



## Helpsheet – exercising a right of lien

Issued: January 2020

Last updated: August 2023

Last Reviewed: August 2023

### Background

Chartered Accountants will sometimes encounter clients who are reluctant to pay fees. While there are a number of options to enforce payment, one is to refuse to release books, records or other documents belonging to the client which are in the Chartered Accountant's possession. The legal basis for this practice is derived from the right of lien.

By highlighting the practical and ethical issues which need to be considered, this helpsheet aims to provide guidance on the exercise of a right of lien by a Chartered Accountant.

### What is a right of lien?

A right of lien is a right to retain possession of property belonging to someone else, pending payment of an outstanding debt. The property could belong to a person, partnership, company or any other legal entity.

While the law makes a distinction between general and special (or particular) liens, only special liens are likely to be relevant to a Chartered Accountant. A special lien is a lien over property which may be retained until a particular debt due in respect of that property is paid.

A Chartered Accountant may exercise a special lien over documents belonging to a client if the Chartered Accountant has performed work on those documents and the client has not paid the resulting fee. In this guidance all subsequent references to lien are to a special lien.

### When can the right of lien be exercised?

While exercising a right of lien can sometimes be legally complicated, there are a number of general points which Chartered Accountants should take into consideration:

- **The documents must belong to the client**

A lien cannot be exercised over property owned by a separate third party, even if that party is connected to the client. It is important to distinguish between work undertaken for a company and services performed for its directors in a personal capacity. If the directors have paid their fees but the company has not, only documents relating to the work undertaken for the company can be the subject of the lien.

- **A fee must be outstanding**

Work must have been undertaken by a Chartered Accountant in connection with an instruction from the client and a fee note rendered. If an invoice for this work has not already been issued to the client, this should be done at the earliest opportunity to ensure that the client is aware of the amount and basis of the fee.

- **The fee must relate to the documents**

There must be a direct link between the documents being retained and the fee that is outstanding. For example, if the unpaid fee relates to company accounts preparation, a Chartered Accountant should not retain papers relating to separate tax work. Similarly, if the outstanding fee relates to company accounts preparation for one period, a lien cannot be exercised over documents relating to the preparation of company accounts for other periods.

- **Acquisition of the documents**

The Chartered Accountant must have come into possession of the documents by proper means in the course of normal business. For example, if a client provided the documents to the Chartered Accountant in error, or they were forwarded by a third party without the client's knowledge, a lien may not be appropriate.

## Are there documents which should not be retained?

There are more restrictions where the client is a limited company.

The courts have held that a lien cannot exist over books or documents which a registered company is legally required to make available for public inspection or to be kept at the registered office or some other specified place or to be dealt with in any special way. This means that documents such as the register of members and the directors' minute books cannot become the subject of a lien.

Also, a lien cannot be asserted over the 'Accounting Records' of a company, as defined in Section 386 of the Companies Act 2006. This section places obligations on the company to keep adequate accounting records which are sufficient (i) to show and explain the company's transactions, (ii) to disclose with reasonable accuracy the financial position of the company at any time, and (iii) to enable the directors to ensure that any accounts required to be prepared comply with the requirements of the 2006 Act.

As the law in this regard is open to interpretation, what constitutes a company's Accounting Records may vary in the circumstances. Before exercising a right of lien over a company's accounting records, the Chartered Accountant should consider the extent to which the company would be able to comply with the legislation on the basis of information in its possession which is not subject to the lien.

Finally, there are circumstances in which a third party may be able to obtain a court order requiring a Chartered Accountant to release documents. One example could be where an appointed insolvency practitioner requires access to a client's records in connection with an insolvent company or individual.

The court order will contain details of which documents should be released and may include a timescale for compliance. In this situation, the court order effectively overrides any right of lien and should be complied with.

## What does the Code of Ethics say on the right of lien?

Section R330.9 of the ICAS Code of Ethics confirms that Chartered Accountants may be entitled to exercise a lien over client books and papers where fees have not been paid. This means that, in general terms, there is nothing unethical in pursuing this course of action. However, the Code of Ethics also says that Chartered Accountants should be prepared to take reasonable and prompt steps to resolve any dispute relating to the amount of their fee. Given the difficulties which are likely to arise with the client, you should also consider whether payment could be obtained through other, less confrontational means, such as direct negotiation with the client. Particular care should be taken if the client is likely to experience significant prejudice as a result of your actions.

## Is there anything I should do before exercising a right of lien?

You should consider taking advice from a solicitor. As the client is likely to be unhappy, you should expect to be challenged, possibly by way of court proceedings. As this can be a complicated area of law, it's best to ensure at the outset that a lien is appropriate. It is likely that you will be considered to have met your ethical obligations if you can show you have obtained legal advice which supports your decision to exercise a right of lien.

## Should my letter of engagement refer to the right of lien?

As the right of lien arises automatically under a contract for services, it is not dependent on an express term in your contract with the client. However, to avoid disputes arising in the future, you may wish to make clear in your standard letter of engagement that you are entitled to retain certain documents until you receive payment for the work done. This will make your intentions clear to the client from the outset.

## For further information and assistance

Further assistance and information can be obtained from the Practice Support team. You can contact them through the Practice Support section of the [ICAS Technical helpdesk](#).

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