Neutral Citation Number: [2020] EWHC 726 (Comm)

Case No: CL-2020-000159

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

TRAFIGURA MARITIME LOGISTICS PTE LTD	**Claimant/ Applicant**
- and –	
CLEARLAKE SHIPPING PTE LTD	**Defendant/ Respondent**

- -

Michael Ashcroft QC and Oliver Caplin (instructed by **Ince Gordon Dadds LLP**) for the **Claimant/Applicant**
Stewart Buckingham QC (instructed by **Winter Scott LLP**) for the **Defendant/Respondent**

Hearing date: 24 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A 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.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 26 March 2020 at 10:30 am.

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Claimant time charterer seeks an urgent mandatory injunction compelling the Defendant voyage charterer to provide security to enable the release of the MT "*Miracle Hope*" (the "***Vessel***"), which is currently under arrest in Singapore. In summary, the Claimant alleges that the Defendant is contractually obliged to provide the security sought but has so far failed to do so.

2. Taking the view that the matter was urgent, the Claimant applied at very short notice to the Defendant, recognising that it (the Claimant) would be under a duty of full and frank disclosure to the court. The Claimant's evidence is that, following the arrest of the Vessel on 12 March 2020, and a demand made on it the same day by the head owners for security to permit the Vessel's release, the Claimant on 13 March 2020 demanded that the Defendant provide such security, threatened an application to court on Friday 20 March 2020, and served the present application on the Defendant on the morning of 23 March. The Defendant says it received notice of the present hearing at 3.28pm the same day.

3. In the event, the Defendant participated in the hearing before me by leading counsel, who filed a short skeleton argument shortly before the hearing. It is fair to record that counsel stated that the Defendant had, given the shortness of notice, had insufficient time properly to consider the application or to develop its response to it, and I return to this topic later.

4. By reason of the difficulties currently arising from the Covid-19 virus, the hearing before me (which took place from 10.30am to 12.50pm and from 2pm to 2.40pm on 24 March) was listed in the cause list to be heard in Rolls Building Court 19 as a remote hearing via telephone. I and the parties attended the hearing by telephone. The proceedings were audible (and recorded) in open court using the telephone and recording equipment in the courtroom, attended by my clerk. I indicated at the end of the morning that I proposed to grant the injunction sought, subject to provision for a parent company guarantee to be provided of the Claimant's obligations under the

undertaking in damages, with reasons to follow. I heard argument and ruled on the terms of the order at 2pm. Given the current circumstances, the parties expressed a preference for a short written judgment to be delivered by the day following the hearing, rather than an oral judgment that would need to be transcribed and approved.

5. This court has jurisdiction over the matter by virtue of the jurisdiction agreement contained in clause 33(6) of the charterparty referred to below, pursuant to Article 25 of the Recast Brussels 1 Regulation. As such, the Claimant does not need permission to serve process out of the jurisdiction.

(B) KEY FACTS

6. The factual summary set out below is derived mainly from the first witness statement of Mr William Marshall, a partner in the Claimant's solicitors Ince Gordon Dadds LLP in support of the application, and the documents exhibited to it.

7. On 26 April 2019, the Claimant time chartered the Vessel from her owners, Ocean Light Shipping Inc ("***Ocean Light***"), on an amended Shelltime 4 form.

8. On 21 August 2019, the Claimant voyage chartered the Vessel to Clearlake Chartering USA Inc ("***CUSA***") by way of a fixture recap incorporating an amended Shellvoy6 form (the "***Charterparty***"). It will be noted that CUSA is a different entity from the Defendant. The intended voyage was from 1/2 safe ports/berths Brazil, Sao Sebastiao-Espirito range, to 1/3 safe ports/berths Far East Singapore-Japan range. On the same date, CUSA voyage chartered the vessel to Petroleo Brasileiro SA ("***Petrobras***") on terms materially similar to those contained in the Charterparty, including the indemnity provision in clause 33 to which this application relates.

9. The relevant bills of lading state that a cargo of 1,001,649.37 US Barrels (net) of Lula Crude Oil was shipped aboard the Vessel at Porto do Acu, Brazil, on 17 September 2019. This appears to have been pursuant to a trade, financed by Natixis, between Hontop Energy (Singapore) Pte Ltd ("***Hontop***") and Petrobras Global Trading BV PGTBV.

10. Clause 33(6) of the Charterparty provides:

> "(6) Notwithstanding any other provision of this Charter, Owners shall be obliged to comply with any orders from Charterers to discharge all or part of the cargo provided that they have received from Charterers written confirmation of such orders.
> If Charterers by telex, facsimile or other form of written communications that specifically refers to this clause request Owners to discharge a quantity of cargo either:
> (a) without bills of lading and/or
> (b) at a discharge place other than that named in a bill of lading and/or
> (c) that is different from the bill of lading quantity
> then Owners shall discharge such cargo in accordance with Charterers' instructions in consideration of receiving ~~the~~ **an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs"**. Following indemnit [sic] deemed to be given by Charterers on each and every such occasion ~~and which is limited~~

> ~~in value to 200 per cent of the C.I.F value of the cargo on board~~
> ~~(i) Charterers shall indemnify Owners, and Owners' servants and agents in respect of any liability loss or damage of whatsoever nature (including legal costs as between attorney or solicitor and client and associated expenses) which Owners may sustain by reason of delivery such cargo in accordance with Charterers' request.~~
> ~~(ii) If any proceedings is commenced against Owners or any of Owners' servants or agents in connection with the vessel having delivered cargo in accordance with such request, Charterers shall provide Owners or any of Owners' servants or agents from time to time on demand with sufficient funds to defend the said proceedings.~~
> ~~(iii) If the vessel or any other vessel or property belonging to Owners should be arrested or detained, or if the arrest or detention thereof should be threatened, by reason of discharge in accordance with Charterers' instructions as aforesaid, Charterers shall provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such vessel or property and Charterers shall indemnify Owners in respect of any loss, damage or expenses cased by such arrest or detention whether or not the same may be justified.~~
> ~~(iv) Charterers shall, if called upon to do so at any time while such cargo is in Charterers' possession, custody or control, redeliver the same to Owners.~~
> (v) As soon as all original bills of lading for the above cargo which name as discharge port the place where delivery actually occurred shall have arrived and/or come into Charterers' possession, Charterers shall produce and deliver the same to Owners, whereupon Charterers' liability hereunder shall cease.
> Provided however, if Charterers shave not received all such original bills by 24.00 hours on the day ~~36~~ 13 (thirteen) calendar months after the date of discharge, then this indemnity shall terminate at that time…
> …
> (vii) This indemnity shall be governed and construed in accordance with the English law and each and any dispute arising out of or in connection with this indemnity shall be subject to the jurisdiction of the High Court of Justice of England"

The words shown in bold above also appear in emboldened type in the original.

11. The Claimant's P&I Club is Steamship Mutual, a member of the International Group of P&I Clubs ("***IG***"). The Charterparty did not refer to Steamship Mutual, but it did state the P&I Club of the head owner, Ocean Light, namely Gard, which is also a member of the IG.

12. No Club letter of indemnity ("***LOI***") wording was provided to (or requested by) CUSA or the Defendant before the 'subs' were lifted, i.e. before the Charterparty became an unconditional binding contract. However, on 14 October 2019 an email was sent to the Claimant by a Mr Mike Chee using the email address "*shippingops@clearlakeshipping.com*", stating in material part:

> "Please may we have a copy of Owners templates for LOI wording for discharge of cargo without presentation of Original Bills of Lading and Owners combined wording for discharge without Bills of Lading and change of destination"

As noted below, Mr Chee used the same email address a few days later when writing in the name of the Defendant to give discharge instructions.

13. The Claimant responded the same day (14 October 2019) providing *"Attached LOI wording".* The attachment was the IG's "C" wording for a standard form LOI to be given in return for delivering cargo at a port other than that stated in the bill of lading and without production of the original bill of lading.

14. The IG also has a standard "A" wording covering cases simply involving discharge without presentation of original bills of lading, which the Claimant did not supply in response to this email. However, the text of the "A" and "C" wordings is very similar, and the "C" wording provided would be perfectly apt for such a case too. Mr Marshall's witness statement helpfully extracts the key provisions, showing in square brackets text appearing only in the "C" wording, thus:

> "In consideration of you complying with our above request, we hereby agree as follows:-
>
> 1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship [proceeding and] giving delivery of the cargo in accordance with our request.
>
> 2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the ship [proceeding and] giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
>
> 3. If in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such inference, whether or no such arrest or detention or threatened arrest or detention or such interference may be justified."

15. As the Claimant points out, reading clauses 1 to 4 and 6 of the IG wording ('A' or 'C') together with sub-clauses (v) to (viii) of clause 33(6) of the Charterparty to produce the overall terms of the agreed indemnity makes perfectly good sense. Clauses 1 to 3 of the IG wording cover similar ground to the deleted sub-clauses (i) to (iii) of clause 33(6). Deleted sub-clause (iv) of clause 33(6) does not have a counterpart in the IG wording. Clauses 4 and 6 of the IG wording do not have a

counterpart in any of clause 33(6). Finally, sub-clauses (v) to (vii) of clause 33(6) apply either because they have no counterpart in the IG wording or because they are different to the IG wording on a particular point (e.g. the terms upon which liability under the indemnity will cease).

16. On 30 October 2019, Mr Chee emailed the Vessel's Master and the Claimant, again using the email address *shippingops@clearlakeshipping.com*, with the subject heading "*Miracle Hope Petrobras – CP 21.8.2019 – Discharge Orders"* asking the Master to *"Pls note discharge orders below".* Those orders were discharge orders given by Petrobras materially as follows:

> "DISCHARGE ORDERS:
>
> Port: DONGJIAKOU
>
> 01st parcel
>
> Agency: QINGDAO PORT INTERNATIONAL LOGISTICS CO
>
> Receiver: HONTOP ENERGY (SINGAPORE) PTE LTD
>
> Inspector: INTERTEK
>
> Discharge = 34,792.525 MT gross in air of Lula Crude Oil (Bill of Lading 02A issued at Porto do Acu/Brazil on September, 17th 2019)
>
> …
>
> Remarks to Owners:
>
> 1. LOI INVOCATION: Charterer's, Petrobras, hereby request Owners to discharge their cargo as per this Voyage Orders without presentation of Bill of Lading. In lieu of an LOI Charterer's hereby invoke Part II, clause 33 (6) of the Charter Party dated 21.08.2019. …"

17. At the same time, Mr Chee emailed the Master and the Claimant, using the same email address and the subject heading "*Miracle Hope Petrobras – CP 21.8.2019 – LOI Invocation*", as follows:

> "Dear Capt Satish
>
> We, Clearlake Shipping Pte Ltd, hereby invoke Clause 33 of relevant CP to discharge as per below orders from Charterers w/o prod of OBL"

The email was thus expressed to be an invocation of clause 33 of the Charterparty by the Defendant.

18. A witness statement from the Vessel's Master, Captain Balendu Tiwari, describes the process by which the relevant cargo was discharged at Dongjiakou, commencing on 13 November 2019, to the knowledge of and in the presence of the appointed agents of Petrobras's port agent Qingdao Port International Logistics Co and also to the knowledge of Clearlake's protective agent SPI Marine (whose daily email from 6 November stated *"Original B/L status. Owner confirms LOI invoked. We will arrange accordingly.")* There has been no suggestion that the cargo was not discharged in accordance with the instructions passed up the line on 30 October 2019.

19. On 2 December 2019 the parties agreed an Addendum as follows:-

> "REF: RE : MIRACLE HOPE / CLEARLAKE – CP DATED 21/08/2019 ----------
>
> FURTHER TO TELCONS OF TODAY IT HAS BEEN MUTUALLY AGREED TO AMEND THE ABOVE CP AS FOLLOWS:
>
> CHARTERERS TO READ:
>
> CLEARLAKE SHIPPING PTE LTD
>
> 12 MARINA BOULEVARD
>
> 35-02 MARINA FINANCIAL TOWER 3,
>
> SINGAPORE 018982
>
> ALL OTHER TERMS, CONDITIONS AND DETAILS TO REMAIN UNALTERED AND IN FULL FORCE AND EFFECT."

20. Mr Marshall's witness statement says this about the change of the named party:

> "Trafigura understands that the inclusion of CUSA in the Clearlake Charter recap was a mistake, and that CUSA is not able to charter in tonnage, only charter it out. This would fit with the later amendment to the Clearlake Charter, substituting Clearlake as the charterer. I would suggest that the best analysis of the effect of the addendum is that Clearlake was at that point transferred all of CUSA's notional extant rights and liabilities under the Clearlake Charter. Alternatively, the analysis would be that CUSA had concluded the Clearlake Charter as agent on behalf of Clearlake, its principal, with the addendum simply regularising the position."

21. Subsequently, on 12 March 2020 the bank Natixis Singapore commenced *in rem* proceedings against the "*Owners and/or demise charterers of the ship or vessel MIRACLE HOPE*", and the court in Singapore granted a warrant of arrest over the Vessel the same day. It appears from the affidavit of Mr Lee Jing Yi in support of the application that Petrobras had sold the cargo to Hontop with payment to have been made by letter of credit; that Natixis paid US$65,134,924.70 to Petrobras (being 98%

of the provisional contract price) against a letter of indemnity from Petrobras in lieu of the latter presenting the original bills of lading to obtain payment; but that Hontop did not reimburse Natixis. Petrobras subsequently endorsed and delivered the original bills of lading to Natixis, who claim to remain in possession of them.

22. On 11 March 2020, Natixis demanded delivery of the cargo from Ocean Light on the premise that they were the lawful holders of the bills. According to Mr Jing Yi, Ocean Light did not respond to the delivery demand, prompting the arrest of the Vessel. Natixis has intimated claims against Ocean Light as follows (§20 of the affidavit):

> "I verily believe that the Defendants' failure and/or refusal and/or inability to confirm that they are holding the Cargo to the Plaintiffs order and would deliver the Cargo to the Plaintiffs is because they have parted with possession of, misdelivered and/or converted the Cargo and/or otherwise impaired the Plaintiff's interest in the Cargo to which the Bills of Lading relate. I verily believe the Defendants have breached their obligations under the contracts of carriage as evidenced by the Bills of Lading and/or as bailees and/or persons in possession of the Cargo and/or their duty of care towards the Plaintiffs in that they had wrongfully parted with the Cargo, and the Plaintiffs have suffered losses, costs and expenses thereby. The Defendants are liable to compensate the Plaintiffs for the same"

23. Mr Marshall understands that Natixis have demanded security of US$76,050,000 to secure the release of the Vessel. On 12 March 2020 Ocean Light demanded that the Claimant put up the security to obtain the release of the Vessel. It is the Claimant's position as against Ocean Light that it is under no obligation to do so, for reasons said not to be relevant to the present application. However, the Claimant is evidently at risk of being required to do so, and in any event currently lacks the use of the Vessel by reason of the arrest.

24. Mr Marshall deposes that on 14 March 2020 he wrote to Clearlake on behalf of the Defendant asking that Clearlake take steps to comply with its obligations under the indemnity clauses. However, despite a series of exchanges between his firm and Kennedys LLP (acting, it seems for CUSA), no Clearlake entity has so far agreed to put up the security, or to accept the existence of the indemnity.

25. The Claimant now seeks urgent injunctive relief in order to compel the Defendant to fulfil what are said to be its obligations under the indemnity:

    i) to provide to Natixis such bail or other security as may be required to secure the release of the Vessel, and

    ii) upon a demand to do so from head owners, to supply them with sufficient funds to defend any proceedings brought by Natixis against head owners in connection with the delivery of the Cargo.

(C) PRINCIPLES

26. The principles outlined below were not in dispute at the hearing before me.

27. The Court has the power to grant an injunction where it is "*just and convenient*" to do so: section 37(1) of the Senior Courts Act 1981.

28. The principles set out by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 apply to the grant of mandatory injunctive relief, and Lord Hoffman indicated in *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] 1 WLR 1405 that no distinction in principle exists between mandatory and prohibitory relief: the court should adopt the path that will cause the least irremediable prejudice to one party or the other: §§ 19 and 20.

29. If the court is persuaded that damages would not be an adequate remedy for the applicant, and that a cross-undertaking in damages would adequately protect the respondent if the injunction were found to have been wrongfully granted at trial, that should ordinarily militate in favour of the grant of the mandatory injunction, without needing to progress to the balance of convenience assessment: *American Cyanamid* at 408D.

30. If there is uncertainty as to the adequacy of damages, then one proceeds to analyse the balance of convenience. There is no absolute or determinative requirement that the court must consider an applicant has a high degree of assurance of succeeding on its case (on the balance of probabilities) at trial. That concept can form part of the court's assessment of the balance of convenience, but the risk of injustice in not granting the injunction is the final metric against which the application should be judged: see Chadwick J in *Nottingham Building Society v Eurodynamics Systems Plc* [1993] FSR 468 at 474, later approved by Phillips LJ in *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354 at 366.

31. Previous case law indicates that the obligations imposed on the indemnifier under a maritime contract of indemnity are amenable to enforcement by a mandatory injunction, with damages being an inadequate remedy: see *Harmony Innovation Shipping Ltd v Caravel Shipping Inc* [2019] EWHC 1037 (Comm) at §30; *The Bremen Max* [2009] 1 Lloyd's Rep 81 per Teare J at §12; and *The Laemthong Glory (No.2)* [2005] 1 Lloyd's Rep 632 per Cooke J at §§51-52.

32. As regards the obligation in clause 33(6) to provide funds to defend proceedings in connection with the delivery of the Cargo in accordance with charterers' instructions, case law indicates that the head owners (here Ocean Light, against whom Natixis has intimated such a claim) are to be regarded as the disponent owner's "*servants or agents*" having effected delivery of the cargo on their behalf: see *The Laemthong Glory (No.2)* and by analogy *The Songa Winds* [2018] 2 Lloyd's Rep 47 at §74 (Andrew Baker J).

(D) ARGUMENTS AND ANALYSIS

33. The Defendant submitted that it was not liable under the indemnity, and/or that no injunction should be granted, for four main reasons:

    i) There is at the least a serious question whether the application has been brought against the correct party. The Defendant says that it has not.

ii) The terms of the indemnity clause relied upon have not been complied with because owners' Club indemnity wording was not provided to the charterer before the fixture was concluded, as required by clause 33(6) of the Charterparty.

iii) No separate LOI was provided to the Claimant as required by clause 33(6) therefore no indemnity has in fact arisen.

iv) In any event, the circumstances do not justify the extreme urgency with which this application has been brought before the court, particularly bearing in mind the serious nature of the relief being sought, namely a mandatory injunction that the Defendant put up US$76 million by way of security plus defence costs (in an unspecified amount) in relation to a claim between two third parties.

(1) Wrong defendant

34. The Defendant points out that:

i) The Charterparty Recap describes the Charterer as CUSA and not the Defendant.

ii) That remained the case when clause 33(6) is said to have been invoked by the Defendant on 30 October 2019.

iii) The Addendum, which changed the Charterer from Clearlake Chartering USA Inc to the Defendant, was not agreed until 2 December 2019.

35. As a result, the Defendant says, if an indemnity arose it was given by CUSA and not the Defendant. Nothing in the Addendum suggests that it was intended to have retrospective effect. Further, although the Claimant's evidence refers to its understanding that CUSA was named as the charterer in error, the basis for a rectification plea has not even begun to be made out, and there is nothing in the Addendum itself to suggest that it was correcting a mistake as opposed to changing the charterer from one entity to another prospectively. In addition, the Addendum is patently not a novation, nor like a novation.

36. Further, the Defendant submits, even if the Addendum operated as a novation or otherwise had retrospective effect, it would not retrospectively alter accrued rights and liabilities separate to and independent from the Charterparty.

37. I asked how it was, on the Defendant's case, that it was the Defendant (rather than CUSA) who on 14 October 2019 requested the Club indemnity wording and on 30 October 2019 gave discharge instructions. Counsel for the Defendant indicated, perhaps not unreasonably, that he had not in the time available received specific instructions on that point, but it was possible that the Defendant was acting as CUSA's agent in taking these steps.

38. Even on that footing, however, I am unable to accept the Defendant's submissions on this issue, for two reasons.

39. First, since discharge of the cargo had no doubt been completed before the Addendum was signed, and all the operational parts of the Charterparty therefore completed, the

signature of the Addendum would have served little purpose unless it was intended to place the Defendant in the shoes of CUSA for all purposes, including any outstanding liabilities that had already arisen. That fits in, moreover, with Mr Marshall's evidence of the Claimant's understanding that CUSA would never have intended to enter into a Charterparty as charterer in the first place.

40. Secondly and in any event, there can be no real doubt that as a result of the Addendum the Defendant at the very least assumed all the charterer's obligations required to be performed thenceforth, whether or not they arose out of events which had previously occurred. The obligations to provide security, defence funds and indemnity to which this application relates all fell to be performed following the arrest of the Vessel, which of course post-dated the Addendum.

(2) Indemnity wording not provided in time

41. Clause 33(6) requires an "*LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs"*", i.e. *before* the conclusion of the fixture. The Defendant says there are obvious reasons for such a requirement:

    i) Certainty: unless the wording to be issued upon an invocation of clause 33(6) is notified and agreed in advance, there is no clarity about what that wording might be. Further, even on its own case the Claimant cannot identify which wording it says was intended, IG wording A or C. The fact is that neither of those documents were submitted by the Claimant as required.

    ii) Consent: the clause obviously contemplates that the charterer will have the opportunity to consider the LOI wording submitted, and negotiate its terms. The charterer may not have been prepared to agree to offer an indemnity on terms (as now asserted) that include the provision of security for release from arrest and funding of a defence. That is particularly so given that the cargo to be carried was obviously of high value, such that any indemnity was likely to be in respect of a large sum.

42. The Defendant adds that it makes no difference that the charterer did not request the LOI wording before the fixture was concluded: it was for the Claimant to "*submit*" its LOI wording and not for the charterer to request it.

43. However, in circumstances where the Defendant has in fact after conclusion of the fixture requested the indemnity wording from the Claimant, has been provided with it, and has then gone on specifically to invoke clause 33(6) in conjunction with instructions to discharge the Cargo without presentation of original bills of lading, this point in my view has no merit. The Defendant thereby achieved the certainty it might have required, and by proceeding to invoke the clause having requested and received the indemnity wording must be taken to have consented to it.

44. I would not construe clause 33(6) as making provision of the wording before lifting of 'subs' a *sine qua non*, provided that by the time of any instructions to discharge without presentation of original bills (or other relevant circumstances in which the indemnity would bite) the indemnity wording was available to the charterer. In any event, any failure to provide the Club wording before lifting of 'subs' would be a breach that could be waived. Although (as the Defendant pointed out) the Claimant

did not put the point in this precise way in its application, the Defendant's actions in requesting and receiving the wording on 14 October 2019 and then proceeding on 30 October to give discharge instructions invoking clause 33(6), would seem to give rise to a very plain case of waiver (and probably also of estoppel by convention, to the effect that the indemnity would be on the Club terms provided on 14 October read with the contents of clause 33(6) itself).

(3) Separate LOI required

45. The Defendant submits that clause 33(6) positively requires the provision of a separate LOI, by the words "*in consideration of receiving an LOI as per Owners' P&I Club wording …"*. That, it submits, requires there to be a separate document constituting the LOI and containing the indemnity. In the absence of a separate LOI, the invocation of clause 33(6) achieves nothing, as the clause itself does not confer an indemnity. It merely sets out, in sub-clauses (v) to (vii), machinery that would apply to any indemnity that a LOI, if issued, might contain. That outcome is not hard on the Claimant, as it was within its own power to request an LOI when clause 33(6) was invoked.

46. The bespoke words which the parties inserted into the standard wording of clause 33(6) are shown in bold below:

> "…in consideration of receiving the **an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs"**."

47. Taken in isolation, those words could be construed as requiring a free-standing LOI to be produced when the occasion for any invocation of clause 33(6) arises. That construction might be arrived at by treating the words *"before lifting the 'subs'"* as governing the time at which the Owners' P&I Club wording is to be provided, but not the time at which any LOI as such should be provided. The alternative construction would be that the parties envisaged that a form of LOI (based on owners' Club wording) would be provided before lifting the 'subs', and the terms of that letter would then govern any indemnity arising under clause 33(6).

48. However, notwithstanding the Defendant's point that the parties' additional wording should prevail over the standard printed wording, I consider that the clause must be construed as a whole. Clause 33(6) viewed as a whole envisages that the indemnity arises under the clause itself, without the need for any separate letter to contain the indemnity. That is clear from (a) the words "*Following indemnity deemed to be given by Charterers…";* (b) the phrase *"…Charterers' liability hereunder shall cease…*" (emphasis added); and (c) the repeated references to "*this indemnity*". It is also consistent in my view with the fact that clause 33(6)(vii) provides that any dispute arising out of or in connection with "*this indemnity*" is subject to the jurisdiction of this court (in contrast with the position relating to other disputes arising in connection with the Charterparty, which are subject to arbitration in London pursuant to clause 54).

49. Moreover, the parties conducted themselves on the basis that the indemnity under clause 33(6) operated without the need for any separate LOI to be provided, by the communications referred to in §§ 16 and 17, and by the parties having acted on them

by effecting the discharge of the cargo without presentation of original bills. In the second of those communications, the Defendant invoked clause 33, making no reference to the provision of any freestanding letter (which, on the Defendant's present case, would under clause 33(6) be the "*consideration*" that it would have been required to provide in return for the discharge instructions being followed). Even more clearly, the Defendant in the first communication passed on up the line to the Claimant instructions from Petrobras (given under a charterparty on materially the same terms) which stated "*In lieu of an LOI Charterer's hereby invoke Part II, clause 33 (6) of the Charter Party dated 21.08.2019. …*" (my emphasis). The discharge having been effected on the basis of these communications, the Defendant in my judgment plainly waived any requirement for a separate LOI (alternatively, sought such a waiver from the Claimant, which was implicitly granted), and/or would be estopped by convention from asserting now that no indemnity arose despite both parties having proceeded on the expressed basis that the indemnity would apply without any separate LOI being provided.

50. I also agree with the Claimant that it would be commercially unreasonable, indeed absurd, to suggest that the parties seriously intended in all the circumstances that the Defendant should not be obliged to indemnify the Claimant against the consequences of complying with its orders to discharge without the original bills of lading. No reasonable commercial party would have understood that to be the position.

(4) Urgency

51. The Defendant makes the point that although it is said that the Claimant has already "*lost out on*" one fixture, there is no suggestion that any particular prospective fixture is now at risk of being lost or cancelled. It says the suggestion that the Claimant "*stands to lose the opportunity*" to trade the Vessel further is too vague. In the absence of any credible evidence of an actual or prospective fixture that might be lost, it is not appropriate that this application should be brought with such extreme urgency and lack of proper notice.

52. Further, if the application were to be granted, the Defendant would be obliged to provide US$76m of security forthwith, plus funds to meet defence costs. The provision for a prompt return date would be of no comfort whatsoever to the Defendant: by then the security would have been provided, and the Vessel released. It is not easy to see how those consequences could be unravelled if the order were to be set aside or amended (unless perhaps the Order provided that, in circumstances whereby the Order was to be set aside or amended, the Claimant was required to step in and provide alternative security/funding and/or fully reimburse the Defendant for all sums expended).

53. In addition, the Defendant has estimated that the cost of providing a bank guarantee for US$76 million alone would (assuming a cost of 4% per annum) be approximately US$3.8 million per annum, plus issue costs of in the region of US$760,000.

54. The Defendant accepts that in cases where a letter of indemnity in clear terms has been given, specific performance will usually be granted. However, the circumstances here are materially different, and the Claimant should be left to its remedy in damages, if (contrary to its submissions) any indemnity is capable of being proven. Alternatively, any order should be on terms that its consequences can be

unwound if necessary, with the Defendant fully compensated for any costs, losses or expenses, and such undertaking should be fortified.

55. I considered this aspect of the matter carefully, and it was the subject of debate at the hearing, particularly in the context of fortification. In my view:

i) The circumstances here are not materially different from the ordinary run of cases where security may be ordered on a mandatory basis at short notice. For the reasons outlined above, the Defendant's arguments to the effect that they are not subject to any obligations under clause 33(6) in respect of the discharge here are clearly unmeritorious. The Defendant became obliged to provide security some days ago but has failed to do so.

ii) There is considerable urgency in the situation. As set out in Mr Marshall's witness statement, the shipping market for Very Large Crude Carriers such as the Vessel is very buoyant at the moment but also very volatile, with daily rates according to Clarksons data rising from US$49,300 on 10 March 2020 to a high of US$270,400 on 16 March, and still at U$171,000 on 19 March. By way of update, counsel for the Claimant told me on instructions that the rates for 20 and 23 March were approximately US$153,000 and US$126,000, i.e. down from the peak but still much higher than the rate on 10 March. It would be unrealistic in my view to expect the Claimant to be able to provide evidence of further actual lost fixtures while the Vessel remains under arrest. There is clearly a very pressing need for the security to be provided in order to secure its release, and I consider this to justify the grant of relief notwithstanding the short notice to the Defendant of this application *per se*.

iii) The Defendant is right that once security has been provided, it may not be possible for that to be undone. However, that is an inevitable feature of this kind of case, and in principle the Claimant's undertaking in damages should protect the Defendant from all types of loss arising should it turn out that the order was wrongly granted. Further, to require the Claimant to provide security or substantial fortification of its undertaking would undermine the purpose of the injunction, namely to require the Defendant, as distinct from the Claimant, to live up to *its* obligation to put up security in the sum required to obtain the release of the vessel (cf *Harmony Innovation* at §30).

iv) Mr Marshall's evidence is that the Claimant is in its own right a substantial company based in Singapore, which acts as the chartering arm of the Trafigura Group. As that evidence, whilst I accept it, was not particularised or supported by documents such as accounts, I concluded that the Claimant should be required to fortify its undertaking by provision of a guarantee in short order from its ultimate parent, Trafigura Group Pte Ltd, whose Annual Report indicates total assets valued at around US$54.2billion and non-current assets of around US$10.8 billion. However, I did not, in all the circumstances, consider it necessary to accede to the Defendant's proposal that no relief should take effect unless and until the guarantee has actually been provided, a process which inevitably may take several more days.

(5) Overall position

56. For these reasons, I concluded that I have a high degree of assurance that the Claimant will succeed on its claim on the merits; that damages would not be an adequate remedy; that a cross-undertaking in damages will adequately protect the Defendant if the injunction were found to have been wrongfully granted; and (to the extent necessary) that bearing in mind the risk of prejudice to each party, the balance of justice comes down in favour of granting the mandatory relief sought.

(E) CONCLUSION

57. For these reasons, the Claimant's application was successful and I granted an injunction whose detailed terms were resolved during the short afternoon session of the hearing on 24 March.