



Neutral Citation Number: [2019] EWCA Civ 143

Case No: A3/2018/0871

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION**  
**Mr Edward Murray (sitting as a Deputy Judge of the Chancery Division)**  
**HC-2016-003081**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 12 February 2019

**Before :**

**LORD JUSTICE LEWISON**  
**LORD JUSTICE SIMON**  
and  
**LORD JUSTICE LINDBLOM**

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**Between :**

**BOTT & CO SOLICITORS LTD**  
- and -  
**RYANAIR DAC**

**Appellant**

**Respondent**

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**Mr George Bompas QC & Ms Anna Markham (instructed by Rosenblatt Solicitors) for the**  
**Appellant**

**Mr Brian Kennelly QC & Mr Tom Coates (instructed by Oracle Solicitors) for the**  
**Respondent**

Hearing dates : 5<sup>th</sup> and 6<sup>th</sup> February 2019  
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**APPROVED JUDGMENT**

**Lord Justice Lewison:**

1. Under EU law airline passengers are entitled to be compensated by airlines if a booked flight is cancelled at short notice or delayed for a substantial period. Bott & Co Solicitors Ltd (“Bott”) is a firm of solicitors which specialises in handling such claims on behalf of passengers. Its business model depends on processing a high volume of such claims all of which are of low value. Ryanair is one of Europe’s largest airlines, and processes many such claims. Almost all of them result in the payment of compensation. Where Ryanair decides to make a direct payment to a customer who has instructed Bott, Bott claims to be entitled to an equitable lien over the payment which would require Ryanair to hold back part of the compensation in order to cover Bott’s entitlement to fees; or to make payment of the whole of the compensation direct to Bott.
2. Bott began its claim under Part 8 of the CPR. That is a procedure designed for cases in which there is no substantial dispute of fact. As a result, none of the witnesses was cross-examined.
3. Mr Edward Murray, sitting as a judge of the Chancery Division, rejected Bott’s claim to an equitable lien. The first issue raised by this appeal is whether he was wrong to do so.
4. In the summer of July 2016 Ryanair changed its standard terms and conditions. Since then they have included in clause 15 a claims procedure which the passenger is required to follow. The passenger is required to deal directly with Ryanair; and to allow Ryanair 28 days to respond before instructing a third party to act on their behalf. Bott argues that that term is invalid under EU law. The judge rejected that argument too. The second issue on the appeal is whether he was wrong to do so.
5. I can take the facts from the judge’s careful judgment, which is at [2018] EWHC 534 (Ch), [2018] 3 Costs LO 275.
6. An air passenger whose flight is delayed for a specified period beyond its scheduled time of departure is entitled, subject to certain conditions, to compensation for the delay under Regulation (EC) No 261/2004 (“Regulation 261”). Regulation 261 does not expressly provide for compensation for delay. It does provide for compensation under article 4 in a case where an air passenger is denied boarding against their will and under article 5 in a case where a flight is cancelled. Article 6 deals with delay of a flight beyond its scheduled time of departure, but it expressly provides only for assistance to be given by the carrier. But the CJEU has decided that the Regulation must be interpreted as if it did provide for compensation for delay. In any of these cases, compensation is payable under article 7, subject to certain conditions, including, in relation to a case under article 5, that the cancellation does not arise as a result of “extraordinary circumstances”. Examples of “extraordinary circumstances” are given in recitals (14) and (15) to the Regulation.
7. The principal conditions, apart from the delay exceeding a prescribed length of time (which, in turn, depends on the distance covered by the flight), are broadly that (i) the air passenger is departing from an EU member state or is travelling to an EU member state with an EU airline and (ii) the delay is not caused by “extraordinary

circumstances". Compensation is, in principle, fixed by the Regulation. The amount depends on the route and distance of the flight and the length of the delay. Depending on these variables it is either €250, €400 or €600. The highest level of compensation is, in effect, for long-haul flights. Ryanair does not operate long-haul flights; so that the compensation that it pays will be either €250 or €400. There are some circumstances in which the compensation may be reduced by 50 per cent.

8. Article 15 of Regulation 261 provides:

*“Exclusion of waiver*

1. Obligations vis-a-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.

2. If, nevertheless, such a derogation or restrictive clause is applied in respect of a passenger, or if the passenger is not correctly informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation.”

9. Bott began handling flight delay compensation claims in February 2013, since when it has acted on approximately 125,000 claims. It has a Flight Delay Compensation Department, which is staffed by one solicitor, Mr Benson, assisted by paralegals. Bott has developed an on-line tool, accessible on its website, which enables a prospective client to enter their flight details and then check whether their claim satisfies the basic eligibility conditions. Those conditions concern time limits and length of delay in article 6 of Regulation 261, distance in article 7 of the Regulation and whether a flight was to or from an airport in an EU member state as required by article 1 of the Regulation. The on-line tool operates without human intervention on the data entered by the prospective client and includes a check against a database of weather reports in order to anticipate whether a problem with the weather might have caused the delay, constituting "extraordinary circumstances" and thus a defence of the airline to a claim for compensation for the delay.
10. After it has operated on the data entered by a prospective client, Bott's on-line tool confirms to the prospective client whether they have a claim that *prima facie* is eligible for compensation under the Regulation and, if so, for how much. The client is then invited to provide other relevant information on-line, including the client's contact details, and to confirm whether they wish to instruct Bott on a "no win, no fee" basis. None of this involves manual intervention by anyone at Bott.
11. If a prospective client confirms through the on-line tool that they wish to proceed with their claim, Bott sends them an e-mail to confirm receipt of the claim, notifying them of Bott's reference number, indicating that Bott will verify the flight information entered, asking whether any other passengers need to be added to the claim and asking the prospective client to provide any documentation such as boarding passes, booking confirmations or correspondence with the airline. The e-mail message includes as an attachment a client publication prepared by Bott entitled "Flight Delay Compensation Guide: Are You Entitled to Hundreds of Pounds?". It sets out basic details of the flight

delay compensation provisions of the Regulation, what counts as "extraordinary circumstances", how much can be claimed relative to flight distance and length of delay and how a claim should be submitted through Bott. The publication includes some other information, including contact and social media details for Bott.

12. One of Bott's paralegals then manually checks the claim under Mr Benson's supervision to verify whether the claim has more than a 50% prospect of success. That process is usually completed within 48 hours. If the claim is accepted by Bott, then Bott sends a further e-mail confirming that Bott is willing to accept the case on a "no-win no-fee basis" and that, if the claim is successful, Bott's fees will be 25% of the total compensation amount awarded to the client, plus VAT; and an administration fee of £25 per passenger, to be deducted from the compensation before Bott pays the compensation from its client account directly to the client's bank account. The e-mail notifies the client that, as a result of the client's having submitted their details through the website, Bott has started working on the claim and is in the process of drafting a first letter to the airline. The e-mail also informs the client that Bott's Terms and Conditions will follow. In a separate e-mail, Bott sends the client a link to its Terms and Conditions, requesting that the client read and then sign them electronically. The conditional fee agreement (CFA) is also sent by e-mail in a form that the client can download. The Terms and Conditions make it clear that if the airline does not accept the claim, Bott has permission from the client to issue court proceedings.
13. Having accepted a claim and confirmed the client's instructions following the procedure outlined above, Bott sends a letter before action in a standard format to the relevant airline, referring to the Practice Direction on Pre-Action Conduct, setting out the claim details (passenger's name, booking number, flight number, flight distance and details of delay), asking for a response within 30 days and, if the claim is admitted, for payment within 21 days of the admission. Bott requests that payment be made by the airline by cheque or by bank transfer to Bott's client account. The letter also asks the airline to confirm whether the statutory defence of "extraordinary circumstances" will be raised and, if so, asks that the airline clarify the exact nature of the circumstances to be relied upon and that it provide supporting disclosure. In the letter Bott reserves the right to issue proceedings and/or to apply to the court for pre-action disclosure if the airline does not respond within 30 days. The same letter may cover a single claim or multiple claims relating to the same flight. The compensation is claimed in euros, but Bott indicates to the airline that it will accept payment in sterling at a stipulated exchange rate.
14. Bott notifies the client by e-mail that it has sent the letter before action to the airline and informs them of the relevant timeframes, including next steps depending on whether the airline responds and, if so, whether it responds affirmatively or negatively. If the airline accepts the claim and makes payment without dispute, Bott simply checks that the right amount has been received, deducts its fees and pays the balance to the client from its client account.
15. If the airline does not respond or disputes the claim, Bott considers the merits of issuing court proceedings. If it decides that a claim is merited, Bott prepares pleadings, issues a claim, considers any defence and prepares written submissions for any hearing, usually without input from counsel. Counsel is normally only instructed for final hearings.

16. In relation to claims against Ryanair, Bott sends its letter before action to Ryanair's head office in Dublin for the attention of Ms Carol-Anne Bergin, Customer Service Solicitor. In 2016 Bott was handling approximately 1,100 flight delay compensation claims against Ryanair per month, with total claims then outstanding for approximately 6,500 clients. The average recovery per claim handled by Bott was €327; and Bott's average fee per claim was £95. So Bott's fee income from claims against Ryanair was over £100,000 per month.
17. Ryanair initially dealt directly with Bott in respect of passenger claims notified to Ryanair by letter before action. Where claims were admitted, Ryanair would pay the compensation directly into Bott's client account as requested by Bott.
18. From early 2016 Ryanair stopped dealing directly with Bott on outstanding claims and instead began to communicate directly with Bott's clients; and to pay compensation directly to them.
19. Bott says that Ryanair's refusal to deal with it causes it a number of problems:
  - i) In some cases it would issue proceedings on behalf of a client; but would subsequently discover that Ryanair had settled the claim or had responded directly to the client disputing the claim on the merits, without Bott having had the opportunity to consider Ryanair's arguments (or even being aware of them) before Bott had issued proceedings.
  - ii) Where Ryanair pays Bott's client directly, Bott loses the opportunity to deduct its fees from the compensation before it is paid to the client. Bott, therefore, must pursue the client directly for payment. Its experience has been that only about 70 per cent of clients pay in response to a direct request. That is said to threaten the viability of its business model.
20. In 2014 Ryanair introduced a new process permitting customers to claim flight disruption compensation using an online form. The passenger was required to provide certain details to support the claim. These were their name; e-mail address, reservation number; last four digits of credit or debit card. There was also a facility for uploading supporting documents in a variety of file formats.
21. The judge said that Ryanair does not require claims to be submitted in a specific format, provided that the claim identifies the name(s) of the passenger(s), the flight number, and the date and route of the flight. If Ryanair receives a claim that does not include sufficient information, its standard practice is to reply to the passenger with a letter setting out what additional information is required.
22. Ryanair's evidence was that it introduced a policy under which passengers entitled to compensation under the Regulation would receive the whole of that compensation within 28 days of submission of a claim online. In practice claims submitted via the online form are dealt with more quickly than that. Once a claim has been submitted, there is an immediate automatic acknowledgement by way of email, if the passenger has provided an email address. The claim is assessed by Ryanair, and Ryanair provides its substantive response to the claim to the same email address within 24 to 48 hours of submission. If the passenger has not provided an email address, Ryanair sends its substantive response by post within 24 to 48 hours of submission. Where the claim is

valid, Ryanair makes payment, usually by cheque, within six working days of submission of the claim. For UK passengers, Ryanair prefers to pay by cheque, as it is easier and faster to post a cheque than chase for the customer's bank details if they have not already been provided. Ryanair sometimes pays by crediting the bank card upon which the relevant booking was made, but only where the card is still valid and matches the name of the customer making the claim.

23. Ryanair accepted that it had changed its policy in February 2016. From that time onwards it had dealt directly with passengers making compensation claims. Its evidence explained the reasons why. Following the change of policy, Ryanair introduced a number of other changes. These included changes to its website; and the creation of on-line forms for the submission of compensation claims. The judge set these out in detail. In relation to claims made by third party handlers (including Bott) Ryanair introduced the following practices.
24. Where Ryanair receives a claim from a third party handler and determines that it is valid, it responds directly to the passenger offering payment of the relevant amount of compensation. It will make the compensation payment directly by cheque to the passenger or, in some cases, to the credit card that was used to make the booking, or it will request bank details in order to make an on-line transfer of funds. The third party handler is copied into that correspondence and is also sent a letter separately notifying it of Ryanair's direct correspondence with the handler's client. If, on the other hand Ryanair determines that the claim is not valid it sends the customer a letter to that effect. A third party handler involved in such a claim would be copied on the letter to the customer and sent a separate letter confirming that "EU261 compensation is not applicable in this case", referring the handler to its client for further information.
25. If the matter goes as far as the issue of proceedings, Ryanair does not seek to contact the passenger directly. It retains solicitors to handle flight disruption compensation litigation. In a case involving Bott representing the passenger, those solicitors would communicate directly with Bott, for example, in relation to the service of court documents. If a claimant represented by Bott obtains a judgment against Ryanair using the English small claims track procedure, the final order specifies that payment is to be made to Bott, and Ryanair therefore makes payment to Bott. Bott usually used the English small claims track for compensation claims. There is a parallel EU Small Claims procedure where the final order does not specify to whom the payment should be made. But Bott does not use it.
26. As I have said, in the summer of 2016 Ryanair amended its standard conditions of carriage. They now included clause 15 which reads:

“15.2 EU261 Compensation Claims

15.2.1 This Article applies to claims for compensation under EU Regulation 261/2004.

15.2.2 Passengers must submit claims directly to Ryanair and allow Ryanair 28 days or such time as prescribed by applicable law (whichever is the lesser) to respond directly to them before engaging third parties to claim on their behalf. Claims may be submitted **here**

15.2.3 Ryanair will not process claims submitted by a third party if the passenger concerned has not submitted the claim directly to Ryanair and allowed Ryanair time to respond, in accordance with Article 15.2.2 above.

15.2.4 Articles 15.2.2 and 15.2.3 above will not apply to passengers who do not have the capacity to submit claims themselves. The legal guardian of a passenger who lacks capacity may submit a claim to Ryanair on their behalf. Ryanair may request evidence that the legal guardian has authority to submit a claim on the passenger's behalf.

15.2.5 A passenger may submit a claim to Ryanair on behalf of other passengers on the same booking. Ryanair may request evidence that the passenger has the consent of other passengers on the booking to submit a claim on their behalf.

15.2.6 In any event, save for Article 15.2.4 and 15.2.5 above, Ryanair will not process claims submitted by a third party unless the claim is accompanied by appropriate documentation duly evidencing the authority of the third party to act on behalf of the passenger.

15.2.7 Passengers are not prohibited by this clause from consulting legal or other third party advisers before submitting their claim directly to Ryanair.

15.2.8 In accordance with Ryanair's procedures, any payment or refund will be made to the payment card used to make the booking or to the bank account of a passenger on the booking. Ryanair may request evidence that the bank account is held by the passenger concerned.”

27. The word “**here**” in clause 15.2.2 contains a hyperlink to the on-line claim submission form. There are other links elsewhere on Ryanair’s website. It is clause 15.2 that Bott says is invalid under EU law.
28. The judge rejected Bott’s claim to an equitable lien because:
  - i) He held that he was bound by authority (*Meguerditchian v Lightbound* [1917] 2 KB 298) to hold that mere negotiation by a solicitor resulting in a recovery for the client could not give rise to a lien; and that there had to be some form of proceedings either by way of litigation or arbitration.
  - ii) The extension of the principle by this court in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2015] EWCA Civ 1230, [2016] 1 WLR 1385 (“*Gavin Edmondson CA*”) to cover cases which proceeded under the approved Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (“the RTA Protocol”) did not justify a further extension to cases which were not regulated by a formalised scheme sanctioned by the judiciary, that itself gives rise to an entitlement to costs.
  - iii) In the vast majority of cases there is not even a negotiation. Either the client is entitled to compensation in the amount fixed by Regulation 261 or they are not.

29. The judge rejected Bott's argument that clause 15 of the conditions of carriage was a waiver or limitation of the passenger's rights under the Regulation, because it did not put a material obstacle in the way of making such a claim; or result in the passenger's recovering less than they were entitled to.
30. With the permission of David Richards LJ, Bott appeals against both these decisions. Since the hearing before the judge, the Supreme Court has given judgment in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21, [2018] 1 WLR 2052. ("*Gavin Edmondson SC*"). Bott argues that whatever the rights and wrong of the judgment in the state of the law as it then stood, the decision of the Supreme Court has answered the question of equitable lien in its favour.
31. It is necessary at the outset to distinguish between a lien at common law (often called a retaining or possessory lien) and the equitable right at issue on this appeal.
32. The former is a right to retain possession of things (including things in action) which have come into the hands of a solicitor until his fees are paid. The existence of such a right is not peculiar to solicitors. It is a right given to many different kinds of agent, as well as to others such as a craftsman asked to make repairs to a chattel. That kind of lien extends to costs due to the solicitor in his professional capacity as such (as opposed to other debts due to him); and only to the extent that the client is personally liable to pay him. We are not concerned with that kind of lien, although its nature is relevant to understanding some of the cases.
33. The latter, although described as a lien in some cases, is not really a lien at all. It has been described on more than one occasion as a right to ask the court to intervene in order to protect the solicitor's entitlement to fees as against his client. In this respect it is no more than a right to ask the court to exercise a discretion in his favour: *Mercer v Graves* (1872) LR 7 QB 499, 503; *Mason v Mason* [1933] P 199, 214; *James Bibby Ltd v Woods* [1949] 2 KB 449, 453; *Re Fuld (No 4)* [1967] P 727, 737. Although in *Gavin Edmondson (SC)* at [3] Lord Briggs said that the right was "better analysed as a form of equitable charge," I do not consider that he intended to cast doubt on the well-established principle that the right is a right to ask the court to exercise a discretionary power. That right is one that historically has been peculiar to solicitors.
34. The main issue under this head on this appeal concerns the limits of that right. As mentioned, the judge considered on the basis of *Meguerditchian v Lightbound* that he was bound to hold that Bott fell outside the boundaries of the right. The simplified facts were these. Z was entitled to a share in a valuable asphalt mining concession. He agreed to sell it to B; and for that purpose handed him documents relating to the concession. B failed to honour the bargain; and Z obtained judgment against him in Egypt. That judgment was not enforceable in England. In consequence Z instructed English solicitors to obtain the documents from B. A representative of the firm went to Egypt to collect evidence and a draft writ was prepared. That was the state of play when Z became bankrupt. M was his trustee in bankruptcy. Following the bankruptcy M instructed the same solicitors to institute a claim against B for the documents. The solicitors began negotiations with B; but he was accidentally killed shortly afterwards. They continued to negotiate with B's executors and eventually agreed that in return for the documents, they would pay £300 and release all claims against B's estate. It is important to appreciate that the documents in question were in the possession of the solicitors. The solicitors claimed to be entitled to retain the documents until all their



fees were paid. The trustee in bankruptcy admitted the lien in relation to fees incurred on his instructions. But as to fees incurred before the bankruptcy on the instructions of Z, he contended that there was no lien; and that the solicitors were restricted to proving in the bankruptcy. The case was heard by Rowlatt J at first instance: [1917] 1 KB 297. It will be noticed that M admitted the existence of a lien as regards the fees incurred on his instructions. But that lien was a lien over the documents that had come into the solicitors' possession on his instructions. It was therefore a common law retaining or possessory lien; and did not engage the equitable jurisdiction at all. The extent of that lien was limited to fees incurred by M personally. It is clear from the argument of Mr Leslie Scott KC on behalf of the solicitors that he was asserting a lien of a different kind which "entitles a solicitor to hold the fruits of his exertions as a solicitor as against his costs incurred in recovering those fruits". He further submitted that "it is immaterial whether they were obtained by litigation, the threat of litigation, or by negotiation." Rowlatt J rejected that argument. He said at 303:

"I can find no authority for a lien of this character upon the fruits of a mere negotiation conducted by a solicitor, nor do I think it can be supported on principle. It is true that long before there was any statutory provision for the making of charging orders on property recovered or preserved the courts had interfered to prevent suitors receiving the fruits of judgments recovered in the courts, or of the compromise of litigation initiated in the courts, without paying the attorneys or solicitors to whose efforts that result was due, and in that sense it may be said that there was a lien for costs in such cases at common law... The so-called lien was a charge enforced by the court in the cause, and its existence depended on the power of the court to make the other party pay again if he paid direct to his adversary with notice of the attorney's claim... It did not rest, like a true lien, on possession at all."

35. The solicitors appealed to this court: [1917] 2 KB 298. The law reporter noted that Mr Scott's argument was the same as in the court below; and therefore did not report it again. As explained by Swinfen Eady LJ, Mr Scott argued that by instructing the solicitors to take proceedings against B, the trustee in bankruptcy must be deemed to have accepted the benefit of the work previously done on the instructions of Z. He drew an analogy with a change of interest in continuing proceedings. Swinfen Eady LJ rejected that argument. He said at 306:

"Now in my opinion there is no analogy at all between proceedings of that kind and the lien so acquired and a case where there are no proceedings, but merely negotiations with regard to a matter and correspondence taking place between the solicitors on either side. Although Mr. Leslie Scott claimed that under such circumstances the solicitors would obtain a lien, yet he was quite unable to produce any authority whatever in support of the proposition. Case after case which he referred to were all cases in which there was an action, or a suit, or proceedings of some kind."

36. He added at 307 that the grounds upon which Rowlatt J had decided the case in the court below were right. That, to my mind, is a clear statement that the equitable right will only arise if there are proceedings on foot.

37. Banks LJ agreed; and said at 308:

“On the question of law it seems to me quite impossible to contend successfully that the rule of law which has been hitherto applied to the solicitor's lien in respect of property recovered can be applied to a case such as this. Mr. Leslie Scott has claimed that the underlying principle should be applied to it. With great respect to him, I can see a very good reason why the principle should be applied in cases where there are proceedings, whether they consist of an action or arbitration, but I can see very good reasons why they should not be applied when the solicitors are left free to take whatever course they choose in order to secure a compromise.”

38. Again, I consider that the existence of proceedings (whether litigation or arbitration) was the nub of the reasoning.

39. Bray J agreed with both judgments.

40. In my judgment, therefore, that case draws a clear distinction between property recovered as a result of litigation or arbitration on the one hand, and property recovered through negotiation on the other. What it did not do, however, was to spell out precisely where the boundary between the two lay. I would infer, though, that their Lordships considered that the boundary lay in the initiation of formal process of one of the two kinds.

41. *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481, [2014] 1 WLR 1185 concerned a payment of costs incurred in judicial review proceedings which were compromised. It was thus a case in which proceedings had been issued and served. Having reviewed a number of authorities, this court stated at [33]:

“In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees. The form of protection ought to be preventive but may in a proper case take the form of dual payment.”

42. It is true that this statement is in very general terms. However, it was made in the context of costs incurred in proceedings already on foot; so the boundary of the equitable right identified in *Meguerditchian v Lightbound* was not in issue. Nor was that case cited to the court.

43. So we come to *Gavin Edmondson CA*. As mentioned, that case concerned claims for personal injury proceeding under the RTA Protocol. The Protocol is not mandatory, but there are costs consequences if it is not complied with. Each of the clients entered into a CFA with Gavin Edmondson; and in each case the claim entered the portal which is the gateway to the RTA Protocol. The RTA Protocol was first published in 2010; and has undergone a number of changes since then. But its purpose and essential structure have remained broadly the same. As Lord Briggs said in *Gavin Edmondson SC* at [5]

the RTA Protocol was “hammered out by stakeholders under the auspices of the Civil Justice Council and approved by the Civil Procedure Rule Committee”. The RTA Protocol describes its aim:

“The aim of this Protocol is to ensure that (1) the defendant pays damages and costs using the process set out in the protocol without the need for the claimant to start proceedings; (2) damages are paid within a reasonable time; and (3) the claimant's legal representative receives the fixed costs at the end of each stage in this Protocol.”

44. The fixed costs are costs prescribed by the Civil Procedure Rules themselves: CPR Part 45. A claim enters the Protocol upon completion of a Claim Notification Form (a “CNF”). The CNF is required to be verified by a statement of truth, which must be signed either by the claimant or his legal representative: para 6.6. The RTA Protocol sets out a detailed timetable for responses. It is an underlying assumption of the RTA Protocol that a claimant is either a litigant in person; or is represented by a lawyer. The process is divided into stages. Stage 1 is designed to discover whether the insurer admits liability. Stage 2 is designed to see whether quantum can be agreed. Stage 3 requires the court to determine any dispute about quantum. If the claim is admitted, then the defendant must pay the Stage 1 fixed costs within 10 days of receiving a Stage 2 Settlement Pack. Stage 2 includes the provision of medical reports; and in some cases other expert reports and witness statements may also be required. Stage 2 also makes provision for the making of an interim payment. Stage 2 goes on to deal with offers of settlement and counter-offers. If the quantum of the claim is agreed at Stage 2, the defendant must pay the Stage 2 fixed costs within 10 days of agreeing to pay the damages. If the parties cannot agree damages, the claim moves into Stage 3. That is governed, not by the RTA Protocol, but by Practice Direction 8B, made under the CPR.
45. In *Gavin Edmondson CA* this court considered that the effect of the CFA in that case was that the clients had no underlying legal liability to pay their own solicitors' costs. Lloyd-Jones LJ said at [30] that the consequence of that was that:

“Edmondson would not have a lien over assets received on its clients' account because there is no underlying liability of the clients to Edmondson for the lien to protect.”

46. Nevertheless, he held that Edmondson was entitled to an interest that equity would protect. He explained this at [31]:

“While Edmondson has no right to recover fees from its clients, I consider that in the normal course of events Edmondson would have an entitlement to recover the fixed costs and other sums payable under the Protocol scheme. This is either an entitlement in Edmondson itself or, alternatively, in the light of the contractual arrangement between Edmondson and its clients referred to at para 22 above, an entitlement to bring proceedings in the name of the clients to recover these sums. In either case, Edmondson has an interest which equity can protect and which is deserving of protection. It is an interest of which Haven was aware by virtue of its knowledge of and participation in the Protocol scheme. I accept that this may involve an extension of the principle

enunciated in the *Khans* case, but I can see no reason why it should not apply in the particular circumstance of this case.”

47. The Supreme Court took a different view of the effect of the CFA. Lord Briggs gave the only judgment, with which the other four justices (Baroness Hale, Lord Kerr, Lord Wilson and Lord Sumption) agreed. They held that the client did have a legal liability to pay Edmondson’s costs. The effect of the various contractual documents merely limited the manner in which that liability could be met. Thus Lord Briggs said at [45]:

“The result of the above analysis is that there did exist, in each of the six cases, a sufficient contractual entitlement of Edmondson against its claimant clients to form the basis of a claim to an equitable lien over the agreed settlement debts payable by Haven on behalf of its insured drivers. The conventional analysis therefore requires the following questions to be answered: (1) did those settlement debts owe their creation, to a significant extent, to Edmondson's services provided to the claimants under the CFAs? and (2) in the absence of collusion did Haven have notice (or knowledge) of Edmondson's interest in the settlement debts?”

48. Having reached that conclusion, Lord Briggs said that the court needed to do no more than to apply the principles in *Khans* case: see [51].

49. It will be recalled that in *Gavin Edmondson* none of the claimants had actually issued proceedings. All the claims were settled through the RTA Protocol; apparently at Stage 1. The fact that no proceedings had actually been issued was not fatal to the existence of the equitable right. Lord Briggs said at [35]:

“Provided that the debt has arisen in part from the activities of the solicitor there is no reason in principle (and none has been suggested) why formal proceedings must first have been issued, all the more so in modern times when parties and their solicitors are encouraged as a matter of policy to attempt to resolve disputes by suitable forms of ADR, and when pre-action protocols of widely differing kinds have been developed precisely for that purpose.”

50. This observation was a necessary step in the reasoning which led to success on the part of the solicitors. It is therefore part of the *ratio* of the case. But Lord Briggs went on to say that there were limits to the principle. He said at [57] to [58]:

“57. I acknowledge that equity operates with a flexibility not shared by the common law, and that it can and does adapt its remedies to changing times. But equity none the less operates in accordance with principles. While most equitable remedies are discretionary, those principles provide a framework which makes equity part of a system of English law which is renowned for its predictability. I have sought to identify from the cases the settled principles upon which this equitable remedy works. One of them is that the client has a responsibility for the solicitor's charges.

58. It is simply wrong in my view to seek to distil from those cases a general principle that equity will protect solicitors from any unconscionable interference with their expectations in relation to recovery of their charges.”

51. *Meguerditchian v Lightbound* was cited to the court, but Lord Briggs did not mention it. It seems improbable, in those circumstances, that he intended to overrule it silently; at least in the sense that an equitable right will arise whatever the nature of the work that a solicitor undertakes. What can be said however, is that the bright line distinction between a case where no proceedings have been issued and a case in which they have, cannot survive *Gavin Edmondson SC*. The boundary, therefore, has been shifted. But how far? Lord Briggs disagreed with the way in which this court had found in Edmondson’s favour. He said clearly that if (as this court had held) the client had no liability to pay the solicitors, there was nothing that could support an equitable lien: see [54]. Nor did Edmondson have a claim in the name of the client, because the client had settled with insurers. So the extension of the principle was wrong.
52. If there is no general principle of the kind to which Lord Briggs referred at [58], there must be a boundary. In seeing where the boundary might lie it is, I think, necessary to examine why equity will recognise a solicitor’s right to be paid. As Lord Briggs explained at [1]:
- “It is a judge-made remedy, motivated not by any fondness for solicitors as fellow lawyers or even as officers of the court, but rather because it promotes access to justice. Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit. It is called a solicitor's lien because solicitors used to have a virtual monopoly on the pursuit of litigation in the higher courts. Nothing in this judgment should be read as deciding whether the relaxation of that monopoly means that the lien is still limited only to solicitors.”
53. He came back to the point at [33]; saying that two early cases demonstrated that “access to justice lay behind the development of the principle.” This, to my mind, is the key to fixing the boundary. In my judgment, although it is no longer necessary for formal proceedings to have been issued, the services that the solicitor provides must still be recognisable as litigation services, promoting access to justice. It must also be borne in mind that other professionals who may well be very important in securing compensation (e.g. the experts who provide medical reports required at Stage 2 of the RTA Protocol) will not be entitled to an equitable right of their own. Equally, in the current state of the law professionals from other disciplines representing parties in arbitrations; or, for that matter, before tribunals, will not be entitled to that equitable right either. Accordingly, it seems to me that the services that will attract the protection of equity are services of the kind that a solicitor would perform in conducting litigation or contemplated litigation.
54. Section 119 of the Courts and Legal Services Act 1990 contains the following definition of “litigation services”:

“any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or any contemplated proceedings, to provide”

55. There is a similar, though not identical, definition of “contentious business” in section 87 of the Solicitors Act 1974 (“business done ... in or for the purposes of proceedings begun before a court or arbitrator”). Although we are concerned with an equitable jurisdiction, rather than a statutory definition (and the equitable jurisdiction extends to arbitration as well as litigation), I consider that those definitions capture the essence of the principle underpinning the right. “Litigation” for these purposes would also include arbitration.
56. That broad area would encompass proceeding under one of the many protocols that now exist. They are, as the judge said, highly prescriptive. Failure to comply with them may result in sanctions imposed by the court under CPR Part 3.1 (4) and (5). They are, in effect, part of an overall process under the supervision of the court. The equitable right may well arise in the case of costs incurred in ADR. But, as the acronym makes clear, ADR is appropriate when there is a *dispute* to resolve. Unless and until Ryanair refuses a claim, there is no dispute.
57. In *Gaynor v Central West London Buses Ltd* [2006] EWCA Civ 1120, [2007] 1 WLR 1045 Dyson LJ said at [17]:

“In my judgment, “contemplated proceedings” are proceedings of which it can be said that there is at least a real likelihood that they will be issued. Until the potential defendant disputes the claim, it is not possible to say that proceedings are contemplated. Advising a client as to whether he or she has a good prima facie case and writing a letter of claim are not enough to amount to litigation services.”
58. The making of a claim under Regulation 261 is largely mechanical and formulaic. It requires little more than the flight distance and the length of the delay, in addition to details of the ticket purchase. The amount of compensation that a delayed passenger is entitled to receive is fixed by the Regulation. It is not a case in which the quantum of damages has to be evaluated. Bott’s evidence is that the “vast majority” of claims do not require the issue of court proceedings; and it claims a 99 per cent success rate. I do not consider that the services provided by Bott in processing that vast majority can be said either to be “litigation services” of the kind that Lord Briggs must have had in mind; or to be required in order to promote access to justice, unless and until Ryanair disputes a claim. In addition, to recognise the existence of an equitable right would place a solicitor in a far more privileged position than a claims handler performing the same services. I cannot see any justification for that; especially since the rationale for the equitable right is not motivated by any fondness for solicitors. If a claim is disputed, different considerations will arise.
59. In my judgment, therefore, where Bott simply writes a letter of claim or assists a client to complete the on-line form, and the claim is paid in response to the letter or the form, it is not entitled to an interest in the compensation that equity will protect. I would reject this ground of appeal.

60. That leads to the question whether clause 15.2 of Ryanair's standard contract of carriage is valid. It is a curious issue for this court to have to decide, for at least three reasons. First, the contract of carriage is governed by the law of the Republic of Ireland, not by the law of England and Wales. We were told that the validity of clause 15.2 is to be decided in proceedings currently before the High Court in Ireland. Our decision on its validity would not bind an Irish court, although it may be persuasive. On the other hand, it is said that whether the clause is valid is a question of EU law, which applies as much to this jurisdiction as to Ireland. Second, Bott is not a party to the contract; and no passenger is before the court. It may be questioned, therefore, whether Bott has any standing to challenge the validity of a term in a contract to which it is not a party. Third, it appears that the judge was invited to consider the issue on the basis that Ryanair relied on clause 15.2 as an answer to Bott's assertion that it was obliged to make any payment of compensation to Bott, rather than to the passenger directly. If compensation is paid to Bott it would of course be entitled to exercise its possessory or retaining lien over funds that came into its hands. But if, as I would hold, Bott has no interest in the compensation that equity will protect, I cannot see that success on this issue will bring it any benefit. It is not a party to any contract with Ryanair; and there is no suggested legal basis for a claim by Bott enforceable against Ryanair, other than the equitable interest in the compensation which I would reject. Nevertheless, since the point has been argued, and both parties urged us to decide it, I will consider it.
61. Clause 15.2 will be valid unless it limits or waives the passenger's right to compensation. The judge set out the legal test that he should apply at [130]:
- “Having regard to Article 15.1 in the context of the Regulation as a whole, including its objectives, it seems clear to me that Article 15.1 is not intended to restrict any and all contractual provisions bearing on how a claim might be made under the Regulation. Yet any such contractual provision could, in a sense, be viewed as a "limitation" ... The key question is whether a passenger is prevented by any term in the contract of carriage from achieving a full realisation of her substantive right to compensation or any other relevant substantive right under the Regulation. Accordingly, a provision mandating that a certain procedure be followed in order to make a claim is not, in my view, a provision that "limits" the right to make the claim within the scope of Article 15.1 of the Regulation, unless the effect of the requirement is to put a material obstacle in the way of making such a claim or to result in the passenger recovering less than she is entitled to recover.”
62. Mr Bompas QC argued that the judge had applied the wrong test. Article 15 should be strictly interpreted. It is not a question whether a passenger is *prevented* from achieving full realisation of their claim. Nor is it a question of a *material* obstacle. Any limitation of the passenger's right to compensation was outlawed. Clause 15.2 of the conditions of carriage exempted Ryanair from paying a compensation claim unless the mandatory process under that clause had been followed. It was therefore a limitation. He referred us to the decision of HHJ Platts, sitting in the county court at Manchester, in *Goel v Ryanair Ltd* (6 August 2015). That case concerned a clause which purported to extinguish a claim for delay compensation if not made within two years of the flight. Judge Platts held (in an obiter part of his judgment) that the compensation was money recoverable by statute for which the applicable limitation period was six years. He went

on to hold that a clause which purported to deprive a passenger of a valid claim before the end of the limitation period was a limitation or restriction on the airline's obligation to pay compensation. That, however, is a far cry from our case.

63. I find it difficult to see how article 15 can outlaw a procedure devised by the airline for handling delay compensation claims, simply on the ground that it prescribes a process. That seems to be the view of the CAA, whose advice (quoted below) contemplates that a letter might have to be sent to a particular address; or that the passenger might have to fill in a standard form. At one point in his submissions Mr Bompas seemed to be arguing that it was even impermissible for an airline to require that claims for compensation be made in writing. I reject that extreme submission.
64. In my judgment article 15.1 of the Regulation is concerned with substance. I agree with the judge that, in effect, there is no bright line between procedure and substance; but that if procedure is to fall foul of article 15.1 it must place a material (or real) obstacle in the passenger's path. An immaterial (or illusory) obstacle will not have that effect. I consider, therefore, that the judge applied the correct legal test.
65. The regulatory bodies encourage direct contact between passenger and airline. The CAA, which is the national regulator, says on its website:
- “If you believe you have a claim, you should contact your airline directly. Many airlines will have a claims procedure for you to follow. Often, a standard form is available. If so, using it will ensure you provide all the information the airline needs to process your claim.
- You can usually find the best way to put in a claim by calling the airline of checking its website.”
66. A little further down, this appears:
- “Use your airline's preferred method
- Many airlines have a standard procedure for dealing with claims. If so, use it. You might have to send a letter to a particular address or fill in a standard form. Check the airline's website for instructions, or call them to find out what to do.”
67. The European Commission gives similar advice. In its Information Notice to Air Passengers it says:
- “Passengers should always seek to contact the operating carrier before considering other means to seek redress for their rights.”
68. It is clear from the Information Notice that “other means” include retaining claims handlers; or lawyers acting as claims handlers.
69. Mr Bompas pointed out that the Information Notice also stated that:
- “As mentioned in section 7.1 of the Commission Interpretative Guidance on Regulation (EC) no 261/2004, a passenger has the right to



decide whether he/she wants to be represented by another person or entity or not.”

70. But the context in which the Commission made that statement in the Interpretative Guidance related to cases in which a complainant asserted that an airline had infringed their rights. That section of the Guidance was dealing with complaints to the regulator; or appeals against an airline’s initial decision. It was not dealing with the making of the initial claim for compensation to the airline itself. I do not consider that the statement in the Information Notice can bear the weight that Mr Bompas sought to suggest. Accordingly, in my judgment there is nothing obviously objectionable in policy terms to a clause which channels a complaint, at least in the first instance, through a process backed by both the national and the EU regulators.
71. I find it difficult to see how Ryanair’s procedure could place a material obstacle in the passenger’s route to compensation. Taken in conjunction with Ryanair’s online process, it enables a passenger to claim compensation with the minimum of effort. It conforms with the advice given by regulators. At [115] the judge described Ryanair’s scheme as “a straightforward and easy-to-use process for its passengers to make their flight delay compensation claims, either on-line or by correspondence, without the assistance of a third party.” He went on to say at [132]:
- “It is easy for a passenger to comply with, it is limited in time and it imposes no substantive limitation on the passenger's right to compensation. In fact, as Ryanair argues, a passenger who complies with the provision will receive the whole of its compensation, without deduction of legal fees as would be the case where the claim is brought through Bott. If a claim is rejected after the passenger applies through the online form or in correspondence, the passenger is advised by Ryanair to use Airline Dispute Resolution, but there is nothing to prevent the passenger from instructing Bott at that point or, indeed, at an earlier point, provided simply that the passenger makes its claim initially directly with Ryanair.”
72. I agree. If a passenger needs help in filling in the on-line form there is nothing to prevent that. On the contrary, clause 15.2.7 permits it. All that the passenger has to do is to press the send or submit button. And even that could be done by a third party, provided that the claim is made in the name of the passenger. At most the delay in processing a claim is 30 days, which is no longer than the response time that Bott itself requests. After that, a passenger is free to process a claim in any way he chooses, with or without the assistance of third parties.
73. Having regard to the judge’s evaluation of the ease of using the system, he found that there was no material obstacle. That was an evaluative judgment to which he was entitled to come. We should not interfere with it. Indeed, I personally think he was right. Ryanair’s on-line process for compensation claims does not appear on the evidence to be any more difficult to operate than Bott’s own on-line method of receiving instructions.
74. I would reject this ground of appeal as well.

75. Although other points were raised and argued, they do not arise in view of my conclusion on the two main points in the appeal. But for the reasons I have given, I would dismiss the appeal.

**Lord Justice Simon:**

76. I agree.

**Lord Justice Lindblom:**

77. I also agree.