

Between:**JOHN BUCKNER AND CARMEL KENNEALLY****PLAINTIFF****– AND –****PROJECT DESIGN AND BUILDING CONSULTANTS LIMITED****DEFENDANT****JUDGMENT of Mr Justice Max Barrett delivered on 6th June, 2019.**

1. Mr Battles, a solicitor, acted for the plaintiffs in the within (determined) proceedings. Despite his successful progression of these proceedings, the plaintiffs are not satisfied with how Mr Battles discharged his overall professional duties towards them. They have instructed a new firm of solicitors, which intimated to Mr Battles by letter of 13 July 2017 that his retainer had been determined; Ms Kenneally has likewise sworn that she and Mr Buckner have determined Mr Battles' retainer. The plaintiffs appear now to be teetering on suing Mr Battles in negligence. To this end, they have sought their case files of Mr Battles. He has claimed a solicitor's lien over those files, i.e. they will be released on payment of outstanding fees. The plaintiffs have now come to court seeking, inter alia, an order compelling release of the files.

2. The plaintiffs, in making the within application have sought to rely on *Mulheir v. Gannon* [2009] 3 IR 433 and *Reilly and anor v. O'Ceallaigh and ors* [2013] IEHC 565. But that reliance is misplaced: those cases were concerned with the release of papers in ongoing proceedings. This is a case where a release of files is sought post-proceedings by clients who have not paid fees owing to their former solicitor in order that their present solicitor can see whether they have a well-founded case in negligence against that former solicitor. Save where negligence was patent or established, for the court to make such an order would make nonsense of the concept of a solicitor's lien (which, short of litigation, is the last refuge of a solicitor whose client fees have gone unpaid). It would also run contrary to the judgment of the Supreme Court in *Fallon v. Gerard M Gannon, practicing as J Delaney Gannon & Co., Solicitors*, [1988] ILRM 193, 199 where Finlay CJ observed as follows:

"It was submitted on behalf of the plaintiff that the exercise by the defendant of a lien was inconsistent with the Constitution. As I understand this submission, it largely was based on allegation that the defendant was negligent and that because he was negligent it was unjust that he should have, in regard to negligent services, a right to retain documents. If the plaintiff had established any negligence on the part of the defendant, then certain remedies would exist with regard to the exercise by the defendant of the lien, but no such negligence has been established".

3. As it was there, so it is here. The only observation that the court would add is that if a bare allegation of (not completely investigated) possible negligence coupled with fresh instructions to a new solicitor sufficed to obviate a solicitor's lien it would be the easiest thing in the world for every client to avoid paying fees to his solicitor for work done through the simple expedient of discharging the old, engaging the new, and casting aspersions. That cannot be, and is not, what the law contemplates. Moreover, even the release of the files subject to an undertaking to return them would, in the circumstances presenting, fatally undermine Mr Battles' lien. Nor does the court see, in what is the plaintiffs' application to make, that any of the foregoing is upset by the bare assertion, for that is all it is, by one of the plaintiffs that neither plaintiff received a preliminary 's.68 letter' identifying Mr Battles' fees. The plaintiffs may consider that they have a case in negligence against Mr Battles but if they wish for their case files from him they will first have to pay the fees outstanding for the work that he has completed for them.

4. In passing, the court notes, though nothing turns on this in light of the foregoing, that the proper way for the plaintiffs to make the within application was not to issue a motion in proceedings that have been determined and to which Mr Battles is not party but to issue a special summons.

5. For the reasons stated, the court declines to direct the release of the case files. Additionally, the court notes that the plaintiffs have not established, in what is their application to make, that, to quote the notice of motion, *"the Plaintiffs discharged the Former Solicitors from their retainer for reasonable cause to act with due diligence and that the Former Solicitors are not therefore entitled to exercise a lien"*. In truth, the plaintiffs have gone no further than to make bald allegations as to why Mr Battles was discharged; hence a declaration along the lines of the just-quoted text (even if properly available pursuant to the motion now brought) does not arise to be made.