Protection for solicitors against direct settlement out of costs when acting under a CFA Lite in RTA Protocol cases

By Ikeni Mbako-Allison

I. Introduction

1. On 18 April 2018 the Supreme Court gave judgment in the case of *Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21 in which it considered the principles applicable on an action for recovery of costs by solicitors, against a third party insurer where a direct settlement has taken place between that insurer and the client without provision for costs. Although those principles are uncontroversial, the case involved their application where:

    (i) the solicitors are retained by CFA under which recovery of charges by the solicitor is limited to what is recoverable from the other side, (**'CFA Lite'**); and

    (ii) the case proceeds under the Pre-action Protocol for Low value personal injury claims in Road Traffic Accidents before 31 July 2013, (**'the RTA Protocol'**)

2. The litigation involved a number of claimants, each of whom had retained the firm on a CFA to pursue personal injury claims. Each had, following claim notification via the RTA Portal, gone on to settle their claim directly with the insurer and without agreeing anything by way of costs.

II. A solicitor's equitable interest in the fruits of litigation

3. Whereas the common law provided only a retaining lien, it has long been established that equity will interfere to secure a solicitor's interest, comprised of the costs due to them, in the fruits of litigation in certain circumstances. In *Barker v St Quintin (1844) 12 M & W 441,* the court had noted that the lien operates by way of a security or charge in

the sense that it *'… is a claim to the equitable interference of the Court to have … [the] judgment held as security for [the solicitor's] … debt',* ([35]).

4. In order for the lien to arise there must be some fund over which it can operate. That requirement may be satisfied by there being a:

    (i) judgment debt or arbitration award; or

    (ii) debt under a settlement agreement, ([35]).

5. In the case of a settlement agreement the underlying debt is contractual. Importantly, for the purposes of claims under the RTA protocol, *'[p]rovided that the debt has arisen in part from the activities of the solicitor, there is no reason in principle … why formal proceedings must first have been issued …',* ([35]).

III. Conditions for the interest to bite

(a) Current state of the law

6. The Supreme Court noted that the lien had recently been considered in the case of *Khans Solicitors v Chifuntwe* [2014] 1 W.L.R 1185. That was a case in which the Home Secretary had compromised a claim for judicial review with the claimant without provision for costs. It was held, at paragraph 33, 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. Although the protection ought to be preventative, it '… *may in a proper case take the form of dual payment.'* ([36])

7. The Supreme Court found the above to be a correct statement of the law as it stands. In order for there to be enforceable security in the case of a settlement debt:

    (i) there must be contractual liability, on the part of the client, to the solicitor for the charges;

    (ii) the settlement debt must have arisen, to a significant extent, from the activities of the solicitor acting under their retainer, ([45]); and

(iii) the client must have colluded with the third party insurer to subvert the solicitors interest or the third party insurer must otherwise have had notice or knowledge of the solicitor's interest prior to settlement, ([37]).

(b) Contractual liability for the charges

8. The relevant CFA made the clients liable to pay the firm's basic charges, disbursements, and success fee if the client won (including on beneficial settlement), ([21]). However, the firm had sent a client care letter, in each case, which appeared to conflict with the CFA in that it stated that the client would only be responsible for those charges to the extent that they were recovered from the losing side, ([22]):

> *"Costs:*
>
> *In this case we have advised and you have elected to enter into a conditional fee agreement. Full details of the terms of the agreement and our charging rates are set out within the conditional fee agreement … .*
>
> *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."* ([22]).

9. The Court of Appeal had concluded that there was no contractual liability because, in each case, the letter had overridden the general provisions of the CFA so that there was no underlying personal liability to pay the fees, ([39]). The Supreme Court disagreed: the proper construction of the letter was that it was either part of the contract of retainer or constituted a collateral contract thereto, ([41]).

10. The language of the letter did three things:

(i) it affirmed the equitable lien by asserting a right for the firm to recover the charges from the defendant since there would otherwise be no basis for that right;

(ii) it stated in clear terms that such recovery was the means by which the firm would give effect to a continuing responsibility of the client for those fees; and

(iii) it limited the firm's recourse to those fees to the amount recovered from the defendant, ([42]).

11. The letter was intended to be read, so far as was possible, in accordance with, rather than in opposition to the CFA and Law Society terms. Full effect could be given to the client letter without destroying the basic contractual liability, ([44]). It was similar to the case of a limited recourse secured loan agreement: it would be absurd for the agreement to be deprived of all security simply because of a limited recourse term, ([43]).

12. The Court demonstrated the importance of the wording of the retainer by finding, *obiter,* that neither the RTA Protocol nor any right on the part of the clients to recovery could ground a claim by the solicitors against the third party insurers for the costs, ([52] to [58]).

(c) The debts owe their creation, to a significant extent, to the activities of the firm under the CFA

13. Each Claim Notification Form (**'CNF'**) contained a description of the claim as well as an indication that, unless settled, the claims would proceed to litigation. There was no need for the firm to have done anything more to trigger entitlement under the CFA assuming a successful outcome, ([46]).

14. As in this case, where the CNF is logged onto the RTA Portal, before any direct offer from the insurer, the lien is likely to be engaged on the basis of a (rebuttable) inference that the settlement offer will have been encouraged thereby, ([62]). The Court noted that the logging of an RTA claim onto the portal contributes to settlement by:

(i) providing the essential details of the claim on which the insurer is able to appraise the claim;

(ii) demonstrating that the claimant is serious in their intent to pursue the claim and has retained solicitors under a CFA for those purposes, ([61]).

(d) There is sufficient collusion, notice, or knowledge of the firm's interest

15. There was no allegation of collusion in this case so that the final condition depended on notice or knowledge, on the part of the third party insurer, of the firm's interest. The condition was satisfied by two facts:

    (i) The CNFs each stated that the firm were acting under a CFA although there was no detail as to the terms; and

    (ii) The insurer was aware that the claims had been initiated using the RTA Portal which implied that the firm would most likely expect to recover its charges under the terms of the RTA protocol if the case settled while in the portal, or by way of costs order if the matter went to court, ([48] and [50]).

16. This condition had also been established, on the facts of one client's particular case, by evidence of a telephone call between the client and third party insurer, ([13] to [15], and [50]). However, the Court was clear that where 15(i) and (ii) above are satisfied there will be notice or knowledge sufficient to render payment of the settlement debt unconscionable.

IV. Final remarks: practical considerations

17. The equitable solicitor's lien will only permit recovery of costs up to the amount of the settlement debt on account of its character as a security interest. Additionally, the amount recoverable may be limited by the terms of the relevant retainer as well as the fixed cost regime under the RTA Protocol, ([65]).

18. The above analysis shows that the most important thing, so far as recovery is concerned, will be the wording of the CFA and any client care letter. Provided the underlying retainer is such that there is, on a proper construction, an intention for the client to be liable for the costs, notwithstanding any term as to the degree of recourse which will be had to any such liability, the lien may arise, (see paragraphs 10 and 11 above). Whether the continuing liability and recourse term are separate on the face of the documents is likely to be key.

19. In an RTA Protocol case it will normally be sufficient that the CNF has been logged on the portal, and that the other side has received it, for there to have been sufficient involvement by the solicitor. However, that may be rebutted, for example, if the third party insurer can show that it had intended to settle the claim anyway so that the CNF was immaterial to the settlement.

20. Similarly, receipt of the CNF by the third party insurer will ordinarily give them sufficient notice of the solicitor's interest where the CNF states that the firm acts under a CFA. It is unclear whether a failure to correctly identify the conditional basis of the retainer would be fatal: in principle there is no reason why that error should prevent recovery.

October 2018

Ikeni Mbako-Allison

Ikeni is a general third six pupil at 3PB with an emphasis on personal injury.

Telephone: 020 7583 8055

Email: ikeni.mbko-allison@3pb.co.uk

Website: https://www.3pb.co.uk/barristers/ikeni-mbako-allison/

LinkedIn: https://www.linkedin.com/in/ikeni/