Case No: 2014-917

Neutral Citation Number: [2015] EWHC 318 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 19/02/2015

Before :

MR JUSTICE HAMBLEN

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Between :

Kassiopi Maritime Co Ltd	**Claimant**
- and -	
Fal Shipping Co.Ltd	**Defendant**

- -
- -

Neil Henderson (instructed by **Mills & Co**) for the **Claimant**
Michael Davey QC (instructed by **Bugden & Co**) for the **Defendant**

Hearing dates: 5 February 2015

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Judgment

Mr Justice Hamblen:

Introduction

1. The Appellants, Kassiopi Maritime Co Ltd ("the Owners"), appeal pursuant to Section 69 of the Arbitration Act 1996 ("the 1996 Act") in respect of questions of law arising out of the award of Mr. Simon Gault and Mr. John Schofield ("the Tribunal") dated 1 July 2014 ("the Award") as corrected in a corrected award dated 23 July 2014 ("the Corrected Award"). Permission to appeal was given by Mr Justice Walker on 7 November 2014.

2. The Owners were the owners of the vessel M/T ADVENTURE ("the Vessel") which was chartered to the Respondent, FAL Shipping Co Ltd ("the Charterers"), under a voyage charterparty on an amended BPVoy4 form dated 15 June 2011 ("the Charterparty").

3. The Owners brought a claim for demurrage in the amount of US$ 364,847.78 as a result of delays at both the load port, Sitra, and the discharge port, Port Sudan. A formal demurrage claim was submitted by email on 5 August 2011 ("the 5 August email"), which attached a number of documents.

4. The Charterers disputed that demurrage was due to the Owners on the principal grounds that the demurrage claim had not attached all of the necessary documents and that, because the 90-day period to submit those documents had elapsed, the Owners' demurrage claim had become time-barred.

5. At the invitation of the parties, the Tribunal proceeded to make its award on the basis of written submissions alone. A formal process of disclosure was not undertaken by either party, but (in accordance with the LMAA Terms) the relevant documents were attached to the submissions. A short witness statement was produced by the Owners to deal with a discrete issue relating to free practique.

6. By the Corrected Award, the Tribunal held that the Owners' demurrage claim failed. The Tribunal held that the Owners had failed to provide the following documents required by both Clause 19.7 and Clause 20:

    (1) The port log and time sheets kept as referred to in the Letters of Protest;

    (2) A manuscript note on an email, made by Captain Karalexis, that the Master had received free practique by VHF at Port Sudan.

7. As a result, the claim for demurrage was held to be partially barred by the failure to comply with Clause 19.7 and wholly barred by the failure to comply with Clause 20.1.

The Charterparty

8. The most relevant provisions of the Charterparty are as follows:

"Demurrage rate :USD 17,000 PDPR
LAYTIME :TTL 84 Hrs SHINC
BPVOY4

6. Notice of Readiness ("NOR")

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 Anchorage where the vessels of her type customarily anchored at the port or, if she has been instructed to wait, she has reached the are with in the port where vessels of her type customarily wait; and

6.3.3 free practique has been granted or is granted within six (6) hours of the Master tendering NOR. If free practique is not granted within six (6) hours of the Master tendering NOR, through no fault of Owners, Agents, or those on board the Vessel, the Master shall issue a protest in writing ("NOP") to the port authority and the facility at the port ("Terminal") failing which lay time or, if the Vessel is on demurrage, demurrage shall only commence when free practique has been granted;

7. Laytime/Demurrage

7.1 Charterers shall be allowed the number of hours stated in Section 1 Part 1 together with any period of additional laytime arising under Clause 7.3.1, as laytime for loading and discharging and for any other purposes of Charterers in accordance with the provisions of this Charter.

7.4 Charterers shall pay demurrage at the rate stated in Section J or PART 1 per running day, and pro rate for part of a running day, for all time that loading and discharging and 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.

19. PART A. LOADING AND DISCHARGE OF CARGO

19.2 The cargo shall be pumped into the Vessel at the expense and risk of Charterers and pumped out of the Vessel at the expense and risk of Owners, in each case only as far as the Vessel's manifold….

19.3 Owners undertake that:-

19.3.1 the Vessel shall load cargo at the maximum safe rate and in any event shall load a full cargo within a maximum period of twenty-four (24) hours, or pro-rate in the case of a part cargo, provided always that the cargo is capable of being supplied within such time; and

19.3.2 the Vessel shall discharge cargo at the maximum safe rate and in any event shall, in the case of cargoes of one or more segregated grades/parcels discharged concurrently or consecutively, discharge a full cargo within twenty-four (24 hours, or pro-rata in the case of a part cargo, or shall maintain a minimum discharge pressure of seven (7) bar at the Vessel's manifold throughout the bulk discharge provided always that the cargo is capable of being received within such time or at such pressure. If restrictions are imposed by the Terminal during discharge, or if physical attributes or the Terminal restrict the discharge rate or pressure, owners shall only be relieved of the aforesaid obligation for the period and to the extent such restrictions or attributes impede the discharge rate or pressure. The Terminal shall have the right to gauge discharge pressure. The Terminal shall have the right to gauge discharge pressure at the Vessel's manifold.

19.4 Any additional time used as a result of the inability of the Vessel to discharge the full cargo within twenty-four (24) hours, or pro rata in the case of a part cargo, or to maintain a minimum discharge or failure by the Vessel to meet any lesser performance required pursuant to a restriction imposed by the Terminal, shall be for Owners' account and shall not count as laytime or, if the Vessel is on demurrage, as demurrage.

19.6 If the full cargo cannot be delivered to the Vessel at the rate requested by the Master or within the time allowed in Clause 19.3.1 or if the Terminal is unable to receive the full cargo within twenty-four (24) hours or at a discharge pressure of seven (7) bar measured at the Vessel's manifold, the Master shall present a Note of Protest ("NOP") to a Terminal representative detailing any Terminal restrictions and/or deficiencies as soon as they are imposed and/or become apparent and shall use all reasonable endeavours to have the NOP signed by the Terminal representative. If the Master is unable to obtain a signature from the Terminal representative he shall present a further NOP recording the failure of the Terminal representative to sign the original NOP. In the case of restrictions imposed by the Terminal or arising from physical attributes of the Terminal, the Master shall ensure that such restrictions are clearly recorded in the Vessel's Pumping Log.

19.7 No claim by Owners in respect of additional time used in the cargo operations carried out under this Clause 19 shall be considered by Charterers unless it is accompanied by the following supporting documentation:-

19.7.1 the Vessel's Pumping Log signed by a senior officer of the Vessel and a Terminal representative showing at hourly intervals the pressure maintained at the Vessel's manifold throughout the cargo operations; and

19.7.2 copies of all NOPs issued, or received, by the Master in connection with the cargo operations; and

19.7.3 copies of all other documentation maintained by those on board the Vessel or by the Terminal in connection with the cargo operations

If vessel ordered to evacuate terminal or load/discharge place due to vessel's inability to load/discharge cargo in accordance with load/pumping warranty as above, then all related time, expenses and or damages incurred by charterers shall be on owners account. Laytime shall not count till vessel again all fast at berth/terminal.

…..

20. Claims Time Bar

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, within ninety (90) days of the completion of discharge of the cargo carried hereunder."

The Questions of Law

9. There are five questions of law for which the Owners obtained permission to appeal. These five questions relate to the Tribunal's interpretation of the proper meaning and effect of Clause 19.7 and Clause 20.1.

10. The specific questions of law which the Owners have permission to appeal are:

As to Clause 19.7:

Question 1: "Does Clause 19.7.3 require owners to provide with their demurrage claim copies of all documents which the owners would be required to disclose in an arbitration reference to determine whether their claim that time counts during loading or discharging operations. If so, does Clause 19.7.3 thereby impose on the owners a contractual obligation to disclose all relevant documents in its possession and control when the claim is first made rather than waiting for disclosure to take place in the normal course of an arbitration reference?"

Question 2: "On a proper construction of Clause 19.7.2 are the charterers first required to satisfy an evidential burden that other notices of protest were issued but not provided by the owners with the demurrage claim in order to place the legal burden on the owners to prove a negative?"

Question 3: "Does Clause 19.7.3 require owners to provide to the charterers copies of documents which are in the owners' possession at the time the demurrage claim is made but the documents were neither created nor maintained on board the vessel?"

Question 4: "On a proper construction of Clause 19.7.3 are 'one-off' documents, which are generated by the vessel in connection with the cargo operations, within

the scope of "*documentation maintained by those on board the Vessel… in connection with the cargo operations…*"?

As to Clause 20.1:

Question 5: "On a proper construction of Clause 20.1, does "*all supporting documentation substantiating each and every constituent part of the claim*" for a claim for demurrage which is not "additional time" for cargo operations within the meaning of Clause 19 of the BPVoy4 form charterparty require owners to provide all relevant supporting documentation, or only 'essential' supporting documentation?"

11. By the time of the hearing it was common ground that Question 2 does not arise because the Charterers accepted that the Tribunal did not rely on the absence of any further notices of protest in finding against the Owners. It was also common ground that Question 3 does not arise because the Charterers accepted that the answer to that Question was "No". That Question related to whether the email with the manuscript note was required to be disclosed under clause 19.7.3. It was accepted that it was not so required as the note was made and kept ashore rather than on the Vessel.

The Award

12. The Tribunal found as follows:

> "20. "ADVENTURE" was undoubtedly delayed at Sitra and at Port Sudan beyond the period of allowable laytime of 3½ days. Kassiopi's Laytime/Demurrage calculation shows that the total time used at both ports was 25 days 5 hours 36 minutes. Allowing for the concession in Kassiopi's Reply Submissions that time did not start to count at Sitra until 16:00 hours on 17th June 2011, their claim that demurrage ran for 21 days 17 hours and 36 minutes is reduced by 3 hours 48 minutes to a claim that it ran for 21 days 13 hours and 48 minutes.
>
> 21. This claim assumes that the whole period of 21 days 13 hours and 48 minutes counts for laytime or, if "ADVENTURE" was on demurrage, for demurrage. The validity of that assumption depends in part on whether:-
>
> (a) Any delay resulted from a failure by Kassiopi to provide any personnel, equipment and facilities which they have been requested to provide in accordance with their obligation under Clause 19.2.
> (b) Any delay resulted from breach by Kassiopi of the obligation in Clause 19.3.1 to load cargo on "ADVENTURE" at Sitra at the maximum safe rate and within a maximum period of 24 hours, or pro rata in the case of a part cargo.
> (c) Any delay resulted from a failure by "ADVENTURE" at Port Sudan:-

(i) to discharge cargo at the maximum safe rate, or in the case of cargoes of one or more segregated grades/parcels within 24 hours; or
(ii) to maintain a minimum discharge pressure of 7 bar at "ADVENTURE's" manifold throughout the bulk discharge unless the terminal was not capable of receiving cargo within that time or at such pressure;

in accordance with Clause 19.3.2.

22. If these assumptions are not supported by evidence, FAL are not liable for any delays resulting from a breach of these provisions by Kassiopi either because a charterer is not liable for delays caused by a breach of the charterparty by the owner or because the clause 19.2 and 19.4 expressly provides that those periods of delay caused by a breach of clause 19.2 or 19.3.2 should not count as laytime or, if the vessel is on demurrage, as demurrage…."

13. The Tribunal found that the following documents were presented by the Owners with the 5 August email:

(a) "An invoice for US $364,847.78 dated 5th August 2011;
(b) A laytime/demurrage calculation for Sitra and Port Sudan;
(c) A Notice of Readiness for Sitra;
(d) A statement of facts for Sitra;
(e) Four Letters of Protest for Sitra;
(f) A Notice of Readiness for Port Sudan;
(g) A pumping record for Port Sudan;
(h) A statement of facts for Port Sudan
(i) Four Letters of Protest for Port Sudan;
(j) An Empty Tank Certificate for Port Sudan."

14. The Tribunal found that a number of the Letters of Protest at Sitra referred to delays or stoppages "recorded in "ADVENTURE"'s port log/time sheets".

15. In relation to free practique the Tribunal found that the grant of free practique was recorded in the Statement of Facts for Sitra but not that for Port Sudan. This was addressed in a witness statement provided by the Owners in 2014.

16. The significance of free practique is that under Clause 6.3.3 the NOR only becomes effective when "free practique has been granted or is granted within 6 hours of the Master tendering NOR".

The authorities

17. The Owners stressed that a barring clause such as Clause 20 is to be construed strictly and that a claim will not be held to be barred unless the clause clearly applies – see *The Pera* [1985] 2 Lloyd's Rep. 103.

18. The commercial purpose of demurrage claim notification clauses was considered by Bingham J in *The Oltenia* [1982] 1 Lloyd's Rep 448 at page 453:

> "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."

19. In *The Abqaiq* [2012] 1 Lloyd's Rep. 18 (a case concerning Clause 20.1 of the BPVoy4 form) Tomlinson LJ observed that the approach to provisions such as these should be informed by certainty rather than strictness. He stated that:

> "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. 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 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."

20. At [64] Tomlinson LJ stated that in that case "no essential document was missing from those presented". As he observed later in the same paragraph:

> "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."

21. At [65] Tomlinson LJ summarised why he considered that the documents presented complied with Clause 20.1:

> "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."

Question 1: *"Does Clause 19.7.3 require owners to provide with their demurrage claim copies of all documents which the owners would be required to disclose in an arbitration reference to determine whether their claim that time counts during loading or discharging operations. If so, does Clause 19.7.3 thereby impose on the owners a contractual obligation to disclose all relevant documents in its possession and control when the claim is first made rather than waiting for disclosure to take place in the normal course of an arbitration reference?"*

22. In relation to the documents required under Clause 19.7.3 the Tribunal stated as follows:

> "33. ….What is encompassed by the third category [Clause 19.7.3] is more debatable. We suspect that the definition of these documents is deliberately vague because different vessels and different terminal will not all keep the same type of record and that it was not possible for the draftsman to specify precisely what classes of documents would exist in any particular case which are relevant to an owner's claim for demurrage. However, the way the draftsman chose to define this category of documents presents two difficulties.
>
> 34. The first difficulty is the reference to documents "*maintained… by the terminal"*. It seems to us that the parties cannot have intended this category of documents to accompany a claim for demurrage unless such documents were either in the possession or control of Kassiopi. Plainly documents maintained by the terminal which are not in Kassiopi's possession or control are not within their power to attach to a claim for demurrage. We do not think the parties to the Charterparty can have intended to require an owner to do the impossible. We therefore conclude that only such documents as are in Kassiopi's possession or control fall within the class of document referred to in Clause 19.7.3.
>
> 35. The second difficulty is what is meant by *"cargo operations".* We do not think that the parties can have intended this phrase to include any document that refers to the cargo as FAL originally appeared to argue. We think that the parties must have intended to include only such documents as are relevant to a claim for laytime and demurrage arising during the loading and discharging of cargo and which bear on the issue of whether or not time counts under clause 19.
>
> 36. A third difficulty arises not from the clause itself, but from the fact that Kassiopi have not given full disclosure of all relevant documents in their possession in this arbitration. Accordingly, we do not know for certain what documents fall within the third category of documents. However, we consider that the purpose of clause 19.7.3 is to require that all the

> documents (other than those referred to in clauses 19.7.1 and 19.7.2) which Kassiopi would be required to disclose in an arbitration to determine whether their claim that time counts during loading or discharging operations should accompany the claim and so impose on Kassiopi a contractual obligation to disclose all relevant documents in its possession and control when the claim is first made rather than waiting for disclosure to take place in the normal course of an arbitration. Such documents would include documents which not only supports Kassiopi's claim that time counts during loading or discharging operations, but also those which adversely effects that claim."

23. The Tribunal then concluded that the port log and time sheets should have been provided. They stated that:

> "38. ….It is plain from the letters of protest that, as we would expect, a port log and time sheets were kept on board "ADVENTURE". These plainly contained relevant entries as the Letters of Protest refer to them. At least these documents should have been attached to the e-mail dated 5th August 2011. In his witness statement, Captain Karalexis exhibits to his statement the e-mail dated 22nd July 2012 *"free Practique by VHF O.K granted".* It seems to us that this is another document which Clause 19.7.3 requires to have been attached to the e-mail dated 5th August 2011 and which was not attached.
>
> 39. In these circumstances, we conclude that Kassiopi have not complied with the requirement in clause 19.7 that the categories of documents which it provides should accompany a claim for demurrage, did in fact do so…."

24. They then found the consequence of failing to provide these documents to be as follows:

> "40. The consequences of the failure to prove that they attached to that e-mail all the documents which clause 19.7 provides should have been attached, are the consequence which by clause 19.7 the parties have agreed should follow from such a failure, namely that *"no claim by Owners in respect of additional time used in the cargo operations carried out under … Clause 19 shall be considered by the Charterers"* or, we infer, by us. This does not conclude matters because there were other delays at Sitra and Port Sudan, which did not arise in the course of cargo operations. Therefore they are not covered by clause 19.7….. "

25. Question 1 centres on the Tribunal's reasoning in paragraph 36 and their apparent conclusion that Clause 19.7.3 requires disclosure of all documents which the Owners would be required to disclose in an arbitration to determine whether time counts.

26. The Owners criticised this reasoning on the following main grounds:

(1) Such an approach is contrary to the aim of promoting clarity and certainty because owners would be left wondering what documents they do in fact have to 'disclose' with the demurrage claim. In particular:

(i) The scope of the disclosable documentation in either an arbitral reference or court proceedings will be determined by the parties' cases as set out in the pleadings. The pleadings identify and define the issues in dispute between the parties which in turn will determine which documents are disclosable.

(ii) As such it is not possible for owners to undertake disclosure before the claim has even begun.

(2) From a practical perspective the Tribunal's construction of the clause would put a very heavy burden on owners.

(i) It would require them not just to provide copies of the type of documents that are routinely attached to demurrage claims (NORs, SOFs, NOPs, Pumping Logs) but would require them to undertake an enquiry with the crew on each occasion to ensure that all documentation was provided.

(ii) On the Tribunal's interpretation this would encompass documents such as rough copy documents, personal notebooks of the crew, and all emails sent or received by the vessel insofar as any of the documents related to the loading or discharging operations.

27. I consider that there is force in these criticisms. The obligation of disclosure is likely to go far wider than merely "supporting documentation" and require a search which is considerably more rigorous than that contemplated by a clause such as this. Further, what disclosure requires may vary as between different arbitration rules and as between arbitration and court. It may also vary between different arbitration proceedings conducted under the same rules. In my judgment the clause cannot have been intended to impose such a far reaching and potentially unworkable obligation on the owners.

28. I would accordingly answer Question 1 "No".

Question 4: *"On a proper construction of Clause 19.7.3 are 'one-off" documents, which are generated by the vessel in connection with the cargo operations, within the scope of "documentation maintained by those on board the Vessel… in connection with the cargo operations…"?*

29. I would make the following preliminary observations in relation to Clause 19.7.3:

(1) The context of the Clause is the provision of documents relating to a claim by Owners for additional time in loading or discharging the cargo. Its focus is the

loading and discharging operations and why that has taken longer than the time set out in the Clause.

(2) The specific documents referred to in Clauses 19.7.1 and 19.7.2 both specifically relate to the performance of loading and discharging operations.

(3) Construed in context, Clause 19.7.3 is likely to be sweep up provision to catch documentary records similar to those covered under Clauses 19.7.1 and 19.7.2. As the Tribunal observed:

> "….different vessels and different terminal will not all keep the same type of record and that it was not possible for the draftsman to specify precisely what classes of documents would exist in any particular case which are relevant to an owner's claim for demurrage."

30. Turning to consider the wording of Clause 19.7.3 against that background (so far as relevant to the present case) the documentation has to be "maintained by those on board the Vessel" and "in connection with cargo operations". In my judgment this connotes contemporaneous records kept by the vessel relating to the cargo operation. The Pumping Log is the most obvious example of such a document but some vessels may keep similar but different records.

31. The Owners submitted that it means documentation involving regular updates as compared to 'one-off' documentation and is to be compared with the wording in the previous version of the BPVoy terms, the BPVoy3 form, which referred to "any documentation generated by the Vessel…". They also drew attention to the Charterers' own submissions in the arbitration to the effect that "maintained" refers to a "record of the type that is kept/compiled on an ongoing basis to evidence a series of transactions and/or activities over a period of time" which was to be contrasted with "one-off documents such as e.g. a statement of facts coming into being solely for the purpose of the demurrage claim". I consider that there is some force in that approach and the distinction drawn and that it may be helpful as general guidance rather than as a definition. Contemporaneous records kept by the vessel relating to the cargo operation will often be kept on such an ongoing basis, but not necessarily so.

32. As to whether the port logs and time sheets in this case are such records this would be a matter for the Tribunal to determine. If I had ruled in the Owners' favour on Question 5 I would accordingly have remitted the issue to the Tribunal for it to decide in the light of the guidance provided as to the meaning of the clause. In the circumstances, I do not propose to answer this Question in terms, but rather as set out above.

Question 5: *"On a proper construction of Clause 20.1, does "all supporting documentation substantiating each and every constituent part of the claim" for a claim for demurrage which is not "additional time" for cargo operations within the meaning of Clause 19 of the BPVoy4 form charterparty require owners to provide all relevant supporting documentation, or only 'essential' supporting documentation?"*

33. In relation to Clause 20.1 the Tribunal ruled as follows:

> "41. Clause 19.7 requires that there should be a claim in writing as there was in the e-mail dated 5th August 2011. It also requires that *"all supporting documentation substantiating each and every constituent part of the claim"* be presented to FAL within 90 days of completion of discharge at Port Sudan, in other words by 27th October 2011. The Court of Appeal held in *The "Abqaiq"* [2012] 1 Lloyd's Rep 18 that it was not necessary for the supporting documentation to be presented with the claim itself, but it had to be presented within the 90 days. This decision does not assist Kassiopi because the only supporting documentation which was presented in time was that which was attached to the e-mail dated 5th August 2011, and the only supporting document which was subsequently presented was Captain Karalexis's witness statement and its exhibits which was not presented to FAL until Kassiopi's Rejoinder Submissions were served on 24th February 2014.
>
> 42. It follows from what we have said above that although some of the supporting documentation was presented within the 90 day period, not all of it was. In particular, "ADVENTURE's" port log and time sheets were not presented at all and the e-mail from the master dated 22nd July 2011 on which Captain Karalexis had written in manuscript the information that free practique had been granted at Sitra was not presented in time. The consequence is the one which the parties agreed in clause 20. I should follow, namely that FAL are discharged and released from all liability in respect of Kassiopi's claim for demurrage; see *The "Eagle Valencia"* [2010] 2 Lloyds Rep 257 at 264 where the Court of Appeal held that where an invalid notice of readiness was presented in time and a valid notice of readiness was presented out of time, the claim for demurrage was extinguished in accordance with the terms of the charterparty in that case."

34. The Owners submitted that the Tribunal's statement in paragraph 42 that "It follows from what we have said.." that not all of the supporting documentation was presented shows that their decision was based on their error in treating the Owners' obligation as being equivalent to that of arbitration disclosure. The Charterers, on the other hand, submitted that the Tribunal has asked itself the right question – has *"all supporting documentation substantiating each and every constituent part of the claim"* been presented – concluded that it had not been and that there is no error of law.

35. The Owners further submitted that the Tribunal erred in that on its proper construction Clause 20.1 only requires presentation of "essential" supporting documentation, which generally means the NOR and Statement of Facts, and that such documents were presented.

36. In this connection the Owners relied on the statements made in Longmore LJ's judgment in *The Eagle Valencia* [2010] 2 Lloyd's Rep. 257 at [30] that: "an essential document in support of every demurrage claim is the notice of readiness" and that if the relevant NOR was not submitted with the demurrage claim then the

claim could not be said to be "fully and correctly documented" as per the demurrage time bar clause in question. They further relied on Tomlinson LJ's statement in *The Abqaiq* at [64] that "In the present case no essential document was missing from those presented…" as showing that the Court of Appeal considered that the proper meaning of the phrase "all supporting documentation" was all essential documents rather than every document that might lend support to the owner's case.

37. In my judgment in neither of the passages relied upon was the court seeking to define what documents are required to be presented under the Clause. In *The Eagle Valencia* Longmore LJ was simply stating that the NOR is an essential document; he was not saying that only essential documents need be presented. Similarly in *The Abqaiq* Tomlinson LJ was stating that in that case all the documents required for the purpose of Clause 20.1 had been presented; in that sense all "essential" documents had been presented but he was not defining the requirements of the Clause in such terms.

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 [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 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 timesheet. 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 "<u>all</u>" such documentation. Where the Owners have available documentation from the load and discharge ports such as port logs and timesheets 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/timesheets. 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 timesheets were required to be presented. Whether the email with the manuscript note had to be presented is open to more doubt. In most cases secondary documentation of this kind would not be so required. However, in this case the time when free practique was granted was important to the commencement and proper calculation of laytime and there was no record in the documentation provided of when it was granted at Port Sudan (in contrast to Sitra where it was recorded in the Statement of Facts). In such circumstances it probably is to be regarded as a supporting document, as the Owners so treated it and the Tribunal so found.

43. The Tribunal found that the consequence of the Owners failure to comply with Clause 20.1 was that their claim was "wholly barred". It follows that the claim fails regardless of whether or not the claim is partially barred under Clause 19.7.

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 *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 Eternity* [2009] 1 Lloyd's Rep 109 David Steel J took a broader view. As he stated at [37]-[38]:

> "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."

45. These 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 *Voyage Charters* at 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".

46. My answer to Question 5 is accordingly that Clause 20.1 is not limited to a requirement to provide "essential" supporting documentation only and that it is to be construed in the manner outlined above. I also conclude that the Tribunal was correct to find that all supporting documentation was not provided as required by the Clause with the consequence that the claim for demurrage is time barred.

Conclusion

47. For the reasons outlined above the Tribunal was correct to find that the Owners' claim for demurrage was time barred and the appeal is therefore dismissed.