SUPREME COURT OF QUEENSLAND

CITATION:	*Lupker v Shine Lawyers Pty Ltd* [2015] QSC 278
PARTIES:	**WERNER LUPKER** (applicant) v **SHINE LAWYERS PTY LTD** (respondent)
FILE NO/S:	BS 8806 of 2015
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	1 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 September – 10 September 2015 and further written submissions 16 September 2015
JUDGE:	Bond J
ORDER:	**The order of the court is that:** **1. It is declared that the respondent is not entitled to retain those documents as contained in the applicant's file and particularised in Order 2 hereof which were produced by or on behalf of the applicant or predominantly for the purposes of the applicant in respect of the applicant's potential claim for damages pursuant to the retainer.** **2. The respondent must deliver up to the applicant all files, documents, correspondence or other material prepared by or on behalf of the applicant or predominantly for the purposes of the applicant, or for the purpose of the applicant's matter including copies of all correspondence including that of 19 January 2015 and 29 January 2015 from the respondent to a Ms Collignon, or other material which records the economic circumstances and earning capacity of the applicant and his deceased spouse for the purposes of assessing the potential quantum of his dependency claim, in the possession or control of the respondent.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – SOLICITOR AND CLIENT – RETAINER – DURATION, TERMINATION AND CHANGE OF ATTORNEY – where

client entered into a contingency costs agreement ("no win no fee" agreement) with law firm – where client terminated the agreement – where the agreement was void – where law firm retained documents on the client's file – operation of the *Legal Profession Act 2007* (Qld) – whether law firm had an existing entitlement to be paid according to a fair and reasonable value of the legal services provided – whether any right of recovery in existence if agreement was not void

PROFESSIONS AND TRADES – LAWYERS – RETAINER – CONSTRUCTION OF RETAINER – IMPLIED TERM – where law firm conceded the existence of an implied term that the client could withdraw from the retainer at any time without giving reasons – where law firm argued that it was entitled to payment if the client terminated the agreement in this manner – whether such a term satisfies the conditions for the implication of a contractual term

PROFESSIONS AND TRADES – LAWYERS – RETAINER – PRINCIPLES OF CONSTRUCTION – entire contract – where law firm argued that the agreement should be construed as providing for payment on completion of the retainer – where after termination retainer no longer source of legal rights – where no right to payment has accrued before termination – whether a contractual right to payment can exist in such circumstances

RESTITUTION – UNJUST ENRICHMENT – where "no win no fee" agreement had been terminated by client for extraneous reason – where law firm claimed an entitlement to recovery as on a *quantum meruit* for work done and services rendered–whether the client, as a reasonable person, should have realised that law firm would expect immediate payment in the circumstances

PROFESSIONS AND TRADES – LAWYERS – LIENS – WHEN LIEN ARISES – DETERMINATION – where law firm has no present entitlement to recover monies – whether lien capable of existing where contingent right to payment exists – where law firm made a claim on the basis that monies were presently owing – whether lien is lost where monies are claimed where no monies presently owed

PROFESSIONS AND TRADES – LAWYERS – LIENS – INHERENT JURISDICTION – where contingent statutory right to payment exists – where the client offered undertakings to secure contingent right – whether the Court has an inherent jurisdiction to set aside a solicitor's lien – whether the Court has a discretion to require law firm to provide the documents conditional upon receipt of the undertakings

Australian Solicitors Conduct Rules 2012, rr 14, 15
Legal Profession Act 2007 (Qld), ss 319, 323, 327, 347

Automobile & General Finance Co Ltd v Cowley-Cooper (1948) 49 SR (NSW) 31, considered
BBB Constructions Pty Ltd v Aldi Foods Ltd [2010] NSWSC 1352, cited
Bechara v Atie [2005] NSWCA 268, considered
BP Refinery (Westernport) Pty Ltd v Shire Hastings (1977) 180 CLR 266, considered
Brenner v First Artists' Management [1993] 2 VR 221, considered
GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd (2003) 128 FCR 1, cited
Gulbis v Strikis [2012] NSWSC 807, cited
Kelly v Hogan [2004] NSWSC 238, considered
Legal Services Commissioner v Baker (No. 2) [2006] 2 Qd R 249, cited
Lumbers v W Cook Builders Pty Ltd (2008) 232 CLR 635, cited
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, considered
McGowan v Commissioner of Stamp Duties [2002] 2 Qd R 499, cited
Minkin v Cawdery Kaye Fireman & Taylor (a firm) [2012] EWCA Civ 546, distinguished
Paragon Finance Plc v Rosling King (A Firm) (Hart J, Chancery Division, 26 May 2000), considered
Planché v. Colburn (1831) 8 Bing. 14, considered
Re Dingjan; Ex Parte Wagner (1995) 183 CLR 323, considered
Re Galland (1885) 31 Ch D 296, considered
Re Weedman [1996] FCA 1112, considered
Sabemo Pty Ltd v North Sydney Municipal Council [1977] 2 NSWLR 880, considered
Stark v Dennett [2007] QSC 171, considered
Stark v Dennett [2008] 2 Qd R 72, considered
Vasco Investments Ltd v Morgan Stanley Australia Ltd [2014] VSC 455, cited
White v Bini [2003] FCA 669, cited
Dal Pont, *Lawyers' Professional Responsibility*, (5th ed)

COUNSEL: A P Collins, with S Mackie, for the applicant

D O'Sullivan QC, with J O'Regan, for the respondent

SOLICITORS: Bourke Legal for the applicant

Shine Lawyers for the respondent

Introduction

[1] The applicant's *de facto* spouse was one of the many airline passengers killed when flight MH17 was shot down over Ukraine in July 2014.

[2] The applicant subsequently retained Shine Lawyers to act for him in relation to his compensation claim for the loss of his spouse. Mr Wheeler was the solicitor with the conduct of the file on behalf of Shine.

[3] In May 2015 Mr Wheeler resigned from Shine. He commenced a consultancy which was then retained by Maurice Blackburn Lawyers. The applicant terminated Shine's retainer and provided authority to Shine to transfer his file to Maurice Blackburn.

[4] There is no suggestion that the applicant terminated the retainer because of any misconduct by Shine. Rather the appropriate inference is that the applicant did so because Mr Wheeler became associated with Maurice Blackburn. In effect, the applicant followed the solicitor who had had the conduct of his file from one firm to the other.

[5] In August 2015 Maurice Blackburn requested Shine to make the applicant's file available for collection.

[6] In September 2015 Shine –

(a) refused to comply with that request and contended that it was entitled to exercise a possessory lien over the file until its professional fees were paid; and

(b) issued a tax invoice to the applicant claiming payment of $20,643.50 for its professional fees, plus GST.

[7] By its originating application, the applicant sought:

> 1. A declaration that the retainer entered into between the applicant and [Shine] was terminated by the applicant on 4 August 2015.
>
> 2. A declaration that [Shine] is not entitled to retain the applicant's file pursuant to the retainer.
>
> 3. An order that all files documents correspondence or other material prepared by or on behalf of the applicant and copies of all documents correspondence or other material in the possession or control of [Shine] be delivered up to the applicant.

[8] It was common ground before me that the applicant had terminated Shine's retainer. Accordingly the applicant did not pursue the first declaration. The second declaration and the claim for an order requiring Shine to deliver up documents were pursued, although the applicant sought and obtained leave from me to amend their terms as follows:

> 2. A declaration that [Shine] is not entitled to retain <u>those documents as contained in</u> the applicant's file <u>and particularised in paragraph 3 hereof</u> <u>which are produced</u> <u>by or on behalf of the applicant or predominantly for the purposes of the applicant in respect of the applicant's potential claim for damages</u> pursuant to the retainer.
>
> 3. An order that all files, documents, correspondence or other material prepared by or on behalf of the Applicant <u>or predominantly for the purposes of the applicant, or for the purpose of the applicant's matter</u> ~~and~~ <u>including</u> copies of all ~~documents~~ correspondence <u>including that of 19 January 2015 and 29 January 2015 from [Shine] to a Ms Collignon</u>, or other material <u>which records the economic circumstances and earning capacity of the applicant and his deceased spouse for the purposes of assessing the potential quantum of his dependency claim,</u> in the possession or control of [Shine] be delivered up to the applicant.

[9] For its part, Shine contended the application should be dismissed with costs.

[10] It was common ground that the principal questions to be determined were –

(a) whether Shine has any right as against the applicant for payment of its fees;

(b) if so, whether Shine has a possessory lien which secures its right to payment of its fees;

(c) if so, whether the court has any power to make an order which might displace Shine's possessory lien.

[11] I will consider under separate headings below those three questions and the various subsidiary questions which arise.

Does Shine have a right to payment from the applicant?

The impact of the *Legal Profession Act*

[12] It was common ground that Shine's written retainer was a conditional costs agreement within the meaning of s 323 of the *Legal Profession Act 2007* (Qld) ("the Act"). The result was that it had to contain all the terms and disclosures mandated by s 323(3) of the Act. It was common ground that it did not do so and, accordingly, that it contravened s 323(3) in a number of respects.

[13] Section 327 of the Act relevantly provided as follows:

> **327 Particular costs agreements are void**
>
> (1) A costs agreement that contravenes, or is entered into in contravention of, any provision of this division is void.
>
> (2) Subject to this section and division 7, legal costs under a void costs agreement are recoverable as set out in section 319(1)(b) or (c).
>
> (3) However, a law practice is not entitled to recover, as set out in section 319(1)(b) or (c), any amount in excess of the amount the law practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received.
>
> (4) ...
>
> (5) ...
>
> (6) If a law practice does not repay an amount required by subsection (3), (4) or (5) to be repaid, the person entitled to be repaid may recover the amount from the law practice as a debt in a court of competent jurisdiction.

[14] It was common ground that –

(a) Shine's contravention of s 323(3) of the Act meant that Shine's costs agreement was rendered void by operation of s 327(1);

(b) Shine was left with the statutory right to payment provided by s 327(2); and

(c) Shine's statutory right to payment was subject to the constraint set out in s 327(3).

[15] In the present circumstances, that meant that Shine's legal costs were recoverable "according to the fair and reasonable value of the legal services provided" (see s 319(1)(c)), but that Shine was not entitled to recover any amount "in excess of the amount [it] would have been entitled to recover if the costs agreement had not been void" (see s 327(3)).

[16] There was evidence before me which suggested that the rates actually charged by Shine in the tax invoice which claimed $20,643.50 plus GST represented the fair and reasonable value of the legal services which Shine provided to the applicant before its retainer was terminated. The applicant, however, contended that s 327(3) would pose an insurmountable obstacle to Shine's recovery of that (or indeed any) amount, because, if the costs agreement had not been void, Shine would not have had any present entitlement to recover any monies from the applicant.

[17] The result is that, although the juridical nature of Shine's actual present right to payment is the statutory right to payment conferred on it by s 327(2) of the Act, it is necessary to

consider what Shine's rights would have been on the hypothesis that the Act had not rendered the costs agreement void.

[18] For its part, Shine contended that if the costs agreement had not been void either -

(a) Shine would have had a contractual right to payment which survived the termination of the retainer; or

(b) Shine would have had a restitutionary claim to recover as on a quantum meruit for the fair value of the work done.

[19] It is necessary to consider each of these propositions.

Shine's alleged contractual right to payment

[20] The express terms of Shine's written retainer were as follows (emphasis added):

> "I, [the applicant] hereby **agree to retain Shine** Lawyers (Shine) **to represent/arrange/investigate legal representation for me in Australia or other jurisdictions to prosecute and/or settle my claim against all parties** responsible for the loss of [the applicant's *de facto* spouse] arising from the shooting down of Malaysia Airlines flight MH17, a Boeing 777-200ER aircraft registration 9M-MRD during the flight from Amsterdam to Kuala Lumpur on 17 July 2014.
>
> **This agreement pertains to any claim for compensation pursuant to the Montreal Convention and/or any other potential claim which is now, or may in future be, available to the Client**.
>
> Legal fees and expenses
>
> In consideration for services rendered by Shine Lawyers, **I agree to pay Shine for the work done its lawyers and staff according to its hourly rate (see below), but these professional fees and case expenses will be capped at a maximum of 23% of the total recovery**, which amount will not take into account my USD$50,000 advance compensation payment, nor my Australian Government Department of Human Services 'Australian Victim of Terrorism Overseas Payment' of (up to) AUD$75,000, should the MH17 attack be declared by the Australian Prime Minister and I receive such a payment before the resolution of my Montreal Convention claim.
>
> **If no recovery is obtained then no fees or expenses will be paid by me**."

[21] The written retainer then set out a scale of applicable fees.

[22] Shine acknowledged that the retainer contained an implied term that the applicant could withdraw from the retainer at any time without giving any reason[1]. That acknowledgement was significant for the analysis of Shine's contractual rights because it meant that the termination of the retainer by the applicant was not to be regarded as a breach of contract giving rise to a right to recover damages.

[23] Once the position is reached that the retainer was validly terminated pursuant to a contractual right to do so, the orthodox position[2] is that unless:

(a) the retainer contained a clause intended to survive termination of its substantive provisions; or

(b) a party has already unconditionally acquired a right under the retainer,

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[1] Shine accepted that such a term should be implied because in view of a lawyer's position of trust and confidence and attendant capacity to influence a client's legal position, the client should not be locked into a retainer with a lawyer in whom the client may lack trust and confidence: see Dal Pont, *Lawyers' Professional Responsibility*, (5th ed) at [3.190].

[2] *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323 per Brennan J at 341 and *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

no contractual right or obligation would survive termination so as to be enforceable as such because the retainer, viewed as a source of enforceable rights and obligations, has ceased to exist.

[24] Shine acknowledged that the retainer contained no express term setting out what would occur if the retainer was terminated, either by the applicant, or by Shine. However its contractual right to payment was said to derive either by virtue of an implied term or as a matter of construction.

The implied term argument

[25] Shine contended that a term should be implied into the retainer:

> whereby the applicant promises that if he terminates the retainer without cause, he will pay Shine its fees and disbursements in accordance with the agreement for the work that the firm has done for him (the cap being applicable only if the agreement is not terminated early).

[26] Shine contended that the proposed term satisfied the conditions for the implication of a contractual term, as spelt out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283, namely that the proposed term –

(a) must be reasonable and equitable;

(b) must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(c) must be so obvious that "it goes without saying";

(d) must be capable of clear expression;

(e) must not contradict any express term of the contract.

[27] I disagree. I think the second and third of the conditions are insurmountable hurdles for Shine's argument.

[28] As to the second condition, it seems to me that the contract is effective without the implication of the term. The only outcome of the absence of such a term is that Shine does not get paid and would be regarded to have taken the risk that the client might lose confidence in it and want to take the retainer elsewhere before any recovery was obtained. The contract would still be effective.

[29] As to the third condition:

(a) The proposition is that a client should not be able to get solicitors' work done for nothing and that there must have been a contemplation that there be remuneration to the solicitor for the work done before termination.

(b) That much may be accepted. But the problem is what the contemplation was as to when and how the remuneration would be paid. Is the solution posed by Shine a solution which is so obvious as to go without saying?

(c) Shine says it is so obvious as to go without saying that in a retainer like the present, if the client exercised his or her implied right to terminate for no cause, all the fees for work done would become immediately due, and without the operation of any cap. I accept that there are arguments based on risk assessment which might suggest that that would be a reasonable and equitable outcome, especially when viewed from Shine's point of view.

(d) On the other hand, however, the only promise to pay was qualified by reference to a cap expressed as a proportion of the amount recovered. And there was an unambiguous statement that if there was no recovery then the client would not have to pay.

(e) For the purposes of assessment of what is so obvious as to go without saying it suffices to make the following observations:

(i) It appears to me to be at least arguable that the parties did not contemplate that the client would ever have to pay any money unless and until there had been a recovery and that the parties contemplated that any payment by the client would be made out of the recovery obtained.

(ii) It appears to me to be at least arguable that the more apposite solution might be that a term should be implied into the retainer:

> whereby the applicant promises that if he terminates the retainer without cause, he will pay Shine its fees and disbursements in accordance with the agreement for the work that the firm has done for him but only if the matter is subsequently brought to a successful conclusion, such that a 'recovery is obtained'.

(iii) Shine suggested that such an implied term would fundamentally alter the risk which Shine accepted by putting it in a position in which its recovery was put at risk in litigation to be conducted by a stranger to the agreement.

(iv) I think, however, that it is at least arguable that it would fundamentally alter the risk which the client accepted, to put him in a position in which he has to pay before any recovery is obtained and regardless of what level of recovery might eventually be obtained.

(f) The present issue is not which of two available solutions might better reflect the parties' intention, but whether the solution Shine has proposed is so obvious as to go without saying. I do not think it is.

[30] The result is that I reject Shine's implied term argument.

The construction argument

[31] Shine contended that the parties must have intended that –

(a) the term which stated that the fees payable would be "capped at a maximum of 23% of the total recovery"; and

(b) the condition "if no recovery is obtained then no fees or expenses will be paid by me",

should be construed as if they provided -

(c) the fees payable would be "capped at a maximum of 23% of the total recovery **obtained after Shine has completed this retainer**"; and

(d) the condition "if no recovery is obtained **after Shine has completed this retainer** then no fees or expenses will be paid by me",

with the result that the same result would be obtained as would be obtained under the proposed implied term.

[32] I do not accept this argument.

[33] Shine acknowledged that the contract should be regarded as an 'entire' contract, such that prima facie, it would not be entitled to charge fees until the matter was completed and then only if the applicant was successful[3]. That acknowledgement was significant for the analysis of Shine's rights because it meant that, even if the cap and the condition were to

[3] If a contract or an obligation is entire its complete performance is a condition precedent to payment: see *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; (2003) 128 FCR 1 per Finn J at [703].

be construed in the way for which Shine contends, there would still be no mechanism by which a contractual right to payment could be regarded to have accrued due prior to termination. And after termination, as I have already noted[4], the retainer, viewed as a source of enforceable rights and obligations, has ceased to exist.

[34] That conclusion is fatal to this part of the applicant's argument. It is unnecessary to determine whether the construction proposed by Shine should be accepted.

Conclusion

[35] The result is that I reject Shine's argument that had the costs agreement not been void, it would have had a contractual right to payment which right survived the termination of the retainer.

Shine's alleged restitutionary claim

[36] Shine advanced an alternative argument that had the costs agreement not been void, it would have had a present entitlement to be paid as on a *quantum meruit*.

[37] As I have already mentioned[5], Shine acknowledged that the retainer contained an implied term that the applicant could withdraw from the retainer at any time without giving any reason.

[38] That acknowledgement was significant for the analysis of Shine's restitutionary claim. If there had not been such a term, the client's conduct would be regarded as a repudiatory breach of contract giving the solicitor the right to elect to recover as on a quantum meruit. In *McGowan v Commissioner of Stamp Duties* [2002] 2 Qd R 499 at [11] McPherson JA (with whom Helman J agreed) noted "… the general principle exemplified in *Planché v. Colburn* (1831) 8 Bing. 14; 131 E.R. 305 that, if a party to a contract for services wrongly repudiates it before the work is completed, the party doing the work is entitled to a quantum meruit for services performed … ."

[39] But the fact that the client's termination of the retainer is not to be regarded as a breach of contract is not fatal to the proposition that a restitutionary right might exist. It just means that the question of the existence of the right must be analysed from first principles.

[40] As a general proposition, and apart from any agreement to the contrary, if an entire contract for the provision of work or services is terminated by the client, the law would recognise the provider of the work or services would have a restitutionary claim to recover as on a quantum meruit for the work done and services provided up to the date of termination: see *Legal Services Commissioner v Baker (No. 2)* [2006] 2 Qd R 249 at [3] and [32].

[41] However an important point is made by the High Court in *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635. It suffices to quote from the judgment of Gummow, Hayne, Crennan and Kiefel JJ at [79] (emphasis added, citations omitted):

> The doing of work, or payment of money, for and at the request of another, are archetypal cases in which it may be said that a person receives a "benefit" at the "expense" of another which the recipient "accepts" and which it would be unconscionable for the recipient to retain without payment. And as is well apparent from this Court's decision in *Steele v Tardiani*, **an essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made**. It is essential to consider how the claim fits with contracts the parties have made because, as Lord Goff of Chieveley rightly warned in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*, "**serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been**

[4] See at [23] above.

[5] See at [22] above.

> **made under an applicable contract**". In a similar vein, in the Comments upon §29 of the proposed Restatement, (3d), "Restitution and Unjust Enrichment" (81), the Reporter says:
>
> > "**Even if restitution is the claimant's only recourse, a claim under this Section will be denied where the imposition of a liability in restitution would overturn an existing allocation of risk or limitation of liability previously established by contract**."

[42] In other words, the terms of the terminated contract, although no longer the source of enforceable rights and obligations, are still very relevant to the existence and scope of the restitutionary claim.

[43] What is to be made of the fact that the contract in this case specifically provided that the entitlement to be paid was contingent on recovery?

[44] Specific guidance on whether a restitutionary claim exists in such circumstances is to be found in *Vasco Investments Ltd v Morgan Stanley Australia Ltd* [2014] VSC 455 per Vickery J in the following passages (at [337] to [339] and [346] to [348], emphasis added):

> [337] The following principles apply to an action in quantum meruit, as derived from *Pavey & Matthews Pty Ltd v Paul*, *Brenner v First Artist Management Pty Ltd*, *Lumbers v W Cook Builders Pty Ltd (in liq)* and the cases cited therein.
>
> [338] Vasco's claim under this head is a claim in restitution arising out of services performed.
>
> [339] **The law may impose an obligation to make restitution on a quantum meruit** basis, under what I will call the first class of case, **where the plaintiff proves:**
>
> **a. Actual or constructive acceptance of the benefit of the provider's goods or services by the recipient;**
>
> **b. The recipient of the goods or services should have realised that the provider expected to be paid; and**
>
> **c. It would be unjust for the recipient to take the benefit of the goods or services provided without paying a reasonable sum for them.**
>
> …
>
> [346] **The provider of the services in the first class of case must prove that the services were not provided** as a gift, or **on the basis that payment should not be made unless a pre-condition has been met and that condition remains unfulfilled**.
>
> [347] **The court is not concerned with the actual state of mind of the parties when considering whether payment ought to have been contemplated in the first class of case. The appropriate enquiry is whether the recipient of the services, as a reasonable person, should have realised that a person in the position of the provider of the services would expect to be paid for them**. Where the services are provided pursuant to a request made in a normal commercial relationship with a person whose business it is to provide those services for reward, this requirement will usually be satisfied.
>
> [348] The circumstances which may satisfy the element of injustice sufficient to impose an obligation under the first class of case to make fair and just restitution will vary from case to case. In *Angelopoulos v Sabatino*, Doyle CJ noted nine factors which were held in that case to give the acceptance of the relevant services the necessary character to support the claim. But these are by no means definitive or exhaustive. Some elements or variants thereof may appear in some cases which justify relief, others may not.

[45] Even where the circumstances do suggest that the services were provided on the basis that they were not to be paid for unless a pre-condition had been met and that condition remains unfulfilled, a restitutionary claim may nevertheless exist. The reason why the condition remains unfulfilled might well provide the additional ingredient which would make it unjust for the recipient to take the benefit of the services without paying for them. As to this proposition, it may be observed:

(a) In *Brenner v First Artists' Management* [1993] 2 VR 221 at 259 Byrne J observed (citing *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880), that in a case of provision of services on the basis that they were not to be paid for unless a pre-condition had been met and that condition remained unfulfilled, an obligation to pay the provider of the services might nevertheless arise where the reason the condition remained unfulfilled was due to a change of heart on the part of the recipient.

(b) The facts of *Sabemo* concerned work which a contractor did for a council in anticipation of being awarded a long term contract for a civic centre development. Ultimately the development had to be replanned and the council withdrew from the project. Sheppard J stated the governing principle as follows, at 902-903:

> In my opinion, the better view ... is that, where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, and thus in the interest of the two parties, which work he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution, if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party.

(c) The correct explanation of the principle which derived from *Sabemo* was the subject of detailed consideration in *BBB Constructions Pty Ltd v Aldi Foods Ltd* [2010] NSWSC 1352 per McDougall J at [331] to [391]. His Honour thought that the correct analysis was that least the following matters must be considered[6]:

(i) whether, from the perspective of the recipient, a benefit was provided;

(ii) whether that benefit was provided on the basis that it should be paid for directly (as opposed to indirectly, e.g. out of what might have been obtained in the event of the precondition having been met); and

(iii) whether, in all of the circumstances of the case, it was unconscientious for the recipient to take the benefit but not to pay the price.

(d) His Honour noted:

> [374] It is clear that for Sheppard J, the decisive factor in *Sabemo* was that the council "deliberately decided to drop the proposal" for reasons that "had nothing to do with" Sabemo: see at 900, 901. His Honour contrasted that with a situation where "the transaction had gone off because the parties were unable to agree". His Honour appeared to regard it as an acceptable risk that there might be a failure in good faith to reach agreement on a point of substance in a complex transaction, but not that one party should decide unilaterally "to change its mind about the entirety of the proposal".
>
> [375] The other point that is significant is that his Honour concluded that it would have been "unthinkable" that Sabemo would act as it did, had it thought that the council might change its mind.

[46] It seems to me to be appropriate to apply the test as articulated in *Vasco* but also to apply the *Sabemo* qualification as explained by McDougall J in *BBB Constructions* as referred to in the previous paragraph.

[47] Accordingly, in the present circumstances, the critical questions are:

(a) whether the applicant, as a reasonable person, should have realised that if he exercised his right to terminate the retainer without cause and before any recovery had been obtained, Shine would expect to be paid in full for the services it had provided and without waiting for any recovery to be obtained; and

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[6] *BBB Constructions Pty Ltd v Aldi Foods Ltd* [2010] NSWSC 1352 at [341] to [342].

(b) whether it would be unjust for the applicant to take the benefit of the services Shine provided without paying a reasonable sum for them now, and notwithstanding that no recovery has yet been obtained.

[48] For its part, Shine would contend for an affirmative answer to both questions. It points out that the risk which Shine should be taken to have accepted when entering into the retainer was the risk of not recovering its fees, but, critically, in litigation of which it had the conduct. It says that Shine should not be taken to have accepted putting its fees at risk in litigation conducted by a stranger to the agreement. Shine contends that a similar outcome should be reached as in *Sabemo*, and suggests a strong correlation between the present circumstances and what McDougall J described (in the quotation at [45](d) above) as the decisive factor in *Sabemo*. The fact that it was the applicant's choice to terminate for extraneous reasons is the critical ingredient in Shine's analysis that it would be unjust for it not to be paid and paid notwithstanding there is not yet any recovery.

[49] I accept that a reasonable person in the position of the applicant would realize that Shine expected to be paid. But as I said at [29](b) above, the critical question is what that person would have expected as to when and how Shine expected to be paid? Shine's observations about the changes to the risk to it are well founded. But it does not seem to me that that is the end of the question and in any event Shine's approach does not pay sufficient regard to the fact that the question is to be approached from the point of view of the applicant as a reasonable person.

[50] In my view:

(a) Because Shine accepts that there was an implied term that the applicant could withdraw from the retainer at any time without giving any reason, Shine must be taken to have accepted that that possibility was within the contemplation of the applicant as a reasonable person.

(b) Yet notwithstanding that, the retainer made no provision for what should happen in relation to fees in the event that the applicant exercised his right to withdraw from the retainer. Rather, as I have earlier observed the only promise to pay was qualified by reference to a cap expressed as a proportion of the amount recovered. And there was an unambiguous statement that if there was no recovery then the client would not have to pay.

(c) Viewed from the point of view of a reasonable person in the position of the client in a "no win no fee" retainer of a solicitor, the critical consideration is that the client does not have to pay out of his or her own pocket, but can wait to do so until put in funds by the fact of the recovery having been obtained. A reasonable person in the position of the client would not regard either the cap or the condition expressed in the retainer as limited in the way for which Shine contends and as I have recorded at [31] above.

(d) Although a reasonable person in the position of the applicant would be taken to have appreciated that the risk to Shine would be different in the event that another solicitor ran the litigation, I think such a person would expect that if Shine wished to ensure it was paid immediately in the event of such a change to the risk, it would have stipulated for payment in the retainer.

[51] The result is that I think that a reasonable person in the position of the applicant would have appreciated that Shine would expect to be paid, but would not have appreciated that if the contractual right to withdraw from the retainer was exercised Shine would expect to be paid in full for the services it had provided and without waiting for any recovery to be obtained. Such a person would think that Shine was prepared to wait for payment until

recovery was obtained, so that the person could pay, having then been put in funds[7]. I do not see any injustice for the applicant to take the benefit of the services Shine provided without paying a reasonable sum for them now[8]. The questions I have posed at [47] above should be answered in the negative.

[52] Of course, it would be entirely different if the question of the existence of a restitutionary right to payment was being analysed after a recovery had been obtained. In those circumstances it is difficult to see why Shine would not be able to recover as on a quantum meruit.

[53] Shine contended that its argument was supported by *Minkin v Cawdery Kaye Fireman & Taylor (a firm)* [2012] EWCA Civ 546; [2012] 3 All ER 1117 at [44] and *Stark v Dennett* [2007] QSC 171 at [18], each of which cases involved the Court affirming the right of the solicitor to recover where the client terminated for extraneous reasons. However, I think that each of those decisions are distinguishable on the facts. *Minkin* did not involve a contingency fee retainer, so the analysis of the relevant considerations, even had it been done in the way I have sought to do it, would have been entirely different. And although *Stark v Dennett* did involve a contingency fee retainer, a note attached to the retainer had provided that if the client changed solicitor the original solicitor might charge and recover fees for work done before notice was given of the change: see *Stark* at [20].

[54] The result is that I reject Shine's argument that had the costs agreement not been void, it would have had a present restitutionary right to payment as on a quantum meruit. Shine may have such a right at some stage in the future, but that will depend at least upon the applicant having obtained a recovery.

Conclusion on whether Shine has a right to payment from the applicant

[55] In the present circumstances, Shine's legal costs are recoverable "according to the fair and reasonable value of the legal services provided" (see s 319(1)(c) of the Act), but Shine is not entitled to recover any amount in excess of the amount it would have been entitled to recover if the costs agreement had not been void (see s 327(3) of the Act).

[56] If the costs agreement had not been void, Shine could not be said to have either a contractual right to payment or a present restitutionary right to payment as on a quantum meruit. Shine may have a restitutionary right at some stage in the future, but that will depend at least upon the applicant having obtained a recovery.

[57] The result is that Shine has a statutory right to payment, but its ability to recover any money in exercise of that right is contingent upon Shine being able to establish that it has a present restitutionary claim. If and when Shine is ever able to satisfy that contingency, Shine's statutory right to payment would expand to the extent that the constraint imposed by s 327(3) was no longer operative. Shine is not presently entitled to recover any amount from the applicant[9].

Does Shine have a possessory lien which secures its right to payment from the applicant?

[58] On the findings I have made, Shine has a statutory right to payment, the amount of which is contingent upon certain events happening. Because the contingency remains unfulfilled, Shine is not presently entitled to recover any amount at all.

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[7] Compare the consideration identified by McDougall J in in *BBB Constructions* referred to at [45](c)(ii) above.

[8] Compare the consideration identified by McDougall J in in *BBB Constructions* referred to at [45](c)(iii) above.

[9] It is not necessary to deal with a further argument which the applicant had which, if accepted, would achieve the same result, namely that the applicant's claim should be regarded as a "speculative personal injury claim" within the meaning of s 347 of the Act, with the result that Shine was not entitled to charge for and recover any fees until an amount could be established as "the amount to which [the applicant] is entitled under a judgment or settlement".

[59] The question whether a possessory lien would lie to protect the sort of contingent right which Shine has is not clear. In *Bechara v Atie* [2005] NSWCA 268 McColl JA was prepared to assume that such a lien would lie to protect a contingent right to payment. A similar assumption seems to have been made in *Stark v Dennett* [2008] 2 Qd R 72. Shine was not able to identify any authority which dealt with the question squarely and which concluded that a possessory lien did exist in such circumstances. My attention was drawn to dictum by Austin J in *Kelly v Hogan* [2004] NSWSC 238 at [35], which expressed reasons for doubting the existence of a possessory lien in such circumstances, but which did not conclude the point.

[60] I do not think I have to resolve this point.

[61] It is important to note that Shine does not have a present right to payment of the amount identified in the tax invoice it has rendered to the applicant. This is not a case where an amount is owed and a solicitor has claimed for more than the right amount. It is a case a solicitor has claimed monies where there can be no amount owed at all at present.

[62] The applicant contended that Shine could not have a possessory lien, relying on *White v Bini* [2003] FCA 669 where Finkelstein J held (at [10]):

> [10] There is another basis for rejecting Mr Bini's lien. It is trite law that a lien will be lost if it is claimed for the wrong cause or the wrong amount: *Automobile & General Finance Co Ltd v Cowley-Cooper* (1948) 49 SR (NSW) 31, 37. A lien will also be lost if a person claims it for two debts (one due and one not due) and intimates that he will not part with possession unless both debts are satisfied: *Jones v Tarleton* (1842) 152 ER 285; *Kerford v Mondel* (1859) 28 LJ (Ex) 303. In *Albemarle Supply Co, Ltd v Hind and Co* [1928] 1 KB 307, 318-319, Scrutton LJ said:
>
> > A person claiming a lien must either claim it for a definite amount, or give the owner particulars from which he himself can calculate the amount for which the lien is due. The owner must then in the absence of express agreement tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (1.) if he has no knowledge or means of knowledge of the right amount; (2.) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that amount is wrongful. The fact that the claim is made for more that the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed.

[63] Reference might also be made to *Gulbis v Strikis* [2012] NSWSC 807, where Slattery J followed both *Automobile & General Finance Co Ltd v Cowley-Cooper* (1948) 49 SR (NSW) 31 and *White v Bini* in the following passage (at [49]):

> [49] The same conclusion can be reached by another means. It is trite law that a lien will be lost if it is claimed for the wrong cause of action or for the wrong amount: *Automobile & General Finance Co Ltd v Cowley-Cooper* (1948) 49 SR (NSW) 31,37 and *White v Bini* [2003] FCA 669. Here Mr Strikis has claimed a lien on the basis that a particular sum is due to him: as a solicitor, when it is not; or as an executor, when it is not. A solicitor's lien is a fragile security. This hearing was the opportunity for Mr Strikis to show what was due to him in comparison to what is claimed. In that he has failed. Whatever lien he ever had would now be dissolved because of his wrong claim.

[64] Shine did not make any submission that I ought not follow *Automobile & General Finance Co Ltd v Cowley-Cooper* or *White v Bini*. I have not identified any authorities which cast any doubt on their correctness. Accordingly, I will follow them.

[65] The result is that any possessory lien which Shine might have had, must now regarded as having been lost.

What, if any, power does the court have to make an order which might displace any possessory lien held by Shine?

[66] In light of my conclusion that Shine does not hold any possessory lien, it is not necessary to consider this question.

[67] In case I am wrong in that conclusion and Shine does hold a possessory lien to protect its contingent right to payment, it is appropriate to indicate what conclusion I would have reached and how I would have exercised any discretion which I might have had.

[68] There are two possible sources of the power of the Court to make an order which might displace any possessory lien held by Shine. First, there might be an inherent equitable jurisdiction to make such an order. Second, there is the jurisdiction conferred by r 15 of the *Australian Solicitors Conduct Rules*.

[69] As to the possible existence of an inherent jurisdiction, I make the following observations.

[70] I acknowledge that there is a real debate as to whether such a jurisdiction exists.

[71] In *Paragon Finance Plc v Rosling King (A Firm)* (Hart J, Chancery Division, 26 May 2000), the controversy was described in this way:

> The extent to which there is otherwise controversy between the parties as to the law relates not to the jurisdiction conferred by that rule but to the extent to which there exists any independent inherent equitable jurisdiction to make such an order overriding a solicitor's lien in a case where the client has terminated the solicitor's retainer as opposed to the case where the solicitor has discharged himself from it. In the latter case it seems to be clearly established that the jurisdiction does exist and the authorities in support of that proposition were the subject of careful review and analysis by Moore-Bick J. in *Ismail v. Richards Butler (A Firm)* [1996] 1 Q.B. 711. There is, however, an area of doubt as to the extent to which the jurisdiction exists in a case where the client has terminated the retainer of the solicitor, it appearing from both Moore-Bick J's judgment and from obiter remarks both in the Court of Appeal and at first instance in *Gamlen Chemical Ltd. v. Rochem Ltd.* [1980] 1 W.L.R. 614 that the inherent jurisdiction in those circumstances did not exist. That, however, appears to leave unexplained statements both in Halsbury's Laws of England to a different effect and the decision of Chitty J., himself reviewing earlier authorities, in *Re Galland* (1885) 31 Ch.D. 296.

[72] In *Stark v Dennett* [2008] 2 Qd R 72 at 89 to 91; [2008] QCA 50 at [41] the Court of Appeal quoted the reasons of Drummond J in *Re Weedman* [1996] FCA 1112 with approval, in which his Honour strongly doubted whether there was any residual discretion in the Court to order that the former client shall have access to the documents where it was the client who has terminated the retainer otherwise than for the solicitor's misconduct.

[73] The decision of Chitty J in *Re Galland*, on the other hand, cited in *Paragon Finance* does suggest the existence of a discretion. *Re Galland* was not apparently cited either to Drummond J in *Re Weedman* or to the Queensland Court of Appeal in *Stark v Dennett*. *Re Galland* was referred to with approval by the New South Wales Court of Appeal in *Bechara*.

[74] If the contingent statutory right which Shine had was capable of supporting a possessory lien, it is impossible to see how that conclusion could be reached without also (and necessarily) accepting the conclusion that the Court could order the papers the subject of the lien to be delivered to the client if Shine was given sufficient security for its contingent right. The client must be capable of discharging the lien and, if the right to recover money is subject to a contingency, the provision of appropriate security is the appropriate means by which that could occur. It seems to me that it would be to accord to Shine a better right than the contingent right it had, to conclude that the possessory lien could only be discharged by tender of full payment of the monies the right to recovery of which was subject to an as yet unfulfilled contingency. That would be manifestly unjust.

[75] That much seemed implicitly to be acknowledged by Shine which, as part of its submission that a contingent right could support a possessory lien, submitted that one consequence might be that "all other things being equal, a Court may be more ready to compel delivery of the file".

[76] In this case:

(a) the applicant offered an undertaking from Maurice Blackburn in these terms:

> I, RODNEY LUKE HODGSON Principle of Maurice Blackburn Lawyers of Level 8 179 North Quay Brisbane in the State of Queensland, undertake to retain, following any settlement on behalf [the applicant, amongst others], an amount sufficient to make payment of the costs of Shine Lawyers Limited ("SHINE") of $22,707.85 as claimed … (or should the settlement proceeds not exceed that amount, then the amount of the settlement) …
>
> In the event the settlement sum is equal to or less than any sum so assessed on behalf of Shine as due and payble such sum shall be paid in priority to any fees which may be payable to Maurice Blackburn.
>
> I undertake to pay immediate disbursements which have been outlayed by Shine directly for a particular client and reasonably incurred for that client.

(b) the applicant, by his counsel, offered to deliver a written irrevocable undertaking authorising Maurice Blackburn to pay Shine out of any recovery.

[77] In those circumstances and conditional upon receipt of the applicant's written irrevocable undertaking I would have determined that I had a discretion to make an order requiring Shine to provide the documents sought by the applicant and would have exercised the discretion in favour of the applicant.

[78] In light of that conclusion, it is unnecessary to consider the issues which were argued in relation to r 15 of the *Australian Solicitors Conduct Rules*[10].

Conclusion

[79] I have found that Shine does not have any effective possessory lien.

[80] As the existence of a possessory lien was the only basis on which Shine resisted the orders sought by the applicant, I make the declaration and order which the applicant seeks in paragraphs 2 and 3 of the amended originating application[11].

[81] I will hear the parties as to costs.

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[10] Shine had argued that the applicant had not established that the rule required Shine to deliver up the documents. The argument required a consideration of a number of arguments concerning the proper construction of the rule.

[11] I note that it may be that, consequent upon my conclusion that Shine is not entitled to a possessory lien, Shine's obligation under r 14 of the *Australian Solicitors Conduct Rules* is to deliver up further documents than those mentioned in the order sought. There is presently no suggestion that Shine will not comply with its obligations and no dispute before me in that regard, so it is not necessary to reflect that obligation in the order which I make.