

JUDGMENT : Mr Justice Cooke : Commercial Court. 31st January 2008

Introduction

1. This is an appeal under section 69 of the Arbitration Act 1996, brought with leave, against an Arbitration Award dated 13 August 2007 relating to a dispute under a long term time Charter Party dated 23 June 1999 between the Appellant Owners and the Defendant Charterers. The Owners were the Claimants in the arbitration and the Charterers were the Respondents. I shall for convenience refer to them throughout as Owners and Charterers.
2. Under the terms of the Charter Party, the vessel Channel Alliance was let to the Charterers for a period of 5 years, with Charterers' options to extend for a further 6th and 7th year. Additionally, the charter provided for a further 2 months plus or minus, at Charterers' option, for the final period of the charter, whether extended by the further 6th or 7th year or not. Additionally there was provision for a Charterers' option to add any off hire periods to the charter. The Charter Party was on the standard NYPE form with additional clauses. Though irrelevant for current purposes, the Owners had become party to the charter by novation in July 2004.
3. The vessel was delivered into the Charter Party on 10 September 1999 and in due course the Charterers exercised their options for the additional 2 years and ultimately the additional 2 months, so that the vessel was ultimately redelivered in November 2006.
4. The rate of hire under the charter was \$13,750, referred to as the floor rate, with a profit sharing agreement contained in clause 98. The dispute between the parties turned upon the proper construction of this clause. Because considerable profits were made in the last 2 years of the charter, substantial sums of money turn upon this issue.

The Charter Party

5. The relevant terms of the charter are as follows:-

"4. The Charterers shall pay for the use and hire of the said vessel at the rate of \$13,750 per day or pro rata including overtime net of commission....hire to continue until the hour of the day of her redelivery...."

35. PERIOD

Five (5) years two (2) months more or less in Charterer's option timecharter.

Charterer's option declarable latest at the end of the 54th month for an additional 6th year timecharter.

Charterer's option declarable latest at the end of the 66th month for an additional 7th year timecharter.

The 2 months more or less in Charterer's option to apply only on the final period.

58. OFF-HIRE EXTENSION

Charterers have the option to add off-hire period, if any, and option to be declared 30 days before redelivery.

98. PROFITSHARING

(1) Charterers and Owners agree that over the basic charter period of 5 years both Owners and Charterers will share the profit made on a 50/50 basis on the running of the vessel as compared to the floor rate of charter hire i.e. USD 13,750/day. The profit made will be calculated by comparing the floor rate of USD 13,750/day with the average rate reflected in the Baltic Cape Size Index (daily average of the routes 8-9-10-11 as published by the Baltic Capesize Index to be adjusted upwards by USD 975 per day or prorata to reflect the value of the MS Channel Alliance compared with the 'index' vessel) during any year of the basic charter period.

(2) Should during the currency of the Charter the Baltic Cape Size Index cease to exist as a means of comparison or should the parameters of the Index which existed at the time of conclusion of the Charter be amended, parties will agree a new reference rate. If parties cannot agree on such reference rate, in order to determine same parties will appoint a reputable London broker by mutual consent, or, if parties cannot agree on such broker each party will appoint their own broker who will both appoint a third broker should the two appointed fail to agree. The decision of the appointed broker or brokers will be binding.

(3) At time of fixing the Baltic Capesize Index (B.C.I.) is described as follows:

"Timecharter routes : based on a Baltic Capesize of the following specification : 161.000 mt dwt, not over 10 years of age, 176.000 cbm grain, max. loa 280 m, max. beam 45 m. 14 knots laden, 14,5 knots ballast on 52 mts fuel oil, no diesel at sea.

- Route 8 : Delivery Gibraltar-Hamburg range, 5-15 days ahead of the index date, trans Atlantic round voyage duration 30-45 days, redelivery Gibraltar-Hamburg range, 3.75 per cent total commission

- Route 9 : Delivery ARA or passing Passero, 5-15 days ahead of the index date, redelivery China-Japan range, duration about 65 days, 3.75 per cent total commission

- Route 10 : Delivery China-Japan range, 5-15 days ahead of the index date, round voyage 30-40 days, redelivery China-Japan range, 3.75 per cent total commission

- Route 11 : Delivery China-Japan range, 5-15 days ahead of the index date, redelivery ARA or passing Passero, duration about 65 days, 3.75 per cent total commission."

(4) At the end of each year of the basic charter period the profit or loss for that year will be assessed by comparing the average Baltic Capesize Index rate for that year (adjusted accordingly) with the basic charter rate over the number of days that the vessel has been in service excluding days of off-hire.

(5) *If a profit has been made in any particular year an advance in respect of Owners' share will be made by Charterers to Owners at the end of that year provided however that if losses have been made in the previous year(s) which are greater than the profit made no advance will be made. If during the currency of any year Charterers anticipate that there will be an overall loss taking into account the previous year(s) Charterers will be entitled to make deductions from hire to up to the total amount of profit already advanced to Owners during the preceding years to cover such loss.*

(6) *For profit sharing purposes, optional year(s), if declared to be considered on their own.*

(7) *Example profit sharing*

- year 1 : loss USD 300.000

No distribution/no reduction

- year 2 : profit USD 100.000 -

No distribution/no reduction

- year 3 : profit USD 400.000 -

Distribution of USD 100.000 to GO

(i.e. 50% of USD 400.000 - (USD 300.000-USD 100.000))

- year 4 : profit USD 500.000

Distribution of USD 250.000 to GO

- year 5 : loss USD 400.000

Charterers can deduct USD 200.000 from the hire (upto maximum the advances)"

The Parties' Contentions

6. For the purpose of this judgment, as in the Arbitrators' Award, I refer to the 7 sub-paragraphs of clause 98 by the numbers which appear by them in the copy of the clause set out above in this judgment.
7. Whilst the Charterers originally contended in the Arbitration that the 6th paragraph of clause 98 constituted no more than an agreement to agree about profit sharing in the 6th and 7th optional years, they abandoned that contention and submitted that the effect of this sub-paragraph, when read in the context of the charter as a whole, was to exclude the 6th and 7th years from the profit sharing arrangements. It was the Owners' contention that the effect of the 6th paragraph of the clause was to include the 6th and 7th years in profit sharing but to exclude them from the "set off" or "netting off" provisions set out in the first 5 paragraphs which applied only to "the basic charter period of 5 years". The Arbitrators accepted the Charterers' submissions.

The Commercial Background to the Charter

8. At the Arbitration, the Owners argued that the Charterers' construction of clause 98 was so favourable to the Charterers that it was difficult to conclude that this was what the parties had intended. In that context the Arbitrators found that there were 2 relevant sets of facts known to both parties at the time of concluding the Charter Party. First, it was known that the rate of \$13,750 per day was required by Owners to cover the financing and running costs of the vessel. Secondly, that the Charter Party rate agreed was above the market rate. They further found that the Charterers had a bullish view of the market but were taking a serious gamble because spot market rates had to improve substantially for the Charterers not to show a loss on a daily and accumulated basis. The Arbitrators concluded that, in the context of the transaction as a whole, it could not be said that the disapplication of the profit sharing agreement to the additional optional years was so advantageous to the Charterers that it could not have been the objective intention of the parties.
9. The Arbitrators did not thus rely on the commercial background to do anything other than counteract the argument put forward by Owners that it was unlikely that the parties would have agreed that there should be a profit sharing agreement for the first 5 years of the Charter but not for the 2 optional additional years, which would in all probability only arise if the Charterers foresaw future profits, since otherwise they would not exercise the option.
10. I can therefore focus upon the wording of clause 98 in the context of the Charter as a whole, as did the Arbitrators. The Arbitrators took the view that the profit sharing obligation was set out in paragraph 1 of clause 98 and that the scope of the obligation was, by the terms of that paragraph, specifically limited to "the basic charter period of 5 years". The Arbitrators placed great weight upon those words in the first line and the words in the last line referring to "any year of the basic charter period".
11. It was the Arbitrators' view that paragraphs 1-5 of clause 98, when coupled with paragraph 7 provided for profit sharing on a netting off basis for the 5 year basic charter period and that the words of paragraph 6 were insufficiently clear to alter the express provision in paragraph 1 which "clearly and unambiguously restricted the profit sharing agreement to those 5 years". They found that, in the context of the whole clause, the meaning of paragraph 6 was clear but at no point in the award do they appear to have grappled with the words used.
12. Whilst the Arbitrators referred to the structure of the clause and went through the various sub-paragraphs of it in order to reach the conclusion which they did and referred to clause 35 in addition, in seeking to construe the wording of paragraph 6 in the context of the Charter Party as a whole, in my judgment they failed to give effect to the clear meaning of the paragraph itself.
13. The structure of clause 98 is, to my mind, relatively clear. Paragraph 1 of the clause does set out the basic obligation to share profits on a 50/50 basis "over the basic Charter period of 5 years". The manner in which the profit is to be assessed is set out by requiring a comparison of the floor rate of \$13,750 per day with the

average rate reflected in the Baltic Cape Size Index (as adjusted upwards in the manner set out in the paragraph) "during any year of the basic charter period". The second paragraph then provides for the contingency of the Baltic Cape Size Index ceasing to exist "during the currency of the Charter." Whilst the Owners placed weight upon this expression of duration, the Charterers pointed out that this was a contingency provision only and that the scope of the obligation set out in the first paragraph could not be changed thereby. The third paragraph set out details of the Index referred to in paragraph 1 and adds nothing to the issue of construction.

14. The fourth and fifth paragraphs of clause 98 not only set out the set off provisions by which a balance is to be struck in the form of netting off profits and losses but also for the time and manner of payment of amounts due. In the fourth paragraph there is provision for the profit or loss for each year "of the basic Charter period" to be assessed by making the necessary comparison over the days of service in that year, excluding off hire. The fifth paragraph however makes it clear that the "netting off" is to be effected on a 5 year basis whilst providing for payments to be made as advances in respect of Owners' share of profit following the end of year assessment, provided that there is an overall net profit at that stage in the light of previous years. It also provides for a claw-back by the Charterers on the basis of an anticipated loss in any particular year where advances have already been made in respect of profits. During any year in the 5 year period, the Charterers can, if they anticipate an overall loss, taking into account the previous years' figures, make deductions from hire but only to the extent of the advances already made in respect of profit. Owners thus always remain entitled to the floor rate of \$13,750 per day and ultimately, by the terms of paragraphs 1-5 of clause 98, obtain a 50% share in any net profit over the 5 year term. During the course of that term they may receive advances or suffer claw-backs as the profit/loss figures or anticipated profit/loss figures fluctuate.
15. The seventh paragraph of clause 98 sets out an example of profit sharing which shows how this works over the 5 year period.
16. It is against this background that reference is to be made to the terms of paragraph 6 of the clause which reads:-
"For profit sharing purposes, optional year(s), if declared to be considered on their own."
17. In my judgment, the meaning of this sentence is clear. It cannot mean what the Arbitrators have effectively taken it to mean, namely that the optional years are not to be considered for profit sharing purposes. To the contrary, there is express provision that, where an option is exercised, the year is to be considered for profit sharing purposes. I cannot see any other sensible meaning to be attached to this form of words.
18. As Owners submitted, the significance of the clause is that "optional year(s), if declared" are to be considered separately from the 5 year netting off process set out in the balance of the clause. The sentence does not exempt those years from profit sharing but exempts them from the balance to be struck in respect of profits and losses in the basic Charter period. The sentence in paragraph 6 is not capable of a great deal of analysis but it plainly requires years 6 and 7, if the option is exercised, to be considered in the context of profit sharing. The words "on their own" equally plainly require these years to be considered individually, as opposed to being taken in conjunction with the earlier 5 years.
19. The reason for the use of terminology referring to "the basic Charter period" in paragraph 1 of the clause is because that paragraph, as well as paragraph 5 makes it plain that profits are to be shared on a 50/50 basis with an assessment over the full 5 year period albeit that interim calculations are made on a yearly basis. The wording at the beginning of paragraph 4 - "at the end of each year of the basic Charter period" is explicable on the same basis. In short, paragraphs 1-5 of clause 98 set out the position for the profit and loss sharing arrangement, on a netting off basis, for the 5 year period, whilst paragraph 6 makes it plain that profit sharing is to persist for the optional years, if declared, but that such years are to be considered separately in the context of assessment of profits for sharing.
20. I do not consider that paragraph 7 of the clause in anyway militates against this conclusion. There, an example is given of profit sharing over the 5 year basic Charter period, without reference to the optional years. The example however illustrates how the netting off provisions work as between profits and losses in various years. This is the most complicated part of the calculation and no example is given as to how otherwise to carry out the assessment of profits and losses for sharing in any particular year. Since the example shows how to net off the figures over the 5 years, there is no requirement to incorporate years 6 and 7 because they stand on their own.
21. There is no difficulty about the point of assessment and payment. Paragraph 6 refers to "profit sharing", without the netting off and thus incorporates the profit sharing provisions of the contract in relation to annual assessment and payment. To the extent that no specific time is set forth, it is self evident that a reasonable time after the year end is to be chosen for calculation and payment.
22. Both parties sought to fortify their arguments by reference to other clauses in the Charter Party. The Charterers and the Arbitrators both considered that clause 35 was of some assistance in as much as an unusual form of words was there adopted in referring to the option "for an additional 6th year timecharter" and "an additional 7th year timecharter". The suggestion was made that significance is to be attached to these words, as opposed to the use of the word "extension". I do not think that these words will bear the weight which is suggested. The very first line of the clause refers to "5 years 2 months more or less in Charterers option timecharter" which in itself is an unusual form of words. The references to the optional years simply repeat the word "timecharter" which appears at the end of that sentence.

23. Arguments were addressed to the existence of the Charterers' plus or minus 2 months option which applied only to "the final period". I agree with the Charterers' submission that not much is to be gained from this provision since, as the Arbitrators found, the 2 months extension (if the Charterers so exercise their option) must take its character from the preceding period to which it is an extension. Thus, on the Owners' argument, if the Charterers were to exercise an option for a 6th or 7th year and then an additional 2 months at the end of either of those years, that 2 month period would fall within the regime attributable to the final year. It would make no difference whether the final year was a year of profit sharing without netting off or a year when there was no profit sharing at all. The debate therefore adds nothing to the strength of either party's argument.
24. A more general point arises however in relation to the exercise of the 2 month option, as it does to the Charterers' option to add the off hire period to the Charter. If either or both of these options were exercised at the end of the 5 year period, there is no doubt (and it was not argued to the contrary) that profit sharing would apply to the periods in question. When clause 35 is considered, there is therefore no basis in the clause itself for suggesting that the terms applicable to the 5 year charter would not also be applicable to the additional time for which any option was declared, whether it be for the 6th year, the 7th year, the final 2 months or, under clause 58, for the off hire period.
25. In the ordinary way the terms and conditions of the Charter would apply to any extension under it, save to the extent that the Charter provided otherwise. To ascertain the position it is necessary therefore to return to clause 98 in order to see what that provides. For the reasons that I have already given, it is clear to me that paragraph 6 of clause 98 expressly provides for the profit sharing to apply to optional years declared by the Charterers on a separate basis from the netting off of shared profits and losses in the basic Charter period of 5 years.
26. As Owners argued, although this point did not attract favour with the Arbitrators, there is a possible commercial explanation for this difference. The parties agreed to a 5 year basic Charter period with the apportionment of risk as set out therein. There were pluses and minuses on both sides since the Owners committed themselves to a Charter for 5 years and thus deprived themselves of the benefit of any upward movements in the market, for which they were prepared to accept a basic rate of hire and a profit share. The Charterers committed themselves to a fixed rate, gauged at a level which they thought appropriate, given their view of the likely movement of the market in the next 5 years, with the profit sharing arrangement and claw-back of losses, if any. There was commercial risk in this in both parties' assessment of the likely movement of the market over the 5 years to which they were definitely committed. By contrast, the Charterers were given an option in respect of the 6th and 7th years which they would doubtless only exercise in the event of a favourable market at the time or a foreseen improvement in the market over the 6th or 7th year in question. The Owners were bound to accept the exercise of the option and had no further opportunity to consider the rates at the time or the future movement of the market. Thus it can be considered likely that the option would only be exercised in the event of an upward moving market, as in fact turned out to be the case. In such circumstances there is a commercial logic in the Owners being able to take a share of the profit in respect of any optional year, without any claw-back of losses. The option is exercised for a year at a time and profit is to be assessed in respect of that year alone.

Conclusion

27. The Owners are therefore entitled to a 50% share of the profits made in each of the 6th and 7th years and also the final 2 months declared by the Charterers at the end of the 7th year. The Owners calculated their 50% share of the profits for the additional 2 years and 2 months as \$14,865,008 but the Charterers' calculation, if wrong on principle, as I have held them to be, gave rise to an entitlement of \$14,679,557.84. The Owners had applied for a Partial Award in that amount, together with interests and costs, leaving the balance to be determined by the Arbitrators later.
28. I therefore vary the Award so as to hold that the Owners are entitled to the sum of \$14,679,557.84 together with interest and the costs of the appeal. Any balance claimed is a matter for the Arbitrators to determine.
29. It may well be possible for the parties to agree on the interest owed and other ancillary matters including the costs of the Arbitration and Award but if not, I will determine such issues at the formal hand down of this judgment.

Mr C Priday (instructed by Winter Scott) for the Claimant
Mr H Byam-Cook (instructed by Lax & Co) for the Defendant