Neutral Citation Number **[2022] EWHC 2188 (Ch)**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

No. BL-2022-000600

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday 15 July 2022

Before:

SIR ANTHONY MANN
(Sitting as a Judge of the High Court)

IN THE MATTER OF SOLICITORS REGULATION AUTHORITY LIMITED

MISS H. EMERSON (instructed by Russell-Cooke LLP) appeared on behalf of the Claimant.

R E V I S E D A P P R O V E D J U D G M E N T

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Sir Anthony Mann:

1 This is an application by the Solicitors Regulation Authority ("the SRA") for authority to operate a policy for the destruction of documents which have come into its possession as a result of interventions in solicitors' practices. It is made pursuant to a Part 8 claim form issued on 5 April 2022, and pursuant to an order of Master Pester the claim form was issued without naming a defendant. That is because there is no obvious defendant to an application of this nature as will appear when I describe it.

2 The SRA today has been represented today by Miss Heather Emerson who has given me all the help that I would be entitled to expect from counsel appearing for the SRA and I am grateful to her for her help and the clarity of her submissions.

3 The application arises in the following circumstances. As will be well-known, the SRA has power to intervene in solicitors' practices for a number of reasons. When it intervenes, it takes over or is authorised to take over the solicitors' practice and, in that context, it comes into possession of all the files of the solicitors. Having come into the possession of the files of the solicitors, it has to decide what to do with them. Some of them, no doubt a large number, can be handed over to new solicitors for the clients in question and no doubt that will happen in all or most of the matters which are then current. However, that is not the fate of all the files. Some of the files are apparently no longer current or not obviously current. In other cases, it may be that the client does not wish to take them over or there is no response to any request to having them taken over, and in other cases it may be apparent that there is nothing obvious to take over. In those circumstances, the SRA, over the years, acquires a considerable number of files containing a vast number of documents which it has to deal with. Subject to relatively recent decisions to destroy the files, the SRA simply stores them and that storage comes at a significant cost.

4 The application and claim are supported by a witness statement from Mr Anthony King who is the technical manager in the Client Protection directorate of the SRA. That witness statement helpfully gives an indication of the storage requirement and the costs involved. In para.40, he recites information that he has been given by the storage firm which stores boxes and boxes of files in their two warehouses. He records the following figures:

> "In June 2021, 346,572 boxes were in storage. Storage costs are currently 28p per box per month. So the cost of storing all those boxes is, in round terms, £1.194 million per year. According to the SRA's records, 215 interventions took place between 2015 and the end of 2020 [the significance of the 2015 date will become apparently shortly], 1.4 million files were collected in relation to those 216 interventions of which 94 per cent were client files, 3 per cent were account files, and 3 per cent were administrative files. The cost of storing those 1.4 million files is £334,000 per year."

An updating witness statement puts the annual cost t £1.15m per year, but the difference is immaterial for present purposes.

5 An application is made for authority to destroy in this application, and if that application is acceded to in accordance with the policy which I am asked to approve, then 765,000-odd files would fall for immediate destruction. Storage costs apparently increase by 1.5 per cent per year. The SRA understandably wishes to reduce what is otherwise a considerable costs burden on an authority exercising public functions and it seeks to do so by continuing to implement a policy which, in circumstances to which I will now come, it has been seeking to implement for some time.

6 The authority for the destruction of files appears in the Solicitors Act 1974 and the existence of an authority to destroy files or, alternatively, to ask the court for authority to destroy files

has been dealt with in a very similar application which came before Mr Iain Purvis QC, sitting as a Deputy Judge of this division on 27 November 2014. He delivered judgment in the matter on 9 February 2015 ([2015] EWHC 166 (Ch)). In that thorough judgment, the Deputy Judge goes through the Act and demonstrates that this court has jurisdiction to order the authority of files taken on an intervention and, indeed, that the SRA itself has authority to destroy files without the court's authorisation. I do not propose to repeat the line of reasoning and the exposition of statutory authority, of Mr Purvis. I respectfully agree with it and adopt it gratefully and reference can be made to his judgment if anyone is concerned to see what it is that I am adopting.

7 When the matter came before him, it was not the first time the point had been raised. In 2009, the SRA came before Lewison J (as he then was) on a similar application. On that occasion, the SRA sought authority to destroy the files on the basis that what they were seeking to destroy was redundant in relation to five named firms. Lewison J also considered the jurisdiction he was being asked to exercise and considered that he had it, a point which was effectively confirmed by Mr Purvis some six years later.

8 There was before Lewison J a draft policy which he effectively approved which governed the ascertainment of which documents were to be destroyed. I do not need to go into any of the details of that policy. So, effectively, Lewison J was authorising the application of what I will call the 2009 policy to the destruction of documents in relation to the five named firms. Essentially, the policy prescribed which documents could be destroyed and how long documents had to be kept before destruction. It distinguished between original and non-original documents and provided various periods for various types of documents in detail which I do not need to go into.

9 The SRA duly did not in fact do what it was entitled to do under that order and by 2015, it was faced with the fact that a lot more documents had to come into its possession as a result

of a lot more interventions. In 2013/2014, the Law Society and the SRA had to come to the conclusion that the 2009 policy required modification. It consulted on modifications. Those modifications included the re-categorisation of some documents as between original and non-original documents and then provided for periods of retention before destruction for various categories of non-original documents and various categories of original documents. By and large, original documents were kept for a very much longer period of time than non-original documents, as one would expect. Having consulted on that policy, the SRA then made an application to this court and the application came before Mr Purvis QC as I have recited.

10 Mr Purvis was invited to make a declaration as to certain powers, which he declined to make for reasons with which I respectfully agree, but he was also asked to approve the implementation of the 2009 policy to the destruction of documents classed as non-original which were, at the date of his order, in the hands of the SRA as a result of interventions other than the 5 with which Lewison J was concerned. Effectively, that will be all interventions which were carried out between Lewison J's order and Mr Purvis's application, and, indeed, any interventions preceding Lewison J's order other than interventions into the five firms with which he was concerned. I stress that Mr Purvis was not asked to approve a policy in relation to the destruction of original documents, of which typical examples are wills and title deeds. He was asked only to authorise the destruction of documents in accordance with the policy relating to non-original documents, although there is an important intersection between those two matters in the classification of documents as original or non-original. To that extent, Mr Purvis was authorising that sort of clarification and distinction.

11 Despite the fact that the policy under consideration had been the subject of consultation and despite the fact that the policy was made known to Mr Purvis, the application was for the

application of the 2009 policy to the destruction of then existing files. I find that puzzling, but it was the case. Mr Purvis considered jurisdiction, as I have indicated. He considered he had jurisdiction and considered, for the reasons given in this judgment at [35] and following, that it was right to make the order sought and authorise the application of the 2009 policy to the documents then in possession of the SRA, and by "then", I mean the date of his order on 9 February 2015.

12 It would seem that having got that authorisation, the SRA decided not to apply it in its terms. It apparently decided that since it had formulated its new policy on which it had consulted, it would apply that policy relying on the finding of Mr Purvis that the SRA had its own power to destroy documents in its possession from interventions without the sanction of the court. Mr Purvis's order, as I have indicated, operated in relation to documents in the SRA's hands at the time of the order. It did not cover documents coming into its hands as a result of interventions thereafter. When I observe that the SRA decided to implement the new policy, which I will call the 2015 policy, even though that was not the policy authorised by Mr Purvis, I am not in any way being critical of the SRA. I find it a curiosity but no more than that.

13 The evidence is that following upon that order and the decision of the SRA to use its inherent powers under its new policy, the SRA implemented that policy, took it forward, and destroyed non-original documents in accordance with that policy. One of the effects of the policy was to shorten the period of time after an intervention before non-original documents could be destroyed. I do not need to go into the details of that.

14 Having been operating for some seven years under that policy in relation to documents existing at the time of Mr Purvis's order, the SRA, as a public body sensitive to the need to seek authorisation where appropriate, has now applied to this court again for an order that it can implement a policy, which is effectively an application for an order that the 2015 policy

can be implemented in relation to documents which have come into their hands since Mr Purvis's order. It does so on the basis that it would otherwise be unreasonable for it to incur the costs of perpetual storage of non-original documents and that there is no other satisfactory alternative for preserving the documents.

15 These matters are dealt with in the witness statements of Mr King to which I have referred. He seeks to rely on the ever-increasing costs which will be incurred by perpetual storage of the documents in question and he also submits that to keep the documents forever, or at least beyond a reasonable time, would be contrary to the provisions of the Data Protection Act 2018 because the documents contain personal information which there is an obligation not to retain beyond the time reasonable for that information in its circumstances. The ICO has been consulted on the matter and it agrees that the steps taken to deal with personal data and, in particular, to destroy personal data, proposed in the policy are acceptable and within what it understands to be general policy.

16 For those reasons, therefore, Mr King seeks authority to have the documents destroyed. He has emphasised the costs point which I certainly take on board. He has also given evidence of the likely impact on clients of the 2015 policy being implemented in relation to documents within the last seven years. A study has been carried out of the occasions on which clients have come back and asked for documents taken over in an intervention where they have otherwise not automatically received them. Looking only at 2015 interventions, the figures show that 15,961 files were returned to clients within two years of the intervention to which they relate. That represented (inaudible – very small) per cent of all files repatriated in relation to 2015 interventions. One hundred and ninety files were returned in the sixth year following interventions to which they related, which represents only one percent of all repatriated files in relation to 2015 interventions. Those statistics demonstrate, it is said and I accept, that the vast majority of files were returned in the first

two years after the intervention. Obviously, the farther away one gets from the intervention, the fewer and fewer files that are going to be requested. In any event, 6 per cent in aggregate of files taken on an intervention relate to the internal governance and affairs of the solicitor's firms itself and will not be requested by clients.

17 The evidence is that only a tiny proportion of clients might ever seek files which might have been destroyed under the policy bearing in mind the retention dates which are proposed under the 2015 policy. I accept that is the case. I also accept Mr King's suggestion that the sort of retention periods proposed by the SRA are likely to be no shorter and very arguably longer than retention policies which the original firm itself would justifiably have put in place in relation to non-original documents. That shows a risk to clients which is negligible although not non-existent. It tends to show that it will be disproportionate to adopt a course which requires the SRA to keep documents forever or for periods longer than those proposed under the 2015 policy. I shall not set out the terms of the 2015 policy in this judgment because it would take too long to do so, but the 2015 policy can be ascertained by going to the SRA website where it clearly appears. Mr King has estimated that acceding to the SRA's application would produce an annual saving of around £120,000, with scope for further savings as additional files become subject to destruction. That is an entirely appropriate saving for the SRA to wish to achieve.

18 The SRA has also investigated other ways of preserving information. In particular, it has considered whether files should be scanned prior to destroying the actual documents. Mr King's evidence is that the costs for this were regarded as prohibitive at an average of around £2.82 per file in 2014, not taking into account the costs of setting up the scanning system or dealing with ongoing data storage.

19 The SRA has also considered writing to clients with files the SRA seeks to destroy to afford them a final opportunity to claim the file prior to destruction. Again, that is considered to be

prohibitively expensive. In 2014, it would have cost an average of £2.12 per file, plus the cost of repatriation with an average of £2.52 per file. That would be a considerable burden in relation to files which would have been in the hands of solicitors for some time and which would have been kept undemanded for a for an appropriate period of time, which tends to demonstrate clearly the non-interest of the clients in the file. Accordingly, faced with those alternatives to destruction pursuant to a sensible policy, destruction is the road down which the SRA wishes to go and, indeed, the road down which it has been going before this matter comes before me. I agree that a policy is a sensible alternative and subject to the points which I am about to make, I agree, having looked at it, that the 2015 policy, which has already been in operation for seven years, is a sensible and proper policy for the SRA to adopt.

20 The order which I am asked to make covers files which are currently in the SRA's possession. I am not asked to make an order, as I understand it, authorising the policy for future files but one can perhaps anticipate that the SRA may apply the policy to those future files too. The terms of the order I am asked to make are as follows (in its material part):

> "The Solicitors Regulation Authority (the SRA) may destroy any non-original documents which are in its possession as at the date of this order by virtue of [various statutory provisions] in accordance with the terms of the requirements of the SRA's file and retention policy as amended from time to time ['the policy'] the current version of which is at Schedule A. For the avoidance of doubt, the documents may be destroyed on a 'rolling' basis as and when they become available for destruction in accordance with the policy."

21 That leaves it open to the SRA to amend its policy from time to time and to depart from the policy as it has been placed before me. If they are going to do that, one wonders why they

have made this application but I accept that the SRA does not necessarily have to come back to this court every time it wishes to amend a policy to a small extent. If a serious change to policy over that which has been placed before me is going to happen then the SRA would be likely to take the precautionary step of applying to court for future sanctions. I do not propose to make that a requirement but I make it clear that this court will anticipate that that should be done. Any minor change of policy, it seems to me, should not require the expense of a court application such as this.

22 I shall therefore make the order sought but raise the following points which will have to be dealt with.

23 I note and take into account the fact that the 2015 policy has reflected some of the comments made by consultees. The consultees were bodies such as local law societies, the ICO, representatives of immigration lawyers, and the like. I have seen some of their responses and have seen that some of the comments were incorporated in the policy and some not. In carrying out its consultation, the SRA provided clear information contrasting the 2009 and the 2015 policies so that the differences were apparent. That consultation exercise is obviously an extremely important one and it provides the court with some independent observations on the proposed policy. That is helpful because the policy is so detailed that without some assistance from those with some expertise, the court might be in some difficulties in approving the actual policy because of the court's understandable lack of knowledge as to some of the practicalities involved.

24 I consider that this court can safely approve the policy without any further assistance so far as the non-original documents are concerned. I do, however, have some concerns, or I would have some concerns were the court to be asked to approve a policy for destruction of original documents. The draft policy still exists but no destruction of original documents, as they are classified at the moment, has, I am told, taken place. It may or may not be that in

the future the SRA will seek the court's approval for a policy of destruction of original documents. That, in my view, presents rather greater difficulties or at least rather more serious matters for consideration than the present application which is confined to non-original documents, non-original documents being matters such as the routine correspondence and notes on solicitors' files and so on. Were there to be such an application in the future it may be, and I do not say it is certainly going to be the case, that the court would require some assistance more than the fruits of a consultation exercise which, of necessity, are likely to be presented in a rather discursive way (because that is how the results of the consultations were presented).

25 In the event of such an application, it seems to me that serious consideration would have to be given to the appointment of somebody in the position of an amicus or some equivalent so the court has some extra assistance as to some of the issues that might be involved and which might not be immediately apparent to the unassisted court. Whether the appointment of an amicus would be an appropriate route or whether some other route could be appropriately taken will depend on the circumstances at the time and I do not propose to be prescriptive about that.

26 Miss Emerson suggested, very sensibly if I may say so, that the appropriate mechanism for considering whether that should be done should be on the occasion when, as is likely, the SRA applies for permission to issue the application without there being a defendant to it as happened in this case. That is the occasion, she says, when the appointment of somebody in the position of an amicus of similar should be raised, and I think that is entirely correct. I do not propose to make any order to that effect but I do propose to make those observations for the assistance of the SRA and the court in the future.

27 The second point I make is one as to review. It is obvious from the events of this case that the SRA, entirely properly, reviews its policy from time to time. One can anticipate that the

policy may need reviewing in the light of experience in the future. One would assume that the SRA would do it but, in any event, Miss Emerson's client, at my request, has indicated that it will give an undertaking that it will, from time to time, keep its policy under review. In the light of that undertaking, I am satisfied that the policy as backed by this order will not necessarily operate forever even in relation to the documents to which it applies. I do not propose to make any further direction requiring the matter to be brought back before the court, particularly bearing in mind that my order will cover only documents which are currently in the SRA's possession.

28 The third point that I raise concerns a category of documents which is not in any way described in the categorization of documents in the current policy. That category of documents is a category which I raised myself at the hearing. It is documents which are clearly kept for safekeeping. I consider that the position of documents which have clearly been deposited for safekeeping with a solicitor require separate and careful consideration. It may be that those documents would not obviously fall into the category of original documents but it is certainly arguable, if not likely, that they should be treated as if they were original documents. The categorisation of some documents as original brings with it the supposition that the client will wish to have the original documents because they will be significant at some point. Those factors do not apply in relation to non-original documents because they are likely to be of much less significance to the client and may even not even belong to the client.

29 If one imagines documents which are expressly deposited with a solicitor for safekeeping, one can imagine that the client wishes those documents firmly to be kept by the solicitor and to have the same interest in having them kept as the client would have in relation to an original conveyance, or an original will, or some other original document kept.

30 I propose that the SRA gives further consideration to this point of preservation of documents that clearly are deposited for safekeeping and to introduce them into the policy before I approve the policy's application to the documents to which it is to be applied. It is not for me to prescribe policy but it is for me to identify any possible holes in the policy which need to be addressed before I am satisfied that it should be applied.

31 When I raised the point with Miss Emerson, I described the category as being documents which were "apparently" deposited for safekeeping. Miss Emerson said that posed serious practical and therefore costs consequences because it would mean that every document in a file would have to be carefully scrutinized to see whether it was a document deposited for safekeeping, or cross-referred to documents deposited for safekeeping at which point there would have to be an obvious hunt for those documents. That would materially affect the scrutinising activities which are to be carried out on these files which can be more easily done if there are simply categories of documents which are classed as original and categories which are not. The trained eye can easily distinguish between original and non-original documents; that is not the case with documents deposited for safe-keeping. Miss Emerson pointed out that the way I put the safekeeping documents meant that a completely different exercise would have to be carried out in relation to the latter, which made the task very onerous because every document would have to be considered carefully, document by document.

32 I accept Miss Emerson's point on this but I do not think it is a complete answer. I am concerned that this point be properly addressed. I either need to be satisfied that, actually, it would be disproportionate, unreasonable, and unfair to require the exercise to be carried out, or that it is right to do something and that it should go into the policy. What I propose to do is this. I think the point needs to be addressed and I think my original description needs to be modified. I consider that it would be appropriate for there to be treated as original

documents documents which are clearly marked or otherwise clearly designated as being documents deposited for safekeeping; that will not require the sort of detailed scrutiny which Miss Emerson fears on the basis of my first formulation, as it seems to me. A reviewer of the files should relatively easily be able to see whether documents are clearly marked or otherwise identified for safekeeping. One would hope there is a marker, and they may be bundled together with a marker. If those things are not present then the documents are unlikely to be clearly marked or designated within my description. I propose that such a category be added to a category of the category of original documents or treated as original documents and kept for some period.

33 I do not require that to be sorted out at this moment because the matter will have to be considered carefully by the SRA, and I propose that the SRA should have an opportunity to consider the matter. It can make further submissions to me in writing, or, if necessary, in person (but I hope not) so that it can be considered whether the concerns I have can be addressed in my way, in a different way or should not be addressed at all.

34 Miss Emerson pointed out the very small portion of people who ever ask for documents from retained files. I accept there is a very small portion but I consider that there is a point here which has to be addressed. It is one thing for clients to be subject to the risk that their files will be destroyed after an appropriate document retention period, save for original documents, but it is another for clients to be expected to understand that documents which they have expressly deposited for safekeeping will be destroyed because of a document retention policy. No document retention policy would likely to be prescribed for that event.

35 I propose therefore to leave that matter for the SRA to sort out. When it has decided what it wishes to do about it, either to convince me I am wrong or to reflect my concerns, the matter can then be reflected appropriately in the policy which the SRA can adopt or not adopt, as

the case may be, and then if I approve of the end result, that final form of policy will be annexed to my order and will be the approved policy.

36 The last point I have is a point of detail which I noted when considering the document which compared the 2009 and the 2015 policies for the purposes of the consultation which took place. I noted that a charge certificate relating to registered land had been moved from the category of original to a non-original. That means that all charge certificates are vulnerable to destruction. I have misgivings about that although they are misgivings which might be allayed. The misgivings arise out of this. As Miss Emerson pointed out, charge certificates have not been issued since 2003. Land registry policy has changed. She seemed to think originally that that meant that the original charge certificates had no relevance. I am not convinced about that at the moment although I have not got to the bottom of the point myself. My strong recollection is that charge certificates, which were issued before 2003, contain not merely entries on the register, which are now dealt with electronically, but also have bound within them the original of the charge in question, and that original, or the use of that original, may have some significance in the future. It used to have to be produced as evidence of title to the charge. That may still be the case in respect of old mortgages, that is to say pre-2003, but I am not sure about that and my own research in the time available did not reveal an answer to that.

37 If, in fact, the proper treatment of charge certificates is such that they should still be treated as original documents then the policy needs to be amended to that extent. If, in fact, old charge certificates are now completely otiose and, in particular, if they do not contain the original charge then the existing policy can stand. That is a point which I require to be addressed. It can be dealt with in the same way as the last point to which I referred, that is to say, the SRA can consider it and consider whether it wishes to satisfy me by amending

the policy or satisfy me that the policy does not need to be amended. When that point has been resolved, I can no doubt approve the policy.

38 Subject to those points, I hold that this court should make the order sought and approve the application of the 2015 policy to the destruction of documents currently in possession of the SRA.

CERTIFICATE

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