

Ellis v John Hodge Solicitors (a firm): the death of the lien?

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1. It is not often that an issue of disclosure in a humdrum case results in the spectre of a coach and horses being driven through a long-established right. In *Ellis v John Hodge Solicitors (a firm)* EWHC 2284 (Comm), however, HHJ Pearce (sitting as a High Court Judge) has, indeed, raised such a ghostly possibility.
2. The long-established right in common law, which in one form or another has existed for over two hundred years, entitles a solicitor to withhold papers in order to force a client to pay outstanding fees.
3. In this case, Mr Ellis, a former client of John Hodge Solicitors, brought a claim in professional negligence. Mr Ellis had sought in excess of £500,000 following an accident. During negotiations, the Defendant had offered £200,000 by way of a Part 36 offer. At trial the judge awarded £11,813.63, triggering disastrous costs consequences for Mr Ellis.
4. Mr Ellis, taking the view that he had been badly advised, refused to pay any costs to his solicitors, who promptly asserted a lien for unpaid fees on all the paperwork. He issued his claim in the Business and Property Courts and under the Disclosure Pilot he and the solicitors were required to provide initial disclosure.
5. The central issue to the negligence claim was the assertion that the solicitors had failed to advise on the effect of the offers made and the risk that the court would prefer the evidence of the Defendant's expert to Mr Ellis' expert. The solicitors defended on the basis that Mr Ellis was fully and properly warned of the consequences and counterclaimed for their fees.
6. The solicitors refused to disclose the client file because of the lien. The reasoning behind the refusal, other than the loss of the lien, was that Mr Ellis had been able to draft his Particulars of Claim without the file and it was not necessary. There was an offer to

disclose the file only to Mr Ellis' solicitors, in reliance on Robins v Goldingham (1872) LR 13 Eq 440 and Evelyn Donaghy v JJ Hughey Solicitors Ltd [2019] NI Ch1.

7. In Robins a solicitor and client parted company in the middle of litigation, with the client refusing to pay fees due. The client instructed fresh solicitors, who sought sight of the original papers. In the application for those papers to be provided, the Court noted that it was the solicitor who had declined to continue because of lack of funds. In addition, the case itself was continuing and could not do so without the papers. The compromise was that the papers were to be handed over to the solicitors and handed back after completion of the case. This being 1872, of course, there was no question of any copies of the papers being available and so this action preserved the lien.
8. In Evelyn Donaghy, a Northern Ireland case, the court ordered that papers subject to a lien should be delivered up on the basis that Ms Donaghy gave security for costs by way of a legal charge over property.
9. HHJ Pearce considered these cases, taking note that the Court has the power to interfere with the operation of the lien even if it is the client who has terminated the retainer. In this case, however, the parties agreed that the retainer had been terminated by mutual consent.
10. There was, prior to this decision, no reported case in which a solicitor's lien had been considered in the context of separate, hostile, litigation against the solicitors themselves. HHJ Pearce referred to the case of Woodworth v Conry [1976] QB 884 (CA).
11. Woodworth involved accountants who asserted a lien in response to a claim for delivery up of the file, counterclaiming for their unpaid fees. The claimant defended on the grounds that some work had not been done and other work was negligent. The Court of Appeal found that, even where the lien was properly declared, the then Rules of Court relating to inspection of documents gave the court a discretion in respect of a file subject to a lien. Such an exercise must be fact based.
12. Since Woodworth the issues of disclosure have fundamentally changed. In this case, the solicitors had an obligation under the Disclosure Pilot to disclose the documents which appeared to be central to the solicitors' defence and for Mr Ellis to understand the claim he had to meet for fees. The judge noted that there were exceptions to the Disclosure Pilot and concluded that he had a discretion to modify the duty of disclosure where there is a valid lien, depending on the circumstances.

13. HHJ Pearce, drawing on Woodworth, said that the court should have regard to all the circumstances but in particular:
- a. When and why the solicitor/client relationship 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.
14. Applying these principles, the learned judge declined to modify the disclosure regime, requiring the file to be disclosed.
15. His reasoning for this was:
- a. this was a negligence claim not subject to any strike-out application;
 - b. there appeared to be an arguable case which could only be considered by reference to the files.
 - c. a Robins undertaking was not practical as Mr Ellis would have to be appraised of the contents of file notes in order for his current solicitors to be able to take evidence and give appropriate advice. Being told their contents would have the same effect as seeing them.
 - d. The lien had effect only in connection with the litigation placing the file firmly in the centre in the same way as in Woodsworth.
16. So, does this case hollow out the value of a lien for unpaid fees?
17. The lien on documents for unpaid fees is intended to give a solicitor some leverage to obtain fees properly due. It does not have the same power as it had prior to the invention of photocopying or scanning, because it is likely that the client will have copies of most essential documents, but it remains a useful weapon in the arsenal of recovery.

18. This decision makes it very clear that, even in litigation between the former client and solicitor, the court has the power to exclude disclosable files to which lien attaches, but that this is a power which must be exercised judicially. It is always going to be a fact-based exercise looking at the principles. This makes it tricky for a solicitor holding a lien to make a decision.
19. There can be little doubt that, where the documents are central to an issue between the former client and the solicitor, such as a professional negligence claim or a claim for fees which is defended on the basis of negligence or failure to do the work claim, the court will order the disclosure for what some might think is the obvious reason that the court cannot make its decision without seeing them and that not having sight of them will place the former client in an impossible position.
20. The danger is, of course, that a disgruntled client may bring a weak claim against a solicitor in order to obtain the documents by the back door without payment. Disclosure is subject to CPR 31.22 and is limited to being used for the matter for which disclosure is made, but there is no doubt it would reduce the power of the lien.
21. A solicitor, faced with a weak claim, could seek a strike-out. It would seem from *Evelyn Donaghy* that it would also be possible for the court to make an order under CPR 3.1(3)(a) for a payment of money or provision of security as a condition of the release of a file subject to a lien.
22. Where the documents are not central to the issues before the court, it is very unlikely that a court will deprive a solicitor of a lien, particularly if the client had ended the retainer.
23. Where the documents are central to an issue but the issue does not directly involve the solicitor it seems highly unlikely that a court would go behind the lien unless there was some other, compelling reason.
24. Overall, the spectre of a wholesale breach of solicitor liens is illusory. The court is clearly very aware that the common law right should only be overridden in specific, and highly limited, circumstances.

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