

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
CHANCERY DIVISION**

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**IN THE MATTER OF A SOLICITOR**

**BETWEEN:**

**PEPPER (UK) LTD T/A ENGAGE CREDIT**

**Plaintiff;**

**and**

**EMMA JANE FOX AND JOHN PETER FOX PRACTISING AS  
BARRY FOX, SOLICITORS**

**Defendants.**

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**HORNER J**

**Introduction**

[1] This is an application by Pepper (UK) Ltd t/a Engage Credit (“Pepper”) against Emma Jane Fox practising as Barry Fox, Solicitors (“the Solicitors”) for the delivery up of all papers, documents and title deeds in the possession and custody of the Solicitors and belonging to the plaintiff relating to mortgage business in respect of a mortgage of premises in County Tyrone.

[2] The plaintiff is the successor in title to Future Mortgages Ltd (“FML”). FML had retained the Solicitors to perfect and register the mortgage over the property which comprises Folio No TY21214 County Tyrone (“the Property”). FML assigned all its rights to this and other mortgages to the Plaintiff by a Deed of Assignment dated 9 November 2010. No point is taken on the question of title. On 4 February 2014 the plaintiff changed its name from Engage Credit Ltd to Pepper (UK) Ltd.

[3] On 6 February 2014 Wilson Nesbitt, the plaintiff’s Solicitors, wrote asking for the original conveyancing file and copy ledger card. There was then a telephone call. A further reminder was sent on 20 March 2014. On 26 March 2014 the Solicitors returned some documentation they had been “able to retrieve from the file”. On

1 April 2014 the Plaintiff's Solicitors wrote saying that the file was incomplete and asking to see a copy of the mortgage offer, a copy of the completed Certificate of Title, any correspondence between the Solicitors and their client, Land Registry documentation, correspondence between the Solicitor and the Land Registry, copy searches, copy property certificates and any title checks which had been carried out. A further reminder was sent on 15 April 2015. On 23 April 2015 a letter was sent seeking 11 classes of documents. There was no response and an Originating Summons seeking delivery up of all papers, documents and title deeds in the possession or custody of the Solicitors followed dated 5 May 2015. This was grounded on an affidavit sworn by Gillian Crotty, solicitor.

[4] In response, an affidavit was sworn and filed by Emma Jane Fox on behalf of the Solicitors. This made the following points:

- (a) All documents had been disclosed to which the plaintiff was entitled.
- (b) The plaintiff was not entitled to the attendance notes on MS, the wife of the borrower, GS, for two reasons. Firstly, they related to MS and contained confidential information relating to her. Secondly, the attendance notes were the property of the Solicitors and did not form part of any file which belonged to the plaintiff.

[5] Ms Crotty of Wilson Nesbitt replied on behalf of the Plaintiff. She said that various classes of documents were outstanding. She went on to say that as the Solicitors acted for both the borrower, GS, and the previous owner of the property, PS, his father, the plaintiff should be entitled to see all the documents. She drew attention to the declaration GS had signed when applying for the mortgage:

"I hereby authorise my Solicitor acting for me to disclose to the lender any information they, or the lender, considers relevant to the lender's decision to lend and I waive any duty of confidentiality or privilege."

[6] In the final affidavit from Ms Fox, she responded to the 10 categories of documents sought in Ms Crotty's affidavit of 22 June 2015. The ones which are now in dispute are as follows:

- (a) The correspondence between the Solicitors and PS, GS's father. The defendants contend that these documents form part of the purchase file, not the mortgage file, and that the plaintiff is not entitled to them, as these documents belong to the borrower.
- (b) The correspondence between the Solicitors and the borrower. The Solicitors contend that this correspondence forms part of the work carried out for the borrower and therefore belongs to him, not to the lender.

- (c) Correspondence between the Solicitors and MS. The Solicitors contend that this correspondence belongs to MS, not to the lender. More importantly, the Solicitors contend that all documents relating to the execution of the occupier's consent form by MS are privileged. MS appears to be claiming in other proceedings that:
- (i) She has an equitable interest in the subject property.
  - (ii) The consent form she executed was procured by means of, *inter alia*, undue influence exercised upon her when she was in a fragile state of mind.

[7] It is not completely clear what purpose is served by the plaintiff bringing the present proceedings. It may be that it considers these documents would be helpful to the claim brought by FML, its predecessor in title, against both GS and MS for possession of the Property. It is more likely that the Plaintiff intends to try and make a case against the Solicitor as appears to have been the intention in Mortgage Business PLC and another v Thomas Taggart & Sons [2014] NICH 14 and Mortgage Express Ltd v Bowerman and Partners [1996] 2 All ER 836.

### **Background Information**

[8] The Property had been owned by PS and GS, his son, a building contractor. Both had financial difficulties. I understand that they were made bankrupt in 2007. On 14 March 2008 the bankruptcy was vacated when they entered into an IVA. At the same time the mortgage in favour of the Progressive Building Society secured on the Property was redeemed and the balance then due of £73,434.36 was paid in full and final discharge. The Property was transferred to GS absolutely for natural love and affection who then re-mortgaged it to FML as security for an advance of £300,000.

[9] It would appear that MS married GS in August 1999. She claims that she has acquired an interest in the Property because she contributed to the repayment of the mortgage on the promise that she would become a joint owner of it. In an affidavit in those other proceedings she admits to signing a form prior to the re-mortgage to FML but says:

- (i) She was under pressure from GS who was in the adjoining room with Mr Fox, Solicitor. She was in a separate room with Ms Fox, Solicitor.
- (ii) She was ill and looking after their first new born child conceived after a number of treatments of IVF.
- (iii) She was told she was signing an occupier's consent form, on which she received no advice from Ms Fox. She did not know the import of what she was signing and she had no independent advice.

[10] In 2009 FML issued proceedings against GS and MS in the Chancery Division to enforce the mortgage. The court was not told what has happened in respect of these proceedings. It may be that the Plaintiff tried to enforce security but has not been able to do so or that there has been a shortfall because of the intervention of MS. As a result the Plaintiff is looking to see whether it can make a case of negligence against the Solicitors for failing to ensure that the occupier's consent form was valid and binding on MS.

### **Agreements and Obligations**

[11] In the application for a mortgage to FML GS declared:

"I hereby authorise you and my solicitor acting for me to disclose to the lender any information they, or the lender, considers relevant to the lender's decision to lend and I waive any duty of confidentiality or privilege."

[12] The offer made by FML was subject to Condition 324 which stated:

"Solicitor to enquire as to whether there will be any occupiers over the age of 17 years residing in the property, and to have a Deed of Consent signed by each prior to completion."

[13] Finally, the court's attention was drawn to Condition 11 of the Mortgage Conditions (2003) Edition which states at paragraph 11:

"11.1 You promise and agree to sign all legal documents and take all other steps we may ask you to take in order to ...

11.2.6 Do anything else which we ... may reasonably consider necessary in exercise of the rights which we ... have under the Mortgage and these Conditions."

It goes on to say that the Power of Attorney contained in Condition 11.2 cannot be withdrawn or revoked whilst the mortgage remains in force.

[14] The terms of the retainer between FML and the Solicitors was governed by the Council of Mortgage Lenders Conditions. In particular, the court's attention was drawn to Paragraph 8.3 which states that unless FML otherwise stated the solicitors must not advise:

"Anyone intending to occupy the property who is to execute a consent to the mortgage, and you must arrange

for them to see an independent solicitor. If we do allow you to advise any of these people, you must only do so after recommending in the absence of any other person interested in the transaction that such persons obtain independent legal advice. Any advice that you give any of these people must also be given in the absence of any person interested in the transaction. You should be particularly careful if the matrimonial home is being charged to secure a business debt.”

I pause to say that if MS’s affidavit evidence is true, then on the face of it the Solicitors have failed to comply with the terms of their retainer. However, that is very much a provisional view as it is based only on the evidence of one side, MS. It is not a concluded view. Further, the court does not know if FML gave permission to Ms Fox to advise MS and thus waived the general prohibition contained in condition 8.3. It rather looks as if it did not because there is no such permission contained in Pepper’s file.

[15] I should also point out that Paragraph 14.3.2 states:

“Subject to any right of lien or any overriding duty of confidentiality, you should treat documents comprising your file as if they are jointly owned by the borrower and the lender and should not part with them without the consent of both parties.”

[16] It is important to note that the claim to ownership by the lender is subject to not only the right of lien but the overriding duty of confidentiality.

### **Discussion**

[17] Before looking at disputed categories of document, it is important to stress that this is not an application for discovery during litigation where one party has to make disclosure of all documents which are relevant and which are in that party’s custody, power or control: see Order 24 of the Rules of the Court of Judicature (NI) 1980. In this application, which is brought under the inherent jurisdiction the court enjoys over its officers

“..a solicitor may be ordered upon summary application ... to deliver up to the client in proper condition all documents in the solicitor’s custody or power belonging solely to the applicant.”

See Paragraph 556 of Volume 65 of *Halsbury’s Laws of England* (5th Edition). It is therefore important to bear in mind that the issue before this court is to determine what documents belong to the client, Pepper.

[18] It is clear that the working papers of a solicitor belong, not to the client, but to the solicitor. This is because the relationship is one of professional and client and not that of principal and agent: see Chantrey Martin (A Firm) v Martin [1953] 2 QB 286. In that case, which related to the working papers of chartered accountants, the Court of Appeal in England held that:

“Working accounts and other papers which were brought into existence by chartered accountants in the preparation of a final audit of a client’s books are the property of the accountants and not of the client ...”

This judgment referred to and relied on the decision of Leicester County Council v Michael Faraday and Partners [1941] 2 KB 205 where the Court of Appeal in England rejected a claim for production of all documents, books, maps and plans in possession of rating valuers who were employed by the County Council to give advice and held that the relationship of the County Council and the valuers was that of client and professional man and not that of principal and agent. Accordingly:

“The documents which the valuers had prepared in carrying out their expert work are their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over.”

[19] As *Halsbury’s Law of England* states at paragraph 583 on the Ownership and use of documents:

“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 by the client to the solicitor, belong to the solicitor.”

[20] When a borrower and a lender retain the same solicitors, there is a several retainer, not a joint retainer. In such a case there is no implied waiver of confidentiality or privilege by one party in favour of the other, or any implied authorisation of the solicitor to make disclosure to one party of documents passed between the solicitor and the other party: see Nationwide Building Society v Various Solicitors [1999] PNLR 52, at 69-72. In this case there was a clear and unequivocal waiver by GS.

As Deeny J said in Mortgage Business Plc and Anor v Thomas Taggart and Sons [2014] NICH 14:

“There is no general right of the lender, where the solicitors is acting for both the borrower and the lender to see everything in the file pertaining to the borrower as well as the lender.”

In Gomba Holdings UK Limited and others v Minorities Finance Limited and others 1 (1992) 3 WLR 1231 the Court of Appeal concluded that the ownership of documents brought into being in the course of carrying out a receivership depended on whether the documents were created in discharge of the receiver’s duties to the mortgagor or debenture holder or to neither and the fact the documents related to the mortgagor’s affairs did not give him a proprietary claim to them. It said that:

“(a) ... as between principal and agent all documents concerning the principal’s affairs which have been prepared or received by the agent belong to the principal and have to be delivered up on the termination of the agency.

However, it was necessary to look at the reality of the situation because the agent may owe duties to two different principals. Accordingly, in general it is important in a tripartite relationship, as here, to look to see whether the documents were brought into being in the discharge of the solicitor’s duties to the lender or to the borrower or to neither: see p 1234(a).”

[21] The solicitor will not be required to produce confidential documents which are covered by professional privilege unless that privilege has been waived by the client. The privilege is the client’s, not the solicitor’s. Privilege can be waived only:

- “(a) By express or implied agreement;
- (b) By conduct in the course of litigation making a fair adjudication impossible without such a waiver; or
- (c) By destroying the confidentiality of the privileged material.”

(See 16.03 of Paul *Matthews on Disclosure* (3<sup>rd</sup> Edition))

[22] A power of attorney is a written authorisation to represent or act on another’s behalf in, inter alia, legal matters. However, it must be construed strictly: see *Bowstead and Reynolds on Agency* at paragraph 3-101.

[23] It is, of course, essential to consider the terms of what has actually being agreed between the lender and the borrower. In Mortgage Express Ltd v Sawali

[2011] PNLR 11 the borrower signed an agreement with the lender when applying for mortgage finance containing a clause which stated:

“We irrevocably authorise my/our conveyancer to send their entire file relating to the whole transaction (not just the loan) to you at your request.”

[24] His Honour Judge Simon Browne QC held that he was obliged:

“To take the background of fact and **commercial common sense** into account when construing a contractual provision.”

Accordingly, he held that in the circumstances as a matter of “commercial common sense” the borrower had expressly authorised his conveyancer to provide the entire file to the lender for the purpose of entering into the transaction notwithstanding the implied default position otherwise at law.

He construed the clause as giving a “clear waiver of privilege, not unduly onerous or unfair”. In the instant case there can be no doubt that GS has waived privilege and agreed to hand over to Pepper all documents relevant to its decision to lend.

[25] When the Solicitors advised MS in connection with her rights of occupation and obtained a signed consent from her, the position was akin to a solicitor advising a wife in connection with a guarantee given in respect of her husband’s borrowing. In such a situation the solicitor’s only client is the wife and the solicitor is in no way acting for the lender in giving that advice. In Royal Bank of Scotland v Etridge (No. 2) [2001] UKHL 44 the House of Lords said at paragraph [74]:

“In my view, overall the latter factors are more weighty than the former. The advantages attendant upon the employment of a solicitor acting solely for the wife do not justify the additional expense this would involve for the husband. When accepting instructions to advise the wife the solicitor assumes responsibilities directly to her, both at law and professionally. These duties, and this is central to the reasoning on this point, are owed to the wife alone. In advising the wife the solicitor is acting for the wife alone. He is concerned only with her interests. I emphasise, therefore, that in every case the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the wife for him to accept instructions from her. If he decides to accept instructions, his assumption of legal and professional responsibilities to her ought, in the ordinary course of things, to provide



sufficient assurance that he will give the requisite advice fully, carefully and conscientiously. Especially so, now that the nature of the advice called for has been clarified. If at any stage the solicitor becomes concerned that there is a real risk that other interests or duties may inhibit his advice to the wife he must cease to act for her. ....

77. I cannot accept this analysis. Confirmation from the solicitor that he has advised the wife is one of the bank's preconditions for completion of the transaction. But it is central to this arrangement that in advising the wife the solicitor is acting for the wife and no one else. The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife. The solicitor is not accountable to the bank for the advice he gives to the wife. To impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement. The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving that advice."

Indeed, the provisional view of this court is that the advice given to the wife/occupier by the solicitor could not be independent if the wife/occupier was obliged to allow the entire file containing any confidential advice given to her by her solicitor to go to the lender. It is difficult to see how any advice given in those circumstances could possibly be considered independent. When Ms Fox gave MS advice she was acting as MS's solicitor and the documents generated belonged to MS (unless they were Ms Fox's "working papers") and privilege attached to any legal advice sought or given. Just before I proposed to hand down my judgment further papers were made available which related to a claim between MS and the Solicitors over the signed consent. This provides some further support for my provisional conclusion. MS sued the Solicitors and in doing so claimed *inter alia* that they were in breach of contract and negligent.

## **Conclusion**

[26] Applying the various principles discussed above, I have reached the following conclusions. At the outset I should make clear that for the reasons given the solicitors are not obliged to produce their own "working papers" as these do not belong to the client, but to the Solicitors.

### **(a) Correspondence between the Solicitors and PS**

Insofar as the Solicitors were acting for PS they were doing so on a separate retainer, namely the transfer of his interest to GS. There is no evidence that

PS has ever waived any privilege to any document. There is no evidence that PS has given up ownership of the documents in his file. These should not be handed over.

Any documents in the file belonging to GS relating to correspondence by the Solicitors as GS's agent to PS concerning the transfer of PS's interest should be disclosed because:

- (i) GS has waived privilege to all documents that were confidential to him; and
- (ii) he has appointed the lender as his attorney to do anything which the lender might consider reasonably necessary in exercise of the rights under the mortgage; and
- (iii) he has agreed to hand over whatever document Pepper considers relevant to FML's decision to lend.

**(b) Correspondence between the Solicitors and GS**

There can be no doubt GS has expressly waived privilege in respect of any documents held by the Solicitors. He has also agreed to do anything which the lender might reasonably consider necessary in the exercise of the rights which it has under the mortgage. Accordingly, in those circumstances I consider that any document in this category of documents should be disclosed.

**(c) Correspondence between the Solicitors and MS**

The same reasoning applies to this category of documents as applied to the correspondence between the Solicitors and PS. There has been no waiver of privilege by MS. There is no obligation on MS to hand over any documents which belong to her and were generated by her retainer of Ms Fox.

In respect of any correspondence from the Solicitors as agents of GS to MS then that should be handed over as they belong to GS.

[27] In the light of my rulings I will hear counsel on the issue of costs.