Gerard Clarke surveys the recent *Harlequin* Caribbean timeshare case, which confirms the importance of contracting for protection

IN BRIEF

- Insurers and funders should take care to protect their premiums and fees by contract.
- Absent contractual priority, insurers (and funders) will not have liens on litigation proceeds.
- The *ex parte James* principle of insolvency law does not apply to officers of overseas courts.

All solicitors know (or should know) that they can assert a lien over money recovered by them for clients through litigation. Even apart from the modern statutory protection afforded by s 73 of the Solicitors Act 1974, which provides for a statutory charge in favour of a solicitor to protect fees and disbursements, the law has for centuries regarded it as unconscionable that the solicitor who brings about a financial recovery for a client should not be paid before the client is paid.

Liens for others?

Should the same principle apply to a barrister? What about a litigation funder or an after the event (ATE) insurer? The answer so far as a barrister is concerned remains undetermined, but the High Court (Robin Dicker QC sitting as a Deputy High Court Judge in the Companies Court) has decided, in *Glasgow v ELS Legal and others* [2017] EWHC 3004 (Ch), that an ATE insurer that has not taken an effective security through a priority agreement cannot assert a lien over money recovered in the litigation that it has insured. The same conclusion would apply by parity of reasoning to a litigation funder, although in the case in question the litigation funders had the benefit of a priority agreement.

Background

Harlequin Property (SVG) Ltd is a company set up to develop a hotel resort at Buccament Bay on the Caribbean island of St Vincent. Harlequin was funded largely by UK investors who subscribed for timeshares at the hotel. The company's business model and methods were questionable, to say the least, and its founder David Ames is under investigation by the Serious Fraud Office and reported also to be wanted by the police in St Vincent and the Grenadines.

The development at Buccament Bay did not go well, and remains unfinished, while Harlequin has become insolvent. The Investors Compensation Scheme in the UK picked up the tab for the UK investors and in due course became the largest unsecured creditor of the company. Other creditors include staff at the partly completed hotel and various contractors.

The Wilkins Kennedy litigation

One of the curious features of the project was that it was in effect project-managed not by a building or surveying firm but by a UK firm of accountants, Wilkins Kennedy. The building contractor, Paudie O'Halloran, was paid millions of dollars of Harlequin's funds, and was found liable for fraudulent misrepresentation in a judgment of the Irish High Court in Dublin (*Harlequin Property v O'Halloran* [2013] IEHC 362).

In the English litigation, Toulson J in the Technology and Construction Court upheld Harlequin's claim that Wilkins Kennedy had failed to advise it about valuation of the project works, *Harlequin v Wilkins Kennedy* [2015] EWHC 3050 (TCC), and US$11.6m in damages was paid by the firm's insurers. The judge was concerned about the probity of the company's pre-insolvency management, and so ordered the damages to be paid into court.

The insolvency proceedings

Harlequin entered insolvency in St Vincent and the Grenadines, with Brian Glasgow of KPMG Caribbean being appointed its bankruptcy trustee (liquidator), and it fell to the Companies Court (now known as the Companies List), assisting Harlequin's bankruptcy trustee under the Cross Border Insolvency Regulations 2006, to resolve rival claims for shares of the litigation proceeds. Numerous law firms and advisers of various kinds came forward asserting claims to the fund on the basis of assistance said to have been provided to Harlequin. Most of these claims were dealt with by agreement.

Substantial fees were due to the solicitors and counsel who had conducted the litigation against Wilkins Kennedy, acting on conditional fee agreements with provision for success fees. In addition, litigation funders and after the event (ATE) and financial guarantee insurers who had backed the claims were owed substantial fees and premiums. The bankruptcy trustee for Harlequin eventually reached settlement agreements with the solicitors and counsel, but not before the Bar Council had intervened to support the position of the barristers in their claim against the fund. Arguments between the Harlequin legal team and the insurers for Wilkins Kennedy about liability

for success fees occupied several days in court, but this dispute was settled, after hearing but before judgment.

The bankruptcy trustee also agreed to pay the litigation funders, but argued that the sums claimed by the ATE and financial guarantee insurers were unprotected by any lien or other security or priority interest.

Priority agreement ineffective

The insurers, along with the litigation funders and the solicitors acting for Harlequin against Wilkins Kennedy, had made a priority agreement with Harlequin. This set out an order of payments, with funders and solicitors ranking ahead of Harlequin. Unfortunately, the agreement mistakenly used a form of standard wording dating from before changes in the law as to recovery of costs made by Pt 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The wording used failed to give the insurers priority rights against Harlequin, and assumed incorrectly that the insurers would recover their premiums from Wilkins Kennedy, as was the norm before Pt 2 of LASPO took effect.

The insurers' case

The insurers asserted liens against the damages, arguing that, just as solicitors who strive for a client are recognised and protected when the money obtained by their striving is being divided up, so should be insurers who agree to put their own money at risk in order to enable a claim to proceed. Lawyers, the argument went, provide skill and effort to win a case. ATE insurers provide financial assurance. Their commitment is what allows a claim that would otherwise fail at gateway points such as a security for costs application to pass through the gateway (as indeed happened in the *Wilkins Kennedy* litigation). The insurers enable the lawyers to use their skill and effort and take the claim to trial. The insurers asked the court to take account of the fact that, in the modern world, some lawyers work on the basis that they take risk as well as applying skill and effort, and that some litigation is financed either by insurance or by funding, or a combination of both, as was the case here. The lawyers may risk not being paid if the claim fails. ATE insurers risk being out of pocket if the claim fails, as in that event they pay out to the opposing party, and may not recover their premiums.

The insurers also cited the principle in *ex parte James* (1873-74) LR 9 Ch App 609 which indicates that an officer of the court should not act unfairly.

> *"In the event, the barristers did not go unrewarded for their efforts, but, subject to appeal, the insurers must take their chances in the insolvency"*

The ruling

The court did not have to rule on the position of the barristers, but ruled against the insurers on the lien point and also on *Ex parte James*. In effect, the court said, the insurers having failed to obtain contractual protection even though they could have done so, they had no right to rank ahead of other creditors of the company. It would be a matter for Parliament to legislate for the existence of a lien in these circumstances, and there was no compelling need for the court to recognise a new category of lien.

The *James* principle, perhaps somewhat surprisingly, did not apply to the officer of an overseas court (even one applying insolvency law which is in substance the same as UK law and seeking the English court's aid under the Cross Border Insolvency Regulations), but in any event the insurers could submit an ordinary proof of debt and thus the *James* principle could not be used to afford the insurers priority over other creditors.

Conclusions

The case thus reinforces the need for insurers and funders to be careful in drafting priority agreements providing for payment of their premiums and fees, mindful of the risk that the client may become insolvent.

The question of a barrister's lien remains open for decision. Solicitors have the benefit of liens recognised by common law and equity and reinforced by the Solicitors Act 1974. The existence of a lien for barrister's fees has been recognised in Australian case law (*Simpson v Rowe* [2011] VSC 149), and the judge in the present case expressed (obiter) support for the existence of a barrister's lien, but the principle remains untested in the courts of any part of the UK. Barristers, like insurers, can contract for protection, and would be well advised to contract not only with the client but with the solicitor. In the present case, counsel had contracted with Harlequin but not with their instructing solicitors. In the event, the barristers did not go unrewarded for their efforts, but, subject to appeal, the insurers must take their chances in the insolvency. **NLJ**

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