

Ethics

STATUS

NOTES ON SOLICITORS' LIEN

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General Lien

The concept of a lien in the general sense is that of a legal right to keep possession of property belonging to another until a claim is met.

In its primary or legal sense it means the right at common law of one man to retain that which is rightfully in his possession belonging to another until claims of the person in possession are satisfied.

In exceptional cases actual possession is not essential to constitute a legal lien.

A legal lien is a right of defence not a right of action, and consequently may be claimed even if the debt is statute – barred.

Generally, a lien does not give any right to sell the thing retained.

The person exercising a lien has a duty to take reasonable care of the property retained in his possession.

No legal lien can arise until possession is obtained by the person claiming the lien.

It is essential to a legal lien that the person claiming it should have possession and the right of continued possession of the article over which the lien is claimed.

The debt which gives rise to the lien must be due.

Solicitor's Lien

At common law a solicitor has two rights which are termed liens.

Firstly, he has a right to retain property already in his possession until he is paid costs due to him in his professional capacity (retaining lien).

Secondly, he has the right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs for such recovery. [In this paper the retaining lien is only dealt with]

The solicitor's lien is in no way different from the liens of other persons under the general law.

If the exercise of the lien is likely to cause damage to the client, the property may be ordered to be handed over to the client upon payment into court.

The Retaining Lien

The general rule is that the retaining lien extends to any deed, paper, or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor with the client's sanction and which is the client's property.

The following may be subject to a retaining lien –

- (a) a bill of exchange
- (b) a cheque
- (c) a policy of assurance
- (d) a share certificate
- (e) a debenture
- (f) letters of administration
- (g) letters patent
- (h) money, including money in a client's account (but only for amount due)
- (i) documents in a safe or drawer of which the solicitor is given the key.

The lien does not extend to -

- (i) a will of the client
- (ii) original court records
- (iii) documents which did not come into the solicitor's hands in his capacity as a solicitor for the client
- (iv) documents which came into the hands of the solicitor as trustee or mortgagee.

Extent of Retaining Lien

A retaining lien extends only to the solicitor's taxable costs, charges and expenses incurred on the instructions of the client and for which the client is liable. It includes costs incurred on taxation or for recovery by action.

The lien does not extend:

- (a) to costs which are due to the solicitor in a capacity other than that of a solicitor e.g. as a real estate agent;
- (b) to sums paid by the solicitor at the client's request which is in effect is a loan to the client;
- (c) to debts generally; or
- (d) to costs which are irrecoverable because the solicitor was unqualified when the work was done.

The lien is a general lien extending to all costs due to the solicitor. It is not limited to the costs incurred in relation to the particular documents in question or upon the particular instructions in consequence of which the property came into the solicitor's possession. In this respect the retaining lien differs from the lien on property recovered for the client.

Nature of Right

The solicitor is entitled to retain the property as against the client and all persons claiming through him and having no better right than the client until the full amount of the solicitor's taxed costs payable by the client is paid.

The client has no right to inspect the documents or take copies of them during the existence of the lien.

A retaining lien may be assigned with the right to the costs which it secures and may also pass to the solicitor's personal representatives.

Discharge of Retaining Lien

A retaining lien may be discharged as follows -

- (i) by solicitor receiving payment of his costs;
- (ii) by solicitor giving up possession of the documents, but not subject to the lien;
- (iii) by waiver or by taking another form of security without expressly reserving the lien.

Generally, a lien is discharged by taking a security inconsistent with the lien, but not if the lien and security are consistent with each other.

Effect of the Discharge of the Solicitor

In the event of the solicitor's discharge in the course of proceedings, his rights in respect of a retaining lien will depend on whether he discharged himself or whether he was discharged by his client.

If the solicitor is discharged by the client, otherwise than for misconduct, the solicitor cannot, so long as his costs are unpaid, be compelled to produce or hand over the documents unless he has waived his rights under the lien.

If, on the other hand, the solicitor discharges himself, he may be ordered by the court to hand over the documents to a new solicitor on the new solicitor undertaking to hold the documents subject to the lien and to return them after the proceedings is over. In the meantime, to allow the former solicitor access to the documents.

See:

Gamlen Chemical Co. (U.K.) Ltd. v Rochem Ltd. (1980) 1 All ER. 1049;
1 W.L.R. 614 CA; and
A v B [1984] 1 All ER 265

In A v B the solicitors had discharged themselves for outstanding costs owed to them by their clients.

In that case two questions arose to be determined -

- (a) whether an exception should be made to the general practice of ordering up the documents to the new solicitors subject to the lien;
- (b) whether the original solicitors had waived their rights in any event to retain their lien.

After reviewing the authorities, Leggatt J held that -

Where, during litigation, a solicitor discharges himself, the usual practice of the court was to order the old solicitor to hand over to the new solicitor the papers which he had on the understanding of the new solicitor to hold them subject to the old solicitor's lien, even if that rendered the lien useless.

However, the court would not exercise its power automatically, the matter being equitable and therefore, one of discretion to be exercised judicially on the facts of each case.

He further stated that in approaching the matter the overriding principle was that the order which would be made would be that which best serve, or at least not frustrate, the interests of justice and that the principle that a litigant should not be deprived of material relevant to the conduct of the case and so driven from the judgment seat, if that would be the result of permitting the lien to be sustained, was to be weighed against the principle that litigation should be conducted with due regard to the interests of the court's own officers, who should not be left without payment for what was justly due to them.

The plaintiff's application, taking all the circumstances in consideration was accordingly dismissed.

[Abstracted from the headnote in A v B [1984] 1 All ER 265 at 266, 267].

In A v B at p. 269 Leggatt J said -

“...it is common ground that if, while litigation is continuing for which a solicitor is retained, his retainer is terminated, the rights of the solicitor depend on whether he is discharged by the client or discharges himself. If he is discharged by the client other than for misconduct, he is entitled to keep his lien and the court has no power to interfere with the exercise of it. If, on the other hand, he discharges himself, he enjoys what has been called a “qualified lien” and the court will, as a matter of general practice, order the solicitor without prejudice to his lien, to yield up papers required for use in the litigation to the solicitor who replaces him, against an undertaking by the new solicitor so long as he retains the papers, to allow the old solicitor to have access to them and to return them to him as soon as the litigation has been concluded...”

In Abse and Cohen v Evan Jones (Builders) [1984] 128 Sol. Jo. 317 CA, it was stated that where the client discharged the attorney without just cause, the attorney is under no obligation to deliver or to produce or to allow inspection of the papers for the benefit of the client and is entitled to hold the papers until his costs are paid.

Position Regarding the Property of Documents in Hands of Solicitor

Briefly as follows -

- (a) Documents that were in existence before the retainer came into existence may belong to the client or to third parties, as the case may be;
- (b) Documents which have come into existence during the course of the retainer and are either prepared by the solicitor for the benefit of the client or received by the attorney as agent of the client, belong to the client;
- (c) Documents prepared by a third party during the course of the retainer and sent to the attorney (other than at the attorney's expense) belong to the client;
- (d) Documents prepared by the attorney for his own protection or benefit and letters written by the client to the attorney, belong to the attorney.

Note should also be taken of Canon VII (c) which provides as follows:-

Canon VII

- (c) Nothing in these Canons shall deprive an attorney of any recourse or right whether by way of lien, set off, counter-claim, charge or otherwise against monies standing to the credit of a client's account maintained by that attorney.
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