Neutral Citation Number: [2018] EWHC 2592 (QB)

Appeals : QB/2018/0009, QB/2018/0071,
Cases : JJ/1706056, CL1706093

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
MASTER JAMES
MASTER LEONARD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 September 2018

Before :

MR JUSTICE SOOLE

- -

Between :

MR IAN HANLEY	**Claimant/ Appellant**
- and –	
J C & A SOLICITORS	**Defendant/ Respondent**

And between :

MR MARK GREEN & ORS	**Claimants/ Appellants**
- and –	
SGI LEGAL LLP	**Defendants/ Respondent**

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Miss Emma Hynes (instructed by **JG Solicitors**) for the **Appellants**
Mr Robert Marven QC (instructed by **the Respondents**) for the **Respondents**

Hearing date : 9 July 2018

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Judgment Approved by the court for handing down

Mr Justice Soole :

1. The issue in these appeals is whether the Court, under the inherent jurisdiction over its officers and/or s. 68 Solicitors Act 1974, has the power to order a solicitor to make

and supply to his client (or former client) copies of documents which are the property of the solicitor, subject to payment of reasonable costs for the task.

2. By Orders in each action the subject of these appeals, the costs judge held that the answer was no. There are decisions to the contrary in two other recent cases: Swain v. J C & A Ltd [2018] EWHC B3 (Costs) (Master Brown); and the Northern Ireland decision in The Mortgage Business Plc & ors v. Taggart [2014] NICh 14 (Deeny J). I understand that there are numerous applications which give rise to this point; particularly in the context of low-value personal injury claims funded by conditional fee agreements (CFA).

3. Section 68 falls within Part III of the Act which is headed 'Remuneration of Solicitors'. It provides as material *'(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.'*

4. Section 70 makes provision, on application by the party chargeable therewith, for an order for assessment of the solicitor's bill by the Court.

5. In each case that the appellant clients retained the respondent solicitors in relation to the recovery of compensation for injuries sustained in a road traffic accident. The retainer was on the terms of a CFA entered after the commencement of the LASPO[1] reforms commencing 1 April 2013. The terms limited the solicitors' recovery of their success fee to the statutory maximum 25% of the relevant[2] damages recovered. Upon settlement of each claim, that total percentage and the ATE premium were deducted.

6. In each case the appellants subsequently instructed fresh solicitors (JG Solicitors Ltd (JG)) for the initial purpose of obtaining advice on whether to exercise their right to a detailed assessment of the solicitors' fees pursuant to s.70.

7. By letter dated 28 March 2017 JG, on behalf of the appellant Mr Hanley, requested delivery up by his former solicitors (JC&A) of a complete file of papers. For that purpose they offered to pay copying charges of 25p per page for those documents which belonged to JC&A. JC&A complied with the request in respect of documents belonging to their former client, but offered copies of documents belonging to themselves for a fee of £644, apparently based on 4 hours at £161 ph (Grade C rate). That counter-offer was refused.

8. By letter dated 15 May 2017 JG, on behalf of the appellants Green/Mughal/Mughal/Edwards, requested delivery up by their former solicitors (SGI Legal) of their complete file. JG complied in respect of documents belonging to their former clients but refused in respect of documents belonging to themselves. These two claims will be referred to as 'the Hanley action' and 'the Green action'.

9. By Claim Forms respectively issued 14 and 12 November 2017 in each action, the appellants sought *'... an Order pursuant to s.68 Solicitors Act 1974 and/or the*

[1] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 2.
[2] General damages for pain suffering and loss of amenity; and damages for past pecuniary loss.

inherent jurisdiction of the High Court over solicitors/ s.7(9) Data Protection Act 1998 for – 1. Delivery of such parts of the Defendant's file over which the Claimant has proprietary rights, and 2. Delivery of copies of such other parts of the file over which the Claimant does not have proprietary rights. 3. The costs arising from this application to be paid by the Defendant.'

10. In each case the attached 'Details of Claim' claimed entitlement (*'subject to reasonable copying charges'*) to copies of documents in a number of listed categories to which they asserted no proprietary right. They comprised *'(i) Any electronic communications; (ii) Letters written by the Claimant to the Defendant; (iii) File copies of letters written by the Defendant to the Claimant; (iv) File copies of letters written by the Defendant to third parties; (v) Documents sent by the Claimant to the Defendant during the retainer, the property in which was intended at the date of despatch to pass from the Claimant to the Defendant; (vi) Attendance notes, working notes, diary notes that were prepared for the benefit and protection of the Defendant; (vii) Timesheets, accounts documents, invoices (including a cash account) sent to the Claimant;'* and documents claimed pursuant to the Data Protection Act 1988.

11. The claims under the Data Protection Act were not pursued at the hearings of the applications. By that time the claimants in the Green action had offered to pay photocopying charges at 15p per page.

12. The applications were each heard on 6 December 2017 : the Hanley action in a telephone hearing before Master James in the morning; the Green action in the afternoon before Master Leonard. As in these appeals, Ms Emma Hynes appeared for the applicants.

The decision in the Hanley action

13. By her skeleton argument Miss Hynes had limited the application to copies of (i) all letters addressed by the solicitors to Mr Hanley (ii) all 'funding documents'; and three other categories which are not pursued in this appeal. The relevant funding document was identified in the course of this appeal as the CFA.

14. As to authorities, the submissions of Counsel focussed on In re Thompson (1855) 20 Beav 544 (Sir John Romilly MR), In re Wheatcroft (1877) 6 Ch D 97 (Sir George Jessel MR) and the Northern Ireland decision in Taggart.

15. As to the need for a copy of the CFA, Miss Hynes further relied on CPR PD46 para. 6.4 which in respect of s.70 applications includes the requirement that : *'The application must be accompanied by the bill or bills in respect of which assessment is sought, and, if the claim concerns a conditional fee agreement, a copy of that agreement. If the original bill is not available a copy will suffice.'*

16. In her reserved judgment (19 December 2017) Master James concluded that the English decisions provided no authority for the proposition that the inherent jurisdiction permitted orders in respect of documents over which the solicitors (but not the client) had proprietorial rights; and did not follow the contrary decision in Taggart. She also drew attention to the Law Society's current Practice Note 'Who owns the file?' (21 March 2017) and the authorities cited therein (in particular Leicestershire County Council v. Michael Faraday and Partners Ltd [1941] 2 KB 205

and Chantrey Martin v. Martin [1953] 2 QB 286) and concluded that these further demonstrated the critical significance of ownership.

The decision in the Green action

17. At the hearing before Master Leonard, Miss Hynes confined the application to three categories of documents, namely copies of: funding documents; all correspondence sent to the claimants; all invoices created during the currency of the retainer. As was recorded in the reserved judgment (18 December 2017), Miss Hynes conceded, by reference to Leicestershire County Council, *'... that the Claimants have no right to require that the Defendants supply, for example, copies of file notes or ledger entries that remain their property, on payment or otherwise.'* (para.33). However, the claim to copies of documents in the three remaining categories was made as of right, subject to payment of reasonable copying costs.

18. In addition to the decisions in Thompson, Wheatcroft and Taggart, Miss Hynes submitted that the language of s.68 (in particular *'or otherwise in relation to'* and *'any documents'*) further demonstrated the wide scope of the inherent jurisdiction.

19. In his judgment Master Leonard concluded in particular that there was no such entitlement. In particular (i) in disagreement with Taggart, Thompson and Wheatcroft provided no such authority (paras.28, 31-2, 38); (ii) the claim was inconsistent with settled law as to what a client needs in order to consider whether to challenge a solicitor's bill (Ralph Hume Garry v. Gwillim [2002] EWCA Civ 1500) (para.39); (iii) the claim of a 'free standing right' to obtain copies of the solicitors' property was at odds with, and an attempt to bypass, the pre-action disclosure provisions of CPR 31.16 (para.40); (iv) in any event there was no evidence as to the extent to which the relevant documents were already in the claimants' possession (paras. 41-42).

Submissions on appeal

20. As a preliminary matter, Miss Hynes wished to resile from the concession made in the Green application. The correct position was that the Court had the discretion to order the making and supply of copies of solicitors' working papers etc., on payment of a reasonable fee for the work, albeit the application was not being pursued in the present case. On behalf of the respondents, Mr Robert Marven QC rightly took no objection. The general point is one of pure law and evidently needs to be resolved. Miss Hynes added that, in respect of all categories of documents belonging to the solicitor, the claim was now made on the basis that the Court had a discretionary power so to order, rather than as an entitlement of the client.

Section 68

21. Miss Hynes' starting point in the appeal is s.68. This must be read in its context of Part III of the Solicitors Act 1974 which makes provision for the Court to oversee and regulate solicitors' remuneration; a supervisory jurisdiction which arises from their position as officers of the court. In the present cases, the appellant clients wanted to take advice as to the amount and reasonableness of the charges deducted from their damages and whether to apply for an assessment under s.70. For that purpose they needed to see these documents. As part of its supervisory oversight the Court should

assist the client in understanding the charges that had been levied; and had the discretion to make orders accordingly.

22. The language of s.68, in particular the words *'or otherwise in relation to'* and *'any document'* demonstrated the breadth of the Court's discretionary power. Thus it drew no distinction as to the type of document in the solicitor's *'possession, custody or power'*; and did not limit the orders which it could make to 'delivery up'. In consequence there was no bar to an order in respect of documents which were the property of the solicitor; and the order could require the solicitor to make and supply copies of such documents, albeit subject to the client's undertaking to pay the reasonable costs of that task.

23. On behalf of the respondent solicitors, Mr Robert Marven QC submitted that the words *'or otherwise in relation to'* related to 'delivery up' not 'documents'. In any event, s.68 was simply recording the inherent jurisdiction and extending it to cases in which no business had been done in the High Court. In order to identify the scope of that jurisdiction it was necessary to look at authority. There was no authority to support the application. On the contrary the authorities, properly understood, were against the application.

Authorities

24. The decisions in Thompson and Wheatcroft are central to the dispute. In each case the prevailing statutory provision was s.37 Solicitors Act 1843. Neither party suggests that the relevant part of that section[3] was in materially different terms.

Thompson

25. In that case the client (Mrs Lowe) had paid the bill of her solicitor (Mr Thompson) and retained new solicitors. Mr Thompson handed over certain documents admittedly belonging to Mrs Lowe, but refused to deliver up other documents in which he claimed the property or at least a qualified property. However he offered to provide copies of those documents at her expense. The two categories of documents at issue related exclusively to Mrs Lowe's business and comprised (i) original letters from third parties, addressed to and received by Mr Thompson and (ii) copies made by Mr Thompson of letters written by him to third parties. Mrs Lowe contended that both classes of documents belonged to her; and that she was therefore entitled to them without payment.

26. Sir John Romilly MR held that (i) the documents in the first category belonged to Mrs Lowe. They had been received by Mr Thompson as her agent and she was therefore entitled to their delivery up; (ii) the documents in the second category belonged to Mr Thompson. They *'...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, she can only have them on the terms of paying for them.'*

[3] *'... and for the Delivery up of Deeds, Documents, or Papers in his Possession, Custody, or Power, or otherwise touching the same, in the same Manner as has heretofore been done as regards such Attorney or Solicitor, by such Courts or Judges respectively, where any such Business had been transacted in the Court in which such Order was made :...'*

27. Although the point was apparently not in issue, the Master of the Rolls indicated that in respect of a third category of documents (letters from Mrs Lowe to Mr Thompson) *'... my impression is that the solicitor would be entitled to retain them'.* The judgment concluded *'My decision is in no way founded on any questions of copyright or qualified ownership'*. (p.547).

28. Miss Hynes submitted that the ratio of this decision was that under its inherent jurisdiction the Court had the discretion to order the solicitor to make and supply copies of documents which belonged to him, provided that the client was willing to pay the reasonable costs of doing so.

29. Mr Marven responded that the issue in Thompson was the ownership of the documents. The court having determined that the documents in the second category belonged to the solicitor not the client, there was no jurisdiction to make any orders against the solicitor. The statement that *'If therefore the client requires copies, she can only have them on the terms of paying for them'* simply reflected the fact of Mr Thompson's offer to make and supply copies on such terms.

Wheatcroft,

30. In Wheatcroft the applicant was the personal representative of a deceased testator. She had retained Mr Wheatcroft as solicitor for the administration of the estate. Having paid his bill of costs, she retained new solicitors. Mr Wheatcroft handed over various documents relating to the business of the estate, but was unwilling to return (i) certain original letters written to him by the applicant in connection with the business (ii) copies of his letters to the applicant, as kept in his own 'letter-book'. On the summons for delivery up, Counsel for Mr Wheatcroft opposed the application on the basis that the documents were his private property and cited Thompson in support.

31. The short report records the decision of Sir George Jessel MR as that : *'...the solicitor was entitled to retain the letters from the client and copies of his own letters in his letter-book, as such letters and copies were his own property.'* (p.98).

32. Miss Hynes submitted that, in respect of the 'letter-book', the issue was whether Mr Wheatcroft could retain the copies which he had made for his own protection and benefit. In contrast with the present era of cheap and simple photocopying/printing of fresh copies, in the 19th century the delivery up of a solicitor's letter-book would deprive him of his only record of documents. Seen in that context, the true ratio was that a solicitor may retain original documents (including 'original copies' made by him as part of his record) and that the client is not entitled to deprive solicitors of that record.

33. Mr Marven responded that the decision demonstrated that the client's ownership of the documents was critical to the availability of the jurisdiction. The client having failed to do so, the order had to be refused. The decision in Thompson was expressly relied on by Counsel for Mr Wheatcroft. The absence of an application for an order for Mr Wheatcroft to make and supply copies of documents evidently reflected the correct understanding of Counsel for the applicant and the Court that the issue of ownership was critical.

Taggart

34. In this case the plaintiff mortgagees sought delivery up of files held by their former solicitors relating to 28 properties. Four categories of documents remained in dispute. The claim was under the inherent jurisdiction and/or the provisions of Northern Ireland legislation (Solicitors (NI) Order 1976, Article 71C). Neither Counsel suggested that the ambit of the jurisdiction was any different to that in England and Wales.

35. The Judge (Deeny J) referred to the statement in Halsbury's Laws of England, (5th ed., Vol.66, para. 583) under the heading 'Ownership and use of documents' that : *'Documents coming into existence in the course of business transacted under a retainer, and either prepared for the benefit of the client or received by the solicitor as agent for the client, belong to the client. However, documents prepared by the solicitor for his own protection or benefit, and letters written to the client by the solicitor, belong to the solicitor.'*

36. As to the first category of disputed documents (' Correspondences between the Defendant and the Plaintiffs'), he said that *'As a general principle it seems to me that the client should be entitled to ask for copies of this correspondence, if it has lost the same. It may be 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 it did not have. However, this right as a client is qualified by the fact that the originals of the correspondence from the solicitor will have been sent to the plaintiffs and the plaintiffs should have retained copies of any replies they gave to the defendants. They are therefore putting the former solicitor to trouble and expense in completing lacunae or possible lacunae in the plaintiffs' own management of its records and affairs. It seems to me therefore that 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 the 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 that is required in the course of furnishing copies.'* [6]

37. The Judge distinguished Wheatcroft on the basis that it concerned the solicitor's own letter-book which was his own property. However *'... 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 the defendant should be entitled to retain such original; likewise with original copies if they exist although in this day and age they may only exist electronically. But Wheatcroft does not seem to me good authority against the former client having access to copies of the correspondence and I so rule.'* [7].

38. The Judge would have been inclined to the same conclusion in respect of copies of pre-completion searches, if the solicitors had these in their possession [8]. As to the costs of the task, the solicitors were entitled to be paid for their time in accordance with their normal professional fees [22].

39. Miss Hynes submits that this decision is on all fours with the present case and the true ratio of Wheatcroft. She points to the same potential uncertainty as to whether the clients have a full set of correspondence, which can only be met by inspection and/or the provision of copies. Mr Marven submits that the decision is contrary to Thompson and Wheatcroft and should not be followed.

Swain

40. Miss Hynes likewise relied on the decision of Master Brown in Swain. This concerned a road traffic claim with a CFA post-dating LASPO, in circumstances very similar to the present appeals. Following a detailed consideration of s.68 and the authorities, Master Brown concluded that Wheatcroft did not assist the solicitors and followed the reasoning in Taggart.

41. In particular (i) the Court had the power in the course of a s.70 assessment to order the inspection of relevant documents held by the solicitors. This was commonly ordered before preparation of Points of Dispute; and was not limited to documents belonging to the client; (ii) it would be odd if there were a pre-action limitation on the power under the inherent jurisdiction, as it would frustrate potential settlement; (iii) s.68 should be seen in the context of the Court's jurisdiction under Part III of the Act; (iv) 'in the spirit of CPR 31.16' there was a reasonable basis to consider that transparency would improve the prospects of settlement; (v) the decision in Taggart was consistent with practical considerations. It was doubtful that clients, particularly those bringing low-value personal injury claims, would appreciate the need to retain documents for any length of time; (vi) by analogy with the rationale for the requirements of a 'statute bill' (Gwillim), copies of the requested documents were reasonably needed in order to make an informed decision as to whether or not to issue a s.70 challenge (vii) the client would be at a further procedural disadvantage without a copy of the CFA : PD46 para. 6.4.

Leicestershire CC/Chantrey Martin

42. As to ownership, Miss Hynes does not dispute the general proposition that working papers prepared by professionals for their own assistance in carrying out expert work on behalf of the client are the property of the professional, not of the client : see Leicestershire CC (valuers) at pp. 216-7; Chantrey Martin (chartered accountants). In the latter case the Court of Appeal added that *'Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients'* (per Jenkins LJ at p.293).

43. Miss Hynes also acknowledged that the Law Society's Practice Note (21 March 2017) 'Who owns the file?' reflects the importance of the issue of ownership and relied on these authorities for that purpose. The Note includes : *'Should you receive a request from a client to supply them with documents, you will need to consider the ownership of those documents, in particular which belong to the client and which belong to you. Documents which come into existence during the retainer are in one of two categories: (a) where the solicitor is acting as professional advisor (b) where the solicitor is an agent of the client. The second category is usually correspondence with third parties where the solicitor is sending or receiving correspondence on behalf of*

the client. On the normal principles of agency, these documents belong to the client. Where the solicitor is acting as professional advisor, ownership of documents depends on the purpose of the retainer and whether the production of the document was a stipulation of the retainer [citing Leicestershire CC, Chantrey Martin and Gomba).

44. The Practice Note then lists categories of documents generally falling within one or other of those two categories. These include documents prepared for the firm's own benefit or protection, e.g. file copies of letters written to the client. This was all subject to any contractual terms covering the ownership of documents.

45. However Miss Hynes submitted that all this was subject to the discretion of the Court under the inherent jurisdiction as identified in s.68. The existence of such a discretion was supported by the Law Society's letter of 28 June 2018 (i.e. post-dating the decisions under appeal) produced in response to a request from the respondent solicitors. That letter, from the Society's Senior Legal Adviser, opines in particular that (i) proprietary rights are a determining factor when the court seeks to exercise its inherent jurisdiction as preserved by s.68 (ii) the basic proposition, supported by the authorities, is that the client is entitled to have documents that he or she owns and the solicitor is entitled to retain those documents he or she owns; but that (iii) as to copies, while the inherent jurisdiction of the court is a wide one, it does not extend to ordering delivery up of copies as a matter of course (iv) in the light of authority (Thompson; also Ex parte Horsfall (1827) 7 B & C 528 and Ex parte Holdsworth (1838) S.C. 6 Scott 170), it may well be open to the court to order up the delivery of copies of documents owned by the solicitor, where a client is willing to pay for them (v) the discretion should be exercised on a case by case basis, taking into account any prior delivery or otherwise of the documents to the client : *'Only in cases in which the claimant is willing to pay for copies and can show that, notwithstanding any objection by the solicitor, there is a compelling reason why the court should order copies to be taken, should the court be willing to make an order.'* : paras.3, 5, 9-11.

46. Turning to those further authorities, in Horsfall the attorney delivered up the deeds and original documents, but not the drafts and copies thereof, for all of which the client (Horsfall) had paid. The Court ordered delivery up of the drafts and copies, stating *'It may be convenient in some cases to leave drafts and copies of deeds or other documents in the hands of an attorney; but the client is the proper person to judge of that. He who pays for the drafts, &c. by law has a right to the possession of them'* : per Lord Tenterden CJ at p.528. Mr Marven submitted that this was not a case where the relevant documents were the property of the solicitor; as the Court of Appeal accepted in Chantrey Martin (p.293).

47. In Holdsworth, a cestui que trust of the marriage settlement (Holdsworth) sought delivery up by the attorney (Callow) of his draft of the marriage settlement, the charges for which he (Holdsworth) had paid. The application was opposed on the basis that, since the attorney and another, as trustees for the lady whom Holdsworth married, were the legal owners of the deed, they also were the owners of the draft. The attorney sought to distinguish Horsfall on the basis that in that case the client had been the owner of the deed. In rejecting this argument and upholding the order for delivery up of the draft, Tindal CJ made clear that delivery of the deed would not have been granted. However, in circumstances where Holdsworth had paid for the draft and did not want to incur the expense of a copy (and where the draft did not

contain anything which was not in the deed) the order for its delivery up should be upheld.

48. Miss Hynes submitted that this supported the existence of a discretion to order the making and supply of copies where ownership by the client could not be established. Mr Marven submitted that the distinguishing feature from the present appeals is that there was no suggestion that the draft was the property of Callow in the capacity of attorney.

Crocker

49. Miss Hynes further relies on the decision of Clauson J (as he then was) in In re Crocker [1936] 1 Ch. 696. That case is cited in Halsbury's Laws, 5th ed., Vol.66 para. 556, headed 'Jurisdiction to order delivery up of papers', for the proposition in the second sentence of the following : *'Under the inherent jurisdiction of the court over its officers a solicitor may be ordered upon summary application by the client, his personal representatives or his trustee in bankruptcy, to deliver up to his client in proper condition all documents in the solicitor's custody or power belonging solely to the applicant. Similarly, the court may order a solicitor to produce all documents in his custody, possession or power, relating to an action, and to allow the client to inspect and make notes of them, and to supply the client with such copies as he desires, even though the litigation was conducted under the direction of an insurance company not appearing upon the record.'*

50. That case arose from civil litigation concerning a road traffic accident. The solicitors (Crocker) conducted the defence of the second defendant driver (Groom), but were instructed through his insurers. Apparently without Groom's knowledge, Crocker served a defence admitting liability with the consequence that judgment was entered against him. Aggrieved by this, Groom issued an application under the inherent jurisdiction and/or a predecessor of s.68 in substantially the same terms (Solicitors Act 1932, s.64) for delivery up by Crocker of all the papers in the action, alternatively an order for liberty to inspect them and to be supplied with copies.

51. At the hearing, Groom's Counsel did not press the application for delivery up and sought the alternative order. This was opposed by Crocker on the principal basis that the documents belonged to the insurance company. Crocker claimed neither ownership nor lien.

52. The insurance policy terms gave the insurers *'absolute conduct and control'* of proceedings against the insured driver. The Judge rejected the argument that this constituted authority from Groom for the insurers *'to interfere with the ordinary rights to see the papers which a client has against a solicitor who is acting for him'* (p.702). He said that the court might have hesitated to make an order for delivery up in the absence of the insurance company. However as to the alternative application *'I cannot see that the insurance company can have any right to interfere with that... I do not see what right I have to interfere with what seems to me to be a plain right of the client against his solicitor'* (pp.702-3). He made the order sought.

53. Miss Hynes submits that this squarely supports the existence of the discretion for which the appellants contend. Mr Marven submits that Crocker is again distinguishable. The issue in the present case did not arise, because the solicitors

were not asserting that they (as opposed to insurers) owned the documents. The decisions in Thompson and Wheatcroft were not cited. The decision did not provide authority for the full breadth of the proposition in Halsbury. Where the documents are owned by the solicitors, there is no jurisdiction to make any order in favour of the client: see also the first sentence of Halsbury's Laws para.559.

Richards Butler

54. In Richards Butler v. Hansen [2002] EWHC 1730 (QB) the client's application under the CPR for specific disclosure and inspection was rejected on the particular facts. In the alternative the client claimed entitlement to delivery up of the documents pursuant to s.68. The Judge (Hart J) rejected this as *'a completely misconceived submission'*, holding that *'... The vast majority if not all of the documents of which the defendants seek disclosure are not documents to which they have any proprietary right at all and are, therefore, not documents to which the inherent jurisdiction of the court, as extended by s.68 is relevant.'* [7]

55. Miss Hynes submitted that this should not be followed, pointing to the absence of any reference to authority and the short terms of the decision. Mr Marven submitted that it correctly identified the essential ingredient of ownership.

Section 70

56. Miss Hynes also drew an analogy with authority on the underlying rationale of the necessary ingredients of a 'statute bill' fit for assessment under s.70. In Ralph Hume Garry v. Gwillim, Ward LJ held that the test was *'...not whether the bill on its face is objectively sufficient but whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right* then *open to him, viz., to seek taxation reasonably free from the risk of having to pay the costs of that taxation'* [32]. Miss Hynes submitted that sight of the copy documents was likewise necessary in order for the clients to take advice and make an informed decision. Mr Marven submitted that the critical issue of ownership defeated any such analogy.

CPR 31.16

57. Miss Hynes submitted that Master Leonard was wrong to consider that an order for the supply of copies would be at odds with CPR 31.16. The rule had no bearing on the jurisdiction under s.68 which was a free-standing power to require the delivery of a bill and any other document. Its purpose was to support the Court's supervisory role in respect of solicitors' remuneration.

58. Mr Marven agreed that the inherent jurisdiction was distinct; but it was not a form of pre-action disclosure of documents belonging to the solicitor. There was no halfway house between a claim for delivery up etc. under the inherent jurisdiction identified in s.68 and an application under CPR 31.16.

Scope of inherent jurisdiction over solicitors

59. Mr Marven further submitted that the inherent jurisdiction of the Court to supervise its officers is essentially disciplinary and to prevent dishonourable conduct. Thus the

jurisdiction is essentially 'punitive and disciplinary' in nature: see e.g. Assaubayev v. Michael Wilson & Partners [2014] EWCA Civ 1491 per Christopher Clarke LJ at [28, 29, 31]. An application for documents which belong to the solicitor is outside that ambit. Miss Hynes responded that the inherent jurisdiction over solicitors had many faces, in particular citing the broader observations of Lord Wright in Myers v. Elman [1940] AC 282 at 319.

Conclusions

60. In my judgment the Court has no jurisdiction to make orders under the inherent jurisdiction and/or s.68 in respect of documents which are the property of the solicitor.

61. First, as a matter of principle, an order for delivery up or otherwise in relation to property belonging to another must have an explicit legal basis.

62. Secondly, the powers referred to in s.68 are derived from the inherent jurisdiction, not the statute itself. The section simply extends the reach of the jurisdiction to cases in which no business has been done in the High Court. It reflects, with immaterial amendments, the provisions of successive statutes governing solicitors. Thus the scope of the jurisdiction is to be identified from authority, rather than interpretation of the statutory language.

63. Thirdly, the decisions relied on by the appellants in my judgment provide no authority for their central proposition that the Court has a discretion under the inherent jurisdiction to order delivery up or make other orders in respect of documents which belong to the solicitor. I will deal with these in turn.

64. As to Horsfall and Holdsworth, in neither case was the disputed document the property of the solicitor. On the contrary, in each case the application succeeded because the client had paid for its preparation : see also Chantrey Martin at p.293.

65. As to Thompson, the underlying fact was that Mr Thompson had offered to supply copies of his documents on terms as to payment. That offer was unacceptable to Mrs Lowe. Asserting ownership in each of the two disputed categories, she claimed delivery up as of right. The issue was therefore whether the documents belonged to the client or the solicitor. The Court held that one category belonged to the solicitor, the other to the client. In consequence the client was entitled only to the latter. As to the former, in stating *'If therefore the client requires copies she can only have them on the terms of paying for them'* the Master of the Rolls was simply referring back to the solicitor's offer to supply copies on such terms. He was not stating that there was jurisdiction to compel him to make and deliver copies of his documents upon the client's undertaking to pay for them.

66. As to Wheatcroft, Counsel for the solicitor resisted the application on the basis that the documents were the property of the solicitor, and the authority of Thompson. Brief as is the report, the Master of the Rolls evidently rejected the application on that basis. The solicitor was entitled to retain the documents as of right. The absence of any application for an order for copies to be made and supplied at the client's expense must have reflected the correct understanding of Counsel for the applicant and the

Court that the exercise of the jurisdiction was dependent on the issue of ownership. It provided no authority for a wider jurisdiction.

67. I do not accept that these authorities are merely reflective of an age when copying was a major task, nor that the decision in Wheatcroft is authority only for the protection of the solicitor's only record of documents. If the document and its contents are the solicitor's property which he is entitled to retain, there is no basis for circumvention of that proprietary right by some other form of order.

68. The importance of ownership is further confirmed by the decisions of the Court of Appeal in Leicestershire CC and Chantrey Martin. The distinction between the categories of documents which belong to the client and to the professional is long established : see in both cases the citation with approval of London School Board v. Northcroft (1889) Hudson's Building Contracts, 4th ed., vol. ii., p.147. In its generality, the distinction applies also to solicitors : see Chantrey Martin at p.293. These decisions are rightly relied on by the Law Society in its Practice Note 'Who owns the file?'

69. As to Crocker the present issue did not arise because there was no assertion by the respondent solicitors that the documents were their property. This doubtless explains the absence of citation of Thompson or Wheatcroft. In my judgment the decision is confined to its particular circumstances, including the policy terms.

70. As to Richards Butler, Hart J's brisk dismissal of the s.68 application was rightly founded on the issue of ownership; and is supported by the earlier authorities.

71. Fourthly, the critical requirement of ownership cannot be overcome by reference to the language of s.68; the overall purpose of Part III of the Solicitors Act 1974; analogy with CPR 31.16 or with the Court's powers on a s.70 application or with the rationale of the required ingredients of a statute bill; or the requirements of PD46 para 6.4. The inherent jurisdiction does not provide a form of pre-action disclosure of documents belonging to the solicitor.

72. It follows that I respectfully disagree with the decisions of Deeny J in Taggart and of Master Brown in Swain to the contrary effect; and thus with the proposition in the Law Society's letter of 28 June 2018 that there is a discretionary power under the inherent jurisdiction in respect of copies of documents belonging to the solicitor.

73. In reaching this conclusion on the appeals, I readily acknowledge the practical considerations and implications identified by the Court in Taggart and Swain. However I do not think that these can defeat the principle of ownership.

74. All that said, it does not follow that solicitors should in all circumstances press their legal rights to the limit, nor that they can necessarily do so with impunity. To take one example, a refusal to comply with a former client's request for a copy of a mislaid CFA (made on an undertaking to pay a reasonable copying charge) so that advice may be obtained on the prospects of a s.70 application, would surely entitle the client to issue such an application notwithstanding the inability to comply with the procedural requirement in PD46 para. 6.4; and could have potential adverse costs implications for the solicitors within those proceedings, whatever their result.

75. However on the issue of principle and for the reasons given, these appeals must be dismissed. I record my gratitude to Master Haworth for his assistance in sitting with me as an assessor. The content of the judgment is of course my own.