Nippon Yusen Kubishiki Kaisha v Golden Strait Corporation [2003] Int.Com.L.R. 01/17

JUDGMENT : Mr Justice Morison : Commercial Court. 17th January 2003.

1. The parties entered into a contract in 1998 whereby the Owners, Golden Strait Corporation (the Owners) agreed to hire to NYK (the Charterers) a vessel named MT GOLDEN VICTORY (the Vessel). A dispute between the parties arose as to the date when the hire agreement could be brought to an end by the Charterers. The contract provided for arbitration in London and Mr Gaisford was jointly appointed as the sole arbitrator. He made an Interim Declaratory Award on 16 September 2002 in favour of the Owners. Cause 41 of the Charterparty which formed part of the contract, gave the parties a right of appeal to the Court on questions of law.

2. The appeal was heard on the last Friday of the Michaelmas term and this is my written Judgment. At the outset I would like to pay tribute to the care with which the Award has been prepared. If I might say so, the Award is a model of its kind, well-reasoned and, in my view, obviously right.

3. I start with the background facts, as found by the arbitrator. In 1998 the Owners were part of a group of companies known as Golden Ocean. The ultimate holding company of the Group was Golden Ocean Limited (GOL) which owned a company called Golden Ocean Group Limited (GOGL) which itself owned four companies, one of which owned a number of single ship owning companies including the Owners in this case. The Group had ordered a number of new buildings of VLCCs (supertankers) from the Hitachi Ariake Yard. The vessel was one such and in May 1998 the parties entered into negotiations for the charter of the Vessel, which culminated in the Contract. The first document in time was a fixture memo between GOGL and the Charterers. This recorded a confirmation of a 7 year fixture for the time charter of the Vessel. At this stage GOGL was described as the Owner and the Charterers were given an option to "*charter back*" the vessel to COGL at three and five years "*on the back to back basis*". The Fixture was stipulated to "*be subject to amicable discussion and mutual agreement of details of Charter Party including form of Charter party.*" Subsequently the details of the Charter Party were agreed, as was the identity of the owner, namely Golden Strait Corporation. And the written agreements forming the Contract were signed by the parties at the end of September 1998. The arbitrator concluded that the vessel was "*delivered into the Charterparty*" on 7 January 1999.

4. The Contract comprised a Charterparty on an amended Shelltime 4 form dated 10 July 1998 with two addenda dated 17 July 1998, and a Memorandum of Agreement (MOA) of the same date. Relevantly, and it was common ground, the Charter was for a seven year period commencing from the time and date of delivery of the vessel. There was a specific daily charter rate together with a profit sharing agreement whereby the Owners and Charterers were to share "*any operating profit over and above*" the stipulated charter rate. The Charterers were under an obligation to use their best efforts to fix the vessel at market related rates. The MOA recited that it was made "*with reference to the captioned Charter Party*" and provided

   "CHARTERERS' OPTION FOR PERIOD:-

   The Charterers shall have their option to charter back the Vessel to (GOL), the Owners' parent company, on the "back to back" basis upon completion of the first three (3) years Time Charter, but such option shall be declared not later than six (6) months prior to the expiry of three (3) years Time Charter.

   Should the Charters elect to continue to timecharter the vessel beyond three (3) years, the Charters shall also have the option to charter back the vessel to GOL on the "back to back" basis upon completion of the first five (5) years Time Charterers, but such option shall be declared not later than six (6) months prior to the expiry of the five (5) years Time Charter.

   All other terms, conditions and exceptions of the above dated Charter Party shall remain unchanged and in full force and effect."

5. The arbitrator found that *"it was common ground between the Owners and the Charterers that the background to the transaction was that the Owners wanted to charter their vessel to an organisation such as the Charterers for seven (or, perhaps at the very least, five years) as this would facilitate the additional financing they required in order to take delivery from the yard. On the other hand, the Charterers required the vessel to fulfil commitments to a potential sub-charterer…for one to three years. They did not, however, wish to take the vessel on charter for seven years and wished to be able to redeliver the vessel after three or five years. The gulf between these two positions was then bridged by Matsui (ship brokers) in proposing a charter-back arrangement and this is what is addressed under the heading "Charterers Option for period*"."

6. The facts leading up to the termination of the contract are, as found by the arbitrator, these.

   (1) In November 1999 the Owners sold the vessel to a German company and, by a sub-charter the Owners became charterers. The Charterers were a party to this new arrangement and the contractual arrangements agreed in 1998 continued to operate. In January 2000 GOGL and its subsidiary which indirectly owned the Owners sought Chapter 11 protection in USA. A reconstruction plan was put in place with the authority of the US Court whereby the three companies which directly or indirectly owned the Owners were merged into GOGL. GOL'S shares in GOGL were cancelled and new shares in GOGL were issued and acquired by an entity called Frontline. It is not known what has happened to GOL – presumably it does not own assets of any worth, but that is pure speculation. It transpires that at the end of the day nothing significant arises from the collapse and reconstruction of this part of the Golden Group. The Charterers do not say that because GOL is not the GOL that the parties contemplated at the date of the Contract, the Contract must be read in a particular way to accommodate the change. In essence, the Charterers say that the MOA gave them a right to re-deliver the vessel either at three or five years and thereby bring the Charter to an end. In support of their contention they rely upon what they contend is the proper construction of the contract.

(2) The Charterers sent a fax to Matsui in June 2001, referring to the changes in the Golden Ocean Group and to the option to charter back to the vessel to GOL "*which has been acquired by frontline*". They sought confirmation that instead they could charter the vessel back to Frontline, and, preferably drop out of the picture altogether. Frontline responded saying that they were aware of the option to charter back to GOL and waited to hear if the Charterers wished to exercise that option and that if they did so then new arrangements whereby the Charterers dropped out of the picture would make logical sense, although not permitted by the wording of the contract. The Charterers then made it clear that they were exercising their option and wished to terminate the 1999 agreement. In due course Frontline said they had become aware that GOL were not part of the Golden Ocean group which they had acquired and that the option to charter back was an option to charter back to GOL. Eventually on 21 November 2001 the Charterers gave the following notice to the owners:

"We … the Charterers hereby declare that we will re-deliver (the vessel) to the Owners, Golden Strait Corporation bearing in mind the non-existence of (GOL) the Owners' parent company on/around 15 December 2001, at Daesan, Korea pursuant to the terms and conditions of the (MOA)…"

The vessel was actually re-delivered on 14 December 2001 and three days later the Owners treated the re-delivery as a repudiatory breach of contract which they accepted.

7. The question before the arbitrator was whether the Charterers were entitled to re-deliver the vessel back to the Owners under the "*CHARTERERS OPTION FOR PERIOD*" in the MOA.

8. For the Charterers, Mr Young QC submitted that upon its true construction, the MOA gave the Charterers an option to terminate the charter by delivering the vessel "*back*" after three or five years. The court should not adopt an over-literal approach to the words which the parties used: the words are no longer "the *irrebuttable final determinant*" of the parties' true intentions. The factual matrix included the Fixture memorandum which "*provides the proper and legitimate basis for construing the Contract*" and the arbitrator fell into error in rejecting it as a legitimate basis for construing the Contract. He emphasized the arbitrator's findings that the intention of the two options was "*to relieve the Charterers of their obligations/liabilities under the Charterparty*" and that they would be likely to exercise their options where they found performance of the Charterparty to be unprofitable. The option was for a clean break and not for a chance to opt back in should the charter market rise during the remainder of the seven years. He made a number of discrete points in support of his general submission:

(1) The MOA was, initially at least, a contract between the Owners and Charterers and to which GOL was not a party. The MOA cannot, therefore, have amounted to the grant of an option by GOL to take a charter "back". The fact that GOL later put their signature on the MOA at the Charterers' lawyers' request did not alter the position, as the MOA had to be interpreted as executed, and GOL were not expressed to be party to it.

(2) The heading "*option for period*" suggested that the provision of a seven year term had been modified and this was re-enforced by the words "*should the Charterers elect to continue to timecharter the vessel beyond three years*" and by the reference to the "*first three years*" and "*first five years*" of the Time Charter. The language strongly suggests that the Charterers had an option (election) to continue or not continue the Charter and that each period was a separable and severable period of time. A charter "*back*" is the very converse of the concept of a sub-charter.

(3) The reference to GOL was to "*indicate a level of guarantee or a right of nomination*". What the designation of GOL and their description as the Owners' parent company does is to "*provide flexibility for the "charter-back", not to limit to something that no-one in fact ever intended. The MOA was plainly directed to market risks, not insolvency risks.*"

(4) The words in the MOA that "*all other terms and conditions*" of the Charter Party "*shall remain unchanged*" demonstrates that the MOA was intended as a variation of the Charterparty including clauses 4 and 18. Clause 4 stipulates the period of hire as seven years; Clause 18 permits the Charterer to sub-charter but to remain liable to the Owners for due Fulfilment of the Charter. Reliance was also placed on clause 71 which required the Owners and Charterers to "*mutually discuss to agree the Vessel's Hull & Machinery Insured Values in due course.*"

(5) The fixture memorandum also spoke of a charter back to the Owners which was, as the arbitrator said, tantamount to a redelivery – it was unlikely that the charterparty could survive a charter back to the owner just as a lease of property could not survive a charter back to the owner just as a lease of property could not survive the property's acquisition by the owner/lessor.

9. For the Owners, Mr Hamblen QC essentially relied upon the reasoning of the arbitrator, which he fully supported. I intend no discourtesy to him if I simply summarise the arbitrator's reasons, adding, where appropriate, comments of my own. These represent the reasons for dismissing this appeal.

10. The correct approach to the construction issue is that "*one should have regard to the factual matrix so as to consider the contract as expressed by the parties in the same context as the parties did at the time they made it. However, serious surgery on the words and syntax would only be justified if it was apparent from the factual matrix, or the particular construction to which those words and syntax would otherwise lead, that something must have gone wrong with the drafting.*" As the arbitrator went on to say, in the light of the correct approach as formulated, the words which the parties choose to express their agreement cannot be said to be the irrebutable final determinant, but that the starting point must be the words chosen by the parties to express their agreement in the first place. The arbitrator's approach seems to me to be right. But, as is often the case, the problems about construction are

usually not eased by general formulations. It is the application of well-known principles rather than their formulation which is the product of much litigation, as here.

11. The only matter of law with which the arbitrator had to deal on the proper approach to construction, related to the Fixture memorandum. Excluded from admissible factual matrix is the subjective intention of the parties ('*when I wrote the document I intended it to mean'* or *'when I read the document I thought it meant'*) and the negotiations leading to the agreement. The negotiations often represent no more than the parties' subjective intention. If what is finally agreed is different from a position adopted in negotiation then how should the court interpret the change without embarking on an examination of subjective intent; if the positions do not change, then what is the point of referring to the negotiations. But '*agreements*' made in the negotiating process may be admissible. But that must depend, I think, on the nature of the agreement and its relationship to the contract in question which is under examination. In this case, the Fixture Memorandum was not a concluded or legally binding agreement; it was simply a step in the negotiations and I agree with the arbitrator's conclusion that "(*for my part therefore I would not be inclined to take it into consideration at all.*") But in view of the Owners' concession that it could be taken into account but that it should be treated *'with caution'*, he was justified in considering it further than I would have thought proper. His reasoning led him, correctly I think, to the conclusion that the Memorandum did not assist the Charterers. As he said, the "*better view would be that in the fixture memo the expression "Owners" was being used loosely to mean the relevant companies making up the Golden Ocean Group of Companies, so that, consistent with its corporate structure, the vessel would be owned by a single - purpose company.*" In these circumstances the Charterers' point that the words 'charter back' to a company could well include a charter back to the company which owned the vessel and, thus, comprise a re-delivery, was empty.

12. The arbitrator concluded that when the MOA was executed it was always the intention of both parties that GOL should be bound, and that finding was entirely compatible with the Charters' subsequent approach through their lawyers, who had apparently advised that it would not be binding on GOL unless guaranteed and signed by them, which is what happened. It would be absurd, I think, to adopt Mr Young's submission that the arbitrator should have approached the question of construction without regard to GOL's subsequent acceptance (by signature) of the obligations on them. As to the language of MOA, the arbitrator said that he found it very difficult to find a plain meaning from the heading to the options clause at all. It is unfair to criticise him for dealing with these detailed points one by one and to suggest that he thereby failed to look at the Contract overall or *'in the round'*. If he had not dealt with the individual points he would have been criticised for not doing so. In a sense he was on a hiding to nothing: damned if he did and damned if he did not. He observed that the MOA was loosely worded, but that a charter back was consistent with the commercial objective which would have been defected had there been a right to de-deliver the vessel at three or five years. The word "back" meant a charter on a back to back basis to a company within the group and was consistent with the commercial background. The words "*elect to continue*" are inconsistent with a 7 year charter and it was common ground that they were not opposite in any event. The arbitrator concluded that the words were really referring to the charter back option. As he put it,

    "this option was, as previously mentioned, a means by which to bridge the different positions of the two parties at the time of contracting and was intended to have a similar commercial result to redelivery. Up until the exercise of the option, the Charterers would have the full rights and obligations under the Charterparty as therein expressed but after the exercise of the option, those rights and obligations would have been passed on to GOL on a back to back basis so that Charterers could look to GOL for the entire performance of the Charterparty."

13. The arbitrator rejected an argument which attached significance to the word "the" in the phrase 'the first three years' and this argument was not repeated to me. As to the words "*all other terms and conditions*" he said that this was boilerplate language and he attached no significance to them. The Charterers say that the arbitrator did not properly address the use of the word "*other*" which shows that the parties intended an amendment to the charterparty, namely clauses 4 and 18. I think this criticism is not justified. The arbitrator was considering whether the phrase comprised the word 'other'. He did not overlook it. He accepted that this was *'the usual (unthinking) mantra',* as the Owners had submitted. But if one had to strain to find a use for the words, then his explanation was that the arrangement for a charter back on a back to back basis might conflict with the obligation to fix the vessel at the best market rates. In my view there is no need to strain to find a use for words designed as a final catch all, but that the arbitrator's rationalization seems reasonably convincing.

14. The arbitrator convincingly dealt with the Charterers' problem of trying to explain why there needed to be options to charter back on a back to back basis if all that was intended was an option to re-deliver at three or five years. For my part I cannot accept the proposition that the reference to GOL and its description as the Owners' parent company indicated a "*guarantee*" or provided "*flexibility*" as Mr Young submitted. The word guarantee is missing and no kind of guarantee was given by GOL, merely a commitment to take the vessel on as a subcharter from the Charters. I do not see how this provided flexibility additional to the Charterers' option to continue as Charterer for the whole period or effectively to hive off their obligations after three or five years. The parties must have intended something by the options and I can see no reason why their language should be distorted to produce a result which would involve massive surgery to the words used.

15. I adopt without repeating the Arbitrator's analysis of the *'business sense' 'reasonable man'* approach, although it adds nothing to what he has already said, so succinctly. In my view the words mean what they say; there was an option to charter back, on precisely the same terms as the existing charter to GOL at three and five years. That was an option which satisfied the Charterers' concern that they themselves might have no business use for the

vessel after three or five years. A charter back is not a re-delivery, which was an option not acceptable to the Golden Ocean Group, for the reasons set out in the Award.

16. For these reasons the appeal must be dismissed.

Mr T. Young QC and Mr H. Byam-Cook (instructed by Messrs Waterson Hicks) for the Claimants
Mr N. Hamblen QC and Mr D. Allen (instructed by Messrs Richards Butler) for the Defendants