Hilary Term
[2022] UKSC 8
On appeal from: [2019] EWCA Civ 143

JUDGMENT

Bott & Co Solicitors Ltd (Appellant) *v* Ryanair DAC (Respondent)

before

Lord Briggs
Lady Arden
Lord Leggatt
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
16 March 2022

Heard on 20 May 2021

Appellant
Nicholas Bacon QC
Ben Smiley
(Instructed by Rosenblatt Ltd)

Respondent
Brian Kennelly QC
Tom Coates
(Instructed by Oracle Solicitors (Holborn))

LORD LEGGATT AND LADY ROSE: (dissenting)

A. INTRODUCTION

1. Expectations about how disputes should be resolved in the United Kingdom and the role of legal representatives in that process have changed significantly over recent years. In *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21; [2018] 1 WLR 2052 ("*Gavin Edmondson*"), this Court considered a small but important piece of the jigsaw of that litigation landscape: the solicitor's equitable lien for their costs. This remedy has been recognised by the courts for over two hundred years. In its traditional form, it entitles a solicitor who assists a client to recover money (or other property) through litigation to recoup the costs of doing so out of the money recovered. Any proceeds of a judgment or settlement will normally be paid to the solicitor's firm, which can then deduct its costs before accounting to the client for the balance. But if the opposing party pays the money directly to the solicitor's client despite knowing or being on notice of the solicitor's interest in the debt, and the client then fails to pay the solicitor's costs, the court may order the opposing party to pay those costs to the solicitor - in addition to the payment already made to the solicitor's client.

2. For many years the equitable lien was thought to arise only where there were court (or arbitration) proceedings in existence when the money was recovered. However, in *Gavin Edmondson* this Court held that the lien applied in cases where the claimant's solicitors had notified a claim under the pre-action protocol for low value personal injury claims in road traffic accidents (the "RTA Protocol") and the claim was then settled without the need to issue proceedings. The result was that, in the three cases before the court in *Gavin Edmondson* where the defendant had paid the settlement sum directly to the claimant despite knowing of the solicitor's involvement and the claimant had not paid his or her solicitor's costs, the defendant was ordered to pay those costs directly to the solicitor.

3. Following the decision in *Gavin Edmondson*, there is no doubt that the solicitor's equitable lien can arise where no formal proceedings have been commenced. The question raised by this appeal is where the boundary of the equitable lien lies and, specifically, whether the lien covers costs charged to clients by the appellant solicitors, Bott & Co, for claiming compensation for flight delays from the respondent, Ryanair.

4. In our view, for the reasons given below, the rationale for the lien requires that, for a lien to arise, there must be a dispute, existing or reasonably anticipated, in

connection with which the services of the solicitor are sought. In the vast majority of cases handled by Bott there is no such dispute: there is no doubt about the fact and amount of compensation payable and no reason to suppose that Ryanair will withhold or delay payment. Bott are simply collecting undisputed amounts of money for their clients. In these circumstances we consider that no lien arises and would therefore have dismissed the appeal. Lord Burrows, Lady Arden and Lord Briggs, however, all take a different view. For the reasons they give, they consider that no actual or prospective dispute is necessary and that is sufficient for a lien to arise that the solicitor is making a "legal claim" on behalf of their client. They conclude that this minimal requirement is satisfied on the facts of this case and so the appeal should be allowed. Accordingly, our judgment represents the minority view.

B. THE FACTS

(1) The Flight Compensation Regulation

5. An air passenger whose flight is cancelled or delayed has rights to compensation and assistance under Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 ("Regulation 261"). Regulation 261 applies where the air passenger is departing from an EU member state or is travelling to an EU member state with an EU airline. Although Regulation 261 does not expressly provide for compensation for delay rather than cancellation, the Court of Justice of the European Union held in *Sturgeon v Condor Flugdienst GmbH, Böck v Air France SA* (Joined Cases C-402/07 and C-432/07) [2010] Bus LR 1206, para 69, that it must be interpreted as meaning that passengers whose flights are delayed have the same right to compensation as passengers whose flights are cancelled if they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. The air carrier is not obliged to pay compensation if it can prove that the cancellation or delay was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". Examples of "extraordinary circumstances" are given in recitals (14) and (15) and include political instability and security risks as well as bad weather. Where compensation is payable under Regulation 261, the amount is fixed at €250, €400 or €600 depending on the flight distance.

6. Article 14 of Regulation 261 imposes obligations on an air carrier to inform passengers of their rights. The carrier must ensure that at check-in a clearly legible notice is displayed to passengers inviting them to ask at the check-in counter or boarding gate for a statement of their rights if their flight is cancelled or delayed. In addition, where a flight is cancelled or delayed for at least two hours, the carrier must

provide each passenger affected with a written notice setting out the rules for compensation under the Regulation.

7. Since the withdrawal of the UK from the European Union, Regulation 261 has been retained as part of UK law and amended to ensure that it continues to apply to travel to and from the UK in the same circumstances as before.

(2) Bott's business model

8. Bott is a solicitors' firm which specialises in consumer claims conducted on a "no win, no fee" basis. Bott began handling flight delay compensation claims in February 2013. Its business model is premised on processing a large volume of claims, the vast majority of which are expected to be settled by the relevant airlines without dispute. By the time this action was begun in October 2016, Bott had handled approximately 125,000 claims and was claiming on its website a 99% success rate. Bott has developed an on-line tool, accessible on its website, which enables a prospective client to enter her flight details and then check whether her claim satisfies the basic eligibility conditions for compensation. The on-line tool operates without human intervention on the data entered and includes a check against a database of weather reports to gauge whether a problem with the weather might have caused the delay. This indicates whether the airline is likely to contest a claim for compensation by relying on "extraordinary circumstances".

9. Bott's on-line tool tells the prospective client whether she has a claim that appears to be eligible for compensation under Regulation 261 and, if so, for how much. Where there is such a claim, she is then invited to provide other relevant information on-line, including contact details, and to confirm whether she wishes to instruct Bott on a "no win, no fee" basis. None of this involves manual intervention by anyone at Bott.

10. If a prospective client confirms through the on-line tool that she wishes to instruct Bott, Bott sends her an email to confirm receipt of the claim. One of Bott's paralegals working under the supervision of a solicitor then manually checks the information provided to verify whether the claim has more than a 50% prospect of success. That process is usually completed within 48 hours. If the claim passes this vetting process, Bott sends a further email to the client confirming that Bott is willing to accept the case and that, if the claim is successful, Bott's fees will be 25% of the total compensation amount awarded to the client plus VAT, plus an administration fee of £25 per passenger, to be deducted from the compensation before Bott pays the

compensation to the client. The email also notifies the client that, as a result of the client having submitted her details through the website, Bott has started working on the claim and is in the process of drafting a first letter to the airline. The email also informs the client that Bott's Terms and Conditions will follow. In a separate email, Bott sends the client a link to its Terms and Conditions, requesting that the client read them and sign them electronically. A conditional fee agreement ("CFA") is also sent by email in a form that the client can download. The Terms and Conditions make it clear that, if necessary, Bott has permission from the client to issue court proceedings.

11. Once Bott has been retained through this procedure, Bott sends a letter before action in a standard format to the airline. The letter refers to the Practice Direction on Pre-Action Conduct and sets out the claim details, asking for a response within 30 days and, if the claim is admitted, for payment within 21 days of the admission. Bott requests that payment be made by a cheque in its favour or by bank transfer to its client account. The same letter may cover a single claim or multiple claims relating to the same flight.

12. If the airline accepts the claim and makes payment to Bott without dispute, Bott simply checks that the right amount of compensation has been received, deducts its fees and pays the balance to the client. If the airline does not respond or disputes the claim, Bott considers the merits of issuing court proceedings. If it decides that a claim is merited, Bott issues a claim and conducts the litigation.

(3) How Ryanair deals with compensation claims

13. A high proportion of the flight delay claims handled by Bott are claims for compensation from Ryanair. When this action was begun, Bott was handling over a thousand such claims against Ryanair each month. Until early 2016, when it received a letter of claim from Bott, Ryanair dealt with Bott. When claims were admitted, Ryanair would pay the compensation into Bott's client account. From early 2016, however, Ryanair changed its practice. It began to communicate directly with Bott's clients and to pay compensation directly to them. In written evidence served in these proceedings, Ryanair has explained the background to this change.

14. According to this evidence, in March 2014 Ryanair introduced a new process enabling customers to claim flight disruption compensation using an on-line form available on Ryanair's website. At the same time, Ryanair say they took steps to ensure that, when a flight is cancelled or delayed, passengers are notified automatically by text and e-mail of their right to receive compensation. Ryanair's policy is to ensure that

valid claims for compensation are paid within 28 days of submission of a claim using their on-line form, though they say that, in practice, claims are dealt with more quickly than that and are usually paid within six working days of submission of the claim.

15. Despite the introduction of the on-line form, Ryanair say that they noticed a sharp increase in late 2015 and early 2016 in the number of claims being submitted by claims' management companies and solicitors. Ryanair considered this an unwelcome development and decided to adopt the practice of dealing directly with passengers. One reason is said to be that the involvement of third-party claim handlers introduces an adversarial element into the relationship between Ryanair and the passenger which is often unnecessary as there is no dispute that compensation is payable. Furthermore, Ryanair tends to be blamed if a dispute arises between the customer and the third-party, especially as many customers wrongly assume that there is some form of relationship between Ryanair and some of these third-party firms. Ryanair also say that third-party claim handlers increase Ryanair's administrative burden and can complicate and delay the resolution of claims.

16. In July 2016, Ryanair amended their General Terms and Conditions of Carriage to reflect their policy of dealing directly with passengers in relation to flight disruption claims. Article 15 of those Conditions requires passengers, subject to some exceptions, to submit claims for delay compensation directly to Ryanair and allow Ryanair 28 days to respond before engaging a third party to claim on their behalf.

17. When Ryanair pays Bott's client directly, Bott loses the opportunity to deduct its fees from the compensation paid by Ryanair before paying the balance to the client. Bott must therefore pursue the client directly for payment of its fees. Bott says that its experience has been that only about 70% of clients pay in response to a direct request and that, given the relatively small sum involved - an average of about £95 per claim, it is not administratively or financially feasible to take legal action to recover its fees from clients who do not pay them.

(4) Bott's claim to a lien

18. In this action Bott claims an equitable lien over sums payable by Ryanair to Bott's clients in compensation for flight delays. Bott seeks an injunction to restrain Ryanair from making any payment of such compensation when on notice that Bott has been retained other than to Bott's nominated client account. In addition, where, since 22 September 2016, payments have been made by Ryanair directly to Bott's clients in

such cases, Bott claims an indemnity for the costs which it has not been able to recover from its clients. Ryanair denies that Bott has any such equitable lien.

C. THE SOLICITOR'S EQUITABLE LIEN

(1) Rationale

19. As Lord Briggs explained in the first paragraph of the judgment in *Gavin Edmondson*, the solicitor's equitable lien:

> "is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit."

Lord Briggs cited, at paras 33 and 34, early cases showing that the aim of promoting access to justice underlay the development of the lien. That aim was facilitated by giving the solicitor a security interest in the fruits of litigation. As it was put by Sir John Romilly MR in *Haymes v Cooper* (1864) 33 Beav 431, 433, a solicitor has "an inherent equity to have his costs paid out of any fund recovered by his exertions".

(2) Comparison with the common law possessory lien

20. The solicitor's equitable lien exists alongside the right that a solicitor has at common law to retain possession of money, deeds or papers held on behalf of a client until the solicitor's costs have been paid. Both forms of lien are "grounded on the principle that it is not just that the client should get the benefit of the solicitor's labour without paying for it": *Guy v Churchill* (1887) 35 Ch D 489, 491 (Cotton LJ). That principle has been relied on to support a claim that the equitable lien is an immediate right of security in the solicitor's favour which survives the client's insolvency: see for example *Addleshaw Goddard LLP v Wood* (Case No CC 1405269) (unreported), 8 April 2015, paras 83 onwards. The equitable lien is narrower than the common law lien in that it is particular to property which is recovered or preserved through the solicitor's instrumentality, but wider in that it does not depend upon the property being in the possession of the solicitor.

(3) Arbitration

21. In *Ormerod v Tate* (1801) 1 East 464; 102 ER 179 the parties to a pending suit entered into bonds to refer the dispute to arbitration. The arbitrator made an award of damages to the claimant and the question arose whether the claimant's solicitors had a lien over the sum awarded. The defendant argued that the lien was confined to cases of money recovered by judgment of the court and did not extend to money awarded by an arbitrator. Lord Kenyon CJ rejected that argument and held, at p 465:

> "The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the Court in the ordinary course of the cause."

22. The principle illustrated by *Ormerod v Tate* was subsequently applied in cases where no court proceedings had been brought and the only proceedings were by arbitration: see *In re Meter Cabs* [1911] 2 Ch 557.

(4) Charging orders

23. In *Shaw v Neale* (1858) 6 HL Cas 581 the House of Lords held that the solicitor's equitable lien did not apply to real property which the solicitor was instrumental in recovering for the client. To address this lacuna, legislation was enacted. The current provision is section 73 of the Solicitors Act 1974. This states:

> "**73. Charging orders**
>
> (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 -
>
> (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."

24. Section 75 of the Arbitration Act 1996 extended the powers of the court to make declarations and orders under section 73 of the Solicitors Act 1974 to arbitral proceedings "as if those proceedings were proceedings in the court".

(5) The notice requirement and the "fund in sight"

25. In *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481; [2014] 1 WLR 1185 ("*Khans*"), the Court of Appeal considered whether, to recover their costs from an opposing party who had paid their client directly, the solicitors had to show that the opposing party had colluded with their client to deprive them of their fees. The Court of Appeal held that there was no requirement of collusion. It was sufficient that the opposing party was on notice that the solicitor had a claim for fees upon part or all of the sum due. If, having had such notice, the opposing party pays the solicitor's client directly, he does so at his own risk; collusion is not necessary.

26. In the present appeal it is not in dispute that, when Ryanair pays compensation for delay directly to a passenger after receiving a letter of claim sent on behalf of the passenger by Bott, Ryanair is aware of the terms on which Bott has been retained, including the amount of Bott's charges.

27. Similarly it is not disputed in this case that the compensation paid by Ryanair is a fund in sight as that concept is discussed in *In the Estate of Fuld, decd (No 4)* [1968] P27.

(6) The requirement for proceedings

28. Before the end of the nineteenth century it was established that the lien could attach to a debt payable under an agreement to compromise a claim: see *Ross v Buxton* (1889) 42 Ch D 190. It was, however, held to be the law that an equitable lien could only arise once proceedings of some sort had been commenced. The authority for this proposition was *Meguerditchian v Lightbound* [1917] 1 KB 297; affirmed [1917] 2 KB 298. In that case an individual (Z) instructed solicitors to recover from a third party various valuable documents relating to mining concessions. Z became bankrupt and receivers were appointed over his estate. The receivers instructed the solicitors to pursue the recovery of the documents. After negotiations, a compromise was reached under which the solicitors obtained the documents. They then claimed a lien over the documents both for the fees owed to them by the receivers and for fees previously incurred by Z which remained unpaid.

29. The sole remaining receiver agreed to pay the fees incurred on the receivers' instructions but disputed liability to pay the fees incurred on Z's instructions (arguing that the solicitors must prove in the bankruptcy for those fees). At first instance, Rowlatt J held that the solicitors had no common law possessory lien over the documents for fees incurred by Z, as the receiver (for whom they held the documents) was not liable for those fees. Rowlatt J also rejected an alternative argument that the solicitors had an equitable lien over the documents as property recovered or preserved by their services in bringing about the settlement. He did so on the basis that he could find no authority for such a lien upon the fruits of a mere negotiation conducted by a solicitor, nor did he consider that it could be supported on principle outside the context of litigation in court. Rowlatt J gave as a further reason that in any case it had not been shown that the recovery of the documents was attributable to the earlier negotiations conducted on behalf of Z before the receivers took over Z's interest.

30. This decision was upheld by the Court of Appeal: *Meguerditchian v Lightbound*. Swinfen Eady LJ observed (at p 306) that the claim that the documents were the fruits of the solicitors' exertions was advanced:

> "… by analogy to cases where there are proceedings in Court, or proceedings in an arbitration, or proceedings to establish a claim, and where after the proceedings have continued for some time there has been a change of interest on a bankruptcy, and the trustee or representative of the bankrupt intervenes and takes up the litigation at the point at which the bankrupt had left it."

He rejected any analogy between such cases and a case where there were no proceedings, but merely negotiations with regard to a matter and correspondence between the solicitors on either side. He noted that counsel for the solicitors had been unable to produce any authority in support of the wider proposition and said:

> "Case after case which he referred to were all cases in which there was an action, or a suit, or proceedings of some kind."

31. Bankes LJ agreed, saying (at p 308) that he could see very good reason why the principle of a lien in respect of property recovered should be applied "in cases where there are proceedings, whether they consist of an action or arbitration," but also very good reasons why it should not be applied "when the solicitors are left free to take whatever course they chose to secure a compromise". Bray J agreed with both judgments.

(7) *Gavin Edmondson*

32. In *Gavin Edmondson*, the decision of the Court of Appeal in *Meguerditchian* was cited in argument in the Supreme Court: see [2018] 1 WLR 2052, 2054. But no argument was advanced by the defendant that an equitable lien could not arise because there were no court proceedings in existence when the underlying claims were settled.

33. Under the RTA Protocol scheme, solicitors instructed by an eligible claimant are expected to notify the prospective defendant's insurer of the claim electronically by submitting a claim notification form through a website referred to as the Portal. In each of the three cases considered in *Gavin Edmondson*, the solicitors entered the details of the claim into the Portal after they had concluded a CFA with the client. In each case the defendant's insurer, when notified of the claim through the Portal, made contact with the claimant directly and agreed a settlement of the claim. In each case the insurer paid the settlement sum directly to the claimant and the claimant then failed to pay their solicitors' charges. The solicitors claimed their costs from the insurer on various grounds. One was that the settlement sum was subject to an equitable lien.

34. The trial judge dismissed the solicitors' claim: [2014] EWHC 3062 (QB); [2015] RTR 14. On the question whether there was a lien, he held that the insurer's knowledge that solicitors had been instructed did not satisfy the requirement of notice of their entitlement to costs. The Court of Appeal (Lloyd Jones LJ, with whom Laws and

Elias LJJ agreed) allowed the solicitors' appeal: [2015] EWCA Civ 1230; [2016] 1 WLR 1385. They accepted an argument advanced by the insurer that, under the terms of the CFAs, the clients had no contractual liability to pay the solicitors' costs on which a lien could be founded; but nevertheless held that the solicitors had a right to receive fixed costs under the RTA Protocol, either in their own right or as a subrogated claim on behalf of the client, to which an equitable lien could attach. The Court of Appeal further found that the requirement of notice was satisfied.

35. On the insurer's appeal to the Supreme Court, Lord Briggs gave the sole judgment with which Baroness Hale of Richmond, Lord Kerr of Tonaghmore, Lord Wilson of Culworth and Lord Sumption agreed. Lord Briggs rejected the analysis which had found favour with the Court of Appeal, but held that on the proper interpretation of the CFAs the clients had a contractual liability to pay the solicitors' charges. Lord Briggs then considered two further questions: first, whether the settlement debts owed their creation "to a significant extent" to the solicitors' services under the CFAs (para 45); and second, whether the insurer had notice or knowledge of the solicitors' interest in the settlement debts.

36. Lord Briggs answered both questions in the affirmative. In the one case where the sufficiency of the solicitors' contribution to the settlement was disputed, he concluded that lodging the claim notification form in the Portal had encouraged the insurer to make a settlement offer and had made "a modest but still significant contribution" to obtaining the settlement which ensued: para 63. On the question of notice, Lord Briggs held that, once a defendant or his insurer was notified that a claimant had retained solicitors under a CFA, and that the solicitors were proceeding under the RTA Protocol, they had 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: para 50. Hence, the Supreme Court upheld the solicitors' claim to an equitable lien over the settlement debts.

D. THE DECISIONS OF THE LOWER COURTS

(1) The High Court

37. Bott's claim, made under CPR Part 8, was heard at first instance by Mr Edward Murray sitting as a deputy judge of the Chancery Division: [2018] EWHC 534 (Ch); 2018 3 Costs LO 275. His judgment was handed down shortly before the Supreme Court decided *Gavin Edmondson*. The judge held that he was bound by authority to decide

that the solicitors' equitable lien arose only once proceedings had been commenced and so does not arise where compensation is paid by Ryanair without the need to issue proceedings.

38. The judge sought to reconcile the decisions of the Court of Appeal in *Gavin Edmondson* and *Meguerditchian* on the ground that the claims in *Gavin Edmondson* had not been settled as the result of a "mere negotiation" (para 109) but only after they had been entered into the Portal so as to participate in what the judge described (at para 110) as:

> "a voluntary but nonetheless formalised system under the [RTA] Protocol, sanctioned by the judiciary, for the early resolution of claims involving personal injury and giving rise, once [the insurer] had also engaged with claims entered into the Portal, to an entitlement of [the solicitors] to receive fixed costs under CPR Part 45."

The judge held that, as there is no such scheme for resolving disputes under Regulation 261 in which Bott participates and not even in the vast majority of cases "what one could call a negotiation", as "a client is either entitled to compensation under the Regulation or it is not", no equitable lien can arise.

(2) The Court of Appeal

39. Bott's appeal to the Court of Appeal was dismissed for reasons given by Lewison LJ, with whom Simon and Lindblom LJJ agreed: [2019] EWCA Civ 143; [2019] 1 WLR 3375. By the time of the Court of Appeal hearing, the Supreme Court had given judgment in Gavin Edmondson. In the light of that judgment, Lewison LJ accepted that it can no longer be said to be necessary for formal proceedings to have been issued before an equitable lien can arise. But he considered that the services that the solicitor provides "must still be recognisable as litigation services, promoting access to justice": see para 53.

40. Lewison LJ referred to the definition of "litigation services" in section 119 of the Courts and Legal Services Act 1990 as "any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide". He referred also to the definition of "contentious business" in section 87 of the Solicitors

Act 1974 as "business done … in or for the purposes of proceedings begun before a court or before an arbitrator". Those definitions, Lewison LJ said, "capture the essence of the principle underpinning the right": para 55. He considered that "litigation" for these purposes includes arbitration and would encompass proceeding under one of the many pre-action protocols that now exist, which he characterised as "part of an overall process under the supervision of the court": para 56. He said that the equitable right may well arise in relation to costs incurred in alternative dispute resolution ("ADR") but that:

> "as the acronym makes clear, ADR is appropriate when there is a *dispute* to resolve. Unless and until Ryanair refuses a claim, there is no *dispute*."

41. Lewison LJ concluded that, on the facts of this case, an equitable lien does not arise unless and until Ryanair disputes a claim for compensation under Regulation 261. He described the making of a claim under Regulation 261 as "largely mechanical and formulaic", noting that it requires little more information than the flight distance and the length of the delay, in addition to details of the ticket purchase, and that the amount of compensation that a delayed passenger is entitled to receive is fixed by the Regulation: see para 58. It is not a situation in which the quantum of damages has to be evaluated. Thus, where Bott simply writes a letter of claim or assists a client to complete the on-line form, the services provided by Bott do not amount to "litigation services" of the kind that equity will protect.

E. THE EXTENT OF THE LIEN

42. The Court of Appeal was undoubtedly right to hold that, although this Court did not expressly overrule *Meguerditchian* in *Gavin Edmondson*, the distinction between a case where no proceedings have been issued and a case in which they have cannot survive the latter decision. Lord Briggs expressly addressed this question when he said at, [2018] 1 WLR 2052, para 35:

> "The requirement for a fund may be satisfied not just by a judgment debt or arbitration award, but also by a debt arising from a settlement agreement. Provided that the debt has arisen in part from the activities of the solicitor there is no reason in principle (and none has been suggested) why formal proceedings must first have been issued, all the more so in modern times when parties and their solicitors are encouraged as a matter of policy to attempt to resolve

> disputes by suitable forms of ADR, and when pre-action protocols of widely differing kinds have been developed precisely for that purpose."

In none of the three cases before the court in *Gavin Edmondson* had proceedings been issued when the claim was settled; yet in each case it was held that the settlement debt was subject to a lien.

(1) Is there any limit on the work that can found the lien?

43. Bott contends on this appeal that the decision in *Gavin Edmondson* had an even more radical effect. Not only did it impliedly overrule what was decided in *Meguerditchian* and extend the scope of the solicitor's equitable lien to work done when formal proceedings have not yet been issued, but it removed any limit at all on the work to which the lien can apply. On Bott's case, all that is necessary for the creation of an equitable lien is: (a) a contractual liability on the part of the client to pay the solicitor's fees; (b) the recovery of a fund which owes its creation to a significant extent to the solicitor's services; and (c) that the defendant has notice or knowledge of the solicitor's interest in the debt. Counsel for Bott submit that the Court of Appeal was wrong to consider that there is any further requirement and, in particular, to suggest that the work done by the solicitor must constitute "litigation services" or "contentious business". They submit that such a requirement is unprincipled and that there is no distinction to be drawn in terms of the basis for an equitable lien between a solicitor who obtains a settlement of a potential road traffic accident dispute and, for example, a solicitor who preserves property in the context of the administration of a complex estate.

44. We do not accept that the decision of this Court in *Gavin Edmondson* is properly understood as transforming the law in this way. To hold, for example, that a solicitor advising on the acquisition of a company would be entitled to apply to the court for a charge over the shares and, if necessary, an order for sale of those shares, or that a conveyancing solicitor might be entitled to an equitable interest in a property following a transaction in which she advised, would have significant commercial consequences that none of the cases, including *Gavin Edmondson*, have addressed. Such a decision would have brought about a fundamental change with minimal discussion in circumstances where the Court itself had recognised (at [2018] 1 WLR 2052, para 57 of the judgment) that the remedy should work in accordance with established principles in order to promote predictability.

45. To remove any limit on the work to which the lien can apply would sever the equitable lien from its historical roots and from its rationale of facilitating access to justice through litigation - or, in a modern context, other means of resolving disputed claims. It would not, in our opinion, be a legitimate extension of the law.

(2) Reliance on statutory definitions

46. What then is the boundary of the equitable lien? In answering this question, we do not consider that the statutory definitions of "litigation services" and "contentious business", quoted at para 40 above, assist. The statutory contexts in which those terms are used and the purposes for which they are defined are different from, and have no real connection with, the equitable lien. To the extent that the Court of Appeal relied on these definitions, we therefore agree with the submission made by counsel for Bott that such reliance was misplaced.

47. The purpose for which the term "litigation services" is defined in section 119 of the Courts and Legal Services Act 1990 is that of specifying when a CFA is enforceable. A "conditional fee agreement" is defined for this purpose in section 58(2)(a) of the Act as "an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances". Such an agreement is enforceable only if it satisfies conditions set out in section 58 and in statutory instruments made under that section by the Lord Chancellor. The terms "litigation services" (and "advocacy services") are given an expanded definition in this context by section 58A(4), inserted by the Access to Justice Act 1999. The effect of this amendment is that advocacy or litigation services include any services which it would be reasonable to expect a person to provide in relation to "any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated". In several cases courts have been called upon to determine whether work that a solicitor had agreed to carry out amounted to "litigation services" because, if it did, the relevant agreement was a CFA which did not satisfy one or more of the conditions applicable to it by virtue of section 58 and was therefore unenforceable.

48. This was the issue in *Gaynor v Central West London Buses Ltd* [2006] EWCA Civ 1120; [2007] 1 WLR 1045, which Bott invited us to overrule as wrongly decided. In that case the terms on which solicitors agreed to act for a person injured in a road traffic accident were set out in a standard letter of retainer. The letter provided for fees to be charged at a normal hourly rate but stated that, if the claim was disputed and the client decided not to pursue the claim, the solicitors would not charge for the work they had done. The defendant admitted liability and, after proceedings had been

issued, made an offer to settle the claim which the claimant accepted. The settlement was embodied in a consent order, which included provision for the defendant to pay the claimant's costs. When the costs came to be assessed, the defendant argued that it had no liability to indemnify the claimant for any costs because the claimant had no liability to pay any costs to her solicitors. It was said that the agreement contained in the retainer letter was unenforceable because it was a CFA within the meaning of section 58 of the 1990 Act but did not comply with the conditions applicable to CFAs under that section.

49. The Court of Appeal (Dyson LJ, with whom Auld LJ and Sir Martin Nourse agreed) construed the definition of a CFA in section 58(2)(a) as meaning an agreement with a person providing advocacy or litigation services which provides for his fees and expenses *for those services*, or any part of them, to be payable only in specified circumstances. Dyson LJ construed the statement in the solicitors' retainer letter as meaning that, if the client decided before proceedings were issued not to pursue the claim, the solicitors would waive their fees for work done up to that point. The critical question then became whether work done by the solicitors before any proceedings were issued constituted "litigation services" as defined in section 119: if it did, then, as the fees for those services were conditional on the client deciding to pursue the claim, the agreement was a CFA and hence unenforceable.

50. Dyson LJ held (at para 17) that advising a client whether he or she had a good prima facie claim and writing a letter of claim (which were the services which it would be reasonable to expect the solicitors to provide before any proceedings were issued) did not come within the definition of "litigation services". This was because it could not be said that there were any "contemplated proceedings" until the potential defendant disputed the claim. This conclusion was consistent with the purpose of the legislation, since "[a] client who, having received limited pre-litigation services, decides not to pursue a claim by litigation has no need for the panoply of protection afforded by the conditions stated in section 58(3) of the 1990 Act": see para 18. It followed that the retainer was not a CFA as defined in section 58 and so was enforceable.

51. We agree with counsel for Bott that this decision does not assist in determining which services provided by a solicitor are within the scope of the equitable lien. There is no reason (and none has been suggested) why the scope of the equitable lien should be defined by reference to statutory rules for determining when an agreement to do work on a conditional fee basis is enforceable. The interpretation of the statutory definition of "litigation services" adopted by the Court of Appeal in *Gaynor* may or may not be the right one; but neither the reasoning nor the result in that case can be transposed to the question with which we are concerned.

52. There is similarly no basis for using the concept of "contentious business" to define the boundary of the lien. Whether business done by a solicitor is classified as "contentious" or "non-contentious" affects which statutory rules regulate the remuneration of solicitors by their clients - although, according to *Cook on Costs* (2021), para 8.1, recent developments in the law have reduced the relevance of the distinction to the point where there is little practical difference between the two in most circumstances. Under the definitions of these terms in section 87 of the Solicitors Act 1974, whether business done by a solicitor is "contentious" or "non-contentious" depends on whether it was done "in or for the purposes of proceedings *begun* before a court or before an arbitrator" (emphasis added). This ties the distinction to whether formal court or arbitration proceedings are commenced. As stated in *Cook on Costs* (2021), para 8.2:

> "Work done in anticipation of court proceedings is non-contentious unless and until court proceedings are actually commenced. When that happens, the work converts to becoming contentious business retrospectively."

53. We can see no reason why fees charged for work done by a solicitor in anticipation of court (or arbitration) proceedings should be covered by the equitable lien if proceedings are subsequently begun but not if the claim is settled without commencing proceedings. Indeed, such an approach is inconsistent with this Court's decision in *Gavin Edmondson*.

(3) Promoting access to justice

54. Although its reliance on the statutory definitions of "litigation services" and "contentious business" was misplaced, the Court of Appeal was, in our view, right to identify (at para 53 of Lewison LJ's judgment) the underlying purpose of promoting access to justice as "the key to fixing the boundary" of the solicitor's equitable lien. It is also the key to fixing the boundary between the kind of work that can be covered by the lien and the kind of transactional work that is not. It is from the purpose of the lien that the scope of the work covered by the lien should be deduced. As explained in *Gavin Edmondson*, in its traditional form the lien was designed to promote access to justice by enabling solicitors to conduct litigation on credit for clients who lacked the financial resources to pay their solicitor's costs up front. It did so by giving solicitors an equitable interest in the fruits of the litigation for the amount of their agreed charges. As methods of resolving disputes other than by obtaining a judgment from a court have come to be recognised as desirable alternative ways of achieving access to justice, so has the compass of the lien been extended: first, to include sums recovered

through arbitration or through a compromise of proceedings; and then, in *Gavin Edmondson*, to include sums recovered through a compromise of a claim before formal proceedings had been issued.

55. In the important passage of his judgment quoted at para 42 above, Lord Briggs based the latter development on the policy of encouraging parties and their solicitors to attempt to resolve disputes "by suitable forms of ADR".

(4) "Alternative" dispute resolution

56. The evolution of this policy represents a sea change in modern times in how access to justice is conceived. A major impetus was the review of the civil justice system carried out by Lord Woolf in the mid-1990s and the consequent introduction in 1998 of a new set of Civil Procedure Rules. In his Access to Justice - Final Report (1996) Section 1, ch 1, para 9, Lord Woolf identified as the first feature of the "new landscape" envisaged by his proposals that "litigation will be avoided wherever possible". Hence:

> "People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available."

57. As Lord Briggs also pointed out in the passage quoted at para 42 above, an important aspect of this policy has been the introduction of pre-action protocols "of widely differing kinds". The purposes of these protocols were described in the Access to Justice - Final Report (1996) ch 10, para 1, as being:

> "(a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
>
> (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
>
> (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and

(d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings."

58. The first pre-action protocols were introduced in April 1999 for personal injury claims and clinical negligence claims. Other protocols have followed that apply to many different kinds of dispute, from disputes about housing conditions to media and communications claims. The Pre-Action Conduct Practice Direction expressly provides in paras 1 and 13 that the court expects parties to conduct themselves in accordance with, and to take the steps set out in, the Practice Direction and the pre-action protocols before proceedings are begun. Para 8 of the Practice Direction states that:

> "Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings."

Para 13 of the Practice Direction also draws attention to the provisions of CPR rule 3.1(4)-(6) and (what is now) CPR rule 44.2(5)(a), which provide that the court will take into account whether or not a party has complied with the Practice Direction and any relevant pre-action protocol when giving directions in the proceedings and in deciding what order (if any) to make about costs.

59. Other rule changes have been introduced to encourage early settlement. For example:

(i) The court's duty under CPR rule 3.1 of actively managing cases includes encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(ii) CPR rule 36.7 provides that an offer to settle under Part 36 can be made at any time including before the commencement of proceedings;

(iii) CPR rule 46.14 allows a party to apply to the court for a costs order where there are no substantive proceedings but where the parties have reached an agreement on all issues, including which party is to pay the costs but have failed to agree the amount of the costs.

60. “Alternative dispute resolution” is defined in the CPR glossary as a “collective description of methods of resolving disputes otherwise than through the normal trial process”. As para 8 of the Practice Direction (quoted above) indicates, such methods include negotiation as well as more formal processes such as mediation and early neutral evaluation. Such is the emphasis today on encouraging the use of such methods of dispute resolution as the primary resort that the description of them as “alternative” is no longer apt. We referred earlier to the expanded definition of “advocacy services” and “litigation services” introduced in 1999 in the definition of conditional fee agreements, a recognition by the legislature of the growing importance of other proceedings for dispute resolution outside court in the work of legal representatives.

61. It would be inconsistent with the policy of encouraging dispute resolution without resort to litigation to confine the solicitor’s equitable lien to cases where formal proceedings have been commenced before a claim is settled. Such a restriction would give solicitors a financial incentive, in direct conflict with this policy, to issue a claim form at an early stage to make sure that they get paid. It also would deter solicitors from offering services on credit to clients who lack financial resources to help them obtain an appropriate settlement without having to bring proceedings. This would undermine the aim of facilitating access to justice that underlies the imposition of the lien.

62. This is so whether a claim is settled following participation in a formalised and judicially approved scheme, such as the scheme established by the RTA Protocol; or after engaging in a process such as a mediation without participating in such a scheme; or simply through a negotiation without engaging in any formal process. In each case the policy of encouraging the resolution of disputes without resort to litigation is promoted. Nor is there any reason to deter solicitors from negotiating settlements for clients, where they can, without invoking a formal system for dispute resolution or where no scheme comparable to the RTA Protocol scheme is available. The principle underlying the equitable lien of facilitating access to justice is equally applicable in all these cases.

63. We therefore think it clear that the primary ground on which *Meguerditchian* was decided - that an equitable lien cannot arise where a dispute is settled through negotiation without proceedings of any kind - can no longer be supported. The decision in that case can be justified only on the alternative ground given by Rowlatt J that there was no evidence to suggest that the success of the solicitors in obtaining the valuable documents sought by the receivers owed anything to the work previously done for Z before his bankruptcy.

64. In our judgment, the ratio of *Gavin Edmondson* on this question and the relevant test is, accordingly, that services provided by a solicitor to a client fall within the scope of the lien if they are provided for the purposes of resolving a dispute - whether by means of litigation or negotiation or any other suitable method. In stating the principle in this way, we do not intend to express any view about whether the lien is still limited to solicitors, which is not a question raised by this appeal.

(5) The scope of dispute resolution

65. This test is clearly satisfied where a potential defendant has refused a claim and a dispute has therefore arisen. But it does not appear that a claim had been refused before the solicitors were retained and a claim notified through the Portal in any of the cases decided in *Gavin Edmondson*: if there had been such a refusal, it is not mentioned in the judgment and cannot therefore have been considered necessary for the existence of a lien. This accords with principle. The need for the assistance of a solicitor to achieve the successful resolution of a dispute may arise before a claim has yet been asserted, if there is a real likelihood that the potential defendant will not provide the remedy claimed. That may be the case not only where the potential defendant denies liability or disputes the quantum of the claim. It includes the many cases where potential defendants simply refuse or fail (for whatever reason) to respond to the claim, either by payment or by providing the non-monetary remedy sought. It is sufficient to engage the lien that a dispute, in this broad sense, is reasonably anticipated.

66. That is generally the situation in cases of the kind considered in *Gavin Edmondson*, where a claim is made for damages for personal injuries suffered in a road traffic accident. Even if liability for the accident is admitted, determining the amount of damages payable depends upon, first of all, establishing the nature and extent of the injuries suffered and, secondly, assessing an appropriate monetary sum of compensation for those injuries. In addition to any expenses reasonably incurred - for example for medical treatment - this sum will include an amount to compensate for pain and suffering and any loss of amenity. Although there are guidelines published by the Judicial College which assist in assessing the appropriate amount of such general damages, an evaluative judgment is required. (Exceptionally, there is now a fixed tariff for whiplash injuries, but the amount payable still depends upon assessing "the duration, or likely duration, of the whiplash injury … if the person were to take, or had taken, reasonable steps to mitigate [its] effect": see The Whiplash Injury Regulations 2021 (SI 2021/642), regulation 2.) In settling a claim, other indeterminate factors, such as the costs that would be incurred if the amount had to be decided by a court, also enter into the parties' calculations. In these circumstances there is inevitably an

element of uncertainty and potential for dispute about what amount of damages, if any, a court would award and for negotiation of a sum which the defendant is willing to pay and the claimant to accept in settlement of the claim. The complexity and potential for contention in claims covered by the RTA Protocol is reflected in the costs regime incorporated in the process, entitling the legal representative acting for the claimant to their fixed costs at the different stages of the procedure to be paid by the potential defendant in addition to the compensation for injury.

(6) The majority view

67. We can see no principled basis, on the other hand, for extending the lien beyond this to circumstances where there is no dispute (actual or reasonably anticipated) between the parties and we foresee difficulties in doing so. If one abandons any requirement for a dispute, as the majority judgments do, one then needs to find a different boundary between the solicitor's work which gives rise to the lien and work which the majority describe as "transactional" and which they accept should not be covered by the lien. There is no explanation of where that boundary might lie or how it might be drawn. As formulated by Lord Burrows, the majority's alternative test is based on whether or not the client is making a "claim asserting a legal entitlement". This, so far as we can see, amounts to an acceptance of Bott's case summarised at para 43 above. As stated at paras 44-45, we do not regard such an open-ended expansion of the solicitor's lien beyond the field of dispute resolution as justified.

68. The majority do not maintain that the claim capable of supporting a lien need be seeking a remedy for an alleged breach of duty or other cause of action. If such a qualification were made to their test, it would not cover Bott's claims. Bott did not base its case on an assertion that a delay to a flight amounts to an actionable breach of duty or other wrong by the airline, and this does not appear to be the effect of Regulation 261. Such a test would also not cover many cases where the lien has been held to exist, for example, *In the Estate of Fuld, decd (No 4)* where the fund to which the lien was held to attach was the result of litigation in which the client was a defendant in an action brought by executors seeking to prove a will. It would likewise exclude every case where a defendant is ultimately successful in litigation and is awarded costs against the claimant. On the present state of the law a payment of those costs by the claimant directly to the defendant is a fund to which the lien can attach: see eg *Campbell v Campbell and Lewis* [1941] 1 All ER 274. The defendant's entitlement to costs at the end of the proceedings is not based on any cause of action.

69. Widening the scope of the lien to encompass any claim asserting a legal entitlement would appear to bring within it situations commonly occurring in transactional work: for example, where a solicitor writes on behalf of a client to remind a contractual counterparty that a payment instalment under the contract will shortly fall due or where a solicitor at the end of a contract negotiation writes to the counterparty asking them to pay the consideration just agreed. On our view, there is no lien attaching to that money if it is then paid directly to the client because there is no dispute or anticipated dispute. It is not clear to us whether the majority consider that either or both of these situations is within the scope of the lien and, if not, what the difference is between that situation and the work that Bott does.

70. For as long as *Meguerditchian v Lightbound* prevailed, the subject matter of the proceedings, the role of the client in those proceedings and the precise juridical nature of that subject matter or role did not matter; it was the commencement of the proceedings that marked the boundary between work falling within the ambit of the lien and transactional work. Similarly if, as we conclude, in the light of the modern developments we have described, the boundary of the lien should today be drawn more broadly by reference to the resolution of disputes, the nature and genesis of the dispute remain irrelevant. We recognise that there could under this test be uncertainty as to whether, on the facts of a particular case, there is any real prospect that a request for payment will be disputed. But we think it unlikely that this will cause a significant problem in practice. To the extent that there may be the occasional case where the application of the test to the facts is unclear, the difficulty is no greater than that involved in applying the definition of "litigation services" in the Courts and Legal Services Act 1990 or determining whether a communication is covered by litigation privilege. Any definition of litigation or dispute resolution for any purpose will be capable of generating borderline cases. That is not a reason to abandon the concept and to extend a privilege or protection inherently linked to securing access to justice beyond its proper scope.

71. By contrast, if one removes any requirement of an actual or prospective dispute, one breaks the link with even a broad principle of access to justice in the sense used in the case law. There is then no or no discernible limit on the services to which the solicitor's lien applies and nothing to distinguish work falling within its scope from transactional work done by a solicitor (or for that matter work which any debt collector does). Although we are heartened by the statements in the majority judgments that transactional work is excluded and that their approach draws the boundary line in only a marginally different place from ours, we find their definition of the line elusive.

72. It is also important to bear in mind that the solicitor's lien operates in equity on the conscience of the paying party. If the payer, when aware or on notice of the solicitor's involvement, pays a sum in settlement of a claim directly to the solicitor's client to whom the sum is owed, the effect of the lien is to render the payer liable to pay part of this sum again if the claimant fails to pay her own solicitor's fees. Imposing this burden on the payer is equitable where it is reasonable to expect that the claim may be disputed and that negotiation or some more formal process in which the solicitor would represent the claimant may therefore be required to resolve the dispute. In such circumstances bypassing the solicitor and agreeing a settlement directly with the client which has the result of depriving the solicitor of his fees can be regarded as unconscionable. But it is hard to see how the payer's conscience can be said to be sufficiently affected if all that he does is to pay directly to the claimant a debt which the payer has never contested and which there was never any reason to expect that he would refuse or fail to pay. If in such a situation the person to whom the money is payable chooses for whatever reason to retain a solicitor (or any other agent) to claim it on her behalf, paying the solicitor's charges should be her sole responsibility in the ordinary way. There is no equitable justification for imposing on the payer responsibility for ensuring that the claimant's solicitor is paid.

(7) The work done by Bott

73. The proper limit of the solicitor's equitable lien is well illustrated by the facts of this case. The services provided by Bott involve claiming compensation on behalf of clients; but, as the judge put it (at para 114), Bott are, "in effect, simply a claims handling agent in relation to the vast majority of flight delay compensation claims they make". It cannot, on an objective consideration, be said that the services provided by Bott before Ryanair responds to a claim are provided for the purpose of resolving a dispute or prospective dispute. In the typical case, when Bott sends a letter of claim, not only is there no existing dispute which needs to be resolved - by negotiation or otherwise - but there is no real prospect that there will be any such dispute. The reason for this is that, as both the judge and the Court of Appeal observed, the liability to pay compensation for flight delay is almost entirely automatic. Except in rare cases where the air carrier might be able to invoke "extraordinary circumstances", both the existence of the obligation to pay compensation and the amount of compensation payable under Regulation 261 are determined solely by the length of the delay in reaching the destination and the flight distance. There is therefore no room for argument. Nor is there any evidence to suggest that - at least since Ryanair introduced its own online claims process in 2014 - Ryanair has sought to avoid its obligations to inform passengers of their rights to claim flight delay compensation and to pay valid claims promptly. There is therefore no basis in an ordinary case for anticipating any difficulty in obtaining payment of the amount of compensation owed.

74. We should make it clear that whether an equitable lien arises does not depend on a judgment about the difficulty or lack of difficulty of the work done by the solicitor. Nor is it relevant whether the work done by the solicitor's firm is done manually or by a computer. It is quite possible to contemplate that technology may be developed (or may already exist) for resolving disputes without human intervention. A solicitor's firm which uses such technology to make and settle claims on behalf of clients would be no less entitled to the protection of an equitable lien than a firm in which all the steps are performed by human agents. What matters is whether the purposes for which the services are provided are the resolution of an (existing or reasonably anticipated) dispute.

F. CONCLUSION

75. For these reasons, we conclude that the work done by Bott when compensation is paid by Ryanair without dispute in response to a letter of claim is not covered by the solicitor's equitable lien. We would therefore dismiss the appeal.

76. In the light of our conclusion, it is unnecessary to consider whether, if the requirements for a lien had all been met, the imposition of the lien would be a matter of right or whether (as Ryanair argues) it is a discretionary remedy. The question is doubly irrelevant as, even if there is in theory a discretion, we can see nothing in the facts of the present case which would have justified the court in declining to exercise it. It is also unnecessary to address a contention made by Ryanair that, in charging its clients the amount at which its fees are capped, Bott regularly charges more than the amount to which its contractually entitled. According to Bott's evidence, its charges are justified because the fees on an hourly basis for the work done in even the simplest case exceed the cap. Although Ryanair disputes this evidence, the judge made no finding on the question and this Court is in no position to resolve it.

LORD BURROWS:

1. Introduction

77. I am most grateful to Lord Leggatt and Lady Rose for setting out the facts and the decisions of the lower courts and the legal background with such clarity in paras 5-63 of their joint judgment. I will not repeat any of that. However, with respect, I disagree with Lord Leggatt and Lady Rose that one can convincingly distinguish the

Supreme Court's decision in *Gavin Edmondson Solicitors v Haven Insurance Co Ltd* ("*Gavin Edmondson*") [2018] UKSC 21; [2018] 1 WLR 2052 from the facts of this case. In my view, *Gavin Edmondson* is best interpreted as supporting a clear, principled and easy-to-apply test that does not turn on whether there was a dispute. In my view, Bott & Co Solicitors Ltd ("Bott") is entitled to an equitable lien on the facts of this case and, in agreement with Lord Briggs and Lady Arden, I would therefore allow the appeal.

2. The solicitor's litigation equitable lien and the modernisation achieved by *Gavin Edmondson*

78. I do not think it is possible to rationalise, so as to produce coherence, all the situations in which non-contractual liens are imposed by law (whether at common law or in equity or by statute). Equitable liens have been described as "something of a themeless rag-bag" (by Donovan Waters, "Where is Equity Going? Remedying Unconscionable Conduct" (1988) 18 University of Western Australia Law Review 3, at 24: see also John Phillips, "Equitable Liens - A Search for Unifying Principle" in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (1993) 635, at 637, reprinted in 2nd ed (1998) 975, at 977). But it is clear from long-established authority that a solicitor is entitled to an equitable lien over the fruits of litigation in order to give the solicitor security for the recovery of the costs (ie the fees) legally owed to the solicitor by his or her client. This is the solicitor's litigation equitable lien.

79. In *Meguerditchian v Lightbound* [1917] 2 KB 298, it was held by the Court of Appeal that the trigger for the solicitor's equitable lien was the issuing of proceedings. Even if a solicitor carried out extensive work in achieving a settlement, if proceedings had not been issued, the solicitor was not entitled to a lien over the settlement fund. As Rowlatt J said in that case at first instance, [1917] 1 KB 297, at 303, there could be no equitable lien "upon the fruits of a mere negotiation conducted by a solicitor".

80. In *Gavin Edmondson* the Supreme Court examined the role of the solicitor's equitable lien in the context of modern litigation, in particular in a climate where access to justice is a central underlying goal and out of court settlements and alternative dispute resolution are encouraged. On the facts of the case, the solicitor had entered the relevant claim on an online portal in line with the pre-action protocol for low value personal injury claims. The Supreme Court decided that the solicitor was entitled to an equitable lien over the settlement fund because the work had made a significant contribution to the settlement of the client's personal injury claim.

81. Three points about the decision in *Gavin Edmondson* are particularly significant. First, no proceedings had been issued (ie no action had been commenced). Although *Meguerditchian v Lightbound* was not expressly mentioned in the reasoning of the Supreme Court, it is clear that the triggering requirement laid down in that case (the issuing of proceedings) was being rejected. To that extent, *Meguerditchian v Lightbound* was implicitly overruled (although the actual decision in that case remains correct for the further reason relied on by Rowlatt J, upheld by the Court of Appeal, as set out in the minority's judgment above at para 29).

82. Secondly, in *Gavin Edmondson* there was no "dispute" in any realistic sense of the word. The insurer had given no indication that it would be denying liability or that it was not willing to agree quantum. For example, in the case of Mr Tonkin, quantum was agreed a few days after a phone call with Mr Tonkin and that phone call was a few days after his claim had been entered by the solicitors on the online portal.

83. Thirdly, although the Supreme Court in *Gavin Edmondson* insisted on the solicitor making a significant contribution to the obtaining of the settlement fund that was treated as a low threshold. In Mr Tonkin's case, the solicitors had done little more than entering his claim on the online portal.

84. It has not been suggested by Brian Kennelly QC, counsel for Ryanair, that we should depart from the decision in *Gavin Edmondson*. In any event, I would not have wanted to do so because, in my view, it recognises in an important way the realities of modern litigation and dispute resolution. In other words, it updates the role of the solicitor's equitable lien in recognition of the modern approach to litigation and dispute resolution (using the latter as a term of art that can include instances where there is no real dispute as in *Gavin Edmondson*).

3. Applying Gavin Edmondson

85. It follows that we are required in this case to apply *Gavin Edmondson*. The fact that *Gavin Edmondson* means that, in a wider range of situations than before, a solicitor is entitled to an equitable lien when others doing similar work are not so entitled is largely irrelevant. Similarly, it is largely irrelevant that solicitors doing transactional work, and not work that can be classed as "litigation or dispute resolution" work, are not entitled to an equitable lien. They are largely irrelevant factors because the historical position we are required to apply takes the fact that solicitors are entitled to an equitable lien in respect of litigation work as a starting point even if others doing the same or very similar work have no such lien. It would not

be appropriate in this case - and neither counsel is suggesting that it is - to try to rationalise why solicitors in relation to litigation work may be regarded as enjoying a favoured position over others doing similar work or over solicitors doing different work that also results in a fund over which a lien could be enforced.

86. Can one properly distinguish the facts of this case from those in *Gavin Edmondson*? I do not think one can. Assuming that the solicitor is acting for a potential claimant rather than a potential defendant, the best interpretation of *Gavin Edmondson* is that, for there to be an equitable lien, the solicitor must provide services (within the scope of the retainer with its client) in relation to the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client. The equitable lien secures, by a charge over that fund, the solicitor's costs. The making of a claim by a client, with or without legal proceedings, is the essence of the services provided by "litigation and dispute resolution" solicitors (acting for claimants). In this case, the solicitors have provided such services in relation to the making of claims for compensation for flight cancellations and delays payable under Regulation (EC) No 261/2004 ("Regulation 261"). Provided their services have significantly contributed to the successful recovery of compensation, they are, in my view, entitled to an equitable lien over that compensation. Although I have had some doubts whether, on these facts, one can say that their contribution has been sufficiently significant (and I return to consider this point further at para 97 below), I am ultimately satisfied that that requirement is met not least because, as I have said, the threshold is a low one as shown by *Gavin Edmondson* in relation to Mr Tonkin.

87. In *Gavin Edmondson*, Lord Briggs said, at para 1, that the motivation for recognising a solicitor's equitable lien was promoting access to justice. He went on:

> "Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit."

The interpretation of *Gavin Edmondson* that I am adopting can readily be seen to promote access to justice in the sense being talked about by Lord Briggs. The vindication of a client's 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. Moreover, on the particular facts of this case, there is a reasonable argument that access to justice has been promoted in the sense that the solicitors have been acting in a way that has enhanced the general prospects of consumers obtaining the flight compensation to which they are entitled from Ryanair (albeit by paying the solicitors' costs as agreed).

88. Therefore, assuming that the solicitor is acting for a potential claimant rather than a potential defendant, the appropriate test for a solicitor's equitable lien is whether a solicitor provides services (within the scope of the retainer with its client) in relation to the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client. That seems to me to be the best interpretation of what *Gavin Edmondson* laid down. It is a clear and simple test to apply. Solicitors (and potential defendants) will know exactly where they stand. Although, given the context, further elaboration of the test seems unnecessary, one might add, lest there be any doubt, that by "claim" one is referring to a claim asserting a legal entitlement or, as one can also describe it, a legal claim.

4. The approach of the minority

89. Lord Leggatt and Lady Rose have gone a long way towards the same conclusion as I am putting forward. But they stop short by proposing a test that turns on extending the question as to whether there is an actual dispute to ask whether there is a real likelihood that the potential defendant will not provide the remedy claimed (para 65) or that there is a reasonably anticipated dispute (paras 65 and 74) or that there is a real prospect of a dispute (para 73). And they argue that, while that test correctly covered the equitable lien recognised on the facts of *Gavin Edmondson*, it does not apply to afford Bott an equitable lien on the facts of this case. As I understand it, this is primarily because, normally, there is a real prospect of a dispute in relation to personal injury claims but, normally, no real prospect of a dispute about flight cancellation and delay claims. And this in turn is because there is always likely to be some negotiation required in relation to the quantum of personal injury claims whereas the quantum in flight cancellation and delay claims is fixed.

90. One can immediately see that that approach would appear to produce the odd result that the entitlement to an equitable lien under *Gavin Edmondson* would become inapplicable if one were dealing with fixed sums for personal injury. More fundamentally, and with great respect, it places a solicitor in a very difficult position. The solicitor needs to know in advance of providing particular services (or developing a business model) whether or not it will be entitled to an equitable lien if there is a successful outcome. The solicitor cannot know whether claims will or will not be disputed by the other side. It may be, for example, that Ryanair (or any other airline) will suddenly take a decision to resist all flight cancellation and delay claims unless they have been pursued beyond a first pre-action letter. In other words, the airline may decide to dispute all claims. Again, how is a solicitor to know in advance whether an airline is going to raise the defence of "exceptional circumstances"? A solicitor's equitable lien should not turn on a test that imports considerable practical uncertainty

by requiring a solicitor to speculate as to whether it is unlikely that there will be any dispute about the relevant claim.

91. With great respect, there seem to me to be further difficulties with such a test and whether it can really distinguish *Gavin Edmondson* from the facts of this case. One might say, for example, that it would be reasonable to expect a dispute whenever one is claiming compensation from another party. People do not like paying out money and, however justified in law, it is reasonable to anticipate that the compensation may be disputed. Yet clearly that is not how the minority see its test as applying. Moreover, it would seem reasonable for a consumer to take the view that, without the assistance of a solicitor, there may be a dispute over compensation claimed from a powerful airline even if there is a relatively straightforward procedure set out on the airline's website (as has been the case in respect of Ryanair since March 2014). More generally, the very reason a person may engage a solicitor to make a claim (including what may appear to be a routine claim) is to avoid a dispute arising. That is, having a solicitor involved in putting forward one's claim indicates to the other side that the claimant is serious in pursuing the claim.

92. One can further see the difficulty of applying the minority's test by thinking about how matters have developed as between Bott and Ryanair. Bott first started providing services in respect of flight compensation claims in February 2013. Applying the minority's test, did Bott have an equitable lien in relation to its services provided between that date and early 2016 when Ryanair started to deal directly with Bott's clients? One might think that, at the start, Ryanair would be likely to dispute the claims. If so, applying the minority's test, there would have been an equitable lien and Bott would have developed its business model on that basis. Can it then be satisfactory that, perhaps partly because of pressure from Bott's success, Ryanair has set up a website whereby customers can straightforwardly claim directly from Ryanair which, so the argument goes, would mean that there should be no equitable lien on the basis that from that date Bott and/or consumers should anticipate that Ryanair will not dispute claims? In my view, Bott's entitlement to an equitable lien should not turn on speculation as to Ryanair's likely approach to claims not least because that approach can change over time.

93. Despite the criticisms made by the minority, I do not regard there as being any practical difficulty in applying the test I have set out at para 88. So, for example, on the facts of this case the test is straightforward to apply. Bott has provided services to its clients in relation to the making of claims for compensation for flight cancellation and delay provided for by Regulation 261, which have significantly contributed to the recovery of compensation. Bott is therefore entitled to a lien over that compensation for its costs.

94. I should add, with respect, that, contrary to what is indicated by the minority at para 67, the test I am adopting is narrower - because, crucially, it requires that the solicitor's services must be provided in relation to the making of a client's claim - than the summary of the test proposed by Nicholas Bacon QC, counsel for Bott, as set out in the minority's judgment at para 43. I also disagree that the test I am adopting extends the solicitor's litigation lien into "transactional work" because, as I understand the term, transactional work does not involve services provided by the solicitor, within the scope of the retainer with its client, in relation to the making of a client's claim.

95. It is also worth stressing that, at least in the context of claims for liquidated sums, if it is clear that the person against whom the claim is made had already decided to comply with the legal obligation to pay the sum owed to the claimant before learning of the solicitor's intervention, the contribution of a solicitor to the recovery of the fund is unlikely to be regarded as significant. In that situation, the solicitor's services can hardly be said to be enhancing access to justice. The claimant's legal rights would have been vindicated in any event. But on the facts of this case, there is no question of Ryanair having decided to pay out without any claims being made although there is a related question as to the effect of Ryanair providing its own online claims procedure which I examine at paras 97-98 below.

96. It is true that the test I have adopted rests on the assumption that, as in this case and *Gavin Edmondson*, the solicitors are concerned with the making of a claim (or, one can add, a counterclaim) rather than the putting forward of a defence. We heard no submissions on the circumstances in which solicitors representing defendants are entitled to an equitable lien over a relevant fund and I therefore prefer to say nothing about that situation. However, it is very important to stress that this judgment, and the test put forward, is in no sense intended to cut back on the traditional ambit of the equitable lien where proceedings have been issued (whether in court or in arbitration).

5. The outer reaches of the solicitor's equitable lien

97. I accept that the facts of this case are at the outer limits of a solicitor's equitable lien. In that sense, my approach and the approach of the minority are close to each other but draw the boundary line in a marginally different place. But I should clarify that the hesitancy I have expressed in para 86 above as to whether Bott was here making a sufficiently significant contribution to the successful outcome is not so much because the services provided by Bott did not involve any factual or legal complexity (it is clear that they did not) but rather because, after March 2014, Ryanair provided a relatively straightforward procedure on its website by which customers could claim compensation directly from Ryanair without involving a solicitor at all. One might

therefore say that Bott has been providing no added value to what a reasonably competent customer of Ryanair can sort out for himself or herself without incurring any legal costs. However, if one looks at this question in the context of Bott's services generally in relation to flight compensation claims it can fairly be said that Bott has made a significant contribution to the recovery of compensation by its clients. And as I have already stressed, the threshold here is a low one. Indeed, Mr Kennelly did not seriously challenge the proposition that Bott had here made a significant contribution to the recovery of compensation. Instead, the main focus of his submissions was on, for example, whether there was a dispute and whether the services provided were litigation or dispute resolution services.

98. There is a further linked concern as to whether it is acceptable for solicitors to charge fees in a context where a person could very easily make a claim and recover compensation without incurring any legal fees. Clearly it is important that people are not misled by solicitors and, in certain situations, it may be strongly argued that any reputable solicitor would first advise a prospective client that he or she should utilise an online claims procedure without incurring any legal costs. In so far as it is thought that a system of online compensation is being abused by solicitors to charge unnecessary fees, this would be a matter for the Solicitors' Regulation Authority to investigate. In relation to an equitable lien, there is a well-established equitable doctrine that could be invoked to prevent any abuse, namely that the solicitor asserting the lien would need "to come to equity with clean hands" (see, generally, Graham Virgo, *The Principles of Equity and Trusts*, 4th ed (2020), p 32). But although Mr Kennelly put forward, as a fall-back submission, that, in the exercise of the court's general equitable discretion, the equitable lien for Bott should be refused, it has not been suggested before us or in the courts below that the conduct of Bott was such that it was barred by the "clean hands" doctrine from asserting an equitable lien. In any event, we do not have the factual basis on which we could now consider applying such a bar and I do not think it would be appropriate to remit the proceedings back on an issue that was not specifically argued.

6. Three final points

99. There are three final points. First, although Ryanair has challenged the amount of the fees (ie the success fees) which Bott is claiming as costs under Bott's conditional fee agreements with its clients (and I agree with the minority at para 76 that we are not in a position to deal with this issue), Ryanair has not suggested that the conditional fee agreements fall outside the definition of conditional fee agreements in sections 58 and 58A of the Courts and Legal Services Act 1990. Yet those definitions require that a conditional fee agreement is with a person "providing advocacy or litigation services";

and a conditional fee agreement which provides for a success fee must relate to "proceedings"; and by section 58A(4), "'proceedings' includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated." The fact that there has been no challenge to there here being a conditional fee agreement within sections 58 and 58A tends to support the view that the solicitor's services were here within the scope of litigation (or dispute resolution) services.

100. Secondly, an equitable lien only goes so far as to give the solicitor security for the costs to which it is contractually entitled. Although there is a wide-ranging debate as to how far the law should ever provide proprietary security, where it has not been contractually agreed (see, for example, in the context of unjust enrichment, *Goff and Jones: The Law of Unjust Enrichment*, 9th ed (2016), paras 37-07 to 37-26), there is no question of the equitable lien resulting in the solicitor obtaining more than the amount to which the solicitor is contractually entitled. What the law is doing is making it more certain that the solicitor will be paid the costs to which it is contractually entitled; and this in turn enhances the willingness of solicitors to extend credit to clients.

101. Thirdly, in accordance with the standard principles applicable to the equitable lien, Ryanair was here bound by the equitable lien because it had notice of it. Once it had notice of the lien, it was taking the risk of double liability if it chose to pay the client direct.

7. Conclusion

102. For these reasons, I would allow Bott's appeal. It can be seen that both Lord Briggs and Lady Arden agree with the test I have adopted at para 88; and my own reasoning and that of Lord Briggs are closely aligned.

LADY ARDEN:

103. Are the reasonable fees of Bott & Co, for acting for claimants who file claims for compensation from Ryanair for flight cancellation or delay, outside the equitable lien of solicitors if paid direct to the client? The equitable lien constitutes an equitable charge and it has been held to arise where there is a compromise made directly with the solicitor's client in pending litigation (see, for example, *Swain v Senate* (1806) 2 Bos & P (NR) 99; 127 ER 561), or in an arbitration (*In re Meter Cabs Ltd* [1911] 2 Ch 557), or

under the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents RTA Protocol ("the RTA Protocol") (*Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] 1 WLR 2052).

104. The solicitor's equitable lien has been developed over time to meet new circumstances. It is at least 200 years old. It began as a principle to enable the court to intervene if a solicitor obtained a judgment for his client, and that led to a recovery for the client. It was extended to a case where the parties decided to refer their dispute to arbitration and most recently where the claimant uses a protocol or scheme for presenting a claim that enables him or her to receive a settlement offer without having to issue court proceedings. The equitable lien is therefore a dynamic legal concept, not one which is hard-edged, circumscribed by immutable rules and incapable of further development. Courts have developed the law to meet changing times and on the basis that they were satisfied that it was appropriate to do so. Parliamentary approval to the equitable lien can be seen in the creation of the parallel scheme for charging orders described by Lord Leggatt and Lady Rose at para 23 above. But that is a parallel stream of development limited to litigation that does not affect the equitable lien. But, although the concept is capable of development, in my judgment it should be developed only if there is a coherent principle which justifies that development.

105. The recent decision of this court in *Gavin Edmondson* established at least two points.

106. Firstly, and most obviously, it established that an equitable lien can arise where no litigation has yet been commenced and indeed may never be commenced. In this regard the decision impliedly overruled the first holding in *Meguerditchian v Lightbound* [1917] 2 KB 298 (referred to by Lord Leggatt and Lady Rose at paras 28-31 above) which is said to lay down a "mere negotiation" rule: I consider this further at para 112 below.

107. Secondly, and importantly from the point of view of my emphasis on coherent principle, it establishes a clear link between the lien and access to justice. This point appears in para 1 of the judgment of Lord Briggs:

> "It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice."

108. Lord Briggs developed this point with the assistance of authority at paras 33 and 34 of his judgment:

> "33. Two early cases demonstrate that access to justice lay behind the development of the principle. The first is *Ex p Bryant* (1815) 1 Madd 49. Plumer V-C said, at p 52:
>
> > '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.'
>
> The Vice Chancellor also said, obiter, that knowledge of the solicitor's lien on the part of the payer would be as effective as notice. To the same effect is *Gould v Davis* (1831) 1 Cr & J 415.
>
> 34. The second case is *In re Moss* (1866) LR 2 Eq 345, although it was about a legal rather than equitable lien. Lord Romilly MR said, at p 347:
>
> > '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 papers and deeds, that a client who is not able to advance money to enable them to carry on business would be deprived of justice, through inability to prosecute his claims in the suit …'"

109. So, the purposes of the solicitor's equitable lien always included helping to ensure that people who have claims, whether to recover property, payment of a sum of money or damages, can pursue their claims even if they have limited means, which makes it difficult for them to retain a solicitor. This is because the solicitor will have the assurance that if the claim is pursued on his advice and judgment is obtained, he or she will have the benefit of the equitable lien, and this will make the solicitor more willing to act for people of limited means.

110. As I see it, because of *Gavin Edmondson*, effective access to justice has become a foremost animating principle of the equitable lien. Access to justice here is about a claimant having an effective means of having his claim determined and enforced. It is about facilitating the making of claims in any manner recognised by law. That is usually a court, but it may also be an arbitration or under a pre-action protocol. The aim of access to justice is that a person with a claim should be able to recover the amount of that claim in any manner recognised by law if the claim is a good one in law. The claimant is not bound to submit to an independent tribunal. He may be able to get proper redress without issuing proceedings or engaging in some other form of adjudication. In my judgment, freed of authority, there is no logical reason why his solicitor should be entitled to rely on the fruits of his labour as security for his fees in pursuing a claim for his client if court proceedings or arbitration or some process under a pre-action protocol has been initiated but not if the settlement has been obtained without doing that. If such a distinction exists it may act as an incentive to issue proceedings or arbitration when some equally effective but less expensive course is open to the client.

111. Beyond that, it is also appropriate to recall that effective access to justice is not a unidimensional subject. It includes the wherewithal for effective adjudication in a court of law, for instance the provision of sufficient resources for the court system, so that the courts are available as and when people who need them can get access to them. By parity of reasoning, there must be sanctions for steps taken by parties to prevent the solicitor from receiving his costs out of the fruits of the action (as in *Welsh v Hole* (1779) 1 Doug KB 238). Those steps would, if not sanctioned, diminish the reliance that the solicitor would be prepared to place on the equitable lien. The equitable lien of a solicitor is a recognition of the importance of the services of a solicitor in pursuing a claim and thus securing their fees is also apt to achieve access to justice. But the key issue here is the availability of the solicitor's equitable lien and the role it must play in the provision of effective access to justice.

What does the mere negotiation rule mean in relation to the solicitor's equitable lien?

112. In *Meguerdtichian*, the critical factor was not simply the fact that the costs were incurred without the commencement of litigation (which is the point emphasised by Lord Leggatt and Lady Rose) but that they were considered by two members of the Court of Appeal (Bankes LJ and Bray J) to be costs purely incurred in negotiations. The third member of the Court of Appeal did not decide the case on the basis of the mere negotiation rule.

113. The first ruling dealing with “mere negotiation” has to be seen against the somewhat unusual facts of the case, which involved the same firm of solicitors acting for a client and later for the syndics in his bankruptcy. The facts were exceptional. As Bankes LJ explains, what mattered was that the solicitors conducted negotiations to see if they could obtain a compromise of a dispute about the right to possession of certain title documents and that the solicitors were free to decide whether there should be proceedings. For Bankes LJ a crucial point was that, at the time they took place, the negotiations might not lead to litigation (“the mere negotiation rule”): see para 31 above.

114. Accordingly, even if the first holding had not been overruled in *Gavin Edmondson*, the negotiations in *Meguerditchian* may have been distinguishable from the negotiations in *Gavin Edmondson* and this case in any event. Moreover, the observations about the need for proceedings must be read in the context of negotiations which appear not to have progressed to the stage of a threat of litigation until a very late stage. The position might have been different if there had been held to be an explicit or implicit threat of proceedings at the time of the negotiations.

115. Swinfen Eady LJ (with whom Bray J also agreed) did not decide the matter on the basis that at the relevant time there were simply negotiations. He decided the matter solely on the basis of the second ground of decision in that case, which was that the documents that the solicitors later recovered were obtained by the solicitors’ labour on behalf of another client, namely the syndics in bankruptcy of the original client who gave fresh instructions to the solicitors and did not take over any proceedings started by the original client before his bankruptcy. The appellants’ argument that there had been an adoption of earlier work was rejected.

116. So far as I can discover, *Meguerditchian* has never been cited in any reported judgment since it was decided, other than this case. Therefore, it could not be said that before *Gavin Edmondson* was decided, *Meguerditchian* represented some hallowed well-defined rule of law about the equitable lien of solicitors. As a consequence, the mere negotiation rule has never been definitively clarified or refined in the process of later case law. So that particular boundary of the solicitor’s equitable lien which existed before *Gavin Edmondson* was not necessarily settled. Accordingly, the mere negotiation rule is neither a rule which has been there since time immemorial nor one considered by the courts to constitute a long-standing and fundamental feature of the solicitor’s lien nor a rule with hard-edged characteristics. It cannot therefore provide much guidance in the development of the law.

Trigger for the equitable lien to be capable of enforcement by the court

117. Lord Leggatt and Lady Rose in their eloquent judgment, for which I am most grateful, answer this issue by holding that the existence of a dispute or anticipated dispute with a defendant is a necessary pre-condition to the equitable lien arising (paras 64 to 66). But that would exclude cases where the client has a claim but does not yet know whether it will be disputed. To find that out is likely to involve cost since the client will almost certainly have to explain the nub in legal and factual terms of the claims sought to be put forward. If the client's claim is not agreed, and proceedings must be issued, that explanation might well go on to be the kernel of the pleaded claim.

118. I agree with Lord Burrows' criticisms of the "dispute" threshold (paras 91 to 96 of his judgment). The minority's test of "dispute or anticipated dispute" also leaves it unclear who must anticipate the dispute and on what basis. If it is the anticipation of the claimant, is it to be tested, as one would have thought it must, by reference to the information that he has? One would have thought that that was necessary for the test to be fair, but the difficulty is that that may involve the disclosure of legally privileged information which the claimant cannot be expected to disclose. If the test is wholly objective, it would seem to be irrelevant whether the claimant himself anticipated the dispute, which again seems wrong in principle.

119. In my judgment, that situation self-evidently falls within the animating principle which I have identified above. Processes for the resolution of complaints and claims by customers are nowadays not unknown and, in my judgment, recognition of the relationship between such processes and effective access to justice reflects our expanding understanding of what is needed to promote and obtain effective access to justice. The extension of the solicitor's equitable lien to cover costs incurred as part of such processes constitutes, therefore, an area in which, in my judgment, judge-made law may properly be developed in accordance with the principles already detailed above.

120. Accordingly, it seems to me that the equitable lien can and should be held to arise where there is no dispute as such, but the client has a claim which has not been admitted and which must be formulated and communicated to the service provider or other prospective defendant in order to elicit whether there is a dispute. In my judgment this is a principled and coherent test for the reasons that I have already given. It is not, as I see it, inconsistent with the historical roots or rationale of the principle. Nor is it to be characterised as an illegitimate extension of the law (paras 45 and 67 above). The majority provides an explanation of where the boundary lies.

121. Insofar as the reasoning of Lord Dyson MR in *Gaynor v Central West London Buses* [2007] 1 WLR 1045, paras 16 to 18 leads to a contrary conclusion, I would hold that his conclusion is distinguishable because it was made in the different context of specific statutory provisions.

122. Since drafting my judgment, I have had the privilege of reading the draft judgments of Lord Briggs and Lord Burrows, and my approach accords with the approach of Lord Burrows, with which Lord Briggs agrees. Where the client is a potential claimant, it is a claim-based approach: was the solicitor asserting a legally enforceable claim on behalf of the client and was his work instrumental in obtaining the compromise or transfer of property or collateral benefit from the dispute which the client has obtained? This read with para 125 below precisely matches in relation to the recovery of a fund the test put forward by Lord Burrows in para 88 of his judgment.

Importance today of out of court settlement of disputes

123. Times have moved on since cases such as *Welsh v Hole* (see para 111 above) were decided. There is today an enormous pressure on court resources, human and physical. Accordingly, the courts in certain circumstances encourage parties to seek to resolve their disputes in other ways, if that is appropriate, before pursuing court proceedings. So, for example, in a dispute about financial services, the client may be encouraged to use some mediation service, or process involving an ombudsperson, before bringing any court proceedings.

124. A reference to arbitration has long been recognised as in the public interest. It follows that other forms of dispute resolution out of court which have been developed since should be regarded in the same way. Lord Kenyon CJ recognised that there was a public interest in arbitration when he held in *Ormerod v Tate* (1801) 1 East 464; 102 ER 179 that the solicitor's equitable lien was available where, after proceedings had been commenced, the parties agreed to go to arbitration. He added (immediately after the passage cited by Lord Leggatt and Lady Rose at para 21 of their judgment):

> "The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference." (p 465)

The relevant area of law may be sufficiently clear to a person who is legally trained, but in reality a layperson may well be unfamiliar with it, or unwilling to act without some

advice. Compensation for delayed or cancelled flights may not be straightforward in every case (see for example *Gahan v Emirates* [2018] 1 WLR 2287) but I accept that it will be relatively so in many cases.

Recovery must be through the instrumentality of the solicitor

125. Clearly, for the equitable lien to arise, the sum recovered must have been obtained through the instrumentality of the solicitor's services. It has been held to extend to collateral benefits obtained on losing the litigation (*Hyde v White* [1933] P 105). But it is not necessary to discuss the meaning of instrumentality further on this appeal.

Transactional work can be distinguished

126. The animating principle of effective access to justice does not extend to the transactional services provided by a solicitor. These are not in general centred on the resolution of any dispute or potential dispute. Moreover, in relation to transactional services a solicitor may as against his client have a general lien over documents of title and so on. If the animating principle is applied, I do not consider that there will be difficulty in the usual case in drawing a distinction between a solicitor's services which may give rise to an equitable lien and those which do not.

The court's discretion to intervene to protect the solicitor's lien

127. The court will not of course automatically interfere if the paying party decides to pay the amount of the claim to the client and not to his solicitors. The court has a limited discretion not to come to the aid of the solicitors. It is a judicial discretion which must be exercised in accordance with settled principles.

128. As Lord Briggs explained in *Gavin Edmondson* at para 37, "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." There are many illustrations of this in the authorities, including the decision of the Court of Appeal in *The Hope* (1883) 8 PD 144, in which, it should be noted, the only ground of appeal was collusion. Notice was not raised.

129. Like other members of the Court, I would express no view on the questions whether the lien should also protect the work of other advisers apart from solicitors or whether the amounts claimed in the present case were in fact reasonable.

Equitable lien is substantially equivalent to a charging order in litigation

130. The equitable lien comes into being when the fruits of the judgment are identified and so in a case like this the right comes into being when the client becomes entitled to a sum of money or other benefit because of the solicitor's labour. Clearly if the costs have not been finally determined, the court's order will protect him for the amount reasonably claimed until final determination takes place. The court will protect the equitable lien by making an appropriate order, for example, where the fund remains in existence, for the payment of an appropriate sum to him.

131. If the fund no longer exists, what the solicitor has is a personal remedy against the wrongdoers, but the personal remedy will compensate him for what occurred when he did not receive payment out of the fruits of pursuing the claim, and the award in his favour will therefore be calculated by reference to what would otherwise have been the solicitor's proprietary interest in those fruits. As I see it, the basis of decision in this case and *Gavin Edmondson* is the personal remedy which flows from wrongful interference with the property right arising from the equitable lien, and the amount claimed here represents not the full amount of the fruits of the solicitor's labour but the amount of his proper costs. Even so, the personal remedy constitutes a clear discouragement to the paying party paying the solicitor's client direct.

132. Section 73(1)(a) of the Solicitors Act 1974 (set out at para 23 above) enables the court to declare (not confer) that the solicitor has a charge over the fruits of litigation obtained by his instrumentality for his costs in that litigation. Section 73(1)(b) then gives the court power to make an order for sale. With the intervention of the court, the equitable lien performs a parallel role to a charging order in relation to the fruits of the solicitor's labour even if there is no litigation.

Conclusion on this appeal

133. For these reasons I would allow this appeal. The question is: to which of the costs incurred by the client with his solicitor does the solicitor's equitable lien apply? My answer is the claim-based test as defined above. The mere negotiation rule has

gone and has not been replaced. It is now a matter of demonstrating that the costs were properly incurred in pursuit of the claim. (I leave aside defences and counterclaims). Moreover, as demonstrated by the second holding in *Meguerditchian*, the costs must have been incurred on behalf of this claimant and not some other client, and, as explained in para 125 above, the sum recovered must have been obtained through the instrumentality of the solicitor's services. The fruits of the labour are to be realistically construed. In some circumstances they extend to a collateral benefit from the litigation and not the relief that was sought: see *Hyde v White*, above. Understood in that sense, I agree with Lord Burrows that the solicitors' services must have significantly contributed to the recovery of money or property (see para 88 of Lord Burrows' judgment). The paying party is protected by the rule that he will not have to pay twice if he did not have the requisite notice and did not collude with the client.

134. I agree with Lord Briggs that this test should be easier to apply than the test of whether a dispute has arisen.

135. As to challenging the amount of the solicitors' costs, there would be no difference whichever test applies. In either case it is possible that Ryanair could challenge the bills on an assessment under sections 69 and 70 of the Solicitors Act 1974, but strict time limits apply. If the court makes an order for the paying party to pay the solicitor/client costs not paid to the solicitor as required by the solicitors' lien, the court will doubtless have jurisdiction to determine what those costs were.

Ancillary matters

136. On the matter now before the Supreme Court I would exercise the discretion which the court has by virtue of the solicitor's equitable lien by ordering Ryanair to recoup to the appellant its proper charges which became due on or after 22 September 2016 from successful claimants for compensation from Ryanair (so far as such costs have not already paid). Those costs should to the knowledge of Ryanair have been paid to the appellant out of the payments of compensation made by it to the appellant's clients.

My approach to the trigger point seen with that of other members of the majority

137. So far as I can see, each member of the majority has reached the same conclusion, though their jurisprudential approaches contain some important differences. These do not affect the outcome: on the contrary they strengthen it. What follows is intended to instance some differences of general approach.

138. I would regard the study of the existing corpus of law as an important element in resolving the question that has to be decided in this kind of situation. My aim has been to present a fair distillation of what relevantly that case law can inform us. Moreover, as our task is to reset an existing principle, I see it as part of my task to consider the matter in its wider context, to ensure as far as possible that the principle, as reset, works fairly and strikes the right balance between those involved.

139. I am not suggesting that one approach is better than another. Each approach provides a cross-check for the others.

140. I do not myself consider that it would be a long-term solution to erect some other hurdle in place of the mere negotiation rule, and therefore I do not favour imposing a requirement that there should be a dispute or anticipated dispute. Like Lord Burrows and Lord Briggs, I think it would ultimately prove to be a difficult distinction to apply. Nor do I think that this is a requirement under the principle behind a solicitor's lien, when deconstructed. I have borne in mind the concern that solicitors should not be in a privileged position as regards other professionals providing legal services, but on the information available at this time I take the view that that is probably a matter for Parliament perhaps when reviewing the provisions of the Solicitors Act 1974 in relation to costs.

141. I agree with Lord Briggs and Lord Burrows that the work of the solicitors in this case, while inconvenient to Ryanair, is entrepreneurial and clearly results in solicitors providing a service which people find useful, and that it is now financed in part by the ability to use the solicitor's lien. If the service is not one people find beneficial, the business model will cease to be viable. Furthermore, it is an important aspect of the role of the solicitor these days in contentious matters that he works as much to keep his client out of court as to support him when he is in court. That is now reflected in the solicitor's lien. It is noteworthy that the response by Ryanair has been to make the collection of compensation for flight delay more convenient for the consumer. Where that is so, it is not for us to express any judgment on whether the industry of claims

advisers should in these circumstances be discouraged or encouraged, or whether laypeople should be required to do straightforward work for themselves.

142. I agree that the Court cannot deal with the question of the quantification of the costs of this case (see para 76 above).

143. As stated, I would allow this appeal.

LORD BRIGGS:

144. 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 issues raised and argued both in the Court of Appeal and in this court have revealed a serious uncertainty as to the boundaries of the type of work for which payment is secured by the lien with which the *Edmondson* case did not deal, at least expressly. The disagreement between us as to outcome of this appeal shows that, if it did so by implication, it was not one which simply jumped off the page.

145. It was taken for granted in the *Edmondson* case that the solicitors' equitable lien was a litigation lien, using "litigation" in the broad general sense of pursuing a legal claim, rather than in the specific sense of the conduct of proceedings in court. Thus the pursuit by solicitors of a claim for compensation for personal injuries by means of the RTA Portal was litigation, even though no court proceedings were issued. It was litigation because it was the pursuit of a claim for compensation for a tortious wrong, namely (in that case) damages for personal injury caused by negligence. The nature of civil litigation had changed so far by 2018 from that which had prevailed in 1917, when *Meguerditchian v Lightbound* [1917] 2 KB 298 was decided, that no submission was even made by the insurers (in whose interests it was to do so) that the absence of issued proceedings was fatal to the solicitors' claim. In 1917 the issue of a writ was typically the first step in litigation. By 2018 the issue of a claim form had become a last resort.

146. The main issues in the *Edmondson* case were whether the solicitors had (or needed to have) a contractual right to their fees, whether their activity made a sufficient contribution to the recovery of an eventually agreed sum by their clients from the defendants' insurers, and whether the insurers had notice of the lien, if there was one. All those questions were answered in the affirmative. They would equally be answered in the same way on the facts of the present case. But Bott's inventive scheme for the recovery of flight delay compensation at affordable cost to claimants has been held by both the courts below to fall outside the boundary of litigation, as that term is to be understood for the purpose of attracting the lien. Although the judge's ruling preceded the decision of this court in the *Edmondson* case, the decision of the Court of Appeal to dismiss Bott's appeal followed it (at least in time) and analysed it in depth.

147. Apart from agreeing with the parties that the equitable lien did not depend upon the issue of proceedings (or the commencement of an arbitration) and thereby implicitly overruling the first ground of reasoning in *Meguerditchian*, this court did not set out in the *Edmondson* case to make new law. The Court of Appeal had done so, seeking a modern solution to the problem caused by its perception that the solicitors had no contractual right to their fees. Having decided that the solicitors did have a contractual right to their fees, this court applied traditional principles in concluding that the equitable lien was available. In the light of the parties' agreement that the solicitors' activity in that case was litigation, sufficient to trigger the lien if the other traditional conditions were met, there was no need to draw a complete definitional boundary around the concept of litigation for that purpose. But if the simple act of putting a client's claim on the RTA Portal was sufficient to classify the solicitor's work as litigation, even if the claim was then promptly settled directly between insurer and client (as in Mr Tonkin's case), then the implicit boundary may readily be thought to have been assumed, rather than decided, to be a wide one.

148. Complete definitional boundaries around or between different legal concepts or (as here) types of professional activity are generally hard to achieve, and usually get wrecked upon the unanticipated facts of a later case which appears to straddle them. Furthermore equity (when it is working properly) operates by reference to principles rather than in accordance with strict rules. Even when the general conditions for the obtaining of equitable relief are satisfied, the court retains discretion as to the grant of relief. Nonetheless solicitors ought to be able to be reasonably sure, when deciding whether to act for a client on credit, what conditions will need to be satisfied in order for them to have recourse to the equitable lien, and so ought the contemplated defendants and their advisors.

149. The present case illustrates why that must be so. Bott devised and marketed a largely automated online scheme designed to enable clients to recover compensation at levels which, only a few years ago, would have been thought to be much too low to warrant engaging a solicitor, because of the inevitable disproportion between the amount of the claim and the reasonable cost of a solicitor's professional services in pursuing it, and all in a context of a small claim in relation to which there would be no recovery of costs by the successful party, save only in exceptional circumstances. The economic viability of the scheme, which generated on average only £95 fee income per claim in 2016, out of an average recovery of only €327, depended in part upon Bott being able to deduct its agreed fees from payments of compensation received from airlines on behalf of its clients, rather than having to pursue clients for payment after their receipt of compensation payments direct from airlines. By that I do not mean that Bott must have assumed in 2013 that it would enjoy an equitable lien over the client's entitlement to compensation while the money was still in the airlines' hands (*Meguerditchian* not by then having been overruled) but rather that, on receipt of a solicitor's letter demanding payment, the airlines would be likely to pay the compensation to the solicitor as requested, in the usual way. Bott then had a contractual right (under its standard form CFA retainer) to deduct its fees from the compensation, before paying the net amount to the client.

150. Save that Bott did not accept a retainer in cases which it estimated to have only a 50% or less chance of success, it made no other case-specific analysis of the question whether to act for a particular client. Undertaking such work was a decision made, at least in principle, when the scheme was set up in 2013, on the commercial expectation that the net profit thereby derived from its operation would justify the time and cost involved in designing and marketing it. The assumption by Bott that the full recovery of the fees charged (in successful cases) would not be affected by credit or other risks affecting the client was, as it turned out, vulnerable to a decision by one or more airlines to pay clients direct, but only if Bott enjoyed no equitable lien for its protection against an endeavour to do so, which was probably motivated (at least in part) by a desire on the part of Ryanair to undermine the economic viability of Bott's scheme, and thereby to exclude solicitors from becoming involved in flight delay cases at all.

151. This scheme was probably not the first, and is unlikely to be the last, attempt by solicitors to devise ways of providing their professional services to clients in the profitable pursuit of modest claims at proportionate cost, by undertaking a large number of claims of particular types based on narrow profit margins per case. In general terms access to justice is well served by such activities, where the perceived obstacles to small claim recovery are such as to deter people from vindicating their rights by other means. Since, as Lady Arden emphasises and *Edmondson* establishes, access to justice for persons of modest means is the animating principle underlying the solicitors' equitable lien, that objective will be served by as clear as possible a

definition of the work which constitutes “litigation” for the purpose of attracting the lien, in a form which enables those working out the economics of a proposed scheme to know in advance whether the lien will or will not be available.

152. Potential defendants need similar certainty. The equitable lien operates against a defendant who pays the claimant direct only if the defendant has notice of the lien, or colludes with the claimant to defeat the solicitors’ entitlement to their fees. In that context “notice” means notice of the facts which, as a matter of law, give rise to the lien. Those conditions reflect the underlying notion that it is only where the defendant has acted in some way unconscionably in paying the claimant direct that it incurs the liability to make an additional payment of the solicitors’ fees. There may be perfectly proper reasons why a defendant would prefer to pay the claimant direct. The inhibition from paying direct constituted by having notice of the solicitors’ equitable lien assumes knowledge of whether or not the relevant facts of which the defendant has notice do give rise to a lien. But if there is real uncertainty whether those facts do in law give rise to an equitable lien, then the notice condition may fail to serve its proper purpose.

153. Most people, lawyers especially, probably think they have a reasonably clear general idea about what constitutes litigation. In relation to solicitors, the work ordinarily done in a litigation department may superficially easily be distinguished from work done, for example, in a conveyancing department, or from other transactional or regulatory work. Many firms of solicitors and other commentators tend now to use the phrase “dispute resolution” in place of litigation, but with much the same intended meaning. There are also some statutory definitions of litigation, but they exist for specific purposes which have nothing to do with triggering the solicitors’ equitable lien. Similarly most people have reasonably clear views about the types of activity which promote access to justice, and the types of work that fall within the legal services ordinarily undertaken by solicitors. But this case has demonstrated that none of these familiar distinctions yields a definition of litigation sufficient to set metes and bounds to the scope of work for which payment is protected by the solicitors’ equitable lien. After lengthy written and oral submissions, and extended deliberation, the other members of this court remain equally divided about which side of this elusive line Bott’s scheme should be held to fall.

154. We are however all agreed about the main principles, most of which derive from *Edmondson.* First, as already noted, the animating principle behind this equitable lien is that it promotes access to justice for potential claimants with insufficient means to pay lawyers up front, by enabling solicitors to act for them in the pursuit of their claims on credit, with reasonable security for their fees, against recoveries. Secondly, the requirement that the recovery be made through the instrumentality of the

solicitors' work sets a low threshold. The work does not have to pass any test of skill or sophistication, nor need it be the sole or effective cause of the client's recovery. It is no objection that the carrying out of the "work" may be largely automated, with minimal human intervention. Thirdly, payment for transactional work is wholly excluded from protection. Fourthly, the lien provides security for the earliest stages of work done in the pursuit of the client's claim (such as the preparation and sending of a pre-action letter of claim, or the notification of the claim on a pre-action portal), and regardless whether the recovery eventually made is the result of court proceedings, arbitration, mediation, negotiation or any other method of dispute resolution. It is in principle sufficient if the intended defendant agrees to pay in full simply in response to the solicitors' pre-action letter of claim. Fifthly, none of the various statutory definitions of litigation or contentious business assist. Finally, the question whether the lien arises must in principle be able to be decided at the time when the solicitors agree to act for the client, provided of course that some recovery ensues, to which the lien can attach. All this sufficiently appears from paras 5-63 of the joint judgment of Lord Leggatt and Lady Rose, with the substance of which Lady Arden and Lord Burrows agree. I also agree, although Lord Leggatt and Lady Rose use the word "litigation" in a narrower sense than I do, as confined to proceedings in court, using the phrase "dispute resolution" to include litigation, arbitration and all other methods of ADR (alternative dispute resolution) including mediation and negotiation by which a claim may be pursued to the making of a recovery.

155. The issue which divides the court is whether it matters that there is an "actual or reasonably anticipated dispute" about the claim, at the time when the solicitors agree to act. For Lady Arden and Lord Burrows what matters is that the solicitors agree to act in furtherance of a claim. They point out that neither the client nor (a fortiori) the solicitors may know whether the claim will be disputed when the solicitors are asked to act. It may have to be researched and formulated in some detail before its presentation to the intended defendant will elicit whether it is disputed, either as to liability or quantum. By that time the solicitors may have expended considerable time, effort and even money (in the form of disbursements) on credit.

156. For Lord Leggatt and Lady Rose, the automatic conferral of the lien whenever solicitors are pursuing a claim fails adequately to reflect the animating principle, that it should serve access to justice. If all that a solicitor does is write a letter on behalf of a client asking for payment of a sum of money about which there can be no reasonable possibility of a dispute, or likelihood of refusal to pay once demanded, then that activity is unconnected with access to justice. The client could just as well obtain the same payment by writing themselves, and their lack of sufficient means to pay a solicitor up front is not, in such circumstances, an impediment to obtaining justice. They conclude that this is all that Bott were doing, in the overwhelming majority of cases falling within their scheme. Indeed, for the average fee recovery of £95 to be

capable of yielding an overall profit, or justifying the outlay of constructing the scheme, it is hard to think that any greater exertions by them in a typical case can have been regarded by Bott as likely to be necessary. They hold that in the absence of any contribution to the resolution of an actual or potential dispute (including refusal to pay) the solicitors should not be given the protection of security for their charges not available to anyone other than solicitors, because there is no contribution to access to justice to justify equitable intervention which, when it really matters, may require the intended defendant to pay the fees element of a settlement sum twice.

157. I have found this to be a difficult question to resolve and admit that I have changed my mind about it more than once. My difficulty has been slightly exacerbated by a lack of confidence that, having delivered the leading judgment in *Edmondson*, I can be sure to reach a coldly objective view of precisely what that case decided. There is however a sufficient consensus about what *Edmondson* decided to reduce that difficulty to a manageable level, not least because the court was simply not then asked to address the present question. We are all however agreed that, contrary to the analysis of the Court of Appeal, *Edmondson* was not just a cautious and limited step beyond the requirement that proceedings be issued, justified by the particular features of the dispute resolution scheme comprised within the RTA Portal and the rules of court regulating its use. It affirmed the availability of the lien in connection with all means by which solicitors may provide what may loosely be described as dispute resolution services.

158. The considerations which have been in the forefront of my analysis are the following. First, the disproportionate cost of having to engage solicitors (or other legal professionals) for the pursuit of small or moderate claims is, if anything, the biggest single impediment to access to civil justice in England and Wales, notwithstanding the sea change achieved by the introduction of the Woolf and then the Jackson reforms, now reflected in the Civil Procedure Rules and the growing use of fixed costs. It follows that any methods by which solicitors can assist in reducing that disproportionality, so as to make the pursuit of small and moderate claims a realistic choice for ordinary people, are in principle likely to serve the cause of access to justice.

159. In chapter 5 of my Interim Report in the Civil Courts Structure Review (published in December 2015) I described the inability of ordinary people to obtain legal assistance at proportionate cost in pursuing small to moderate claims as being the single, most pervasive and intractable weakness in our civil justice system. At para 5.24 I said:

> "Despite all the efforts made over the last fifteen years, the cost of legal representation in the civil courts, coupled with

> the risk of liability for a successful opponent's costs, still make the conduct through professional representation of small and medium-sized civil cases, other than for personal injuries on CFAs, disproportionately expensive and therefore unaffordable, measured against value at risk. Those who choose, or are forced, to litigate in person suffer crippling disadvantages by comparison with represented opponents which none of the present efforts to alleviate do more in reality than palliate. Many others simply choose not to litigate at all for the vindication of their civil rights."

And at para 5.40 I continued:

> "The likelihood, or risk, of incurring costs liabilities which are disproportionate to the VaR (*value at risk*) is not merely a barrier to access to justice for those who simply cannot afford to pay or risk the amounts at stake. It is also a barrier for potential litigants generally, since the outlay and risk of disproportionate sums for the purpose of recovering or preserving money or value in civil litigation is just not sensible or rational conduct. Thus the barrier to justice constituted by this weakness affects not only those who, being unable to afford legal representation, are nonetheless forced to litigate in person at grave disadvantage. It affects that large, silent class of persons with civil rights or disputes that deserve the attention of the courts who, even if they can afford to do so, rationally choose not to deplete or risk their resources in litigating at disproportionate cost and risk with an uncertain outcome. This leads both to civil rights not being vindicated by potential claimants, and to those with a good defence to a claim submitting to it rather than risk the disproportionate costs of contesting it. A recent survey by Citizens Advice suggests (subject to final checking) that 71% of its clients would think twice before even contemplating litigation, and that only 14% would feel confident enough to represent themselves."

This analysis was confirmed in my Final Report in 2016, and both reports were broadly endorsed by government and by the judiciary.

160. As already noted, Bott's scheme enabled people with flight delay claims for less than £500 to pursue them with the professional assistance of solicitors at a capped cost of (on average) about one third of the value of the claim, and no cost liability at all in the absence of a recovery. When launched in early 2013 neither Ryanair nor any other airline (so far as the evidence went) had set up its own online scheme for enabling passengers to seek recovery of flight delay compensation. Payment was not volunteered by airlines, which must have known which flights were relevantly delayed, and must have had the names and contact details of the passengers thereby entitled to compensation. The rapid success of Bott's scheme demonstrates that it served a hitherto unmet demand. Whether it spurred Ryanair or other airlines to launch their own online compensation schemes can only be guessed at, but does not appear unlikely.

161. Accordingly, viewed as at 2013, I consider that Bott's scheme did serve the cause of access to justice. It did so notwithstanding the unlikelihood of any issue as to quantum, the limited facts needing to be established and the limited defence of exceptional circumstances available to the airlines. Although, viewed objectively, it may have been very unlikely that a claim based on the existence of the relevant delay and the absence of reported exceptional weather conditions would be disputed by the airline, the scheme provided access to justice in the sense that it enabled passengers to seek compensation due to them by a simple route, at a price (in terms of Bott's charges) which it must be supposed that they regarded as acceptable, by comparison with the effort and uncertainties of pursuing their claim (if they even knew about it) direct with the airline. In short, the scheme dealt with impediments to access to justice, such as lack of knowledge of the relevant rights, of how to claim and lack of any subjective perception as to likely outcome, which were not dependent upon any objective assessment of the likelihood of a dispute.

162. Matters changed when, in March 2014, Ryanair introduced its own online process enabling passengers to make claims for delay and notified qualifying passengers of their right to compensation. The likelihood of a dispute did not change, but potential claimants had an alternative means of claiming compensation direct from the airline which, viewed objectively, appeared to address the impediments described above, and which did not appear to involve the passenger in any greater effort or complexity than in instructing Bott. It was also a cost-free way of obtaining compensation in full. But this did not stop passengers from continuing to use Bott's scheme. In fact the numbers of passengers using Bott's scheme or similar schemes launched by competitors actually increased. It is a matter of speculation why they did, but it must be assumed that, if passengers knew of the Ryanair process for obtaining compensation, they still regarded the prospect of obtaining two thirds of it through Bott's services as preferable to seeking compensation in full direct from Ryanair. It is not established that this was the result of any misrepresentation by Bott. While their

choice might appear misguided to an experienced lawyer, there is no basis for concluding that the decision of the many passengers who used Bott's services after April 2014 was irrational.

163. I have found it instructive first to examine the lien question as at 2013 when Bott's scheme was launched, even though the *casus belli* for the present litigation did not arise until Ryanair started paying Bott's clients direct in 2016, more than two years after Ryanair introduced its own online claims process. I consider, for the reasons already given, that the access to justice animating principle behind the equitable lien was well-satisfied as at that earlier date. In short, Bott's scheme opened an attractive avenue for delayed passengers to vindicate their rights to compensation which overcame the impediments (whatever they were) which had previously inclined them simply not to claim at all. Accordingly, at the time when Bott designed and launched its scheme, it would have been entitled to assume (on the necessary hypothesis that the law already was as later stated in *Edmondson*) that the recovery of its fees would be protected by an equitable lien, provided only that relevant airlines had notice of it, something which Bott was well able to, and later did, achieve in its correspondence with the airlines.

164. That being so, it is I think counter-intuitive and wrong to conclude that anything changed when, a year later, Ryanair introduced its own online process for enabling passengers to seek compensation, even if the contribution of Bott's scheme to the obtaining of access to justice for its Ryanair passenger clients may be said to have thereby been diminished. It is counter-intuitive for three reasons. First, Bott made no change of any kind in its scheme. Apart from notice, the conditions for the existence of the equitable lien turn on what is agreed between the solicitor and client, and upon what the solicitor then does for the client in terms of the pursuit of the client's claim. This is because a lien, including this equitable lien, is in principle an incident of the relationship between the parties, here the relationship of solicitor and client, implied or conferred by law. If Bott's scheme qualified for the protection of an equitable lien against all relevant airlines when launched, why should a later change of practice by one of them lead to the lien becoming unavailable? Secondly, it is by no means beyond the bounds of reasonable speculation that Ryanair's change in practice was spurred on (as already noted) by Bott's scheme. Thirdly, it seems at first sight strange that (leaving aside notice) an identical scheme might attract the lien when deployed against one airline, but not against another.

165. More importantly, the test proposed by Lord Leggatt and Lady Rose, that the lien should depend upon whether there was an actual or reasonably anticipated dispute at the time of the retainer, would be answered in exactly the same way, both before and after Ryanair's introduction of its own online process. There is no basis in

the evidence for any assumption that, before 2014, Ryanair would have refused to pay against a properly founded claim for compensation. The basis for any denial of liability, and for quantifying the claim, remained the same. This leads me towards the conclusion that, attractively framed though it is to embed access to justice within the conditions for the availability of the lien, the existence of an actual or anticipated dispute is not a test which will serve reliably as a general rule. It would in my view wrongly have excluded the lien in relation to a retainer accepted by Bott under its scheme before 2014, and it would not serve as the basis for any different conclusion thereafter.

166. My second main consideration lies in the need for reasonable certainty as to the existence of the lien. An equitable lien is a species of property right which does not depend upon the positive exercise of the court's case by case equitable discretion, even though the court may refuse, on discretionary grounds, to enforce it in particular cases: see *Edmondson* at paras 2 and 3. A fund either is, or is not, subject to an equitable lien. It operates by way of equitable charge over the relevant fund, requiring the holder of the fund with notice of the charge (here, Ryanair) to pay it to the solicitors, so that the solicitors can recover their fees before accounting to the client for the balance. The court's power to order the fund-holder to pay again is merely an *in personam* remedy against a fund-holder with notice who ignores the charge: see again *Edmondson* at para 4. The "fund" will typically be a debt at the time of its creation, owed by the defendant to the claimant as the result of a judgment, award or settlement agreement which concludes the litigation: see again *Edmondson* at para 37. It is therefore important for all potentially affected parties to be able to know, without having to make extensive enquiry or analysis, whether the conditions for its existence are established. While there is no serious uncertainty about a test which is based upon the question whether a solicitor is pursuing a client's claim for the recovery of money (including damages) or property, nor even a test which asks the question whether there is an actual dispute, the need for Lord Leggatt and Lady Rose to include a question whether at the time of the retainer there is a reasonably anticipated dispute introduces an unacceptable level of uncertainty.

167. It is, I think, common ground between us that to impose a requirement (for the existence of the lien) that there be an actual dispute at the time of the retainer is to confine the conditions for the lien too narrowly. There are many cases, and indeed some whole classes of case, where clients need to obtain the solicitor's assistance without having had any prior discussion of their potential claim with the potential defendant. They include types of case where the adverse consequences of even communicating a claim before taking detailed advice about its merits make prior discussion unlikely, or at least unwise. This may include cases where there is a risk that, if the claim is communicated, the defendants will take steps to make themselves judgment-proof unless restrained, or steps to destroy evidence. There are cases, such

as potential claims under the Inheritance (Provision for Family and Dependants) Act 1975, where the consequences in terms of family disharmony of the communication of a claim render it inadvisable in advance of clear advice that it has real merit. In all such cases, a requirement that there be an actual dispute at the time of the retainer would exclude claimants from access to justice by seeking legal assistance on credit, on the basis that the solicitors would enjoy a lien over recoveries as security for payment.

168. Lord Leggatt and Lady Rose therefore realistically accept that a reasonable anticipation that the claim may be disputed should be sufficient. But in many of those cases it may be impossible for the solicitor to make a reasonable appraisal, at the time of deciding whether to accept a retainer to act on credit, whether the claim once communicated will be disputed. Much may depend upon the way in which the claim is eventually presented by the solicitor, and the extent to which it is accompanied by probative detailed evidence, assembled by the solicitor after being retained. And the solicitor's appraisal of the likelihood of a dispute may depend upon privileged information from the client. If the solicitor later has to enforce the lien against a defendant who has paid the claimant direct, and for that purpose explain why a dispute was reasonably anticipated, there is no reason to suppose that the claimant client will assist by waiving privilege.

169. For similar reasons Lord Leggatt and Lady Rose sensibly accept that "dispute" must for this purpose have a wider meaning than just a disagreement about liability or quantum. Although "dispute resolution" has come to be almost a synonym for litigation, recourse to court for the obtaining of justice is about much more than the resolution of such disputes. At the time of the Civil Courts Structure Review, the largest group of civil claims by number issued (known as "bulk claims") were against consumers of goods and services (such as electricity and gas) where the defendant had merely failed or refused to pay, without ever raising any question as to liability or quantum, either before or during the proceedings. The justice system was invoked to provide enforcement of claims, rather than the resolution of disputes about them. But if refusal to pay is to be included as a type of dispute sufficient to attract the lien, how is the existence of such a refusal to be established by the solicitor seeking to enforce the lien, when the defendant finally agrees to pay? Does refusal to pay include a merely careless failure? Must it be express, or may it be inferred from a failure to pay after demand, or after the due date for payment?

170. Uncertainties of this kind do not form an appropriate general test, or part of a test, for the existence of the solicitors' equitable lien, however much they may seek to embed its animating principle into the conditions for its existence. As already explained, solicitors need to know, when deciding whether to accept a retainer on credit, whether or not they will enjoy an equitable lien over recoveries. Defendants

need to know, when they decide to whom to pay the sum due (after judgment or settlement, or even after receipt of a solicitor's letter of claim) whether there is any legal inhibition on paying the claimant direct. That need to know will be better served by the existence of a clear and simple test for the existence of a lien, readily applied to known facts, than by a test which contains the uncertainties proposed, even if it more closely approximates to the circumstances where access to justice is most likely to be achieved.

171. I recognise that the simple test proposed by Lady Arden and Lord Burrows may occasionally involve the recognition of the equitable lien in wider circumstances than is strictly justified by its animating access to justice principle. It may also confer upon solicitors a proprietary security for payment for services with no very sophisticated legal content which other providers of the same services do not enjoy, simply because they are not solicitors. The facts of this case illustrate both those concerns. Bott went on providing their flight delay service to Ryanair's passengers long after Ryanair introduced its own apparently equally simple way of obtaining prompt payment of compensation in full. Other claims-handlers entered the market for low-cost claims services with products similar to Bott's scheme who, because they were not solicitors, lacked the protection of the lien.

172. As to the first concern I have therefore asked myself whether the recognition of the lien based upon a simple claim-based litigation condition which may in some cases be wider than necessary to provide access to justice imposes any burden or unfairness on the intended defendant (here Ryanair) which requires it to be more narrowly defined. Ryanair have submitted understandable commercial reasons why they would prefer solicitors not to be involved in flight delay claims at all. They are summarised in Lord Leggatt's and Lady Rose's judgment at para 15. In short they introduce an unnecessarily adversarial element into an aspect of the airline customer relationship about which there is rarely any real dispute. And the passengers get less in their pockets than if they used Ryanair's own online claims process. But these are not complaints about the lien itself. While in theory it imposes a risk of having to pay the costs element twice if it is ignored, the lien imposes no additional burden upon a defendant airline which, once on notice of it, pays the solicitor rather than the client. And the obligation to pay the solicitor is no impediment to discussion of the claim with, or to any other direct communication with, the client. The same was true of the insurers in *Edmondson* and is probably true of defendants generally. There may be obligations of professional courtesy which inhibit a solicitor from direct contact with an opposing party when it is known that they have their own solicitors acting, but this is nothing to do with an obligation to pay the solicitor arising from the equitable lien.

173. In practice, leaving aside any commercial motivation to exclude solicitors altogether from the supplier/customer relationship, payment of the whole sum to the solicitor by a defendant with notice of the lien is advantageous to the defendant. It gets a good receipt for the satisfaction of the lien, and a good receipt for the balance of the debt due to the claimant, because the solicitor is the claimant's authorised agent for that purpose. Above all, the defendant need not then be concerned about any issue between the solicitor and the claimant about the amount of the solicitor's fee entitlement.

174. The second concern is that, if the lien is available to solicitors as security for payment for services of a type which other service providers can and do provide, then solicitors are given an unfair competitive advantage in the reduction of credit risk, which equity should not countenance. I agree that there is an element of commercial advantage, but since this case has not involved claims-handlers in competition with solicitors there has been neither the occasion nor the evidence necessary to conclude whether it is unfair. It has to be acknowledged that, at the time when this lien was originally recognised, no one other than solicitors could provide the access to justice which it was designed to promote. The abolition of that former virtual monopoly has given rise to this concern for the first time. But it by no means follows that a lien which in most cases will continue to promote access to justice should now be withdrawn or restricted in its scope merely because there are others who do the same in competition with solicitors. An obvious alternative might be to extend the lien to them as well. But that is not a matter capable of being addressed in this case. It would in all probability best be left to legislation.

175. The first and main objection made by Lord Leggatt and Lady Rose to the test which Lord Burrows proposes is that it fails to exclude transactional work from the scope of work for which payment is secured by the equitable lien. As they observe, we all agree that such work is wholly excluded. This is because the lien is a legal (or strictly equitable) incident of the relationship between client and solicitor arising from a retainer to pursue a claim, not from any other kind of retainer. Its purpose is only to encourage solicitors to accept, on credit, that type of retainer. If the retainer is to act in connection with a transaction, then no lien arises.

176. I acknowledge that there may be unusual borderline cases where there is a composite retainer to do both: eg to conclude a transaction with a third party and then to pursue any claims which may arise from it, but no test will deal with every borderline case without some difficulty. In such a case the equitable lien would only secure payment for the work done pursuing the claim, not for the transactional work. The solicitor may have a possessory lien (eg over documents of title) which secures payment for the transactional work, but that is not the subject of this appeal. And the

equitable lien will only affect a third party with notice. So there must be something about the way in which the solicitor communicates with the third party which reveals that the solicitor's retainer is to pursue a claim, rather than to conduct a transaction, or carry out some other type of work. A typical pre-action letter will do just that, but not a reminder to pay on time, sent by a solicitor at the end of a transactional retainer.

177. Taking Lord Leggatt's and Lady Rose's example at para 69, in my view there would be no equitable lien for three reasons. First, the reminder to the counterparty to pay on time would not, in context, be making a claim at all. It would just be a reminder. Secondly, the reminder would be sent at the end of a transactional retainer, not as part of a retainer to pursue a claim. Thirdly, the counterparty would not be on notice that the solicitor had been retained to pursue a claim. The counterparty would be corresponding with the solicitor as a professional retained by the other party in connection with the transaction, not with the pursuit of a claim.

178. Their second objection is that there is nothing unconscionable in a person paying their creditor an undisputed debt merely because the creditor has decided to employ a solicitor to collect it. There are I think two answers to that objection. The first is that if the debtor had already decided to pay the debt before receiving a demand or other communication from the solicitor, then the solicitor would generally fail to demonstrate that its activity crossed even the low threshold of having made a significant contribution to the claimant's recovery. The second is that where equity recognises an equitable lien as an incident to the relationship between two persons, it is generally unconscionable for a third party who has notice of it to do something which has the effect of defeating it.

179. I agree with Lord Burrows' test for the existence of a solicitor's equitable lien and my reasoning and his are closely aligned. Lady Arden also agrees with Lord Burrows' test for the existence of a solicitor's equitable lien, and it will be apparent from the foregoing that I agree with the central thrust of her reasons for doing so.

Conclusion

180. Bott's retainer for customers of Ryanair for the purpose of pursuing their flight delay claims plainly satisfied the test propounded by Lord Burrows and supported by Lady Arden and me as sufficient to attract the solicitors' equitable lien, regardless whether there was any actual or reasonably anticipated dispute at the time of the retainer. The pursuit by solicitors of a client's claim by the provision of professional services on credit will generally provide the client with access to justice, even though it

may be less closely focussed upon the achievement of that animating principle than a test based on the existence of an actual or reasonably anticipated dispute. But the claim-based test has the commanding advantage of simplicity and predictability. It is not in dispute that the other conditions for the existence of the lien, laid down in the *Edmondson* case, are all satisfied. I would therefore allow the appeal.