

REAL LIENS

A lien is a right to withhold property from its owner in order to enforce the payment of a debt. Like all security, the right to withhold the property is accessory to the principal debt. Unlike Mortgages and Pledges, a lien cannot secure an obligation other than the payment of a debt.

A real lien confers a right of retention over moveable or immovable property. It comes into operation when one person is in control of the property of another person, who owes him money in connection with improvements made to that property. The controller of the property is entitled to refuse to return it to its owner unless the owner pays the outstanding debt.

There are two types of lien –

1. A debtor-creditor lien; and
2. An enrichment lien.

Strictly speaking, only an enrichment lien is a “real” lien, because it confers rights as against the whole world – not simply against another party to a contract.

Debtor – Creditor Liens

If the principal debt arose from a contract between the parties, the lien securing it is known as a **debtor – creditor** lien. The right to retain the property exists only between the parties to the contract and is only permitted to the extent of the contractual debt. So, for example, if A pays B to repair C’s car. A cannot retain C’s

car in terms of a debtor-creditor lien unless C has a contractual obligation to pay A back the money A has spent repairing the car.

This may seem like an odd example, but that was the case in **Singh v Santam Insurance**. In that matter Santam insured the car of a person call Muthusamy. Muthusamy never paid his premiums, but before his policy was cancelled, he claimed against it for damage done to Singh's car. Santam paid Hutton, a panel beater, to repair Singh's car. When it discovered that Muthusamy had not paid his premiums, it cancelled his policy and took the car from Hutton, purporting to exercise a lien for the repairs it had paid Hutton to carry out.

There could have been no debtor-creditor lien because there was no contract between Santam and Singh. Santam was the insurer of a third party who claimed in terms of his policy for damage done to Singh's car. There being no contract between Singh and Santam, there could have been no debtor - creditor lien.

Enrichment Liens

What Santam claimed was an **improvement lien** which is a form of **enrichment lien**.

An **improvement lien** comes into existence when its holder has made "useful expenses" on the property. "Useful expenses" are expenses which enhance the market value of a thing. The lien can be exercised to recover its holder's useful expenses on the property. The other type of enrichment lien is the **salvage lien** which covers its holders "necessary expenses" on the property. Necessary expenses are the expenses which are needed to maintain the property in its current state.

Luxurious expenses, which are simply the result of personal whim or caprice, cannot be recovered pursuant to a lien.

Liens: Possession is Essential

Santam claimed that Singh had been unjustifiably enriched at its expense. However, the Appellate Division ruled that this was not so, because Santam had failed to prove two elements essential to demonstrate the constitution of an enrichment lien.

First, Santam did not allege or prove that it was **in possession** of the car at the time the improvements were made. Indeed, it was common cause that Hutton was in natural possession of the car at the time the repairs were conducted. Santam had not established that it had some sort of constructive possession over the car (for example that Hutton possessed it as Santam's agent). So this fundamental requirement for the exercise of a lien – viz. that Santam expended money on the car while the car was in its possession – was not met.

Second, Santam's possession of the car, when it was established, was not established lawfully. There was no legal basis upon which Santam could have taken possession of the car from Hutton. A lien can only be established through **lawful possession**.

Singh v Santam Insurance accordingly illustrates that **effective possession** and **lawful acquisition of possession** are required in order to establish a lien.

Enrichment liens: the owner must be enriched without lawful cause

In any event, the court held, in order to establish an enrichment lien, Santam would have to prove that the enrichment took place without lawful cause. Yet there were at least two lawful causes for Singh's enrichment. First there was the contract between Hutton and Santam for the repair of the car. Second there was the insurance policy between Muthusamy and Santam, in terms of which the car was sent to Hutton for repair in the first place. There was no suggestion that Singh was not entitled to the repair of her car in terms of these arrangements. She, after all, had been assured by Muthusamy that the damage to her car would be covered by his insurance. The claim was made openly by Muthusamy, before the insurance contract had been cancelled for non-payment of the premiums. Singh was surely entitled to benefit.

Singh v Santam Insurance accordingly also illustrates the requirement that enrichment liens only cover the extent to which the owner is enriched **without lawful cause** at the expense of the holder of the lien.

Buzzard Electrical v 158 Jan Smuts Avenue

Problems can arise when complicated relationships come into play. For example, imagine A contracts with B to make improvements to his house, and B subsequently contracts with C to, say, do all the electrical wiring on the property. B then goes into liquidation before paying C for its work. C is still on the property, and has virtually completed its work, but has not been paid. C has made useful improvements to the property. Can C exercise an improvement lien over the property?

In the Buzzard Electrical case, it was decided that C had no enrichment claim against A, because A contracted with B and is responsible to pay B for the work. The fact that B then subcontracted, but did not pay, C is not A's problem. A is liable to

pay B and B is liable to pay C. C's enrichment of A is not "without lawful cause". The cause is A's contract with B.

This decision may seem odd, in that A gets the benefit of all the improvements to his property, and C does not get any of the money to which it is entitled – unless it is lucky enough to get it out of B's liquidated estate.

Consider whether you agree with the decision. Does your opinion depend on whether A has actually paid B at the time C attempts to exercise its lien?

Now consider another situation to which the Buzzard electrical decision does not apply. Imagine you are the owner of a garage which sells a car under an instalment sale agreement to a man called John. In terms of the agreement, you retain ownership over the car until the last instalment is paid. John takes the car to a service station. He authorises necessary improvements (replacing a leaky water tank), useful improvements (installing a car stereo system) and luxurious improvements (repainting the car shocking pink).

John then leaves the country before paying you all the instalments due in terms of the agreement and before collecting the car from the garage. You seek to claim the car back from the garage. The garage relies on a lien. Can it so rely? If so, what sort of lien can it rely on? What can it claim?

Enforcement of Liens

Finally, it is important to remember that a lien creates a defence to an action by an owner. It **does not** create a separate free-standing action for the debt secured, or for recovery of lost possession. It is also a discretionary remedy. A court may decline to

enforce a lien even where all the other requirements for the enforcement of a lien have been met.

Accordingly, the following circumstances usually give rise to the enforcement of the lien –

1. The owner of the property is claiming it back;
2. From a person in possession or effective control of it;
3. Who is retaining it in order to secure payment of a principal debt owed to the holder by the owner;
4. Where the debt arises either from a contract with the owner or because the owner has been unjustifiably enriched as a result of improvements made to the property at the holder's cost;
5. While it was in the holder's possession; and
6. The court is satisfied that it should exercise its discretion to enforce the lien.