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**Civil Mock Appeal – The Hon. Mr Justice Green, The Hon.
Mrs Justice Carr, Mrs Justice Andrews, Sir John Mummery,
Martin Griffiths QC, Adam Constable QC**

(transcript of [video](#))

- A** **Mr Justice Green:** The appeal you are about to what would probably in real life take longer, nonetheless, what you will see demonstrated are some of the points made in the talks. The case study used is fictional, but is based on a real case.
- B** The Appellant; James Morgan, retained the Respondent, Pennywise Accounting Services (a firm) to prepare his tax return.
- C** Mr Morgan provided his financial data to the firm on a USB stick and also by email.
- After completion of the accounts, but before they were submitted to HMRC, a dispute arose about Pennywise's bill, and Mr Morgan refused to pay it.
- D** Mr Morgan terminated the retainer and sought return of his financial information. Pennywise refused, claiming they could retain the information until their bill was paid (this is called a lien). Mr Morgan was unable to submit his tax return as a result and claimed for loss and damage.
- E** Mr Morgan's claim failed. The District Judge found that Pennywise was entitled to exercise a lien over the USB stick, and by extension the data contained on it, just as any accountant would be entitled to exercise a lien over a paper file. The Judge declined to make any findings in relation to Pennywise's wider policy submission that the Court should if necessary extend the principles of lien to intangible electronic data, in cases such as the present one.
- F** Mr Morgan appealed to the Court of Appeal, on the basis that:
- G** Mr Morgan appealed to the Court of Appeal, on the basis that:
- H**
 - First, the District Judge was wrong in law to uphold the claim of Pennywise to a common law possessory lien over the intangible property held on a USB data storage device, and that,
 - Secondly, the District Judge was wrong in law to uphold Pennywise's claim to a common law possessory lien over the same intangible

A property, consisting of electronic data, which had also been sent by the appellant to the respondent by e-mail

B

Martin Griffiths QC: The issue in this appeal is whether a lien can be exercised over electronic data. I am going briefly to identify the facts which are essential to the appeal, then I'm going to address the law and how it should be applied to the undisputed facts, and finally I will deal with the policy question if it arises.

C

This is a case about financial data. You will see from Agreed Fact Four that this data was provided in two forms: first of all on a USB storage device and secondly, **D** and separately, by email. There is no dispute in this case that the defendant, absent a lien, was obliged to return the financial data at the end of the contract.

E **Mrs Justice Carr:** So Mr. Griffiths, you accept you need an independent basis in which to claim return of the data but for that purpose you rely on an implied term?

F **Martin Griffiths QC:** I accept that I do need an independent basis for it and I point out that nobody suggests that I don't have it. If anybody were to make that suggestion I do rely on the implication of the term and I base myself on **G** paragraph 33 of the Court of Appeal decision in Datateam

Mrs Justice Carr: Thank You

H **Martin Griffiths QC:** May I now turn to the law which I have introduced at paragraphs four to ten of my skeleton argument?

The leading case and the only case referred to in the judgment below is the recent decision of the Court of Appeal in Datateam. Datateam was a case about an electronic database and looking first of all at the holding you will see that it

A was based on a decision that the database was intangible property, this meant
that it could not be possessed in the way that it is necessary for property to be
B possessed if a lien is to be exercised over it, and that meant that there could be
no right of lien. A common law possessory lien, which is what this case is about,
permits a bailien possession of chattels to refuse to redeliver them to the bailor
until he'd receive payment of outstanding sums due to him. So the person
C exercising a lien must be in possession of a chattel or something in the nature of
a chattel and it's my submission that the electronic data in this case are not such
a thing

D **Mrs Justice Carr:** What about the USB stick Mr. Griffiths?

Martin Griffiths QC: The USB stick is a chattel but the data on it is distinct from
the USB stick and that is demonstrated by the fact that it was sent not just
E through the USB stick but separately on an email. The nature of a lien is helpfully
explained by the judgment of Lord Justice Diplock in the Tappenden case, which
is set out at paragraph 11 of the Datateam report.

F Looking at paragraph 12; in Datateam the Court of Appeal emphasise that for a
lien to exist there must be actual possession of goods and looking at paragraph
16 of Datateam, the essential nature of a lien is a right to retain possession of
G goods delivered for the purpose of carrying out work. So one must find possession
and one must identify goods. In the absence of goods there cannot be possession
and in the absence of goods possessed there cannot be a lien.

H **Mrs Justice Carr:** Mr. Griffiths between paragraph 12 and 16 of Datateam we
see the Court of Appeal consider the House of Lords authority in OBG v Allen,
indeed it was one of the main authorities considered by the Court of Appeal. It
would help me if you could simply summarise the material ratio of OBG and

A perhaps Mr. Constable you can identify any disagreement with that summary for present purposes?

B **Martin Griffiths QC:** My Lady certainly. Perhaps the easiest way of doing that is by taking you to paragraph 14 of Datateam which summarises OBG

Mrs Justice Carr: Yes

C **Martin Griffiths QC:** OBG was a decision that because contractual rights are intangible property, the tort of conversion cannot apply to them because the tort of conversion applies only to chattels – shows in possession, to things - and not to rights; to shows in action, and that is why the Court of Appeal in Datateam drew on it as a direct authority and analogy to the case of electronic data.

D **Mrs Justice Carr:** Thank you, Mr. Constable you're happy with that broad summary?

E **Adam Constable QC:** Yes, that's agreed

F **Mrs Justice Carr:** Thank you, thank you Mr. Griffiths

Mrs Justice Andrews: Your response, Datateam?

G **Martin Griffiths QC:** The question in this case is whether the financial data, which is the subject matter of the appeal, is the sort of thing that can be possessed so that a lien may be exercised over it, and in my submission Datateam is direct authority for the proposition that it cannot.

H At paragraph 16 of Datateam, final sentence: "The concept of possession in the hitherto accepted sense has no meaning in relation to intangible property" and if that was true of the electronic data making up the database in Datateam, it is equally true of the financial data, the electronic data in the present appeal.

- A** The data is not the disc and similarly in this appeal the data is not the USB key, it is independent of the USB key. It is not tangible property, therefore it must be intangible property, therefore a lien cannot be exercised over it.
- B** **Sir John Mummery:** So, If I'm following your argument Mr Griffiths, you're saying that the error committed by the Judge in this case is to be found in paragraph 54 of the agreed note of his judgment where he said that he found
- C** that "Pennywise was entitled to exercise a lien over the USB stick and by extension the data contained on it, on it" and then he says "just as an accountant would be entitled to exercise a lien over a paper file and the financial information contained in it." You say the Judge is erroneously saying there you can have a
- D** lien over the data, the information?
- E** **Martin Griffiths QC:** My Lord yes, the Judge... the Judge's error with great respect to him is the words "by extension." There is a fundamental difference which the Judge simply overlooked between the physical object which is the stick and the data which is the subject matter of the appeal.
- F** **Mrs Justice Andrews:** But then what's the utilisation, what's the utility of having a right of lien over the USB stick because that's a physical piece of property you accept. It has no meaning does it for the person who's exercising the lien
- G** because it's no worth to him to have a lien over the stick, what's of value is what's on it.
- H** **Martin Griffiths QC:** And that is why it is fatal to my Learned Friend's case that the case is about electronic data. If this were a case about writing on a page and one could withhold the page, there is no authority which says that the writing has an existence independent of the page and you cannot email it and copy it and replicate it in the way that you can electronic data, it has no independent existence.

A Can I now go to the judgment, the agreed note of judgment? You will see from paragraph 49 that the entire basis of the judgment on this point is an attempt to apply the Datateam case. So if that case is not applied correctly the judgment cannot stand. The judgment distinguishes Datateam solely on the basis that

B there was a USB stick in the present case. It simply overlooks, it does not mention the fact that the data was also sent by email. And even if you ignore the USB

C stick the problem therefore doesn't go away. The Learned Judge has left out half the case.

Mrs Justice Carr: And that was fully argued in front of him was it?

D **Martin Griffiths QC:** My Lady yes...

Mrs Justice Carr: Yes

E **Martin Griffiths QC:** ...and indeed you can see from the Agreed Facts...

Mrs Justice Carr: Mm hmm...

F **Martin Griffiths:** ...That the fact that the data was sent by email independently of the USB stick, was part of the Agreed Facts before the Judge

Mrs Justice Carr: Yes

G **Martin Griffiths QC:** Paragraph six of my Learned Friend's skeleton says that the case turns on the nature of the relationship and he says, to quote him: "that because the present case is about the long established relationship of accountant and client this is a relationship capable of giving rise to a common law lien."

H

With respect to him, that misses the point that I wish to make. The problem with his case is not the nature of the relationship, of course accountants do exercise liens over appropriate goods such as client files. The fact that the relationship makes a lien conceivable does not mean that it can overcome the absence of

A physical property in the case and it is that which is fatal to the defence. The relationship is not the point, the fact that the financial data are intangible is the point.

B Having addressed the law and the facts of this case I will now turn to the policy point if the Court wishes me to.

C **Mrs Justice Carr:** Well as My Lady, Lady Justice Andrews has identified, it may be more helpful I think to all of us if we wait to hear from MR. Constable and see if we need your further assistance on that point in due course.

D **Martin Griffiths QC:** My Lady yes; in that case, unless there is anything else that I can assist you on, those are my submissions.

E **Sir John Mummery:** What do you say would be the position when all that the accountant has is the USB stick with the information on it, is that a lien case or a no lien case?

F **Martin Griffiths QC:** He may have a lien over the USB stick, but because the electronic data is independent information and because he has an obligation to return the electronic data as I explained at the outset, he cannot resist that obligation by claiming a lien. He cannot claim a lien over the electronic
G information on the USB stick because that information is intangible property and cannot be possessed for the purposes of a lien.

H **Sir John Mummery:** So how does the client get the information back?

Martin Griffiths QC: It can be sent back to him by email or provided to him in any other way, electronic information can be reproduced and sent easily and multiple times. If I have a right to the information back, which as I say I do, it is no impediment to me receiving it but I do not have a right to receive it back on the USB key.

- A** **Mrs Justice Andrews:** The right of lien over the stick is essentially meaningless.
- Martin Griffiths QC:** It's irrelevant yes.
- B** **Sir John Mummery:** It's an example of the common law giving a meaningless remedy?
- C** **Martin Griffiths QC:** No, it's an example of a common law remedy which was fashioned over physical goods not being extended as a matter of policy to electronic data and there are many good reasons for that, the law of unintended consequences, the way in which creditors would be preferred and the very nature of electronic data which is that it is very easy to reproduce, it can be transmitted
- D** in many forms. It is not appropriate for that sort of material to be subject to a lien, it is not like a chattel
- E** **Sir John Mummery:** Thank you very much, any more questions?
- Mrs Justice Carr:** No thank you
- F** **Mrs Justice Andrews:** No
- Sir John Mummery:** Thank you very much Mr. Griffiths
- G** **Sir John Mummery:** Yes Mr. Constable
- H** **Adam Constable QC:** Issues have narrowed it seems, on listening to my Learned Friend, it appears at the outset that he accepts the need for an independent basis upon which to exercise the absence as it were of a lien on the absence of an obligation to return the information to his client, and the reason he quite rightly had to accept the need for an independent basis became clear during his answers to My Lord's questions.

A The acceptance that there would be a lien over the paper example and secondly
that there would be a lien over the chattel of the USB stick. Now, how does he
then seek to persuade this Court that nevertheless there is no right by my clients
B to withhold the information? He has two routes to persuade the Court.

The first is that the electronic data is capable of separation from the USB stick in
a physical sense. What in fact he's telling this Court, without justification, is that
C there is an obligation upon my client to remove the information from the USB
stick and provide it to my client's client. So where does that obligation come
from? That's the first question for this Court.

The second is independently from the USB stick, he relies upon the existence of
an email, but in turn that requires an obligation upon the accountant, the
professional, to return the information when in a position of the fees being
E unpaid.

Mrs Justice Andrews: Well Mr. Constable QC, forgive me if I'm wrong, but I've
seen nothing in these papers that suggests that your client was suggesting that
F he had any right to retain the electronic information that was sent by email at
least in the absence of a lien, am I wrong about that?

Adam Constable QC: Yes, with respect; my client need not return the information
- when bills are unpaid - without an obligation to do so and, and we're really now
at the heart of the issue between myself and my Learned Friend, and one can see
that Datateam deal with it on very different bases to the present case.

H If I can take the Court to paragraph 30, one sees first of all that in Datateam it
was accepted by both parties that "the defendant was entitled to have access to
the database at will during the currency of the contract and a claimant was
provided with a passport for that purpose." And then at 33 the Court concludes:
"it must have been implicit in the contract that when it came to an end the

A claimant was under an obligation to send the defendant by electronic means a
copy of the database in its latest form,” and the reason that the Court comes to
that sensible conclusion in Datateam is because the production of the database
B was the very purpose of the contract. The benefit of the contract for the recipient
of the services was the existence of the database at any particular time and that
benefit, the Court decided, would be the subject of at least an implicit right to
C return - in its form - at the end of the contract.

Mrs Justice Carr: Mr. Griffiths in his submissions appeared to proceed on the
premise that this implicit entitlement was not in dispute. From what you’re
saying Mr. Constable it’s very much in dispute and could you just help me by
D reference to your skeleton argument where this point emerges.

Adam Constable QC: Well my Lady, it emerges from the way the case has moved
forward and the way that Mr Griffiths now accepts, in essence, that the USB stick
and the retention of the USB stick which was the subject really, the focus of the
E case in the Court below, he accepts a lien over that and he accepts essentially
that the lien is a meaningless remedy and, when one, when one digs into really
F what he’s saying this isn’t about a lien at all it’s about an obligation upon my
clients to have done something.

G **Mrs Justice Carr:** So is the short answer, it’s not in your skeleton argument, but
for good reason, you would say?

H **Adam Constable QC:** My Lady yes, my Lady yes. I propose briefly to deal with
the ability to distinguish between the data on the USB stick and the USB stick
itself.

My Learned Friend says that the two are capable of separation. This point hasn’t
essentially been dealt with by this Court already, if I can take the Court to
paragraph 21 of Datateam and the relevant section of the judgment has also

A been set out in paragraph 11 of my skeleton argument. There the Court says that
“the appeal was argued on the basis that the parties intended that the relevant
B data to be transferred electronically by the defendant to the claimant i.e. without
the use of physical media such as discs or other forms of portable storage
devices” and there the Court is essentially saying if the data had been transferred
electronically on a disc there would have been a lien over the storage media and
C the information on it. And my Lord, when asking my Learned Friend about
paragraph 54 on the judgment and the focus on the words “and by extension the
data on it” with the greatest respect to the point my Learned Friend makes, the
Judge was not falling into error, he was saying no more than the information is
D on the disc. He wasn’t saying that there’s a separate legal lien over the electronic
data which has a separate legal existence, he’s simply saying there’s a lien over
the physical chattel which is the USB stick which happens to have the
E information on it and so as a matter of practical purposes there is a lien over the
electronic data, but it’s only by reference to the lien over the physical storage
media.

F **Mrs Justice Carr:** But wouldn’t he just have said and therefore the data, by
extension, does suggest a little more doesn’t it?

G **Adam Constable QC:** Well, if, I can see the point My Lady makes, sort of detailed
semantic...

Mrs Justice Carr: No I understand-

H **Adam Constable QC:** -analysis of what he is saying could lead to either, either
example...

Mrs Justice Carr: Mmm

Sir John Mummery: Well it would have been more-

A **Adam Constable QC:** I mean, my, my, if I make my position clear it's, I am not saying that there is a separate lien over the data which exists other than by reference to the lien that is over the physical chattel of the US... chattel of the

B USB stick...

C **Sir John Mummery:** It would have been more accurate for the Judge to say in paragraph 54: the defendant was entitled to exercise a lien over the USB stick which contained the data

Mrs Justice Carr: Yes

D **Adam Constable QC:** Absolutely correct

Sir John Mummery: Mmm?

E **Mrs Justice Andrews:** Yes

F **Adam Constable QC:** Absolutely correct, and I take that essentially to be what the Judge intended to say whether, whether he did or did not and certainly that's the way I put it before this Court in terms of the reasons to uphold that judgment below

G **Mrs Justice Andrews:** And I suppose you'd also say would you not that if you have got a lien over the USB stick which contains the data then it's a meaningless lien if you then say you can't utilise it to withhold the data?

H **Adam Constable QC:** Absolutely, absolutely and one can take the ready analogy to the box of papers with the information on it, my Learned Friend relies on the fact that one can't physically lift the ink from the paper as a means of distinction but that's true, but the data on the USB stick will not lift itself from the USB stick, it's there, it's an integral part of the USB stick.

A In fact Datateam makes clear that by taking the data off the USB stick you would be physically changing the chattel in fact and there's no more of an obligation upon my client - a professional - to remove the data from the USB

B stick when they are one and the same physical being, to separate that out into two physical objects, than he would be to for example photocopy the information on the file of papers and scan it in an email to...

C **Mrs Justice Carr:** But the Court of Appeal in Datateam didn't find the physical change to be of any assistance.

D **Adam Constable QC:** No that's right but, that's absolutely right but the point I'm making is that there's no obligation upon a professional to physically change the chattel in order to remove the information from it and provide it to his client. If he happens to have the information on the physical chattel he has the benefit

E of a lien over that chattel.

We've dealt with the USB distinction point, we've dealt with the email, the policy point is the other matter which I know this Court was interested to hear from me

F first in relation to. The point that will be made against me is that the Court of Appeal in Datateam appears in for example, paragraph 27 to have already refused to consider the extension of a lien over intangible property, the policy

G point is a much narrower one than the one that was considered by Datateam.

I'm not suggesting that this Court do anything that this Court in Datateam clearly refused to do. Here the position of the Respondent is that the Court could

H consider a much narrower extension that relates solely to the electronic data held by professionals, accountants and lawyers and such who will have possession of that data in the context of a USB stick or physical media in, as in this case

A **Mrs Justice Andrews:** Well why should the, the person who's holding the data make a difference to the point of principle as to whether or not you can extend a lien to it?

B **Adam Constable QC:** Well, my Lady, there is of course a well-established common law lien for professionals and the present distinction that exists between a professional holding a USB stick and holding a file, a box file of papers
C is illusory in practice and my submission members of the Court would be that it is open to this Court to, to say that such a distinction is an illusory one, that has no benefit in the modern world.

D **Mrs Justice Andrews:** But you keep coming back to the problem that the reason why there isn't a lien is because there is no tangible asset and I can't see, speaking for myself, on what basis you can possibly rationalise a distinction just
E because it happens to be data that's held by a professional.

Adam Constable QC: Well, there we are. The policy point is one that I've made, if the Court isn't persuaded of it then I won't abandon it but clearly if this matter
F goes elsewhere then it may be something for another Court to consider.

Sir John Mummery: If I could just raise a couple of points?

G **Adam Constable QC:** Yes

Sir John Mummery: First, so you dismiss the appeal and what Mr. Griffiths relies on as an error in paragraph 54 of the note of judgement - you say is not an error;
H the judge wasn't saying there that there was lien over the data on the stick, separate from the stick? He hasn't got that... he's not saying there's a lien over data?

Adam Constable QC: He's not saying-

- A** **Sir John Mummery:** -over data
- Adam Constable QC:** Exactly
- B** **Sir John Mummery:** Mmm, separate from the stick?
- Adam Constable QC:** He's not saying there was a lien over the intangible property
- C** **Sir John Mummery:** No
- Adam Constable QC:** He's saying there was a lien over the tangible property which happens to...
- D** **Sir John Mummery:** Which contained intangible property?
- Adam Constable QC:** Have contained it, precisely My Lord
- E** **Sir John Mummery:** Forget about any papers being supplied or any USB stick, it's simply an email, it's not a necessary part of your case to say that there is a lien over the information which has been emailed?
- F** **Adam Constable QC:** That's correct, it's no necessary part of my case...
- Sir John Mummery:** It's not part of you're...mmm?
- G** **Adam Constable QC:** One has to analyse the relationship and the... and fall back essentially on a contractual analysis
- H** **Sir John Mummery:** Right, that's very helpful, thank you very much
- Adam Constable QC:** Thank you
- Sir John Mummery:** Yes Mr. Griffiths

A **Martin Griffiths QC:** My Learned Friend said that the issues in the case have narrowed; he accepts the need for an independent basis on which to exercise the retention of the financial data independent of a lien. But this is a case about a

B lien. The judgment appealed from is only about the existence or non-existence of a lien. The only issue in the case was whether there was a lien, the only defence to the claim was a lien and therefore if my Learned Friend moves the argument away from the lien he is conceding the case and therefore the appeal.

C

My Learned Friend says that the electronic data is not capable of separation from the USB stick, Agreed Fact four demonstrates that is wrong. The data was so far separate that it was conveyed by email, it did not depend on the USB stick.

D

My Learned Friend says that I have accepted that the lien over the USB stick is a “meaningless remedy” - is the way that he puts it. It’s not a meaningless remedy, he can exercise a lien over the USB stick, it is simply that it is not a defence to my claim, because my claim is not for the stick it’s for the information and the information is separate from the stick and was indeed sent independently of the stick.

E

F

My Learned Friend says that paragraph 21 of Datateam, as quoted in paragraph 11 of his skeleton argument, shows that if the data in Datateam had transferred on a disc the issue in that appeal would not have arisen, but in our case the data was transferred by an email so it plainly does arise in this case and I haven’t heard my Learned Friend’s submission on how he can exercise a lien over the information sent by email. In fact, in answer to My Lord’s question he said that he could not. Now-

G

H

Mrs Justice Carr: -No, he’s falling back entirely on the contract isn’t he?

- A** **Martin Griffiths QC:** He is and the difficulty for him is that that was not the case that he ran below, it is not the basis of the decision he's trying to defend and it is not the defence which he must maintain if he is to resist my claim
- B** **Bench (together):** There's no Respondent's Notice!
- (laughter)*
- C** **Sir John Mummery:** Great minds think alike
- (laughter)*
- D** **Martin Griffiths QC:** My Learned Friend ended by saying in answer to questions from my Lord that it was not a necessary part of his case to say that there was a lien over the email. With great respect it is because if he cannot resist return of the email and the information on the email I get what I want and what was
- E** withheld from me and I should have won the case and I ask you to hold that I will win the appeal.
- F** In a nutshell, I am claiming financial data. The financial data in this case are intangible property therefore no lien can be exercised over them and that means the judgment cannot stand and there is no defence to the action and that is my
- G** reply to my Learned Friend.
- Sir John Mummery:** Thank you very much
- ***
- H** **Mr Justice Green:** In that appeal you will particularly have noticed:
- The appellant's clear opening exposition, briefing summarising the essential facts, issues and relevant law

- | | |
|---|--|
| A | <ul style="list-style-type: none"> • The carefully structured arguments, using the skeleton argument as a tool but not slavishly following, let alone reading it • The use of simple, direct language |
| B | <ul style="list-style-type: none"> • Concentration on just a few strong points • Referring to authority only for relevant passages • Clear, direct and immediate responses to the Court's questions – both |
| C | <ul style="list-style-type: none"> when agreeing and disagreeing • A courteous and persuasive manner • Engagement with the court on the matters which are obviously troubling them; and reading their body language |
| D | <ul style="list-style-type: none"> • Flexibility in developing or dropping points, according to the reactions of the court |
| E | <ul style="list-style-type: none"> • The respondent being truly responsive to the appellant's argument and its development in response to the Court's questions • And, the appellant's short, focused reply, dealing in a structured way with the Respondent's submissions, and again being alive to the way the case, and the Court's thinking, may have moved on |
| F | |

END

G

H

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