Case No: A3/2010/2894

Neutral Citation Number: [2011] EWCA Civ 1127
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION, COMMERCIAL COURT**
**Mr Justice Field**
**2010 EWHC 3043 (Comm)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2011

**Before :**

**LORD JUSTICE WARD**
**LORD JUSTICE TOMLINSON**
and
**SIR MARK POTTER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **National Shipping Company of Saudi Arabia** | **Appellant** |
| **- and -** | |
| **BP Oil Supply Company** | **Respondent** |

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**Mr Timothy Young QC** (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
**Mr Henry Byam-Cook** (instructed by **Hill Dickinson LLP**) for the **Respondent**

Hearing dates : 20/21 July 2011

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# Judgment

**Lord Justice Tomlinson :**

*Introduction*

1. This is a case about demurrage. More accurately, it is about a claim for damages for a period of detention which at the time the Owners did not think counted as either laytime or demurrage, but which in fact did. Two questions arise on the appeal. The first is whether by agreeing to a demurrage calculation in respect of time which they did recognise counted towards laytime and demurrage, Owners precluded themselves from recovering demurrage in respect of the period which they had mischaracterised. The second is whether as a result of misdescribing or mislabelling their claim Owners failed to comply with the Claims Time Bar clause in the BPVOY4 form of charterparty so that their claim, if not otherwise precluded, is in any event time-barred.

2. Field J on a summary judgment application in the Commercial Court resolved both of these issues against the Owners, although strictly the second did not arise. It is not in dispute that in consequence the Owners have been deprived of damages for detention of in excess of US$ 500,000, which is payable unless either the Owners inadvertently deprived themselves of the ability to recover it as demurrage by agreeing to accept a payment for demurrage in a lesser amount or the claim is time-barred because not initially correctly presented with all relevant supporting documents. It is further not in dispute that the Charterers in fact received from the Owners within the 90 days prescribed by the Claims Time Bar clause all of the supporting documentation required to substantiate each and every part of what is now recognised to be a claim for demurrage. If Field J is right the Owners have been deprived of a very substantial part of the agreed remuneration for the voyage. The compensatable delays all occurred as a result of matters for which the Charterers were contractually responsible, including their failure to have cargo ready to load. In the circumstances the agreed remuneration for the performance of the voyage was US$ 3.5M freight and over US$ 800,000 demurrage. There is thus a shortfall of nearly 12%.

3. This no doubt explains why in the correspondence which followed performance of the voyage the Owners expressed their increasing frustration that, in spite of the long-standing excellent relationship between themselves and the Charterers, BP, their claim remained unmet. I have to confess that I have found the Charterers' approach to this claim as surprising as it is unattractive. I have little doubt that it has come about as a result of the decision-maker not being in possession of the full facts. However that may be, if the Charterers are right in law, they are entitled to succeed, and Field J concluded that they are. It is against that conclusion that the Owners appeal.

*The parties*

4. The Appellants are the National Shipping Company of Saudi Arabia and I shall call them "the Owners". Pursuant to a charterparty on BPVOY4 form dated 29 January 2008 the Owners agreed with the Respondents, BP Oil Supply Company, whom I shall call "the Charterers", to perform with their vessel "*Abqaiq*" a single cargo carrying voyage from, in the event, Freeport Bahamas to Singapore. *Abqaiq* is a tanker of over 300,000 tonnes deadweight. The cargo was to be dirty petroleum products – in the event heavy sulphur fuel oil.

*The charterparty*

5. The fixture was concluded by a single intermediary broker, Poten and Partners and is recorded in a Final Recap sent by email from the broker to both parties.

6. The recap reads as follows under the heading FINANCIAL:

| | |
|---|---|
| FREIGHT RATE: | FOLL BASIS 1/1<br>LUMPSUM USD 3.5 MILLION<br>IF ADDITIONAL LOAD/DISPORT, VITOL<br>INTERIM PORT CLAUSE TO APPLY |
| DEMURRAGE RATE: | USD 70,000 PDPR |
| OVERAGE: | N/A |
| LAYTIME: | 96 HOURS |
| PORT CHARGES: | ALL PORT CHARGES TO BE FOR CHART'S ACCOUNT |

7. The freight rate agreed was thus on the basis of one loadport and one discharge port, although the Charterers were in fact at liberty both to load and to discharge at one or two ports within the loading and discharging range. The documentation for the appeal did not include the Vitol Interim Port Clause, but the judge set it out in his judgment:-

> "Charterer shall pay for any interim load/discharge port(s) at cost. Time for additional steaming, which exceeds direct route from first loadport to furthest discharge port, shall be paid at the demurrage rate plus bunkers consumed, plus actual port costs, if any. The reasonable, estimated costs will be payable as an on account payment together with freight, followed by final invoice plus all supporting documents as soon as possible but not later than ninety (90) days after completion of this voyage."

8. Other relevant clauses in Part 2 of the standard BPVOY4 form include, in relevant part:-

> "5.2 Charterers shall have the option of instruction owners to load the Vessel at more than one berth at each loading port and to discharge at more than one berth at each discharge port in which event Owners shall, in the first instance, pay expenses arising from any of the following movements of the Vessel:-
>
> 5.2.1 unmooring at, and pilotage and towage off, the first loading or discharge berth;
>
> 5.2.2 mooring and unmooring at, and pilotage and towage onto and off, any intermediate or discharge berth; and
>
> 5.2.3. mooring at, and pilotage and towage onto, the last loading or discharge berth.

Charterers shall reimburse Owners in respect of expenses properly incurred arising from any of the aforementioned movements, upon presentation by Owners of all supporting invoices evidencing prior payments by Owners.

5.3 Charterers shall reimburse Owners in respect of any djues and/or other charges incurred in excess of those which would have been incurred if all the cargo required to be loaded or discharged at the particular port had been loaded or discharged at the first berth only. Time used on account of shifting shall count as laytime or, if the Vessel is on demurrage, as demurrage, except as otherwise provided in Clauses 17 and 18.2.

. . .

6.3 Notwithstanding tender of a valid NOR by the Vessel such NOR shall not be effective or become effective for the purposes of calculating laytime, or if the Vessel is on demurrage, demurrage unless and until the following conditions have been met:-

. . .

6.3.2 In the case of the Vessel not berthing upon arrival and being instructed to anchor, she has completed anchoring at an anchorage where vessels of her type customarily anchor at the port or, if she has been instructed to wait, she has reached the area within the port where vessels of her type customarily wait;

. . .

7.3.2 Laytime or, if the Vessel is on demurrage, demurrage, shall commence, at each loading and each discharge port, upon the expiry of six (6) hours after a valid NOR has become effective as determined under Clause 6.3, berth or no berth, or when the Vessel commences loading, or discharging, whichever first occurs.

7.3.3 Laytime or, if the Vessel is on demurrage, demurrage shall run until the cargo hoses have been finally disconnected upon completion of loading or discharging, and the Master shall procure that hose disconnection is effected promptly…

7.4 Charterers shall pay demurrage at the rate stated in Section J of PART 1 per running day, and pro rata for part of a running day, for all time that loading and discharging and any other time counting as laytime exceeds laytime under this Clause 7. If, however, demurrage is incurred by reason of the causes specified in Clause 17, the rate of demurrage shall be reduced to one-half of the rate stated in Section J of PART 1 per

running day, or pro rata for part of a running day, for demurrage so incurred.

. . .

20.1 Charterers shall be discharged and released from all liability in respect of any claim for demurrage, deviation or detention which Owners may have under this Charter unless a claim in writing has been presented to Charterers, together with all supporting documentation substantiating each and every constituent part of the claim, with ninety (90) days of the completion of discharge of the cargo carried hereunder.

20.2 Any other claim against Charterers for any and all other amounts which are alleged to be for Charterers' account under this Charter shall be extinguished, and Charterers shall be discharged from all liability whatsoever in respect thereof, unless such claim is presented to Charterers, together with full supporting documentation substantiating each and every constituent part of the claim, within one hundred and eighty (180) days of the completion of discharge of the cargo carried hereunder."

. . .

32. Charterers shall deduct 1.25% address commission from freight, (including fixed and variable freight differentials), and any dead freight and demurrage payable under this charter."

*The facts*

9. The judge summarised the events of the voyage and I gratefully adopt his account given at paragraphs 5, 6, 7 and 8 of his judgment:-

> "5. I turn to the factual background. The vessel arrived at Freeport, the nominated loadport, and tendered notice of readiness at 0930[1] on 6 February 2008. She berthed at berth 10 at the BORCO terminal at 1712 on 7 February and started loading operations at 2236 the same day, loading cargo by ship-to-ship transfer, from the BRITISH WILLOW and the BARING SEA, and from shore tanks. At 0136 on 11 February 2008 the hoses were disconnected and at 0330 that morning the vessel left berth 10 to drift off Freeport awaiting the arrival of the GANGES SPIRIT, from which she was due to load a further parcel of cargo. Her place at berth 10 was taken by another vessel, the CAP GEORGE.
>
> 6. The GANGES SPIRIT arrived off Freeport the following day (12 February 2008) and gave notice of readiness to discharge

[1] All times stated in this judgment are local times.

her cargo at 0735. At 1025 that day, the BORCO terminal suspended operations at the jetties and at 1354 the same day closed operations at the jetties, due to deteriorating weather conditions.

7. The intention had been for the GANGES SPIRIT to berth at berth 9 and to discharge a parcel of cargo into the ABQAIQ at berth 10. However, the arrival draft of The GANGES SPIRIT was too great for berth 9, requiring her to berth at berth 10 to discharge part of her cargo into a shore tank, before shifting to berth 9. As it happened, however, when the GANGES SPIRIT arrived, the ABQAIQ and the GANGES SPIRIT had lost their turn for berths 9 and 10, which were now occupied by the CAP GEORGE and the SANKO BRIGHT. The ABQAIQ eventually re-berthed at berth 10 at 0300 on 17 February and between 0654 on 17 February and 0954 on 18 February she loaded cargo from the GANGES SPIRIT and a shore tank. At 1312 that day hoses were disconnected and an hour later she unmoored and headed for Singapore.

8.The ABQAIQ arrived at Singapore and tendered notice of readiness at 1200 local time on 22 March. At 1306 she anchored awaiting a berth and shifted to her discharging berth between 1324 and 1600 on 28 March. She completed discharge and hoses were disconnected at 1500 on 30 March."

10. At the time the Owners evidently formed the view that the events at Freeport had the effect of interrupting the running of laytime. At all events they drew up their laytime statement, here called a demurrage report, on the basis that laytime stopped running at 0136 on 11 February. At that point, 3 days, 4 hours, 24 minutes of laytime remained unused. Although the vessel was once more all fast at the berth at 0300 on 17 February and resumed loading at 0654 that day, the Owners did not reflect this in their demurrage report, recording that the vessel left Freeport with 3 days, 4 hours 24 minutes of laytime unused. Thus none of the time spent loading on 17 and 18 February was scored either as laytime or, as in fact it was, as demurrage. It is as I understand it common ground that laytime in fact expired before the vessel resumed loading on 17 February – there are apparently some points to be resolved concerning the impact of bad weather interruptions but it is not as I understand it disputed that a substantial amount of demurrage was earned at Freeport – the Owners say 4.3 days.

11. The Owners did not of course take the view that the substantial period of detention at Freeport was for their account. They thought at the time that the correct way in which to claim for this period was to claim for the entire period occasioned by what they regarded as a second berthing at the demurrage rate and additionally to claim for the cost of bunkers consumed during this exercise. Thus on 31 March 2008, the day after completion of discharge, the Owners issued an invoice entitled "Supplementary Invoice" (referred to hereinafter as "the Time & Bunkers Invoice") claiming: (1) "Time consumed for 2nd berthing at Freeport (7.445 x $70,000/day)": US$521,150; and (2) "Bunkers consumed for 2nd berthing at Freeport (140.2 mts x $490.50)": US$68,768.10.

12. In the account of the correspondence which follows I have borrowed extensively and with gratitude from paragraphs 15-30 of the judge's judgment. The invoice of 31 March 2008 was sent by email to Captain Mike Honcharik of Poten & Partners (the brokers) on the day it was issued. Also attached to the email were: (I) A Statement of Fact signed by the Master of the *Abqaiq*, certifying that: (i) the "time consumed for the second berthing" at Freeport was the period from 0330 on 11 February, when the vessel left her berth for the first time, due to the unavailability of cargo, and 1412 on 18 February when she left the berth for the second time following completion of loading; and (ii) the "bunkers consumed for the second berthing" were the bunkers consumed in that period, based on the vessel's ROB figures, namely 140.2 mt. (II) A bunker invoice dated 3 March 2008 addressed to the Owners, evidencing the price of the bunkers (HFO) supplied to the vessel on 8 February 2008. The covering email in fact referred to the Time and Bunkers Invoice as the "2nd Supplementary Invoice" for the time/bunkers consumed by *Abqaiq* for the second berthing at Freeport. Although the Owners did not say so in this email, it seems that the Owners thought that their claim lay properly under the Vitol Interim Port clause, interim loadport being perhaps the closest analogue to the requirement to visit Freeport twice. The Owners did in due course on 21 August 2008 articulate that it was pursuant to the Vitol Interim Port Clause and clause 5.3 of the charterparty that the claim was put forward. Finally, the Owners in this email asked brokers to "please note, we will issue an invoice for the port charges once we receive the relevant final disbursements from the Agents".

13. I should mention that it is accepted that communication to the brokers constituted communication to both the Owners and the Charterers as appropriate. I should also mention, insofar as it is not already clear, that it is now recognised by the Owners that what occurred at Freeport does not give rise to a claim under the Vitol Interim Port Clause. The claim in this action is brought on the straightforward and conventional basis, acknowledged by the Charterers to be correct, that laytime and in due course demurrage simply continued to run at Freeport after the vessel had been required to leave the berth. The Owners did maintain before us a claim, advanced under clauses 5.2 and 5.3 of the charterparty, for the cost of bunkers consumed during the 7.445 days spent at Freeport after 0136 on 11 February, but this was not in the event pursued with any enthusiasm by Mr Timothy Young QC who appeared on their behalf on the appeal, although not below.

14. On 31 March 2008 Captain Honcharik duly forwarded the Time & Bunkers Invoice and accompanying documents to Ms Joanne Radke, an employee of the Charterers working in the Fuel Oil / VGO Trading Operations department. Neither the invoice, nor the supporting documentation, nor the covering email made any reference to the Vitol Interim Ports Clause. Ms Radke took the view that the claim was a demurrage claim and sent the documentation on to the Charterers' demurrage group. On 2 April 2008 Mr Radke responded by email to Poten and Partners "this is a demurrage claim and it was sent to that group for review".

15. On the same day, 2 April 2008, the Owners issued an invoice entitled "Demurrage Invoice" (referred to hereinafter as the "Demurrage Invoice") by email to Captain Honcharik claiming demurrage for 4.5833 days in the total sum (net of address commission) of US$316,822.92. The email was headed "Demurrage Claim-Inv/Calc/Docs" and had attached to it the following documents: (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.

16. As I have already set out, the demurrage report for Freeport indicated that the running of laytime was suspended at 01.36 on 11 February, with neither laytime nor demurrage counting thereafter, even when the vessel had returned to the berth and was loading. The demurrage report for Singapore in consequence indicated that there was 3 days, 4 hours, 24 minutes of laytime unused on arrival at that port. This was wrong. It is common ground that laytime, which was 96 hours for all ports combined, of which there might have been four, had in fact been wholly used at Freeport. The vessel was on demurrage on arrival at Singapore. In the Owners' demurrage report for Singapore laytime was counted as from 1800 on 22 March, i.e. six hours after giving of notice of readiness. This also was wrong. Pursuant to clauses 6.3.2 and 7.3.2 of the charterparty, time, whether laytime or time on demurrage, did not count until six hours after the vessel had completed anchoring, i.e. not until 1906.

17. On 10 April 2008, Captain Honcharik's colleague at Poten, Athena Sarris, forwarded the Demurrage Invoice and attachments to Mr Lowell Rupp, a specialist in the Charterers' demurrage group.

18. On 4 May 2008 the Owners sent another invoice, also entitled "Supplementary Invoice" (referred to hereinafter as "the Port Costs Invoice") to Captain Honcharik claiming the port costs for Freeport and Singapore. Attached to this invoice were invoices from the Owners' agents at Freeport and Singapore and a number of supporting vouchers. Two days later, 6 May 2008, Captain Honcharik's colleague, Athena Sarris, emailed the Port Costs Invoice and attachments to Ms Radke.

19. Similarly on 6 May 2008 Ms Sarris of Poten sent to Mr Rupp an email string which included Ms Radke's message of 2 April 2008 to which I referred at paragraph 13 above. In her own covering message entitled "Supplementary Invoice Due" Ms Sarris asked Mr Rupp:-

> "Per Joanne Radke's below, please advise who in your group is handling."

20. On the following day Mr Sarris sent Mr Rupp another email attaching the Time & Bunkers Invoice and saying:-

> "I received your confirmation of receipt for demurrage claim.
>
> I need confirmation of receipt of attached."

As far as I can see this joined the email string to which I referred in the last paragraph.

21. On 7 May Mr Rupp forwarded this email string to Mr Tony Orona, another specialist in the Charterers' demurrage group. Mr Rupp's covering email to Mr Orona read, under the heading "*Abqaiq*/BP CP 29/01/08-Supplementary Invoice Due"

> "Tony
>
> Please respond to Athena."

In point of form Mr Orona was I think being asked to acknowledge receipt of the Time and Bunkers Invoice. The documents before us do not indicate whether he in fact did so.

22. On 3 June, Mr Orona emailed Ms Sarris as follows:

> *"*Subject: RE: Abqaiq/BP 29/01/08: Supplementary Invoice For Port Charges + Demurrage
>
> Athena,
>
> I have gone over the claim for the Abqaiq and see that time at Singapore should have started at 13:06 at anchorage as per BP Voy4 6.3.2.
>
> I have a counter offer of gross demurrage of $317,625.00 with a 1.25% commission for a net of $313,654.69
>
> Await comments/agreement.
>
> Also, I have forwarded the other charges for this vessel to my operator Joanne. For settlement of those invoices. Please contact Joanne.*"*

23. On 4 June 2008, Mr Ranjeet Sunder, Voyage Management Co-ordinator of the Owners sent an email to Ms Sarris in these terms.

> "Subject: RE: Abqaiq/BP 29/01/08: Supplementary Invoice For Port Charges + Demurrage
>
> Good Day Athena,
>
> Without Prejudice
>
> Owners hereby in agreement with Charterer's comment.
>
> For sake of good order, please find enclosed revised final agreed demurrage invoice.
>
> Kindly advise us the remittance details/value date to track funds from our end."

24. The "enclosed revised final agreed demurrage invoice" is simply a revised version of the Demurrage Invoice initially sent to Poten and Partners on 2 April 2008. The only difference is that the period of demurrage claimed is reduced from 4.5833 days to 4.5375 days, with consequential reductions to the amount claimed and the appropriate deduction for address commission. The judge thought it significant that the invoice included the following details and wording:-

| Description | Currency | Amount |
|---|---|---|
| FREEPORT (BAHAMAS) | | |
| SINGAPORE | | |
| Combine All ports: 4.5375@70,000 (Demurrage) | US$ | 317,625.00 |
| Addr Comm 317,625.00 x 1.25% | US$ | -3,970.31 |
| TOTAL | US$ | 313,654.69 |

I will revert to this point in due course, merely observing for the moment that wording to which the judge attached particular importance "Combine All ports . . . demurrage" appeared in both versions of the invoice, including that sent on 2 April 2008.

25. On 4 June 2008 Ms Sarris passed on to Mr Orona Mr Sunder's email of the same day which I have set out above. In doing so she said:-

> "Per below, Owners are in agreement with your revised demurrage calcs. Attached please find Owners' revised demurrage invoice. Please advise remittance details."

26. Payment of the amount due under the revised Demurrage Invoice was made on 9 June 2008.

27. On 19 June 2008 Ms Sarris emailed to Ms Radke another copy of the Time and Bunkers Invoice and its accompanying documents. She did so under cover of an email headed " Supplementary Invoice Due", which read:-

> "HERE'S THE 2ND ONE!
>
> PLEASE CONFIRM ALL IN ORDER NOW."

It is unclear from the documents before us what prompted Ms Sarris to re-send the documents. However, I note that at the end of his email of 3 June 2008 Mr Orona had said:-

> "Also, I have forwarded the other charges for this vessel to my operator, Joanne. For settlement of those invoices. Please contact Joanne."

Presumably therefore there had been some contact between Ms Sarris and Ms Radke, possibly by telephone, as a result of which Ms Radke had asked for the invoice and the supporting documents to be re-sent. It will be recalled that these had first been sent to Ms Radke on 2 April, and passed on by her to the Charterers' demurrage group.

28. 28 June 2008 was the last day for the timely submission of a claim under the charterparty for demurrage, deviation or detention in view of the requirement in clause 20.1 of the charterparty that such claims be presented within 90 days of completion of discharge.

29. On 19 August 2008, i.e. 52 days after expiry of the time bar, Mr Radke replied to the email of 19 June 2008 from Ms Sarris, with copy both to Mr Orona and to Mr Guzik, the Charterers' Crude Oil Scheduling Team Leader in these terms:-

> "Attached invoice does not have full supporting documentation attached for the waiting time declared. Based on what little documentation was submitted for the claim, this time should be demurrage not waiting time and should be declared as such. Further bunkers for a vessel waiting on demurrage are not Charterers responsibility. Please send proper supporting documentation and revise invoice to show demurrage and delete the bunker costs."

I would simply comment at this stage that the sending of this request is inconsistent with any intention to meet a revised invoice with the contention either that all claims for demurrage arising out of the charter had been finally settled or that the claim which an invoice revised in compliance with Charterers' request would present would be time-barred.

30. This message must have been passed to the Owners, for on 21 August Mr Sunder of the Owners replied to Ms Sarris:-

> "Without Prejudice.
>
> Owners would like to advise Charterer's (sic) that the freight for the subject voyage was paid basis 1:1. Additional ports for loading/discharging will be charged basis Vitol Interim port clause & CP clause 5.3
>
> Owners would like to thank Charterer's for settling the demurrage claim earlier, the additional time calculated is based on demurrage rate and the last bunker purchased invoice which has been passed to Charterer's earlier. For Charterer's guidance have attached cargo documents for kind perusal.
>
> Hence owners stand by their claim and request Charterer's to review claim positively."

31. On 28 August Mr Sunder chased for a reply in these terms:-

> "It's been a week since our response to chrtrs comments, Owners now want Charterers to settle this claim asap."

32. This message having been sent on by Poten to Charterers on 28 August, with the exhortation "your prompt attention to this matter will be greatly appreciated" on 29 August Mr Radke replied to Poten "It is under review".

33. On 9 September the Owners in the shape of Captain Prasad approached Mr Guzik direct. His email reads as follows:-

> "We, the National Shipping Company of Saudi Arabia, share an excellent relationship with your organisation. FYG, we have done six fixtures in the last 12 months.
>
> We refer to NSCSA/BP CP dated 29 Jan 2008 (performing vessel Abqaiq)
>
> On completion of the voyage, a supplementary invoice was raised on 31 March 2008.
>
> After numerous reminders through the normal broker channel, we have only received a response saying the claim is under review.
>
> We have had excellent record of closing out of claims with BP, do realize that this may be a "one off" case.
>
> We request you to review the enormity of the amount involved, and would much appreciate your looking into this matter and expediting the close-out."

34. On 11 September 2008 Mr Guzik responded, with copy to Mr Orona:-

> "Dear Captain Prasad:
>
> According to my operator, this invoice was sent back to the broker advising that the supplemental invoice should be part of demurrage as time waiting to berth the vessel and that the Charterer should not be responsible for any bunkers consumed as this was part of a 2 port option originally agreed to by the parties.
>
> Apologies for any confusion this may have caused your company."

35. On 14 September Captain Prasad responded to Mr Guzik, copied to Mr Orona:-

> "Dear Mr Guzik
>
> Thank you for your prompt reply. We attach correspondence wherein we have replied to the counter on the 21 August 2008, and this was acknowledged by your operator on 29 August 2008.
>
> We must add with regret that the delay in closing out this claim is frustrating.
>
> We would much appreciate your further involvement in ensuring this claim is closed out soonest.

Thank you for your help this far."

36. It was Mr Orona who responded to this email on the same day. His response to Captain Prasad was:-

> "Captain Prasad,
>
> In regards to your supplementary invoice about the Abqaiq. I have spoken with Joanne Radke about this and she finds that this invoice should have been part of the demurrage claim since it is in fact time the vessel waited for product.
>
> However, a claim for the Abqaiq has already been settled in regards to this vessel back on June 9th in the amount of $313,654.69.
>
> If you have any further questions, please feel free to contact me at your earliest convenience."

37. On 21 September 2008 Captain Prasad responded to Mr Orona:-

> "Dear Mr Orona
>
> Thank you for your response.
>
> We did present a demurrage claim – the same was settled as mentioned by you.
>
> The claim in discussion was presented based on the following that was agreed in the CP.
>
> FREIGHT RATE: FOLL BASIS 1/1
>
> LUMP SUM USD 3.5M
>
> IF ADDITIONAL LOAD/DISPORT, VITOL INTERIM PORT CLAUSE TO APPLY.
>
> Please do realize that it is extremely frustrating for us to have had numerous correspondences, with no improvement in the status of this substantial claim.
>
> We do realize that there is an excellent relationship between the companies, and we would much appreciate an expedited solution."

38. Mr Orona's response on 30 September was:-

> "Captain Prasad,
>
> I have spoken with my manager about reopening a demurrage claim and he is in agreement that this is not done.

> Furthermore, since you consider this invoice an interim port clause invoice and not demurrage due to the bunkers that were used, I would recommend going through operations to settle this invoice. However, since the vessel never left the port, it is highly unlikely that an interim port clause in valid in this case.
>
> I have brought this issue to the attention of my manager since there will need to be a commercial decision made on this invoice since I only handle demurrage."

39. The documents before us reveal two further emails from the Owners to the Charterers on 2 October 2008 and 13 May 2009, in each of which the Owners expressed their frustration that their claim had not been dealt with. If there were replies from the Charterers we have not seen them.

"*The Claim in this Action*"

40. On 1 March 2010 the Owners issued these proceedings. In the Particulars of Claim the claim in respect of detention at Freeport was recast on the conventional basis, i.e. that laytime and in due course demurrage continued to count notwithstanding the vessel had been ordered to leave the berth and had in due course returned to the same berth. On this footing demurrage was claimed on the basis that the vessel was on demurrage for 4.3 days at Freeport and for a further 7.8292 days at Singapore. Credit was given for the payment already made in respect of 4.5375 days demurrage pursuant to the agreement made in June 2008. The claim net of address commission was in the sum of US$ 524,776.26.

41. The Charterers' defence of 20 April 2010 asserted (a) that the emails exchanged in June 2008 "evidence a final agreement which binds the parties as concluding any claim for demurrage" and (b) that in any event any further claim for demurrage became time-barred on 28 June 2008.

42. Both parties sought summary judgment, although in the alternative Charterers sought leave to defend insofar as they wished to assert that between 1052 on 12 February and 1648 on 15 February adverse weather had the effect that time counted as one half laytime or, if the vessel was on demurrage, at one half of the demurrage rate, pursuant to clauses 7.4 and 17 of the charterparty.

"*The decision below*"

43. The hearing before Field J occupied two days. The judge was invited to determine a series of issues. Issues 1, 2 and 5 were as follows:-

> <u>Demurrage</u>
>
> 1. Was the parties' agreement of 4 June 2008 in full and final settlement of any and all claims for demurrage under the charter?
>
> 2. If not, is the claim for the balance of demurrage time-barred under clause 20.1?
>
> . . .

Bunkers

5. Is the Claimant entitled to the cost of bunkers consumed by the vessel between 0330 on 11 February and 1412 on 18 February under clause 5.2 or clause 5.3 on their true construction?

The parties were agreed that issue No.1 was purely a matter of construction of the documents in the agreed bundle. They were similarly agreed that issue No.2 was a matter of construction, and there was no obstacle to it being determined summarily. Presumably their agreement was to the effect that the issue raised issues of construction both as to the meaning and effect of clause 20 of the charterparty and of the documents presented in support of the various claims. Plainly issue No.5 is likewise to be resolved as a matter of the proper construction of clauses 5.2 and 5.3 of the Charter.

44. The judge decided all three issues in favour of the Charterers whilst noting that his decision on the first rendered a decision on the second strictly unnecessary, and so dismissed the Owners' claim in its entirety.

*The appeal to this court*

45. When he opened his appeal before us Mr Timothy Young QC for the Owners appeared to be unaware of the basis upon which the parties had proceeded below. He suggested that he was entitled to succeed on the appeal if he could show that the Owners' arguments had a realistic prospect of success. Indeed, the Grounds of Appeal seek only the setting aside of the judgment and remission of the matter to the Commercial Court for directions for trial. In consequence there was some confusion as to the relief in fact sought. This led Mr Henry Byam-Cook for the Charterers to suggest in turn that, if we were persuaded by the Owners' arguments, we should do no more than set aside the judgment and remit the matter for trial. This does not seem to me a sensible approach. Having heard very full, and I might add very skilled, argument on the issues, if we consider that they can properly be resolved on the material before the court, as the parties contended before the judge, we should in my view proceed finally to resolve them.

46. So I turn to the three issues resolved by the judge in respect of which an appeal is brought. The judge slightly recast the first issue, in the following terms, to which I have added the words in square brackets, which must I think have been inadvertently omitted:-

*"Was the agreement reached by the exchange of emails from Mr Orona and Mr Sunder on 3 and 4 June a settlement of any and all claims for demurrage or just a settlement of the demurrage claim in respect of the periods 2224 on 25 March 2008 to 1324 on 28 March 2008 and [between 1600 on 28 March and] 1500 on 30 March 2008?"*

47. The judge expressed his conclusion on this issue as follows:-

> "35. I decline to accept Mr Macey-Dare's submissions. In my view, the relevant background for interpretative purposes includes: (i) the presentation by the Claimant of two quite

different claims, one for demurrage and one for additional freight, which were deliberately being advanced separately and in respect of different periods of time under the charter; (ii) the fact that demurrage is a well known entitlement under voyage charters which arises once the stipulated laytime has been exceeded; and (iii) the Amended Demurrage Invoice contained the details set out in paragraph 22 above, including, in particular: "Combine All ports: 4.5375@70,000 (Demurrage) USD 317,625.00".

36. Construed against this background, what was being settled was ***all and any*** claims for demurrage under the charter. The only other period in which demurrage was potentially claimable was the period prior to 25 March 2008 and a different claim for additional freight was being deliberately made in respect of this period. Accordingly, in my judgement, the parties were proceeding on the basis that the only claim for demurrage that was going to be made under the charter was the claim made in the Amended Demurrage Invoice and by settling that claim, they were settling ***all and any*** claims for demurrage under the charter. There is no question here of the Defendant unfairly taking advantage of a mistake it knew the Claimant had made. On the contrary, the Claimant was well aware of Ms Radke's suggestion that the additional freight claim be re-submitted as a demurrage claim but it persisted in maintaining two separate claims, one for demurrage and one for additional freight. In these circumstances, the Defendant was entitled to proceed on the basis that no demurrage claim was being made or was going to be made in respect of the period before 25 March 2008, and it was on that basis that the parties entered into the settlement that resulted from Mr Sunder's acceptance of Mr Orona's counter offer.

37. I would add for completeness that the words "Without Prejudice" in Mr Sunder's email are not to be construed as a reservation of a right to claim demurrage in respect of the period prior to 25 March 2008. Instead, those words are either to be ignored as mere surplusage, or, if they are to be given any meaning, they mean that the acceptance of Mr Orona's offer is without prejudice to the claim for Port Costs and the claim made in the Time and Bunkers Invoice, the latter claim being a claim for additional freight, not a claim for demurrage. I am also of the view that the reference to "other charges" in Mr Orona's email of 3 June 2008 is a reference to the port charges covered by the Port Costs Invoice and the words "those invoices" refer back to those charges and to the vouching invoices itemising the port costs claim."

48. I agree with the judge that the words "without prejudice" in Mr Sunder's email of 4 June 2008 do not carry the matter any further either way. As it happens Mr Sunder

used them again in his email of 21 August. However I respectfully cannot agree with the judge's conclusion that by this exchange of emails the parties concluded a settlement of any and all claims for demurrage. I think that the judge's conclusion was based in important part upon a serious misapprehension, and that had the judge not been under this inadvertent misapprehension he might well have formed a different view. The Owners were not as at 4 June well aware of Ms Radke's suggestion that the "additional freight" claim (not a label Owners ever gave it) should be re-submitted as a demurrage claim. That suggestion was only made on 19 August 2008. Indeed, far from knowing that Charterers suggested that the claim should be re-submitted as a demurrage claim or even that they expected the claim to be re-submitted as a demurrage claim, the information which Owners had been given was that the claim made in the Time and Bunkers Invoice was regarded by Ms Radke as in fact a demurrage claim and that she had accordingly sent it to the Charterers' demurrage group for review – "This is a demurrage claim and it was sent to that group for review". Thus the impression given to the Owners was that their claim as presented in the Time and Bunkers Invoice was being treated as a demurrage claim and was under review by the relevant department in the Charterers' organisation, the demurrage group. This had led Ms Sarris to ask Mr Rupp on 6 May who within that group was handling the claim. The only contender for a response to that request prior to the making of the agreement on 4 June is Mr Orona's email of 3 June, in which he said "I have forwarded the other charges for this vessel to my operator Joanne. For settlement of those invoices. Please contact Joanne". As it happens, although this would not have been known to the Owners and cannot therefore be prayed in aid in construing the exchange, Mr Rupp had on 7 May asked Mr Orona to respond to the query as to who was handling the claim. However what is important and admissible as part of the background against which the email exchange of 3/4 June must be construed is that the Owners would reasonably have been under the impression that their claim set out in the Time and Bunkers Invoice was under review by Charterers on the basis that it was in fact a claim for demurrage.

49. The judge thought that the words "other charges" in Mr Orona's email of 3 June are unequivocally a reference to the port charges in the Port Costs Invoice and that the words "those invoices" refer back to those charges and to the vouching invoices itemising the port costs claims, but again I respectfully disagree. Those references are I think at best ambiguous. I note that the heading to the email is "Supplementary Invoice for Port Charges and Demurrage", which is obviously consistent with the judge's conclusion as to what was intended, but I remind myself that I am examining this email to see whether an unequivocal agreement can be spelled out of it and the response to it precluding any further claim for demurrage in respect of the period covered by the Time and Bunkers Invoice. The fact that the heading to this email does not seem to include that claim militates strongly against any such conclusion. Furthermore, in point of form it was not the three vouching invoices itemising the port costs claim which required settlement by Charterers. Those invoices had already been settled by the Owners and the Owners had submitted a single invoice to the Charterers in respect thereof. Whilst invoices (plural) in Mr Orona's email might have been a mistake, equally it could reasonably have been understood as being a reference to both of the other outstanding invoices rendered by the Owners to the Charterers, viz the Time and Bunkers Invoice and the Port Costs Invoice. Again, for what it is worth, I note that the last paragraph of Mr Orona's email of 3 June seems to have been the catalyst for the contact between Ms Sarris and Ms Radke which led to Ms Sarris on 19

June resending to Ms Radke the Time and Bunkers Invoice, together with supporting documentation.

50. The judge's inadvertent misapprehension as to the Owners knowing of Ms Radke's as yet unmade suggestion that the claim in respect of time used at Freeport be resubmitted as a demurrage claim led him to approach the matter on the footing that the Owners were "deliberately" "persisting" in maintaining a claim for "additional freight" in a manner which would have led the Charterers to believe that no claim for demurrage would ever be made in respect of the period covered thereby. This approach is I believe flawed because there is no question of the Owners having by 4 June persisted in their error despite it having been drawn to their attention as an impediment to their effecting any recovery for the period in question. There was nothing said or done by the Owners from which the Charterers could reasonably have concluded that no claim for demurrage was going to be made in respect of this period. On the contrary, it was the Charterers themselves who signified to the Owners that they were treating the claim as properly being one for demurrage. Bearing in mind that the compensation sought for the delay at Freeport was claimed at the demurrage rate and bearing in mind also that the Owners were treating it as in fact a claim for demurrage, it is to my mind simply impossible to conclude that the parties were proceeding on the basis that no claim for demurrage other than that contained in the Demurrage Invoice either was being or would ever be pursued by the Owners arising out of this charterparty. The Charterers knew that a claim for compensation at the demurrage rate in respect of the time spent at Freeport was being pursued but that the Owners were wrongly under the impression that they were additionally entitled to the cost of bunkers consumed. The Charterers knew or could have known as a result of studying the demurrage reports that the Owners had wrongly assumed that laytime stopped running when the vessel left the berth and that the Owners had not even appreciated that laytime would at the very least count again once the vessel was actually back at the berth loading. The 3 June email from Mr Orona made no reference to the claim in respect of time used at Freeport, either expressly or by implication, save possibly insofar as the last paragraph can be regarded as a reference to that claim. Since Ms Radke had correctly observed on 2 April that Owners' claim in respect of Freeport was in fact a demurrage claim, the Charterers' demurrage specialists must be taken to have had it well in mind that in fact the vessel <u>had</u> incurred demurrage at Freeport and what is more that she was already on demurrage upon arrival at Singapore. The Charterers cannot possibly have been approaching the matter on the basis that, were the Owners to accept the 1 hour 6 minutes adjustment of the timesheet proffered by the 3 June email, they would thereby lose their entitlement to recover the additional demurrage due to them once the demurrage reports were correctly drawn up. To attribute to the Charterers such an approach would be an attribution of sharp practice which I decline to make.

51. The exchange of emails in my view achieved no more than agreement that, on the basis of the claim put forward in the Demurrage Invoice, the net amount due was US$ 313,654.69. The agreement related only to the claim presented in the Demurrage Invoice and related therefore only to time used at Singapore. The agreement did not in my view preclude recovery by Owners of a further sum in respect of time used at Singapore. Still less in my view did the agreement preclude recovery by Owners of demurrage incurred at Freeport. Once the issue of the claim in respect of time spent at Freeport was addressed, it would inevitably be necessary to adjust the demurrage

report for Singapore to reflect the fact that the vessel had in fact arrived already on demurrage. Mr Byam-Cook did not argue that if the exchange of emails was ineffective to bring about settlement of all and any claims for demurrage under the charterparty, then at least it was effective to preclude any further recovery in respect of demurrage incurred at Singapore, and it may be this last consideration which informed his judgment in that respect. Whatever the reason, Mr Byam-Cook was in my view right not to argue for some half-way house effect. In my view the agreement set out in the exchange of emails, which at bottom amounted to no more than agreement that in the circumstances time started to run only 6 hours after anchoring, not 6 hours after tender of Notice of Readiness, did not preclude further recovery by way of demurrage in respect of the time spent at both Freeport and Singapore as recorded and itemised in the Owners' demurrage reports.

52. I should perhaps mention finally that I cannot attach any significance to the use of the phrase "Combine all ports" in both forms of the Demurrage Invoice, i.e. as initially presented and as revised. Both invoices in fact claim demurrage only in respect of detention at Singapore. The reference to "Combine all ports" is obviously a reflection of the circumstances that the laytime allowed under the charterparty is simply 96 hours in respect of all ports combined.

*Is the claim now made for demurrage time-barred?*

53. The judge reminded himself of the guidance given by Bingham J, as he then was, in *The Oltenia* [1982] 1 Ll Rep 448 at 453 as to the proper approach to clauses such as clause 20.1, which are in very common use in voyage charter parties. The clause there under consideration was:-

> "Charterers shall be discharged and released from all liability in respect of any claims Owners may have under this Charter Party (such as, but not limited to, claims for deadfreight, demurrage, shifting expenses or port expenses) unless a claim has been presented to Charterers in writing with all available supporting documents within 90 . . . days from completion of discharge of the cargo concerned under this Charter Party."

There is no material distinction between that clause and clause 20.1 of the BP VOY4 form.

54. Of that clause and necessarily others of its type, Bingham J said this:-

> "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 … 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 personal injury. The owners would not, as a matter of common sense, be debarred from making factual corrections to claims presented in time … 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."

55. The judge rightly accepted that a claim in writing means the substance of the claim for demurrage, deviation or detention, as the case may be, for which Owners seek to hold Charterers liable.

56. The essence of the judge's reasoning finding the claim now advanced time-barred is to be found in paragraphs 42 and 43 of his judgment as follows:-

> "42. In my judgement, in the circumstances of the instant case, the claim made in the Time and Bunkers Invoice is not to be regarded as substantially the same claim as the demurrage claim now advanced. On the contrary, the Time and Bunkers Invoice deliberately advanced a claim not for demurrage, but for additional freight under the Vitol Interim Ports Clause. Thus: (i) the claim was in respect of the period of 7.445 days between 0330 on 11 February 2008 and 18 February 2008 at the loadport, with no reference being made to the running of laytime or to when laytime was alleged to have expired; (ii) the documents sent with the claim were not demurrage-type documents; (iii) the invoiced sum includes an element for bunkers, whereas there is no liability for bunkers under a demurrage claim; (iv) the trigger points for the start and the end of the claimed period (i.e.vessel line away) are the trigger points under the Interim Port Clause and not the trigger points for a demurrage claim (under clause 7.3.3 laytime and demurrage run until the disconnection of hoses).
>
> 43. I also accept Mr Byam-Cook's submission that, even if the claim made in the Time and Bunkers Invoice can be regarded as [a] demurrage claim, that invoice was not accompanied by "all supporting documentation substantiating each and every constituent part of the claim" as required by Clause 20.1. As Mr Byam-Cook contended, a demurrage claim should have been presented together with at least notices of readiness, a statement of facts, letters of protest and pumping logs, yet the Claimant presented none of these in support of the claim in the Time and Bunkers invoice. Mr Macey-Dare argued that the Claimant presented the necessary documents by presenting them with the Demurrage Invoice but I reject this submission. The Claimant was obliged to comply carefully and strictly with the requirement to present all supporting documentation substantiating each and every constituent part of the claim and

> it is not enough for the Claimant now to seek to rely on documents presented with an entirely separate claim from the claim for additional freight which was made through the Time and Bunkers Invoice."

57. In a sustained submission on this aspect of the case Mr Byam-Cook first contended that the Supplementary Invoice submitted on 31 March 2008 was neither a claim for demurrage nor a claim for detention but rather a claim for freight under the Vitol Interim Ports Clause. It could not be regarded as a claim for demurrage since neither it nor the supporting documents presented with it showed the starting point for demurrage now claimed at the loadport, still less that claimed at the discharge port. As to that, the invoice focused entirely on the loadport, and could not possibly be taken as a sufficient claim in writing for demurrage at the discharge port. Secondly, Mr Byam-Cook contended that clause 20.1 requires that supporting documents substantiating each and every part of the claim must be presented in a manner which makes clear to the Charterers that the documents in question go together with the claim notice at issue. In that regard he stressed the use of the words "together with" in clause 20.1 and referred us to the decision of Gloster J in *The Sabrewing* [2008] 1 Ll Rep 286 to the effect that strict compliance with the terms of a clause such as this is habitually required. The essence of Mr Byam-Cook's submission was that the two documents submitted with the Supplementary Invoice of 31 March 2008 are not sufficient documentation to support the claim now pursued for both loadport and further discharge port demurrage. In relation to that claim, Mr Byam-Cook submitted, the Owners could not rely upon the documents which accompanied the demurrage invoice presented on 2 April 2008, because they had not been presented together with the Invoice of 31 March and it had not been made clear that they were to be relied upon as substantiating that claim. It was, he submitted, 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".

58. Skilfully presented though these arguments were, I find them most unattractive on the facts of this case. Mr Byam-Cook accepted that the documents which accompanied the Demurrage Invoice of 2 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. Furthermore, the Charterers appreciated that, properly analysed, the claim put forward by the Supplementary Invoice, which ignoring the bunker element was at bottom a claim for detention at the loadport, quantified at the demurrage rate, fell to be resolved as a straightforward claim for demurrage. The Charterers even went so far, after expiry of the time bar, as to request that the invoice be revised and re-presented as a straightforward claim for demurrage. True, Ms Radke also asked Owners to send proper supporting documentation, but that can only be because she was unaware that full supporting documentation had already been sent with the 2 April 2008 Demurrage Invoice which had been sent by Poten direct to the demurrage specialist Mr Rupp. In these circumstances I must examine whether the authorities constrain the court to reach so unattractive and uncommercial a result as that for which Mr Byam-Cook contends.

59. I would begin by observing that at first blush the present appears to be just such a case as envisaged by Bingham J where the Owners wish to put a different legal label on a claim, the substance of which has been presented in time, as have all the supporting documents. Charterers had in their possession from 2 April 2008 all of the factual material required in order to satisfy themselves as to the extent of their liability.

60. As noted above, we were referred to an observation of Gloster J in *The Sabrewing* to the effect that parties are obliged to comply carefully and strictly with demurrage time bar clauses of this sort. Gloster J was there concerned with the precursor provision in BPVOY3, and in particular with clause 16 thereof, now clause 19 of BPVOY4, which calls for the presentation of particular documentation supporting a claim for extra time incurred in consequence of the inability to receive cargo at a discharge pressure of 7 bar measured at the vessel's manifold. 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. As Stuart-Smith LJ observed, giving the judgment of this court in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Ll Rep 423, where such an agreement was under consideration:-

> "Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty."
>
> See at page 442

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. 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.

63. I regard these observations as consistent with the approach to clauses of this type enjoined by Bingham J. In my view they are consistent also with the decision of this court in *The Eagle Valencia* [2010] 2 Ll Rep 257 and with the observations of Longmore LJ in giving the only reasoned judgment. There the Owners had failed to submit a contractually valid Notice of Readiness in support of their claim for demurrage. Shortly before trial, long after expiry of the time bar, they sought to rely upon an email later in time than the Notice of Readiness hitherto relied upon which the court regarded as in fact constituting a Notice of Readiness even though, as Longmore LJ observed, the email was not in the standard form of a Notice of Readiness and it "might even be the case that the Master did not think that he was serving a fresh or new Notice of Readiness". At paragraph 30 of the judgment, page 263, Longmore LJ said this:-

> "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 a particular number of days and hours had be 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."

I find there support for my view that it is the substance of the presentation which is important.

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 0136 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 claim was wrongly drawn up because it scored the laytime unused as at 0136 on 11 February 2008 at Singapore rather than at Freeport, but that did not prevent the Charterers from appreciating, as in fact they did, that the Owners had a valid claim for demurrage in respect of the substantial period beyond her laytime for which the vessel was detained at the two ports. The Owners are not debarred from now putting a different legal label on part of the claim, the substance of which was presented in time. 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.

*Are the Charterers liable under Clause 5.2 or 5.3 for the cost of bunkers consumed by the vessel between 0330 on 11 February 2008 and 0300 on 17 February 2008?*

66. I can deal very shortly with this point. The judge decided that the claim failed on two grounds. First he held, consistently with the decision of this court in *The Afrapearl* [2004] 2 Ll Rep 305, that there had been no instruction given by Charterers to load at more than one berth at Freeport. Second, he held that clause 5.2 is concerned with expenses incurred to third parties in performing the movements identified therein and that bunkers do not come within this category of expense. He held further that the words "any dues and/or other charges" are not apt to describe bunkers. I agree with the judge that neither clause 5.2 nor clause 5.3 envisages the recovery of the cost of bunkers consumed. Where the cost of bunkers consumed in and about some operation is to be recoverable it is usual in voyage charterparties or similar contracts to so stipulate expressly, as in the Vitol Interim Port Clause. In these circumstances the claim for bunkers consumed cannot succeed and I need express no view on the judge's first reason for rejecting it.

67. *Conclusion*

68. For all these reasons I would uphold the judge's dismissal of the claim for bunkers but I would otherwise set aside his judgment. Subject to any further representations which the parties may wish to make in writing as to the form of relief, I would substitute therefor a declaration that the Owners are entitled to succeed in their claim for demurrage, subject only to the Charterers being at liberty to argue that between 1052 on 12 February 2008 and 1648 on 15 February 2008 adverse weather had the effect that time counted only as one half laytime or, if the vessel was on demurrage, at one half of the demurrage rate, pursuant to clauses 7.4 and 17 of the charterparty. I would remit the matter to the Commercial Court for directions as to the manner in

which the extent of the Charterers' liability is to be finally determined in default of agreement.

**Sir Mark Potter:**

69. I agree.

**Lord Justice Ward :**

70. I also agree.