Neutral Citation Number: [2020] EWHC 700 (Comm)

Claim no: CL-2019-000165

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2020

Before:

MR JUSTICE ROBIN KNOWLES CBE

- -

In the Matter of the Arbitration Act 1996
And in the matter of an Arbitration

Between :

TRICON ENERGY LTD	**Claimant/ Arbitration Respondent**
- and –	
MTM TRADING LLC	**Defendant/ Arbitration Claimant**

- -
- -

Thomas Steward (instructed by HFW LLP) for the **Claimant (Respondent in the Arbitration)**
Karen Maxwell (instructed by Lax & Co LLP) for the **Defendant (Claimant in the Arbitration)**

Hearing date: 19 September 2019
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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles J:

Introduction

1. The claimants, Tricon Energy Ltd ("the Charterers") appeal pursuant to section 69 of the Arbitration Act 1996 ("the 1996 Act") in respect of a question of law arising out of the award of an experienced arbitral tribunal, dated 13 February 2019 ("the Award"). Permission to appeal was given by Popplewell J on 21 June 2019.

2. The defendants, MTM Trading LLC ("the Owners") were the owners of the vessel 'MTM HONG KONG' ("the vessel") which was chartered to the Charterers under a charterparty dated 13 February 2017 ("the Charterparty").

3. The Owners brought a claim for demurrage in the amount of US$56,049.36 as a result of delays at both the load port, Antwerp, and the discharge port, Houston. A formal demurrage claim was submitted by email on 9 June 2017, which attached a number of documents. The demurrage due was calculated in the net sum of US$55,841.16. The claim was subsequently revised to US$56,049.36, the figure maintained in the arbitration proceedings.

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

5. At the invitation of the parties, the tribunal made the Award on the basis of written submissions alone. By the Award, the tribunal held that the Owners' demurrage claim succeeded in full. It awarded the Owners US$56,049.36.

The Charterparty terms

6. The Charterparty was on an amended Asbatankvoy form.

7. The most relevant provisions of the Charterparty were as follows:

> By clause 10:
>
> **"Laytime/Demurrage**
>
> … …
>
> (e) If load or discharge is done simultaneously with other parcels then laytime to be applied prorate between the parcels.

…

(g) In the event of Vessel being delayed in berthing and the Vessel has to load and / or discharge at the port(s) for the account of others, then such delay and/or waiting time and /or demurrage, if incurred, to be prorated according to the Bill of Lading quantities".

By clause 12:

"**Statement of Facts**

Statement of facts must be signed by supplier or receiver, respectively. If they refuse to sign, the Master must issue a contemporaneous protest to them. Owner shall instruct each port agent to release port information to Charterer on request and to forward to Charterer the statement of facts and N.O.R. as soon as possible after Vessel has completed loading or discharge there".

By clause 38:

"**Time Bar Clause**

Charterer shall be discharged and released from all liability in respect of any claim/invoice the Owner may have/send to Charterer under this Charter Party unless a claim/invoice in writing and all supporting documents have been received by Charterer within [90] days after completion of discharge of the cargo covered by this Charter Party or after other termination of the voyage, whichever occurs first. Any claim/invoice which Owner may have under this Charter Party shall be waived and absolutely barred, if claim/invoice and all supporting documents are not received by Charterer before the time bar".

8. Both parties accepted that a manuscript amendment to clause 38 meant that the time bar period was one of 90 days.

Common ground

9. The following was common ground:

(a) the Vessel tendered Notice of Readiness ("NOR") at the loadport, Antwerp, on 21 February 2017 at 11.12;

(b) hoses disconnected on 25 February 2017 at 20.20;

(c) NOR was tendered at the discharge port, Houston, on 20 March 2017 at 01.12;

(d) the Vessel was shifting to her berth between 14.48 and 20.40 on 21 March 2017;

(e) discharge commenced on 22 March 2017 at 03.20;

(f) discharge was completed, with hoses disconnected, at 04.30 on 23 March 2017.

10. A second parcel of cargo was discharged at the same berth in Houston. This engaged the provisions of clause 10 of the Charterparty, which governs simultaneous cargo operations.

11. The Owners' claim for demurrage of US$55,841.16 was submitted within the 90-day period (on 9 June 2017). The claim was supported by the demurrage invoice, laytime/demurrage calculations, NOR, vessel timesheet/statement of facts, hourly rate/pressure logs and various letters of protest.

12. The Owners did not provide copies of the two bills of lading for the two parcels of cargo (the Charterers' parcel and the second parcel).

13. The statement of facts provided did not accurately record the bill of lading quantities, at least insofar as the bill of lading for the Charterers' parcel was concerned. The Owners stated that the error arose from the wrong figure having been recorded by the Master in the NOR for discharge at Houston which was then inserted into the statement of facts and not picked up by the port agent.

14. The statement of facts for the third party's parcel of cargo was redacted and covered the discharge port only. It suggested that the bill of lading quantity for that parcel was 6,014.906 MT.

The dispute

15. The Charterers' case was that the Owners had failed to provide "all supporting documents" in accordance with clause 38 because copies of the bills of lading were not provided.

16. The Owners' case was that their claim was sufficiently documented for the purpose of clause 38 by the statements of facts and, in any event, the bill of lading for the second parcel was not an available document for the purposes of clause 38.

The question on the appeal

17. The question of law on which the Charterers have been granted permission to appeal by Popplewell J is framed as follows:

> "Where a charterparty requires demurrage to be calculated by reference to bill of lading quantities, and contains a demurrage time bar which requires provision of

all supporting documents, will a claim for demurrage be time-barred if the vessel owner fails to provide copies of the bills of lading?"

The Award

18. The tribunal answered the question in the negative, on the basis that the provision of the statement of facts was sufficient.

19. The tribunal reasoned:

> "The statement of facts which records the bill of lading figure is in reality all that Charterers need to check that the apportionment of waiting and discharging time has been correctly calculated."

20. The tribunal added:

> "We were not persuaded by the Charterers' argument that they needed to see the bill of lading to satisfy themselves that the cargo quantity figures recorded in the statements of facts had been calculated on the same basis, namely measured in air or in a vacuum; since the statements of facts were prepared by ship's officers in the knowledge that they would be required to pro-rate discharging time, they would have used the cargo quantity figure recorded by the same method in each bill of lading."

21. The tribunal recorded that to the best of its recollection in disputes involving the discharge of different parcels of cargo, parties to those disputes have "only ever adduced in evidence statements of facts and never any bills of lading". It also had "very real doubts whether an owner could properly forward a copy of a bill of lading to a third party in an unconnected transaction without the permission of the holder of that bill of lading".

Interpretation

22. The Charterers argued that the tribunal was in error in construing clause 38 of the Charterparty as requiring no more than the presentation of sufficient information to allow the Charterers to understand the Owners' case. They argued that "all supporting documents" had to be submitted, and that included the bills of lading for both the Charterers' parcel and the third-party parcel. Without such documents, they argued, the Charterers could not determine whether the claim for demurrage was well-founded.

23. The Owners, on the other hand, argued that the tribunal was correct and that on its proper construction, clause 38 only required presentation of "essential" documents, which generally meant the statement of facts.

24. In this regard the Owners relied on the statements made by Mr Justice McNair in *Metalimex Foreign Trade Corporation v Eugenie Maritime Co. Ltd.*, [1962] 1 Lloyd's Rep. 378 at page 386:

> "… when one is dealing with general disputes under a charter-party such as this, it is wholly reasonable and in the interests of both parties that there should be some time limit imposed within which claims should be made ... Great difficulties may be anticipated by both owners and charterers in obtaining the necessary information as to facts, or evidence as to facts, if some limit is not put upon the time within which claims can be presented".

25. The Owners also referred to Longmore LJ's judgment in *The Eagle Valencia* [2010] EWCA Civ 713 at [23] that demurrage claims must be made "promptly" to allow factual investigation to be done "while minds are moderately fresh", and Popplewell J's statement in *The Ocean Neptune* [2018] 1 Lloyd's Rep. 654 at [16] that demurrage time bar claims are intended "to enable the parties to have a final accounting as swiftly as possible and, if any factual enquiries have to be made, to ensure that the parties are able to do so whilst recollections are reasonably fresh". These passages, argued the Owners, showed that the proper meaning of the phrase "all supporting documents" was all essential documents rather than every document that might lend support to the Owner's case.

26. In my judgment these passages are addressed principally to the reason for time limits. Further in none of the passages relied upon was the court seeking to define what documents are required to be presented under the clause. As explained by Hamblen J (as he then was) in *The Adventure* [2015] 1 Lloyd's Rep 473 at [37], in *The Eagle Valencia* Longmore LJ was: "simply stating that the NOR is an essential document; he was not saying that only essential documents need to be presented".

27. In *The Abqaiq* [2012] 1 Lloyd's Rep. 18 (a case concerning Clause 20.1 of the BPVoy4 form) Tomlinson LJ explained (at [65]) that the requirement was for "documents which objectively [the charterers] would or could have appreciated substantiated each and every part of the claim", and so that they "were thereby put in possession of the factual material which they required in order to satisfy themselves that the claim was well-founded".

28. In that case the following documents had been provided:

> "(1) a summary demurrage report, plus detailed demurrage reports for Freeport and Singapore; (2) notice of readiness, port log, statement of facts and Master's letters of protest for Freeport; and (3) notice of readiness, statement of facts, discharging log, timesheet, Master's letter of protest and pumping log for Singapore."

Mr Thomas Steward, for the Charterers noted these documents included a port log and a timesheet as well as a statement of facts recording that information. He suggested that it was clear from this that a statement of facts is not sufficient in and of itself even if it contains important information. I do not consider that the fact that a port log and a timesheet were provided in one case gives them the quality of required

documents in all cases. However Mr Steward also used their provision to argue that what was important was the provision of the primary source of information, because (as in the present case) a statement of facts could be wrong.

29. Ms Karen Maxwell, for the Owners, referred to clauses which required the documents provided to substantiate "each and every constituent part of the claim". She argued that those words imposed an evidential standard of proof as part of the time bar, and were notable by their absence in the present case. She said the words "supporting documents" in clause 38 should be given their natural meaning and that meaning extended only to documents relied on in support of the claim.

30. I do not accept that the words "substantiate each and every constituent part of the claim" are a relevant point of distinction. In each of the authorities cited by Ms Maxwell, the courts endorsed the statements made by Bingham J in *The Oltenia* [1982] 1 Lloyd's Rep 448 at page 453 that the commercial intention underlying such clauses is 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 ...". In *The Adventure* Hamblen J expressly stated at [26] that the documentary requirement was not onerous and applied to a very limited class of documents which, if they existed, ought to be capable of submission without undue difficulty or expense.

31. Ms Maxwell contended that signed statements of fact are "essential" or "primary" documents in a demurrage claim. Where such essential documents are submitted, the underlying purpose of the clause 38 does not, she argued, require the Owners to provide further documents that duplicate the information. She said the parties are most unlikely to have intended to impose such a documentary requirement and this was because it was inefficient or wasteful. Rather, effect should be given to the natural meaning of the words used, and to the purpose of the clause, by construing it as requiring the provision of documents that are relied on by the Owners in support of the relevant claim, that are "sufficient" to allow the Charterers to understand and evaluate that claim.

32. As Mr Steward highlighted, the Charterparty in the present case contains an express reference to "Bill of Lading quantities" in clause 10(g). While clause 10(e) does not make a specific reference to bill of lading quantities, it is made clear in 10(g) that "pro rating" means a division according to bill of lading quantities. The tribunal was right to observe in the Award that the Charterparty "made it clear" that pro-rating for demurrage purposes had to be calculated by reference to the bill of lading quantities. Furthermore the Charterparty in the present case refers not simply to "supporting documentation" but "all" such documentation.

33. In these circumstances I do not consider it possible to treat the bills of lading as outside the requirements of clause 38. The practical difficulties that Ms Maxwell suggested the Owners might encounter in having to produce bills of lading were not in my judgment an answer. In the present case there was no evidence that the bills were unavailable to the Owners (or even, as Mr Steward said, that they were not in the Owner's possession). The suggestion was that they were confidential, but there I would accept Mr Steward's submission that if there were sensitive elements to the bill

of lading, those could very easily be redacted and the redaction would not realistically include the quantities. If a bill of lading was not available then a proper explanation of that fact would need to be provided for the purposes of clause 38 alongside what was available.

34. One final point made by Ms Maxwell was that failure to submit the third-party bill cannot affect the entirety of her claim but only the part of the claim attributable to delays in berthing. She contended that that element of demurrage is addressed separately in the Charterparty, attracts separate and unique evidential requirements and can naturally be "hived off" from the remainder on the claim. In this regard she relied on Hamblen J's comments in *The Adventure* [44] to [45], citing *The Eternity* [2009] 1 Lloyd's Rep 107 and Cooke, *Voyage Charters* para 16.21(4).

35. In the present case I am not persuaded that this point, on which I heard less argument, is good on the particular wording of Clause 38 and in the context of the Charterparty as a whole. The clause refers to a claim/invoice as a single item and does not (in contrast to the clause in *The Adventure*) refer to "constituent part[s]" of a claim for demurrage. Accordingly, I find that the Owners' failure to produce bills of lading in support of their demurrage claim bars the entire claim.

Conclusion

36. For these reasons, I am respectfully unable to agree with the conclusion of the experienced tribunal on this occasion. I answer the question formulated at paragraph 17 above "yes" but only on the basis of an interpretation of the particular clauses in this case, and without suggesting that there is a requirement to provide bills of lading where these are not available in a particular case.