

Solicitor's Lien

Introduction

A solicitor's right to exercise a lien arises where:

- the retainer for legal services is terminated before completion of a matter, and the client either refuses to or cannot pay the outstanding legal costs; or
- the matter has been completed but the legal costs and/or disbursements remain outstanding.

The lien allows a solicitor to retain any client documents or other personal property in their possession until the outstanding fees are paid, or reasonable security for those fees is provided.

*'[A]t common law, who terminates the retainer and why will largely determine if a possessory lien subsists.'*¹

If the retainer is terminated by the client for reasons other than misconduct by the solicitor, the solicitor may exercise a lien over any client documents in the solicitor's possession.²

If the solicitor has terminated the retainer with the client on the basis of 'just cause',³ the solicitor can exercise what is known as a 'qualified lien'⁴ over the client documents. The client's former solicitor will generally be required to provide the client documents to the client's new solicitor upon receiving an undertaking 'that [the former

solicitor's] lien over the documents will be preserved and the documents will be returned to [the former solicitor] at the end of litigation'.⁵

A lien will not arise where a retainer has been terminated by the solicitor without 'just cause' or the client has terminated the retainer on the basis of misconduct on the part of the solicitor.⁶

There are three main kinds of lien:

- General possessory or retaining lien;
- Statutory lien; and
- Particular ('fruits of action') lien.

General Possessory or Retaining Lien

A general possessory or retaining lien covers outstanding costs and disbursements properly owed by the client to the solicitor. It is not critical that the documents over which the lien is exercised have any direct connection to the legal matter undertaken, but cannot include a client's will, whether the client is living or deceased.⁷ The lien can also be claimed over the personal property of a client that came into the solicitor's possession in the course of the retainer and in their capacity as a solicitor with the sanction of the client. The *Australian Solicitors' Conduct Rules 2015* (ASCR) protect the lien over documents,⁸ and note the lien as an exception to the client's right to obtain their

¹ Justice Emilius Kyrou, 'Solicitors Possessory Lien' (2018) 92(10) *Law Institute Journal*, 36-39 ('Kyrou').

² Gordon Lewis, Emilius Kyrou & Nuwan Dias, *Lewis & Kyrou's Handy Hints on Legal Practice* (Thomson Reuters, 4th ed 2018) 173 ('Lewis and Kyrou').

³ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 13.1.3.

⁴ Kyrou (n 1).

⁵ Lewis and Kyrou (n 3) 174; See also Kyrou (n 1).

⁶ Lewis and Kyrou (n 3) 171, 173-176.

⁷ *Hawkins v Clayton* [1988] HCA 15.

⁸ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 15.1 ('ASCR').

documents from the solicitor at the conclusion of the matter.⁹

Statutory Lien

A statutory lien exists under the Uniform Law¹⁰ over trust monies held by a solicitor. This *'entitles a law practice to exercise a retaining lien over trust money held in a general trust account (or controlled money account) for the practice for a person for the amount of costs reasonably due and owing by the person to the practice.'*¹¹

All the usual requirements for deducting money from trust still apply.

Particular ('fruits of action') Lien

A particular (or fruits of action) lien is different in its nature from the other kinds of lien and is akin to an equitable charge. It *'arises over any personal property recovered or preserved, or any judgment obtained, for the client by the solicitors' exertions in litigation.'*¹² Equitable liens enable a solicitor's fees to be secured and *'are in essence, a right to approach the Court for intervention, where having obtained a judgment, the solicitor is at risk of a probability of the client depriving him or her of costs.'*¹³

In *Oakley Thompson & Co Pty Ltd v Maisano (No 2)*¹⁴ Elliott J summarised the relevant principles for the particular lien as follows:

... (3) *if a client obtains a judgment for the payment of money (including a judgment for costs), the solicitor acquires a right to have their costs paid out of the money payable, such right being an equitable right to be paid. This right is not dependent upon an order having been made to recognise the right, or upon a taxation having occurred;*

(4) *if a solicitor gives notice of the right to the person who is liable to pay the money, only the solicitor, and not the client, can discharge to*

that person for an amount of the money equivalent to the solicitor's costs;

(5) *if the person liable to pay has notice of the solicitor's right, but refuses to pay the solicitor, the solicitor may obtain a 'rule of court' directing that the costs be paid to the solicitor and not to the client (in this context, a 'rule of court' is a reference to an order or a direction of the court);*

(6) *if the client and a judgment debtor make a collusive arrangement in order to defeat the solicitor's right, the Court will enforce that right against the judgment debtor notwithstanding the arrangement and notwithstanding that no notice of the solicitor's claim has been given to the judgment debtor prior to the arrangement.*¹⁵

These principles have been affirmed in a Victorian case¹⁶ where a fruits of the action lien on the proceeds of costs orders was upheld in priority to claims of other creditors in an insolvency. Understanding the operation of the 'fruits of the action' lien in the recovery of legal fees is a critical practice management issue, and will maximise fee recoveries for a solicitor from successful proceedings.¹⁷

It is important to be aware that there may be a statutory prohibition on a solicitor exercising a lien. For example, there is a statutory prohibition on a solicitor exercising a lien over workers compensation payments,¹⁸ and over any sum payable as assistance under the *Victims of Crime Assistance Act 1996 (Vic)*.¹⁹

Preservation of Lien

Rule 15.1 ASCR applies when the provision of a client's documents to their new solicitor is deemed *'essential'* to the conduct of *'current proceedings'*. The court can order a solicitor to provide the client's documents to the new solicitor and *'save the client's litigation from catastrophe'*. *'This is subject to the new solicitor undertaking 'to preserve' the original solicitor's lien and to return the papers to*

⁹ See Michael Dolan 'I want my file please' (2017) 91(3) *Law Institute Journal*, 43-45; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic)* r 14.1.2.

¹⁰ *Legal Profession Uniform Law Application Act 2014* s 144(2)(a).

¹¹ GE Dal Pont, *Lawyers Professional Responsibility* (Law Book Co., 6th ed, 2016) 525 [16.45].

¹² *Ibid* 519 [16.10].

¹³ Michelle Castle & Andrew Bailey, 'Getting in on the 'fruits of the action': the power of the equitable lien' (2018) (47) *Law Society Journal* 80.

¹⁴ [2015] VSC 210.

¹⁵ *Ibid* [77].

¹⁶ *DLA Piper Australia v Official Receiver of Singapore* [2017] VSC 216.

¹⁷ Castle & Bailey (n 10) 81.

¹⁸ *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* s 344; *Accident Compensation Act 1985 (Vic)* s 134AB, 135A.

¹⁹ *Victims of Crime Assistance Act 1996 (Vic)* s 48(4).

*the original solicitor, for what they are worth, after the end of litigation.*²⁰

Lewis and Kyrou suggest that, in addition to the undertaking provided by the new solicitor, an agreement should be prepared to detail the terms of the undertaking and ensure the new solicitor retains the client's verdict or settlement monies to meet outstanding costs.²¹

ASCR rule 15.1.2 requires a solicitor to deliver documents to the client that are subject of a lien where 'reasonable security' is provided. This phrase is not defined in the ASCR but can be interpreted as 'something of monetary value which would ensure the satisfaction of the possessory lien. Like should be replaced with like.'²²

Circumvention of the Lien

It is possible that a lien can be circumvented in practice due to an opposing lawyer providing documents to the former client's new lawyer to continue the matter. Lewis and Kyrou have commented that it would be 'appropriate... to cooperate with the new solicitor by providing relevant documents from your file, such as pleadings and copy discovered documents'.²³

Can a subpoena be used to obtain documents protected by a lien?

A client's new lawyer may attempt to obtain documents held under a lien by the client's previous lawyer through the service of a subpoena for production. In *Tyneside Property Management Pty Ltd v Hammersmith Management Pty Ltd*²⁴ a solicitor terminated the retainer for good cause and the former client then issued a subpoena to produce the documents held under the lien. The court made an order for production, subject to the preservation of the lien, and also ordered security be given. The court considered ASCR rule 15 as 'a framework for the steps that solicitors must observe where a former client seeks access to document, it did not impose binding guidelines on the court.'²⁵

How can we help you?

Visit the Ethics, Wellbeing & Practitioner Support Department's website at <https://www.liv.asn.au/Professional-Practice/Ethics>

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and any other applicable rules or legislation.

To discuss the exercise of a solicitor's lien, contact the Ethics, Wellbeing & Practitioner Support Department on (03) 9607 9336.

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²⁰ Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice* (Queensland Law Society, 1st ed, 2014) 64.

²¹ Lewis & Kyrou (n 3) 178; See also *Bechara v Atie* [2005] NSWCA 268.

²² *Bechara v Atie* [2005] NSWCA 268 [64] (McColl JA).

²³ Lewis & Kyrou (n 3) 179.

²⁴ [2011] NSWSC 156.

²⁵ Kyrou (n 1) 37.