

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

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LIENS

By Steve Mark, Legal Services Commissioner (NSW)

A proportion of complaints received at the OLSC relate to disputes involving liens. One of the most common scenarios is when the client has terminated the practitioner's retainer and the client wishes to retain new representation. The rules in relation to liens are clear about the circumstances in which a lien can be claimed.

TYPES OF LIENS

There are two forms of liens available to legal practitioners.

The first, more common lien is a legal practitioner's right to keep a client's property until the client has paid all outstanding fees and disbursements.

Unless the client and the legal practitioner have come to some other arrangement, this lien, and the second form of lien which is discussed below, can be exercised at any time after an amount is "due and owing" to the legal practitioner. While there have been conflicting authorities, the better view is that a legal practitioner does not need to issue an account or bill of costs to the client before the legal practitioner can exercise a lien.

This lien is known as the "retaining lien" or the "possessory lien", but is also referred to as a "general lien." General liens owe their origin to custom, principally to the custom of merchants and can be exercised by specific professions – including solicitors, stockbrokers, factors

and insurance brokers – which have been recognised by judicial notice, or when the lien holder is able to convince the Court that his or her right to exercise the lien arises from custom or usage within that trade or profession: *Majeau Carrying Co Pty Ltd-vs-Coastal Rutile Ltd* [1973] HCA 22. A wharfinger's lien is an example of judicial notice being taken of a right by members of a particular trade to a general lien.

A legal practitioner is entitled to claim a general lien until the time when the client has paid the practitioner's bill in full.

The second form of lien available to a legal practitioner is a "particular lien". In the case of a particular lien, which is not just available to legal practitioners, the person claiming the lien is only entitled to claim it over property directly referable to the costs due and owing. An example of a particular lien is the lien held by dry cleaners and motor mechanics.

The particular lien claimed by legal practitioners is also known as an "equitable" or "fruits of the action" lien.

In such a case, a legal practitioner will have the right to payment of his/her fees from any judgment or award or compromise where the legal practitioner has acted for the client in the proceedings, and there was a sufficient causal link between the legal practitioner's exertions and the recovery of the fund of money: *Ex Parte Patience; Makinson-vs-The Minister* (1940) 40 SR (NSW) 96. The quantum of money to which the legal practitioner has an equitable right is the amount which is properly owing to the legal practitioner by the client, whether that amount is ascertained by taxation of a bill of costs, or assessment, or pursuant to a costs agreement.

This lien can be claimed against any personal property recovered or preserved, or any judgment obtained for the client by the practitioner's exertions in litigation.

LIENS *continued*

PROFESSIONAL CONDUCT RULES GOVERNING LEGAL PRACTITIONERS' LIENS

Liens are governed by Rules 8 and 29 of the *Revised Professional Conduct & Practice Rules NSW 1995 (Solicitors' Rules)*. In short, they require a legal practitioner to transfer the file on termination of the retainer upon receipt of the client's authorisation and some form of reasonable security for the practitioner's costs.

Rule 8.3 of the Solicitor's Rules provides that on completion or termination of retainer, a legal practitioner must, when requested to do so by the client, give to the client or another person authorised by the client any documents related to the retainer to which the client is entitled, unless, on the grounds set out in Rule 8.3.1 to 8.3.3, the legal practitioner claims a lien over the documents for costs due from the client.

Rule 8.4 deals with the situation where a legal practitioner claims a lien for unpaid costs over a client's documents that are essential to the client's defence or prosecution of current proceedings. If the client has new representation, the Rule stipulates that the legal practitioner deal with the documents as provided in Rule 29; or if the legal practitioner's costs are "satisfactorily secured", deliver the documents to the client. The test as to whether a practitioner's costs is "satisfactorily secured" is subjective.

Rule 29 stipulates the delivery up of documents where the first practitioner's retainer has been terminated before the completion of the client's business, and the client instructs another legal practitioner to take over conduct of the client's business.

WHAT CAN A LEGAL PRACTITIONER CLAIM UNDER A GENERAL LIEN?

A legal practitioner can claim a general lien over almost any property of a client that comes into the possession of the legal practitioner during the course of the retainer. A legal practitioner may therefore be able to claim a general lien over papers, files, documents and deeds as well as money. There are, however, limitations on exactly what can be claimed.

After a legal practitioner's lien over papers, files, documents and deeds has been discharged (or waived), the following classification generally applies:

1. Documents in existence before the retainer commences and sent to the legal practitioner by the client belong to the client;
2. Documents which come into existence during the retainer, and for the purposes of business transacted by the legal practitioner pursuant to the retainer fall into four broad categories:
 - i. Documents prepared by the legal practitioner for the benefit of the client and which may be said to have been paid for by the client, belong to the client.
 - ii. Documents prepared by the legal practitioner for their own benefit or protection the preparation of which is not regarded as an item chargeable against the client, belong to the legal practitioner. Note that original file notes of telephone and personal attendances with the client have been found to be property of the legal practitioner.

- iii. Documents sent by the client to the legal practitioner during the course of the retainer, the property in which was intended at the date of sending to pass from the client to the legal practitioner, belong to the legal practitioner.
- iv. Documents prepared by a third party during the course of the retainer and sent to the legal practitioner (other than at the solicitor's expense) belong to the client.

In relation to costs, while there is some conflicting authority, in some circumstances a legal practitioner may be able to hold a lien over money that the practitioner is holding on behalf of a client. For example, upon the conclusion of a matter, if the legal practitioner receives a cheque for the client and the practitioner deposits that cheque into their trust account, the legal practitioner can refuse to disburse that money if the client refuses to pay the practitioner's fees. The legal practitioner can however, only retain the amount specified in the practitioner's bill to the client, no more.

WHAT MATERIAL CANNOT BE HELD UNDER A LIEN

There are a number of situations in which a lien cannot be claimed.

Firstly, a legal practitioner cannot claim a lien over documents that were not received in the capacity as legal practitioner for the particular client: *Ex parte Fuller* (1881) 16 Ch D 617. For example, a legal practitioner who was instructed by a mortgagee and received title deeds from the mortgagee, then was subsequently instructed by the mortgagor to sell the mortgaged property, cannot

claim a lien over the title deeds for costs incurred in relation to the sale of the property on behalf of the mortgagor.

Secondly, a lien cannot be claimed over documents that are owned by a third party, or are no longer owned by the client. For example, a practitioner cannot hold a lien over new title deeds for land that has passed to one owner (who used to hold his or her share of the property as a joint tenant) after the other owner (the client) died.

This would ordinarily mean that a lien cannot be claimed over a client's Australian passport. This is because an Australian passport constitutes Commonwealth property. Holding an Australian passport is subject to the *Australian Passports Act 2005* (s54), and it is an offence to hold a passport without the consent of the person to whom it was issued. The passport must be returned upon request.

However, as held by the New South Wales Court of Appeal in *Xu v Council of the Law Society of NSW* [2009] NSWCA 430, although by statute the Commonwealth retained the general property in an Australian passport, this did not prevent the recognition of a special property in the grantee as a bailee at will, or the creation of a sub-bailment in favour of a solicitor which entitled him to exercise a lien over the passport. It will, however, be unwise for a legal practitioner to hold onto a passport.

Third, a lien does not extend to costs and disbursements that are not subject to assessment, such as non-professional costs.

Finally, a legal practitioner is not entitled to exercise a lien where the retainer has

been terminated due to misconduct: *Hughes v Hughes* [1958] P 224; *In the matter of an application by Darryl Paul Weedman & Ors* [1996] FCA 1112.

WAIVING A LIEN

The Commissioner has the power under section 571 of the *Legal Profession Act 2004* to make compensation orders to compensate a person for loss suffered because of the conduct of the legal practitioner.

As part of this power, the Commissioner is able to make an order discharging a lien possessed by the legal practitioner in respect of a specified document or class of documents.

In addition to the Commissioner's power to discharge (or waive) a lien, the Court can order the release of documents pursuant to an application by the client. Section 728(1) of the *Legal Profession Act 2004* provides:

"Ss (1) On the application of a client of a law practice, the Supreme Court may order the law practice:

(a) to give to the client a bill of costs in respect of any legal services provided by the law practice; and

(b) to give to the client, on such conditions as the Supreme Court may determine, such of the client's documents as are held by the law practice in relation to those services."

It is important for legal practitioners to be aware and understand the dynamics of the rules and regulations regarding liens. Liens should be used with caution. The improper use of a lien can bring the profession into disrepute.

AROUND THE GLOBE

With the technological revolution currently hitting the profession and the impending introduction of alternative business structures in the United Kingdom in October we thought we would use this space in this and future issues of *Without Prejudice* to inform you of how the legal services marketplace is dramatically changing around the world and the implications for Australian legal practitioners.

Of particular interest is the recent news that on 7 April WHSmith, one of the largest newsagents in the United Kingdom signed an agreement with QualitySolicitors (QS) to place 'legal access points' WHSmith stores. QS's plan is to place trainee solicitors, paralegals and other trained staff in the WHSmith branches in high streets in 150 stores.

QS is a law firm marketing alliance in the United Kingdom which recently launched a national high street branch network in a bid to become the first 'household name' legal brand. At present there are more than 170 firms now carrying the QS brand. QS was launched as an online legal alliance in 2008, but has since evolved into a "high street legal alliance."

It is anticipated that QS staff will offer advice on a range of consumer legal matters, including providing conveyancing quotes and selling will-writing packages, but will also be able to arrange divorce consultations. Staff will use iPad apps to book appointments for customers and sign clients up to loyalty card scheme. QS will also place free legal guides and advertising in WHSmith travel stores. The deal will be promoted through a television advertising campaign.

QS's deal with WHSmith has been described as a watershed moment for the profession and a "game-changer" both for the profession and for consumers. The arrangement is said to provide an accessible and consumer-friendly legal services market. The concept of a newsagent providing access to legal services is so far out of the realm of traditional legal practice that one must wonder whether and in what other countries such an arrangement can effectively exist. Only time will tell.

What are your views about this arrangement? The OLSC is keen to hear what you think. Please send your comments to

Tahlia_Gordon@agd.nsw.gov.au

ISO RECERTIFICATION

The OLSC achieved re-certification to *ISO 9001: 2000* in March this year with the support of all management and staff. This is the fifth year in a row that the OLSC has gained certification to *ISO 9001: 2000*. SAI Global conducted a Triennial Recertification Audit of the OLSC's Quality Management System on 31 March 2011. SAI Global concluded that the OLSC continues to implement an effective process for managing customer complaints.

The OLSC is proud of its continued efforts to maintain ISO Accreditation. ISO Accreditation provides numerous benefits, not only internally but also externally to our clients as well as the general community.

RECENT PAPERS/ARTICLES/SEMINARS

ETHICS SEMINARS IN FULFILLMENT OF RULE 42 OF THE LEGAL PROFESSION ACT 2004 (NSW)

During February and March the Commissioner, the Assistant Commissioner (Legal) and the Research and Projects Manager have presented numerous ethics and professional responsibility seminars to practitioners in fulfillment of the requirements under Rule 42 of the *Legal Profession Act 2004* (NSW). Seminars were delivered to a range of organisations including law firms, in-house legal departments at organisations, regional law societies and government organisations.

UNIVERSITY LECTURES

OLSC staff together with the Commissioner and the Assistant Commissioners have delivered a number of lectures to university students across New South Wales. Over the past few months students from Sydney University Law School, UNSW Law School and the University of Western Sydney heard from OLSC staff about the purpose and function of the OLSC, ethics and practice and the ethical use of technology in practice.

WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* to you via email. If you would like to receive *Without Prejudice* electronically please contact us at **OLSC@agd.nsw.gov.au**

Comments ? Suggestions ? Something you'd like to know more about ? Write to the editor Tahlia Gordon at **Tahlia_Gordon@agd.nsw.gov.au**



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