Neutral Citation Number: [2021] EWHC 1826 (Ch)

Case No: BR-2020-000450

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST (ChD)

7 Rolls Building, Fetter Lane
London EC4A 1NL

Date: 2 July 2021

Before :

MR JUSTICE ZACAROLI

Between:

CANDEY LIMITED — **Applicant**

- and –

(1) TONSTATE GROUP LIMITED — **Respondents**
(2) TONSTATE EDINBURGH LIMITED
(3) DAN-TON INVESTMENTS LIMITED
(4) ARTHUR MATYAS

Benjamin Williams QC and Stephen Ryan (instructed by **Candey Limited**) for **Candey Limited**
Andrew Fulton QC (instructed by **Rechtschaffen Law**) for the **Respondents**

Hearing dates: 19 May 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be NB 10.30 am on 2 July 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. On 30 April 2021 I gave judgment ([2021] EWHC 1122 (Ch)) on two out of three aspects of an application by Candey Limited ("Candey") under section 73 of the Solicitors Act 1973 (the "Section 73 Application"), seeking the grant of a charge over 22,500 ordinary shares (the "Shares") in Tonstate Group Limited ("TGL"). I subsequently heard argument on the third of those aspects, and this is my judgment on that aspect.

2. I refer to my earlier judgment for the relevant background. As explained there, Candey entered into a damages based agreement dated 20 September 2019 (the "DBA") with Mr Wojakovski in relation to numerous proceedings between him and Mr and Mrs Arthur Matyas and companies in the Tonstate group. Although Mr Wojakovski lost most aspects of the underlying litigation, he succeeded in partially resisting Mr and Mrs Matyas' claim to rescind the transfer of shares in TGL to him. By a settlement agreement reflected in a consent order dated 21 May 2020, Mr Wojakovski was permitted to retain the Shares.

3. In my earlier judgment, I concluded that on the true construction of the DBA, it only entitles Candey to any payment from Mr Wojakovski if Mr Wojakovski recovers something in or as a consequence of the proceedings. Accordingly, the fact that Mr Wojakovski retained the Shares does not entitle Candey to payment under the DBA. Moreover, even if the "Proceeds" under the DBA did include the Shares, the DBA would not be enforceable to that extent.

4. On that basis, the third aspect of the Section 73 Application – whether Candey is entitled to a charge over the Shares with priority over the final charging order in favour of the claimants in the Main Action (as defined in my earlier judgment) (the "Claimants") – does not arise.

5. There is an outstanding application for permission to appeal by Candey against that decision. The parties were in agreement that I should go on to determine the third aspect of the Section 73 Application (there having been insufficient time to do so in the time allotted for the hearing of the application on the last occasion) before the application for permission to appeal was addressed.

6. This judgment accordingly proceeds on the basis that the conclusion in my earlier judgment was wrong.

7. In brief outline:

   (1) Candey contends that it acquired an equitable charge over the Shares immediately upon the execution of the consent order on 21 May 2020;

   (2) On 9 June 2020, the Claimants acquired an interim charging order over the Shares, by way of enforcement of the judgment (at that time in excess of £15 million) obtained in the Main Action;

(3) On 7 July 2020 Candey, on behalf of Mr Wojakovski, consented to the interim charging order being made final;

(4) The final charging order over the Shares in favour of the Claimants is dated 21 July 2020;

(5) Mr Wojakovski was made bankrupt on 15 October 2020;

(6) On 3 December 2020, Candey issued the Section 73 Application.

8. The Claimants rely on four independent grounds for contending that Candey has no entitlement to an order under section 73:

(1) The alleged equitable charge is inconsistent with undertakings given by Mr Wojakovski in an order dated 1 February 2018;

(2) Section 73 only entitles a solicitor to a charge in respect of "assessed costs", which does not include a right to payment under a DBA;

(3) The Claimants' charging order takes precedence because (i) the Section 73 Application was made too late; (ii) Candey waived their entitlement to an equitable charge; (iii) Candey's application amounts to an abuse of process; and (iv) the Claimants had no notice of Candey's equitable charge at the time they obtained the final charging order; and

(4) An order under section 73 is not justified because Candey cannot prove it is necessary or justified by work done.

9. Alternatively, the Claimants contend that these points ought to lead the court to refuse to exercise its discretion under section 73 to make an order in favour of Candey.

The solicitor's lien

10. Section 73 provides as follows:

> "(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 any 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."

11. It is common ground that this reflects a pre-existing right at common law to seek the protection of the court in respect of a solicitor's lien: *Harris v Solland International Ltd (No.2)* [2005] EWHC 14 (Ch) per Christopher Nugee QC at [21(ii)].

12. At the heart of the dispute between the parties is the question as to the true nature and character of a solicitor's "lien" as it relates to the fruits of litigation which his or her efforts have produced for the benefit of the client.

13. This right has long been referred to as a lien, and was described as follows by Lord Mansfield in *Welsh v Hole* (1779) 1 Doug KB 238:

> "An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it in transit if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice. But I think we cannot go beyond those limits."

14. It is not, however, a true lien, which can only exist where the person claiming the lien is in possession of the property over which the lien is claimed: *Harris v Solland International Ltd (No.2)* (above), at [21(iii)].

15. The Claimants contend that a solicitor has no proprietary right over the fruits of litigation which are not in his or her possession unless and until the court grants a charge (whether under section 73 or under a parallel right which exists at common law). Until then, all that the solicitor has is "a claim or right to ask for the intervention of the court for his protection": see *Harris v Solland (No.2)* (above), at [21(iii)], citing *Mercer v Graves* (1872) LR 7 QB 499, 503, per Cockburn CJ and *James Bibby Ltd v Woods and Howard* [1949] 2 KB 449, 453f per Lord Goddard CJ.

16. In the latter case (*Bibby*), Mr Howard and Mr Woods began actions against each other arising out of the dissolution of a partnership between them. These were compromised on terms that Mr Howard paid Mr Wood £90. Bibby Ltd obtained judgment against Mr Woods in a separate action and applied for attachment of the £90 debt due from Mr Howard. On 25 February 1949, Bibby Limited obtained a garnishee order nisi. At the hearing of the application for that order to be made absolute, Mr Woods' solicitor (having heard of the order nisi) claimed that he had a lien over the debt of £90 for his costs in the partnership proceedings. The master made the order absolute. Mr Woods appealed to the Divisional Court (although as Lord Goddard CJ pointed out, in truth it was an

appeal by his solicitor). The Divisional Court dismissed the appeal, holding that the "so-called 'lien'" of the solicitor was, until such time as he obtained a charging order from the court, "only … at the most an inchoate right to apply for one" (p.453) and "until that is done, he has no right in it … In the present case, when the application for the garnishee order absolute was before the district registrar no charging order had been made or applied for [by the solicitor]. There was therefore no lien or charge on the money at that time. There was no lien on it in the strict sense of the term, and there was no charge on it because a charging order had not been applied for" (p.454).

17. The Claimants contend that the present case is indistinguishable from *Bibby*. At the time that the Claimants obtained their final charging order over the Shares, Candey had not made the Section 73 Application. For that reason alone, it is said, Candey are not entitled to an order under section 73 and do not otherwise have any interest in the Shares which takes precedence over the Claimant's final charging order.

18. Mr Williams QC, who appeared with Mr Ryan for Candey, accepted that if *Bibby* represented the law, then that would be its effect. He contended, however, that I ought not to follow *Bibby* because it is inconsistent with prior authority and with the subsequent decision of the Supreme Court in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 ("*Haven Insurance*").

19. In *Haven Insurance*, multiple claimants with road traffic claims retained the solicitors on identical conditional fee agreements. Pursuant to the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the "RTA Protocol", which had been agreed by stakeholders under the auspices of the Civil Justice Council), claims were notified by the claimants' solicitors to the defendants' insurers via an online portal. Where liability was admitted, a settlement was negotiated or determined by the court at a fraction of the cost if the matter were resolved in ordinary court proceedings. It was an express objective of the RTA Protocol that solicitors were paid their fixed costs and charges direct by the defendant's insurers. One of the insurers responded to notification of claims on the portal by settling directly with the client, with the intention of avoiding having to add to the settlement amount the fixed costs and disbursements of the solicitors.

20. The Supreme Court held that the solicitors had a lien on the agreed settlement debts payable by the insurer, as security for their charges, and that the insurers had the requisite notice of the lien such that it could be enforced against them. The insurers were accordingly ordered to pay the charges due under the protocol directly to the solicitors, in addition to the settlement sums already paid to the clients.

21. The description of the solicitors' lien in the judgment of Lord Briggs JSC (with whom the other members of the Supreme Court agreed) is indeed inconsistent with the analysis in *Bibby*. Lord Briggs, at [2], referred first to the ancient common law retaining lien, and to the fact that it afforded no assistance where there was nothing of value in the possession of the solicitor. He continued:

> "But equity deals with that deficiency in the common law by first recognising, and then enforcing, an equitable interest of the solicitor in the fruits of litigation, against anyone who, with notice of it, deals with the fruits in a manner which would otherwise defeat that interest."

22. Each of a judgment debt, a sum due under an arbitration award and a debt due under a settlement agreement are a form of property – a chose in action – in which equity could recognise and enforce an equitable interest in favour of the solicitor. Although called a lien, it is better analysed as a form of equitable charge: see [3] of the judgment of Lord Briggs.

23. Although (as Lord Briggs pointed out at [4]), in normal litigation, the amount due under a judgment would be paid directly to a solicitor, in which case the equitable lien permitted the solicitor to deduct his charges before paying the sum over to the client, equity would also enforce the security where the defendant had paid the sum directly to the claimant, if the defendant had colluded with the claimant to cheat the solicitor of his charges, or dealt with the debt inconsistently with the solicitor's equitable interest in it, after having notice of that interest. He said:

> "This form of remedy, or intervention as it is sometimes called, arose naturally from the application of equitable principles, in which equitable interests may be enforced *in personam* against anyone whose conscience is affected by having notice of them, either to prevent him dealing inconsistently with them, or by holding him to account if he does."

24. It is an essential part of that reasoning that the so-called "solicitors' lien" creates a proprietary interest in the judgment debt, even before the intervention of the court. That is clear from Lord Briggs' analysis of equity's role being first to *recognise* and then to enforce the solicitor's "equitable interest". The right arises from the moment there is a "fund in sight": see *re Fuld (No.4)* [1968] P. 727, per Scarman J at p.736, cited by Lord Briggs in *Haven Insurance* at [35].

25. I note that *Bibby* was cited in argument to the Supreme Court in *Haven Insurance*. Moreover, Lord Briggs referred to *Mason v Mason* [1933] P 199, 214, where Lord Hanworth MR described the lien as "merely a right to claim the equitable interference of the court", being the very passage relied on by Lord Goddard CJ in *Bibby* for the proposition that there exists no lien or charge in favour of the solicitor before he or she has applied for an order from the court.

26. While Lord Briggs did not in terms say that the proposition, stated in that way by Lord Goddard CJ in *Bibby* was wrong, I agree with Mr Williams QC that the proposition cannot stand with the reasoning and conclusion of the Supreme Court and must be taken to have been at least implicitly overruled (notwithstanding the obiter comment to the opposite effect by Lewison LJ in *Bott & Co Solicitors v Ryanair DAC* [2019] 1 QWLR 3375, at [33], in a case

where no question of priority as between the solicitor's lien and a security right of a third party arose).

27. That is reinforced by the fact that the *earlier* authority cited by Lord Briggs is equally inconsistent with Lord Goddard CJ's proposition. Lord Briggs cited, for example, Lord Mansfield's statement in *Welsh v Hole* (cited above), commenting:

> "The typically terse judgment may be said to have dealt with legal and equitable lien without clearly distinguishing between the two, but the analogy of an assigned debt shows that Lord Mansfield recognised that the solicitor had an interest in the judgment debt which the court would protect, provided that notice of that interest had been given to the debtor before payment to the judgment creditor. An interest dependent on notice is typical of an equitable interest."

28. Mr Williams QC also referred me to *Haymes v Cooper* (1864) 33 Beav. 431 which involved similar facts to *Bibby*, but in which the opposite conclusion was reached. In that case, the defendant Jenkins became entitled to a sum of money paid into court by the plaintiff. On 10 February 1864, Mr Cooper (a creditor of Jenkins) obtained an order *nisi* charging Jenkins' interest in the money paid into court. Cooper applied for the charging order to be made absolute, and Jenkins' solicitor – Mr Field – sought a declaration that he had a charge on the fund in court for his costs in acting on behalf of Jenkins. Sir John Romilly M.R. held that the solicitor's claim succeeded, saying:

> "I have always understood the law to be, that a solicitor had an inherent equity to have his costs paid out of any fund recovered by his exertions; and that the Court would not part with it until these costs had been paid, except by consent of the solicitor."

29. Sir John Romilly M.R. said that this was not a question of priority, because it was an existing equity of the solicitor, which could not be divested by any assignment of his client. He also said that "it is not a question of notice" (notwithstanding that the predecessor to Section 73 declared that any disposition to a *bona fide* purchaser for value with notice might defeat the charge granted by the court) "…because every man who knows there is a fund in Court, knows also that it is liable to the lien for costs of the solicitor, through whose exertion the fund has been obtained, and the assignee has the benefit of those exertions as well as the assignor … My opinion is that where a man knows that there is a fund in Court, he knows also that it is subject to the solicitor's lien for his costs in recovering it, and that he is entitled to be paid in the first instance." Although the legislation clearly pointed out that there may be a bona fide purchaser who may have priority, he said "As to that I express no further opinion than this, that the present is not such a case, for Mr Cooper had notice of the lien of the solicitor."

30. Accordingly, subject to the other objections raised by the Claimants which I consider below, and on the assumption that the conclusion reached in my earlier judgment was wrong, I conclude that Candey had an equitable interest in the Shares, from the moment there was a "fund in sight", upon the making of the consent order on 21 May 2020.

Priority

31. The precise nature of the "lien" and, in particular, whether it is binding on a person who acquires an interest in the same fund before it is the subject of an order of the court under section 73, remains unclear. Mr Williams submitted that the lien is binding on such a person irrespective of their knowledge or notice of the lien. Mr Fulton submitted that (if, contrary to his contention, it gave rise to any equitable right at all) it would not bind someone in the position of the Claimants who acquired rights under a final charging order unless they had notice of the solicitor's lien. That was particularly so where, as here, the Claimants had reached an agreement, for consideration, with Mr Wojakovski, his consent to the final charging order being given in return for the Claimants giving up a claim to costs against him.

32. In each of the formulations of the nature of the solicitor's lien prior to an application to court for a charge giving effect to it, it is referred to as being effective against the debtor (if the relevant fund is a debt due from the other party to the litigation) provided that notice is given: see the cases cited by Lord Briggs at [30] to [36] of *Haven*. At [37], Lord Briggs, in endorsing a passage from the judgment of Sedley LJ in *Khans Solicitors v Chifuntwe* [2014] 1 WLR 1185, said:

> "It recognises that the equity depends upon the solicitor having a claim for his charges against the client, that there must be something in the nature of a fund against which equity can recognise that his claim extends (which is usually a debt owed by the defendant to the solicitor's client which owes its existence, at least in part, to the solicitor's services to the client) and that *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*." (emphasis added).

33. In other cases, the effectiveness of the lien against third parties who claim an interest in the same fund has also been discussed in terms of notice. In *Haymes v Cooper*, for example, although Sir John Romilly said, as I have noted above, that it was not a question of notice, that was solely because everyone is taken to have notice of a solicitor's lien over a fund in court. In *Faithful v Ewen* (1878) 7 Ch D 495, the right of mortgagees of a plaintiff's claim to the share of an estate, the subject matter of litigation, was postponed to the lien of defendant's solicitor, because they "must have known, or must be presumed to have known" of the plaintiff's solicitor's rights.

34. In most cases, it is unlikely that a third party who acquires an interest in a fund over which a solicitor asserts a lien would be able to claim priority. That is for two reasons.

35. First, because (as noted above) knowledge that a solicitor is retained by the claimant in relation to an action will be enough to fix a third party seeking to take a charge over recoveries in the action with notice of the solicitor's lien.

36. Second, because the rationale behind the solicitor's lien over recoveries in the action applies equally to render that lien effective as against a third party who has obtained its own assignment or charge over those recoveries. The rationale behind the solicitor's lien has sometimes been described by analogy with the principle of salvage. The recoveries in the action exist as a result of the solicitor's efforts, so the solicitor ought to have a right to those recoveries as security for its fees in priority to the client. Equally, the solicitor should have such right in priority to a third party who acquires a charge over the recoveries, because the value of that charge is similarly dependent on the solicitors' efforts.

37. This is illustrated by *Scholey v Peck* [1893] 1 Ch 709. In that case, S, the claimant, sought to enforce a contract to purchase a house. The claimant's rights under that contract had been mortgaged to C. S's solicitors sought a lien over the house. Romer J held that the property was preserved by the action brought by the solicitors on behalf of S and, but for those proceedings, C would have lost her security. Accordingly, the solicitors were entitled to a charge not only as against S but also as against C "who is taking the benefit of the action, and over whose mortgage they must have priority".

38. A similar principle underlies the conclusion that a solicitor's lien survives the insolvency of the client. The insolvency estate, which comes into being on the liquidation or bankruptcy of the corporate or individual client, as the case may be, has the benefit of the recoveries only because of the solicitor's efforts: see *Guy v Churchill* (1887) 35 Ch D 489. In that case, solicitors to the plaintiff were held entitled to a lien on a sum recovered by the plaintiff (although the recovery of the sum was not the direct result of the action). The solicitors' entitlement to that lien was not affected by the bankruptcy of the plaintiff. In the Court of Appeal, Cotton LJ said: "Here the official receiver wishes to get the benefit of the solicitor's exertions by which the [sum] has been recovered, without paying for them". Lindley LJ said: "I agree and have nothing to add. It is right that they who get the benefit of the recovery of money should bear the expense of recovering it."

39. The position in this case is different, however, because the Shares were always the property of Mr Wojakovski. The Claimants, in their capacity as holders of the final charging order over the Shares, cannot I think be described as someone taking the benefit of the action or of Candey's exertions. Moreover, the fact that the Shares are not "recoveries", in the sense of having been recovered in the proceedings, means that the reasoning which fixes third parties with knowledge of a solicitor's lien does not apply.

40. Mr Williams submitted that the Claimants had notice of the lien because they knew that Candey had entered into the DBA and must be taken to know that Candey would therefore be entitled to a lien over the Shares. He relied on the passages from *Haymes v Cooper* and *Faithful v Ewen* I have referred to above, to the effect that knowledge that a solicitor is involved in litigation is sufficient to constitute notice that the solicitor will have a lien over the fruits of the litigation. I do not accept this submission in the circumstances of this case. As I have noted, this is not a case where the litigation between Mr Wojakovski and the Claimants has led to a right in Mr Wojakovski to receive anything. At most, he was entitled, as a result of the settlement of the Shares Claim, to retain a portion of the shares held by him in TGL. I do not accept that the Claimants knew, or must be taken to have known, that the DBA entitled Candey to a lien over the Shares. Any such entitlement would depend on the terms of the DBA. It is not suggested that the Claimants were aware of the terms of the DBA. Even if they had been, it is difficult to see how they could be said to be on notice of the fact that it gave Candey any entitlement to recover fees as a result of the settlement of the Shares Claim, given that I have concluded that on its proper construction it did not.

41. In my judgment, in circumstances such as this, the better view based on the authorities to which I have referred above is that Candey's lien, although it exists from the date of the Consent Order of 21 May 2020, is defeated by the Claimant's interest under the final charging order, which was acquired for value (foregoing a right to costs against Mr Wojakovski) without notice of the lien.

42. My conclusion that the final charging order takes precedence over Candey's lien means it is unnecessary to deal with the remaining points. I will, however, deal briefly with the questions of waiver, alleged inconsistency with the undertaking previously given by Mr Wojakovski and whether the amount claimed by Candey under the DBA is "assessed costs" for the purposes of section 73, as these points were fully argued.

Waiver

43. The Claimants contend that even if Candey had an entitlement to a lien over the Shares, they waived that right by reason (primarily) of their conduct in agreeing on Mr Wojakovski's behalf to the final charging order.

44. The circumstances in which a solicitor might waive rights to a lien were considered recently by the Court of Appeal in *Candey v Crumpler* [2019] EWHC 282 (Ch). In that case, solicitors with an equitable lien took a charge for fees due to them. The Court of Appeal concluded (at [96]) that the rights conferred by the new security were inconsistent with the lien and that this gave rise to an inference that they intended to waive the lien, unless (which had not happened) the solicitors had reserved their rights. The reason why the taking of an inconsistent security by a solicitor – but not others such as a banker or inn-keeper – gave rise to an inference of waiver was because of the duty of the solicitor to explain to his client the effect of what he is about to do: *Re Taylor* [1891] 1 Ch 590, per Lindley LJ at p.597, cited by Rose LJ in *Candey v Crumpler* at [36].

45. Mr Fulton submitted that the same logic applies where the solicitor permits the client to enter into subsequent inconsistent security arrangements with a third party. Accordingly, Candey's actions in permitting Mr Wojakovski to agree to a final charging order over the Shares in favour of the Claimants without explaining the effect of that on their lien was a waiver. In so doing, he submitted, Candey would have led Mr Wojakovski to believe that he was conferring a valuable benefit on the Claimants, without disclosing to him that they retained a prior right to a lien over the Shares.

46. I do not accept this argument which, in my judgment, fails on the basis that the legal charge in favour of the Claimants is not inconsistent with the lien. It is not inconsistent for there to be two charges over the same asset in favour of different creditors. It is just that there is then a competition between them such that one must take priority over the other. If the creditor with first priority (here the lien - as I must assume in order for the waiver argument to be relevant) is satisfied from other sources, then the asset remains available for the sole benefit of the second ranking charge. Moreover, in this case, since the lien attaches to only 29% of the Shares, there would be no priority dispute in relation to the remainder of the Shares. Mr Fulton suggested that if the bill which Candey had presented to Mr Wojakovski for some £2.4 million was correct, then that might lead to a greater proportion of the Shares being appropriated towards Candey's lien. The answer to that, however, is that Candey's bill for £2.4 million cannot be justified unless that is the cash equivalent of 29% of the Shares.

47. Mr Fulton relied, in addition, on Candey's subsequent conduct which he said pointed in the same direction. He referred to the submissions made by Counsel for Mr Wojakovski in the bankruptcy proceedings, to the effect that the Claimants were secured by the final charging order and that this should be taken into account in determining whether Mr Wojakovski was in a position to repay their debt, as supporting creditors, within a reasonable time. While I accept that these submissions appeared to assume that the whole of the equitable interest in the Shares was charged to the Claimants, and that this is inconsistent with Candey having a prior lien over 29% of the Shares, I do not think that would amount to a waiver of the lien, as between Candey and Mr Wojakovski.

Inconsistency with Mr Wojakovski's undertaking to the Court

48. The Claimants contend that the lien cannot arise given the terms of an undertaking given to the Court by Mr Wojakovski in the Order of Morgan J dated 1 February 2018. Mr Wojakovski undertook that, until any trial of the matters in dispute or further order of the Court, he would not without the prior written consent of the Claimants, transfer or in any way whatsoever dispose of or deal with (among other things) his shares in TGL, "save upon 14 days' written notice to the [Claimants'] solicitors". The matters in dispute at that stage (which preceded the commencement of proceedings) related primarily to the wrongful extractions made by Mr Wojakovski from the Tonstate group (i.e. the subject matter of what became the Main Action). The undertaking was given in lieu of a freezing order intended to ensure that Mr Wojakovski's assets were not dissipated prior to any judgment being obtained by the Claimants.

49. Mr Williams submitted that the undertaking could not survive the compromise of the Shares Claim, because it was intended merely to hold the ring until that claim was disposed of. I disagree. The compromise of the Shares Claim merely crystallised that the Shares were Mr Wojakovski's property. Judgment in the Main Action remained outstanding and the undertaking not to deal with the Shares, so as to ensure a fund was retained by Mr Wojakovski to meet the judgment debt, remained of critical importance to the Claimants.

50. I accept, however, Mr Williams' alternative submission that an undertaking by Mr Wojakovski not to deal with the Shares would not prevent a lien arising in favour of Candey. The lien arises by operation of law and is not the result of any dealing by him with the Shares.

51. Mr Fulton's argument was, however, a subtle variation on this point. He contended that the consequence of the undertaking was that the Shares were not property at Mr Wojakovski's disposal and, as such, were not something to which Candey's lien could attach.

52. In *Withers LLP v Rybak* [2011] EWCA Civ 1419, solicitors claimed a lien over a sum in their client account in respect of unpaid costs. The sum in question was held to the order of the court with the intention of ensuring that a sum remained in this jurisdiction so as to be available, if the court thought fit, to satisfy the claim of the counterparty to the litigation (Langbar) against the solicitors' client. The Court of Appeal held that the terms on which the sum was held by the solicitors were inconsistent with a lien.

53. Sir Robin Jacob, in a judgment which the other members of the Court agreed with, referred to Halsbury's Laws of England, 5th ed., vol 66 (2009), para 997, for the proposition that where money is paid into a solicitor's account for a particular purpose so that he becomes a trustee of the money, no lien arises over it, unless subsequently left in the solicitor's possession for general purposes. He identified the key question as being whether the money in the client account was there "for general purposes". He held that there was no purpose trust in favour of Langbar. That did not mean, however, that the money was that of the client so as to enable a lien to arise. He said, at [33]: "There is room for an undistributed middle, namely that the deposit of the money was inconsistent with a lien arising, actually or potentially."

54. Lloyd LJ, in a concurring judgment, said (at [55]) that the solicitor could have no better right to assert a lien over the money than his client has to use the money for payment of sums due to the solicitor. When the money had first been paid into the client account, it was not at the disposal of the client to any extent (it being held to the order of the Court). Although the restrictions on the money in the account were subsequently relaxed, the client still required the consent of the counterparty to the litigation, or further order of the court before using them. He said: "That seems to me to make it impossible to contend that the money held in the account at that stage was available for payment of legal costs by [the client]. If it was not, then I do not see how it can have been subject to a lien to secure the payment of such costs on the part of Withers."

55. I do not think that this case assists the Claimants. While the fact it concerned a possessory lien (because the money was in the solicitors' client account) is not in my view a critical distinction, the restrictions on the money were much greater than the restrictions on the Shares pursuant to the undertaking in this case. Mr Wojakovski was free to deal with the Shares, provided only that he gave 14 days' written notice to the Claimants. I accept that the purpose of this was so that the Claimants could, if they so wished, apply to court to restrain any proposed dealings in the Shares. That, however, is fundamentally different to the obligation imposed on the client in *Withers v Rybak* to seek consent – or an order of the Court – before being entitled to use the funds in the client account. The Court was not bound to grant relief, and I do not think it would be right to equate the right to apply for relief with the restriction that might be imposed if the Court were to grant relief. Accordingly, I consider that the requirement to give 14 days' notice is not a sufficient restriction on the Shares to put them in Sir Robin Jacob's "undistributed middle" category, so as to prevent a lien from arising.

Assessed costs

56. Section 73 permits the court to grant a charge as security for a solicitor's "assessed costs". It is common ground that this is not limited to costs which have actually been assessed. The Claimants contend, however, that the term "assessed costs" does not extend to a sum due to a solicitor pursuant to the DBA.

57. Mr Fulton first drew attention to the distinction drawn in the Damages Based Agreement Regulations between "costs" (meaning the total of the representative's time reasonably spent in respect of the claim multiplied by the reasonable hourly rate) and "payment" (meaning part of the sum recovered). He recognised that the Regulations, drafted long after section 73 was enacted, cannot be used as an aid to interpreting the latter, but submitted that they highlighted that the essential character of a claim for a percentage of recoveries was conceptually different from costs as typically calculated by reference to time and hourly rates.

58. Mr Williams referred me to *Harrod's Ltd v Harrod's (Buenos Aires) Ltd* [2014] 6 Costs LR 975, in which Jacob J interpreted "assessed costs" in section 73 to mean costs which would be granted on taxation (or, now, assessment of costs), i.e "proper costs".

59. Mr Fulton submitted that this did not assist Candey, because the amount due under a DBA would not be awarded on an assessment of costs. There would only be an assessment of a solicitor's costs, where the client had entered into a DBA, if the agreement was successfully challenged as unreasonable, and in that case what is assessed is the amount of work done by the solicitor and an appropriate hourly rate. The DBA is not, itself, assessed.

60. More broadly, he submitted that the limitation in section 73 to assessed costs is an important 'safety valve', and that a payment pursuant to a DBA which is not capable of being evaluated by means of assessment ought as a matter of principle to be excluded.

61. Attractively though the point was put, I do not think that the limitation to "assessed costs" in section 73 precludes a solicitor from obtaining a charge over property recovered in the action, merely because the solicitor is entitled to be paid pursuant to a DBA. I consider that the interpretation of "assessed costs" by Jacob J in the *Harrod's* case as "proper costs" which would be ultimately recovered by the solicitor from the client is equally apt to encompass such amount as is properly chargeable by a solicitor under a DBA. The rationale behind the solicitor's lien – that recoveries in the action should be appropriated, first, in satisfaction of the costs of the solicitor whose efforts led to those recoveries in the first place – applies irrespective of the basis upon which the solicitor's fees are to be calculated. There is a safety valve of sorts, in that the client can challenge the DBA as unreasonable.

Remaining point

62. The parties addressed only briefly the remaining questions (whether the Section 73 Application is an abuse of process; discretion; and whether there was sufficient need for a charge). I will address them equally briefly.

63. The questions of abuse and discretion would have arisen only if I had determined that Candey's lien took priority over the Claimants' charging order even though the Claimants had no notice of it at the time they acquired the final charging order. In those circumstances, I would not have found in the Claimants' favour on either point.

64. I do not think Candey's failure to raise their lien at an earlier stage, and their delay in applying under section 73 until after Mr Wojakovski's bankruptcy amounts to abuse of process in the *Henderson v Henderson* sense. In *Candey v Crumpler* [2019] EWHC 282 (Ch), the Judge noted the distinction drawn by Lord Neuberger of Abbotsbury in *Henley v Bloom* [2010] 1 WLR 1770 (between whether a party *could* have raised a point at an earlier stage in proceedings and whether it *should* have done). In that case, he refused to find an abuse even though Candey had brought earlier proceedings in which it sought to establish security for its costs without mentioning the lien, and clearly could have raised the point much earlier. In this case, the only proceedings which relate to Candey's entitlement to costs are the Section 73 Application itself. There is a more difficult question (which I think is separate from the question of abuse of process) as to whether a solicitor, against whose client a charging order is sought, loses the right to assert his lien if he does not refer to it in the context of the charging order proceedings. Given that I do not need to decide this point, and I received limited submissions on it, I will not do so.

65. As to discretion, the Court of Appeal in *Candey v Crumpler* noted (at [95]) that the authorities were clear in stating that, if the lien exists, it should be enforced unless there are good reasons why not. Had I concluded that the lien took priority over the Claimant's charging order, I would not have refused to enforce it as a matter of discretion.

66. The Claimants contend that a charge under section 73 is not justified because there are other sources from which Candey could be paid their costs. This in turn is based upon submissions made on behalf of Mr Wojakovski in the course of the bankruptcy proceedings, to the effect that he had valuable assets such that he ought not to be made bankrupt. It was the Claimants' position at the time, however, that these submissions were simply wrong, and they were not accepted by the Court. That was a reasonable conclusion and the Claimants do not point to any evidence to support the assertion that Mr Wojakovski is able to pay Candey the amount claimed by them. I would not have refused to make an order under section 73 on this ground.

Conclusion

67. For the reasons set out above, if the conclusion in my earlier judgment is wrong, I would nevertheless have found that the Claimants' rights under the final charging order had priority over Candey's lien over the Shares.