



Neutral Citation Number: [2019] EWHC 3402 (Comm)

Case No: LM-2019-000023

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**QUEEN'S BENCH DIVISION**  
**LONDON CIRCUIT COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/12/2019

**Before :**

**PETER MACDONALD EGGERS QC**  
**(Sitting as a Deputy Judge of the High Court)**

-----  
**Between :**

**“Amalie Essberger” Tankreederei GmbH & Co KG**  
**- and -**  
**Marubeni Corporation**

**Claimant**

**Defendant**

-----  
**Mr Alex Carless** (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**  
**Mr John Robb** (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**

Hearing dates: 8 November 2019  
-----

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**PETER MACDONALD EGGERS QC**  
**(Sitting as a Deputy Judge of the High Court)**

## Peter MacDonald Eggers QC:

### Introduction

1. The Claimant (“the Owners”) is the owner of the vessel *M/T Amalie Essberger* (“the Vessel”) and chartered the Vessel to the Defendant (“the Charterers”) for a voyage from Rotterdam, The Netherlands, to Castellon, Spain to carry a cargo of Cyclohexane, under a voyage charterparty dated 18th November 2017 (“the Charterparty”).
2. Between 29th November 2017 and 1st December 2017, the Vessel loaded the cargo and then sailed to Castellon. The Vessel arrived at Castellon and commenced discharging on 9th December 2017. However, the receiver refused to accept delivery of that part of the cargo carried in one of the Vessel’s tanks (tank 5S), because that cargo was contaminated with mono ethylene glycol. The remainder of the cargo was discharged at Castellon and the Vessel then shifted to an anchorage off Castellon on 10th December 2017, remaining there until 19th December 2017, when the Vessel sailed to Valencia where the cargo in tank 5S was discharged between 19th and 21st December 2017.
3. The laytime permitted under the Charterparty was “48hrs shinc ttl”. The laytime was therefore 48 hours across both the loadport and the discharge port. The Owners claim that 1 day, 1 hour and 40 minutes (1.07 days) of the laytime were used at Rotterdam and the laytime expired at Castellon on 10th December 2017. The demurrage rate was US\$14,000 per day pro rata. On 22nd December 2017, the Owners submitted, by email, a demurrage claim to the Charterers in the sum of US\$154,875.00. The demurrage claim was submitted to the Charterers via the broker. In the email, the broker said that the “*Owner’s demurrage invoice together with their laytime calculation and support documents*” were attached and asked the Charterers to “*immediately advise if any documents are missing in order for you to review this claim*”.
4. In these proceedings, the Owners claim demurrage from the Charterers. The Charterers’ defences are twofold: first, that the delay suffered by the Vessel was the result of the contamination of the cargo in tank 5S which occurred on board the Vessel and therefore was the Owners’ responsibility or fault; second, the demurrage

claim is time-barred because the demurrage claim was not submitted in accordance with the requirements of Rider Clause 5 of the Charterparty within the permitted time period of 90 days.

5. The Charterers apply for summary judgment pursuant to CPR rule 24.2 on the ground that the Owners have no real prospect of succeeding in their claim for demurrage because of the time bar defence (the second of the two defences referred to above) and there is no other reason why the disposal of the claim should await trial. The Owners resist the application on the ground that the demurrage claim was submitted in accordance with the requirements of the Charterparty, alternatively that the relevant factual issues arising are triable and not amenable to summary judgment.

### **The Charterparty**

6. The Charterparty was on an amended ASBATANKVOY form. The Charterparty contained the following provisions (with agreed amendments underlined and struck through):

*“CHARTER PARTY RIDER CLAUSES*

*These terms shall be used together within Asbatankvoy Charterparty form, which is deemed incorporated herein. Should the terms as provided for hereunder be in conflict with the terms as printed in the Asbatankvoy Charterparty, the terms hereunder shall take precedence ...*

*5) TIME BAR*

*Any claim for demurrage, deadfreight, ~~shifting expenses or other charges or invoices~~ shall be considered waived unless received by the Charterer or Charterer's broker in writing with all supporting calculations and documents, within ~~sixty (60)~~ 90 days after completion of discharge of the last parcel of Charterer's cargo (es). Demurrage, if any, must be submitted in a single claim at that time, and the claim must be supported by the following documents:*

- A. *Vessel and/or terminal time logs;*
- B. *Notices of Readiness;*
- C. *Pumping Logs; and*
- D. *Letters of Protest ...*

23) *DOCUMENTATION CLAUSE*

*For any load/discharge operation owner must provide charterer with a complete sets of cargo documents including:*

- *NOR*
- *SOF*
- *Dead freight claim (If issued)*
- *Any letter of protest issued/received in connection with cargo operations*
- *Vessels cargo calculations after loading/prior discharge*
- *Empty tank certificate*
- *Vessel pumping Logs ... and Letter of Protest against high back pressure/any shore limitations which must be duly signed by Master and responsible shore personnel.*
- *Nitrogen log, if any nitrogen purging being carried out on cargo.*
- *Temperature log, if any cargo heating.*

*These documents should be forwarded to charterers within 7 banking days after completion of loading or discharge. Faxed copies will be accepted provided readable ...*

32) *DEMURRAGE*

*Charterers shall pay Demurrage at the rate specified on this Charter Party hereof. Demurrage shall be paid per running day and pro rata for part of a running day for all time by which the allowed Laytime specified in this fixture hereof is exceeded and which under the provisions of this Charter party counts against or for Demurrage ...”*

7. The Charterparty was expressed to be governed by English law.

**The issues**

8. The issues arising on the summary judgment application arise by reason of the following facts.
- (1) On 22nd December 2017, the Owners submitted the claim for demurrage to the Charterers. This claim was submitted within the 90 day period referred to in Rider Clause 5.

- (2) When the demurrage claim was submitted, the Owners provided the Charterers with the Vessel's and/or terminal's time logs (there is an issue on the statements of case as to whether or not this was the case, but the Charterers are prepared to assume that these logs were provided for the purposes of this application), the notices of readiness and the Vessel's pumping logs for the discharge ports.
  - (3) The following documents did not accompany the demurrage claim on 22nd December 2017, namely (a) the Vessel's pumping log at Rotterdam and (b) a letter of protest issued by the Master of the Vessel dated 30th November 2017, noting that the Charterers' and the shippers' surveyor had not supplied the Vessel with sealed samples of the cargo upon completion of loading. However, both of these documents had earlier been provided by the Owners to the Charterers on 1st December 2017. I shall refer to both of these documents - the Rotterdam pumping log and the letter of protest dated 30th November 2017 - as "the Disputed Documents".
9. The parties are agreed that the following issues arise for determination on the application:
- (1) Issue 1: Did the Owners' obligation to provide supporting documents under Rider Clause 5 of the Charterparty extend only to documents which were relevant to the demurrage claim being made? If the answer to this issue is "Yes", there is the further (factual) issue whether the Disputed Documents were relevant to the claim being made.
  - (2) Issue 2: Did the Owners' obligation to provide supporting documents under Rider Clause 5 of the Charterparty require the Owners to provide documents which were already in the Charterers' possession (whether received from the Owners or otherwise)?
  - (3) Issue 3: Did the supporting documents have to be provided at the same time as the demurrage claim or was it sufficient that the documents were provided at some point before the expiry of the relevant 90 day period?

- (4) Issue 4: In the event that the Owners failed to provide a particular supporting document in accordance with Rider Clause 5, is the Owners' entire claim for demurrage, or only that part of the claim to which the particular document related, time-barred? If the answer to this issue is that only the relevant part of the claim is time-barred, there is a further (factual) issue, namely to which part or parts of the demurrage claim were the Disputed Documents related.

### **Approach to construing demurrage time bar provisions**

10. These issues involve the interpretation of the Charterparty. The aim of construing a commercial contract, such as a charterparty, is to identify the meaning of a contractual provision having regard to the language of the provision often by reference to the natural and ordinary meaning and the business sense of such language, but also in the context of the commercial purpose of the contractual provision and the relevant factual background of the contract known, or knowledge of which was reasonably available, to the parties (*Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune)* [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep 654, para. 8).
11. In the context of a contractual time bar provision such as that set out in Rider Clause 5 of the Charterparty, the following considerations are to be taken into account, which considerations appear largely to have been common ground between the parties.
12. First, the commercial purpose of a demurrage time bar provision was explained by Bingham, J in *Babanaft International Co SA v Avant Petroleum Inc (The Oltenia)* [1982] 1 Lloyd's Rep 448, which was concerned with a demurrage time bar provision in substantially similar terms to the first sentence of Rider Clause 5 in this case. At page 453, Bingham, J said:

*“The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh (cf. Metalimex Foreign Trade Corporation v. Eugenie Maritime Co. Ltd., [1962] 1 Lloyd's Rep. 378 at p. 386, per Mr. Justice McNair). This object could only be achieved if the charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not.”*

13. Accordingly, the provision of a demurrage claim and supporting calculations and documents within a relatively short period of time is designed to allow the recipient of the demurrage claim, the Charterers, to investigate and verify or dispute the claim, soon after the events giving rise to the claim, having regard to both the Owners' formulation of the claim and the factual material supporting the claim.
14. Second, demurrage time bar provisions should be construed with the object of clarity and certainty to ensure that the Owners are in a position to know what will be required to be done in accordance with the time requirements of the provision; this will also enable the Charterers to understand what documentation might legitimately be expected to be provided in support of a demurrage claim. By contrast, there is no automatic requirement that the requirements of the demurrage time bar provision should be strictly complied with (*cf. Waterfront Shipping Company Ltd v Trafigura AG (The Sabrewing)* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd's Rep 286, para. 16). In *National Shipping Company of Saudi Arabia v BP Oil Supply Co (The Abqaiq)* [2011] EWCA Civ 1127; [2012] 1 Lloyd's Rep 18, the Court of Appeal was concerned with a charterparty provision, on the BPVoy4 charter form, which barred a demurrage claim "*unless a claim in writing has been presented to Charterers, together with all supporting documentation substantiating each and every constituent part of the claim, within ninety (90) days of the completion of discharge of the cargo carried hereunder*". At paragraphs 60-62, Tomlinson, LJ said:

*"60. ... For my part I am not sure that it is helpful to introduce into the approach to these provisions a notion of strict compliance. Where in a commercial contract one finds a provision to the effect that one party is only to be liable to the other in respect of claims of which he has been given notice within a certain period, it is fair to assume that the parties wish their relationship to be informed rather by certainty than by strictness ...*

*61. Thus the touchstone of the approach ought in my view to be a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results ...*

*62. ... I would further accept that, consistently with the need for certainty, it must objectively speaking be apparent that the documentation is that which supports the claim, but I do not consider that in approaching that issue one should adopt a pedantic or strict approach which focuses on the form of the presentation rather than the substance."*

15. Third, given that the demurrage time bar provision has the potential to bar the making of an otherwise valid claim if not presented in accordance with Rider Clause 5, both the time bar and the conditions for the application of the time bar must be clearly stated. It follows that if there is any genuine ambiguity in the meaning of the provision, it should be construed restrictively against the Charterers and in favour of the Owners. However, as Mr John Robb, who appeared on behalf of the Charterers, made clear, this principle of construction should be applied as a last resort, meaning that there must be a real ambiguity which remains after the analysis of the language, the commercial purpose and factual background, and should be applied less rigorously than a full exemption clause (Lewison, *The Interpretation of Contracts*, (6th ed., 2015), para. 12-16 - 12-17). The position was summarised by Gloster, J in *The Sabrewing* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd's Rep 286, at paragraph 15:

*“It was common ground between counsel that a demurrage time bar clause must be clear and unambiguous if effect is to be given to it. Thus, if there is any residual doubt about the matter, the ambiguity is to be resolved in such a way as not to prevent an otherwise legitimate claim from being pursued; see Pera Shipping Corporation v Petroship SA (The Pera) [1985] 2 Lloyd’s Rep. 103 at page 106 per Lloyd LJ, and at page 108 per Slade and Griffiths LJJ. However, the words in a time bar provision must be given their ordinary and natural meaning. A time bar provision is, or is closely analogous to, a limitation clause. Thus, the especially exacting principles of construction that apply to exemption clauses probably do not apply to time bar provisions; see Lewison, The Interpretation of Contracts, 2nd Edition, para 11.15. The contra proferentem rule is only invoked as a last resort if the meaning of the words is so finely balanced that the contra proferentem rule should be applied in favour of owners; see Mira Oil Resources of Tortola v Bocimar NV (The Obo Venture) [1999] 2 Lloyd’s Rep. 101 per Colman J at page 104.”*

16. I will take account of these principles and considerations in construing Rider Clause 5 and in addressing the issues relating to the interpretation of the Charterparty.

### **Issue 1: Must the supporting documents include the Disputed Documents?**

#### The parties’ submissions

17. Mr John Robb, on behalf of the Charterers, submitted that:
- (1) Rider Clause 5 does not require the submission of documents only if they are relevant; the clause does not use the word “*relevant*”, but uses the word “*supporting*”. Accordingly, Rider Clause 5 is not stipulating that the four



specified categories of documents must be provided only if they are relevant to the demurrage claim. The difficulty with equating “*supporting*” with relevance is to import a standard disclosure requirement, which would be “*potentially unworkable*” (*Kassiopi Maritime Co Ltd v Fal Shipping Co Ltd (The Adventure)* [2015] EWHC 318 (Comm); [2015] 1 Lloyd's Rep 473, para. 27).

- (2) By providing that “*the claim must be supported by*” the specified documents, including the Disputed Documents, Rider Clause 5 is stipulating that the specified documents must be provided in support of the demurrage claim; the second sentence of the provision identifies the minimum content of “*supporting documents*” in the first sentence of Rider Clause 5. In other words, the specified categories of documents are deemed to be supporting documents.
- (3) Accordingly, even if some of the specified documents are neutral in their relevance to the demurrage claim, they should be provided as the Charterers might still legitimately want to know that they had all of the documents within the specified categories in order to present a “*reasonably full evidential picture*”.

18. Mr Alex Carless, who appeared on behalf of the Owners, submitted that:

- (1) Rider Clause 5 required only the provision of documents which were relevant to the “*internal*” elements of the demurrage claim, but not documents in relation to the potential “*external*” defences which the Charterers might wish to raise to the demurrage claim. During the oral argument, Mr Carless put this submission in terms that the documents had to relate to the key or core elements of the demurrage claim. (Potentially at odds with this construction is a statement made by Ms Rebecca Cawley in paragraph 6.1 of her witness statement dated 5th July 2019, made on behalf of the Owners, that supporting documents embrace documents which “*go to proving or disproving an element of Owners’ claim for demurrage*”). In support of this submission, Mr Carless relied on the view of the editors of *Voyage Charters*, (4th ed., 2014), para. 16.21(2) to the effect that “*Where the clause calls for supporting documents to*

*be provided, without specifying the documents, the owner must provide documents supporting his case on liability and, if relevant, on quantum”.*

- (2) The word “*supporting*” in the first sentence of Rider Clause 5 and the word “*supported*” in the second sentence of Rider Clause 5 must be read in the same way.
- (3) Accordingly, the four categories of documents specified in Rider Clause 5 (A-D) had to be submitted in support of the demurrage claim only insofar as the documents in question were relevant to the internal, key or core elements of the demurrage claim. In other words, only “*supporting*” time logs, “*supporting*” notices of readiness, “*supporting*” pumping logs and “*supporting*” letters of protest had to be provided in order to comply with the requirements of Rider Clause 5. It is notable, argued Mr Carless, that the four specified categories of documents do not use the words “*all*” or “*the*” (e.g. “*all letters of protest*” or “*the letters of protest*”).
- (4) This construction avoids the necessity of undertaking a complex inquiry into the merits of a potential defence which might be advanced by the Charterers to a demurrage claim and allows for certainty in identifying the requirements of Rider Clause 5, because it requires the parties to consider only the well-known elements of a demurrage claim.
- (5) If the Owners’ primary submission that “*supporting documents*” refer to relevant documents is wrong, there is a *de minimis* exception, introduced by means of an implied term, which means that if irrelevant documents are not provided in accordance with Rider Clause 5, they would fall within the exception.
- (6) The Disputed Documents were not relevant or the Court is not in a position to determine their relevance on a summary judgment application, being a triable issue.

The authorities

19. The meaning of “*supporting documents*” has been considered in a number of decisions of the Court and arbitral tribunals. In most cases, the contractual provision in question was similar to the first sentence of Rider Clause 5. In some cases, the provision in question included a list of specified documents as in the present case.

20. In *The Oltenia* [1982] 1 Lloyd's Rep 448, 453, Bingham, J explained what was understood by the words “*supporting documents*” in a demurrage time bar provision which was substantially similar to the first sentence of Rider Clause 5 of the Charterparty. After considering the commercial purpose of the provision, Bingham, J added:

*“This object could only be achieved if the charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not. I cannot regard the expression “all available supporting documents” as in any way ambiguous: documents supporting the owners’ claim on liability would of course be included, but so would a document relating to quantum only, just as a doctor’s bill would be a document supporting a claim for damages for personal injury. The owners would not, as a matter of common sense, be debarred from making factual corrections to claims presented in time (as they have done to the claim in par. 12 (A)), nor from putting a different legal label on a claim previously presented, but the owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to de minimis exceptions) have not been presented in time.”*

21. In *The Abqaiq* [2011] EWCA Civ 1127; [2012] 1 Lloyd's Rep 18, the Court of Appeal relied on this sense of “*supporting documents*” as explained by Bingham, J.

22. In *The Adventure* [2015] EWHC 318 (Comm); [2015] 1 Lloyd's Rep 473, the charterparty was on the BPVoy4 form; the owners presented a demurrage claim which included some documentation, but the charterers argued that not all supporting documentation had been provided. Hamblen, J held that the documents required to be presented in connection with the demurrage claim were not so extensive so as to embrace all of the documents which the owners would be required to disclose in an arbitration reference, because, first, it would be contrary to the aim of promoting clarity and certainty in that the owners would have to consider what documents would be disclosable and, secondly, this would impose a very heavy burden on the owners (para. 26-27). The owners argued that the demurrage time bar provision required only

essential supporting documentation. Hamblen, J referred to Tomlinson, LJ's judgment in *The Abqaiq* (referred to elsewhere in this judgment) and said at paragraphs 38-42:

*“38. The most helpful general guidance as to how one determines what documents are required to be presented is to be found in Tomlinson LJ's judgment at para 65 cited above, namely “documents which objectively [the charterers] would or could have appreciated substantiated each and every part of the claim”, and which meant that they “were thereby put in possession of the factual material which they required in order to satisfy themselves that the claim was well-founded”.*

*39. As to the type of documents which are generally likely to meet those requirements, guidance is to be found in the decision in that case (at para 5) that the following documents sufficed:*

*“(1) a summary demurrage report, plus detailed demurrage reports for Freeport and Singapore; (2) notice of readiness, port log, statement of facts and master's letters of protest for Freeport; and (3) notice of readiness, statement of facts, discharging log, timesheet, master's letter of protest and pumping log for Singapore.”*

*40. It is to be noted these documents included a port log and a time sheet. The owners submitted, however, that such documents were not required in this case as all the information required for the purpose of the demurrage claim was set out in the signed statement of facts. They emphasised that the documents provided did substantiate “each and every constituent part of the claim” and that there was no need for them to provide additional documentation which would simply provide further substantiation.*

*41. Under clause 20.1 the owners are not merely to provide “supporting documentation” but “all” such documentation. Where the owners have available documentation from the load and discharge ports such as port logs and time sheets those are, as the tribunal found, “relevant” to the claim made. In the present case that is specifically borne out by the fact that the letters of protest relied upon refer to delays and stoppages recorded in the port log/time sheets. As such they are clearly supporting documentation for the claim made. In any event I consider they are primary documents containing factual material which should be made available to the charterers so that they may satisfy themselves that the claim is well founded, consistent with the purpose of the clause.*

*42. I accordingly agree with the tribunal's conclusion that the port logs and time sheets were required to be presented ...”*

23. The above authorities were concerned with cases where the demurrage time bar provision was broadly in the same terms as the first sentence of Rider Clause 5, although it is right to note that in *The Abqaiq* and in *The Adventure*, the BPVoy4

charterparty form of the clause was used which referred to “*all supporting documentation substantiating each and every constituent part of the claim*”.

24. There are further decisions where the demurrage time bar provision also included a list of categories of supporting documents.
25. In *London Arbitration 18/89* (LMLN 29 July 1989), in addition to a provision similar to the first sentence of Rider Clause 5, there was a second sentence that provided “*Demurrage, if any, shall be payable by the charterer against owners’ invoice supported by Notices of Readiness and Statements of Facts from loading and discharge ports duly signed by shippers/receivers respectively*”. The owners presented a demurrage claim within the contractual time period of 60 days from completion of discharge of the cargo, but the supporting documents did not include a notice of readiness issued at the loadport. The arbitral tribunal held that the claim was time-barred, holding that the demurrage time bar provision was clear and unambiguous and that the second sentence of the provision was “*intended as a list of what were to be regarded as the documents supporting a claim for demurrage which were to be presented within 60 days. It was a code for the presentation of demurrage claims ... and in respect of which the supporting documentation was easily identifiable ...*”.
26. In *The Sabrewing* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd’s Rep 286, the demurrage time bar provision in the charterparty (clause 23) was in the form included in the BPVoy4 form. That provision did not identify categories of documents to be provided in support of a demurrage claim, but another provision of the charterparty (clause 16) provided for a claim for additional time, which required the owners to supply to the charterers a signed pumping log, all notes of protest, and any other documentation “*relevant to the discharge in question*”. On 26th October 2005, the charterers received via the brokers the owners’ demurrage claim together with some supporting documents. On 4th November 2005, the owners supplied what they described as a pumping log, but the document was not described as such on its face and was not signed. Earlier, on 25th October 2005, the charterers received from their own agents the vessel’s discharge record which included recorded pumping pressure. The charterers contended that the demurrage claim was time-barred because signed pumping logs had not been provided by the owners. The owners argued that there was no need to provide pumping logs, because the owners’ claim was not dependent upon

these logs; the pumping logs might sometimes be relevant to a defence run by charterers to a claim for demurrage, but they were not relevant to the owners' claim for demurrage. Gloster, J held at paragraph 22 that the additional time provision (clause 16) "*identifies some of the necessary "supporting documentation" for the purposes of clause 23*". Gloster, J said at paragraph 21 that she was not impressed by the owners' argument that they do not need to produce documents to anticipate a defence by charterers, because the onus was on the owners to support their claim with appropriate documents. At paragraphs 27-28, the Court appeared to acknowledge that there was a *de minimis* exception, but held that it did not apply to the absence of signed pumping logs, because the requirement of a signature was commercially important and that "*the de minimis exception should not be applied to a document that is expressly required to be produced by the contract and is plainly relevant*". At paragraph 36, Gloster, J said:

*"The commercial purpose of a demurrage time-bar clause, requiring owners to submit all supporting documents within a short time period, is to ensure certainty, to ensure that it is clear to charterers at an early stage what the claim is and what documents are relied upon by owners in support of it, so that they may take such steps as are appropriate to respond to, or investigate, it. It is important for charterers to be told, in formal and certain terms, what owners' claim is, and what documents owners are relying upon in order to support that claim"*

27. In *The Ocean Neptune* [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep 654, the second sentence of the demurrage time bar provision (clause 2B) stated that "*For Demurrage Claims supporting documents must include whenever possible*" and there then followed a list of documents, namely the owners' calculation of demurrage, the notice of readiness, the statement of facts, the vessel's pumping logs and letters of protest. Mr Carless suggested that the documents enumerated were described more specifically or less generically than those set out in Rider Clause 5 of the Charterparty. Mr Carless also sought to distinguish the decision by reason of the words "*whenever possible*"; however, I do not consider that those words alone provide a sufficient distinction in that if the enumerated documents referred to in the demurrage time bar provision do not exist, they cannot be provided or be required to be provided, and the presence or absence of the words "*whenever possible*" should not affect the matter.

28. In *The Ocean Neptune*, certain of the specified documents were not provided and the charterers argued that the demurrage claim was time-barred. At paragraph 21, Popplewell, J addressed the owners' argument that if the charterers' construction of clause 2B were correct, the owners would be required to provide irrelevant documents:

*"... even if there might be some circumstances in which the clause 2B documents were irrelevant, that is not a sufficient reason for failing to give effect to the clear wording of the contract. The requirement is not onerous: it applies to a very limited class of documents which, if they exist, ought to be readily to hand and capable of submission without undue difficulty or expense. If a provision which is designed to operate for good reason in most circumstances might occasionally require irrelevant documents, that is no reason to suppose that the parties did not intend it to have the effect for which it clearly provides."*

#### Decision on Issue 1

29. There are in fact two separate questions. First, what does the phrase "*all supporting ... documents*" mean in the first sentence of Rider Clause 5? Second, what is the effect of the second sentence of Rider Clause 5 in listing the four specified categories of documents, including the Disputed Documents?
30. As to the first question, the words "*all supporting ... documents*" in the context of a demurrage claim might be interpreted to refer to (a) documents on which the Owners rely in support of their demurrage claim, (b) documents, or the essential or primary documents, which, taken at face value, establish, or possibly promote or advance, the validity of the demurrage claim, or (c) documents which are objectively relevant, or documents which are primarily or essentially relevant, to the Owners' demurrage claim, including adverse documents.
31. In *The Oltenia*, Bingham, J referred to the function of the provision of "*supporting documents*" in this context as providing "*the factual material which they [the charterers] required in order to satisfy themselves whether the claims were well-founded or not*". This interpretation was adopted by Tomlinson, LJ in *The Abqaiq* and by Hamblen, J in *The Adventure*. The position was explained further by Gloster, J in *The Sabrewing* in referring to the function of the provision as informing the charterers

as to “*what owners’ claim is, and what documents owners are relying upon in order to support that claim*” (para. 36).

32. I am inclined to adopt either a construction that requires the Owners to submit documents on which they rely in support of their demurrage claim or one that requires the submission of documents which taken at face value establishes the validity of the demurrage claim, *i.e.* one of the first two of the possible interpretations referred to above. The provision requires the submission of “*all*” such supporting documents (*The Adventure*, para. 41). Such documents would almost invariably include documents which evidence the time used by the Vessel in berthing, loading, and discharging operations and the interruptions and stoppages in such operations, including the notice of readiness and the statement of facts or time logs (*The Adventure*, para. 39). This construction is in accordance with the requirement of certainty and would not impose a burdensome obligation on the Owners. The Owners would readily and easily be able to identify and provide the documents on which they rely or which objectively establish the validity of their claim. For reasons explained below, however, the precise meaning to be given to these words is not material to the interpretation of the second sentence of Rider Clause 5.
33. That said, I do not consider that the first sentence of Rider Clause 5 bears the meaning accorded by the third of the possible interpretations referred to above, in particular the requirement that the Owners must submit documents which are relevant, or essentially relevant, to the Owners’ demurrage claim, including adverse documents, insofar as they are not “*supporting*” documents as construed above, because:
- (1) The word “*supporting*” does not mean that documents must be provided which are merely relevant to the demurrage claim or negate the demurrage claim by way of defence.
  - (2) If a wider meaning were intended, such as “*relevant*” documents, the provision should have been clearer in giving effect to such an intention. Once relevance is introduced as a criterion, one is drawn into comparisons with disclosure obligations in legal proceedings. It would be a difficult task to define “*supporting ... documents*” by reference to any relevant documents, including any potentially adverse documents. Further, such a construction has



the potential of imposing an unnecessary burden on the Owners (*The Adventure*, para. 26-27). If this were the intended meaning, it would detract from the certainty and clarity required in the interpretation and application of a demurrage time bar provision.

- (3) The provision of supporting documents in the sense I have preferred would enable the Charterers at least to assess the *prima face* validity of the demurrage claim by reference to the documents provided as supporting documents or to investigate the circumstances giving rise to the demurrage claim and to formulate their defence, if any, accordingly.

34. The critical issue, however, is the second question concerning the meaning of the second sentence of Rider Clause 5, which provided that “... *the claim must be supported by the following documents ...*” and then proceeded to list four categories of documents: time logs, the notices of readiness, the pumping logs and the letters of protest. Whether or not the listed documents might be said to be “*supporting documents*” in the sense I have adopted above, I consider it to be clear from the mandatory language of the second sentence (“*must be supported*”) that the four listed categories of documents must be provided in support of the demurrage claim referred to in Rider Clause 5, even if they are strictly irrelevant to the demurrage claim. To use Mr Robb’s words, these documents are deemed to be “*supporting ... documents*”. I reach this conclusion, because:

- (1) I cannot think why the documents should be listed if they were not required to be provided.
- (2) These documents are very often, if not always, relied on in support of a demurrage claim (*The Adventure*, para. 39). Accordingly, the parties are merely anticipating in this provision what they consider will be documents supporting a demurrage claim.
- (3) The documents are readily identifiable. That said, there is a question as to what types of letters of protest were required to be provided by Rider Clause 5, in particular whether they were limited to letters of protest “*in connection with cargo operations*” and letters of protest “*against high back pressure/any shore limitations*” referred to in the Documentation Clause (Rider Clause 23)

of the Charterparty. I suspect that this is the case, but the precise bounds of the meaning of “*Letters of Protest*” in Rider Clause 5 is not a relevant issue for the purposes of this application.

- (4) This is the conclusion adopted by Gloster, J in *The Sabrewing* and by Popplewell, J in *The Ocean Neptune*. It was also the conclusion adopted by the arbitral tribunal in *London Arbitration 18/89* (LMLN 29 July 1989), although I am conscious that the report is an edited and abridged report of the full award.
35. Although a *de minimis* exception might be applicable to excuse the provision of a “*supporting*” document in accordance with the first sentence of Rider Clause 5, I do not consider that such an exception is applicable to the requirement in the second sentence, where the particular categories of documents to be provided by the Owners are identified and are stipulated as having to be provided (*The Sabrewing*, para. 28).
36. Therefore, in answer to issue 1, the Disputed Documents (the pumping log and the letter of protest) were required to be submitted in support of the demurrage claim within the 90 day time period referred to in Rider Clause 5.
37. In these circumstances, the factual issue associated with Issue 1 does not arise. If it had arisen, I would not have been able to decide, on a summary judgment application, whether the Disputed Documents were relevant.

**Issues 2 and 3: Must the supporting documents accompany the demurrage claim?**

38. Issue 2 is whether the supporting documents required by Rider Clause 5 may include documents already in the Charterers’ possession. Issue 3 is whether all of the supporting documents and the demurrage claim must be presented to the Charterers at the one time. As both Issues 2 and 3 are concerned with the time at which the supporting documents can be submitted to the Charterers under Rider Clause 5, I will address these two issues together.

The parties' submissions

39. Mr Robb, on behalf of the Charterers, submitted that the supporting documents do not extend to the Disputed Documents - the pumping log and the letter of protest - which were already in the Charterers' possession, because:
- (1) Rider Clause 5 expressly provides that the claim for demurrage must be received by the Charterers "*with*" the supporting documents and, moreover, the "*Demurrage*" must be "*submitted in a single claim at that time*". The reference to "*Demurrage*" is a reference to the demurrage claim, calculations and supporting documents. Rider Clause 5 therefore explicitly requires the single, simultaneous submission of the various elements of the demurrage claim, namely the demurrage invoice, the demurrage calculation and the supporting documents.
  - (2) There is some latitude available to the Owners in complying with this provision in that if a document is mistakenly omitted from the submission and is then sent immediately afterwards or if the documents were so voluminous that they required more than one submission, that would not fall foul of Rider Clause 5. However, the Disputed Documents were sent to the Charterers 21 days before the submission of the demurrage claim: such a submission was not in accordance with Rider Clause 5. Further, the Disputed Documents were sent before the commencement of the permitted time period for the provision of the claim and supporting documents, because that time period commenced only on the completion of discharge.
  - (3) The authorities establish that it is not sufficient for the purposes of a demurrage time bar provision that the Charterers have already been provided with a missing document.
  - (4) The commercial purpose of the provision was to allow the Charterers to investigate and resolve the claims properly, with the benefit of the documents presented as a package and identified as supporting documents enabling the Charterers to determine whether the demurrage claim is well-founded.

- (5) The onus should not be on the Charterers to investigate what documents they might already have in their possession which might constitute supporting documents; the onus is on the Owners clearly to identify the supporting documents.
40. Mr Carless, on behalf of the Owners, submitted that the Owners were not required by Rider Clause 5 to provide a further copy of the documents which were already in the Charterers' possession, having been provided to the Charterers by the Owners previously. This is so whether the Disputed Documents were provided the day before the demurrage claim or, as in this case 21 days before the demurrage claim.
- (1) The authorities demonstrate that the supporting documents need not be supplied simultaneously with the demurrage claim; it is sufficient that they are provided within the time requirements of Rider Clause 5, *i.e.* by the end of the 90 day period after the completion of discharge (*Voyage Charters*, (4th ed., 2014), para. 16.21(3)).
- (2) There is nothing in the language of Rider Clause 5 which requires a different interpretation. Rider Clause 5 provides that "*Demurrage, if any, must be submitted in a single claim at that time*"; it does not provide that the supporting documentation must be provided "*at that time*". If the parties had intended that the supporting documents had to be submitted at one time with the demurrage claim and at no other time, Rider Clause 5 should have clearly so provided.
- (3) The commercial purpose of the demurrage time bar provision does not require a simultaneous submission. The Charterers did not have to be provided with the Disputed Documents at the same time as the demurrage claim in order to possess factual material enabling them to satisfy themselves whether the demurrage claim is well founded.

#### The authorities

41. In *The Sabrewing* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd's Rep 286, the owners argued that there was no need for the owners to produce signed pumping logs in circumstances where the charterers already had an unsigned vessel discharge record

from their own agents (relying on as the “*futility principle*”). At paragraphs 36-37, Gloster, J said:

“36. ... *The commercial purpose of a demurrage time bar clause, requiring owners to submit all supporting documents within a short time period, is to ensure certainty, to ensure that it is clear to charterers at an early stage what the claim is and what documents are relied upon by owners in support of it, so that they may take such steps as are appropriate to respond to, or investigate, it. It is important for charterers to be told, in formal and certain terms, what owners’ claim is, and what documents owners are relying upon in order to support that claim ...*

*37. An important commercial purpose of the demurrage time bar clauses in this case was to ensure that charterers were presented with a package of documents by owners that was sufficient in itself for them to consider (without the need for any collateral investigation and, therefore, without the need to make any check of other documents received from third parties) in order to evaluate each and every part of owners’ claim. In my judgment, that is similarly fatal to the application of the futility principle: charterers were entitled to look only at the documents supplied by owners and to determine promptly, by reference to those documents alone, whether or not the owners’ claim was fully supported or was time-barred.”*

42. In *The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd (The Eternity)* [2008] EWHC 2480 (Comm); [2009] 1 Lloyd's Rep 107, David Steel, J considered the demurrage time bar provision on the BPVoy4 form and said at paragraph 37 that “*I am not persuaded that the clause requires the owners to submit only one composite claim (even though they would usually do so and in fact did so)*”.
43. In *AET Inc Ltd v Arcadia Petroleum Ltd (The Eagle Valencia)* [2010] EWCA Civ 713; [2010] 2 Lloyd's Rep 257, the charterparty was on an amended Shellvoy 5 form and included the following demurrage time bar provision (clause 15(3)): “*Owners shall notify Charterers within 60 days after completion of discharge if demurrage has been incurred and any demurrage claim shall be fully and correctly documented, and received by Charterers, within 90 days after completion of discharge. If Owners fail to give notice of or to submit any such claim with documentation, as required herein, within the limits aforesaid, Charterers’ liability for such demurrage shall be extinguished*”. A demurrage claim was presented by the owners together with an earlier notice of readiness which the Court held was invalid, but the owners did not include with the demurrage claim a copy of a later email which, it was held,

constituted a valid notice of readiness. The Court of Appeal held that the demurrage claim had been barred. At paragraph 30, Longmore, LJ said:

*“In the present case it might well be fair to say that the substance of the owners’ claim was presented in time inasmuch as it was always clear that they were claiming that a particular number of days and hours had been spent at Escravos when no berth had been accessible for the vessel. But an essential document in support of every demurrage claim is the notice of readiness and, if the only notice of readiness submitted is a contractually invalid notice, the claim cannot be said to be “fully and correctly documented” within the wording of clause 15(3). That is not necessarily to say that alternative laytime statements and invoices would always have to be submitted to avoid the extinction of an alternative claim but merely to say that the documents to be submitted pursuant to the clause must include a valid notice of readiness. It is not unreasonable for charterers to require such a notice nor is it unreasonable to expect owners to supply it.”*

44. It is fair to say, however, that the Court, in *The Eagle Valencia*, did not directly address the argument that the supporting documents had already been provided by reason of the fact that the charterers were already in possession of the later, valid notice of readiness.
45. In *The Abqaiq* [2011] EWCA Civ 1127; [2012] 1 Lloyd's Rep 18, the demurrage time bar provision was that in the BPVoy4 form. On 31st March 2008 the owners submitted a demurrage claim in respect of detention at the loadport of Freeport, Bahamas and, on 2nd April 2008, the owners submitted a demurrage claim in respect of detention at the discharge port of Singapore and also provided two groups of documents, first a notice of readiness, port log, statement of facts and master's letters of protest for Freeport, and, second, a notice of readiness, statement of facts, discharging log, timesheet, master's letter of protest and pumping log for Singapore. The charterers argued that the owners could not rely upon the documents which accompanied the demurrage claim presented on 2nd April 2008, because they had not been presented together with the demurrage claim presented on 31st March 2008 and it had not been made clear that they were to be relied upon as substantiating that claim; further, it was argued, it was insufficient that by happenstance those documents were with the charterers before the expiry of the 90-day time bar. The owners had to identify those documents as *“going together with the claim”*. It was common ground that the documents which accompanied the demurrage claim on 2nd April 2008 comprised everything which could possibly be required to substantiate each and every

constituent part of the claim now put forward both for demurrage at the loadport and for further demurrage at the discharge port.

46. The Court of Appeal held that the demurrage claim was not time-barred. At para. 62, 64-65, Tomlinson, LJ said:

*“62. The basic requirement of the clause is that the charterers shall have received both the claim and the supporting documentation within the 90-day period. I accept that the charterers must be in a position to know that the one relates to the other. However I do not think that Mr Byam-Cook went so far as to suggest that the supporting documents must necessarily be presented at the same time as the claim, and if he did I would reject that suggestion. Once that is accepted, the words “together with” import no requirement other than that both presentations, that of the claim and that of the supporting documentation, must have been achieved within the 90-day period. I would further accept that, consistently with the need for certainty, it must objectively speaking be apparent that the documentation is that which supports the claim, but I do not consider that in approaching that issue one should adopt a pedantic or strict approach which focuses on the form of the presentation rather than the substance ...*

*64. In the present case no essential document was missing from those presented on 2 April 2008. Moreover, all of the documents had been presented by the owners in support of a claim under the charterparty; they were not documents which by happenstance came into the possession of the charterers before the expiry of the time bar. In these circumstances I need express no view on the view of Gloster J, expressed obiter in *The Sabrewing*, to the effect that documents must be presented by the owners themselves, and that the owners cannot rely upon the circumstance that the charterers may be in possession of documents from another source. I would however again caution against too mechanistic an approach. I cannot think that the mere fact that a necessary document has been supplied by a third party who is not for that purpose an agent of the owners should of itself and automatically result in the conclusion that there has been non-compliance with the clause. What is important, as Bingham J observed, is that the charterers are put in possession of the factual material which they require in order to satisfy themselves whether a claim is well-founded or not. No doubt ordinarily the documents will be presented by the owners or by their agents, but I would not rule out the possibility that there could be circumstances in which compliance could be achieved in another manner, for example by asking charterers to refer to documents already in their possession or shortly to be received from third parties.*

*65. Drawing the threads together, in my judgment the charterers had received from the owners within the 90-day period, in the shape of the two invoices of 31 March and 2 April, a claim in writing for either damages for detention measured at the demurrage rate or straightforward demurrage in respect of the periods spent at Freeport and Singapore after 01.36 on 11 February 2008, subject only to the claim being properly drawn up in accordance with the charterparty provisions and by reference to the events recorded in the demurrage reports ... The charterers received with the invoice of 2 April 2008*

*documents which objectively they would or could have appreciated substantiated each and every part of the claim. They were thereby put in possession of the factual material which they required in order to satisfy themselves that the claim was well-founded. They were able to satisfy themselves as to the extent of their liability. In my judgment the owners are not precluded from pursuing a claim for demurrage as formulated in these proceedings.”*

47. In London Arbitration 22/17 (LMLN September 2017), the demurrage time bar provision was in a form similar to the first sentence of Rider Clause 5. The charterers contended that the ordinary meaning of the words “*such claim has been presented to Charterers in writing with supporting documents*” was that each claim had to be presented in writing and simultaneously accompanied by each and every supporting document which might be relevant. The charterers accepted that supporting documents had been produced, but contended that they had not been produced at the same time as the owners’ demurrage claim. The arbitral tribunal rejected the charterers’ construction of the provision. The documents about whose absence the charterers complained were the notices of readiness at the two load ports. It was common ground that copies of those were supplied to the charterers before the cut-off date envisaged by the clause. They had been supplied contemporaneously with the events to which they related. In the circumstances, the arbitral tribunal was satisfied that the documentation supplied was sufficient for the charterers to evaluate the owners’ claim for demurrage and therefore the claim was presented “*with supporting documents*”. The arbitral tribunal apparently distinguished the case at hand from the wording of the demurrage time bar provisions in the other cases relied on by the charterers, for example, “*claim ... presented ... together with supporting documentation*” (*The Sabrewing*) or “*claim shall be fully and correctly documented*” and “*claim with documentation*” (*The Eagle Valencia*) or “*claim ... presented ... together with all supporting documentation substantiating each and every constituent part of the claim*” (*The Abqaiq*), and said that in those cases “*the requirement was stronger than the provision in the subject clause*”.

#### Decision on Issues 2 and 3

48. Rider Clause 5 provided that:

*“Any claim for demurrage ... shall be considered waived unless received by the Charterer or Charterer’s broker in writing with all supporting calculations and*



*documents, within 90 days after completion of discharge of the last parcel of Charterer's cargo (es). Demurrage, if any, must be submitted in a single claim at that time, and the claim must be supported by the following documents ..."*

49. In my judgment, there is no express requirement in the language of this provision that the supporting documents must be provided at one time and at the same time as the demurrage claim for the following reasons:
- (1) The word "*Demurrage*" at the beginning of the second sentence is to be construed as a reference to the demurrage claimed and not as a reference to the demurrage claim and supporting documents, because if it had been intended that the supporting documents must be provided "*in a single claim at that time*", I would have expected Rider Clause 5 to have so provided.
  - (2) The requirement that the demurrage claim "*with*" all supporting documentation must be received by the Charterers within 90 days after the completion of discharge means no more than that the claim and supporting documents must be received before the expiry of the 90 day period. As Tomlinson, LJ said in *The Abqaiq*, "*the words "together with" import no requirement other than that both presentations, that of the claim and that of the supporting documentation, must have been achieved within the 90-day period*" (para. 62).
  - (3) The demurrage claim must be submitted in "*a single claim at that time*". The reference to a "*single claim*" means that only one claim may be submitted. In other words, separate demurrage claims, for example at loadport or at each discharge port, are not permitted. The words "*at that time*" refer to the submission of a claim within the 90 day period referred to in the first sentence.
  - (4) The commercial purpose of Rider Clause 5 does not require the simultaneous submission of the demurrage claim and the supporting documents. The provision merely requires the submission of the claim and the supporting documents before the end of the 90 day period.
50. Accordingly, I do not accept the Charterers' submission that the supporting documents must be provided at the same time as the demurrage claim. The only temporal requirement affecting the supporting documents is that they are provided

within 90 days of the completion of discharge. I should add that I regard this temporal requirement as identifying only the end-point of the relevant time period and not the starting-point. The reference to the completion of discharge is to enable the calculation of the expiry date of the time period for the submission of the demurrage claim. I do not consider that that means that, if supporting documents are provided before the completion of discharge, any demurrage claim supported by such documents would necessarily be time-barred. I am reinforced in this construction by reason of the fact Rider Clause 23, the Documentation Clause, requires the provision of some of the supporting documents identified in Rider Clause 5 within seven days after loading, which might well be before the completion of discharge.

51. The more substantial question is whether the Disputed Documents, which were provided to the Charterers on 1st December 2017, were readily understood by the Charterers as being “*supporting documents*” within the meaning of Rider Clause 5. In *The Sabrewing*, Gloster, J said that the charterers should be “*be told, in formal and certain terms, what owners’ claim is, and what documents owners are relying upon in order to support that claim*” (para. 36). However, in *The Sabrewing*, the issue before the Court was whether a document (a discharge record) provided to the charterers containing information which would have been included in one of the documents specifically required to be produced (a signed pumping log) was sufficient for the purposes of the demurrage time bar provision. That is not the issue before the Court in the present case.
52. I also note that Tomlinson, LJ said in *The Abqaiq*, at para. 62, that “*The basic requirement of the clause is that the charterers shall have received both the claim and the supporting documentation within the 90-day period. I accept that the charterers must be in a position to know that the one relates to the other ... I would further accept that, consistently with the need for certainty, it must objectively speaking be apparent that the documentation is that which supports the claim*”, but added that “*I do not consider that in approaching that issue one should adopt a pedantic or strict approach which focuses on the form of the presentation rather than the substance*”, and further added that it was possible for a supporting document to be provided by a third party (para. 64).

53. In this case, the Disputed Documents are identified in Rider Clause 5 as documents which are deemed to be “*supporting ... documents*” and are therefore documents which had to be provided. They were also documents which were to be provided in accordance with Rider Clause 23 within seven days of the completion of loading. Accordingly, when the Disputed Documents were provided on 1st December 2017, 21 days before the date of the submission of the demurrage claim, it should have been obvious to the Charterers that the Disputed Documents - the pumping log and the letter of protest - were already in their possession and that they were documents deemed to be supporting documents within the meaning of Rider Clause 5. In those circumstances, I do not consider that the Owners were obliged to draw attention to the fact that the Disputed Documents already in the possession of the Charterers were documents required in accordance with Rider Clause 5. Therefore, the fact that the email submitting the Owners’ demurrage claim did not refer to the Disputed Documents does not detract from the fact that the Owners had provided the documents which they were required to be provide in accordance with Rider Clause 5 in order to avoid the application of the time bar in that clause and which the Charterers would have known were required to be submitted in support of the demurrage claim. This accords with the certainty of application required of the provision. If the parties had intended a stricter requirement for the presentation of a demurrage claim, that intention would have had to be more clearly expressed than in the words used in Rider Clause 5.
54. Therefore, in answer to issues 2 and 3, the Owners were not obliged to re-submit the Disputed Documents to the Charterers at the time of the presentation of the demurrage claim in order to avoid the application of the time bar in Rider Clause 5. The provision by the Owners of the Disputed Documents on 1st December 2017, before the expiry of the 90 day period from the completion of discharge, was in accordance with the requirements of Rider Clause 5. In those circumstances, Rider Clause 5 does not have the effect of barring the Owners’ demurrage claim by reason of the submission of the Disputed Documents on 1st December 2017, rather than on 22nd December 2017.

#### **Issue 4: The consequences of non-compliance with Rider Clause 5**

##### The parties' submissions

55. Mr Robb, on behalf of the Charterers, submitted that:

- (1) If Rider Clause 5 is not complied with, the entire demurrage claim is waived, because (a) the provision contemplates a single submission of the demurrage claim and the supporting documents, and (b) the provision expressly states that “*Any claim for demurrage ... shall be considered waived*”. The failure to provide a particular document required to be submitted by Rider Clause 5 does not operate to waive only that part of the demurrage claim to which the missing document related.
- (2) If, however, the effect of a failure to submit a particular document is to waive only that part of the demurrage claim to which the missing document related, the Disputed Documents in this case related to the whole of the Owners’ demurrage claim, because they were relevant to the demurrage incurred at the discharge ports and to the Owners’ responsibility for contamination of the cargo.

56. Mr Carless, on behalf of the Owners, submitted that:

- (1) If a particular document was not submitted in accordance with Rider Clause 5, only that part of the demurrage claim to which the missing document relates is waived, not the entire demurrage claim. This is established by the authorities.
- (2) The Court should not determine, on a summary judgment application, the extent of the relevance of the Disputed Documents to the Owners’ demurrage claim. If the matter is summarily determinable, the Court should determine that the Disputed Documents are not relevant to the Owners’ demurrage claim, because (a) they relate to the loadport, and demurrage was incurred at the discharge port, and (b) they relate to “*external*” aspects of the demurrage claim (as explained above).

The authorities

57. In *The Sabrewing* [2007] EWHC 2482 (Comm); [2008] 1 Lloyd's Rep 286, the charterparty allowed for laytime of 84 hours, 118.7 hours of which was used at the loadport, so that the chartered vessel was on demurrage at the loadport, and immediately on demurrage on arrival at the discharge port (as laytime was reversible). The charterparty contained a demurrage time bar provision (clause 23) in a form similar to the BPVoy4 form. At paragraph 30, Gloster, J said:

*“In my judgment, however, the particular wording of clause 23 and the fact that, in the present case, only one composite claim for demurrage was made by owners, means that Mr Kimmins’ argument has to be rejected, despite its initial superficial attraction. Clause 23 required owners to present “a claim in writing” (my emphasis) within 90 days of discharge of cargo, “together with supporting documentation substantiating each and every constituent part of the claim” (my emphasis). Unless such a claim, with supporting documentation, is presented within the relevant time period, charterers are released “from all liability in respect of any claim for demurrage”, ie not merely that particular constituent part of the claim that is not supported by relevant documentation. Accordingly, if, as here, only one composite claim for demurrage was made, owners are time-barred in respect of the entirety of the claim, notwithstanding that the absence of documents only relates to one constituent part of the claim. It is clear from the particulars of claim, the invoice and the supporting documents, that only one single claim for demurrage was made in the present case.”*

58. In *The Eternity* [2008] EWHC 2480 (Comm); [2009] 1 Lloyd's Rep 107, the demurrage time bar provision was on the BPVoy4 form (clause 20). David Steel, J did not follow Gloster, J’s construction of the provision as regards the consequences of non-compliance. At paragraphs 37-38, the learned judge said after citing paragraph 30 of Gloster, J’s judgment in *The Sabrewing*:

*“37. I confess that I find the proposition that a claim put in on time but in respect of part of which the accompanying documents are non-contractual gives rise to a bar to the entire claim is a commercially surprising construction. I am not persuaded that the clause requires the owners to submit only one composite claim (even though they would usually do so and in fact did so). In my judgment it was open to the owners to present a number of separate claims if so advised and in those circumstances the lack of documentation for one or more parts of the claim would not constitute a bar to the balance.*

*38. In my judgment it cannot have been the intention of the parties that the choice to present a composite claim would give rise to a different outcome. Even if a composite claim was required, I am not persuaded that on its proper*

*construction the effect of clause 20 was such that the failure to provide all 'supporting documentation' (whether needed by reason of the requirements of clause 19 or otherwise) for one constituent part of the claim discharged liability for the entire demurrage claim."*

59. In *The Adventure* [2015] EWHC 318 (Comm); [2015] 1 Lloyd's Rep 473, the demurrage time bar provision was on the BPVoy4 form. Hamblen, J considered both Gloster, J's and David Steel, J's interpretation of the provision and expressed a preference for the latter. At paragraphs 44-45, Hamblen, J said:

*"44. In those circumstances, although it was referred to in argument, it is not necessary to choose between the differing views of Gloster J and David Steel J as to the effect of failing to provide supporting documentation in respect of a part of the claim. In *Waterfront Shipping Co Ltd v Trafigura AG (The Sabrewing)* [2008] 1 Lloyd's Rep 286 Gloster J held that where one composite claim for demurrage is made then the entirety of the claim is barred even if the missing documents only related to a constituent part of the claim. In *The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd (The Eternity)* [2009] 1 Lloyd's Rep 107 David Steel J took a broader view ...*

*45. [David Steel, J's observations] are powerful observations and some support for them is to be derived from Tomlinson LJ's caution in *The Abqaiq* against an approach of strict compliance. Although David Steel J did not explain precisely how he reached his conclusion as a matter of construction of the wording of clause 20.1, it was presumably on the basis that where the demurrage claim can be divided into "constituent" parts and it is only a part of such claim which is not substantiated by the requisite documentation, then it is "all liability" in respect of the "claim for demurrage" for that part rather than the claim as a whole which is discharged. If it had been necessary to determine this question I would have held that this is the preferable construction and that the general position is as stated in *Cooke, Voyage Charters*, at para 16.21(4):*

*"If the required documentation relating to one part of the claim is incomplete the owner will . . . not be barred from recovery of another part of the claim, where the two parts are unrelated".*"

#### Decision on Issue 4

60. I will address this issue briefly, because by reason of my decision on Issues 2 and 3, the issue does not arise.
61. I prefer Mr Robb's submission. Rider Clause 5 provides plainly that "Any claim for demurrage ... shall be considered waived unless received by the Charterer ... in writing with all supporting calculations and documents, 90 days after completion of

*discharge ...*”. It does not provide that only a part of the demurrage claim will be waived if anything less than “*all supporting ... documents*” are provided. Further, Rider Clause 5 contemplates only a “*single claim*” (unlike the position in *The Eternity*). However, perhaps most importantly, the second sentence of Rider Clause 5 identifies four specified categories of documents which must be provided in support of a demurrage claim; it does not state that such documents are relevant only to one or another part of a demurrage claim; they are to be treated as supporting the entire claim. Accordingly, if there had been a failure to provide the Disputed Documents in accordance with Rider Clause 5, the whole demurrage claim would have been time-barred.

62. I can see the sense of an approach that if there are two parts of the demurrage claim which are unrelated and if a supporting document is relevant for one part of the demurrage claim, but not the other, there is no pressing reason why the unaffected part of the claim should be time-barred. This is supported by the weight of authority in the form of the decisions of David Steel, J and Hamblen, J, although I note that their decisions, as well as that of Gloster, J, were concerned with the demurrage time bar provision in BPVoy4, which expressly refers to “*all supporting documentation substantiating each and every constituent part of the claim*”. Nevertheless, the sense of this approach does not affect the application of the time bar to the entirety of the demurrage claim in this case. If this approach were applied, and if the Disputed Documents were, as Mr Carless submitted, not in fact relevant to any part of the demurrage claim, the result would be that the demurrage claim would not be waived at all, and that would be contrary to the plain intention of Rider Clause 5 that the four specified categories of documents must be provided in support of a demurrage claim within the relevant time period, failing which the demurrage claim would be time-barred.

## **Conclusion**

63. In my judgment, for the reasons explained above, the Owners’ demurrage claim is not time-barred by reason of their having not included the Disputed Documents in company with the demurrage claim when the latter was presented on 22nd December 2017, because the Disputed Documents had already been provided to the Charterers on 1st December 2017 and because it would have been obvious to the Charterers that

the Disputed Documents in their possession would have been deemed supporting documents as contemplated in Rider Clause 5.

64. In those circumstances, the Charterers' application for summary judgment on the ground that the Owners' demurrage claim is time-barred, must be dismissed.
65. I am grateful to both counsel for their very helpful submissions.