

LIEN: LESSONS FROM SCOTLAND?

Andrew J M Steven, University of Edinburgh

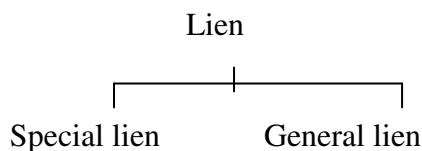
andrew.steven@ed.ac.uk

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1 What is a lien in Scotland?

A real right to retain property until the discharge of an obligation or certain obligations, the property not having been delivered to the retaining party for the purpose of security.

2 Types of lien



Special lien: right to retain in respect of a particular obligation, typically the sum due under a contract (*exceptio non adimpleti contractus*).

General lien: exceptional right to retain in respect of multiple obligations: eg solicitors and bankers.

Compare § 273 *BGB*

Right of retention

(1) If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered (right of retention).

(2) A person who is obliged to return an object has the same right, if he is entitled to a claim that is due on account of outlays for the object or on account of damage caused to him by the object, unless he obtained the object by means of an intentionally committed tort.

(3) The obligee may avert the exercise of the right of retention by providing security. The providing of security by guarantors is excluded.

§ 320 BGB

Defence of unperformed contract

(1) A person who is a party to a reciprocal contract may refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance. If performance is to be made to more than one person, an individual person may be refused the part performance due to him until the complete consideration has been rendered. The provision of section 273(3) does not apply.

(2) If one party has performed in part, consideration may not be refused to the extent that refusal, in the circumstances, in particular because the part in arrears is relatively trivial, would be bad faith.

(Translation from http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#Section%20273)

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Right to withhold performance of reciprocal obligation

(1) A creditor who is to perform a reciprocal obligation at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed.

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(4) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.

3 A recent example of a special lien

Onyvax Ltd v Endpoint Research (UK) Ltd [2007] CSOH 211
(<http://www.scotcourts.gov.uk/opinions/2007CSOH211.html>)

Contract to carry out medical research was terminated. The company which had undertaken the research asserted a lien over a document containing the results. It claimed it was owed £147,000. This was denied by the other company.

Arguments: (1) that the terms of the contract excluded the lien; and
(2) the court was asked to exercise its equitable jurisdiction in respect of the lien.

4 Lessons

Drafting of contracts.

Ability of court to intervene.