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Solicitors' Equitable Liens

Lord Briggs of Westbourne JSC[1]

Introduction

This talk is about liens and costs, two words which, perhaps understandably though for different reasons, are liable to make most people's, and indeed many lawyers', eyes glaze over. I would not, of course, suggest that this is true of the learned members of the Chancery Bar Association, even during the last event in this otherwise excellent conference. But, for any at risk of being sent soundly to sleep by mention of liens and costs, it might jolt them wide awake to discover that of the equity cases which have reached the Supreme Court in the past five years, four of the most significant and, dare I say it, interesting ones have been concerned with equitable liens, and three of those with solicitors' equitable liens, that is liens on the fruits of litigation to secure unpaid solicitors' costs.

I shall return to the claim that this is an interesting area of law, but I hope I can say without controversy that it is an important one in the modern legal world, and one which is only likely to become more so. That is the case even though solicitors' equitable liens have been recognised and enforced by the courts for over two hundred years. The simple reason for this is the problem we face with access to justice. This was at the heart of the decisions in *Gavin Edmondson Ltd v Haven Insurance Co Ltd*[2] and *Bott & Co Solicitors Ltd v Ryanair DAC*[3], the first and second of the Supreme Court trilogy of solicitors' lien cases.

I have long-standing concerns about access to justice, as described in my 2016 report on the structure of the Civil Courts.[4] In *Bott* I pointed out that it is becoming close to impossible for ordinary people to obtain legal assistance at proportionate cost in relation to small to moderate-sized claims. Moreover, even in larger matters fought between commercial parties, it may be hard to fund the potentially punishing costs of complex litigation without the assistance of solicitors, or even counsel, agreeing to act on a contingent basis (i.e. 'no win-no fee'). In that way, now that civil legal aid is all but consigned to the history books, solicitors (backed by litigation funders) are increasingly acting as the gatekeepers for access to justice, in assessing the merits of claims and deciding whether or not to fund them. As the Supreme Court observed in *Edmondson*, the specific benefit of the lien is that "*it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit.*"[5]

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[1] With thanks to Nicholas Wright for his research assistance.

[2] [2018] UKSC 21; [2018] 1 WLR 2052 ("Edmondson").

[3] [2022] UKSC 8; [2022] 2 WLR 634 ("Bott").

[4] Civil Courts Structure Review: Final Report, Lord Justice Briggs, July 2016.

[5] *Edmondson* at [1].

Access to justice is the "*animating principle*" behind the solicitors' equitable lien, because it is thought that solicitors will be more willing to act for impecunious clients with meritorious claims if they know that they will be paid first out of any proceeds, and have first-ranking security over them. With the courts and Parliament leaving behind the traditional suspicion that solicitors acting on conditional or damages-based agreements may be guilty of maintenance or even champerty, the provision of contentious legal services on credit, repaid out of recoveries, is likely to become ever more common as a main enabler of access to justice. It is therefore important that solicitors have adequate and clear protections in place to ensure that, whether due to evasion, insolvency, or some other reason, they are paid if their clients cannot, or will not, pay them for the work they have done which has led to recoveries in litigation. After three Supreme Court cases in the past five years, I hope we have gone a long way toward bringing this old area of law up to date, and resolving at least some of its uncertainties.

A Short History Lesson

The 'primitive' common law lien

First, a short history lesson. The idea of solicitors being able to hold their clients' feet to the fire when they are not paid is nothing new. For hundreds of years, the response of the common law to a client who does not pay their solicitor for work done has been to grant the solicitor what the common law called a "lien" over the client's papers or other personal property in the possession of the solicitor, the so-called common law possessory or retaining lien. This, self-evidently from its name, granted the solicitor a right to refuse to return papers or other personal property, a classic example being deeds to real property, until they had been paid their fees.

The possessory lien did not however grant the solicitor any sort of security right by way of charge, although it did extend to retaining monies already in the client account (so long as they were put there for general rather than specific purposes which were inconsistent with the existence of the lien)[6] up to the amount of any outstanding fees. That included retaining monies in priority to any claims made by creditors or by officeholders in the client's insolvency.[7] The principle does not however extend to a right to retain books and records as against an insolvency officeholder where they have a different or better right to obtain them than the client themselves.[8]

Nor was the possessory lien uniquely tailored to the situation of solicitors. It was simply one example of the common law possessory lien which arises generally in favour of any unpaid provider of services (see *Richards v Platel*).[9] Lord Justice Diplock (as he then was) was therefore doubtless correct to say in *Tappenden v Artus* that the common law possessory lien

[6] See the distinction drawn by the Court of Appeal in *Withers LLP v Langbar International Ltd* [2011] EWCA Civ 1419; [2012] 1 WLR 1748 where the appellant was unable to rely upon the lien to deduct its outstanding fees from monies paid into the client account for the specific purposes of being a settlement payment.
[7] *Prekookeanska Plovidba v LNT Lines Srl* [1989] 1 WLR 753 at 757.
[8] See *Re Toleman and England, ex p Bramble* (1880) 13 ChD 885 and s.349 Insolvency Act 1986. See also *Re Aveling Barford Ltd* [1989] 1 WLR 360 per Hoffmann J.
[9] (1841) Cr & Ph 79; 41 ER 419.

is little more than a "*primitive*" "*self-help*" remedy for solicitors and others who go unpaid for services rendered.[10] The right it grants them is modest and, in many contexts, manifestly insufficient to protect their interests. It is all very well for a shipwright or a garage mechanic to be able to hold on to the subject matter of their work until payment, since the article under repair will generally be worth at least as much as, if not indeed much more than, the price of the work done. But in an age of registered land and securities the present value of the old documents of title will be much reduced from their value in times gone past. It may be mere happenstance whether the solicitor holds on to anything of real value for which the client will want to pay to get back.

This insufficiency of the possessory lien to protect solicitors' interests is likely to be most obvious in the context of litigation where, by the time the solicitor has not been paid for his potentially considerable efforts, he might no longer have papers in his possession in which the client has any practical interest. The possessory lien is also obviously of little comfort to the solicitor where the client has become insolvent or otherwise unable to pay. Something more was therefore needed and, as happens so often in these situations, equity rode to the rescue with something more flexible and sophisticated than the "*primitive*" common law possessory lien.

The intervention of equity

At its heart, the solicitors' equitable lien is a deceptively simple concept. It is equity's response to the unconscionability of a client taking the benefit of their solicitors' work in litigation in the form of what is often described as the "fruits of the litigation" whilst not paying them. It has widely been described as a right akin to salvage in that it recognises that certain assets only exist because of the solicitors' actions and they therefore have an interest in them to the extent of their unpaid fees incurred in the course of generating or preserving them in priority to any other claim on them. It is therefore limited in its scope only to fees and disbursements attributable to the proceedings in which the property is recovered or preserved rather than to the general balance of fees as between solicitor and client.

The solicitor's equitable lien is therefore properly described as a litigation lien. In other words it is an incident of a retainer to conduct litigation, or, now more widely, to pursue or defend clients' claims.

The solicitors' equitable lien has been recognised since at least the eighteenth century. The first seed may have been planted in *Ex parte Price* from 1751[11] in which a solicitor brought a "*petition to be paid his bill of costs in taking out a commission of lunacy out of the fund of the lunatic's estate, and not to be obliged to come under the commission of the bankruptcy against him who took out the commission of lunacy*". The Lord Chancellor, Lord Hardwicke, ordered the solicitor to be paid from the estate on the grounds that "s*olicitors have this equity allowed to them to be intitled to a satisfaction out of the fund for their expenses, whether it was in the way of suit, or prosecution in lunacy or bankruptcy*". There may be difficulties in treating this case as the true origin of the solicitors' equitable lien, not least because it is not

[10] [1964] 2 QB 185 at 195.
[11] (1751) 2 Ves Sen 408; 28 ER 260.

clear that taking out a commission in lunacy is properly to be regarded as litigation, even in the broad way that this concept is now to be understood after *Bott.*

The idea of the equitable lien in the form we now recognise really took off when it became necessary to address situations in which parties to litigation paid each other directly, thereby cutting out the claimant's solicitors, whether as a result of collusion or otherwise. The upshot of this was that solicitors were not able to deduct their outstanding fees out of the proceeds of litigation passing through their client accounts in the usual way, thereby rendering enforcement considerably more difficult and circumventing that aspect of the possessory lien.

The solution was for equity to recognise the proprietary interest which the solicitor had in the fruits of the litigation themselves rather than simply a right to dip into what was passing through their client account, for their unpaid fees. This principle was set out first by Lord Mansfield in *Welsh v Hole* .[12] The case stemmed from a civil claim for assault in which the Plaintiff obtained judgment for £20 but then settled the case with the Defendant for a direct payment of £10, including costs, after trial. There was no finding that there had been collusion to defeat the solicitor's ability to obtain payment out of the monies passing through his client account but Lord Mansfield nevertheless held that the court would intervene to ensure that the solicitor was paid. He began with an explanation of the lien which was not far removed from the then existing possessory lien in the form of deducting money paid into the client account to the extent of any outstanding liability for fees: "a*n attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hand, he may retain to the amount of his bill.*" Lord Mansfield's leap however was then to recognise that the solicitor had rights which went beyond money in his possession, indeed:

> "*He may stop* [any payment by the Defendant to the Claimant] *in transitu if he can lay hold of it. If he apply to the Court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong* […]*"*

Whilst the defendant in that case had received no such notice, it was apparent that he would have been required to pay the costs element again a second time if he had in fact been on notice from the plaintiff's solicitor. That rule was confirmed in 1795 in *Read v Dupper*[13], a case where the defendant appears to have paid the plaintiff direct rather than via his solicitors in a panic at threats of enforcement. Lord Kenyon CJ enunciated the principle with admirable clarity and force:

> "*The principle by which this application is to be decided was settled long ago, namely that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained*."

[12] (1779) 1 Doug 238; 99 E.R. 155
[13] (1795) 6 Term Rep. 361; 101 ER 595.

Although those cases are now over two hundred years old, we cited them with approval in *Gavin Edmondson* and they remain good law in their descriptions of the fundamental underpinnings and justifications for the solicitors' lien.[14] They explain the significance of the paying party being on notice of the solicitor's interest, and that the entire jurisdiction is grounded in enhancing access to justice via the equitable lien.

In short therefore, equity recognises the interest which solicitors have in the proceeds of litigation where they have generated those proceeds but have gone unpaid. The court will intervene to ensure that the solicitor is able to obtain payment out of the proceeds where otherwise unable to as a result of collusion or at least direct payment on notice of the lien. As Sir John Romilly MR put it pithily in *Haymes v Cooper*, an 1864 case which built upon the eighteenth-century cases and re-stated the principles they enumerated, a solicitor has "*an inherent equity to have his costs paid out of any fund recovered by his exertions*".[15]

To those foundational principles which govern the solicitors' equitable lien and explain its importance, I would highlight two further subsequent developments which have enhanced its practical importance in the real world.

The first is the recognition that the lien grants the solicitor a <u>security</u> interest in the proceeds of the litigation and that this accords them the status of a secured creditor in the insolvency of their client – see *Re Meter Cabs Ltd*.[16] Indeed, more than that, because the right is one in the nature of salvage, it elevates them right to the top of the insolvency waterfall as a first ranking charge holder above even the claims of officeholders for their expenses. The reason for this is that the relevant assets will only form part of the insolvent estate as a consequence of the solicitor's actions so it remains fair that the solicitor be paid out of them first.

This reliance upon the lien as an immediate, prevailing, security right in the context of insolvency is something which forms one strand of the authorities which has come to the fore since *Addleshaw Goddard LLP v Wood* in 2015[17], which concerned the insolvent estate of the late Boris Berezovsky, though it has been recognised since at least *Guy v Churchill*[18] building on *Haymes v Cooper*[19] which established that the solicitors' equitable lien could not be defeated by an assignment.

The second strand is the statutory intervention enacted to assist in the enforcement of the lien as a way of making it an even more potent tool for solicitors. In particular, this was done to avoid the issues created by 1858 decision of the House of Lords in *Shaw v Neale*[20] that, prior to statutory intervention, the equitable lien could not bite on real property which the solicitor had caused to be recovered or preserved via acting in litigation. This statutory intervention is now found in section 73 of the Solicitors Act 1974 and, most significantly,

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[14] *Edmondson* at [30]-[31].
[15] (1864) 33 Beav. 431; 55 ER 435.
[16] [1911] 2 Ch 557
[17] *Addleshaw Goddard LLP v Nicholas Stewart Wood, Kevin John Hellard as General Administrators of the Estate of Platon Elenin (formerly Boris Abramovich Berezovsky)* (SCCO, 8 April 2015, Unreported).
[18] (1887) 35 Ch D 498.
[19] (1864) 33 Beav. 431; 55 ER 435.
[20] (1858) 6 HL Cas 581; 10 ER 1422.

provides that the court may at any time, in respect of a suit, matter or proceedings in which a solicitor has been employed to prosecute or defend, declare the solicitor entitled to a charge on any property "*recovered or preserved*" through his instrumentality for his assessed costs in that "*suit, matter or proceeding*". The solicitor's charge is then further protected by section 73 which goes on to state that "*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.*"

Before moving on, I should also make clear that, as an equitable remedy, it is a matter for the court's discretion whether to enforce a solicitor's equitable lien even if the technical requirements for it to arise are satisfied. Generally however, it will only very rarely be appropriate to deny the solicitor their lien. Indeed, on the authorities this has been put as high as it being "*monstrous*" for the court to refuse to exercise its discretion to do so.[21] The lien is a form of property right, the enforcement of which will not lightly be interfered with by the court on discretionary grounds.[22] Having said that, extreme cases, such as a lack of clean hands on the part of a solicitor, cannot in the future be ruled out where refusing to enforce the lien might be justified.

Here ends the history lesson.

The recent developments

Gavin Edmondson v Haven

That brings us to *Gavin Edmondson v Haven* itself. At its heart, this case and *Bott v Ryanair* after it were about how far the solicitors' equitable lien could adapt to facilitate changing forms of dispute resolution in the modern world whilst still striving to keep access to justice at its core.

The facts of *Edmondson* were as follows: an enterprising solicitors' firm (Edmondson) had entered into conditional fee agreements with its clients to act for them in their low value personal injury claims. Edmondson notified the claims via the online RTA Portal in accordance with the relevant Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The purpose of the Portal is to enable low value claims to be resolved without recourse to the courts where liability (but not quantum) is admitted by the insurer, in which case the insurer is also expected to pay the solicitor's fixed costs and charges directly to the claimant's solicitors.

The issue in the case was that, after being notified of a claim via the Portal, rather than dealing with claimants via the Portal (and thus also via Edmondson), Haven (who were insurers of negligent drivers) instead began simply to make offers direct to the claimants, promising them more money and more quickly than if they went via the Portal. The effect of claimants accepting these offers was to cut out Edmondson and cause clients to cancel their CFAs. Edmondson, understandably, was unhappy at being deprived of its costs in this way and sued

[21] Per Farwell J in *Re Born* [1900] 2 Ch 433 at 435.
[22] Per Lord Briggs JSC in *Bott* at [166].

Haven, asserting its solicitors' equitable lien for its fixed costs and charges in relation to the claims it had filed via the Portal.

Much of the case was taken up with a question of the construction of Edmondson's client care letter and whether the clients owed a contractual duty to pay Edmondson's fees.[23] It was also in issue whether Haven was on notice of Edmondson's equitable lien.[24] Those fact-sensitive issues need not trouble us further here. What was more significant in the case was that the Court of Appeal had said that Edmondson's equitable lien was engaged even if the clients had no contractual obligation to pay its fees.[25] That was a decision which went to the heart of what a lien was. Was it a principled protection to prevent solicitors being intentionally or inadvertently (with notice) deprived of the fees contractually due to them, or was it some broader equitable discretion to protect solicitors from unconscionable interference with their expectations to be paid?

I identified in my judgment the central principles for the enforcement of solicitors' equitable liens, namely a solicitor being contractually entitled to payment from their client, a fund over which equity can recognise the solicitor has a proprietary claim (often labelled a "fund in sight" – see *In the Estate of Fuld, decd, (No 4)*[26]) and something sufficient to affect the conscience of the payer at the time of the payment, either collusion to cheat the solicitor or knowledge or notice of the solicitor's interest in the fund.[27] I then held, and my colleagues agreed with me, that the Court of Appeal had gone too far in saying that the lien was available to Edmondson even if it had not had a contractually binding right to payment of its fees from its clients.[28]

Whilst it would have been a breach of the RTA Protocol for Haven not to pay Edmondson its fees, that was not enough to engage the lien which was there to protect the solicitors' right to the fees <u>due from their client</u> where the solicitor had facilitated the client winning in litigation. Equity had to operate in accordance with principle and whilst it must move with the times and will inevitably operate in a more flexible manner than the common law, the equitable protection of solicitors via the equitable lien could not be elevated to some general organising principle that equity will protect solicitors from any unconscionable interference with their expectations of payment, including in that case, by breach of the RTA Protocol. It was well-established in the authorities that one requirement for the lien to operate was that the client was liable to their solicitor for their fees. Any other outcome would undermine the principled exercise of equitable discretion in a predictable manner and risk destabilising the operation of the voluntary RTA Protocol. But, disagreeing with the Court of Appeal, we concluded that the solicitors did have a contractual right to their fees, so that the lien operated against Haven on conventional principles. So, overall, we thought that we were

[23] *Edmondson* at [39]-[44].
[24] *Edmondson* at [45]-[50].
[25] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2015] EWCA Civ 1230; [2016] 1 WLR 1385 at [31]-[32].
[26] [1968] P 727.
[27] *Edmondson* at [30]-[37].
[28] *Edmondson* at [51]-[58]; [65].

restoring the conventional boundaries of the lien after an unprincipled extension of them by the Court of Appeal.

Bott v Ryanair

Bott was another lien case concerned with enterprising solicitors providing new mechanisms for promoting access to justice. Historically, small claims arising from delayed flights gave rise to difficulties for claimants given the high costs of bringing a claim relative to its likely value. In order to address this problem, Bott & Co set up a system to pursue these claims, over a thousand per month, directly with airlines, including Ryanair, *en masse,* for fees on a scale which represented only a modest part of the small amount being claimed. The scheme depended for its profitability to Bott, and therefore its availability to prospective clients, on a very high level of automation in the formulation and communication of claims, and on a very low level of dispute by airlines, either as to liability or quantum.

Prior to early 2016, whenever claims were admitted, Ryanair would pay the compensation straight into Bott's client account. After that point however, Ryanair decided to seek to resolve any compensation claims with customers directly, thereby cutting out Bott and forcing it to seek payment from its clients for fees due rather than simply deducting them from the compensation received into its client account. Ryanair also introduced its own automated online claims-handling procedure, under which successful customers would be paid in full where the claim was admitted, free of any fee liability to Bott or any other intermediary. Nonetheless many customers preferred to continue to use Bott's scheme.

When Bott sued, asserting a lien over the sums paid to their clients direct by Ryanair, the airline denied that any lien arose on the facts as well as in principle. Ultimately, the case turned on whether there was litigation sufficient to trigger the solicitors' equitable lien given that the lien can only bite on the fruits of "litigation", whatever that encompassed. Both the trial judge[29] (before the Supreme Court's decision in *Edmondson*) and the Court of Appeal[30] (after *Edmondson*) concluded that Bott's scheme did not amount to litigation, so that no lien arose.

As I made clear in my judgment in *Bott*, I had considered in *Edmondson* that "litigation" for the purposes of a solicitors' lien ought to be construed broadly so as to facilitate access to justice, that concern which lies at the heart of the lien.[31] That included it not being necessary, contrary to the earlier decision of the Court of Appeal in *Megeurditchian v Lightbound*[32], for proceedings actually to have been issued before the lien could arise. Court proceedings were almost always unnecessary, either in RTA Portal cases as in *Edmondson*, or in flight delay claims under Bott's scheme. *Meguerditchian* was not expressly disapproved in the Supreme Court's judgment in *Edmondson*. Although it was cited, it was no part of Haven's case that a lien could not arise because no proceedings had been issued.[33] It was a sort of unspoken

[29] *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch); [2018] 3 Costs LO 275 at [116].
[30] *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143; [2019] 1 WLR 3375 at [59].
[31] Per Lord Briggs in *Bott* at [145]-[147].
[32] [1917] 2 KB 298, CA.
[33] Per Lord Leggatt and Lady Rose in *Bott* at [32].

common ground in *Edmondson* that modern developments in dispute resolution, such as the RTA Portal and mediation meant that a supposed requirement for the issue of proceedings had long-since passed its shelf life. In 1917 the issue of proceedings was a typical first step in litigation. Now it is rightly regarded as a last resort.

But some boundary to the concept of litigation in the modern world had to be identified, if the lien was not to cover all work done by solicitors for their clients. The two candidates anxiously debated by the court were dispute resolution and the pursuit of claims. In the result a bare majority of us, but with Lord Leggatt and Lady Rose dissenting[34], allowed the appeal in *Bott*, concluding that what Bott was doing did amount to "litigation" for the purposes of triggering the lien. This was not (as the minority would have preferred as a test) because there had to be an "*actual or reasonably anticipated dispute*" when Bott agreed to act against Ryanair for their clients.[35] If that was the test, Bott would have failed. Rather It was because the client had retained Bott to pursue a claim, and their services had significantly contributed to the obtaining of a sum for their client. That was so even if all Bott was doing was merely writing a letter seeking payment where liability turned out not to be disputed, in a manner the client would have been perfectly capable of writing themselves. Indeed, as I said, the effect of *Edmondson* was to affirm "*the availability of the lien in connection with <u>all</u> means by which solicitors may provide what may <u>loosely</u> be described as dispute resolution services*" (emphasis added).[36]

<u>Outstanding questions</u>

One issue which this broader conception preferred by the majority raised was that permitting Bott the benefit of the lien in such a case would, on one view, be odd given that, though solicitors, Bott had exercised little or no legal skill in bringing about recoveries for their client given that the process of filing (substantially undisputed) claims with Ryanair and receiving compensation was mostly automated. Indeed, this was a point taken strongly by Lord Leggatt and Lady Rose in their dissenting judgment. In their view the level of difficulty of the work done by the solicitor, and whether it necessarily required a solicitor to do it, was not determinative, however a lack of skill required by the solicitor might tend to show that there was not in fact a sufficient legal dispute to trigger the lien.[37]

But the issue of the level of skill exercised by the solicitor does leave open other questions. Why, in a case like Bott, should the lien be available to a solicitor but not to a claims handling firm doing exactly the same thing, just without the wrapper of a solicitors' practicing certificate, particularly where that might give a solicitor a potentially unfair competitive economic advantage? The issue remains very much open in a *Bott*-type case involving substantial automation of the disputes process. And it is precisely by modern forms of automation that access to justice can often be achieved for the pursuit of very small claims, which would otherwise just be uneconomic.

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[34] *Bott* at [75].
[35] Per Lord Briggs in *Bott* at [155].
[36] Per Lord Briggs in *Bott* at [157].
[37] *Bott* at [74].

A further related question, perhaps of more relevance to those in this room, is whether a barrister who conducts litigation acting on a direct access basis has the benefit of an equitable lien like that afforded to a solicitor. Of course, the whole purpose of permitting barristers to conduct litigation and act on a direct access basis was to facilitate access to justice at proportionate cost, so one can see why it might be said to be appropriate to extend the benefit of the lien to them. In both *Edmondson* and *Bott* the Supreme Court was careful to say nothing either way about that issue, so that it remains to be decided.

One other point, which does not yet appear to have penetrated the authorities in any great volume, and certainly not those at the highest level, is the extent to which the lien is available to a solicitor who acts for a defendant, and how precisely this works in practice. As we have seen, the solicitors' equitable lien was first recognised in circumstances where a solicitor acting for a claimant was deprived of having their fees paid out of any damages received due to the circumvention of their client account by the defendant paying the claimant direct. That is quite different to the position of a defendant's solicitor, but section 73 of the Solicitors Act 1974 is clear that the Court may grant a charge in support of a lien where the solicitor has acted to "*prosecute or defend any suit*" with the result that property is "*recovered or preserved*." Whilst preservation certainly extends to assets belonging to a claimant – there is no reason in principle why it should not also apply to a defendant's assets, and section 73 is clear about this on its face.

In some cases, the application of the lien in relation to a defendant might be relatively easy, subject to potential issues surrounding notice, for example in a case involving a straightforward fight over beneficial ownership of real property. Indeed, for example, no point seems to have been taken in the recent case of *Candey Limited v Tonstate Group Limited and others*[38] that a solicitor who acts for a defendant in proceedings which are resolved by way of consent order under which the defendant retains property (in that case shares) being claimed from them, ought, in principle to have the benefit of a lien over that property.

But what about, for example, a damages claim where a Claimant claims £10 million but is awarded only £1 million. Might the defendant's solicitor be able to assert a lien for their unpaid fees over some "fund in sight" belonging to the defendant for whom they acted on the grounds that they were instrumental in preserving £9 million for them? Indeed, it is clear that the lien can bite on any "fruits of litigation" as Lady Justice Rose (as she then was) pointed out in *Candey v Crumpler*[39] in the Court of Appeal saying that the lien "*did not depend upon the fruits of litigation including a specific amount for costs between the parties or an element in a settlement sum on account of costs*" (emphasis added). Such a claim would obviously raise very difficult causation issues but would also potentially require a recalibration of some of the fundamental requirements for the lien.[40] I would not rule out equity rising to the challenge to protect the fee entitlement of solicitors who act for defendants as well as claimants.

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[38] [2021] EWHC 1826 (Ch).

[39] *In re Peak Hotels and Resorts Ltd (in liquidation); Candey Ltd v Crumpler and another* [2020] EWCA Civ 26; [2020] Bus LR 1452 at [31].

[40] See for example some of the difficulties raised by Zacaroli J in *Candey v Tonstate* at [39] – [42].

The fundamental question

Notwithstanding the recent Supreme Court liens trilogy, all these issues, and doubtless others which have not yet been dreamt up by creative lawyers, remain open to trouble the courts in the future. What I will say however is that if vigorous litigation over solicitors' liens is to continue to be a feature of the legal landscape for the foreseeable future, and given the potency of the lien - particularly in the insolvency context, there is every reason to believe these claims will become more, not less, common, then we need to ask another, more fundamental question: what actually is a solicitors' equitable lien? On the authorities, this is not altogether easy to answer.

Is it really a lien at all?

The essence of the problem is that the label "lien" perhaps serves to obscure as much as it reveals. Everybody knows that anything called a lien involves some sort of right over property belonging to another, generally arising from some sort of work done to or in relation to that property. As Christopher Nugee QC (as he then was) pointed out in *Clifford Harris & Co v Solland International Ltd (No.2)*[41] however:

> "[...] *although commonly referred to as a lien, the solicitor's right, whether under common law or the statute* [a reference to section 73 of the Solicitors Act 1974]*, is not a true lien, which can only exist in the strict sense where the person claiming the lien has the property which he claims to be subject to the lien in his possession. Thus, a solicitor also has at common law a general lien over his client's papers or other property in his possession, which is a true retaining lien; but the so-called lien over property recovered in proceedings is 'only a claim or right to ask for the intervention of the court for his protection'*".

Merely using the term lien, or even equitable lien, is therefore difficult. But, even distinguishing carefully between a "true" common law possessory or retaining lien and an equitable lien is not the end of the story. Treating equitable liens as a separate category which generally creates a proprietary interest gives rise to myriad issues as my colleagues and I, sitting as the Judicial Committee of the Privy Council, recently discovered in *Equity Trust v Halabi*[42]. This involved leviathan conjoined appeals from Jersey and Guernsey which raised surprisingly fundamental, and previously undecided, issues of trusts law on trustees' equitable liens. Those issues included whether the lien afforded the trustee a proprietary interest in the trust property, the extent to which any such proprietary right survived the transfer of the trust property to a successor trustee and, if it did, the priority of the liens of successively appointed trustees' *inter se*, where the trust fund was insufficient to pay them all in full.

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[41] [2005] EWHC 141 (Ch); [2005] 2 All ER 334 at [21(iii)], citing *Mercer v Graves* (1872) LR 7 QB 499, 503 *per* Cockburn CJ, itself approved in *James Bibby Ltd v Woods and Howard* [1949] 2 KB 449, 453f *per* Lord Goddard CJ.

[42] *Equity Trust (Jersey) Ltd v Halabi (in his capacity as Executor of the Estate of the late Madam Intisar Nouri) (Jersey); ITG Ltd and others v Fort Trustees Ltd and another (Guernsey)* [2022] UKPC 36 ("Equity Trust").

The Board held that the lien did confer a proprietary right on a trustee which survived their retirement and consequential surrender of possession of the trust fund. In doing so however, it drew a contrast with the solicitors' lien which exists primarily as a security interest to secure performance of the client's specific contractual obligation to pay fees due to the solicitor. The trustees' lien cannot really be described as a security interest, as opposed to a proprietary interest, because it does not stand as security for any primary liability of anyone to the trustee, being instead simply the "primary" means of obtaining payment for the fluctuating balance of the account between the trust estate and the trustee.[43]

We then went on to say (by a bare 4-3 majority) that where there is a shortfall in the trust assets, the trustees must bear it *pari passu* rather than the lien of the first trustee to be appointed prevailing (as the minority would have preferred) following the usual "first in time" practice of equity when it comes to the relative priority of competing equitable interests.[44]

Many of the issues which arose in relation to trustees' liens in *Equity Trust* remain essentially unresolved in the context of solicitors' liens. For example, when it comes to the priority of competing, successive, solicitors' liens on an insufficient fund, there is very limited authority. The issue was litigated in *Re Wadsworth (Rhodes v Sugden)*[45] in 1886 but does not appear to have been litigated directly since then though that case has occasionally since been cited with approval on tangentially related points. Kay J held that, in fact, the lien of the solicitor who acted last in time took priority upon an insufficiency of the fund rather than applying either the usual first in time rule or *pari passu*. The reason for this seems to have been that the solicitor who acted last in time was to be regarded as more proximate in a causative sense to the recoveries being made for the client and ought therefore to be able to recover via the lien first, ahead of solicitors who had acted earlier. One can also see why that might be a desirable result from a policy standpoint of promoting access to justice in the sense that if first in time or *pari passu* were to be the rule then replacement solicitors might be reluctant to act where substantial legal bills had already been racked up.

I must however confess some unease about this in light of the Privy Council's decision in *Equity Trust*, where *pari passu* was applied by the majority as the answer demanded by justice to the common misfortune of the trustees having a lien over an insufficient fund through no fault of their own, rather than allowing some to recover in full and the rest to get nothing. The case of a solicitor may be distinguishable from this but I retain an open mind and it will be a matter for a future court as to whether *Wadsworth* remains good law.

An equitable charge?

The closest anyone has come to advancing a substantive definition of what a solicitors' lien actually is was in *Edmondson*, where we eschewed the label "lien" saying it was *"better analysed as a form of equitable charge*".[46] I say that in all humility given that three cases on

[43] Per Lord Richards and Sir Nicholas Patten at [105] and [166] (with whom the other members of the Board agreed on these issues).
[44] Per Lord Briggs at [277]-[278] (with whom Lord Reed, Lady Rose and (for different reasons) Lady Arden agreed on this point).
[45] (1886) 34 Ch D 155.
[46] *Edmondson* at [3].

equitable liens later, I think that I might have been going too far at least insofar as that description could be construed as appropriate for all equitable liens. The reason I say this is that as the Privy Council explained in *Equity Trust*, the species of equitable lien which benefits a trustee, is not a security for a debt owed by anyone.[47] Equitable liens generally therefore cannot really sensibly be regarded as a species of equitable charge, though the security interest afforded by the solicitors' lien might look very much like one.

But even the analogy between a solicitors' equitable lien specifically (rather than any other kind of equitable lien) and the equitable charge is not free from controversy. As the quotation from the judgment in *Clifford Harris v Solland International* I gave earlier indicates, there is a considerable line of authority which regards, or appears to regard, the solicitors' lien as a mere right to ask for the court's intervention which is at large until there is a fund in sight, thereby potentially leaving the solicitor with no security interest until a charge is actually granted by the court. That might well call into question whether it is appropriate to regard the solicitors' lien as a charge at all, or whether is should better be regarded as a species of mere equity.

This issue was considered recently in the careful judgment of Mr Justice Zacaroli in *Candey v Tonstate* (Candey being a firm which appears to have got a taste for litigating solicitors' liens in recent years). As the Judge put it, the case was about "*the true nature and character of a solicitor's "lien" as it relates to the fruits of litigation which his or her efforts have produced for the benefit of the client*".[48] The Claimants had obtained a final charging order over certain shares prior to their owner, Mr Wojakovski, being made bankrupt. Candey had acted for Mr Wojakovski as the defendant in litigation brought by the Claimants which had ended with a consent order under which he had been permitted to retain the shares which it was being alleged had been unlawfully transferred to him. Candey therefore applied for a charging order under section 73 of the Solicitors Act 1974 claiming that it had a lien on the shares which trumped the final charging order previously obtained by the Claimants. That was disputed by the Claimants on a number of grounds, including, primarily, that prior to being granted a charge over a fund by the court in support of their lien, the solicitors in fact had no interest in the fund at all. All they had, as Lord Goddard CJ had said in *James Bibby Ltd v Woods and Howard*, was "*only* […] *at the most an inchoate right to apply for* [a charge]" and "*until that is done,* [the solicitor] *has no right in* [the fund]" and "*there was therefore no lien or charge on the money*".[49] That would be more like a mere equity than an immediate proprietary interest in a fund.

Mr Justice Zacaroli however held that this analysis could not survive what was said about the nature of the solicitors' lien in *Edmondson*, in particular that equity rose to the challenge of protecting the rights of solicitors "*by first recognising, and the enforcing, an equitable interest of the solicitor in the fruits of litigation*".[50] In other words, the solicitor does have a security

[47] Per Lord Richards and Sir Nicholas Patten at [170]-[171] and Lord Briggs at [249].
[48] [2021] EWHC 1826 (Ch) at [12].
[49] [1949] 2 KB 449 at 453-4.
[50] *Candey v Tonstate* at [26]-[27].

right in the specific fund even before a charge is granted by the court in support of the lien, because equity recognises the solicitor's interest prior to the court actually enforcing it.

Although *Edmondson* did not expressly overrule the *Bibby* line of authority, I would respectfully agree with Mr Justice Zacaroli that it did so by necessary implication, so that any case which suggests that the solicitor has no security right over a specific fund prior to a charge actually being granted by the court can no longer be regarded as good law. To my mind, if the lien takes effect only from the court's order, it is very hard to understand why, as in *Edmondson,* a defendant who pays the claimant direct when on notice of the claimant's solicitor's lien should be liable to pay (again) the costs secured by the lien to the solicitor. It is only if the lien consists of an immediate proprietary interest in the fund represented by the settlement sum that the payment of the whole sum direct to the claimant can be regarded by equity as an interference with the solicitor's rights. The *Bibby* analysis would leave solicitors in an inherently vulnerable position which is inconsistent both with the policy justification for the lien and with any principled understanding of how it works as an equitable proprietary interest. This perhaps illustrates why, although inappropriate for equitable liens in general, the label of *"a form of equitable charge*" may well still be helpful in describing the solicitors' lien.

The charge analysis helps explain how the lien works. It attaches to the judgment or settlement debt from the moment of its creation, so that the defendant debtor with notice will get a good receipt by paying the whole debt to the solicitor as chargee. The debtor is not concerned with the amount of the solicitor's entitlement to fees and disbursement. That is a matter between the solicitor and the claimant.

All of these issues surrounding what an equitable lien actually is, do however make me wonder whether the time has come, following through on my comments in *Edmondson*, to do away entirely with the label of "lien" in the context of what are currently labelled equitable liens. 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. I leave it to others however to take up the challenge of formulating appropriate new labels which more accurately identify the various rights. Perhaps the Chancery Bar Association would like to offer a prize!

Losing the lien - *Candey v Crumpler*

The third member of the Supreme Court trilogy on solicitors' equitable liens is *Candey v Crumpler*[51], handed down just before Christmas. This case was not about the existence or scope of the lien but rather whether the solicitors had lost their lien by taking further security from the client during the course of the retainer. The further security took the form of a floating charge over the same subject-matter as the equitable lien. It was held at all levels,

[51] *Candey Ltd v Crumpler and another (as Joint Liquidators of Peak Hotels and Resorts Ltd (In Liquidation))* [2022] UKSC 35 ("Candey v Crumpler").

including the Supreme Court, that the equitable lien had been waived.[52] This had disastrous consequences (for the solicitors) as the floating charge proved to be of little benefit to them upon the insolvency of their client, whereas the lien (had it been preserved) would have given them priority even over the liquidator's expenses, on the salvage principle.

The essence of the decision was that, when taking fresh security which was in any sense inconsistent with the lien, a solicitor is under a professional duty to make it expressly clear to the client that he intends to retain the lien, otherwise it will be assumed from his silence that he is waiving it.[53] This duty, which is an incident of the professional relationship between solicitor and client , was recognised over 100 years ago in *In re Taylor Stileman & Underwood*[54] and affirmed in *Re Morris*[55], and has never since been doubted, even though the Court of Appeal has very recently held that a solicitor owes no fiduciary duty when negotiating the financial terms of his retainer: see *Belsner v CAM Legal Services Ltd*[56].

Conclusions

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.

More generally this potted history of the equitable lien demonstrates equity's continuing vitality, flexibility and readiness to work on the basis of principle rather than from rigid rules. A strict rule-based approach would have led to the liens claimed in both *Edmondson* and *Bott* being struck down, because of the supposed rule in *Meguerditchian* that there could be no lien in the absence of the issue of proceedings. And it is hard to see how they could have led to any useful relief in either case if the supposed rule in *Bibby* had been adhered to, because in each case the defendants would have made their direct payments to the claimants prior to the arising of any proprietary interest of the solicitors in the relevant fund. Similarly in *Equity Trust* adherence to the first in time rule would have led to the later-

[52] [2019] EWHC 282 (Ch) at [119]; [2020] EWCA Civ 26 at [96]; [2022] UKSC 35 at [104].
[53] *Candy v Crumpler* at [64]-[65].
[54] [1891] 1 Ch 590.
[55] [1908] 1 KB 473.
[56] [2022] EWCA Civ 1387; [2022] Costs LR 1569 at [73]-[74].
[57] *Edmondson* at [1].

appointed trustees receiving nothing from the wreckage of their funds. In that case I described the search for an appropriate priority principle, as between successively appointed trustees in this way:

> *"That requires a faithful dedication to the fulfilment of the purposes for which the law confers this lien, a recognition of the nature of the fiduciary office of which it is an incident, a reflective consideration of its likely effects over the whole range of fact-situations in which it may be applied, not just the very unusual facts of these two appeals, and a stand-back appreciation of which, as between potential competitors, does better justice or equity."*[58]

In my view this essentially purposive approach is likely to be applicable to most endeavours to discern or (where necessary) modernise equitable principles. In relation to solicitors' equitable liens, the access to justice objective has been paramount throughout, and it has enabled the utility of the lien for that purpose to be achieved in the radically changed world of modern litigation when mere adherence to established rules would largely have killed it off. If that's not adapting to change, I don't know what is.

[58] Per Lord Briggs at [250].