

Neutral citation number: [2022] EWHC 2284 (Comm)

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 5 September 2022

Before:

His Honour Judge Pearce

Between:

MR DAVID ELLIS

Claimant

- and -

JOHN HODGE SOLICITORS (a firm)

Defendant

Mr Nick Harrison (instructed by Ozon Solicitors Limited) for the Claimant

Ms Francesca O'Neill (instructed by Travelers Legal) for the Defendant

Hearing date: 30 August 2022

JUDGMENT

His Honour Judge Pearce:

This judgment was handed down in private at 2pm on 5 September 2022. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. This is my judgment on an issue of disclosure that arose during a first Costs and Case Management hearing on 30 August 2022. At the conclusion of counsel's submissions on the issue, I announced my decision that the order would be for disclosure to be given without any requirement for an undertaking from the Claimant's solicitors of the kind sought by the Defendant and that I would give my reasons in writing at a later date. I also indicated that I would adjourn an application for permission to appeal and extend the time for filing an Appellant's Notice generally until I handed down written reasons, whereupon I would fix the time limits for the hearing of such an application and/or for filing an Appellants' notice, as indicated at the conclusion of this judgment.

BACKGROUND

2. The Defendant is a firm of solicitors who specialise in personal injury litigation. The Claimant was injured in an accident at Mullions Restaurant, 43 The Avenue, Minehead on about 29 April 2014. He instructed the Defendant to act for him in respect of the claim ("the underlying claim"). Medical reports were obtained in respect of the Claimant's injuries. It is clear that there were issues as to the cause and extent of his injuries, the predominant questions being whether chronic pain and related psychological symptoms following revision of a pre-accident hernia repair were caused by the accident and were of the severity asserted by the Claimant.
3. The defendant in the underlying claim made a series of offers, the highest being in the sum of £200,000. The Claimant in contrast sought to recover a figure in excess of £500,000. The underlying claim was tried in July/August 2018 and led to an award of

damages of £11,813.63. It is clear that the decision not to accept the offer of £200,000 (or one of the lesser offers made) had a disastrous consequence for the Claimant.

4. The Claimant brings a claim for damages for professional negligence, issued in the Circuit Commercial Court. It is his case that the Defendant failed properly to advise him on the effect of the offers made by the defendant in the underlying claim and, in particular, the risk (which came to pass) that the expert evidence for the defendant in the underlying claim would be preferred to that of the Claimant.
5. During the Case Management Conference on 30 August 2022, I heard argument and ruled that this was not a suitable claim for issue in the Circuit Commercial Court. In accordance with the preferences of the party, I indicated that I proposed, subject to the appropriate consent, to transfer the case to the Business List. In any event, since the case had been issued within the Business and Property Courts meant that the obligations under what is currently the Disclosure Pilot governed by Practice Direction 51U (soon to cease as a pilot and to be replaced in similar terms by PD57AD) arose, in particular the obligation under paragraph 5.1 to provide initial disclosure at the same time as serving a statement of case.
6. The Defendant defends the claim on the basis that the Claimant was fully and properly warned of the risks in the litigation and the potential consequences of failing to beat offers in the underlying claim. It acknowledges (as one might expect) that its file of papers relating to the underlying claim is highly relevant, not least to a proper understanding of the Defendant's defence to this claim.
7. However, within the Defence, the Defendant indicated that it was "*not able*" to provide Initial Disclosure because it was exercising a lien over its file on the grounds of unpaid fees. The Defence goes on:

"4. The Claimant has failed to enter into any meaningful discussion about the resolution of the outstanding fees, and plainly has not required sight of the underlying file before drafting his Particulars of Claim. The Defendant will say that this is misconceived and has only served to increase the costs of this litigation, since there are assertions pleaded therein that are not supported by the content of that file and should not have been pursued.

5. In the premises, and in light of the positive obligations of the Initial Disclosure pilot scheme, the Defendant makes an offer to disclose the underlying file to the Claimant's solicitors upon provision of a solicitor's undertaking that it will not be further disclosed to the Claimant and that it will be returned after they have had the opportunity to consider it. This arrangement is in line with that originally

articulated in Robins v Goldingham [1872] LR 13 Eq 440 and recently cited with approval in Evelyn Donaghy v JJ Haughey Solicitors Ltd [2019] NI Ch 1”

8. The Defendant persisted in this argument at the CCMC on 29 August 2022 and accordingly the issue required determination.

THE ISSUES

9. It was common ground that:
- i) The retainer between the Claimant and the Defendant was terminated by mutual consent on the resolution of the underlying claim.
 - ii) The sums pleaded by way of counterclaim are unpaid (though the Claimant’s liability to pay those sums is disputed);
 - iii) The file relating to the underlying claim was disclosable in these proceedings at the very least on the ground that it contained key documents on which the Defendant relies, sight of which is necessary to enable the Claimant to understand the case he has to meet.
 - iv) In any event, the file contains material which is properly needed for the Claimant to know whether his case, as pleaded, could be maintained;
 - v) The issue before me was not as to whether I order specific disclosure of the file, since the file would fall within ambit of disclosable documents whichever model of disclosure the court ordered under PF51U; rather the court was being asked to decide whether a lien of this nature extends so as to restrict disclosure of the file pursuant to a disclosure obligation under the Civil Procedure Rules and, if so, whatever I should exercise the court’s undoubted power to restrict the right to withhold pursuant to the lien.

THE RELEVANT LAW

10. The law in respect of the exercise of a solicitor’s lien over a client’s file was considered and summarised by McBride J in Donaghy v JJ Haughey Solicitors [2019] NI Ch 1, the case cited by the Defendant in the Defence. Those principles can be summarised as follows:
- i) Subject to any agreement to the contrary, a solicitor has a common law right to exercise a general lien in respect of his costs on any property belonging to his client which properly comes into the solicitor’s possession in that relationship.

As Moore-Bick J put it in Ismail v Richard Butler [1996] 2 All ER 506, “*The basic rule is that a solicitor has the general right to embarrass his client by withholding papers in order to force him to pay what is due and the court will not compel him to produce them at the instance of the client.*”

- ii) Solicitors as officers of the court are subject to its supervisory jurisdiction and the court can therefore interfere with the enforcement of the common law lien on equitable principles.
- iii) Where it is the solicitor who terminates the retainer, the court will normally make an order obliging the original solicitor to hand over the file to the new solicitor against an undertaking by the new solicitor to preserve the original solicitor’s lien (a so-called *Robins* undertaking, following the decision of Malins VC in Robins v Goldingham (1872) LR 13 Eq 440);
- iv) Where the client terminates the retainer, this is a weighty factor against interfering with the exercise of the lien, but the court retains the power to do so on equitable principles;
- v) When invited to interfere with the exercise of the lien, the court should make the order which best serves the interest of justice, in particular weighing the risk that the client would be deprived of material relevant to the conduct of the case and might thereby be “*driven from the judgment seat*” if the lien is sustained against the principle that litigation should be conducted with due regard to the interest of officers of the court, who should not be left without payment for what is justly due to them.
- vi) In determining the appropriate order, the court should have regard to all of the circumstances of the case, including, in particular:
 - a) When and why the solicitor/client relation ended;
 - b) Who ended it;
 - c) The nature of the case;
 - d) The stage that the litigation had reached;
 - e) The conduct of the solicitor and the client respectively;

- f) The balance of hardship which might result from the order that the court is asked to make.
 - g) The fact that the value of the lien is likely to be considerably reduced if the file is handed over.
11. It should be noted that, in Donaghy as in all of the other cases cited to me, the litigation in which the lien was being asserted was either the same litigation as that which the original solicitor had been retained to conduct or related to the original litigation by way of enforcement of existing orders. Thus, the criterion listed at (d) above, “*the stage that the litigation had reached*” is clearly a reference to the stage of the litigation in which the solicitor had been instructed. That is to be contrasted with the position here where the litigation in which the lien is being asserted is a different claim involving a different defendant (in point of fact the very solicitor who is asserting the lien).
12. I note also in passing that the principle asserted by McBride J that the court could interfere with the exercise of the lien even when it was the client who had terminated the relationship is supported by the decision of Patton J in Slatter v Ronaldsons [2001] All ER (D) 251, but apparently goes further than the judgments of the Court of Appeal in French v Carter Lemon Camerons [2012] EWCA Civ 1180 and Barling J in Higgins v TLT [2017] EWHC 3868. In Donaghy, McBride J spoke only of the application of equitable principles in deciding whether the lien could be interfered with in such circumstances, whereas in both French and Higgins it was common ground that the solicitors in that circumstance could not be compelled to hand over the file unless they had been discharged for “*misconduct.*” Neither French nor Higgins appears to have been cited in Donaghy and it may be that the broad statement there of the court’s power to interfere in the lien where a client terminates a solicitor’s retainer other than for misconduct is not a correct statement of the principle to be applied in such a case. In any event, given the agreement that the retainer here was discharged by mutual consent, the issue does not arise.
13. In submissions, neither counsel was able to point to a case, such as the present, where the solicitor’s client sought disclosure of documents for a dispute other than that in which the file had been created. Since the hearing, I have noted the case of Woodworth v Conroy [1976] QB 884. This related to an accountant’s lien, asserted by

way of a defence to a claim for delivery up of the accountants' file. The defendant accountants counterclaimed for their unpaid fees, which the client defended, not admitting all of the work for which fees were claimed and alleging negligence in the performance of some of the work. Lawton LJ, in a judgment with which other members of the Court of Appeal agreed, drew attention to the undoubted discretion of the court as to making an order for inspection then contained in RSC Order 24, rule 13(1), and said:

“RSC Ord. 24, r. 13 (1) gives the court a discretion but judges no doubt would be guided by what had been decided in the past in relation to similar kinds of lien. The right of a solicitor to withhold papers from inspection by his client, even in litigation between them, was recognised as long ago as 1822: see Lord v Wormleighton (1822) Jac. 580. In later cases the limitations upon this right have been discussed (for an example, see In re Hawkes [1898] 2 Ch. 1) but the basic right has not been queried.

14. However, he noted that the defendant had not simply asserted the lien but had raised a counterclaim for the fees, in response to which the claimant raised the defences referred to above. He said:

“If these defences are put forward in good faith, it would be impossible to try the issues raised without evidence being led as to what work had been done and how it was done. The best evidence of what had been done would be in the files and the court would have to assess their contents in order to decide whether the fees charged were reasonable and whether the work had been done negligently. Unless there is some other element in the case, inspection of the files would be necessary in order to dispose fairly of these issues.”

He went on:

“The defendants contended that there was another element. They submitted that these defences were nothing more than tactical moves to raise issues on the pleadings which would justify an order for inspection. They invited attention to the precipitate way in which the action had been started after the defendants had claimed their fees and to the absence of any correspondence before the writ was issued making allegations against the defendants of the kind now to be found in the pleadings. They also pointed to the way these defences had been pleaded; bare denials that the work had been done and that the charges were reasonable, coupled with an allegation of negligence unsupported by any particulars and without identification of the damage alleged to have resulted. All this gives cause for suspicion; and in the case of the negligence plea its inherent defects and the way it has been put forward lead me to conclude that it has no substance. I do not feel justified, however, in coming to the same conclusion about the other pleas.”

THE DEFENDANT'S CASE

15. The Defendant's case is that the lien it is seeking to exercise falls squarely within the recognised common law lien for unpaid fees of a solicitor. The fees are unpaid, and the Defendant was therefore entitled to "*embarrass*" the client by declining to provide the file. In so far as this risked any prejudice to the Claimant, that risk was sufficiently mitigated by the Defendant's offer to release the file to the Claimant's new solicitors subject to a *Robins* undertaking, thereby allowing the solicitors to read, take instructions on and use any material of relevance from the file but preserving at least some of the value of the lien by preventing the Claimant himself having sight and control of the file.
16. The Defendant complains that the Claimant; has not engaged with its attempts to seek payment of the outstanding fees and further has increased the costs of litigation by pleading the case without first having sight of the file. Of this, the Defendant says in its skeleton argument, it "*has only served to increase the costs of this litigation, since there are assertions pleaded therein that are not supported by the content of that file and should not have been pursued (i.e. a failure to advise, including advice about the merits of offers to settle).*"

THE CLAIMANT'S CASE

17. The Claimant contends that the Defendant's position is fundamentally misconceived. The lien to which the Defendant refers may give a right to the solicitor to withhold the file from the former client where for example the client wishes to use the file to continue to prosecute an existing case in which the solicitor has previously acted or indeed wishes to commence a fresh claim to which the material in the file is relevant. But the lien has no application where, as here, the disclosure being sought is pursuant to the parties' disclosure obligations under the Civil Procedure Rules. The CPR governs that situation and there is no ground for holding that a document that is otherwise disclosable can be withheld (or withheld subject to an undertaking of the kind sought here) pursuant to a lien.
18. Counsel for the Claimant illustrated the point by referring to a situation where his client was saying, "*That is my file – give it to me.*" In that situation, the Defendant could assert the lien and would be under no obligation to hand over the file unless the court could be persuaded to interfere on equitable principles. In contrast, the position

here is that the Claimant is accepting that the file is in the Defendant's control but asserting that the disclosure obligations under the CPR require the contents to be disclosed. The obligation to produce the file is not based on the Claimant's rights in the file against which the lien can be asserted; it is based on the disclosure obligations of the CPR to which the lien has no relevance.

19. In so far as the Defendant seeks an undertaking that restricts the right of the Claimant himself to see the file, the Claimant contends that this is contrary to principle. Save in exceptional cases relating to issues such as national security or certain claims of privilege, there is no basis for requiring a party that has the benefit of disclosure and inspection to give an undertaking of this kind. In so far as the Defendant may have a concern that disclosure of the file in these proceedings will devalue the lien because it would enable the Claimant to use its contents in other proceedings, the Claimant points to the limitation in CPR 31.22 (which applies equally here in light of paragraph 1.9 and section II to PD 51U) on the use to which a party to whom a document has been disclosed may put that document. The Claimant is simply not permitted to do this save in the narrow circumstances referred to there. No express undertaking is required to give effect to this obligation. (In point of fact, counsel for the Defendant accepted in argument that the only probable value of the file was to the Claimant in the prosecution of this claim or defence of the counterclaim.)
20. If the court finds, contrary to his primary position, that the lien can be enforced in circumstances such as here and that to order disclosure of the file would substantially diminish the value of the lien, the Claimant contends that the interests of justice weigh heavily in favour of making an order for disclosure without requiring an undertaking. The Claimant has not been able fully to particularise his Defence to the Counterclaim because he does not have sight of the file. In any event, his main claim may be substantially compromised if he does not have sight of the file at this stage.

DISCUSSION

21. It is striking that the parties have been unable to find any authority on the exercise of a solicitor's lien in this context. The Defendant says this is because issues such as this are usually resolved at the stage of a pre action application for disclosure by the Claimant. It probably is correct that most issues of this nature would arise at the stage of a pre-action application for disclosure rather than at the stage of the present case,

simply because a claimant might be expected to have wanted sight of the file before deciding to issue the claim. Indeed, if the Defendant here is correct, the decision to issue without sight of the file may prove to have been ill-judged. But it seems unlikely that the Defendant's explanation for the absence of authority on this issue can be correct. If the question of the application of the lien is normally dealt with at the stage of a pre action disclosure application, one might expect that there would be reported cases on this issue in such applications, yet none has been cited by either party. The Claimant says this is because his position is generally thought so obviously to be right that no one has raised an argument against it previously. But, if this is so, it cannot detract from the need to examine whether the assumed true position is in fact correct.

22. The decision in Woodworth v Conroy however provides some assistance to the determination of the issues before the court. In particular it appears to support the conclusions that:
 - i) The court's discretion as to ordering inspection under the Rules of the Supreme Court gave it a power to decline to order inspection of documents subject to a lien. This would appear to be an answer to the Claimant's argument that the lien simply has no relevance in the context of disclosure issues.
 - ii) However, it would be inappropriate on the facts of the case to exercise the power where the person asserting the lien was suing for the fees which gave rise to the lien, the client was putting in issue the holder of the lien's right to the fees claimed and inspection of the file was central to determining liability for the fees.
23. Further, it would appear that, had the claimant in Woodworth properly particularised a negligence claim, that claim itself would have been a ground for ordering inspection notwithstanding the existence of the lien, if inspection of the file was necessary to the disposal of that issue (which it probably would have been).
24. The true application of the decision in Woodworth to the facts of this case is not straightforward since the powers and duties in respect of the discovery process under RSC Part 24 are significantly different than the regime of CPR PD 51U. In particular where, as here, the documents were subject to the Defendant's obligation of initial disclosure (since it is common ground that they are necessary to enable the Claimant

to understand the claim he must meet), the obligation to produce the documents under PD51U has relatively narrow exceptions. Nevertheless, such exceptions are recognised to exist (see paragraph 5.10 of PD51U) and I therefore proceed, without having heard argument on the issue in light of Woodworth, on the basis that the court has a power to modify duties of disclosure that would otherwise arise under PD51U where the party from whom disclosure is sought has a valid lien over the file for unpaid fees.

25. On the facts of this case, I am satisfied that it is not appropriate to allow the Defendant to continue to assert the lien so as to modify disclosure obligations that would otherwise arise, whether by requiring an undertaking on the lines sought by the Defendant or otherwise, for the following reasons:

- i) The Claimant has alleged negligence on the part of the Defendant in the discharge of its duties in respect of which the fees are sought. It has not been said that the claim is inadequately particularised (as opposed to containing particulars that it is said cannot be sustained in light of the contents of the file) and there is no application before the court to strike out the claim. On the face of it, the Claimant has an arguable case that can only be understood by consideration of the documents. If the Defendant is correct, consideration of those documents will demonstrate the correctness in whole or in part of its defence. It may well be that the decision to issue without sight of the file will prove costly to the Claimant. However, the documents in the file are clearly central to the issues before the court. The Claimant cannot fairly conduct this claim without knowing the contents of the file.
- ii) Whilst it is argued that a type of *Robins* undertaking that allowed the solicitors (but not the claimant himself) to see the file would properly balance the Defendant's interest under the lien with the Claimant's need to know the contents of the file, I do not consider that this is realistic. The context of discussions recorded in file notes is likely to be important in judging the evidential significance of the file notes to the claim. The Claimant cannot properly deal with the issues without knowing exactly what the documents say – and if he is told the full content of the documents, the lien would lose its value just as much as if he saw the documents themselves;

- iii) The obligation under CPR 31.22 not to use documents disclosed in these proceedings for the purpose of other proceedings has the same consequence as the type of obligation which might arise from a *Robins* undertaking to return the file at the end of the current litigation. There is no reason to think that the one would be more protective of the lien than the other. (It might be added that the file and therefore the lien would appear to have no value other than for the purpose of the present litigation in any event.)
 - iv) The fact that the Defendant has counterclaimed for the fees is significant. This claim is defended in part on the basis of whether the Defendant is in fact entitled to the fees claimed, thereby putting the contents of the file directly in issue such that, as in Woodworth, it is difficult to see how the case could properly be tried without the file being disclosed. It is possible that the undertaking sought by the Defendant might be less problematic on this issue, since the defence of the fee claims on the grounds of the Defendant's right to charge the fees is likely to be a matter largely of analysis by the lawyers and legal argument rather than evidence from the Claimant that would be potentially weakened by the fact that he had not had sight of the file. However, the risk of prejudice to the Claimant still arises, in circumstances where the Defendant has chosen to bring a counterclaim for fees against him. That is a powerful argument for holding that the lien cannot be asserted on equitable principles.
26. Since I have not heard argument on Woodworth, it was not an authority that affected my decision expressed orally to make an order along the lines sought by the Claimant - I would have made the order in any event. Having seen the judgment in that case, it provides some support to both sides in this case, in part for the argument advanced by the Claimant as to the merits of an order for disclosure without the limitations contained in a *Robins* undertaking and in part for the argument advanced by the Defendant that the court does have a power to modify the disclosure order that would otherwise have been made in light of the assertion of the lien. Whether Woodward in fact remains good law having regard to the disclosure regime under the Civil Procedure Rules and the PD51U, which differs significantly from the regime under the Rules of the Supreme Court, may fall to be considered on another occasion when

the issue has been fully ventilated – for present purposes I decide this case on the basis that it does indeed remain good law.

CONCLUSION

27. For these reasons, I determine that the disclosure obligation of the Defendant includes an obligation to disclose its file arising from the underlying claim and that the Claimant's solicitors should not be required to give an undertaking restricting the use to which the file is put beyond the restrictions that are contained in the CPR in any event.

DIRECTIONS

28. As indicated above, I have already extended time for the Defendant's application for permission to appeal. However, the time scales in respect of any application for permission need to be tight given their potential consequences for the intended trial in 2023. Any application for permission made to me should be by written submission no later than 4pm on 9 August 2022. I will determine it on paper. In the event that the Defendant does not pursue an application for permission to appeal, this equally should be notified by 4pm on 9 August 2022. The time for filing an Applicant's Notice to the Court of Appeal is extended in the first instance to 4pm on 16 August 2022. If there is any delay in me dealing with an application made to me, I will extend that time, with a view to giving the Defendant as close to 7 days as possible in which to file the Appellant's Notice. If the Defendant seeks a longer period for filing an Applicant's Notice, application can be made to me at the same time as filing written submissions to me seeking permission.