Case No: CL2021000532
Neutral Citation Number: [2022] EWHC 730 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 4 March 2022

BEFORE:

HIS HONOUR JUDGE PELLING QC
(Sitting as a High Court Judge)

BETWEEN:

MICHAEL WILSON AND PARTNERS LIMITED

Claimant

- and -

JOHN FORSTER EMMOTT
AND OTHERS

Defendants

MR DALBY SC appeared on behalf of the Claimant
MR KIRBY QC appeared on behalf of the First Defendant
MR DOUGHERTY appeared on behalf to the Second Defendant

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

JUDGE PELLING:

1. This is an application by the claimant Michael Wilson and Partners, hereafter "MWP," for an order under paragraph 21 of Practice Direction 51U, requiring two of the defendants to the proceedings I am currently concerned with, to produce documents which, it is alleged, are mentioned in witness statements filed by those defendants in relation to an application by the defendants for an order striking out these proceedings.

2. The background to the application can briefly be stated. Indeed, I attempted to summarise it earlier this morning in a judgment I gave concerning an application for permission to serve these proceedings out of the jurisdiction. The rather lengthier summary of the dispute contained in that judgment should be treated as incorporated by reference into this.

3. In summary, in these proceedings, MWP seeks to allege, as against the first six named defendants, in effect, that they dishonestly conspired together to make claims for costs orders in other proceedings between the claimant and the first defendant, amongst others, for costs orders, knowing that the second to sixth defendants were not entitled to payment in respect of the legal services they had provided to the first defendant, and therefore no entitlement to an indemnity arose, and therefore no entitlement to costs orders arose either.

4. The claimant seeks to recover, in these proceedings, all sums advanced by way of interim payments on account in respect of the costs orders concerned, and seeks a declaration that none of them were entitled to recover any costs, either by reference to the orders which are under challenge, or otherwise.

5. There is an additional claim against the seventh defendant which appears to be based, in summary, on an allegation that in its capacity as the assignee of the rights of Mr Sinclair as against the seventh defendant, MWP, in right of Mr Sinclair, is entitled to recover sums from the seventh defendant which were advanced to the seventh defendant by Mr Sinclair for onward payment to one or more of the first to sixth defendants, in respect of the costs of the first defendant's legal representation.

6. In respect of these proceedings, the second to sixth defendants have issued applications seeking to strike out the claims in their entirety, and for orders dismissing the proceedings. In that context, witness statements have been filed, in particular by the late Mr Michael Robinson, a solicitor, at one time retained by the first defendant, and by Mr Philip Shepherd QC, one of the named defendants, who acted as leading counsel to the first defendant for significant periods relevant to this dispute. There is no need for me to summarise further the nature of the disputes, or the underlying disputes, between the first defendant and the claimant. They are the subject of numerous earlier judgments from me, and to the extent it is necessary for any party reading this judgment to understand the deeper background, then reference should be made to those judgments.

7. As I have said, this is an application under paragraph 21 of Practice Direction 51U. Paragraph 21 contains a self-contained code by reference to which a party in receipt of a statement of case, witness statement, or affidavit is able to seek the disclosure of documents mentioned in such documents.

8. Paragraph 21 provides as follows:

> "1. A party may at any time request a copy of a document, which has not already been provided by way of disclosure but is mentioned in:
>
> (39)a statement of case;
>
> (ii) a witness statement;
>
> (iii) a witness summary;
>
> (iv) an affidavit;
>
> (v) an expert's report.
>
> 2. Copies of documents mentioned in the statement of case, in witness evidence, or in an expert's report, requested in writing, should be provided by agreement, unless the request is unreasonable or a right to withhold production is claimed.

3. A document is mentioned where it is referred to, cited in whole, or in part, or there is a direct allusion to it.

4. Subject to Rule 35.10(4), the court may make an order requiring the document to be produced, if it is satisfied that such an order is reasonable and proportionate as defined in paragraph 6.4."

9. The points which are apparent from this framework rule, are, first of all, there are two requirements that must be satisfied before disclosure can be obtained under this paragraph. First, it must be established that the document or categories of document in respect of which disclosure is sought are mentioned, as defined in paragraph 21.3. Secondly, assuming that is established, the party seeking disclosure must also satisfy a court that the order sought is reasonable and proportionate, as defined in paragraph 6.4.

10. Paragraph 6.4 defines what is meant by reasonable and proportionate in the context that phrase is used in Practice Direction 51U, as something to be assessed by reference to the overriding objective, which I do not need to set out in this judgment, and also the following factors identified within paragraph 6.4 being:

"1. The nature and complexity of the issues in the proceedings;

2. The importance of the case, including any non-monetary relief sought;

3. The likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

4. The number of documents involved;

5. The ease and expense of searching for and retrieval of any particular document, taking into account any limitations on the information available and on the likely accuracy of any costs estimate;

6. The financial position of each party;

7. The need to ensure that a case was dealt with expeditiously, fairly and at proportionate cost."

11. In relation to those factors, in the circumstances of this case, it is necessary to assess reasonableness and proportionality in the relevant procedural context. Very often such an assessment will have to be carried out by reference to documents sought in the course of extended disclosure under the practice direction, which will be deployed, or may be deployed, at trial. That is not this case. This case is concerned with an interlocutory application by the second to sixth defendants to strike out the claims made by the claimant against them. Therefore, and in those circumstances, the approach, in particular to reasonableness and proportionality, may be a rather more focused and acute one than would otherwise be appropriate.

12. Looking at the factors which are set out in paragraph 6.4, the ones which stand out as likely to be of primary importance include that at subparagraph (3) which focuses attention on the probative value of the documents which are likely to be obtained, which in turn focuses attention on the issues which arise on the application; subparagraph (4), the number of documents involved, which focuses attention on the way in this which this application has been formulated, whilst acknowledging that the application as advanced orally has been advanced on a significantly more constrained scale than it was issued; and finally, the requirement to deal with a case expeditiously fairly and at proportionate cost, it is relevant to note that the application to strike out these proceedings has been listed over a period of, I think, two days in May of this year.

13. Against that background, and before turning to the witness statements which are relied on for the purposes of this exercise, I should note the scope of the disclosure which has been sought. The approach, both orally and in the application, starts with the creation of a schedule of documents expressed in extravagant terms, and seeks disclosure of those documents which it is submitted are bound to exist, and in reality have been appropriately alluded to in the witness statements concerned. In my judgment, that is a fundamentally wrong approach for an application of this sort. This application, being an application under paragraph 21 of Practice Direction 51U, must start with the witness statement, statement of case, witness summary, affidavit, or expert's report, which is said to contain mention of documents that have not otherwise been disclosed. Then, to identify the documents, or categories of documents mentioned before then

proceeding, in relation to those documents, to consider whether disclosure is reasonable and proportionate, applying the principles I mentioned earlier.

14. There are three other points which I should mention at this stage. The first concerns what constitutes "mention" of relevant documents. This has been addressed in numerous authorities decided by reference to CPR 31.14. Before turning to what has been said, it is necessary to note at the outset, that disclosure in the courts of England and Wales proceeds on two alternative bases. Either CPR Part 31 applies, or it does not. CPR 31 applies broadly to all civil proceedings to which the Civil Procedure Rules apply, unless Practice Direction 51U applies. Where Practice Direction 51U applies, then, save for the provisions of CPR Part 31 identified in section 2 of the Practice Direction, Part 31 does not apply to any proceedings falling within the pilot. The proceedings which fall within the pilot are, broadly, those proceedings which are taking place in the Business and Property Courts either of England and Wales, or in the various regional centres located around England and Wales, other than those identified in paragraph 1.4 of the practice direction.

15. Therefore, and in those circumstances, paragraph 21 constitutes a self-contained code, and therefore some care needs to be exercised in referring to authorities decided under CPR Part 31. Nonetheless, the one authority that I do propose to refer to is one which turns upon the meaning of the word "mentioned." The meaning of the word "mentioned" is defined in paragraph 21 of Practice Direction 51U. It replicates what the case l"w decides in relation to the meaning of that word in CPR Part 31. Therefore, regard can safely be had to the general principles identified by reference to that phrase.

16. The relevant authority that I need to refer to is the decision of Warby J in *Rudd v Bridle & Anor* [2019] Costs LR 1067 ("*Rudd*") where at paragraph 41 on page 1081 he said this:

> "The exercise of the power to order inspection under these rules and the meaning of, "mentioned" in this context have been considered in a number of authorities, among them *Rubin and Expandable Limited* [2008] EWCA Civ 59, [2008] 1WLR 1099 ("*Rubin*")relied on by both parties to this application. Rix LJ, with whom Jacob LJ and Forbes J agreed, distinguished the case in which a document is, "mentioned" from one where the wording of

> the sta”ement merely allowed an inference that a document existed. He held at paragraph 22 to 25 that “mention” must mean, “specifically mention” and approved a test of, “direct allusion.” He gave examples of forms of expression in which “the making of the document itself is the direct subject matter of the reference and amounts to the document being, “mentioned.”” He was referring here to statements su”h as, "he wrote,” or, “I recorded and transcribed our telephone call.” Statements such as these were contrasted with assertions such as, “he conveyed,” or, “he guaranteed,” which Rix LJ characterised as references to transactions, from which it might be inferred that a document had come into existence.”

17. As I have said, paragraph 21 of the practice direction at paragraph 21.3 adopts the case law approach identified in *Rubin*, and therefore what is summarised by Warby J, assists in arriving at a conclusion as to whether or not a document has been sufficiently mentioned for the purposes of paragraph 21 of the practice direction.

18. There are two other points arise which I should mention, albeit briefly. The first concerns the question of whether or not a document attached to another document, which refers to yet other documents, is a sufficient mention of the documents mentioned in the attached documents, to support an application of this sort. This proposition is not supported by any of the texts contained within Practice Direction 51U, but appears to be supported by a note, relatively obscurely expressed, to CPR Rule 31.14 in the current edition of the White Book. Paragraph 31.14 provides that a party may inspect a document mentioned in an affidavit. That specific provision is considered in the note at paragraph 31.14.4 in these terms:

> “This includes an affidavit sworn or served on an opposing party though not filed in court …”

That is of no application in the circumstances of this case and I need say no more about it. The note continues:

> “… an exhibit to an affidavit (cf *Re Hinchcliffe* [1895] 1 Ch 117 at 120 CA) …”

It is that phrase which is relied upon by MWP to justify the proposition that where a witness statement refers to or attaches another document, and the other document

contains a reference to yet further documents, the consequence is that the recipient of the witness statement concerned is entitled to call, not merely for documents mentioned in the body of the witness statement, but for any document that happens to be mentioned in any document attached to, or otherwise mentioned in the witness statement, subject only to the reasonableness and proportionality requirement identified in paragraph 21.4 of the practice direction.

19. In my judgment that is not a construction which I consider to be either reasonable or appropriate to adopt. This rule is concerned with identifying documents which can fairly be said to be relied upon by the party whose statement of case, witness statement, witness summary, or affidavit is under consideration, as being part of his, her or its evidence in either support of or opposition to whatever application is material. Even allowing for the constraints imposed by the requirements of reasonableness and proportionality, the notion that it is, in principle, open to a party to seek the disclosure of any document that happens to be mentioned anywhere in the body of a document itself mentioned in a witness statement, or attached to it, opens up the prospect of a wide-ranging search for documents which may trigger, in particular cases, a search for many thousands of documents, which will needlessly increase cost, increase delay, and trigger all of the problems that the overriding objective is designed to address and avoid.

20. In my judgment, on that basis alone, the construction for which the claimant contends, is extravagant and is to be rejected. In my judgment, what is appropriate in the circumstances, is to treat the requirement identified in CPR Rule 31.14 and, by extension, paragraph 21 of the practice direction, as being a requirement where an application is made by a party to inspect a document mentioned in an affidavit, to inspect any document which has been exhibited to the affidavit. Any other construction, as I say, would go further than what is reasonable and proportionate.

21. The only other point I should make concerns privilege. The issue concerning privilege arises specifically in relation to some retainer letters and/or counsel's conditional fee agreements. It was submitted on behalf of MWP, and I agree, that it is wrong to characterise retainer letters or conditional fee agreements as privileged by virtue of their very nature. That goes much further than the authorities justify, and in my

judgment the principles are correctly identified by way of recent example in the First Tier Tax Chamber judgment in *B Haig against HM Revenue and Customs* where FtT Judge Barbara Mosedale summarised the principles at paragraph 19 and following. In relation specifically to the question of whether engagement letters and the like are privileged, then the judge said this at paragraph 22 and following:

> "HMRC submit that engagement letters between a solicitor and his client are not privileged at least if they merely set out the terms on which the solicitor will act. This is consistent with authority. Rimer J in *Dickinson v Rushmer* [2002] 1 Cost LR 28 said, "Not all such documents, ie client engagement letters, will necessarily and automatically be privileged. It is possible that in any particular case the client care letter will reflect or contain advice or other material which would serve to clothe it with privilege. It is not, however, suggested that the letter produced to the judge was privileged on that basis. In principle, I cannot see why a letter merely setting out the terms of which the solicitor is to act for the client should be privileged.""

22. As the first tier judge observed at paragraph 25, and I respectfully agree, everything depends upon what the actual letter says. Where an engagement letter specifies the particular matter or matters on which the solicitor is contracted to provide legal advice, then privilege will attach, at any rate to that section of the engagement letter, where that material is to be found – see paragraph 26 of the judgment. As she added at that end of that paragraph:

> "LPP must extend not only to the content of the legal advice but that a fact that a person sought legal advice on any particular matter. Therefore, to the extent that an engagement letter sets out what the advice will cover, it will be subject to LPP."

23. With that summary of framework principles complete, I am now able to turn to the applications that are made.

24. I turn first in relation to the witness statement of Mr Michael Robinson, deceased. I should explain that when these proceedings were commenced by MWP, Mr Michael Robinson, deceased, was the second defendant, he being the solicitor who acted for the first defendant for large periods of time in relation to the first defendant's dispute with MWP. At the end of last year, Mr Robinson died, suddenly, and is now represented in these proceedings by his son and executor, Mr Mark Robinson. Prior to his death,

Mr Robinson prepared and served a witness statement in support of his application that the claim against him be struck out. In relation to that witness statement, MWP, in the schedule of documents attached to the application notice by which this application is made, sought by reference to this witness statement, no less than nine separate sub-categories of documents, some of which are expressed in the most general terms.

25. In order that I can identify precisely how general this approach has been, it is necessary that I set out in full what is sought in relation to Mr Robinson's first statement. The schedule provides, in relation to the first witness statement of Mr Robinson, that the documents sought are as follows:

> "1.1 All engagement letters, retainers, invoices, bills, fee notes, statements of account and client account statements, as to the engagement and involvement of the second, third and fourth defendants, including in particular in about July 2006, paragraphs 9 and 13, the end of 2006 and early 2007, paragraph 27, 2008, paragraph 28, October 2012 to late 2020, paragraphs 9, 2 and 29, the signed letter of 15 October 2021.
>
> 1.2 All and any consultancy agreements, letters, retainers, invoices, bills and fee notes between the first and second defendants on the one hand and the third and fourth defendants and/or KSL on the other hand and as to all and any payments made.
>
> 1.3 The loan agreement, funding deed, and all or any addenda thereto including those as referred to in paragraphs 22 and 23 and as to all and any advances and repayments made.
>
> 1.4 Signed copies of all invoices referred to in paragraph 25 and exhibited at pages 11 to 27 and the documents proving the same wherever actually signed, issued, and sent to the first defendant and as to all and any payments made.
>
> 1.5 All pleadings, evidence and orders in the QBD proceedings referred to in paragraph 28 other than the Tomlin Order.
>
> 1.6 All statements of costs, costs schedules referred to in paragraph 37 on page 11 and 12.
>
> 1.7 The standard retainers referred to in paragraph 33 on page 13.

1.8 The invoices listed on page 1 of exhibit MR1.

1.9 The counsel fee notes referred to in the invoices at pages 12, 14, 16, 18, 22, 24, and 27 or MR1."

26. Commendably, in the circumstances, Mr Dalby, who appears on behalf of MWP, advanced the application in respect of Mr Robinson's statement on a significantly more confined basis. The way in which he put his application was to start with paragraphs 43 and 45, in order to identify what he submits are "mentions" of relevant categories of document, and then to seek to fix the documents in time by reference to earlier paragraphs within the witness statement. Of the particular phrases relied upon in paragraph 43, was:

> "The retainers with Mr Emmott were standard retainers with the responsibility of Mr Emmott being unconditional. There is simply no basis on which MWP can state that Mr Emmott had no liability to his lawyers."

And in paragraph 45 a statement that:

> "Mr Emmott's agreements with his lawyers did not include any conditionality."

The earlier paragraphs on which reliance was placed were paragraphs 13, 27 and 28. In so far as is material, paragraph 13 states as follows:

> "Towards the end of July 2006 my law firm … was retained by Mr Emmott to act for him in connection with a dispute which had arisen between him and MWP."

Paragraph 27 contains a statement to the following effect:

> "Kerman and Co LLP acted for Mr Emmott for about six weeks towards the end of 2006 and early 2007."

Paragraph 28 contains the statement that:

> "Kerman and Co LLP also acted for Mr Emmott for a few months before the start of the liability hearing on 14 November 2008."

The reference to the liability hearing is to the hearing of the liability hearing in the arbitration, which is the foundation from which the various claims by and between Mr Emmott and MWP originated.

27. I have already identified the principles which apply in deciding whether or not there has been a sufficient mention of a particular document in order to trigger the obligation that arises under paragraph 21 of Practice Direction 51U. They are summarised in the judgment of Warby J, I quoted earlier. Paragraph 13 does not contain any relevant mention of anything, essentially for the reasons identified by Warby J, in his judgment. As he put it, in relation to the short-term loan referred to at paragraph 44.1 of his judgment in *Rudd*:

> "A loan is a transaction which may or may not be contained in or evidenced by a document. This is a reference to a transaction akin to a guarantee."

As he also said in paragraph 44.2, in relation to a reference to a, "contract of sale for land," and the submission that it was almost inconceivable that a contract for the sale of land being negotiated by professional solicitors would not be in writing:

> "This is another case where there is no direct allusion to a document."

And in relation to a reference to communication when the buyer's solicitor informed the first defendant and his solicitors that the sale would not be completed, he said:

> "It is submitted that paragraph 13I makes a direct allusion to correspondence with the putative buyer's solicitor. It does not. The existence of correspondence might be inferred on the footing that the solicitors usually communicate on such matters in writing rather than face to face or by 'phone, but there is no direct allusion."

28. Returning to paragraph 13 of Mr Robinson's statement, it is manifest that referring to a retainer does not satisfy the requirements of mention of a written contract of retainer, for the same reasons identified by Warby J in the authority I referred to a moment ago. In particular, in relation to a suggestion I put to Mr Kirby QC, appearing for Mr Robinson, that it was to be inferred that a retainer letter must exist because

solicitors are not permitted to act for clients unless a letter of retainer has been provided, he submitted, in my judgment, correctly, that whilst it might be inferred that there exists a written letter of retainer, that is not in any way the same thing as saying that in paragraph 13 there has been a sufficient direct allusion to such a document. I agree with and accept that submission.

29. Similar considerations apply, and indeed it is almost **a fortiori** the case, in relation to the statements which appear in paragraph 27 and 28 of Mr Robinson's statement. Each of the relevant parts of those paragraphs refers to a period when Kerman and Co LLP were retained. There is no direct allusion to the existence of written contracts of retainer.

30. Against that background, therefore, I return to the principal paragraphs which were relied upon by Mr Dalby in relation to Mr Wilson. He says, in relation to paragraph 14, that the reference to retainers with Mr Emmott is a sufficient mention to justify making the order sought. I am far from satisfied that it can be said legitimately that this is either an express reference to a letter of retainer or a direct allusion to such a letter. This is classically material which comes within, or is closely akin to, what Warby J described in paragraph 41 as assertions that, "he conveyed," or, "he guaranteed," as opposed to being a specific mention as, for example, "he wrote," or, "I recorded and transcribed." In those circumstances, as it seems to me, there is no relevant mention of letters of retainer. There is a point that is made, however, in relation to letters of retainer that have been produced. That is that letters of retainer have been produced by Mr Robinson but are unsigned. In relation to that, it is unclear to me whether it is said that these documents are the only versions of the documents that are available but if, and to the extent that it is complained that these are documents that are not signed by Mr Emmott, I am unpersuaded that requiring the production of documents signed by Mr Emmott will be either reasonable or proportionate. But before reaching a final conclusion I will just ask for brief submissions as to whether or not it is said these documents exist, or whether they have been lost. But subject to that, I consider that there is no proper order that can be required in relation to Mr Robinson's statement.

31. I now turn to the statement of Mr Philip Shepherd QC. The documents which are sought in relation to that, as set out in the schedule to the application, are the following:

> "1. All engagement letters, retainers, invoices, bills, fee notes, receipted fee notes, statements of account, client account statements as to the engagement and involvement of the fifth defendant including in particular, in or about late 2006, paragraphs 14 and 43, the two conditional agreements in 2012, paragraphs 17 and 41 and PAS1.1, and 2017 paragraphs 18 and 41.
>
> 2. The various funding deeds and their addenda.
>
> 3. The various creditors and bankruptcy petitions as signed, dated and sealed by the court and all documents as to the withdrawal of the same and the payment made.
>
> 4. The compromise agreement and the related documents, paragraph 38 and as to the payment of fees.
>
> 5. The contracts of 13 October 2008, 5 December 2008, 7 January 2009 and the statutory demand of 14 April 2019."

32. So far as that is concerned, the submissions which were made were made primarily by reference to specific paragraphs within Mr Shepherd's witness statement, and then by reference to some of the exhibits to which I turn in a moment.

33. The first paragraph to which reference was made, was paragraph 15 which contains as its first sentence:

> "My instruction as counsel on behalf of Mr Emmott was entirely conventional."

That is not, in any sense, a mention of a written retainer, or a direct allusion to such, applying the learning as to what mention means in this context as summarised by Warby J. It is submitted, therefore, that in those circumstances no disclosure order should be made. I accept that submission.

34. Paragraph 16 refers to "Two conditional fee agreements." As to which Mr Shepherd said:

> "Whilst the existence of the CFAs is not confidential, I do not consider myself free to exhibit the CFAs or refer to their specific contents absent the agreement of Mr Emmott. They arguably contain privileged material and their detailed contents are, in any event, confidential. Without waiving any privilege or confidentiality, which is not mine to waive, I can, however, confirm …"

The position since that witness statement was filed and served, is that Mr Emmott has waived any right to assert privilege or any reliance on any confidentiality other than to the extent that parts of the CFAs have been redacted. The CFAs are in evidence. The redactions occur at paragraphs 9 and 10. Paragraph 9 says:

> "The uplift which is to apply to counsel's base rate is, "blank.""

Paragraph 10 states:

> "The reason for setting the uplift at that rate is, "blank.""

It is asserted in relation to that that the material is privileged and, in any event, is not Mr Shepherd's privilege to waive, and/or is irrelevant. It is in this context that I have to have regard to the nature of the application that I am concerned with, which is to strike out a claim which asserts that there has been a fraudulent claim to recover fees for which there is no indemnity obligation. In my judgment, the amount of an uplift from a base fee which is identified in earlier paragraphs of the CFA is not, in any sense, material to the issues that arise and thus, it would not be reasonable and proportionate to require the disclosure of the CFA with paragraph 9 unredacted, particularly having regard to the fact that reasonableness and proportionality must be judged by the factors identified in paragraph 6.4 of the practice direction, subparagraph (3) of which focuses particular attention on the probative value supporting or undermining a party's claim or defence.

35. So far as paragraph 10 is concerned, it is entirely foreseeable that one of the reasons given for a particularly significant uplift is likely to be the risk of losing, and therefore, to that extent, paragraph 10 is likely to contain material which is relevant to an assessment of the prospects of success. That is material which is likely to be privileged, but I take the point, which is made by MWP, which is at the moment there

is, as far as one can see, a document simply with redacting, without any underlying material, which seeks to justify why that redaction has been made. I agree, therefore, that it may be appropriate that there should be a brief witness statement filed, possibly by Mr Emmott, which simply explains why privilege is being asserted, but if such a witness statement is to be filed, it has to be understood that it would have to be expressed in terms which do not themselves reveal what is, by its nature, privileged.

36. Returning to Mr Shepherd's witness statement, the next paragraph to which reference was made, was paragraph 21where there appears this sentence:

> "This is reflected in the various funding deeds between Mr Sinclair and Mr Emmott."

Although this is focused on as meaning that this should justify a requirement that Mr Shepherd produce the, "various funding deeds," there referred to, this submission depends upon the notion that it can be safely said that Mr Shepherd has access to these documents. In relation to that it is necessary to consider the evidence which has been filed in relation to this application by the solicitors who act on behalf of Mr Shepherd. At paragraph 9.3 of that witness statement, the following appears:

> "Copies of the funding deeds between Mr Emmott and Mr Sinclair have been requested. I understand that Mr Shepherd in his statement was simply referring documents already exhibited to MWP's particulars of claim and the documents referred to therein. In any event the only funding deeds in Mr Shepherd's possession beyond those exhibited by MWP to its particulars of claim are the unsigned version of the 21 May 2007 funding deed and the addendum date of 13 March 2008 which have already been deployed publicly in claim number CL2010804 brought by MWP and which will accordingly, already be in MWP's possession. I exhibit and refer to the judgment of Master Kay QC dated 14 June 2018, which makes this clear."

In those circumstances, if what is stated in the solicitor's witness statement is correct, then it would plainly be wrong to make an order, but even if that is incorrect, it would be unreasonable and disproportionate to make an order since, by definition, Mr Shepherd could not comply with it. Again, I take the point that what is said in paragraph 9.3 of Mr Shepherd's solicitor's statement does not expressly say it is made on instructions. But that is to introduce into all of this an air of unreality, because

Mr Shepherd QC is a very experienced commercial Silk in private practice, and the notion that an experienced solicitor acting for someone such as Mr Shepherd in proceedings of this nature would set out what is there set out, otherwise than on instructions, is fanciful. In those circumstances, as it seems to me at the moment, it would be inappropriate simply to require Mr Shepherd to reproduce in a witness statement what is set out in paragraph 9.3, though again I will hear brief submissions on that, to the extent it is necessary to do so.

37. Returning to Mr Shepherd's witness statement, I now turn to paragraph 22. Within paragraph 22 there appears the following:

> "In 2009, I joined various members to 24 Old Buildings, in issuing a bankruptcy petition against the second defendant in respect of unpaid fees. I cannot locate a copy of the petition but I attach a copy of the draft petition sent to the second defendant."

This results in an application for:

> "The petitions as signed, dated and sealed by the court and all documents as to the withdrawal of the same, and the payment made."

So far as that is concerned, I do not see how it can be appropriate for me to direct Mr Shepherd to produce documents which, on the face of his own witness statement, he says he cannot locate. As it seems to me, that statement, having been made in a witness statement containing a statement of truth, really has to be the end of what is there stated. It was submitted that these are documents which ought to be available on a court file, or ought to be available by requiring Mr Shepherd to make appropriate enquiries of the various members of 24 Old Buildings, with whom he joined in presenting the petition. All of that strays from appropriate principle. If, and to the extent, it might be appropriate to make such an order in the context of an extended disclosure exercise, as to which I express no view, it is manifestly inappropriate in relation to an application under paragraph 21 of the practice direction, which is concerned with the production of copies of documents which have been mentioned. The only document that has been mentioned in any way that is appropriate, in the circumstances, is the draft petition, which is attached. It is, as it seems to me, wrong in principle, or alternatively, unreasonable and disproportionate, for me to require

Mr Shepherd to produce a document which he has already said, in a witness statement containing his statement of truth, that he does not have and therefore cannot produce. I should add that Mr Shepherd's solicitor has said, in relation to this issue, at paragraph 9.4 of his statement, the following:

> "A copy of the bankruptcy petition issued by Mr Shepherd and others against the second defendant has been requested. As explained in paragraph 22 of Mr Shepherd's witness statement, Mr Shepherd cannot locate a copy of the issued bankruptcy petition, only the draft which has been exhibited to his witness statement. Mr Shepherd should not be ordered to produce a document he does not have."

I agree.

38. It is probably at this point that I ought to refer to a submission concerning the contents of the draft petition, which Mr Shepherd produced. The draft bankruptcy petition contains at paragraph 3 the following:

> "The debtor is justly and truly indebted to me in the sum of £255,697.63 comprising a) £220,015.26 due to me under a contract on 13 October made on 13 October 2008; and b) £34,364.00 due to me under a contract made on 5 December 2008 as varied on 7 January 2009, being contracts for the provision of my services as self-employed leading counsel to him as sole solicitor in an arbitration, and seek contractual interest on the said debts totalling at the date of service of the statutory demand £1,318.37. Under the terms of the said contracts, the former principal sum fell due on 31 January 2009 and the latter principal sum on 27 February 2009 …"

This leads MWP to submit that an order should be made requiring the production of the contracts for the provision of services by Mr Shepherd, a self-employed leading counsel to Mr Robinson. So far as that is concerned, a number of points arise. First, as I have already said, I do not consider that the mention of a document, if indeed a document has been mentioned, in an attachment to a witness statement, is a document which should be treated as having been mentioned in the witness statement for the purposes of paragraph 21. To reach such a conclusion, as I have already explained, opens up the possibility that any document mentioned in any document exhibited to, or attached to, a witness statement would thereby become disclosable. That would be

contrary to principle, because it could not be said of such a document that it was one being relied upon by the person whose witness statement is under consideration, as part and parcel of that person's evidence. Much more significantly however, paragraph 3 of the petition does not contain any reference to any document being in writing. In this context I return once again to what Warby J said at paragraph 41, and in particular paragraphs 44.1 and 44.2 of his judgment in *Rudd*. To say that there has been a retainer, or a contract of retainer, between Mr Shepherd and Mr Robinson is not, in the circumstances, to say that there was such a written contract. In those circumstances, it seems to me to be inappropriate that I should direct the disclosure of such documents as may exist and are referred to in paragraph 3 of the draft petition, on the basis that they have been mentioned for the purposes of paragraph 21 of the practice direction.

39. Returning now to Mr Shepherd's witness statement, I move on in the statement to paragraph 38 which appears under the sub-heading "2009 Fee Dispute" between the first defendant and the fourth defendant. In paragraph 38, Mr Shepherd says this:

> "I am aware that the proceedings were compromised and the fourth defendant continues to act for Mr Emmott."

This results in the request that the compromise agreement and all related documents be produced. The difficulty about that proposition is that ignores what Mr Shepherd says in the very following sentence, which is:

> "I have not seen that compromise agreement."

Mr Shepherd could not say that to be so if a copy was in his possession. In my judgment, to require Mr Shepherd to produce a document which he has not seen and does not possess, would not be appropriate, having regard to the requirements of paragraph 21, and in particular would not be reasonable or proportionate.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge