Neutral Citation Number: [2015] EWHC 3405 (Comm)

Case No: AD-2015-000053

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 27/11/2015

Before :

MR. JUSTICE TEARE

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Between :

POLARIS SHIPPING CO. LTD.	**Appellant**
- and -	
SINORICHES ENTERPRISES CO. LTD.	**Respondent**

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Saira Paruk (instructed by **Birketts LLP**) for the **Appellant**
James Hatt (instructed by **Watson Farley & Williams LLP**) for the **Respondent**

Hearing date: 11 November 2015

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Judgment

Mr. Justice Teare :

1. This is an appeal from an arbitration award brought with leave pursuant to section 69 of the Arbitration Act 1996. It involves a speed and consumption claim arising out of a time charterparty. Although on such an appeal one would expect there to be a dispute as to the law, there does not appear to be any such dispute in this case. The dispute between the parties is as to how the arbitrator decided this case. Did he dismiss the charterers' claim because, as they maintain, he had an erroneous understanding of the effect in law of the owners' performance warranty or did he dismiss the claim because, as the owners maintain, the charterers had failed to prove a breach of the performance warranty on the evidence adduced before the arbitrator?

2. In reading the arbitrator's award in order to establish the basis on which he decided the case I bear in mind that the court must read the arbitrator's reasons in "a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault than can be found with it." The court does not approach an award "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration" (see *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 per Bingham J.)

3. Before turning to that task I shall summarise the facts. The ship OCEAN VIRGO was chartered in December 2013 on the NYPE form for a time charter trip via North Pacific region to Singapore/Japan range carrying coal in bulk. The owners gave certain speed and performance warranties on the basis of "good weather/smooth sea, up to max BF SC 4/Douglas sea state 3, no adverse currents, no negative influence of swell". There was no dispute that good weather meant a wind speed up to a maximum of Beaufort scale force 4 (16 knots), a sea state up to a maximum of Douglas sea state 3 (maximum 1.25 metres), no adverse currents and no negative influence of swell.

4. Pursuant to the charterparty the vessel was delivered into the charterers' service on 14 December 2013 and performed a ballast voyage and a laden voyage. The ballast voyage was from Chang Jiang Kou to Roberts Bank BC and was commenced on 14 December. It was divided into two legs. On the first leg the master was instructed to steam at a certain speed and on the second leg the master was instructed to steam at a different speed. The laden voyage was from Roberts Bank to Donghae where the vessel arrived on 8 February 2014. The vessel was redelivered to the owners on 22 February 2014.

5. The charterers alleged that the vessel was not able to meet the speed and performance warranties in good weather and claimed US$263,832 in damages.

6. The traditional manner in which a charterer seeks to establish a breach of a speed and performance warranty is to assess the vessel's performance in good weather as defined in the charterparty, excluding any period of slow steaming at the request of the charterer. If analysis of the vessel's performance in good weather establishes a breach then the extent of the shortfall in performance should be applied to all voyages in all weather conditions but excluding any period of slow steaming at the request of the charterer; see *The Didymi* [1988] 2 Lloyd's Reports 108 at p.117 per Bingham LJ and *The Gas Enterprise* [1993] 2 Lloyd's Reports 352 at p. 366 per Lloyd LJ. It may be, as suggested in *Time Charters* 7th.ed. at paragraph 3.68, that breaches can be established in some other way but no other way was suggested in this particular case.

7. The arbitrator, Captain Paines, analysed the vessel's performance in paragraphs 64-118 of his award and reasons.

8. In paragraph 75 he said that for a period to be considered as being admissible "Good Weather" it must constitute a period of 24 consecutive hours running from noon to noon. In reaching this conclusion he had in mind a statement by the charterers in their submissions that "it was assumed that each good weather day is 24 hours." He agreed with that and said that traditionally a ship's day runs from noon to noon.

9. The arbitrator then considered (between paragraphs 76-88) whether there was "admissible" good weather during the ballast voyage. He concluded that there was not. He broke down the period of the ballast voyage in respect of which AWT (the charterers' weather analysts) had concluded there was good weather into four periods. The first period of 14 hours from departure Chang Jiang Kou at 1400 on 14 December until (local) noon (0400) on 15 December was (see paragraph 80) "inadmissible as it comprises only fourteen (14) hours whereas an admissible "Good Weather" day is to be 24 hours or alternatively the period from noon to successive noon." During the second period of 8 hours from (local) noon on 15 December (0400) until noon that day the wind was Beaufort force 5 and the height of the waves exceeded 1.25 metres

and so there was no "good weather". The third period of 16 hours from noon on 15 December until (local) noon (0400) on 16 February was 16 hours and so "ineligible for analysis as the day is no longer 24 hours in duration." During the fourth and final period of 23 hours from (local) noon (0400) on 16 February until (local) noon (0300) on 17 February there was an adverse swell of up 1.8 metres in height and so the weather was inadmissible for that reason.

10. It thus appears that the first and third periods of 14 and 16 hours respectively were excluded from consideration because they were not of 24 hours length. The second and fourth periods of 8 and 23 hours were excluded from consideration because good weather (as defined) was not experienced.

11. The arbitrator went on to note in paragraph 89 that any speed and consumption analysis was a sampling exercise and that "the sample size must be sufficiently large as to be representative of the voyage in its entirety." He referred to the first and second legs of the ballast voyage. He said (in paragraph 92) that had AWT correctly identified the period of admissible good weather a good weather analysis could have been undertaken of the first leg. With regard to the second leg the period of good weather analysed by AWT was only 5.51 % of the leg "which could not be taken as being representative of the voyage in its entirety." (see paragraph 93). He therefore said (at paragraph 94) that no "satisfactory "Good Weather" analysis" could be undertaken of the second leg. He concluded (see paragraph 95) that "had the AWT report correctly identified the period of admissible "Good Weather" Charterer's claim would have been restricted to the initial, leg 1, period."

12. It appears to me, on a reasonable and sensible reading of the award, that whilst the arbitrator considered that the period of good weather alleged to have been experienced during the first leg of the ballast voyage was regarded as a sufficient sample, AWT were judged to be wrong in finding admissible good weather in that leg; in respect of two periods because they were not 24 hours long from noon to noon, and in respect of two further periods because the weather was not good weather as defined in the charterparty.

13. The arbitrator then considered the performance of the vessel on the laden voyage between paragraphs 100 and 118. At paragraphs 104-106 he observed that the period of good weather relied upon (27 hours) was 5.336% of the total voyage. He then examined the suggested good weather between paragraphs 107-114. He said that on 27 January there was an adverse swell and so for a period of 6 hours there was no good weather as defined. That left a period of less than 24 hours and so there was "no longer a period of 24 hours, or a "day", of admissible "Good Weather" ". That left a final period of three hours on 8 February which was "not a "day"." In any event it is likely there was slow steaming at that time and there might have been shallow water effects as the vessel closed the land. He therefore concluded that there were no "days" of admissible Good Weather during the laden voyage.

14. It appears to me, on a sensible and fair reading of the award, that the arbitrator considered in relation to the laden voyage that whilst there was a period of 18 hours of good weather the arbitrator concluded that that period was inadmissible because it was not good weather lasting a day of 24 hours. However, even if the entire 27 hours had been good weather it would not have been a sample of a sufficient size to be representative of the voyage in its entirety. The arbitrator did not state that in terms

but it must have been his view having regard to what he had said about the second leg of the ballast voyage.

15. Having analysed the reasons why the arbitrator dismissed the charterers' claim I can return to the parties' submissions.

16. Miss Paruk submitted that the arbitrator had erred in law in excluding from consideration periods of good weather which did not last 24 hours. Whilst the statement attributed by the arbitrator to the charterers had been made she said that it had been taken out of context. There was no reason as a matter of the true construction of the charterparty to require the tribunal, when determining whether there has been a breach of the speed and performance warranties in good weather, to limit its enquiry to periods of 24 hours of good weather from noon to noon. She said that there were periods in the first leg of the ballast voyage (14 hours and 16 hours) which had been excluded on this account. If they were taken into account and established a breach of the speed and performance warranty then that failure should have been applied to the whole period of the charterparty to establish the resulting loss and damage.

17. Mr. Hatt submitted that the arbitrator had not erred in law in making his award but had searched for, and not found, reliable evidence based upon a sufficient sample. His decision was on the evidence and was not susceptible to an appeal.

18. In my judgment Miss Paruk has correctly identified an error of law by the arbitrator when he directed himself that an admissible period of good weather must be a period of 24 consecutive hours running from noon to noon. The charterparty merely referred to "good weather". There are no words in the charterparty which justify construing good weather as meaning good weather days of 24 hours from noon to noon. However, Mr. Hatt was right to say that the arbitrator also excluded the periods of good weather relied upon in the second leg of the ballast voyage and in the laden voyage because they were too small a sample. That is not an error of law. It is an approach to the assessment of the evidence which he was entitled to take. Thus, even if he had not made the error of law with regard to "a good weather day of 24 hours from noon to noon" he would still have held that the periods of good weather in (a) the second leg of the ballast voyage and (b) the laden voyage were too small a sample to be representative.

19. But that leaves the first leg of the ballast voyage. The alleged good weather in that leg was not, in the arbitrator's opinion, too small a sample. Two periods were excluded from consideration because there was no good weather as defined in the charterparty and two other periods were excluded because they were not a good weather day of 24 hours from noon to noon. The first reason discloses no error of law. The second reason does.

20. I therefore consider that the appeal should be allowed. The award should be remitted to the arbitrator for him to determine whether the two periods of good weather in the first leg of the ballast voyage (14 and 16 hours) are by themselves or cumulatively a sufficient sample to enable a breach to be established. They cannot be excluded from consideration on the grounds that each is less than 24 hours. If they are a sufficient sample then the arbitrator must determine whether they establish a breach of the performance warranty and, if they do, apply that breach to the whole of the

charterparty, excluding any periods of slow steaming on the instructions of the charterers, in order to quantify the charterers' claim for damages.

21. Miss Paruk had a further point. At paragraph 116 the arbitrator said that the warranties "are inapplicable in conditions that fall, for any reason, outwith the Good Weather criteria." He concluded in paragraph 117 that no claim could therefore be "formulated" on the basis of the warranties. It was submitted by Miss Paruk that this was a further error of law in that the arbitrator was failing to give effect to what Bingham LJ and Lloyd LJ had said in the two cases to which I have referred, namely, that once a breach is established by looking at performance in good weather the consequential damages claim is assessed by having regard to the whole of the charter period whatever the weather.

22. The award has to be read, not with a view to finding faults, but in the expectation that there are no faults. Read by themselves paragraphs 116 and 117 could mean no more than if there are no admissible periods of Good Weather then a breach cannot be established because the evidence upon which the charterers relied to establish a breach of the speed and performance warranty did not relate to good weather. However, the award must be read as a whole and in paragraph 95 the arbitrator said that "had the AWT report correctly identified the period of admissible "Good Weather" Charterer's claim would have been restricted to the initial, leg 1, period." That comment supports Miss Paruk's submission that the arbitrator considered that even if a breach had been established by reference to the performance of the vessel in the first leg of the ballast voyage the charterers' claim would be restricted to that period and would not be applied to the whole period of the charterparty. I therefore accept that there was this further error of law.

23. In addition to the section 69 appeal there was also a challenge to the award based upon section 68. It was said that the arbitrator had failed to consider the question of breach. I can deal with this very shortly. My understanding of the award and reasons is that the arbitrator considered the question of breach and found that none had been established. Whilst his reasons disclose an error of law they do not reveal a serious irregularity within section 68.