Welcome to this week’s edition of BC Disease News.

In this week’s edition, we report on the case of *Williams v The Secretary of State for Business, Energy & Industrial Strategy* [2018] EWCA Civ 852. The court considered whether a NIHL claim which avoided the EL/PL Portal, despite being eligible, should result in fixed costs consequences post-acceptance of a Part 36 Offer.

Elsewhere, we report that two solicitors, formerly of claimant firm, Isaac Abrahams, have been struck off on grounds of dishonesty, after a recent disciplinary tribunal hearing.

In this week’s feature, we consider the law to-date on solicitor’s lien as an equitable remedy. We go on to discuss the latest ruling of the Supreme Court in the case of *Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21, in which the defendant insurer sought to settle directly with RTA claimants and avoid paying fixed Portal fees.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Costs Consequences of Failing to Follow PAP: Williams v The Secretary of State for Business, Energy & Industrial Strategy [2018] EWCA Civ 852

This week, the Court of Appeal has handed down judgment in the case of Williams v The Secretary of State for Business, Energy & Industrial Strategy [2018] EWCA Civ 852. This considered the costs consequences of Part 36 Offer acceptance in a case which could have been commenced through the Pre-Action Protocol (PAP) and composite Portal.

The claimant was employed by the National Coal Board (NCB) and British Tissues and was exposed to a 'history of unprotected noise exposure of high level and long duration'. The claimant worked at the NCB between 1977 and 1991. Then, between 1991 and 1993 and 1997 and 2008, the claimant worked at British Tissues. The NCB's liabilities were subsequently devolved to the defendant. As a result of noise exposure, the claimant was diagnosed with NIHL. Medical evidence showed that the claimant had 'more likely than not sustained hearing loss in the order of 12 dB over and above the hearing loss expected for someone of this age'.

In December of 2013 and February of 2014, Letters of Claim were sent to British Tissues and the defendant, respectively. The claimant did not seek to pursue the claim under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and the EL/PL Portal, as this was not a single defendant claim.

The defendant, in its response to the LOC, stated:

'If this claim is not submitted through the Claims Portal and the claim is ultimately settled against our Client alone, the Defendant will seek an order from the Court for fixed costs to be applied under CPR Part 45.24'.

The claimant’s solicitor replied:

'... as we have previously advised you we are pursuing a claim against British Tissues who have confirmed that they're on cover'.

In May of 2014, British Tissues disclosed the claimant’s employment contract, which identified a mandatory condition of his employment to wear personal hearing protection. Further, certificates were disclosed, which showed that the claimant had completed a Working Safely course, while also disclosing details of a formal disciplinary hearing for the claimant’s failure to follow Health and Safety Procedures. This contradicted the claimant’s witness statement, which made no mention of the disciplinary hearing and alleged that hearing protection ‘was not enforced’.

As a result, in November of 2014, the claimant’s solicitors realised that they had no viable claim against British Tissues. The defendant’s solicitors were informed that the claim was now pursued ‘solely against yourselves’. Proceedings were now brought against a single defendant.
Part 36 Offers of £4,000 and £2,000 were made by the defendant and claimant, respectively, before the defendant’s final Offer, of £2,500 was accepted by the claimant in December of 2014. Prior to acceptance, there had been no correspondence that the defendant was liable for limited EU/PL Portal fixed costs.

In January of 2015, official confirmation was given that the defendant was the only party which legal action was being pursued against. The defendant argued that it was only liable for costs ordinarily due under the PAP as the exception to the EL/PL Portal no longer existed. The claim was valued at less than £25,000, there was a single defendant, and the claim was for an industrial disease [see Dalton v BT PLC [2015] EWHC 616 (QB)].

At first instance, the Deputy District Judge took the view that the Protocol should have applied to this case. He highlighted that the Protocols are subject to the overriding objective and observed that it would be ‘unjust’ to require the defendant to pay ‘substantially more’ costs because the claim was made against another ‘potential defendant’, which ‘failed at the first hurdle’.

At first instance, the Deputy District Judge took the view that the Protocol should have applied to this case. He highlighted that the Protocols are subject to the overriding objective and observed that it would be ‘unjust’ to require the defendant to pay ‘substantially more’ costs because the claim was made against another ‘potential defendant’, which ‘failed at the first hurdle’.

DDJ Morris also suggested:

‘... it seems to me that to prevent abuse, however innocent, some sort of qualifying test for the validity of the claim against an alternative defendant employer must be considered. Whether that test is that the claim must be more than weak, reasonable, viable, compelling, or some other term, is not for me to say’.

In doing so, the judge gave a purposive interpretation, qualifying the definition of ‘defendant’, for the purpose of paragraph 4.3(6) of the PAP.

On the question of whether CPR 45.24 applied, the judge said:

‘... I think it must apply despite the fact that there have been no formal proceedings and no judgments ... The defendant appears to have acted properly and within the spirit of the protocol on what was achieved in this case was precisely what the protocol was set up to achieve by yearly settlement by way of negotiation and without the need for litigation. I cannot understand why the defendant should therefore be prejudiced in costs for settling a case reasonably, appropriately and at an early stage. To say otherwise would leave the parties in the ridiculous position in my view of having to say to each other proceedings have to be commenced before we can achieve a settlement because of the costs implications of that settlement. That would be perverse.

I am satisfied that 45.24(2)(c) applies to this case. The claimant did not comply with the protocol at all despite this claim falling within the scope of the protocol. As such I am entitled to order that the defendant pays no more than the fixed costs and disbursements allowed pursuant there to.’
On appeal, HHJ Godsmark disagreed with the DDJ’s reasoning and refused to make a purposive interpretation of ‘defendant’ for the PAP to only include ‘viable’ parties:

‘I cannot read CPR Part 45.24 as applying when express conditions are not met. It is even more difficult to do so when interpreting the terms of a contract. The claim was not brought within the protocol and there are no fixed costs. The claimant is entitled to costs to be assessed on the standard basis’.

There were no Part 7 proceedings and there had been no judgment. Given the lack of satisfied pre-conditions, the judge was not able to apply CPR 45.24 to the facts.

Nevertheless, His Honour Judge Godsmark expressly stated:

‘An appropriate sum may well be fixed costs but that is a matter for the district judge. I offered to deal with the matter today but the parties concluded that this was not appropriate. The appeal is allowed and the matter is remitted to the district judge’.

At the Court of Appeal, Lord Justice Coulson favoured the reasoning of HHJ Godsmark and refused to extend the remit of CPR 45.25 by interpretation:

Council for the defendant, in seeking a more ‘certain remedy’ than the Part 44 costs assessment mechanism, adduced a Policy paper for the CPRC on 15 May 2009, in proposing the application of CPR 45.24:

‘To ensure that the new pre-action protocol is followed that Ministry proposes that the fixed recoverable costs applicable under the new process should also be applied by the court (in place of any other costs regime) where it considers that the claim has incorrectly been made outside the new process, or where it has been taken out of the process inappropriately…’

However, Coulson LJ considered that Part 44 of the CPR provided the ‘complete’ answer to the issues at play on appeal. Upholding the ruling of Judge Godsmark QC:

‘... Neither the EL/PL Protocol nor r.45.24 provides a mechanism which automatically applies the fixed costs regime in circumstances where a claim has not been started under the Protocol and/or has not been the subject of a Part 7 claim and a judgment. There is no drafting error, obvious or otherwise, in the CPR.

Indeed, the judge went further than the county court judge on Part 44:

Although Judge Godsmark QC may have had Part 44 in mind, I would allow the appeal on the second ground. In a case where the Protocol should have been used, and its non-use was unreasonable then,
ISAAC ABRAHAMS: TWO LAWYERS STRUCK OFF

A senior partner and solicitor of the claimant personal injury firm, Isaac Abrahams, have been struck off for dishonestly bungling 37 NIHL claims and misleading the court. The pair involved were Safina Bibi Shah (senior partner) and Shamila Hanif (solicitor). We last reported on Isaac Abrahams in edition 153 (here), when the SRA intervened and suspended Ms Shah.

Before the Solicitors Disciplinary Tribunal (SDT) hearing, it was revealed that, in 2015, the firm had 65 of its cases transferred to Bolton County Court. The cases were transferred to DJ Swindley because a number of ‘procedural issues’ were present. Suspiciously, all of the cases had applications for ‘time extensions for service of the claim, medical evidence and schedules of damages’. Ms Shah had denied all allegations made. Whereas Ms Hanif admitted to all of the allegations made against her, including misleading the court, client and opposition lawyer.

DJ Swindley struck out numerous claims and ‘strongly criticised’ the firm. The judge said that it was ‘clear that the fee-earners were not being supervised and monitored’ and its practice was ‘entirely unacceptable’. In 35 cases, DJ Swindley found that claims were issued, even though medical evidence had not been obtained. He also criticised the firm’s way of conducting files as ‘generally lamentable’ and stated that there had been ‘no effective management’ of cases.

Allegations of dishonesty were made against Ms Shah and were heard at the SDT. She was also found to have failed to uphold the Rule of Law and proper administration of justice in each case, lacking integrity. After having had 37 NIHL claims struck out, it was found she had failed to provide a ‘standard of service’ or ‘act in the best interests of clients’.

After the SDT found both Shah and Hanif to have acted dishonestly, both were struck off the register and ordered to pay £75,000 in costs collectively.

CIVIL LIABILITY BILL UPDATE

In this article, we provide an update on the progress of PI reforms in the Civil Liability Bill. The Bill proposes to increase the small claims limit. We last discussed the Bill in edition 224 (here), when it was first presented in the House of Lords.

Scrutiny of the Civil Liability Bill

The second reading of the Bill took place in the House of Lords this week. On Friday of last week, however, the ‘House of Lords delegated powers committee’ raised concerns over the Lord Chancellor setting the new tariff of damages.

The Motor Accident Solicitors Society (MASS) also expressed its concerns to the Committee that there are no key provisions in the Bill concerning delegation of power to the Lord Chancellor. The Committee, in agreement with MASS, said:

‘...the extensive use of delegated powers in what it described as a “skelatal” 12-clause bill “will severely limit parliamentary scrutiny as the full impact of the proposed measures cannot be determined without consideration of the proposed regulations/secondary legislation. The devil is very much in the detail”’.

The Government has said that the tariff would be reviewed from time to time but the Committee were not ‘convinced’ by the Ministry of Justice’s arguments:

‘It was also not convinced that the Lord Chancellor would make a better job of tweaking the tariff, for whatever reason, than judges, “who have had decades of experience dealing with damages for personal injury at the bar and on the bench”’. And “If this is not to be determined by the judges, it would be better determined by independent medical experts rather than by government”.

The second reading took place on 24 April 2018, wherein the chamber provided further scrutiny of the Government’s plans on Whiplash Reforms and the Civil Liability Bill. Lord Marks, a frontbencher for the Liberal Democrat’s, stated that he would prefer to see the small claims limit for RTA claims increase to £3,000, rather than £5,000.

APIL CONFERENCE

Former President of APIL, David Bott spoke at the annual conference, on 17 April 2018, and said the reforms are a ‘huge task’ for the Ministry of Justice to implement. Mr Bott predicts that the reforms, at the earliest, will be in place in October of 2019.

The ‘huge task’ Mr Bott alluded to was the creation of a gateway portal, allowing ‘litigants in person’ to have access and use ‘personal injury portals’ and ‘medical reporting portal, MedCo’.

Mr Bott predicts that both tools could become overwhelmed with the volume of cases it would likely see. It was suggested that defendants may deny liability ‘in the hope that litigants in person would be discouraged from pursuing the case further’.

FURTHER LASPO REVIEW DELAY

In this article, we discuss the progress of the Ministry of Justice (MoJ) in reviewing the effectiveness of LASPO reforms. The LASPO review, conducted by the MoJ, is set see ‘how LASPO has worked out in practice’ and ‘invite responses on what changes should be made in the future’.
We last reported on the LASPO review in edition 222 of BC Disease News (here), in which we discussed whether the Government would achieve its ‘ambitious’ review deadline. An earlier report, in edition 218 (here), conveyed the aims of the MoJ post-legislative memorandum to complete the review by summer of 2018.

Deputy Director of the MoJ, Matthew Shelley, has said, in an all-party parliamentary group meeting, that the review will be complete by the end of the year, despite the fact that the Lord Chancellor has warned against the review slipping into 2019.

Consultative groups will be carried out this week to discuss Civil Justice. It has been said that the second round of meetings will take place before the summer recess and third rounds, later in the year.

Mr Shelley, in response to a question posed by Nicola Mackintosh QC, has requested an increase in time for discussion in parliamentary group meetings, cautioning that areas of suggested improvement cannot be effected by ‘simply putting money back into the system and reversing the reforms’.

Personal Injury Firm Reports Annual Losses of £3m

This week, personal injury providers, Lyons Davidson, have reported financial losses of £3 million. Lyons Davidson revealed post-tax figures for the year ending 31 May 2017. The firm admitted that losses were due to ‘a year of consolidation and restricting’. Last year, its profits fell from £4.06 million to £1.1 million, while its turnover fell from £44.47 million to £41.9 million.

Mark Savill, Managing Director of Lyons Davidson, said that the decline in profit had been expected because of the challenges posed by impending reform to the personal injury sector. In 2017/18, the firm closed its smaller offices as a means to restructure the business, but retained seven offices and increased its staff numbers. Digital services investment may have also affected the firm’s profit and turnover.

Mr Savill has assured that, despite financial losses, Lyons Davidson has ‘maintained a strong market position’.

The firm also attempted to expand through ‘joint business ventures’ with insurers LV= and AA, in anticipation of a changing personal injury market. However, these were both ‘short-lived’, as have many attempted legal ABS creations over the past 5 years.

Dentists at Increased Risk of Rare Lung Disease

Researchers at the Centres for Disease Control and Prevention (CDC) in the USA are investigating why a cluster of dentists were diagnosed with a rare lung disease called idiopathic pulmonary fibrosis (IPF). In one Virginia clinic, nine dental professionals have been treated in the last 15 years. During 2016, dentists accounted for an estimated 0.038% of US residents, yet represented 0.893% of patients treated at this clinic, which is 22.5 times more than expected.

IPF is a chronic disease, the cause of which is primarily unknown. Symptoms include unexplained shortness of breath that gradually becomes worse, which may be accompanied by a nonproductive cough. It has previously been associated with occupations, including farming, work with livestock, hairdressing, exposure to metal dust, work with birds, stone cutting/polishing and exposure to vegetable or animal dust. Smoking and viral infections have also been suggested as possible contributing factors. IPF is usually fatal, with the median survival time being around 3 years.

In April 2016, a dentist diagnosed with IPF at the Virginia clinic contacted CDC to report concerns that IPF had been diagnosed in other dentists in the same area. The medical records of all patients treated for IPF at the clinic, between September of 1996 and June of 2017, were checked for evidence of work in the dental industry. Nine patients, (eight dentists and one technician) were dental professionals, and all were treated since 2000. Seven of them had died. Three patients were former smokers, one had never smoked, and smoking history was unknown for five. One patient reported polishing dental appliances and preparing amalgams and impressions without respiratory protection. Some substances used in these tasks have potential respiratory toxicity, such as silica, polyvinyl siloxane, alginate and others. The researchers concluded that, even though no clear etiology could be determined, occupational exposures may have contributed towards the onset of IPF. Limitations of the study were that several of the patients were smokers (a contributing factor) and only one was available for interview.

Although this is the first report of IPF in dentists, four years of National Occupational Respiratory Mortality System data indicate that dentists, or workers in offices of dental practice, were more likely to die as a consequence of ‘other interstitial pulmonary diseases with fibrosis’ than the general population.

The report concludes that dental personnel should wear adequate respiratory protection if other control methods, such as improved ventilation, are not practical or effective. Further investigation of this cluster of cases is warranted.

Low-Level Exposure to Lead Associated with Greater Risk of Cardiovascular Disease

A new study has suggested that the significance of low-level environmental lead exposure on cardiovascular disease,
in the USA, is greater than previously thought\textsuperscript{13}.

Lead exposure is a known risk factor for cardiovascular disease, and numerous other acute and chronic illnesses. Historically, the main sources of lead exposure were lead-based paint, leaded petrol and lead pipes. However, lead-based paint and petrol are now banned, and exposure to lead has declined significantly. Still, heavy ground contamination is a persistent source of lead exposure in industrialised countries\textsuperscript{14}. Moreover, it has recently emerged that recycling of computers is a source of lead exposure among workers involved in this process.

It is not clear whether concentrations of lead in blood lower than 5 $\mu$g/dL, which is the current action level for adults in the USA, are associated with all causes of death, or specifically cardiovascular disease mortality.

The new study used data from the Third National Health and Nutrition Examination Survey between 1988 and 1994. The participants underwent medical examinations and were interviewed to give information about their health, lifestyle, and exposure to a range of agents. There were 14,289 adults included in the study. In this follow-up, an average of 19.3 years after enrollment, the National Death index was examined for information about the participants.

As part of the medical examination, the concentration of lead in the participants’ blood was measured, and ranged from 0.70 to 56.0 $\mu$g/dL. Participants who had the highest concentrations of lead in blood were older, less educated, had high levels of cadmium in urine, earned less (annual income of less than $20,000), were more likely to be male, smoked (including ex-smokers) cigarettes, consumed larger amounts of alcohol, and had unhealthier diets. They were also more likely to have elevated cholesterol levels and higher rates of high blood pressure and diabetes.

The results of testing showed that higher lead concentration in the subjects’ blood was associated with all-cause mortality, cardiovascular disease mortality and ischemic heart disease mortality. The analysis suggested that 28.7% of cardiovascular disease-related deaths and 37.4% of ischemic heart disease-related deaths could be attributed to elevated lead exposure. This corresponds, respectively, to 256,000 and 185,000 deaths in the USA per year.

Overall, the analysis found that about 400,000 deaths per year are attributable to lead exposure, an estimate that is about ten times larger than previously thought. Current estimates had been lower because it had been assumed that blood lead concentrations of less than 5 $\mu$g/dL were not high enough to significantly increase health risks. For example, a 2012 report by the National Toxicology Program on the effects of blood lead levels less than 5 $\mu$g/dL and 10 $\mu$g/dL found ‘limited evidence’ of an association between blood lead level less than 10 $\mu$g/dL and cardiovascular-related death\textsuperscript{15}.

In the current study, a secondary analysis was performed, in which the only participants included were those with blood lead concentrations of less than 5 $\mu$g/dL. Compared to a blood lead concentration of 1.0 $\mu$g/dL, blood lead concentrations of 5 $\mu$g/dL were more significantly associated with all-cause mortality, cardiovascular disease mortality and ischemic heart disease mortality. It has been proposed that lead exposure-based mortality could be reduced if blood lead levels in the entire US population over the age of 20 were reduced to 1.0 $\mu$g/dL or lower.

In conclusion, the researchers found that low-level lead exposure is an important, but largely overlooked, risk factor for cardiovascular disease mortality in the USA.

**Cumulative Pesticide Exposure Tool Advancements**

The European Food Safety Authority (EFSA) is close to completing two landmark assessments of the risks posed to consumers by exposure to multiple pesticides\textsuperscript{16}.

European Union Regulations require that cumulative effects of pesticide exposure be considered when determining the maximum levels of pesticides in food, and that pesticides placed on the market should have no harmful effects, including cumulative effects on humans.

The Dutch National Institute for Public Health, RIVM, has, in partnership with EFSA, developed a software tool that can be adapted to perform assessments of cumulative exposure. Next steps include further refinement and creation of a data model which provides information required to perform cumulative risk assessments. A proposal for the data model has just been published.

Pilot assessments are expected to be finalized by the end of the year. The assessments consider the cumulative effects of exposure to pesticides on the human nervous and endocrine systems.

EFSA’s pesticide experts have also developed a way of classifying pesticides into groups that exhibit similar toxicity in a specific organ or body system\textsuperscript{17}.

Over the coming years, the cumulative effects of pesticides affecting other organs, tissues and systems, such as the liver, kidneys, eyes, and the reproductive and developmental systems will also be investigated.
Feature:
Equitable Intervention to Protect a Solicitor’s Lien: Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited [2018] UKSC 21

INTRODUCTION

Last week (here), we reported that judgment, in Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited [2018] UKSC 21, had been handed down from the Supreme Court. In this feature article, we provide an overview of the law on solicitor’s equitable lien. We go on to discuss the ratio of the latest Supreme Court ruling in Gavin Edmondson, which took a different approach from the Court of Appeal ruling, but ultimately reached the same conclusion, in preserving the right of claimant’s solicitors to recover Portal costs in Portal claims. This is the first occasion that the Supreme Court, or its predecessor, has considered the nature and effect of the solicitor’s lien.

What is a Solicitor’s Lien?

Solicitor’s lien is an equitable remedy which ensures the recovery of agreed charges for the successful conduct of litigation, ‘out of the fruits of that litigation’, in priority to the interest of the successful client, or anyone claiming through them. Snell’s Equity (33rd edition), at paragraph 44-023, cites Re Born [1900] 2 Ch 433 and Re Meter Cabs Ltd [1911] 2 Ch 557 as the first cases to refer to the solicitor’s lien as a ‘common law lien’. Although the remedy is judge-made, this is NOT to be confused with the solicitor’s common law lien over client property in its possession, which it has the right to retain until payment is complete. As such, Snell’s Equity clarifies that the remedy is ‘more properly regarded as a right to apply to the court for a charge, or as an equitable lien, because it does not depend on the fund being in the possession of the solicitor’.

Recognition and enforcement of the solicitor’s equitable lien serves as an extension of access to justice. As early as authorities, such as In re Moss (1866) LR 2 Eq 345, judges have spoken of ‘great importance to preserve the lien of solicitors’.

When is the Lien Relied Upon?

Over time, equity has evolved to provide an intervention in personam against anyone whose conscience is affected by having notice of solicitors, either by preventing inconsistent dealings, or by holding wrongdoers to account. Where a defendant (or his agent or insurer) pays a debt directly to a claimant, in circumstances where there has been collusion between parties to cheat the solicitor out of fees ordinarily due, or parties on notice of an equitable interest engage in inconsistent dealings regardless of said interest, ‘the court would require the payer to pay the solicitor’s charges again, direct to the solicitor, leaving the payer to such remedy as he might have against the claimant’.

Since the introduction of the Ministry of Justice Pre-Action Protocols, defendant insurers are notified by claimant’s solicitors of modest claims for personal injuries, using an online platform. In respect of RTA claims, claims pass through the RTA Portal. Where liability is admitted, for settlement to be negotiated, or quantum to be determined at court, the scheme allows for the incurrence of fractional costs and effort, when compared with ordinary County Court proceedings. Pursuant to CPR 45 and the Pre-Action Protocol, claimant solicitors are rewarded with fixed costs for work conducted at each stage of the Portal process.

‘EQUITABLE LIEN’ CASE LAW

Welsh v Hole (1779) 1 Dougl KB 238

This was the first case to recognise the existence of a solicitor’s equitable lien. The claimant obtained judgment for £20, which was compromised by a £10 direct payment via a defendant. In this instance, it was held that there was no collusion to defeat the solicitor’s right to the payment of its bill. However, in devising an alternative to collusion, as a means to entitle a lien, Lord Mansfield stated:

‘I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay until 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’.

Read v Dupper (1795) 6 term Rep 361

Extending the effect of notice on lien, in Read, the defendant’s solicitor, on notice of the claimant’s solicitor’s interest, paid the claimant direct. The court held 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’.

*Ex parte Bryant (1815) 1 Madd 49*

This case was one of the first to incentivize access to justice as reasoning behind the lien:

‘I do not wish to relax the doctrine as to lien, for it is to the advantage of clients, as well as solicitors; for business is often transacted by solicitors for needy clients, merely on the prospect of having their costs under the doctrine as to lien’.

*Barker v St Quintin (1844) 12 M & W 441*

In *Barker*, Baron Parke demonstrated that the equitable lien operates by way of security or charge.

‘The lien which an attorney is said to have on a judgment (which is, perhaps, an incorrect expression) is merely a claim to the equitable interference of the Court to have that judgment held as a security for his debt’ [followed in *Mason v Mason and Cottrell* (1933) P 199 *In re Fuld dec’d (No 4)* (1968) P 727, which identified the necessity of a ‘fund’ to operate the charge].

*Khan Solicitors (a firm) v Chifuntwe (2014) 1 WLR 1185*

In this more recent case, a two-part test was derived, in respect of ‘equitable intervention’, reflecting historic case precedent on solicitor’s lien. At paragraph 33, Sir Stephen Sedley stated:

‘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 [following dicta in *Ormerod v Tate* (1801) 1 East 464], 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’.

**GAVIN EDMONDSON SOLICITORS LTD V HAVEN INSURANCE COMPANY LTD**

**The Facts**

Six claimants, involved in three motor accidents, entered into identically worded conditional fee agreements (‘CFA Lite’), which provided for a success fee, with the same firm of solicitors (Gavin Edmondson). The purpose of the CFA was to ensure that in no circumstances would the client pay the solicitor’s fees with their own funds. Under the terms of the CFA, successful claimants would pay its solicitor’s charges and reclaim them from the defendant insurer.

Subsequently, the insurer (Haven) responded to claims, which had since entered the RTA Portal, by offering the claimants a scheme of compensation, which could be paid into their bank accounts as soon as settlement figures were agreed. Terms of proposed settlement did not include solicitors’ fixed fees, despite the fact that claim notification forms, providing details of the retainers, were confirmed.

**Stage 1**

**Completion of the Claim Notification Form**

6.1 The claimant must complete and send—

(1) the CNF to the defendant’s insurer; and

(2) the ‘Defendant Only CNF’ to the defendant by first class post, except where the defendant is a self-insurer in which case the CNF must be sent to the defendant as insurer and no ‘Defendant Only CNF’ is required.
When settlements, including damages for pain suffering and loss of amenity, were negotiated, the claimants were directed to tell its instructed solicitors that the claims could be closed and CFAs be cancelled.

Gavin Edmondson brought a claim against Haven for ‘wrongful inducement to the clients to breach their retainer contract, intentional causing of loss by unlawful means and, by amendment, seeking equitable enforcement of its solicitors’ lien’.

It was alleged that repetition of this practice on a large scale meant the determination of the dispute had financial consequences ‘running to many millions of pounds’.

**The High Court Decision**

HHJ Jarman QC originally dismissed the claim for costs recovery, brought by the claimant’s solicitors.

**The Court of Appeal Decision**

In the Court of Appeal case of *Gavin Edmondson Solicitors Ltd v Haven Insurance Company Ltd* [2015] EWCA Civ 1230, previously discussed in edition 120 of BC Disease News, the defendant insurers argued that the retainer did not give rise to contractual liability upon which an equitable security could be founded.

The judge identified a conflict between the wording of the CFA, which followed the Law Society’s standard terms, and the wording of the prevailing Client Care Letter, which stated:

“For the avoidance of any doubt if you win your case I will be able to recover our disbursements, basic costs and the success fee from your opponent. You are responsible for our fees and expenses only to the extent that these are recovered from the losing side. This means that if you win, you pay nothing”.

As such, it was the view of Lloyd Jones LJ that ‘Edmondson would not have a lien over assets received on its clients’ amount because there is no underlying liability of the clients to Edmondson for the lien to protect’.

However, the judge overruled the decision of the trial judge. Although Lloyd Jones LJ found that there was no such contractual liability upon true construction of the retainers, ‘equitable jurisdiction to intervene could be extended far enough to enable the court to recognise and then enforce an interest of Edmondson under the RTA Protocol in receiving its fixed costs and charges as therein provided or, alternatively, an interest under an express provision in the retainers to sue in its client’s names for recovery of those charges from Haven, and that Haven knew of those interests’.

As can be seen from the above quote, implied notice of the CFA through Portal-supplied information was sufficient for the principle of the equitable lien to apply.

Thus, in addition to the payment of settlements reached with the claimants, the defendant was ordered to pay the fixed costs prescribed by the RTA Protocol.

**Aims**

3.1 The aim of this Protocol is to ensure that—

(1) the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings;

(2) damages are paid within a reasonable time; and

(3) the claimant’s legal representative receives the fixed costs at each appropriate stage.

This decision extended the principle enunciated in the Khans case.
The Intervention

In edition 217 of BC Disease News (here), we reported that, prior to the Haven appeal in February of 2018, the Law Society had urged the Supreme Court to confirm that the equitable lien can be applied to protect solicitors’ rights to their costs in modern litigation; particularly in fixed costs regimes where the indemnity principle does not apply. The public plea to the Supreme Court, which it obtained written permission to provide, strongly indicated that the claimant’s solicitors had an interest which equity can protect and which is deserving of protection, which was reflected in the Court of Appeal decision.

The Supreme Court Decision

On appeal, the defendant maintained its position, that the ‘CFA Lite’ retainers afforded no basis upon which an equitable lien could attach, while also arguing that the lower court had erred in extending the ‘equity of intervention’.

Lord Briggs gave the unanimous judgment. The remaining constitution of Lady Hale, Lord Kerr, Lord Wilson and Lord Sumption were all in agreement.

1. Basis of a Claim to an Equitable Lien?

On the contractual issue, Lord Briggs disagreed with the Court of Appeal judge. On his analysis, the conflict caused by the Client Care Letter was plainly intended to be read, so far as possible, in accordance with, rather than in opposition to, the CFA and Law Society’s terms. The wording of the Client Care Letter, therefore, merely limited the recourse from which Edmondson could satisfy that liability to the amount of its recoveries from the defendant. His Lordship affirmed that the CFAs made between Edmondson and its clients contained a sufficient contractual entitlement to charges to support the equitable lien on traditional grounds, as long as the charges did not exceed the settlement sums.

The Law Society supported the Court of Appeal’s reformulation of the solicitor’s equitable lien, namely that Gavin Edmondson could derive its entitlement to costs recovery under the RTA Protocol, or alternatively, that Gavin Edmondson had a right to sue for enforcement of costs using its clients’ names.

In spite of the intervention, Lord Briggs reasoned that the voluntary nature of the RTA Protocol, in addition to the fact that the Protocol creates no legal or equitable rights, meant that no security against the insurer could be supported. Further, suing in a client’s name is a form of contractual subrogation and the solicitor cannot be in a better position than the client, as against the insurer. As such, ‘Any attempt by Edmondson to stand in their shoes by way of subrogation would be met by an unanswerable defence’.

Counsel for the claimant vigorously argued that the court should construe the solicitor’s equitable lien as a flexible remedy, in order to aptly respond to any instance of unconscionable conduct by the insurer, including breach of the RTA Protocol.

Even though Lord Briggs acknowledged that ‘equity operates with a flexibility … and does adapt its remedies to changing times’, he warned, at paragraphs 57 and 58, that:

‘... equity nonetheless operates in accordance with principles. While most equitable remedies are discretionary, those principles provide a framework which makes equity part of a system of English law which is renowned for its predictability. I have sought to identify from the cases the settled principles upon which this equitable remedy works. One of them is that the client has a responsibility for the solicitor’s charges.

It is simply wrong in my view to seek to distil from those cases a general principle that equity will protect solicitors from any unconscionable interference with their expectations in relation to recovery of their charges. Furthermore the careful balance of competing interests enshrined in the RTA Protocol assumes that a solicitor’s expectation of recovery of his charges from the defendant’s insurer is underpinned by the equitable lien, based as it is upon a sufficient responsibility of the client for those charges. Were there no such responsibility, it is hard to see how the payment of charges to the solicitor, rather than to the client, would be justified. Furthermore, part of the balance struck by the RTA Protocol is its voluntary nature. Its voluntary use stems from a perception by all stakeholders that its use is better for them than having every modest case go to court. If the court were to step in to grant coercive remedies to those affected by its misuse by others, that balance would in all probability be undermined’. 
2. Notice of the Lien?

At paragraph 50, Lord Briggs followed the Court of Appeal reasoning and concluded, on the question of the defendant’s notice, that:

‘Once a defendant or his insurer is notified that a claimant in an RTA case has retained solicitors under a CFA, and that the solicitors are proceeding under the RTA Protocol, they have the requisite notice and knowledge to make a subsequent payment of settlement monies direct to the claimant unconscionable, as an interference with the solicitor’s interest in the fruits of the litigation. The very essence of a CFA is that the solicitor and client have agreed that the solicitor will be entitled to charges if the case is won. Recovery of those charges from the fruits of the litigation is a central feature of the RTA Protocol’.

The full Supreme Court judgment in Gavin Edmondson can be accessed here.

REACTION TO THE HAVEN JUDGMENT

Following the Supreme Court ruling, Law Society President, Joe Egan, expressed that solicitors ‘may now wish to consider whether they have any claims against insurers who took action similar to Haven’. It is clear, therefore, that the Law Society is encouraging practitioners to take action against insurers who engage in so-called ‘third party capture’ and recover costs due under the equitable lien. Mr Egan also praised the decision for providing ‘useful confirmation given the expected broader application of fixed recoverable costs regimes in the future’.

Claims Director at the Haven Insurance Company, Joe O’Connell, reacted to the judgment, as follows:

‘While we are naturally very disappointed by the decision, this case was not about whether insurers should settle directly with claimants. It was only about the claimants’ solicitors’ costs and it turned on a technical analysis of their retainers’.

These comments appear to neglect the Supreme Court ruling, which said that once an insurer knows that a claimant is represented by solicitors acting under the RTA protocol, ‘they have the requisite notice and knowledge to make a subsequent payment of settlement monies direct to the claimant unconscionable’.

In any event, Mr O’Connell went on to say:

‘We believe that it is in claimants’ interests to settle directly with us … Claimants who deal directly with Haven will resolve their claims more quickly and are likely to receive more in compensation than they would if they involved solicitors, particularly as solicitors will deduct up to 25% from claimants’ damages to cover success fees and other legal costs. Haven strongly believes that every claimant has the right to decide how to deal with their own claim and that claimants should not be forced to use solicitors. We encourage any claimant to speak to us before committing themselves to instructing solicitors’.

RELEVANCE TO OCCUPATIONAL DISEASE CLAIMS?

At present, the Pre-Action Protocol for Low Value Personal Injury (Employers’ Liability and Public Liability) Claims encompasses disease claims, worth up to £25,000, where there is one defendant employer. Even though the Gavin Edmondson ruling involved an RTA claim, which had entered the Portal, it is foreseeable that the principles underpinning the equitable lien would also apply to EL/PL Portal, which rewards solicitors with fixed costs at Portal stages.

We previously reported (here and here) in BC Disease News, that Jackson LJ’s 2nd review on fixed costs suggested an extension of fixed costs to include claims valued between £25,000 and £100,000, falling within the new intermediate track, as well as a separate matrix of fixed costs for noise induced hearing loss (NIHL) claims. These ‘future’ fixed recoverable costs regimes, as Mr Egan eluded to in his post-trial statement, could allow solicitors, acting under CFAs, to rely on the equitable remedy when insurers attempt to settle directly with claimants.
References


2. Ibid.


4. Ibid.


9. Ibid.


Disclaimer

This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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