**Nine points about solicitors' equitable liens**

Something quite unusual has happened in the United Kingdom Supreme Court. Three times in the last five years appeals on solicitors' equitable liens have reached that court. In March 2022, Lord Briggs commenced his judgment in a sharply divided decision, *Bott & Co Solicitors Ltd v Ryanair DAC* thus:[1]

> This is an appeal about the solicitors' equitable lien. It is remarkable that two cases about the same lien have come before this court in a mere three year time-frame, having never previously troubled this court or its predecessor. Having delivered the lead judgment in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] 1 WLR 2052 I hope I may be forgiven for having thought, during the intervening period, that this court had dealt sufficiently comprehensively with the principles underlying the lien that it would not have to be re-visited at this level for many years, if ever. I was wrong.

The Supreme Court overturned decisions of the Court of Appeal in *Gavin Edmondson* and *Bott & Co*. In the former, the main point was whether a firm acting in low value personal injury claims actually had a contractual right to its fees, without which there could be no lien. In the latter, a firm which acted for large numbers of passengers entitled to compensation for delayed flights was entitled to cause the airline to hold back payments it was making directly to passengers, even without legal proceedings having been commenced, and even where the process of filing (mostly) undisputed claims was largely automated. A bare majority of the court allowed the appeal and upheld the firm's entitlement.

Subsequently, in December 2022, the Supreme Court was called upon for a third time in recent years to determine an appeal concerning a solicitor's lien in *Candey Ltd v Crumpler*.[2] This time the issue was waiver. A unanimous court held that when the firm took a floating charge over the same subject matter as the equitable lien, its entitlement to rely on the lien was waived because the fresh security was different. The firm took the fresh security because the client was desperately short of funds. A liquidator was subsequently appointed, and the result proved to be disastrous because the liquidator's expenses ranked in priority to the floating charge, but would have ranked behind the equitable lien.

1 [2023] AC 635; [2022] UKSC 8 at [144].
2 [2022] UKSC 35; [2023] 2 All ER 527.

Those three recent United Kingdom decisions have been helpfully discussed in a lecture given by Lord Briggs to the 2023 Chancery Bar Association Annual Conference.[3] The United Kingdom experience is the reason this column is devoted to Australian decisions on the solicitors' equitable lien, and the unresolved issues which remain. There is a full coverage in standard works,[4] and Campbell J's judgment in *Firth v Centrelink* remains helpful.[5] What follows is by way of emphasis.

First, the adjective "equitable" matters. Solicitors enjoy a common law possessory lien over a client's documents, entitling a solicitor to retain possession of a client's documents until any outstanding fees have been paid. This is utterly different from a solicitor's entitlement in equity to obtain relief against a fund. The entitlement has also been described as a "particular lien" or a "fruits of the action" lien.[6]

Second, "lien" is a misnomer.[7] It is not really a lien. As Cockburn CJ said:[8]

> **[874]** There is no such thing as a lien except upon something of which you have possession … although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs.

It is an entitlement, enforceable in equity, to have outstanding fees paid from a judgment or award or compromise from litigation in which the solicitor has acted for the client. As Jordan CJ wrote in the classic account, *Ex parte Patience; Makinson v The Minister*,[9] the right is "analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor". This does not turn on possession, and resembles a charge rather more than a lien. In contrast to the possessory lien at common law – which is essentially negative, permitting the retention of documents whilst fees remain unpaid – equity recognises a positive entitlement for a solicitor's outstanding fees to be met from a judgment or an amount paid into court. Wilcox, Ryan and Gummow JJ said in *Worrell v Power & Power* that the lien involves more than a personal right of the solicitor to approach the court to obtain a charging order, and that the assistance of the court is invoked not to create rights but to enforce them.[10]

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3 Lord Briggs, "Solicitors' Equitable Liens", Chancery Bar Association Conference, 14 January 2023. See also L Harris, "The Solicitor's Equitable Lien" [2023] *Private Client Business* 139.

4 Notably, G Dal Pont, *Law of Costs* (LexisNexis, 5th ed, 2021), ch 27 and E Tyler, P Young, C Croft, *Fisher & Lightwood's Law of Mortgage* (Butterworths, 3rd Aust ed, 2013), 75-80.

5 (2002) 55 NSWLR 451; [2002] NSWSC 564, especially the list of propositions at [35].

6 See *Strahan & Strahan* [2021] FamCA 97 [18].

7 See *Re Wedgwood; ex parte Bank of New Zealand* (1993) 116 ALR 153, 159; cf *Firth v Centrelink* at [38]-[42].

8 *Mercer v Graves* (1872) LR 7 QB 499, 503.

9 (1940) 40 SR (NSW) 96, 100.

10 (1993) 46 FCR 214, 224.

Third, there must be a sufficient causal connection between the work done by the solicitor and the judgment or settlement. One way of framing the issue is whether the judgment or orders or settlement are "the fruits of the cause produced by the industry of the solicitor".[11] Another is whether the solicitor has been "instrumental" in obtaining the judgment or compromise.[12] Acting for the client in the proceedings will go far to establish the requisite connection, even if the solicitor was not on the record when the litigation was resolved. It has been said that the link is "not an exacting standard".[13] In every case, this will be a question of fact.

Fourth, the previous point entails that two or more firms of solicitors may enjoy an entitlement to the same fund. It has been held that the firm which acted last in time takes priority, on the basis that the last in time is more proximate to the recovery for the client.[14] That principle was relied upon without criticism in the Privy Council's recent split decision in *Equity Trust (Jersey) Ltd v Halabi*,[15] yet it is noteworthy that Lord Briggs has "confess[ed] some unease" about this in light of the decision in *Halabi* that the entitlements of a former and successor trustee upon trust property ranked *pari passu*, and said that "it will be a matter for a future court as to whether *Wadsworth* remains good law".[16]

Fifth, the *equitable* aspects of the entitlement may be seen in the need to establish that there is a risk that the solicitor will not be paid, and the ability to withhold relief on equitable grounds, although Farwell J once said that it would be "monstrous" for the court to refuse to exercise its discretion,[17] and Lord Briggs said in his address to the Chancery Bar Association that generally it would "only very rarely be appropriate to deny the solicitor their lien".[18]

Sixth, there is a remarkable and important interplay with statute. In 1858, the House of Lords held in *Shaw v Neale* that the equitable entitlement did not extend to real estate recovered by the client by the actions of the solicitor.[19] The reasons were not very satisfactory,[20] but little turned on that

11 *Grogan v Orr* [2001] NSWCA 114 [62].
12 See Lehane J's judgment in *Roam Australia Pty Ltd v Telstra Corporation Ltd t/as Telecom Australia* [1997] FCA 980, citing Jordan CJ in *Ex parte Patience* at 103.
13 *Jackson v Richards* [2005] NSWSC 630; 12 BPR 23,091 [47].
14 *Re Wadsworth (Rhodes v Sugden)* (1886) 34 Ch D 155.
15 [2022] UKPC 36; [2023] 2 WLR 133.
16 Lord Briggs, above n 3, 12.
17 *Re Born; Curnock v Born* [1900] 2 Ch 433, 435.
18 Lord Briggs, above n 3, 6.
19 (1858) 6 HLC 581.
20 *Jackson v Richards* [2005] NSWSC 630; 12 BPR 23,091 at [33].

because **[875]** the result was promptly overturned by statute in 1860,[21] authorising a court to make a declaration that a solicitor had a charge upon property which was recovered or preserved. The legislation was not introduced in New South Wales until 1935, when s 39A was inserted into the *Legal Practitioners Act 1898*, and this legislation was considered by Jordan CJ in *Ex parte Patience*, who held that it did not displace the entitlement in equity. However, in most Australian jurisdictions the statutes have not been re-enacted, and so the entitlement is entirely equitable. That in turns means that English decisions (where the statute remains in force) need to be read with care, and decisions in Australia have proceeded on the basis that the entitlement does not extend to real property recovered by the solicitor's efforts.

Seventh, the restriction concerning land is not the only somewhat arbitrary distinction in this area. A solicitor whose actions for a client recovers a judgment or compromise has an entitlement in equity to have recourse for the payment of fees. But the solicitor whose actions for a defendant succeed in preserving the defendant's property has no similar entitlement. As White J observed, "logic is not the determining factor".[22]

Eighth, there is a helpful review of the decisions concerning the rights of *barristers* to a comparable entitlement in *Williamson v Pay*, concluding with the tentative view that it may be limited to cases where counsel receives a direct brief from a client or where a solicitor was not directly liable for counsel's fees.[23]

Finally, the justification for the equitable lien lies in access to justice. From the outset, it was noted that solicitors would in the absence of a lien eschew work for persons facing insolvency.[24] The recent decisions in the United Kingdom have emphasised the way in which the equitable lien enhances access to justice. The first point made in Lord Kitchin's judgment for a unanimous Court in the most recent decision was:[25]

> 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 made this clear in the first paragraph of his judgment in *Gavin Edmondson*.

21 23 & 24 Vic c 127 s 28.

22 *Jackson v Richards* [2005] NSWSC 630; 12 BPR 23,091, [62].

23 [2020] QSC 324 at [81]. An appeal was dismissed substantially by consent: see *Pay v Williamson* [2021] QCA 32 and *Williamson v Pay* [2021] QCA 182.

24 *Ex parte Bryant* (1815) 1 Madd 49 at 52; 56 ER 19, 20, where Sir Thomas Plumer VC said "business is often transacted by solicitors for needy clients, merely on the prospect of having their Costs under the doctrine as to Lien".

25 *Candey Ltd v Crumpler* [2022] UKSC 35; [2023] 2 All ER 527, [3]-[4].

> This same point emerges from the more recent decision of this Court in *Bott & Co Solicitors v Ryanair DAC* [2022] UKSC 8; [2022] 2 WLR 634. There Lord Burrows emphasised, at para 87, that the vindication of clients' legal rights, through the making of claims, is more likely to be effective if solicitors know that they have the security of a lien to recover their costs. Similarly, Lord Briggs reiterated, at para 154, that the animating principle which lies behind the equitable lien is that it promotes access to justice for potential claimants with insufficient means to pay their lawyers in the usual way, by enabling their solicitors to act for them in pursuit of their claims on credit, with reasonable security for their fees, against recoveries.

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