

5 Stone Buildings

The solicitors' equitable lien

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3rd February 2023

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Liens

- Possessory/retaining liens over personal property:
 - Common law (operation of law):
 - General lien (exceptional) – detention pending payment of all debt
 - Particular lien (more common) – detention pending payment of relevant debt
 - Statute (operation of law)
 - Contract (consent)
- Equitable, non-possessory liens (like an equitable charge by operation of law)
 - Vendors' and purchasers' liens
 - Trustees' liens
 - Solicitors' liens
- *"I do not think it is possible to rationalise, so as to produce coherence, all the situations in which non-contractual liens are imposed by law (whether at common law or in equity or by statute). Equitable liens have been described as something of a themeless rag-bag"* Lord Burrows, Bott [78]
- *"Indeed, the most which can be said on the basis of the analysis in this talk is that an equitable lien, whether afforded to a solicitor, a trustee, or someone else, is really just a convenient label for **a rag-bag of proprietary interests recognised by equity using a rather inappropriate word borrowed from the common law** where it means something completely different – as with the possessory lien."* (Emphasis added.) Lord Briggs, Solicitors' Equitable Liens, Lecture to the Chancery Bar Association Annual Conference (14.01.23)

The solicitors' lien

- Common law retaining lien:
 - General lien
 - Detention of papers, deeds etc.
 - Covers money already in client account if paid in for general not specific purpose:
see *Withers LLP v Langbar International* [2011] EWCA Civ 1419; [2012] 1 WLR 1745
- Equitable lien over the fruits of litigation:
 - *Gavin Edmondson Ltd v Haven Insurance Co Ltd* [2018] UKSC 21; [2018] 1 WLR 2052
 - *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8; [2022] 2 WLR 634
 - *Candey Ltd v Crumpler & anor (as joint liquidators of Peak Hotels and Resorts Ltd (in liquidation))* [2022] UKSC 35; [2023] 1 WLR 342

The equitable principle

*[2] The nature of the solicitor's equitable lien was explored in the decision of this court in Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] 1 WLR 2052. As Lord Briggs JSC explained, at paras 3 and 4, the solicitor's equitable lien is a **security interest and is enforceable against the proceeds of the litigation** up to the amount contractually due to the solicitor, in priority to the interest of the successful client, or anyone claiming through the client. The interest is in the nature of **an equitable charge and, as such, may be enforced in personam against anyone whose conscience is affected by having notice of it, either to prevent him from dealing inconsistently with it, or by holding him to account if he does.***

*[3] There can be no doubt that an important purpose of the solicitor's equitable lien is to **promote access to justice**. It enables a client to obtain legal representation in cases and in circumstances where it is likely that payment can only be made out of the proceeds of litigation. Indeed, Lord Briggs JSC made this clear in the first paragraph of his judgment in Gavin Edmondson." (Emphasis added.)*

Candey Ltd v Crumpler, per Lord Kitchin

Gavin Edmondson Ltd v Haven

- Edmondson entered into CFAs with clients to act for them in low value personal injury claims
- Edmondson notified the claims through the RTA portal
- This portal, established by stakeholders, allows modest claims to be notified by claimants solicitors to insurers and, where liability is admitted for quantum to be negotiated or determined by court. The insurer must pay fixed costs and charges, at various stages, to the claimants solicitors direct
- Having been notified of claims through the portal, Haven adopted a practice that of making direct offers to to claimants thus cutting out Edmondson.
- Edmondson sued Haven for fixed costs and charges of the claims it had filed via the portal
- The Supreme Court held that the lien protected Edmondson's contractual right to fees under the CFAs and that Haven had notice of Edmondson interest – and therefore allowed the claim

Bott & Co Solicitors v Ryanair

- Bott specialised in handling claims by airline passengers who were entitled to modest compensation for cancelled or delayed flights under EU legislation
- It developed a system, through an online tool with a high degree of automation, for pursuing claims in bulk against airlines for a modest cut of the award (which Bott deducted before accounting to the client)
- In 2015 Ryanair established its own online tool to settle claims directly with passengers but many customers still claimed via Bott
- In 2016 Ryanair started to pay claims, notified by Bott, to customers directly, thus cutting Bott out and so requiring Bott to pursue the passengers for their fees
- The majority of the Supreme Court (Lords Burrows and Briggs and Lady Arden) held that, as in *Gavin Edmondson*, the lien protected Bott's interest
- The minority (Lady Rose and Lord Leggatt) thought that the trigger for a lien had not arisen

Key features (1)

- The lien is underpinned by fairness, being based on the principle that it is not just that the client should get the benefit of the solicitors' labour without paying for it
- It is justified on public policy access to justice grounds. It encourages solicitors to take on cases which their clients would not otherwise have been able to afford
- Recovery must be through the 'instrumentality' of the solicitor; this a low threshold
- The work does not have to pass any requirement of skill or sophistication, nor must the solicitor be the sole effective cause of recovery, nor is any objection that the work is largely automated

Key features (2)

- The lien does not depend on possession; it operates by law as a first ranking right of the solicitor to be paid fees out of the proceeds of litigation
- It operates as a form of equitable charge which binds third parties with notice of it but is not effective against a purchaser for value without notice
- There must be a 'fund in sight' against which equity acts (usually a debt owed by the defendant to the solicitor's client as a result of the solicitor's industry)
- The lien survives the client's insolvency: if the client becomes insolvent the solicitor is a first ranking secured creditor for charges (incurred before and after the insolvency) – so above the claims of the officeholders for their expenses

What counts as 'litigation'

- Transactional work is excluded – the lien bites on the fruits of litigation. But in *Bott*, the SC was divided as to where to draw the boundary
- The minority (Lady Rose and Lord Leggatt proposed the test of an “*actual or reasonably anticipated dispute*”
- It appeared that the minority thought that *Gavin Williamson* fell on the right side of the line:
“primarily because, normally, there is a real prospect of a dispute in relation to personal injury claims but, normally, no real prospect of a dispute about flight cancellation and delay claims. And this in turn is because there is always likely to be some negotiation required in relation to the quantum of personal injury claims whereas the quantum in flight cancellation and delay claims is fixed.” (as explained by Lord Burrows at [89])
- However, the majority adopted Lord Burrow's formulation at [88]:
*“assuming that the solicitor is acting for a potential claimant rather than a potential defendant, the appropriate test for a solicitor's equitable lien is whether a solicitor provides services (within the scope of the retainer with its client) in relation to **the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client.** That seems to me to be the best interpretation of what Gavin Edmondson laid down”* (Emphasis added.)

The statutory charge (1)

- In *Shaw v Neale* (1856) 6 HL Cas 581, the House of Lords held that the equitable lien did not apply to real property which the solicitor was instrumental in recovering
- Section 73 of the Solicitors Act 1973 now provides:
 - “(1) Subject to subsection (2), any court in which a solicitor has been employed **to prosecute or defend** any suit, matter or proceedings may at any time -
 - (a) **declare** the solicitor entitled to **a charge** on any property **recovered or preserved** through his **instrumentality** for his assessed costs in relation to that suit, matter or proceeding; and
 - (b) make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit;

and all conveyances and acts done to defeat, or operating to defeat, **that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor.**” (Emphasis added)

The statutory charge (2)

- In *Candey*, Lord Kitchin said [42]:

“there is no great distinction for the purposes of this appeal between the solicitor's equitable lien and the right solicitors have under section 73 of the 1974 Act to secure a declaration that they are entitled to a charge on any property recovered or preserved through their instrumentality for their assessed costs in relation to the suit or matter in issue. In **a real sense, in making a charging order under section 73 of the 1974 Act , the court is not giving any solicitor a new right but is enabling the solicitor more cheaply and speedily to enforce a right he or she already possesses**..... facts which amount to a waiver of the solicitor's right to an equitable lien will generally amount to a waiver of the right to a declaration under section 73 of the 1974 Act . Similarly, if the right under section 73 has been waived, the position is likely to be the same in respect of the underlying equitable lien.” (Emphasis added.)
- The statutory right is largely procedural (but note it does apply to land)
- In *Bott*, Lady Arden said at [132]: *“With the intervention of the court, the equitable lien performs a parallel role to the charging order in relation to the fruits of the solicitor's labour even if there is no litigation”*

Notice and/or collusion

- As an equitable proprietary interest in a fund, the lien may affect the conscience of third parties
- In *Khans Solicitors (a firm) v Chifunte & anor* [2013] EWCA 481 Sir Stephen Sedley stated at [33] (approved by the SC):

“In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor’s claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is **colluding with the client** to cheat the solicitor of his fees, **or** (b) the paying party is on **notice that the other party’s solicitor has a claim** on the funds for outstanding fees. The form of protection ought to be **preventative** but may in a proper case take the form of **dual payment**.”
(Emphasis added.)
- ““notice” means notice of the facts which, as a matter of law, give rise to the lien”: Lord Briggs, *Bott* [152]
- So a defendant who pays the client direct may then have to pay the solicitors fees. This may be seen as an *in personam* remedy against the fund holder who ignores the lien

The role of discretion

- As an equitable remedy it is a matter of discretion for the court whether to enforce it if the requirements are otherwise satisfied
- However, it will only very rarely be appropriate to deny the solicitor the lien: *"An equitable lien is a species of property right which does not depend upon the positive exercise of the court's case by case equitable discretion, even though the court may refuse to enforce it in particular cases"*, *Bott*, per Lord Briggs at [166]
- The threshold will be high (Farwell J saying that it would be *"monstrous"* for the court to deny the statutory charge in *Re Born* [1900] 2 Ch 433, 435)

Candey Ltd v Crumpler (facts-1)

- Candey acted for PHRL in worldwide litigation from Apr 2014 to March 2016
- By March 2015 PHRL was short of funds and renegotiated its retainer with Candey
- In October 2015 Candey and PHRL entering into (i) a Fixed Fee Agreement ("FFA") providing for a lump sum in various circumstances including insolvency and (ii) a deed of charge expressed to be a fixed and floating charge over all of PHRL's assets
- PHRL took independent legal advice before entering into the FFA
- In February 2016 PHRL went into liquidation and the respondent liquidators were appointed
- This triggered the fixed fee and Candey lodged a proof of debt referring to the charge as security for the fixed fee but made no reference to any pre-existing solicitors' equitable lien
- On 03.03.16, before a trial in London the liquidators settled with the defendants and Candey, who had played no part in the settlement negotiations, were disinstructed

Candey Ltd v Crumpler (facts-2)

- In proceedings issued by the liquidators it was established that:
 - the deed of charge created a floating charge only; and
 - as PHRL was unable to pay its debts when it entered into the charge, by s. 245 of the Insolvency Act 1986 the charge was only valid as security for fees incurred after the date of the charge
- By a separate application, Candey asserted an equitable lien and applied for it to be converted into a charge under s. 73 of the Solicitors Act 1973
- The Deputy Judge held that Candey had waived its lien when it accepted the charge
- The Court of Appeal found that by accepting the charge, Candey must be taken to have waived its equitable lien as there were terms which were inconsistent with it, in particular:
 - the charge covered assets which would otherwise be covered by the lien
 - the charge (unlike the lien) conferred priority on a third party which had provided litigation funding to PHRL
 - the FFA provided an interest rate of 8% which would not have been payable under the lien

Candey v Crumpler (principles-1)

- Whether there has been a waiver depends upon the parties intention [43]
- Intention must be ascertained objective (“...when speaking of intention, we are not concerned to decide what the intentions of the parties actually were but with what a reasonable observer would have understood them to have been.” [63] and see [49])
- The intention may be express or inferred [43]
- In cases of inferred intention:

“[42] ...the question will be whether an intention to waive the lien can be inferred taking into account all of the circumstances of the case...”

*[47]. It is not possible to identify in the abstract all the factors which may prove relevant in assessing whether solicitors have abandoned their equitable lien for this must depend on the features and circumstances of the particular case. But some factors have tended to recur as bearing on this question. **One is the taking of new security and whether and to what extent this is inconsistent with solicitors' rights** in equity and under section 73 of the 1974 Act ; another is whether, in light of the professional relationship between them, **the solicitors explained to the client that they were reserving their earlier rights.**”*

Candey v Crumpler (principles-2)

- "Where the solicitor takes a **new security over different property** it is now well established that, if the new security is in any way inconsistent with the existing equitable lien and the solicitor takes it without explaining to the client that the existing lien is retained, then it is likely to be reasonable to infer that the new security is intended to replace the lien, and that the lien is surrendered." [59]
- "a **new security with a right to interest** is inherently likely to be inconsistent with the retention of an equitable lien which carries no such right." [60]
- "The position where a solicitor takes **new security over the asset covered by the original lien** is in my view still clearer. An agreement to take such a charge will, on the face of it, displace that lien." [61]
- "If the **new security over the same property has a priority different** from that of the equitable lien, the inference in favour of a waiver of the lien may be strengthened still further." [62]
- "I would respectfully endorse the observations of Lord Alverstone CJ in *In re Morris* at p 475 to the effect that if solicitors take any security which is in any degree inconsistent with the retention of the lien, **it is their duty to give express notice to the client if they wish and intend to retain the lien, and that if they do not do so, it is very likely that the lien will be taken to have been abandoned.**" [64] (Emphasis added.)

Candey v Crumpler (outcome)

- The SC held that Candey had waived its lien:
 - The charge created a consensual security over the settlement proceeds which was inconsistent with the continued existence of a non-consensual security over the same property
 - The lien was first in priority but the charge ranked behind the charge to the litigation funder
 - On true construction of the FFA (which, with the charge, created a new package of rights) there had been no reservation of the equitable lien. The FFA said that it superseded and replaced any fee agreement
- This conclusion was not precluded by Candey's having taken independent legal advice:

*"If the new security is inconsistent with the retention of the equitable lien, it is incumbent on the solicitor to give express notice to the client if he or she intends to retain the lien. **A solicitor is not absolved of that obligation simply because the client has agreed to take independent legal advice in relation to the new security and that is because the independent adviser is not in a better position than the client to discern the solicitor's intention.** Accordingly, if, despite the apparent inconsistency between the new security and the lien, the solicitor does not make clear his or her intention to retain the lien, it remains reasonable to infer an intention to surrender it."* [79]

Takeway

Speaking extra-judicially, Lord Briggs recently said:

*"Standing back, it might be said that the courts have displayed a certain schizophrenia when reviewing the creation and destruction of a solicitor's equitable lien. They have shown very considerable inventiveness in recognising such a lien over the fruits of litigation in a modern context, but a much greater readiness to recognise its loss by waiver by a solicitor than by holders of security generally. This may be (although it is nowhere specifically spelt out) because the judicial 'invention' (if that is the right word) of the solicitor's equitable lien is, as I said at the outset, and in Edmondson, not the product of any special fondness for solicitors, but rather to encourage them to deliver access to justice by acting for worthy but financially weak litigants on credit.⁵⁷ Once they have their lien, the court naturally reverts to a rather more austere perception of the circumstances in which it may be held to have been given up by waiver. **The moral of the story may be that the court will readily give the solicitor a very valuable security for his fees, in the form of the lien over the fruits of the litigation but, if solicitors want to go one better, they do so at their own peril, and will receive no sympathy from the court if they do not seek to preserve their lien in the clearest express terms.**" (Emphasis added.)*

Lord Briggs, Solicitors' Equitable Liens,

Lecture to the Chancery Bar Association Annual Conference 14.01.23

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Questions?

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