

LCRO 124/2014

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

SM

Applicant

AND

TK

Respondent

The names and identifying details of the parties in this decision have been changed

DECISION

Introduction

[1] Ms SM has applied for a review of a decision by the [Area] Standards Committee (the Committee) which made findings of unsatisfactory conduct, following inquiry into complaints made by Mr TK.

Background

[2] In 2010 Ms SM was instructed by Mr TK to undertake immigration work for his wife.

[3] Ms SM rendered an account for her services in July 2012.

[4] Her account was not paid.

[5] Ms SM claimed a lien over Mr TK's file on account of unpaid fees. Included on the file was Mr TK's passport.

[6] Mr TK made repeated requests to Ms SM to have his passport returned. Ms SM refused to provide the passport.

The complaint and the Standards Committee decision

[7] Mr TK lodged a complaint with the New Zealand Law Society Complaints Service (the Complaints Service) on 21 November 2013. The substance of his complaint was that:

- (a) the fee charged was excessive;
- (a) Ms SM had refused to provide a statement of account detailing the work that had been completed;
- (b) the invoice provided failed to sufficiently particularise the work that had been completed; and
- (c) Ms SM had refused to return his passport which she was holding.

[8] Ms SM responded to the complaint on 10 February 2014.

[9] She submitted that:

- (a) she had received instructions to act for Mr TK on 9 September 2010;
- (b) Mr TK had been invoiced throughout, and received a final account when the work had been concluded;
- (c) Mr TK had not raised any queries with the invoices;
- (d) attempts had been made to secure payment for over two years;
- (e) a reminder letter and copies of invoices were forwarded to Mr TK in July 2012. Receipt of that correspondence was acknowledged by Mr TK and no objection was raised at that time to the invoices;
- (f) Mr TK had originally agreed to pay off his account in the sum of \$500 per month;
- (g) Mr TK failed to keep to the agreement despite final reminders being forwarded to him;

- (h) fees charged were fair and reasonable, and had in fact been discounted;
- (i) she was under no obligation, when rendering her account, to provide Mr TK with a record of the time spent on the file;
- (j) invitation had been extended to Mr TK to attend at her office to discuss any concerns. He had not taken up that offer;
- (k) allegation that Mrs TK's Indian passport had been improperly held was false. Mrs TK had uplifted her passport hours after her residency had been granted;
- (l) Mr TK had used the complaint process for an improper purpose; and
- (m) his complaint in respect to fees was out of time, and for an invoice that was rendered in a sum that fell below the statutory threshold.

[10] On 15 January 2014, the Complaints Service made request of Ms SM to provide further information including:

- (a) copies of all invoices issued;
- (b) copies of itemised time records;
- (c) a copy of Mrs TK's full file; and
- (d) a copy of all trust account records relevant to the file.

[11] An exchange of correspondence then ensued between the Complaints Service and Ms SM, concerning the extent to which Ms SM was required to provide disclosure of requested information to the complaints service.

[12] In further submissions filed on 10 February 2014, Ms SM submitted that:

- (a) jurisdictional issues should be determined before request was made of her to provide further information;
- (b) it appeared that the request for further information was made by the Complaints Service, rather than the Standards Committee or an investigator;
- (c) there were no special circumstances which would justify inquiry into the fees rendered;

- (d) it was not an offence to hold a lien on Mr TK's New Zealand passport;
- (e) she had a reasonable excuse and lawful authority to retain the passport;
- (f) the passport had come into the possession of her firm as a result of Mr TK's instructions;
- (g) the passport was held neither as a security nor a pledge (such as would bring it within s 33 of the Passports Act 1992) but a lien;
- (h) she placed reliance on the contractual rights which arose from her terms of engagement;
- (i) she was entitled to hold a lien on Mr TK's passport until such time as payments had been made;
- (j) without the passport, her firm's lien was "worthless"; and
- (k) the decision of the High Court in *Vallant Hooker & Partners* had no relevance.¹

[13] There was, for a period of time, some confusion as to whether Mr TK's passport was an Indian passport or a New Zealand passport. Mr TK contributed to this confusion by describing the passport in his initial complaint as an Indian passport.

[14] Further confusion arose as to whether the passport being held was Mr TK's, or his wife's.

[15] The Complaints Service initially advised Ms SM that the complaint was that Ms SM had refused to release Mrs TK's passport.

[16] I am satisfied that any confusion that arose had been resolved before the Committee considered the matter.

[17] A file note made by the professional standards solicitor who was managing the file, recorded the solicitor's discussion with Ms SM on 7 February 2014 and notes that Ms SM had confirmed that the passport she was holding was a New Zealand passport. That file note also records that Ms SM had expressed a view that she did not consider that the Passports Act impeded her ability to hold on to the passport, as she did not consider she was holding the passport as a security. Ms SM was offered opportunity to file further submissions if she wished.

¹ *Vallant Hooker & Partners* [2001] 2 NZLR 357 (HC).

[18] The Committee convened a meeting on 11 February 2014. At that meeting, the Committee resolved to commence an own motion inquiry into Ms SM's conduct in retaining Mr TK's passport, namely, whether she may have committed an offence under s 31 of the Passports Act 1992.

[19] After completing inquiry into the own motion matter, the Committee determined to take no further action.

[20] Further submissions were received from Ms SM on 13 March 2014. In those submissions she:

- (a) reiterated her view that there were no special circumstances to justify enquiry into the fees rendered;
- (b) submitted that fees charged were fair and reasonable, and set with regard to the fee factors set out in the conduct rules;
- (c) submitted that the invoices were sufficiently particularised to describe the nature of the work completed;
- (d) argued that the law permitted her to hold a passport if there was "lawful authority" or "reasonable excuse" for holding a password, as affirmed by s 31(1)(d) of the Passports Act 1992; and
- (e) submitted that an examination of the lien issue was more appropriately assisted by a consideration of the approach adopted in the New South Wales Court of Appeal decision, *Xu v Council of the Law Society of New South Wales*.²

[21] The Committee delivered its decision on 15 April 2014.

[22] The Committee determined to take no further action in respect to:³

- (a) the fees complaint; and
- (b) complaint that an itemised account had not been provided.

[23] In respect to complaint that Ms SM had inappropriately claimed a lien over Mr TK's passport, the Committee determined that an unsatisfactory conduct finding in respect to that matter was appropriate.⁴

² *Xu v Council of the Law Society of New South Wales* [2009] NSWCA 430, (2009) 236 FLR 480.

³ Standards Committee determination, 15 April 2014 at [16], [25].

- [24] In reaching that decision the Committee noted that:⁵
- (a) it placed reliance on the New Zealand High Court decision of *Vallant Hooker*, rather than following the decision of the New South Wales Court of Appeal;
 - (b) Ms SM's conduct in purporting to exercise a creditor's remedy in claiming a lien over the passport was conduct unbecoming of a lawyer and unprofessional;
 - (c) the lien had been asserted over Mr TK's New Zealand passport, not his wife's file;
 - (d) section 33 of the Passports Act 1992 provides that all New Zealand travel documents are the property of the New Zealand government. That section also prohibits the right in a travel document conferred by the New Zealand Government being defeated by any security, pledge, deposit or encumbrance by the holder or by any other person; and
 - (e) Ms SM's conduct was such that would be considered by lawyers of good standing as being unacceptable.

Application for review

[25] Ms SM filed an application for review on 29 May 2014.

[26] She submits that:

- (a) the Committee had proceeded to conduct an inquiry into the retention of the passport, despite withdrawing its own motion investigation;
- (b) the Committee's decision to impose a fine and costs was inconsistent with its decision to withdraw its own motion investigation;
- (c) the Committee's decision was not supported by satisfactory reasoning;
- (d) the Lawyers and Conveyancers Act 2006 (the Act) permits law firms to claim a lien on documents;
- (e) retaining a passport did not contravene the Passports Act 1992, if there was reasonable excuse for retaining the passport;

⁴ At [38].

⁵ At [31]–[37].

- (f) her terms of engagement, which were understood by Mr TK, permitted retention of the passport;
- (g) reliance was placed on case authority which was outdated. Greater reliance should have been placed on *Xu*, the New South Wales Court of Appeal decision;
- (h) she had been denied an opportunity to be heard on the issue of costs and fine;
- (i) the Committee decision had failed to provide clear guidance on the law or the conduct rules; and
- (j) Mr TK had sought a review of fees charged, in order to facilitate the return of his passport.

[27] Mr TK was invited to comment on the application and submissions filed by Ms SM. He elected not to respond.

Hearing

[28] A hearing attended by both parties proceeded on 17 November 2017.

[29] At that hearing Ms SM expanded on the written submissions filed. A new issue raised by her on review was argument that she had never placed obstacles in the path of Mr TK retrieving his passport. She maintained that he was free to pick up his passport from her office at any time, but he had failed to do so.

[30] Mr TK accepted that the review hearing did not provide him with opportunity to relitigate the issue as to whether fees charged by Ms SM were fair and reasonable. That issue had been settled by:

- (a) the Committee decision (not challenged on review);
- (b) a decision of the Disputes Tribunal dated 6 March 2015; and
- (c) a decision of the Waitakere District Court dated 15 October 2015.

Nature and scope of review

[31] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁶

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[32] More recently, the High Court has described a review by this Office in the following way:⁷

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[33] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) consider all of the available material afresh, including the Committee’s decision; and
- (b) provide an independent opinion based on those materials.

Analysis

[34] The arguments traversed by Ms SM on review can be summarised as follows:

- (a) she had not asserted a lien;

⁶ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁷ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (b) the Committee's decision to take no further action on its own motion inquiry confirmed the correctness of her decision to assert a lien, and her right to do so;
- (c) case law supported her view that a lawyer was entitled to exercise a lien over a client's passport;
- (d) the authority relied on by the Committee was "old law";
- (e) her terms of agreement provided her with a contractual right to retain the passport until her fee was paid; and
- (f) her decision not to release the passport had to be considered in the context of Mr TK's continued refusal to pay his account, and his failure to comply with the agreements reached to settle the outstanding account.

[35] The issues to be addressed on review are:

- (a) Had Ms SM attempted to assert a lien over Mr TK's passport?
- (b) Did case authority support argument that a lawyer was entitled to exercise a lien over a client's passport?
- (c) Does a lawyer's decision to retain a client's passport potentially raise professional conduct issues?
- (d) Did the clause in the terms of engagement which enabled Ms SM to claim a lien, entitle her to retain the passport?
- (e) Did the refusal of Ms SM's client to pay his account, and his failure to comply with an agreement reached to settle the account, provide justification for Ms SM's decision to retain the passport?

Issue one — had Ms SM attempted to assert a lien over Mr TK's passport?

[36] In the course of the review hearing, Ms SM argued that she had advised Mr TK that he was free to uplift his passport. He had not taken up the invitation.

[37] This was argument (and she returned to it on a number of occasions during the course of the review hearing), that she had never attempted to assert a lien over the passport.

[38] This presented as a surprising submission. It was submission that challenged the very basis of the Committee's determination which had led to the unsatisfactory conduct finding, and was at odds with argument she had consistently advanced that she was entitled to exercise a lien over the passport.

[39] In her first response to the complaint, Ms SM rejects suggestion that she has inappropriately claimed a lien and argues that:

- (a) the law permitted her to do so; and
- (b) her terms of engagement allowed her to do so.

[40] In her review submissions Ms SM says that while she was prepared following receipt of the Committee's decision to release the passport to Mr TK, she continued to have reservations as to whether she was required to do so.

[41] She argues that the Committee was itself unsure of its grounds, and that it had relied heavily on case authority which was outdated.

[42] Her review submissions can be characterised as indicating a reluctant preparedness to abide by the Committee's decision and the retention of a firm conviction in the correctness of her position.

[43] Mr TK advised that he had made several requests of Ms SM to return his passport. He says she had consistently refused to do so.

[44] When pressed, Ms SM accepted that she had received a number of requests from Mr TK. She explained that her response to those enquiries was to advise Mr TK that he could uplift his file at any time, provided that he settled his outstanding account.

[45] It is difficult to understand how Ms SM construes an invitation to Mr TK to pick up his file on the basis that he pay his outstanding account before doing so, as an unfettered invitation to uplift his file.

[46] Unable to secure the release of his file, Mr TK sought legal advice.

[47] Any suggestion that Ms SM may not have been intending to assert a lien is dispelled by an examination of the correspondence between her and Mr TK's lawyer.

[48] On 23 April 2013, Mr TK's lawyer wrote to Ms SM in the following terms:

We have also been informed that your firm still holds the passport of Mr TK. We request its immediate return. Failure to do so will result in the Department

of Internal Affairs becoming involved. Please respond to the writer at the details below within five working days.

[49] Ms SM responded on 29 August 2013 as follows:

In the meanwhile, please provide us with relevant provisions of any Act or Regulation which does not allow us to claim a lien on the passport.

[50] Ms SM's argument, arrived at late in the piece, that she had never attempted to assert a lien is at odds with the consistent position she had advanced in responding to the complaint, and her dealings with Mr TK and Mr TK's lawyer.

[51] Ms SM's response to requests to release the passport was to consistently maintain that she had a right to retain it.

Issue two — Did the Committee's decision to take no further action on its own motion inquiry, reinforce Ms SM's right to assert a lien?

[52] In the course of conducting its inquiry into Mr TK's complaints, the Committee resolved to commence an own motion investigation into whether Ms SM may have committed an offence under s 31(1)(d) of the Passports Act 1992.

[53] That section provides that every person commits an offence who:

(d) without lawful authority or reasonable excuse, takes or retains in his or her possession or under his or her control a New Zealand travel document against the will of the holder.

[54] There is nothing remarkable or untoward in a Committee determining to commence an own motion inquiry, if it considers that the conduct which is the subject of an inquiry raises further issues.

[55] Section 130(c) of the Act provides that it is a function of a Committee:

to investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in section 121.

[56] In raising possibility that Ms SM may have committed a breach of the Passports Act, the Committee considered whether Ms SM's retention of Mr TK's passport may have constituted misconduct.

[57] Having raised the spectre of a possible offence, the Committee concluded that it was:⁸

⁸ Standards Committee determination, 15 April 2014, at [10].

not for it to decide if Ms SM had committed an offence under section 31 of the Passports Act 1992, as this was a matter for the relevant authority to determine.

[58] The relevant authority was the Police.

[59] The Committee determined that no further action was required, but nevertheless decided to report the matter to the Police.

[60] Ms SM was duly contacted by the Police. She put her position to them. She considered she had a right to retain the passport. Her explanation was accepted by the Police. They advised that they would be taking the matter no further.

[61] Ms SM submits that her decision to retain the passport is vindicated both by the Committee's decision to take no further action on its own motion enquiry and by the decision of the Police to take no steps.

[62] I do not agree.

[63] Inquiry into complaint that Ms SM may have committed an offence engages a quite separate and distinct set of issues, from inquiry into whether her retention of the passport raised professional conduct issues.

[64] When considering whether Ms SM may have committed an offence by breaching the Passports Act, the Police would necessarily have conducted that inquiry, with regard to the standard of proof that would need to be met to establish an offence which required a mens rea element.

[65] A breach of s 31(d) of the Passport Act is established if a person takes or retains a passport against the will of the holder, "without lawful authority or reasonable excuse".

[66] Having had opportunity to hear Ms SM's account of her discussions with the Police, I do not consider it surprising that the Police would have indicated a disinclination to take the matter further.

[67] Ms SM had a genuine conviction that she was entitled to retain the passport. She considered that the law was on her side. The Police are commonly reluctant to become embroiled in civil disputes, and I think it unlikely that they would have been prepared to deploy their stretched resources to advancing a charge which would have required the Court to consider whether a lawyer, in these circumstances, had a reasonable belief that she was entitled to hold onto a passport.

[68] But the Police's decision to take no further action did not, as Ms SM would have it, settle the issue as to whether she was entitled to hold onto the passport, and whether conduct issues arose as a consequence of her failure to release the passport.

Issues two and three — Case authority supported argument that a lawyer was entitled to exercise a lien over a client's passport/ the authority relied on by the Committee was "old law".

[69] A lawyer's right to assert a lien over a client's file in circumstances where the client has refused to pay their bill is well established.

[70] The ability of a lawyer to exercise a lien over a client's file is recognised in r 4.5 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) which confirm that a lawyer is not prevented from including in their retainer, a term authorising the lawyer to retain copies of the client's documents and records.

[71] Ms SM places reliance on her terms of engagement which provided that:

In the event of termination, you are responsible for the value of recorded unbilled time plus disbursements to the date of termination. We will render our final account to you, and at all times we shall have a lien over your file until our account is paid.

[72] Not all documents a lawyer holds relating to the affairs of their client, necessarily belong to the client.⁹

[73] Items that are the property of a third party, not of the solicitor or client, cannot be the subject of the retaining lien, but must be delivered up to that party, unless the solicitor has some valid security as against the third party.

[74] The critical question is, whether Ms SM's right to assert a lien over Mr TK's file as a security for payment of her fees, included a right to retain his passport.

[75] That question necessarily involves a consideration as to whether a passport is to be treated differently from other documents that may be on a client's file.

[76] A passport is a document issued to a citizen by his or her government, to facilitate travel outside the citizen's country of origin.

[77] A passport may frequently be required to be produced to satisfy questions of identity, but its primary purpose is to facilitate travel.

⁹ GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017), at 133.

[78] The Committee noted that Mr TK was the holder of a New Zealand passport.¹⁰

[79] All passports issued by the New Zealand Government, remain the property of the Government of New Zealand.¹¹

[80] If it is the case that a lawyer can only assert a lien over property owned by their client, Ms SM's retention of the passport would appear to present difficulties as the passport in question was the property of the New Zealand Government.

[81] The only New Zealand decision that has, to my knowledge, considered whether a lawyer can assert a lien over a passport, is the decision of the High Court in *Vallant Hooker & Partners v Proceedings Commissioner*.¹²

[82] That case involved an appeal against a decision of the Complaints Review Tribunal, which had held that a lawyer's actions in retaining a client's passport to secure payment of an outstanding account amounted to discrimination under the Human Rights Act 1993. The passport in contention was an Indian passport, and the property of the Indian Government.

[83] As such, the Court was not called on to address the significance to the case of the New Zealand Passports Act 1992, but in obiter comments, the Court observed:

that we have a real doubt whether it was ever possible to claim a solicitor's lien over any passport in the first place. Clearly s 33 of the Passports Act prevents such a lien in the case of New Zealand passports.

[84] If it is the case that s 33 of the Passports Act, specifically prohibits a lien being exercised over a New Zealand passport, that would reinforce the Committee's view that Ms SM erred in failing to release the passport on request.

[85] Ms SM argues that the *Vallant Hooker* decision has no relevance, firstly because it is an older decision and little reliance can be placed on it today. It is argument that the efficacy of a decision diminishes with the passage of time.

[86] Putting to one side that a decision delivered in 2000 cannot, in the context of case authority, be said to have attained pensioner status, Ms SM is misguided when she argues for the proposition that the authority or force of a decision diminishes with age.

¹⁰ Standards Committee determination, above n 3, at [27].

¹¹ Passports Act 1992, s 33(1).

¹² *Vallant Hooker & Partners v Proceedings Commissioner*, above n 1.

[87] Principles of precedent demand that a decision is authoritative (taking into consideration of course the hierarchy of the Courts) until such time as it is modified or reversed by a Court of higher standing.

[88] As I have noted, I am unaware of any decision issued subsequent to *Vallant Hooker*, that has considered the issue. In the absence of further consideration by the Courts, the obiter comments in *Vallant* stand as record of the High Court's view that it had "real doubts" as to whether a solicitor's lien could be claimed over any passport, but a certainty that a lien could not, because of s 33, be claimed over a New Zealand passport.

[89] In the second limb of her challenge to the *Vallant Hooker* decision, Ms SM argues that *Xu* is authority for the proposition that a lawyer may exercise a lien over a client's passport.

[90] She contends that the decision in *Xu* should be relied on rather than the comments in *Vallant Hooker*, it being her view that the *Xu* decision reflected the legally correct approach, and an approach more attuned to the realities of modern practice.

[91] I agree with the Committee that the decision in *Xu* is not binding, but in fairness to Ms SM, a degree of analysis of the *Xu* decision is appropriate, particularly as the decision has significantly changed the position in the Australian jurisdiction, though not perhaps as emphatically as Ms SM argues for.

[92] The *Xu* decision was decided with reference to sections 6A and 9A (1), (2) of the Passports Act 1938 (CTH), legislation which was in force at the time of the relevant conduct in mid-2004. Section 6A provided that an Australian passport was to always remain the property of the Commonwealth. Section 9A recorded the offences which might arise from the improper use or possession of a passport.

[93] The applicable Australian law is now the Australian Passports Act 2005, which replicates s 6A of the previous legislation in s 54, and s 9A in s 32 (4).

[94] The sections of both Acts, in affirming that passports remain the property of the Commonwealth, achieve similar purpose to s 33 (1) of the New Zealand Act.

[95] Objection to asserting a lien on a passport has fundamentally rested on argument that the property in the passport, remains the property of the issuing government.

[96] A lien cannot be exercised over property that the client does not own.

[97] In examining this pivotal issue, the Court in *Xu* approached the argument by examining the extent to which, if any, third parties could have a property interest in a passport issued by the Commonwealth.

[98] It concluded that the attribution of “property” in a passport, was to be seen as providing a basis upon which the Commonwealth could exercise its statutory powers to control the use and misuse of documents issued by it to holders.

[99] Until the Commonwealth elected to exercise its powers in respect to the passport, the person to whom the passport was issued also retained a “property” in the passport. A client of a solicitor, as the holder of the passport, retained a property in the passport. This, argued the Court, brings the passport within the category of property which may be attached by a lien. The grantee of an Australian passport, it concluded, was a bailee at will of the Commonwealth with good title against everyone except the Commonwealth.

[100] This analysis led the Court to conclusion that:¹³

The solicitor having obtained possession of the passport for a legitimate forensic purpose, was entitled to retain possession against his client, and exercise a lien over it until his proper costs and disbursements were paid or payment thereof was secured.

[101] A careful reading of the *Xu* decision however, gives clear indication that the Court considered that a degree of care needed to be exercised before a lawyer elected to refuse to release a passport.

[102] Basten JA, noted that:¹⁴

A passport is not necessarily to be treated as equivalent to any other document or property of the client for the purposes of a solicitor’s lien. Rather, it is a document issued by a central government to a citizen to facilitate travel outside the country of issue.

[103] The judge who delivered the majority judgment also accepted that although a solicitor may have a lien on his client’s passport, the Court may decline to enforce it if its exercise would deprive an impecunious client of his liberty.¹⁵

[104] In *Commissioner of Taxation V American Express Wholesale Currency Services Pty Ltd* Dowsett J (in a minority decision) questioned the correctness of the

¹³ *Xu v Council of Law Society of New South Wales*, above n 2, at [54].

¹⁴ At [18].

¹⁵ At [57].

decision in *Xu* by reference to the High Court case of *Palgo Holdings Pty Ltd v Gowans* and the English case of *The Odessa*.¹⁶

[105] Importantly, the *Xu* decision references the New Zealand decision in *Vallant Hooker*, and identifies a significant difference between the Australian and New Zealand legislation, noting that unlike s 33(3) of the Passports Act 1992 (NZ) considered in *Vallant Hooker*, “the Commonwealth Act did not in terms prohibit the grant or acceptance of any security or pledge over an Australian passport”.¹⁷

[106] This draws attention to the important distinction between the Australian and New Zealand legislation.

[107] Section 33 of the Passports Act 1992 provides as follows:

(1) All New Zealand travel documents issued by or on behalf of the Government of New Zealand, whether before or after the commencement of this Act, shall be the property of the Government of New Zealand.

(2) The right in a New Zealand travel document conferred on the Government of New Zealand by subsection (1) shall not be defeated or affected by any security, pledge, deposit, or encumbrance given, made or accepted in respect of the New Zealand travel document by the holder or by any other person.

(3) No holder or any other person shall give, make, or accept as a security, pledge, or deposit, or otherwise encumber, a New Zealand travel document issued by or on behalf of the Government of New Zealand, and any term of an agreement which would otherwise have that effect shall be void.

[108] Section 33(2) affirms the Governments right to property in a passport, in circumstances where a security or encumbrance is given over the document by the holder or any other person.

[109] Ms SM in her written submissions (though the point was not advanced by her at hearing) argued that exercising a lien did not amount to her accepting the passport as a security. I disagree. The passport was being held as a security for payment of fees.

[110] Adopting the reasoning in *Xu*, Ms SM may argue that s 33(2) is not inconsistent with the reasoning adopted in *Xu*. *Xu* does not purport to stand for authority that a lawyer’s right to exercise a lien over a passport can prevail over the interests of the Commonwealth.

[111] But s 33(3) presents problems for Ms SM.

¹⁶ *Federal Commissioner of Taxation v American Express Wholesale Currency Services Pty Ltd* [2010] FCAFC 122; (2010) 187 FCR 398 at [44], citing *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [17] and *The Odessa* [1916] 1 AC 145 (PC) at 158–9.

¹⁷ *Xu v Council of Law Society of New South Wales*, above n 2, at [51].

[112] That section specifically directs that no person shall accept as a security, pledge, or deposit, or *otherwise encumber* (emphasis added) any travel document issued on behalf of the Government. Any term in an agreement which purports to do so, shall be void.

[113] Even if I were to accept Ms SM's argument that the passport was not being held as a security (which I do not), she is caught by the statutory prohibition on encumbering a passport.

[114] Refusing to release a passport unless fees are paid, is placing an encumbrance on the passport.

[115] Encumbrance is defined in *Blacks Law Dictionary* as:¹⁸

a claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest

[116] Ms SM's argument that her terms of engagement gave her a contractual right to exercise a lien on the passport is thwarted by the statutory direction that any term in an agreement which has purpose to provide authority to encumber a passport, shall be void.

[117] The purpose of s 33(3) is clear. Its intent is to assert the New Zealand Government's property rights in the passports it issues, and to impose a total prohibition on a holder, or any other person, from using a New Zealand passport as a form of security.

Issue three — does a lawyer's decision to retain a client's passport potentially raise professional conduct issues?

[118] If a practitioner is contemplating retaining a client's passport as a means to secure payment of outstanding fees, it is important to consider that decision not only in the context of the relevant statutory provisions and case law (limited as that is) but also within the context of a practitioner's professional obligations.

[119] Ms SM's decision to retain the passport in circumstances where there was a statutory prohibition on her doing so properly raised conduct issues. Those issues arise not solely as a consequence of the retention being in breach of the Passports Act, but because a lawyer's decision to retain a passport must also be considered with reference to a lawyer's professional obligations and responsibilities.

¹⁸ Bryan A Garner *Black's Law Dictionary*, (9th ed, Thomson Reuters, St Paul, 2009) at 607.

[120] Whilst I am not expressly required to address the question as to whether conduct issues would have arisen if the passport that Ms SM had retained was a foreign passport, I consider it appropriate to consider, from the disciplinary perspective, the implications for a lawyer of retaining a non-New Zealand passport.

[121] It is debatable as to whether a passport should be regarded as equivalent to any other document or property of a client for the purposes of a lawyer's lien.

[122] Retention of a passport has potential to frustrate the client's ability to exercise a fundamental right, the right to freedom of movement.

[123] A lawyer who holds on to a client's passport is restricting their client's ability to travel, and that presents at first blush, as being at odds with the rights to freedom of movement accorded to any person who is lawfully in New Zealand under s 18 of the New Zealand Bill of Rights Act 1990.

[124] The area of legal work which may, most frequently, require a lawyer to obtain a passport from their client, is immigration work.

[125] That is work which is often carried out by licensed immigration advisers, whose conduct is subject to statutory regulation. It is of interest to consider the manner in which immigration advisers are required to deal with the management and control of their clients' documents.

[126] The conduct of immigration advisers is regulated by a code of conduct. That code is approved by the Minister of Immigration in accordance with s 37(4)(b) of the Immigration Licensing Advisers Act 2007.

[127] Clause 27 of the code directs that a licensed immigration adviser is, when requested or required, obliged to return passports and other personal documents to the client without delay and in a secure manner. This recognises the effect of s 33(3) of the Passports Act.

[128] The Immigration Advisors Complaints and Disciplinary Tribunal when considering a case where an immigration adviser had refused to release a passport, concluded that:¹⁹

[a]n elementary principle all licensed immigration adviser's must understand is that there is never a justification for withholding travel documents to force a person to pay fees; or indeed for any other purpose.

¹⁹ *Chand v Prakash* [2012] NZIACDT 85 at [27].

[129] In exercising control over a passport, a lawyer's remedy to facilitate enforcing payment of outstanding fees, is considerably strengthened. Retention of a passport will provide strong incentive to a client to pay their bill, particularly in circumstances where their ability to travel is compromised.

[130] Ms SM's view of the importance of retaining her client's passport is well illustrated by her response to the Committee, in which she describes her lien as "worthless" if she couldn't hold on to the passport.

[131] Because of the importance a passport has for its holder, and the potential for the interests of the holder to be significantly compromised if they are unable to access the passport, any decision by a lawyer to retain a client's passport in the face of their client's objections, may well give rise to a consideration as to whether the lawyer's refusal to release the passport, raises disciplinary issues.

[132] It would present as unsatisfactory if a lawyer's right to control the release of a passport, through the vehicle of exercising a lien for unpaid fees, was not properly subject to the scrutiny of the disciplinary regime.

[133] In *Malik v Legal Complaints Service*, a decision of the High Court of England and Wales, in considering a lawyer's appeal from a decision of the English Lawyers Complaints Service to compel a lawyer to return a file to a client over which a lien had been claimed, the Court rejected argument that a lawyer could not be compelled to deliver up a file.²⁰

[134] The Court concluded that a lawyer's decision to assert a lien must properly be open to disciplinary scrutiny. The Court observed that:²¹

there may well be circumstances where it would be unreasonable to exercise a lien, even bearing in mind that the more valuable the property withheld then the more likely it is that payment would be obtained. The mere fact that it is legal for the solicitor to exercise lien does not mean that it cannot be unreasonable to do so nor is there any reason why the Defendant [the Law Society] should not regulate those occasions.

[135] Nor should a lawyer be put in the position of determining whether a client's requirement to travel was sufficiently important to merit a release of the passport.

[136] In my view, it is difficult to perceive of any circumstances in which it would present as professionally acceptable for a lawyer to refuse to release a passport in the face of indication from a client or former client of their need to have the passport to facilitate travel plans.

²⁰ *Malik v Legal Complaints Service* [2010] EWHC 981 (Admin).

²¹ At [15].

[137] Nor is it the case that potentially adverse consequences of retaining a passport are limited to impeding the ability to travel.

[138] A passport can be a critical source of identification, particularly for individuals who are seeking to gain extensions to visas which allow them to remain in the country, or persons who are in the process of seeking permanent residence.

[139] Their ability to open a bank account, obtain temporary employment, or conduct other transactions where identification by production of the passport is required, may be jeopardised, if not totally compromised, if they are unable to produce their passport.

[140] The consequence of refusing to release a passport may be significant.

[141] It is arguable as to whether a lawyer should retain a passport on a file, when the purpose for which the passport is required can be met by the simple expedient of photocopying the passport and completing the appropriate certification of the copy.

[142] It would, by way of example, be imprudent for a conveyancing lawyer who had taken possession of a client's drivers licence to facilitate the necessary A & I identification for a conveyancing transaction, to have expectation that the licence could be retained on the file and become assimilated into the raft of documents over which the lawyer could subsequently assert a lien to secure payment of an account.

[143] In my view, a lawyer should exercise considerable caution when resisting a client's request for return of a passport.

[144] Whilst the *Xu* decision stands as authority in the New South Wales jurisdiction for the principle that a lien may be asserted over a passport, it is significant that the New South Wales Law Society advises its members to exercise caution before deciding to take a lien over a passport, noting that:²²

solicitors should be cautious before choosing to assert a lien over any passport, including an Australian passport, and should not do so unless the passport was obtained for a legitimate forensic purpose.

[145] The question as to whether a lawyer could retain a client's passport as security for fees in the American jurisdiction, was considered in the decision of the Supreme Court of Colorado, *Re: Attorney G*.²³

²² New South Wales Law Society "Professional Ethics FAQ" (January 2017) <www.lawsociety.com.au>.

²³ *Re: Attorney G* 302 P 3d 248 (Co 2013).

[146] The court noted that it was aware of only two cases in which issue as to whether a lawyer could assert a restraining lien over a client's passport had been considered. In both, the courts had determined that the lawyers were unable to do so.

[147] The Colorado Supreme Court noted that a decision of the Civil Court of the City of New York, *Bonner v Goonewardene* had been widely accepted and cited with approval, for the proposition that a lawyer may not retain a client's passport pursuant to a retaining lien.²⁴ In *Bonner*, the court had gone one step further and declared the practice unethical.

Issue four — did the clause in the terms of engagement which enabled Ms SM to claim a lien, entitle her to do so?

[148] The Committee noted that whilst Ms SM had expressly referred to her right to exercise a lien in her terms of engagement, the lien in this case was over Mr TK's passport, not his wife's.

[149] That being said, Ms SM was instructed by both Mr and Mrs TK.

[150] Ms SM had no legal right to assert a lien over the passport. The statutory prohibition on encumbering a passport could not be overcome by the letter of engagement.

[151] When implementing terms of engagement which allow opportunity for a lawyer to retain possession of their file if their account is not paid, it would be expected that lawyers would carefully explain the possible consequences of a failure to pay to their client.

[152] Ms SM's terms of agreement provided that her client would be liable for all unbilled time and disbursements up to date of termination of the retainer, and noted that "at all times we shall have a lien over your file until our account is settled".

[153] It is critical that a lawyer who includes a provision in their terms of engagement authorising them to exercise a lien on their client file if an account is not paid, ensures that their client fully understands the possible consequences of such a provision.

Issue five — Did Mr TK's refusal to pay his account, and his failure to comply with an agreement reached to settle the account, provide justification for Ms SM's decision to retain the passport?

²⁴ *Bonner v Goonewardene* 9 Misc 3d 1059 (NY 2005)

[154] Ms SM was disgruntled that her account had not been paid.

[155] She argued that she had given Mr TK abundant time to settle the account. She agreed to give him opportunity to settle the account over a period of time. Mr TK did not keep to the agreement.

[156] She considered that Mr TK had pursued his complaints with a collateral purpose. His objective was to delay or avoid paying her bill.

[157] The Committee dismissed all the complaints excepting the passport complaint.

[158] Mr TK's attempt to litigate the fee in the Disputes Tribunal was unsuccessful, as was his appeal of the tribunal decision to the District Court.

[159] Against that background, Ms SM's disgruntlement is understandable. She had completed, successfully, the work she had been instructed to carry out. She considered her fee to be fair and reasonable (a view supported by the Disputes Tribunal finding) and she had been put to inconvenience and cost in opposing the appeal.

[160] I have sympathy for the position that Ms SM was in, but her refusal to release the passport properly amounted to conduct that was deserving and requiring of a disciplinary response.

[161] She was put on notice of the factors she needed to consider if she remained resolute in her view that she could hold on to the passport. She had been alerted to the provisions in the Passport Act that prohibited such a course of action.

[162] She appears to have paid scant attention to the possibility that impeding her client's right to travel, in the face of indication from him that he wished to do so, required from her a proper reflection on the appropriateness of her effectively restricting her client's freedom of movement.

[163] It was not that Ms SM was oblivious to the consequences. Her frank admission that she considered her lien would be worthless if the passport was returned, indicates that she was fully cognisant of the potentially serious consequences for her client of him being unable to retrieve his passport.

[164] Ms SM in agreeing to undertake work on expectation that she would receive payment at the end of the retainer, was exercising a commercial judgement that lawyers are commonly called on to make.

[165] There is inevitably risk in taking on work in circumstances where a client's financial circumstances are fragile and there is no certainty that the client will be able to pay their fees.

[166] Her preparedness to assist Mr TK on the basis of an expectation of payment was commendable, but her failure to appreciate the limitations on her ability to assert an interest in the passport resulted in her continuing to refuse to release her client's passport in circumstances where she had no authority to retain the document. This was a serious breach that amounted to unsatisfactory conduct.

Costs

[167] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[168] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of \$1,200 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[169] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006

Enforcement of costs order

[170] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006 I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 31st day of January 2018

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms SM as the Applicant
Mr TK as the Respondent
Mr SM as the Interested Party
[Area] Standards Committee
The New Zealand Law Society