Neutral Citation Number: [2007] EWHC 2372 (Comm)

Case No: 205-681: 2007-421

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2007

Before :

THE HON MR JUSTICE GROSS

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Between :

Samsun Logix Corporation	**Claimant**
- and -	
Oceantrade Corporation	**Defendant**
And between	
Deval Denizeilik VE Ticaret A.S.	**Claimant**
- and –	
Oceantrade Corporation (1)	
Samsun Logix Corporation (2)	**Defendants**

- -

Poonam Melwani (instructed by **Birketts LLP**) for the **Claimant, Samsun Logix Corporation**

Dominic Happé (instructed by **E.G.Arghyrakis & Co.**) for the **Claimant, Deval Denizeilik V.E. Ticaret S.A.**

(The Defendant Oceantrade Corporation was not represented)

Hearing dates: 10th & 11th September 2007

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Judgment

The Hon Mr Justice Gross :

INTRODUCTION

1. There are before the court competing applications by Samsun Logix Corporation ("Samsun") and Deval Denizcilik Ve Ticaret AS ("Deval"), each in effect claiming, *inter alia*, priority in respect of the same sum of money held in the client account of a firm of solicitors, Mills & Co ("Mills").

2. Though at first blush a little confusing, the background may be shortly summarised. As will be seen, the villain of the piece, so to speak, is an entity Oceantrade

Corporation ("OTC"), incorporated in the Marshall Islands, currently and since about September 2005 subject to Chapter 11 proceedings under the jurisdiction of the US Bankruptcy Court of the Southern District of New York ("the US Bankruptcy Court"). Both Samsun and Deval, almost in parallel, chartered vessels to OTC. Both have unsatisfied claims against OTC; hence the competing claims to the funds held by Mills. I turn to outline how this position has come about.

3. *Samsun:* By a time charterparty dated 3rd March, 2005 on an amended NYPE form and with additional clauses, Samsun, as disponent owners, chartered the vessel, the "NORD MONACO" to OTC ("the Samsun charterparty").

4. Plainly, all was not as it should have been under the Samsun charterparty and, on the 18th August, 2005, Samsun obtained, *ex parte*, a worldwide freezing injunction from Aikens J ("the Aikens order") against OTC. The Aikens order prohibited OTC from removing from this jurisdiction any of its assets in England and Wales up to the value of US$3.5 million. The order made specific reference to:

> "…any sums due or becoming due to [OTC]…from Helm AG in respect of freight payable under a voyage charterparty relating to the vessel 'ORHAN DEVAL'"

5. Pausing there, as will become apparent, the "ORHAN DEVAL" was a vessel time chartered by Deval to OTC and sub-voyage-chartered by OTC to Helm AG ("Helm"); at the time in question, hire was due from OTC to Deval and freight was due from Helm to OTC.

6. Returning to the Aikens order, it contained an additional prohibition (not in standard form) as follows:

> "9.…[OTC] must not…..
>
> (1) give directions for and/or request the payment of and/or receipt of and/or acceptance of any sums due or becoming due to [OTC] from Helm AG in respect of freight payable under a voyage charterparty relating to the vessel 'ORHAN DEVAL'"

On the evidence before me, that prohibition was due to Samsun's concern that OTC would dissipate any moneys received, notwithstanding the existence of the freezing injunction.

7. Both the injunction and the prohibition contained in para 9(1) of the Aikens order were challenged by OTC at the *inter partes* hearing before Smith J on the 30th August, 2005. In the event, by order of Smith J, made on that day ("the Smith order"), the Aikens order was varied, with particular reference to the payment of freight in respect of the "ORHAN DEVAL". On the undertaking of Mills & Co. to hold the "ORHAN DEVAL" Freight (as defined later in the order) to the order of the Court, the Aikens order was varied, insofar as presently material, as follows:

> "2. Paragraph 9 of the Freezing Order be varied so as to permit the payment of the freight in relation to the ORHAN DEVAL

> therein referred to ('the ORHAN DEVAL Freight') to Mills & Co., [OTC's] Solicitors.
>
> 3. The parties by their solicitors write forthwith to Helm AG and Helm Dungemittel GmbH (being the voyage charterers of the ORHAN DEVAL), advising them (i) of the terms of this order and (ii) that it is permissible for the said charterers to discharge their obligations regarding the payment of the ORHAN DEVAL freight by paying the same to the United States Dollar account of Mills & Co., Solicitors….
>
> 4. No payment of the monies constituting the ORHAN DEVAL freight be made by Mills & Co., save:
>
> (1) To the Owners of the ORHAN DEVAL in the sum of not more than US$202,125 (being the net sum falling due on 19 August 2005 in respect of hire under the charteerparty between the said Owners and [OTC] dated 8 February 2005…..
>
> (2) In the ordinary course of [OTC's] business…."

Payments made under (2) were subject to various requirements as to consent and notification, the detail of which need not be set out here.

8. On the material before me, on or about the 7th September, 2005, Helm paid the freight due from it (the "ORHAN DEVAL" Freight, as defined in the Smith order) in the amount of US$662,040.64 to the relevant Mills account ("the Mills account"). On the 9th September, 2005, using the money in the Mills account, OTC paid hire to Deval in the sum of US$322,812.50, apparently representing sums already due for certain instalments of hire; as this sum is greater than that set out in para. 4(1) of the Smith order, I assume that appropriate consents were obtained. Also on the 9th September, 2005, again using the money in the Mills account, OTC paid US$103,184.82 to Samsun in the ordinary course of business. These payments having been made, there remained – and still remains - a balance of about US$236,000 in the Mills account The competing applications before me, in effect relate to that sum of money.

9. Continuing with the history so far as concerns Samsun, its disputes with OTC proceeded to arbitration. In an award dated 19th October, 2005 ("the Samsun award"), the arbitration tribunal held that OTC, in repudiatory breach of the Samsun charterparty, had redelivered the "NORD MONACO" prematurely and was liable to Samsun in damages in the amount of US$1,244,666.82, plus interest and costs. By order of Field J, dated 3rd April, 2007, Samsun was given permission to enforce the Samsun award as if it were an order or judgment of the court. As I understand the position, the Samsun award remains unpaid.

10. *Deval:* By a time charterparty on the NYPE form, as amended and with additional clauses, dated 8th February, 2005, Deval chartered the vessel, the "ORHAN DEVAL" to OTC ("the Deval charterparty").

11. Here too concerns must have arisen, because on the 9th September, 2005, Deval's solicitors, E.G. Arghyrakis & Co. ("Arghyrakis") wrote to Mills, acknowledging receipt of the US$322,806.93 and going on to say this:

> "…we hereby put you on notice that our clients now exercise their lien on sub-freights pursuant to cl.18 of the charter. This lien is exercised in relation to the balance of the sub-freights held in your client account, to the extent of the sums which are still due to our clients from Charterers to date and until these sums are paid to our clients.
>
> For the avoidance of doubt, our clients' calculation of the sums currently due to them as of today is as follows:
>
> - Balance as per our clients' hire statement 06.09.05 …$578,750.00
>
> - Less received today ($322,806.93)
>
> - Balance: $255,943.07"

12. Cl. 18 of the Deval charterparty, reflecting the NYPE standard form, provided as follows:

> "That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter…."

To that clause ("the cl.18 lien"), I shall return in due course.

13. It will at once be appreciated that Deval's purported exercise of its rights under the cl.18 lien came two days after the payment by Helm of the "ORHAN DEVAL" freight into the Mills account.

14. Subsequently, on the 30th September, 2005, Deval obtained a freezing injunction from Tugendhat J ("the Tugendhat order") against OTC, *inter alia* prohibiting OTC from removing from England and Wales any of its assets in England and Wales up to the value of US$880,000.

15. Disputes having arisen under the Deval charterparty, Deval commenced London arbitration. In the arbitration, Deval claimed various amounts, by way of damages or otherwise and also claimed a declaration that it was entitled to and had validly exercised a lien over sub-freights from the 9th and/or the 20th September, 2005. As I understand it, the arbitration was conducted by way of written submissions; Mills, who continued for a time to represent OTC, disputed Deval's claim, including its entitlement to the declaration sought as to the exercise of the lien. In the event, by an award dated 25th April, 2007 ("the Deval award"), the arbitrator found in favour of Deval. He awarded Deval the total sum of US$783,026.09; additionally, he declared that Deval had at and from the 9th September, 2005 validly exercised its right to a lien under cl. 18 of the Deval charterparty over sub-freights held in the Mills account and that those sub-freights were subject to Deval's lien and were accordingly due to

Deval. With regard to the exercise of the lien on sub-freights, the arbitrator expressed his conclusion in the following terms:

> "44. …It seemed to me to be clear…that the sub-freights remitted by Helm had not been paid to the Charterers [OTC] at all but rather to their solicitors [Mills].., as stakeholders and that these sub-freights were never intended to be 'paid' over to the Charterers or to be freely available for their use…..the sum paid by Helm could not be regarded as being 'held' by Mills …to the Charterers' instructions (as the Charterers maintained) since the terms of the freezing order (dated 31st August 2005) [the Smith order] expressly recorded that Mills…were to hold the sub-freights to the order of the High Court….
>
> 46. The evidence before me in relation to the circumstances in which the payment had been made by Helm into the account of Mills…was limited but I was bound to conclude that they were holding the monies received from Helm as stakeholder under the terms of the High Court freezing order. It was clear that the sub-freights had not been paid to the Charterers and that Mills…could not be treated as a party holding these funds on behalf of the Charterers."

16. There has been no appeal against the Deval award but, as I understand the position, it remains unpaid. No application has been made to enforce the Deval award as if it were an order or judgment of the court.

THE APPLICATIONS BEFORE THE COURT

17. *Applications:* Against this background, I come to the applications before the Court. By way of Application Notice, dated 6th June, 2007 ("the Samsun application"), Samsun sought the following relief:

> "1. The Court determine the issue of whether Deval…. have a lien over the Orhan Deval Freight (as defined in [the Smith order]….) and order that Deval do noot in fact have any such lien.
>
> 2. Subject to paragraph 4 below, Mills…do pay to Samsun…such of the Orhan Deval Freight as is retained by them, such payment to be in part satisfaction of the Arbitration Award dated 19th October 2005.
>
> 3. The Freezing Injunctions ….[viz., the Aikens, Smith and Tugendhat orders]….are varied so as to permit the payment referred to in 2 above.
>
> 4. No sum shall be paid by Mills….pursuant to 2 above until they are provided with a copy of an order from the US Bankruptcy Court of the Southern District of New York in Oceantrade's bankruptcy case, which order is not subject to

> further appeal, permitting/stating no objection to such payment…."

18. By way of Application Notice dated 4th September, 2007 ("the Deval application"), Deval claimed the following relief:

> "(1) the [Aikens and Smith orders] be varied to permit that payment be made to the claimant (or to this firm's client account) of the sum awarded to the claimant [i.e. in the Deval arbitration] out of the sum held in the Mills Account;
>
> (2) Dismiss [Samsun's] application dated 6th June, 2007"

19. In fairness to Deval, I should record that at the hearing before me, Mr. Happé (for Deval) while resisting Samsun's application throughout, indicated a reluctance to press ahead with Deval's application. As it seemed to me, this was due in part to some *inter partes* skirmishing which, with respect, carried the matter no further forward. More pertinently, this stance was also consistent with the substantive submission (of which more below) that I should not proceed to a ruling, alternatively, that any ruling of mine should be most narrowly confined. Still further and appropriately, Deval's stance was based on concern as to the position of OTC and whether it had effective notice of these proceedings. Happily, this aspect of the matter was clarified overnight when, at my urging, the parties jointly made contact with Mr. Brendan Scott, the administrator of OTC pursuant to the Ch. 11 proceedings, specifically drawing his attention to the Samsun application. By e-mail dated 11th September, 2007, Mr. Scott responded in the following terms:

> " Receipt acknowledged. Our understanding of tomorrow's proceeding, based on representations made by counsel for Samsun, is that the proceeding is limited to a determination of priority between the competing claims of Samsun and Deveal to funds held in escrow by Mills & Co. in London. We understand there will be no determination made with respect to the priority of Oceantrade's claim to those funds. If this is not accurate please advise.
>
> It is our position that the escrowed funds are the property of Oceantrade's bankruptcy estate here in the US and should rightfully be transferred to Oceantrade's debtor-in-possession bank account for eventual distribution to Oceantrade's creditors……"

20. With OTC's position thus clarified, the hearing before me proceeded, essentially (i) by reference to Samsun's application and (ii) focussed upon the issue of priority (if any) as between Samsun and Deval, rather than any question of a payment out to either party. In my judgment, it was either not in dispute, alternatively indisputable, that any suggestion of this court making an order for payment out of the funds from the Mills account must, at the least, await an appropriate and prior determination by the US Bankruptcy Court. For completeness, although Deval was not a party to the Samsun application, whereas Samsun was a party to the Deval application, this

curiosity had no bearing on the substance of the dispute; if need be and if asked to do so, I will consider whether any "tidying up" order should be made.

THE RIVAL CASES

21. For *Samsun*, Ms Melwani submitted that Samsun was not and could not be bound by any ruling made in the Deval arbitration to which it was not a party; no finding made in that arbitration was capable of creating a right in rem nor indeed did the cl.18 lien confer a proprietary interest. In any event, by the time that Deval purported to exercise its right of lien, on the 9th September, 2005, it was too late; Helm had already discharged its obligation to pay freight by paying the funds to Mills, on or about the 7th September, 2005 – regardless of the capacity in which Mills held the funds. It followed that Deval enjoyed no priority over Samsun in respect to the funds in the Mills account; if anything, Samsun, as a judgment creditor enjoyed priority over Deval. It was appropriate for this Court to go at least as far as making a declaratory ruling to such effect. The funds in question were in this jurisdiction, in the bank account of English solicitors and held subject to a freezing injunction imposed by this Court. The foundation for Deval's claim to priority was the cl.18 lien, contained in the Deval charterparty, a contract governed by English law. Even if the US Bankruptcy Court would not be bound by any ruling of this Court, it would in no way be offended by this Court proceeding to make such a ruling; *per contra*, the US Bankruptcy Court had given permission to the parties (by way of lifting the Ch. 11 stay of proceedings) to have this issue determined by this Court so that it would be unfortunate if this Court declined to entertain or deal with it.

22. For *Deval*, Mr. Happé submitted that the arbitrator, who alone had jurisdiction to determine the question, had determined that Deval had validly exercised its right of lien over the Helm sub-freights. There had been no appeal from the Deval award and this Court had no jurisdiction to rule upon it. Any debate as to the proprietary or other nature of the cl. 18 lien or the position of third parties was nothing to the point, as the lien had been validly exercised, as had been determined by the arbitrator. He had ruled that the money had been intercepted in time. As between Deval and Samsun, Deval accordingly enjoyed priority in respect of the funds in the Mills account. If this Court was to make any ruling, that was the conclusion to which it should come; however, the utility of any ruling by this Court was seriously open to question. No such ruling would bind the US Bankruptcy Court and it was that Court, taking such view as it did of the rights conferred by the cl.18 lien and the Deval arbitration award, which would determine the fate of the funds in the Mills account. In particular, Mr. Happé urged caution, in that the treatment of liens such as that conferred by cl.18 was or might be different under English and US law. The procedural question of how to get the funds out of the Mills account could properly be addressed after the US Bankruptcy Court had reached its decision.

23. In reply for *Samsun*, Ms Melwani underlined that Mr. Happé had not argued that the cl. 18 lien in the Deval charterparty had been validly exercised, other than by way of reliance on the Deval award. If that lien did give rise to proprietary rights, how could Samsun not be heard on this issue? Conversely, if that lien did not give rise to proprietary rights, how could Samsun be bound?

24. The issues raised by the rival cases can conveniently be addressed under the following broad headings:

i) Utility (Issue (I));

ii) Principle: contractual rights and third parties (Issue (II));

iii) Timing (Issue (III)).

ISSUE (I): UTILITY

25. It is not in dispute that the ultimate fate of the funds in the Mills account rests (at least primarily) in the hands of the US Bankruptcy Court, by reason of that Court's jurisdiction over the Chapter 11 proceedings concerning OTC. In the course of its administration of the affairs of OTC, the US Bankruptcy Court will be confronted with a variety of matters not before this Court. By way of example, it is that Court not this, which is likely to be faced with issues going to the enforcement of the Deval award under the New York Convention, together with argument by Deval that the status of the cl. 18 lien under US law means that the funds in the Mills account are not available to OTC or the general body of its creditors. To such extent, Mr. Happé was undoubtedly right in urging caution on this Court. Against this background, as already remarked, by the conclusion of the hearing before me there was no or no realistic question of this Court at this stage making any order for payment out of the funds in the Mills account.

26. In my judgment, however, it does not follow that this Court should express no view on the question of whether, as a matter of English law, by virtue of the cl. 18 lien, the Deval claim to the funds in the Mills account enjoyed priority over the Samsun claim. Given that the contract (the Deval charterparty) under which the cl. 18 lien arose was governed by English law, that the funds are in this country, in the bank account of English solicitors and held subject to a freezing injunction imposed by this Court, there are ample connections with this jurisdiction. Moreover, as it seems to me, at some stage in the US Bankruptcy Court proceedings, notwithstanding the importance likely to be attached to the *lex fori*, the question of whether or not the cl. 18 lien was validly exercised as a matter of English law, so according Deval priority over Samsun in respect of the funds in question (under English law), will inevitably arise: see *Dicey, Morris & Collins*, *The Conflict of Laws* (14th ed.), at para. 7-033. Even if a decision of this Court will not bind the US Bankruptcy Court (concerned as it will be with an assortment of issues not before this Court, some to be determined under US law), it is likely to be of assistance to the US Bankruptcy Court to know the view of this Court on this issue. Indeed it appears to me, with respect, implicit in the permission granted by the US Bankruptcy Court to Samsun for these applications to be pursued, that a decision of this Court would be of assistance to that Court. The alternative, on the face of it less satisfactory, is that the US Bankruptcy Court would have to consider for itself, what this Court would have done as a matter of English law.

27. In the circumstances, without in any way trespassing into the territory of the US Bankruptcy Court proceedings, it seems to me that a ruling from this Court would neither be futile nor academic. Instead it is likely to be useful to the US Bankruptcy Court; indeed, for the reasons discussed, a refusal to rule might well be perceived as unhelpful by that Court. It is therefore appropriate for me to proceed. See, generally, the discussion in *The "Rama"* [1996] 2 Lloyd's Rep. 281, at pp. 288-291. I remind myself that the issue for my determination is confined to the question of whether, as a

matter of English law, by virtue of Deval's purported exercise of the cl.18 lien, its claim to the funds in the Mills account enjoyed priority over the Samsun claim.

ISSUE (II): PRINCIPLE: CONTRACTUAL RIGHTS AND THIRD PARTIES

28. It will be recollected that Mr. Happé's submission proceeded as follows: the arbitrator's decision was conclusive as to the validity of Deval's exercise of the cl. 18 lien; he alone had jurisdiction in the matter; there had been no appeal by OTC; this Court had no jurisdiction to interfere; any remaining issues were for the US Court if or when it came to consider enforcement of the Deval award under the New York Convention.

29. With the last point – as to the appropriateness of this Court making any ruling at all – I have already dealt. So far as concerns the balance of Mr. Happé's submissions under this heading, I am, with respect, wholly unable to accept them. My reasons follow.

30. First, as a matter of principle, I find it difficult to conceive of a situation where a decision *in rem*, or binding on the world, could be made, without the opportunity for those affected to be heard. That, however, would be the effect of Mr. Happé's submission, if well-founded. The arbitrator's decision, right or wrong, would be conclusive as against Samsun, even though Samsun was not a party to the arbitration. I do not think that can be right.

31. Secondly, Mr. Happé's submission would lead to a surprising conclusion, in that it is established, at least as a matter of English law, that the cl. 18 lien creates rights only as between the parties to the contract in which it is contained. This is so, both insofar as cl.18 provides a lien over cargo and a lien over sub-freights. *Wilford, Time Charters* (5th ed.), puts the matter this way (at pp. 531 and 534):

> "….Under English law the liens are contractual only…and no maritime liens are created.
>
> **The nature of the owners' lien upon cargoes**
>
> 30.2 In English law liens may be maritime liens in admiralty or may be granted by the common law, by equity, by statute or by contract. The lien of owners over cargoes, given by …[cl.18]…is a contractual lien only. It has no independent root in admiralty, common law, equity or statute. Consequently it creates a right only as between the parties to the contract in which it is contained. So it does not give the owners any right, as against bill of lading holders other than the time charterers, to exercise a lien over their cargo….
>
> **The nature of the owners' lien upon sub-freights**
>
> 30.16 This lien is similar to the owners' lien upon cargoes….in that it is contractual only. It differs, however, in that it operates not as a right to retain possession of something already in the owners' possession but as a right to intercept that which is moving from a third party to the charterers. Indeed, this makes

> it doubtful whether it can properly be described as a 'lien' at all…"

32. Thirdly, as it seems to me, these considerations point to the true scope of the arbitrator's decision in the Deval award. The arbitrator's decision, that Deval had validly exercised the cl. 18 lien in the Deval charterparty, is conclusive but between and only between, Deval and OTC (subject only to any appeal by OTC, now well out of time). This Court has no jurisdiction to interfere in that process, as between those parties, even if it was minded to do so (which it is not). Conversely, however, the arbitrator's decision does not, without more, bind anyone other than the parties to the Deval arbitration – and certainly not without any non-party, thus affected, having the opportunity to be heard.

33. I therefore conclude that in considering whether, as a matter of English law, by virtue of the purported exercise of the cl. 18 lien, the Deval claim to the funds in the Mills account, enjoys priority as against Samsun, the Deval award does not preclude further argument.

ISSUE (III): TIMING

34. The short question which arises here, *as between Samsun and Deval*, is whether, by the time Deval purported to exercise its cl. 18 lien, it was too late to do so.

35. In English law, it is settled (i) that the lien on sub-freights operates by giving owners a right to intercept the sub-freights before they are paid by a shipper or other third party to charterers or their agents; and (ii) that this lien is lost if the sub-freights have already been thus paid: *Wilford (op cit)*, at pp. 537-8. In *Tagart Beaton & Co v James Fisher* [1903] 1 KB 391, Lord Alverstone CJ put the matter this way (at p.395):

> "A lien such as this on a sub-freight means a right to receive it as freight and to stop that freight at any time before it has been paid to the time charterer or his agent; but such a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight."

Much more recently, in *The "Spiros C"* [2000] 2 Lloyd's Rep 319, Rix LJ said this (at p.323):

> "….The shipowner perfects his right of lien by giving notice to the debtor; if the notice is in time to pre-empt payment of the relevant sub-freight, then the shipowner is entitled to payment from the debtor, even though he otherwise has no direct contractual relationship with him. But if the shipowner's notice to pay comes too late, and the sub-freight has already been paid, then the lien fails to bite on anything…."

36. On the facts of the present case, Ms Melwani submitted that by the time the lien was purportedly exercised by Deval on the 9th September, 2005, it was too late; the sub-freights had already been paid to Mills on the 7th September. Mr. Happé submitted

that the cl. 18 lien had been validly exercised; but, as already underlined, he relied solely on the decision by the arbitrator in the Deval award to this effect.

37. As will be seen, I have come to the clear conclusion that as between Deval and Samsun, it cannot be said that Deval validly exercised its cl.18 lien. I preface the reasons which follow by emphasising that the conclusion to which I have come involves neither disrespect for nor criticism of the decision of the arbitrator. I acknowledge that the Deval award was before the Court *de bene esse*, even though OTC had not given consent for such a course. I read and considered the award and the arbitrator's reasons *de bene esse*, though I have little doubt that, notwithstanding OTC's stance, I would have acceded to a formal application for the award to be before the Court had one been made. However, I have not seen the submissions advanced to the arbitrator nor am I aware of the evidence or other materials before the arbitrator.

38. Dealing with the matter on the materials before me, I am amply satisfied that, on the true interpretation of the scheme of the Smith order, Helm made the 7th September payment of the "ORHAN DEVAL" freight to Mills as OTC's agent but subject to the terms of the freezing injunction. The constraints of the freezing injunction do not in any way tell against the conclusion that the funds in the Mills account were OTC's funds; they simply regulate the uses which could be made of those funds.

39. By way of brief elaboration:

    i) So far as relevant to questions concerning the cl.18 lien, it was neither here nor there that Helm paid the "ORHAN DEVAL" freight to Mills rather than to OTC. The reason for paying the "ORHAN DEVAL" freight to Mills was because of the risk of dissipation by OTC had it received the moneys directly. Mills was designated as the recipient of the moneys for OTC because of the understandable confidence placed in the integrity of solicitors holding the money to the order of the Court. These arrangements were of the essence of the freezing injunction, as encapsulated in the Smith order but they do not alter the underlying nature of the Helm payment.

    ii) There is nothing in the Smith order to suggest that the moneys were deemed to remain Helm's moneys; to the contrary, the scheme of the Smith order suggests otherwise. Para. 3(ii) of the Smith order gives rise to the natural inference that Helm was now out of the picture. If so and if payment to Mills had the effect of discharging Helm's obligations as regards the payment of the "ORHAN DEVAL" freight, as of the 7th September that could only be because the payment was to be treated as a payment to OTC; as of that date Deval had not yet purported to exercise its cl. 18 lien.

    iii) The subsequent payments out of the Mills account, permitted by the Court, are difficult to explain save on the basis that the funds were OTC's to disburse – subject only to the constraints of the freezing injunction.

40. Accordingly, as a matter of English law and as between Deval and Samsun, my conclusion is that by the time Deval purported to exercise the cl.18 lien under the Deval charterparty, on the 9th September, 2005, it was too late to do so, the sub-freights in question having already been paid by Helm to Mills, as agent for OTC. Therefore, under English law, Deval does not enjoy priority over Samsun to the funds

in the Mills account. That conclusion is sufficient to decide the present matters before me in Samsun's favour.

41. For completeness, I add that having reached this conclusion it is unnecessary to express any views on the following:

i) Ms Melwani's further submission, as expressed in her skeleton argument, that whatever the true role or status of Mills:

> "…payment to [Mills] constituted payment of freight under the charter so as to discharge Helm's obligations. Accordingly, it was too late thereafter to exercise their lien."

Notwithstanding the attractions inherent in the simplicity of this submission, a full consideration of an argument of this breadth should await an occasion when its resolution is necessary.

ii) The difference of opinion as to the true juristic nature of the lien on sub-freights, exemplified in particular by the observations (with respect, most probably *obiter*) of Lord Millett in *Agnew v CIR* [2001] UKPC 28; [2001] 2 AC 710 (PC), at [39] – [41] on the one hand and the decision of Nourse J (as he then was) in *In re Welsh Irish Ferries* [1986] Ch 471, esp. at pp. 374-5. In *In re Welsh Irish Ferries*, Nourse J, concluded, rejecting in the course of doing so the submissions of Mr. Millett QC (as he then was), that the cl. 18 lien on sub-freights created an equitable charge. In *Agnew v CIR*, Lord Millett said that the cl. 18 lien on sub-freights was not a charge at all but gave a merely personal right to intercept freight before it was paid, analogous to a right of stoppage in transitu. In the course of the hearing, I had wondered aloud as to whether, if I followed the observations of Lord Millett in *Agnew v CIR*, that might provide a short answer to this dispute, even if (contrary to my earlier conclusion), Deval had validly exercised the cl. 18 lien. In the event, I am not attracted to pursuing this line of thinking. First, to enter into territory disputed by (*inter alia)* Lord Millett and Nourse J, when it is unnecessary for my decision to do so, would seem at least rash. Secondly, even if the cl. 18 lien is not a charge because, in accordance with Lord Millett's opinion, it confers no proprietary rights, if it is analogous to a right of stoppage in transitu, it is likely in any event to accord priority in bankruptcy: see, *Benjamin's Sale of Goods* (5th ed.., 1997), at para. 15-062. If so, then a consideration of this issue takes the resolution of the present dispute no further.

42. Finally, it is also correct to say that in terms of enforcement in this jurisdiction, Samsun, as a judgment creditor, is procedurally a step ahead of Deval – but that consideration has played no part in my decision.

43. I shall be grateful for the assistance of counsel in drawing up an appropriate order both reflecting my decision on the question of priority and making clear the limited nature of that decision. I shall also be grateful for the assistance of counsel on all questions of costs.