The new solicitors delivered up the documents to deliver up the copies, contending that they covered by the retaining lien and that they had been to take the copies in order to inform the client of their on about certain aspects of the plaintiffs' handling of arbitration.

The plaintiffs brought proceedings against the new solicitors claiming delivery up of the documents, an injunction restraining the new solicitors from making use of the documents or any copies, and damages.

At first instance the judge dismissed the claim. The plaintiffs appealed to the Court of Appeal.

Held (Sir Richard Scott V-C dissenting), that the case law established that where solicitor one transferred documents to solicitor two to hold to solicitor one's order, the lien of solicitor one was preserved. Solicitor one retained the legal possession of the documents, albeit that the physical possession was now with solicitor two.

In what form was the lien preserved? The principle was stated by Lord Cottenham LC in *Heslop v Metcalfe* (1837) 3 My & C 183, 190:

> "I think the principle should be that the solicitor claiming the lien should have every security not inconsistent with the progress of the cause."

That principle could be applied to cases such as the present, where solicitor one transferred documents to solicitor two to hold "to his order". The cases indicated that the practice of solicitors who had been dismissed by their clients but whose fees had not been fully discharged, handing their files to the new solicitors to "hold to our account" or "to hold to our order" was well established. It was a practice which had led to little difficulty in the real world.

The appeal would be allowed. In copying every document in every file and sending copies of all those documents to the client, the new solicitors were in breach of the plaintiffs' lien. The present case was, however, one of those rare cases where it was inappropriate to order any relief. Nor was it a case in which it was appropriate to order compensation. Consequently, the Court would allow the appeal, reverse the finding of the court below that the new solicitors were not in breach of the plaintiffs' lien, and would make a declaration to that effect. However, the Court would, in the exercise of its discretion, decline to grant any of the relief sought by the plaintiffs.

John Cherryman QC and David Bailey (Hewett & Co) for the plaintiffs; Peter Gross QC and David Allen (Sinclair Roche & Temperley) for the new solicitors.

NEW YORK ARBITRATIONS

Demurrage – Whether charterers required to pay only half-rate demurrage pursuant to Conoco Weather Clause

Medtank Ltd v Adam Maritime Corporation (The "Alaska") – Before Hammond L Cederholm; Jack Berg and R Glenn Bauer (Chair) – 15 August 1996 (SMA – No 3290)

The vessel *Alaska* was chartered on the Asbatankvoy form for a voyage from Skikda, Algeria, to one or two safe US Atlantic, Gulf or Caribbean ports. A dispute arose as to demurrage at the loading port.

The charterers claimed that on the disputed days, they were required to pay only one-half demurrage because of the wording of the Conoco Weather Clause, which read:

> "Delays in berthing for loading or discharging and any delays after berthing which are due to weather conditions shall count as one-half laytime, or, if on demurrage, at one-half demurrage rate."

The owners contended that that clause should be narrowly construed to apply only to delays in getting into a berth which had already been designated by the charterer in accordance with the charterer's obligations under clause 9 of the Asbatankvoy form. The owners also argued that the clause did not apply where the charterer had not as yet met its overriding obligation to procure a cargo for the vessel as well as its duty of procuring a berth "reachable on her arrival".

Held (by a majority), that it was clear that the weather did at times interfere with some operations in the port. However, it was not at all clear that those weather conditions were responsible for the delays experienced by the *Alaska*.

The first delay occurred before the vessel's turn to berth had arrived, and before a berth had been designated and procured by the charterer. The intended berth was occupied when NOR was tendered and the *Alaska* was third in the lineup for that berth. This was an Asbatankvoy form of charter, the same form as in *The Laura Prima* [1982] 1 Lloyd's Rep 1. There, the charterer could not be excused for delays "getting into" berth, but that distinction was not enough to excuse the charterer from its duty to designate and procure a berth "reachable on her arrival" under clause 9.

The Conoco Weather Clause did not go far enough to change that rule. It spoke of "berthing" rather than "getting into" berth, but that distinction was not enough to excuse the charterer from its duty to designate and procure a berth "reachable on her arrival" under clause 9.

The second delay was in a different category. A berth had become available, but its use had been lost for reasons other than bad weather. To take advantage of the Conoco Weather Clause the charterer had to prove that the "delays in berthing" were "due to weather conditions". The burden of proof was on the charterer.

There had been a serious problem regarding the furnishing of the cargo. When that problem first began was unclear. It certainly existed when the vessel's turn to load came up, and the berth was free. One of her tanks was sampled and analysed, found to be off-spec and refused. That meant the loss of the window in which the vessel could have loaded before the second round of bad weather occurred. The *Alaska's* turn to berth had come. The weather was favourable. No other vessels had priority. The cause of her missing her turn was the charterer's. Not only had the charterer failed to provide a berth, but the charterer also failed to provide a cargo. The cause of the delay was the failure of the cargo to be on spec when a berth became available. An adverse weather clause did not protect a charterer from demurrage if there was no cargo to load – see "Laytime and Demurrage" (3rd ed) by Schofield at page 193.

In other circumstances, ie where a berth and a cargo were available, and berthing was clearly delayed because of weather conditions, the Conoco Weather Clause would reduce the demurrage to one-half without the need to prove the weather bad enough to be a "storm" under clause 8. In the present case, evidence of delay to the vessel caused by the weather conditions was met by evidence that the delay was caused by the charterer's inability to obtain a cargo from its supplier. The preponderance of the evidence was not in the charterers' favour. They had not met the burden of proof, and therefore the Conoco clause did not apply.

The owners were entitled to full demurrage.

Donald F Mooney (Law Offices of Donald F Mooney) for the owners; David P Langlois (Piper & Marbury) for the charterers.