LEGALCOUNSEL

Solicitor's liens, set-offs and the role of the Law Society

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Introduction

The remedies of liens and set-offs have been around for a long time. It is well known, therefore, that a hotel may refuse to return belongings to a customer refusing to pay his bill. While this "hotelier's lien" (or inn-keeper's lien as it was) is seldom invoked these days, solicitors have been less shy about flexing their common law remedies. It probably comes as a shock to the layman who cannot - or will not - pay his legal bill, to be told that his solicitor can lawfully refuse to return his property until the bill is paid. That, of course, is both the essence and the force of the remedy - it does not require an expensive application to the court (being self-help in nature) and will normally strike panic into the most cavalier of clients. Yet, for remedies which have been around for so long and are used so frequently, there is a paucity of Irish case law in respect of both set-offs and liens.

I recently came across a situation in my own practice where, acting for a solicitor, I was asked to consider whether a client of that solicitor was entitled to make a complaint to the law society following an invocation of a set-off/lien buy the solicitor. With that matter now concluded, I thought it might be helpful to share my views insofar as they may assist other solicitors and their clients.

Set-offs, liens and client accounts

The situation in question arose where a firm of solicitors was owed money by its client, who we will call X. The firm also held a sum of money in a client account belonging to X. The first question was whether it is lawful to exercise a right of set-off or lien to client accounts. The answer appears to be "Yes", with some caveats and ambiguities. The Solicitors Accounts Regulations 2014 (SI 516/2014) regulate the status and operation of solicitors' accounts. They contain detailed rules regarding the types of accounts which solicitors are required to maintain, how those accounts may be dealt with and so on. Regulation 39 provides that "nothing in these Regulations shall deprive a solicitor of any legal recourse or right, whether by way of lien, set-off, charge or otherwise, against moneys standing to the credit of a client account...". Therefore, it is at least envisaged that such remedies are available against funds standing to the credit of a client account. A slight caveat is contained in section 68(3) of the Solicitors (Amendment) Act 1994. It states that a solicitor may

not, save with agreement in writing by the client, "deduct or appropriate" any amount in respect of his charges from any monies payable to that client arising from contentious business (such as litigation). It seems to follow that no set-off may be invoked against funds in a client account where they represent the proceeds of litigation. It is unclear whether a lien may be invoked since, arguably at least, this does not amount to a deduction or appropriation of funds. A solicitor may, of course, invoke other remedies against such funds, which are beyond the scope of this article. It is also worth noting that section 68 has now been repealed by section 5 of the Legal Services Regulation Act 2015 which, at the time of writing, has not been commenced.

Self-help and the client's options

The major attraction of set-offs and liens is that they do not generally require a court order. The problem with that, of course, is that the solicitor relying on the remedy must be absolutely certain that he is entitled to do so. For if it transpires that he was mistaken, he could be liable to the client for all manner of compensation. Indeed, I have found that the words "set-off" and "lien" are too liberally thrown around the legal profession: they are technical terms with technical meanings. This was recently observed by Baker J in *Re: O'Callaghan deceased: Byrne applicant [2016] IEHC 668* where she said this about liens:

> "The word has a legal meaning, the meaning of which a solicitor in practice will well know."

True that most solicitors know what a lien is and what it does. But it is important to know the details because, despite the scarcity of case law, the rules relating to the two remedies are complex and not without their problems. We know, for instance, that a solicitor may not claim a lien over title deeds agreed to be held on trust for a mortgagee (*Martin v. Colfer, Unreported, High Court, Finnegan P., 27 April 2006*), that no lien may arise in respect of property belonging to a person other than the client (*Ring v. Kennedy, Unreported, Supreme Court, June 11, 1998*) and that set-offs may be claimed only where there is mutuality between the debts. That, of course, is a handful of the controversies which arise when engaging the remedies. But they are the exception; in most cases the matter will be straightforward - the solicitor will engage the remedy and then wait for the client to make a move.

What options then are available to a client whose solicitor refuses to return his deeds, or to pay over money received from the sale of his house? Generally, the only available course of action (other than paying his solicitors' fees) is to dispute the debt. That is done by way of application to the court for a declaration that the solicitor was mistaken in his actions, and the consequential relief following from that

declaration. There must naturally be good grounds for making the application because such applications will likely not be cheap and a litigant may find it difficult recruiting a solicitor willing to act for a client already in dispute about fees with another solicitor. Which leads to the question: since the dispute is between a solicitor and his client, can the latter simply make a complaint to the Law Society?

The Law Society's jurisdiction

In the most recent of such cases in which I was involved, the client complained against his solicitor to the Law Society's "Complaints and Client Relations committee". The procedure for such complaints is that they are dealt with by way of written submissions and evidence, but the committee may summon the solicitor to a formal meeting of its members if it considers this necessary for resolving the dispute. The client's claim was that his solicitor had acted unprofessionally and illegally by exercising a set-off and lien over funds in his client account. In response, I wrote that the solicitor was perfectly within his rights to exercise the remedies but, even if that was not the case, the Law Society's Clients Relations committee was hardly the proper forum for deciding the issue. Given the historical complexity of the remedies and the legal nuances surrounding them, only a court was equipped to decide whether the solicitor was acting illegally. My argument was effectively that the Committee did not have jurisdiction to decide upon the complaint. My client (the solicitor in question) was summoned to a meeting of the Committee where I repeated the same arguments. They were accepted by the Committee which ruled that they did not have jurisdiction to adjudicate on the matter.

Both my client and solicitors throughout the country can breathe a sigh of relief about the decision reached by the Committee. Such decisions are of limited precedential value; however, the Committee's willingness to cede jurisdiction to the courts in such matters effectively retains the "self-help" nature of the remedies of set-off and lien. It would, in my opinion, be unworkable if it was open to clients to complain to the Law Society every time their solicitor exercised either of these remedies. Indeed, the Society - and the new Legal Profession Regulatory Authority - ought to issue a formal direction that they will not intervene save in the most exceptional of such cases. The exceptional cases could include situations where a solicitor is so blatantly abusing the privileges offered by the remedies that it becomes a regulatory matter rather than a legal one. It is also worth noting that, quite apart from the need to ensure that solicitors have some recourse in respect of unpaid fees, there is a more practical reason why committees such as those of the Law Society ought not to have jurisdiction in such matters. The members of those committees are made up predominantly of lay persons and I think they will be the first to admit that they do not have the legal skills or knowledge to adjudicate on complex legal issues. Their role is

regulatory only. Neither are their decisions a matter of public record, meaning that it would become impossible for solicitors to know whether or not they are entitled to exercise the remedies in accordance with the jurisprudence which would inevitably build up over time.

Conclusion

Clients who have been at the receiving end of a lien or set-off exercised by their solicitors will no doubt point to the violation of their constitutional property rights. They will argue that it should not be left to them to make an expensive application to the court for the return of their property. After all, is it not the Law Society which is meant to protect them against the unruly behaviour of their solicitor? I express no view about whether or not they are correct in those arguments. But the current state of the law is that the remedies of set-offs and liens - and I have been referring to them in the same breath throughout this article, though they are different things - are self-help remedies and do not require an application to the court by those engaging them. The application must be made by the person disputing the exercise of the remedies, namely the client. While it is more cost-effective to make that application to the Law Society instead, it is clear that that is not the proper forum for such disputes.

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Important Note