Storage wars

To avoid unnecessary costs, firms should have clear policies in place for the storage of client documents, says **Bryan Shacklady**

The recent case of *JSC BTA Bank v Ablyazov and others* [2014] EWHC 2788 highlighted potentially substantial costs risks to solicitors posed by documents in their possession.

In *Ablyazov*, Mr Justice Popplewell made an order for the disclosure of materials held by the defendants' former solicitors on the grounds that the well-known 'iniquity exception' justified going behind the shield of privilege.

Popplewell J noted that providing the disclosure sought would require "a search through very large quantities of often unorganised material held by three firms as the result of five years of litigation which has been conducted on all sides by means of the forensic equivalent of trench warfare." The costs estimates of the solicitors, against whom the order was ultimately made to conduct the disclosure exercise, amounted to £2.5m.

The claimant recognised the cost of the exercise should not be borne by the solicitors involved, but refused to bear this cost itself. The court noted any order it made would depend on implementation of Mr Ablyazov funding the order. However, Ablyazov indicated that he had no intention of doing so. The court was aware of this, but nonetheless made the order, effectively placing the solicitors in the position of being ordered to carry out a large disclosure exercise with the prospect of not being paid for it.

Professional exposure

The *Ablyazov* judgment raises serious concerns about the exposure of solicitors who may hold papers going back many years. The following are some practical suggestions for limiting that exposure.

> **It is time for the Law Society and the SRA to revisit the question of document storage**

Solicitors should consider including in their engagement terms provision making it clear (a) for how long documents will be stored following a matter's conclusion; (b) what will happen to those documents at the end of that period; and (c) what will happen to those documents if the solicitor, after making reasonable efforts, is unable to contact the client to return them. Terms permitting solicitors to destroy documents if they are not returned will need to be clearly drawn to the client's attention.

Solicitors should also consider whether they can include in their engagement terms an indemnity from a client to protect against the costs of complying not just with court orders, but against the costs of complying with other obligations. For example, requests to assist the police, HMRC or other investigating authorities with powers to compel the production of documents. Solicitors should also consider whether any such indemnity is likely to be satisfied: client due diligence has practical implications for firms rather than being merely a box ticking exercise.

Solicitors should review their own document destruction policies. Anecdotal evidence suggests that, too often, solicitors send material to storage and never think of it again. Not only is storing obsolete papers an unnecessary cost, it also increases the amount of material that needs to be reviewed in a case such as *Ablyazov*. Care should also be taken not to store multiple copies of the same material.

Solicitors should consider whether or not to charge for papers kept in storage after the conclusion of a matter. Aside from assisting solicitors by recovering the costs of storage, this would also ensure the matter of storing documents remains a live issue in the minds of both solicitor and client.

Solicitors should also consider carefully how electronic documents such as emails are stored. One of the difficulties in *Ablyazov* was that much material was disorganised and unwieldy, which increased the likely costs of reviewing it. It may not always be possible to use keyword searches to review electronic documentation. Given the proliferation of electronic documents in recent years, it is vital firms have clear policies in place in relation to electronic documents and not just physical documents.

Regulator guidance

The Law Society has previously suggested that files should be maintained for a minimum of six years following the completion of a matter. However, a longer period may (and probably should) be considered. It would, for example, be sensible to consider limitation periods in respect of any claims that might be brought concerning the matter. In matters involving tax, it might be sensible to consider the time limits within which HMRC might raise enquiries.

It is time for the Law Society and the SRA to revisit the question of document storage, and produce clear guidance. Until then, it lies in the hands of practitioners to protect themselves and consistent with client expectations. **SJ**

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