Mine!

Thomas Braithwaite discusses the complicated status of the ownership of the client file

WHO OWNS THE DOCUMENTS IN THE HANDS of a solicitor? When it comes to returning papers to which the client is entitled, passing them to a new firm, or retaining and archiving such papers, it is often important that a solicitor can identify, with reasonable ease, what is his and what is his client's. The question may not often be controversial, but it is nevertheless important and can arise in a wide variety of circumstances.

Law Society guidance

Not unnaturally, therefore, the Law Society gives guidance about title to documents. This is found in Annex 12A of the Guide to the Professional Conduct of Solicitors. Troublingly, however, the guidance is unprincipled, incomplete and, in some important respects, probably wrong.

The Law Society's guidance divides documents into two main types: those that came into existence before the retainer commenced (which belong to the client); and those that came into existence during the retainer. Documents that came into existence during the retainer are further subdivided with examples into:

(1) documents prepared for the benefit of the client and which have been paid for (directly or indirectly) by the client (which belong to the client);

(2) documents prepared for the benefit or protection of the solicitor, the preparation of which was not charged to the client (which belong to the solicitor);

(3) documents sent to the solicitor by the client with an intention to pass title (which belong to the solicitor); and

(4) documents prepared by a third party and sent to the solicitor (which belong to the client). The solicitor is left to work out by himself what to do about the considerable number of documents that do not fall within any of these categories, or which fall within more than one.

No authority is given for these somewhat haphazard and arbitrary categorisations – and in particular the importance attached to the criterion of payment in the first and second categories – other than a reference to *Cordery on Solicitors*. That work quotes no authority other than the Law Society guidance. To make matters worse, some types of document are treated differently by each: in particular, attendance notes are treated as usually belonging to the solicitor by *Cordery*, but to the client by the Law Society.

In the face of such circularity and confusion, it is, perhaps, time to return to first principles.

Test of ownership

The question of who owns a document cannot, and should not, be determined by such a crude yardstick as payment. Nor does the law require this to be the test. The true test is to establish the intention of the parties.

The starting point must therefore be the terms of the retainer. It may be prudent for a solicitor to clarify in the terms of his engagement who owns documents created in the course of the retainer and what is to happen to papers, emails and so forth when the retainer comes to an end. If the solicitor wishes to assert ownership in certain classes of documents, or to destroy such documents as a matter of routine data management, he should say so.

If the contract is silent (as it is more often than not), then it is necessary to consider the parties' intentions from the surrounding circumstances. For example, where the solicitor is acting merely as agent for the client, documents received or created by him will probably belong to his principal. Where the solicitor is providing a professional service, however, he is not acting as an agent, and other considerations must be taken into account.

Case history

The principles to apply in that circumstance have been considered by the courts in a number of cases. In *Leicestershire County Council v Michael Faraday & Partners* [1941] 2 KB 205, the Court of Appeal held that documents created by valuers to assist them in the performance of their duties belonged to the valuers, not the clients. MacKinnon LJ drew an analogy with counsel's notes, saying (at 216) that the valuers could not be required to hand over their notes "any more… than [counsel's] solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be deliv-

ered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal".

Similarly, in *Chantrey Martin v Martin* [1953] 2 QB 286, the Court of Appeal held that working accounts and other papers brought into existence by accountants in the preparation of a final audit belonged to the accountant. And in *Gomba Holdings v Minories Finance* [1988] 1 WLR 1231, the Court of Appeal affirmed Hoffman J's decision that the ownership of documents in the hands of a receiver depended on whether the documents were brought into being to discharge the receiver's duties to the debenture holder, the company, or (at 1234) "simply to enable the receivers to prepare such documents or perform such duties as they were required to prepare or perform".

Payment documents

What these cases have in common is that they all addressed the purpose of the creation or receipt of the documents. None addressed the question of who paid for the documents. In all the cases, one would expect someone else to have been paying for the professional's time (and therefore, indirectly, for the document produced). But in no case did the mere fact of payment give that person a proprietary right, or even the presumption of a proprietary right, in the documents created. So why do *Cordery* and the Law Society attach such importance to payment?

While it is true that there is ancient authority in which payment was held to be the determinative factor in the case of a solicitor (*Ex p Horsfall* (1827) 7 B&C 528), the decision cannot seriously stand modern scrutiny. It was glossed in *Chantrey Martin* as being based upon the nature of the services rendered in that case and the system upon which the attorney was remunerated. The basis of charging in the profession has moved on in almost 200 years (even if little else has), and the vestiges of the rule in *Horsfall* that remain create an unjustified anomaly compared with other professionals. It is instructive that the Court of Appeal of New South Wales in *Wentworth v de Montfort* (1988) 15 NSWLR 348 treated the issue of payment as no more than a factor to be considered when establishing ownership.

Professional skill principle

The true principle to be extracted from the authorities is, therefore, that where a solicitor exercises professional skill to produce a document for the benefit of the client, it should (in the absence of other considerations) belong to the client. Where it is created for the benefit of the solicitor, so as to allow the solicitor to carry out his job more effectively, it should belong to the solicitor. However, intention is key. If the client is specifically charged for the document, that might indicate that title was intended to pass to him, but not, it is suggested, if he was merely charged for the time or overheads in its preparation. Where a document has a mixed use, a "predominant purpose" test might be appropriate (as suggested in *Wentworth*). But where there is doubt, a solicitor should of course err on the side of caution in determining what he is entitled to claim as his own or to destroy.

Attendance notes

Applying this test, who is right about attendance notes: the Law Society (which says they belong to the client) or *Cordery* (which says they belong to the solicitor)? Perhaps neither. Attendance notes of conversations with third parties might be said to belong to the client, because the solicitor is simply acting as his client's agent, but notes of conversations with the client might be said to belong to the solicitor, where they are prepared for the solicitor's benefit.

What about drafts of documents? The Law Society says that these should belong to the client (because they have been indirectly paid for). Earlier editions of *Cordery* suggested that the client would be entitled to the drafts if he had been charged a proportion of the solicitors' total overheads attributable to their production (on the basis that he had indirectly paid for them), but not perhaps otherwise. The modern looseleaf edition is (perhaps wisely) silent on the point. On the basis of *Chantrey Martin*, however, drafts of documents should, *Horsfall* not withstanding, usually belong to the solicitor.

It appears that when the new Code of Conduct comes into force, the Law Society proposes not to preserve Annex 12A. Instead, solicitors will be told that at the end of a retainer they must hand over "the client's files" and will be referred to *Cordery* to work out what this means (see draft guidance note 11 to Rule 2). While this will have the benefit of removing the contradictions between Annex 12A and *Cordery*, it does not address the shortcomings in the current approach to the question of title. That approach is incomplete in its analysis, unduly mechanistic in its categorisations and gives undue prominence to the question of payment.

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