



Electronic databases and liens

In the recent case of *Your Response Ltd v Datateam Business Media Ltd* the Court of Appeal held that it was not possible to exercise a lien over an electronic database.

A lien is a common law right which allows a party to retain any assets in their possession until they receive payment which they are owed. The right to exercise a lien over a physical asset, for example a garage retaining a car until the repair bill is paid, is well known. However, this case raised the question of whether it is possible to exercise a lien over an intangible asset.

Your Response Ltd (“**Your Response**”) was a database manager engaged by Datateam Business Media Ltd (“**Datateam**”) in March 2010 to store and maintain a database of magazine subscribers. The contract was made very informally by an exchange of emails. By the summer of 2011 Datateam was unhappy with the service being provided and in October 2011 they sought to terminate the contract. Your Response invoiced for its outstanding fees, Datateam refused to pay until the database was released, Your Response refused to release the database until it was paid -- a complete impasse -- and court proceedings began in early 2012. The County Court held that Your Response was entitled to exercise a lien over the database and not hand it over until its fees were paid. Datateam appealed to the Court of Appeal.

Your Response argued that the database should be regarded as a physical object because it existed in a physical form on its servers and should be treated in the same way as a document. The Court of Appeal rejected this argument, finding that the information was not in itself a physical object capable of possession independently of the medium on which it was held. The nature of a database is that it is an intangible protected as a type of intellectual property.

Possession and control

Your Response also argued that as they were in possession of the database they were entitled to exercise a lien over it. The Court found that they **did** have practical control over the information on the database but, due to the intangible nature of information, they **did not** have possession of the database as this would require physical control. No possession meant no lien.

Holding that it was not possible to exercise a lien over an electronic database, Lord Justice Floyd stated that “*Although information may give rise to intellectual property rights, such as database rights and copyright, the law has been reluctant to treat information itself as property. When information is created and recorded there are sharp distinctions between the information itself, the physical medium on which the information is recorded and the rights to which the information gives rise. Whilst the physical medium and the rights are treated as property, the information itself has never been.*”

The future?

The Court of Appeal considered the argument that the courts should not leave the common law possessory lien stuck in its 18th and 19th century origins and should give it a 21st century application, appropriate to modern commercial activities and modern digitised materials. However, they considered that too significant a step to be taken without Parliament’s intervention.

As a small crumb of comfort, even if an unpaid supplier cannot exercise a lien over an intangible, they can still take a charge which is dependent on control not possession. The Court also pointed out that, had the parties entered into a formal agreement, they would have dealt properly with what happened on termination and could have provided for handing over or retention of the database.

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