

## The subpoena to produce, the former client and the lien

Two recent decisions of Brereton J in the New South Wales Supreme Court focus once again our attention on whether we can resist a subpoena to produce client's documents as against a former client where we are asserting a lien over those documents on the basis that the client has not paid outstanding legal costs.

The two decisions are *Tyneside Property Management Pty Ltd & Ors v Hammersmith Management Pty Ltd & Ors (Tyneside Property)* [2011] NSWSC 156 and *Hall v Donlon (Hall)* [2011] NSWSC 1068.

In *Tyneside Property* a firm of solicitors applied to set aside a subpoena for production issued at the request of their former clients seeking production of the original and copy documents described in a List of Documents provided by them in a Supreme Court action.

The solicitors and their former client had entered into a retainer whereby the legal practice agreed not to charge the client until the conclusion of the matter, but reserved the right to review and change those arrangements in the future at their discretion. Subsequently the firm and the client agreed to a new "cost plan". The former clients paid some costs pursuant to the plan, but not all of them.

The evidence did not disclose precisely how the relationship between the firm and its former client ceased.

His Honour inferred that the firm intimated to the former clients they would not continue to act unless their outstanding costs were paid. It seems the clients were unable to pay or alternatively unwilling to do so, and chose to change solicitors.

The former clients applied under a section 728 of the Legal Profession Act 2004 (NSW) for an order that the file and documents held by their former solicitors be delivered up to their new solicitors.

A judge made the order subject to the clients paying the sum of \$100,000 into a trust account for outstanding costs pending assessment or agreement. This condition had not been met.

The former clients issued the subpoena, in order that their discovered documents might be made available for the inspection and use of the defendants in the Supreme Court litigation in which they were involved. The former client proffered an undertaking to their former solicitors that they would not access the discovered documents and that access to the documents is restricted to their defendants.

The relevant principles Brereton J outlined are:

1. a solicitor is not entitled to resist production of documents over which a possessory lien is claimed when a subpoena for their production is issued by a third party (that is, a person or entity that is not the former client);
2. a solicitor can refuse to produce documents in response to a subpoena for production over which the solicitor has a possessory lien under a subpoena for production, issued by, the former client;
3. the second proposition is subject to the qualification that where the retainer is terminated by the solicitor, as distinct from the client, the court may, and usually will, require the production of the documents at the client's request in the interests of justice and to avoid catastrophe for the client's litigation, subject to terms preserving, so far as can be preserved, the lien - including usually security for unpaid costs (as a matter of discretion - the ability and willingness of the former client to secure the outstanding costs is an important consideration);
4. where the client terminates the retainer, without just cause, then the solicitor can withhold production against the former client;
5. the solicitor is taken (in the context of the question of resisting the production of client documents) to have discharged the retainer when the solicitor says that he or she is unwilling to act further unless

outstanding or further costs are paid, and the client, taking the solicitor at his or her word, then instructs another solicitor to act; and

6. where the interest of a third party intervenes, the solicitor is, in any event, not entitled to resist production.

The Court concluded that this was a case in which the former solicitors discharged their retainer (this does not imply that the termination was wrongful or that they were not entitled to terminate). In addition, Brereton J, held it was also a case in which it should be considered that third parties (namely the defendants to the litigation), have an interest in the relevant documents.

On the facts the former solicitors were not absolutely entitled to retain the documents – that is, the documents should be produced unconditionally.

The practice of the court in such circumstances is to protect, as best it can, the interests of the former solicitors. Based on certain inferences the Court concluded that the former clients were unable to provide security. Pursuant to the undertakings proffered the former clients themselves get slight benefit from the production of the documents, that is, they are able to satisfy their obligation to produce documents for their defendant's inspection and use at the trial but not access them.

Brereton J refused to set aside the subpoena and ordered in accordance with the undertakings given by the former clients that the requested documents be produced.

In *Hall* the former clients of a solicitor applied for a warrant for the arrest of their former solicitor for non-compliance with a subpoena to produce certain documents to the court.

The former solicitor raised three objections to explain and excuse his non-compliance with the subpoena. It is with the third ground advanced that this note is concerned. The solicitor claimed a possessory lien over the former client's documents and material for his unpaid costs.

Brereton J noted that the court will not require a solicitor to produce documents the subject of a lien where the subpoena is issued by a former client unless it falls within the exception referred to in point 3 above.

However, his Honour noted that the solicitor doesn't have a right to disregard the subpoena; the proper process to be followed in such a scenario is that if the solicitor wishes to resist production of the documents to the court, he or she should make an application to have the subpoena set aside. Alternatively, the solicitor can produce the documents to the court but oppose inspection being permitted. What is clear is the solicitor cannot simply disregard the subpoena.

In Queensland (unlike New South Wales) r419 of the *Uniform Civil Procedure Rule 1999* provides that a person is excused from complying with a subpoena to produce unless conduct money sufficient to meet the reasonable expenses of complying with the subpoena is tendered when the subpoena is served or within a reasonable time before attendance under the subpoena is required.

Tyneside Property Management Pty Ltd & Ors v Hammersmith Management Pty Ltd  
& Ors (Tyneside Property) [2011] NSWSC 156  
<http://www.austlii.edu.au/au/cases/nsw/NSWSC/2011/156.html>

Hall v Donlon (Hall) [2011] NSWSC 1068  
<http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=154680>

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