Neutral Citation Number: [2020] EWHC 1214 (QB)

Case No: QB-2019-003929

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

(1) DMITRII VLADIMIROVICH SHEIANOV
(2) LIMITED LIABILITY COMPANY "MOTORWORLD BY VYACHESLAV SHEYANOV" also known as MOTOMIR VYACHESLAVA SHEIANOVA, LLC — **Claimants**

- and -

SARNER INTERNATIONAL LIMITED — **Defendant**

- -
- -

Alexander Halban (instructed by **Bates, Wells & Braithwaite London LLP**) for the **Claimants**
Yash Kulkarni QC (instructed by **Keystone Law Ltd**) for the **Defendant**

Hearing date: 1 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GRIFFITHS

Mr Justice Griffiths :

1. The Defendant, for a contract price of just under £1.75 million, agreed to design, create and supply materials for an exhibition including 27 vintage motorcycles lent to it for that purpose. Its most recent invoice of £524,628.90 has not been paid. It believes that the company owing the money under the contract has no assets. But it still has the motorcycles. Can it keep them until it is paid? The answer to this question depends, primarily, on whether the Defendant is entitled to exercise the common law right known as a particular lien.

The parties

2. The Defendant is Sarner International Limited. It is described in the evidence as an international creative design and audio-visual system integration company whose clients include corporate venues, theme parks, visitor attractions, museums, exhibitions, conferences, themed restaurants and retail outlets. I will refer to it as "the Defendant".

3. The First Claimant is Mr Dmitrii Vladimirovich Sheianov. He claims to own 19 of the vintage motorcycles in question, although the Defendant does not accept that. I will refer to him as the First Claimant.

4. The First Claimant has a brother called Vyacheslav Sheianov (who I will refer to as "VS"). VS owns the Second Claimant, which is a Limited Liability Company called "Motorworld by Vyacheslav Sheyanov" or "Motomir Vyacheslava Sheianova, LLC", both names being used in the title of the action. I will refer to it as the Second Claimant. The Second Claimant says it owns 8 of the vintage motorcycles in question, although the Defendant does not accept that either.

5. Part of the background against which the Defendant challenges the First and Second Claimants' right to possession (which is a pre-requisite of their claim for delivery up, whether or not the Defendant is entitled to exercise a particular lien) is that the Defendant's contract was not with either of the First or Second Claimants.

6. The Defendant's contract was with a company which is not party to these proceedings, incorporated in the British Virgin Islands, called "Motomir Viacheslava Sheianova Ltd" in the contract itself. I will refer to it as "BVI Co". BVI Co was (as its full name suggests) owned by VS, who was (as I have mentioned) the owner of the Second Claimant and brother of the First Claimant.

Procedural history

7. Since the Defendant refuses to give back the motorcycles until it has been paid in full by BVI Co, the First and Second Claimants have issued and served a Claim Form and Particulars of Claim on the Defendant, to which the Defendant have responded with a Defence and Counterclaim. A Reply and Defence to Counterclaim has also been served.

8. The Claimants have drawn out the Defendant further on its case with a Request for Further Information, to which the Defendant responded on 31 December 2019.

9. The Claimants have now issued an Application Notice seeking:

> "Summary judgment against the Defendant on the Claimants' claim and on the Defendant's counterclaim, pursuant to CPR r. 24.2; and/or an order striking out the Defence and Counterclaim and entering judgment for the Claimant, pursuant to CPR r.3.4(1)(a); and (in either case) an order for delivery up by the Defendant to the Claimants (or their nominated agent) of the motorcycles which are the subject of the claim, for the reasons set out in the attached witness statement."

10. The evidence in support of this application is a witness statement from the Claimants' solicitor. The application is opposed by a witness statement from the Defendant's managing director, Mr Ross Magri. There is no other evidence, and no party has asked for time to file further evidence.

11. This is the application which I have to decide. Although there is a strike-out application in the alternative, the case is put primarily on the basis that the Claimants are entitled to summary judgment.

The issues

12. The test for obtaining summary judgment under CPR is (by CPR r 24.2) that the Defendant "has no real prospect of successfully defending the claim or issue" and "there is no other compelling reason why the case or issue would be disposed of at a trial." The Defendant argues that it has a real prospect of successfully defending the claim and, indeed, that the matter is so clear cut in its favour that the claim should be dismissed and the trial should proceed on the Defendant's Counterclaim only.

13. What amounts to a "real prospect" for these purposes has been settled over the course of discussion in many well-known cases, which are (as recognised by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]) conveniently reviewed and summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] as follows:-

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,

> particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

14. Before me, the Defendant has argued two issues which, it says, provide it with at least a real prospect of success at trial in resisting the Claimants' claim for delivery up of the motorcycles.

    i) It has challenged, first, the Claimants' right to possession, pointing out that all 27 of the motorcycles (that is, both those claimed by the First Claimant and

those claimed by the Second Claimant) were delivered pursuant to the Defendant's contract with BVI Co and not by the First or Second Claimants.

ii) It has argued, secondly, and in any event, that it is entitled to retain possession of the motorcycles against anyone, including a person with good title, because it is exercising a particular lien over them until it has been paid.

15. **Uncontroversial background facts**

16. The following facts appear from the evidence and the documents and do not appear to be controversial.

Initial contact and earlier contractual arrangements

17. The Defendant's original contact was with VS, in April 2017.

18. Following this, the Second Claimant (the company belonging to VS) and the Defendant entered into a contract prior to the one under which the Defendant now claims its particular lien. This contract was for the Defendant to work up an initial proposal and feasibility study, and I will call it "the Feasibility Study Contract". The Feasibility Study Contract took the form of a letter (in formal terms) from the Defendant's Managing Director dated 1 November 2017 ("the Letter") accompanied by and incorporating a document entitled "A touring exhibit proposal by Sarner International Ltd. V1.01 October 2017" ("the Proposal"). The counterparty to the Feasibility Study Contract was the Second Claimant.

19. In the Feasibility Study Contract, the Defendant agreed to provide services in relation to a projected exhibition or installation with the working title "Two Wheeled War – Motorcycles of WWII". The Proposal attached to the Letter summarised the idea as follows:-

> "Two Wheeled War is the story of the machines and the men and women that rode them in an era when the world was plunged into conflict and chaos. 2019 sees the 75th anniversary of D-Day – a good year to show some of the lesser known artefacts and stories of the war years."

20. The Letter stipulated a contract price for the Feasibility Study of £70,000 and envisaged a programme of work leading to a final report on 1 March 2018 (mistyped as 2017). The elements of the work were summarised in the Letter as follows:-

> "○Written description based on our research
>
> ○ Outline schematic layout
>
> ○ Scale model of one full sized diorama
>
> ○ 3 illustrative visuals
>
> ○ Preliminary costs breakdown"

21. This work seems to have been satisfactory and was followed by a further contract which is the one which resulted in disputes over payment and the application before me. That further contract was dated 17 July 2018 and is entitled "Attraction and Walkthrough Agreement" ("the Attraction Agreement").

22. The Attraction Agreement was between the Defendant and BVI Co. Before it was signed, all 27 of the motorcycles were leased to BVI Co under a Leasing Agreement dated 1 June 2018 ("the Leasing Agreement").

23. The Leasing Agreement is between the Second Claimant and BVI Co (although the Claimants say that the Second Claimant entered into it "acting for itself and also as agent for [the First Claimant]"; Claimant's evidence para 7). By it, BVI Co agreed to lease from the Second Claimant "the Collection of Historic Motorcycles identified in the attached Exhibits" which were the 27 motorcycles now being retained by the Defendant. The Defendant emphasises the description as a "collection". The Leasing Agreement said that "Title to the Collection shall remain at all times with [the Second Claimant]", although the Claimants now say that it included the motorcycles belonging to the First Claimant. The Leasing Agreement provided that BVI Co would "keep the Leased Collection in the same condition as originally conveyed…" It provided for delivery of the motorcycles on 16 July 2018 until 16 July 2023 "for the purpose of exposure", although there were provisions for earlier termination. It contained an express prohibition against the creation of a lien: "…neither the Leased Collection, nor individual elements of such may be… subject to any charge or lien by, the [BVI Co] or any Third Party." There was also a prohibition against any "unauthorised repair, modification, repurpose or alteration".

24. There is no evidence that the Defendant was put on notice of the terms of the Leasing Agreement dated 1 June before it entered into the Attraction Agreement on 17 July 2018. It was, however, sent a copy on 1 August 2018, which was before the motorcycles were physically delivered to the Defendant on 22 September and 4 October 2018.

The Attraction Agreement

25. The Attraction Agreement is the contract for which the Defendant has not been paid in full, and pursuant to which it claims a particular lien over the motorcycles. It was dated 17 July 2018 and the parties were the Defendant and BVI Co.

26. The preamble noted that BVI Co "wishes to host an attraction at the Location, the details of which are set out in the Design Proposal" and "wishes to appoint [the Defendant] to design, fit out and install the attraction on the terms and subject to the conditions set out in this Agreement."

27. The Location was not defined, except as "The venue or location where the Attraction will be hosted".

28. The Attraction was defined as "The multisensory exhibition, full details of which are set out in Appendix 1". There is no Appendix 1 in the evidence, but it was probably either the Design Proposal (also not in the papers) or something similar to it. Nothing turns on that.

29. Clause 4.6 made it clear that the Defendant was only designing and building the exhibition; it was not going to operate it. It provided:-

> "Except in relation to any repairs required under the warranties in this Clause 4, [the Defendant] shall not be under any obligation to operate or maintain the Attraction following Completion. Should [BVI Co] wish [the Defendant] to operate or maintain the Attraction following Completion, it must agree a separate agreement with [the Defendant] for that purpose."

30. Clause 9 made it clear that some work remained to be defined and would require separate agreement and payment. It also provided that, if that agreement was not reached, either party would be entitled to terminate the Attraction Agreement.

31. Clause 23.1 provided that "Neither party may assign and/or license this Agreement and the rights acquired under it." Those rights included certain intellectual property rights retained by the Defendant and licensed to BVI Co (clause 12.6).

32. Clause 23.2 excluded the provisions of the Contracts (Rights of Third Parties) Act 1999.

33. Clause 12.6 stipulated that "For the avoidance of doubt, Client [i.e. BVI Co] shall have no right to relocate or recreate the Attraction", except "at the Location and for the purposes set out in this Agreement".

34. Clause 10 provided for payment of a Contract Sum which was a total of £1,748,763. A breakdown of the work allocated to this total sum, and a payment schedule, was in Schedule 2. Since the Design Proposal is not in the papers, this is a convenient and authoritative summary of the work envisaged under the Attraction Agreement. Schedule 2 is particularly relied upon by the Defendant in its Further Information (Response 3.1 first sentence; Response 3.2 first sentence).

35. Schedule 2 Part 1 described the work to be performed by the Defendant under the Attraction Agreement, and allocated the total Contract Sum between them, as follows:

> "**Interpretation, graphic design and printing - £138,580.00**
> Copywriting; image sourcing, purchase and licensing; graphic design; 450m^2 printing; application of print; production of specialist material panels.
>
> **Realistic life-cast figures - £240,292.00**
> Production of 41 custom posed character figures; uniforms; weapons; equipment; insignia; breakdown and weathering.
>
> **Dioramas and scenic construction - £410,091.50**
> Production of 24 realistic, highly detailed environments; scenic props; replacement motorcycle weapons; steel armature structures and custom motorcycle supports.
>
> **Partition walls, plinths and furnishings - £163,280.00**

> Quick release timber wall structures/graphics substrate; shaped diorama plinths, specialist stage fittings.
>
> **Audio-visual, sound, lighting and show-control systems - £232,056.50**
> Script writing; Sourcing, purchase and licensing of stock film footage, editing; HD screens and playback hardware, electrical installation, sound effect sourcing and editing; sound systems; lighting design; lighting unit purchase; special effect lighting, lighting truss design and purchase; central show control system design, equipment purchase, programming and installation.
>
> **Interactives - £265,655.00**
> Design; software development; hardware production; screens, construction; commission and direction of interactives.
>
> **Transport crating - £98,930**
> Purchase of shipping containers, design and construction of custom crates for the exhibit motorcycles.
>
> **Design - £199,878.00**
> Technical, CAD and creative design and specification."

36. Somewhat confusingly, the payment schedule in Part 2 of Schedule 2 broke down the Contract Sum differently, and also described the elements of each payment instalment differently, although consistently with the breakdown and description in Part 1 above. The division and (less detailed) description in Part 2 of Schedule 2 was as follows:-

> "Mobilisation Fee (Preparing for Build) – 15% - £262,314.45 – 07-Jun-18
>
> Scheme Design Submission (Start of Dioramas Build) – 20% - £349,752.60 – 06-Aug-18
>
> Detailed Design Submission – 30% - £524,628.90 – 05-Oct-18
>
> Technical Procurement – 10% - £174,876.30 – 30-Nov-18
>
> Interim Build Milestone – 15% - £262,314.45 – 31-Jan-19
>
> Testing – 5% - £87,438.15 – 25-Mar-19
>
> Completion – 5% - £87,438.15 – 25-Apr-19
>
> Total – 100% - £1,748,763.00"

37. The dates are the agreed invoice dates. Invoices were payable within 15 days of the date of invoice (Part 3).

Events after conclusion of the Attraction Agreement

38. After conclusion of the Attraction Agreement, and after the Defendant had been sent a copy of the Leasing Agreement (apparently to show the Defendant that BVI Co was entitled to at least temporary possession of the motorcycles), work began.

39. A Programme of Works in a "Design Update Document" from the Defendant dated December 2018 shows that the first phase of the work (from 23 July 2018) was "Scheme Design", which continued to 30 September 2018. While that was underway, "Figures build" and "Set/Graphics/Dioramas Build" began on 20 August 2018 and was expected to continue until 28 April 2019. From 20 August 2018 and continuing until 9 December 2018 was "Detailed Design". The motorcycles were not required until the week of 17 September and 1 October (in two deliveries). They were in fact delivered on 22 September and 4 October 2018 which was within the weeks agreed. By that stage Scheme Design (although not Detailed Design) was complete, or almost complete, the Programme of Works indicating Scheme Design between 23 July and 30 September 2018.

40. During 2018, the first and second invoices provided for in Part 2 of Schedule 2 of the Attraction Agreement ("Mobilisation Fee (Preparing to Build)" 15% and "Scheme Design Submission (Start of Dioramas Build) 20%") were submitted and paid. The third invoice (attributed in Part 2 of Schedule 2 to "Detailed Design Submission – 30% - £524,628.90") was submitted in December 2018 and has not been paid.

Suspension of work and issue of proceedings

41. After submission of the third invoice, BVI Co suspended the work on 22 January 2019. No work has been carried out since then. An indication of the progress of work to that date is provided by the Defendant's "Design Update Document" dated December 2018, which includes photographs and visuals, including images of the motorcycles and completed figures. The final stages of the payment schedule have, therefore, not been reached and those invoices have not been submitted; i.e. Technical Procurement (10%), Interim Build Milestone (15%), Testing (5%) and Completion (5%).

42. Disputes having arisen, and payment of the third invoice (rendered in December 2018) not having been received, the Defendant wrote a letter before claim on 22 March 2019. The Defendant did not at that stage claim a particular lien explicitly, but was in fact retaining possession of the motorcycles.

43. On 6 and 7 May the First and Second Claimants wrote to BVI Co requesting return of the motorcycles from BVI Co to themselves under the Leasing Agreement. On 10 May 2019, BVI Co wrote to the Defendant (by a UK agent) requesting return of the motorcycles by 7 June 2019. This deadline was not complied with and the motorcycles remain in the Defendant's possession.

44. On 1 July 2019, the Leasing Agreement between the Second Claimant and BVI Co was terminated by BVI Co, on the basis that it could no longer be performed. Given the close connections between BVI Co, the Second Claimant, VS and the First Claimant, it is perhaps not surprising that there has been no dispute between them about the termination of the Leasing Agreement and the claims by the First Claimant and the Second Claimant to an immediate right to possession of the motorcycles as between themselves and BVI Co. The Second Claimant formally confirmed its

agreement to termination of the Leasing Agreement with BVI Co on 8 July 2019, in a letter copied to the Defendant.

45. On 3 July 2019, the Defendant made its first reference to retention of the motorcycles "by way of security", it having become clear that neither BVI Co nor anyone else (such as the First or Second Claimants, or VS) was proposing to pay the third invoice rendered in December 2018. The Defendant appears to have no prospect of enforcing payment from BVI Co (which it believes to have no assets).

46. The Defendant challenged the rights of the First and Second Claimants to ownership or possession of the motorcycles and on 15 July and 12 September 2019 solicitors acting for them provided what was said to be sufficient proof. These proofs were not accepted by the Defendant, who in any event continued to retain the motorcycles against payment, and proceedings were issued against the Defendant on 5 November 2019.

Ownership

47. The Defendant does not accept that the Claimants, or either of them, are the owners of the motorcycles. It does not, however, have any positive case about who the owner or owners are (Defence and Counterclaim para 4.e.). There is no evidence that BVI Co owned them, for example. BVI Co received them under the Leasing Agreement, and the Leasing Agreement has now been terminated.

48. The ownership of the 27 motorcycles by the First Claimant (19 motorcycles) and the Second Claimant (8 motorcycles) is asserted in paragraph 5 of the witness statement from the Claimant's solicitor. Detailed evidence of title was provided under cover of a letter dated 12 September 2019 in a "Schedule of ownership of the motorcycles" which sets out, in respect of each one, a brief identifying description of the motorcycle in question (e.g. "Harley-Davidson WLA-42"), the ownership document from which title is derived or proved (e.g. "Sale-purchase agreement dated 1 May 2013" or "Vehicle certificate of ownership") and the name of the owner (either the First or the Second Claimant). The proofs themselves have been exhibited to the Claimant's evidence.

49. I see no basis for doubting the ownership claims based on this detailed schedule of proofs. No specific submissions have been made upon the proofs or the Schedule. Ownership is not addressed in the Defendant's evidence.

50. That leaves only the issue of whether the Defendant is entitled to exercise a particular lien over the motorcycles, to which most of the argument before me has been addressed. As the skeleton argument for the Defendant recognised, "If [the Defendant] is entitled to exercise a common law particular lien, it has a complete defence to the claim. If it is not so entitled, it has no defence."

Lien – the law

51. The law of lien, including the particular lien being claimed in this case, has the interesting quality of being an important commercial right which derives entirely from the common law. It has never been codified or regulated by statute. It therefore cannot be deduced from the interpretation and application of definitive statutory words. Like

all common law, the law of lien has developed on a case by case basis. Since the circumstances of every case differ, claims which fall outside the usual run (which this one certainly does) do not have direct precedents, and require a careful review of the earlier cases and their subsequent development so that the essentials and the boundaries of the principle can be thoroughly understood. Counsel on both sides have invited me to consider cases going back over 200 years.

Review of authorities

52. Chapter 3 of Joseph Chitty the elder's *Treatise on the Laws and Commerce of Manufacturers* vol 3 (1824) contains an authoritative review of the principles and cases illustrating the law of liens as it was understood at that date. At p 537 he explains the difference between a particular lien and a general lien:

> "*Particular* liens are where persons claim a right to retain property, in respect of labour or money expended on such particular property, and these liens are favoured unless the interests of creditors in general are injured by them. *General* liens are claimed in respect of a general balance of account, and are looked upon with jealousy. Liens may arise in three ways. 1st. By express contract. 2d. By implied contract, as from general or particular usage of trade. 3dly. By legal relations between the parties."

53. Within this classification, the Defendant asserts a particular not a general lien and does not claim it by express contract or by general or particular usage of trade (which Chitty says would require "a long-established general usage of trade to that effect, or where there is a particular usage of trade between the parties themselves, which in effect might be considered as an implied contract for the lien.")

54. That leaves Chitty's third category: "by legal relations between the parties." Leaving aside the special cases of "common carriers, innkeepers and farriers", and others, such as attorneys and masters of ships (which have their own rules and lines of authority), the case is closest to Chitty's cases of particular lien by legal relations between the parties:

> "…where, from circumstances, a party has bestowed his labour and expense upon the property detained, thereby creating a moral and legal obligation on the owner of such property to make a remuneration before he can take them away."

In these cases, Chitty explains,

> "…it may be taken as a general rule, that whenever goods are delivered to a tradesman, or other person, for the execution of the purposes of his trade or occupation upon them, and he incurs expense and trouble in the execution of such purposes, he has a particular lien upon them."

He then gives examples, and exceptions, the most straightforward (each supported by citation of authority) being that

> "calico printers, dyers, fullers, millers, packers, printers, tailors, and wharfingers have a particular lien on goods, linen, cloth, corn, or prints, dyed, printed, fulled, ground, packed, made up, or wharfed by them respectively, such property having been left with them respectively for those purposes."

55. This corresponds quite closely (albeit with some notable differences) to the formulation of the modern law of particular lien by the authors of *Halsbury's Laws of England*. Under the heading "Workman's lien" (vol 4 *Bailment* para 170) they say:

> "Everyone to whom a chattel is delivered in order that he may, for reward, do work upon it, and who does work upon the chattel which improves it, has at common law a lien on the chattel for the amount of the remuneration due to him for the work done, and therefore is not bound to restore it until his remuneration is paid, unless that lien is excluded by express agreement or is otherwise inconsistent with the express or implied terms of the contract.
>
> But if a chattel is bailed to a workman for the sole purpose of his working with it, and not upon it, no lien attaches [citing *Steadman v Hockley* (1846) 15 M & W 553 at 556 per Pollock CB; *Bleaden v Hancock* (1829) 4 C & P 152; *Welsh Development Agency (Holdings) Ltd v Modern Injection Mouldings Ltd* (6 March 1986, unreported).]."

56. Under the heading "Lien for work done" (vol 68 *Lien* para 841) they say:

> "The right of particular lien has been extended to agency and to all cases where a person has expended labour and skill in the improvement or repair, as distinct from mere maintenance, of a chattel bailed to him for that purpose. It is a common law principle that if a person has an article delivered to him on which he has to do some work and to bestow trouble or expense, he has a right to retain it until his charge is paid. The lien applies only to the chattel produced or on which the work is done."

57. In *Hollis v Claridge* (1813) 4 Taunt 807, 128 ER 549, the Plaintiff delivered to a potential lender a building lease "that he might examine the title" with a view to security. The lender did not examine the title but asked another person to do so and that person (who was not an attorney, and so not entitled to an attorney's lien) refused to return it to the Plaintiff until his fee had been paid. The court refused the claim for lien on the grounds that the person claiming the lien was not the person to whom the Plaintiff had given the deed. However, Gibbs J also said, *obiter*:

> "If the Plaintiff had employed the Defendant to look into the lease, the Defendant would, I think, have been entitled to retain the lease till he was paid for the work which he had performed on it, without reference to the question whether he is an attorney or not: for upon the second point, I think the

> distinction is, that if this lease were delivered to the Defendant by a person having a right to dispose of it, that he might do any thing upon this particular deed, by the general law of the land he has a lien on it, whether he is an attorney or not…"

58. Gibbs J was therefore suggesting that a lay person who examined a title deed given to him for that purpose would have done enough work "on it" to claim a particular lien over it, but that remark was clearly not part of the *ratio decidendi* of the Court or even of Gibbs J himself.

59. In *Bleaden v Hancock* (1829) 4 C & P 152, 172 ER 648 a printer was refused a lien over the plates given to him from which to print books although he had used the plates to print the books and had not been paid. In his summing up to the jury, Sir Nicolas Tindal CJ said "This is not the case of a lien claimed by a person who has bestowed labour, or expended money upon an article, and who may detain it till he is paid." I assume that he said this because, although the plates were used for the printing, and ink must have been applied to them, and the plates must have been set up in a printing press, none of this constituted work done "upon" the plates sufficient to create a particular lien over them. They had been given to the printer ready-made, and the printing process did not change or improve them.

60. In *Scarfe v Morgan* (1838) 4 M & W 270, 150 ER 1430 a mare was sent by its owner to the owner of a stallion for breeding. The mare was duly covered by the stallion but the owner of the mare failed to pay. The owner of the stallion claimed a particular lien over the mare until he was paid. Barons Parke, Bolland, Alderson, and Gurney reserved the question of whether the case gave rise to a particular lien. The reserved judgment of the Court was eventually delivered by Parke B who said (at 284-285):-

> "The case is new in its circumstances, but must be governed by these general principles which are to be collected from the other cases in our books.
>
> The principle seems to be well laid down in *Bevan v. Waters*, by Lord Chief Justice Best, that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form; or the farrier by whose skill the animal is cured of a disease; or the horsebreaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases.
>
> This, then, being the principle, let us see whether this case falls within it; and we think it does. The object is that the mare may be made more valuable by proving in foal. She is delivered to the defendant, that she may by his skill and labour, and the use of his stallion for that object, be made so; and we think, therefore, that it is a case which falls within the principle of those cited in argument."

61. Parke B therefore stated the principle that a particular lien arises when a bailee has expended his labour and skill "in the improvement" of a chattel delivered to him. This is narrower than the general principle stated by Chitty, that a party has bestowed his labour and expense "upon" the property detained, without specific reference to "improvement"; or that "goods are delivered to a tradesman, or other person, for the execution of the purposes of his trade or occupation upon them, and he incurs expense and trouble in the execution of such purposes", again without specific reference to "improvement". It does, however, explain the distinction between work "on" a chattel and work "using" a chattel demonstrated by the case of the printer who could not claim a particular lien over the printing plates delivered to him for printing. It is an essential requirement of a particular lien that the goods in question are not merely worked upon but also improved. The later cases to which I will turn support this, also.

62. In *Jackson v Cummins* (1839) 5 M & W 342 cows were "depastured, agisted and fed" by a landowner who claimed a particular lien over them when he was not paid by the owner of the cows. Depasturing is putting out to pasture, or grazing. Agisting is an old word (now, according to the *Oxford English Dictionary*, mostly used in Australia and New Zealand) meaning the pasturing of livestock belonging to another person for reward, or pasturing one's own livestock on land belonging to another person. Essentially, therefore, the person claiming the particular lien had fed the cows, but not been paid for it.

63. The court, consisting of Barons Parke, Alderson and Maule, agreed (per Alderson B) "that the agister has no lien". The reasons were most fully explained by Parke B, who said:-

> "I think that by the general law no lien exists in the case of agistment. The general rule, as laid down by Best, C. J., in *Bevan v. Waters*, and by this Court in *Scarfe v. Morgan*, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Scarfe v. Morgan*; he simply takes in the animal to feed it. In addition to which, we have the express authority of *Chapman v. Allen*, that an agister has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle, that no lien can exist in the case of agistment; and it was so understood by this Court in *Judson v. Etheridge*."

64. Again, therefore, it is made clear that it is not enough that work is done on the chattel; the chattel must thereby be improved, or given additional value.

65. In *Steadman v Hockley* (1846) 15 M & W 553, 153 ER 969 an attempt was made by Counsel to resist the principle that there is no particular lien unless the work

contracted for will improve the chattel, and there was also some discussion with the judges about what might constitute "improvement" for this purpose. The report picks up the following exchanges from the argument (at 555), in response to submissions by Mr Udall of Counsel:-

> "Udall, contra. The plea is good. It is not necessary, in order that the lien should attach, that the work done should be absolutely mixed up with the chattel, so as to make it more valuable. There are several cases that do not fall within that principle; for instance, that of a jeweller for weighing a diamond, mentioned by Gibbs, C. J., in *Hollis v. Claridge* (4 Taunt. 308).
>
> [Rolfe, B. Is not that work done whereby the value of the chattel is increased?
>
> Pollock, C. B. It is like measuring corn; the value is increased by the weight or measure being ascertained. A bale of cloth, the quantity of which is known, is more valuable than a bale, the quantity of which is not known.]
>
> [Udall of Counsel] The weight is not necessarily known to anybody but the person weighing it, and the chattel would be returned in exactly the same state in which it was bailed."

66. The facts of the case were that a particular lien was claimed by a conveyancer (not an attorney, and so not entitled to an attorney's lien) over deeds delivered to him "for the purpose of enabling the defendant to do and transact divers affairs and businesses, as such conveyancer, for the plaintiff, with and in respect of the said deeds". Exactly what he was doing with them is not stated. He does not appear to have been examining them for title (which might increase their value, if his opinion was favourable); but he might (for example) have been using them to offer as security for loans (which would not have that effect). The Court was unanimous in rejecting the lien, and the reasons given by two of the Barons, with whom the other two agreed, were as follows (at 556-557):-

> "POLLOCK, C. B. The plaintiff is entitled to the judgment of the Court. The defence set up in this action is a lien, and the question is whether a conveyancer, as such, has a lien upon a deed "with and in respect of" which he has transacted some other business. The principle applicable is well stated by Tindal, C. J., in *Bleaden v. Hancock* (4 C. & P. 152). He says, "This is not the case of a lien claimed by a person who has bestowed labour or expended money upon an article, and who may detain it until he is paid. Every body knows that by the common law a man may detain the commodity on which he has bestowed labour or money." Nobody appears to have suggested in that case, that, independently of any custom, there was a lien at common law, because of something done "with and in respect of " the plates which were delivered to the defendant. With respect to the cases which have been referred to, of the

> jeweller weighing the diamond, and of the measuring of corn, by which the value of the thing is not apparently increased, the answer is that the labour is bestowed upon the article itself. If a man has a lien for carrying corn, why should he not also for letting it pass through any other process which makes it more valuable, or appears to do so? An ingot of gold is more valuable when it has been assayed by the standard; it is more likely then to find a purchaser, its quality having been ascertained: so also is an article the quantity of which has been ascertained. These cases, therefore, fall within the rule that the lien exists wherever labour has been bestowed upon the article itself; here all that appears is that something has been done "with respect of" it: that does not create a lien.
>
> On principle, therefore, and upon the authorities, I am of opinion that this plea is bad.
>
> ALDERSON, B. The lien is claimed in this case at common law. Now a lien at common law exists only in respect of articles on which the labour of the bailee has been expended; but it does not appear by this plea that any labour has been expended on this article."

67. This reasoning is less clearly expressed than that of Parke B in the earlier cases but I think, particularly when read in conjunction with those cases, it supports the following propositions:-

    i) The work for which payment is claimed must improve the chattel over which a particular lien is claimed.

    ii) Improvement need not physically change the goods, so long as it increases its value.

    iii) It is not enough that work is done "with" goods or "in respect of" them. The labour or expenditure in respect of which payment is claimed must be "upon" them. Thus, using the goods (as a conveyancer uses deeds to transact business, or a printer uses plates given to him to print from) does not create a particular lien, but working on them (as a valuer works on goods to be valued) may.

68. In *Hatton v Car Maintenance Company Ltd* [1915] 1 Ch 621, the owner of a motor car had a fixed term contract with a garage to maintain the car, provide a chauffeur, and "supply all petrol, lubricant, tyres, tubes, and other things necessary for the proper running of the car, and repair breakdowns". Sargent J applied the distinction between maintenance and improvement and refused the garage's claim to a particular lien over the car, saying (at 623-624):-

> "It was said by Mr. Crossfield that whenever an article is repaired, the repairer gets a lien on the article for the amount of his charges. Well, I do not dissent at all from that view of the law assuming that the repairer gets the article in his shop for the purpose of repair and by that repair improves it, as he would

> ordinarily do. But certainly I cannot find anything in the authorities which have been cited to me to show that, if what the contractor does is not to improve the article but merely to maintain it in its former condition, he gets a lien for the amount spent upon it for that maintenance. The cases with regard to horses seem to point entirely the other way, because it is clear that a jobmaster has no lien at all for the amount of his bill in respect of feeding and keeping a horse at his stable, whereas, on the other hand, a trainer does get a lien upon a horse for the improvement which he effects to the horse in the course of training it for a race."

69. *Albemarle Supply v Hind* [1928] 1 KB 307 CA is another case of cars put into a garage which "supplied them with tyres, grease, oil and petrol, and did all necessary repairs". The Court of Appeal upheld the claim for a particular lien. Scrutton LJ said (at 318) "in my view repair of a damaged cab, though it may be described as "maintenance," gave rise to a repairer's lien." Sargent LJ (who had decided *Hatton* at first instance in the other direction) said (at 320) "the repairs… of course, involved the improvement on each occasion of the existing condition of the cabs".

70. The question of improvement is therefore one of fact. If the "repair" is of something broken, that improves the item, and a lien can be claimed. If, however, the repairs are part of a general programme of maintenance, there is no improvement, and no lien.

71. *Re Southern Livestock Producers Ltd* [1964] 1 WLR 24 introduces a further principle relevant to the case before me. After noting from the earlier cases that "it is quite clear that improvement is now a necessary ingredient" (at 28), Pennycuick J decided on the facts that a farmer who looked after a herd of pigs for their owner (including both sows and boars) was not improving them, even though the sows from time to time had litters of piglets from the boar while under his care (it being critical to that decision that both boars and sows were provided to him, and not by him).

72. Pennycuick J went on, however, to decide that, in any event, when the work that might in isolation create a particular lien is indistinguishable from work which could not, no particular lien can be claimed for the work. He said (at 29):-

> "I would add that, even if there were an element of improvement in this respect—that is, supervising the production of litters—the farmer would find himself in this difficulty because under the terms of the agreement it would be impossible to apportion the sums expended by him between the ordinary upkeep on the one hand and the improvement on the other hand. Upon this point I was referred to *Sanderson v. Bell* (1834) 2 Cromp. & M. 804, 311…
>
> I think it is clear that the judge is meaning to say that if the claim is inseverable, the claim as a whole must be treated as in respect of both operations and there is no lien at all. I conclude, accordingly, that the farmer has failed to make out his claim to have had a lien upon the pigs in his possession, and, consequently, to have a charge upon the proceeds of sale."

73. I therefore accept the proposition of law advanced to me by the Claimants' Counsel that, if the work done is of a hybrid nature, some of which is apt to create a particular lien and some of which is not, and the work cannot be severed into those two constituent parts, no particular lien is created.

74. In *Tappenden v Artus* [1964] 2 QB 185 the Court of Appeal recognised that a garage which executed repairs to a van which had broken down was entitled to a particular lien. Per Diplock LJ (at 196), "a particular lien [is] limited to work done upon the actual goods upon which the lien is claimed",

75. In *Welsh Development Agency (Holdings) Ltd v Modern Injection Mouldings Ltd* (6 March 1986, unreported), QBD, *Halsbury's Laws of England* vol 68 para 841 fn 6 there was "no lien over plastic injection moulds bailed to manufacturers for purpose of manufacturing toys". Although neither Counsel nor I have access to any fuller report of this case than this footnote in *Halsbury*, it appears to be comparable to my reading of the judgment of Sir Nicolas Tindal CJ in *Bleaden v Hancock* (1829), above. The injection moulds must have been set up, filled with material, and operated to manufacture the toys, but there was no lien. The moulds were delivered ready-made, they were not improved by the bailee, and the work done *with* them was not work done *on* them.

76. In *Minerva Publishing Company v Minerva Press Ltd* [2001] All ER (D) 137 (Nov), a vanity publishing company submitted manuscripts to the Defendant for printing. The Defendant "claimed that it had done substantial work on the manuscripts pursuant to the agreement" but "although it was accepted that the defendant had done work in relation to at least some of the authors' materials, it had not done any work to the authors' materials themselves". In those circumstances, Hart J rejected the Defendant's claim to a lien over those materials. Although the report is brief, it appears that the case was not decided on the basis that there had been no "improvement": by editing perhaps poor-quality manuscripts the publisher might well have improved the work. What decided the case, however, was that the work of editing was not work "on" the manuscripts, but work "with" them, and a necessary requirement of an artificer's particular lien was therefore lacking.

77. A particular lien is what Diplock LJ described in *Tappenden v Artus* [1964] 2 QB 185 as a "primitive" remedy (at 195), "of very ancient origin" (at 194). It is essential that it operates on something physical, a chattel. It cannot operate on something incorporeal, such as an idea, or intellectual property, which was the subject matter of the work done by the printer in *Minerva Publishing Company v Minerva Press Ltd*: see *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281. The manuscripts themselves were not changed, and were no better than they had been before the printer worked "in relation to them".

78. The improvement required for the exercise of a particular lien over a chattel must be inherent to the chattel itself, even if its inherent improvement does not take a physical form. An improvement to the value of the object itself can satisfy this test, even if the object is not physically changed. But a poor manuscript is not itself made more valuable by an editor who creates a better text based upon it. By contrast, "An ingot of gold is more valuable when it has been assayed by the standard; it is more likely then to find a purchaser, its quality having been ascertained: so also is an article the quantity of which has been ascertained. These cases, therefore, fall within the rule that

the lien exists...” (per Chief Baron Pollock in *Steadman v Hockley* (1846) 15 M & W 553 at 557, above).

79. In *Spencer v S Franses Ltd* [2011] EWHC 1269 (QB), old embroideries were given to an expert by the owner, who had been told they were nineteenth century work of limited value. The expert agreed to do extensive research on them for reward and, when he was not paid, claimed a particular lien over them. Thirlwall J upheld the lien. The judgment on this point is relatively brief, there being many other disputed questions which the judge had to decide, but the following appear to be the essential reasons why she reached that conclusion:-

i) The expert did not merely conduct academic research in relation to the embroideries. He did physical work on them. For example (at para 78): “Throughout the summer Mr Franses worked on the embroideries. He analysed the construction of the thread. He visited Dr Organ of the Assay Office on 8th August 2003, and showed him the textiles. Dr Organ removed a tiny sample of silver gilt. Mr Franses then commissioned spectroscopic tests at Goldsmiths Hall.” See also para 259: “Mr Franses had physically worked on the embroideries in inspecting and analysing them macro and microscopically.”

ii) The expert’s work improved the value of the embroideries by demonstrating that they were rare medieval work of outstanding quality (para 249, and paras 257-258).

iii) The value added by the expert’s work was inherent to the embroideries themselves, although it did not change them physically. “The embroideries and what is known about them are (and as of 2005 were) effectively indivisible; the Defendant could not return the embroideries without giving Mr Spencer the benefit of the work he had done.” (para 260). “The embroideries will never again be considered 19th century or stage props.” (para 261).

Summary of the law

80. From the authorities, therefore, the essential requirements for the exercise of a particular lien include the following:-

i) A particular lien can only operate on something physical, a chattel. It cannot operate on something incorporeal, such as an idea, or intellectual property.

ii) Work must be done “on” the chattel being detained and not merely “with” it or “using” it or “in relation to” it.

iii) The work must improve or give additional value to the chattel in question. Whether it does so is a question of fact.

iv) The improvement need not be physical, but it must be inherent to the chattel itself.

v) If the agreed work is of a hybrid nature, some of which is apt to create a particular lien and some of which is not, and the work cannot be severed into those two constituent parts, no particular lien is created.

I will refer to these as "the Five Principles". There are others, also considered in the caselaw, but they are not relevant to the case I have to decide.

Lien –arguments and decision in this case

Submissions of the Claimants

81. For the Claimants, it is argued that the Defendant did not carry out (and was not contracted to carry out) any work "on" the motorcycles. At most, the Claimants argue that the Defendant's work was done "with" or "with respect to" them. The Claimants say that this distinction is reinforced by a passage at the end of the contract sum breakdown in Part 1 of Schedule 2 to the Attraction Agreement, which provided:-

> "Note that the following are not included in this Contract Sum: (…) Any necessary modifications required to adjust the motorcycles to appropriate wartime specifications (e.g. wartime tyres)."

82. The Claimants also submit that neither the pleadings nor the evidence raise a case with a realistic prospect of success that the Defendant's work improved the motorcycles.

83. Finally, the Claimants argue that neither the work agreed in the Attraction Agreement as a whole, nor any part of the breakdown of fees for that work, can be separated out between work that is argued as creating a particular lien and other work.

Submissions of the Defendant

84. For the Defendant, it is argued that the Attraction Agreement provided for work to be done "on" the motorcycles.

85. It is also argued that the work increased the value of the motorcycles, particularly when they are viewed as a collection.

86. The Defendant argues that, this being an application for summary judgment (and/or striking out), it would be premature to reach any conclusions until all the evidence has been heard at trial. The Defendant stresses (referring to the summary of principles by Lewison J in *Easyair* which I have quoted above) that the burden is on the Claimants to show that the claim for a particular lien has no real prospect of success. I must not conduct a mini-trial. I must take into account, not only the evidence before me, but also the evidence that can reasonably be expected to be available at trial. I should hesitate about making a final decision without a trial, even when there is no obvious conflict of fact at the time of the application, "where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case" (para (vi) of the *Easyair* summary quoted above).

Discussion and decision

87. I will consider, first, the undisputed facts of the case so far as they bear on the first two of the Five Principles, namely, (i) A particular lien can only operate on something physical, a chattel. It cannot operate on something incorporeal, such as an idea, or intellectual property, and (ii) Work must be done "on" the chattel being detained and not merely "with" it or "using" it or "in relation to" it.

88. The Defendant's evidence (the witness statement of Mr Magri) immediately suggests a weakness in this respect because the relevant passage is headed by Mr Magri "Work performed by Sarner with respect to the collection of motorcycles". But work merely performed "with respect to" a chattel cannot create a particular lien. Under Principle (ii); it must be work performed "on" it. Mr Magri continues with this language in the body of his witness statement, beginning his explanation (at para 20) by saying:

> "A good way to understand the overall work which Sarner performed **in respect of** the collection of motorcycles, is to watch the five-minute promotional video…" (emphasis added).

89. I have watched the video, and it does not show any work performed on the motorcycles, except that at one point a man is briefly shown giving an already clean bike a wipe with a cloth, which has not been suggested as a basis for creating a particular lien over it.

90. The voiceover on the video says:

> "What we are looking to create in this exhibition, is an environment, where the stories that are represented by these motor bikes come to life."

This is borne out by the video itself, which shows that environment being created, with props, stands, and panels of images and text. The motorcycles are included in many of the shots, but they are always freestanding. Creation of an exhibit around a chattel or chattels (an environment) is not the same as working on them.

91. Mr Magri's evidence emphasises the amount and quality of research that was done into the motorcycles. But this was not like the research into the embroideries in *Spencer v S Franses Ltd* which required physical work on the object. This was background research, most if not all of which was programmed for the period before physical delivery of the motorcycles was taken. The research was in respect of the motorcycles, but not work on them.

92. The Defendant's Counsel accepted that a particular lien requires work to have been done "on" the motorcycles, and so he focussed particularly on the high point of the evidence in that respect, which was the life-size and life-like human figures which were created under the Attraction Agreement. This was only one of the eight elements of work identified in Schedule 2 Part 1 of the Attraction Agreement quoted at paragraph 35 above where they are described as:

> "**Realistic life-cast figures - £240,292.00**
>
> Production of 41 custom posed character figures; uniforms; weapons; equipment; insignia; breakdown and weathering."

93. Some, although not all, of these figures were designed to be physically placed on to the motorcycles. Mr Magri deals with this in paragraph 26 of his witness statement as follows:-

> "The next stage is the "Figures Build". This is the stage where we build the models of the riders for each specific motorcycle. Illustrations of how we build the figures for these motorcycles are attached **[RM1, pp. 88-89]**. The figures are fixed. So, they must be modelled on to the specific motorcycle and in the exact position that they will appear in the display. So, if we did not have the motorcycles physically present, we would have had to take detailed measurements of each motorcycle, to ensure the figure would become an integral part of the motorcycle in the exhibit. As we actually had the motorcycles, detailed measurements were not needed, as we could use the actual motorcycle to design the figure. Each figure must be made of specific materials to comply with the numerous regulations with respect to health and safety. Designing and building the figures requires a great deal of skill and technical know-how, so that they fit the motorcycles and the exhibition as a whole. The figures are life casts of real people, so they are hyper realistic and made of fibre glass using fire retardant finishes, so that they can carry the weight of the weapons."

94. This bears out Mr Magri's own language that the work was "in respect of" the motorcycles and not "on" them. Work on the figures was not work on the motorcycles. The motorcycles were not altered by the creation of figures to be placed on them, even if fixed (it being clear from the evidence that the fix was temporary, and did not damage the motorcycles).

95. The motorcycles and the figures were distinct even visually, just as a real rider is separate from the motorcycle he is riding, although perched on it. The motorcycles were used to create the figures in the correct size and shape (although Mr Magri says this was a matter of convenience, and might have been achieved by measurement), but this is no different from using printing plates to create impressions, or injection mouldings to create toys. Using an object is not the same as working on the object itself so as to create a particular lien over it. However important the motorcycles were to the process, no work was done "on" the motorcycles in the course of it. No work in restoring the motorcycles was provided for in the Attraction Agreement; nor is any work of restoration or repair alleged in the pleadings or the evidence. It is not suggested that the motorcycles were changed in any way, except perhaps in terms of value, which is a point I will come to separately, below.

96. The Defendant's case on the pleadings is even weaker. Paragraph 10 of the Defence says that the Defendant:-

> "…performed services under the Attraction Agreement in respect of the collection of Motorcycles, including casting and kitting out bespoke, life-size figures of soldiers to fit and interact with the Motorcycles in the exhibition."

97. It is not alleged that the Defendant's services were for work "on" the motorcycles; only "in respect of them".

98. An opportunity to develop the point was provided by the Request for Further Information. The Defendant was asked for particulars of the "services under the Attraction Agreement in respect of the collection of Motorcycles" pleaded in paragraph 10 of the Defence. The Defendant's response, at paragraph 3.1, was that they were "set out in the Attraction Agreement itself and more specifically at Schedule 2, Part 1 of the Attraction Agreement", which was then set out in full (as I have set it out at paragraph 35 above). There was no reference in the response or in Schedule 2, part 1 of the Attraction Agreement to work "on" the motorcycles.

99. This leads me to the conclusion that there is no real prospect of the Defendant establishing a particular lien in this case.

100. But I will consider also the other aspects of the case that have been argued, starting with the Defendant's case on improvement and increase in value. This (in my judgment) has to satisfy the third and fourth of the Five Principles, namely: (iii) The work must improve or give additional value to the chattel in question; and (iv) The improvement need not be physical, but it must be inherent to the chattel itself.

101. The Defence does not allege any increase in value (indeed, paragraph 30.c. of the Defence says "No admissions are made as to the value of the Motorcycles").

102. Paragraph 3.3. of the response to the Request for Further Information, however, says:-

> "The stated purpose of the Attraction Agreement was to create a multi-sensory exhibition of the collection of Motorcycles. The value of the collection of Motorcycles as a temporary touring exhibition was improved as a result of work under the Attraction Agreement which was performed. The precise increase in value would depend in part on the market value of the multi-sensory touring exhibition of the collection of Motorcycles."

103. The alleged increase in value is not quantified. It is also said to be an improvement in the "value of the collection of Motorcycles as a temporary touring exhibition". A temporary touring exhibition was not the chattel given by the BVI Co to the Defendant, and the Claimants are not seeking delivery up of a temporary touring exhibition. They are seeking delivery up only of the motorcycles. It is over the motorcycles that the Defendant has to establish a particular lien if it is to have a realistic prospect of defending the claim. Does the Defendant have a real prospect in showing that the value of the motorcycles was improved?

104. The only reference to valuation evidence in Mr Magri's witness statement is in paragraph 30, where he says:-

> "Of course, because we are responsible for the collection of motorcycles whilst in our possession, we also had the collection valued by a Bonhams valuer who came and valued the bikes. We did this so that we could take out UK based insurance for

> the collection of motorcycles, which we have done. Both the valuation and the insurance has been paid for by Sarner."

105. The valuation is not exhibited, and no more details of either the basis or the amount of the valuation have been disclosed. Mr Magri does not present any specific evidence of an improvement in value, and does not say that such evidence will be obtained for the trial. Since the Defendant has already obtained an (undisclosed) valuation of the motorcycles from Bonhams, Bonhams could also have been asked to support the assertion that the creation of the Attraction under the Attraction Agreement would have a bearing on the value of the motorcycles themselves, if it did, and, if so, that it would increase their value. The fact that there is nothing of this kind in the evidence, although it would be so helpful to the Defendant, and so easy to obtain from Bonhams or another expert (if true), and the fact that Mr Magri does not say that it is intended that evidence of this kind will be presented at trial, makes it fanciful to imagine that anything of that kind will be forthcoming at trial. Mr Magri does not put himself forward as an expert in the valuation of motorcycles and cannot supply this evidence.

106. The case on improvement in value is put on the basis of an assertion only, which is said (in para 42.a. of the Defendant's skeleton argument) to be "obvious":

> "One probably does not need an expert valuer to state the obvious proposition that, whilst a collection of 27 WW2 motorcycles lined up in a room might be of interest to military enthusiasts and thus have a particular value in an exhibition, the value of that collection is likely to be enhanced when the motorcycles are incorporated into an interactive exhibition with a narrative and life size figures that transport the exhibition attendee to what it would have felt like in WW2 so that the history and significant role of the machines is understood by a wider audience. This would likely command a higher gate price for the exhibition than an exhibition consisting simply of 27 motorcycles lined up in a room."

107. If the question is reframed, as it should be, as to whether the Attraction Agreement would improve or give additional value to the motorcycles themselves (which are the chattels over which the particular lien is being claimed), I do not think it is obvious or even realistic to say it would. On the contrary, given the provisions of the Attraction Agreement and the nature of the work being done under it, I think it is fanciful to say that it was a contract which could be expected to increase the value of the motorcycles, either individually or as a collection, having regard, particularly, to the following features of the Attraction Agreement:-

    i) Clause 4.6, as I have noted, made it clear that the Defendant was only designing and building the exhibition; it was not going to operate it. Whether the operation of such an exhibition would even be profitable cannot be assumed, and is not a question addressed in the pleadings or the evidence.

    ii) Clause 9 meant that, assuming the Attraction Agreement was completed in accordance with its own terms (which I accept is the basis on which the lien should be assessed), some work remained to be defined and required separate agreement and payment. If that agreement was not reached, either party was

entitled to terminate the Attraction Agreement. Therefore, even full performance of the Attraction Agreement would not necessarily lead to a working exhibition: further agreement and payment was required.

iii) The Attraction Agreement was directed to an exhibition at a specific Location at a specific time. The Defendant was not agreeing to design and install an exhibition for any other place or occasion.

iv) Clause 23 prevented the benefit of the Attraction Agreement, including certain intellectual property rights licensed by the Defendant to BVI Co in connection with it, being assigned to anyone else, or licensed to anyone else, and the provisions of the Contracts (Rights of Third Parties) Act 1999 were expressly excluded.

v) Clause 12.6 stated, in terms, that even BVI Co would have "no right to relocate or recreate the Attraction", except "at the Location and for the purposes set out in this Agreement".

108. I also cannot see how any increase in value would be inherent to the motorcycles. The increase would be utterly dependent on the separate materials being created around them. Those materials did not become part of the motorcycles. That contrasts with the reasoning of Thirlwall J in *Spencer v S Franses Ltd* that "The embroideries and what is known about them are (and as of 2005 were) effectively indivisible; the Defendant could not return the embroideries without giving Mr Spencer the benefit of the work he had done" (*Spencer* para 260). If the motorcycles are delivered up to the Claimants, they are not delivered up with the benefit of the Attraction, which is separate.

109. I reject the ingenious argument of the Defendant's Counsel that, by the Attraction Agreement, the parties were "creating a new chattel – a motorcycle with a bespoke rider on it". Creating a new object (a figure) which is to be placed on another object (a motorcycle) does not create a new object out of the motorcycle. It remains, evidently, a separate thing. Chattels are things. A box made for a watch might give rise to a particular lien over the box, but it would not justify a particular lien over the watch, which can always be taken out of it. No-one suggests that the figures were to be permanently affixed to the motorcycles, or that the motorcycles were to be permanently placed in the exhibition, which was (by its nature, and by the terms of the Attraction Agreement) temporary.

110. Finally, I will consider the Defendant's position in relation to the fifth of the Five Principles: namely "if the agreed work is of a hybrid nature, some of which is apt to create a particular lien and some of which is not, and the work cannot be severed into those two constituent parts, no particular lien is created."

111. The Defendant's case is a particular lien, not a general lien. The Defendant asserts a particular lien, specifically, in relation to non-payment of the third invoice, submitted in December 2018, which was attributed in Part 2 of Schedule 2 to "Detailed Design Submission – 30%". This does not appear to be an invoice for building work, whether of model figures, props, or display panels. It is an invoice for creating and submitting a design, not physical material. The first two invoices did potentially cover physical materials, but they have been paid. The first invoice was (per the Payment Schedule in

Part 2 of Schedule 2 of the Attraction Agreement) for "Mobilisation Fee (Preparing for Build)" and the second was for "Scheme Design Submission (Start of Dioramas Build)". The next invoice for physical build was to be the fifth, "Interim Build Milestone", which has not been reached. That is another reason for concluding that there is no real prospect of demonstrating at trial that non-payment of the third invoice is capable of giving rise to a particular lien over anything.

112. However, even if one assumes that some element of what the third invoice describes as "Detailed Design Submission" included work on the motorcycles, by reference to the production of physical figures or anything else (which I have decided it did not, on any realistic view of the Defendant's prospects in the case), it is impossible to say how much of it would be attributable to that. No evidence before me, or at trial, could assist, given that the third invoice is simply derived from the payment schedule in Part 2 of Schedule 2 of the Attraction Agreement. This schedule set the date of the invoice (5 October 2018), the amount of the invoice (30% of the contract sum, i.e. £524,628.90), and the description on the invoice (Detailed Design Submission). It was not an invoice based on an assessment or valuation of work done on the ground. Therefore, it is impossible to interrogate it, or look behind it, through evidence at trial. Moreover, the invoice does not correspond to any of the items, or even sums, in the "Contract Sum Breakdown" in Part 1 of Schedule 2, and so it is not possible to allocate any of those items (which include the "Realistic life-cast figures", for example) to this invoice.

113. A substantial part of the third (unpaid) invoice must have related to work other than building and physical work. "Preparing to Build" (15%), "Scheme Design Submission (Start of Dioramas Build)" (20%), "Interim Build Milestone" (15%) and "Completion" (5%) (a total of 55%) are covered by other invoices in the Schedule 2 Part 2 payment schedule. Since the third invoice (Detailed Design Submission) is based on the payment schedule in Part 2 of Schedule 2, it is impossible to say how much (if any) of this invoice also related to the building work which is said to be work "on" the motorcycles and said to give rise to a particular lien.

114. A cross-check to the different breakdown of the contract sum in Part 1 of Schedule 2 leads to the same conclusion. There are eight elements to that breakdown (which I have set out in paragraph 35 above). "Design" is mentioned as all or part of 5 of them, but it is not mentioned in the 2 elements covering the "Realistic life-cast figures" or the "Dioramas and Scenic Construction". Therefore, the invoice rendered in December 2018 for the "Detailed Design Submission" does not include apparently anything in relation to that work, and, if it did, at least a substantial part of it, being design, was not work on the physical motorcycles and could not give rise to a particular lien.

115. A hybrid invoice for work, some of which is apt to create a particular lien and some of which is not, cannot create a particular lien when it is impossible to say which parts of the invoice, if any, relate to the work capable of creating a particular lien. Per Pennycuick J in *Re Southern Livestock Producers Ltd* [1964] 1 WLR 24, 29 (quoted more fully above), "if the claim is inseverable, the claim as a whole must be treated as in respect of both operations and there is no lien at all".

Conclusion

116. For these reasons, I am satisfied that neither the Defendant's challenge to the Claimants' claim to ownership (or superior possessory title), nor its claim to be entitled to exercise a particular lien over the motorcycles until payment of the third invoice, have any real prospect of success. The Claimants are entitled under CPR 24.2 to summary judgment on their claim (and on the Counterclaim, which depends on the Defendant successfully defending the claim), and to an order for delivery up by the Defendant to the Claimants (or their nominated agent) of the motorcycles.