

JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 31st October 2007

1. This is an application by the defendant, Trafigura AG ("Charterers") for summary judgment under part 24 of the CPR. The basis of the application is that a claim for demurrage in the sum of USD114,887.40, made by the claimant, Waterfront Shipping Company Limited ("Owners") is time-barred pursuant to clause 23 of a charterparty of the M/T Sabrewing ("the Vessel"), dated 18 July 2005 and concluded on a Beepeevoy 3 form, by reason of Owners' failure to produce "supporting documentation" within 90 days of discharge of cargo.
2. The particular point upon which Charterers rely for the purposes of this application for summary judgment is Owners' failure to provide:
 - i) pumping logs signed by:
 - a) a responsible officer of the Vessel; and
 - b) a representative of the terminal or of Charterers; and/or
 - ii) a note of protest as to the lack of countersignature by a terminal or Charterers' representative.

Charterers contend that these missing documents were expressly required to be produced in support of Owners' demurrage claim, given the terms of clause 16 of the charterparty.

Relevant clauses of the charterparty

3. For present purposes, the charterparty contained the following material provisions:

"Recap

Laydays commencing: July 19, 2005

Laydays cancelling: July 21, 2005

Demurrage: USD23,000 PDPR

Laytime: 84 hours SHINC

...

13. Owners undertake that the Vessel is equipped with a fully functional Crude Oil Washing System and that the officers and crew are properly qualified by way of certification for, and experienced in, the operation of such System.

...

For all such crude oil washing the period for discharge specified in Clause 16 shall be increased from 24 to 30 hours pro rata thereof in the case of a part cargo. Any additional time taken for discharge and crude oil washing shall not count as laytime or, if the Vessel is on demurrage, as demurrage.

...

16. Owners shall undertake that the Vessel shall discharge a full cargo, as defined hereunder, within 24 hours, or pro rata thereof in respect of a part cargo, from the commencement of pumping or that the Vessel shall maintain an average discharge pressure of 100 psig at the Vessel's manifold throughout the period of discharge except when stripping provided that the shore receiving facilities are capable of accepting discharge of the cargo within such time or at such pressure. The shore receiving facilities shall have the right to gauge discharge pressure at the Vessel's manifold.

Any additional time used owing to the inability of the Vessel to discharge the cargo within 24 hours or 30 hours, as the case may be, or such shorter period as may be applicable in the case of a part cargo, or to maintain a average discharge pressure of 100 psig at the Vessel's manifold throughout the discharge except when stripping shall be for Owners' account and shall not count as laytime or, if the Vessel is on demurrage, as demurrage. If the shore receiving terminal facilities are unable to accept discharge of the cargo within the aforementioned time or at the aforementioned discharge pressure the Master shall present the shore receiving terminal with a Note of Protest forthwith, and in any event prior to the Vessel's departure from the berth, and shall use all reasonable endeavours to have such Note of Protest countersigned on behalf of the shore receiving terminal in the absence of which countersignature the Master shall present a further Note of Protest to the shore receiving terminal.

For the purpose of this Clause, a full cargo shall mean the quantity referred to in Clause 3 or the Bill of Lading quantity, whichever is the greater.

Charterers will not consider any claim by Owners for additional time used in the foregoing circumstances in the absence of the provision by Owners of the following documentation:-

- (a) *an hourly pumping log, signed by a responsible officer of the Vessel and a terminal or Charterers' representative, showing the pressure maintained at the manifold throughout discharge and, in the absence of a signature from a terminal or Charterers' representative, a Note of Protest;*
- (b) *copies of all Notes of Protest issued or received by the Vessel in relation to the discharge in question; and*
- (c) *copies of any other documentation generated by the Vessel or by the shore receiving terminal relevant to the discharge in question.*

...

20. *Time shall not count against laytime or, if the Vessel is on demurrage, for demurrage where spent or lost: -*

...

- (b) *due, whether directly or indirectly, to breakdown, inefficiency or other cause attributable to the Vessel and/or Owners, including inability of the Vessel to pump out the cargo at the rate indicated in Clause 16 after taking account of any variations in back pressure;*

...

22. Charterers shall pay demurrage at the rate of US\$... 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 the laytime specified in Clause 18.

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

...

55. The construction, validity and performance of this Charter shall be governed by English Law. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter."

Facts which are common grounds for the purposes of this application

4. For the purposes of this application the following facts are common ground. Under the terms of the charterparty, Owners chartered the Vessel to Charterers to carry a cargo of unleaded gasoline from New York to Vancouver. The Vessel arrived at New York on 18 July 2005. Although the Vessel was described as having a deadweight of 49,323.00mt and the quantity loaded was 38,215.513mt, Charterers were prepared to accept, for the purposes of this application, that the Vessel loaded a full cargo, between 22 and 24 July 2005. Time allowed for loading and discharge was 84 hours, and the time used for loading at the load port was 118.683 hours, so, upon leaving New York, the Vessel had already been on demurrage for 34 hours and 41 minutes.
5. The Vessel then sailed to the discharge port of Vancouver, Canada. The Vessel tendered Notice of Readiness at 0600 hours on 12 August 2005. The Vessel anchored at 1318 hours, as the berth had been occupied, and time started to run at 1918 hours on 12 August. As the laytime allowance of 84 hours had already been utilised at the load port, the Vessel went on demurrage immediately. Time between 0706 hours and 0830 hours on 14 August 2005 was spent moving from the anchorage and, in accordance with clause 20(a), did not count as time on demurrage. In addition, in accordance with clause 20(b), time between 1435 hours and 1640 hours on 15 August 2005 did not count due to a broken gasket. The hoses were disconnected and time ceased to run at 1330 hours on 16 August 2005. A total of 86 hours and 43 minutes was used at the discharge port.
6. Total time used at the load and discharge ports was 205 hours and 24 minutes. Accordingly, the total time on demurrage was 121 hours and 24 minutes. At a demurrage rate of USD23,000 per day (less 1.25% commission), this left a balance by way of demurrage due to Owners of USD114,887.40.
7. Given that the Vessel was, for present purposes, fully laden, clause 16 contained an undertaking that the Vessel should discharge the cargo within 24 hours, or maintain a minimum discharge pressure of 100 psig at the Vessel's manifold throughout discharge, shore facilities permitting. According to the Port Stay Report for the discharge port, the Vessel began discharging at 1205 hours on 14 August 2005, and completed discharge at 1115 hours on 16 August 2005. Bulk discharge therefore occupied a period of 47 hours 10 minutes.
8. The ninety-day period for presenting a claim for demurrage in accordance with clause 23 of the charterparty expired on 14 November 2005 (90 days after the completion of discharge).
9. On or about 26 October 2005, Charterers received, via brokers, a hard copy of Owners' claim for demurrage, together with various supporting documents upon which Owners relied in support of their claim.
10. On or about 4 November 2005 Charterers received, again via brokers, further documents from Owners. Owners, or their brokers, wrote "Further to demurrage claim we are attaching pumping logs for referenced voyage". However, the attached documents were not:
 - i) on their face described as pumping logs;
 - ii) signed by a responsible officer of the Vessel;
 - iii) signed by a terminal or charterer's representative; or
 - iv) signed at all.
11. In the meantime, however, on or about 25 October 2005, Charterers obtained, via a third party, a vessel discharge record relating to the discharge of the Vessel at Vancouver. Certispec Services Inc ("Certispec") was the cargo surveyor at the discharge port. For the purposes of the summary judgment application only, Charterers accepted that Certispec was Charterers' representative in relation to discharge. The Certispec vessel discharge record purported to record pressures at the Vessel's manifold. It is on Certispec headed paper and is signed by Certispec. It contains spaces for the insertion of the name of, and a signature by, the Vessel's chief officer. However, those spaces are left blank.

The issues which arise on the Part 24 application

12. Counsel for Charterers, Mr. Michael Ashcroft, contends that the following issues arise, and are suitable, for summary determination under Part 24 on the basis of the facts agreed for the purposes of this hearing:
 - i) Question 1: On a true construction of the charterparty, were Owners obliged to provide to Charterers prior to 14 November 2005 as part of the supporting documentation under clause 23 necessary to support the demurrage claim made in this action:
 - a) pumping logs signed:

- i) by a responsible officer of the vessel and
- ii) by a terminal or charterers' representative; or
- b) in the absence of a signature from a terminal or charterers' representative:
 - i) pumping logs signed by a responsible officer of the vessel; and
 - ii) a note of protest as to the lack of countersignature on such pumping logs from a terminal or Charterers' representative?

Charterers submit the answer to this question is "yes".

- ii) Question 2: If the answer to the first question is 'yes', on a true construction of the charterparty, what is the effect of the Claimants' failure to provide the required documents by 14 November 2005? This gives rise to two sub-issues:

- a) First, was the failure to comply with the obligation to provide pumping logs signed by Owners *de minimis* and therefore legally irrelevant?

Charterers submit that the answer to this sub-issue is "no".

- b) Second, if the failure to comply was not *de minimis*, is it possible to break the claim into parts such that only some part of the claim is time-barred?

Charterers submit that the answer to this sub-issue is 'no', with the result that the entire claim is time-barred.

- iii) Question 3: In the abstract, can the futility argument apply as a matter of principle in the context of clause 23 of the present charterparty so as to excuse Owners' compliance with the requirement to provide pumping logs signed by the terminal or Charterers' representative?

Charterers submit that the answer to this question is "no".

- iv) Question 4: If the answer is to the third question is 'yes', does the futility argument assist the Claimants in the present case, given that the Certispec vessel discharge record is not signed by or on behalf of Owners?

Charterers submit that the answer to this question is 'no'.

- 13. I was told that other factual issues do exist between the parties, which are not suitable for summary determination, and which may have to be decided subsequently, depending upon my determination of, or approach to, the above four questions. Thus, for example, it may be that the unsigned "pumping logs" that Owners provided in support of the demurrage claim do not record pressures at the vessel's manifold. That issue would require factual and possibly expert investigation. If the documents do not show pressures at the Vessel's manifold, Charterers would wish to argue that that is a further reason why they should be considered defective (irrespective of the lack of signature(s)), with the consequence that the claim is time-barred. However, it was agreed that for the purposes of the hearing before me it would be assumed that they did adequately record pressure at the ship's manifold. Secondly, there may well be an issue as to whether the Certispec vessel discharge record contains the exact same data that should have been contained in any pumping logs that Owners were obliged to provide. There may also be an issue as to whether Certispec was Charterers' agent/representative. If the data were different, or if Certispec was not Charterers' agent/representative, Charterers would wish to argue that this provides a further reason why the "futility principle", even if applicable as a matter of law, does not assist Owners on the facts. Thirdly, Owners suggested that the pumping logs might in fact be signed on their behalf, and that accordingly another factual issue arose in this respect.

Importance to the market of the issues

- 14. Although the amounts in contention in this case are small, I was told that the points of principle which arise in relation to the above issues are important to the market. Beepeevo 3 charterparties are used widely. A number of trading companies, including Defendant Charterers in the present case, trade regularly on the basis of this form. I was told that the type of issues raised in the present case have surfaced in a number of London arbitrations, including a very recent one in which Mr. Ashcroft, and counsel for Owners, Mr. Charles Kimmins, were both involved. In those other cases, relatively substantial sums apparently turn on the same, or substantially the same, points as arise in this case.

The approach to construction of time-bar clauses

- 15. It was common ground between counsel that a demurrage time-bar clause must be clear and unambiguous if effect is to be given to it. Thus, if there is any residual doubt about the matter, the ambiguity is to be resolved in such a way as not to prevent an otherwise legitimate claim from being pursued; see *Pera Shipping Corporation v Petroship SA ("The Pera")* [1985] 2 Lloyd's Rep 103 CA at 106 per Lloyd LJ, and at 108 per Slade and Griffiths LJJ. However, the words in a time-bar provision must be given their ordinary and natural meaning. A time-bar provision is, or is closely analogous to, a limitation clause. Thus, the especially exacting principles of construction that apply to exemption clauses probably do not apply to time-bar provisions; see Lewison, *The Interpretation of Contracts*, 2nd Edition paragraph 11.15. The *contra proferentem* rule is only invoked as a last resort if the meaning of the words is so finely balanced that the *contra proferentem* rule should be applied in favour of Owners; see *Mira Oil Resources of Tortola v Bocimar, "The Obo Venture"* [1999] 2 Lloyd's Rep 101 per Colman J at 104.
- 16. The authorities show that parties are obliged to comply carefully and strictly with demurrage time-bar clauses of this sort, which are well-known within the industry. Importance is also attached to requirements for signed documents where included. As Bingham J (as he then was) stated in *The Olenia* [1982] 1 Lloyd's Rep 448 at 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 (cf *Metalimex Foreign Trade Corp v Eugenie Maritime Co Ltd* [1962] 1 Lloyd's Rep 378 at 386 per McNair J). 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 in relation to quantum only, just as a doctor's bill would be a document supporting a claim for damages for personal injury. The owners would not, as a matter of common sense, be debarred from making factual corrections to claims presented in time (as they have done to the claim in para 12(A)), nor from putting a different legal label on a claim previously presented, but the owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to *de minimis* exceptions) have not been presented in time. It is true that the drafting of the clause would give a legal draftsman little cause for pride, but it was obviously not the work of a legal draftsman and that is a good reason for not embarking on any sophisticated legal exegesis. One possible, though strict, interpretation, that the presentation of any claim has the effect of preserving all claims, was not embraced by [counsel for the owners] with any show of enthusiasm, and indeed it borders on the absurd. Clause 24 is not in my judgment inconsistent with my construction: claims could be introduced into an arbitration even though they had not originally been the subject of the arbitration, but the charterers would have a defence if cl M2 had not been complied with."

17. The commercial purpose of such clauses is also to achieve finality; per Judge Hallgarten QC in *The Yellow Star* [2002] 2 Lloyd's Rep 637 at 641.

Question 1 - On a true construction of the charterparty, were Owners obliged to provide signed pumping logs to Charterers prior to 14 November 2005, as part of the supporting documentation under clause 23 necessary to support the demurrage claim made in this action?

18. Mr. Kimmins, for Owners, submitted as follows:

- i) As a matter of construction, Owners were not time-barred if they failed to provide signed pumping logs within 90 days, because there was no obligation to provide signed pumping logs within 90 days under clause 23. Under that clause, all that Owners had to produce were the usual documents which evidenced the sum claimed by Owners, such as, for example, a Notice of Readiness to demonstrate when time began, and a statement of facts to demonstrate when hoses were disconnected.
- ii) There was no need to provide pumping logs at all under clause 23, because Owners' claim was not dependent upon these logs. The pumping logs might sometimes be relevant to a defence run by Charterers to a claim for demurrage, but they were not relevant to Owners' claim for demurrage. Breach of the pumping warranty amounted to an exception to laytime under clause 20 of the Charterparty, and accordingly, the burden of proof was on Charterers to prove an exception to laytime; see *Summerskill*, 4th Edition, paragraph 8-27.
- iii) In any event there was no reason for Owners to provide pumping logs when they might not know whether they were in breach of the pumping warranty, or whether Charterers intended to take any point on the pumping warranty.
- iv) But even if pumping logs were required, these were in fact provided within time because there was no requirement under clause 23 for pumping logs to be signed by the Owners and terminal/charterers, or, failing a signature from the terminal/charterers, no requirement for the production of a notice of protest.
- v) It was an illegitimate approach to construction for Charterers to seek to borrow some of the provisions of clause 16, so as to enlarge the scope of Owners' obligations under clause 23. There was no link between clauses 23 and 16, which respectively served entirely different purposes. Clause 23 did not refer to clause 16, and clause 16 did not refer to clause 23. There was no justification for borrowing provisions from clause 16 in order to bolster the width of the time bar under clause 23. In any event, it could not be said that the clause clearly or unambiguously required the provision of signed pumping logs by Owners within the 90 day period, so as to meet the certainty requirements for the construction of these type of time provisions.
- vi) Clause 23 was a time bar provision, requiring production by Owners of the documents evidencing their claim for demurrage within the 90 day period. However, clause 16, entitled "Pumping", merely determined the pumping rate which must be met by Owners, and the consequences of Owners' failure to meet the required rate. It provided that Charterers would not consider any claim by Owners for "additional time used" unless certain documents were produced. But clause 23 imposed no obligation to provide additional documents where there is said to be a claim for "additional time used".
- vii) But a claim for "additional time used" is only made when Owners are in breach of the pumping warranty. When Owners are in breach of the pumping warranty, there then arises an issue as to whether that was caused by the vessel, or by the shore terminal. If the former, then Owners may not claim the additional time used. If the latter, Owners can claim the additional time used. The documentary requirements under clause 16 ensure that Charterers are provided with adequate information and documentation to enable them to consider whether the pumping warranty was fulfilled, and if not why not. But there was no time limit within which such documents must be provided.
- viii) The pumping warranty consists of two discrete alternative obligations on the part of Owners: (1) to discharge within 24 hours, or (2) to discharge with an average discharge pressure which is not less than 100 psig, except when stripping (line 221), and after taking into account any variations in back pressure (lines

293/4). It is only when neither of these is fulfilled that Owners arguably have a claim for "additional time". Line 224 of the charterparty provides: "Any additional time used owing to the inability of the Vessel to discharge within 24 hours, ..., or to maintain an average discharge pressure of 100 psig ...". That is the "additional time" referred to in line 236.

- ix) Hence Owners will not know whether they are claiming "additional time", and so whether to provide additional documents, until they have worked out the average discharge pressure (except when stripping (line 221), and after taking into account any variations in back pressure (lines 293/4)). This may well be in dispute. Discharge may have taken place in several instalments, and there may have been 2 or more hoses. The pressures may not be immediately apparent in any event. Owners may have to carry out complex conversion calculations to ensure the figures were in psig. The vessel may have recorded different pressures at its manifold to those taken by the terminal at the manifold. There may be other disputes, for example as to the existence and effect of "variations in back pressure". All these factors illustrate the uncertainty that can arise in seeking to determine whether Owners were in breach of a pumping warranty. Uncertainty is not compatible with time bars.
- x) Furthermore, on Charterers' case, Owners would have to do all this within 90 days, even if it was quite clear that the problem was shoreside, and even if the Charterers had never indicated that they would allege a breach of the pumping warranty. The parties cannot have intended the clauses to operate in this manner. Owners' construction makes much more commercial sense. There is no time limit within which to provide pumping documents. But if there arises a serious issue as to pumping rates, Owners must provide particular documents before Charterers will pay for additional time. Charterers remain protected on Owners' construction, as additional documents must still be provided under clause 16 (but not within 90 days).

Conclusion on Question 1

- 19. In my judgment, on the main issue (namely whether, as a matter of the construction of clauses 16 and 23, Owners' claim is time-barred in whole, or in part because of the failure to provide signed pumping logs) Charterers' arguments are to be preferred. It is obvious from the plain reading of clause 16, that, in any case where the Vessel takes longer than 24 hours to discharge its cargo (as it did here), the issue will immediately arise whether Owners have complied with their alternative obligation under clause 16 to maintain an average pressure of 100 psig. Thus, if, as here, the Vessel has taken approximately 47 hours to pump out her cargo, demurrage will only accrue for the additional time beyond 24 hours if the required average pressure has been maintained by the Vessel. Necessarily in such circumstances, any claim for demurrage in respect of the period beyond 24 hours, is a claim for "additional time". Here, Owners' demurrage claim included a claim for 45 hours 5 minutes discharging pumping time (2 hours, 5 minutes having correctly been excluded as attributable to a broken gasket). Indeed, the only claim that could be made in respect of "additional time" is a claim for demurrage.
- 20. I see no logic in Owners' argument that "additional time" is only brought into play for the purposes of clause 16 if the Vessel is in breach of the pumping warranty. That is commercially absurd, as, necessarily, Owners have no claim for additional time in respect of a period where they have been in breach of their pumping warranty.
- 21. Likewise, I was not impressed by Owners' argument that they do not need to produce documents to anticipate a defence by Charterers. As Mr. Ashcroft pointed out, the onus is on Owners to support their claim with appropriate documents. Unless they produce pumping logs, they cannot, in circumstances where discharge has taken longer than 24 hours, justify their claim for additional time as clause 16 makes clear.
- 22. Nor do I accept Owners' further argument that there is no linkage between clauses 16 and 23. Clause 16 supplements the provisions of clause 23 by making it clear that Charterers are under no obligation even to consider a claim for demurrage for additional time if the 24 hour rule is exceeded, unless effectively Owners have demonstrated, by provision of the relevant documentation identified in clause 16(a)-(c), that they are not in breach of their pumping warranty, and that the fault lies with the terminal. Thus clause 16 identifies some of the necessary "supporting documentation" for the purposes of clause 23.
- 23. Such an interpretation is consistent with commercial sense and certainty. The whole purpose of demurrage time bars is that Charterers are provided promptly with all the documents necessary in order to consider Owners' demurrage claim. The practical difficulties that Mr. Kimmins suggested Owners might encounter in having to produce the documents identified in clause 16(c) within 90 days were, upon analysis, more imagined than real. If the terminal had not "generated" a document "relevant to the discharge in question", in the sense of producing it upon requests by the Vessel within the 90 day period, Owners would hardly have come under an obligation to produce it, as opposed to a note of protest. The clause would not be construed as imposing an obligation upon Owners to produce documents that it was realistically impossible for them to obtain from the terminal within the 90 day period.
- 24. Accordingly, in my judgment, the answer to question 1 is "Yes". I am supported in this conclusion by certain arbitral decisions; see, for example, *The Divine Star* SMA 2883 (16 July 1992); and London Arbitration 8/01 (LMLN 560); and also by certain textbooks: see, for example, *Lloyd's Practical Shipping Guides, Laytime and Demurrage in the Oil Industry* (Edkins and Dunkley) page 71; *Voyage Charters*, 3rd Edition paragraph 60.35 – 60.38, although it is fair to say that some arbitral decisions have been to contrary effect.

Question 2, sub-issue (a): Was Owners' failure to provide signed pumping logs by 14 November 2005 de minimis and therefore legally irrelevant?

25. In this context, Mr. Kimmins submitted that, even if Owners were in breach of the pumping warranty and were obliged to provide pumping logs signed by Owners within 90 days under clause 23, the lack of signatures by Owners was *de minimis*, and accordingly Owners were not time-barred. (He had a different argument in relation to the absence of signatures by Charterers' representatives, to which I refer later). He contended that documentary requirements under time bar provisions of this nature were subject to principles of *de minimis*, and he relied upon *London Arbitration 21/98*, and *The Oltenia (supra)*. In other words, if a failure to comply with an obligation to provide a particular document was trivial, then such failure might not result in a claim being barred.
26. So far as the absence of signatures from Charterers' representatives was concerned, Mr. Kimmins submitted that, on Tuesday 17 July 2007, Charterers disclosed pumping logs which they had received, allegedly from their local agents, which were signed by Certispec. On the assumption that Certispec were Charterers' agents, it would follow that Charterers did receive pumping logs signed by Charterers' representatives, within the 90 day period. He relied on the futility principle in this regard (as to which see Question 3 below), and contended that Owners should not be time barred if the missing documents were in fact provided to Charterers, albeit by a different source. Mr. Kimmins therefore submitted that Charterers' case was limited to a complaint that the pumping logs were not signed by Owners. Even this, he asserted, was subject to some doubt, as some pages of the logs provided by Owners appeared possibly to have signatures of some kind in the top right hand corner. He told me that Owners are currently investigating whether the logs provided by them within the 90 day limit were in fact signed by them. But even if the Owners' signatures were missing, Mr. Kimmins contended that this deficiency was *de minimis*. Given that the pumping logs provided by Owners were obviously the Vessel's documents (and, indeed Charterers' case is that they came from the pumping control room), he submitted that the failure of Owners to sign the document was of little significance; it cannot have resulted in any prejudice to Charterers, and, indeed, Owners could sign the documents now.

Conclusion on the *de minimis* point (a)

27. I reject Owners' argument in relation to the application of the *de minimis* principle to excuse their non-compliance with the obligation to provide pumping logs signed by Owners. In my judgment, there is a real commercial purpose and importance in requiring a signed pumping log to support a claim in these circumstances for additional pumping time in excess of 24 hours, i.e. to prove that they had maintained the required average pressure throughout the discharge and that the fault lay with the terminal. The signature of a responsible officer of the Vessel was obviously important to show that such a person was prepared to put his name to the document to confirm its accuracy, to authenticate it and to prove its provenance; see, by way of analogy the importance attached by Colman J to a signature on a charterparty in *The Obo Venture* [1999] 2 Lloyd's Rep. 101 at 103-104 and to a signature on a time-sheet by HHJ Knight QC in *Trans Oceanic Co Limited v Newton Shipping Limited ("The Minerva")* (unreported) 17 January 2001 at paragraph 6(2); see also in this context *The Oltenia (supra)*.
28. The same arguments would also apply, to the signatures of either a charterer's representative or a terminal representative (or in their absence, relevant notices of protest), on the assumption, for present purposes that the futility principle does not apply. I do not consider that the absence of any of these signatures was trifling or insignificant. I also take the view that, other than in very special circumstances (which do not exist here), the *de minimis* principle should not be applied to a document that (as I have held) is expressly required to be produced by the contract and is plainly relevant.

Question 2, sub-issue (b): given the absence of a signed pumping log, is only that part of the claim for "additional time" time-barred, or is the entire claim time-barred?

29. The issue that arises under this head is what are the consequences of Owners' failure to provide signed pumping logs. Mr. Kimmins, on behalf of Owners, submitted as follows:
 - i) First, he submitted that only the claim for "additional time used" would be time-barred. It would be most unjust if the entire claim for demurrage was time-barred. He contended that the time-bar would operate as follows. The Court would have to calculate when the Vessel would have completed discharge if she had not been in breach of the pumping warranty. Owners would be entitled to claim demurrage on the basis that the Vessel completed discharge at that time. Any additional time spent discharging would be additional time used, and would be time-barred. Mr. Kimmins submitted that this analysis was consistent with the judgment of HHJ Knight QC in *The Minerva (supra)* at paragraph 6(7):

"While my ruling means that the claim for demurrage at Marsaxlokk is time-barred, it does not follow that the totality of the demurrage claim is time-barred. I can see no justification for construing cl. L.13 as meaning that an owner can only submit one claim, although the claim may include claims relating to loading and a range of discharge ports. I accept Mr. Kimmins' submissions that i) provided the constituent parts of the claim can be broken down (as they can in this case) valid claims can be identified and quantified ..."
 - ii) Secondly, he submitted that the claim for "additional time used" was a distinct and severable part of the claim for demurrage. If, for example, one document relevant to that part of the claim was not signed by the terminal, it cannot sensibly be suggested that the entire claim for demurrage would be time-barred.
 - iii) Further or alternatively, he submitted that, at the very least, Owners would be entitled to demurrage incurred at the loadport, which was an approach which was consistent with the judgment of HHJ Knight in *The Minerva*.
30. In my judgment, however, the particular wording of clause 23 and the fact that, in the present case, only one composite claim for demurrage was made by Owners, means that Mr. Kimmins' argument has to be rejected, despite its initial superficial attraction. Clause 23 required Owners to present "a claim in writing" (my emphasis)

within 90 days of discharge of cargo, "together with supporting documentation substantiating each and every constituent part of the claim" (my emphasis). Unless such a claim, with supporting documentation, is presented within the relevant time period, Charterers are released "from all liability in respect of any claim for demurrage", i.e. not merely that particular constituent part of the claim that is not supported by relevant documentation. Accordingly, if, as here, only one composite claim for demurrage was made, Owners are time-barred in respect of the entirety of the claim, notwithstanding that the absence of documents only relates to one constituent part of the claim. It is clear from the Particulars of Claim, the invoice and the supporting documents, that only one single claim for demurrage was made in the present case.

31. The decision in "*The Minerva*" is not, of course, binding upon me, but, in any event, it is arguably distinguishable on its facts, not only because the wording in the relevant time bar clause was much less clear than the provisions of clause 23, but also because the judge appeared to treat the case as one where more than one claim for demurrage had been made (in respect of the loadport and the two different discharge ports); see paragraph 6(7) of his judgment.
32. Accordingly, I hold against Owners on this point and conclude that the entirety of the claim for demurrage is time barred.

Question 3: in the abstract, can the futility principle apply as a matter of principle in the context of clause 23 of the present charterparty?

Question 4: if the futility principle can, in the abstract, apply to a clause such as clause 23, can it apply on the (assumed) facts of this case?

33. I deal with these two issues together, as in the light of my earlier conclusions on construction and in relation to the point that it was not *de minimis* to require production of pumping logs signed by or on behalf of Owners, they do not strictly arise for determination, although, theoretically, they could do so in the event that the logs were in fact signed by Owners.
34. Mr. Kimmins submitted that Owners could rely on the futility principle to dispense with the need to show that Owners had produced pumping logs signed by Charterers' representative (Certispec) within the 90 day period. He contends that Owners should not be barred if logs signed on behalf of Charterers were produced by their agents (as opposed to by Owners) within the period. He relied upon the principle that the law never compels a person to do something which is useless or unnecessary: see *Barrett Bros (Taxis) Ltd v Davies Lickiss and Milestone Motor Policies at Lloyd's, Third Parties* [1966] 1 WLR 1334 at 1338. That principle can be articulated as follows: if, for example, a particular contractual requirement was not fulfilled by the claimant, but in circumstances where the fulfilment of that requirement would have added nothing of value to either party, then the requirement would be futile, and the claim would not be barred. He contended that Charterers were not entitled to ignore documents which were within their possession and which evidenced the claim. The purpose behind the time bar is to ensure that Charterers have sufficient documentation to evaluate the claim, and it should make no difference whether the documents were provided to Charterers by Owners or by others. He further submitted that there can be no absolute rule that Owners are not entitled to rely on documents provided to Charterers by third parties. He gave the example of a case where Charterers' claims' manager was considering the documents provided by Owners and noticed that one pumping log was missing, but in fact the claims' manager had available to him the missing pumping log signed by Owners recently received from his local agents. Mr. Kimmins suggested that in such circumstances the manager could not sensibly ignore that document and contend that Owners' claim was time-barred. He submitted that, on the facts, the precise circumstances in which the documents signed by Certispec were received by Charterers were not known. Nor, indeed, he pointed out, have Charterers confirmed that they have provided Owners with disclosure of all documents which they received from other sources within the 90 day period. He submitted that, in such circumstances, it could not be said that Owners' reliance on the futility principle had no real prospect of success. Accordingly, he argued that Owners should be given unconditional leave to pursue the claim.
35. In my judgment, Owners' submissions in relation to both Questions 3 and 4 should be rejected. Whilst I would not want to go so far as to hold that the futility principle could never apply in appropriate circumstances to clauses such as clauses 16 and 23, in the present case, where Owners are, as I have held, obliged to provide pumping logs countersigned by Charterers or Charterers' representatives (to confirm their contemporaneous agreement to the accuracy of the logs) I see no room for the application of the principle. A similar approach was taken in *The Yellow Star* (*supra*) at 641, paragraph 5, and in *The Minerva* (*supra*) at 12, paragraph 3.
36. As Mr. Ashcroft submitted, the decision of the Court of Appeal in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 also militates strongly against the application of the futility principle in the present context. The commercial purpose of a demurrage time-bar clause, requiring Owners to submit all supporting documents within a short time period, is to ensure certainty, to ensure that it is clear to Charterers at an early stage what the claim is and what documents are relied upon by Owners in support of it, so that they may take such steps as are appropriate to respond to, or investigate, it. It is important for Charterers to be told, in formal and certain terms, what Owners' claim is, and what documents Owners are relying upon in order to support that claim; see in particular paragraph 90-91 of the judgment of Stewart-Smith LJ at 441.
37. An important commercial purpose of the demurrage time-bar clauses in this case was to ensure that Charterers were presented with a package of documents by Owners that was sufficient in itself for them to consider (without

the need for any collateral investigation and, therefore, without the need to make any check of other documents received from third parties) in order to evaluate each and every part of Owners' claim. In my judgment, that is similarly fatal to the application of the futility principle: Charterers were entitled to look only at the documents supplied by Owners and to determine promptly, by reference to those documents alone, whether or not the Owners' claim was fully supported or was time-barred. Thus, in my judgment, the present case, like *Senate Electrical*, is readily distinguishable from *Barrett Bros (supra)*, relied on by Mr. Kimmins.

38. Moreover, and upon the assumption in Owners' favour that the Certispec vessel discharge record contained all the data that should have been provided by Owners in a vessel's pumping log, the absence of Owners' signature on the logs, confirming the accuracy of the content of the documents means that, on the facts of this case, the futility principle cannot apply in any event. On no basis can it be said that it was "useless and unnecessary" to require Owners to provide a document in which they confirmed, by the signature of a responsible Vessel's officer, the pumping performance of the Vessel. Accordingly, I do not regard the fact that Charterers received the Certispec vessel discharge record within the 90 day period (i.e. prior to 14 November 2005) as of assistance in relation to the arguments on the time bar.

Conclusion

39. Accordingly, in my judgment, Charterers, as defendants are entitled to summary judgment on the whole of Owners' claim for demurrage because it was time barred.

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Michael Ashcroft Esq (instructed by Middleton Potts) for the Defendant