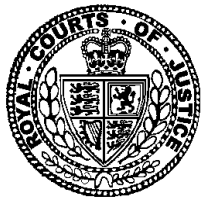

Neutral Citation Number: [2017] EWHC 3004 (Ch)

Case No: CR-2017-000422

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28th November 2017

Before :

Robin Dicker Q.C.
(sitting as a Deputy High Court Judge)

- -

Between :

BRIAN GLASGOW **Applicant**
(the bankruptcy trustee of Harlequin Property SVG Limited)

- and –

(1) ELS LAW LIMITED
(2) ELS LEGAL LLP
(3) NICHOLAS DAVIDSON Q.C.
(4) HEFIN REES Q.C.
(5) NABARRO LLP
(6) SIMON TERRY
(7) DANIEL ABRAMS
(8) ANDY REGAN
(9) WILKINS KENNEDY (a firm)
(10) DAS LEGAL EXPENSES INSURANCE COMPANY LIMITED
(11) ELITE INSURANCE COMPANY LIMITED
(12) ACASTA EUROPEAN INSURANCE COMPANY LIMITED

Respondents

- and –

THE BAR COUNCIL OF ENGLAND AND WALES

Intervener

- -
- -

Mr Andreas Gledhill Q.C., Mr Jamie Carpenter, and Mr Martin Ouwehand (instructed by **Jones Day**) for the **Applicant**
Mr Benjamin Williams Q.C. and Ms Fiona Dewar (instructed by **Herbert Smith Freehills LLP**) for the **1st, 2nd, 3rd and 4th Respondents**
Mr Alex Hutton Q.C. and Mr Mark James (instructed by **Kennedys Law LLP**) for the **9th Respondent**
Mr Gerard Clarke (instructed by Mr Ashley Netherclift of DAS, Mr Ian Coleman of Elite and Mr David Kearns of Acasta) for the **10th, 11th and 12th Respondents**
Mr Nicholas Bacon Q.C. and **Mr Alan Tunkel (**instructed by **Simpson Millar LLP**) for the **Intervener**

Hearing dates: 3rd, 4th, 5th and 6th July 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Robin Dicker Q.C.:

1. This judgment concerns an application for directions by the Applicant, the bankruptcy trustee of Harlequin Property SVG Limited ("the Company") pursuant to section 168(3) of the Insolvency Act 1986 and article 21(1)(g) of Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("the CBIR").

2. The application was issued to determine the rights of various respondents to a sum of approximately £7.9 million ("the Fund"), held by the Court Funds Office, representing the net proceeds of a successful claim by the Company against the ninth Respondent ("Wilkins Kennedy") following a trial before Coulson J last year, in the Technology and Construction Court.

3. Following settlements, including settlements between the Applicant and the first, second, third and fourth Respondents ("the Legal Team") at the start of the hearing and between the Legal Team and Wilkins Kennedy after the conclusion of the hearing, the remaining issues that still require to be decided are those between the Applicant and the tenth, eleventh and twelfth Respondents ("the Insurers").

4. The Company's claims against Wilkins Kennedy were pursued with the benefit of various insurance arrangements provided by the Insurers, including legal expenses policies provided by the tenth and eleventh Respondents and a financial guarantee policy provided by the twelfth Respondent. Under the terms of these policies, the Insurers claim payment of premium totalling some £3,020,600.

5. The Insurers contend that they have a proprietary claim over the Fund in respect of the sums due to them in respect of premium, by way of a lien analogous to the common law and equitable lien which a solicitor has over the proceeds of a judgment recovered for the client in the course of litigation by the solicitor's exertions. They also rely, in the alternative, on the principle in *Ex p James; In re Condon* (1874) LR 9 Ch. App 609.

6. The Applicant contends that the Insurers' claims rank only for proof as unsecured claims in the Company's bankruptcy in St. Vincent and the Grenadines.

The background

7. The Company was incorporated under the St. Vincent and the Grenadines Companies Act 1994.

8. The Company's main asset is a property at Buccament Bay, the construction of which was funded by deposits from individual investors who wanted to purchase cabanas or apartments, either at Buccament Bay or at other resorts planned by the Company. Although more than 1,900 deposits were taken by the Company for units at the Buccament Bay property, only approximately 116 units were fully completed and approximately 60 other units were partially completed. The deposits were not segregated from the general assets of the Company and were not used exclusively for the purposes of construction works at the Buccament Bay property.

9. In 2014 the Company issued proceedings against its former accountants and professional advisors, Wilkins Kennedy, claiming damages for breach of contract and professional negligence ("the Proceedings").

10. On 12 December 2016, Coulson J handed down judgment in the Proceedings. He found in favour of the Company, awarding damages of US$11,630,970.50 plus interest and costs. His judgment is reported at [2016] EWHC 3188. In light of the serious misgivings which he expressed about the probity of the Company's business methods, he directed that this sum be paid into court, rather than to the Company.

11. On 21 December 2016 a further hearing took place before Coulson J to determine consequential matters following his judgment. At this hearing he converted the judgment sum into sterling and ordered that Wilkins Kennedy should pay the Company 60% of its costs to be assessed on the standard basis if not agreed and should make an interim payment on account of the Company's costs in the sum of £2,000,000.

12. Pursuant to that order, sums totalling £10,540,866.84, including interest, were paid into court by Wilkins Kennedy on 13 January 2017.

13. On 3 October 2016 the Company commenced restructuring proceedings under Part V of the Bankruptcy and Insolvency Act of St. Vincent and the Grenadines ("the B&I Act") naming the Applicant, a partner of KPMG Eastern Caribbean, as the Proposal

Trustee. On 17 December 2016, the Applicant applied for and obtained an order from the High Court of St. Vincent and the Grenadines, appointing him interim receiver of the Company's property, pending the outcome of the Part V proposal.

14. On 19 January 2017 the Applicant applied for and obtained an order from this court recognising the proceedings in respect of the Company as foreign main proceedings under article 17 of the CBIR.

15. On 24 February 2017, the High Court of St. Vincent and the Grenadines dismissed the last of a series of applications by the Company for an extension of time to file its Part V proposal, with the result that, from 3 March 2017, the Company's affairs have fallen to be administered under the B&I Act and the Applicant has assumed the functions of bankruptcy trustee.

16. The Company is heavily insolvent, with unsecured claims estimated at some £200 million. The largest single creditor is the UK Financial Services Compensation Scheme, which is owed some £29 million in respect of compensation paid by it to members of the public who lost money by investing in the Company through UK-based independent financial advisers.

The Application

17. The application was issued on 16 March 2017. At that stage, only the first to eighth respondents were joined to the proceedings. Various developments, since the application was issued, have considerably reduced the scope of the issues that still require to be determined.

18. The application, as originally issued, primarily concerned a damages based agreement, within the meaning of section 58AA of the Courts and Legal Services Act 1990 and the Damages-Based Agreements Regulations 2013, pursuant to which the Legal Team had represented the Company in the proceedings against Wilkins Kennedy. Paragraphs 3.1 to 3.4 of the application sought directions, in short, as to whether that agreement was valid, whether the first and second Respondents' (together "the Solicitors") rights in or over the Fund extended to the entitlements of the third and fourth Respondents (together "the Barristers") and whether the Barristers had direct rights in or over the Fund.

19. The Bar Council of England Wales ("the Bar Council") was given permission to intervene to take a position in relation to those issues supportive of the Barristers.

20. The issues between the Applicant and the Legal Team were settled by an agreement dated 3 July 2017, and the hearing proceeded on the basis of submissions on such issues by the Legal Team and Wilkins Kennedy, together with the Bar Council. After the conclusion of the hearing, the issues as between the Legal Team and Wilkins Kennedy were settled by an agreement dated 18 July 2017. In these circumstances, I indicated to the parties that I would, absent any application to the contrary, be proceeding on the basis that it would not be necessary nor an appropriate use of judicial resources to produce a judgment on the issues in paragraphs 3.1 to 3.4 of the Application, and that is the course that I now take.

21. The application also sought directions as to whether the fifth to eighth respondents had any proprietary rights in or over the Fund. Prior to the hearing, the Applicant had also reached agreement disposing of those claims, together with a discrete claim made by the fourth Respondent.

22. The application did not initially join the Insurers as respondents, reflecting the fact that the Applicant did not, at that stage, intend to contest their proprietary claims. Having subsequently concluded that there might be grounds on which to do so, they were joined as further respondents by order of Marcus Smith J of 5 April 2017.

The remaining issues

23. The Insurers claim premium due totalling £3,020,600 and contend that they have a lien over the Fund in respect of such sums, alternatively are entitled to an order requiring the Applicant to pay such sums on the basis of the principle in *Ex parte James; In re Condon* (1874) LR 9 Ch App 609. At an earlier stage, the Insurers also sought to rely on the decision in *Lord Napier & Ettrick v Hunter* [1993] A.C. 713, but this was not, in the event, pursued by Mr Clarke.

The facts relevant to the Insurers

24. The Company obtained the benefit of insurance arrangements with the Insurers, including a legal expenses policy dated 24 April 2014 with the tenth Respondent ("DAS"), a legal expenses policy dated 23 November 2015 with the eleventh Respondent ("Elite") and a financial guarantee policy commencing 18 May 2016 with the twelfth Respondent ("Acasta").

25. The Insurers claim deferred premium due in respect of such agreements, totalling £3,020,600 in aggregate, including IPT, comprised as to £2,168,100 (DAS), £275,000 (Elite) and £577,000 (Acasta).

26. The proceedings by the Company against Wilkins Kennedy were also supported by funding agreements with two funders, namely BC Investments Limited ("Burford") and Sparkle Capital Limited ("Sparkle") (together "the Funders").

27. The rights of, amongst others, the Company, the Solicitors, the Funders and the Insurers in respect of any recoveries are regulated by an agreement between them dated 31 May 2016 ("the Priorities Agreement").

28. Recital (D) to the Priorities Agreement records that, in consideration for the Funders entering into the funding agreements with the Company to enable the claim against Wilkins Kennedy to progress, the parties wanted to set out the priority order for paying the sums due to each of them from any recoveries made from prosecuting the claim.

29. The Priorities Agreement, which is expressed to be governed by English law, provides that, in consideration of the parties entering into the various agreements that they had respectively entered into with the Company ("the Transaction Documents"), it was agreed by clause 2 that "*all sums due to any of the Parties pursuant to the Transaction Documents shall be paid out of any Proceeds in accordance with the terms of this Agreement until all such sums are discharged or until the Proceeds are exhausted*." The agreement provides that "Proceeds" has the same meaning as in the agreements with the Funders.

30. The agreement provides that the Proceeds will be distributed in the priority order set out in clause 3, namely:

> *"3.1.1 Firstly, to reimburse the Fund in full for all and any sums paid or incurred pursuant to the Funding Agreement, to reimburse the ATE Insurer and FGI Insurer in full for any payments actually made in respect of Adverse Costs, expenses, Counsel's fees or Solicitor's fees pursuant to the ATE Policies and FGI Policy and to pay to the Solicitor any Base Costs properly incurred under the Legal Costs Agreement plus any disbursements properly incurred. The Proceeds shall be applied and shall rank pari passu between the aforementioned parties in this clause 3.1.1 and any pro rata payments shall be paid at the same time to each of them;*
>
> *3.1.2 Secondly, to pay any sums due to the ATE Insurer under the ATE Policies and the FGI Insurer under the FGI Policy contained within the Transaction Documents.*
>
> *3.1.3 Thirdly, to pay the Fund any other sums due under the Funding Agreement, any Interest, Success Fee or Deferred Fee due to the Solicitor under the Legal Costs Agreement until all the entitlements of the Fund and the Solicitor to fees pursuant to the Transaction Documents as at the date of distribution have been discharged in full. The Proceeds shall be applied and shall rank pari passu between the aforementioned Parties in this clause 3.1.3 and any pro rata payments shall be paid at the same time to each of them.*
>
> *3.1.4 Fourthly, the balance to the Claimant."*

31. The basic priority order set out in clause 3 is, however, subject to adjustment where proceeds are received as a result of judgment. In this situation, clause 4 provides as follows:

> "*Where the Proceeds are received as a result of judgment being received in the Proceedings and not as a result of settlement whether before or after judgment, the order as set out in clause 3 of this Agreement shall apply SAVE THAT any premium due under the ATE Policies and FGI Policy only shall not form part of the Proceeds for distribution in accordance with this Agreement and shall be treated independently*."

32. The Priorities Agreement further provides as follows:

> "5. *The Parties to this Agreement agree that, except as expressly provided herein, the priorities, rights and obligations of the Fund, ATE Insurer, FTI Insurer and Solicitor set out herein shall apply in all events and in all circumstances.*
>
> *6. The Solicitors acknowledge that they will hold the Proceeds as trust property for the Parties and undertake to distribute the Proceeds as trust property in accordance with the terms of this Agreement.*

> *7. The Parties shall do all such acts and things and execute all agreements, instruments and other documents as may be reasonably required to carry out the intent and purposes of this Agreement.*
>
> *8. Nothing in this Agreement shall be construed as conferring any rights upon any third party. The terms and conditions of this Agreement are and shall be for the sole and exclusive benefit of the Fund, ATE Insurer, FGI Insurer and Solicitor and their respective successors and permitted assigns.*
>
> *9. This Agreement is intended to determine the priority order for distribution of Proceeds and nothing in this Agreement shall affect the underlying liability of the Claimant to pay all sums which may fall due for payment to Solicitor, Fund, the ATE Insurer or FGI Insurer under the terms of the Transaction Documents.*"

33. As a result of clause 4, the priority order differs depending on whether or not the proceeds are received as a result of a judgment. In the event that they are received as a result of a judgment, any premium due to the Insurers will not form part of the Proceeds for distribution in accordance with the Priorities Agreement.

34. In their evidence on the present application the Insurers said that clause 4 was included by mistake. Mr. Netherclift, a senior commercial underwriter with DAS, explained the position in his witness statement as follows: "*No one who looked at the Priorities Agreement realised at the time that it contained a form of wording in respect of insurance premiums that was not apt for the deal. The wording dated from the time when it was normal and lawful for insurance premiums to be recovered by successful litigants from their opposing parties. The law changed, and recovery of premiums in that way was phased out in stages …*".

35. In short, according to the Insurers, the agreement had been drafted using an old form which assumed that, in the event of a judgment, they would be entitled to recover the premium directly from Wilkins Kennedy, with the result that such premium would not form part of the Proceeds and they would have no need for any priority rights under the Priorities Agreement.

36. The mistake appears to have existed not merely when DAS entered into its policy on 24 April 2014, but also when Elite and Acasta subsequently entered into their policies dated 23 November 2015 and 18 May 2016, and when, on each occasion, the Priorities Agreement was re-stated and re-executed.

37. The Insurers initially sought to contend in an e-mail dated 29 March 2017, that on its true construction clause 4 nevertheless continued to entitle them to payment of the premium due out of the Fund in accordance with the priority set out in clause 3.1.2 of the Priority Agreement.

38. However, in their position paper dated 19 May 2017, the Insurers explained that they did not assert that the Priorities Agreement conferred on them an enforceable right to priority, saying that "*The Priorities Agreement was, as a matter of fact, intended to do so … but, because of a mistake in the drafting – the use of an out of date form of words – the Priorities Agreement did not do so*." They further explained that they did not presently intend to ask the Court to find in their favour on the basis of rectification or estoppel by convention, but reserved their right to do so.

39. It follows that, for the purposes of the present application, the parties to the Priorities Agreement are to be taken to have agreed that, in the event that sums were recovered from Wilkins Kennedy as a result of litigation, the Insurers would not have a right of priority under the Priorities Agreement, and that any balance left after payment of any sums due under clause 3.1.1 would be distributed in accordance with clauses 3.1.3 and 3.1.4 of that agreement.

Lien

40. Mr. Clarke, on behalf of the Insurers, in his Skeleton Argument, submitted that "*[The Insurers] could obtain protection by contract for the premiums. But they do not have to do so, and the Court is not powerless to assist them if they do not*." He accepted that the Insurers have no statutory or contractual right to a lien, but submitted that they should be held to be entitled to a lien analogous to the common law and equitable lien which a solicitor has over the proceeds of a judgment recovered for the client in the course of litigation by the solicitor's exertions, as recognised in cases such as *Re Wright's Trust* [1901] 1 Ch 317. Mr. Clarke accepted that there is no existing authority indicating that parties in the position of the Insurers have such a lien, but submitted that the facts were such that the court should hold that they were entitled to a lien because, were it not for the Insurers, the Company could not have pursued its claim against Wilkins Kennedy and would never have obtained judgment.

41. There are, in my view, a number of fundamental and insuperable difficulties facing the submission that the Insurers are entitled to the benefit of a lien.

The general position

42. There is no general right to a lien merely because a party has done work or spent money which has preserved or benefitted the property of another. In *Falke v Scottish Imperial Insurance Company* (1996) 34 Ch. D 234 Bowen LJ explained at 248 that:

> "*The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefitted, nor, even if standing alone, create any obligation to repay the expenditure*."

In general, a party will only have a lien if there is an express or implied agreement to that effect, amounting to a contract, or if the facts fall within a number of well recognised exceptions, including compulsion or salvage, none of which are said to apply in the present case.

43. The fact that the debtor is now insolvent and subject to bankruptcy proceedings does not put the party who has expended such work or money in any better position. There is no principle of insolvency law conferring a proprietary claim on an unsecured creditor with a provable claim, merely because his conduct may have enhanced the value of the estate.

44. A good illustration of this is provided by *Re Gozzett; Ex parte Messenger & Co. Ltd* [1936] 1 All E.R. 79. In that case Messenger agreed to erect greenhouses on land occupied by Gozzett, on the understanding that it would be paid out of funds to be advanced by a lender. Messenger erected the greenhouses, but Gozzett became bankrupt. Gozzett's trustee in bankruptcy sold the land at a price that was enhanced as a result of the greenhouses, but determined that Messenger's claim ranked only for proof. Messenger contended that, on the facts, it either had an equitable charge or the trustee was obliged to pay its claim in full on the basis of the principle in *ex parte James*, because the greenhouses had enhanced the value of the insolvent estate. The Court of Appeal rejected such claims, Lord Wright M.R. commenting at 88 that "*Here Messenger were simply unsecured creditors and their position was due to their failure to take the precaution of securing any sort of charge on the property. The estate of the*

debtor has been enriched by work done on credit, and the person who has done it in this case is simply in the position of any ordinary creditor." In *Re Clark (a bankrupt*) [1975] 1 W.L.R. 559, Walton J explained at 564B-C that the reason why Messenger was not entitled to succeed was that "*to give effect to the rule would conflict with the mandatory rateable division of the estate between all the bankrupt's creditors*."

The solicitors' lien

45. One exception to the general position concerns a solicitor's lien over a fund or the proceeds of a judgment. Apart from statute, a solicitor has a lien which may be actively enforced over a fund or proceeds of a judgment recovered for the client in the course of litigation or arbitration by the solicitor's exertions, but not over the fruits of negotiation without litigation.

46. This lien, although often referred to as a lien, is more accurately described as a right to ask for the court's intervention for the solicitor's protection when, having obtained judgment for his client, he finds that there is a probability of the client depriving him of his costs: *Halvanon Insurance Co Ltd v Central Reinsurance Corpn.* [1988] 1 W.L.R. 1122 per Hobhouse J at 1125H to 1126A. It is a right to ask the court to charge the property in favour of the solicitor and, until that is done, the solicitor has no right to the money.

47. A solicitor's lien on recoveries has been recognised at common law since at least the decision of Lord Mansfield in *Welsh v Hole* (1799) 1 Douglas 238. By the time of *Taylor v Popham* (1806) 13 Ves. Jun. 59 it was referred to by the Lord Chancellor as something whose existence could not be disputed.

48. A solicitor's right to a lien over proceeds was placed on a statutory footing in section 28 of the Solicitors Act 1860, as subsequently re-enacted in section 69 of the Solicitors Act 1932, section 72 of the Solicitors Act 1957 and section 73 of the Solicitors Act 1974.

49. Nevertheless, the solicitors' lien also continues to exist at common law and in equity (see, for example, *In Re Born* [1900] 2 Ch. 433 and *In Re Wright's Trust* [1901] 1 Ch. 317) where it also extends to recoveries in arbitration (*In Re Meter Cabs Ltd* [1911] 2 Ch 557).

50. Mr. Clarke submitted that the Insurers should be held to be entitled to a lien because their position is "*directly and closely analogous to that of the lawyers who brought the case to trial*." In particular, he submitted that, were it not for the Insurers, the Company would never have obtained judgment against Wilkins Kennedy.

Barristers' lien

51. Mr. Clarke referred, in this context, to the fact that in Australia, the Supreme Court of Victoria has held that barristers are also entitled to a lien over monies recovered by litigation: see *Simpson v Rowe* [2011] VSC 149.

52. The question whether barristers, in addition to solicitors, are entitled to such a lien was, as I have already indicated, originally an issue between the Applicant and the Legal Team. The Legal Team submitted that such a lien should be held to exist, and this was supported by submissions by the Bar Council. The Applicant initially submitted that such a lien should not be recognised, largely on the basis that the matter should be left to the legislature. However, in its supplemental position paper, it conceded that the Barristers were entitled to the benefit of a lien, either through the Solicitors or in their own right. Wilkins Kennedy expressed themselves to be neutral on the issue. The result is that the court has not had the benefit of detailed submissions against the existence of such a lien and, given the subsequent settlement of the issues between the Applicant and the Legal Team, this is not an issue which I now need to decide. For the purposes of the Insurer's submissions, it is sufficient to say that the questions of whether barristers are entitled to a lien akin to the lien enjoyed by solicitors and whether persons in the position of the insurers are also entitled to such a lien involve different historical backgrounds and raise very different issues.

53. There has been a division in function between barrister and attorney or solicitor in the English legal profession since a secular legal profession first emerged in England at the beginning of the thirteenth century. Originally, however, there was nothing to prevent a barrister from soliciting causes or dealing directly with clients as part of his profession. Although the practice of removing the barrister from direct contact with the lay client developed over the centuries and appears to have been well underway by the time that the lien came to be recognised, the final step was not taken until the mid-nineteenth century.

54. The parties were not able to identify any authority in which a barrister was held to have been entitled to a lien over the proceeds of litigation, which right appears to have been referred to as one enjoyed by attorneys, solicitors and proctors, rather than by any wider category of persons. However, one reason for this may simply have been that, in practice, barristers did not need a lien as fees were almost invariably paid in advance as a result of the *honorarium* doctrine, and later their fees would be covered by the solicitor's lien where the solicitor had paid the barrister's fee by way of a disbursement.

55. Given recent developments in the structure and conduct of the legal profession, it is difficult to identify any reason why, as a matter of principle, solicitors, but not also barristers, should be entitled to a lien. As Mr. Williams Q.C., for the Legal Team observed, in modern times law firms, partnerships, LLPs and limited companies through which the relevant legal services are provided may all assert a lien in their own name, although such entities are not strictly solicitors. Furthermore, as he pointed out, if barristers are not entitled to a lien in their own right, a lien would arise in respect of: (a) the fees of a solicitor conducting litigation, but not a barrister performing the same function under a direct retainer with the client; (b) the fees of a solicitor acting as advocate in the case, but not a barrister performing the same function on a direct access basis; and (c) the fees of a barrister acting as advocate in the case if incurred by a solicitor as disbursements, but not if incurred directly with the client. Similar submissions were made by Mr. Bacon Q.C., on behalf of the Bar Council. It is difficult to regard such distinctions as anything other than illogical, unprincipled and potentially unfair.

56. Given the different circumstances that apply to the Insurers, I do not consider that Mr. Clarke gets any assistance from the fact that the existence of a lien in favour of barristers has been recognised in Australia in *Simpson v Rowe* [2011] VSC 149.

Matter for the legislature

57. There are, as it seems to me, two main reasons why the Insurers are not entitled to a lien in the present case. The first reason is that the decision as to whether or not persons in the position of the Insurers should be held to be entitled to the benefit of a lien, by analogy with the solicitor's lien, is a decision that is properly for the legislature, not the courts.

58. In this context, Mr. Gledhill Q.C., for the Applicant, referred me to *R (Prudential plc) v Special Commissioners of Income Tax* [2013] 2 A.C. 185. The issue in that case was whether legal advice privilege ("LAP") should be extended to communications for the purpose of giving or receiving legal advice on tax issues between clients and chartered accountants.

59. The appellants in that case contended that, although LAP had traditionally been understood as attaching only to communications with lawyers, the principles of such privilege are concerned with the function that is being performed and not with the status of the adviser who provides the advice. They also contended that the traditional limitation of LAP to lawyers failed to reflect the fact that the provision of legal services was no longer exclusively the preserve of professional lawyers, and that there was no good reason for leaving the issue to Parliament as LAP was a legal principle developed by the common law as part of the administration of justice.

60. The appeal was dismissed, by a majority. For present purposes, four passages from Lord Neuberger's judgment are particularly relevant:

    (1) He said at [39] that "*There is no doubt that the argument for allowing this appeal is a strong one, at least in terms of principle, as anyone reading Lord Sumption JSC's judgment can appreciate … it is hard to see why, as a matter of pure logic, [legal advice] privilege should be restricted to communications with legal advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field*".

    (2) However, he explained at [49] "*Where a common law rule is valid in the modern world, but it has an aspect or limitation which appears to be outmoded, it is by no means always right for the courts to modify the aspect or remove the limitation. In any such case, the court must consider whether the implications of the proposed modification or removal are such that it would be more appropriate to leave the matter for Parliament.*"

    (3) He concluded at [52] that, in that case, it was appropriate to leave the matter to Parliament for three connected reasons "*First, the consequences of allowing Prudential's appeal are hard to assess and would be likely to lead to what is*

> *currently a clear and well understood principle becoming an unclear principle, involving uncertainty. Secondly, the question whether LAP should be extended to cases where legal advice is given from professional people who are not qualified lawyers raises questions of policy which should be left to Parliament. Thirdly, Parliament has enacted legislation relating to LAP, which, at the very least, suggests that it would be inappropriate for the court to extend the law on LAP as proposed by Prudential*."

(4) He added at [67] that "*Of course, in another case, points such as these could be overcome if the court was satisfied that there was a pressing need, in terms of the rule of law, injustice or even practicality, for the common law to move from its generally understood position in a particular area. However, although there is evidence of some concern about the presently understood limits of LAP, there is no evidence that even gets near establishing a pressing need to change those limits*".

61. It would, in my view, plainly be inappropriate for the courts to extend the law in relation to solicitors' liens, to hold that persons in the position of the Insurers are also entitled to the benefit of a lien over recoveries in litigation. It is worth briefly setting out some of the policy issues involved.

62. Any decision that the Insurers have a lien over the Fund would create an exception to the statutory regime for the distribution of the assets of an insolvent debtor amongst its creditors which, in England & Wales, is contained in the Insolvency Act 1986. That scheme prescribes "*proportionate recovery by all those who are unsecured creditors at the commencement of the winding-up, subject to any preferment or deferment of creditors pursuant to particular statutory provisions, but regardless of the moral strength of their claims*": *Re Buckingham International plc (No.2)* [1998] BCC 943 per Robert Walker LJ at 962G-H.

63. In *Angove's Pty Ltd v Bailey* [2016] UKSC 47 Lord Sumption, in rejecting a claim for a constructive trust, commented:

> "[25] *... The statutory rules for the distribution of insolvent estates represent an important public policy designed to achieve a pro rata distribution of the company's estate between its creditors ...*

> [26] *It is inherent in the statutory scheme of distribution in an insolvency that apparently arbitrary results may follow from the adventitious timing of the commencement of the liquidation, especially in the case of deferred obligations. In principle, an advance payment to a company made before the commencement of the liquidation for an obligation performable afterwards will form part of the company's estate, notwithstanding that its supervening insolvency means that the obligation will not be performed, at any rate in specie. The payer must prove in the liquidation for damages for the breach of contract. Likewise, a contractor providing goods or services on credit will have to prove in the liquidation for the price if the other party becomes insolvent before paying … In the nature of things, these consequences involve a detriment for the payer, attributable to the timing of the company's insolvency; and a windfall for the general creditors, since the estate available for distribution will be increased by the payment without being reduced by the cost of performance*."

64. The general effect of this, so far as the identification or creation of proprietary claims by the courts are concerned, is illustrated by the authorities. Three examples will suffice. In *Roberts Petroleum v Bernard Kenny Ltd* [1983] 2 A.C. 192 Lord Brightman, in the context of an application by an execution creditor to convert an order nisi into an order absolute, said at 208F-G, that "*I would myself have thought that the court should exercise its discretion so that the asset falls within the statutory scheme*". In *Re Polly Peck International Plc (No.4)* [1998] 2 B.C.L.C. 185 Mummery LJ said at 201h-i that "*… the position is that there is no prospect of the court in this case granting a remedial constructive trust to the applicants … since the effect of the statutory scheme applicable on an insolvency is to shut out a remedy which would, if available, have the effect of conferring a priority not accorded by the provisions of the statutory insolvency scheme*." In *Angove's Pty Ltd v Bailey* [2016] UKSC 47 the Supreme Court held that the decision of Bingham J in *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep 658 could not be justified, at any rate on the ground on which it was decided. In that case, Bingham J had held that there was a constructive trust of a payment which had been made by the shipowners to the debtor company after its directors had concluded that the company was insolvent and at a time when there was bound to be a total failure of consideration.

65. In these circumstances, the question of whether persons in the position of the Insurers should, as a matter of general law, be entitled to priority over unsecured and preferential creditors as set out in the statutory scheme, is, in my view, self-evidently a matter for the legislature, not the courts.

66. As Mr Gledhill submitted, any decision that persons in the position of the Insurers have a lien over the Fund would also create a further category of non-possessory security interests, which, because they would not be regarded as having been created by the debtor, would be outside the ambit of registration.

67. Although the solicitors' lien is itself an exception to registration, its existence has been justified on the basis that "…*it is clearly laid down by the cases that all persons of business when dealing with a fund obtained by litigation must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which is successful*": see *Dallow v Garrold* (1884) 13 QBD 543 per Pollock B at 546.

68. In these circumstances, it is regarded as foreseeable that litigation proceeds will be subject to a priority claim in respect of the fees of the lawyers who have acted. The same could not be said of any lien in favour of persons in the position of the Insurers, as third parties would have no way of knowing whether or not a claim had been maintained with the assistance of after the event insurance or financial guarantees.

69. In addition, there is no evidence of a "*pressing need*" of the type identified by Lord Neuberger in the *Prudential* case for extending the law in the manner contended for, given that, as Mr Clarke acknowledged, it is always open to persons in the position of the Insurers to contract for security if that is what they want.

The effect of the Priorities Agreement

70. The second reason is that holding that the Insurers are entitled to a lien over the Fund in this case would be inconsistent with the terms of the Priorities Agreement.

71. The general rule is that, where a party has contracted for an unsecured right only, the court will not elevate it to a secured status by means of a lien.

72. Thus, for example, in *Paul v Speirway Ltd* [1976] 1 Ch 220 a shareholder claimed to be entitled to a lien on the proceeds of sale of a property to secure payment of monies that he had previously advanced to enable the property to be purchased. Oliver J held that, where the parties' intention was the creation of an unsecured loan, there was no room for the doctrine of subrogation because the application of the doctrine would put

the lender in a better position than he had bargained for. In such circumstances, he said at 234F-G "*the plaintiff obtained all that he bargained for and it would not, I think, be equitable that he should now assert some further right for which he did not bargain*".

73. In the context of a solicitors' lien, it has been held that it is open to a solicitor to waive his right to a lien over the proceeds of litigation: see, for example, *In Re Wright's Trust* [1900] 1 Ch 317 per Vaughan Williams J at 325 and *Clifford Harris & Co. v Solland International Ltd* [2005] 3 Costs LR 414 per Mr. Christopher Nugee Q.C., sitting as a deputy judge of the High Court, at [24] to [26].

74. The Insurers entered into the Priorities Agreement with the Company, the Funders and the Solicitors, to set out their respective proprietary entitlements to the Fund:

(1) In the event of a settlement of the claim against Wilkins Kennedy, the Insurers contracted for proprietary claims in respect of both "*payments actually made by them … in respect of adverse costs, expenses and fee*s" (by clause 3.1.1) and "*sums due ... under the ATE Policies ... and the FGI Policy*" (by clause 3.1.2).

(2) But, in the event of a judgment, the Insurers agreed to exclude the sums referred to in clause 3.1.2 from the scope of their proprietary rights.

75. For the purposes of the present application, the Insurers therefore accept that the effect of the Priorities Agreement is that they do not have a right of priority to the Fund in respect of their claims to premium and that any balance left, after payment of the sums identified in clauses 3.1.1 and 3.1.3, is to be paid to the Company in accordance with clause 3.1.4.

76. Having agreed that the balance of the Fund is to be paid to the Company without first discharging sums due to them by way of premium, it is not now open to the Insurers to contend that they are nevertheless entitled to a lien as security for the payment of such sums so as to give them priority.

77. For these reasons, the Insurers' contention that they are entitled to a lien over the Fund to secure the sums due to them in respect of premium fails.

Ex parte James

78. Mr Clarke also sought to rely on the principle in *Ex p James; In re Condon* (1874) LR 9 Ch App 609.

79. The most authoritative word on this subject is the judgment of Lord Neuberger in *Re Nortel GmbH* [2013] UKSC 52. He said at [122]:

> "As to the common law, there are a number of cases starting with *Ex p James; In re Condon* (1874) LR 9 Ch App 609, in which a principle has been developed and applied to the effect that "*where it would be unfair*" for a trustee in bankruptcy "*to take full advantage of his legal rights as such, the court will order him not to do so*", to quote Walton J in *In re Clark (a bankrupt), ex p The Trustee v Texaco Ltd* [1975] 1 WLR 559, 563. The same point was made by Slade LJ in *In re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 287, quoting Salter J in *In re Wigzell, Ex p Hart* [1921] 2 KB 835, 845: "*where a bankrupt's estate is being administered ... under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right*" which "*should be exercised wherever the enforcement of legal right would ... be contrary to natural justice*". The principle obviously applies to administrators and liquidators: see *In re Lune Metal Products Ltd* [2007] Bus LR 589, para 34."

80. There are a number of reasons why, in my view, the principle in *ex parte James* cannot assist the Insurers in the present case.

81. The first reason is that the principle provides a means whereby "*the court can control the conduct of its own officers*" (see *Re Lehman Brothers International (Europe)* [2015] EWHC 2270 per David Richards J at [174]) and the Applicant is not an officer of this court.

82. The principle applies to officers of the court, as they are persons who are subject to its general supervisory or inherent jurisdiction. Trustees in bankruptcy and liquidators or provisional liquidators in a compulsory liquidation are officers of the court. Court appointed receivers and administrators are also officers of the court and, no doubt to ensure uniformity, administrators appointed out of court following the changes introduced by the Enterprise Act 2002 have also been accorded the status of officers of the court; see Schedule B1, paragraph 5 of the Insolvency Act 1986. However, liquidators in a voluntary liquidation have been held by the Court of Appeal not to be officers of the court: see *Re TH Knitwear (Wholesale) Limited* [1988] Ch. 275, and the

same is the case for administrative receivers, even though both are entitled to seek the directions of the court in relation to matters arising during the course of the relevant proceedings.

83. Given that the Applicant is not an officer of this court, having been appointed bankruptcy trustee by the High Court in St. Vincent and the Grenadines, the principle in *ex parte James* does not apply to him.

84. Consistent with this, in *IPCOM GmbH & Co KG v HTC Europe Co Ltd* [2013] EWHC 2880 (Ch) Roth J referred at [48] to the fact that a foreign lawyer is not an officer of this court: compare *Kanat Assaubayev v Michael Wilson & Partners Limited* [2014] EWCA Civ 1491 per Christopher Clarke LJ at [28] to [32] and [46] to [49].

85. The position is not, in my view, affected by the fact that the Applicant applied for and obtained an order from this court recognising the proceedings in respect of the Company as foreign main proceedings under article 17 of the CBIR:

(1) Recognition under the CBIR triggers a stay on proceedings under article 21 and entitles the foreign representative to relief under article 21, including, as in this case, seeking the court's directions, pursuant to article 21(1)(g). But, as illustrated by the position in relation to liquidators in a voluntary liquidation and administrative receivers, this entitlement does not make someone an officer of this court.

(2) When the legislature amended the regime governing administration in 2002, it expressly provided for administrators to be officers of the court, whether appointed by the court or not. Although enacted four years later, there is no similar provision in the CBIR.

(3) Status as an officer of the court entails amenability to the court's supervisory jurisdiction, including its punitive and disciplinary powers. There is no indication that the CBIR was intended to permit this court to exercise such powers against a foreign professional, merely because he had obtained an order for recognition.

86. The rule in *ex parte James* may be a feature of insolvency law in St. Vincent and the Grenadines, although there is no evidence before the court to this effect. But, even if it is, a party wishing to invoke it would, in my view, have to do so in that jurisdiction, rather than in this court. Absent authorisation by the foreign court, this court cannot exercise the supervisory jurisdiction of that court over its own officers.

87. Given this, there is, in my view, no scope for the principle in *ex parte James* to be applied by this court to the Applicant.

88. The second point is that, even if the principle in *ex parte James* was capable of applying to the Applicant, it would not, in my view, be engaged on the facts of the present case.

89. In *In Re Clarke (a bankrupt)* [1975] WLR 559 Walton J identified four conditions which, he said, must be present for the principle to operate. He expressed the second condition as follows at 564A-C:

> "*Returning to the conditions for the application of the rule, it is, I think, clear that except in the most unusual cases the claimant must not be in a position to submit an ordinary proof of debt. I think that this is exemplified by the decisions in Ex parte Whittaker, In re Shackleton (1875) 10 Ch. App. 446, which was admitted by Sir James Bacon C.J. to be an exceedingly hard case, and In re Gozzett, Ex parte Messenger & Co Ltd v The Trustee [1936] 1 Al E.R. 79. Although the basis for this has never been expressly formulated, I think the underlying reason is obviously that to give effect to the rule would conflict with the mandatory rateable division of the estate between all the bankrupt's creditors. The rule is not to be used to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any*."

90. Applying the principle in *ex parte James* in the present case would not satisfy this condition nor the underlying reason for it.

91. The Insurers agreed to provide insurance to the Company on terms that left the premiums outstanding and on the basis that, in the event that any recoveries were made from Wilkins Kennedy as result of judgment, they would not have a proprietary claim over those recoveries, but merely an unsecured claim against the Company. In these circumstances it would, in my view, not be remotely unfair to require them to prove for such sums, equally with all other unsecured creditors. Whilst the Insurers' evidence is that, from their perspective, clause 4 of the Priorities Agreement was included as a result of a mistake on their part, the nature and circumstances of that mistake are not

such as would, in my view, justify the application of the principle, even if one were to leave aside the involvement of the other parties to that agreement. Subject to this point, the position is, in substance, indistinguishable from that in *In re Gozzett, Ex parte Messenger & Co Ltd v The Trustee* [1936] 1 All E.R. 79.

92. The Insurers' contention that they are entitled to an order requiring the Applicant to pay the premium due to them on the basis of the principle in *Ex p James; In re Condon* (1874) LR 9 Ch. App 609 therefore also fails.

93. I shall invite the parties to agree a minute of order reflecting this judgment and dealing with any consequential matters including costs. If any aspect cannot be agreed, I will hear further submissions.