine whether the October bill is a statute bill. But even if it could be said that a detailed statute bill has been delivered to the Claimant I would not accept that this prevents me from making the order sought. In *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500 Ward LJ held that when considering whether sufficient information had been provided to a client for the purposes of deciding whether a bill could be regarded as statute bill regard was to be had to information in the possession of the client (paragraphs 32 and 64). The client can ordinarily have been presumed to have been provided with the retainer documents and to have access to that information and the decision does not deal with the situation that arises here when the client does not have access to such information. However at paragraph 32 Ward LJ stated that the legislative intention which underlay a consideration as to whether a bill was a bona fide bill complying with section 69 of the 1974 Act was that the client "*should have sufficient material as to the nature of the*

charges on the face of the bill so as to enable him to obtain advice as to taxation"; he held that such advice was needed in order to be able to judge the reasonableness of the charges and "*the risks of having to pay the costs of taxation if less than one-sixth of the amount is taxed off*" (see now Section 70 (9) for the 'one-fifth rule'). Applying the same considerations here it does seems to me that there is likely to be important material in the relevant documents, and that the Claimant would reasonably need to take advice on this material before making an informed decision as to whether or not to challenge costs clamed. The October bill appears to have been produced by the Defendant after this dispute had arisen, indeed in response to the threatened application, and for the reasons given it does not provide all the information that the Claimant reasonably requires.

31. The exercise of the power to order copies or inspection to make good any failing in the client's own management of his papers is subject to payment of costs by the client as set out in *Taggart* above. In the witness statement served on his behalf the Claimant accepted his liability to pay the costs of providing copies of the schedules and other documents comprising the funding arrangements (albeit the offer was limited to copying charges). It was not however contended before me by the Defendant that there would be any further material prejudice to the Defendant in providing copies of the documents. There is no privilege or confidentiality between these parties in the material documents.

32. There are substantial and legitimate concerns about the proportionality of costs incurred in applications of this sort, and as to the prospect that allowing the production of copies of documents might encourage 'satellite' litigation. In this case the costs that would be at stake on an application for assessment are potentially significant in proportion to the damages received such that the matter is likely to be of importance to the Claimant, particularly given the recent demand for payment by the Defendant. Indeed I do not think that these two concerns should weigh against making an order which I otherwise consider to be correct; if the sums involved are modest in proportion to the costs that would be incurred in pursuing a section 70 assessment that might be said to be a factor which weighs in favour of giving the disclosure sought now, not against. Further, if the exercise of providing copies or inspection of documents is at the Claimant's expense this should deter frivolous requests; the costs involved in this application will reflect the issues arising, including issues as to proprietary interests, and thus may be higher than might otherwise be the case. In addition, the 'one fifth rule' is statutory protection against frivolous or unsubstantiated applications for assessment. Moreover, in the spirit of CPR 31.16, there is, it seems to me, at least a reasonable basis for thinking that 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.

33. I have some concerns as to the alternative basis for inspection based upon a claimed proprietary right in the withheld schedules to the CFA, particularly given the manner it was raised. It does not seem to me necessary for me to determine this issue if, as I understand to be case, the Claimant accepts that he must pay for the costs associated with the provision of copies of the relevant documents (paragraph. 14 of the Claimant's skeleton argument). However I should perhaps say that it was agreed by the parties that the Claimant had an entitlement to delivery up of a full copy of the original CFA, including schedules, if it had not already been provided to him in signed form. And further, whilst the witness statement from the Claimant's solicitor dated 8 December 2017 does not fully address the issue, the Defendant having provided a bundle of documents comprising correspondence between the parties, it seems to me that I could have reached a conclusion on this issue on the basis of these documents and the October bill.

34. As already noted, in the October bill the Defendant claims a right to charge for costs associated with the funding arrangements including the preparation of the client care pack and the CFA. According to that bill the pack was sent to the Claimant for him to consider on 3 June 2015 and, presumably, for him to sign the relevant documents. It appears that he did sign the CFA and returned some or all of the documents that had been sent to him and in a letter dated 2 July 2015 to the Claimant the Defendant acknowledges receipt of documents completed by the Claimant. I have also seen in the bundle a copy of part of the CFA which has not been signed by the solicitors but has been signed by Claimant. It appears that the documents then sent by the Claimant to the Defendant included the CFA, signed by him but unsigned by the Defendant. The letter of 2 July 2017 does not however also return a copy of the CFA signed on behalf of the Defendant. Had a signed copy of the CFA been provided to the Claimant I would have expected it to have been sent with this letter. Moreover I have not found in the bundle any other letter sending a signed copy of the CFA to the Defendant (noting that the 8 letters charged in the October bill are in the bundle of papers provided to me and the Defendant claims an entitlement to charge for costs associated with their funding arrangements).

35. The assertion at the hearing on behalf of the Defendant that a full signed copy of the CFA had been provided to the Claimant did not sit with documents which it had disclosed. Mr Dunne for the Defendant told me that in response to other similar applications evidence has been submitted by the Defendant to the effect that the signed conditional fee agreement has been sent to the client. I did not however understand him to seek an adjournment in order to do so in this case or to seek to supplement the bundle the Defendant had already provided.

36. Thus, whilst it has not been necessary for me to make a decision on this issue the evidence before me pointed to the Defendant not having returned a full signed copy of the CFA to the Claimant. Accordingly, if that were right, on this alternative basis, the Claimant would have been entitled to production of a signed copy of the CFA including the schedules.

37. It has also proved unnecessary for me to decide whether there was an implied waiver of the right to withhold the whole of the CFA. Plainly in the context of the obligations under CPR 31 disclosure of part of a document generally gives rise to a waiver of the whole of the document unless the other parts of the document are so distinct as to amount to different documents. The CFA is to be read as a whole and in my view the schedules could not be regarded as distinct documents. If the powers referred to in section 68 are not limited as the Defendant has contended, I would have thought that the partial disclosure of the CFA (in circumstances where the Defendant asserted, at least initially, that the Claimant had a right to it) would appear to be a further good reason why the schedules to the CFA should be disclosed albeit subject to payment of costs as provided for in *Taggart*.