Getting in on the 'fruits of the action': the power of the equitable lien

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Snapshot

- After looking at the possessory lien in the July *LSJ*, we now turn to an exploration of the equitable lien.
- Equitable liens are a practically useful device to secure the payment of solicitors' fees.
- They 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.

In the July edition of *LSJ* we looked at possessory liens. In this article we look at the equitable (sometimes called 'fruits of the action') lien. The latter has often been said by the courts not to be a lien at all but something more in the nature of an equitable charge. Nevertheless the name has stuck, though the point underlying the observation is important and helps to explain its characteristics. The intent of this update is to focus on the equitable lien available to the solicitor with reference to the principal decision in the area, being *Firth v Centrelink (formerly known as the Department of Social Security) & Anor* (2002) 55 NSWLR 451; [2002] NSWSC 564 ('***Firth***') and some older authorities on the topic.

The equitable lien

A solicitor whose efforts result in the recovery of money ('fruits of the action') for their client has an equitable right to have their proper costs and disbursements paid from the money so recovered (*Firth* at [33]).

The nature of the solicitor's rights

The classical statement of principle is set out in *Ex parte Patience; Makinson v Minister* (1940) 40 SR (NSW) 96 ('***Ex parte Patience***'). In that case, Jordan CJ observed that if a solicitor acts and a client is successful, the solicitor receives no common law title or right to receive monies, but an equitable right to have the costs paid from the proceeds of the judgment, award or compromise. After having notice of the lien, if the person liable refuses to pay the costs, the solicitor is then able to approach the Court to obtain an order requiring the amount of the costs to be paid by the judgment debtor to him or her. Once notice has been given, it is no answer for the judgment debtor to rely on the fact of payment to the solicitor's client who was the judgment creditor.

Although often described as a lien, the right has been characterised as a claim to the equitable interference of the Court to have the judgment held as security for his debt (see *Barker v St Quinton* (1844) 12 M&W 441). As a matter of practice, the court's assistance is invoked not to create but enforce the right, and a solicitor's claim is one recognised independently of any declaration of the right (*Ex parte Patience* at 101 (and the authorities referred to there)).

The following principles concerning the lien, or right of approach to the court, were recapitulated by Campbell J in *Firth* at [35] (with case citations omitted), as follows:

(a) it applies to verdict and judgment or a compromise reached in the client's favour;

(b) it covers the judgment sum and any order for costs;

(c) a lien will attach to monies in the solicitor's possession, monies in Court payable to a client and monies owed to the client but not paid into Court;

(d) a solicitor can maintain a lien even though they are no longer acting for the client;

(e) the quantum to which the right extends is the amount properly owing to the solicitor ascertained with reference to a costs agreement, or by process of costs assessment or taxation of costs. The lien will extend to the whole of the fund until the process of costs assessment is complete – at which point, it may reduce only to the funds determined as payable;

(f) the lien exists immediately upon any of the following obtained through the exertions of a solicitor:

  (i) upon the payment over of monies pursuant to judgment given in favour of a client;

  (ii) at the point an order for costs is made in favour of a client; or

  (iii) at the point of entry into a settlement agreement;

(g) it will support the grant of an injunction preventing payment to a client without notice to a solicitor until the quantum of costs properly payable to the solicitor is ascertained;

(h) the lien can be enforced against third parties in certain circumstances – e.g. the assignee of a debt, unless the assignee is a bona fide purchaser for value without notice;

(i) in the insolvency context:

  (i) where a client company goes into liquidation, the solicitor is entitled, concerning costs incurred before the start of the liquidation, to claim full costs from any fund recovered as a result of his or her efforts and is not required to prove their claim;

  (ii) where a natural person is the client and becomes bankrupt, the solicitor is not required to prove for costs incurred prior to bankruptcy; the solicitor is a secured creditor, the security being the lien asserted;

  (iii) where the liquidator is the client, the solicitor's lien over property recovered through his or her exertions is to be satisfied before the statutory order for priorities for distribution of the property comes into effect; and

(j) where money is held in a solicitor's trust account, and the solicitor is served with a garnishee notice issued to enforce a debt owed to another, the garnishee notice is not effective to attach the money in the trust account to the extent the solicitor has a lien over it.

The lien extends to property or proceeds recovered (*Cordery on Solicitors* (8th edition) referred to in *Grogan v Orr* [2001] NSWCA 114 *('**Grogan**')* per Powell JA at [74]. Whether the lien extends to property preserved by the practitioner's actions has been doubted in the absence of authority on the point (*Jackson v Richards* [2005] NSWSC 630 at [55], [56], referring both to *Cordery* and to *Re Sullivan v Pearson; ex parte Morrison* (1868) L.R. 4 QB 153).

Statutes of limitation

Referring to the authorities of *Spears v Hartley* [1800] 170 ER 545, *Higgins v Scott* [1831] 109 ER 1196 and *Re Carter; Carter v Carter* (1885) 55 LJ Ch 230 (with citations here different from those footnoted in the text), Atkinson FW in *The Law and Practice Relating to Liens and Charging Orders* (1905), observes that, '[t]he Statutes of Limitation do not apply to the solicitor's lien. They only bar the remedy by action, and afford no ground for resisting an application to the Court by motion or summons to give effect to the lien.'

Notice

In giving notice of the claim to an equitable lien, practitioners should be mindful that:

(a) notice should be given to the practitioner acting in your place, to any practitioner acting beforehand, and to the practitioner acting for the defendant or respondent who bears the liability to pay if the client succeeds; and

(b) notice should also be given even if you have ceased to act because you came to a view that the case lacked reasonable prospects of success; and

(c) notice should be given at the earliest time, though a practical opportunity to assert the lien will arise at the point that the client seeks access to his or her file kept by you and the incoming practitioner is requesting a tripartite agreement.

Practical tips for approaching the court to enforce rights under an equitable lien

The equitable lien will exist even where there has been non-compliance with disclosure obligations, though this fact may delay ultimate recovery (see for example, *Waldemar Drexler t/as Drexler & Partners Litigation Lawyers v Karabay* [2014] NSWSC 1863 (*'**Waldemar Drexler**'*)).

Practitioners will then need to expeditiously bring the application where a defence of laches can defeat it if significant time has passed (*Grogan v Orr* [2001] NSWCA 114 per Sheller JA at [66]-[70]; Meagher JA, agreeing).

Of the evidence required, the affidavit evidence must establish a causal link between the solicitor's exertions and the recovery of the fund obtained by judgment, the costs order or the compromise of the proceedings (see *Roam Australia Pty Ltd v Telstra Corporation Ltd* [1997] FCA 980 (22 September 1997) and *Carew Counsel Pty Ltd v French* (2002) 166 FLR 460 at 462, both referred to in *Firth* at [35](f)). Evidence is required of the industry of the practitioner (*Grogan* at [62]), rather than specific exertion (*Waldemar Drexler* at [35]), to make good the entitlement to enforce the lien.

The application itself – which is ordinarily to have an amount covering the costs to be paid into Court - is made to the Supreme Court of New South Wales (usually to the Equity Division, though it can be made to the Common Law Division) by summons and affidavit. Solicitors should prepare short minutes of order for short service of the material relied upon. Part of the affidavit should disclose the means by which the application can be brought to the attention of the respondent(s) against whom you are seeking to enforce the lien. The approach can be made on short notice by email or, if urgent, by telephone to the chambers of the sitting duty judge or simply by turning up in the courtroom where the duty judge sits. In any case, you will need to attend with sufficient copies for yourself, for the court file and for service. If you successfully obtain orders for short service, you then serve the summons, affidavit and orders made, and the matter is allocated a return date before the duty judge, typically within a couple of days.

Conclusion

Identifying when and how to assert and enforce a 'fruits of the action' lien is a topic of considerable importance in a solicitor's practice. It is necessary to maximise recoveries where proceedings have successfully concluded for a client and where the judgment may be a substantial asset coming into the hands of a client who was a successful litigant. **LSJ**