

TRIPARTITE DEED

THIS DEED is made on day of 20

THE PARTIES

..... (the 'present practitioner')

.....(the 'client')

.....(the 'former practitioner')

BACKGROUND

- A** The former practitioner acted for the client in the matter until the retainer was terminated.
- B** The present practitioner is now acting for the client and has taken over the carriage of the matter.
- C** The client owes costs to the former practitioner.
- D** The former practitioner claims a general retaining lien over the documents in the matter but agrees to transfer the file to the present practitioner upon satisfactory security for the costs.

NOW THIS DEED WITNESSES AS FOLLOWS

1 INTERPRETATION

Definitions

- | | |
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| 'assessed' | means a concluded assessment, including any reviews or appeals, under Part 3.2 of the Act. |
| 'costs' | includes fees, charges, disbursements, expenses, remuneration and GST. |

'documents'	means documents as defined in s.4 of the Act subject to Rules 8.5.1 and 8.5.2 of the <i>Solicitors Rules</i> .
'equitable lien'	means the right under the general law to be paid costs from the money. It has the same meaning as the 'fruits of the action lien' and 'particular lien'.
'matter'	means (..... <i>details</i>).
'money'	means the net amount resulting from a settlement, award or verdict in the matter, including party/party costs.
'practitioner'	includes the practitioner's law practice.
'general retaining lien'	means the right, under Rule 8.3 of the Solicitors' Rules, to retain the client's documents pending payment of all costs. It has the same meaning as the 'possessory lien'.
'retainer'	means the agreement to act pursuant to the costs agreement between the practitioner and the client dated (..... <i>date</i>).
'the Act'	means the <i>Legal Profession Act 2004</i> .
'the other party'	means the opposing party, or its legal representative/s, in the matter.
'the Regulation'	means the <i>Legal Profession Regulation 2005</i> .
'valuable consideration'	means the present practitioner's agreement to continue to act for the client.

2 THE PRESENT PRACTITIONER AGREES

- 2.1** upon receipt of money from the other party and availability of cleared funds, subject to the provisions of the Act and the Regulation, to pay the former practitioner's costs of an amount to be agreed between the former practitioner and the client;
- 2.2** if agreement is not reached, to keep the amount claimed by the former practitioner in the present practitioner's trust account until the amount of outstanding costs has been agreed or assessed;
- 2.3** to provide a notice of equitable lien on the money to the other party; and
- 2.4** to make the file available to the former practitioner at mutually convenient times to prepare a bill of costs or to deal with the assessment of costs.

3 THE CLIENT

- 3.1** gives to the present practitioner an irrevocable authority, for valuable consideration, to receive money from the other party and to pay the former practitioner's costs of an amount to be agreed or, failing agreement, as assessed;
- 3.2** authorises the present practitioner to advise the former practitioner upon obtaining any entitlement to a settlement, award or verdict, including any party/party costs, the details of such entitlement in so far as they are relevant to the former practitioner;
- 3.3** agrees not to provide instructions to the present practitioner to act contrary to his or her agreements under this Deed; and
- 3.4** will not charge or encumber the proceeds of the transaction, litigation or dispute without the consent of the former practitioner.

4 THE FORMER PRACTITIONER AGREES

- 4.1** to transfer the client's documents to the present practitioner upon the execution of this Deed or within a reasonable time;
 - 4.2** to refrain from commencing any court action to recover from the client any costs owed to the former practitioner in the matter, unless this agreement has been breached by the present practitioner and/or the client.
- 5** Interest is payable on the outstanding costs but only if it is payable under section 321 and section 363A of the Act or Regulation 109 of the *Workers Compensation Regulation* 2003 or any other legislation.
- 6** If the money received from the other party is not sufficient to pay the costs, the costs are to be apportioned as agreed by the present practitioner and the former practitioner on a pro rata basis.

- 7 If the costs are regulated by legislation, the costs are to be apportioned by agreement between the present practitioner and the former practitioner on a pro rata basis and in the absence of agreement as to the apportionment of the costs, the present practitioner agrees to obtain an apportionment, where permissible, under one of the following provisions:
- Section 342 of the *Legal Profession Act 2004*
 - Regulation 84(2)& (3) of the *Workers Compensation Regulation 2003*
 - Regulation 9(2) & (3) of the *Motor Accidents Compensation Regulation 2005*
 - Regulation 12(2) of the *Victims Support and Rehabilitation Rule 1997*
 - A provision under any other legislation.
- 8 The client acknowledges that, prior to execution of this Deed, opportunity has been given to seek independent advice about the Deed and such advice has been recommended by the present practitioner.
- 9 The former practitioner's general retaining lien over any of the client's documents is not discharged by entering into this Agreement.
- 10 This Agreement shall continue in force until the costs and interest, if any, have been paid to the former practitioner.

Executed as a Deed

SIGNED, SEALED and DELIVERED

.....

.....

(Witness)

.....

.....

(Witness)

.....

.....

(Witness)

Tripartite Deed – Explanatory Notes

These notes must be read by all parties prior to the execution of the Deed

- 1 Rule 29 of the Solicitors Rules provides for the rights and obligations of the present practitioner and the former practitioner, where the former practitioner's retainer is terminated and the client instructs the present practitioner.
- 2 This Deed is recommended as security for the former practitioner's costs. Each new practitioner is to enter into a separate Deed with each immediate previous practitioner.
- 3 Where the matter is such that does not involve the recovery of money, this Deed may not be appropriate. Payment of the former practitioner's costs should be in accordance with the Termination Clause in the costs agreement between the former practitioner and the client.
- 4 If a bill has not already been provided, it should be forwarded by the former practitioner with the Deed but it does not form part of the Deed. Beazley J was of the opinion that a lien may still exist even though no bill has been rendered to the client, provided of course that costs have been incurred (*Re Ly Ty Tran Cao (Bankrupt) Ex Parte: Thomas William Frederick Dixon v Ly Ty Tran Cao, Thanh Phuong Cao and Thanh Phu Cao* [1995] FCA 1409 (28 July 1995)).
5. The application and effect of the Deed must be fully explained to the client before the client is required to execute the Deed.
6. Where the former practitioner has terminated the retainer with the client, it may not be appropriate to charge interest. However, dependent on the facts and circumstances, interest may be allowed by the costs assessor.
7. Payment of necessary disbursements to the former practitioner prior to the completion of the matter is subject to negotiation by the parties. However, the inability to pay such disbursements is not a reason for withholding the transfer of the file.
8. The client agrees, in 3.1 of the Deed, to give the practitioner for the other party an irrevocable authority, to pay the money to the present practitioner. This does not bind the other party. Therefore it is necessary for the present practitioner to give notice of an equitable lien to the practitioner for the other party in these terms:

Notice is given that (present and former law practices) have an equitable lien over the judgment/settlement debt in the matter (matter number, court), such equitable lien being security for payment to (present and former law practices) by (client) of all costs and disbursements of and incidental to professional services rendered by (present and former law practices) as legal practitioners to the plaintiff/defendant, being costs and disbursements due but unpaid.

I declare that (present and former law practices) are entitled to have the said costs and disbursements due but unpaid satisfied out of the said judgment/settlement debt in priority to payment of the judgment/settlement debt to (client)."

This Notice should be sent together with the Tripartite Deed to the practitioner for the other party. A written request should be made for acknowledgement of these documents [see Grogan v Orr [2001] NSWCA 114 (2 August 2001)].

The documents should be sent before the matter is finalised. Note that a lien can be effectively claimed at a time when the interest is still inchoate, at a time when no verdict or award yet given nor settlement yet occurred to which the lien could attach [see Twigg & Anor v Kung & Anor [2002] NSWCA 220].

Only the present practitioner, not the client, can give a good discharge of the lien to practitioner for the other party [see *Ex parte Patience*; *Makinson v Minister* (1940) 40 SR (NSW) 96 at 100]; *Roam Australia Pty Ltd v Telstra Corporation Ltd* (1997) FCA 980]

The right to the lien presupposes that costs are payable, and upon proper disclosure and a valid retainer [see *Re Trepca Mines Ltd* (1962) 3 All ER 351]. Where it is necessary to enforce the lien, a court order is required. The court may then consider whether there is a right to 'exercise' the lien.

9. Quick & Garnsworthy in *Quick on Costs* LBC discusses competing claims to an equitable lien by successive solicitors at para 7.1730. He refers to, prima facie, the pari passu approached. See also *Riley Solicitors Manual* Butterworths 19,040.10.
10. The present practitioner is not required to deposit the money for costs in the trust account under s.246(4) of the Act. However, please consider this section carefully.
11. Practitioners should adapt the deed to suit their purposes and seek their own legal advice with respect to the Deed.
12. Please check regularly for updated versions on the Law Society website as changes to the legislation occurs.
13. The Law Society on behalf of itself and its employees, disclaims any liability for direct, indirect or consequential loss arising in connection with the use of the Deed.
14. To assist in obtaining the file from the former practitioner, consideration might also be given to an application to the Supreme Court pursuant to s.728 of the Act.