Possessory lien does not apply to database

By Peter Susman QC and Noel Dilworth

1. Is a data manager, who has been engaged to manage a database for a client, entitled in the absence of an express contractual right to rely upon a common law possessory lien over the contents of the database to justify denying the client access to the database pending payment of disputed invoices? The Court of Appeal says "No": *Your Response Ltd v Datateam Business Media Ltd* ([2014] EWCA Civ 281, [2014] WLR(D) 131).

2. Extensive legislation had defined and governed the creation and protection of "database rights". The Copyright and Rights in Databases Regulations 1997, whose effect was to amend the Copyright, Designs and Patents Act 1988, had implemented European Council Directive No. 96/9/EC. However, the objective of the 1997 regulations was to prevent extraction and re-use of a substantial part of a database against the interests and consent of the "owner". Such protection was a practical safeguard against unlawful or unauthorised abuse of a person's data. It was obviously deserving of legislative intervention. However, both 1997 Regulations and the 1996 Directive had been silent on the question of a party simply asserting control over access to the database to the exclusion of the "owner" (but not thereafter "using" it, save that depriving the owner of access to it served as leverage in negotiations with that party for payment of the contractual debt).

3. Such a scenario arose in *Your Response Ltd v Datateam Business Media Ltd*, where the Respondent database manager had fallen out with the Appellant publisher

over the level of service the former had provided to the latter. The publisher refused to pay the manager's fees and terminated the service agreement, demanding return of the contents of the database. The manager refused to return the contents of the database and sued for the outstanding fees. The publisher counterclaimed both in respect of losses alleged to have been caused by contractual breaches during the lifetime of the contact and for the costs incurred in reconstituting its data in consequence of the withholding of the database. At trial, the manager succeeded both on its claim and in resisting the counterclaim. The basis for rejecting the counterclaim was, according to the County Court judge, that the manager could rely on a common law lien to justify refusal to return the database, notwithstanding that its contents were intangible. The relevant part of the district judge's reasoning, recorded at paragraph 9 of Moore-Bick LJ's judgment, was that "*would not be appropriate for the law to ignore the development in the real world of record keeping moving from hard copy records into electronic media.*"

4. The publisher appealed. Its argument, essentially, was that the possessory nature of a lien was such that it could only be exercised over tangible objects. The Court of Appeal agreed. In doing so, it pointed out that, in *Tappenden v Artus* [1964] 2 QB 185, the common law possessory lien, "*like other primitive remedies such as abatement of nuisance, self-defence or ejection of trespassers to land, is one of self-help.*" The House of Lords had, in *OBG Ltd v Allan* [2007] UKHL 21, upheld the centrally important distinction between tangible and intangible objects in determining whether the tort of conversion could apply. Since possession was the touchstone for application of both the tort of conversion and the possessory lien and since only tangible objects were capable of possession, it followed that the lien could not, in principle, apply to intangible objects. In reality, what the Respondent had sought to do (as recognized by the judge at first instance) was

to update the common law so as to extend the common law lien to intangible data.

5. The Respondent had invoked four arguments in support of the extension of the scope of the lien to the content of databases, notwithstanding its intangibility. First, it asserted that databases were actually tangible objects because they were necessarily stored in physical media. Second, possession was equated to control and an intention to exclude. Third, drawing on the rules governing the disclosure of documents, it was time to include electronic data within the scope of the lien. Fourth, it sought to evince a third class of thing (labelled, an intangible chose in possession). In a characteristically lucid judgment, Moore-Bick LJ dismissed each of those objections, although he acknowledged the attractiveness of the second argument and the proximity of the concepts of possession and control. He also expressed some sympathy with the view expressed in academic circles that *OBG Ltd v Allan* had represented a missed opportunity. However, realistically, he acknowledged that it was now really only Parliament that could effect a change in the law.

6. In observations that were strictly obiter, Moore-Bick LJ noted (paragraph 31) that, even if control were the yardstick by which the possessory lien could be measured, on the facts of this case, there was insufficient control to justify exercise of any such right, since the publisher had continued to have access to the database throughout the duration of the contract. The means by which the data manager had excluded the published was to disable the existing password or access code which the publisher had been using.
7. Both Moore-Bick and Davis LJJ held that the personal security entailed by exercise of a possessory lien would complicate matters in the event of insolvency of the data manager.

8. Further observations made only by Floyd LJ were that an electronic database consisted in structured information and that the law had been resistant to the idea of treating information (as distinct from the physical medium or the database right) as property. Were the Respondent's arguments successful, it was likely to have the effect of collapsing that principle.

9. An important factual point in this appeal was that the terms of the contract were partly oral, partly written, but completely silent as to what happened in the event of a dispute. Where the contract does stipulate the rights and the obligations of the parties in such circumstances, the courts will be slow to interfere with the parties' expressed intention.

10. The points of practical importance arising from :
    a. In drafting contracts, data managers and the media industry ought to specify what rights of access to the database (or rights to withhold access thereto) they intend. Clarity of contractual intention is likely to obviate litigation.
    b. If not specifically governed by contractual terms, data managers are not entitled to withhold the content of a database by reference to a lien, even if their fees have not been paid.
    c. Even if there might be a right to assert a lien, continued access to a database is likely to countermand the operation of such a right.

Peter Susman QC and **Noel Dilworth** acted on behalf of the successful Appellant publisher.

20th March 2014