

Holding a Lien over Client Books

Rosemary Mallon, BL, reviews and sets out an opinion regarding the right of an accountant to hold a lien over the book and records of a client.

The Entitlement to a Lien

A lien can arise in respect of the dealings between many suppliers of goods and services and their clients and undoubtedly can arise as between an accountant and his client. An accountant's lien is in essence the right of the accountant to retain the clients papers until the accountant's fees have been paid.

The Terms of a Lien and Its Enforceability

There are no reported decisions of the Irish Courts dealing expressly with the existence and/or enforcement of an accountant's lien. The vast majority of the, relatively few, reported cases in this area of the law related to solicitor's lien. A solicitor's lien is in many ways comparable to an accountant's lien in that the solicitor typically will hold important papers the property of his client.

In litigation the solicitor will invariably hold the original court documents and much of the originals of papers which may be relevant in any litigation. Typically the solicitor may not be paid the substantial proportion of his fees until after the litigation is concluded.

Disputes often arise where a client changes solicitors during the course of litigation and does not or is not in a position to discharge the first solicitor's fees up to that time. A practice has developed, endorsed by the Courts, that the solicitor will hand over the papers to the new solicitor with that new solicitor giving to the former solicitor an undertaking in lieu of the lien to give the first solicitor a right of inspection over the documents for the purposes of preparing his bill and secondly to return the papers to the first solicitor at the termination of the proceedings.

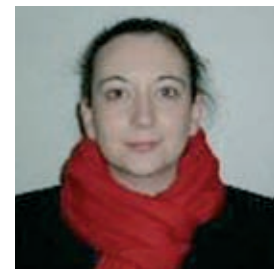
One commentator¹ has suggested that the second part of that undertaking is "almost

worthless, because it removes from the client the need to pay the bill promptly, and virtually erases the strict security aspect of the solicitor's lien". That comment was noted, in this jurisdiction, by one eminent Judge as containing "a large element of truth"². A solicitor might not only hold files relevant to litigation he may, and in fact often does hold title documents to property. A solicitor may well have a right of lien over such documents, notwithstanding their extreme importance, but, as set out before of course he cannot do anything with the documents other than retain them for the purposes of enforcing the client to pay the fees.

The Fundamental Principles Relating to an Accountant's Lien

Having regard to the total absence of reported decisions in this jurisdiction expressly in relation to accountant's liens it does however seem to me that regard can be had to the case law in this jurisdiction in relation to solicitor's liens and indeed in the case in the United Kingdom relating to liens in general. From an analysis of the leading case in this jurisdiction it is clear that there is no significant deviation from the law as it has been determined in the neighboring jurisdiction³. Applying the foregoing it would seem that the following are the fundamental principles which relate to the existence and enforceability of an accountant's lien.

A. It is unlikely that an accountant would be able to show a right to a general lien over all of a client's property and any lien which the accountant has is likely to be solely a "particular lien", that is a right to retain the client's property (papers) until such time as the debt due in respect of that property is discharged. The decision of the Court of Appeal in England would be probably followed in this jurisdiction. In that case it was stated the Judge (Lawton LJ) that



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1. see Silvertown "The Law of Lien", Butterworths, London 1988
2. See Treacy –v- Len Roche and Hilary Roche, High Court, Laffoy J (unreported) 27th February 2009
3. See for example Tracey –v- Roche, High Court (unreported), 27th February 2009 (Laffoy J), Galdan Properties Limited (In Liquidation) 1988 IR 213, Martin –v- Colfer (unreported) 27th April 2006 (Finnegan P), Ring –v- Kennedy (unreported) High Court, 18th July 1997 (Laffoy J) and Ahern & others –v- Minister for Agriculture and Food & others (unreported) High Court, July 2008 (Laffoy J).

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"I would adjudge that accountants in the course of doing their ordinary professional work of producing and auditing accounts, advising on financial problems, and carrying on negotiations with the Inland Revenue in relation to both taxation and rating have at least a particular lien over any books of accounts, files and papers which their clients delivered to them and also over any documents which have come into their possession in the course of acting as their client's agents in the course of their ordinary professional work."

B. A lien cannot be claimed over books or documents of a registered company that either by Statute or by the Articles of Association of the company have to be available for public inspection or to be kept at the registered office or some other defined place. The requirements of Section 202 of the Companies Act 1990 are clear and require every company to keep proper books of accounts at the registered office of the company or such other place as the directors think fit. The purposes of keeping such books of accounts are so that they can be inspected by the directors or such other persons entitled pursuant to the Companies Act to inspect the books of account of the company. It

accordingly seems to me that if originals of the books of accounts of the company are transferred to an accountant for the purposes of preparing accounts, tax returns or for other purposes then they must be returned to be held in accordance with the provisions of the Act and cannot be subject to any lien.

C. In order to exercise a right in respect of lien the documents which are to be retained must be the property of the client who owes the money and a lien cannot be claimed in respect of a debt owed by somebody other than the owner of the documents. A debt could not be sought to be enforced by the attempted exercise of a lien over a company's papers where the debt is in fact the personal debt of a director or of a subsidiary company and equally an accountant could not seek to retain possession of say an individual director's tax returns to enforce the debt of the company. A lien will only reside in documents which have properly come into the possession of the accountant and some work must have been done by the accountant on those papers themselves. The papers cannot be held for the purposes of seeking to enforce a general lien in the absence of an express

contractual agreement to that effect. Fees for which the lien is exercised must be in respect of work on the documents retained and not in respect of other unrelated work.

Some Scenarios Relating to an Accountant's Lien

Example 1 – Sole Trader/Unincorporated Entity and Preparation of Financial Statements

In respect of a sole trader/unincorporated entity, where the client prepares their own underlying books and records and presents them to their Accountant to prepare annual financial statements for filing with the Revenue Commissioners, Bank, etc. Can the Accountant hold a lien on the underlying books and records prepared by the client and handed into with a view to using them to prepare financial statements? If an Accountant completes additional work on those underlying records (e.g., prepares debtors'/creditors' ledgers) can he retain a lien over these additional papers. Can an Accountant refuse to file a return or to send financial statements to the Bank because of unpaid fees thereby causing the client to incur penalties?

In circumstances where the client has prepared the underlying books and records and then transfers them to the accountant they clearly have been properly received by the accountant and in my view an accountant could hold a lien on those underlying books and records and equally if he does additional work it seems to me that it would also hold a lien in respect of those additional papers.

The second part of the question however raises very serious matters. The individual tax payer is obliged by law to make returns in accordance with strict time limits. An accountant would be entitled to advise a client that he will carry out no further work on behalf of the client in the absence of his fees being paid and in those circumstances he could not be compelled, absent receipt of appropriate fees, to make a tax return.

No exercise of a valid lien however could result in the individual client being prohibited from complying with the law and making his tax return. If an accountant was to take the view that he was not going to file a tax

return then in my view he would be required to give to his client sufficient notice that he is adopting that position and also he would be, in my opinion, obliged to advise the client that he should make alternative arrangements to ensure that his tax returns are properly dealt with.

As I pointed out above there is a dearth of reported decisions in this area but I believe that a Court would probably be of the view that the exercise of the accountant's lien should be in a manner similar to the exercise of the solicitor's lien. That is that if he is refusing to make the tax return he should make available the papers to the new accountant on the basis that the new accountant will give an undertaking to return the papers so that the first accountant can continue to exercise the lien. I accept that the effect of that would be to render the usefulness of the lien to be ineffective.

I would draw distinction between the making of a tax return and providing financial statements to the Bank. The making of tax returns is on foot of statutory obligations

directed towards the client whereas the returning of financial statements to the Bank are merely a matter of contract. I do however believe that an accountant exercising such a power would not only have to advise his client that he intended to do no work but perhaps also advise the Bank that he was no longer acting for the client in relation to those matters.

Example 2 – Filing and Submitting VAT, PAYE and Income Tax on Behalf of Client

The accountant prepares the underlying books and records and files and submits VAT, PAYE and Income Tax Returns on behalf of the client.

In my opinion the Accountant can exercise a lien over the books and records but again I would be of the view that it is not open to him simply to refuse to make the appropriate tax returns without giving the client sufficient notice of same and without taking appropriate steps to assist the client, by offering access to the records, to have the returns made.

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I am strongly of the view that if an accountant by his exercise of the lien knowingly “prohibited” the client making a tax return on time that he would be open to a substantial risk of the client successfully recovering from the accountant the additional costs incurred. I would also have very serious doubts that such conduct could be seen as being ethical.

Example 3 – Limited Company and Preparation of Financial Statements

A limited company prepares its own underlying books and records and presents them to the accountant for the preparation of annual financial statements for filing with the CRO, Revenue Commissioners, etc.

I am of the view that an accountant could not retain a lien on the books and records. It is well established that by virtue of the provisions of the Companies Act that no lien can be exercised over the books and records which must be maintained by the company for inspection. Again in relation to refusal to make returns and therefore expose the client to penalties I am of the view that same would be unlikely to arise in the instant case because the accountant would have to make the relevant books and records available to the company. The accountant of course would in my view be under a contractual duty to notify the client and return the books in sufficient time for the client to make alternative arrangements.

There is a line of authority involving solicitors liens which suggests that where the solicitor terminates the relationship he cannot exercise a lien over the books and records and it would seem to me to be arguable that in circumstances where an accountant advised a client that he was not going to make the statutory returns and thereby expose the client to the risk of penalty that in fact it would be the accountant who is terminating the retainer and that in my view could substantially undermine any rights he might have to exercise a lien over the books and records.

Example 4 – Limited Company and Audit Papers

In relation to a limited company who is an audit client of the accountant and where the accountant does additional work on the underlying records and noting that an auditor is entitled and obliged to retain control of their audit papers, I draw distinction between the exercise of a lien over the audit papers insofar as they are different to the statutory books and records which must be maintained by the company. If documents fall into both categories then it would seem to me that the accountant can comply with his obligations by maintaining copies of such documents as he has to return to the company so that the latter can exercise its statutory rights of maintaining its books and records for inspection.

Example 5 – Liquidation, Examinerships and Receiverships

The final question relates to liquidation, examinerships and receiverships and whether or not an accountant can retain a lien over books and records on the appointment of a Liquidator, Receiver or Examiner. It is likely that the appointment of a Receiver will have no effect on any lien however where a company is placed in examinership or where a Liquidator is appointed then the decision is less clear as it would seem to me that the accountant would be in no better a position than any other creditor of the company and of course the Examiner or Liquidator would be absolutely entitled to the statutory books and records so that it would seem to me that any lien that existed on other paper would be of little or no value.

Conclusion

The opinion as set out above is set out in general terms. It must be emphasised that these questions about accountant’s liens have not yet come before the Courts. I also am of the view that it is most unwise to attempt to rely on a general opinion that was not written for a specific set of facts. Therefore I must say in the strongest possible terms that an individual accountant that has issues that touch on the issue of liens should seek independent legal advice in relation to the specifics of his case.

