ENSURING YOU GET PAID

James Wibberley, Guildhall Chambers, April 2018

"I think it of great importance to preserve the lien of solicitors. That is the real security for solicitors engaged in business. It is also beneficial to the suitors. It would frequently happen, but for the lien which solicitors have upon paper and deeds, that a client who is not able to advance money to carry on business would be deprived of justice, through inability to prosecute his claims in the suit." Lord Romilly MR in *In re Moss* (1866) LR 2 Eq 345.

1. We would all like to work for wealthy clients for whom money is no object, and who are able to make substantial payments on account to ensure the future bills and/or invoices will not go unpaid. The world does not work like that though and lawyers across all areas are familiar with working for clients who cannot make substantial payments on account, cannot pay their bills on time and who can only afford to pay the costs they incur if the litigation is successful. Lawyers are therefore required to take risks, not just on the outcome of the litigation, but also by formally or informally advancing their clients credit and running the risk that even if the claim does succeed, they will go unpaid.

2. It has long been recognised that there is a strong public interest in protecting lawyers who take such risks and that, where possible, lawyers who seek to facilitate access to justice should not go unpaid. Fortunately, these protections are not needed on a regular basis. Unfortunately, because they are not need on a regular basis, they are often overlooked or forgotten about when a problem does arise. This is particularly the case when a client and solicitor fall out towards the end of the case and the client looks to cut a deal with their opponent direct. In those circumstances the desire to pursue the now alienated client often distracts from far more simple means of securing payment.

3. The primary aim of this talk is to explore the means of protection available to solicitors under statue, equity and the common law, and to offer practical guidance to those struggling to recover costs from their former clients or their former clients' opponent.

4. This topic has been the subject of recent controversy and attention due to the case of *Gavin Edmondson Solicitors Limited v Haven Insurance Co Limited* [2018] UKSC 21, a dispute concerning the direct settlement of low-value personal injury claims by the defendant insurer. Leaving aside the strong feelings that the *Edmondson* case evokes, it will hopefully be seen that the case is nothing more than a restatement of long-standing authority setting out the breadth, and limitations, of the protections available to solicitors.

The Solicitor's Lien

5. Solicitors often refer to the fact that they have a lien for their costs. This statement is of itself an oversimplification. Solicitors do not have *a* lien, rather there are broadly three different types of lien available to them:

   a. The common law or 'retaining' lien;

   b. The statutory lien; and

   c. The 'equitable lien'.

The Retaining Lien

6. This is the type of lien with which readers will be most familiar. It is at its simplest the right *"to retain possession of a thing until a claim be satisfied*".[1] Because of this, it is a lien that can only exist where the party claiming the lien has property in their hands over which they can assert a claim, *and* in respect of which they have a right to keep.[2]

7. There are broadly speaking two different types of retaining lien.

8. Firstly, there is the general lien, which gives the party holding the lien the right to retain the possession of any property that they hold until all claims that they have against the owner are satisfied. General liens are generally discouraged by the common law as they give the holder of the lien a significant benefit over other creditors. They can normally only be established either where a party has specifically agreed that a general lien can be exercised over their property or were they are established within the trade/industry/profession as a matter of custom and practice.[3]

9. Secondly, there is the particular lien. This gives the party holding property that they have worked on the right to hold that property as security for the charges they have raised for that work.[4] The best way to illustrate this is with an example. If a mechanic changed the wheel of a car, they may be able to exercise a particular lien, holding onto the car until their invoice for changing the

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[1] Stroud's Judicial Dictionary of Words & Phrases (6th Edition), p.1466.
[2] See *James Bibby Ltd v Woods* [1949] 2 KB 449, at 453
[3] For a further discussion see *Halsbury's Laws of England,* v.68, §817 onwards.
[4] *Ibid*, §818 onwards.

wheel is paid. This particular lien would not give them the right to hold on to the car for other purposes though; for example, to secure payment for work done on another vehicle.

10. It is well established that solicitors are entitled to the benefit of a general lien. *Halsbury's* summarises the solicitor's retaining lien and the benefits it brings in the following terms:

"*A retaining lien extends only to the solicitor's assessable costs, charges and expenses incurred on the instructions of the client against whom the lien is claimed, and for which the client is personally liable, including the costs of recovering the remuneration by action or upon an assessment. The lien therefore does not extend to costs which are due to the solicitor in a capacity other than that of solicitor, or to loans, or to sums paid by the solicitor at the client's request and thus in effect lent by the solicitor or to debts generally. The lien extends to costs which are not recoverable by action because they are barred under the statutes of limitation, but does not extend to costs which are irrecoverable because the solicitor was unqualified when the work was done.*

The lien is a general lien extending to all costs due to the solicitor and is not limited to the costs incurred in relation to the particular documents in question or upon the particular instructions in consequence of which the property came into the solicitor's possession. In this respect the retaining lien differs from the lien on property recovered."

11. To this the writer would add one further gloss. Even though a solicitor has a right to a general lien, they may not be able to exercise that right if property (i.e. funds) have only entered their hands for a specific purpose.[5] For example, if a solicitor hold funds for a property transaction as a nominee, it may struggle to assert a lien over those funds for work done on other matters.

The Statutory Lien

12. Under section 73 of the Solicitors Act 1974, solicitors have the right to apply to the court for a charge on any property recovered or preserved through their efforts.

13. Section 73 in full provides that:

"(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—

[5] See by way of example *Walker v Birch* (1795) 6 Term Rep 258 and *Squamish Terminals Ltd v Price-Waterhouse Ltd* (1980) 26 BCLR 22 at 26 in which the court adopted a restrictive approach to a contract purporting to give rise to a right to claim a general lien.

(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.

(2) No order shall be made under subsection (1) if the right to recover the costs is barred by any statute of limitations."

14. Section 73 is the current incarnation of a long line of statutory provisions starting with section 28 of the Solicitors Act 1860.

15. Section 28 itself was enacted in response to the House of Lords' decision in *Shaw v Neale* (1858) 6 H.L. Cas. 581 that the ordinary solicitor's lien was not available in respect of the recovery of real property. Although the statutory provision is intended to mirror the common law lien, it provides a wider pool of assets that a solicitor can seek to go against. Importantly, those assets are not limited to assets that pass into its hands (e.g. money and papers).

16. The statutory provision is therefore particular helpful in cases involving real property disputes and disputes over the control of commercial assets. It is also helpful as the right to apply for an order appears to arise on a settlement being reached (i.e. as soon as a cause of action in favour of the client arises) and not simply once payment has been made and received.[6]

17. Obtaining an order under section 73 is not entirely straightforward though. In addition to meeting the statutory requirements, a solicitor seeking an order under section 73 must also be able to make out a *prima facie* case that they will not be paid unless an order is made.[7] This is because such an order is only made for the solicitor's necessary protection and not simply as a means of charging property to keep it out of the hands of creditors generally. The importance of this point cannot be overemphasised as, given that the effect of making an order is to effectively take the preserved or recovered asset outside of the client's pool of assets (in particular on a bankruptcy), it is a power that the court is cautious about exercising.

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[6] *Addelshaw Goddard LLP v Wood* [2015] Lexis Citation 160, Master Campbell in the SCCO.
[7] *Harrison v Harrison* (1883) 13 PD 180

18. Because of this, the court will not normally make an order under section 73 if there has been a breach of good faith by the solicitor (e.g. by claiming costs other than in good faith) or if the solicitor has stood by whilst the property is dealt with or disposed of such that it would be unfair to third parties to make an order.[8] Ditto where the solicitor has sought to take other means of enforcements action against the client such as proving in a bankruptcy[9] or taking security that was inconsistent with the charge that could be granted under the statute.[10]

19. Finally, it is important to stress that the statutory jurisdiction is limited to those cases where there has been a *"suit, matter or proceedings"*. This appears to implicitly rule out any order in cases where a claim is merely intimated and settled pre-issue and it has previously been held (albeit in a case now of some antiquity) that the power is not available in respect of the fruits of an arbitration.[11]

The Equitable Lien

20. Consideration of the equitable lien arises in those cases where funds do not pass into the solicitor's hands and so the solicitor does not have the basic 'possession' required in order for a common law lien to arise. In those circumstances, the court has an equitable jurisdiction to intervene to protect the solicitor's interests and to order that a payment is made to the otherwise disappointed solicitor) direct.

21. Describing this equitable jurisdiction to intervene as an equitable lien is controversial. On one hand it is a complete misnomer as there is no lien, whether at equity or otherwise, and the remedies open to the court are, as will be seen below, far greater than simply the basic security right provided by the common law lien.[12] On the other hand, and as again will be seen below, the court does not have an equitable jurisdiction to intervene if, had the money passed into the solicitor's hands, the right to a common law lien would not have arisen.[13] The writer adopts the term equitable lien as it helps remind oneself of the purpose and nature of the equitable jurisdiction.

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[8] Dallow v Garrold, ex p Adams (1884) 13 QBD 543 at 545–546
[9] *Higgs v Higgs* [1934] P 95.
[10] *Clifford Harris & Co v Solland International Ltd* [2005] EWHC 141 (Ch), [2005] 2 All ER 334.
N.B. there needs to be positive inconsistency, the mere fact of taking security may not of itself be enough to prevent an order being made.
[11] in *Re Meter Cabs Ltd* [1911] 2 Ch 557 at 559
[12] See for example *James Bibby Ltd v Woods* at p.453 where it was described in this way. See also *Barker v St Quintin* (1844) 12 M & W 441, albeit the decision there stresses that the purpose of the equitable interference is to provide a fund that the solicitor can hold as security for his debt.
[13] See by way of illustration the decision in *Edmondson*, per Lord Briggs at [30] to [38].

22. The equitable lien has a long and distinguished history. The decisions reached in the early cases are important in understanding the scope and limits of the jurisdiction.

23. The earliest case to refer to the Court's power to require payment of costs directly to the receiving party's solicitor is *Welsh v Hole* (1779) 1 Doug. KB 238 at 238. In that case, the plaintiff had been awarded damages of £20. Pending a writ of error, the plaintiff and defendant entered into a direct settlement of ten guineas including costs. On the facts of the case, the Court refused to intervene, but Lord Mansfield described the jurisdiction thus:

"An attorney has a lien on the money recovered by his client for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it 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, and like paying a debt which has been assigned, after notice. But I think we cannot go beyond those limits".

24. *Welsh* was then applied in *Read v Dupper* (1795) 6 T.R. 361 in which the defendant paid the judgment sum directly to the plaintiff, having received notice from the plaintiff's attorneys not to do so, because their bill was unsatisfied. Lord Kenyon CJ held:

"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 cases at whose expense, those fruits are obtained. If indeed the money has been paid over bonâ fide to the plaintiff, before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which cannot be suffered. In Welch [sic] v Hole*, Lord Mansfield compared this to the case of an assignment of a chose in action, which indeed in legal strictness cannot be done; but still according to the rules of equity and honest dealing if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice."* (at 362)

25. Accordingly, having paid in breach of the notice, the defendant was ordered to make a further (i.e. second) payment to the solicitor to enable him to recover his costs. Although the court questioned the assignment analogy, it is probably the best way of understanding how (on a broad level) the jurisdiction operates.

26. Over the years, the court began to expand the basis upon which it would interfere. As well as cases where the defendant had notice from the solicitor not to pay, the court also accepted that

it could interfere in cases where the claimant and the defendant had deliberately structured their settlement so as to ensure that money would not pass through the solicitor's hands. In *Re Margetson and Jones* [1897] 2 Ch 314, Kekewich J described the principle as follows: *"If the one solicitor meeting the party on the other side, or the two parties compromise knowing of the lien of the solicitor and intending to defeat it, that shall not be allowed"* (at 319).

27. At the same time though, the court was careful to limit the extent that it would intervene in cases where parties had legitimately agreed to structure settlements that would prevent a common law lien from arising; e.g. where cases settle on a drop-hands or no order as to costs basis. Per Lord Campbell CJ in *Brunsdon v Allard* (above) at 26:

"Although an attorney has a lien for his costs, and, when his client has recovered judgment in an action, may apply the fruits of the action in payment of the sum which is due to him, that does not prevent the parties to the action from coming to a compromise, the result of which is that the attorney loses his lien, provided that the arrangement is not a mere juggle between the parties, entered into by them in collusion to deprive the attorney of his costs".

28. In the same case, Crompton J said at 28:

"*Nor is the attorney's lien equivalent to the equitable assignment to him of the judgment debt. It is a right subject to that of the parties to the suit to make a bonâ fide compromise between themselves. Each party is, for that purpose, dominus litis; and the Court will not interfere with any fair settlement that they may come to, although it will probably restrain them from carrying out a collusive arrangement made on purpose to defraud the attorney of either"*.

29. The historic authorities were recently considered by the Court of Appeal in *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481, [2014] 1 WLR 1185. There, the defendant, Mr Chifuntwe, had settled judicial review proceedings with the Home Secretary on terms including payment of his costs. Whilst negotiating the amount of the costs, Mr Chifuntwe sacked his solicitors (i.e. Khans) accepted the Treasury Solicitor's offer in respect of his costs, and asked for the money to be paid directly to him. Khans wrote to the Treasury Solicitor, notifying them that Mr Chifuntwe was attempting to avoid costs properly due to them and warning them not to make payment to him. The Treasury Solicitor nevertheless paid the money to Mr Chifuntwe, who disappeared with it.

30. Having reviewed the historic authorities, Sir Stephen Sedley summarised the extent of the jurisdiction as follows (at [33]):

"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 preventive but may in a proper case take the form of dual payment."

31. Accordingly, the Court of Appeal ordered the Home Office to pay the costs again, this time to Khans, so that the solicitor would not go unpaid. The remedy might seem like an extreme one – the Home Office had after all paid everything that it had agreed with the party to whom the costs were legally due – but it stresses the breadth of the equitable jurisdiction.

Gavin Edmondson v Haven Insurance

32. The most recent case concerning the equitable lien is the Supreme Court's decision in *Gavin Edmondson v Haven Insurance*. Readers may be familiar with the case from the legal press as it concerned the direct settlement of six low-value personal injury claims by the defendant road traffic insurer. Much of the excitement in the legal media about the case concerned the fact that Haven had gone behind Edmondson's back. The case turned though not on an assessment of the morality or otherwise of Haven's conduct, or even consideration of the RTA Protocol, but the application of long-standing equitable principles.

33. As set out above, the case started out as six low-value road traffic accidents. In five of the cases, following receipt of the Claim Notification Form. Haven wrote to the individual claimants direct offering them sums in the region of £2,000 as compensation for their injuries. In the sixth case, Haven had been provided with the claimant's details by its own insured, had written to the claimant *before* Edmondson was instructed, and had made an offer of compensation over the telephone following a phone call from the claimant to discuss the provision of a hire car whilst his vehicle was being repaired. In all six cases, Haven offered, and the individual claimants accepted, a full a final settlement that did not provide for the payment of Edmondson's costs.

34. Aggrieved by Haven's actions, Edmondson brought a claim in its own name to recover the costs that it said it would have been paid had the cases settled under the RTA Protocol. Having initially brought claims in inducing a breach of contract and unlawful interference, Edmondson amended its pleadings shortly before trial to include a claim for equitable interference on the principles set out by the Court of Appeal in *Khans Solicitors v Chifuntwe*. Edmondson contended that as Haven was on notice of the CFAs, and/or because Haven had sought to reach settlements that did not require the payment of costs (in essence an allegation of collusion) the court should intervene under its equitable jurisdiction to order the (re)payment of the costs that would have been recovered under the RTA Protocol.

35. Edmondson lost at first instance, with HHJ Jarman QC holding that Edmondson did not have an enforceable claim for costs against the individual claimants. This finding was made on the basis that Edmondson's client care letter rendered its standard form CFA a CFA-lite (i.e. a CFA under which costs are only payable to the extent recovered) and as the individual claimants had not recovered costs (n.b. the settlements did not include costs) liability to make payment under the CFAs was not triggered. There was therefore no term of the contract that Haven could have induced the claimants to breach, and no interest that equity could protect.

36. Edmondson appealed. The Court of Appeal upheld HHJ Jarman QC's interpretation of the client care letter, but nonetheless allowed the appeal, holding that equity could intervene to protect the solicitor's expectation of payment even absence an enforceable right to payment. In a significant extension of the jurisdiction, the Court of Appeal held that Edmondson's expectation that in the *"normal course of events"* it would recover fixed costs was enough for equity to intervene. Haven then appealed, and were granted permission on the papers.

37. Shortly before the case was heard by the Supreme Court, the Law Society were granted permission to intervene in the appeal. Their intervention was largely an attempt to persuade the Supreme Court to accept that the RTA Protocol (and by extension the EL/PL Protocols) gave rise to a contractual right to costs that could be enforced directly by the solicitor.

38. Giving the judgment of the Supreme Court, Lord Briggs rejected the Court of Appeal's approach, preferring instead that adopted by the Court of Appeal in *Khans*, stating at [37] in respect of the judgment in *Khans* that:

> *"I consider that to be a correct statement of the law. It recognises that the equity depends upon the solicitor having a claim for his charges against the client, that there must be something in the nature of a fund against which equity can recognise that his claim extends (which is usually a debt owed by the defendant to the solicitor's client which owes its existence, at least in part, to the solicitor's services to the client) and that for equity to intervene there must be something sufficiently affecting the conscience of the payer, either in the form of collusion to cheat the solicitor or notice (or, I would add knowledge) of the solicitor's claim against, or interest in, the fund. The outcome of the case also recognised that the solicitor's claim is limited to the unpaid amount of his charges. Implicit in that is the recognition that the solicitor's interest in the fund is a security interest, in the nature of an equitable charge."*

39. However, the Supreme Court went on to overturn the concurrent findings of HHJ Jarman QC and the Court of Appeal that Edmondson did not have an enforceable claim for costs against the individual claimants. Although the Supreme Court accepted that the Edmondson's retainer rendered its CFA a CFA-lite, it held that the effect of a CFA-lite was not to remove the liability for

costs, but simply to limit the circumstances in which that liability could be enforced. Edmondson's theoretical but otherwise unenforceable claim for payment was therefore a sufficient right for equity to protect.

40. The Supreme Court further held that as Haven knew from the CNFs that Edmondson was working on a CFA, and knew more generally that Edmondson would be looking to take payment from the fixed costs under the RTA Protocol, there was a sufficient basis for equity to intervene; see [40] and [50]. Such intervention would though be limited to ordering the amounts due to Edmondson under its CFAs, and *not* (as the Court of Appeal had ordered) simply the sums payable under the RTA Protocol.

41. Lord Briggs though was less than impressed with the Law Society's argument that the RTA Protocol gave rise to enforceable rights to costs, holding at [53] that the RTA Protocol was voluntary and non-contractual in nature. This included rejecting the argument that any offer made under the RTA Protocol would necessarily carry an implied term as to the payment of costs; see [54].

42. Standing back, there are three broad conclusions that can be drawn from the *Edmondson* case:

    a. The court is not adopting a more flexible approach to the equitable lien. The advent of CFAs, prescriptive pre-action protocols and fixed costs have not abrogated the need for solicitors to prove they have an enforceable claim for costs against their clients;

    b. Because the court continues to adopt a traditional approach, there is nothing to prevent parties from structuring a settlement that minimises a solicitor's costs entitlement (e.g. by the claimant terminating his retainer or avoiding triggers for further costs to be payable) or even – so long as it is not done improperly – preventing any right to cost from arising at all (e.g. a drop-hands or no order as to costs settlement); But

    c. In the context of modern litigation, knowledge that a solicitor is working on a CFA and that they are (likely) expecting to take payment from the costs recovered *inter partes* is enough for equity to intervene. If a party approaches the opposing litigant direct and seeks to enter a settlement that cuts out the solicitor, they can expect to be ordered to make a further payment to the solicitor.

Practical Steps

43. The writer would offer the following pieces of practical advice:

a. Even though solicitors have a common law right to a retaining lien, ensure that your retainer provides for a general lien in the broadest possible terms. If you want to be able to exercise a lien against any funds that enter your hands for any purpose, you need to say so expressly;

b. Do not forget about the ability to apply for an order under section 73. If you have had a falling out with the client, then there is no reason why you can't apply as soon as a matter is settled or judgment is given to prevent funds being paid and dissipated. This is particular important in real property cases (e.g. TOLATA disputes) or disputes about commercial assets;

c. If you apply for an order under section 73, it may result in a cross order for an assessment of costs. This is an order that can be made even if the client is otherwise out of time to seek a statutory assessment. Be ready to prepare and serve a bill (with the subsequent VAT payment that might require);

d. Even though there is no longer an obligation to give notice of funding, if you are working on a CFA, or indeed more generally hoping to get paid from the proceeds of the claim, make sure you tell your opponent this. If your opponent has been told not to make a direct payment, it is their risk if they do; and

e. Whichever sort of lien you are seeking to utilise though, remember that you can only assert a lien for your assessable (and once assessed, assessed) costs. You can't seek to hold on to, or seek a charge over, client money generally. If there is a dispute about what your assessable costs are or are likely to be, you will need to raise a statutory bill (which may of itself have consequences such as the payment of VAT).